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Magna Carta has been preserved not as a museum piece, but as part of the common law of England, to be defended, maintained or repealed as the needs and function of the law required. That so much of what survives is now concerned with individual liberty is a reflection of the quality of the original act of 1215. It was adaptable. This was its greatest and most important characteristic.

J. C. Holt, *Magna Carta*

In a world drastically changed by the 9/11 attacks, Supreme Court justice Anthony Kennedy authored a 2008 legal opinion deciding whether “war on terror” detainees could be barred from U.S. courts. By military order and congressional act, the U.S. government had declared that these detainees, many of whom were confined at the Guantanamo Bay Naval Base, were not entitled to petition the federal courts for release from their confinement. Once they were determined to be properly classified as “enemy combatants,” they would be tried before a military tribunal or simply detained indefinitely. The doors of the federal courts were closed to them.

The detainees claimed that stripping the courts of jurisdiction in this way was unlawful. They sought to file habeas corpus
petitions in federal court, following a time-honored procedure in Anglo-American law by which prisoners challenge the government’s authority to hold them. In the United States, habeas corpus is enshrined in constitutional text. The constitution requires that the writ of habeas corpus be available to prisoners at all times unless Congress explicitly suspends it and effectively declares martial law. Because there had been no formal suspension, the detainees reasoned, they were entitled to make habeas corpus petitions and could not be blocked from doing so.

Justice Kennedy agreed and ruled in the detainees’ favor. His majority opinion linked the writ of habeas corpus to the U.S. Constitution, of course, but also to a much earlier document: the Magna Carta, or Great Charter, of AD 1215. For Kennedy, habeas corpus “became the means by which the promise of Magna Carta was fulfilled.” Among its numerous provisions setting forth rules for interactions between King John and the English nobility of the time, the Magna Carta declared in Article 39 that no one would be imprisoned except by the “law of the land.” It was this provision that Kennedy took to contain the “promise” of liberty, a promise that had been redeemed in modernity by the emergence of habeas corpus as an accepted and regularly used form of pleading. He ascribed more than a symbolic significance to the 800-year-old document; he acknowledged its immediate practical effect on legal outcomes. The Constitution requires scrupulous protection of habeas corpus rights, and Kennedy traced that requirement back to the Magna Carta.

Why would the Supreme Court continue, today, to invoke an agreement between an English king and his barons that was made eight centuries ago—and to cite it as a source of individual rights and a limitation on government power? Why, especially, would it do so in the midst of a national security crisis brought on by the 2001 terror attacks? To address these specific questions is to probe the history of modern civil liberties, but it is also to explore the process by which judges go about deciding individual
rights cases. First, though, some historical background on the Magna Carta itself is in order.

The Magna Carta’s Origins

The Magna Carta was signed at Runnymede in June 1215. King John met an armed group of barons dressed for war in a meadow on the river Thames. The king gave his seal to the document, and it was signed by a group of barons who represented the rebellious faction. The signing/sealing of the Magna Carta concluded tense and protracted negotiations precipitated by complaints and disputes between the king and the barons regarding the king’s use of power. In the course of the dispute, the rebel barons had taken control of London, and they were actually in possession of the city as they negotiated with the Crown. There is much historical evidence to establish a high level of tension and an imminent threat of violence in 1215 England. In addition to the physical occupation of London by the barons, there were letters of “safe conduct” issued to certain members of the nobility by King John in the weeks leading up to the June 19 ceremony at Runnymede. The king issued these letters so that the nobles could travel freely through the realm without fear of arrest or attack. The need for such documentation suggests a state of hostility between the warring groups. The barons sought guarantees of reform from the king in exchange for a promise that they would remain loyal to him.² About a week before the ceremonial acceptance of the Magna Carta at Runnymede, discussions between King John and the barons had produced a document that J. C. Holt calls the “Articles of the Barons.”³ A copy of this document was retained by Stephen Langton, the archbishop of Canterbury, who served as intermediary between the disputants, and it formed an agreement in principle indicating that progress in negotiations had taken place. The parties then made a “firm
peace” at Runnymede on June 19, as the Articles of the Barons became the Magna Carta, and both sides agreed to be bound by its terms. Although a “firm peace” was reached on June 19 as the barons reestablished their loyalty to the king, the pacifying effect of the Charter did not last long. Two months later (after the immediate danger of war had passed), Pope Innocent III annulled it, claiming that the king had only agreed to its terms under duress. Following annulment, hostilities resumed. The Magna Carta was reinstated and reissued several times subsequently, most immediately in 1216, 1217, and 1225. The 1215 text is set forth in the appendix.

