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MAGNA CARTA AND THE DEFINITION OF FUNDAMENTAL RIGHTS

Joshua C. Tate*

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The U.S. Supreme Court has long relied on the language of Magna Carta in interpreting the U.S. Constitution, particularly the Fifth and Fourteenth Amendments. In recent years, the Court has concluded that the absence of certain rights from Magna Carta—and the common law tradition more generally—means that those rights ought not to be considered fundamental today. Some Justices of the Court have also crafted a highly restrictive definition of “liberty” on the basis of Magna Carta and the common law texts interpreting it. This Article argues that the Court has viewed Magna Carta too narrowly, and that “liberty” has a broader meaning in the common law tradition. Reviewing the privileges and liberties of medieval cities that were reaffirmed in Magna Carta, the Article concludes that rights to travel, to conduct one’s business without interference, and to avoid the jurisdiction of oppressive courts are all a part of the common law tradition of liberty and should be considered deeply rooted in our nation’s history and tradition.

I. INTRODUCTION

The definition of fundamental rights is a contested question. Some rights have nearly universal recognition as being fundamental, such as the right to be secure in one’s property.1 Other rights are more controversial. For example, the U.S. Supreme Court no longer recognizes a right to abortion as a fundamental right under the federal Constitution.2 By

* Professor of Law, SMU Dedman School of Law. For helpful comments and insight, I thank the attendees and my fellow panelists at the 2022 Annual Meeting of the Haskins Society, the Seventh Congress of the Latin American Institute for Legal History, the Sixty-Second Missouri Valley History Conference, and an Association of American Law Schools panel discussion on “800 Years of Comparative Constitutionalism: The Unique Legacy of Magna Carta.” I appreciate the careful criticism of Lisa Hasday, Tom McSweeney, Ryan Rowberry, and Meghan Ryan, all of whom were kind enough to read earlier drafts of this Article. I am also grateful for the work of my research assistants Christopher Cornell and Brooke Hauglid, as well as the invaluable assistance of the Underwood Law Library and its Director, Greg Ivy. The research for this article was funded in part by the Fred E. Tucker Endowment for Faculty Excellence at SMU Dedman School of Law. https://orcid.org/0000-0002-2496-538X

contrast, the right to abortion is now specifically included in the state Constitution of California. The European Union (“EU”) includes the protection of personal data, academic freedom, and the right to health care in its Charter of Fundamental Rights. On the other hand, the EU does not guarantee trial by jury, which is a fundamental right in the United States. Instead, the EU recognizes a right “to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”

When searching for the definition of fundamental rights, the U.S. Supreme Court prefers to look to history and tradition. Apart from the U.S. Constitution itself, no legal text has commanded the reverence of U.S. lawyers and judges more than Magna Carta, the famous charter of liberties first agreed to by King John in 1215 and subsequently reissued by John’s successors. Over the past two centuries, the U.S. Supreme Court has cited Magna Carta (or, in English, the “Great Charter” or simply “the Charter”) many times, and not merely in passing. Dissenting in the infamous Dred Scott case, for example, Justice Curtis invoked Magna Carta in support of Congress’s prohibition of slavery in free U.S. territory. Magna Carta was discussed extensively in both the majority opinion and Justice Harlan’s dissent in Hurtado v. California (1884), a leading Fourteenth Amendment case holding that the right to a grand jury in federal criminal cases was not incorporated against the states. In Klopfer v. North Carolina (1967), the Charter was invoked to bar a state from indefinitely postponing the prosecution of a civil rights protester. Most recently, the Charter was cited in Tyler v. Hennepin County (2023), where a unanimous Court held that a county violated the Takings Clause by retaining the excess value of a taxpayer’s home above the amount of her tax debt.

For most of the Court’s history, when the justices have cited Magna Carta, they have usually done so in the service of expanding or strengthening the fundamental rights guaranteed in the U.S. Constitution. Justices and judges, like the lawyers who argue before them, typically trace the pedigree of Constitutional rights back to Magna Carta for the

3. See Cal. Const. art. 1, § 1.1 (added Nov. 8, 2022) (“The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives.”).
5. See Thompson v. Utah, 170 U.S. 343 (1898).
7. See, e.g., Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (noting that the Supreme Court’s “decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition”).
8. See Derek A. Webb, What Say the Reeds at Runnymede? Magna Carta in Supreme Court History, 43 J. Sup. Ct. Hist. 210, 211 (2018) (“Despite its antiquity, Magna Carta has managed to reach out from the vast deep of the past to exert a modest but ongoing influence on the deliberations of the court. Indeed, Magna Carta has served as something of a leitmotif throughout Supreme Court history.”); Mary Ziegler, The Conservative Magna Carta, 94 N.C. L. Rev. 1653, 1653 (2016) (“For much of American history, Magna Carta has enjoyed almost as much popularity as the Constitution.”).
9. See Webb, supra note 8, at 215 (“From 1789 to 2017, the Supreme Court cited “Magna Carta (or Magna Charta or “Great Charter”) in 160 distinct cases.”).
11. 110 U.S. 516, 521–38 (1884); id. at 542–56 (Harlan, J., dissenting).
12. 386 U.S. 213, 223–25 (1967); see Ziegler, supra note 8, at 1657 (noting the importance of Magna Carta in the ACLU’s arguments before the court on behalf of the protester).
14. See Robert M. Pallitto, In the Shadow of the Great Charter: Common Law Constitutionalism and the Magna Carta 6–7 (noting that the Charter is often cited in cases involving due process and habeas corpus); Webb, supra note 8, at 223–24 (concluding that the Supreme Court has “almost always” cited the Charter “in the end as a source for constraining arbitrary government power within the limits of some kind of formal legal process.”).
same reason that restaurants brag about their Michelin stars: To invoke a universally recognized seal of approval. In recent years, however, some of the Court’s opinions have treated Magna Carta as something more, finding that certain rights may not be considered fundamental if they fall short of the Great Charter’s standard. In these cases, Magna Carta is treated less like a Michelin star and more like a sign at an amusement park showing how tall a visitor must be to ride an attraction. Dobbs v. Jackson Women’s Health Organization, the recent decision overruling prior precedent and holding that the U.S. Constitution provides no right to an abortion, is a notable example of this trend.

In his majority opinion in Dobbs, Justice Alito cites an earlier opinion by Justice Ginsburg in the case of Timbs v. Indiana, one of a line of cases holding that a right may be considered fundamental—and thus protected by the Due Process Clause of the Fourteenth Amendment—if it is “fundamental to our scheme of ordered liberty” and “deeply rooted in this Nation’s history and tradition.” The right at issue in Timbs was the Excessive Fines Clause of the Eighth Amendment. Writing for the majority, Justice Ginsburg traced the origin of the constitutional provision back to Magna Carta, a clause of which limited the imposition of “amercements,” or fines. Justice Alito contrasted the constitutional provision at issue in Timbs to the previously recognized right to an abortion, which, according to Justice Alito, lacked an equivalent historical pedigree. On the other hand, Justice Alito found much support in the historical record, including various treatises and “English cases dating all the way back to the 13th century,” for the rule that abortion after “quickening” was a crime. Justice Alito’s historical analysis led him to “[t]he inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation’s history and traditions.

Dobbs was not the first case to cite Magna Carta in seeking to narrow the list of fundamental rights. Writing for the majority in Kerry v. Din, which upheld the denial of an immigrant visa to the husband of a U.S. citizen, Justice Scalia concluded that it would be “absurd” to find that a visa denial might constitute a deprivation of liberty considering the Magna Carta origins of the Due Process Clauses. Justice Thomas followed a similar analysis in his dissenting opinion in Obergefell v. Hodges, arguing that liberty as seen through Magna Carta was much broader and more fundamental than the Due Process Clause. This conclusion runs contrary to Justice Alito’s.”

15. On the origins of the Michelin star ranking system for restaurants, which has always favored French cuisine over foreign and regional alternatives, see Stephen L. Harp, Marketing Michelin: Advertising and Cultural Identity in Twentieth-Century France 247–53 (2001). The system has been criticized on several grounds, including that it discourages risk-taking by chefs and prolongs the hegemony of French haute cuisine in Europe and elsewhere. See Jane K. Glenn, The Joy of Eating: A Guide to Food in Modern Pop Culture 124–27 (2022); Christel Lane, The Cultivation of Taste: Chefs and the Organization of Fine Dining 291–94 (2014). These criticisms, interestingly, echo some of the arguments made against Magna Carta by those who consider the Charter little more than a failed effort to protect the wealth of the elite. See, e.g., Timothy Endicott, Magna Carta 1215: A Glorious Failure, 11 Frontiers of Law in China 204, 205–06 (2016) (noting that Magna Carta “did not even address the fact that a substantial part of the population were subjected to poverty and subservience and forced labor, without freedom of movement or the right to hold property, as serfs.”).

17. 142 S. Ct. 2228 (2022).
18. Id. at 2245 (citing Timbs v. Indiana, 139 S. Ct. 682 (2019)).
19. Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
21. “A free man is not to be amerced for a small offence, and only in accordance with the degree of his offence; and for a great offence, he is to be amerced according to the magnitude of the offence, saving his livelihood . . . .” Magna Carta 47 (David Carpenter ed. & trans., 2015). All quotations from the 1215 Charter in this Article use Carpenter’s English translation and/or the original Latin text, unless directly quoting a source that relies on a different translation.
22. See Dobbs, 142 S. Ct. at 2249–50 (discussing the status of abortion in thirteenth-century common law).
23. Id.
24. Id. at 2253.
the prism of Magna Carta meant only “freedom from physical restraint.” 26 In these opinions, what happened at Runnymede in 1215 A.D. seems to be not only relevant to the analysis, but potentially dispositive. If so, it is crucial that we fully understand what Magna Carta was and the wide range of rights it protected.

