The Heritage Foundation

LEGAL MEMORANDUM

No. 159 | JULY 27, 2015

The Role for Magna Carta in America in 2015

Paul J. Larkin, Jr.

Abstract

Most Americans have heard of Magna Carta, but few know its history or the role it plays today in Anglo–American constitutional law. In fact, "What Magna Carta initiated...was constitutional government—or, as the terse inscription on the American Bar Association's stone puts it, 'freedom under law.'" The doctrine that we now call "the rule of law"—that is, the principle that "[a]bove the king brooded something more powerful," an axiom that "you couldn't see or hear or touch or taste but that bound the sovereign as surely as it bound the poorest wretch in the kingdom"—owes its distinguished place in Anglo–American constitutional law to Magna Carta. Americans should celebrate that document no less than we celebrate our Declaration of Independence or our Constitution. We might not have had either one of them were it not for Magna Carta.

This year is the 800th anniversary of Magna Carta. Most Americans have heard of Magna Carta, but few know its history or the role it plays today in Anglo–American constitutional law. Fewer still know that Article 39 of Magna Carta was the parent of the Due Process Clause that is found in the Fifth and Fourteenth Amendments to the federal Constitution.[1] The phrase "due process of law" comes from a 14th century act of Parliament stating that "[n]o Man of what Estate or Condition that he be, shall be put out of Land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[2] The similarities between that statute and our Due Process Clause are striking. Americans therefore should celebrate the anniversary of Magna Carta as much as our English cousins will.

This paper, in its entirety, can be found at **http://report.heritage.org/lm159**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- Magna Carta's "immediate result...was to familiarize people with the idea that by means of a written document it was possible to make notable changes in the law," a proposition that foreshadowed our written Constitution. Another "decisive achievement" was the "shift" from "individual" to "communal" or "corporate" privileges, which laid the framework for our Bill of Rights.
- Article 39 of Magna Carta was the parent of the Due Process Clause that is found in the Fifth and Fourteenth Amendments to the federal Constitution.
- The Due Process Clause buttresses the structural features of Articles I, II, and III and prohibits private delegations of the lawmaking power that would allow lawmaking to occur without the constraints those articles impose.
- In fact, granting a private party lawmaking authority that the Constitution vests only in individuals who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind.

The purpose of this paper is threefold: It will explain how Magna Carta came into being in England. It will also identify the purpose that Magna Carta served when it was adopted in England and when the Colonists brought it to America. Finally, it will offer an example of an important role that Magna Carta can still play in American constitutional law.

The English Origins of Magna Carta

The Declaration of Independence was a statement of grievances and a political justification for a rebellion. By contrast, Magna Carta was a peace treaty.[3] The immediate purpose of Magna Carta was to end a civil war between King John and the English barons, a revolt that was the culmination of a long series of events that began in 1189 when John became king and lasted until 1216 when he died.[4]

The 26 years leading up to June 15, 1215, were a tumultuous period in English history. John replaced Richard I as king but not as England's military champion. In fact, John lost a disastrous war with King Philip of France and much of the Crown's holdings in France were now under French rule. Those military defeats cost John the barons' confidence in him as a commander and sovereign. To regain England's French lands, John sought to raise a new army through additional taxes, which further angered the barons. Atop that, King John had engaged unsuccessfully in a rancorous dispute with Pope Innocent III over the right to appoint the Archbishop of Canterbury, a fight that King John completely lost, further reducing his standing as sovereign.

By 1215, rumblings in England did not bode well for King John. The combination of John's failures as king and his arbitrary personal style as a ruler spurred the barons to renounce their oaths of fealty to him and launch a military assault against his position on the throne. After London, England's largest city, threw in with the barons, a politically weakened King John offered to negotiate with them. Rather than demand that John step down, the barons proposed that he agree to a list of remedies to correct specific grievances and failures of the feudal system, as well as to prevent further abuses of royal power.[5] The intended effect of the agreement was to force King John to submit to "the rule of law"—that is, to agree to the principle that England was a nation under law and that the law both empowered and limited the authority of the Crown.

