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A New Magna Carta for the Early Modern Common Law: An 800th Anniversary Essay

John Witte, Jr.[1]

Introduction

Over the past three decades, a veritable cottage industry of important new scholarship has emerged dedicated to the history of rights talk in the Western tradition prior to the Enlightenment. We now know a great deal more about classical Roman understandings of rights (*iura*), liberties (*libertates*), capacities (*facultates)*, powers (*potestates*), and related concepts, and their elaboration by medieval and early modern civilians.[2] We can now pore over an intricate latticework of arguments about individual and group rights and liberties developed by medieval Catholic canonists and moralists, and the ample expansion of this medieval handiwork by neo-scholastic writers in early modern Spain and Portugal.[3] We now know a good deal more about classical republican theories of liberty developed in Greece and Rome, and their transformative influence on early modern common lawyers and political revolutionaries on both sides of

[1] Robert W. Woodruff Professor of Law; Alonzo L. McDonald Distinguished Professor; Director of the Center for the Study of Law and Religion, Emory University. My thanks to Mark Hill, Justin Latterell, and Thomas J. McSweeney for helpful comments on an earlier of this article, to Amy Wheeler for her fine administrative support of this project, and Elizabeth Christian and Kelly Parker Cobb for their excellent library services. Portions of this text are drawn, with the publisher's permission, from John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007.

[2] See sources and discussion in Charles A. Donahue, "*Ius* in Roman Law," in John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Human Rights: An Introduction* (Cambridge: Cambridge University Press, 2010), 64-80; Max Kaser, *Ius Gentium* (Köln: Böhlau, 1993); id., *Ausgewählte Schriften,* 2 vols. (Jovene: Naples, 1976-1977); Tony Honoré, *Ulpian: Pioneer of Human Rights*, 2d ed. (Oxford: Oxford University Press, 2002).

[3] Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 1997); A.S. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge/New York: Cambridge University Press, 1997); R. W. Davis, ed., *The Origins of Modern Freedom in the West* (Stanford, CA: Stanford University Press, 1995); Richard Tuck, *Natural Rights Theories: Their Origins and Development* (Cambridge/New York: Cambridge University Press, 1979); Michel Villey, *La formation de la pensée juridique moderne* (Paris: Presses universitaires de France, 1968); id., *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983); id., *Leçons d'histoire de la philosophie du droit*, new ed. (Paris: Dalloz, 1977).

the Atlantic.[4] We now know, in brief, that the West knew ample "liberty before liberalism,"[5] and had many fundamental rights in place before there were modern democratic revolutions fought in their name.

The Magna Carta was a critical early source of rights and liberties in the Anglo-American common law tradition. Charters of rights and liberties were actually quite common in the Middle Ages, both in England and on the Continent.[6] But no medieval charter proved more critical for later English and American law than the Magna Carta. The Archbishop of Canterbury, Stephen Langton, guided the creation of this famous document at Runnymede, England in 1215 at the insistence of the barons who were threatening civil war in retaliation for the excessive taxes, forced loans, and other oppressive royal measures of King John. Though nullified ten weeks later, the charter was reissued with revisions several more times, most authoritatively in 1225 and 1297. The Magna Charter made ample provision for early forms of fair taxation, rights of marriage, private property, and inheritance, various freedoms of trade, travel, and commerce, freedom of the church, a number of criminal procedural protections,[7] and more. Particularly prescient for later Western constitutionalism were Articles 39 and 40 (Article 29 in the better known 1225 version): "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." And again: "To no one will We sell, to none will We deny or delay, right or justice."[8] By the fourteenth century, courts were calling these guarantees the rights of "due

[4] C. Wirszubski, *Libertas as a Political Idea at Rome During the Late Republic and Early Principate* (Cambridge: Cambridge University Press, 1950); Eric Nelson, *The Greek Tradition in Republican Thought* (Cambridge: Cambridge University Press, 2004); Annabel Brett and James Tully, eds., *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006).
[5] Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998).
[6] R.H. Helmholz, " Magna Carta and the Law of Nations," in Robin Griffith-Jones and Mark Hill QC, eds., *Magna Carta, Religion, and the Rule of Law* (Cambridge: Cambridge University Press, 2015), 70-80; R.H. Helmholz, "Magna Carta and the Ius Commune," *University of Chicago Law Review* 66 (1999): 297-371.
[7] See J.C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965); Anne Pallister, *Magna Carta: the Heritage of Liberty* (Oxford: Clarendon Press, 1971).
[8] In Randy J. Holland, ed., *Magna Carta: Muse and Mentor* (Eagan, MN: Thomson Reuters, 2014), 243; cf. Art. 52, in ibid., 244. See also A.E. Dick Howard, *Magna Carta: Text and Commentary* (Charlottesville, VA: University of Virginia Press, 1964).

process,"[9] and by the eighteenth century, William Blackstone was calling them "the foundation of the liberty of Englishmen."[10]

To be sure, the Magna Carta and its medieval analogues were not on the order of modern comprehensive statements of rights and liberties. Particularly the fundamental rights of religion, speech, press, association, equality, and privacy, all so central to the law today, were only very lightly touched even in the most progressive of medieval legal texts and commentaries.[11] And many other commonplace rights today, set out in the 1948 Universal Declaration of Human Rights and in later international human rights as well as in sundry other constitutional bills of rights were hardly prefigured at all in the Magna Carta or other medieval charters.[12]

Historians have been at work mapping how we got from there to here – how this medieval seedbed of rights and liberties eventually grew into the thick forest of human rights norms in place today. In this brief Article, I focus on one small piece of this emerging map – namely, the growth of rights in seventeenth-century England and colonial America.[13] The seventeenth century was a time in England, not unlike the early thirteenth century, when chronic royal abuses prompted various English groups to rise up to rebel against the king and demand greater rights and liberties. This was also a time when a massive wave of revolutionary tracts pressed not just for the restoration of the old Magna Carta but also for the creation of a new Magna Carta with many more rights and far more sweeping protections than its medieval ancestor. While no such new Magna Carta was passed, the old Magna Carta was given vibrant new life in the turbulent seventeenth century, and many of the other provocative rights ideas advocated in the English revolutionary tracts gradually made their way into the Anglo-

[9] See 28 Edw. III, c. 3 (1354), which renders this provision: "no man shall … be put out from land or tenement or arrested, imprisoned, or disinherited, or put to death without being brought to answer by due process of law." On the various applications of this provision before the seventeenth century, see Sir John Baker, "The Legal Force and Effect of Magna Carta," in Randy J. Holland, ed., *Magna Carta: Muse and Mentor* (Eagan, MN: Thomson Reuters, 2014), 65-84. On the development of parallel rights in this same period, see Thomas J. McSweeney, "The Right to Jury Trial and Magna Carta," in ibid., 139-58; Justin Wert, "Habeas Corpus and Magna Carta," in ibid., 159-180.

[10] William Blackstone, *Commentaries on the Laws of England in Four Books* [1765], repr. ed. (Buffalo, NY: Hein, 1992), bk. 1, ch. 1.

