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The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment

Robert W. Emerson[†] *& John W. Hardwicke*[††]

Foreword: In Remembrance of John W. Hardwicke

My co-author, the late John W. Hardwicke, Sr., was a most impressive man. Lawyer, teacher, scholar, elected official, and judge were just five of his many prominent, public roles.

With a panoramic view of life far beyond what he needed for work, my co-author was, truly, a Renaissance man. He passionately explored, learned, and then shared almost anything imaginable. Some of this was, no doubt, his just being "a character" —always ready to engage in philosophical jousting, historical "what ifs," and pronouncements on matters grand and small.

A lover of word play, linguistics, and good grammar, John Hardwicke understood in his bones a writer's need to use just the right word. Nonetheless, always looking for the broad and historical nature of language, he would first turn to etymology before synonymy. And he was continually learning, whether a new language (*e.g.*, Greek, learning it on his own late in life), a new biography, or a new composer, composition, or performance. To my co-author, a meaningful life meant a life of non-stop learning. One learns for its own sake, even in fields where one has no professional goals or even a personal agenda. Consider, for example, my co-author and his lifelong love affair with classical music. John Hardwicke knew more about classical music than anyone not fortified with a couple doctorates and a lifetime of work concentrating exclusively on that subject. Since he was a teenage boy in the 1940s buying records, John Hardwicke did not acquire or use his newfound knowledge for any practical purpose; he just learned the music, loved the music, and shared that love with others.

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It was this, his magnificent love of all forms of learning, that brought my co-author to what became our article, published herein ("The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment"). First, though, permit me to provide a brief biographical sketch. Judge Hardwicke lived a very full, accomplished 82 years, and some attention should be paid to his bill of particulars, as he might have said.

A Biographical Sketch

Born in Winston-Salem, North Carolina in 1927, John Hardwicke entered the University of North Carolina, qualifying by examination at age 16 in June 1943. Two years later, he commenced teaching Latin, English, History, and Mathematics in the North Carolina public schools. Armed with a UNC Bachelor's degree, in 1950 John Hardwicke traveled northward. He graduated from George Washington University Law School in 1953 and was admitted to the Maryland Bar that year. After short, two-year stints as Assistant Counsel to the Controller of the Currency in Washington, D.C. and then as an Associate with the firm of Piper and Marbury in Baltimore, John Hardwicke served as corporate counsel for a large chemical company. He continued in that role for over three decades. Also, from 1968 to 1990, John Hardwicke maintained his own law practice. Based in the City of Baltimore and Harford County, Maryland, he had a wide-ranging, general practice, but with an emphasis on corporate contract negotiations, national energy curtailment and supply, and environmental and product liability law. John Hardwicke founded the Florida Phosphate Council (Lakeland, Florida) in 1969 and was co-founder and counsel to the Maryland Industrial Group (representing industrial consumers of natural gas and electricity) from 1974 to 1990.

Coexisting with his legal career was John Hardwicke's long and distinguished life of service in both state and county government. He was elected as a Member of the Maryland House of Delegates from Harford County (1963–1967), and he proudly and without reservation had already been an early advocate of the Civil Rights movement in Maryland. Harford County's voters followed up by electing John Hardwicke as a delegate to Maryland's Constitutional Convention, 1967–68. In 1973, he sought a seat in Congress and in the late 1970s a nomination to be governor. In the early 1980s, he was strongly considered for appointment to a U.S. District Court judgeship. Throughout those years, John Hardwicke did find

numerous successes in local politics. From 1972–74, he was an elected Member of the Harford County Council, and then the voters elected him President of the Council for three successive terms, from 1978 through 1990.

By 1990, John Hardwicke, now in his sixties, already had a lifetime as a teacher, a lawyer, and a political leader. Yet it was that year—at a time in life when many retire, slow down, or at least review their pensions more than upcoming job prospects—that John Hardwicke entered a new career path. It turned out to be the pinnacle of his professional life when John Hardwicke secured his appointment by Governor William Donald Schaefer as Maryland's first Chief Administrative Law Judge. In this role, he oversaw the creation and development of a state central hearing agency—the Office of Administrative Hearings—to resolve conflicts between citizens and the state. In 1996, Governor Parris Glendening appointed him to a second six-year term. By the conclusion of his tenure in 2002, Judge Hardwicke was recognized as the foremost authority on state administrative law in the United States, having effectively created a model for a vital state agency that was adopted throughout the nation.

A prolific writer, speaker, and mentor, Judge Hardwicke continued to work and to serve even while in retirement. He was a fellow of the American Bar Association and an Officer, including Chair, of the ABA Judicial Division's National Conference of the Administrative Law Judiciary. Judge Hardwicke testified at legal symposia and provided expert testimony at a Congressional hearing on administrative law, and he served as President of the National Association of Administrative Law Judiciary (NAALJ), 1995-1996, as well as Executive Director for NAALJ from 2003 to 2006. In 2003, the NAALJ Board of Governors awarded Judge Hardwicke its highest honor for significant contributions to the field of administrative adjudication, the Victor J. Rosskopf Award. Finally, in June 2009 the Maryland State Bar Association, Administrative Law Section, awarded him the first Annual John W. Hardwicke Award for leadership, vision, and invaluable contributions to the field of administrative law both in Maryland and throughout the United States.

Last but far from least, Judge Hardwicke served as a superlative educator for his entire adult life. To the end of his days, Judge Hardwicke remained actively engaged in delivering important information, meaningful reflections, and vital lessons for living a

purposeful life. That educational mission is a key to understanding the man. From his late teens and early twenties in North Carolina teaching high schoolers, all the way to his eighties still speaking before law conferences, civic assemblies, and religious congregations, he remained a passionate advocate for and exemplar of an educated society. Indeed, Judge Hardwicke was awarded a lifetime achievement award from Johns Hopkins University for over forty years of outstanding contributions as an adjunct professor of business law at Johns Hopkins. Furthermore, in addition to authoring several law review articles and an article about H.L. Mencken, he was my co-author of a textbook, *Business Law*, first published by Barron's in 1987 and now in its 6th[th] edition. Long considered a readable, even interesting text, it is studied each year by many thousands of business law students and businesspersons worldwide.

The Magna Carta

Certainly, Judge Hardwicke's was a rich life, a life well led and lived well. However, what gave the Judge purpose until the end of his life was the very thing that also resulted in his leaving behind unfinished business—that is, one more project in need of completion. And that is where I entered the picture.

For his last few years, Judge Hardwicke worked intermittently on a discussion of the Magna Carta and its role in English and American law. I recall several conversations about the work, and even some reviewing of his initial outline and a very rough draft. But then time itself intervened. It was the one thing that could stop John Hardwicke, a.k.a. Force of Nature, from continuing to read and write. Judge Hardwicke died on Christmas Eve, 2009. He was preceded in death by his beloved wife of 52 years, Mary (née Mary Elizabeth Bunker, 1928-2001). And he left behind many friends and colleagues in addition to a family that included six children, seventeen grandchildren and one great-grandchild (now up to nine).

My co-author's life certainly seems complete. Still, knowing the man as I do, his unfinished "symphony," his cache of research books, notes, and historical accounts must have left him with a tiny regret over his partial, tentative Magna Carta project. Later, in the first months and years looking at what the great man had left behind, I came to realize and appreciate much more the work of historians trying to pick up where a prior archivist had left off. It was at first a daunting task. On and off, over the years, the work was arduous.

Though I love history, and I teach some legal history, including our Constitution, the Magna Carta has never been my research focus. I primarily write about everything related to franchise law as well as occasional works on comparative civil procedure. But minding and mining the Magna Carta became a fun task, not just to learn about the Great Charter, but to glean from his notes or his citations the major concerns of my co-author: how he thought and what he felt. And it became a joy to work hard taking Judge Hardwicke's preliminary notes and very rough draft on the medieval Magna Carta and the 17th Century jurisprudence of Lord Coke, and then developing a much larger and different law journal article than what my co-author would have, with much more time, produced. I believe the end-product is still worthy, something my co-author would have approved. I added many new learning streams and made our joint effort empirical, based on a U.S. constitutional framework, and filled with at least as much or more law than history, as much or more theory and case law than simple description.

The Family

Certainly, my efforts for this article were and are a personal choice, not merely professional. They are much more than a desire to help someone, now deceased, with whom I had co-authored a textbook and worked on some court cases and other legal matters over the years.

Full disclosure is required. My co-author, John W. Hardwicke, Sr., was also my father-in-law ("Dad"). Forty years ago, I married his youngest daughter, Heidi.

When you marry into a family, you do not always get what you want. If you are lucky, you get what you need. And, if you are really lucky, you get both - your needs *and* your desires.[*] I hit the jackpot, both with the wife and the family! So, in a small way, working on this article was a way to honor the man who was, in effect, my second father, John W. Hardwicke, Sr.

Surely our article is not exactly as Dad imagined the work would end, but I am confident he would have approved. I know Dad would have heartily approved of the publisher. It is a highly felicitous

[*] Hats off to the Rolling Stones for those classic lyrics, "You can't always get what you want/ But if you try sometimes you just might find/ You get what you need." THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (London Records 1969).

coincidence, for a North Carolina native, born and raised in the Tar Heel state, a proud graduate of UNC, that our article is appearing in the flagship international law journal at the University of North Carolina.

Though no one in life gets exactly what he or she expected, one can come away satisfied. My father-in-law certainly lived such a life: Patriarch of a large and talented family, professionally admired (even adored), blessed with a powerful mind and a strong moral compass, and endowed with rigorous training that cultivated, *inter alia*, crucial scholarly habits and a resolute, patient judicial demeanor. The latter in turn suited him as a legislator, a teacher, a corporate counselor, an executive, and—of course—a judge. He had the tools to achieve consensus, to let everyone have a chance to speak, to put issues in perspective, and to act as a friend. This article thus has some language and reasoning, particularly in the early historical parts, for which I give credit to my co-author's sense of history as well as his hours in the library, to both his sense of proportion and his reasoning. Those who recognize Dad's voice will certainly still hear it when they read some language about King John, Henry III, and Lord Coke. I believe my father-in-law was at my side throughout this endeavor, and so—even to this day—he has been a teacher, a mentor, and an inspiration. Thanks, Dad!

Robert W. Emerson

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I. Introduction

"Every present has a past of its own."[1] Likewise, every past has a past of its own. Our law's history may be likened to a vast, seemingly now still sea, with the inspiration for our present rights often having humble origins—small swells forming ripples leading to waves that may crash ashore and dramatically change the legal landscape. The Magna Carta[2] was, and remains, a key part in this

[1] R.G. COLLINGWOOD, THE IDEA OF HISTORY 247 (1956). In the Revised Edition, this thought receives further elaboration: "The present is composed in this way of two ideal elements, past and future. The present is the future of the past and of the future." R.G. COLLINGWOOD, THE IDEA OF HISTORY 247 (Jan van der Dussen ed., 1994).

[2] In this Article, "Magna Carta" refers to the formal document dated 1225 and printed under the name of Henry III. However, the Magna Carta covers many subjects. To this day, three Caps., including the "due process" provisions of Cap. 29, are still part of English statute law. "Cap." is the abbreviation of the Latin "Capital" or "Article." The basic principles of Cap. 29, as modified in the time of Edward III, are the principal interests of this Article and, unless the context requires otherwise, it is in that sense that we refer to

ebb and flow of Anglo-American history that continues to play a role in the legal and cultural aspects of our society.[3] As a complex document from feudal and medieval times, the Magna Carta is best understood by looking at its ancient past, during thirteenth-century England, as well as its evolution throughout history to the time of Sir Edward Coke in the early seventeenth century.[4]

The power and influence of Coke brought the Magna Carta to America as part of the English tradition.[5] Thereafter, language from the Magna Carta was adopted, almost verbatim, in the U.S. Constitution[6] and numerous state constitutions.[7] It is, therefore, unsurprising that the U.S. Supreme Court has looked to the Magna Carta when interpreting the nature of the rights protected by the U.S. Constitution, as demonstrated both historically and currently, in cases both federal and state, both appellate and trial. The legally,

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the Magna Carta.

3 Matthew Shaw, *Modern America and Magna Carta*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/modern-america-and-magna-carta [https://perma.cc/YXT7-LGZ5]; JAY-Z, MAGNA CARTA HOLY GRAIL (ROC Nation LLC 2013) (naming his certified Platinum album after the Magna Carta); *The Simpsons: Magical History Tour* (Fox television broadcast Feb. 8, 2004) (portraying one of the main characters, Homer, as King Henry VIII using the Magna Carta as a napkin); *Dr. Who: The King's Demon* (BBC television broadcast Mar. 15, 1983) (involving a plot where one character, the Master, plots to overthrow King John to prevent the signing of the Magna Carta); Lawrence van Gelder, *A Magna Carta for Taxi Passengers*, N.Y. TIMES (Aug. 18, 1995), https://www.nytimes.com/1995/08/18/nyregion/a-magna-carta-for-taxi-passengers .html [https://perma.cc/EY9T-E4XZ] (dubbing a proposed Bill of Rights for taxi passengers as the "Magna Carta of hack hires"); Hannah Keyser; *15 Illustrious Facts About Magna Carta*, MENTAL FLOSS (June 15, 2015) (reporting over 43,00 people applied for tickets to see the four surviving Magna Carta in 2015), http://mentalfloss.com/ article/64805/15-illustrious-facts-about-magna-carta [https://perma.cc/V68A-HP5L].

4 J.C. Holt summarizes Coke's recognition of the importance of looking to the past: "His aim was to call in the past in order to support his arguments about the present." *See* J.C. HOLT, MAGNA CARTA 9 (2d ed. 1992).

5 *See generally* Elizabeth F. Cohen, Jus Tempus *in the Magna Carta: The Sovereignty of Time in Modern Politics and Citizenship*, 43 PS: POL. SCI. & POLS. 463 (2010); H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1 (1917); David W. Saxe, *Teaching Magna Carta in American History: Land, Law, & Legacy*, 43 HIST. TCHR. 329 (2010).

6 *The Magna Carta*, NAT'L ARCHIVES, (Aug. 4, 2017), https://www. archives.gov/exhibits/featured-documents/magna-carta [https://perma.cc/K6LY-9RAW] (noting the Fifth Amendment to the U.S. Constitution tracks language from the Magna Carta).

7 *See* GA. CONST. art. I, § 1, para. 11; TENN. CONST. art. XI, § 12; ARIZ. CONST. art. II, § 24.

politically, and culturally extraordinary U.S. Supreme Court decision, *Obergefell v. Hodges,*[8] offers one such example.

The purpose of this Article is to analyze the treatment of the Magna Carta from its adoption in England to its modern jurisprudence as elaborated in U.S. Supreme Court decisions. The Article's overview of history and jurisprudence leads to an examination of American Magna Carta case law concerning due process, juries, and punishment.

To facilitate our journey into jurisprudence, we may recognize five basic types of legal arguments, as William Huhn postulated: text, intent, precedent, tradition, and policy analysis.[9] Text is the primary source of law.[10] An example of a text is the Constitution.[11] Within the text, a person can look at the plain meaning, the canons of construction, and intratextual meanings.[12] Intent looks to the person who wrote a document, such as the founders with respect to the U.S. Constitution.[13] For determining intent, one can look to previous versions of the text, words in the text itself, the history of the text, official comments, and contemporary commentary.[14] When making an argument based on precedent, one needs to look to case similarities and differences.[15] Tradition arguments usually look to common law or the "law of the land,"[16] while a policy

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8 576 U.S. 644, 723 (2015) (Thomas, J., dissenting) (discussing Clause 39 of the 1215 Magna Carta as foundation for the holding of a fundamental right to marriage under the U.S. Constitution's Due Process Clauses).

9 WILLIAM HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 13 (2d ed. 2008).

10 *Id.* at 17.

11 *Id.*

12 *Id.* at 19–25.

13 *Id.* at 31.

14 *Id.* at 34–39.

15 HUHN, *supra* note 9, at 42–43.

16 *Id.* at 45. Oppressed men and women have often turned to the Magna Carta for solace or support, no matter their own place of origin. For example, in 1964, Nelson Mandela praised the Magna Carta when he was on trial in Pretoria. Alexander Lock, *Magna Carta in the 20th Century*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/magna-carta-in-the-20th-century [https://perma.cc/B7B2-G52B]. Much earlier in the 20th Century, the Magna Carta played an important role in the fight for women's rights worldwide. In 1911, the Magna Carta was cited in a suffragette newspaper to justify action against authorities. Likewise, in 1915, a suffragette said that it was "expressly contrary to the Magna Carta" to deny women a right to vote. In the 1960s in the Bahamas, women looked to the Magna Carta while fighting for women's rights. *Id.* In 2009, the Philippines passed a law known as the Magna Carta for Women. The Magna

argument is unique from the other types of argument: it is the only form of argument that does not look to authority, but to the future, for confirmation.[17] All five of Huhn's types of legal argument can be found in this Article.

Philip Bobbitt states that there are six types of constitutional arguments: historical, textual, structural, prudential, doctrinal, and ethical.[18] Historical examines the writer's intent.[19] Textual considers the present meaning of the words.[20] Structural looks to "claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments."[21] Prudential means being "self-conscious to the reviewing institute and [the] need not [to] treat the merits of the particular controversy (which itself may or may not be constitutional), instead advocating particular doctrines according to the practical wisdom of using the courts in a particular way."[22] Doctrinal depends upon the quintessential common law rule of *stare decisis*—[23] a review of

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Carta of Women, Rep. Act. No. 9710 (July 28, 2008) (Phil.); Magna Carta for Philippine Internet Freedom, Rep. Act. No. 10175 (Sept. 12, 2012) (Phil.); *see, e.g.*, Sofia Santelices, *Know What Protects You: A Guide to Philippine Laws on Women,* PREEN.PH (July 31, 2019), https://preen.ph/98828/know-what-protects-you-a-guide-to-philippine-laws-on-women [https://perma.cc/Y59C-ZJKE] ("The Magna Carta of Women or the Republic Act 9710 conveys a framework of women's rights, based directly on international law. It seeks to eliminate discrimination through the recognition, protection, fulfillment, and promotion of the rights of Filipino women – especially to those that belong in the marginalized sectors of society.").

17 HUHN, *supra* note 9, at 51.

18 PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 246 (Oxford Univ. Press 1982).

19 *Id.* Certainly, any examination of constitutional principles in a common law nation must include historical analysis. Precedent matters, and one may view the Great Charter itself as a type of precedent. Indeed, the principles of the Magna Carta have played an influential role in the creation of national *constitutional* provisions as well as international human rights treaties. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 354–56 (2001) (noting that, in emergency situations, international human rights treaties recognize that the scope of the right to personal liberty could be limited and determined by public policy; public health and safety concerns may trump individual freedom).

20 BOBBITT, *supra* note 18, at 7.

21 *Id.*

22 *Id.*

23 The principle is that judges rely on previous judicial determinations when deciding the same points or principles of law. *Stare Decisis*, BLACK'S LAW DICTIONARY (10th ed.

precedent, both judicial and academic.[24] Finally, ethical involves the characterization of American institutions, and the role within those institutions of the American people.[25] We also utilize these six types of arguments in this Article.

Taken in tandem with both the federal and state constitutions' reliance on the Magna Carta for borrowed language, it is clear that to understand the role of the Magna Carta in present and future American jurisprudence, we must first understand its past.[26] In the manner of Coke, Part I of this Article begins with the Magna Carta's own past, throughout Anglo-American history and including the treatment of and impact upon the American Colonies. The Magna Carta is best understood by looking at its evolution through the centuries.

At the heart of the Article, the past Magna Carta is taken to the present. Part II details the U.S. Supreme Court's treatment of the Magna Carta in its jurisprudence concerning: substantive due process,[27] the right to a jury trial,[28] and cruel and unusual punishment.[29] The language of Clause 29 of the Magna Carta has provided support for the conclusion that the Fifth and Fourteenth Amendments' protections include substantive due process guarantees, not only procedural guarantees.[30] More importantly,

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2014).

24 BOBBITT, *supra* note 18, at 7.

25 *Id.* at 94.

26 *See supra* note 7 and accompanying text.

27 *See infra* Part II.A; *see also* i*nfra* Appendix A (listing 43 cases).

28 *See infra* Part II.B; *see also infra* Appendix B (listing 21 cases).

29 *See infra* Part II.C; *see also infra* Appendix C (listing 14 cases); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 33 (Tenn. 2000) (describing the origins of the Due Process Clauses and the Constitution's "law of the land" clause in the Magna Carta's Clause 29 "per legem terrae" clause); Duncan v. Louisiana, 391 U.S. 145, 196 (1968) (discussing Magna Carta's Clause 39 foundations for the modern jury trial); McDonald v. City of Chicago, 561 U.S. 742, 816 (2010) (referencing the Magna Carta's influence in the development of the Privileges or Immunities Clause); McClenskey v. Kemp, 481 U.S. 279, 339 (1987) ("The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."); Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 268 (1989) (analyzing petitioners' argument that the Excessive Fines Clause developed from the "use and abuse of 'amercements'" prior to the Magna Carta).

30 The Due Process Clause has a substantive component is firmly established through case law. *See generally, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding prohibition of contraceptive devices violated protected privacy rights under the penumbra

future citation to the Magna Carta is likely to encompass historical discussions of the meaning of the terms "life, liberty, or property."[31] As for its Sixth Amendment jurisprudence, the Supreme Court has cited to the Magna Carta as the foundation of the right to a jury trial.[32] Finally, the Court's Eighth Amendment analysis may rely on the Magna Carta as embodying a proportionality principle toward penalties, especially fines and allegedly excessive liability awards[33] and the case law thereof.[34]

We come to see that the Magna Carta, as currently imagined, invoked, and employed, speaks to these issues[35] as much as any others.[36] Finally, the Appendix provides data about Supreme Court cases that cite the Magna Carta.[37] Overall, the Article shows how

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of the first, third, and fourth amendments); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (finding parents have a liberty interest in controlling the education of their children).

31 *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) (discussing the Magna Carta in reference to the protection of individuals from "arbitrary exercise of the powers of government"); Hurtado v. California, 110 U.S. 516, 527 (1884) (discussing the role of the Magna Carta in due process as a safeguard against arbitrary government action); Cty. of Sacramento v. Lewis, 523 U.S. 833, 845 (citing *Hurtado* and further discussing the Magna Carta's influence on due process). *See generally* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (discussing the relation between an individual's property interest, restraining orders, and due process).

32 *See McDonald*, 561 U.S. at 816.

33 *See* Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 293–96 (1989) (discussing the Magna Carta's development of the principle of proportionality and the principles relation to fines under the Eighth Amendment).

34 DANIEL BARSTOW MAGRAW, ANDREA MARTINEZ & ROY E. BROWNELL II, MAGNA CARTA AND THE RULE OF LAW 113 (2014).

35 *See id.* at 268–73 (discussing the Magna Carta's influence on contemporary understanding of cruel and unusual punishment); Calvin R. Massey, *The Excessive Fines Clause & Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1252–53 (1987) (discussing the development of a standard for cruel and unusual punishment under the Eighth Amendment through case law dicta).

36 *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) (discussing the principle of the Magna Carta which protected crops from uncompensated takings); *Obergefell*, 576 U.S. at 723–25; *McDonald*, 561 U.S. at 818 n.4 (discussing the Magna Carta's influence on the Privileges and Immunities Clause); S. Union Co. v. U.S., 567 U.S. 343, 370 (2012) (Breyer, J. dissenting); Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C., 565 U.S. 171, 182 (2012) (discussing Magna Carta as foundation for religious freedom); Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 395–97 (2011) (discussing the origins of the right to petition).

37 Appendix A discusses Due Process. Appendix B shows cases that cite the Magna Carta for jury trials and Appendix C shows cases that cite the Magna Carta for cruel and unusual punishment.

the Magna Carta has influenced not just our fundamental legal precepts but continues to inform our case law.

