

The Two Sides of Magna Carta:
How Good Government Sometimes Wins Out Over Public Choice

By

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ABSTRACT:

This article examines two rival interpretations of Magna Carta. It rejects the view that Magna Carta is largely a special interest deal between the King and the Barons, and defends the proposition that by and large it works as a public-regarding document that did much to cure the defects of the feudal and judicial systems they had evolved under King John. A clause-by-clause analysis of the document, dealing with such matters as tenurial succession, marriage, courts and judicial procedures,

debtor and creditor arrangements, and property rights and liberties shows that Magna Carta exhibited a high degree of technical excellence. By constantly referring back to ancient customs, Magna Carta introduced sensible reforms, some of which were peculiar to the feudal system, but others of which carry over to similar problems today. The durability of the Magna Carta is justified by its political and legal achievements.

KEYWORDS (suggested): ancient customs, church and state, debtor/creditor relations, Magna Carta, liberties of London, medieval courts, marriage, property rights, succession tenurial relations

JEL Codes (suggested): H110; K190; K490; N430

Introduction

This year marks the 800th anniversary of Magna Carta, which has brought forward an outpouring of discussion about its origins and effects, both in England and throughout the world. Much of that discussion has tended to center around whether it deserves the widespread approbation that it continues to receive from all quarters of the world [1]. Much less attention has been paid to the convergence of the conceptual and political forces that brought it into being and determined its organization and structure. In this essay, I hope to offer a tentative account of how Magna Carta came about by looking at the document in light of the two general theoretical approaches to political behavior.¹ The first of these is what one might call the good government theory. The second might be called the public choice theory.

Under the first view, the individuals (now statesmen) who take on the responsibility of governance are aware of their solemn responsibilities to the nation

¹ For discussion of the typology, see [2].

and the public at large, or at least to the constituency that they represent, and accordingly conduct themselves in a high-minded and disinterested fashion. Short-term personal advantage is put off the table, and there are conscientious efforts to advance some social good larger than their own parochial self-interest. These efforts can easily go astray, for, even with the best intentions, it is difficult to make the right calculations for difficult issues. The effort to resolve these difficulties is often made with reference to prior general theory developed abstractly and then applied to particular circumstances. The reference to prior practices or independent sources of authority is no accident. It is done to get some intellectual and political distance from the underlying problem in the hopes that these grand considerations can inform particular decisions.

This problem of extrinsic validation is always acute in ordinary situations, but it becomes far more so in those few “constitutional moments” of high politics where everyone knows that what is at stake is either the basic structure of government or some decision that could easily turn the course of history, or both [3,4]. These include the adoption of a new constitution or the rejection of an old one, declarations of independence or of war, civil war, and the formation of grand alliances. In these situations, real public leadership is important, but so too is the basic structure of political institutions, which can serve as a check against outlandish or destructive behavior. As James Madison famously said, “Enlightened Statesmen will not always be at the helm” [5],² which is reason enough to develop redundant and overlapping social institutions to limit the damages that bad statesmen can inflict.

Yet there are limits. While that proposition is indubitably true, it should not be allowed to overshadow the welcome, if concealed, truth that enlightened statesmen *are* sometimes at the helm, where their presence contributes enormously to the well-being of the nation and peoples whom that person leads. There is good

² The full passage reads: “It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.” The sad truth is that even when they are at the helm, they can be overwhelmed by political forces.

reason why selection of leadership in all organizations matters enormously, and why the succession process is always critical, even if some ideal set of structural and substantive safeguards were included in whatever government constitution, corporate charter or charitable organization bylaws. The constitutional structure is not self-executing; it operates as a constraint only when invoked in times of public conflict. But routine executive decisions are made unilaterally thousands of times per day, typically outside the scope of any formal system of review. Anyone who has ever worked on a search committee for a president knows just how critical the choice is, given the high degree of independence that the president has over a wide range of activities, no matter how ideal the governance structure. The difference between great and good, let alone that between great and bad, is just enormous. There is no set of corporate or constitutional charter provisions that can substitute for top-class leadership, which is why orderly succession in office matters to keep performance levels high.

The second model of government is the public choice model, which has gained influence in recent times. Under this model, all individuals in a political setting are assumed to act with the same relentless set of self-interested motives that they (allegedly) display in other business and social settings. Self-interest properly channeled is not the problem: individuals who act out of their own self-interest do well if they work in a competitive environment that offers strong protection for liberty and property and strong enforcement of private contracts for the transfer of goods and services. In the public choice model, the outcomes of competitive market processes become the gold standard by which various government actions are measured. This is especially the case on such matters as economic regulation, concerning everything from zoning, to rates, to drugs, and to the environment, where it is often found falling short.

On this view, the incursion of political forces into the economic and social spheres creates the ugly risk of protectionism—whereby legal monopolies distort competitive processes—in virtually every walk of life, in both the domestic and international arenas. In this atmosphere of pervasive original sin, enlightened actors will be few and far between, such that the outcome of deliberative processes

is likely to be systematically worse than those predicted by the defenders of good government. Therefore, the key challenge of the legal system is to develop a set of rules that can counteract the high levels of self-directed efforts of interest groups (Madison's factions) as part of the political life. The efforts to control the concentration of political power by setting ambition against ambition can have positive effects.³ Nonetheless, in the end, some sorts of special-interest forms of legislation and agreements will make it through the protections devised by the political process, and these in turn will survive if the constitutional environment—for example, the rational basis test of modern American constitutional law—tolerates, indeed invites, interest-group legislation [7, 8]. This approach is often fostered on the supposed ground that the superior expertise of disinterested legislative and administrative bodies have advantages that no court, with its limited investigative powers, can hope to match.⁴

The general prediction of public choice theory is gloomy. In the short run, special interest politics may be contained, but over time it becomes ever more difficult to hold them in check. Before it gains some special privilege, a given interest group has to rely on its political clout to obtain its initial toehold. But once it is in power, it becomes enormously difficult to deprive it. At this point, inertia tends to work against legislative or administrative correction. At the same time, the newly

³ [6]: "But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition."