The Magna Carta of 1215 memorialized “concessions” made by King John to the barons. Its sixty-three articles cover a range of contested issues between the king and the people, including the following:

- rules for inheritance
- regulation of marriage
- debt collection
- court jurisdiction and procedures
- the proportionality of fines to offenses
- fair and just legal proceedings
- freedom of travel for merchants
- creation and use of “forests”
- restoration of property seized by the Crown
- real property law

These concessions had to do with property rights as well as individual liberties. In fact, these categories overlap: for example, provisions of the Charter establish procedures and schedules for amercements (fines), which amount to deprivation of property but also concern liberty because they are penal in nature. Some of the property issues might appear quite mundane to us today (such as how to select sheriffs to oversee royal forests), but they
were important and consequential to the parties involved. Other topics covered, such as the purchasing of marriage rights by one family from another, seem anachronistic to the modern reader, and yet their implications for individual liberty are obvious. At the root of many of the concessions wrought by the Magna Carta was the establishment of the rule of law: “It maintained the principle that authority was subject to law.”5 Because the king controlled the availability of legal process and determined what legal claims were cognizable and who could bring them, access to courts was a fundamental element of rule of law. By granting or withholding legal process, the king was mediating justice itself. Subjects expected and sometimes demanded that legal process be available to them.6

Kenton Worcester has pointed out that the substantive content of the Magna Carta was foreshadowed in an earlier document issued by King Henry I in 1100 at his coronation. In fact, the barons negotiating with King John in 1215 specifically sought as one of their demands confirmation of the earlier Charter of Henry I.7 They sought to have Henry I’s charter reaffirmed by King John. In the end, the Magna Carta “followed the pattern set by the Charter of Henry I in devoting its first section to the liberties of the Church. The next sections, as in Henry’s charter, were concerned with the king’s feudal rights. Magna Carta, like Henry’s charter, represented an attempt to state the detailed implications of the oath to destroy evil and maintain just customs which kings swore at their coronation.”8 Although Henry did not use the “law of the land” phraseology, his coronation charter is similar in tone to the Magna Carta: it is conciliatory, and it delineates specific rights that members of the kingdom will enjoy as against the king. Like the Magna Carta, the Charter of Liberties of 1100 announces certain procedures that will be followed regarding marriage, baronial service, collection of debts, and other matters.9 Thus, the barons in 1215 were invoking “custom and precedent” by linking their demands with earlier promises
made by a long-dead king. Just as the Magna Carta serves as evidence of legal limits on executive power for modern commentators, so did Henry I’s charter stand for limits on royal power as the barons cited it in 1215. Even more than the specific terms, the *act* of promising publicly to rule justly and to “destroy evil” was difficult to rescind. King John tried to do so as he moved his army north later in the year and resumed a state of war with the barons, but his concessions helped to solidify the notion that kings were constrained by law. As Holt puts it, “Where it concerned justice the Charter asserted broad principles which had their roots deep in the past.”