II. A History of the Magna Carta

The Magna Carta did not necessarily erect anything new.[38] It came into English history as an assertion of feudal privileges and liberties that existed before the Norman Conquest[39] and were also outlined in numerous charters throughout medieval Europe.[40] Generally, these charters guaranteed justice from monarchs, lords, and other leaders.[41] The charters were contracts, and as such, required mutuality: protection, fairness, and justice from the lord, as well as loyalty, respect, and service from the vassal.[42] A breach by either party dissolved the contract and freed the other from the mutual obligation.[43] The Magna Carta did not arise by plan; it arose by impulse from a series of medieval charters that created a political principle akin to the rule of law.[44]

The Norman invasion and conquest of England[45] was the start

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38 *See*, *e.g.*, 1 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 172 (London, Cambridge Univ. Press 2d ed. 1898) ("[T]he charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing.").

39 *See* HOLT*, supra* note 4, at 35 (explaining that the Magna Carta affirmed grants of feudal privileges that barons, knights, and townsfolk had long since come to expect).

40 *See generally* 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 PS: POLI. SCI. & POL. 457, 457–61 (2010).

41 Holt explains that these medieval charters "were the natural reaction of feudal societies to monarchical importunity." *See* HOLT*, supra* note 4, at 27.

42 *See* MARC BLOCH, FEUDAL SOCIETY 451 (2d ed. 1962) ("Vassal homage was a genuine contract and a bilateral one. If the lord failed to fulfill his engagements, he lost his rights.").

43 *See id.*

44 Nederman, *supra* note 40, at 457–61; *see* Michael Steenson, *Roots of Constitutional Government: Magna Carta at 800*, 72 BENCH & B. OF MINN. 18, 21 (2015) ("Magna Carta was initially intended to constrain John's abuses of power, but as to a select group of his subjects. The notion that power is subject to the rule of law evolved from its limited application in 1215 to a concept--a tailor-made argument--that power must be subject to limits.").

45 The story of the Norman invasion and conquest of England begins with the story of Edward the Confessor. Edward the Confessor ruled England from 1042 to 1066. Still unmarried by the age of forty, he had no designated successor. Thereafter, a conflict developed over who would become the next King. There were four claimants to the throne and William the Conqueror was one of them. *See* 3 J. B. BURRY, THE CAMBRIDGE

of a new chapter in England's history. After the Battle of Hastings in 1066, William the Conqueror became the first Norman king of England (William I), and he sought to earn legitimacy by claiming to be an heir to Edward the Confessor.[46] William I and his successors promised to continue the liberties contained in the social contract, which they attributed to Edward the Confessor.[47] For example, consider the coronation of Henry I in 1100: when William I's immediate successor, his son William II, died, William I's youngest son, Henry I, rather than his oldest son Robert,[48] then became King of England.

Consistent with feudal custom, Henry I's coronation oath outlined a charter confirming to his English vassals the liberty and justice inherited from his royal Anglo-Saxon predecessors.[49] English kings after the time of Henry I continued to deliver similar promises in their coronation oaths, thereby perpetuating the Anglo-Saxon freedoms that had extended down a long line of monarchs.[50] Indeed, much earlier, by 1086, when William I still ruled, ancient Anglia already had a new French aristocracy; although in place due to the Norman Frenchman William I's conquest of England, this

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MEDIEVAL HISTORY 390–93 (1922).

46 Because conquest was a poor justification of title, William the Conqueror's claim to the throne required that Edward the Confessor be a legitimate conduit of power. William the Conqueror therefore legitimized his title by claiming to be the Confessor's lawful heir. *See* J.C. Holt, *The Ancient Constitution in Medieval England*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 22, 69 (Ellis Sandoz ed., 1993).

47 Although Edward the Confessor is romanticized in history as "the good king," there is no evidence that Edward the Confessor promulgated any system of law of any historical importance. *See* HOLT, *supra* note 4, at 121–51.

48 Perhaps that shows the ranking of the kingdoms. Robert remained as ruler of Normandy, while the more junior Henry took charge of England. Regardless, William the Conqueror's children, especially Henry and Robert, constantly sought to outdo one another. In fact, Maitland suggests that if William the Conqueror had had only one son, the course of English history would have been entirely different. While two of William the Conqueror's sons became Kings of England (William II, from 1087 to 1100, and Henry I from 1100 to 1135), Robert remained on the continent and became a crusader. Eventually, Henry I imprisoned him. *See* 3 FREDERIC W. MAITLAND, THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 15 (H.A.L. Fisher ed., 1911).

49 *See* S. E. Thorne, *Henry I's Coronation Charter, Ch. 6*, 93 ENG. HIST. REV. 369, 794 (1978); Henry L. Cannon, *The Character and Antecedents of the Charter of Liberties of Henry I*, 15 AM. HIST. REV. 37, 37–46 (1909).

50 Holt, *supra* note 46, at 69 (emphasizing that concern for the antecessor was deeply ingrained in English law).

new ruling class was quick to assert the very rights held by those they had replaced through force of arms.[51]

The prior English monarchs were treated as, in effect, the Norman Frenchmen's legal forbears.[52] Ever as demanding as the Anglo-Saxon nobility had been, these new patricians of the Norman realm reacted just as strongly as the former had against any encroaching powers exerted by their king.[53] These aristocrats, of course, considered themselves entitled to the charter promises of Henry I and his successors.[54]

These charter promises became their opening salvo against King John,[55] who ruled England from 1199 to 1216.[56] From the beginning of King John's reign, the barons perceived him as devious and untrustworthy.[57] The barons demanded an unequivocal limitation on the executive power of King John that would also bind all future heirs to the throne.[58] At first, in his confrontation with the

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51 John Hudson, *Maitland and Anglo-Norman Law*, *in* 89 THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON "POLLOCK AND MAITLAND" 21, 39 (John Hudson ed., British Academy 1996) ("[B]y 1086 England had a new, French aristocracy. These men brought their customs to England not in writing but in their heads. Prominent therein were ideas concerning lordship . . . Norman ideas, together with the consequences of Conquest and settlement, gathered more closely the elements of personal lordship, landholding, and jurisdiction.").

52 *Id.*

53 *Id.*

54 *See* HOLT, *supra* note 4, at 267 (explaining that some of the motives of the aristocrats in challenging King John may have been selfish but others were defenders of liberty for themselves and for the English nation as well).

55 King John (1167–1216) was the youngest child of Henry II (1133–1189) and Eleanor of Aquitaine (1122–1204). John was the great-grandson of King Henry I, who ruled England from 1100 to 1135 and the great-great-grandson of William I ("William the Conqueror"), who ruled England from 1066 to 1087. *See* Nicholas Vincent, *The Origins of Magna Carta*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/the-origins-of-magna-carta [https://perma.cc/43LG-LN26].

56 Holt, *supra* note 46, at 25 ("The movement against King John had begun with a cry for the confirmation of the Charter of Liberties of Henry I and the restoration of the laws of Edward the Confessor.").

57 *See* BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 234–43 (1980) ("The unsavory character of John had never bred devotion or loyalty in the rank and file of his vassals, but generally a distrust; they felt his insatiable greed for money knew no bounds.").

58 The agenda of the barons was allegedly drawn from ancient charters that the barons considered as the laws of Henry I and Edward the Confessor. *See* WILLIAM S. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION 32 (James MacLehose & Sons 1905).

barons, King John was in a superior position. That lasted until 1209, when John was excommunicated because of a quarrel with Pope Innocent III over the naming of the archbishop of Canterbury.[59] By 1212, King John had become so unpopular that an attempt had been made on his life.[60] The following year, the king placed himself under the protection of Pope Innocent III[61] and was declared a vassal of the Pope, thus owing tribute to the papacy.[62] Unfortunately for King John, a military disaster at the Battle of Bouvines resulted in the loss of all English holdings in France.[63] When John returned to England in the winter of 1214, the royal treasury had no funds.[64]

Being in dire financial straits, King John parlayed for peace with the barons but did not succeed.[65] The accumulation of unaddressed grievances led the barons to declare John in breach of his feudal

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59 Claire Breay & Julian Harrison, *Magna Carta: An Introduction*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction [https://perma.cc/T8PH-3AVT].

60 MAGRAW ET AL., *supra* note 34, at 24–25. The assassination attempt, influenced by baron and rebel Robert Fitzwalter, illustrated the growing discontent among the barons with King John. *See* Mike Ibeji, *King John and the Magna Carta*, BBC, http://www.bbc.co.uk/history/british/middle_ages/magna_01.shtml [https://perma.cc/S7AT-ERQA] (last updated Feb. 17, 2011); James Holt, *John: King of England*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/John-king-of-England [https://perma.cc/B34E-KELQ] (last updated Jan. 14, 2021).

61 Article 61 in the 1215 version severely limited the kings' power by establishing a security council that would oversee the king. Limiting the kings' powers the barons were also limiting the pope's powers, which would obviously be unfavorable in a time when the church was interested in establishing its power. Pope Innocent III annulled this version of the Magna Carta but then approved the later versions that did not include Article 61. This shows that the intentions behind the original Magna Carta were to separate church and state. *See* Nederman, *supra* note 40, at 457–61.

62 MAGRAW ET AL., *supra* note 34, at 25; Katherine Har, *Papal Overlordship of England: The Making of an Escape Clause for Magna Carta*, BRIT. LIBR. (July 9, 2015), http://britishlibrary.typepad.co.uk/digitisedmanuscripts/2015/07/papal-overlordship-of-england-the-making-of-an-escape-clause-for-magna-carta.html [https://perma.cc/LWA6-9DRL].

63 MAGRAW ET AL., *supra* note 34, at 55.

64 Hugh Schofield, *The Most Important Battle You've Probably Never Heard Of,* BBC NEWS (July 26, 2014), http://www.bbc.com/news/magazine-28484146 [https://perma.cc/5Y7D-XHQ8].

65 *See id.* ("All [King John's] taxation had gone to waste. He was weakened, and the barons saw their opportunity.")

agreement.[66] Thereafter, the parties prepared for war.[67] The barons' stance was straightforward: they sought all the ancient liberties derived from Edward the Confessor and those promised in accord with the coronation oath since the time of Henry I.[68] King John expressed a willingness to address specific grievances; however, he was inconsistent and appeared willing to promise everything, but do nothing.[69] After joint discussions, the barons and King John agreed to meet at Runnymede[70] to resolve their differences.[71]

Under oath,[72] the barons and King John agreed to a document that confirmed medieval ancient rights and eliminated specific abuses attributed to King John—this document is known as the Magna Carta.[73] In anticipation that King John would attempt to

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66 *See* J.E.A. JOLIFFE, CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND: FROM THE ENGLISH SETTLEMENT TO 1485 158 (3d ed. 1954) ("The maxim that the power of a king who acts as a tyrant is illegitimate . . . was thus in the twelfth and thirteenth centuries the cornerstone of legal security . . . . [W]hen refused legal redress, the aggrieved party is entirely within his rights in declaring his obligation of vassalage at an end, making war upon his lord").

67 *See* Ibeji, *supra* note 60.

68 *See* MCKECHNIE, *supra* note 58, at 58–60.

69 For a detailed description of the struggle between King John and the barons, see Holt, *supra* note 46, at 22–29.

70 Ironically, squatters living in this area in modern times claimed a right to live there under the Rights Afforded to Common People in the 1215 version of the Magna Carta. They were evicted in recent years. *Arrests Made at Runnymede 'Magna Carta' Squatters' Eviction*, BBC NEWS (Sept. 16, 2015), http://www.bbc.com/news/uk-england-surrey-34269232 [https://perma.cc/BDA2-8SN9]; *see also* Carolyn Harris, *The Charter of the Forest*, MAGNA CARTA CAN. (Dec. 17, 2013), http://www.magnacartacanada.ca/the-charter-of-the-forest/ [https://perma.cc/MAU7-ZPHX] ("The Magna Carta began the process of transforming the forests into common land that served the needs of communities. According to the 1215 version of the Great Charter, 'All evil customs relating to forests . . . are at once to be investigated in every county . . . and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably.' This clause was eliminated from future reissues of Magna Carta as the Charter of the Forest expanded . . . . ").

71 *See* Vincent, *supra* note 55.

72 The oral exchanges of oaths and the King's seal, the Great Royal Seal, established the validity of the document. King John did not sign the Magna Carta. In fact, there is no evidence that King John could even write. *See* HOLT, *supra* note 4, at 255.

73 *See* Vincent, *supra* note 55. An example of one such abuse was the absolute control over forest lands. With the signing of the Magna Carta, the land was released to the common folk. The Magna Carta of John (1215), 17 John 1, cl. 47 (Eng.) [hereinafter Magna Carta (1215)], *available at English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/AK6G-96W6].

circumvent his obligations, the Magna Carta contains tightly drawn limitations on the executive power of the king:

> Cap. 39. No Freeman shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land.
>
> Cap. 40. To none will we sell, to none will we deny, to none will we delay right or justice.[74]

The Magna Carta was unique in that it not only affirmed ancient rights, but also contained provisions that protected the foundation of modern rights.[75] Later in English history, the Magna Carta would serve a dual role as both foundation and statute.

A. The Great Charter's First Four Centuries

Treatment of the Magna Carta has varied throughout English history.[76] In thirteenth century courts, the "Great Charter"[77] was invoked when, with grand principles at play, it furnished support for counsel's legal arguments.[78] The Magna Carta, however, fell into disuse in the fourteenth century once lawyers, absorbed with more mundane or practical concerns, found much of the document's broad, ambitious language to be unwieldy.[79] Still, the failure to use the Magna Carta, even in the face of a flagrant violation of one of its clauses,[80] is not a testimony to its impotence. Instead, it is a nod

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74 Magna Carta (1215), *supra* note 73, cl. 39, 40.

75 *See generally* Steven M. Richman, *Magna Carta - Its Essence and Effect on International Law*, 294 N.J. LAW. MAG. 5 (2015).

76 The Magna Carta has actually been altered three times. It was first created in 1215, then altered in 1225, finally adopted into law in 1297. Interestingly, in the beginning of its life, the Magna Carta was of little or no use to the ordinary British subject. Despite such a "Great Charter," the churches, kings, and barons were unchecked in their power. Breay & Harrison, *supra* note 59.

77 "Great Charter" is a translation of "Magna Carta." *Id.*

78 *See* HOLT, *supra* note 4, at 2 ("Lawyers have been responsible for much of Magna Carta's survival and for the residual veneration of the Charter.").

79 *See generally id.* (explaining that the Magna Carta fell into disuse primarily after the time of Edward I, king from 1272 to 1307, when lawyers became more interested in building a citizen and client practice than dealing with broad constitutional questions, which were rarely matters at issue).

80 Occasionally, the Magna Carta's sixty-three provisions or parts are referred to as "chapters." However, given the relatively short length of a single-parchment document having about 3,600 words, it seems entirely more accurate to call such short provisions

to circumstance and practicality. While the Magna Carta is the foundation of many modern-day rights, it is only foundational: what matters is not just the underlying principles, but what emanates therefrom, as its clauses have been incorporated into amendments, statutes, and case law. As demonstrated later in this Article, the Magna Carta's purposes are mainly restricted to explaining the extent of protection or the historical grounds for why protections exist. It is much more practical to cite to the statutes and case law because of our judicial process.[81] It is this Article's goal to demonstrate that the Magna Carta does provide, and should continue to provide, substantive rights in U.S. common law.

The following discussion begins with the treatment of the Magna Carta during the reign of King John's successor, Henry III, a king who gave even greater standing to the charter by reaffirming it four times.[82] The Article then studies the Magna Carta's role during King Edward I's reign, a period that saw the establishment of a written system of statutory law that gave practical effect to the Great Charter.[83] Discussion thereupon proceeds in a completely opposition direction, to the lack of any genuine reference to the Magna Carta during the Tudor period, more than a century of English history (1485 to 1603) featuring a powerful monarchy.[84] The Magna Carta was kept on a shelf, where it gathered dust until picked up and revived by Sir Edward Coke in the early seventeenth

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"clauses" instead of using a word typically indicating a much more substantial length. In fact, "clauses" does seem to be the usual term. *See*, *e.g.*, *English Translation of Magna Carta*, *supra* note 73 (referring to the divisions of the Magna Carta as clauses).

81 The purpose of the judiciary is to interpret the rules created by Congress and to determine whether an individual broke those rules. Thus, statutes and Constitutional provisions will have a stronger weight than the Magna Carta's clauses. Secondly, precedent created by previous cases are binding under the principle of *stare decisis*.

82 The charter was reaffirmed in 1216, 1217, 1225, and then again in 1237. The 1237 affirmance was significant because King Henry had finally reached the age of adulthood. David Carpenter, *Revival and Survival: Reissuing Magna Carta*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/revival-and-survival-reissuing-magna-carta [https://perma.cc/RG73-ZD66].

83 Richard H. Helmholz, *The Myth of the Magna Carta Revisited*, 94 N.C. L. REV. 1475, 1480 (2016); *see also* Susan Crennan, Honourable Just., High Court of Austl., Magna Carta, Common Law Values and the Constitution, Oration at the Victoria L. Found. (May 21, 2014), *reprinted in* 39 MELB. U. L. REV. 331, 338–39 (2015) (noting that King Edward I referred to the Magna Carta as the "Great Charter of the Liberties").

84 *See infra* Part I.A.iii.

century.[85]

1. *Reaffirmation but Disuse*

Historians generally agree that King John had no intention of abiding by the Magna Carta.[86] When he died in 1216,[87] a new opportunity was given to the charter.[88] Upon King John's passing, King Henry III, a mere nine years old at the time, came into power.[89] King Henry III's counsel, William Marshal, known for unseating the future King Richard I, the Lionheart, from his horse in battle, served as the king's regent after King John's death.[90] William also took charge at a crucial time in England's history. Just before King John died, the French had invaded England.[91] The invasion would have been successful, but William was able to defeat the invader, King Louis, and ensure Henry took the throne.[92] This, along with William's other achievements provided him with a prominent status in 13th Century England.[93]

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85 Carolyn Harris, *The Rebirth of Magna Carta*, MAGNA CARTA CAN. (Jan. 12, 2014), http://www.magnacartacanada.ca/the-rebirth-of-magna-carta/ [https://perma.cc/QW6L-HK4W]. This revival is examined *infra* Part I.B.

86 *See* HOLT, *supra* note 4, at 228 ("Not all the men involved were men of good will, the king least of all. Throughout, even when he sealed the Magna Carta, John had not the slightest intention of giving in or permanently abandoning the powers which the Angevin kings had come to enjoy. He would surrender to force if he had to."). This lack of faith is demonstrated by his attempt to invalidate it a few months after signing. Eric T. Kasper, *The Influence of Magna Carta in Limiting Executive Power in the War on Terror*, 126 POL. SCI. Q. 547, 550 (2011).

87 *See* POLLOCK & MAITLAND, *supra* note 38, at 507; NAT'L ARCHIVES, MAGNA CARTA TIMELINE 2, http://nationalarchives.gov.uk/documents/education/magna-carta-timeline.pdf [https://perma.cc/N9SU-SLD7].

88 It was clear that John and Pope Innocent opposed the Magna Carta. By the time of John's death, Pope Innocent had also passed. With both of its opponents dead, the Magna Carta had none of its previous obstacles to overcome. *See* Kasper, *supra* note 86, at 551.

89 King John's successor, Henry III, ruled England from 1216 to 1272. *See* POLLOCK & MAITLAND, *supra* note 38, at 507.

90 *William Marshal - The Flower of Chivalry*, MEDIEVAL WARFARE, http://www.medievalwarfare.info/marshal.htm [https://perma.cc/QD6K-6WWH] (last visited Aug. 12, 2020).

91 *See* Gavin Morgan, *Guildford, the Magna Carta and the Forgotten Invasion of 1216*, SURREY LIVE, https://www.getsurrey.co.uk/news/nostalgia/guildford-magna-carta-forgotten-invasion-11446262 [https://perma.cc/8UKQ-3MA3] (last updated June 9, 2016).

92 *Id.*

93 *See id.*

Harnessing his power and fame, Marshal reissued the Magna Carta twice while serving as the regent.[94] Although Henry III did not promptly make an open commitment to the charter, the Magna Carta was backed by his advisors during his minor years.[95] In fact, one of his principal advisors, Hubert de Burgh, advised him to confirm the Magna Carta when he was of full age.[96] As soon as King Henry III turned eighteen years old in 1237, he confirmed the Magna Carta in full for the first time in English history.[97] He reconfirmed the charter in the years 1248, 1249, and 1255 and demanded personal participation in the formal ceremonies to confirm the charter.[98] Although Henry III's bolstering the Magna Carta gave it great importance, the Great Charter fell out of use during this period.[99] Ongoing disputes were solved not by reference to the generally accepted Magna Carta, but by changes in custom.[100]

2. *Perpetuation as Statute*

The Magna Carta was again given new importance during King Edward I's reign when the charter became part of England's statutory law.[101] Edward I began a system of written statutory law[102]

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94 Scott Alan Metzger, *Magna Carta: Teaching Medieval Topics for Historical Significance*, 43 HIST. TCHR. 345, 353 (2010); *Magna Carta*, HISTORY.COM, https://www.history.com/topics/british-history/magna-carta [https://perma.cc/FB6B-YTT5] (last updated Sept. 20, 2019) (noting that the document was reissued in 1216, 1217, and 1225).

95 William Marshal was entrusted by King John to protect Henry III and served king regent after King John's death. The Magna Carta was reissued at least twice during his governance. *See William Marshall – The Flower of Chivalry*, *supra* note 90.

96 POLLOCK & MAITLAND, *supra* note 38, at 550.

97 Carpenter, *supra* note 82.

98 JOLIFFE, *supra* note 66, at 294.

99 Harris, *supra* note 85.

100 *See id.*

101 *See id.* As Henry III's son and heir, Edward I ruled England from 1272 to 1307. *See* David S. Bachrach, *The Ecclesia Anglicana Goes to War: Prayers, Propaganda, and Conquest During the Reign of Edward I of England, 1272–1307*, 36 ALBION 393, 393–94, 394 n.6 (2004). Edward I has often been called the "Justinian" of the Law of England. Reginald Francis Treharne, *Edward I: King of England*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Edward-I-king-of-England [https://perma.cc/WG3A-67ZV] (last updated July 3, 2020).

102 *See* Treharne, *supra* note 101. Coincident with the beginning of written statutory law, the reign of King Edward I saw the development of a judicial institution. *See* Jonathan Rose, *The Legal Professional Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 34–37 (1988). King Edward I began a formal judiciary that included the King's

that gradually supplemented, but did not supplant, the common law.[103] He assembled a group of advisers—an incipient parliament—that would participate with the king in statutory government.[104] In 1295, a broad summons was issued for a "Model Parliament" that included bishops, earls, knights, and locals.[105] The Model Parliament confirmed all ancient charters, including the Magna Carta, into statutory law.[106]

Between 1331 and 1368, Parliament gave new power and responsibility to the Magna Carta through interpretation of its language.[107] Parliament passed six statutes that clarified Clause 29.[108] Parliament concluded that the phrase "lawful judgment of peers" meant trial by jury.[109] Additionally, Parliament interpreted the phrase "law of the land" to mean "due process of law," which at the time meant procedure by original writ or indicting jury.[110] Moreover, Parliament changed the beginning phrase of Clause 29 from "no free man" to "no free man of whatever estate or condition he may be."[111] There are reasons in logic and common sense that

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Bench, Common Pleas, and Yearbooks for recording judicial decisions. *See* LYON, *supra* note 57, at 440–41, 619–22. Additionally, legal practitioners who received training at the Inns of Court directly represented citizens in English Courts. *See id.* at 625–28.

103 Mark A. Kishlansky et al., *United Kingdom - Edward I (1272-1307)*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/United-Kingdom/Edward-I-1272-1307 [https://perma.cc/R3S3-FSLT] (last updated Jan. 31, 2021); *see also* Rose, *supra* note 102, at 34–37.

104 *See* Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of Presidential Power of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 30–31 (1998) (discussing the need behind the creation of a parliament under King Edward I's reign).

105 J. H. Round, *The House of Lords and the Model Parliament*, 30 ENG. HIST. REV. 385, 395 (1915) (providing the Model Parliament date).

106 Metzger, *supra* note 94, at 354.

107 *Id.*

108 Holt, *supra* note 46, at 46–47. "No free man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by a legal judgment of his peers, or by the law of the land. To no one will we sell, to none we will deny, to none we will delay right or justice." *Id.* at 16.

109 *Id.* at 61–62 (noting that, while the law progressed to include a trial by jury, it by no means had that interpretation in 1215).