Magna Carta drew on the views of Hubert Walter, Archbishop of Canterbury under Richard I, and Stephen Langton, Walter's successor. Walter and Langton believed in a system of natural law that was superior to the Crown's authority, that "'loyalty was devotion, not to a man, but to a system of law and order,'" which they believed to be "'a reflection of the law and order of the universe.'"[6] King John acceded to the barons' demands in 1215 "in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign."[7]

Magna Carta was an intensely practical document, unlike the philosophical statement of principle found in our Declaration of Independence.[8] Indeed, Magna Carta was originally thought to be a failure because the Crown and the barons resumed their civil war almost before the wax seal was dry.[9] But history has proved the charter's importance long after the death of its signatories. Bearing King John's seal and committing him and his successors "publicly for all time" to observe its requirements,[10] over the ensuing 800 years, Magna Carta has become one of the foundational laws of Anglo–American legal history.[11]

Magna Carta had both short-term and long-term consequences. The charter's "immediate result, apart from the reforms contained in it, was to familiarize people with the idea that by means of a written document it was possible to make notable changes in the law,"[12] a proposition that foreshadowed our written Constitution. Another "decisive achievement[] of 1215" was the "shift" from "individual" to "communal" or "corporate" privileges, which laid the framework for our Bill of Rights.[13] In 1297, King Edward I placed Magna Carta on the Statute Books of England,[14] and in 1368 Parliament effectively bestowed on Magna Carta the status of a constitution[15] by providing that it would nullify the terms of any inconsistent law.[16]

The critical section in Magna Carta is Chapter 39, a provision that "stands out above all others,"[17] perhaps to the point of being "a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had."[18] It provided that "[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go send against him, except by the lawful judgement of his peers or by the law of the land."[19] By stating that even the king was subject to the rule of law,

Chapter 39 imposed substantive and procedural restraints on the Crown to prevent King John from abusing royal power.[20] It sought to protect parties against arbitrary detention and punishment by prohibiting such action "except by the lawful judgement of his peers or by the law of the land,"[21] a term that Coke construed to refer to "the Common Law, Statute Law, or Custome of England."[22]

The Incorporation of Magna Carta into American Law

The colonists brought English law, including Magna Carta and Coke's treatise, with them to the New World.[23] The guarantee of "the law of the land" or "due process of law" appeared in the charters of the colonies, in statutes passed by the colonial assemblies, in resolutions of the Continental Congress, in the Declaration of Independence, and in state constitutions.[24] Chapter 39 is the direct historical antecedent of the "cornerstone" principle, carried forward into contemporary English law[25] and the Fifth and Fourteenth Amendment Due Process Clauses,[26] that no one may be "deprived of life, liberty, or property without due process of law."[27] Early American judicial decisions and treatises regarded due process as a protection against the entire government, both the executive and the legislature.[28]

Every provision in the American Constitution plays an important role, but some provisions are cast more often than others. The Due Process Clause is likely the best example of that point. Its deceptively simple text prohibits federal and state or local government officials from depriving any person of "life, liberty, or property" without "due process of law." Since it became law in 1791, parties have invoked the Due Process Clause in a host of settings as the basis for claiming that the government has acted unconstitutionally by charging a defendant with the violation of an unduly vague statute,[29] by paying the trial judge from the fines collected after guilty verdicts,[30] by trying the accused in a state that has no connection to the parties or the events underlying a lawsuit,[31] by holding trial in a locality overwhelmed with adverse pretrial (and in-trial) publicity about the crime,[32] by forcing the accused to wear prison garb at trial,[33] by using at trial a confession that was obtained by torture,[34] by inducing a defendant to plead guilty based on a promise regarding a sentencing recommendation that the government later breaks,[35] by limiting a woman's ability to select an abortion instead of childbirth,[36] by denying her funding for an abortion if she chooses that option,[37] by preventing two people of the same sex from becoming married,[38] and so forth. In each instance, the Supreme Court of the United States was called on to decide whether the Due Process Clause safeguarded a person against some allegedly arbitrary action by the government.

The English barons and American Framers intended that the guarantees afforded by "the law of the land" and "due process of law" would protect against arbitrary government actions,[39] and the Supreme Court has applied the Due Process Clauses to afford that protection ever since then. Today, due process continues to restrain arbitrary government action.

A Contemporary Role for the Due Process Clause: Restraining the Delegation of Lawmaking Power to Private Parties

One of the roles that due process plays today is to help ensure that federal government officials cannot evade the lawmaking process that was carefully established by Articles I, II, and III. In particular, due process demonstrates why the federal government may not delegate standardless, unreviewable lawmaking power to private parties who are neither legally nor politically accountable to the individuals over whom they exercise that authority.