[11] See John H. Baker, *Selected Readings and Commentaries on Magna Carta 1400-1604* (London: Selden Society, 2015).

[12] John H. Baker, "Magna Carta and Personal Liberty," in Griffith-Jones and Hill, eds., *Magna Carta,* 81-108.

[13] For earlier treatments, especially around the 750th anniversary of Magna Carta, see Maurice Ashley, *Magna Carta in the Seventeenth Century* (Charlottesville, VA: University of Virginia Press, 1965); Herbert Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries* (Reading: University of Reading, 1969); Faith Thompson, *Magna Carta: its Role in the Making of the English Constitution, 1300-1629* (Minneapolis, MN: University in Minnesota Press, 1948). See also the cautionary tale about rights talk told by James Hutson, *Forgotten Features of the Founding Era: The Recovery of Religious Themes in the Early American Republic* (Lanham, MD: Lexington Books, 2003), 73-110.

American common law. They were reflected provisionally in English documents like the Petition of Right (1628) and eventually in the Habeas Corpus Act (1679), and in the Bill of Rights and Toleration Act of 1689 as well. These rights ideas came to more direct and dramatic expression in the many founding seventeenth-century laws of colonial America, notably in Puritan New England, whose leaders shared the Calvinist theological ideas of the English revolutionaries and had greater freedom to articulate and implement them locally.

Rights Ideas in the English Revolution of 1640-1660

Invoking the Magna Carta. In 1640, the English "world was turned upside down."[14] For the first time in eleven years, King Charles called Parliament into session, and the members erupted in unprecedented fury against decades of royal abuses. The landed aristocracy and merchants had chafed under oppressive taxation, property confiscations and strangulating regulations of trade. Clergy and laity had suffered under harsh new establishment laws that drove religious nonconformists first out of their families, pulpits and churches, then out of England altogether. Much of the country had come to resent the increasingly belligerent enforcement of oppressive royal measures by the prerogative courts – Star Chamber, Admiralty, High Commission, and Requests. When finally called into session, Parliamentary leaders seized power by force of arms, and civil war erupted between the supporters of Parliament and the supporters of the monarch. The Parliamentary party prevailed and passed an act "declaring and constituting the People of England to be a commonwealth and free state." The Commonwealth Parliament abolished the kingship, and the deposed King Charles was tried, convicted for treason, and executed in 1649. Parliament also abolished the aristocratic House of Lords and prerogative courts and declared that "supreme authority" resided in the people and their representatives. "Equal and proportional representation" was guaranteed in the election of local representatives. The Church of England, too, was formally disestablished.

This radical Commonwealth experiment lasted only until 1660 with the restoration of the traditional church, crown, and commonwealth. But in those brief twenty years, England was buried in an avalanche of new writings that would prove critical for the eventual expansion of rights in the common law tradition. More than 22,000 pamphlets, sermons, and other tracts were published from 1640 to 1660 -- some of them crafted in England and abroad well before 1640 but hitherto censored, many more written in the heat of revolutionary battle. A great number of the pamphleteers denounced the

[14] Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution*, repr. ed. (New York, NY: Viking Press, 1972).

tyranny of church and state and called for more robust protections of the "people's rights and liberties."[15]

The pamphleteers pointed first to the Magna Carta with its opening guarantee that "the church of England shall be free and shall have all her whole rights and liberties inviolable" and that all "free-men" shall enjoy various substantive and procedural rights and liberties.[16] For some pamphleteers, like Sir Henry Vane, the Magna Carta was a pristine statement of "those fundamental laws or liberties of the nation, which are so undeniably consonant to the law of nature, or light of reason."[17] Vane and others advocated extending these fundamental guarantees to all peaceable churches, not just the Church of England, and to all English subjects, not just aristocratic "freemen."[18] Puritan pamphleteer, John Lilburne, was another champion of this view. He called Magna Carta "the birthright" of every Englishman. In pressing for greater protection of rights, liberties, privileges, and immunities, he declared: "I build upon the Grand Charter of England." While "I am no freeman … I have as true a right to all the privileges that do belong to a freeman, as the greatest man in England."[19]

Some leading common law jurists shared this view. In 1616, for example, Sir Francis Ashley, a barrister in the Middle Temple, declared that, on account of the Magna Carta, all of us English subjects "have property in our goods, title to our lands, liberty for our persons, and safety for our lives…. [B]y force of this statute every free subject may have remedy done to his persons, lands, or goods. And not only so for that would but give recompense for a wrong done, but this statute also prevents wrongs, for

[15] See *Catalogue of the Thomason Tracts in the British Museum* (London, 1906)*;* Charles R. Gillett, ed., *Catalogue of the McAlpin Collection of British History and Theology*: index (New York, NY: Union Theological Seminary, 1930). See samples in William Haller, *Tracts in the Puritan Revolution, 1638–1647,* 3 vols., (New York, NY: Columbia University Press, 1934); Don M. Wolfe, ed., *Leveller Manifestoes of the Puritan Revolution: 1638-1647* (New York, NY: T. Nelson and Sons, 1944); Arthur S.P. Woodhouse, *Puritanism and Liberty: Being the Army Debates (1647-9),* 2d ed. (Chicago: University of Chicago Press, 1951). Throughout this Article, I have modernised the spelling of quotations from old English sources, but have retained the original spelling of the titles. See discussion in William Haller, *Liberty and the Reformation in the Puritan Revolution* (New York, NY: Columbia University Press, 1955); George Yule, *Independents in the English Civil War* (Cambridge: Cambridge University Press; Carlton, Vic.: Melbourne University Press, 1958); Henry N. Brailsford, *The Levellers and the English Revolution* (Stanford, CA: Stanford University Press, 1959); George P. Gooch, *English Democratic Ideas in the Seventeenth Century*, 2d ed. (New York, NY: Harper Torchbooks, 1959), and analysis of more recent scholarship in David Wootton, "Leveller Democracy and the Puritan Revolution," in James H. Burns and Mark Goldie, eds., *The Cambridge History of Political Thought, 1450–1700* (Cambridge: Cambridge University Press, 1991): 412–442.

[16] Magna Carta, Arts. 1 and 63 In Holland, *Magna Carta*, 239, 247.

[17] In Joyce Lee Malcolm, ed., *The Struggle for Sovereignty: Seventeenth-Century Political Tracts*, 2 vols. (Indianapolis, IN: Liberty Fund, 1999), 2:536.

[18] See Haller, *Tracts*, 1:102–107, 111–113, 177–178, 182; 2:170ff; 3:263–265, 305, 311–315, 365–366; Malcolm, *Struggle for Sovereignty,* 2:502-504, 535-542.