110 *Id.* at 62.

111 Holt explains that the reason for the addition of the language "of whatever estate or condition he may be" was not to give the unfree complete access to the courts. Instead, the addition of the language became necessary because the term "freeman" had become

explain the passage of statutes interpreting the Magna Carta. For example, such statutes give the Great Charter its effect through its application to specific situations. Law is not self-operating merely because it is on the books; it is, instead, Parliament's interpretation of the Magna Carta that gave effect to the provisions contained in the Magna Carta.

3. *Decline Under the Tudors*

During the Tudor period, the Magna Carta fell into obscurity.[112] The House of Tudor commenced with King Henry VII in 1485 and marked the advent of a powerful monarchy with practically no reference to the Magna Carta.[113] Henry VII was determined to consolidate the power of the monarchy by shifting power from the barons to himself and his Tudor successors.[114] In this endeavor, Henry VII succeeded—he created an almost tyrannical kingship for Tudor powers throughout the sixteenth century.[115] For example, his son and successor, King Henry VIII, drafted a "Statute of Proclamation" in 1539 which granted him the royal power to create any law without Parliamentary authority.[116] During his early years as king, Henry VIII was personally admired as he worked adroitly with Parliament, although rarely with unanimity.[117] Those personal

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synonymous with "franklin," a term referring to a member of a social class that was not a "serf." *See id.* at 62–63.

112 *See* CHARLES BÉMONT, CHARTES DES LIBERTÉS ANGLAISES [CHARTERS OF ENGLISH FREEDOM] (1100–1305), xlviii–l (1892) ("Le Parlement approuva docilement les coups d'état politiques et religieux du XVe et du XVIe siècle, et la Grande Charte resta dans l'ombre." ["The Great Charter rested in the shade during the fifteenth and sixteenth centuries."]) *Id.* at L.

113 Alexander Reginald Myers & John S. Morrill, *Henry VII: King of England*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Henry-VII-king-of-England [https://perma.cc/D22F-JY7U] (last updated Jan. 24, 20121) (providing a background for Henry VII's seizure of the throne); *England in the 15th Century: Henry VII (1485-1509)*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/United-Kingdom/England-in-the-15th-century#ref482910 [https://perma.cc/5ZZG-7H9L] (last visited July 28, 2020) ("He had to . . . develop organs of administration directly under his control . . . . ").

114 J.R. TANNER, TUDOR CONSTITUTIONAL DOCUMENTS, A.D. 1485–1603 3 (1922) ("Henry VII perceived that what the English needed in his day was an efficient central administration controlled by a strong and wealthy house; and he set his policy steadily in this direction.").

115 *See* LYON, *supra* note 57*,* at 588.

116 TANNER, *supra* note 114, at 529–30, 532–35.

117 *See id.* at 13.

skills proved useful but unnecessary for the king and his successors, even after the Statute of Proclamation was repealed upon Henry VIII's death in 1547.[118] In addition to the Magna Carta, Henry VIII also absorbed the powers of the papacy and passed the Act of Supremacy, which declared that he would be the leader of the English Church.[119]

Additionally, King Henry VII exercised great power by expanding the scope of the crime of "treason."[120] Henry VII created the Star Chamber, an English court of law that was given exclusive control over crucial areas of criminal and civil activity.[121] He then expanded the Treason Statute of 1351 to allow the Tudor monarchs to reach any action that the king, through Parliament, might deem threatening or potentially threatening.[122] The Act of Supremacy would later be considered one of the most influential acts, second only to the Magna Carta.[123] During the Tudor dynasty, "treason" had a very broad definition, which included "constructive treason."[124] Thus, violations could be determined judicially ex post

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118 Indeed, long after Henry VIII's death, "Henry VIII clauses" have continued to exist. "Henry VIII clauses" are enacted and called that because power is given to a minister to amend or repeal primary legislation without having to look to Parliament. For a detailed discussion of "Henry VIII clauses," see generally, Dennis Morris, *Henry VIII Clauses: Their Birth, a Late 20th Century Renaissance and a Possible 21st Century Metamorphosis*, 2007 LOOPHOLE 14 (2007).

119 The Act of Supremacy was in response to the Roman Catholic Church's refusal to grant his divorce from Katherine of Aragon. Patrick Williams, *Katherine of Aragon*, 69 HIST. REV. 36, 36–41 (2011). These events marked the beginning of the constantly shifting religious landscape in England throughout the Tudor period. *See id.* at 40. In an attempt to muster support for his reign, King Henry VIII's advisors created propaganda that painted King John's resistance to both Pope Innocent III and to the baron's initial Magna Carta proposal in a positive light, thus paralleling King John's supposed bravery to King Henry VIII's. *See id.* at 39–41; *see also* Carole Levin, *A Good Prince: King John and Early Tudor Propaganda,* 11 SIXTEENTH CENTURY J. 23, 24 (1980).

120 Stanford E. Lehmberg, *Star Chamber: 1485-1509,* 24 HUNTINGTON LIBR. Q. 189, 195 (1961).

121 The court heard cases ranging from attempted murder to land tenure; it is believed that the majority of the cases involved allegations of riot. *Id.*

122 *See* TANNER, *supra* note 114, at 5–6. It is also interesting to note that this statute served as the foundation for the "Treason Clause" of the U.S. Constitution. Carlton F. W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PENN. L. REV. 863, 869 (2006).

123 Larson, *supra* note 122, at 870.

124 During the sixteenth century, treason included "adhering to the king's enemies." *Id.* at 869. Such a definition could include almost any political offense. *See id.* at 869–70. As time went on, Henry VIII engaged in two areas of monarchical contests: (1)

facto.[125] Under these circumstances, an appeal to the Magna Carta could be viewed as an attempt to limit the king's power; therefore, such an appeal could be conceived as "treason" against the Crown.

When Elizabeth I came to power in 1558,[126] there was practically no reference to the Magna Carta. Elizabeth I continued the pattern established by Henry VII: she controlled Parliament by the force of her personality and tactful manipulation.[127] However, she was capable of more direct interference than Henry VII. For example, she dissolved Parliament twice, once in 1567 and again in 1571.[128] In 1593, Elizabeth I stated: "'It is in me and my power' (I speak now in her maj.'s person) 'to call Parliaments; and it is in my power to end and determine the same; it is in my power to assent or dissent to anything done in [Parliament].'"[129]

When Elizabeth I died in March 1603, the Tudor line of monarchs passed over to the House of Stuart. The new monarch, King James I of England,[130] perceived himself to be a philosopher

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disengagement from a series of wives who caused him much "pain," and (2) independence from the Papacy because of its abusive and frequently exercised power of excommunication. *See Henry VIII (1509-47)*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/United-Kingdom/Henry-VIII-1509-47 [https://perma.cc/H7YL-FH42] (last visited Jan. 17, 2021).

125 Having retroactive force or effect: for example, under the heading of constructive treason, Parliament found Catherine Howard guilty of "treason" by reason of her "infidelity." *Catherine Howard: Queen of England*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Catherine-Howard [https://perma.cc/CWB5-6WNU] (last updated Feb. 9, 2020). The Treason Act of 1534 hinged upon the deprivation of the "dignity" of the king. *See* TANNER, *supra* note 114, at 379–80 (discussing a number of actions brought by Parliament to shelter or further promote the monarchy).

126 Stephen J. Greenblatt et al., *Elizabeth I: Queen of England*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Elizabeth-I [https://perma.cc/4MSR-PL4Q] (last updated Jan. 28, 2021).

127 *Id.* ("[Her image] was the result of a carefully crafted, brilliantly executed campaign in which the queen fashioned herself as a glittering symbol of the nation's destiny.").

128 Queen Elizabeth I did not dissolve Parliament during these years. She vetoed a bill passed by Parliament in between 1566 and 1571. In 1576, Elizabeth I and Parliament finally came to an agreement on several statutes. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 587 (2000).

129 1 WILLIAM COBBETT, COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND: FROM THE NORMAN CONQUEST, IN 1066, TO THE YEAR, 1803 889 (1806).

130 James VI had initially become King of Scotland in 1567 as an infant upon the death of his mother, Mary Queen of Scots. ADAM NICOLSON, GOD'S SECRETARIES: THE MAKING OF THE KING JAMES BIBLE 3–5 (2005). In 1603, James VI, King of Scotland, became James I, King of England. *Id.* His reign ushered in England's Stuart Period (1603–

king, whose motto was taken from the Sermon on the Mount—*beati pacifici*—blessed are the peacemakers.[131] As a *rex pacificus*—king of peace—James had much work to do.[132] England had been at war with Spain throughout much of Elizabeth I's reign.[133] Additionally, England often fought with other Catholic neighbors, namely France, and even with James' native Scotland,[134] a country despised by English nobility and members of both Houses of Parliament.[135]

King James had a personal program for achieving peace with Spain and for solving disagreement over religious doctrine by a Biblical translation bearing his name, the King James Bible.[136] He sought to be a personal participant in both endeavors.[137] However, James I's reign saw a rebellious Parliament that had long been subservient to the Tudor monarchs.[138] During his reign, the Magna Carta remained in the shade, where it would remain until Edward Coke picked it up and used it as a powerful tool to argue against the pretensions of the Crown.

B. The Magna Carta's Renaissance

Sir Edward Coke, one of the most revered jurists in the entire

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1714). *The Stuarts*, The ROYAL FAMILY, https://www.royal.uk/stuarts [https://perma.cc/NK6G-NZWG] (last visited Jan. 17, 2021).

131 LEANDA DE LISLE, AFTER ELIZABETH: THE RISE OF JAMES OF SCOTLAND AND THE STRUGGLE FOR THE THRONE OF ENGLAND 45 (2007).

132 *See* Pauline Croft, *Rex Pacificus, Robert Cecil, and the 1604 Peace with Spain, in* THE ACCESSION OF JAMES I: HISTORICAL AND CULTURAL CONSEQUENCES 140, 140 (Glen Burgess, Rowland Rymer & Jason Lawrence eds., 2006).

133 *See id.*

134 The alliance between Scotland and France against England became known as the Auld Alliance. *See* William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1073 (2010).

135 *Id.* at 1077 ("The Scottish Parliament made clear its determination to safeguard 'the fundamentall lawes, Ancient privilegeis, offices and liberteis of this kingdome.' The Scots lawyers argued that, if the two legal systems were to be united, then the common law should be abandoned . . . Scotland continued to be ruled by King James VI of Scotland and the Scottish Parliament; England was ruled by King James I of England and the English Parliament.").

136 NICOLSON, *supra* note 130, at 3–5.

137 *Id.*

138 *See* David Mathew, *James I: King of England and Scotland*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/James-I-king-of-England-and-Scotland#accordion-article-history [https://perma.cc/3VYK-B8DS] (last updated Dec. 22, 2020).

history of the common law,[139] was responsible for the Magna Carta's renaissance in the early seventeenth century. Coke is an iconic figure in the history of liberty—"iconic" in the sense that so great was his stature that his writing was sufficient authority for its own truth or historicity.[140] He turned his hand to every aspect of law: advocate, judge, councilor, prosecutor, and parliamentarian.[141] A core premise of Coke's jurisprudence is that liberty can be achieved only through the law's supremacy as defined in the Magna Carta and the ancient common law of England.[142] Coke asserted that the liberties protected in the Magna Carta were beyond the reach of the Stuart kings.[143] Unsurprisingly, Coke became the focal point of opposition to the Stuart kings.

Supporters of the Stuart Kings argued that the liberties contained in the Magna Carta did not form part of the common law; instead, they argued that the liberties were statutory in nature and, therefore, subject to repeal and modification.[144] Their reasoning was that only events prior to the coronation of Richard I on September 3, 1189 were meant to be treated as ancient times that

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139 There is a bas-relief of Sir Edward Coke barring King James I from the court on the bronze door of the U.S. Supreme Court; there is another bas-relief of King John being forced to sign the Magna Carta by the Barons on the door as well. OFF. OF THE CURATOR, SUP. CT. OF THE U.S., THE BRONZE DOORS: INFORMATION SHEET 2, http://www.supremecourt.gov/about/bronzedoors.pdf [https://perma.cc/4FFF-9XRF]. Of the eight panes on the bronze door, three depict scenes from British legal history: one of King John's signing of the Magna Carta in 1215, one of the publishing of the Westminster Statute in 1275, and finally, the scene of Sir Edward Coke and King James I. *See id.* at 1–2.

140 *See generally* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994) (discussing Coke's relation to English Law and historicism); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (discussing Coke's role in developing the common law theory).

141 Early in his career, Coke became regarded the pre-eminent lawyer in England. He found consistent favor with the popular Elizabeth I and remained the King's Man into the first years of King James I. As a speaker of the Crown, he became Speaker of the House of Commons in 1593 and was named Attorney General the following year. As the King's Attorney, it was his lot to be the chief prosecutor of the Gunpowder conspirators in 1603 and Sir Walter Raleigh's trial for treason. *See* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 40–67 (2003).

142 *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 598–600 (2009); *see also* JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT 347 (3d ed. 2000).

143 Gedicks, *supra* note 142, at 598–600.

144 *See* HOLT, *supra* note 4, at 14.

would form part of the common law.[145] It followed, therefore, that because the Magna Carta was established after 1189, the cutoff date would exclude the protections of the Magna Carta from the common law. However, the liberties contained in the Magna Carta would in fact form part of the common law because the liberties were not created in 1215. Instead, the rights protected and affirmed by the Magna Carta dated to times "immemorial"; this may have inspired the language of the United States Declaration of Independence.[146]

Coke placed the authority of the common law—and thus the Magna Carta—unequivocally above the actions of the Parliament and the Crown. Take, for example, the Semayne's case.[147] In that situation, Coke restricted the reach of the court and king in confronting the "general warrant," which was a dangerously broad document.[148] By likening a man's home to a "castle or fortress" (truly an inspiration for future legislation and rights), Coke proposed that a man in his home should be safe from such general warrants.[149] In Fuller's Case,[150] Coke ruled that the king could not

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145 *See* Richard H. Helmholz, *John Hudson*, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta (1996)*, 29 ALBION 461, 461 (1997) (book review) (noting the long-held view, from Maitland to the present, that "formation of the basic patterns of English law occurred during the reign of Henry II"). More recent scholarship has added nuance, but has still not displaced the vital role generally ascribed to that reign from 1154 to 1189. *See generally* JOHN HUDSON, THE FORMATION OF ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA (David Bates ed., Routledge 2014) (arguing that the common law essentially formed in that essential time from 1066 to the end of Henry II's reign).

146 *See* WALTER BAGEHOT, THE ENGLISH CONSTITUTION AND OTHER POLITICAL ESSAYS 348 (1920) ("Even in the 'Great Charter,' the notion of new enactments was secondary, it was a great mixture of old and new; it was a sort of compact defining what was doubtful in floating custom, and was re-enacted over and over again, as boundaries are perambulated once a year, and rights and claims tending to desuetude thereby made patent and cleared of new obstructions."); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

147 Semayne's Case (1604) 77 Eng. Rep. 194; 5 Co. Rep. 91 a.

148 These warrants did not mention a person, place, or evidence for which to be searched. *See* Laura K. Donohue, *The Original Fourth Amendment,* 83 U. CHI. L. REV. 1181, 1208 (2016).

149 *Id.*

150 For a description of the *Fuller* case, see RENE A. WORMSER, THE LAW: THE STORY OF LAWMAKERS, AND THE LAW WE HAVE LIVED BY, FROM THE EARLIEST TIMES TO THE PRESENT DAY 288 (1949).

decide common law issues; instead, the courts had the exclusive responsibility for making such decisions.[151] Coke and his colleagues successfully reinvigorated the English common law and effectively established it as the supreme law of the land - the English Constitution.[152] His judgment in Bonham's Case[153] is perhaps his most influential. There, Coke stated that judicial review could be required of actions of both Parliament and the Crown.[154] Although Coke appears to have acknowledged that the common law was a form of positive law, he was careful to place the power of altering it in the hands of judicial officers.[155]

C. The Great Charter in the American Colonies

The Magna Carta was brought to the American colonies as part of the English common law.[156] English settlement in America began in 1606 with James I's granting of the first Virginia charter.[157] In the Virginia charter, the king, in addition to claiming the right to colonize the New World, also asserted the colonists' entitlement to the same rights possessed by Englishmen in the homeland.[158]

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151 *See* Gareth H. Jones, *Sir Edward Coke: English Jurist*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Edward-Coke [https://perma.cc/MVT5-EUCH] (last updated Jan. 28, 2021) (quoting Coke, "[T]he king in his own person cannot adjudge any case").

152 *See id.*; DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS 195 (Cambridge Univ. Press 2014) (stating that the court ruled only judges may construe the statutes of England and its letters patent).

153 Bonham's Case (1610) 77 Eng. Rep. 646; 8 Co. Rep. 114 a; *Bonham's Case*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Bonhams-Case [https://perma.cc/2EKC-D9NP] (last updated Nov. 21, 2013).

154 *See* Richard H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 327 (2009) (noting the Bonham case is the "fountainhead of the doctrine of judicial review"); Charles M. Gray, *Bonham's Case Reviewed*, 116 PROCEEDINGS OF THE AM. PHIL. SOC'Y 35, 35 (1972).

155 At the time, it was known that judges had less authority to change the law than Parliament. Parliament's laws were supreme. Thus, the idea of questioning a Parliament created law was extremely uncommon. *See* Helmholz, *supra* note 154, at 330.

156 Many colonial charters in the early 1600s promised the "liberties, franchises, and immunities" of an Englishman. *See* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 19–23 (1968) (noting that a plaque in Virginia states English common law arrived in 1607).

157 *See id.* at 19.

158 *See* Hazeltine, *supra* note 5, at 7 (explaining that this principle made English colonization in the American colonies distinct because in ancient times the colonists of other countries did not have the privilege to enjoy the same constitutional rights accorded

Additionally, colonists were granted the power to create their own laws so long as those laws were not inconsistent with the laws of England.[159]

Although colonial charters set forth the principle that the colonists enjoyed the rights guaranteed to them under the English common law and the British Constitution,[160] the colonists recognized the need to set forth their own rights in their colonial statutes. John Winthrop, the first governor of the Massachusetts Bay Colony, recognized the need to have a general law like the Magna Carta. He explained:

> The deputies having conceived great danger to our State in regard that our magistrates for want of positive law in many cases might proceed according to their discretion, it was agreed that some men should be appointed to frame a body of grounds of law, in resemblance to a Magna Carta, which being allowed by some of the ministers and the General Court, should be received for fundamental laws.[161]

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to them under the legal system of their home country).

159 *See id.* at 8. For an example, see R.I. ACTS AND ORDERS of 1647, § 4.

160 Whether rights under the British Constitution extended as equally to colonists as to subjects residing in Britain was and still is debatable, along with other issues (*e.g.*, parliamentary jurisdiction and the power of the Crown in America) rendered moot once the colonies won their independence. *See* DAVID AMMERMAN, IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774 53–61 (1974) (explaining the consensus among most American politicians and advocates was that Parliament exercised no right of control over colonial affairs, such as trade); CHARLES HOWARD MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 192 (1923) (noting that by the time of the Declaration of Independence in 1776 Americans had moved beyond claiming their rights as the King's subjects and protesting allegedly unlawful actions of Parliament; these Americans were now revolutionaries with grievances against the King, basing their arguments not as much on supposedly unconstitutional statutes enacted in Britain, but on the executive's (*i.e.*, the King's) violations of the colonists' natural rights). In effect, the proto-revolutionaries' position by the early-to-mid 1770s had to be that the colonists *should* have rights similar to those in the homeland, not that they already had them. As summarized by Professor Ammerman: "[T]hat King and Parliament [] claim[ed] the absolute dependency of the colonies on the British government, brought the colonists first to dismantle the supremacy of Parliament on constitutional grounds and then to rebuild it on the natural rights of compact and consent[.]" David Ammerman, *The British Constitution and the American Revolution: A Failure of Precedent*, 17 WM. & MARY L. REV. 473, 475 (1976). By that point in time (circa 1776), these Americans wanted their own completely independent government – their own "parliament" and any other governing structures (*e.g.*, an executive and a judiciary) not answerable to superior authorities in London. *See id.* at 473–76.

161 Hazeltine, *supra* note 5, at 10.

Soon after, the Massachusetts Body of Liberties was adopted.[162] It was the first legal code in the colonies, and it took language directly from the Magna Carta.[163] A few years earlier, in 1638, Maryland passed a bill that King Charles I ultimately rejected, a bill recognizing the Magna Carta as a part of the law of the colony.[164]

Other colonies followed suit in taking language from the Magna Carta and incorporating it into their own statutes. For example, in 1647, Rhode Island passed a law incorporating Clause 39 of the 2015 Magna Carta[165] and declaring that the "law of the land" phrase did not refer to the law of England; instead, the Rhode Island law asserted that the phrase referred to the law that the Rhode Island General Assembly itself enacted.[166] The Magna Carta was, therefore, influential not only in serving as a model for major colonial statutes, but by laying out the rights that American colonists relied upon to demand relief from the Crown.[167]

In addition to serving as a model for colonial statutes, the Magna Carta also served as a model for early state constitutions.[168] For

162 *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435 (2010).

163 MASS. BODY OF LIBERTIES of 1641, para. 1 ("No mans life shall be taken away, no mans honour or good name shall be stayned . . . unless it be by virtue or equitie of some expresse law . . . . ").

164 MD. ACT FOR THE LIBERTIES OF THE PEOPLE of 1638; Hazeltine, *supra* note 5, at 12.

165 R.I. ACTS AND ORDERS of 1647, § 4.

166 *See* Hazeltine, *supra* note 5, at 12.

167 *See id.* at 17–18. One may see a similar impact in other former British colonies. *See* R v. Sec'y of St. for Foreign & Commonwealth Aff. [2001] QB 1067 at 1094–95 (Eng.) (explaining that while the Magna Carta "does not . . . curtail the sovereignty of the proper [colonial] lawmaker to make what laws seem fit to him[,] . . . [s]o far as it is a proclamation of the rule of law, [the Magna Carta] may indeed be said to follow the flag"); Calder v. Att'y-Gen. of B.C., [1973] S.C.R. 313, 395 (Can.) ("[The] Magna Carta [] has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories."); Irina Spector-Marks, *"The Indian's Own Magna Carta": Britishness and Imperial Citizenship in Diasporic Print Culture, 1900-1914*, 16 J. COLONIALISM & COLONIAL HIST. 1, 9 (2015) (speaking not to the later issue of independence for colonies, but concluding that Indians residing throughout the British Empire, 700 years after the Great Charter's signing at Runnymede, asserted their rights emanating from the Magna Carta as a proclamation of their "imperial citizenship as both a racially neutral category and as steeped in British cultural, national, and racial cachet").

168 *See* 3 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1688 (Francis N. Thorpe ed., 1909) [hereinafter 3 FEDERAL AND STATE CONSTITUTIONS]; *see also* GA. CONST. art. I, § 1, ¶ XI; TENN. CONST. art. I, § 9; ARIZ. CONST. art. II, § 24.

example, in their state constitutions, Delaware,[169] North Carolina,[170] and South Carolina[171] tracked the language of the Magna Carta.[172] As a result, the Magna Carta and English common law are of central relevance to courts when analyzing the original meaning of constitutional requirements.[173] The Magna Carta has likewise played a role in the context of U.S. Supreme Court jurisprudence on substantive due process, the right to a jury trial, and individual protection against cruel and unusual punishment.[174]

III. U.S. Supreme Court Jurisprudence

Like Coke, the U.S. Supreme Court has looked to the past—specifically the English common law and the Magna Carta—to make arguments about the present.[175] Historically, the Court's citations to the Magna Carta have largely been cursory, something naturally found in many common law countries, particularly those with strong ties to the English crown.[176] The Court has mainly cited

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169 *See* DEL. DECLARATION OF RIGHTS OF 1776, §§ 10–17.

170 *See* N.C. CONST. of 1776, § 12.

171 *See* S.C. CONST. of 1778, § XLI.

172 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 168, at 1688; *see also* GA. CONST. art. I, § 1, ¶ XI; TENN. CONST. art. I, § 9; ARIZ. CONST. art. II, § 24; Hazeltine, *supra* note 5, at 15.

