

Teaching Magna Carta in American History: Land, Law, and Legacy

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MAGNA CARTA, that great cornerstone of American liberty, has been in the news lately. Put up for sale by three-time U.S. Presidential candidate Ross Perot in December 2007, the 1297 version of Magna Carta displayed in the National Archives was sold to financier David Rubenstein for \$21.3 million.¹ While its sale demonstrates the cash value of the document as a national treasure, it is debatable whether or not Magna Carta retains much currency in our nation's classrooms.

As with other seminal elements of the history curriculum, when given the opportunity, teachers must not only make the commitment to teach a particular topic, but also to lead the way in demonstrating the value of their curricular choices. Magna Carta is, of course, the seminal document which America's founders referred to as that "Great Charter of liberty." With the 800-year anniversary of Magna Carta in 2015, a scant five years away, it is perhaps timely for teachers to pause and reflect on what the document has meant for the Western world and on how they might use Magna Carta in their classrooms. In more conspicuous terms, this article is also designed to stimulate educators to use Magna Carta and other seminal works and episodes of history to articulate the curricular importance of history in our schools.

Magna Carta and its thirteenth-century participants are of another world, a supposed English world where Latin and French summed the languages

of scholarship and Norman government; a world 800 years ago on another continent some 3,000 miles away from America. To our modern sensibilities, of what possible use can this document be to those of the twenty-first century with our digital cameras, artificial sweeteners, and laser-guided surface-to-air missiles? Still, whether educators and citizens know it or not, Magna Carta has been irrevocably woven into our modern society.

In supposing the importance of Magna Carta to our American culture, it may appear incongruent to consider a more systematic study of Magna Carta at a time when many teachers are conflicted on how to maintain any history as a school subject. Nonetheless, despite the unintended consequences of No Child Left Behind that seemingly favor math and reading at the expense of history and other social studies, this article will attempt to demonstrate that teachers ought to consider ways to bring Magna Carta into focus for our students. Perhaps, in demonstrating that past is prologue, they may establish that there is more to schooling than scoring well on standardized tests.

Leaving the curricular politics for another venue, I invite readers to consider the place Magna Carta holds in American heritage. My aim is not to demonstrate without flinch or pause that Magna Carta brought us to this day, or that Magna Carta is the “mother ship” of liberty, but rather to explore how Magna Carta was woven into the American fabric.

On the document itself and the context of its writing, from what we know of Magna Carta, its contemporary history cannot support the weight given it as the linchpin of the American experiment. Magna Carta was not the primal document of liberty, at least not for the subjects of King John, for it did nothing and meant nothing to the masses of English people in 1215. In this world, the Church, King, and barons remained masters.²

However, it is not the history of 1215 that brought fame to Magna Carta; it was what people in subsequent generations thought about that history, or rather how they imagined new histories for Magna Carta. Because useful access to primary documents was limited at best to people in the past, the idea that those people acted on perceptions of things past cannot be overemphasized. While correctives on poorly understood perceptions are instructive, the reality is that, to our founding fathers and their colonial fathers and mothers, Magna Carta was the great talisman of liberty. That is, it does not matter that the founders “got it all wrong” (on the real Magna Carta); that is an academic concern. For our curricular purposes (the history civics lesson), what matters is that the legacy of Magna Carta possessed a life of its own, a life and tradition however ill-formed that came to mean something for Americans centuries after being pressed upon King John at Runnymede.³

As we begin our trek into the past, in telling and teaching about Magna

Carta's foundations in American heritage as it is connected to American independence, it is instructive to recognize how colonial Americans used perceptions to deal with two seminal problems of American history directly related to the introduction of Common Law in the American colonies:

1. By what right did the English come to own America? And collaterally, how was this right upheld?
2. By what law was America to be governed? And collaterally, how was this law established?

Notions of land titles and laws are centered on how Englishmen applied Common Law and, according to 1840s U.S. Supreme Court Justice Joseph Story, it was Magna Carta's material support for trial by jury as a right, together with Magna Carta's influence on the Common Law, that elevated Magna Carta as the font of liberty to the founders.⁴ While this essay can only briefly acknowledge the moral issues associated with the passing of the Indians, America's native peoples (for that is another story with different conclusions), it is important to set the context for the founders' perceptions on Magna Carta that launched America's independence. As exemplars, although perceptions on Magna Carta as a basis for the Common Law and as a foundation for colonial charters were present throughout the colonial period, Magna Carta did not enter the public debates until the passage of the Stamp Act in 1765. However, in advance of that, two essential perceptions were at play bearing on America's beginnings (both connected to Magna Carta): land ownership and law.⁵