*Magna Carta’s Legacy in the United States*

Throughout the more than 200 years the Supreme Court has been in existence, the record of its decisional law shows the continuing influence of Magna Carta principles. Due process (in criminal proceedings) and habeas corpus are the best known of the principles for which the Magna Carta is cited, and they are the ones that receive the vast majority of attention in this book. Nonetheless, the Court has cited other Magna Carta provisions in a variety of legal disputes. References to the Magna Carta in Supreme Court case law are frequent. Even if passing and extraneous references are excluded, more than a hundred citations by the Supreme Court can still be found. The following is a sampling of decisions citing lesser-known provisions of the Great Charter:

- *The Nereide* (1815) (safekeeping of merchants’ goods during war—Article 41)
- *South v. Maryland* (1855) (limitations on powers of a sheriff—Article 45)
- *Kent v. Dulles* (1958) (right to travel—Article 42)
These citations span the entire history of the United States, and they continue up to the present. In chapter 2, I will show how even the colonial charters reflected the influence of the Magna Carta as colonists claimed certain liberties against the king just as the people in England did. But as the Charter was referenced in Supreme Court decisions it became influential in the development of the constitutional common law.

The Practice of Judicial Interpretation

It is a convention, and perhaps an inevitable obligation, for judges to set forth the grounds on which their decisions are based. This practice safeguards the legitimacy of the court as a public institution and also lends persuasive weight to decisions that stand as precedent to be scrutinized by later courts. It has
been clear, at least since *Marbury v. Madison* was decided in 1803, that judges would regularly cite constitutional text as authority for judicial decisions. And so as judges decide cases (particularly cases involving the limits of state power over individuals), they must construe constitutional provisions such as the Bill of Rights and the institutional grants of power found in Articles I and II. No matter how clear and unambiguous those provisions might appear to the outside observer, there is always room for questions and disagreement among the ultimate arbiters of constitutional meaning who sit on the Supreme Court. One need only compare majority and dissenting opinions in the same case in order to see how sharply different the justices’ interpretive approaches can be. Moreover, many justices have over time spoken publicly about their individual approaches to the work of constitutional interpretation, and so we have a record in the justices’ own words indicating how they go about it. Sometimes there is more than one answer to an interpretive dispute. And sometimes the plain meaning yields a result that is unacceptable or even absurd. Akhil Amar notes that the text of Article I, Section 3 would seem to allow the vice president, as president pro tempore of the Senate, to preside over his own trial on impeachment charges. Of course, such an arrangement would make no sense. Amar’s point here is that the written text does not answer all of the questions that arise in the course of disputes over governing. The Constitution cannot be read in isolation from principles and commitments predating the document itself, he argues, and in a general sense this is true whether one adheres to an “original meaning” approach, a “living constitution” approach, or any other methodology of interpretation.

Amar suggests that an “unwritten constitution” exists alongside the written document. In addition to rules rooted in the common law, the unwritten constitution draws on principles of modern political thought and certain documents generated through American history that reflect those principles. Amar
includes the Gettysburg Address, the opinion in Brown v. Board of Education, and the Reverend Martin Luther King Jr.’s “I Have a Dream” speech in his list of the texts that help to form the unwritten constitution.25 Of course, once the reader moves outside the text to search for interpretive guidance, the problem of what to include arises. In other words, what counts as part of the unwritten constitution, and how do particular elements (a speech, an interpretive principle) represent more than idiosyncratic choices? How can one say that they stand for things that everyone would choose as constitutive? As Amar himself poses the question, “Exactly what sorts of things outside the text are sensibly viewed as genuinely ‘constitutional’ things?”26

Another way of posing this problem is to say that iconic statements like the Brown opinion and the Declaration of Independence all conform to some ideal, some core commitment, such as the “liberal tradition,” as Louis Hartz suggested.27 In other words, we can say that they are not random choices because they fit with something that we have already identified. But what is the warrant for that principle? How do we identify it? How do we define it? Why should my vision of that commitment be taken as more authoritative than yours?