⁴ For one of many such claims, see *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) ("Courts are ill equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest."). See also *Abigail Alliance For Better Access v. Von Eschenbach*, 495 F.3d 695, 713 (D.C. Cir. 2007). ("The Alliance's arguments about morality, quality of life, and acceptable levels of medical risk are certainly ones that can be aired in the democratic branches, without injecting the courts into unknown questions of science and medicine."). Ironically, the protection that Justice Pitney offered under the misappropriation doctrine between direct competitors got the result about right. See generally Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992).

successful interest group can use its additional wealth and public financial support to further entrench its legal position. It is a common observation that the cartel institutions put into place in the United States in the 1930s—the labor and the agricultural and industry preferences—have all proved to be exceedingly durable, lasting for generations. It is much easier to prevent special interests from gaining their initial foothold than it is to remove their legal protection once they have gained political and legal acceptance.

The great institutional challenge is determining the relative influence of these two theories in particular contexts. That task would be easy if either one trumped all the time, but in deciding which of these two views is correct, it is important to start with the obvious: there is no reason why the outcomes should run all one way. Magna Carta, like all great events, brought together individuals from divergent backgrounds with divergent agendas. In dealing with individuals, there is no reason to assume that all persons have the same general disposition toward egoism on the one hand and disinterested benevolence on the other. In ordinary life, we describe some people as “selfish.” In doing so, we do not mean to say that they have exhibited only the universal tendency, which is to put themselves, friends and families ahead of everyone else. We mean instead that they have broken from the general social norm by behaving in ways that work to their own advantage over other people who are able to avoid cheating, lying and posturing in the same or similar situations.

The term “self-ish” (note the hyphen) in this context is descriptive, not normative, so it covers some people but not all. In this context, the term helps identify those people of bad character who flaunt the commonly observed behaviors of other individuals. The point simply reaffirms what is doubtless the case, namely, that any selfish trait, like the selfish gene [9]⁵, is distributed, perhaps normally, over

⁵ The choice of title, *The Selfish Gene*, here is controversial because it literally means that under a theory of inclusive fitness, the goal of maximization is seen from the point of view of a gene that expresses itself over many generations, instead of the person who has that particular trait. The irony here, of course, is that the selfish nature of the gene leads to cooperation and limited altruism within living organisms, human beings included, who exert greater care toward others in proportion to their common genetic connections. See [10].

a population such that some people have more of the desirable trait than others. Once that variation is regarded as an inescapable feature of individual personality, it poses a real challenge to any effort to develop a uniform theory of collective behavior that treats all persons as equally self-interested. For starters, the methods used to determine the selection of a group involved in any negotiation could easily have a powerful influence on the level of selfishness that is manifested in its decisions.

Second, not all members of any body have an equal stake in all matters that are before the assembly. For some individuals, one given issue could be a make-it-or-break-it proposition, while for others the matter may have only indirect or abstract relevance. Often people have a more balanced view on those matters in which their own stakes are smaller. Now they act *as if* they were behind a veil of ignorance, and self-interest and social interest thus reinforce each other. People tend to support socially attractive outcomes when they have no direct interest to put first. It is this level of generality that lies behind Adam Smith's notion of the ideal observer [11, 12]. It is also at work in Hegel's "die List der Vernunft," or the cunning of reason. The basic logic is that limited knowledge gives people an egoistic reason to pick the right substantive rule. If forced to pick a rule before one knows his own place in some future dispute, there is pressure to pick the better social rule because it is not possible to improve one's own position without simultaneously improving the position of others [13].

Finally, the adoption of any given constitutional settlement may well require its acquiescence, acceptance, and endorsement by persons who took no part in its deliberation. At this point, it becomes unclear whether the participants will extend some protection to those groups or just shut them out. Where the agreement is thought to be one stage in a complex process, it is unlikely that the parties involved in the deliberation will give no thought to how outsiders will respond to its provisions. It could well be a smart strategy to extend them some protections and advantages today in order to secure their support tomorrow.

Given this complex set of factors, it is exceedingly difficult to make any abstract judgment as to whether the selfish impulses will in any setting dominate

the more universal ones. The most likely outcome in this and similar situations is a mixed solution. The final agreement will have some elements that appeal to the universal aspirations of truth and justice, but others will, and will be understood, to serve only local interests. The point here does not apply only to Magna Carta, but to all sorts of major events. By way of introduction, I shall mention just two. Roman private law represents one of the supreme intellectual achievements of all time. As a general matter it rested on the principles of natural law. Yet it is possible for Justinian's Institutes to accept chattel slavery in the teeth of natural-law principles:

The law of the nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free. Further, by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others [14].

First we learn that slavery is contrary to the law of nature. With moral qualms put to one side, the Romans then integrate the law of slavery seamlessly into the private law [15], after which it is on to the discussion of the various consensual contracts, which holds as much today as it did when it was first written. The juxtapositions are jarring to say the least. Yet after the Roman law of slavery is rejected, it operates as a springboard for developing the law of agency.

Fast-forward to the adoption of the American Constitution, and the same ugly compromises exist. The same Constitution that gives us separation of powers, federalism, and the Bill of Rights also legitimates chattel slavery in the Three-Fifths Clause, which gave additional voting power to the southern states by counting disenfranchised slaves as three-fifths of a person.⁶ It then pairs it with the Fugitive Slave Clause, which uses the eloquent circumlocution "bound in service" to force

⁶ U.S. CONST. art. I, § 2, cl. 3

northern abolitionists to return fugitives slaves to the South.⁷ And why? Because the rest of the constitutional deal was DOA if these provisions were not included (though they were repudiated after the Civil War). Yet none of this material undermines the enduring achievements in the other parts of the U.S. Constitution, including, for example, its ban on religious qualifications for holding public office.⁸ In hindsight, it is possible to keep the good and disregard the bad. In addition, it is also possible to reframe and reinterpret the same parochial provisions so as to extend their influence to cover people and situations that were either ignored or consciously excluded.

Mixed solutions then remain a live possibility, so much so that the question gets harder still because there is often serious disagreement as to which solutions are in the public interest and which are not. In dealing with that problem in this paper, I take the view that solutions that tend to honor competitive solutions whenever possible are preferable to those that tend to negate them. But all too commonly the law has to address specific situations in which competitive solutions are not possible, namely, those in which some adjustment is needed in the relationship between two individuals, neither of whom can look to a third party for relief. The test in these one-on-one situations is to look for solutions that ease the task of transition and permit the specialized relationship to continue. Both of these patterns are evident in Magna Carta, and it takes some effort to analyze them.