For participants in America's founding, on the question of land claims, the historical accounts contain essentially the same perceptions: Indians occupied the land, presumably as owners, but they either neglected to use the land as God intended or, when pressed in courts, could not prove title. And, of course, when confronted by the armed challenges, Indians ultimately could not defend or hold their supposed claims. Witness the following historical account, centered on perceptions of religious beliefs as applied to land entitlement. While a group of Puritans prepared to leave England in 1630, John Cotton delivered a parting sermon in which he anointed the travelers as "chosen people" authorized to take the land under the temporal authority of the Crown with God's blessing. Invoking II Samuel 7:10, Cotton explains:

'I will appoint a place for my people Israel, and I will plant them, that they may dwell in a place of their own, and move no more ...' Now, God makes room for a people in three ways: First, when He casts out the enemies of the people before them by lawful war with the inhabitants ... Second, when He gives foreign people favor in the eyes of any native people to come and sit down with them either by purchase ... or else when they give [land] in

courtesy ... Third, when He makes a country, though not altogether void of inhabitants, yet void in the place where they reside. Where there is a vacant place, there is liberty for the sons of Adam or Noah to come and inhabit though they neither buy it nor ask their leaves.⁶

Accordingly, while the Crown authorized settlers to occupy “the King’s land” in the custom of royal right to lands claimed, the superior authority of God legitimized not only the occupation, but also ownership of the land. Although some authors refrain from putting much stock into such Biblical authorizations, for people whose lives were centered on the Bible and their faith in God, II Samuel 7:10 was good enough to overcome what might have resembled any advanced twenty-first-century morality concerns.

As measured by another colonial some 150 years later, God commanded that his people “go forth and multiply,” “to subdue the land,” and “to make the land fruitful.” In simple pragmatics, one frontiersman made clear:

The whole of the earth was given to man, and all descendents of Adam have a right to share it equally ... [However] I am so far from thinking the Indians have a right to the soil that, not having made a better use of it for many hundreds of years, I conceive they have forfeited all pretense to claim and ought to be driven from it.⁷

Such historical perceptions stand in stark opposition to the presentist conclusions of contemporary researchers in the past forty years who raise their own concerns.⁸ However, put into historical contexts with the presentism removed, rather than race, it was cultural differences over how each group interpreted land use and land titles at the root of the legal divisions between Indians and colonists. Still, the old adage holds; to the victors remain the spoils. To the colonists, the Indians’ collective inability to match up to governing scripture, as understood by the settlers, was a significant if not defining problem whose reasoning was often reduced to: God made the land to be used for all, but Indians failed to use it; therefore, the Indians’ claim was forfeited. Certainly, we in the twenty-first century recognize the injustice of such thinking and applications, but we in the present must understand that those in the past governed their lives by different rules. And moreover, whatever the perceptions of past peoples (together with their actions), however ill-formed and morally suspect by twenty-first-century standards, these perceptions stand independently of our judgment. In effect, we in the present may come to other conclusions in our thoughts and actions and, although we might judge those in the past for not living up to our standards (or our perceived sensibilities), in the moment of action, the only perceptions that matter are those of the historical participants set in their own time.

Moving away from such pragmatic Biblical explanations that supposedly authorized colonial land acquisitions, just before Americans decided

to declare Independence, Thomas Jefferson affirmed a secular justification that his fellow colonials' land claims rested on the act of conquest. Writing in 1774, Jefferson explained that America was taken by conquest much like his ancient Anglo-Saxon ancestors "left their native wilds and woods in the north of Europe [and] had possessed themselves of the island of Britain then less charged with inhabitants." Moreover, Jefferson claimed that America's emigration also came by right:

[A] right, which nature has given to all men, of departing from the country in which chance, not choice has placed them; of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness.⁹

While such a quest for America, according to Jefferson, drew upon a universal right to travel from one place to another with the intention of establishing a settlement, upon settlers' arrival, Jefferson applies another universal: the "right to conquer." Thus, rather than relying on God's word (that we ought to acknowledge as a powerful perception and justification for action), according to Jefferson, the English settlers established their land claims by the ancient right of blood conquest.

To Jefferson and ostensibly his contemporary intellectuals, the settlers' land claims may have been initially and erroneously based on the Bible; however, the greater claim stood on the secular authority given collaterally by the universal right of establishing new homes and the universal right to conquer land if contested. The colonials did not establish this action, or rather precedence; according to Jefferson, the exemplar for the American conquest was the Saxon conquest of England (which Jefferson argued was identical in form and consequence). Again, as suggested here, for our study of the past, it may be interesting that perceptions on the past may or may not be supported by the "real" history, but such revelations do not sum the instruction. The important fact is that perceptions led to action.