173 *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 967 (1991) ("[N]ot only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate."); *Duncan*, 391 U.S. at 169–70 (Black, J., concurring) (citing the Magna Carta when discussing the origin of the Due Process Clause); Kerry v. Din, 576 U.S. 86, 91–92 (2015) (discussing the impact of the Magna Carta and Edward Coke on due process); *Horne*, 576 U.S. at 358 (referencing the Magna Carta as inspiration for the Takings Clause as well as the Massachusetts Body of Liberties).

174 The influence of the Magna Carta can also be seen when discussing the rights of war prisoners and habeas corpus. Robert Pallitto, *The Legacy of the Magna Carta in Recent Supreme Court Decisions on Detainees' Rights*, 43 PS: POL. SCI. & POLS. 483, 483 (2010) (referring to *Hamdi v. Rumsfeld* and *Boumediene v. Bush*).

175 *See Harmelin*, 501 U.S. at 967; *Duncan*, 391 U.S. at 169; *Kerry*, 576 U.S. at 91–92; *Horne*, 576 U.S. at 358.

176 Consider Australia and New Zealand. By the time both countries became independent, English common law and legislation had already exerted a strong influence. Australia was colonized in 1770 and received its independence in 1901. *Colonisation: Disposition, Disease and Direct Conflict*, AUSTRALIANS TOGETHER, https://australianstogether.org.au/discover/australian-history/colonisation/ [https://perma.cc/MY45-CDQG] (last updated Nov. 17, 2020); *1901: Inauguration of the Commonwealth of Australia*, NAT'L MUSEUM AUSTL., https://www.nma.gov.au/defining-

to the charter to affirm that rights guaranteed by the U.S. Constitution are long-standing and date back to at least 1215; many of the rights protected and guaranteed by the U.S. Constitution align with those present in the Magna Carta.[177] The intent of the framers of the Constitution is frequently at issue when interpreting the plain meaning thereof, and the close parallelism of the U.S. Constitution to the Magna Carta commands a consideration of the charter's framed intent. The most in-depth treatment of the Magna Carta is largely found in concurring and dissenting opinions when a justice makes a historical argument to narrow the scope of rights—it is from these concurring and dissenting opinions that the seeds of new interpretations of law and laws themselves spring. A recent example of this category of citations is Justice Thomas's dissenting opinion in the 2015 same-sex marriage case, *Obergefell v. Hodges*.[178]

Overall, the Magna Carta continues to play a fundamental role in courts' decisions involving fundamental rights and liberties.[179] As new judges are appointed to courts and as new claims or theories are advanced, new rights can be discovered in the documents, such as the Magna Carta.[180] Indeed, in just the first five and a half months

moments/resources/federation [https://perma.cc/MCG9-TQZK] (last updated Sept. 9, 2020). New Zealand was brought into the British Colonies in 1840 and received its independence in 1907. Steve Watters, *History of New Zealand 1769-1914*, N.Z. HIST., https://nzhistory.govt.nz/culture/history-of-new-zealand-1769-1914 [https://perma.cc/97QF-7LY7] (last visited Jan. 28, 2021). A natural jurisprudential development, therefore, is that in Australia and New Zealand, the Magna Carta is one of the most cited documents by both litigants and judges. *See* David Clark, *Icon of Liberty: Status and Role of Magna Carta in Australia and New Zealand Law*, 24 MELB. U.L. REV. 866, 866, 868 (2000). Despite its heavy historical influence, the Magna Carta is little used for practical purposes in these jurisdictions. *Id.* at 868. By now, the rights it professed are codified, so the Magna Carta often is used for sentiment in those two nations and to serve as a connection between modernity and the early development of modern rights. *Id.* Because it is so commonly cited, the Magna Carta is in jeopardy of becoming a truism when courts or other decision makers assert its fundamental liberties.

177 For a list of cases where the U.S. Supreme Court has cited to the Magna Carta and the nature of the treatment in each case, see *infra* Appendices A, B, and C.

178 576 U.S. at 721–28 (Thomas, J., dissenting) (describing the formulation of life, liberty, and property as well as the origin and meaning of due process); the Magna Carta was later discussed in Breyer's dissent in the case *Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018).

179 *See* Justin Fisher, *Why Magna Carta Still Matters Today*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today [https://perma.cc/9P97-X6Y6].

180 *See, e.g.*, Joshua Rozenburg, *Magna Carta in the Modern Age*, BRIT. LIBR. (Mar.

of 2020, twenty-seven courts had already cited the Magna Carta in justification for their decisions. According to a search on Westlaw on June 13, 2020, since 1956, there have been at least 238 state appeals court opinions and 344 state supreme court opinions referring to the historic Magna Carta, with such opinions found in all fifty states as well as Puerto Rico and the District of Columbia. Likewise, the same search showed that there have been 183 U.S. Court of Appeals opinions since 1921 referring to the Magna Carta, with 101 of those opinions mentioning due process, thirteen discussing the right to jury trial, and nineteen commenting on cruel and unusual punishment. As for U.S. District Courts, the same search showed that they have referred to the Magna Carts in 290 opinions since 1960. Both in the states and in the federal courts, and at all levels and across jurisdictions, the trend is toward more referencing of the Magna Carta.[181]

The rights granted by the Magna Carta include freedom of petition, due process, just compensation for takings, freedom from excessive bail or fines, no cruel or unusual punishment, speedy trials, public trials for criminal cases, the ability to confront one's accusers, and access to a trial by an impartial jury for criminal charges.[182] Sometimes, Magna Carta references made before the American courts are, in effect, invocations of hoary concepts of liberty, as a matter of rhetoric, rather than any sort of precedent.[183] For instance, an early allusion to the protection of liberty occurred when John Quincy Adams used the Magna Carta's ideas to successfully defend the freedom of the Amistad slaves in the Supreme Court.[184] However, that particular argument was unsuccessful, and the Court instead granted the slaves their freedom

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13, 2015), https://www.bl.uk/magna-carta/articles/magna-carta-in-the-modern-age [https://perma.cc/K34E-KGWL] (noting that a 2008 U.S. Supreme Court case traced its reasoning on a habeas corpus ruling for foreign prisoners of the United States back to the U.S. Constitution's provisions, which were drawn from the Magna Carta).

181 *See* Matthew Shaw, *Modern America and Magna Carta*, BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/modern-america-and-magna-carta [https://perma.cc/L4J9-CW4E].

182 *The English and Colonial Roots of the U.S. Bill of Rights*, TEACHING AM. HIST., https://teachingamericanhistory.org/resources/bor/roots-chart/ [https://perma.cc/5QHW-7PEF] (last visited Feb. 8, 2021) [hereinafter *English and Colonial Roots*].

183 *See* Ralph Turner, *Magna Carta in the United States*, 15 INSIGHTS ON L. & SOC'Y 6, 9–13 (2014).

184 *Id.* at 10.

because of their Spanish origin.[185] The same argument did not work for Dred Scott, who was an American born slave.[186] Nonetheless, later appeals to the Magna Carta helped further define liberty, illustrating that while the scope of freedom may change, its foundation in the Magna Carta remains.[187] So, when looking at American courts and the Magna Carta, we see the constant conflict between merely rhetorical declarations and creation of case precedents.

A. The Magna Carta and Substantive Due Process

Generally, the U.S. Supreme Court cites the Magna Carta to support the proposition that a right in question is long-standing and firmly established.[188] The Supreme Court's citations in the due process arena—discussing procedural protections—are no different. The Court has quickly cited to the Magna Carta when asserting that the due process guarantees are long-standing and ancient in origin.[189] The Magna Carta has also played a substantive role in defining due process. As shown below, Clause 29 of the Magna Carta has helped the Supreme Court shape the argument that the Due Process Clauses of the U.S. Constitution's Fifth Amendment[190] and Fourteenth Amendment[191] protect not only

185 *Id.* at 10–11.

186 *See id.*

187 *See id.* at 11.

188 For example, the Court will refer to Magna Carta when the right to a jury trial, due process, etc. are involved. *See* Malinski v. New York, 324 U.S. 401, 413–14 (1945) (Frankfurter, J., concurring).

189 *See, e.g.*, *Malinski*, 324 U.S. at 413–14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people"); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) ("Dating back to Magna Carta, however, it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned or disseised [sic] or outlawed or exiled . . . without the judgment of his peers or by the law of the land.'").

190 The Fifth Amendment provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . " U.S. CONST. amend. V.

191 The Fourteenth Amendment provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

procedural guarantees,[192] but substantive guarantees as well.[193]

1. *Linking "Law of the Land" with Due Process*

The U.S. Supreme Court has cited the "law of the land" clause[194] of Clause 29 primarily to support the argument that the Fifth and Fourteenth Amendments' Due Process Clauses include substantive, as well as simply procedural components.[195] The plain language of the Due Process Clauses guarantee procedural due process.[196] However, the Supreme Court has interpreted "due process" to cover much more than procedural requirements.[197] When citing to the Magna Carta to support this proposition, the Court's line of reasoning is that the Due Process Clause grew out of the "law of the land" provision of the Magna Carta, and the "law of the land" provision guaranteed substantive rights.[198] Essentially, the Court

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192 Guarantees of procedural due process include notice and the opportunity to be heard. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting) (explaining that "[p]rocedural due process has to do with the manner of the trial").

193 Substantive due process is a principle that allows courts to protect individuals against arbitrary government action that hinges on their life, liberty, or property. *See* Williams, *supra* note 162, at 417–18.

194 The "law of the land" clause (Clause 29) provides: "No freeman shall be taken, or imprisoned . . . . [save] by the law of the land." *See* The Magna Carta of Henry III (1225), 9 Hen. 3, cl. 29 (Eng.) [hereinafter Magna Carta (1225)] (cl. 39 of John's Charter of 1215), *translated and quoted in* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 45 (E. & R. Brooke 15th ed. 1797) (1642); *see also* Peter Coss, *Presentism and the 'Myth' of Magna Carta*, 234 PAST & PRESENT 227, 229 (2017) ("No free man is to be arrested, or imprisoned . . . . nor will we go against him, nor will we send against him, save by the lawful judgment of his peers or by the law of the land . . . . to no one will we deny or delay, right or justice.").

195 *See infra* Appendix A for a list of U.S. Supreme Court cases concerning substantive due process that cite to the Magna Carta.

196 *See* U.S. CONST. amend. V ("[Nor shall he] be deprived of life, liberty, or property without due process of law."); *id.* §1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]").

197 *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three."). *But see McDonald*, 561 U.S. at 811 (2010) (Thomas, J., concurring) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

198 For a discussion on the historical meaning of the phrase "law of the land" and

has relied on the Magna Carta to state that the "law of the land" and "due process" are one and the same.[199]

The Court's linkage of the "law of the land" provision with the Due Process Clause is consistent with the English Parliament's fourteenth century interpretation of the phrase "law of the land" as referring to due process.[200] Additionally, this approach is consistent with Coke's work in this area.[201] Since the Court has firmly established through case law that those Due Process Clauses guarantee substantive due process, the Magna Carta has played a significant role in the Court's analyses of the cases elaborating upon the 5th and 14th Amendment Due Process Clauses' guarantee of substantive due process.

2. *The Meaning of "Life, Liberty, and Property"*

The Court's use of the Magna Carta has firmly established the existence of substantive guarantees in the Due Process Clauses, and

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whether the phrase was intended to cover substantive rights, see Robert E. Riggs, *Substantive Due Process in 1791*, WIS. L. REV. 941, 948–58 (1990).

199 *See, e.g.*, O'Bannon v. Town Nursing Ctr., 447 U.S. 773, 792 n.2 (1980) (Blackmun J., concurring) ("It is well recognized that the Due Process Clauses of the United States Constitution grew out of the 'law of the land' provision of the Magna Carta and its later manifestations in English statutory law."); *In re* Winship, 397 U.S. 358, 378 (1970) (Black, J., dissenting) ("Both phrases are derived from the laws of England and have traditionally been regarded as meaning the same thing."); Davidson v. New Orleans, 96 U.S. 97, 101 (1877) ("The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words the 'law of the land' in the Great Charter."); Beckwith v. Bean, 98 U.S. 266, 294–95 (1878) (Field, J., dissenting) (explaining that due process and the Magna Carta's phrase "law of the land' are synonymous); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856) (explaining that "the 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.").

200 *See* Coss, *supra* note 194, at 231 (discussing the impact of the Magna Carta being the "cornerstone of English liberty, law, and democracy[,]" quoting UNESCO's inscription of Magna Carta in its Memory of the World Register); *see also O'Bannon,* 447 U.S. at 792 n.2.

201 *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 50 (The Lawbook Exchange, Ltd. 2002) (1642) ("*Nisi per Legem terrae*. But by the law of the land. 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 [sic], without due proces [sic] 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 free-hold without process of the law; that is, by indictment or presentment of good and lawfull [sic] men, where such deeds be done in due manner, or by writ original [sic] of the common law.").

the Magna Carta may be of further use in defining what rights and interests are to be protected by substantive due process.[202] Both Coke and Blackstone understood that the principles contained in the Magna Carta are capable of producing results greater than what is readily apparent from the text of the document.[203] By using the Magna Carta in this manner, courts could begin to expand and develop rights protected by substantive due process.[204] Where procedural due process may more readily equate to the fundamental legal theory found in the Magna Carta—the necessity for adequate legal *procedures* when taking away an individual's life, liberty, or property—substantive due process requires the government to justify an infringement on freedom in order to protect against arbitrary exercise of power.[205] In this way, substantive due process develops out of the Magna Carta's legal theory.[206] So also it springs from the Great Charter's spirit.[207]

In substantive due process cases, courts must determine whether an individual's asserted interests are protected by the Fifth and Fourteenth Amendments' protection of "life, liberty, and

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202 In other words, instead of limiting the Magna Carta's use to prove simply that substantive rights exist, use the Magna Carta to create the specific rights.

203 *See* Helmholz, *supra* note 83, at 1492.

204 *See* Chantal-Aimee Doerries, *Magna Carta in 2015: A View from London*, 294 N.J. LAW. MAG. 47, 48 (2015) (arguing that the Magna Carta is still relevant for developing rights in the United Kingdom: "The admonition of Magna Carta is not abstract. Even today, 800 years later, the need for adherence to its most basic prescription of no delay or denial of justice can be seen").

205 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 935 (Wolters Kluwer 4th ed. 2013). Countries such as India have adopted the principle that government cannot arbitrarily deprive individuals of their personal liberty. Jinks, *supra* note 19, at 354–55. Although this principle is widely recognized in national constitutions, in its application nations often disagree over the meaning of the term, "arbitrary." *Id*. at 354–56.

206 *See* Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621, 641–42 (2016) (discussing the foundational role the Magna Carta has served in developing modern law).

207 *See* Paulette Brown, *Magna Carta: A Blueprint for Rule of Law in America*, 294 N.J. LAW. MAG. 22, 22–24 (2015); William J. Brennan Jr., Assoc. Justice, U.S. Sup. Ct., Address at the Rededication of the American Bar Association's Memorial to Magna Carta (July 13, 1985), *in* 19 LOY. L.A. L. REV. 55, 57 (1985) (speaking on the development of rights and liberties: "[T]hese liberties, taken for granted today, find their root in the spirit of Magna Carta. Once it was recognized that an individual had rights against the government and that there was a do-main of personal autonomy and dignity in which the government had no right to intrude, it was only a matter of time before the full range of civil rights and liberties were called forth in service of the same ideal.").

property."[208] Answering that question requires a court to precisely define "life, liberty, and property," which is often easier said than done. In defining "life, liberty, and property," the Court looks to the past to determine whether the right has been protected historically.[209] The Court's emphasis on the past is accompanied by a reluctance to expand the scope of substantive guarantees; the reasoning underlying this reluctance is that the Court cannot push too far ahead as a judicial body.[210]

Although the Court places great emphasis on assessing whether a right has been historically protected,[211] the Court has recognized that the identification of a right "has not been reduced to any formula."[212] In that same vein, the Court has acknowledged that

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208 For an example, consider *Roe v. Wade*, where the court recognized a woman's interests in her pregnancy. *See generally* Roe v. Wade, 410 U.S. 113 (1973). Those rights were then protected by the Fourteenth Amendment. *Id.* at 153.

209 *See e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the . . . pursuit of happiness by free men."); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) ("Our 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."); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (finding fundamental rights which are "deeply rooted in this Nation's history and tradition" qualify for heightened scrutiny under the doctrine of "substantive due process"); Lawrence v. Texas, 529 U.S. 558, 578 (2003) ("Individuals are "entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."); *Obergefell*, 576 U.S. at 647 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

210 *See, e.g.*, *Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field' . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 520–21 (2012) (defining theory of judicial self-restraint and discussing rationale behind the theory).

211 *See*, *e.g.*, Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 4 (2007) (explaining that many of the Court's opinions "stress that substantive rights are unlikely to be protected by due process unless they are rooted in historical understandings").

212 *See Obergefell*, 576 U.S. at 663–64 (Harlan, J., dissenting) (quoting *Poe*, 367 U.S.

while historical understandings guide the identification of a right, 'history and tradition' do not set the right's outer boundaries.[213] This approach is consistent with the idea that courts must be flexible when defining rights in light of changing norms and customs in society.[214] This methodology for constitutional interpretation also follows the practices adopted for interpreting the Magna Carta—that the "mind" of the document governs the interpretation, and not necessarily the text alone—[215] this has been evinced by consistent expansion of the rights protected by the Magna Carta as well as conformity to social norms and the contemporary ideal of justice through statutory interpretation.[216] For example, Justice Douglas, in his dissenting opinion in *McGautha v. California*, criticized the majority for relying on only Anglo-American law from the time of the Magna Carta to conclude that granting a jury unbridled discretion in determining guilt and punishment in a single trial did not violate due process requirements.[217] Justice Douglas emphasized that due process cannot be frozen in content as of one

at 542).

213 *See*, *e.g.*, *Lawrence*, 539 U.S. at 572 (holding unconstitutional a Texas statute that criminalized certain intimate sexual conduct between two persons of the same sex as a violation of due process and recognizing that although history is the starting point in a substantive due process inquiry, it is not the ending point in all cases).

214 Consider the end of the "Lochner era." In the early 1900s, the Supreme Court recognized a fundamental right to contract and struck down a New York statue for limiting that right. Lochner v. New York, 198 U.S. 45, 74 (1905) (stating the freedom of master and employee to contract with each other cannot be interfered with). Then in 1937, the Supreme Court determined that the fundamental right to contract must be limited by upholding a minimum wage law for women. *See* West Coast Hotel v. Parrish, 300 U.S. 379, 392 (1937) ("Freedom of contract is a qualified, and not an absolute, right."). This change was likely motivated by the increase in government control during the Great Depression. *Id.* at 399–400.

215 Reading between the lines of the Magna Carta shows other meanings to the document. Nicholas Vincent, *A Letter of 9 July 1214 Showing King John's Disquiet*, MAGNA CARTA PROJECT (Sept. 2014), https://magnacarta.cmp.uea.ac.uk/read/feature_of_the_month/Sep_2014_2 [https://perma.cc/X2U4-MCC8].

216 Helmholz, *supra* note 83, at 1490; *see also* Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language from 1776 to 1789*, 40 T. JEFFERSON L. REV. 103, 113–14 (2018) ("A series of statutes enacted during Edward III's reign (1327–1377) specified and updated the interests protected and the nature of the protections afforded under the Magna Carta's law of the land and denial of justice clauses. These statutes are the original link between due process language and the Magna Carta. . . . . Further, a 1363 statute (37. Edw. 3, ch. 18) interpreted the Magna Carta as prohibiting taking or imprisoning a man, or putting him out of his freehold, 'without process of the law.'").

217 402 U.S. 183, 243–45 (1971) (Douglas, J., dissenting).

point in time by saying:

> [T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[218]

Certainly, Justice Douglas considered the Constitution and, in effect, the Magna Carta, to be living documents. While his was the dissenting opinion, Justice Douglas' reasoning may, as society evolves, form the basis for a future majority opinion. In light of the two competing views as to the weight that historical understandings should have when identifying rights, the Magna Carta will continue to play a role as a foundation for fundamental rights and liberties protected by the U.S. Constitution.

The Court has cited the Magna Carta to both expand and limit the scope of protection that "liberty" entails. For example, one of the Court's most recent in-depth treatments of the Magna Carta that discusses a narrowing of the scope of "liberty" is found in Justice Thomas's 2015 dissenting opinion in *Obergefell v. Hodges*.[219] Justice Thomas relied on William Blackstone's interpretation of the Magna Carta as historical support for the proposition that the original meaning of the term "liberty" does not encompass the fundamental right to marry.[220] In contrast to the dissenting Justice Thomas, the majority in *Obergefell* held that because the right to marriage is a fundamental right, same-sex couples cannot be deprived of the right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[221] *Obergefell*

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218 *Id.* at 243 (quoting *Hurtado*, 110 U.S. at 529). Some legal professionals criticize Douglas's opinions because "[t]here is too much reliance upon the raw facts of life, generalities about human liberty and dignity . . . too much Magna Carta[.]" Stephen B. Duke, *Mr. Justice Douglas*, 11 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 241, 241 (1976). Justice Douglas was known to be ahead of his time in his opinions as he was often criticized for basing them on moral values instead of previous court decisions. For example, he wanted to desegregate school years before the *Brown v. Board of Education* decision. He was also known for his beliefs against too much government and the oppression of individual rights. David J. Garrow, *The Tragedy of William O. Douglas*, NATION (Mar. 27, 2003), https://www.thenation.com/article/tragedy-william-o-douglas/ [https://perma.cc/9SNH-2ETJ].

219 *See* 576 U.S. at 720–36 (Thomas, J., dissenting).

220 *Id.* at 723–25.

221 *Id.* at 675–76, 681 (majority opinion). "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that

examined due process, which is contained within the Magna Carta, and used an old right to create a new right for same-sex couples to marry. When the Magna Carta was written, the writers probably did not think that one day the Magna Carta's due process could be used to give same-sex couples the right to marry. Justice Thomas's disagreement with the majority was two-fold and dealt with both the Fifth Amendment[222] and the Fourteenth Amendment.[223]

Justice Thomas explained that his view of "liberty" is based on Blackstone's interpretation of Clause 29 of the Magna Carta and refers only to freedom from physical restraint, and not an entitlement to government benefits.[224] He further explained that the Due Process Clause dates back to the Great Charter's Clause 29, which provides that "[n]o free man shall be taken imprisoned, disseised [sic], outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by law of the land."[225] Justice Thomas reasoned that in discussing the "absolute rights of every Englishman" affirmed and codified by Clause 29,[226] Blackstone

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Amendment's guarantee of the equal protection of the laws." *Id.* at 672. "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Id.* at 675. Other approaches to this analysis have also been favored. For instance, "the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to strict scrutiny under the Hawaii Constitution." *Id.* at 662 (citing Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1930)); *see also* Evan Gerstmann, *Fourteenth Amendment, Fundamental Rights, and Same-Sex Marriage*, 17 INSIGHTS ON L. & SOC'Y 18, 19–21 (2017) (discussing the historical role of the Fourteenth Amendment and its application to same-sex couples).

222 In a case about the federal Fifth Amendment Due Process Clause, not the Fourth Amendment (*e.g.*, searches and seizures), the Court held "that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

223 First, Justice Thomas explained that the Due Process Clause of the Fourteenth Amendment does not protect substantive rights. *Obergefell*, 576 U.S. at 722 (Thomas, J., dissenting) ("By straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority."). Second, even if the Fifth Amendment's Due Process Clause protects substantive rights, the same-sex couple petitioners were not deprived of the "liberty" that the Fourteenth Amendment protects. *Id.* at 725.

224 *Id.* at 721–26.

225 *Id.* at 723.

226 *See The English and Colonial Roots of the U.S. Bill of Rights*, *supra* note 182 and accompanying text (listing some basic rights whose origins trace to the Magna Carta).

defined "the right of personal liberty"[227] as "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, unless by due process of law."[228] Justice Thomas's dissent illustrates the nexus of Clause 29 and Blackstone's interpretation.[229]

The Court has also cited the Magna Carta to broaden the scope of the term "liberty." For example, the Court has cited the Magna Carta to discuss and clarify the right to travel. In *Kent v. Dulles*,[230] the Court ruled that the right to travel is an inherent element of "liberty" protected by the Due Process Clause of the Fifth Amendment.[231] The Court explained that "[the] right was emerging at least as early as the Magna Carta" and cited to the Great Charter's Article 42:

> It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above.[232]

The Supreme Court's use of the Magna Carta supports the notion that its principles expand beyond the text itself. Looking to the "mind" of the Magna Carta gives courts a larger scope of freedom in making decisions.[233] An example can be seen in Sir

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227 *See infra* Parts II.A, B (noting that the Magna Carta did not create substantive rights, but affirmed and codified rights present since "time immemorial").