[19] In Pauline Gregg, *Free-Born John: a Biography of John Lilburne,* repr. ed. (London: Phoenix Press, 2000), 120-122, 129, 149.

by virtue hereof, no man shall be punished before he be condemned, and no man shall be condemned before he be heard, and none shall be heard but his just defense shall be allowed."[20] Similarly, Sir Edward Coke, the greatest English jurist of his day, called the Magna Carta not just a dusty and dispensable agreement foisted onto King John by the restive barons, as some of his colleagues like Francis Bacon were calling it.[21] The "Great Charter of the Liberties of England," said Coke, is "the principal ground of the fundamental laws of England." Neither king, nor church, nor Parliament could breach its fundamental principles. "Magna Carta is such a fellow that he will have no sovereign" superior to him.[22] In his monumental *Institutes of the Laws of England* (1628), Coke sought to make good on this claim, by assembling four centuries of medieval English statutes and cases built on the foundation of Magna Carta and evidencing its supremacy.[23]

Going Beyond the Magna Carta. Beyond the Magna Carta, the seventeenth-century pamphleteers pointed to the Petition of Right of 1628, which Coke had also helped to shape, drawing in part on these medieval precedents. Parliament had pressed this document on a very reluctant King Charles in exchange for their consent to new taxes. The Petition called for no further taxation without the "common consent" of Parliament; no forced loans from the people; no taking of a man's life or liberty "but by the lawful judgment of his peers, or by the law of the land"; no taking of a man's land, no imprisonment and no disinheritance without "due process of law"; no suspension of the writ of habeas corpus; no forced quartering of soldiers or mariners in private homes; no prosecution for crime that was set out in a statute; and no use of martial law save in true emergencies. All these "rights and liberties," the Petition declared, were to be maintained and enforced "according to the laws and statutes of this realm," without "prejudice" to the people or to their Parliament.[24]

Given that royal abuses continued apace, however, various pamphleteers in the 1640s and 1650s called for further and stronger rights documents. Magna Carta "is but a part of the people's rights and liberties," wrote Puritan leader William Walwyn to John Lilburne, and because of repeated royal abuses it has "become a very blotted book."[25]

[20] In Hubert Lister Parker, *Magna Carta and the Rule of Law: An Address by Lord Parker of Waddington, Jamestown, Virginia, June 15, 1965* (Richmond, VA: Magna Carta Commission of Virginia, 1965), 9.
[21] See esp. his colloquies with Francis Bacon, discussed in Ashley, *Magna Carta,* 8-17.
[22] In Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke*, 3 vols. (Indianapolis, IN: Liberty Fund, 2003), 3:1285. But cf. Robert C. Johnson, et al, eds., *Commons Debates,1628* (New Haven, CT: Yale University Press, 1977), 3:494-495, which renders Coke's quote as "Magna Carta is such a fellow that he will have no saving."
[23] In ibid., 2:745-914 with analysis in Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 2006), 214–216, 238–245, 257–260, 263–269; Doris M. Parsons Stenton, *After Runnymede: Magna Carta in the Middle Ages* (Charlottesville, VA: University of Virginia Press, 1965).
[24] Carl Stephenson and F.G. Marcham, eds., *Sources of English Constitutional History from AD 600 to the Present* (New York: Harper Bros., 1937), 450–453.
[25] Haller, *Tracts*, 3:313-315.

We need "a new Magna Carta," said Walwyn, which provides sturdier safeguards against "the tyranny of Crown, Church and Commonwealth."[26] Walwyn and Lilburne thus joined forces with Richard Overton and Thomas Prince in 1649 to draft such a new Magna Carta, which they called an *Agreement of the Free People of England*.[27]

The Agreement, which circulated in various drafts in the later 1640s, was in reality a proposed new written constitution for England. It focused carefully on the forms and functions of government, calling for a representative Parliament, with annual election of members and no member serving consecutive terms. All persons were to be eligible to run for office, save Catholics and foreigners. Interference in elections by anyone was a serious crime. Parliament was to stick to its clearly enumerated powers, including the power to impose taxes only at an "equal rate … upon every real and personal estate."[28] Parliament could not interfere with the judiciary or executive or interfere in military matters, beyond appointment of generals and raising military revenues when needed. Enumerating and limiting the powers of government was considered essential to protecting the people's rights.[29]

Enumerating the people's rights in full was equally essential. The 1649 Agreement added to the Magna Carta and the Petition of Right several rights that would become fundamental in the later common law tradition. A strong new religious freedom clause prohibited "any laws, oaths, or covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion or God's worship or to restrain any person from the profession of his faith, or to exercise of religion according to his conscience." Also included was a guarantee of freedom from compulsory tithes and appointed clergy and freedom for members of each parish or congregation to elect and contract their own ministers.[30]

In other pamphlets published around the same time, the authors of the Agreement called further for religious freedom from compulsory oath-swearing and military service for the conscientiously opposed, freedom from "a single form of church government" enforced by excommunication, and a guarantee that no one could "be punished or persecuted as heretical" for preaching or publishing his opinion in religion "in a peaceable way."[31] They also called for a more general freedom of "speaking, writing, printing, and publishing" and freedom of the people for "contriving, promoting, or presenting any petitions" to Parliament concerning their "grievances or liberties."[32] Anyone who wanted to read more could turn to John Milton's brilliant defense of

[26] Ibid.
[27] In Wolfe, *Leveller Manifestoes*, 400–410, with prototypes in ibid., 223–234 and 291–303.
[28] Ibid., 410.
[29] Ibid, 139, 317.
[30] Ibid., 300.
[31] Ibid, 122–123, 139, 300-301.
[32] Ibid, 195, 329.

freedom of speech in his famous *Areopagitica* of 1644[33] and his series of tracts offering a spirited defense of several fundamental principles of religious freedom that would become axiomatic for the Anglo-American legal tradition common law – freedom of conscience, free exercise of religion, equality of all peaceable faiths before the law, separation of church and state, and no establishment of religion.[34] These were far more sweeping protections of religion and speech than anything that appeared in the Magna Carta.

In addition to freedoms of religion and speech, the 1649 Agreement set out several criminal procedural guarantees, echoing and elaborating the Magna Carta and the Petition of Right: no prosecution or punishment for crimes in cases "where no law hath been before provided"; a guarantee of the privilege against self-incrimination; the right to call witnesses in one's own criminal defence; the right to jury trial; no capital punishment "except for murder" or other "like heinous offences", notably treason; punishments in non-capital cases that were "equal to the offence"; and no imprisonment for private debts. Elsewhere, the authors of the *Agreement* also called for "just, speedy, plain, and unburdensome" resolution of "controversies and suits in law," at least two witnesses "of honest conversation" for capital conviction, and no detention or imprisonment without a warrant.[35]

Finally, the Agreement protected commerce, business, and private property. It included guarantees of tax- and excise-free domestic and foreign trade as well as freedom from government-sponsored business monopolies, a subject of frequent complaint in earlier pamphlets. It forbade any government actions designed to "level men's estates, destroy property, or make all things common," and required officials to make provision for the poor and restore to the families the private estates of criminals, save those who had been executed for treason.[36]

Theological Foundations of Rights. The authors of the 1649 Agreement and other English pamphleteers insisted that there were not merely positive legal rights created by the state, but fundamental "natural rights" created by God and deserving of legal ratification and protection. As Richard Overton put it in 1646:

> For by natural birth, all men are equally alike born to like property, liberty, and freedom, and as we are delivered of God by the hand of nature into this world, everyone with a natural, innate freedom and property (as it were writ in the table of

[33] John Milton, *Areopagitica and other Political Writings of John Milton,* ed. John Avis (Indianapolis, IN: Liberty Fund, 1999).
[34] See detailed sources and discussion in John Witte, Jr., "Prophets, Priests, and Kings: John Milton and the Reformation of Rights and Liberties in England," *Emory Law Journal* 57 (2008): 1527-1604.
[35] Wolfe, *Leveller Manifestoes,* 139–140, 406-408.
[36] Ibid, 268–270, 288–289.

