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MAGNA CARTA: THE FIRST EIGHT- HUNDRED YEARS*

ALFRED L. BROPHY, WILLIAM P. MARSHALL & JOHN V. ORTH

When the Honorable James A. Wynn, Jr. proposed that the *Law Review* hold a symposium on Magna Carta, we immediately knew it was an exciting idea that offered much to discuss. The topics run from the context of Magna Carta in the thirteenth century, to its “rediscovery” in the seventeenth century by English lawyers looking for historical precedents for their claims about the ancient constitution, to the invocations of Magna Carta in the British North American colonies, and to the unfinished business of the extension of the rule of law in the twenty-first century. We set about recruiting some of the finest legal and constitutional historians from around the globe to bring them here to Chapel Hill for a conference in October 2015. The articles in this issue were all presented at that symposium.

Much has been written over the centuries about Magna Carta. But one surprising constant is how much there is left to say. We began the conference with a talk from A. E. Dick Howard, which built on his volume written around the time of the 750th anniversary of Magna Carta, *The Road from Runnymede*. The first set of presentations dealt with what one might call the historical Magna Carta, that is, the document that was sealed in 1215. Those presentations began with Wilfrid Prest’s reevaluation of Sir William Blackstone’s scholarly edition of the text of Magna Carta and reassessment of the impact that Blackstone’s study had on his famous *Commentaries on the Laws of England*. Richard Helmholz then used the jurisprudential assumptions of thirteenth-century England to narrow the gap between the later glorification of Magna Carta as the foundation of the rule of law and the modern scholarly project that reduces it to a merely feudal document. Charles Donahue also examined the contrast between the myth of Magna Carta and its historical reality, offering an interpretation of the document that recognizes some common ground between the two. Paul Babie carried the story forward to the Charter of the Forest, a document that accompanied the 1217 reissue of Magna Carta and that—like Magna Carta—came to stand for the rule of law. But as Babie aptly noted, it might also

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stand for the preservation of communal property rights. And, perhaps, therein lies one of the secrets of Magna Carta's resilience: that it can stand as a symbol for claims as diverse as the limitation of the state's power to imprison people, to the need for the state to respect the rights of private property, and numerous and varied claims in between.

The next round of discussion addressed the invocation of Magna Carta in the English-speaking colonies in North America and, later, the United States. Mary Bilder turned to seventeenth-century Virginia to identify what she has labeled "charter constitutionalism." The rights of early Virginians to English liberties, she showed, were promised in a series of letters patent. But in Virginia those rights were in flux. Over time, charter constitutionalism became an important support for the growing American constitutional culture. Daniel Hulsebosch then moved the story to the eighteenth century where he focused on one important but oft-ignored chapter of Magna Carta: its protection for foreign merchants. He traced the idea that commerce was a central impetus to lawmaking through key texts of the eighteenth century, from Montesquieu and Blackstone to the United States Constitution. Sally Hadden's presentation analyzed the references to Magna Carta that appeared in American newspapers in the latter part of the eighteenth century. Hadden's study revealed the many places where Americans appealed to Magna Carta and its deep cultural resonance around the time of the American Revolution and the framing of the Constitution. John Orth continued the story from independence to the twenty-first century with an intensive study of citations to Magna Carta in decisions of the Supreme Court of North Carolina. His comprehensive study reveals the powerful resonance of the symbol of Magna Carta, despite the historical reevaluation of its feudal origins. Judge Jed Rakoff of the Southern District of New York delivered the keynote address at lunch, which linked Magna Carta's disputed guarantee of habeas corpus to the contemporary crisis of incarceration.

It may be the symbol of Magna Carta—and its ability to mean so many different things to so many people—that accounts for its cultural cachet. It is a testament to how broadly Magna Carta resonated with Americans of the early nation that both pro- and antislavery writers invoked it. The proslavery historian Thomas R. Dew wrote of Magna Carta in his legal history of western civilization as a critical step on the long road of the development of English

freedom because it assured the right to property.¹ That right to property was a critical component of English liberty; elsewhere, Dew wrote of the ways that property rights supported slavery and vice versa.² Such celebrations of Magna Carta and property might lead one to ask, after the fashion of Frederick Douglass, what to the slave was Magna Carta . . . except that Douglass tells us what it meant, or ought to mean, to the slave: freedom.³

The final panel turned to the current meanings of Magna Carta and its as yet unfulfilled promises. Mary Ziegler's research demonstrated that conservative activists have increasingly relied on Magna Carta to make claims for fetal personhood and, more generally, to argue for the limitation of what they see as court-imposed tyranny. Ted Wells and Richard Myers also presented on that final panel, although their articles are not included in this issue, on the growing edges of Magna Carta. Myers urged that we should not strive so ardently to demythologize Magna Carta. Because the Framers drew upon the myth of Magna Carta when they established the United States Constitution, the myth itself has become reality and taken its own place as a valuable part of our history. Wells envisioned a world of expanding rights of individuals and of the rule of law that will support such expansions of rights as gay marriage and perhaps an expanded social welfare state. However Magna Carta is invoked in the future, we can safely assume that it will be used as a symbol for the idea of justice.

From the historical underpinnings of Magna Carta to current and potential future uses and analyses, our symposium contributed to a conversation that has spanned many generations. The articles collected in this issue continue that conversation. Although the premises presented in the following pages are varied, one thread emerges: Magna Carta's historical importance does not simply endure. Eight-hundred years on, Magna Carta seems as relevant as ever.

1. See THOMAS DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS 468–69 (New York, D. Appleton & Co. 1852).

2. THOMAS R. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832, at 20–23 (Negro Univ. Press 1970) (1832).

3. PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 252 (2008) (quoting Frederick Douglass, Slavery the Live Issue: Addresses Delivered in Cincinnati, Ohio (Apr. 12, 1854), *reprinted in* 2 THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS (1847–54), at 467 (John W. Blassingame ed., 1982)).