**Constitutionalism**

The question of what binds legal actors beyond constitutional text has of course been addressed by many commentators. The concept of constitutionalism is a connecting thread through much of this literature. At the most general level, constitutionalism simply suggests that the constitutional text binds and constrains legal actors, generating a politics that is more than just the play of power. There are commitments that are regularly honored and rules that are followed, and these rules are assented to and considered binding because participants in public disputes view
them as legitimate. Specific versions of constitutionalism include “common law constitutionalism,” a school of thought that holds “that courts do and should develop the meaning of general or ambiguous constitutional texts by reference to tradition and precedent, rather than to original understanding.”28 For example, Amar resolves the previously mentioned quandary about vice presidential impeachment by using a long-accepted legal maxim that is so widely honored, he says, that it “goes without saying.”29 So if the text of Article I seems to permit the vice president to preside over his own impeachment proceedings, and we can see that such a reading would be absurd, we can resolve the conflict between the written text and common sense by invoking the rule that “no one shall be judge in his [sic] own cause.” Following that maxim, the vice president would be prohibited from presiding over his own trial. The maxim is not part of the text, but it is part of a tradition of legal dispute resolution long followed by judges and common law commentators alike. In fact, James Madison makes reference to it in The Federalist No. 10.

Critiques of Common Law Constitutionalism

As intuitively appealing and cogent as this version of constitutionalism might sound, it has troubled some scholars. Frank Michelman, for example, worries that Supreme Court justices practicing common law constitutionalism will often find themselves caught between procedural and substantive notions of democracy.30 As they perform their roles in a democratic system, they may imagine democracy as purely procedural (i.e., as a set of rules that must be followed) or as a substantive state of being that is ideal for individuals. Michelman sees this conflict exemplified most clearly in the life and work of Justice William Brennan. Deeply committed to unfettered and universal democracy, Brennan nonetheless saw the need to protect individuals’
liberty and dignity from government, and that obligation often led him to rule contrary to the expressed preference of the majority of the citizenry. In other words, Brennan believed that a *procedural* democracy of rules guaranteeing access to the process of self-government stood alongside—and in tension with—a *substantive* notion of democracy as the highest aspiration of human development, which required protection and nurturing that often had to come from the courts. This tension troubled Michelman because judges holding a substantive conception of democracy (like Brennan) must necessarily refer to “laws of lawmaking” that would help them to evaluate majority enactments and see whether those enactments tended to advance or threaten their substantive conception. And, of course, the problem of process arises at this higher level as well: if the “laws of lawmaking” are not democratically enacted, the problem of justifying them arises. Once a judge rests a particular decision on a higher commitment such as the essential dignity of all humans qua humans, that judge has violated the procedural conception of democracy because popular sovereignty has neither enacted nor authorized that higher principle. Michelman did not think Justice Brennan ever resolved this tension, though Brennan “gave us the best exhibition of his version of democracy that we and our posterity are ever likely to see.”

Adrian Vermeule posits common law constitutionalism as the opposite methodological pole to originalism. Judges can gravitate to one pole and use the original meaning of constitutional text as their guide in construing that text, or they can go to the other pole and look outside the text and rely on precedent or tradition. Original meaning has been explained by Justice Scalia—one of the most forceful proponents of the approach—as “the fair meaning of the word,” “the ordinary meaning of the words in their context,” and “a persuasive indication of what the Constitution meant to the people at the time.” This approach is bound by the text and only looks beyond the text insofar as to
determine the meaning of its terms, and not for any other interpretive guidance. Common law constitutionalism, by contrast, as I have shown, allows precedent and tradition to influence interpretation of the text when questions arise. The extratextual sources can be seen as superior, sometimes, to the text standing alone.