228 *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *130). Indeed, the Magna Carta may be considered relevant even after 800 years, as it may foster fundamental rights. Eric Engle, *Death Is Unconstitutional: How Capital Punishment Became Illegal in America--A Future History*, 6 PIERCE L. REV. 485, 488–93 (2008) (arguing that the principles established by the Magna Carta will lead to the eventual outlawing of the death penalty).

229 Justice Scalia's plurality opinion in *Kerry v. Din*, joined by Justices Roberts and Thomas and decided only eleven days before *Obergefell v. Hodges*, reiterates the notion that the definition of liberty as stated by the Magna Carta is limited to physical liberties. This opinion rejects the argument that due process was incorrectly denied when the visa of the spouse of U.S. citizen was denied. *Kerry*, 576 U.S. at 91–92.

230 357 U.S. 116 (1958).

231 *Id.* at 125.

232 *Id.* at 125 n.12 (citing to the 1225 edition of the Magna Carta).

233 Helmholz, *supra* note 83, at 1490.

Edward Coke's interpretation of the charter in his Institutes.[234] Although he supported the declaratory effect the Magna Carta had on English law and liberty, he recognized the possibility of change to ancient law.[235] Coke interpreted the Magna Carta to promote the creation of amendments to existing laws.[236] Further, Coke interpreted the principles of Magna Carta to impact a greater purpose in the emergence of future laws.[237] The Framers of the Constitution had a similar understanding of the significance of the Magna Carta, specifically in relation to substantive due process.[238] The Constitution's reliance on an implied meaning of the principles of the Charter should encourage courts to rely on this interpretation when exploring new rights.

3. The Magna Carta and Protection of the Internet

With the June 2018 repeal of Net Neutrality,[239] many internet users—while seeking to protect their unrestrained access to the internet—[240] have joined the campaign for a "Digital Magna Carta (DMC)";[241] this is the result of a 3,000 participant survey conducted by the British Library with the purpose of creating a top ten list of internet declarations.[242] Sir Tim Berners-Lee, the inventor of the

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234 *Id.* at 1490–91.

235 *Id.* at 1491.

236 *Id.*

237 *Id.* at 1491–92. Coke continued to support the idea that the principles of the Magna Carta should be interpreted beyond the words of the text. For instance, Coke interpreted the guarantee of rights to "free men" to apply to both women and men. *See id.* at 1491–92. The rights of these "free men" were to be protected by the Charter's text. *See id.*; *see also* Crennan, *supra* note 83, at 337.

238 *See* Helmholz, *supra* note 83, at 1475.

239 Alina Selyukh, *FCC Takes Another Step Toward Repeal of Net Neutrality*, NPR (Feb. 22, 2018), https://www.npr.org/sections/thetwo-way/2018/02/22/587896608/fccs-repeal-of-net-neutrality-on-track-to-go-into-efffect [https://perma.cc/Q9PR-MDHR]; s*ee also* Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How that Could Affect You.*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/ technology/net-neutrality-repeal.html [https://perma.cc/S94K-TZ92].

240 Alex McClintock, *8 Ways Magna Carta Still Affects Life in 2015: Net Neutrality*, ABC NEWS, http://www.abc.net.au/news/2015-06-15/magna-carta-800-years/6538364 [https://perma.cc/2399-K5UD] (last updated Oct. 9, 2016).

241 *Id.*

242 Jamie Redman, *Millennials Demand Web Freedoms in 'Digital Magna Carta'*, COINTELEGRAPH (June 16, 2015), https://cointelegraph.com/news/millennials-demand-web-freedoms-in-digital-magna-carta [https://perma.cc/FA7J-HTLC].

World Wide Web, has expressed his support for the DMC.[243] Broadly interpreted, this may be viewed as a reaffirmation of rights that have been in existence since time immemorial. The technology is new, but the rights are venerable, and a long-revered document espousing basic rights, such as the Magna Carta or the U.S. Constitution, may apply to internet freedom.

This provides an interesting question with respect to how far the Great Charter's protection of rights can evolve. Certainly, unrestrained internet access was not contemplated by the drafters of either the Magna Carta or U.S. Constitution. This begs the question: can the Magna Carta protect net neutrality moving forward? The Magna Carta provides a due process safeguard for "liberties," which can be an extremely broad term.[244] This can be likened to the United Nations' Universal Declaration of Human Rights ("UDHR") and the European Convention on Human Rights ("ECHR"), both inspired by the Magna Carta and both calling for a respect of one's privacy.[245] This right is embodied in the Magna Carta because these treatises represent the new natural law, which the Magna Carta must match.[246] It is not difficult to imagine such protection when the internet provider might be likened to a modern day version of King John. With the internet being the primary source by which information is currently disseminated, the danger of net neutrality repeal cannot be overstated. Without neutrality, companies will theoretically be able to restrict which websites individuals may be able to access freely moving forward.[247] The ultimate reality of which websites are accessible without a fee or amercement may come down to arbitrary decisions made under unbridled individual or institutional authority.[248]

The Magna Carta's influence on the protection of an open and

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243 *Id.*

244 Magna Carta (1225), cl. 49, *supra* note 194 at 45.

245 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights] art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

246 *See* JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011) (providing an overview and introduction to natural law and its various theories); *infra* notes 371–379 and accompanying text (discussing natural law and the Magna Carta).

247 McClintock, *supra* note 240. This may also involve issues regarding First Amendment speech, but for the sake of this Article, the discussion is limited to "liberty" and the Magna Carta.

248 Selyukh, *supra* note 239.

neutral internet hinges on its definition as a liberty interest. The Magna Carta protects human rights through its imposition of due process, and among those rights are the rights to freedom of expression, the press, and speech. The First Amendment to the U.S. Constitution protects the right to free speech and freedom of the press: this is especially important in the context of free internet access to younger generations, who increasingly derive news information and communicate through social media platforms.[249] In addition to free access to the internet being protected under Magna Carta due process principles and U.S. Constitution free speech principles, the United Nations added internet access to the UDHR.[250] It did so by interpreting UDHR Article 19, which encompasses the uninhibited right to receive or disseminate information through any medium, as a universal human right, to internet access.[251]

Multiple sovereigns opposed the resolution under the UDHR protecting free internet access, but the United States was not one of them.[252] Though the United States did not oppose the resolution, it has not been motivated to strictly abide U.N. declarations and resolutions.[253] Article 19 was made to address more extreme

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249 J. Clement, *Internet Usage of Millennials in the United States – Statistics & Facts*, STATISTA (Nov. 20, 2019), https://www.statista.com/topics/2576/us-millennials-internet-usage-and-online-shopping/ [https://perma.cc/FT4R-KRHR] (stating that 48% of adults between the ages of 18 and 29 report that they are online "almost constantly"); Tim Berners-Lee, *We Need a Magna Carta for the Internet*, 31 NEW PERSP. Q. 39, 40 (2014) (describing the internet as a public utility); *see also* U.S. CONST. amend. I.

250 Catherine Howell & Darrell M. West, *The Internet as a Human Right*, BROOKINGS (Nov. 7, 2016), https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/ [https://perma.cc/NC5B-X4Y7] ("Section 32 adds [to UDHR Article 19] 'The promotion, protection and enjoyment of human rights on the Internet' and another 15 recommendations that cover the rights of those who work in and rely on internet access. It also applies to women, girls, and those heavily impacted by the digital divide.").

251 UDHR Article 19 does not expressly include the word "access" but instead mentions the right to freely express opinions, including the right to receive and disseminate those opinions without interference: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." G.A. Res. 217 (III) A, *supra* note 245, art. 19. In effect, the universal right embraces a right to access, as declared in an interpretative, non-binding resolution. Now, 193 U.N. members have signed and adopted the resolution, which marked a global shift towards internet access truly being recognized as a human right. Howell & West, *supra* note 250.

252 *See* Howell & West, *supra* note 250.

253 That could be seen as indicated by the United States' refusal to follow the UDHR's trend of prohibiting the death penalty. The Article certainly could be classified as merely

instances of internet restriction: one such U.N. report was released to address the total shutdown of Syria's internet because of political unrest.[254] It has become clear that on the international scene, the United States' position is that the right to free internet access is a basic human right. Domestically, however, it is not clear how far a U.S. citizen's right to the internet extends when taken in comparison to an internet service provider's right to profit therefrom.

With the Federal Communication Commission's repeal of Net Neutrality, the U.S. Supreme Court will likely have to confront this issue. The Supreme Court has not addressed whether internet access is a right, only saying that overbroad restriction of the internet raises constitutional concerns.[255] Recently, the Court of Appeals for the D.C. Circuit deferred to 2005 precedent with the court deciding to uphold the FCC's decision to strip neutrality rules from the internet, but the FCC cannot block states from writing their own neutrality laws.[256] The public's protection against the overbroad restriction of the internet in many ways hearkens back to the due process guaranteed through the Magna Carta, as well as its incorporation into the U.S. Constitution's First Amendment.

B. The Magna Carta and the Right to a Jury Trial

The Sixth Amendment to the U.S. Constitution guarantees the various rights of criminal defendants, including the rights to a trial by jury, to an attorney, and to a trial without unnecessary delay.[257]

"soft law." *Id.*

254 *Id.*; Nicholas Thompson, *Why Did Syria Shut Down the Internet*, NEW YORKER (May 8, 2013), https://www.newyorker.com/news/daily-comment/why-did-syria-shut-down-the-internet [https://perma.cc/LBZ9-4ZEK].

255 Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 844 (1997) (holding that facially overbroad restrictions of internet content were in violation of the First Amendment). *But see* United States v. Am. Libr. Ass'n, 539 U.S. 194, 194 (2003) (requiring libraries to utilize internet filters to protect children from vulgar content as a requisite for the receipt of federal funding not a violation under the First Amendment).

256 *See* Nilay Patel, *The Court Allowed the FCC to Kill Net Neutrality Because Washing Machines Can't Make Phone Calls*, VERGE (Oct. 4, 2019), https://www.theverge.com/2019/10/4/20898779/fcc-net-neutrality-court-of-appeals-decision-ruling [https://perma.cc/C7V5-46WB]. The court declined to rehear the case on February 6, 2020. David Shepardson, *U.S. Appeals Court Will Not Reconsider Net Neutrality Repeal Ruling*, U.S. NEWS & WORLD REP. (Feb. 6, 2020), https://www.usnews.com/news/technology/articles/2020-02-06/us-appeals-court-will-not-reconsider-net-neutrality-repeal-case [https://perma.cc/423Z-AWNN].

257 The Sixth Amendment states:

The U.S. Supreme Court has relied on the Magna Carta for historical support in interpreting these rights. In its Sixth Amendment jurisprudence, the Supreme Court has specifically cited to Clause 39 of the Magna Carta, which states in relevant part: "[n]o free man[258] shall be seized or imprisoned, . . . except by lawful judgment of his equals or by the law of the land."[259] The Court has also cited to language in Clause 40 which states: "To no one will we sell, to no one deny or delay right or justice."[260]

Much of the Magna Carta's Clause 40 language was incorporated into the Virginia Declaration of Rights in 1776 and from there into the Sixth Amendment.[261] The Speedy Trial provision is "an important safeguard to prevent undue and oppressive incarceration prior to trial"[262] and serves "a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused."[263] The public benefit is centered around the considerable expense of supporting persons in jail, as well as the hardship to the accused persons'

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

258 Freemen constituted a small percentage of the population at the time of the Magna Carta's drafting; freemen were held to be tenant farmers who maintained "freehold title to their farms" or estates. This definition expanded over time to include "all Englishmen (not women)[.]" *Magna Carta Guaranteed the Freemen of the Kingdom Their Liberties Forever (1215)*, ONLINE LIBR. OF LIBERTY, https://oll.libertyfund.org/quotes/508 [https://perma.cc/Y3YR-SS7X] (last visited Jan. 21, 2021)*; see* MCKECHNIE, *supra* note 58, at 114–16.

259 Magna Carta (1215), *supra* note 73, cl. 39. *But see* Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, *in* MAGNA CARTA: MUSE AND MENTOR 139, 146–49 (Randy J. Holland ed., Thomson Reuters 2014) (noting that cl. 39 originally did not guarantee a right to a jury trial). The fallacy will be further discussed later.

260 Magna Carta (1215), *supra* note 73, cl. 40; *see also* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (quoting Clause 40 of the 1215 Magna Carta).

261 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES AND TERRITORIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3813 (Francis N. Thorpe ed., 1909), *as reprinted in* H. Doc. No. 357 (2d Sess. 1909).

262 United States v. Ewell, 383 U.S. 116, 120 (1966).

263 Barker v. Wingo, 407 U.S. 514, 519 (1972).

families; furthermore, any delay might stymie the deterrent and rehabilitative effects of the criminal law.[264]

The U.S. Supreme Court has also cited to the Magna Carta in Sixth Amendment jurisprudence to support the proposition that the right to a trial by jury is a long-standing right that dates back to the Magna Carta.[265] However, the Court later acknowledged that the Magna Carta itself may not have referred to a jury trial.[266] As early as 1879, the U.S. Supreme Court cited Blackstone in his Commentaries to explain that the right to a jury trial was enshrined in the Magna Carta.[267] In 1898, in a case that has now been overturned, the Court asserted, "[w]hen [the] Magna Carta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors."[268]

1. Clause 29

In *McKeiver v. Pennsylvania*, a plurality of the Court concluded that the constitutional right to a jury trial does not apply in juvenile cases.[269] Justice Douglas' dissenting opinion in *McKeiver* cited to

264 *See id.*; Dickey v. Florida, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174, codified the law with respect to the right, intending "to give effect to the sixth amendment right to a speedy trial." S. REP. NO. 1021, 93d Cong., 2d Sess., at 1 (1974).

265 *See*, *e.g.*, United States v. Booker, 543 U.S. 220, 239 (2005) (asserting that "the right to a jury trial [has] been enshrined since the Magna Carta"); Walton v. Arizona, 497 U.S. 639, 711 (1990) (explaining that "by the time our Constitution was written, jury trial in criminal cases . . . carried impressive credentials traced by many to Magna Carta" (quoting *Duncan*, 391 U.S. at 150 (1968))); *McDonald*, 561 U.S. at 815 (2010) (Thomas, J., concurring) (recognizing that certain basic liberties, including the right to a jury trial, date back to the Magna Carta).

266 *See infra* notes 273–279 and accompanying text.

267 *See* Strauder v. West Virginia, 100 U.S. 303, 308–09 (1879) ("Blackstone, in his Commentaries, says, 'The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter.'").

268 *See* Thompson v. Utah, 170 U.S. 343, 349 (1898).

269 *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (concluding that the right to a jury trial does not apply to juveniles, explaining that the Sixth Amendment rights that apply to juveniles, including the right to a lawyer or the right to cross-examination, are guaranteed to juveniles for fact-finding purposes, reasoning, however, that a jury is not a necessary component of accurate fact-finding, and concluding also that the Sixth Amendment's right to a jury trial does not apply in the context of juvenile court because juvenile prosecution considered neither civil nor criminal).

the Magna Carta as historical support for the argument that the right to a jury trial is not limited in scope to the protection of adults.[270] Justice Douglas quoted the language of Clause 29 of the Magna Carta, which provides that freemen should not be imprisoned unless by the lawful judgment of his peers.[271] Justice Douglas explained that like adults, juveniles also fit within the Magna Carta's reference to a "freeman," and as such should enjoy the same constitutional rights.[272]

Despite this promising reference to the Magna Carta with respect to an accused's right to a speedy trial, scholars generally agree that Clause 29's mention of the phrase "judgment of his peers" does not refer to a jury trial.[273] At the time of the Magna Carta's drafting, England did not have jury trials.[274] As jury trials began to frequently occur,[275] interpreting the Magna Carta's reference to "lawful judgment of his peers" to mean "trial by jury" served as a natural progression of the interpretation of the Magna Carta with changing times and legal procedures.[276] As such, many people, including Supreme Court justices, construed "judgment of his peers" to equate to a right to trial by jury.[277] For example, in his

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270 *Id.* at 563 (Douglas, J., dissenting).

271 *Id.*

272 *Id.*

273 *See* POLLOCK & MAITLAND, *supra* note 38, at 25, 184 n.124 ("[I]t is now generally admitted that the phrase *iudicium parium* does not point to trial by jury . . . [but rather that] 'No man shall be judged by his inferior who is not his peer[.]"); MCKECHNIE, *supra* note 58, at 84 ("One persistent error, adopted for many centuries, and even now hard to dispel, is that the Great Charter guaranteed trial by jury."); Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922 n.14 (1926) (referring to the linkage between "judgment of his peers" and a trial by jury as an ancient error).

274 *See* Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 PUBLIUS 2, 19–20 (1992) ("Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question [in Parliament] the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights . . . . " (quoting James Madison for comparisons between the U.S. Bill of Rights and the Magna Carta)).

275 *See* Holt, *supra* note 46, at 62 (noting that reading "lawful judgment of his peers" to mean "trial by jury" is an interpretation that is a "natural and logical progression" of the Magna Carta but in the year 1215 did not exist).

276 *See id.*

277 *See* Justin J. Wert, *With a Little Help from a Friend: Habeas Corpus and the Magna Carta After Runnymede*, 43 PS: POL. SCI. & POLS. 475, 477 (2010) (discussing that some scholars argue that the right to jury trial, though not explicit in the Magna Carta,

dissenting opinion, Justice Douglas noted that the phrase "judgment of his peers" in Clause 29 of the Magna Carta is a reference to a jury trial.[278] Conversely, the U.S. Supreme Court has acknowledged that it may have been wrong in citing to the Magna Carta to forge a connection between Clause 29 and the right to a jury trial.[279]

Historians have generally interpreted Clause 29 to set forth the right to a trial, though not necessarily one by jury, because jury trials did not exist in England at the time the Magna Carta was drafted.[280] By 1215, as long described by commentators and historians,[281] there were three types of trials in England: (1) trial by

could be implied).

278 *See McKeiver*, 403 U.S. at 571 (recognizing that "'[j]udgment of his peers' is a term expressly borrowed from the Magna Charta, and it means a trial by jury" (citing *Ex parte* Wagner, 50 P.2d 1135, 1139 (Okla. Crim. App. 1935))).

279 *See Duncan*, 391 U.S. at 151 (1968) (explaining that it is sufficient to say that by the time the U.S. Constitution had been written, jury trial had been in existence in England for several centuries although it is disputed whether the right to a jury trial can be traced to the Magna Carta); Williams v. Florida, 399 U.S. 78, 91 n.27 (1970) (acknowledging that whether "judgment of his peers" is a reference to a jury is a fact that historians dispute).

280 *See*, *e.g.*, Laura Logiudice, *The Never Ending Story of the Peremptory Challenge: Racial Discrimination in the New Jersey System*, 7 SETON HALL L.J. 617, 623 (1997) ("Although the Magna Carta supposedly guaranteed a trial by jury, it was not until the Roman Catholic Church prohibited other forms of justice, and upon a writ by Henry II in early 1219, that criminal jury trials began to occur on a regular basis."); MCKECHNIE, *supra* note 58, at 250 (arguing that to introduce trial by jury into the Magna Carta is an unpardonable anachronism because the criminal petty jury had not been invented in 1215); HOLT, *supra* note 4, at 10 (explaining that the Magna Carta's reference to "lawful judgment of peers" could not have meant trial by jury because the process existed only in "embryo" in 1215).

281 Walker Clark, *Magna Carta and Trial by Jury*, 2 N.C. L. REV. 1, 1–2 (1923) (explaining the three types of trials in England in 1215 and recognizing that the first authentic instance of a trial by jury in England occurred in the year 1351, long after the signing of the Magna Carta).

compurgation,[282] (2) trial by ordeal,[283] and, lastly, (3) trial by battle.[284] Many defendants actually preferred trials by battle to the other forms of trials because it was the only way to avoid perjury.[285]

As established, Clause 29's reference to a "judgment of his peers" does not necessarily refer to a jury trial; instead, the phrase merely required that every judgment be delivered by the accused person's equals.[286] At the time of the Magna Carta's drafting, King John frequently and arbitrarily seized the properties of his subjects without any legal process of confiscation or opportunity for the

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282 Trial by compurgation involved the summoning of compurgators, specifically the defendant's neighbors and friends, to swear to their belief in the truth of the claim against the defendant. JOHN BRIGGS, ET. AL, CRIME AND PUNISHMENT IN ENGLAND: AN INTRODUCTORY HISTORY 5 (1996). The compurgators would not swear to the truth of the claim in light of the evidence before them; instead, their swearing was based on their personal knowledge of the defendant's reputation and the nature of the alleged offense. *See id.* at 4. Even after the compurgators had put in their two cents, the judge ultimately decided the matter. Clark, *supra* note 281, at 3 ("Scattered references to a trial by jury . . . have been shown to refer solely to trial by compurgators, which was simply the summoning of witnesses for either side who swore only as to their belief as to which party was right and the matter was decided, not by a jury as we know it, but by the judge.").

283 In a trial by ordeal, the innocence or guilt of the defendant was determined through several unpleasant tests. For example, in a trial by hot iron, a defendant was forced to carry a heated weight of iron throughout a specified distance. If three days later, the defendant's hand healed without festering, the defendant was considered innocent. Briggs also describes in detail other forms of trial by ordeal. For example, a trial by consecrated bread was normally reserved to determine the guilt or innocence of a cleric. The defendant is forced to swallow a piece of consecrated bread; if the defendant choked, the defendant was guilty. *See* BRIGGS ET AL., *supra* note 282, at 5.

284 Trials by battle required two persons to fight to the death, often on horseback with sword, shield, and spear. *See* POLLOCK & MAITLAND, *supra* note 38, at 39, 44 (explaining that William the Conqueror introduced trial by battle into England through "[a]n apparently genuine ordinance" which allowed Englishmen to choose trial by battle in their lawsuits but also expressly allowed them to decline the option).

285 *See id.* at 50.

286 *See id.* at 173 n.3.

> The spirit of the clause is excellently expressed by a passage in the laws ascribed to David of Scotland: Acts of Parliament, vol. i. p. 318: "No man shall be judged by his inferior who is not his peer; the earl shall be judged by the earl, the baron by the baron, the vavassor by the vavassor, the burgess by the burgess; *but an inferior may be judged by a superior*." Some of John's justices were certainly not of baronial rank. Just at this same moment the French magnates also were striving for a court of peers; Luchaire, Manuel des institutions, p. 560; they did not want trial by jury.

Id. (emphasis in original).

hearing of objections.[287] As a result, whenever a dispute with the king arose, usually over land, the barons wanted to ensure that their disputes with the king would be settled by men of their own rank and status.[288] By having disputes settled by individuals of similar socioeconomic status, the barons would be ensured a more thorough, fair, and reasonable judgment, as opposed to an arbitrary ruling by the king without any checks or balances.[289]

2. *A Limited Right:* Green v. United States *and Thereafter*

In the modern era, Clause 29 of the Magna Carta may no longer appear in the Supreme Court's opinions concerning the right to a jury trial, at least in any significant way. That is due to the general historical consensus that Clause 29 does not support the right to a jury trial, but rather to a trial in general. The Supreme Court's previous reliance on Clause 29 for historical support was based on the aforementioned error, and the argument is no longer viable.[290] The possibility of reference is further diminished by the fact that the Court itself has acknowledged the error.[291]

This mistake was discussed in *Green v. United States*.[292] Justice Frankfurter's concurrence noted that the Magna Carta cited in contemporary jurisprudence is not the same Magna Carta that was originally created at Runnymede.[293] In *Green*, the defendants had violated their surrender orders and were on trial for criminal contempt without a jury being present.[294] Sentenced to three years in prison, the defendants argued that the punishment outside of the

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287 *See* MCKECHNIE, *supra* note 58, at 214–17, 221–22, 441–44.