From reading Supreme Court decisions citing Magna Carta, one might get the impression that the Charter primarily dealt with procedural rights, especially in criminal cases. 27 Justices are particularly fond of citing Clause 39, guaranteeing judgment by one’s peers, 28 and Clause 40, promising not to sell, deny, or delay justice. 29 These clauses, however, have often been misunderstood by those most enamored of citing them. Judgment by one’s peers cannot have been interpreted in 1215 as extending trial by jury to criminal cases, which were then commonly resolved by judicial ordeals or trial by battle. 30 The sweeping language of Clause 40, on the other hand, raised more questions than it answered. Certainly, the clause did not prohibit the king from charging for royal writs, 31 nor did it stop John’s successors from seeking payments from parties to speed up or transfer litigation or even obtain a specific judge. 32 Although John’s majestic promise in Clause 40 is worthy of being inscribed on a courthouse wall, 33 it would have been of little use to actual litigants in 1215, since it is broad enough to support virtually any argument, yet vague enough to be rejected in every case.

Magna Carta, however, consists of much more than general promises relating to due process. The 1215 text of Magna Carta is conventionally divided into sixty-three clauses. 34 Some of the clauses focus on very specific and time-sensitive issues relating to the war between King John and the barons, such as the status of certain Welsh hostages and the king of Scotland. 35 John famously repudiated his Charter in its entirety only a few months after agreeing to it, and secured a papal letter voiding it as issued under duress. 36 However, the majority of the provisions in the original charter were reissued multiple times by John’s successors Henry III and Edward I. 37 Although reduced to thirty-seven clauses, the 1225 reissue of the Charter still covers a myriad of issues, including inheritance rights,

27. See PALLITTO, supra note 14, at 6–7.
28. “No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land.” MAGNA CARTA, supra note 21, at 52–53. Several of the new constitutions adopted after independence included English translations of this clause. See Renée Lettow Lerner, The Troublesome Inheritance of Americans in Magna Carta and Trial by Jury, in MAGNA CARTA AND ITS MODERN LEGACY 78 (Robert Hazell & James Melton eds., 2015).
29. “To no one will we sell, to no one will we deny or delay, right or justice.” MAGNA CARTA, supra note 21, at 52–53.
31. See id.
33. The courthouse in Denver, Colorado, named for Justice Byron White of the U.S. Supreme Court, contains a paraphrase of Clause 40 of Magna Carta inscribed on one of its sides. Byron White U.S. Courthouse, Denver, CO, U.S. Gen. Servs. Admin., https://www.gsa.gov/real-estate/historic-preservation/explore-historic-buildings/find-a-building/all-historic-buildings/byron-white-us-courthouse-denver-co (last visited Mar. 21, 2023). Ironically, White was one of the few U.S. Supreme Court justices to take a critical view of the Magna Carta tradition. See Williams v. Florida, 399 U.S. 78, 91 n.27 (1970) (noting that “[w]hether or not the Magna Carta’s reference to a judgment by one’s peers was a reference to a ‘jury’” is “a fact that historians now dispute”).
34. The original Latin charter is one continuous text but was divided into sixty-three numbered clauses (or chapters) by Blackstone in 1759. See MAGNA CARTA, supra note 21, at 22–23. This Article will follow the conventional numbering of the 1215 Charter unless otherwise indicated.
35. See id. at 63 (clauses 58 and 59).
36. See id. at 395–403.
the maintenance of public property, the rights of widows, judicial administration, economic regulation, monastic orders, and merchants. If Magna Carta is in any way relevant to the modern definition of fundamental rights, we must look beyond the handful of procedural safeguards that have been the focus of so much prior interest, and consider the document as a whole.

This Article focuses on an important aspect of Magna Carta that deserves more attention, namely: the Charter’s affirmation of the rights and privileges (liberties) of the City of London and the other cities of England. These rights and privileges, reaffirmed in the Great Charter, included a variety of rights that we would recognize as fundamental today, especially relating to travel and commerce. Citizens were expressly granted rights to come and go peacefully between cities and to engage in trade and commerce. Although Magna Carta was not the origin of these rights, it elevated their status to that of a constitutional guarantee, and thus made it more difficult for the rights to be infringed in the future. This, too, is part of the story of Magna Carta, and should not be overlooked, particularly at a time in U.S. history when seemingly well-established rights are facing new scrutiny.

The liberties of the cities are preserved in hundreds of charters issued by English kings beginning before the Norman conquest. John himself issued many charters to cities, as did his brother Richard and his father Henry II. Moreover, John’s son Henry III not only confirmed the general grant of liberties by reissuing Magna Carta, but also issued several specific charters to cities of his own. This Article will examine these various charters to show what liberties the cities would have expected John and Henry III to honor in the years after 1215 and will show that the rights and privileges of cities were extensive and significant.

This Article is divided into five parts. Part II will survey the history leading up to and following the document known as Magna Carta. Part III will then consider how Magna Carta has been used in two centuries of U.S. Supreme Court jurisprudence and what provisions the Court has chosen to focus on. Part IV will then examine some provisions of the Great Charter that have been relatively neglected in the Court’s opinions and how those provisions are likely to have been understood by the framers of the U.S. Constitution. Part V concludes.

II. Magna Carta in Historical Perspective

In the eight centuries since King John first gave royal assent to the list of promises we know as Magna Carta, views on the significance of the Charter have tended toward two extremes. On the one hand, there are those who elevate the Charter to an almost mythical status as a guarantee of rights comparable in significance to the first ten amendments to the U.S. Constitution. This view is especially prominent in decisions of the U.S. courts charged with interpreting those ten amendments, and in works of constitutional hagiography written by American lawyers and jurists. These commentators see Magna Carta as a key landmark on the road toward democracy, or at least toward the rule of law.
On the other hand, one may find a more skeptical or cynical view, aimed at deconstructing the myth of Magna Carta as a fundamental constitutional text. Writings in this vein often begin by noting that the 1215 charter was quickly repudiated by King John and annullé by the Pope. While the Charter was admittedly reissued the following year under the name of the young Henry III, some of the most radical provisions were omitted. But according to the skeptics, even the original Charter of 1215 was of little use to the great majority of the English population, as opposed to the great barons who forced John to accept it. From this perspective, Magna Carta is derided as a mere totem, a magical mirror in which entranced jurists can imagine precedents for their own preferred constitutional order.

To understand the Charter, one must first know the political, social, and military history that lay behind it. This history goes back to well before the events that took place in Runnymede in 1215. The story begins nearly a century before Runnymede, with the death of King Henry I, the youngest son of William the Conqueror, in 1135. The king’s chosen successor was his daughter Matilda, who had married the German emperor Henry V in 1114. At Henry’s death, however, the crown was instead claimed by his nephew Stephen, count of Boulogne. The empress Matilda contested this claim, and for the next fourteen years, a bitter civil war was fought between the supporters of Stephen and Matilda, until peace was finally made in 1153 when Stephen agreed to recognize Henry, son of Matilda, as his successor. Stephen died the following year, and the empress’s son was crowned as Henry II.

By virtue of inheritance and through his marriage to Eleanor of Aquitaine, the new King Henry II controlled not only England, but a vast empire that extended from the Scottish border to the Pyrenees. Henry II made significant and lasting reforms to the English judicial system. On the other hand, he became involved in a notorious dispute with Thomas Becket, the Archbishop of Canterbury, which ended with the murder and

48. See e.g., Ginsburg, supra note 47 (calling the Magna Carta of 1215 a “failure” because it did not constrain King John, while acknowledging the frequent reissues of the Charter by John’s successors).
51. This point was made most memorably by Sellar and Yeatman, who wryly explained, in their classic 1066 and All That, that Magna Carta was “a Good Thing for everyone (except the Common People).” WALTER CARLUTHERS SELLAR & ROBERT JULIAN YEATMAN, 1066 AND ALL THAT: A MEMORABLE HISTORY OF ENGLAND 26 (1930). For recent variations on the argument, see Sarah Lyall, Magna Carta, Still Posing a Challenge at 800, N.Y. TIMES (June 14, 2015), https://www.nytimes.com/2015/06/15/world/europe/magna-carta-still-posing-a-challenge-at-800.html (quoting Nicholas Vincent, who refers to the mythology surrounding Magna Carta a “load of tripe,” but nonetheless a “very useful myth,” and Akhil Amar, who calls the Charter “one of the many, many things in the Anglo-American legal tradition that will eventually grow and mutate and be misinterpreted as something that’s important”).
52. EDMUND KING, KING STEPHEN 42 (2010).
53. Id. at 29.
54. Id. at 41.
55. Id. at 53, 73, 280.
Overall, however, Henry II was a successful king. Stet, Henry’s successor Richard I, known as “The Lionheart,” spent little time in England and is best remembered for his victories over the Muslim leader Saladin in the Third Crusade. Although Richard took drastic measures to raise revenue before leaving for the Holy Land, most of his English contemporaries thought that the goal justified the means.

At the death of Richard I in 1199, John became king of England. Although some revisionist historians have attempted to rehabilitate John’s reputation in recent years, he has generally been regarded as one of England’s most disastrous kings. In the early years of his reign, John was defeated in several battles against King Philip II of France and consequently lost the duchy of Normandy and most of the other possessions on the Continent that had belonged to his brother and father. In an attempt to raise funds to win back his French possessions, John raised taxes on his barons in the form of increasing certain feudal dues. These actions were very unpopular, and by 1215 a group of rebel barons began a military campaign against the king. The document that we know as Magna Carta is an attempt at a peace agreement between the king and the barons, in which John made certain concessions in an effort to prevent a civil war.

Despite this peace attempt, Magna Carta caused only a temporary interruption in the war between John and the rebel barons. Within a few months, John repudiated the Charter and asked the pope to quash it, a request that was quickly granted. The barons responded by voting to depose John and offered the throne to Prince Louis, the eldest son of King Philip Augustus of France. Since neither John nor Louis was committed to the charter at that point, it seemed likely that Magna Carta would be forgotten. However, John died in 1216, and his supporters rallied to his young son Henry III, whose regent quickly reconfirmed many of the provisions of the original Magna Carta while omitting others. Louis and the English barons who continued to follow him were decisively defeated at the battle of Lincoln in 1217. Henry III would go on to reissue the charter two more times: in 1217 and 1225, with the 1225 version eventually being considered definitive.