Vermeule is skeptical of the argument that common law constitutionalism allows judges to access “latent wisdom” and is therefore superior.33 He questions the epistemic version of the constitutionalists’ claim by pointing out that legislatures are arguably better at producing fully informed legal texts than judges are. Simply put, there are far more legislators and legislative staffers than there are Supreme Court justices, and as a result the legislators have access to greater informational resources, which should in turn generate better outputs. Why, then, assume that judges’ decisions reached in reliance on precedent and tradition are more likely to embody latent wisdom than legislative enactments are? Second, Vermeule considers whether common law constitutionalism might be more defensible in evolutionary terms than epistemic terms, and once again he decides that it is not. He sees no basis for concluding that constitutional decisions tend over time to evolve toward optimal results. Isolating a mechanism within the process of adjudication that would cause this result is confounding, for that mechanism would have to operate at a level above human intention to “cause[ ] the uncoordinated action of biased judges to produce a body of common law that is economically efficient.”34 In other words, the “heritability” (in evolutionary biology terms) of superior principles must be explained by some force within the legal system, such as the tendency of litigants to attack bad precedent and have it overruled. But judges have a range of options besides simply overruling bad precedent (refuse to hear the appeal, decline to reach the merits of the dispute, defer to stare decisis), and this is one reason why Vermeule rejects the evolutionary claim: common law
cannot consistently evolve when judges have so many different options for disposing of a case. Also, gauging the value of constitutional decisions by “efficiency” is problematic to begin with. Many judges would resist the notion that “efficiency,” rather than “justice” or “liberty,” is the proper evaluative criterion for their rulings. A metric for judging the evolutionary progress of constitutional doctrine remains elusive.

**Magna Carta, Tradition, and Constitutionalism**

How, then, does the Magna Carta fit within current constitutional interpretive practice, and how did it come to occupy that place? Frederick Gedicks has shown that the path from the Magna Carta’s signing to its place in twenty-first-century American constitutional interpretation is not an entirely straight one. In the political thought of eighteenth-century England, we encounter a fork in the road. The Magna Carta set out limitations on state power, which initially meant the power of a monarch. Over time, as the institution of Parliament became part of English government, the guarantee of individual liberty in the Magna Carta became applicable against Parliament as well. In the eighteenth century, however, a new understanding of the relationship among legislature, executive, and the people took shape, in which the “supremacy of Magna Carta, due process, and the common law, in which Coke had placed so much faith, was replaced by the supremacy of Parliament.” Gedicks continues: “This new understanding held the English constitution to be what Parliament chose to enact or repeal as law, even when such actions violated natural or common law.” In this arrangement of state power, the legislature (Parliament) constrains the executive, but the people possess no such check on the power of Parliament. When the U.S. Constitution was adopted later in the eighteenth century, the American experience proceeded
differently, through the instantiation of the practice of judicial review. Judges say “what the law is” in the context of disputes over constitutional meaning, and so judicial power counterbalances legislative decisions. To choose otherwise would be to equate the “law of the land” (in Article 39 terms) with whatever the legislature decided, thus foreclosing the application of any higher principle of justice. That path takes us to legal positivism, of course, and we must remember that that strain exists—indeed, must exist—in a democracy. Thus, to say that American law has proceeded according to constitutional rather than legislative supremacy is accurate only to the extent that the Supreme Court and the inferior courts have claimed the power for themselves to have the last word in disputes over constitutional meaning.

Current controversies over same-sex marriage implicate questions of constitutionalism and the balance between popular sovereignty and individual rights. When the Supreme Court invalidated the Defense of Marriage Act in 2013, it relied on a conception of individual liberty that is derived from constitutional jurisprudence but not stated explicitly in the constitutional text. Common law constitutionalism trumped the will of the legislature. As a result of the ruling, federal law could no longer define “marriage” in exclusively heterosexual terms. Because the decision pertained to a federal law, it pushed the conflict down to the states, which could still legislate on this issue. The states would become the only battleground where the same-sex marriage conflict would play out. In New Jersey, Governor Chris Christie suggested that the matter be put to the people directly, in the form of a public question. While this was a politically shrewd suggestion that allowed the governor to avoid taking sides on an emotionally freighted controversy during an election year, it also highlighted the tension between majority decision making and constitutional tradition. In response to the governor’s suggestion, one legislative leader demurred, saying that civil rights should not be determined by majority vote. This exchange illustrates
two contrasting approaches to settling rights conflicts and also reminds us that the tension between the two approaches manifests itself in the most divisive conflicts of our time.