For example, later, after the nation was well established, when pressed by conflicting land claims (many brought by and on behalf of Indians suing in American courts), U.S. Supreme Court Justice Joseph Story applied the third (and what came to represent the final) authoritative explanation over land claims. Story wrote in 1840:

How, then, it may be asked, did the European nations acquire the general title [to America], even to that in the occupancy of the Indian tribes? The only answer, which can be given, is, in their own assertion, that they acquired a general title thereto in virtue of being the discoverers thereof, or, in general words, that their title was founded upon the right of discovery. They established this doctrine (whether satisfactorily or not is quite a different question) that discovery is a sufficient foundation for the right to territory . . . The right of discovery, thus asserted has become the settled foundation, on

which the European nations rest their title to territory in America; and it is a right, which, under our governments, must now be deemed incontestable, however doubtful in its origins, or unsatisfactory in its principles.¹⁰

As evidenced by Story's pronouncement, by 1840, then, the case was closed on land titles. Using Story's reasoning, the United States' claim to land stemmed directly from John Cabot's original 1497 claim that America belonged to the King of England by right of discovery. Thus, applying Story's reasoning, all American land claims were, in effect, legally conveyed without fail by the 1783 Treaty of Paris from the King of England to the governments of the various United States in 1783.

In sum, as its history unfolded, however imperfect, America's land claims rested on three simultaneous or concurrent bases as exemplified by: (1) Cotton's exemplar of Biblical Authority; (2) Jefferson's Right of Travel, Settlement, and Conquest; and (3) Story's definitive Right of Discovery. By the early to mid 1800s, the time had passed when one could bring a Bible to civil or criminal court to prove one's case, and once the Revolutionary War was settled, the right of conquest carried little weight. Dismissing all such contested claims to original ownership, Story's Right of Discovery came to be and remains now the settled legal interpretation of land ownership; case closed.

With all land claims running through the Crown and then by treaty vested under the authority of individual states and then collectively the United States of America, the next issue is to tackle which law governed the colonists, and here is where the story turns to Magna Carta.

Before the first permanent English settlement was established at Jamestown in 1607, the King's Charter law assured that all colonists and their descendents in America would possess the same rights of those living in England. In specifics, the First Charter of the Virginia Company signed under seal by King James on April 10, 1606 bound the Crown in perpetuity to respect the rights of his American colonists. For our Revolutionary history, here is where the story gets interesting. The governing Charter read in part:

[All] and every person being our subjects which shall dwell and inhabit within every and any of the said several Colonies and plantations and every and any of their children . . . shall have and enjoy all liberties, franchises, and immunities as if they had been abiding and borne with this our realm of England.¹¹

Writing in his famous book, *A Familiar Exposition of the Constitution of the United States*, Story commented on the vitality of Common Law implanted into the American mind:

There is a great conservative principle in the common law of England, which would have insured to our ancestors the right to partake of its protection, its

remedial justice, and its extensive blessings. It is a well-settled doctrine of that law, that, if an uninhabited country is discovered and planted by British subjects the laws of England, so far as they are applicable, are there held immediately in force.¹²

Thus, as echoed in the famous words of John Adams that the “Revolution was in the hearts and minds of Americans” before “the War commenced,”¹³ if anything, the seeds of the American Revolution and the Great Separation between England’s American thirteen colonies and the Crown were established long before Jefferson’s Declaration of Independence, long before Lexington-Concord, before the Boston Tea Party, before the Boston Massacre, before Stamp, Townsend, Tea, or Quartering Acts, before the French and Indian War, and in fact, long before *all* that happened in America after the first settlers touched foot on American shores at Jamestown or at Plymouth Rock.

The separation between England and America that was the American Revolution was kindled and fanned by the familiar events that lead to revolutions, but the genesis of American Independence stems from an ancient devotion to what these American Englishmen viewed as the sacred rule of law and their ancient rights under that law.

The proof of this contention rests in the Virginia Charter, signed in advance of settling the American colonies in the New World; here, King James established the legal fodder for American Independence that would come 170 years later. In 1776, as King George III’s “loyal” subjects, Thomas Jefferson, John Adams, and Benjamin Franklin penned the famous Declaration of Independence, making clear that the King’s colonial subjects were not rejecting their English roots, nor did they intend to refuse their duties to their King. Instead, these “Englishmen” were demanding that their King protect their rights, rights they claimed were guaranteed and traced to that great talisman of liberty: Magna Carta.