288 *See* Clark, *supra* note 281, at 1–3 ("The Barons in their combination against King John were not only anxious to protect themselves against the arbitrary power of the King but to fence off and prohibit the jurisdiction of the Common Law Courts of the Kingdom as to themselves and hence arose the much misunderstood expression in Magna Carta that they should be tried solely by the judgment (not a jury) of their peers.").

289 *See generally* J. C. Holt, *The Making of Magna Carta*, 72 ENG. HIST. REV. 401 (1957) (discussing the formation of the Magna Carta and the barons' strategies in negotiating with the king).

290 *See supra* notes 269–289 and accompanying text.

291 *See supra* note 279 and accompanying text.

292 356 U.S. 165, 192–93 (1958).

293 *Id.* at 189.

294 *Id.* at 168.

presence of a jury exceeded the judge's authority.[295] Secondly, the defendants argued that criminal contempt hearings were among those with a constitutional guarantee to a jury trial.[296] Frankfurter mentioned the Magna Carta's involvement and addressed the existence of a mistake of interpretation in previous jurisprudence.[297] He further mentioned that the mistake did not undermine the century of case law regarding precedent.[298]

The *Green* majority ruled that certain types of contempt, including the type involved in that case, were not guaranteed a jury trial.[299] The *Green* court also noted that the Magna Carta's influence in Supreme Court jurisprudence is not absolute. There had never been a constitutional doubt of punishing for contempt without the intervention of the jury prior to the defendants' challenge.[300]

The *Green* decision was, however, later restricted. In *Bloom v. State of Illinois*, the Supreme Court held that the denial of a jury trial for serious charges of contempt was indeed a constitutional violation.[301] Without mentioning the Magna Carta in the opinion, this decision was more in line with its "judgment by the law of the land" principle contained in the original Great Charter's Clause 39. Contempt procedures are punitive in nature with the possibility of arrest or imprisonment.[302] Thus, Clause 29 of the Magna Carta (1225) is likewise invoked.[303]

Despite the mistaken reliance, the Supreme Court is not likely to completely abandon its use of historical support when discussing the right to a jury trial. To add historical importance to this right, the Supreme Court is more likely to cite to the long-standing recognition of the right in English common law than to cite the

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295 *Id.*

296 *Id.*

297 *Id.* at 189.

298 *Green*, 356 U.S. at 189.

299 *Id.* at 187 ("The principle that criminal contempt of court [is] not required to be tried by a jury under Article III or the Sixth Amendment is firmly rooted in our traditions.").

300 *Id.* at 190.

301 391 U.S. 194, 201 (1968).

302 *Criminal Contempt*, BLACK'S LAW DICTIONARY (10th ed. 2014).

303 Magna Carta (1225), cl. 29, *supra* note 194, at 45.

language of the Magna Carta specifically.[304] Even then, any citations to the Magna Carta or English common law are likely to be a quick reference without any need for elaboration, as the right to a jury trial is expressly set forth in the Sixth Amendment,[305] Article III of the Constitution,[306] and further detailed through a body of case law.[307]

However, the previous mistake does present an interesting opportunity for the future of the Magna Carta: as noted in *Planned Parenthood v. Casey*, a previous decision may only be overturned based on 1) the workability of any new rules, 2) strong reliance on the prior holding would lead to special hardships as a consequence of its overruling, 3) no related principles of law have developed so far that the decision's reasoning or rationale is obsolete, and 4) the facts surrounding the decision have changed to such a degree that the decision is no longer justified.[308] As noted above, the facts surrounding the previous Magna Carta decisions have changed. Thus, one of the requirements has been satisfied.[309] Additionally, a change in the Supreme Court's composition may prime the interpretation of the Magna Carta for a change in its future.[310] In

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304 Another possible source of reference may include the English Petition of Rights, art. III (1628). *English and Colonial Roots*, *supra* note 182.

305 "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI.

306 U.S. CONST. art. III, § 2, cl. 3. ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

307 *See* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 145–46 (1997) (outlining the judicially-created tests that courts apply when determining whether an entitlement to a jury trial exists); *see also Green*, 356 U.S. at 189 (arguing, in the context of contempt, "[t]he fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded, hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions").

308 505 U.S. 833, 854–55 (1992).

309 The change being historians and the Court's realization that there was no allusion to a jury trial in the Magna Carta. *See Duncan*, 391 U.S. at 151 (explaining that it is sufficient to say that by the time the U.S. Constitution had been written, jury trial had been in existence in England for several centuries although it is disputed whether the right to a jury trial can be traced to the Magna Carta).

310 With the passing of Justice Antonin Scalia, Justice Neil M. Gorsuch was appointed. *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/P7YU-E457] (last visited July 26, 2020). Gorsuch's appointment is not likely to alter any historically-based jurisprudence since he and his predecessor share a common Constitutional view. *Neil Gorsuch*, OYEZ,

the event that an issue regarding the Magna Carta and its protection of a jury trial arises, the Supreme Court already has one of the keys to overturning precedent. However, the jury trial is guaranteed under the U.S. Constitution,[311] hence insusceptible to "reform" without a strong challenge in court.

In conclusion, the right to a jury is not absolute. For some cases there is no right for a case to be heard before a jury. As stated in the Magna Carta, all people are entitled to a "lawful judgment of his peers."[312] The procedural protections developed through modern procedural rules and jurisprudence have continued to uphold and guarantee this foundational principle of the Great Charter. Though not often directly cited with respect to an accused's right to a jury trial, the principles originally codified by the Magna Carta continue to be upheld as foundational substantive rights to this day and are likely to continue to be protected and held as such well into the future.

C. The Magna Carta and Cruel and Unusual Punishment

In its Eighth Amendment[313] jurisprudence, the U.S. Supreme Court has relied on the Magna Carta primarily to analyze the meaning of the Cruel and Unusual Punishments Clause and to support the proposition that citizens are to be protected against arbitrary punishments.[314] The linkage of the Eighth Amendment to the Magna Carta is based on the uniformity in language between the Virginia Declaration of Rights, the English Bill of Rights, and the Eighth Amendment. The specific language of the Eighth Amendment was drawn from Section 9 of the Virginia Declaration

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https://www.oyez.org/justices/neil_gorsuch [https://perma.cc/S6Q7-YPX5] (last visited July 26, 2020). Likewise, moderate-conservative Justice Anthony Kennedy was replaced by a more conservative Justice, Brett Kavanaugh. Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/ [https://perma.cc/WUJ2-VG3Z]. The impact on reliance upon the Magna Carta is, at this early point, unclear.

311 U.S. CONST. amend. VI, VII.

312 Magna Carta (1225), *supra* note 194, cl. 29.

313 The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

314 *See infra* Appendix C for a list of cases concerning the Eighth Amendment where the U.S. Supreme Court has cited to the Magna Carta.

of Rights,[315] which stated: "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The language of the Virginia Declaration of Rights was an almost verbatim adoption of Article 10 of the English Bill of Rights of 1689.[316] This consistency in language has, therefore, prompted both scholars and the U.S. Supreme Court to interpret the meaning of the Eighth Amendment by analyzing English history and interpreting the Magna Carta.

For instance, in determining what constituted cruel and unusual punishment, the U.S. Supreme Court first referenced the Magna Carta in 1958. In *Trop v. Dulles*, the Supreme Court held that the use of denationalization as a punishment for wartime desertion was "cruel and unusual punishment" within the meaning of the Eighth Amendment.[317] In an opinion written by Chief Justice Earl Warren, the Court explained that although it had not considered the meaning of "cruel and unusual punishment" at length, the principle it represents was taken directly from the English Declaration of Rights of 1688 and dates back to the Magna Carta.[318] The Court ruled that in determining whether a punishment is cruel and unusual, the punishment is to be measured by "evolving standards of decency."[319]

Part 1 of this section analyzes the principle that the punishment must be proportionate to the crime. Part 2 examines the death penalty. Part 3 discusses protection against arbitrary punishment. Finally, Part 4 reviews protections against punitive damages.

1. *Proportionality*

In addition to the "evolving standard of decency," the Court is also guided by the principle of proportionality in interpreting

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315 *See* ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791 202 (2011); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969); Rummel v. Estelle, 445 U.S. 263, 287 (1980) (Powell, J., dissenting).

316 *See* RUTLAND, *supra* note 315, at 202; Granucci, *supra* note 315, at 840.

317 356 U.S. 86, 100 (1958) (explaining that denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development").

318 *Id.* at 99–100.

319 *Id.* at 101 ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"); *see also infra* text accompanying notes 230–238.

whether a fine or punishment violates the Eighth Amendment; this draws back to Clause 20 of the Magna Carta (1215) which states "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."[320] The principle of proportionality requires that a punishment be proportional to the severity of the crime committed.[321] On its face, through the repeated use of the term "excessive," the language of the Eighth Amendment incorporates a proportionality requirement in the context of bails and fines.[322] Therefore, the Court has readily applied a proportionality analysis when considering the excessiveness of fines.[323] However, the term "excessive" is not used in the Punishments Clause; instead, the Punishments Clause prohibits only "cruel and unusual punishments."[324] The Court, inconsistently, has relied on historical support to justify the implication of the principle of proportionality to the Punishments Clause.[325]

In 1910, the Court held in *Weems v. United States* that the imposition of a punishment known as *cadena temporal*,[326] for the crime of falsifying public records, was "cruel and unusual" within

320 *Rummel*, 445 U.S. at 292 (Powell, J., dissenting); *see also* Magna Carta (1215), *supra* note 73, cl. 20.

321 *Rummel*, 445 U.S. at 292 (Powell, J., dissenting) (explaining that the principle of proportionality requires measuring "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender"); *Browning*, 492 U.S. at 293 (discussing the Magna Carta's development of a measure of proportionality). *See generally* Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) (explaining that the essence of the proportionality analysis is about ensuring that the punishment is appropriate for the defendant and his or her crime).

322 *See* Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?*, 25 GEO. MASON U. CIV. RTS. L. J. 271, 274 (2015).

323 *See* United States v. Bajakajian, 524 U.S. 321, 324 (1998) (holding that a fine of $357,144 for failing to disclose the transportation of $10,000 while attempting to leave the United States was grossly disproportionate to the gravity of the offense and thus violated the Eight Amendment).

324 U.S. CONST. amend. VIII.

325 *Compare* Roper v. Simmons, 543 U.S. 551, 561, 578 (2005) (providing a history of the Eight Amendment's origins), *with* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (relying on case law to establish the principle of proportionality).

326 217 U.S. 349, 364 (1910) (explaining that *cadena temporal* is a punishment of a minimum of 12 years and it requires that a prisoner always carry a chain at the ankle that hangs from the wrists and be employed at hard and painful labor).

the meaning of the Eighth Amendment.[327] As support for its conclusion, the Supreme Court cited to the first English case to apply the "cruel and unusual punishments" provision of the English Bill of Rights of 1689.[328] In 1689, the Court noted, the House of Lords held that the imposition of a $30,000 fine for an assault and battery was "excessive and exorbitant" and a violation of the Magna Carta.[329] Additionally, the Court reasoned, "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[330] The *Weems* Court, although not explicitly, recognized that the Eighth Amendment's Cruel and Unusual Punishments Clause incorporates a proportionality principle that dates back to the Magna Carta.[331]

In addition to the Supreme Court's indirect use of the Magna Carta in *Weems*, the Court has cited directly to the Magna Carta as evidence that the Eighth Amendment embodies a proportionality principle. In *Solem v. Helm*, the Court struck down a life sentence for a recidivist who was convicted of uttering a no-account check for $100 because the punishment was not proportionate to the crime.[332] The Court reasoned that the Cruel and Unusual Punishments Clause prohibits not only barbaric punishments, such as whipping, but also punishments that are disproportionate to the crime committed.[333] To support the conclusion that the Eighth Amendment requires proportionality, the Court explained that when the Framers of the Eighth Amendment adopted the language of Article 10 of the English Bill of Rights, the Framers intended to adopt English principle of proportionality.[334] The English principle of proportionality, the *Solem* Court explained, dated back to the

327 *Id.* at 382.

328 *Id.* at 371, 372, 376 (1910) (citing The Earl of Devonshire's Case, 11 How. St. Tr. 1353, 1354 (Parl. 1689)).

329 *Id.* at 376 (citing The Earl of Devonshire's Case, at 1354).

330 *Id.* at 371.

331 *But see Rummel*, 445 U.S. at 272–73 (1980) (rejecting the argument that the Weems Court interpreted the Eighth Amendment to embody a proportionality principle because the type of punishment at issue in Weems was too extreme to analogize to traditional forms of imprisonment imposed under the Anglo-Saxon system).

332 463 U.S. 277, 303 (1983), *overruled by Harmelin*, 501 U.S. at 965 (stating the Eighth amendment has no proportionality guarantee).

333 *Id.* at 284.

334 *Id.* at 285–86.

Magna Carta.[335]

In *Solem*, the Court cited to Clause 20 of the Magna Carta, which declared, "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it."[336] An amercement, as the Court explained, was a form of fine that was the most common criminal punishment in the thirteenth century.[337] Clause 20 of the Magna Carta thus required that punishments be proportional to the offense. Accordingly, the Court concluded that because the Eighth Amendment was based on the English Bill of Rights, the Eighth Amendment embodies a proportionality principle.[338] Thus, although concepts of proportionality were not written into the Cruel and Unusual Punishment Clause of the 8th amendment, the Court's use of the English Bill of Rights and ideologies established in the Magna Carta have led to an interpretation of the clause as incorporating principles of proportionality.

Just a few years before *Solem*, the Court upheld a life sentence for a recidivist who had been convicted of obtaining $120.75 by false pretenses in *Rummel v. Estelle.*[339] In an opinion written by Justice Rehnquist, the Court rejected the argument that the life sentence imposed by the recidivist statute was grossly disproportionate to the crime committed.[340] Justice Powell

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335 *Id.* at 284.

336 *Id.* at 284 n.9 (citing 1 S.D. Codified Laws, p. 4 (1978) (including a translation of the Magna Carta)).

337 *Id.* at 284 n.8.

338 *Solem*, 463 U.S. at 285–86. The principle of proportionality may soon not just be restricted to the field of punishment. Recent technological advances in military technology will soon lead to fully autonomous weapons that would be incapable of making certain value judgments only humans can make. This lack of judgment could lead to harsh results despite a minor beginning. International laws about warfare use proportionality as one of its principles in making decisions with regard to life. These machines "would threaten a target's right not to be arbitrarily deprived of life." These technological advances should soon lead to a heated legal debate in both the international community and in the United States. *See* Bonnie Docherty, *The Case for a UN Ban on "Killer Robots"*, PUB. RADIO INT'L (June 17, 2016), https://www.pri.org/stories/2016-06-18/case-un-ban-killer-robots [https://perma.cc/6R3N-Y7QP] (linking to a report by the Harvard Law School International Rights Clinic and Human Rights Watch on banning autonomous weapons).

339 445 U.S. at 285.

340 *Id.* at 270–78 (distinguishing the applicability of the principle of proportionality in cases involving the imposition of the death penalty from cases involving the imposition of long sentences and concluding that the Court is less likely to conclude that cases involving the latter violate the principle of proportionality).

disagreed: in his dissenting opinion, he emphasized that the principle of proportionality is deeply rooted in both American and English constitutional law.[341] As support for his assertion, Justice Powell cited the principle of proportionality embodied in Clause 20 of the Magna Carta.[342]

Lack of uniformity in punishment resulted in the 1987 Federal Sentencing Guidelines (with a mandatory grid for determining a defendant's sentence).[343] While the *Booker* decision in 2005 held that mandatory sentences are unconstitutional, judges still must take the Guidelines into account when determining a person's sentence.[344] *Booker* cites to the Magna Carta.[345] Moreover, many judges, such as Mark W. Bennett, argue that the Guidelines are too harsh.[346] Judge Bennett uses policy disagreements to depart from the Guidelines and the crack-to-cocaine ratio, which he argues has a disproportionate racial effect.[347] Although Judge Bennett never cites the Magna Carta, he, as with many judges, sentences defendants based on a proportionate scheme relative to the nature of the crimes.[348]

Although the Court has relied on the Magna Carta as historical support for the proposition that the Punishments Clause requires proportionality, such a requirement has now been fleshed out

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341 *Id.* at 288 (Powell, J., dissenting).

342 *Id.*

343 *Booker*, 543 U.S. at 268 (holding that the Sentencing Guidelines violated the Sixth Amendment where they allowed judges to enhance sentences using facts unreviewed by juries).

344 *Id.*

345 *Id.* at 239.

346 *See generally* Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 1 (2018).

347 Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV 874, 876–77, 893–96 (2015).

348 One might even apply proportionality to the use of sentencing algorithms. Some of these algorithms have been shown to produce results that may be racially biased, thus affecting the proportionality of the punishment to the crime. At the same time, a "good" algorithm could in theory produce a perfectly proportionate punishment. Adam Liptak, *Sent to Prison by a Software Program's Secret Algorithms*, N.Y. TIMES, May 2, 2017, § A, at 22 (referring to, *inter alia*, Loomis v. Wisconsin, 881 N.W.2d 749 (Wis. 2016), *cert. denied*, 137 S. Ct. 2290 (2017)).

through case law.[349] The beginning of this recognition and the argument as to what it means in contemporary American jurisprudence came in *Solem v. Helm*; the Court established a three-part test for courts to use in determining whether a punishment is grossly disproportionate to the crime committed.[350] The Court's *Solem* ruling has, however, since been overruled. In *Harmelin v. Michigan*, Justice Scalia's opinion overruled the notion that the Eighth Amendment contained a guarantee of proportionality.[351] Rather than guaranteeing proportionality, the *Harmelin* majority held that the Cruel and Unusual Punishments Clause of the Eighth Amendment was directed at prohibiting certain methods of punishment.[352] In furtherance of this point, the Court opined that the imposition of mandatory life sentences (*i.e.*, no possibility of parole) without considering mitigating factors may be cruel, however it is not unusual in a Constitutional sense.[353] The Eighth Amendment, as it were to follow, protected against only cruel *and* unusual punishments, not offering protection against either alone.

Because it is now settled law that the Punishments Clause does not embody a proportionality principle, there is no need for the court to cite to the Magna Carta as support for that proposition.[354]

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349 *See, e.g.*, *Solem*, 463 U.S. at 288 (noting that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments").

350 *See id.* at 292 ("[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions."). *But see Harmelin*, 501 U.S. at 962 ("We specifically rejected the proposition asserted by the dissent . . . that unconstitutional disproportionality could be established by weighing three factors . . . . ").

351 501 U.S. at 958 ("The guarantee was directed at the arbitrary use of the sentencing power by the King's Bench in particular cases and at the illegality, rather than the disproportionality, of punishments thereby imposed.").

352 *Id.*

353 *Id.* at 994–95 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'") (citations omitted).

354 *See*, *e.g.*, Lerner, *supra* note 322, at 282–83 (explaining that recent cases have not cited to the Magna Carta as support for the proposition that the Punishments Clause embodies a proportionality principle).

Additionally, although the Magna Carta's "salvo contenemento suo" principle presents an opportunity for use of the Magna Carta, courts generally do not consider a defendant's ability to pay a relevant factor in an Eighth Amendment analysis concerning the Excessive Fines Clause.[355] Use of the Magna Carta in this area is likely to be confined to a cursory explanation that certain rights are long-standing.

It is also of note that U.S. Supreme Court jurisprudence concerning the Excessive Fines Clause[356] does not cite the Magna Carta for its "*salvo contenemento suo*" principle.[357] *Salvo contenemento suo* literally means "saving his livelihood."[358] The principle requires that a defendant not be fined an amount that exceeds his ability to pay.[359] Although there is potential for use of the Magna Carta in interpreting the Excessive Fines Clause, American courts are unlikely to rely on the Magna Carta in this area because a defendant's inability to pay a fine is generally not relevant.[360]

In a post-Scalia climate, the U.S. Supreme Court began to revert to its previous interpretation of the Eighth Amendment protection against cruel and unusual punishment. Less than one month before Scalia's death, the U.S. Supreme Court retroactively applied a 2012 decision that made it unconstitutional to sentence minors to life

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355 *Id.*

356 The Excessive Fines Clause states: "[N]or excessive fines imposed." U.S. CONST. amend. VIII.

357 The *salvo contenemento suo* principle is embodied in Clause 20 of the Magna Carta, which states, in relevant part: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood." Magna Carta (1215), *supra* note 73, cl. 20.

358 Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 836 (2013). That can also be translated as "saving his land." JOHN F. ARCHBOLD, EDWARD CHRISTIAN & JOHN WILLIAMS, A TRANSLATION OF ALL THE GREEK, LATIN, ITALIAN, AND FRENCH QUOTATIONS WHICH OCCUR IN BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 245 (1823).

359 *See* McLean, *supra* note 358, at 834–35 (explaining that historical evidence suggests that the English Bill of Rights' outlawing of "excessive fines" was intended to reaffirm the "*salvo contenemento suo*" principle).

360 *But see id.* at 835 (explaining that since United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007), the First Circuit, in a line of cases, has considered the defendant's ability to pay a fine as a relevant factor in an Excessive Fines Clause analysis).

without parole for a murder conviction.[361] The following year, the U.S. Supreme Court decided that the use of outdated medical definitions of intellectual disability violated the Eighth Amendment's protection from cruel and unusual punishment.[362] Recently, in *Jennings v. Rodriguez* the Court denied claims that sections of the Immigration and Nationality Act granted detained aliens the right to periodic bond hearings during their detention.[363] While the case was decided mostly on due process arguments, the dissent by Justice Breyer linked principles from the Magna Carta and the Eighth Amendment to the due process right to a bail hearing and protection from arbitrary detention.[364]

In light of the most recent U.S. Supreme Court cases, as well as with the confirmation of Justices Neil Gorsuch and Brett Kavanaugh, it is likely that decisions to expand the Eighth Amendment right against cruel and unusual punishment will not soon be based on or swayed by principles of the Magna Carta. Decisions regarding application of the Eighth Amendment probably would follow the Scalia logic of only protecting against certain types of punishment in the near future, though the Magna Carta could still be referenced in dissents that may have an impact on future rulings.[365]

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361 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (applying the Miller v. Alabama, 567 U.S. 460 (2012) decision, the Court suggested that "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them . . . Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity – and who have since matured – will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment").

362 Moore v. Texas, 137 S. Ct. 1039, 1053 (2017).

363 *Jennings*, 138 S. Ct. at 846.

364 *Id.* at 859, 861 (Breyer J., dissenting).

365 Some states have enacted "three strikes" laws. When a defendant is convicted of a third offense, then the defendant is subject to a mandatory, severe sentence, such as 25 years to life in prison. In reviewing California's three strikes law, the U.S. Supreme Court found the laws to not be in violation of the constitutional right against cruel and unusual punishment. *See generally* Ewing v. California, 538 U.S. 11 (2003); Lockyer v. Andrade, 538 U.S. 63 (2003). The Court issued two 5-4 decisions on the same day, with a total of five opinions in *Ewing* and the court majority opinion and one dissent issued in *Lockyer*, yet of the six Justices who authored an opinion (Justice O'Connor wrote the plurality opinion in *Ewing* and the majority opinion in *Lockyer*; Justices Scalia and Thomas wrote opinions concurring in the judgment in *Ewing*; Justices Stevens and Souter filed dissenting opinions in *Ewing*; and Justice Souter authored the dissenting opinions for the four dissenters in *Lockyer*) not one Justice referred to the Magna Carta.

2. *The Death Penalty*

The Magna Carta was originally written as a guarantee of liberties against a disliked king.[366] Regardless of the rights the Magna Carta may provide, it is accepted that the Magna Carta was not originally meant to apply to the common man.[367] Rather, it was intended to protect barons and other powerful lords in medieval England against monarchial overreach.[368] Conversely, as recently as 2015, eight centuries after its inception, concepts within the Magna Carta were used to ensure the right of a minority of citizens to have their marriage recognized by the federal government and across state lines.[369] This demonstrates the continual value and evolution of the Magna Carta. Its ability to be reinterpreted provides it with life through the interpretation of a "living" U.S. Constitution.