Habeas Corpus, Rule of Law, and Emergency Powers

Another contemporary dispute reflects the Magna Carta lineage as well: the question of emergency powers of the executive. This is not a new problem, of course, but the terror attacks of 9/11 have brought it to prominence in popular discourse as well as public law scholarship. When emergencies arise—particularly those that threaten the very existence of the state itself—the executive predictably seeks to exercise powers beyond those normally employed. For instance, the executive may seek to confine enemies of the state without criminal charges, to interrogate them aggressively, or to curtail due process rights in the trial context. One response to this dilemma was offered by the political theorist Carl Schmitt long ago: the executive must create a space for emergency action outside the law, a state of exception. There is a danger in creating such a “legal black hole,” or “space beyond law,” as David Dyzenhaus puts it.39 If the executive gets to determine whether and when the rule of law will apply to it, then the rule of law ceases to function. Or, as Justice Kennedy put it, the test for applying the Constitution “must not be subject to manipulation by those whose power it is designed to restrain.”40 The possibility of a state of exception negates meaningful constraint on state power. But Dyzenhaus sees an equal or greater danger in what he calls “grey holes”: where rule of law may apply, or applies to a limited extent.41 These holes actually make it seem possible that law and exception can coexist, which is damaging to political theory and practice in the long run. At least Schmitt’s approach has the virtue of eschewing all pretense that rule of law applies. Bruce Ackerman’s “emergency constitution”
Chapter One

is one theory that Dyzenhaus faults for suggesting that law continues to function when ordinary politics have been suspended. Ackerman suggests that an “emergency constitution” kicks in when certain threats arise, and that it must be authorized and reauthorized by ever-increasing legislative supermajorities. But this “grey hole” makes the cessation of law difficult to see, as it covers up lawlessness with a veneer of legality.

The “state of exception” shares one feature with common law constitutionalism. Both theories require us to look outside the text for guidance in resolving legal disputes. But it is a limited similarity. In the former case, the executive is free to take any action that is judged to be beneficial to the survival of the state. In the latter case, by contrast, judges are bound by limits of tradition and precedent, even if those limits admit of some ambiguity. Because of the extratextual aspect of the state of exception, though, it is an important area to explore in a study of constitutional tradition and rule of law.

The Magna Carta as Myth

For at least a century, scholars have written of a “myth of Magna Carta,” suggesting that what the document actually meant to its signatories and the circumstances under which it was executed were quite different from what is commonly supposed. In an influential article from 1904, Edward Jenks argued that the Magna Carta had not been intended to establish liberties on behalf of the general citizenry but rather for the nobility alone. The notion that modern liberty is coeval with the 1215 signing of the Magna Carta was, for Jenks, a fiction contradicted by historical circumstances. Jenks does not find evidence of baronial solicitude for the interests or concerns of the general population. He suggests that the majority of the English populace was unconcerned and uninvolved in the struggle between the nobility and
the Crown. Moreover, Jenks contends that the “law of the land” provision of Article 39, which is most significant in American constitutional law, was meant to refer to nobility alone rather than to all the people. Article 39, he writes, “was no magnificent declaration of the rights of the common man; it was simply a recognition of the privileges of an aristocratic class, a class of landowners who, though not technically ‘feudal,’ can no more be ranked amongst ‘the people,’ than can the country gentleman of to-day.” Jenks places primary responsibility for this “myth” of Magna Carta as a populist victory on Sir Edward Coke. Jenks says that Coke’s reading of the history of 1215 was political: he wanted to claim historical precedent for popular activism and use it in his own epoch: the “troubulous times” preceding the English Civil War. As he tried to make the Magna Carta a rallying point for popular resistance to the government, Coke cast it as a foundational source of individual liberty that all English citizens could claim as their heritage.