> every man's heart, never to be obliterated) even so we are to live, everyone equally and alike to enjoy his birthright and privilege; even all where God by nature hath made him free.… [E]very man by nature [is also] a King, Priest, and Prophet in his own natural circuit and compass, whereof no second [person] may partake, but by deputation, commission, and free consent from him whose right and freedom it is.[37]

Overton, Lilburne, Walwyn, Milton, and scores of other English writers in the mid-seventeenth century defended these natural rights on various grounds. As the Overton quote reflects, some writers adduced the prevailing Protestant idea that each person is called by God to be a "prophet, priest, and king" in the world, with the natural right and duty to speak, preach, and rule in their community.[38] Others took the Ten Commandments as a source and summary of both natural law and natural rights – with its First Table duties and rights to honor, worship, and properly use God's name, and its Second Table duties and rights concerning marriage, family, and household, life, property, and reputation. Others turned to the Hebrew Bible with its repeated calls to protect the poor, needy, orphans, and widows, its provision of sanctuary for fleeing felons and victims of abuse and disaster, and its built-in relief and remedies for slaves, debtors, sojourners, and various other *personae miserabiles*. Still other writers turned to Roman law and medieval *ius commune* sources to defend all manner of public, private, penal, and procedural rights.[39]

Many of these ideas came together in various forms of Christian social covenant or contract theory that circulated in later sixteenth- and seventeenth-century England and the Continent.[40] Though more theological than its Enlightenment successor, this Christian social contract theory had the same broad outline. All persons were created by God with fundamental natural rights and liberties, the theory went. But all persons were also sinful, and prone to exercise their natural rights in violation of their neighbors' rights. God thus called people to enter social, political, and ecclesiastical covenants, each sworn between the people and their rulers before God, to form a society under the twin authorities of church and state. By these covenants, each person agreed to limit the exercise of his or her natural rights for the sake of the common good. Each person further agreed to delegate control over a portion of their natural rights to life, liberty, and property to the authorities, in exchange for their protection and support – and, in the case of a church covenant, in exchange for the blessings of spiritual communion. But every official, especially those in the state, holds power on behalf of the people, and in

[37] In Haller, *Tracts*, 1:113.
[38] See sources in John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 217-220; John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002).
[39] See detailed sources and discussion in Witte, *The Reformation of Rights,* 209-275.
[40] See detailed sources and discussion in ibid., 124-134, 181-196, 288-318.

protection of their rights. "The rulers were made for the people, not the people for the rulers," a familiar Calvinist adage of the day had it.[41] Those state officials who abused the people's rights had to be resisted. Those who inflicted more persistent and pervasive abuses had to be removed, even if by organized revolutionary force and regicide.

Among many others writing in this vein, John Milton laid out this argument in classic terms in his *The Tenure of Kings and Magistrates* (1649), a tract which was used to justify the deposition and execution of King Charles for tyranny:

> [A]ll men naturally were born free, being in the image of and resemblance of God himself, and were by privilege above all the creatures, born to command and not to obey; and that they lived so. Till from the root of Adam's transgression, falling among themselves to do wrong and violence, and foreseeing that such courses must needs tend to the destruction of them all, they agreed by common league to bind each other from mutual injury, and jointly to defend themselves against any that gave disturbance or opposition to such agreement. Hence came cities, towns, and commonwealths. And because no faith in all was found sufficiently binding, they saw it needful to ordain some authority, that might restrain by force and punishment what was violated against peace and common right. This authority and power of self-defense and preservation being originally and naturally in every one of them, and unitedly in them all, for ease, for order, and lest each man should be his own partial judge, they communicated and derived either to one, whom for the eminence of his wisdom and integrity they chose above the rest, or to more than one who they thought of equal deserving....
>
> The power of kings and magistrates is nothing else, but what is only derivative, transferred and committed to them in trust from the people, to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them, without a violation of their natural birthright.... As the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place, and not his own, then may the people as often as they shall judge it for the best, either choose him or reject him, retain him or

[41] See, e.g., Cambridge writer, Christopher Goodman, *How Superior Powers Ought to be Obeyd* [1558], facs. ed., ed. Charles H. McIlwain (New York: Columbia University Press, 1931), __.

> depose him, though no tyrant, merely by the liberty and right of free born men, to be governed as seems to them best.[42]

These and other rights ideas that exploded onto the scene during the English Revolution of the 1640s and 1650 proved too radical for the English commonwealth of the day. With the Restoration of the established church, crown, and commonwealth in 1660, many of these revolutionary writings were consigned to the flames and some of their authors and defenders were pilloried, punished, and banished, and a few were killed for treason. Nonetheless, this short burst of expansive rights talk in the mid-seventeenth century set a normative totem for later generations to make ever more real. In the next generation, Parliament passed a provisional Habeas Corpus Act (1679).[43] A decade later, after the Glorious Revolution upended King Charles II's reign because of his royal abuses, Parliament passed a more expansive Bill of Rights and Toleration Act of 1689.[44] These early enactments laid the statutory foundation for the gradual expansion of English rights over the next three centuries, culminating ultimately in the Human Rights Act of 1998.

Rights Ideas and the Magna Carta in Colonial America

The new rights ideas that took centuries to develop in England came to more immediate legal application in seventeenth-century colonial America. The English royal charters that first constituted many of the seventeenth-century American colonies gave the settlers broad latitude to conceive and create their ideal polities.[45] Even during the harsh reigns of King James I and Charles I in the early seventeenth century, the charters imposed no royalist establishment on the young colonies. The colonists were free to develop their own political and legal structures, and to elect their own magistrates, provided that they did not act "contrary or repugnant to the laws" of England or trespass "the liberties, franchises, and immunities" or the "rights, liberties, and privileges" of "free and natural subjects."[46]

[42] In *Areopagitica and Other Political Writings,* 58-59, 63 and more generally ibid., 98-313.
[43] In Stephenson and Marcham, *Sources of English Constitutional History,* 557-59.
[44] In ibid., 599-608.
[45] See detailed discussion in A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville, VA: University of Virginia Press, 1968), 14-34; Anthony Pagden, "Law, Colonization, Legitimation, and the European Background," in Michael Grossberg and Christopher Tomlin, eds., *The Cambridge History of Law in America,* 3 vols., (Cambridge: Cambridge University Press, 2008), 1:1-31.
[46] Charter of Massachusetts Bay (1629), in Francis Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws,* (Washington, D.C.: Government Printing Office, 1909), 3:1856-57; see additional examples in Howard, *Road from Runnymede,* 14-22. On the importance of these constitutional constraints in the American colonial charters, see Mary Sarah Bilder, *The TransAtlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge, MA: Harvard University Press, 2004).