1. Whither Magna Carta? In examining Magna Carta, I have made the conscious decision *not* to take into account every variation in feudal relationships that were found at the time of Magna Carta. This step toward simplification may roil medieval historians whose mastery of their materials reveals subtle differences in the operation of the supposedly unitary feudal system. In response, I do not claim these local variations do not matter at all. Rather, the argument is that these local variations do not matter in evaluating Magna Carta because the King and the barons at Runnymede did not address these local problems in their decidedly global

⁷ U.S. CONST. art. IV, § 2, cl. 3.

⁸ U.S. CONST. art. VI, § 3.

confrontation, except to say that ancient local customs should be honored, which they are in several places.⁹ Thus, there is no point in using this meaning to work out refinements in customary arrangements dealing with the sharing of expenses or the rotation of crops that depend on local patterns of access to resources on the one hand or small climate differences on the other. Instead, Magna Carta only focused on those features of the feudal system that impacted the King and all the barons similarly, in ways that permitted them to devise some generalized solution. The *selection* by the parties of the topics to put on the agenda helps simplify the analysis some 800 years later.

In dealing with Magna Carta, we see evidence of both the public choice and good government views. Professor Thomas Ginsburg has taken a cynical, public choice view toward the issue [1]. Ginsburg's first line of defense was that the charter had to be counted as a failure given that bad King John repudiated his promises the moment he escaped Runnymede and was able to call on the assistance of Pope Innocent III. Thereafter, Magna Carta survived only because of the King's convenient death, when the charter could be imposed on the infant Henry III, who took over at age 9 in 1216. In 1225, when he was 18 years of age and able to rule in his own right, a stripped-down version of Magna Carta was reaffirmed. Worse still, Magna Carta contains a set of provisions that commend the respect of no one. There are two clauses that regulate the interest that has to be paid on debts owed to Jews,¹⁰ and another that limits the power of women to initiate criminal proceedings.¹¹ Viewed as a whole, moreover, the entire document was just the product "of an intra-elite" struggle, in which the barons used whatever arguments they could to advance their own self-interest against the King. In subsequent iterations, the mystical invocation of Magna Carta had little to do with its intrinsic

⁹ See, e.g., Magna Carta (MC) cl. (2) (ancient reliefs and fees); cl. (13) (liberties of City of London); cl. (23) (obligation to build bridges); cl. *(25) (ancient rents); cl. (41) (merchant travel); cl. (46) (abbeys).

¹⁰ MC cl. (11) & (12).

¹¹ MC cl. (54): "No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband."

merits. Sometimes Magna Carta was a window dressing for public-regarding legislation. In other cases, it has been invoked opportunistically in support of some particular result to which it was not precisely relevant. Thus, Magna Carta has frequently been invoked as support for the 1935 Wagner Act, which at the time was widely hailed as the “Magna Carta of American labor.”¹² The two documents have nothing in common. More recently, Magna Carta was invoked by the Supreme Court as an imperfect justification for curbing the power of state-sponsored agricultural cartels [17]¹³. Any document that can be this pliable should, Ginsburg’s argument concludes, encourage us to look elsewhere for inspiration and justification of more modern laws and social practices.¹⁴

The opposite position has also been expressed in equally strong terms, even by economists and lawyers with a strong public choice orientation. Thus Alan Meltzer and Kenneth Scott offer a diametrically opposed account in their article *The Magna Carta at 800* [19], where they claim: “All freedom loving people should pause to recognize how much we owe to the English barons who forced King John to accept restrictions on his arbitrary authority as a sovereign.” In their view, this one

¹² [16]: “The National Labor Relations Act (NLRA, also known as the Wagner Act), is often referred to as the Magna Carta of organized labor because it dramatically strengthened the ability of labor unions to represent workers.”

¹³ *Horne* invokes clause 28 as a precedent for the Takings Clause. It reads (in the British Library translation): “(28) No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.” The key issue here is the timing of the payment, so the clause says that no constable or royal official can force a party to sell corn on credit. The provision has nothing obvious to do with the question of what justification the government needs to make to take corn, or indeed any other form of property, without any compensation at all, which was closer to the issue in *Horne*.

¹⁴ For an uncommonly bellicose and ignorant statement of a similar position, see Judge Posner in [18]:

I have been extremely annoyed by the fuss being made about Magna Carta. This is the 800th anniversary of Magna Carta. Magna Carta has absolutely nothing to say to us. The people who talk about Magna Carta, don’t understand Magna Carta, don’t understand history, don’t realize it was repealed a couple of years after. It was a power struggle between a bunch of aristocrats and a bunch of kings. The profession is always looking backwards, to the 18th century, to old decisions.

Note that Magna Carta was never “repealed” but was reaffirmed, and the deal was not with aristocrats but barons, and there was no bunch of kings on the other side.

principle transcended the particular disputes of the time and helps explain why the tale of Magna Carta still resonates today in the United States and throughout the world. That same theme is echoed by Clint Bolick, when he notes correctly that the articulation of the Due Process Guarantees in the U.S. Constitution was derived from the earlier guarantees of open justice found in Magna Carta [20].

At this point it is appropriate to frame the inquiry to give a detailed examination of the provisions of Magna Carta to determine whether they represent or entrench various forms of privilege or special-interest protections, and whether they are sensible, one might even say “efficient,” solutions to the complex challenges raised by the then regnant feudal system. In doing so, I shall look at the various provisions of Magna Carta not only from the point of view of political liberty but also as an exercise in feudal organization. Did the parties who met at Runnymede come up with sensible solutions for the problems of governance that they faced in their own time? Looked at comprehensively, the good government types win hands down over the special interest pleaders. To be sure, there are many provisions in Magna Carta that relate specifically to the operation of the feudal system, and thus offer a level of protection to the barons. But most of them are sophisticated responses to serious breakdowns in the system, which posed no threat to the position of innocent third parties, e.g., freemen, merchants, the serfs and villeins who operated outside the feudal system. But with a few exceptions, most of Magna Carta’s particular solutions reflect the solution that modern theories of contract, property and remedies would find attractive. Indeed, in many ways its detailed technical provisions bear an uncanny resemblance to the American Constitution, which is also rife with similar provisions. With Magna Carta, the ultimate verdict is that cynics are wrong. The celebration of Magna Carta is justified.

In reaching this conclusion, I do not mean to suggest that Magna Carta is some ideal doctrine that operates in perfect conformity to classical liberal principles of limited government. But it does strike all the right chords. It seeks to insulate all persons from the arbitrary imposition of government force; it seeks to preserve religious liberty through the separation of church and state; it extends its protection to the economic realm; it, with some modest class distinctions, encourages roughly

equal treatment of citizens before the law; it provides for sensible adjustment of its basic rules in time of war; and it implements many institutional safeguards against the excesses of royal power. And, of course, it does nothing to advance or preserve slavery.