Although Magna Carta was not a result of legal developments, much of the original document and its subsequent reissues deal with issues relating to law and justice.

60. See White, supra note 56, at 213–19 (summarizing Henry’s contributions in the areas of administration, politics, and justice).
62. See id. at 114–22.
63. At the time of his accession, John was out of favor with his brother Richard, whose throne he had once tried to usurp. See Marc Morris, King John: Treachery and Tyranny in Medieval England: The Road to Magna Carta 100–06 (2015).
64. See id. at 287–98; W.L. Warren, King John 11–16, 259 (1961). For a somewhat more sympathetic view, see Stephen Church, King John and the Road to Magna Carta 1–9 (2015).
65. See Morris, supra note 63, at 144–59.
66. Warren, supra note 64, at 145–53.
67. See Morris, supra note 63, at 237–52.
68. Id. at 257–60.
69. See Magna Carta, supra note 21, at 395.
70. Id. at 398–99.
71. Id. at 403.
72. Id. at 406–09.
73. Id. at 411.
The barons who took up arms against King John had been aggrieved by his personal intervention in legal disputes, which advantaged some litigants over others. Among the most famous provisions of the original Magna Carta were Clause 39 and Clause 40. In its original form, Clause 39 provided that “[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers by the law of the land.” Clause 40 went on to promise that “[t]o no one will we sell, to no one will we deny or delay, right or justice.” Subsequent reissues of the Charter combined these two provisions into a single Clause 29, with the added phrase “of his free tenement” after “disseised.”

In his famous Commentaries, Blackstone would later cite the language of Clause 39 for the proposition that “trial by jury, or the country, per patriam, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter.” As discussed below, some decisions of the U.S. Supreme Court would eventually follow this misinterpretation. The connection, however, likely reflects “a tendency of later generations to explain what was unfamiliar in the Great Charter by what was familiar in their own experience.” The “lawful judgement of his peers” referred to in the original Clause 39 was not a synonym for jury trial. Rather, it embodied a more general principle: that men, regardless of rank, could not be tried by those who ranked below (or above) them in the feudal hierarchy, and that freemen could not be tried by the unfree. The mechanisms that were used to resolve criminal cases, including the ordeal of water, might fall under the heading of “the law of the land,” but were quite dissimilar from jury trial.

In addition to the famous Clauses 39 and 40, Magna Carta contained other provisions important to the administration of justice. For example, Clauses 17 and 18 of the original Charter of 1215 provided that common pleas had to be held in a fixed place, and certain traditional common-law actions were to be heard only in the counties. These provisions made the common-law courts more convenient and accessible for some litigants and offered a safeguard against inappropriate interference by the king. In addition, Clause 20 put restrictions on amercements, which were fines imposed for petty offenses. Magna Carta made the imposition of amercement less arbitrary and fixed them at a rate

77. Nullus liber homo capitatur, vel inprisonetur, aut distaisatur, aut utlaghetur, aut exuletur, aut aliquo alio modo destruatur, nec super eum ibimus, nec super eum mitiemus, nisi per legale iuditium parium suorum vel per legem terræ. Magna Carta, supra note 21, at 52–53.
78. Nulli vendemus, nulli negabimus, aut differemus, rectum aut justitiam. Id.
79. See VINCENT, supra note 37, at 276, 279.
80. 4 William Blackstone, Commentaries *349 (Chicago Callaghan & Co. 1872) (1765).
81. See infra text accompanying notes 161–64.
82. See William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 392 (1914).
83. See id. at 377–78.
84. See id.
86. See Magna Carta, supra note 21, at 45.
88. See Magna Carta, supra note 21, at 47.
that was commensurate with both the gravity of the offense and the offender’s ability to pay. 

By the early fourteenth century, many provisions of the original Magna Carta were no longer relevant, having been outpaced by other developments in English history and changes in the system of land law. The Charter saw a resurgence of interest, however, during the early seventeenth century, particularly in the writings of Sir Edward Coke (1552-1634), who served as Chief Justice under the Stuart king, James I. Coke saw the Great Charter as a symbolic check on the power of the Stuart kings, and discussed it extensively in his Institutes of the Lawes of England. The Institutes consisted of four volumes, but only the first volume was published during Coke’s lifetime due to Stuart censorship.

Coke focused on Magna Carta in the second volume of his Institutes, published posthumously in 1642. In his commentary on the language of the original Clause 39 (which he knew as Clause 29 of the 1225 reissue), Coke argued that the words “the law of the land” were equivalent to “due process of law”:

For the true sense and exposition of these words, see the Statute of 37 E.3 cap. 8 where the words, by the Law of the Land, are rendred, without due proces of Law, for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his freehold without proces of the Law; that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by Writ original of the Common Law.

Coke’s formulation opened the possibility that a government act might be a violation of a person’s rights even if it followed the letter of the law, if it fell short of “due process.”

As the common law followed the British flag to North America, Coke’s interpretation of Magna Carta as a fundamental guarantee of due process followed as well. As early as 1676, William Penn included a provision in his constitution for West New Jersey providing that no “Proprietor, freeholder or inhabitant” of the province “shall be deprived or condemned of life, limb, liberty, estate, property or any ways hurt . . . without a due trial, and judgment passed by twelve good and lawful men of his neighborhood.” When the colonies declared independence, many of the first state constitutions and declarations of rights copied language from Magna Carta verbatim.
Most importantly, the Great Charter as construed by Coke influenced the language of the U.S. Constitution itself. In words clearly echoing the original Clause 39 of Magna Carta, the Fifth Amendment provided that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” The framers thus incorporated language from the Great Charter, as interpreted in the common law tradition, into the constitution of the new American nation. This fact would not escape the attention of the U.S. Supreme Court in the decades and centuries to come.

III. MAGNA CARTA IN U.S. SUPREME COURT JURISPRUDENCE

The earliest direct citation to Magna Carta in the U.S. Reports appears to be in the 1794 case of Georgia v. Brailsford, where it is mentioned in a long list of English authorities that had been cited by counsel for the defendants. The case is unique as being one of only three jury trials known to be heard by the U.S. Supreme Court, and the only one to be reported. As a dispute between the state of Georgia and a purportedly British creditor over a debt owed by a citizen of Georgia, it fell under the original jurisdiction of the Supreme Court. No specific clause of Magna Carta was mentioned in the U.S. Reports, and the Charter was not cited in the opinion by Chief Justice John Jay. However, a circuit court opinion by Justice Iredell from an earlier phase of the litigation focuses on Clause 41, the so-called “Merchants’ Chapter” guaranteeing the safety of foreign merchants during times of war provided that English merchants were treated equally well by the enemy nation. Thus, Magna Carta was directly relevant to the case as an accepted and persuasive authority of international law establishing a principle of reciprocity.

Magna Carta next makes an appearance in the U.S. Reports two decades later, in the reported arguments in two cases from 1814 and a dissenting opinion by Justice Story in one of the cases. Both cases, The Frances and Brown v. United States, involved cargo owned or partially owned by British subjects that was seized and condemned as enemy property during the War of 1812. As in Georgia v. Brailsford, the arguments in The Frances and Brown centered on the Merchants’ Chapter of Magna Carta, which was alleged to provide protection for British goods seized in the United States under the principle of reciprocity. The Court upheld the condemnation of the cargo in The Frances, which

99. U.S. CONST. amend. V.
100. See ANTHONY ARLIDGE & IGOR JUDGE, MAGNA CARTA UNCOVERED 160–61 (2014).
101. 3 U.S. (3 Dall.) 1, 2 (1794). This first citation uses the spelling “Magna Carta,” rather than “Magna Charta,” which was the dominant spelling in the U.S. Reports for most of the nineteenth century. After Brailsford, the spelling “Magna Carta” does not appear again in the U.S. Reports until Chambers v. Florida, 309 U.S. 227, 237 n.10 (1940). On the changing spellings of Magna Ch(h)arta (as well as the case for excluding the definite article), see Bryan A. Garner, A Lexicographic Look at Magna Carta, in MAGNA CARTA: MUSE AND MENTOR 85, 86–91 (Randy J. Holland ed., 2014).
103. Id.
104. See generally Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).
107. The Frances, 12 U.S. (8 Cranch) 335, 338–341 (1814); Brown v. United States, 12 U.S. (8 Cranch) 110, 114 (1814); id. at 142–43 (Story, J., dissenting).
108. The Frances, 12 U.S. (8 Cranch) at 335 (cargo seized in Rhode Island owned in part by a Scotsman); Brown, 12 U.S. (8 Cranch) at 110 (cargo owned by British merchants seized in Massachusetts).
109. The Frances, 12 U.S. (8 Cranch) at 339; Brown, 12 U.S. (8 Cranch) at 114; see Brailsford, 3 U.S. (3 Dall.) at 1–3.
was captured on the high seas, but reversed the condemnation of the cargo in *Brown* because it was already in U.S. territory when the war began.

Neither the justices nor the lawyers questioned the relevance of Magna Carta to these seizure cases, but they reached different conclusions on how it might affect the outcome. Dissenting from the Court’s decision in *Brown*, Justice Story noted that the Merchants’ Chapter referred not to merchants generally, but to merchants who were in England at the outbreak of hostilities. Justice Story further argued that Great Britain had not respected the rights of foreign merchants in the war with the U.S. (still ongoing at the time the case was decided), and thus the protection of the Merchants’ Chapter would not apply. The reversal of the condemnation by the majority was not based on a different application of the Merchants’ Chapter, but on the lack of congressional authorization.

Magna Carta continued to be cited by the Marshall Court after the conclusion of hostilities with Great Britain, most often in the context of interpreting colonial documents. For example, the Great Charter made an appearance in *Town of Pawlet v. Clark*, a dispute about conflicting land grants. The original grant referred to “a glebe for the church of England as by law established,” and the Court looked to the first clause of Magna Carta—which declared that “the English church is to be free”—to interpret the language at issue. Magna Carta was also cited by Daniel Webster in his reported arguments in *Dartmouth College v. Woodward*, both as evidence for the meaning of “liberties” in the college’s charter and for the general principle against unjust disseisin of property. In his concurrence to the *Charles River Bridge* case from 1837, Justice Baldwin applied terminology from Magna Carta to the charter granted to Harvard College to maintain a ferry from Charlestown to Boston.