Religious Liberty Experiments. A number of the first colonial companies used this freedom to create something of a haven for European dissenters, offering them greater rights protection than they had at home. In particular, many colonies introduced their own experiments in religious liberty, incorporating some of the radical ideas of the English pamphleteers and their counterparts on the Continent. Both the Plymouth Colony of 1620 and the Massachusetts Bay Colony of 1629 were founded by Puritan dissenters from the Church of England and eventually became havens for Calvinist refugees from throughout Europe -- though for few others before the eighteenth century. Providence Plantation was established in 1636 as "a lively experiment [for] full liberty in religious concernments," in the words of its founder Roger Williams, who had been banished from the Massachusetts Bay colony because of his heretical views. The Providence colony's remarkably progressive policies of protecting "liberty of conscience" and "the free exercise and enjoyment of all their civil and religious rights" eventually attracted Anabaptists and other Christian dissenters from Europe and other North American colonies. Rhode Island eventually became a model for various religious liberty advocates of the eighteenth century.[47]

Maryland, too, was founded by the Catholic leader Lord Baltimore in 1633 as an experiment in Catholic and Protestant coexistence. An Act of 1639, oft repeated in the colony, stated that the "Inhabitants of this Province shall have all their rights and privileges according to the Great Charter of England," and even more religious liberties.[48] An Act of 1649 provided further that "no person ... professing to believe in Jesus Christ, shall from henceforth be any way troubled ... for his or her religion nor in the free exercise thereof ... nor any way compelled to the belief or exercise of any other Religion against his or her consent."[49] Though ultimately frustrated by persistent Catholic-Protestant rivalries and slowly eclipsed by later Anglican establishment policies, the Maryland experiment provided ample inspiration during the constitutional debates of the next century.

Equally inspirational was Quaker leader William Penn's "holy experiment" in religious liberty instituted in Pennsylvania in 1681. The Great Law of 1682 captured Penn's cardinal convictions about Christian liberty:

> [N]o person now or at any time hereafter living in this province, who shall confess and acknowledge one almighty God to be the creator, upholder, and ruler of the world, and who profess[es] himself or herself to be obliged in conscience to

[47] "Plantation Agreement of Providence (1640)" and "Charter of Rhode Island and Providence Plantations (1663)," in Thorpe, *The Federal and State Constitutions,* 6:3205–3206, 3211–3213. See further discussion in John M. Barry, *Roger Williams and the Creation of the American Soul: Church, State, and the Birth of Religious Liberty* (New York: Viking, 2012).
[48] William H. Browne, ed., *Archives of Maryland 1* (Baltimore, MD: Maryland Historical Society, 1965), 82-83; see discussion in Howard, *Road from Runnymede,* 53-65.
[49] In Browne, *Archives*, 1:244, 246.

> live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his or her conscientious persuasion or practice. Nor shall he or she at any time be compelled to frequent or maintain any religious worship, place, or ministry whatever contrary to his or her mind, but shall freely and fully enjoy his, or her, [C]hristian liberty in that respect, without any interruption or reflection.[50]

Penn's own brilliant defense of religious liberty, on the strength of liberty of conscience for all peaceable religions and disestablishment of all state religions, would prove to be axiomatic for the later American logic of religious liberty.[51] Also influential was Penn's broader defense of various public, penal, and procedural rights, which he deliberately anchored in the Magna Carta. Indeed, Penn was the first to publish the text of the Magna Carta in America, in a 1687 tract that included a commentary on the medieval charter, together with his own new charter of liberties for the new colony.[52]

A New Magna Carta for Colonial Massachusetts. Colonial America was an active laboratory for experiments not only with religious liberty, but with many other rights and liberties as well. Indeed, more than a century before the state and federal constitutional conventions set to work crafting the new rights instruments in the aftermath of the American Revolution, a number of the colonies had already forged their own bills of rights, which they set out in various covenants, compacts, and codes.[53]

Among the many colonial rights documents from the seventeenth century, let me focus on a surprising early one: The *Body of Liberties* drafted for Massachusetts Bay in 1641 -- "in resemblance of a Magna Charta," as Governor John Winthrop put it.[54] The *Body of Liberties* incorporated not only the rights guarantees of the Magna Carta (1215) and the Petition of Right (1628), but also many of the most daring rights proposals of the early pamphleteers in England, along with a number of surprising innovations.

[50] In J. T. Mitchell and J. Flanders, eds., *Statutes at Large of Pennsylvania* (1911), 1:107–109; see further *The Political Writings of William Penn,* ed. Andrew R. Murphy (Indianapolis, IN: Liberty Fund, 2002) and Andrew R. Murphy, "The Emergence of William Penn, 1668-1671," *Journal of Church and State* 57 (2015): 333-359.
[51] J. William Frost, *A Perfect Freedom: Religious Liberty in Pennsylvania* (Cambridge: Cambridge University Press, 1990).
[52] William Penn and William Bradford, *The Excellent Priviledge of Liberty & Property, Being the Birth-Right of Free-Born Subjects of England* (Philadelphia: The Philobiblon Club, 1897 [1687]); reprinted in part in Howard, *Road from Runnymede,* 412-25 and discussed in ibid., 78-95.
[53] On these different local colonial instruments, see Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge, LA: Louisiana State University Press, 1988).
[54] John Winthrop, *Winthrop's Journal: History of New England, 1630-1649,* ed. J.K. Hosmer, 2 vols. (New York, NY: C. Scribner's Sons, 1908), 1:151.

I say surprising because seventeenth-century colonial Massachusetts was hardly known in its day as a haven of liberty. It was better known for its austere Calvinist morality, its early banishment of Roger Williams, Anne Hutchinson, and others for heresy, its belligerent treatment of the Quakers, hanging four of them in the Boston Common, and its horrible and deadly campaigns against the "witches" of Salem. This seems like the wrong place to look for rights. But in fact, the articulation and protection of rights was an early and important part of the constitutional development of this young colony. It must be remembered that Massachusetts Bay was set up in part as a haven for Puritan Calvinists, who shared many of the rights ideas of the English revolutionaries of the 1640s; indeed, some of the New England colonists had been forced to flee from England in the 1620s and 1630s because of their radical views. Moreover, the Puritans of both England and New England were heirs to a century of European Calvinist rights talk that had become ever more radical and expansive in the later sixteenth and early seventeenth centuries as Calvinists faced tyrannical oppressors in church and state and rose up in revolutionary defense of their God-given "fundamental rights."[55] The New England Puritans knew this Calvinist rights heritage, and had taken a number of the key theological and political documents with them to the new world.