Again, referencing one of the greatest legal minds of America’s first half-century, according to Story, Magna Carta as represented in “the Common Law was [the colonist’s] birthright,” and “the first revolutionary Continental Congress in 1774, unanimously resolved, that the respective Colonies [were] entitled to the common law.”¹⁴ Perceptions mattered.

Given the King’s refusal to acknowledge his subjects’ ancient rights, his loyal colonial subjects reasoned that the King had abdicated his right to rule them and, moreover, the King’s repeated refusals to honor his ancient and sacred obligations authorized his loyal subjects to sever their ties to him. Thus, with the stroke of a pen, the Declaration of Independence voided the King’s Charters and simultaneously established a new government. The King contested this declaration and the American Revolution continued until 1783. The foundation of the new American government was not,

however, based on new principles, but rather was determined by a logical and reasoned extension of established Common Law of England.

When King James authorized the Virginia Company's business in the New World and guaranteed the rights of all colonists, the whole of English law, the Common Law, was seated in America.¹⁵ As begun by Magna Carta 1215, the centuries-old evolution of Common Law was one of the most important legal advancements to upend the arbitrary nature of royal rule and the idiosyncratic nature of local law and custom. The tradition of Common Law harkened back to medieval times, with the belief that law was not made in the legislative sense of someone or some group of people inventing it, but rather that law was discovered. As practiced throughout the British Empire, it was the task of skillful jurists to reveal law and its revelation was not only heavily dependent on documents, but on perceptions of law.

While we know that Magna Carta was not meant for common folk, such information or conclusion meant little to our American founders. By the time of the great English migrations to the New World in the seventeenth century, Magna Carta had been revisioned, as our social historians might say. Through the work of reformers, Magna Carta *was* the great talisman of liberty, the "Great Charter of liberties" as John Adams described:

Where the public interest governs, it is a government of laws, and not of men; the interests of a king, or of a party, is another thing—it is a private interest; and where private interest governs, it is a government of men, and not of laws. If, in England, there has ever been such a thing as a government of laws, was it not *magna charta*? And have not our kings broken *magna charta* thirty times? Did the law govern when the law was broken? Or was that a government of men? On the contrary, hath not *magna charta* been as often repaired by the people? and, the law being so restored, was it not a government of laws, and not of men?¹⁶

Writing 180 years later, Winston Churchill said in 1956:

Here is a law which is above the King and Parliament which even He and They must not break ... This reaffirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.¹⁷

Separated by nearly two centuries, if Adams and Churchill stand correct, Magna Carta was great law; law that stood over King and what came to be Parliament. Here was law that no King or Parliament could upend or legally overturn. Magna Carta was a law so superior that any attempt to invalidate or nullify its form, function, remedy, or enforcement need not be respected and as such could be legally ignored. Moreover, if any attempt to abrogate Magna Carta's rights proved successful, the King's subjects were bound to attack these villains of the law.

If Adams' "government of laws, and not of men" is the foundation of constitutional government, the question begged is what formed that definitive conclusion. Anticipating the famous Federalist Papers of James Madison, John Jay, and Alexander Hamilton, Adams and his founding brothers understood well the natural tendency of men (and women) to separate themselves into factions, to act in accordance of their natures, of their interests. These were understandings they had read, believed, experienced, and acted upon. From their perceptions on the past, they accepted the notion that powerful rulers will, if allowed, establish a government of men. To the founders, such tyrants were the great enemy of liberty. As Jefferson wrote, the only known "safe depository" of rights is the people; and that requires a government of laws.

To understand our own history, to teach about our founding, the teacher's first issue is to establish the theme of our instruction, the conceptual framework; the essential organizer from which our instruction shall follow. Here, the power of perceptions is manifest. While we in the present have unlimited access to documents, books, written law, history, and more, past peoples applied argument and reason in ways that are poorly understood by us. As teachers, our task is not to heap scorn and judgment on historical characters for failing to act in ways that are obvious to us, but to seek understanding and appreciation of how decisions were made and what might have been the basis of those decisions. To that end, if perceptions mattered, once we untangle religion from political action (and the founders did seek to establish a secular state, albeit centered on Christian virtues), we discover the power and influence of the idea of Magna Carta as understood by our founders. To them, next to God's (or nature's) law, Magna Carta was the first to demand limits on government in favor of rights and liberty.