By 1776, the "rule of law"—*viz.*, the principle that every government official, including a nation's chief executive officer, is subordinate to the law—was firmly established in England and America. Yet each nation had a different view of that concept. Magna Carta established in the 13th century that the law was the unwritten constitution of England—*viz.*, the long-standing customs of the people expressed in the common law—and that the king was subject to the law.[40] The Colonists brought that understanding of the rule of law with them to this nation.

By 1776, however, England had witnessed the English Civil War, the Interregnum under Cromwell, the Restoration, and the Glorious Revolution, all of which established Parliament as superior to the Crown and ultimately as the source of political and legal sovereignty.[41] By contrast, Americans still believed that the law was sovereign and that it governed the actions of the Crown and Parliament. Because there was no political or legal forum where that fundamental disagreement over the

constitutional relationship between the Mother Country and the Colonies could be resolved, the dispute ultimately led to the American Revolution. As Professor Andrew Cunningham McLaughlin once wrote, "the central principle of the American Revolution" was that "rebellion against an unlawful act was not rebellion but the maintenance of law. This philosophy gave character to the Revolution."[42]

To keep the nation's new executive and legislature from reassuming the same sovereign power that the Colonists had just fought a war to overcome, the Framers drafted a written Constitution that carefully designed the new national government. They created a tripartite federal government system and strategically limited the power that each branch may exercise.

Articles I and II (along with the Twelfth and Seventeenth Amendments) create the offices of Representative, Senator, and President; define the qualifications those officeholders must have; and establish procedures for the election of individuals to those positions.[43] Those Articles also specify the particular legislative and executive powers that elected federal officials may exercise.[44] The Article I Bicameralism and Presentment requirements set forth the procedure that elected officials must follow to create a "Law" that, given the Supremacy Clause, will govern the people in every state. The Article II Take Care Clause then directs the President to ensure that those "Law[s]" are faithfully executed.[45] Article III complements the other two articles by addressing the judiciary. Article III identifies the position of Chief Justice of the Supreme Court and contemplates that Congress and the President will add to that court by creating lower federal courts. Article III also limits the power of federal courts "to say what the law is"[46] to specified types of "Cases" and "Controversies."[47]

Read together, those three Articles define the "Republican Form of Government" that the Framers created for the nation and that Article IV guarantees to each state.[48]

The practice of delegating federal lawmaking authority to subordinate federal officials has become commonplace since the New Deal[49] and has been defended on the ground (among other rationales) that delegation enables the political branches to take advantage of the particularized knowledge, skill, and experience of individuals who, by virtue of their status as civil service employees, can act without fear of losing their positions due to changes in the political orientation of Congress and the Presidency.[50] It could be argued that each of those three branches may exercise only the specific powers granted to each one and that each branch must exercise its powers alone.[51] Yet the Supreme Court has allowed Congress and the President to delegate various fact-finding and lawmaking powers to federal officials who are not elected by the people or often not even appointed by the President himself.[52] Numerous commentators have criticized the Supreme Court's Delegation Doctrine decisions and have urged the Court to revisit this field,[53] but only Justice Clarence Thomas has signaled a willingness to do so.[54]

Occasionally, however, Congress delegates governmental power to parties who are not obviously federal government officials. Consider Amtrak. Amtrak is the colloquial term for the National Railroad Passenger Corporation, a corporation established by Congress to maintain the continued operation of the nation's passenger rail service.[55] In 2008, Congress authorized Amtrak, in cooperation with the Federal Railroad Administration, to "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations" and to "incorporate" them "into their access and service agreements" with the freight companies whose track systems Amtrak must use for its passenger service.[56]

The question in the *Amtrak* case was whether Congress had acted unlawfully by delegating federal government lawmaking power to a private company. The Supreme Court did not reach that issue because the Court decided that Amtrak is a government corporation for purposes of the Delegation Doctrine.[57] The issue, however, is likely to arise again. Congress has previously delegated comparable authority to other private parties,[58] and that approach to lawmaking enables Congress to have it both ways: It can claim success if the delegation works while denying responsibility if it does not. For politicians, it is a classic "win-win."