2. Magna Carta: Sorting Through the Hodge-Podge. It is a commonplace observation that Magna Carta is something of a hodge-podge, given that its provisions do not follow in some logical progression, but instead read like “a long and disorderly jumble” [21]. But the question of order is far less important than the question of substance and how the individual provisions, whether read alone or in tandem, square up with the normative standards used to judge sensible solutions to contract and property rights problems. In making this judgment, it is critical to remember that Magna Carta necessarily reflects the influence of high scholarship on the one hand and pressing practical concerns on the other. We know about the former, for, as Richard Helmholz has shown, there are strong echoes of the *ius commune*, a peculiar blend of the secular provisions of Roman law with the more religiously bound provisions of the Canon law, that run through the document [21]. But in one sense that correct observation is a form of overkill. Any document that is drafted in Latin surely has to bear the influence of people learned in Latin, which requires some knowledge of both Roman and Canon law. Yet at the same time, the feudal system of England then had over 400 years to go before it ran its course. Feudalism necessarily developed some distinctive institutions that had no direct parallels in either Roman or Canon law. These institutions gave the King a dual role first as the Tenant-in-Chief throughout England and second as the defender of the realm who had sovereign power. Thus, the early writs novel disseisin (1166) and mort d’ancestor (1176) [22] gave protection against the disseisin (i.e. dispossession) of freehold estates outside the system of feudal courts, which posed risks of the extension of arbitrary royal power that any King, especially King John, could exercise.

These relations certainly required special attention, but it is a mistake to think that the particular provisions of Magna Carta are only directed toward conflicts between the King and the barons. Many of its provisions address what

today would be called private disputes between ordinary individuals, in which the Crown plays the role of the definer and enforcer of the rights and the special role of the Crown is far more limited. In dealing with these provisions, Magna Carta's emphasis upon the particular should not be interpreted as an effort to exclude or ignore the rights of others. It is just a recognition of unique local institutions that require some particularistic grounds of redress.

In the following section, I shall catalogue the various provisions in the following fashion. First, I shall consider questions of church and state. Next, I shall deal with the various incidents of feudalism, as it generates both special rules pertaining only to the Crown and more general rules that apply to all relations between lord and tenant. Third, I shall look at the rules directed toward marriage in the context of these feudal relationships. Fourth, I shall look at the provisions that govern debtor-creditor relations. Fifth, I shall examine the provisions dealing with courts and jurisdiction. Sixth, I shall examine the provisions that deal with liberties and properties. Finally, I shall examine the various provisions that governed the control over the royal forests seized by John and his predecessor.

2.1 Religious liberty and the separation of church and state. One of the great achievements of modern constitutional law is the ability to establish some separation between church and state. The task is evidently not easy because there are many areas of necessary overlap between the two domains, evident from the simple fact that the King, as sovereign, possesses the exclusive use of force within the domain. Accordingly, the asymmetrical position between the Crown and the Church requires a special willingness of the state to hold back the exercise of its power so as to protect the Church with its sword when the Church has no sword of its own.

In this connection, Clause (1) of Magna Carta gets high marks because it recognizes "the freedom of the Church elections." This of course amounts to a recognition of the Church's own control of its internal affairs, which remains a bulwark of religious liberty to this day. The Church that cannot control its membership or set its own rules cannot long survive as a free institution. And making sure that the obligation runs "in good faith by our heirs in perpetuity" sends

a strong signal with its conscious parallel to the largest estate in property law, the fee simple absolute in possession. To put that guarantee into Magna Carta is absolutely critical because succession in office is always, as noted earlier, the source of political risk. It is uncertain what to make of the removal of Clause (63) on the reissuance of the Charter, given that it also confirmed the liberties under the Charter against the King and his heirs.¹⁵ But there is much redundancy between the two clauses. The great achievement is binding the Crown as an institution and not just some particular king. Surely, this clause resists any charges of partisanship, even if it does not address all the disputes that are likely to surface between church and state.

2.2 Feudal Relationships. Magna Carta then immediately veers off into a discussion of the relationship between the various lords of the realm (“any earl, baron, or other person that holds land directly of the Crown”) and the King himself. It is here that there is a clear whiff of the class differences that are embedded into Magna Carta, because the entire section begins with this broad definition:

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs.

The words “free men” in this case do not connote all human beings, but only those of a certain high level, which excludes the serfs and villeins who were tied to the land and had no standing or protection in the King’s Court. It is obvious that the exclusion here was deliberate and made for the simple reason that the barons who met the King had no desire to alter their relationships with their own villeins, who are allowed to keep “the implements of [their] husbandry, if they fall upon the mercy of a royal court.”¹⁶ But by the same token, the provisions are capable of easy

¹⁵ MC cl. *(63) read: “IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fullness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.”

¹⁶ MC cl. (20).

generalization to other situations, and as between the parties to them reflect the kind of efficiencies that are generally associated with an arm's length bargain. In addition, the heading is not quite accurate because there are provisions therein that do cover virtually all people precisely because they are not tethered to the feudal system and the complex arrangements that it put into place.

One sign that a public choice theory does not capture the situation is Clause (60), which does recognize that the principles here that bind the Crown with respect to the "customs and liberties" that it has granted are a good template for other relationships, and which accordingly bind the barons. The point is captured in this command: "Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men." It is powerful self-constraint and a useful guide.

The provisions of the general introduction to civil issues before Clause (2) are bookended by Clause *(61), which sets out complex procedures that give twenty-five barons strong powers to impose sanctions on the Crown for violating these norms. The provisions are slow and balky, and they raise as many questions as they answer. It is doubtful that the early thirteenth century had the capacity to enforce these rules. So when King John went, the need for extraordinary procedures was felt less keenly and went as well. The same argument applies to the general pardon provision in Clause *(62), which was directed toward the abuses of King John and, accordingly, was allowed to lapse after his death when Magna Carta was renewed a year later.