Massachusetts Bay issued its *Body of Liberties* in 1641, just over a decade after their arrival of the first colonists. The document was drafted by Nathaniel Ward, a distinguished Cambridge-trained lawyer and Heidelberg-trained Calvinist minister. Ward had come to New England in 1634, with ten years of legal experience as a barrister in England. He had also been a preacher in England, but had been removed from his pulpit in 1631 because of his dissenting Calvinist views.[56] The *Body of Liberties* that he crafted fills twenty-five pages in modern edition, and provides a detailed recitation of what Ward called the "first, basic, elemental, and essential" public, private, and procedural rights that were to obtain in the Massachusetts Bay colony.[57]

The preamble to the 1641 *Body of Liberties* makes clear that the Massachusetts colonists regarded the protection of rights and liberties to be essential to the peace and stability of church, state, and society alike:

> The free fruition of such liberties, immunities and privileges as humanity, civility, and Christianity call for as due to every man in his place and proportion without impeachment and infringement hath ever been and ever will be the tranquility

[55] See Witte, *The Reformation of Rights*, chaps. 1-4.
[56] On Ward, see Jean Béranger, *Nathaniel Ward (ca. 1578-1652)* (Bordeaux: Société Bordelaise de Diffusion de Travaux des Lettres et Sciences Humanines, 1969); Samuel Eliot Morison, *Builders of the Bay Colony* (Boston/New York: Houghton Miffin Co., 1930), 217-243.
[57] Nathaniel Ward [Theodore de la Guard], *The Simple Cobler of Aggawam in America* [1646/7], ed. Paul M. Zall (Lincoln, NE: University of Nebraska Press, 1969), 46. The *Body of Liberties* is reprinted in Edmund S. Morgan, ed., *Puritan Political Ideas: 1558-1794,* repr. ed. (Indianapolis/Cambridge: Hackett Publishing Co., 2003), 177-202.

> and stability of churches and commonwealths. And the denial or deprival thereof, the disturbance if not the ruin of both.
>
> We hold it therefore our duty and safety whilst we are about the further establishing of this government to collect and express all such freedoms as for present we foresee may concern us, and our posterity after us, and to ratify them with our solemn consent.
>
> We do therefore this day religiously and unanimously decree and confirm these following rights, liberties and privileges concerning our churches, and civil State to be respectively impartially and inviolably enjoyed and observed throughout our jurisdiction for ever.[58]

The document then opened with strongly worded guarantees of the rights to life, liberty, property, family and reputation, echoing in part the "due process" language of the Magna Carta and later medieval English statutes:

> No man's life shall be taken away, no man's honor or good name shall be stained, no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any way damaged under color of law or countenance of authority, unless it be by virtue or equity of some express law of the country warranting the same, established by a general court and sufficiently published, or in case of the defect of a law in any particular case by the word of God.[59]

The *Body of Liberties* fleshed out these basic guarantees with a number of criminal procedural rights and protections. All persons, "whether inhabitant or foreigner," were to "enjoy the same justice" and "equal and impartial" execution of the law. Parties could be charged only for crimes that were explicitly prohibited by statute. Grand juries were to be used to make preliminary findings in cases of suspicious death. Defendants had a right to bail except in cases of capital crime (idolatry, witchcraft, blasphemy, homicide, homosexual sodomy, adultery, kidnapping, treason, or perjury leading to wrongful execution). They could not be punished for failure to appear in court because of unforeseen circumstances. They had a right to a hearing before an impartial judge, and the right to a speedy trial, whether a bench or jury trial. They were guaranteed the privilege against self-incrimination. They could not be subject to double jeopardy for the same offense, and official case records were to be kept by courts to ensure the same. Conviction for crime required proof by "clear and sufficient evidence."

[58] Ibid., 178-179.
[59] Ibid., 179.

Conviction in capital cases required "the testimony of two or three witnesses or that which is equivalent thereunto." A defendant could not be tortured to collect evidence against himself. Every defendant had the right to appeal his case to a higher court and ultimately to the General Council. If the defendant was sentenced to corporal punishment, the *Body of Liberties* provided that "we allow amongst us none that are inhumane, barbarous or cruel." In capital cases, "no man condemned to die shall be put to death within four days next after his condemnation, unless the court see special cause to the contrary, or in case of martial law."[60]

In civil suits, parties could select written or oral pleadings, and could elect a bench or jury trial. In a jury trial, jurors were selected from the electorate of the community, and both plaintiffs and defendants could challenge the selection of individual jurors. Jurors could deliberate together, and reach general, special, or partial verdicts, but only "clearly and safely" from the evidence presented. Parties could appear pro se, or through (non-compensated) representatives. They could sue for legal damages or equitable relief. Defendants could counterclaim as apt. Parties could be compelled to testify in these civil cases, at the judge's discretion. Plaintiffs could withdraw their suits any time before the verdict, after paying the defendant's fees in the first case. Cases could be dismissed and the plaintiff fined for "barratry," however, if the plaintiff was unduly litigious or sought simply to harass the defendant or harm his reputation. Defendants could plead contributory negligence by the plaintiff in cases of trespass or damage. Defendants were prohibited from feigning poverty to discourage lawsuits or collection of judgments against them. They could not be imprisoned for private debts, except in cases of extreme profligacy, and they could claim the equivalent of a modern "homestead exemption" from collections. In all cases, parties could appeal adverse orders or judgments.[61]

The *Body of Liberties* included strong guarantees of private property rights and private contracts based on the same. All competent males, 21 or older, had the right to hold, alienate, devise, and inherit private properties without fees, taxes, or government interference. Married women, minors, and the mentally incompetent could do the same "if it be passed and ratified by the consent of a General Court." Forced or "fraudulent conveyances" and alienations of any sort, however, would be reversed and the perpetrators punished upon petition by the injured party. Private landowners had fishing and hunting rights on public lands. While everyone was expected to assist in the public work of the community, nobody could bear a disproportionate burden, and exemptions were to be granted to the aged and the disabled. While all persons were expected to pitch in what they could in cases of emergency, they could not be compelled to military service in offensive wars, and any of their private property taken for public use would need be replaced or its costs reimbursed. The law banned monopolies in general, but

[60] Ibid., 182-189
[61] Ibid., 183-186.

granted short-term exclusive patents for new inventions. The law also banned usury and price gouging, but did allow interest charges on loans.[62]

The *Body of Liberties* included special liberties and protections for women, children, and servants, bracketing the traditional common law rules about the right of the paterfamilias to rule the home with little state interference. "Every married woman shall be free from bodily correction or stripes by her husband," and had special procedural protections to bring complaints. Widows could also seek redress from their late husband's estate if her legacy proved inadequate. Children were to be free from any "unnatural severity" from their parents and had special procedures to seek redress in such cases as well as in cases where parents "willfully and unreasonably" withheld their consent to their "timely or convenient marriage." Servants, too, were to be free from "the tyranny and cruelty of their masters" and were to be given sanctuary with other freemen if they escaped. While corporal discipline of servants was presupposed, they were to be freed if their masters injured them severely, and no indentured servitude could last more than seven years. Even domestic animals received some protection: "No man shall exercise any tyranny or cruelty towards any brute creature which are usually kept for man's use."[63]