By and large, these earliest citations to Magna Carta in the U.S. Reports did not arise in the context of constitutional interpretation, as would later be the case. In cases involving foreign relations with Britain where merchant goods were at stake, the Merchants’ Chapter was directly and obviously relevant. Had the U.S. gone to war against France instead of Britain, Justice Story might have cited principles of French law instead of the Great Charter. Likewise, if the *Dartmouth College* case had involved a French or Spanish charter rather than a British one, it is not clear that the Charter would have been mentioned in the arguments. When the grants and charters under dispute were issued, the colonies were still subject to the law of Great Britain, including those provisions of Magna

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112. See supra text accompanying notes 107–11.
113. 12 U.S. (8 Cranch) at 142–43.
114. Id. at 144–45.
115. Id. at 129; see Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335, 1353 (2007) (explaining that, in Justice Marshall’s view, “the property did not automatically revert to the U.S. government when war was declared, so the President lacked the constitutional power to seize the property without congressional authorization.”).
118. Id. at 292, 325–26.
121. See infra text accompanying note 130.
122. See supra text accompanying notes 105, 113–15.
Carta that had not been repealed. Magna Carta was relevant because English law lay at the heart of these early cases.

The Court’s use of Magna Carta as a tool to interpret the U.S. Constitution traces back not to the founding era or the Marshall Court, but to the 1855 decision in Murray’s Lessee v. Hoboken Land & Import Company. In a unanimous opinion written by Justice Curtis, the Court held for the first time that the Due Process Clause of the Fifth Amendment could require something more than mere compliance with procedural formalities such as jury trial. Citing the commentary of Lord Coke, Justice Curtis wrote in Murray’s Lessee that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta.” In other words, the Fifth Amendment had incorporated the received understanding of Magna Carta, which became a Great Charter not just for England and the British colonies, but for the United States.

Murray’s Lessee was a land dispute involving a summary procedure called a “distress warrant” authorized by an Act of Congress and executed by the U.S. marshal for New Jersey. To assess the constitutionality of this procedure, Justice Curtis looked at English precedents and history, including Clause 9 of Magna Carta, in which the king forbade his bailiffs to seize any land of a debtor who had sufficient chattels to pay the debt. The implication of this clause was that the lands of the debtor could be levied when the chattels were insufficient, and that understanding was reflected in subsequent practice. Justice Curtis concluded that the summary procedure at issue in Murray’s Lessee satisfied the standard of Magna Carta and was therefore constitutional under the Fifth Amendment.

Two years later, Justice Curtis would cite Magna Carta again, this time in dissent in the infamous case of Dred Scott v. Sandford. The majority opinion by Chief Justice Taney held the Missouri Compromise Act to be unconstitutional on the theory that it deprived slaveholders of their property without due process of law. Curtis responded to this argument by noting again that the Due Process Clause traced back to Magna Carta. The dissenting justice further reasoned that, if the Missouri Compromise violated the right to due process by prohibiting slavery in the territories, then so did the Northwest Ordinance of 1787, as well as various laws in slaveholding states that banned the slave trade, including a 1778 law from Virginia. Since this conclusion would be absurd, then the Missouri Compromise must also have been constitutional.

After the Civil War, the Court turned to interpreting the newly adopted Fourteenth Amendment, and once again Magna Carta played a key role. Dissenting from the majority’s narrow construction of the Privileges and Immunities Clause in the Slaughter-
House Cases, both Justice Bradley and Justice Swayne invoked Magna Carta in support of a more robust understanding of the privileges and immunities of citizenship. Justice Bradley mentioned particularly the right of freemen not to be unjustly disseized as one of “the rights of Englishmen” that ought to attach to citizenship of the United States as well as citizenship of the states. Justice Swayne added that the three Reconstruction Amendments “may be said to rise to the dignity of a new Magna Charta.” Although these arguments failed to persuade the majority of the Court, they ensured that Magna Carta would remain in the spotlight as the Court moved to consider the Due Process Clause.

Of all the nineteenth-century due process cases to cite Magna Carta, the most influential was probably the 1884 case of Hurtado v. California. Hurtado involved a criminal case in California where a district attorney charged a defendant by information without a grand jury investigation. The defendant claimed that his conviction violated the Due Process Clause of the Fourteenth Amendment because there was no grand jury indictment or presentment.

Writing for the majority, Justice Matthews accepted that, as originally claimed by Lord Coke, the phrase “due process of law” was equivalent to “the law of the land” in Clause 39 of Magna Carta. However, the majority reasoned that Coke mentioned indictment or presentment by a grand jury only “as an example and illustration of due process of law as it actually existed in cases in which it was customarily used.” The common law recognized appeals of felony, “which were never regarded as contrary to Magna Carta,” as an alternative to grand jury presentation.

The Hurtado majority set out a more forward-looking view of Magna Carta and its protections than we find in the Court’s earlier jurisprudence. According to Justice Matthews,

[t]here is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

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140.  Id. at 114–15 (Bradley, J., dissenting).
141.  Id. at 124–26 (Swayne, J., dissenting).
142.  See supra notes 139–41 and accompanying text; see infra note 143 and accompanying text.
144.  110 U.S. at 520.
145.  Id. at 518–20.
146.  Id. at 526, 550–51 (citing Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857)).
147.  Id. at 522–23 (citing COKE, SECOND INSTITUTE, supra note 94).
149.  See infra notes 151–56 and accompanying text.
150.  Hurtado, 110 U.S. at 531.
The procedures used to convict *Hurtado*, in the view of the majority, were consistent with the spirit, if not the letter, of Magna Carta and were therefore constitutional under the Fourteenth Amendment.151

Dissenting in *Hurtado*, Justice Harlan also relied extensively on Magna Carta.152 Justice Harlan cited *Murray's Lessee* for the proposition that the phrase “law of the land” in Magna Carta meant the same as “due process” in the Fourteenth Amendment.153 Noting that several early state constitutions drafted after independence included the language of Clause 39 of the Great Charter, Justice Harlan relied on both English and colonial authorities for his conclusion that “according to the settled usages and modes of proceeding existing under the common and statute law of England at the settlement of this country, information in capital cases was not consistent with the ‘law of the land’ or with ‘due process of law.’”154 At the time of the adoption of the Fourteenth Amendment, no state permitted prosecution of “a crime involving life” by information; thus, Harlan would have found the California procedure to be unconstitutional.155

The opinions in *Hurtado* marked the beginning of a trend where most of the citations to Magna Carta occurred in due process and habeas cases, and if any specific provision was mentioned, it was almost always Clause 39.156 For example, in a case from 1888, a defendant who had been convicted of conspiracy without a jury trial in Washington, D.C., and sentenced to pay a fine, brought a habeas action when the court refused to release him until the fine was paid.157 Finding his detention unconstitutional, the Court cited Clause 39 of Magna Carta.158 In another case from the same year, however, the court refused to grant habeas to a petitioner who was imprisoned for contempt of court despite the petitioner’s assertion that the imprisonment was “in disregard of the fundamental principles of *magna charta*.”159 The Court found it to be settled in both English and U.S. jurisprudence, “reaching back to the earliest times,” that an offender could be imprisoned without a jury trial for direct contempt in the court’s presence.160

One of the most important uses of Magna Carta in the due process context came in the 1898 case of *Thompson v. Utah*.161 The defendant in *Thompson* was convicted of grand larceny in Utah by a jury of eight persons, which was permitted by the Utah Constitution at the time of its admission as a state.162 Justice Harlan, writing this time for the majority, concluded that the reference to judgment by one’s peers or “the law of the land” in Magna Carta “referred to a trial by twelve jurors.”163 The Constitution thus also required a jury of twelve persons for felony cases, and the defendant’s conviction by a jury of eight was unconstitutional.164

Modern historians would dispute Justice Harlan’s understanding of jury trial in Magna Carta. The Great Charter never referred to the right to trial by a jury of twelve in criminal cases, because no such thing existed in 1215 as a regular process.165 While juries

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151. *Id.* at 537–38.
152. *Id.* at 539–43, 545–47, 549–54, 556 (Harlan, J., dissenting).
153. *Id.* at 543 (Harlan, J., dissenting) (citing *Murray’s Lessee* v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855)).
154. *Id.* at 539–541, 545 (Harlan, J., dissenting).
156. See *supra* notes 143–54 and accompanying text; *infra* notes 157–60 and accompanying text.
158. *Id.* at 552 (citing *In re Glenn*, 54 Md. 572, 600, 605 (1880)).
160. *Id.*
161. See 170 U.S. 343 (1898); *infra* notes 162–69 and accompanying text.
162. *Id.* at 344–45.
163. *Id.* at 349.
164. *Id.* at 355.
were regularly used for presentment of criminal cases at the time the Great Charter was sealed, trial juries could decide only civil cases, especially land disputes. Felony cases at the time of Magna Carta were generally decided by the “ordeal of water” or by appeal of felony, and it was not until after the Fourth Lateran Council effectively abolished the ordeals that the English royal courts were forced to adopt trial by jury as an alternative. In Thompson v. Utah, however, the Supreme Court applied the contemporary understanding of Magna Carta as a minimum standard that must be met in order to qualify as due process. Such a holding communicated that U.S. citizens might have more rights than Clause 39 guaranteed, but they could not have less.

Into the twentieth century, the Court continued to refine its view of Magna Carta as establishing a baseline of minimal due process rights. In the 1941 case of Bridges v. California, for example, the Court considered whether it was constitutional for a court to find individuals and a newspaper guilty of contempt and fine them for criticizing court proceedings in print. Writing for the majority in favor of overturning the contempt convictions, Justice Black cited previous statements by James Madison on the limitations of the common law as a source of U.S. constitutional rights. As Madison had noted in urging the House of Representatives to adopt the Bill of Rights, Magna Carta did not protect the freedom of the press. Nevertheless, as Madison wrote elsewhere, the state of freedom of speech under Magna Carta and the common law could not be “be the standard of its freedom in the United States.” The U.S. Constitution drew upon the English common law tradition, but also went well beyond it in protecting such rights as freedom of speech.