The Due Process Clause provides a powerful argument that any such private delegation is unlawful. The clause buttresses the structural features of Articles I, II, and III and prohibits private delegations that would allow lawmaking to occur without the constraints those articles impose:

> By requiring that all three branches act only pursuant to law, the Fifth Amendment Due Process Clause ensures that the actors in each department cannot evade the Framers' carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties, individuals beyond the direct legal and political control of superior federal officials and the electorate. That is, the due process requirement that federal government officials act pursuant to "the law of the land" when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate. That is the bedrock due process guarantee, one so fundamental that we take it for granted. The principle that government officials are governed by "the rule of law" is so deeply ingrained into the nation's culture, psyche, and legal systems that we forget just how important it is. The Barons at Runnymede had no Parliament to which they could turn for protection against King John. They had only their own troops and the common law, representing the accepted, common understanding of Englishmen regarding the permissible operation of the crown and its institutions, as enforced by the courts. In order to avoid a continuing need to rely on the former, they forced the king to agree to be governed by the latter. The requirement that the crown act pursuant to "the law of the land" was a protection against the king going outside the law to accomplish his will through brute force.
>
> Congress and the President, of course, may help private parties change the law. Congress has the authority to regulate "[t]he Times, Places and Manner" of congressional elections to ensure that the electorate has that opportunity. The limited terms that Representatives, Senators, and Presidents hold ensure that the public can make its voice heard during the federal elections held every two, four, and six years. Between elections, the public has the right to "petition the Government for a redress of grievances." To make that right effective, Congress may grant private parties an opportunity to initiate the working of the government through the officials holding office in one of the three branches. But Congress may not displace the legal and political protections that a government organized and operated under the rule of law guarantees the public by handing over the so-called "levers of government" to private individuals. Vesting in private parties governmental authority over a matter otherwise designated as a subject fit only for governmental responsibility eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787.[59]

In fact, granting a private party lawmaking authority that the Constitution vests only in individuals who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind:

> If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King's delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The "plan of the Convention" was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government's choice of either option. Using private

> parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers' signal accomplishment of establishing a government under law.[60]

The delegation of federal lawmaking power to private parties would be a clear violation of the "rule of law" that Magna Carta required the Crown to satisfy and that limits the authority of federal officials by virtue of the Due Process Clause. Were Congress to grant federal lawmaking authority to a private party unencumbered by any legal or political constraints, the "Law" through which Congress sought to achieve its goals would be no less invalid than an effort undertaken by King John 800 years ago to empower a family member or friend to exercise royal authority. Accordingly, Magna Carta may yet play an important further role in the development of American constitutional law.

Conclusion

It has been said that "[t]he very success of Magna Carta makes it hard for us, 800 years on, to see how utterly revolutionary it must have appeared at the time.... What Magna Carta initiated, rather, was constitutional government—or, as the terse inscription on the American Bar Association's stone puts it, 'freedom under law.'"[61] No longer was the law "just an expression of the will of the biggest guy in the tribe."[62]

The doctrine that we now call "the rule of law"—that is, the principle that "[a]bove the king brooded something more powerful," an axiom that "you couldn't see or hear or touch or taste but that bound the sovereign as surely as it bound the poorest wretch in the kingdom"—owes its distinguished place in Anglo–American constitutional law to Magna Carta.[63] Americans should celebrate that document no less than we celebrate our Declaration of Independence or our Constitution. Why? Because we might not have had either one of them were it not for Magna Carta.

—Paul J. Larkin, Jr., *is Senior Legal Research Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*

Selected Bibliography

Bernard Bailyn, The Ideological Origins of the American Revolution (1992)

Robert Bartlett, England Under the Norman and Angevin Kings, 1075–1225 (2000)

William Blackstone, The Great Charter and Charter of the Forest (1759)

Christopher Brooke, From Alfred to Henry III, 871–1272 (1961)

David Carpenter, Magna Carta (2015)

Danny Danziger & John Gillingham, 1215: The Year of Magna Carta (2003)

Ralph C. Davis, The Normans and Their Myth (1976)

Gottfried Dietze, Magna Carta and Property (1965)

Arthur L. Goodhart, "Law of the Land" (1966)

Jack P. Greene, The Constitutional Origins of the American Revolution (2011)

Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 858 (1978)

R. H. Hemholz, *Magna Carta and the Ius Commune*, 66 U. Chi. L. Rev. 297 (1999)

Henry of Huntington, The History of the English People, 1000–1154 (Diana Greenway trans. 2002) (1154)

Magna Carta: Muse and Mentor (Randy J. Holland ed., 2014)

J. C. Holt, Magna Carta (2d ed. 1992)

J. C. Holt, The Making of Magna Carta (1965)

A. E. Dick Howard, Magna Carta: Text and Commentary (1998)

A. E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968)

1 David Hume, The History of England from the Invasion of Julius Caesar to the Revolution in 1688 (1983) (1778)

Edward Jenks, A Short History of English Law (1912)