The *Body of Liberties* set forth a number of public or civil rights. All "freemen" (male church members, 21 or older) had the right to vote in political election, to stand for political office, and to participate in popular referenda on fundamental issues of law and morality – and in all such contexts had the right to speak or to be silent and to vote or not to vote in accordance with their conscience. All competent adult males had the right and duty to serve on a jury when selected, though no more than twice a year. All adults, regardless of gender or status, had the right to appear and speak at regular town meetings, provided they were not disruptive or offensive. They had the further "liberty to come to any public court, council, or town meeting, and either by speech or writing to move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, bill or information." They also had "free liberty to search" and make copies of public records. The *Body of Liberties* provided a right to sanctuary for anyone "professing the true Christian Religion" who fled to the colony to escape tyranny, oppression, war, famine or shipwreck. It also included a general prohibition against "bond slavery," save where "lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us. And these [lawful captives and strangers] shall have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require."[64]

This last admonition to the colonists to adhere to the law of God in their administration of state law underscored that the *Body of Liberties* was a self-consciously Christian recitation of rights and liberties. "No custom or prescription shall ever prevail amongst us in any moral cause," the law provided, "that can be proved to be morally

[62] Ibid., 180-182.
[63] Ibid., 194-197.
[64] Ibid., 190-196.

sinful by the word of God." This overtly Christian commitment was further underscored by the detailed provisions on religious liberty for "true believers":

> 1. All the people of God within this jurisdiction who are not in a church way, and be orthodox in judgment, and not scandalous in life, shall have full liberty to gather themselves into a church estate. Provided they do it in a Christian way, with due observation of the rules of Christ revealed in his word.
>
> 2. Every church hath full liberty to exercise all the ordinances of God, according to the rules of scripture.
>
> 3. Every church hath free liberty of election and ordination of all their officers from time to time, provided they be able, pious and orthodox.
>
> 4. Every church hath free liberty of admission, recommendation, dismissal, and expulsion, or disposal of their officers, and members, upon due cause, with free exercise of the discipline and censures of Christ according to the rules of his word.
>
> 5. No injunctions are to be put upon any church, church officers or member in point of doctrine, worship, or discipline, whether for substance or circumstance besides the institutions of the Lord.
>
> 6. Every church of Christ hath freedom to celebrate days of fasting and prayer, and of thanksgiving according to the word of God.
>
> 7. The elders of churches have free liberty to meet monthly, quarterly, or otherwise, in convenient numbers and places, for conferences, and consultations about Christian and church questions and occasions.
>
> 8. All churches have liberty to deal with any of their members in a church way that are in the hand of justice. So it be not to retard or hinder the course thereof.
>
> 9. Every church hath liberty to deal with any magistrate, deputy of court or other officer whatsoever that is a member in a church way in case of apparent and just offence given in their places, so it be done with due observance and respect.

> 10. We allow private meetings for edification in religion amongst Christians of all sorts of people. So it be without just offence for number, time, place, and other circumstances.[65]

Earlier the document had set out three provisions that ensured a basic separation of the offices and activities of church and state:

> Civil authority hath power and liberty to see the peace, ordinances and rules of Christ observed in every church according to his word so [long as] it be done in a civil and not in an ecclesiastical way.
>
> Civil authority hath power and liberty to deal with any church member in a way of civil justice, notwithstanding any church relation, office, or interest.
>
> No church censure shall degrade or depose any man from any civil dignity, office, or authority he shall have in the Commonwealth.[66]

The 1641 *Body of Liberties* was an impressively detailed list of public, private, penal, and procedural rights and liberties. It was all the more impressive in that it was drawn up for a young scattered community of some 15,000 souls, whose most pressing concern was mere survival for a second decade of harsh winters, bad harvests, widespread disease, and clashes with Native Americans. The *Body of Liberties* was duplicated in other New England colonies, and it became one of the anchor texts for New England and broader American constitutionalism.[67] Indeed, John Adams and the constitutional conventioneers drew directly on this text in crafting and ratifying many of the rights provisions of the 1780 Massachusetts Constitution.[68] The main author of the 1641 *Body of Liberties*, Nathaniel Ward, later argued that this document was just something of a compilation of the rights and liberties of the English common law tradition in which he had been trained, many of them anchored in the Magna Carta and

[65] Ibid., 199-201.
[66] Ibid. 190.
[67] In Massachusetts, many provisions of the *Body of Liberties* were echoed – and some qualified -- in *The Laws and Liberties of Massachusetts Bay* (1648), ed. Max Farrand (Cambridge, Mass., 1929). For other documents and discussion, see W. Keith Kavenagh, ed., *Foundations of Colonial America: A Documentary History,* 3 vols. (New York: Chelsea House, 1973); Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis, IN: Liberty Fund, 1998).
[68] See detailed sources and discussion in David Little, “Differences Over the Foundation of Law in Seventeenth and Eighteenth Century America,” in Griffith-Jones and Hill, *Magna Carta,* 136-156; John Witte, Jr., "'A Most Mild and Equitable Establishment of Religion': John Adams and the 1780 Massachusetts Constitution," *Journal of Church and State* 41 (1999): 213-252.

in later medieval cases interpreting its provisions.[69] Ward was deprecating both the novelty and the sweep of his formulations – as Governor Winthrop and the General Council made clear a few years later in comparing the Massachusetts and English formulations.[70] But Ward's argument underscored the reality that the New England Puritans, like the European Calvinists before them, were drawing on a deep rights tradition going back more than half a millennium.

What was new in colonial New England was to have these widely scattered traditional common law rights (and many new rights besides) compiled in a single source, generally available to all subjects of the community regardless of the court in which they appeared, and generally binding on all officials and citizens at once. Nothing like that existed in the English common law of the day, with its byzantine complex of courts, writs, and procedures. The one recent attempt by Parliament to compile a few of the more important rights of the people, namely the Petition of Right of 1628, had been cavalierly ignored by the Crown.

What was also new in colonial New England, compared to old England, was to have this *Body of Liberties* serve as something of a written constitutional text that gave preemptory instruction to government authorities on the limits of the law and that gave procedural rights to colonial citizens to press claims to vindicate rights abuses. The Massachusetts colonists understood the novelty of this approach, and took pains to underscore it in the concluding paragraphs of the document:

> Howsoever these above specified rights, freedoms, immunities, authorities and privileges, both civil and ecclesiastical, are expressed only under the name and title of liberties, and not in the exact form of laws or statutes, yet we do with one consent fully authorize, and earnestly entreat all that are and shall be in authority to consider them as laws, and not to fail to inflict condign and proportional punishments upon every man impartially that shall infringe or violate any of them.
>
> We likewise give full power and liberty to any person that shall at any time be denied or deprived of any of them, to commence and prosecute their suit, complaint or action

[69] Ward, *Simple Cobler*, 40-61. In 1646, in fact, the Massachusetts Bay Authorities drew up a list of the "parallels" between English and colonial laws, arguing that the Body of Liberties "is framed according to the charter, and the fundamental and common laws of England … beginning with Magna Carta." The document is set out in Appendix to Howard, *Road from Runnymede,* 401-411, quoting ibid., 401-402.
[70] See *John Winthrop's Discourse on Arbitrary Government* (1644), in *Winthrop Papers,* 5 vols. (Boston, MA: Massachusetts Historical Society, 1944), 4:468-488; and materials analyzed in Francis C. Gray, *Remarks on the Early Laws of Massachusetts Bay* (Boston, MA: Charles C. Little and James Brown, 1843), 7, 11, 16.