Justice Frankfurter also discussed the Great Charter in his dissenting opinion in Bridges, pointing out that “[t]he administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta.” However, Justice Frankfurter also tried to break free from the past, noting that the question was not “whether eighteenth-century restraints upon the freedom of the press should now be revived,” but “rather whether nineteenth- and twentieth-century American institutions should be abrogated by judicial fiat.” Justice Frankfurter concluded that the authority to issue contempt citations was necessary to protect the impartiality of court decisions from real and substantial threats against them. For Justice Frankfurter, the core of the problem was that the right to freedom of speech conflicted in the case with another fundamental right: that to an impartial judiciary.

Magna Carta made another notable appearance in Klopfer v. North Carolina, the 1967 decision that incorporated the Sixth Amendment right to a speedy trial against the

166. See id. at 139–42, 145.
167. See id. at 142–45, 149–53.
168. 170 U.S. 343, 354–55 (1898); see supra notes 161–64 and accompanying text.
169. See id.
171. Id. at 258–59.
172. Id. at 258, 264.
173. See id. at 264. For the full text of Madison’s comments to the House of Representatives, see STEPHEN W. STATHIS, LANDMARK DEBATES IN CONGRESS 31–37 (2009).
174. 6 THE WRITINGS OF JAMES MADISON 386–87 (Gaillard Hunt ed., 1906), quoted in Bridges, 314 U.S. at 264.
175. Bridges, 314 U.S. at 264.
176. Id. at 282 (Frankfurter, J., dissenting).
177. Id. at 289. Justice Frankfurter also emphasized that “[t]he Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans.” Id. at 283. For more on Justice Frankfurter’s methodology in his Bridges dissent and how it fits into his jurisprudence more generally, see HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 131 (1960).
179. See id. at 284–85.
states via the Fourteenth Amendment. The case involved the arrest in February 1964 of Peter Klopfer, a zoology professor at Duke University, on a state charge of criminal trespass for participating in a civil rights protest in North Carolina. After a mistrial, the trial judge continued the case, but Congress enacted the Civil Rights Act of 1964 in the meantime, which Klopfer argued ought to abate his trespass charge. Rather than dismiss the case, the trial court approved a motion by the prosecutor to take a “nolle prosequi with leave,” which would have allowed the charge to be restored to the trial docket at a time of the prosecutor’s choosing. Klopfer challenged the entry of the nolle prosequi as violating his constitutional right to a speedy trial.

In his opinion ruling in favor of Klopfer, Chief Justice Warren cited Magna Carta, specifically Clause 40, which guaranteed that neither right nor justice would be denied or delayed. Coke had interpreted this clause as precluding long detention without trial, an interpretation that, according to Chief Justice Warren, would have been widely familiar to American lawyers at the time of the framing of the Sixth Amendment. This history meant that the right to a speedy trial was “one of the most basic rights preserved by our Constitution,” and, in the opinion of the majority, ought to be incorporated against the states.

Bridges v. California and Klopfer v. North Carolina together illustrate how Magna Carta was treated by the Court for much of the twentieth century. Even if a right was absent from Magna Carta—such as the right to freedom of speech at issue in Bridges—that would not preclude the Court from treating it as a fundamental right worthy of protection. However, if a right could be found in Magna Carta, the Justices would take note of that fact, and it could have important constitutional ramifications. Rights that the Justices could trace back to Magna Carta were more likely to be considered fundamental or “essential to ordered liberty,” which justified their incorporation into the Fourteenth Amendment and application against the states.

Although Magna Carta was often cited by the Warren Court, it usually appeared in the context of procedural due process and played little role in the development of the right to privacy and the revival of substantive due process. Finding a right of married couples to use contraception in Griswold v. Connecticut, Justice Douglas claimed to “deal with a right of privacy older than the Bill of Rights,” but cited no precedents from English history in support. Chief Justice Warren made no mention of Magna Carta in striking

183. Id. at 214, 218.
184. Id. at 218.
185. Id. at 223.
186. Id. at 224–25 (quoting COKE, SECOND INSTITUTE, supra note 94, and citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 157-87 (1911)).
187. Klopfer, 386 U.S. at 222, 226. Justice Harlan concurred in the result because he was opposed to the concept of “incorporation” but agreed that, in light of the history, the North Carolina procedure “violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.” Id. at 226–27 (Harlan, J., concurring).
188. See Bridges, 314 U.S. 252, 264, 282 (1941); Klopfer, 386 U.S. at 222–25.
189. See Bridges, 314 U.S. at 258, 260, 263–64, 281.
191. See e.g., Duncan v. Louisiana, 391 U.S. 145, 149, 151, 155–56 (1968) (incorporating the right to jury trial in criminal cases, which “had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta,” against the states through the Fourteenth Amendment).
down the statutory prohibition of interracial marriages in *Loving v. Virginia*, although the right to marry was implicated in some provisions of the Charter. These opinions certainly could have invoked Magna Carta had the Justices considered it worthwhile to do so.

Writing for the majority in *Roe v. Wade*, Justice Blackmun went into greater historical detail, tracing the law and practice of abortion from ancient Greece to modern times. Blackmun cited Bracton, Coke, and Blackstone on the history of abortion in the English common law, but made no mention at all of Magna Carta, even though Blackstone’s cited discussion of abortion originally appeared in the context of the rights protected by the Great Charter. The dissenting opinions by Justice White and Justice Rehnquist did not discuss the English background at all, focusing on the Court’s prior precedent and the history of American law on the subject. Neither side of the divided Court in *Roe* seemed to see any relevance of Magna Carta to the question at hand.

The decision in *Roe v. Wade* brought new energy to the socially conservative movement in the U.S. Although socially conservative “pro-life” activists initially sought to make arguments within the framework of the Fourteenth Amendment, they eventually turned to Magna Carta as an alternative framework from which to criticize the Court’s jurisprudence. Conservative groups such as Focus on the Family and the American Center for Law and Justice cited Magna Carta in amicus briefs to the Court in cases relating to religious freedom, sexual orientation, and campaign finance. Although this renewed interest in the Great Charter was at first limited to the arguments of counsel, it began to spill over into the Court’s opinions in two decisions from 2015: *Kerry v. Din* and *Obergefell v. Hodges*.

In the first of these cases, *Kerry v. Din*, a U.S. citizen named Fauzia Din sought to challenge the State Department’s denial of a visa petition she had filed on behalf of her husband, an Afghan citizen. The Ninth Circuit had held that Din had a liberty interest in her marriage and that this protected interest entitled her to have her husband’s visa denial reviewed. Writing for a plurality and reversing the Ninth Circuit, Justice Scalia concluded that Din had not been denied her “life, liberty, or property” and thus no process was due. Although the analysis in Justice Scalia’s opinion followed earlier decisions of the Court, it took the line of reasoning in a new direction.

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194. 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”). Had Justice Warren wished to mention Magna Carta, he could have referred to Clause 6, which barred the forced marriage of heirs to persons of lower social standing, and to Clause 8, which protected widows from being forced to marry if they chose to remain single after the death of their husbands. See MAGNA CARTA, supra note 21, at 41.
195. Supra notes 192–94 and accompanying text; see Ziegler, supra note 8, at 1653–54.
198. *Roe*, 410 U.S. at 171–78 (Rehnquist, J., dissenting); id. at 221–23 (White, J., dissenting).
199. See supra notes 196–98 and accompanying text.
201. See Ziegler, supra note 8, at 1658–64.
202. See id. at 1665–68.
203. See supra notes 197–02; *infra* notes 204–12.
205. *Din* v. *Kerry*, 718 F.3d 856, 860, 868 (9th Cir. 2013); *Kerry*, 576 U.S. at 90.
207. See *infra* notes 210–12 and accompanying text.
Justice Scalia began by tracing the long-accepted line of descent from the Fifth Amendment back to Coke and his interpretation of Clause 39 of Magna Carta, citing Murray’s Lessee and Klopfer. Unlike those other opinions, Justice Scalia then attempted to offer a precise definition of “liberty” based on the commentary of Coke and Blackstone.

Coke had interpreted Magna Carta to protect against various types of confinements and dispossessions. Blackstone had referred to “liberty” as consisting of “the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint.” These two texts, for Justice Scalia, constituted a “historical understanding” under which it was “absurd” for Din to claim that she was deprived of her liberty, for neither she nor her husband had been taken, imprisoned, or confined against their will.

After setting out this “historical understanding” of liberty as mere locomotion, Justice Scalia went on to acknowledge that the Court’s definition of “liberty” in prior cases was in fact broader, encompassing certain “implied fundamental rights.” Although Justice Scalia considered this expanded definition of liberty to be “textually unsupportable,” he nonetheless argued that Din’s fundamental liberty interest had not been violated under the Court’s precedents. Justice Scalia’s opinion was joined by only two other members of the Court, and a majority concurred only in the result.

The approach to Magna Carta taken in Din can also be seen in Justice Thomas’s dissent in a more famous case from the same Term, Obergefell v. Hodges. Obergefell arose from several related challenges to state statutes defining marriage as “a union between one man and one woman.” The majority opinion noted that, under the Court’s precedent, the right to marry was a fundamental right encompassed in the “liberty” protected by the Due Process Clause. Since the state statutes violated that liberty, the Court held that states could no longer refuse to recognize a marriage between persons of the same sex.

Justice Thomas wrote one of four dissenting opinions in Obergefell, and he was joined in his dissent by Justice Scalia. Several conservative legal advocacy groups had submitted amicus briefs in Obergefell that relied on Magna Carta as a foundation for due process rights that, in the view of those groups, ruled out the recognition of gay marriage. These arguments seem to have influenced the dissenting justices, especially Justice Thomas. Justice Thomas had previously cited Magna Carta in his concurrence in McDonald v. City of Chicago, the 2010 case in which the Court incorporated the Second Amendment into the Fourteenth Amendment.