There is much truth to Jenks’s view of Magna Carta as a myth. For one thing, habeas corpus probably predates the document by at least a decade, so it is not true that the Magna Carta gave birth to habeas corpus. Also, most of the articles in the document pertain to specific aspects of the relationship between the Crown and the nobility. Two articles (6 and 8) regulate marriage, and two others (10 and 11) refer to “borrow[ing] . . . money from Jews” and “owing money to Jews,” respectively. These four provisions hardly support a belief in the Magna Carta as a fountain of liberty. Moreover, King John renounced the Charter once the most acute danger prompting its issuance had passed. And, as Jenks points out, the fact that the Magna Carta was reissued repeatedly undercuts the claim that it was widely understood as the unshakable foundation of individual rights—why, Jenks asks, did reformers and royalists alike call for its reissuance time and again if it was already established as a binding source of rights protections? In short, there is ample evidence to conclude that
there is a mythical element to the narrative of the birth of modern liberty beginning with the Magna Carta.

At the same time, though, this mythical element can be overstated. The text of the Magna Carta refers to various categories of persons recognized within the social milieu of the time: landowners, debtors, widows, “freemen,” clergy, merchants, criminal defendants, and civil litigants, among others. The reader cannot ignore these pluralistic references even if the political conditions surrounding the document’s execution were far less democratic than a casual reading might suggest. Also, succeeding versions of the Magna Carta broadened its coverage so that it applied beyond the members of the nobility:

- Article 63 of the 1215 Charter granted liberties to “men in our kingdom.”
- Article 2 of the 1216 Charter addressed “all the free men of our kingdom.”
- The Preamble of the 1225 Charter applied to “all of our kingdom.”

How much does it matter that there is a mythical element to the story of the Magna Carta? It is certainly important to recognize the actual historical circumstances surrounding the creation and execution of the Magna Carta. Rigorous historical inquiry serves to show that mythologies traceable to founding acts or moments persist—and operate similarly—in the development of different nations. It would be a mistake to ignore the facts of the Magna Carta’s origin just as it would be misguided to ignore, say, the common class interests of many eighteenth-century American revolutionaries. At the same time, though, tradition gathers a force over time that is not dependent on the accuracy of its historical claims. The words and actions of Edward Coke, William Penn, and others who used the Magna Carta symbolically to further the cause of liberty strengthened the linkage
between the document and the common law constitutionalist tradition. Their actions were arguably even more important to the tradition’s development than the circumstances by which the Magna Carta came to be written and signed centuries earlier. Also, the provisions of the Magna Carta can be read as aspirations to a more inclusive rights tradition that would develop later, surpassing the narrow class boundaries of the parties to the original agreement. Akhil Amar makes a similar point about the Preamble to the U.S. Constitution. Amar notes that when the Preamble was written, “we the people” excluded slaves, women, and Native Americans. And yet the Preamble stated a promise of inclusion, according to Amar, that was eventually redeemed by a wider range of Americans. As he put it, the Preamble was like a portal through which those previously excluded groups would eventually pass. Something similar could be said about the Magna Carta. Even if it initially protected only the nobility, its insistence that the government follow the “law of the land” would eventually benefit everyone who faced adverse government action, regardless of social standing. Viewed that way, it is far more than myth.

The best defense of the Magna Carta’s central place in our legal tradition is a historical-pragmatic one. We can disagree over the original understanding of the Charter’s terms among its signatories, and even over the meaning of “due process” among the founders of the Republic. What is clear, however, is the linkage between the Charter and habeas corpus that has strengthened over time, and the resulting linkage between habeas corpus and the rule of law. Compelling voices such as Edward Coke and William Brennan emphasized the importance of these connections, and in Brennan’s case his practices of constitutional interpretation in the context of solving actual disputes have added weight to the tradition. To abandon the commitment to this principle with its warrant in historical experience would bring grave consequences that we have thus far avoided. Common
law constitutionalism, with its lineage to the Magna Carta, has worked to produce a constitutional tradition that has proved workable and enduring. Rights gain meaning through the testing process of legal disputes, and the understandings that have developed up to this point are worth retaining.