Over time, regardless of the license taken with the actual Magna Carta and a track of history that had grown irrelevant, the function of Magna Carta as a basic principle was to remind governors and would-be governors (kings, rulers, parliaments, cabals, committees, and all) that human rights are sacred and cannot be overturned by governments of men. This essential fact stems from the declaration that all power rests with the people and that the people willingly surrender some rights (by consent) for the good of the order. Yet this surrender of rights is not to a government of men, but to a government of laws in which all citizens possess equal rights.

Without Magna Carta, our founding remains shrouded in incomprehensible mystery. Founder after founder reiterates the power and purpose of Magna Carta; it was plain common knowledge to all that the sacred rights of Englishmen stemmed from Magna Carta's immutable dictum that kings (rulers) must be subject to the law. It was the founders' conviction

that England was a government of laws, not a government of men. It was the protests that arose from the fallout of the French and Indian War and England's attempt to raise revenues from their colonies that put colonists at odd with England; namely, that England (its King and Parliament) was acting as a government of men and not of laws, treating the colonists not as fellow subjects, but slaves. To the founders, the trouble with England began when the King and Parliament sought to tax colonists without their expressed consent. To the founders' perceptions-sensibilities, that action violated Magna Carta and was thus null and void. Resting aside our presentist discussions on perceived slavery versus practiced slavery, the constitutional issue raised in the wake of the Stamp Act and later legislative actions was between King and subject, not masters and slaves. As teachers, we need to explore what perceptions led to such conclusions. For that answer, we turn to Magna Carta.

To the founders, the colonists were *preserving* the law and principles of Magna Carta, and it was the King and his Parliament who were illegally usurping power. As proof of their protested convictions, when put to the test by Revolution and victory, the founders responded with a government of laws, not of men. The principles of American government based on Magna Carta were enshrined in the Declaration of Independence, Articles of Confederation, and more directly in the United States Constitution. Like Magna Carta, none of these documents proposed to introduce or grant new rights or demonstrate new principles. Rather, like Magna Carta, the founding documents were *declaratory* of rights, that is, these documents reminded citizens of the immutable rights of man; that human rights exist outside of government, that human rights presuppose government, and that governments cannot under any condition usurp these rights without violating the principle upon which these rights rest.

While the United States Constitution's first words, "We the People" have been criticized as exclusionary terms meant only for rich white males, it has been noted that Magna Carta was in the same vein an exclusionary document. However, in time, "We the People" has come to embrace and include a great diversity of citizens. In effect, the Constitution and Magna Carta were prepared with the same intention, that kings (government) must submit to law and that kings (government) must recognize that the rights of subjects (citizens) cannot be altered or destroyed.

While the full expression of these essential principles took centuries to formulate and find flower in our founding, it was Sir Edward Coke, the great seventeenth-century champion of Magna Carta, who widened the circle of Magna Carta's influence when he declared the Great Charter to be England's fundamental and immutable law. Coke not only helped craft the Virginia Charter of 1606 that laid the seeds of Revolution 170 years later,

his work also unlocked and unleashed the intellectual and legal hardware that led to the English Petition of Rights in 1628, anticipating the Glorious Revolution of 1688 and the later American Revolution era in 1774-1783.

Magna Carta was not merely a document that foreshadowed the principle of constitutional law (that law is supreme, that all are equal under law, that rulers are bound to respect the law, that fundamental human rights are secured by law); it embodied ideas that resonated with like-minded men over the centuries. The stellar biography of Magna Carta's famous track toward the foundation of the United States begins not with King John, but most likely his chief advisor Stephen Langton, Archbishop of Canterbury (head of the Church in England). It was Langton who historians believe introduced the operative and inclusive language that allowed Magna Carta to become a hallmark for human rights.

Once launched, it was quickly denounced by King James and voided by the pope, throwing England into civil war. After the death of King James in 1217 and the accepted accession of his son, Magna Carta went through a series of revisions. Although periodically reviewed, recalled, or reissued, its human rights and governmental controls rested quietly until effectively (if not creatively) revived by Sir Edward Coke in the seventeenth century.

The idea that the historical context of Magna Carta 1215 is found in England of 1628 or 1689, or in America between 1765 and 1776, is absurd. Magna Carta was a product of medieval minds in a medieval world unimagined by or understood by future generations. Again, what mattered to future generations (most of which had never even read Magna Carta 1215) were perceptions.