In dealing with particular feudal arrangements, the first point to stress is that there is a constant interaction between the role of the King as Sovereign and the role of the King as Tenant-in-Chief. That last position requires special attention, for as Maitland wrote in his great history of English Law, the system of feudalism has its greatest stress at the top where the King is always lord and never tenant [22]. The point here relates back to the cunning of reason. Within the feudal system more generally, the complex hierarchies meant that powerful individuals were lords in some cases and vassals in others, and thus had some inclination to act as if behind the veil of ignorance in making key choices. As mentioned above, succession is a key

issue in any organization, and all the more so in feudal times when there was not as yet a full separation between the King in his role as landowner and in his role as sovereign. The situation was more complex because, even though scutage was beginning to displace knight's service, the King's lords and barons had very special obligations to help him in times of need or peril, dealing with ransom, or making the eldest (note not all) son a knight. It is for this reason that Clause *(12) of Magna Carta places limitations on levying "scutage" or "aid."¹⁷ These are delicate asymmetrical relationships, and it is important to get the balance right between them, lest the entire system fall into disarray.

There are obvious bargaining difficulties that can arise in these cases, for it is clear that the King has to count on his lords not just for money but for loyalty, and it was well-known then, as it is well-known today, that it is far more difficult to delegate the performance of services, which are rarely fungible, than it is to delegate the payment of money, which is. It is for that reason that when services dominated in the feudal relations, subinfeudation was the preferred form of organization, so that the King could look to one person for the full obligation, without having to worry about how his various lords parceled out their obligations among their own inferiors. Only later, when commutation of service was routine, did subinfeudation die out, aided mightily by the passage of *Quia Emptores* in 1290 [24].

This arrangement is very much like those that are used today in various forms of subcontracting, where the owner of the property does not wish to be in privity with all the many subcontractors who work on the site. It is also the situation that a potential bilateral monopoly problem can arise if the King is forced to take the son of the decedent when it is unclear as to what payments, if any, have to be made for the son to secure that position. In this situation, the liquidation of the obligations has the real advantage of avoiding the bargaining tussles that could arise given that there is a duty to serve by the rising lord, and a correlative duty of the King to accept those services. The question is how to stabilize these relationships.

¹⁷ See MC cl. 12; see also *infra* at pp. 2–3 .

Judged in light of these business realities, Magna Carta provisions that deal with the orderly succession count as a valuable and useful template that could be invoked in modern contexts, including leases and corporations that are far removed from the original problem that confronted the parties at Runnymede. Viewed from this organizational perspective, the Magna Carta shows a good deal of sophistication. Clause (2) is limited to cases of people who hold directly of the Crown for military services, where all the administrative tussles of substituted and continuous services are most acute. The Clause then fixes the scale of relief in two ways, both consistent with principles of sound governance. The first is to use a fixed fee of £100 for the heir of an earl, and 100 shillings for the heir of a knight. This provision uses fixed numbers to avoid a dangerous bargaining game at succession. Those numbers of course are not set at random. Obviously, they stand in a coherent relationship with each other, such that the larger the stakes, the greater the payment to enter the land. It seems clear, moreover, that these numbers were not set arbitrarily, but were set in reference to “the ancient scale of ‘relief,’” which offers a useful, if imperfect, benchmark that leapfrogs backward over the derelictions of bad King John to a legitimate reference point from some earlier age. To be sure, there is a downside to a fixed number that is common to other contexts. Very large estates secure an advantage relative to smaller ones. But that problem always arises with any fixed number, and it is hard to deny that uniformity has major offsetting advantages.

In dealing with Clause (2) specifically, it is also worth noting that lesser amounts for smaller estates are not specified by pounds and shillings, probably because the variation in these smaller holdings makes the choice of a given number difficult to accept. But the sliding scale of proportionality—“and any man that owes less shall pay less”—and then in accordance with “the ancient usage of fees” shows the effort to constrain discretion. The question of renewal often arises in connection with leases or insurance policies where the approach taken in Clause (2) of Magna Carta is often adopted. A combination of fixed amounts, good-faith constraints and customary usages are invoked in various proportions that depend on the setting.

These basic rules governing succession and relief are backed up in multiple ways. Clause *(49) states that “we will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service,” a peculiar vice of King John. The clear intent of this provision is to make sure that the holding of hostages cannot be allowed to alter the terms of trade that otherwise apply between the King and the barons. Clause (16) states, “No man shall be forced to perform more service for a knight's 'fee', or other free holding of land, than is due from it.” This clause appears to bind both the Crown and lesser parties, and it is an obvious effort to prevent the abuse that could arise if the Crown, or indeed any lord, were in a position to redefine the quantity of work demanded by the basic unit of labor production. Similarly, the provision in Clause (43), dealing with “escheats” of baronies, represents another principled limitation on royal power. The difficulty with the escheat is that it could pave the way for imposing on an inferior lord the extra obligations properly asked of a tenant-in-chief. But this clause blocks that rule by insisting that “at his death his heir shall give us only the 'relief' and service that he would have made to the baron, had the barony been in the baron's hand.” The transfer of right from a tenant-in-chief to the King does not thereby prejudice any lord lower down in the feudal hierarchy.

Clause (3) deals with the situation left open in Clause (2), namely that of the underage person who is a ward to the King. The wardship over the estate of a minor raised many problems in feudal times. If a given lord holds separate properties by different lords, there is no way that all of them can share in the control of the ward's person. So, whenever the King is involved, he gets priority. What Clause (3) does is prevent double-dipping by both the King and any other lord holding the dominant position. Having taken advantage of the situation with the immediate advantages of running the estate, the guardian has to accept the quid pro quo: upon majority (which could be years later), the heir comes in “without relief or fine.”

The rule for the King is, usefully, the rule for all other lords. That basic pronouncement does not indicate how the wardship should be managed, but the problem of waste is endemic in any system in which one person gets to exercise control over land in which another person of limited capacity has the beneficial

interest [25]. So now the choice of remedies is critical. In this case, the protection applies not only to wardships run by the King, but also to any “guardian” of the land who is always in a position to commit waste. The rules are formulated without any distinction between them, which gives those wardships held of the Crown the protection of a nondiscrimination rule: the Crown binds itself to operate under the same duties that it imposes on others, subject to necessary differences because of its unique sovereign duties of enforcement.