This also demonstrates a possible path for the Magna Carta to continue down. William Blackstone stated the liberty provided in the Magna Carta to be "the power of locomotion, of changing situation . . . without imprisonment or restraint, unless by due course of law."[370] It appears to be an entirely procedural guarantee, but as seen in *Obergefell*, liberty can be interpreted as a much broader term.

Consider one of the contemporary substantive right debates: the right to live. Scholars have noted the Magna Carta's basis in natural law, a body of unchanging moral principles regarded as a basis for all human conduct.[371] Natural law influenced the 40th, 41st, and 48th Clauses of the Magna Carta, to name a few.[372] Historically, natural

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366 Helmholz, *supra* note 83, at 1476.

367 *See id.* at 1479.

368 *Id.*

369 Although the Magna Carta was only directly invoked by the dissenters, the Magna Carta may be seen as inspiring the wording of the very constitutional amendment which was held to contain the right. *Obergefell*, 576 U.S. at 724–25 (Roberts, C.J., dissenting).

370 1 WILLIAM BLACKSTONE, COMMENTARIES *121, *134.

371 Engle, *supra* note 228, at 490.

372 Richard H. Helmholz, *Magna Carta and the Law of Nature*, 62 LOY. L. REV. 869, 879 (2016); *see*, *e.g.,* Magna Carta (1215), *supra* note 73, cl. 40 ("To no one will we sell, to no one deny or delay right or justice."); *id.* cl. 41 (guaranteeing safe and secure passage to and from England for all merchants, and limiting the exaction of tax to "ancient and lawful customs" except in time of war"); *id.* cl. 48 (declaring all "evil customs" to be immediately investigated in each county by twelve sworn knights of the same county who would then abolish the evil customs, "completely and irrevocably").

law dominated the European continent in the early 1200s.[373] This assertion is bolstered by the parallelisms between the clauses of the Magna Carta in England and other documents being written in Europe around the same time.[374] Under contemporaneous natural law of the 1200s, it was accepted that there are some crimes so abhorrent that death was an acceptable penalty.[375] Though death was an acceptable penalty for morally reprehensible crimes abhorrent to life, Clause 20 of the Magna Carta protected individuals against punishment disproportionate to their crimes by stating: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."[376] Natural law theory has likewise evolved since the 1200s; the modern theory of natural law wholly proscribes death as a punishment.[377] With the U.S. Constitution being so influenced by the Magna Carta,[378] it is argued that to deprive someone of life is a violation of the natural law, and thus, against the Constitution as proscribed by the Eighth Amendment protection against cruel and unusual punishment.[379] This argument is interesting for two reasons: 1) it would provide another use of the Magna Carta and 2) it demonstrates the Magna Carta's ability to evolve.

Since the Magna Carta was written before the new natural law, it must have been inspired by the original natural law. There are no provisions regarding the penalty of death for a crime. Thus, it can be assumed that execution was acceptable as long as the due process requirements were followed, and the punishment was proportional to the abhorrence of the crime. Judging by the plethora of execution

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373 Helmholz, *supra* note 372, at 873.

374 *See id.* at 872.

375 Edward Feser, *Capital Punishment, Catholicism, and Natural Law: A Reply to Christopher Tollefsen*, PUB. DISCOURSE (Nov. 21, 2017), http://www.thepublicdiscourse.com/2017/11/20504/ [https://perma.cc/2RBU-8EMT]; *see also* Magna Carta (1215), *supra* note 73, cl. 20.

376 *Id.*

377 Feser, *supra* note 375*; see also* Steven A. Long, *God, Death, and the New Natural Law Theory*, THOMISTICA (Mar. 5, 2015), https://thomistica.net/posts/2015/1/8/god-death-and-the-new-natural-law-theory [https://perma.cc/F7UJ-MZCB].

378 *Trop*, 356 U.S. at 100; Engle, *supra* note 228, at 495.

379 Engle, *supra* note 228, at 511; *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

methods in the Middle Ages, it is clear that despite the barbarity of the actions, the Magna Carta originally did not take a stance against the death penalty.[380]

The avoidance of the subject may be attributable to the low frequency of capital punishment in the Middle Ages.[381] A second reason could be the vitality of capital punishment's role. When a government is in early development, capital punishment is helpful in demonstrating state power and control over its constituents.[382] The 1200s were unstable, as demonstrated by the Barons' rebellion leading up to the Magna Carta. Having the ability to demonstrate control through capital punishment could have been instrumental for King John in re-securing his role as king.[383]

Recently, new natural law theory has been invoked in order to protect human rights nationally and internationally.[384] Now, over 800 years after its drafting, the Magna Carta is more aligned with the new natural law approach as opposed to the natural law that formerly influenced it. As noted in *Green*, the Magna Carta "has become [something] very different indeed from the immediate objects of the barons at Runnymede."[385] Indeed, while some judges, especially Justice Hugo L. Black, have objected to a natural law jurisprudence as giving unfettered freedom to adopt legal standards based on personal notions of fairness rather than on actual legal texts,[386] newer concepts of natural law may help introduce general

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380 *Execution in the Middle Ages*, HISTORY.COM, http://www.history.co.uk/shows/britains-bloodiest-dynasty/articles/execution-in-the-middle-ages [https://perma.cc/SE8L-VLZY] (last visited Jan. 21, 2021).

381 RICHARD WARD, A GLOBAL HISTORY OF EXECUTION AND THE CRIMINAL CORPSE 3 (2015).

382 *Id.* at 11.

383 The 29th Clause of the 1225 Magna Carta states that a man shall not be attacked except by the lawful judgment of his peers. Magna Carta (1225), *supra* note 194, cl. 29. This could be a reservation that allows the King to secure his kingdom and prevent rebellion.

384 *See* Mark Searl, *A Normative Theory of International Law Based on New Natural Law Theory*, LONDON SCH. OF ECON., DEP'T OF L. 3 (Sept. 2014), https://etheses.lse.ac.uk/999/1/Searl_A_Normative_Theory_of_International_Law_Based_on_New_Natural_Law_Theory.pdf [https://perma.cc/SNJ2-ZCSB].

385 *Green*, 356 U.S. at 189; *see also supra* Part II.B.ii (discussing *Green*).

386 *Duncan*, 391 U.S. at 168–69 (Black, J., concurring) (opining that due process, simply a notion of "fundamental fairness," can "shift from time to time in accordance with judges' predilections and understandings of what is best for the country," that is gives "unconfined power . . . to judges in our Constitution that is a written one in order to limit

notions of procedural fairness as tied to core principles of justice, encompassed in the Magna Carta if not tied directly to a current, binding positive law such as the Constitution.

The Magna Carta has reached far beyond the common law countries to impact Civil Law and mixed-law nations as well as the United Nations. Consider the UDHR, which drew from the Magna Carta.[387] The UDHR states that all people have the right to life.[388] Judging by the effect on various signatory nations, that line has been interpreted to disapprove of the death penalty, as 118 nations have abolished capital punishment since the making of the Declaration.[389]

The United States has not followed this trend.[390] In 1976, the Supreme Court upheld the constitutionality of the death penalty.[391] In *Gregg*, the Petitioner was convicted of armed robbery and murder and sentenced to death.[392] The Supreme Court of Georgia found

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governmental power," and that, instead of "the particular judge's idea of ethics," that judge should decide cases based "on the boundaries fixed by the written words of the Constitution"); Adamson v. California, 332 U.S. 46, 75 (1947) (Black, J., dissenting) ("[T]he 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution.").

387 Shami Chakrabarti, *Magna Carta and Human Rights,* BRIT. LIBR. (Mar. 13, 2015), https://www.bl.uk/magna-carta/articles/magna-carta-and-human-rights [https://perma.cc/BH6P-96GK]. Eleanor Roosevelt called the UDHR the "international Magna Carta of all men everywhere." Karina Weller, *Magna Carta: The Origin of Modern Human Rights*, EACHOTHER (Apr. 3, 2017), https://eachother.org.uk/magna-carta-rights-today/ [https://perma.cc/96KM-7KC6]. In 1948, the United Nations took ideas from the Magna Carta in the Universal Declaration of Human Rights for freedom of movement, freedom from arbitrary arrest, and right to a trial by jury. The chairwoman of the committee, Eleanor Roosevelt, hoped that the declaration would extend the protections of the Magna Carta around the world and would become "the international Magna Carta of all men everywhere." In 1950, the European Convention on Human Rights was ratified, which used Clause 29 of the Magna Carta in its documents. Lock, *supra* note 16.

388 G.A. Res. 217A (III) A, *supra* note 245, art. 3.

389 Richard D. Vogel, *The Demise of the Death Penalty in the USA: The Politics of Capital Punishment and the Question of Innocence*, MR ONLINE (Nov. 22, 2019), https://mronline.org/2009/11/22/the-demise-of-the-death-penalty-in-the-usa-the-politics-of-capital-punishment-and-the-question-of-innocence/ [https://perma.cc/Z278-5W8V].

390 Twenty-nine states allow the death penalty as a sentence. Fortunately, only seven of those states actually executed someone in 2014. *United States of America (United States): Death Penalty Profile*, CORNELL L. SCH.: CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=united+states+of+america#f3-1 [https://perma.cc/RV6X-XZJ2] (last updated Oct. 1, 2020) [hereinafter *U.S. Death Penalty Profile*].

391 *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976).

392 *Id.* at 160–61.

that there was no prejudice or arbitrary factors in making the sentence. Thus, capital punishment was not excessive or disproportionate.[393] The Petitioner appealed by writ of certiorari to the U.S. Supreme Court on the grounds that the death penalty was a violation of the Eighth Amendment's protection against cruel and unusual punishment as incorporated to the states through the Fourteenth Amendment.[394] The U.S. Supreme Court discussed the relationship of the death penalty with the Eighth Amendment and concluded that the definition of "cruel and unusual" changes with time.[395]

Prior to their decision in *Gregg*, the U.S. Supreme Court's jurisprudence on the death penalty was in sync with modern international norms regarding the subject. In *Furman v. Georgia*, the defendants were convicted of murder or rape and sentenced to death.[396] In this instance, the Supreme Court held that the death penalty was a violation of the Eighth Amendment.[397] Separate concurring opinions which referenced the Magna Carta were authored by both Justice Marshall[398] and Justice Douglas.[399] Justice Douglas' concurrence noted that the language of the Eighth Amendment was taken from the English Bill of Rights of 1689's prohibition of arbitrary and excessive penalties, which was inspired by Clause 20 of the Magna Carta.[400] In Justice Marshall's concurrence, he noted that it had been previously argued that the Magna Carta forbade torture.[401]

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393 This applies to the murder charge. The death sentence with respect to the armed robbery since in Georgia the death penalty was rarely issued for robbery charges. *Id.* at 162.

394 *Id.*

395 *Id.* at 173 (affirming the Supreme Court of Georgia's decision, stating, "the Amendment must draw its meaning from the evolving standards of decency that mark a maturing society" (quoting *Trop*, 356 U.S. at 101)).

396 408 U.S. 238, 239 (1972).

397 *Id.* at 240.

398 *Id.* at 316 (Marshall, J., concurring).

399 *Id.* at. 240 (Douglass, J., concurring).

400 *Id.* at 242–43.

401 *Id.* at 316 (describing the use of cruel and unusual punishment on both convicted defendants and witnesses). With respect to these cases, the Supreme Court has not condemned the Death Penalty while the Court does acknowledge its permanency. *Gregg*, 428 U.S. at 187. It has imposed some limitations. *See generally Roper*, 543 U.S. 551 (holding that death penalty on juvenile offenders is unconstitutional), but more must be done. The frequency of executions does, however, seem to be diminishing. In 2007, there

The Magna Carta can be seen as evolving to a "living" document. This can create a conflict with our Constitution.[402] The Fifth Amendment reserves a right to deprive a citizen of life as long as that citizen is afforded a right of due process.[403] If the United States wishes to be recognized as a "maturing society," its treatment of the death penalty should evolve in tandem with the natural law as has the Magna Carta; thus, the nation must recognize that the right to life cannot be taken away by the government, even when citizens are afforded due process. This most significant challenge thus remains: how to meet the necessity to evolve while adhering to basic principles.

A longstanding principle is that the U.S. Constitution, like the Magna Carta, presents for posterity a "living document" capable of being reinterpreted with respect to changing moral and societal norms.[404] The living document theory is proposed as the way to interpret the Constitution because times change.[405] Another view is originalism, which is the idea that the Constitution should be interpreted as originally written.[406] Originalists look to the words of the text and the minds of the Founders when writing the Constitution.[407] Originalists argue this is the way that the Constitution should be interpreted because 1) "it binds and limits any particular generation from ruling according to the passion of the times[,]" 2) the Founders intended to limit government, 3) it ensures the separation of power, like preventing the Supreme Court from

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were forty-two executions. In 2017, the number of executions dropped to twenty-three for the entire year, indicating a 50% decrease in ten years. *U.S. Death Penalty Profile*, *supra* note 390.

402 The Framers' acceptance of the death penalty is apparent from the text of the Constitution. *See Gregg*, 428 U.S. at 177. Without maturing, the Magna Carta's denouncement and the Constitution's acceptance conflict with one another.

403 U.S. CONST. amend V. ("No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law[.]").

404 Thurgood Marshall, Justice, U.S. Sup. Ct., Remarks at the Annual Seminar of the S.F. Pat. and Trademark Law Ass'n, The Bicentennial Speech (May 6, 1987), transcript available at http://thurgoodmarshall.com/the-bicentennial-speech/ [https://perma.cc/66PE-PKP5].

405 Jason Swindle, *Originalism vs. "Living Document"*, SWINDLE L. GRP. P.C. (Oct. 29, 2017), https://www.swindlelaw.com/2017/10/originalism-living-constitution-heritage/ [https://perma.cc/8CTV-KER8].

406 *Id.*

407 *Id.*

creating law, 4) the Founders understood humans have self-motivated impulses, so the Constitution tries to limit those impulses while allowing amendment, and 5) originalism is not result-oriented.[408] Under originalism, the death penalty is not a valid form of punishment because it is not expressly in the Constitution. In fact, the living document theory of the Constitution is the more popular theory for interpreting this theory.[409]

The flexibility of the U.S. Constitution has been demonstrated by providing protection to historically oppressed groups through the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.[410] For instance, not only was slavery legal at the inception of the U.S. Constitution, slaves were counted as only three-fifths of a whole person for the purpose of census-taking while Native Americans were wholly ignored.[411] It is through the evolving interpretation of the Constitution's words in parallel with the evolution of the natural law, as well as by incorporation of its protections to the states through the Fourteenth Amendment, that these same classes were afforded the same rights and protection.[412]

The basis for this argument about a progressing explanation of key constitutional concepts could come from the Great Charter's omission of the death penalty, as it only provided the king with the ability to disseize freeholds, liberties, and customs. In other words, the Constitution should be amended to state that there is a right to impose the death penalty because without that provision the United States is carrying out a "right" not stated in the Constitution. This could serve as a foundation for the Supreme Court to show that the previous interpretation of the Fifth Amendment is incongruent with the new interpretation of the Magna Carta, focusing specifically on

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408 *Id.*

409 *See id.*

410 Mark Charles, *What if We Struck Racism and Sexism from the Constitution of the United States, Actually Abolished Slavery, and Added 2 Simple Words Articulating Value for Life?*, WIRELESSHOGAN, (May 9, 2017) https://wirelesshogan.com/2017/05/09/what-if-we-struck-racism-and-sexism-from-the-constitution/ [https://perma.cc/3AUM-AZZT].

411 *Id.*; *see also* U.S. CONST. art. I, §2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

412 *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (ruling separate is not equal).

a new definition of "life." That approach is required as the United States continues to create necessary human rights. Indeed, the entire point of both the Magna Carta and the Fifth Amendment is that the rights have existed since "time immemorial."[413] It is not the government that creates or grants these rights; rather, their incorporation into these documents confirms rights that are "endowed by the creator" and not able to be taken by the government.

3. *Protection Against Arbitrary Punishment*

In *Furman v. Georgia*, Justice Douglas's concurring opinion cited to the Magna Carta to support the proposition that the Eighth Amendment was intended to protect against arbitrary and discriminatory punishments.[414] In *Furman*, the Court concluded that imposing and carrying out the death penalty would constitute cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments.[415] Justice Douglas explained: "[T]he provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature."[416]

To support the proposition that one of the aims of the English Bill of Rights was to protect against arbitrary and discriminatory punishments, Justice Douglas cited to the Magna Carta;[417] he explained that following the Norman conquest of England in 1066, the old system of penalties was replaced by a system that imposed discretionary amercements.[418] Although the system allowed the particular circumstances of each case to be considered when arriving at an amount to fine the defendant, arbitrary and excessive amercements became prevalent.[419] As a result, three clauses of the Magna Carta of 1215 were devoted to protecting against arbitrary

413 *See supra* Part I.A (noting that the Magna Carta did not create substantive rights, but affirmed and codified rights present since "time immemorial").

414 408 U.S. at 243 (Douglas, J., concurring).

415 *Id.* at 239–40.

416 *Id.* at 241.

417 *Id.* at 243.

418 *Id.* at 242–43.

419 *Id.* at 243.

and excessive punishments.[420] Against this backdrop, Justice Douglas concluded, the English Bill of Rights, from which the Eighth Amendment was modeled after, was created.[421] As such, the same protection against arbitrary and excessive punishments survived.

4. *Protection Against Punitive Damages*

While not commonly granted,[422] punitive damages are another area of punishments protected by the Magna Carta. Punitive damages are compensation paid by the losing party in order to discourage the losing party's behavior in society.[423] The principle of proportionality is invoked because punitive damages should be calculated in proportion to the losing party's wrongdoing.[424]

Today, the Great Charter serves as protection against arbitrary damages as it did against amercements in the era of King John.[425] Both amercements and punitive damages serve as punishment for wrongdoing. The Magna Carta does not prohibit punitive damages from being awarded, despite few clear ways of determining what

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420 *Furman*, 408 U.S. at 243–45 (1972) (Douglas, J., concurring) ("The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. . . . The words 'cruel and unusual' certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty - or any other penalty - selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."); Magna Carta (1215), *supra* note 73, cl. 20, 21, 22. The protection continued into subsequent editions of the Magna Carta. Magna Carta (1225), *supra* note 194, cl. 14.

421 *Furman*, 408 U.S. at 242–43.

422 *Fact Sheet: Punitive Damages: Rare, Reasonable, and Limited (2011)*, CTR. FOR JUST. DEMOCRACY AT N.Y. L. SCH., https://centerjd.org/content/fact-sheet-punitive-damages-rare-reasonable-and-limited-2011 [https://perma.cc/A8FH-22XN] (last updated Apr. 2011) [hereinafter *Fact Sheet: Punitive Damages*].

423 James F. Ferrelli & Trevor H. Taniguchi, *Roots of New Jersey Punitive Damages Law in Magna Carta*, 294 N.J. LAW. MAG. 36, 36 (2015).

424 *Id. See* BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996).

425 Generally, the Great Charter continues to be invoked, in any number of common law countries, for its prohibition of any number of arbitrary governmental actions. In Australia and New Zealand, for example, the Magna Carta is considered when deciding the following: sentencing principles, the right to trial according to law, a prohibition on arbitrary detention, and the foundation of prohibitions against cruel or unusual punishments. Clark, *supra* note 176, at 875.

the financial equivalent of a "punishment" is.[426] As noted in statutes and in the common law, punitive damages are only required to be proportional.[427] In a more radical sense, it could be argued that the Magna Carta protects the granting of punitive damages when such a grant is not in proportion to the offense.

Under the Civil Law system, which generally has not adopted the Magna Carta, punitive damages are very unlikely to be awarded.[428] On the other hand, almost all common law countries which have adopted the Magna Carta in some form allow punitive damages to harmed litigants.[429] In fact, in the United States, some states have used the Magna Carta to craft punitive damage statutes.[430] Internationally, New Zealand, a country with roots in the Magna Carta,[431] allows entire cases based solely on punitive damages.[432]

Unfortunately, with the slow decline in the awarding of punitive

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426 Punitive damages were awarded during the time of the Magna Carta. Mimi B. Miller, *Torts – Punitive Damages: A New Finish on Punitive Damages. BMW of North America v. Gore, 116 S. Ct. 1589 (1996)*, 19 U. ARK. LITTLE ROCK L. REV. 519, 523 (1997) (noting that English common law has been using punitive damages since the thirteenth century).

427 Ferrelli & Taniguchi, *supra* note 423, at 36. Note, however, not all jurisdictions require proportionality. Some states only set maximum caps. *See* ARK. CODE ANN. § 16-55-208 (2003) (*declared unconstitutional by* Bayer CropScience LP v. Schafer, 385 S.W.3d 822 (Ark. 2011)).

428 ROBERT W. EMERSON, BUSINESS LAW 477 (6th ed. 2015) (stating that a large majority of Civil Law countries do not permit the awarding of punitive damages). The purpose of this Article is not to identify why Civil law nations have chosen to adopt "moral damages" as opposed to "punitive damages." It could be attributed to the "end goal."

429 *Id.*

430 *See* N.J. STAT. ANN. § 2A:15-5.14 (2006) ("[T]he trial judge shall ascertain that the award is reasonable in its amount and justified in the circumstances of the case.").

431 When New Zealand was incorporated into the British Empire, the native inhabitants of New Zealand were provided with the same rights as British Englishmen. STEPHEN LEVINE, NEW ZEALAND AS IT MIGHT HAVE BEEN 42 (2006). In fact, the Magna Carta's imprint can be seen in the adopting legislation of both independent Australia and New Zealand; thus, in statutes enacted from 1969 to 1998, the Magna Carta's preamble and Clause 29 appear in the Imperial Acts Application Ordinances of several Australian states (Victoria, New South Wales, Queensland, and the Australian Capital Territory) and of the New Zealand national government. Clark, *supra* note 176.

432 *New Zealand Legal Environment – A Summary of the Major Differences Between the New Zealand Legal System and Other Legal Systems.*, WILSON HARLE, https://www.wilsonharle.com/legal-information/nz-legal-guides/new-zealand-legal-environment [https://perma.cc/Y2TY-YPLV] (last visited Jan. 13, 2021) (noting that English law serves as the source of awarding punitive damages New Zealand).

damages, this may not be a necessary path for the Great Charter to continue.[433] In 2007, the Supreme Court ruled that excessive punitive damages are takings of property without due process.[434] Along these lines, substantive due process may justify denial or diminution of punitive damages when a losing party has personal circumstances preventing such a large payment. Sometimes, when an excessive fine is imposed, a defendant may feel compelled to declare bankruptcy,[435] thus resulting in the plaintiff's getting less than the plaintiff may have received if a more "reasonable" damages award had been imposed.[436] Nonetheless, the Great Charter may continue to protect defendants from excessive punitive damages, regardless of whether the wrongful act causes physical harm or harm that is less tangible or visible. A recent example of this protection offered to Defendants is found in *Payne v. Jones*. In *Payne*, the U.S. Court of Appeals for the Second Circuit interestingly ruled that $300,000 was excessive punitive damages in an excessive force and battery claim committed by a police officer.[437] The English Bill of Rights,[438] in some states' Declaration

433 There was a decrease in the recovery of punitive damages from 2001 to 2005. *Fact Sheet: Punitive Damages*, *supra* note 422. *But see* Daniel M. Braun, *The Risky Interplay of Tort and Criminal Law: Punitive Damages*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 449, 449–50 (2013) (claiming the size of punitive damage awards has increased).

434 Phillip Morris USA v. Williams, 549 U.S. 346, 349 (2007).

435 While awards based on fraud or other intentional wrongdoing ordinarily are not dischargeable, punitive damages may be discharged, depending on the underlying facts. The United States Court of Appeals for the Fourth Circuit reiterated in TKC Aerospace Inc. v. Muhs, 923 F.3d 377 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 607 (2019), that such debts may be dischargeable if the debtor did not intend to cause injury. Thus remains strong the longstanding principle expressed in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), that a bankruptcy discharge under 11 U.S.C. § 523(a)(6) requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau*, 523 U.S. at 61.

436 In bankruptcy, for example, when a judgment debtor is able to discharge some of that debt, the plaintiff creditor may get paid in "bankruptcy dollars," perhaps just pennies on the dollar.