For Americans (particularly colonists and later founders), the traditions of Magna Carta rested on law tracts by Coke. In 1682, William Penn applied Magna Carta via Coke's liberal interpretations in the construction of his "Frame of Government of Pennsylvania." Later, in 1687, Penn published a collection of documents outlining the rights of colonial Americans. In this collection, Penn included a reprint of the 1225 version of Magna Carta, essentially the first publication of Magna Carta in America. It was not until 1759 that the original 1215 text of Magna Carta was available. As published by William Blackstone, the *Commentaries* featured the now-familiar Coke interpretation of Magna Carta as being the foundation of human rights. Blackstone's *Commentaries* were first published in America in 1771. For the founders, Blackstone's works largely replaced Coke's as the most popular source on Magna Carta and its applications to common law and human rights. The many lawyers among the founders all relied on Blackstone's interpretations that were of course centered on Coke's original revisions on Magna Carta.

In America, dating from Stamp Act protests in 1765, Magna Carta's

position as the rock-foundation of English rights was firmly established. Colonial leaders such as James Otis, Benjamin Franklin, Payton Randolph, John Adams, Patrick Henry, John Dickinson, Thomas Jefferson, George Mason, and James Madison all made specific references to Magna Carta as providing legal justification for their protests to the King and used it later to serve as virtual license to separation.

To the founders, the Great Revolution was the English Revolution of 1688 and the English Bill of Rights that followed. In our Revolutionary era, the colonists frequently invoked the Glorious Revolution and Magna Carta. For example, when Parliament passed the Stamp Act in 1765, the Massachusetts Assembly declared the act null and void as a violation of their natural rights outlined in Magna Carta; namely, no parliament could by right tax subjects without representation and thus without consent.

For history teachers, the puzzle here is why British officials did not agree with their colonial brothers. Truth is, many British leaders did agree—however, the ruling powers did not. While sentiments on Magna Carta as the foundation of rights dominated on both sides of the Atlantic, there was a distinct difference between how Parliament was viewed. From the English Revolutions between 1642 and 1689, the prevailing British position was that Parliament assumed the sovereign position; that is, the statutory power of Parliament was supreme.

For Americans, the earlier reliance on foundational rights was the preferred position. Thus, after the seventeenth century, Magna Carta took on a far greater importance in America than it did in England. To Americans, the law was backward-looking in that ancient rights were supreme to any legislative action. In Britain, legislative actions could undercut supposed “foundational rights.” Indeed, as was demonstrated in the Declaration of Independence, Jefferson outlined the dispute between King and subjects as centered on the King’s supposed usurpations on his subjects’ rights. Moreover, it was the King’s failures to protect the ancient rights of his subjects (not the acts of Parliament) that provided the legal justification for not only the separation and war (as was necessary), but also the right to establish a new nation. Undoubtedly, Jefferson’s attack on the King baffled British sensibilities as they had long ago tied back the hands of kings as would-be tyrants. Still, as America’s ancient and operative colonial charters rested on grants from the English throne, most dating from before the Glorious Revolution, the King as target was legally “correct.”

Perhaps an even more telling example of the difference between the British interpretation of Magna Carta (which placed Parliament as master of the Empire) versus the American interpretation of Magna Carta (which provided for the people as supreme authority), can be read in Franklin’s *Examination* before Parliament in 1766.

Just as the howls of protests were peaking over the imposed Stamp Act, Franklin was called to Parliament to explain the reason why Americans were so reluctant to submit to the law. Then living in London as agent for Pennsylvania, Franklin outlined what appeared to be the prevailing colonial position. When questioned over the purported immediate need to send British troops to America to protect colonists from the Indians, Franklin answered, “No, by no means; it was never necessary.” Franklin’s answer undercut the supposed purpose for the Stamp Act as a means to raise revenue to support the defense of the American colonies.

When questioned on the fundamental issue of Parliament’s right to tax, Franklin was asked how “the assembly of Pennsylvania [could] assert, that laying a tax on them by the Stamp Act was an infringement of their rights.” Franklin answered with authority:

They understand it thus: by the same charter [issued by James I in 1606], and otherwise, they are entitled to all the privileges and liberties of Englishmen; they find in the Great Charter [Magna Carta], and the Petition and Declaration of Rights [as interpreted by Coke as being founded on Magna Carta], that one of the privileges of English subjects is, that they are not to be taxed but by their common consent . . . that the parliament never would, nor could, by colour of that clause in the charter, assume a right of taxing them.¹⁸

Parliament went on to ask on what grounds the colonists justified this position. Franklin answered bluntly, “The common rights of Englishmen as declared by Magna Carta and the Petition of Right, all justify it.” Pushed further, Parliament asked, if “the Stamp Act were repealed, would it induce the assemblies of America to acknowledge the right of parliament to tax them?” Franklin answered simply, “No, never.”