Edward Jenks, *The Myth of Magna Carta*, 4 Indep. Rev. 260 (1904)

Magna Carta Commemorative Essays (Henry Elliott Malden ed., 1917)

Magna Carta and the Rule of Law (Daniel Barstow Magraw et al. eds., 2014)

Frederick W. Maitland & Francis C. Montague, A Sketch of English Legal History (1915)

Charles McIlwain, Constitutionalism: Ancient and Modern (rev. ed. 1947)

Charles Howard McIlwain, The American Revolution: A Constitutional Interpretation (1923)

C. H. McIlwain, *Due Process of Law in Magna Carta*, 14 Colum. L. Rev. 27 (1914)

William Sharpe McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction (2d ed. 1914)

Andrew Cunningham McLaughlin, The Foundations of American Constitutionalism (1932)

Daniel John Meador: Habeas Corpus and Magna Carta: Dualism of Power and Liberty (1966)

Samuel Eliot Morison, The Oxford History of the American People (1965)

Sources of Our Liberties (R. Perry & J. Cooper eds., 1959)

Theodore F. T. Plucknett, A Concise History of the Common Law (5th ed. 1956)

Frederick Pollock, The Expansion of the Common Law (1904)

1 Frederick Pollock & Frederick W. Maitland, The History of English Law Before the Time of Edward I (2d ed. 1909)

Max Radin, *The Myth of Magna Carta*, 60 Harv. L. Rev. 1060 (1947)

John Phillip Reid, The Ancient Constitution and the Origins of Anglo–American Liberty (2005)

John Phillip Reid, The Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries (2004)

John Phillip Reid, The Concept of Liberty in the Age of the American Revolution (1988)

4 John Phillip Reid, Constitutional History of the American Revolution: The Authority of Law (1987)

The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo–American Tradition of Rule of Law (Ellis Sandoz ed., 1993)

Doris M. Stenton, After Runnymede: Magna Carta in the Middle Ages (1965)

Ralph V. Turner, Magna Carta (2003)

Roger Twysden, Certaine Considerations upon the Government of England (John Mitchell Kemble ed., 1829) (1655)

James K. Wheaton, The History of the Magna Carta (2011)

Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1998)