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209. Id. at 91–92.
210. Id. at 91 (citing COKE, SECOND INSTITUTE, supra note 94, at 46–48).
211. Id. at 91–92 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *130 (Chicago Callaghan & Co. 1872) (1765)).
212. Id. at 92.
213. Kerry, 576 U.S. at 92.
214. Id. at 93–97.
215. Scalia was joined by Justice Thomas and the Chief Justice. Id. at 87, 101. Justice Breyer wrote a dissenting opinion, joined by three other Justices, arguing that the rule of law, “stretching at least 800 years to Magna Carta,” required more procedural safeguards than had been offered to Din in the case. Id. at 106, 111 (Breyer, J., dissenting).
217. Id. at 644.
218. Id. at 663–65.
219. Id. at 680–81.
220. Id. at 721 (Thomas, J., dissenting).
221. See Ziegler, supra note 8, at 1668–69.
222. Id. at 1669–70.
Amendment against the states via the Fourteenth Amendment. In that concurrence, Justice Thomas had rejected the doctrine of substantive due process as a basis for incorporating amendments against the states, and sought to apply the Second Amendment to the states by way of the Privileges or Immunities Clause instead.

In his dissent in *Obergefell*, Justice Thomas first reaffirmed his view set out in his *McDonald* concurrence, stating that the doctrine of substantive due process strayed from the Constitution and ought to be abandoned.

Thomas proceeded to consider whether the plaintiffs would have a claim even if the doctrine of substantive due process were defensible, and began his analysis with Clause 39 of *Magna Carta*. Like Justice Scalia in *Kerry v. Din*, Justice Thomas paraphrased Blackstone’s definition of liberty as the freedom to move one’s person from place to place. Since “liberty” in the Fifth and Fourteenth Amendments had the same meaning as in *Magna Carta*, Justice Thomas concluded that liberty meant nothing broader than “freedom from physical restraint.”

After reaffirming Justice Scalia’s definition of liberty as locomotion, Justice Thomas took a further step and excluded all governmental entitlements from his definition of liberty. Justice Thomas argued that liberty could not encompass “the types of rights claimed by the majority,” because “[i]n the American legal tradition, liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement.” On this point, Justice Thomas cited John Locke, who defined liberty as the freedom from legislative or judicial constraints other than those established “by consent in the commonwealth.” *Magna Carta*—which Blackstone called “the great charter of liberties” in the passage quoted by Justice Thomas—was absent from this discussion of governmental action.

Neither Justice Scalia’s plurality opinion in *Din* nor Justice Thomas’s dissent in *Obergefell* spoke for a majority of the Court. The next direct reference to *Magna Carta* in a majority opinion came in *Timbs v. Indiana*, a 2019 decision that affirmed the incorporation of the Eighth Amendment against the states. The court unanimously agreed that the Eighth Amendment prohibition on excessive fines should apply against the states. Justice Ginsburg, writing for eight Justices of the Court, traced the Excessive Fines Clause back to Clause 20 of *Magna Carta*, which promised that amercements would be proportional to the degree of the offence and that a freeman’s livelihood could not be jeopardized. This principle, Justice Ginsburg explained, was also affirmed in the English Bill of Rights of 1689, and was included in 35 of the 37 state constitutions at the time of the ratification of the Fourteenth Amendment.

Because of this history, Justice Ginsburg held that the Eighth Amendment prohibition of excessive fines satisfied the requirement for incorporation most recently set out

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*224* See id. at 805–06, 858.

*225* *Obergefell*, 576 U.S. at 721-22 (citing *McDonald*, 561 U.S. 742, 811–12, (2010) (Thomas, J., concurring in part and concurring in judgment)).

*226* Id. at 723.

*227* Id. at 723–25.

*228* Id. at 725–26 (citing *Hurtado v. California*, 110 U.S. 516, 534–535 (1884) and *Munn v. Illinois*, 94 U.S. 113 (1877)).

*229* Id. at 726 (emphasis in original).

*230* Id. (citing *John Locke, Second Treatise of Civil Government*, § 4, p. 4 (J. Gough ed. 1947)).

*231* 1 William Blackstone, Commentaries *124* (Chicago Callaghan & Co. 1872) (1765).


*233* Id. at 685, 691.

*234* Id. at 685, 687–89.

*235* Id. at 688.
by the Court in *McDonald*: namely, that the provision be “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.” Justice Thomas concurred in the judgment, but restated his position in *McDonald* that the Eighth Amendment should be applied against the states on the basis of the Privileges and Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. Like Justice Ginsburg, Justice Thomas found the origins of the Excessive Fines clause in Clause 20 of Magna Carta.

The majority opinion in *Timbs*, and its discussion of Magna Carta in particular, would appear three years later in a context that would likely have surprised Justice Ginsburg: as support for the Court’s rejection in *Dobbs v. Jackson Women’s Health Organization* of the long-recognized right to abortion. In reaching the conclusion that the right to abortion was neither deeply rooted in the nation’s history and tradition, nor fundamental to our scheme of ordered liberty, Justice Alito compared the historical treatment of abortion in the law to the history of the prohibition of excessive fines traced back to Magna Carta in *Timbs*. According to Justice Alito, a long line of common-law authorities from the treatise known as *Bracton* in the thirteenth century through Coke and Blackstone had described abortion after “quickening” as a crime. This and other historical sources led Justice Alito to his “inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation's history and traditions.”

It is certainly true that the founders of this country were intimately familiar with *Bracton*, Coke, and Blackstone. The use of English legal history in *Dobbs* bears a superficial resemblance to the Court’s long tradition of comparing the Fourteenth Amendment to the language of the Great Charter that helped to inspire it. What the *Dobbs* majority opinion eschews, however, is the forward-looking attitude that led the Court in *Hurtado* to predict “that the new and various experiences of our own situation and system will mould and shape [the common law] into new and not less useful forms.” Magna Carta offered no support for “freedom of the press and rights of conscience,” and yet both James Madison and the Court understood that those rights were just as fundamental as the rights protected in the Great Charter, if not more.

This review of the Supreme Court’s use of Magna Carta shows that it has always been advantageous for a party claiming a contested constitutional right to point to some analog for that right in Magna Carta. Following the Court’s decision in *Dobbs*, this will be even more important, as the fact that the Court has recognized a right in its prior precedent is no guarantee that it will continue to be recognized going forward. Although Justice Alito stated in the majority opinion in *Dobbs* that the Court’s overturning of *Roe v. Wade* should not be assumed to cast doubt on other substantive due process cases, Justice Thomas
called upon the Court to reconsider its precedents in such cases as *Griswold* and *Obergefell* as being "demonstrably erroneous decisions."^{247}

If the Court takes up Justice Thomas’s invitation, the entire line of substantive due process decisions since the Warren Court is seemingly up for reexamination, and Magna Carta is likely to play a key role in the Court’s analysis going forward. The next Part will turn back to Magna Carta to examine a category of rights—or, more accurately, liberties—that was affirmed in the Charter and may have some relevance to the Court’s future work.

### IV. The Liberties and Privileges of Cities: Magna Carta Reconsidered

As we have seen, while recent Supreme Court opinions have raised Magna Carta onto an even higher pedestal than before, they have also reduced the significance of the Charter by adopting a narrow reading of its definition of liberty. When looking back to Magna Carta for evidence that a right is deeply embedded in history and tradition, the Court tends to find very little outside the confines of Clause 39 and a select few other provisions. This Part will show that a full understanding of the Charter requires an examination not only of the Charter itself, but of the charters of English cities, which were incorporated into Magna Carta by reference. These city charters show clearly that liberty meant something more than mere freedom from physical restraint.

The city of London is either mentioned by name or referenced indirectly in several provisions of Magna Carta 1215. Clause 12 references “aids” from the city of London, which were prohibited from being levied except at a reasonable amount set by common counsel of the kingdom on specific occasions such as the knightig of the king’s first-born son.\(^{248}\) Clause 35 provides that the “London quarter” will be the standard for measures of wine, ale, and corn.\(^{249}\) Clause 33 does not mention London specifically, but takes up an issue which was important to the city, namely, that all fish weirs be removed from the Thames and the Medway, and through all England, except at the seashore.\(^{250}\) But the most sweeping provision related to London is Clause 13, which provides that “the city of London is to have all its ancient liberties and free customs, by both land and water,” and that “all other cities and boroughs, and vills and ports, have all their liberties and free customs.”\(^{251}\) This guarantee, like that made to the Church in Clause 1 of the Charter,\(^{252}\) was vague yet potentially far-reaching, and obviously prompts the question of what “ancient liberties and free customs” had been previously granted or confirmed to the cities by John’s predecessors.

Fortunately, we do not have to guess at the answer to this question, because the liberties of the cities are preserved in a string of hundreds of charters issued by English kings tracing back to before the Norman conquest and continuing well after John’s reign. John himself issued many charters to cities, as did his brother Richard and his father Henry

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247. *Id*. at 2301–02 (Thomas, J., concurring).
248. *Magna Carta*, supra note 21, at 43.
249. *Id*. at 51.
250. *Id*.
251. *Magna Carta*, at 43, 45.
252. On the reference to the liberties of the Church in Chapter 1, see Thomas J. McSweeney, *Salvation by Statute: Magna Carta, Legislation, and the King’s Soul*, 25 Wm. & Mary Bill Rts. J. 455, 469-70, 480 (2016) (suggesting that the Charter’s reaffirmation of Church liberties should be read in conjunction with the second sentence of the Charter, which states that King John granted it “for the salvation of our soul”); and Cary J. Nederman, *The Liberty of the Church and the Road to Runnymede: John of Salisbury and the Intellectual Foundations of the Magna Carta*, 43 Pol. Sci. & Pol. 456, 461 (2010) (arguing that the Church’s liberty “cannot be reduced to the conception of baronial liberties that historical scholarship attributes to the charter”.


II. Moreover, John’s son Henry III not only confirmed the general grant of liberties by reissuing Magna Carta, but also issued several specific charters to cities of his own. By examining all these charters, we can get a sense of what liberties the cities would have expected John and Henry III to honor in the years after 1215. Such an examination shows that the rights and privileges of cities were extensive and significant.