Outline of the Book

This book will explore the influence of the Magna Carta on the contemporary jurisprudence of individual rights. To investigate this question, I will focus on specific areas of dispute and controversy located at particular historical moments in the nation’s history. First, I will discuss the influence of the Magna Carta on legal thought in the North American colonies. I will also provide some insight into the English legal thought of the time concerning the Magna Carta. Next, I will examine pre–Civil War cases addressing the question of slavery. Here, while the courts in cases such as *State v. Mann* and *Dred Scott v. Sandford* were aware of the tradition by which Anglo-American law professed solicitude for individual liberty, they declared themselves helpless to intervene in the unequal power relationships between slaveholders and slaves. In one sense, this time period and the cases generated within it mark off a limit of courts’ willingness to view the liberty-protecting tradition of the Magna Carta as a binding constraint on individual property rights.

Next, I will consider a development whose connection to the Magna Carta is not explicit: the change in the status of federal common law around the pivotal decision in *Erie Railroad v. Tompkins* (1938). Supreme Court justice Louis Brandeis’s opinion in that case struck a new balance among state and federal courts and legislatures by declaring that there is no general federal common law. In other words, federal judges must follow the case law resulting from the decisions of state courts rather than
generating precedents of their own in areas such as tort and insurance law. *Erie* had implications for constitutional theory in a number of ways. It relied on a particular view of the constitutional authority of the federal courts, and it “symbolized . . . the decline of customary, historical and natural rights jurisprudence and the rise of positivism and legal realism.”50 And because of its connection with the Legal Realist movement of the time, *Erie* also provides the opportunity to consider that important movement and its effect on legal thought in general in individual rights jurisprudence in particular. Thus, a chapter on federal common law in the early twentieth century becomes an important part of the story of common law constitutionalism and the Magna Carta.

Following that, I will discuss the “rights revolution” of the Warren Court as an instance where political and historical events gave shape to the tradition of rule of law and respect for individual rights. The general public is more familiar with the Court’s landmark rulings on segregation, criminal defendants’ rights, and other freedoms by virtue of their *substantive* content. However, those rulings are also important for my purposes here by virtue of their role in incorporating Bill of Rights guarantees so that they apply against the states as well as the federal government.

Then, I will consider the curtailment of habeas corpus by the Rehnquist Court. The decisions of this period raise the obvious question of the depth of commitment—on the part of the Supreme Court, at least—to the principle of habeas corpus. While the writ was not repudiated (this would have flown directly in the face of the constitutional text), it became more difficult to access. How did the Rehnquist Court address the long-standing commitment to habeas corpus as a pillar of individual liberty? What, if anything, has happened since the Rehnquist era that would restore the place of habeas corpus in the law of detention?

Finally, I will discuss the most recent context in which individual liberty as against the state has been contested: claims of
heightened and even unreviewable executive power arising post-9/11 as the Bush and Obama administrations conducted the war on terror. Through my examination of these historical conflicts, I will consider the extent to which the Magna Carta’s Article 39, with its “law of the land” guarantee, has functioned within American constitutionalism. The primary lessons to be learned here, I will argue, have to do with the way in which ideas come in conflict with power relations. On the one hand, the rule of law protected by Article 39 has been challenged and even threatened by the demands of power at certain crucial junctures. On the other hand, decisional law produced from these moments of conflict can—sometimes, though not always—actually strengthen commitments to liberty, thereby reinforcing the Magna Carta’s declaration of liberty from state domination. In other words, in order to understand how we got from the Magna Carta’s execution in 1215 to its use as a source of authority in 2008, we must examine closely the moments in U.S. history when attempts to preserve or increase power called the guarantee of individual liberty into question.

Let me add a word about the organization of this book. While it follows a broad chronological outline, some cross-referencing and forward/backward-looking is not only helpful but probably inevitable. One cannot properly analyze *Erie* without discussing *Swift v. Tyson* (1842), which *Erie* overruled. Similarly, in considering the tension between Magna Carta’s conception of liberty and the pro-slavery rulings by American courts, comparison with substantive liberties as pronounced in later decisions is useful. And the Rehnquist Court’s restriction of habeas corpus is best understood against the background of two preceding centuries of American habeas corpus jurisprudence. I hope that readers will find these occasional deviations from strict chronological narrative to be far more enlightening than distracting.