Endnotes

1. The Due Process Clause appears in almost identical form in the Fifth and Fourteenth Amendments. *See* U.S. Const. amend. V ("No person shall be…deprived of life, liberty, or property, without due process of law[.]"); *id*. amend. XIV, § 1 ("No State shall…deprive any person of life, liberty, or property, without due process of law[.]"). This Legal Memorandum does not distinguish between the two clauses and refers to both clauses in the singular.
2. 28 Edw. III, c. 3 (1354), reprinted in The Statutes of the Realm 345 (Dawsons of Pall Mall 1963) (1810); *see also* A. E. Dick Howard, Magna Carta: Text and Commentary 15 (rev. ed. 1998) (hereafter Howard, Magna Carta) ("[A]s early as 1354 the words 'due process' were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century 'due process of law' and 'law of the land' were interchangeable."); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911).
3. *See* J. C. Holt, Magna Carta 6 (2d ed. 1992) (noting that Magna Carta was "a political document produced in a crisis").
4. For lengthy discussions of the background to, provenance of, and importance of Magna Carta in England and America, see, for example, David Carpenter, Magna Carta (2015); Danny Danziger & John Gillingham, 1215: The Year of Magna Carta (2003); Holt, *supra* note 3; A. E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968) (hereafter Howard, The Road from Runnymede); Theodore F. T. Plucknett, A Concise History of the Common Law 22–25 (5th ed. 1956); James K. Wheaton, The History of the Magna Carta (2011). For a summary, see Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J.L. & Pub. Pol'y 337, 411–15 (2015).
5. *See*, *e.g.*, Holt, *supra* note 3, at 24, 188–89; Howard, The Road from Runnymede, *supra* note 4, at 2, 6; Plucknett, *supra* note 4, at 20–25.
6. Plucknett, *supra* note 4, at 21 (citation omitted). The draftsmen also drew inspiration from the "Coronation Charter" issued by Henry I in 1100. That charter criticized his predecessor's unpopular practices and included his promise to jettison them. *See* Danziger & Gillingham, *supra* note 4, at 257–58; Holt, *supra* note 3, at 36–38; *id*. app. 4, at 418–28.
7. Carpenter, *supra* note 4, at 69 (quoting signature section of Magna Carta). June 15 was the day that John personally impressed the royal seal on Magna Carta. The formal version of the original charter, however, was revised in some details over the next few days and was not finalized until June 19. Wm. S. McKechnie, *Magna Carta (1205–1915)*, *in* Magna Carta Commemorative Essays 5 (Henry Elliott Malden ed., 2005) (1917).
8. *See* Holt, *supra* note 3, at 6 (noting that Magna Carta was "a political document produced in a crisis"); Howard, The Road from Runnymede, *supra* note 4, at 8–9, 22; Frederic W. Maitland & Francis C. Montague, A Sketch of English Legal History 78–79 (1915); Plucknett, *supra* note 4, at 24–25.
9. *See* Holt, *supra* note 3, at 1. King John found Chapter 61 particularly irritating because it established a council of barons that could overrule the king for violating the charter's guarantees. King John entreated the papacy for support, and Pope Innocent III sided with King John because the pope saw the council of barons as a challenge to the papal authority over the king. A new insurrection broke out, known as the First Barons' War, which ended in 1216 with John's death. To placate the barons, John's son and successor Henry III reissued a shortened, revised version of Magna Carta as the Charter of Liberties of 1216. Issuance of the new charter quelled any thoughts of further revolt, and Henry III was able to remain on the throne. *See*, *e.g.*, Danziger & Gillingham, *supra* note 4, at 253–61; Wheaton, *supra* note 4, at 8–10, 52–53. Henry III repromulgated Magna Carta in 1217 and 1225. *See* Howard, Magna Carta, *supra* note 2, at 8–9. In that last reissuance, the charter acquired the name "Magna Carta" to distinguish it from charters dealing with use of the forests for game and wood. *See* Danzinger & Gillingham, *supra* note 4, at 269. Successors to Henry III reaffirmed Magna Carta on dozens of occasions before the close of the Middle Ages. *See* Wheaton, *supra* note 4, at 23.
10. Holt, *supra* note 3, at 259.
11. "In 1770 William Pitt the Elder called it 'the Bible of the English Constitution'…. In 1956 the English judge, Lord Denning, described it as 'the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot'." Holt, *supra* note 3, at 277–78; *see also*, *e.g.*, *id.* at 21; Howard, The Road from Runnymede, *supra* note 4, at 24; Wheaton, *supra* note 4, at 28–32.
12. Plucknett, *supra* note 4, at 25–26; *see also* Holt, *supra* note 3, at 18–19 ("Approached as political theory [Magna Carta] sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law.").
13. *See* Holt, *supra* note 3, at 55.
14. *See* Howard, The Road from Runnymede, *supra* note 4, at 298.
15. *See id*. at 299.
16. *See* 42 Edward III, c. 1 (1368) ("[Magna Carta shall be] holden and kept in all points; and if any Statute be made to the contrary that shall be holden for none."), *reprinted in* Howard, The Road from Runnymede, *supra* note 4, at 9. The Framers incorporated that principle into the Supremacy Clause of Article VI of the Constitution. *See* U.S. Const. art. VI, cl. 2.
17. Howard, Magna Carta, *supra* note 2, at 14.
18. 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 173 (2d ed. 1898).
19. Holt, *supra* note 3, app. 6, at 461.
20. *See*, *e.g.*, *id.* at 35, 45, 81–83; Howard, The Road from Runnymede, *supra* note 4, at 7; 1 Pollock & Maitland, *supra* note 18, at 182–83.