Once again the remedial structure is exemplary. There is a general customary limitation on what can be taken from the land, and an absolute prohibition against the “destruction or damage to men or property,” which today would be called “affirmative waste.” There is also a very sophisticated provision in Clause (4) by which the Crown agrees to “exact compensation” from those managers who commit the waste. It is a nifty compromise. The Crown does not put itself on the hook for wrongs that it has not committed. But given that it has had a role in the appointment process, it pledges itself to bring the lawsuit needed to rectify the situation. Clause (4) also goes further and calls for the removal of those who were responsible for the damage by appointing “two worthy and prudent men” to take over the specified duties. The substantive qualifications matter even if they are hard to define or enforce, and the use of two men is done so that one can be a check on the dangers from another. In this situation, the Crown is part-arbiter in private disputes and part-participant. It is hard to identify any real substantive gap that prevents using this solution across the board, and in more modern times it is easily extended to other trust-like cases where there is a separation of ownership from control.

This same theme is developed further in Clause (5), which also deals with the separation of ownership from control. As the modern law of waste makes clear, it is important to deal not only with the affirmative destruction of property that is covered in Clause (4), but also with the issues of maintenance and upkeep that arise in running any property. Once again, we have a dispute that covers all guardianships, so that the King is caught by the same provisions that apply in ordinary private disputes. And the rules so adopted put the right set of incentives in

place. The guardian has the duty to maintain, but he does not have to reach into his own pocket to do so; instead, he is able to rely on the fruits of the land to support (and limit) his obligations, which is the exact same position that the outright owner would find himself in. These provisions thus control opportunism both ways. We have both the good-faith duty and the requisite financial constraint in place. The section then provides for the orderly transition at the end of the guardianship, as the guardian has to return the land to the former ward, along with the equipment, which presumably was part of the estate, that is needed to work the land. Once again, the set of specific duties removes the risk of destructive bargaining at a delicate moment of transition. That same theme is captured later on in Clause (46) in connection with abbeys: "All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due." The writ clearly dovetails with the preservation of the writ of *darrein presentation* covered in Clause (18), which determines which lord has the right to present a parson to a particular benefice.

It is instructive to extend the analysis to Clause *(12), which starts off with the basic command that "No 'scutage' or 'aid' may be levied in our kingdom without its general consent..." Scutage is a sum that is used to commute the service obligation to supply particular knights, which thus makes it a more versatile mode of financial support because it is no longer tied to any particular piece of land. At this point, what is involved is the collection of general revenues, which has to be done "by general consent." The term used to draw the middle line between unduly large amounts and no payments at all is the overused word "reasonable." But it is here for a purpose. The situation is quite different from the entry into an estate on death, which is a routine occurrence for which precise figures can be given. Here it is never certain as to how much ransom will be required. The situation with the eldest son and the daughter are probably subject to greater specificity than this, but so long as affairs of state are involved, as they are not with lesser figures, the openness probably makes sense as well. There is also in Clause *(15) a parallel provision that provides other (unspecified) people the same privileges as the Crown, but subject to the same limitations. This provision was dropped in the 1216 version,

perhaps because the issue is far less important elsewhere in the feudal system than it is for the Crown.

The use of the word “reasonable” in these two provisions could be treated as so vague as to carry no weight at all, but that objection would be mistaken. The term is used frequently today in calculating the payments on the renewal of leases and in figuring out the rates that can be charged by common carriers and other parties who are affected with the public interest [26].¹⁸ There are often benchmarks that make these calculations easier to do in more concrete situations. As that is the case, the adoption of this position shows an awareness once again of the holdout situation in these highly specialized transactions. It is not clear that modern drafting has produced a better all-purpose word. There are surely imperfections in this solution, but not any that bespeak of the influence of special interest politics.

There is also in Magna Carta the further question of how the collective interest is best determined. In this regard, the 1215 version of Magna Carta contains in Clause *(14) an elaborate set of procedures to determine how to get parties from the various groups together in one place.¹⁹ There are different rules for tenants-in-chief, or for the various orders of lords spiritual and temporal, as it is sometimes said. But the whole provision looks so cumbrous that it is no surprise it was dropped when the Charter was reissued. What was left was an obvious gap, which is difficult to fill when there is no organized governance structure that can be called upon to represent the people at large.

¹⁸ For a more detailed account of this critical case, and the general evolution in English and American law, see [27].

¹⁹ MC cl. (14) reads:

To obtain the general consent of the realm for the assessment of an 'aid' - except in the three cases specified above - or a 'scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

This discussion is not complete without some reference to Clause (37), which addresses the not uncommon situation in which some lord holds lands under two distinct tenurial relations. The basic concern here is whether the slightest interest of the Crown allows it to claim guardianship over the heir to the exclusion of other lords with more substantial interests. Again, the clause's solution looks technically sound insofar as it places the military obligations first, so that the service obligations can be discharged; otherwise the Crown relents on its claim for a special provision. Knight's service is unique, but the provision of knives or arrows is not sufficient to assert the Crown's priority because fungible goods do not raise any issue of personal fealty or loyalty. Accordingly, in ordinary cases of socage or burgage, the King relents on any special claim of loyalty. Again the principle is unique to the feudal system, but it surely shows a consistent effort to subordinate the Crown to the rule of law.

2.3 Marriage. Magna Carta also contains provisions dealing with the delicate political issue of marriage, which should not be regarded just as an affair of the heart, but as a key tool for forming political alliances. The bargaining problems are frequently acute. Most evidently, there is a conflict of interest between the lord, who is worried about the potential spouse of an heir, and the heir, who has to have some control over the issue. That same ethos of compromise dominates Clause (6), which allows the lord to give the heir in marriage, but "not to someone of lower social standing," so critical for lifestyle concerns. Publication "to the heir's next-of-kin" is a notice requirement that allows that person to protest any proposed arrangement.

Clause (7) again is not unique to the King but deals with yet another transition problem, namely the death of the husband and the need for provision of the wife. Dower and the marriage portion are to come as of right, so as to avoid the risk that she will have to pay in advance to obtain what is rightfully hers. The property is limited to that which they "jointly held on the day of his death," which means that she cannot reach back and take property in which she had no interest during his life. The prompt assignment of dower (which should probably carry over to the marriage portion) offers yet another protection, and the forty days to stay in

her husband's house is another useful transitional provision. What is not clear from this provision is whether she never has any lifetime claim to the house in which she lives, which seems unlikely if it were a residence that she brought to marriage.