As Franklin represents, by 1766, ten years before the Declaration of Independence, the colonial position on “ancient rights” being centered on Magna Carta was settled and later founders did not waver from this interpretation. Accordingly, for the founders, in the tradition of Coke, the English Levellers, Blackstone, and others, the established rights of freedom, safety, and well-being were not based on some new invented law, but were supported by what they supposed was the fundamental law of England: Magna Carta. For the antecedent to Magna Carta, writers in the seventeenth century interpreted the English Civil War and the execution of Charles I as restorative acts that finalized the end of Norman rule that began in 1066, thus returning to the people their ancient rights, those same rights outlined in Magna Carta.

Lest we think these colonials were the only ones who had run amok with inventive imaginations of Magna Carta, we come to Thomas Hayter, the Bishop of London in the 1750s, who may have been the first to reveal that Magna Carta established the legal imprimatur for not only “Liberty

of Speech,” but also certified its cousin “Liberty of the Press.” Hayter reasoned that speech was an essential right and that printing was merely “a more extensive and improved kind of speech.” The topper of course was that Hayter connected both freedom of speech and press (lumped together as one in the same) as constitutional rights protected by Magna Carta. Continuing in the fashion that Magna Carta did not invent or create new rights, it was Hayter’s contention that “Liberty of Speech” was “antecedent to that Great Charter of British Liberties.” As one of our twentieth-century historians put it, if Hayter’s “declaration of faith was historically and legally groundless, it had the quality of myth-making which characteristically transcends the grubbiness of fact.”¹⁹

By the founding era, the fictional Magna Carta had merged with the historical, and even if one wanted to separate one from the other, the inertia of liberty would not have it.

In 1776, some 561 years after Magna Carta, when Jefferson’s Declaration of Independence inferred the King’s tyranny as a violation of Magna Carta, the legal right of revolution was invoked and nobody cared to question Mr. Jefferson’s claim. Later, in 1787, explicitly merging myth and history, the United States Constitution borrowed lines from Magna Carta’s 39th clause. Where Magna Carta declared “No free man shall be taken, imprisoned, . . . outlawed, or in any way destroyed except by the lawful judgment of his peers and by the law of the land,” the Constitution’s Fifth Amendment asserts, “No person shall be deprived of life, liberty, or property, without due process of law.”

There was more: in the Constitution’s Article I, Section 9, connected by inference, “the privilege of the Writ of Habeas Corpus” was guaranteed, and in Article III, Section 2, the right of trial by jury is also outlined and assured. And finally, as the Magna Carta was invoked as fundamental law, in Article VI, the Constitution was explicitly declared “the supreme Law of the Land.”

Conclusion

However ill-formed, as found in their works and actions, to the founding fathers, the universal perception was that Magna Carta was the first and therefore the definitive assertion that no man, not even a king, was above the law. In conclusion, I have not, of course, exhausted this important subject, as there is much that can be learned by examining the contextual history of Magna Carta as well as the history taken on in the name of Magna Carta. It is perhaps peculiar to our time that many in our society have no urge or desire to revere things past and such people do not look upon the ancients of having some particular knowledge or conception of the world

that is in advance of what our modern sensibilities tell us is worthy.

One corollary of our attempts to ensure that no child will be left behind in math and reading is that if such work continues to reduce time and attention to other subjects, we can be assured that in less than a generation, every child will be left with no clue as to how this nation was formed or have any idea what the rule of law means or what influences must be studied in order to understand the law. This is no small curricular quibble and no small catastrophe in the making.

As exemplified in this invitation for a rigorous study of Magna Carta and America's founding, it is the task of history practitioners as well as those advocating for other subjects to speak up and speak out for their subject matters. We would be wise to refrain from complaining about today's "curricular weather" brought on by the unintended and potentially devastating effects of NCLB to do something substantial to advance a more rounded public education as a means to promote a healthy republican form of government as well as happier and more engaged citizens.

As a starting point in history instruction, Magna Carta is not a magical thing, nor are the words found therein useful to conjure or cast spells upon your enemies. In addition, I was assured by one humorless guard at the British Library that no Masonic maps or clues to national treasures will be found on the reserve side any of the copies of Magna Carta in their care. Still, the consequence of perceptions of Magna Carta and the world in which it was created led to the establishment of the United States. Therefore, the study of our founding fathers' perceptions on Magna Carta provides an opportunity not only to reflect on the great unfolding of liberty and of law and what these ancient rights have meant to millions, but also to appreciate the power of perceptions that led to action.