21. Holt, *supra* note 3, app. 6, at 461.
22. Ellis Sandoz, *Introduction* to The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law 16–17 (Ellis Sandoz ed., 1993); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament."). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* Edward Coke, The Second Part of the Institutes of the Laws of England 50 (E. & R. Brooke 1797) (1642).
23. *See* Danziger & Gillingham, *supra* note 4, at 272 ("Magna Carta was headline news at the time that the American colonies were being settled."); Howard, The Road from Runnymede, *supra* note 4, at xi, 15, 19, app. B, at 397 (listing charters). Coke and Blackstone had an important influence on early American law. *See, e.g.*, Bernard Bailyn, The Ideological Origins of the American Revolution 30–31 (1967); Howard, The Road from Runnymede, *supra* note 4, at 128; Plucknett, *supra* note 4, at 25; Chapman & McConnell, *supra* note 22, at 1684. For discussions of the development of law in the colonies and new nation, see, for example, Peter Charles Hoffer, Law and People in Colonial America (rev. ed. 1998); Law and Authority in Colonial America (George Athan Billias ed., 1967); William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830 (1994).
24. *See, e.g.*, Holt, *supra* note 3, at 17–18; Howard, The Road from Runnymede, *supra* note 4, at 15–16, 211–15; Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 269 (2d ed. 1998); Chapman & McConnell, *supra* note 22, at 1705; Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 435–40 & nn.106–30 (2010).
25. *See* Danziger & Gillingham, *supra* note 4, at xiii ("The eloquence of [Chapters 39 and 40 of Magna Carta], the nobility and idealism they express, has elevated this piece of legislation to eternal iconic status."); Howard, The Road from Runnymede, *supra* note 4, at 23 ("Since Magna Carta the Common Law has been the cornerstone of individual liberties[.]"); Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights 17 (Richard L. Perry & John C. Cooper eds., 1959).
26. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) ("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*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words."); *see also, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986); Hovey v. Elliott, 167 U.S. 409, 415–17 (1897); Hurtado v. California, 110 U.S. 516, 543 (1884) (Harlan, J., dissenting); Davidson v. New Orleans, 96 U.S. 97, 101 (1878) ("The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown."); Jones v. Robbins, 74 Mass. (8 Gray) 329, 342–43 (Mass. 1857) (Shaw, J.); Howard, The Road from Runnymede, *supra* note 4, at 14–15, 23, 300 & n.6 (collecting state court cases to that effect).
27. James Madison was the principal drafter of the Fifth Amendment, and he chose the phrase "due process of law," not "the law of the land." No one knows precisely why he made that choice. *See, e.g.*, Williams, *supra* note 24, at 445–46. Some commentators have speculated that Madison used "due process of law" to avoid confusion given the text of the Article VI Supremacy Clause. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land[.]"). That is, the term "the law of the land" could have been read to permit Congress to become like Parliament and avoid being subject to the Constitution because federal legislation would be deemed "the supreme Law of the Land." *See* Chapman & McConnell, *supra* note 22, at 1723–24.
28. *See, e.g.*, Dent v. West Virginia, 129 U.S. 114, 124 (1889); Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1874); Howard, The Road from Runnymede, *supra* note 4, at 303–07; Williams, *supra* note 24, at 446–54.
29. *See* Johnson v. United States, No. 13-7120 (U.S. 2015) (ruling unconstitutionally vague a provision in a federal law imposing an enhanced penalty for committing a crime involving conduct "that presents a serious potential risk of physical injury to another").
30. *See* Tumey v. Ohio, 273 U.S. 510 (1927) (holding unconstitutional state law allocating a trial judge's compensation to the number of convictions in his court).
31. *See* Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (ruling that a corporation cannot be tried in a state based on the allegedly tortious activities of a subsidiary unrelated to that forum).
32. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966) (ruling that defendant was denied a fair trial due to massive and prejudicial pretrial publicity).
33. *See* Estelle v. Williams, 425 U.S. 501 (1976) (stating that a defendant has a right not to be tried in jail garb).
34. *See* Brown v. Mississippi, 297 U.S. 228 (1936) (ruling that the admission of a coerced confession violates the Due Process Clause).
35. *See* Santobello v. New York, 404 U.S. 257 (1991) (ruling that the government must keep its promises made during plea bargaining).
36. *See* Roe v. Wade, 410 U.S. 113 (1973) (creating a constitutional right to abortion).
37. *See* Harris v. McRae, 448 U.S. 297 (1980) (ruling that due process does not require the government to fund abortion-related services even if it funds comparable services for childbirth).
38. *See* Obergefell v. Hodges, No. 14-556 (U.S. June 26, 2015) (creating a constitutional right to same-sex marriage).