> against any man that shall so do in any court that hath proper cognizance or judicature thereof.
>
> Lastly because our duty and desire is to do nothing suddenly which fundamentally concern us, we decree that these rights and liberties, shall be audibly read and deliberately weighed at every General Court that shall be held, within three years next ensuing, and such of them as shall not be altered or repealed they shall stand so ratified, that no man shall infringe them without due punishment.[71]

The *Body of Liberties* was intended to serve as something of a constitutional bill of rights for the Massachusetts Bay colony. Studies of later colonial case law make clear that it was so used -- although inevitably, like every law in action, it was also blatantly breached, especially in the hands of some early leaders with oligarchic and theocratic pretensions.

What was most novel of all was the ability of the Massachusetts colonists and their New England neighbors to develop a new theological construction of rights and liberties based on the doctrine of covenant. The link between covenant and liberty was, of course, not new to the Calvinist tradition, nor to other traditions before and with Calvinism.[72] But the New England Puritans drew these traditions into their own theories both of liberty of covenant and covenants of liberty as they constructed and elaborate system of church and state to govern their "city on a hill." That fuller story I and many others have told at length elsewhere.[73]

Summary and Conclusions

In the Introduction to this Symposium, I argued that subjective rights were commonplace in Western law. For Western jurists and judges, rights talk was a common way to define and defend the law's protection, support, limitations, and entitlements of persons and groups in society, and the proper relationships between political and other authorities and their respective subjects. For Western lawyers, subjective rights were not a modern invention, a seductive new form of liberal exotica crafted by Enlightenment philosophers in manifestation of their new secular theories of individualism, rationalism, and contractarianism. Lawyers, since classical Roman and medieval times, used rights ideas and terms as a plain and uncontroversial way of talking about the claims one legal subject could legitimately make against another, the charges that an authority could legitimately impose upon its subjects, and the

[71] Ibid., 202.
[72] See David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton,N.J.: Princeton University Press, 2000); John Witte, Jr. and Eliza Ellison, eds., *Covenant Marriage in Comparative Perspective* (Grand Rapids, MI.: Wm. B. Eerdmans Publishing Co., 2005).
[73] See analysis of this theory in John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Wm. B. Eerdmans, 2006), 143-168.

procedures that were to be followed in these legal interactions. This Article illustrates how one important Western legal system – the Anglo-American legal tradition – articulated these rights in medieval and early modern times, and how common law jurists came to ever more refined and elaborate statements of public, private, penal, and procedural rights guarantees in their political advocacy and legal documents.

In the Introduction to this Symposium, I also argued that Christianity, in various forms, played an important role in uncovering and articulating rights, building on both classical and biblical foundations. This Article illustrates that proposition, too. "Magna Carta can be read as an historical, constitutional, or legal document," writes Robin Griffith-Jones, Master of the Temple at the Inns of Court. "But it was first and foremost a *religious* document."[74] It not only provided a guarantee of religious freedom for the church in England. It was not only sealed by King John "in the presence of God, and for the salvation of our soul, and the souls of our ancestors and heirs, and unto the honour of God and the advancement of [the] Holy Church."[75] But the document was filled with rights provisions that were part and product of the medieval Christian culture in which it was forged. This was a Christian society that had already drawn from the Bible and from the Roman law, and from many centuries of legal experience, a whole series of substantive and procedural rights and liberties – *iura* and *libertates* as they were called in Latin, "ryhtes," "rihtes," and "rihta(e) as they came to be called in Anglo-Saxon texts.[76] This was a Christian society whose canon law systems of the church had already developed a rich latticework of subjective rights, liberties, privileges and immunities, that were defined in ecclesiastical legislation, defended in litigation in church courts, and refined by sophisticated deliberation among jurists, philosophers, and theologians in the new universities. This was further a Christian society whose secular law systems of imperial, royal, ducal, manorial, feudal, and urban law also operated in part with rights norms and procedures, as those were set out in sundry charters constitutions, concordats, statutes, cases, and codes.

Magna Carta was part and product of this medieval Christian world. Some of its rights provisions were peculiarly local creatures of their time and place – such as the right to fishing weirs on the Thames, offensive restrictions on loans from the Jews, the arcane talk of "assizes of novel disseisin, and of "mort d'ancestor," and of "darrien presentment, or of "fee-farm, socage, or burgage," and the like.[77] But other provisions set out grand rights principles that would grow into central commands of the common law tradition, eventually on both sides of the Atlantic. And in hard individual cases and in dire times of crisis, these more enduring rights principles were given new life and expanded into ever more elaborate and specific precepts.

[74] See detailed discussion of this in Robin Griffith-Jones, "Magna Carta and Religion: For the Honor of God and the Reform of our Realm," in Randy J. Holland, ed., *Magna Carta: Muse & Mentor* (St. Paul, MN: Thomson Reuters, 2014), 47-64, at 48.
[75] Magna Carta, Preamble, in Holland, *Magna Carta,* 239.
[76] O.E.D., s.v. "right"; Alfred Kiralfky, "Law and Right in English Legal History," in *La formazione storica de diritto moderno in Europa* (Florence: Leo S. Olschki, 1977), 3:1069-1086.
[77] Magna Carta, Arts. 12, 18, 33, 37.

The seventeenth century was one such crisis moment in the common law tradition. The crisis in England was the mounting tyranny of the Stuart monarchs, and the need to articulate those fundamental rights whose pervasive and persistent violation by a tyrant justified armed revolution. The crisis in colonial America was the daunting challenge of creating a legal and political system for the brand new colonial societies that sprung up all along the Atlantic seaboard and needed to define and maintain ordered liberty. On both sides of the Atlantic, Anglo-American common lawyers went back to the core rights principles of the Magna Carta, and drew them out into ever more elaborate rights precepts. They also went back to biblical ideas of justice and mercy, covenant and community, liberty and equality to work out an ever more refined Christian theory of constitutional rights, social and political order, and rule of law.

By the mid-seventeenth century, these common law writers had defined, defended, and even died for every one of the rights that would appear more than century later in United States Bill of Rights, and in parallel state constitutions of the later eighteenth century. Taken together, these seventeenth century texts included robust protections of freedoms of religion, speech, press, assembly, association, and petition. They had rights of persons to hold and bear arms in their own defense and in defense of their community. They had rights to be free from forced quartering of soldiers, sailors, and military men. They had rights to property and freedom from government takings of property without just compensation. They had rights to the privacy of their homes, businesses, and papers. They had rights to jury trial in civil and criminal cases. They had rights to fair and speedy trials, rights to confront and cross examine witnesses, rights to appeal, and freedom for cruel and unusual punishment. Even the rights to vote and to pursue political office were adumbrated in these early texts. The American constitutional founders, like the liberal Enlightenment philosophers, inherited many more rights than they contributed. What they contributed more than anything was a philosophical defense of these rights that transcended religious particular religious premises and a constitutional system of governance that allowed for a much broader if not universal application.