In sum, this article does not imply that we teach Magna Carta as part of some nationalistic-mythical tradition, but rather that we teach about the power of perceptions (of perhaps mythical proportions) that have led to action. As unlikely as this medieval document might seem to us as a great catalyst of liberty, Magna Carta was an essential part of American history and not only does its study have the potential to reveal a glimpse of things past and the heritage of liberty, but its teaching also helps us understand a bit more about ourselves as we might imagine our collective futures.

Notes

1. *Sotheby's Magna Carta Catalogue* (2007).

2. See David L. Brooks, ed., *From Magna Carta to the Constitution: Documents in the Struggle for Liberty* (San Francisco, CA: Fox and Wilkes, 1993); James C. Holt, *Magna Carta* (London, U.K.: Longman, 1961); Caroline P. Stoel and Ann B. Clarke, *Magna Carta to the Constitution* (Portland, OR: Magna Carta in America and Graphic Arts Center Publishing, 1986); William F. Swindler, *Magna Carta: Legend and Legacy* (Indianapolis, IN: Bobb-Merrill, 1965); and Louis B. Wright, *Magna Carta and the Tradition of Liberty* (Washington, D.C.: United States Capitol Society and the Supreme Court Historical Society, 1976).

3. The following represent a range of texts available on Magna Carta for students and specialists. Any study of Magna Carta ought to begin with its text: A. E. Dick Howard, *Magna Carta: Text and Commentary* (Charlottesville, VA: University Press of Virginia, 1998) provides a serviceable translation with expert commentary. Danny Danziger and John Gillingham, *1215: The Year of Magna Carta* (New York: Touchstone, 2005) offers a concise generalist title on times and trials of 1215 England. One of the best recent scholarly treatments is Ralph V. Turner, *Magna Carta Through the Ages* (Harlow, U.K.: Pearson Longman, 2003). For a useful treatment on the men who advanced Magna Carta into American law, an interesting portrait of three seminal figures is presented in James Ayars, *We Hold These Truths: From Magna Carta to the Bill of Rights* (New York: Viking, 1977). Perhaps one of the most interesting and timely texts was one prepared to celebrate the 750th anniversary of Magna Carta: Samuel E. Thorne et al., *The Great Charta* (New York: Mentor, 1965).

4. Joseph Story, *Story of the Constitution* (New York: Harper Brothers, 1872), 20-21.

5. David W. Saxe, *Land and Liberty II: The Basics of Traditional American History* (Boca Raton, FL: BrownWalker, 2006).

6. John Cotton, "The Divine Right to Occupy the Land" (1830), in *The Annals of America*, Vol. 2 (Chicago, IL: Encyclopædia Britannica, 1976), 107-108.

7. H. H. Brackenridge, "A Negative View of Indian Rights" (1782), in *The Annals of America*, Vol. 2 (Chicago, IL: Encyclopædia Britannica, 1976), 582.

8. See Thomas R. Frazier, ed., *The Underside of American History* (New York: Harcourt Brace Jovanovich, 1971); Gary B. Nash, *Red, White, and Black* (Englewood Cliffs, NJ: Prentice-Hall, 1974); and Ronald Takaki, *A Different Mirror* (Boston, MA: Little, Brown, and Co., 1993).

9. Thomas Jefferson, "A Summary View of the Rights of British America" (1774), in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (New York: Viking, 1975), 4.

10. Story, 13-14.

11. First Charter of Virginia (1606), in *The Annals of America*, Vol. 1 (Chicago, IL: Encyclopædia Britannica, 1976), 17.

12. Story, 21.

13. John Adams, "The Meaning of the American Revolution" (1818), in *The Annals of America*, Vol. 4 (New York: Encyclopædia Britannica, 1976), 465.

14. Story, 20.

15. Ibid.

16. John Adams, "Letter to Price" (1779), in *The Works of John Adams, Second President of the United States*, Vol. 4, ed. Charles Francis Adams (n. p., 1851).

17. Winston S. Churchill, *A History of the English-Speaking Peoples*, Vol. 2 (New York: Dodd, Mead, and Co., 1956).

18. Benjamin Franklin, "The Examination of Benjamin Franklin" (1766), in *The American Revolution Through British Eyes*, ed. Martin Kallich and Andrew MacLeish (Evanston, IL: Row, Peterson, and Co., 1962), 23.

19. Leonard W. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* (New York: Harper Touchstone, 1963), 144.