39. *See, e.g.*, William Howard Taft, *The Administration of Criminal Law*, 15 Yale L.J. 1, 3 (1905) ("Run through the Magna Charta of 1215, the Petition of Right of 1625, and the Bill of Rights of 1688, the great charters of English liberty, and find in them an insistence not on general principles, but on procedure. Take the most comprehensive—'No man shall be deprived of life, liberty, or property without due process of law'—this does not attempt to define the cases in which a man shall be entitled to life, liberty and property, but points to, and insists upon the necessity for a legal procedure by which it shall be done."). That proposition has even more force in the United States than in England, given the unique role that our Constitution plays. "In America a constitution had become, as Madison pointed out, a charter of power granted by liberty rather than, as in Europe, a charter of liberty granted by power." Wood, *supra* note 24, at 601.
40. *See, e.g.*, William Sharpe McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction 124 (2d ed. 1914) (Magna Carta required the king to govern "by law and custom, not by the caprices of his evil heart"); 1 Pollock & Maitland, *supra* note 18, at 173 ("[I]t means this, that the king is and shall be below the law.").
41. *See, e.g.*, Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 56–57 (1978). For a discussion of the English Civil War, the Interregnum, the Restoration, and the Glorious Revolution, see Christopher Hill, The Century of Revolution, 1603–1714 (1982).
42. Andrew Cunningham McLaughlin, The Foundations of American Constitutionalism 119 (1932); *see also, e.g.*, *id.* at viii, 72–73, 104–08. For discussions of the roots and origins of American constitutionalism, see Gottfried Dietze, Magna Carta and Property 71 (1965); Arthur L. Goodhart, "Law of the Land" (1966); Jack P. Greene, The Constitutional Origins of the American Revolution (2011); Daniel Hannan, Inventing Freedom: How the English-Speaking Peoples Made the Modern World 201 (2013); Charles Howard McIlwain, The American Revolution: A Constitutional Interpretation (1923); Edmund S. Morgan, The Birth of the Republic, 1763–89 (4th ed. 2013); Samuel Eliot Morison, The Oxford History of the American People 180–82 (1965); John Phillip Reid, The Concept of Liberty in the Age of the American Revolution (1988); John Phillip Reid, Constitutional History of the American Revolution: The Authority of Law (1987).
43. *See* Larkin, *supra* note 4, at 416.
44. *See, e.g.*, U.S. Const. art. I, § 8 (listing the "power[s]" that Congress may use law to regulate); *id.* art. II, § 1, cl. 1; *id.* § 2.
45. *See* U.S. Const. art. II, § 3.
46. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
47. U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *id.* § 2, cl. 1 ("The judicial Power shall extend to" defined "Cases" and "Controversies[.]").
48. *See* U.S. Const. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government [.]").
49. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).
50. *See, e.g.*, Stephen G. Breyer et al., Administrative Law and Regulatory Policy: Problems, Text, and Cases 4–11 (7th ed. 2011).
51. *See* Larkin, *supra* note 4, at 363 ("Under the conventional view of administrative and constitutional law, those delegations might appear *ultra vires*. After all, Article I vests 'all legislative Powers' in the Congress, Article II provides that '[t]he Executive power shall be vested in a President,' and Article III states that '[t]he judicial Power' belongs to the Supreme Court and whatever lower federal courts Congress may create. The implication of dividing legislative, executive, and judicial power among the three branches would seem to be that each one should exercise only the specific power it received.") (footnotes omitted).
52. *See, e.g.*, Lawson, *supra* note 49; Larkin, *supra* note 4, at 363–68.
53. *See, e.g.*, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 133–34 (1980); Daniel A. Farber & Philip P. Fricke, Law and Public Choice: A Critical Introduction 81–82 (1991); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 91–126 (2d ed. 2009); Martin H. Redish, The Constitution as Political Structure 138–43 (1995); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. Law 251, 265–66 (2010).
54. *See* DOT v. Ass'n of Amer. R.R., 135 S. Ct. 1225, 1240–29 (2015) (hereafter *Amtrak*) (Thomas, J., concurring in the judgment).
55. *See Amtrak*, 135 S. Ct. at 1228–29.
56. *Id.* at 1229 (citations and internal punctuation omitted).
57. *Id.* at 1231–34.
58. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding unconstitutional a provision in the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (1935), that, among other things, allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding unconstitutional a provision in the National Industrial Recovery Act, Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933), that delegated to trade or industrial groups the authority to define "unfair methods of competition" that later were to be approved by the President). The states have performed such delegations as well. *See* Larkin, *supra* note 4, at 403–05, 408–09 (discussing state private delegation cases).
59. Larkin, *supra* note 4, at 416–18.
60. *Id.* at 419–20.

61. Hon. Daniel Hannan, *Magna Carta: Eight Centuries of Liberty*, Wall St. J., May 29, 2015, http://www.wsj.com/articles/magna-carta-eight-centuries-of-liberty-1432912022.
62. *Id.*
63. *Id.*