Clause (8) is an amalgam of private rights and royal prerogative. Its protection against compelled marriage is an enormous benefit to a woman who could otherwise be subject to manipulation by the powerful men around her, including the King. But in any feudal system, marriage influences power relationships. Thus, if she is on lands that she holds directly of the King, she has to give security that she will not marry without his consent—a provision not unlike a tenant's promise under a modern lease that he will not assign his interest to another without the consent of the landlord. But the identical rules apply to widows who hold of other lords, which means that the King is not given any unique advantage. There is a gap in this area, which is the question of whether the King or Lord can withhold consent unreasonably, that is, those cases where the potential suitor is of good character, means, and loyalty to serve well when personal services are required. In the modern landlord and tenant relationships, the provision that the consent should not be unreasonably withheld is usually written into the transaction, and often read into it by good-faith implication if the agreement is silent on the issue [28]. Query whether that applies here. Given the general rules of interpretation, that view is consistent with the overall effort of Magna Carta to allow for transitions without undue hold-up problems. Marriage and leases share a great deal in their underlying bargaining dynamics.

2.4 Debtor-Creditor Arrangements. Clause (9) introduces an elaborate set of rules for the collection of debt. These rules require the coordination of two elements. First, there is the question of which assets should be seized first for the payment of debts. Second, there is the tripartite relationship between the creditor, the debtor, and the sureties of the debtor, a subject that received extensive attention in Roman Law [29]. The stated provisions are like a clinic in the law of debtor-creditor relations. Initially, the Crown and its officials have full responsibility for the collection of all debts, both public and private, which is why the Clause begins with “neither we nor our officials.” The question is how they restrain themselves, and the

rules put in place provide the answer. In general, seizing movable goods first is vastly superior to taking after land. The shift in title for land is very difficult to execute, and it often involves property in which other people have interests, making seizure difficult to organize. The priorities here seem sound. The same can be said about the proposition that one cannot go after sureties until the remedies against the principal have been exhausted. That is not the only solution possible, but it is one that tends to avoid discretion, especially in cases of multiple securities, given that Clause (9) does *not* deal with the relations among them. The surety then has an action against the debtor's land and rents, unless the debtor has first settled the obligation. One possible puzzle is why the surety need not go after movables first, for which the answer may be that if the debtor could not pay the principal debt, these assets are not available. There is also the question of whether the creditor has to go after land before going after sureties, which again seems unclear. But even though the section does not exhaust all the permutations on a particular question, it does point in the right direction, and it certainly requires the Crown to act as an honest agent rather than an interested partisan.

The benevolent judgment cannot be given to the somewhat infamous provision in Clause *(10) that eliminates for Jewish creditors the interest of an heir during the period of minority. But what is of equal interest in this case is that it also imposes limitations on the Crown, for in the event that it takes an assignment of the claim, it too is bound not to collect the interest, in the same manner as the Jew. Richard Helmholz has offered elaborate explanations as to why this provision may be consistent with the distinctive position of Jewish lenders in mediaeval law. But for these purposes, the more decisive point is that this provision did not survive the second publication either. Its half-life was one year, although doubtless other provisions that dealt with Jewish lenders remained on the books a long time thereafter.

The treatment of Jews is, however, somewhat odder in Clause *(11), which was also omitted in the 1216 version. That provision provided that the wife's claim for dower takes precedence over a claim by the Jewish lender. It is also clear that some proportionality is needed when the conflicting claims are between the heirs

and the creditors. These are conflicts that can arise in modern bankruptcy law when, for example, certain kinds of property deemed essential to family life are “exempt” from the operation of the statute. But in this instance, it would be a mistake to think that this provision singles out the Jews for special treatment given that “[d]ebts owed to persons other than Jews are to be dealt with similarly.” It would be most unwise to think that these two provisions should be used to undercut the overall legitimacy of Magna Carta, even if they could be criticized in their own right.

Later on, Clause (26) deals with debt collection and addresses the procedures for debts that are owed to the Crown. Yet again the rules here seem largely unexceptional. The sheriff or Royal official cannot collect more than the value of the debt owed, where the claim is to be assessed, not by the Crown on its own behalf, but “by worthy men” all of whom are independent of Royal power. The procedures then allow for all property to be kept in place until any debt owing is paid, which is no different from standard bankruptcy procedures and is the only sensible way to protect priorities. But thereafter, the remainder of the estate is distributed just as if there had been no debt, such that the provisions of wills are honored except to the extent that the valid claims of the wife and children have to be honored first. And if there is no debt owing, then distribution takes place just as if there had been no proceeding at all. It is hard to find fault with these procedures, which are similar to those in place today. Clause *(27) continues in the same vein in dealing with the distribution of free men who die intestate. Preserve the rights of debtors first, and then make the distribution as per the standard rules. Here again, it is the Church, not the Crown, that engages in the oversight. There is little to criticize as a matter of substance.

2.5 Courts and Jurisdiction. Magna Carta also contains a number of key provisions that relate to the jurisdiction of the courts, and these too in general make perfectly good sense—even by the standards of modern adjudication. Clause (17) relates to the question of where jurisdiction is proper. In modern times, there are constant questions of whether someone can be forced into an inconvenient forum, in which the dominant theme is rightly that bad procedures always result in the

derogation of substantive rights. Thus when, with respect to what we may call general jurisdiction, it is stipulated that lawsuits will not follow the royal court around, but instead be held in a fixed place, it reduces the uncertainty in litigation and thus counts as a boost to sound judicial administration. But the principle is quite different for assizes dealing with the possession of land or of the right to appoint to a church, which are protected by novel disseisin, mort d'ancestor, and darrein presentment, respectively. Now the rule stresses that it has to be done locally "in their proper county court." The locational preference is critical because to this day *in rem* actions are best tried in the county or district in which the land is located. But there is still the further question of how these trials should be run. All of these possessory writs must be administered by royal courts because they fall outside the feudal system. So the remainder of this provision makes sure that the royal presence will be there four times per year, so that undue delay can be avoided. In addition, the decisions are made cooperatively by two judges and four locally elected knights. The provision gives the majority of the voices to the local interests, allowing the Crown to provide the needed order without running roughshod over local interests. The theme is hammered home in Clause (19), which provides for an extended stay in the local courts for business that cannot be done on schedule. It is hard to find fault with either of these provisions.

Next, it is critical to mention the well-known Clause (34): "The writ called precipe shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court" [30, 31]. As ever, the question of jurisdiction did a great deal to shape the distribution of power between the King and his various lords. The system of writs as it was developed before 1216 restricted, as above, the King's intervention to disputes over possession. Matters of title should be decided in the court of law to which both the demandant and respondent reported. It was only in those cases where there was a claim that property was held of the King, and not of a lesser lord, that the case would be decided in the King's Court. The writ of precipe was intended to block the King from hearing those cases that were properly administered in feudal courts pursuant to the writ of right. Again, the contribution of Magna Carta to the distribution of

power between the King and his various lords does not seem subject to any serious substantive criticism.