Not surprisingly, a great many of the rights mentioned in the charters to cities in the decades before 1215 are related to trade and commerce. The rights of merchants are frequently mentioned. For example, in the 1170s or 1180s, Henry II issued a charter to the men of Coventry, ordering that whatever merchants might be brought in for the improvement of the town “shall have peace, and that none shall do them an injury or unjustly sue them.” Around the same time, King Henry issued a mandate for the protection of merchants visiting the three-day fair at Godstow.

In 1204, John promised that any merchants traveling to the borough of Lynn with their merchandise, whether strangers or others who have come by the king’s license, would be permitted to come, stay, and leave in the king’s safe peace, on paying the due customs, and none shall unjustly disturb them in defiance of the king’s safe peace, order, and license. In the 1170s or 1180s, Henry II granted a fair to the Borough of Portsmouth. In that charter, King Richard promised that “all our men of England, Normandy, Anjou, Poitou, Wales, Scotland and all of our lands, as well of others, may attend the said fair, and come and go, safely and in peace, and that they may have all the acquittances and liberties that they have at the fairs of Winchester, or Holland, or elsewhere in our land.”

Of course, market privileges would not be of much use if it were not possible to transport goods in and out of the towns. Given the importance of transport by water in

255. 1 BBC, supra note 253, at 198; 1 LCH, supra note 253, at 685.
257. 1 BBC supra note 253, at 172; 1 ROTULI CHARTARUM IN TURRI LONDINENSI ASSERVATI 138 (Thomas Hardy ed., 1838) [hereinafter ROTULI CHARTARUM].
258. THE CHARTERS OF THE BOROUGH OF CAMBRIDGE 5, 7 (Frederic William Maitland & Mary Bateson eds., 1901).
260. 1 BBC, supra note 253, at 201; 1 CALENDAR OF CHARTER ROLLS 410–11.
medieval England, it is unsurprising that the navigation of rivers was the subject of charters. For example, the same charter that granted the men of Nottingham a monopoly on dyed cloth also guaranteed free navigation of the river Trent “as far as a perch extends from each part of the stream of water.” In the 1160s or 1170s, Henry II issued a charter to the men of Gloucester promising free passage of the River Severn for transporting wood, coal, timber, and all other merchandise.

The issue of river navigation was directly addressed in Clause 33 of Magna Carta, which ordered the removal of all fish weirs from all England, except at the seashore. Fish weirs, or fish traps, were artificially constructed barriers designed to divert fish into an area where they could easily be caught in nets. Medieval city authorities both in England and elsewhere considered such weirs to be a public safety hazard. In London, the weirs could pose an obstacle to navigation on the Thames, a vital artery for commerce. The removal of the weirs was a victory for London and other English cities, not just against the king, but also against lords who had their own weirs along their respective sections of river. But Clause 33 was not the first time the king had promised the removal of the fish weirs. In an 1196 charter to the city of London, Richard I had enjoined all the weirs on the Thames, barred the future placement of such weirs on the Thames, and quit-claimed all the annual receipts from the weirs that had previously been obtained by the guardians of the tower of London. This charter was reissued by John in 1199, but expanded to cover the Medway as well as the Thames. Clause 33 extended it further to cover all England except at the seashore, where presumably the effect on navigation was minimal (or the benefit to fishermen too great).

The various economic and trade rights recognized in Magna Carta and the earlier city charters would be recognized today as fundamental rights. For example, among the rights enumerated in the EU Charter of Fundamental Rights are the freedom of assembly and of association, the freedom to choose an occupation and residence. The charters granted to cities by King John and his predecessors protected these rights, not just for those who lived in the cities, but for merchants who wished to trade there and ordinary Englishmen who sought to purchase goods at the urban fairs.

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265. MAGNA CARTA, supra note 21, at 51.
266. See Aidan O’Sullivan, Place, Memory and Identity Among Estuarine Fishing Communities: Interpreting the Archaeology of Early Medieval Fish Weirs in 35 WORLD ARCHAEOLOGY 449, 451 (2003). Archaeological evidence for these weirs can be found in various places in Great Britain, particularly near the coast; Rick Turner, Fish Weirs and Fish Traps, in THE COASTAL ARCHAEOLOGY OF WALES 95, 95–96 (Andrew Davidson ed., 2002).
267. See RICHARD C. HOFFMAN, THE CATCH: AN ENVIRONMENTAL HISTORY OF MEDIEVAL EUROPEAN FISHERIES 251 (2023) (“Concern for public safety led London and Austrian authorities alike to ban fish weirs as hazards to navigation in the Thames and the Danube, while Florentine councilors did likewise because of such structures’ role in the Arno flood disaster of 1333.”).
269. MAGNA CARTA, supra note 21, at 119.
270. 1 FOEDERA, CONVENTIONES, LITERAE, ET CUSCUS UNQUE GENERIS ACTA PUBLICA, INTER REGES ANGLIÆE (Thomas Rymer & Robert Sanderson eds., London 1816) 67 [hereinafter 1 FOEDERA]; 1 BBC, supra note 253, at 200–01.
272. MAGNA CARTA, supra note 21, at 51.
274. See supra text accompanying notes 245–54.
Another right recognized as fundamental today is the right to an effective remedy and to a fair trial.\textsuperscript{275} Many charters to cities contain protections relating to the administration of justice that were incorporated into Clause 13.\textsuperscript{276} For example, an extremely common provision would specify that citizens of a particular town would not be compelled to plead outside of the city.\textsuperscript{277} An early example of this promise may be found in the charter to London of Henry I, dating to the early 1130s, which laid down that “the citizens shall not plead outside the walls of the city for any plea.”\textsuperscript{278} This promise was reiterated by Henry II and Richard I, both of whom provided in their respective charters to London that no citizen of London “may plead without the walls of the city . . . for any pleas, saving pleas of foreign tenures, except our moneyers and ministers[.]”\textsuperscript{279} John affirmed the promise once again in his first charter to the city in 1199.\textsuperscript{280} Like Clauses 17 and 18 of Magna Carta, provisions like these ensured that pleas would be heard in a fair and convenient place for the litigants in question.\textsuperscript{281}

In addition to general limitations on external pleas, other provisions exempted the citizens from suits in specific venues. For example, in an 1191 charter, Richard promised the men of Rye and Winchelsea that they would be exempt from the jurisdiction of the shire and hundred courts.\textsuperscript{282} Three years later, he promised the citizens of Portsmouth that they would have the same exemption not only in shire and hundred courts, but with regard to “suits of shires and hundreds,” “Sheriff’s and sergeants’ summonses and aids,” and “all pleas and plaints . . . and of all other secular exactions both by sea and by land.”\textsuperscript{283} John made a similar promise to the men of Marlborough in a 1204 charter.\textsuperscript{284} In an 1200 charter to the burgheers of Dunwich, John promised that the men of that town “shall make no suit of county or hundred courts except before our justices.”\textsuperscript{285}

As discussed above, one common misinterpretation of Magna Carta concerns Clause 39, which guarantees no free man shall be punished “save by the lawful judgment of his peers or by the law of the land.”\textsuperscript{286} This reference to “the law of the land” cannot be a reference to jury trial in criminal cases, because such cases were resolved by ordeal prior to the Fourth Lateran Council.\textsuperscript{287} The principle of judgment by one’s peers, however, is also present in the city charters. For example, in an 1189 charter to the citizens of Colchester, Richard I promised that “whatever they shall be summoned before our justices in eyre, they may acquit themselves by four lawful men of the same borough.”\textsuperscript{288} In his 1200 charter to the burgheers of Dunwich, John agreed that “when they shall be summoned to before the justices, they shall send twelve lawful men of their borough for themselves who shall act for all, and if by chance they ought to be fined, they shall be fined by six upright men of their own borough and six upright men without the borough.”\textsuperscript{289} These provisions not only show that trial by one’s peers was considered to be a traditional privilege of city

\begin{itemize}
\item \textsuperscript{275} Charter of Fundamental Rights of the European Union, art. 47, 2012 O.J. C 326/391, at 405.
\item \textsuperscript{276} MAGNA CARTA, supra note 21, at 45.
\item \textsuperscript{277} 1 BBC, supra note 253, at 150–51; F. LIEBERMANN, DIE GESETZE DER ANGELSACHSEN 525 (1903).
\item \textsuperscript{278} 1 F. LIEBERMANN, supra note 277, at 525. On the dating of the charter, see J.S.P. Tatlock, The Date of Henry I’s Charter to London, 11 SPECULUM 461, 469 (1936).
\item \textsuperscript{279} 3 THE LETTERS AND CHARTERS OF HENRY II, KING OF ENGLAND 1154-1189 no. 1638, at 268–71 (Nicholas Vincent ed., 2020); HISTORICAL CHARTERS, supra note 271, no. 5, at 7.
\item \textsuperscript{280} HISTORICAL CHARTERS, supra note 271, no. 7, at 11.
\item \textsuperscript{281} MAGNA CARTA, supra note 21, at 45; see supra text accompanying notes 272–74.
\item \textsuperscript{282} 1 FOEDERA, supra note 270, at 53; 1 BBC, supra note 253, at 123.
\item \textsuperscript{283} PORTSMOUTH ROYAL CHARTERS, supra note 262, at 3; 1 BBC, supra note 253, at 123.
\item \textsuperscript{284} 1 BBC, supra note 253, at 123; ROTULI CHARTARUM, supra note 257, at 135.
\item \textsuperscript{285} 1 BBC, supra note 253, at 123; ROTULI CHARTARUM, supra note 257, at 51.
\item \textsuperscript{286} See supra text accompanying notes 92–94.
\item \textsuperscript{287} See supra text accompanying notes 163–65.
\item \textsuperscript{288} 1 BBC, supra note 253, at 124; 1 CALENDAR OF CHARTER ROLLS 410.
\item \textsuperscript{289} 1 BBC, supra note 253, at 123; 1 ROTULI CHARTARUM, supra note 257, at 51.
\end{itemize}
residents, but also provide important context to Clause 39, which applied to all free men, including those in the cities.290