437 711 F.3d 85, 87 (2d Cir. 2013) (recounting that the defendant police officer verbally agitated and repeatedly punched the plaintiff war veteran, who was being admitted into a mental hospital after experiencing a post-traumatic stress disorder episode at another hospital).

438 An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown 1689, 1 & 2 W. & M. c. 2 (Eng.), *available at English Bill of Rights, 1689, an Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights)*, U. OF MINN. HUM. RTS LIBR., http://hrlibrary.umn.edu/education/engbillofrights.html [https://perma.cc/3F62-F3D5]

of Rights[439] as well as the U.S. Constitution's Eighth Amendment,[440] reaffirms the Magna Carta's idea of no excessive bail or fines.

Consider Clause 14 (1225) of the Magna Carta: "A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . ."[441] In other words, the "Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'"[442] It creates a proportionality requirement that has been demonstrated in most Supreme Court decisions.[443] In most instances, punitive damages are awarded for grave offenses.[444] The Great Charter has no requirement that the offense requiring due process occur in the civil or criminal prosecution, therefore it should be applicable to punitive damages that arise in either situation.[445]

The Supreme Court has already determined that civil suit punitive damages are not restricted by the Excessive Fines Clause, so a civil defendant cannot rely solely on constitutional protection from arbitrary punitive damages. *Browning-Ferris Industries* held that the Excessive Fines Clause does not apply in civil cases,[446] but this could change. At the very least, a reasoned, nuanced judgment

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(last visited Jan. 14, 2021).

439 *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

440 U.S. CONST. amend. VIII.

441 Magna Carta (1225), *supra* note 194, cl. 14.

442 *Timbs*, 139 S. Ct. at 688 (alteration in original) (quoting *Browning*, 492 U.S. at 271). Finding the Excessive Fines Clause to be an incorporated protection applicable to the states under the Due Process Clause, the Court held that the safeguard "is 'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'" *Id.* at 686–87 (alterations in original) (quoting *McDonald*, 561 U.S. at 767).

443 *See supra* Part II.C.i.

444 *Punitive Damages*, CORNELL L. SCH., https://www.law.cornell.edu/wex/punitive_damages [https://perma.cc/9PXY-987J] (last visited Jan. 14, 2021).

445 By the lack of a restriction, the Magna Carta may protect defendants where the Excessive Fines Clause may not. *See* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 532 (2011) (noting that punitive damages are outside of the scope of the Excessive Fines Clause of the Eighth Amendment).

446 *Browning*, 492 U.S. at 263–64 (1989) ("[W]e now decide [that the Excessive Fines Clause] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

may take hold. Some lower courts have imposed a proportionality test to determine if the award of punitive damages is proportional.[447] In response, defendants could invoke the venerable, jurisprudential architecture of the Magna Carta and its requirement that there be proportional payment for grave or trivial offenses. With its central place in the Anglo-American legal firmament, the Magna Carta may show a clearer path of how punitive damages can be fairly awarded.

Some courts seem to have even created an informal formula for determining whether punitive damages are excessive. Two years after *Payne*, the Tenth Circuit reduced the punitive damages awarded to the plaintiff apartment tenant, who was exposed to carbon monoxide, from $22 million to $1.95 million to reflect a 1:1 ratio to the compensatory damages the jury awarded the plaintiff.[448] However, there have been instances where courts have extended the ratio to 2:1 when it is found that the defendant's conduct was egregious or intentional.[449]

By requiring a defendant's personal circumstances to be considered, the Magna Carta can continue serving a purpose through its "salvo contenemento suo" principle. An individual's inability to pay may deprive him or her of the necessary enjoyment of life and liberty.[450] Studies have demonstrated that, in the criminal arena, economic sanctions have some extremely harsh results.[451]

The Magna Carta has already influenced legislation in providing a reasonableness requirement on the amount of punitive damages that may be awarded. Some states have employed a reasonableness standard, while others weigh the defendant's financial situation.[452]

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447 *See In re* Actos Prod. Liab. Litig., No. 6:11-md-2299, 2014 WL 5461859, at *15–23 (W. D. La. Oct. 27, 2014); Hawks v. Greene, No. M1999-02785-COA-R3-CV, 2001 WL 1613889, at *7–8 (Tenn. Ct. App. Dec. 18, 2001); United States v. One Parcel Prop. Located at 427 & 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996).

448 Lompe v. Sunridge Partners, LLC, 818 F.3d 1041, 1076 (10th Cir. 2016) (concluding that because the amount of compensatory damages was so substantial, the equal amount awarded as punitive damages would represent the maximum amount that due process would allow).

449 Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 146 (2d Cir. 2014) (holding that a 2:1 ratio is appropriate where defendants subjected the plaintiff to "an extraordinary and steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years").

450 Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 281 (2014).

451 *Id.* at 290–95.

452 MINN. STAT. § 549.20 (1990); KAN. STAT. ANN. § 60-3701(b)(6), (7) (1998).

These latter ruminations may be vital if one is to shelter a defendant's lifestyle and livelihood, while still discouraging that defendant's inappropriate or outright wrongful behavior. For example, if Smith and Jones are both defendants for lawsuits based upon allegedly reckless driving, but Smith has no disposable income, a punitive award may strip away Smith's way of life while leaving Jones in an increasingly superior financial situation compared to Smith.

The main purposes of punitive damages are to punish and deter similar conduct. In the United States, punishment is normally handled by the criminal justice system. There is not typically a necessity for it to bleed into civil law and remove distinctions between tort and criminal law.[453] As punitive damages continue to increase in size or at least possibilities of an award, the U.S. Supreme Court must intervene to allow for consideration of an individual's financial circumstances. Recently, the U.S. District Court for the Eastern District of Louisiana upheld a $20 billion settlement for British Petroleum's Deepwater Horizon Oil Spill, which included the imposition of punitive damages.[454] To wrest punitive damages from defendants necessitated that courts consider the resources of British Petroleum, the ability of the corporation to pay the fines as well as continue functioning, and the deterrent value of such an imposition.[455] In the future, it appears highly likely that in the civil arena large corporations will still face the risk of punitive damages when committing gross negligence or willful misconduct.

IV. Conclusion

The Magna Carta, as enacted at Runnymede, affirmed liberties that had existed "since times immemorial"[456] but had heretofore

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453 Braun, *supra* note 433, at 453.

454 *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 21 F. Supp. 3d 657, 757 (E.D La. 2014); *see* Devin Henry, *Judge Approves $20B BP Oil Spill Settlement*, THE HILL (Apr. 4, 2016), https://thehill.com/policy/energy-environment/275100-judge-approves-20b-settlement-over-bp-oil-spill [https://perma.cc/R8BU-W6MV].

455 *Id.* at 751 ("The Ninth Circuit's maritime rule follows the Restatement, which allows punitive damages against the corporate entity when the actor was in a 'managerial capacity' and performing within the scope of his employment. . . . The First Circuit appears to also use the managerial agent theory, but with the added requirement that there be 'some level of [corporate] culpability for the misconduct.' The Court finds that punitive liability would attach to BPXP under this standard as well.").

456 *See* discussion *supra* Part I.

been indefinite and uncodified. Although the Magna Carta fell into disuse throughout the fifteenth and sixteenth centuries, continued invocation of the Magna Carta on solemn occasions helped provide a luster that it retains to this day. Judge Coke initiated the Magna Carta's renaissance in the early seventeenth century, as he effectively used the Charter to place the legislative power of Parliament beyond monarchical authority as well as within the foundational common law.[457]

When England established its first American colony in the same time frame (the seventeenth century), the English brought with them the traditions of the Magna Carta and the common law.[458] The common law traditions inspired the early Americans to codify the Magna Carta's guarantees in their statutes, state constitutions, and the U.S. Constitution. Therefore, the time of the Magna Carta and early English common law is of particular relevance to courts analyzing the original meaning of rights guaranteed by the U.S. Constitution. Accordingly, the Court has analyzed the meaning of "due process" by analyzing the meaning of the Magna Carta's "law of the land" provision,[459] the meaning of "life, liberty, and property" by looking to what rights have been historically protected by the Magna Carta,[460] the right to a jury trial by looking at the meaning of "lawful judgment of his peers,"[461] and the meaning of "cruel and unusual punishment" by looking at English common law and Clause 20's prohibition of excessiveness in the context of amercements.[462]

These uses have expanded the fundamental liberties upon which American jurisprudence is based. As evidenced by the large number of cases under Appendix A discussing due process[463] when compared to the relatively few cases discussing jury trials and cruel

457 *Id.*

458 *Id.*

459 *See* discussion *supra* Part II.A.i.

460 *See* discussion *supra* Part II.A.ii.

461 *See* discussion *supra* Part II.B.

462 *See* discussion *supra* Part II.C.

463 There have been twenty-one majority opinions discussing due process and the Magna Carta, and twenty-three other opinions likewise featuring the Magna Carta in a non-majority opinion such as concurrences or dissents. *See infra* Appendix A.

and unusual punishment in Appendices B[464] and C,[465] the Magna Carta's capacity to further define American liberties may lie not simply with due process, but with the Sixth and Eighth Amendments. The Magna Carta will continue to play a quieter and perhaps undefined role as a foundation to rights and liberties protected by the U.S. Constitution. While the Magna Carta may see its direct citations decrease,[466] the principles contained in the Great Charter may continue to inspire our understanding and interpretation of foundational rights.

Regardless of whether the U.S. Supreme Court will continue alluding to the Magna Carta on any particular issue, the Great Charter is by no means finished with demonstrating its value.[467] Instead, the Magna Carta will simply transition into a different role. It can once again be characterized as a restriction on the executive power of a country, like how it was used to restrict the authority of King John in 1215. But there is much more to see and consider than an allusion between the rule of a medieval king and a modern U.S. President. The U.S. Supreme Court could use the Magna Carta in the future to produce a modern justice that is, nonetheless, nearer to both (1) the earlier document's words and its interpretation in subsequent centuries, such as by the great Sir Edward Coke, and (2) the U.S. Constitution's text as well as its framers' intent. The Magna Carta as the people's protection against a despotic English monarchy in both the thirteenth and eighteenth centuries, as well as in service to Coke's rebellion against the Stuarts in the seventeenth century, remains a useful tool for twenty-first century U.S. common law and constitutional jurisprudence.

It is worth noting the Magna Carta's use in efforts against the

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464 There have been eleven majority opinions discussing the right to jury trial and the Magna Carta, and ten other opinions, mainly dissents, likewise featuring the Magna Carta. *See infra* Appendix B.

465 There have been six majority opinions discussing cruel and unusual punishment as well as the Magna Carta, with eight other opinions – seven dissents and one concurrence – similarly featuring the Magna Carta. *See infra* Appendix C.

466 Presently, it is exactly the opposite: the number of citations to the Great Charter of 1215 is, if anything, on the rise in U.S. federal and state courts. *See supra* notes 30–34 and accompanying text; *infra* Appendices A, B, and C (showing that U.S. Supreme Court opinions discussing the Magna Carta and due process, jury trial, or cruel and unusual punishment have increased dramatically since the 1960s).

467 Outside of creating substantive rights, the Magna Carta may continue to be used by the Supreme Court for statutory construction. *See* Helmholz, *supra* note 372, at 886.

"War on Terror" over a decade ago. There, we see that the Magna Carta may revert from a "source of rights" into a "restraint on the government." Indeed, due process must be granted. Consider the cases of *Hamdi v. Rumsfeld*, a "War on Terror" case in which the Magna Carta was acknowledged in the concurrence.[468] Justice Souter believed that the Magna Carta's protection fell short with respect to Hamdi's right of Habeas Corpus.[469] Though the focus on the War on Terror has declined, the Supreme Court may continue to use the Magna Carta in guaranteeing a trial for an unpopular defendant. In the early 2000s, it was terrorists or enemy combatants. Perhaps, in the future, the Magna Carta can be used to protect the jury trial rights of alleged domestic terrorists.

As noted in *Harmelin v. Michigan*, there is no proportionality guarantee in the Eighth Amendment. Thus, with respect to punishments, the future of the Supreme Court is limited on this front. However, the Magna Carta may still be of influence with regards to excessive fines. After *Bajakajian*, lower courts were still left confused on determining 1) whether a certain punishment was "cruel" and 2) whether the punishment was unconstitutional given the crime.[470] The Magna Carta may continue to be of use by connecting U.S. common law to the English case law that provides those sorts of measurements.

Secondly, *Harmelin* did not restrict the Magna Carta's link between the penalty and the circumstances of the offender.[471] The Magna Carta may continue to demonstrate its value by protecting an offender in a situation in which the amount of punitive damages is not proportioned according to the person's circumstances. Whether the offender's circumstances may be considered in deciding if a punishment is constitutional was expressly reserved in *Bajakajian*.[472]

Lastly, the Magna Carta may provide a way forward for reevaluating the death penalty, punitive damages, and jury trials. It may even provide guidance to newly evolving frontiers such as internet protection and access to needed products such as drugs. In

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468 Kasper, *supra* note 86, at 569.

469 *Id.*

470 McLean, *supra* note 358, at 845.

471 *Id.* at 836 (noting two constitutional principles come from the Excessive Fines Clause of the Eight Amendment).

472 *Id.* at 847.

Raich v. Gonzalez,[473] for example, the court heard the issue of a fundamental right of access to unapproved products. The appellate court analyzed the asserted right by asking whether it was deeply rooted in our nation's history:

> It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course, this Court has never accepted that view.[474]

While the United States continues to mature, the Magna Carta, with its age and influence, remains a highly valuable interpretive tool, if not an imperative. Though the future of the Great Charter is not secure for all matters, its presence in the courtroom will continue to determine paramount legal questions. The Magna Carta is not only to be invoked for historical purposes, but it can serve a functional role: to keep playing a part in identifying fundamental rights. History is, indeed, a very important aspect of finding fundamental rights. With that in mind, we see the ability of a venerable but also vibrant Magna Carta to influence the declaration or expansion of a set of fundamental, modern rights.

Appendices

Appendix A: U.S. Supreme Court Opinions About Due Process that Cite to the Magna Carta

Year	Case	Citation	Type of Opinion	Magna Carta Treatment
1856	Murray's Lessee v. Hoboken Land & Improvement Co.	59 U.S. 272, 276	Majority	Linkage of "law of the land" with "due process"
1877	Davidson v. New Orleans	96 U.S. 97, 101	Majority	Linkage of "law of the land" with "due process"

473 500 F.3d 850, 857 (9th Cir. 2007).

474 *Id.* at 862 (quoting *Casey*, 505 U.S. at 847).

1878	Beckwith v. Bean	98 U.S. 266, 294	Dissenting	Linkage of "law of the land" with "due process"
1884	Hurtado v. California	110 U.S. 516, 522, 540	Majority, Dissenting	Linkage of "law of the land" with "due process"
1908	Twining v. New Jersey	211 U.S. 78, 100	Majority	Right is long-standing
1940	Chambers v. Florida	309 U.S. 227, n.10	Majority	Citing Magna Carta as support for due process
1945	Malinski v. New York	324 U.S. 401, 414	Concurring	Right is long-standing
1947	Louisiana ex rel. Francis v. Resweber	329 U.S. 459, 467	Concurring	Right is long-standing
1958	Kent v. Dulles	357 U.S. 116, 125	Majority	Meaning of "liberty"
1959	Bartkus v. Illinois	359 U.S. 121, 126	Majority	Due process has been expanded since the time of the Magna Carta
1961	Poe v. Ullman	367 U.S. 497, 541	Majority	Due process has been expanded since the time of the Magna Carta
1963	Kennedy v. Mendoza-Martinez	372 U.S. 144, 186	Majority	Right is long-standing
1964	Bell v. Maryland	378 U.S. 226, 293 n.10	Concurring	Roots of due process of law in Magna Carta; Meaning of "liberty"

1965	Republic Steel Corp. v. Maddox	379 U.S. 650, 669	Dissenting	Roots of “law of the land” and due process in Magna Carta
1968	Duncan v. Louisiana	391 U.S. 145, 151, 169	Majority, Concurring	Magna Carta as assurance of due process of law
1970	*In re* Winship	397 U.S. 358, 378	Dissenting	Linkage of “law of the land” with “due process”
1971	McGautha v. California	402 U.S. 183, 243	Dissenting	Roots of due process of law in the Magna Carta; Magna Carta as restraint on the executive
1972	Furman v. Georgia	408 U.S. 238, 243	Concurring	Magna Carta was intended to protect against arbitrary powers of government
1976	Moody v. Daggett	429 U.S. 78, 92	Dissenting	Magna Carta as foundational for the due process right to speedy trial
1977	Ingraham v. Wright	430 U.S. 651, 673	Majority	Right is long-standing
1980	Rummel v. Estelle	445 U.S. 263, 288	Dissenting	Magna Carta was intended to protect against arbitrary powers of government
1980	O’Bannon v. Town Nursing	447 U.S. 773, 792	Concurring	Linkage of “law of the land” with

	Ctr.			"due process"
1986	Daniels v. Williams	474 U.S. 327, 332	Majority	Magna Carta was intended to protect against arbitrary powers of government
1989	Browning-Ferris Indus. v. Kelco Disposal	492 U.S. 257, 268	Majority	Magna Carta was intended to protect against arbitrary powers of government
1991	Pac. Mut. v. Haslip	499 U.S. 1, 28	Concurring	Linkage of "law of the land" with "due process"
1992	Collins v. City of Harker Heights	503 U.S. 115, n.10	Majority	Magna Carta was intended to protect against arbitrary powers of government
1992	Planned Parenthood v. Casey	505 U.S. 833, 847	Majority	Magna Carta was intended to protect against arbitrary powers of government
1994	Albright v. Oliver	510 U.S. 266, 272	Majority	Magna Carta as protection against arbitrary use of powers of government
1996	BMW v. Gore	517 U.S. 559, 588	Concurring	Magna Carta was intended to protect against arbitrary powers of government

1996	Seminole Tribe of Fla. v. Florida	517 U.S. 44, 135 n.32	Dissenting	Magna Carta as foundational for due process.
1997	Washington v. Glucksberg	521 U.S. 702, 757	Concurring	Linkage of “law of the land” with “due process”
1998	E. Enters. v. Apfel	524 U.S. 498, 559	Dissenting	Right is long-standing
1998	County of Sacramento v. Lewis	523 U.S. 833, 845	Majority	Magna Carta was intended to protect against arbitrary powers of government
2003	State Farm v. Campbell	538 U.S. 408, 417	Majority	Magna Carta was intended to protect against arbitrary powers of government
2004	Hamdi v. Rumsfeld	542 U.S. 507, 553	Dissent	“Law of the land” as foundational for confining executive power
2005	U.S. v. Booker	543 U.S. 220, 239	Majority	Magna Carta intended by founders to protect against tyranny
2008	Boumediene v. Bush	553 U.S. 723, 740	Majority	Right is long-standing
2010	McDonald v. Chicago	561 U.S. 742, 815	Concurring	Magna Carta as foundational to the Privileges or Immunities Clause

2015	Dep't of Transp. v. Ass'n of Am. R.Rs.	575 U.S. 43, 72	Concurring	Magna Carta as foundational for protection of private rights against government intrusion
2015	Kerry v. Din	576 U.S. 86, 91–92	Plurality	Magna Carta and application of "liberty" for due process in immigration/marriage
2015	Obergefell v. Hodges	576 U.S. 644, 723–26	Dissenting	Meaning of "liberty"
2018	Jennings v. Rodriguez	138 S. Ct. 830, 861	Dissenting	Mentioning Magna Carta
2019	Timbs v. Indiana	139 S. Ct. 682, 687–88	Majority	Citing Magna Carta and deciding that the Excessive Fines Clause in the Eighth Amendment applies to the states through the 14th Amendment's Due Process Clause

Appendix B: U.S. Supreme Court Opinions on Right to Jury Trial Citing the Magna Carta

Year	Case	Citation	Type of Opinion	Magna Carta Treatment
1879	Strauder v. West Virginia	100 U.S. 303, 308–09	Majority	Blackstone, in his Commentaries, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter"
1888	Callan v. Wilson	127 U.S. 540, 552	Majority	Discussing linkage of "lawful judgment of his peers" with the right to jury trial
1899	Capital Traction Co. v. Hof	174 U.S. 1, 19	Majority	Right is long-standing
1895	Sparf v. U.S.	156 U.S. 51, 114	Dissent	Right is long-standing
1900	Maxwell v. Dow	176 U.S. 581, 609	Dissenting	Right is long-standing and requires protection against arbitrary power of juries

1942	Glasser v. U.S.	315 U.S. 60, 85	Majority	Discussing origins of jury trial as "privilege" under English law
1958	Green v. U.S.	356 U.S. 165, 187	Majority	Noting that Magna Carta and constitutional concepts of a right to jury trial does not extend to many cases involving contempt
1967	Klopfer v. North Carolina	386 U.S. 213, 223	Majority	Right is long-standing
1968	Duncan v. Louisiana	391 U.S. 145, 151	Majority	Right is long-standing
1970	Williams v. Florida	399 U.S. 78, 91	Majority	Discussing linkage of "lawful judgment of his peers" with the right to jury trial
1971	McGautha v. California	402 U.S. 183, 244	Dissenting	Discussing that right to jury trial cannot be frozen to the time of the Magna Carta
1971	McKeiver v. Pennsylvania	403 U.S. 528, 563	Dissenting	Making the textual argument that "freeman" extends to juveniles
1974	Pernell v. Southall Realty	416 U.S. 363, 371	Majority	Distinguishing trial by assize

				and trial by jury
1976	Moody v. Daggett	429 U.S. 78, 92	Dissenting	Right is long-standing
1977	U.S. v. Lovasco	431 U.S. 783, 800	Dissenting	Right is long-standing
1990	Walton v. Arizona	497 U.S. 639, 711	Dissenting	Right is long-standing
2005	U.S. v. Booker	543 U.S. 220, 239	Majority	Right is long-standing
2010	McDonald v. Chicago	561 U.S. 742, 815	Concurring	Magna Carta as foundational for the right to a jury trial
2012	S. Union Co. v. U.S.	567 U.S. 343, 370	Dissenting	Historical analysis of Magna Carta's limitations on a judge in a jury trial
2016	Betterman v. Montana	136 S. Ct. 1609, 1617–18	Majority	Sixth Amendment Speedy Trial Clause did not apply to a delay between the defendant's conviction and sentencing

Appendix C: U.S. Supreme Court Opinions About Cruel and Unusual Punishment that Cite to the Magna Carta

Year	Case	Citation	Type of Opinion	Magna Carta Treatment
1910	Weems v. U.S.	217 U.S. 349, 376	Majority	Meaning of cruel and unusual punishment
1958	Trop v. Dulles	356 U.S. 86, 100	Majority	Meaning of cruel and unusual punishment
1971	McKeiver v. Pennsylvania,	403 U.S. 528, 563	Dissenting	Magna Carta prohibited punishment without "lawful judgment"
1972	Furman v. Georgia	408 U.S. 238, 243	Concurring	Meaning of cruel and unusual punishment
1979	Carmona v. Ward	439 U.S. 1091, 1094	Dissenting	Meaning of cruel and unusual punishment
1980	Rummel v. Estelle	445 U.S. 263, 288	Dissenting	Meaning of cruel and unusual punishment
1983	Solem v. Helm	463 U.S. 277, 284	Majority	Meaning of cruel and unusual punishment
1984	Spaziano v. Florida	468 U.S. 447, 473 n.9	Dissenting	Eighth Amendment was derived from the Magna Carta
1987	McCleskey v. Kemp	481 U.S. 279, 339 n.10	Dissenting	Magna Carta restricted discretionary

				fines
1989	Browning-Ferris Indus. v. Kelco Disposal	492 U.S. 257, 268	Dissenting	Discussing the principle of proportionality between the crime and punishment
1991	Harmelin v. Michigan	501 U.S. 957, 967	Majority	Discussing the principle of proportionality between the crime and punishment
1998	U.S. v. Bajakajian	524 U.S. 321, 335	Majority	Discussing Magna Carta and its proportionality requirement
2012	S. Union Co. v. U.S.	567 U.S. 343, 370	Dissenting	Discussing limitations of excessive fines and “depriv[ing] offender of means of livelihood”
2015	Horne v. Dep’t of Agric.	576 U.S. 350, 358	Majority	Discussing Magna Carta’s protections against uncompensated takings and excessive fines