Other common provisions in city charters related to fines. For example, citizens were typically relieved of the murder fine that otherwise applied when a dead man was found in a particular hundred (unit of local governance) and not proved to be of English birth.291 This promise was made by Henry I in his charter to London, alongside a guarantee that no man of London would be amerced in an amount greater than 100 shillings in a plea relating to money.292 Henry II affirmed in his charter to London that “[n]one shall be judged on a money amercement except according to the law of the city, which they had in the time of King Henry my grandfather.”293 Both Richard I and John reaffirmed this promise in their respective charters to the city.294

Relief from fines was not limited to charters to London. In a charter of Henry II to the men of Canterbury, dating to the 1150s, Henry II exempted the city from the murder fine, limited amercements, and made other promises similar to those he granted London around the same time.295 In 1189, Richard I promised the men of Northampton that “[n]one shall be judged of an amercement of money except according to the law our citizens of London have.”296 The following year, he promised the men of Winchester that “[n]one shall be judged of an amercement of money except according to the ancient law of the city which they had in the time of our ancestors.”297

The various provisions of city charters relating to fines ensured that the penalties imposed on an unsuccessful litigant did not exceed the bounds of longstanding custom.298 By limiting the discretion of royal officials, these provisions helped to ensure that the penalties imposed would be reasonable and proportionate.299 John’s affirmation in Magna Carta that the cities would have their liberties certainly would have encompassed the limits on penalties that had been affirmed by John and several of his predecessors in numerous charters to London and other cities.300

The guarantees of liberty offered to English cities by King John and the line of kings before him implicated several rights that we would today consider fundamental: freedom of assembly and of association; freedom to choose an occupation, engage in work, and conduct a business; freedom of movement and of residence; the right to an effective remedy and to a fair trial; and the principles of legality and proportionality of criminal offenses and penalties.301 It is true that Magna Carta did not directly refer to all these city privileges, but it would have been unnecessary to do so, as they were already affirmed in royal charters preserved by the leaders of the cities.302 But the inclusion of the cities in Magna Carta was important, for it elevated their promises to the same level as those made

290. MAGNA CARTA, supra note 21, at 53.
291. See Frederick Coyne Hamil, Presentment of Englishry and the Murder Fine, 12 SPECULUM 285 (1937); for numerous examples, see 1 BBC, supra note 253, at 150.
292. 1 BBC, supra note 253, at 150-51; 1 F. LIEBERMANN, supra note 277, at 525.
294. HISTORICAL CHARTERS, supra note 271, no. 5, at 7 no. 5 (Richard I); id. no. 7, at 11 (John).
295. 1 LCH, supra note 253, no. 483, at 482-84.
296. 1 BBC, supra note 253, at 152; 1 RECORDS OF THE BOROUGH OF NORTHAMPTON 25 (Christopher A. Markham ed., 1898).
297. 1 FOEDERA, supra note 270, at 50; 1 BBC, supra note 253, at 152
298. See supra text accompanying notes 291–97.
300. See supra text accompanying notes 253–62.
302. See MAGNA CARTA, supra note 21.
to the barons and to the Church and ensured that the promises to the cities would be reaffirmed every time one of John’s successors reissued the Great Charter.

Most of the liberties of English cities did not, of course, apply to everyone. However, the same can be said of Clause 39, which applied only to free men, thus excluding the many unfree peasants known as villeins. Clause 20, cited by Justice Ginsburg as the original inspiration for the Excessive Fines Clause, likewise applied in Magna Carta only to free men. The vast majority of rights and liberties protected in the Great Charter were limited to specific categories of people within England.

While the framers of the U.S. Constitution were unlikely to have perused the various charters of London and the other cities of England, it is likely that they understood the concept of liberties reflected in those charters. Probably the most widely read law book in colonial America was Coke’s commentary on Littleton’s Tenures, also known as the First Institute. Thomas Jefferson referred to Coke’s commentary on Littleton as “the universal elementary book of law students.” Since the subject of Littleton’s original treatise was land law, the topic of privileges of cities was not addressed in detail in the First Institute. However, regarding the topic of reservations of rent, Coke listed “liberties, privileges, franchises, and the like” along with “fayres” and “markets” among the inheritances from which a rent could not be reserved. Early American lawyers who read Coke would thus have understood the word “liberties” to include special privileges granted by the government.

Lawyers whose study of Coke went beyond his commentary on Littleton would have encountered “liberties” again in Coke’s notes on Magna Carta in the Second Institute. Explaining what was meant by the ancient liberties of the city of London, Coke noted,

It is a maxim in Law, that a man cannot claim anything by custom or prescription against a Statute, unless the custom, or prescription be saved by another Statute. For example, They of London claim by custom, to give lands without license to Mortmain because this custom is saved, and preserved, not only by this Chapter of Magna Carta, but by divers other Statutes . . . See more in particular concerning London, in the fourth part of the Institutes, Cap. of the Courts of the City of London.

The example given by Coke here is, once again, a special privilege of the citizens of London.

In his Fourth Institute, Coke returned as promised to the liberties of London in his discussion of the City’s courts. Coke noted that “to treat of the great and notable Franchises, Liberties, and Customes of the City of London, would require a whole Volume of it self.” He argued that the “most beneficial” of the city’s liberties was a recognition by a statute that the citizens would have their liberties, even if they were not used or had

305. See MAGNA CARTA, supra note 21, at 46–47.
308. COKE, supra note 306, at *47a.
309. COKE, SECOND INSTITUTE, supra note 94, at 20.
311. Id. at 250.
been abused (“licet usi non fuerunt vel abusi fuerunt”). Coke also gave specific examples, such as the power of a City court to govern “using unlawfull Nets, and other unlawfull Engines in fishing,” and the right of the Serjeants of the City to “carry their Maces of silver within the liberties of London before the Mayor in the presence of the King.”

Another standard text frequently read by young colonial men training to become lawyers was Thomas Wood’s *Institute of the Laws of England*, a forerunner to Blackstone’s Commentaries. Wood’s text was recommended by a leader of the New York Bar to a young friend of John Jay in 1760 and was read by both John Adams and John Quincy Adams as they prepared for the bar. Wood did not discuss the specific provisions of city charters, but had much to say about the liberties in the second chapter of his *Institute*. Like Coke, he referred to liberties in the sense of privileges or special rights.

Wood began his discussion by equating “liberty” and “franchise,” and stating that both indicated “a Royal Privilege in the Hands of a Subject, either by Charter of Letters Patent or Prescription.” Liberties could be held by corporations or governmental entities such as counties, boroughs, and towns, as well as by individuals. The right to hold a fair or market was a type of liberty, as was the right to a park. A person or entity that had the right to hold a fair or market had concomitant rights, including the right to hold a court over disputes in the marketplace. Wood also discussed the liberty to hold pleas, and liberties that offered exemptions from the sheriff’s jurisdiction.

Another text that was known to lawyers in colonial America was Lilly’s *Abridgment*, a glossary of legal terms that was part dictionary and part legal treatise. Lilly’s entry for “franchise” provided a definition of “liberties” that included both corporations and markets. Moreover, in the entry for “forfeiture,” Lilly described fairs, markets, and courts as types of liberties. Lilly also explained that corporations could have “Franchises and Liberties” that bound their members together.

The framers of the U.S. Constitution did not need to consult the original charters of London or other cities to know that the rights to hold fairs and markets, to regulate certain types of commerce, and to hold courts were likely to be included in the protection of Clause 12 of Magna Carta. At a minimum, a colonial lawyer who read Coke and standard treatises like those of Wood and Lilly would have understood that the word “liberty” could mean much more than mere locomotion or freedom from government action. To read the U.S. Constitution with such a narrow understanding of liberty is to ignore a good deal of the common law tradition, including the original context and subsequent history of Magna Carta.

312. See id. (citing 7 Rich. 2 c. 37, in 3 Rotuli Parlamentorum 160).
313. Id. at 250–52.
314. See Warren, supra note 184, at 170–84.
315. See id. at 170–77.
317. See id.
318. Id. at 217.
319. Id. at 218.
320. See id. at 219–21 (distinguishing the characteristics of a “forest,” a “chase,” and a “park,” in addition to a “fair” and a “market”).
321. See id. at 221.
322. See id. at 218–19.
323. See generally John Lilly, THE PRACTICAL REGISTER OR, A GENERAL ABRIDGEMENT OF THE LAW (2d ed. 1745); Warren, supra note 186, at 162, 171.
324. See Lilly, supra note 323, at 853.
325. See id. at 846.
326. See id. at 459.
V. CONCLUSION

One of the traditional fables of Aesop tells of the stag at the pool, who admired his antlers in the water but was angry that his feet were slender and weak. Suddenly a lion began to chase him, but his antlers became entangled in the tree branches. In his last moments, the stag realized that his hated feet might have saved him, but the antlers were his destruction.\footnote{327}{“The Stag at the Pool,” \textit{in} \textit{THREE HUNDRED AESOP’S FABLES} 165 (ed. George Fyler Townsend, 1887).} The provisions in Magna Carta relating to cities have been regarded by scholars and jurists over the centuries like the stag regarded his feet, while the famous Clauses 39 and 40 have been a source of amazement like the stag’s majestic but ultimately useless antlers. If we want to understand what was important about Magna Carta at the time that it was issued, we cannot focus exclusively on one aspect of the document but must consider the entire Charter and the context that surrounded it. John may have met the barons on the field of Runnymede, but it was in the cities of England no less than the countryside that his successors were held to account.\footnote{328}{See supra Part II.}

What, then, of the future of constitutional law in the United States? The Court seems to be embarking on a new project of pruning back the garden of fundamental rights and eliminating those now deemed to lack deep roots in our history and tradition. It would be wise for the Court to understand that the roots of our due process tradition are both wide and deep, and that the soil that nourishes them is richer than some might believe. That tradition includes rights to travel, to conduct one’s business without interference, and to avoid the jurisdiction of oppressive courts. The citizens of this country, no less than those of London in 1215, deserve to have all our liberties and free customs confirmed.

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