The same pattern applies to judicial administration. Clause *(45) kicked things off by promising that key legal officials would both know and faithfully apply the law. There is a clear principle of proportionality announced in Clause (20), later captured in the English Bill of Rights, which contains prohibitions against excessive bail and excessive fines. There are again special provisions to protect local merchants and local villeins (so that not only freemen are protected), and here too there is a local check insofar as the fines cannot be imposed from the center but instead “shall be imposed except by the assessment on oath of reputable men of the neighbourhood.”

The rule is otherwise for earls and barons, who can only be judged by their own peers, which is a protection against royal power and the risk that individuals of lesser station could pass on them. The provision obviously has a class bias, but it does not have any substantive exemptions built into it. Given the high level of class stratification of the time, it would be odd to expect that Magna Carta would be used as a comprehensive means for social reform. But it is also instructive that Clause (24) guarantees the protection of royal justice in at least some cases, when it provides that these persons shall not be displaced by sheriffs, constable, coroners or other local officials. It is critical to note that this case does not involve any conflict between local and royal participants in particular disputes. Rather, it is assumed that all of these cases do belong within the King’s jurisdiction, where the guarantee is that high-level officials will actually do the work, given the seriousness of the cases. The obvious parallel is that one does not bring major criminal cases in small claims courts, where the level of adjudication is likely to be less. Finally, it is notable that the specific protections given to clergy under Clause (22) also rest on the general principles of proportionality, from which it exempts “the value of his ecclesiastical benefice” which is an assist to the separation of church and state outlined in Article I of Magna Carta.

At this point it is worth mentioning what are surely the most enduring guarantees in Magna Carta, contained in Clauses (38) to (40). These are separated

from earlier materials on criminal procedure, with which they are best read. Clause 38, which is generally downplayed, reads:

In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

Rightly read, this provision looks like an earlier form of the protection against self-incrimination. "His own unsupported statement" reads as though he is condemned out of his own mouth. The requirement of credible witnesses to support the prosecution is a clear way of saying that confessions are not sufficient to enforce convictions without some form of corroboration. However the difficulties are resolved, it is hard to read this as a form of special-interest legislation.

Clause (39), which to many is the centerpiece of Magna Carta, reads as follows:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

This provision has been the subject of such extensive commentary that there is little reason to spend too much time on it here [32]. There is of course the possible charge of insularity given that it only applies to free men and not to all persons. But the provision does not seek to limit the rights of any other class of individuals, and it is reasonable enough to think that the restriction to free men applies because these are the only persons who in general appear in the royal courts. But it takes little imagination to go the extra mile by extending it to all persons. Similarly, the list of protections may contain some gaps, but that is hardly unusual in constitutional provisions. The Fourth Amendment guarantee of "persons, houses, papers and effects" uses a similar partial list, but in the end the protection dutifully applies to boats and cars even if they are not on the original list. The power of analogy is so great that the extension is done against the literal restrictions of the text in order to make matters conform to a general principle.

Similarly, the third pillar of Clause (39) is also capable of extension. It applies in its original form only to what appear to be judgments in individual cases, and not to unfair statutes that lead to improper judgments in individual cases. And it is unclear whether judgment of his equals (or peers) is sufficient to convict or whether it must also be in conformity with the law of the land. But again it took little imagination to put all these elements together in ways that led to the Due Process Clauses of the Fifth and Fourteenth Amendments that say, in more general form, “nor shall any person be deprived of life, liberty or property, without due process or law,” where that last clause has spawned the near interminable debate as to whether it covers procedure only or deals with substance as well, which seems to have been the early nineteenth-century reading of the Clause [33, 34]. So if these various points are put together, it is something of a stretch to give the Clause its modern substantive meaning. But its capacity for growth to related situations seems too clear for dispute.

Clause (40) is also worth a brief note: “To no one will we sell, to no one deny or delay right or justice.” Again, there are no visible grounds for objection. The prohibition of sale is an obvious safeguard against favoritism that matches the last two prohibitions on the denial or delay of justice. The point of these rules is that they promote a certain level of confidence in the administration of justice, which is of course consistent with the rule of law more generally. The shortness of the paragraph is no sign of its lack of importance. Procedural justice may not be a sufficient condition for social welfare. But it is surely a necessary one.

Clauses (39) and (40) are also backed up by the specific remedies supplied in Clauses *(52) and *(55). The former called for the immediate restoration of lands, castles, liberties, or rights that had been taken from a lord without the lawful judgment of his equals along with various stays for lands taken from either Henry II or Richard I. The same theme carries over to fines. It is a nice pairing of a general proposition with specific relief. The second raises the question of fines that were unjustly obtained, and Clause (56) tries to resolve the issue of the protection of Welshman with respect to their “lands, liberties or anything else in England and Wales.” Here the due process guarantees are still in place, and they are matched

with a choice of law provision that applies the law of the place, whether it be England, Wales, or the Marches, to resolve these disputes. These same choice of law and jurisdiction rules are used today to resolve similar cases. The unwieldy procedures set out in Clause *(61) for dealing with disputes in England are carried over here, and when these are junked as being too complex in England, they are junked here as well.

Finally, Clause (54) provides, “No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.” Clearly such a provision would not stand today, but as against the background of the time, with systematic limitation of the civil capacity of women, it is hardly distinctive. And indeed, the exception for an appeal with respect to her husband probably covers the most common situation, for in other cases the husband is likely to be in a position to press the claims of his wife.

2.6 Protection of Liberties and Property. One of the common principles of natural justice is that no person shall be forced to surrender his property to the state without the payment of just compensation [35]. Exactly how far this principle ought to run in an age rife with regulation is an open and much debated question today. But the outright seizure of property is still regarded as being subject to a per se rule of protection, which means that the state has to give very specific justifications, like payment for a debt or fine. This principle is not stated in general terms in Magna Carta, but there is a group of individual clauses that express disapproval for taking “corn or other movable goods,”²⁰ or “horses and carts,”²¹ or “wood for [the] castle.”²² Each of these clauses has its own distinct wrinkles. Corn can only be taken for immediate payment if there is a voluntary postponement by the owner. Perhaps this is because it is a perishable, so the matter has to be resolved right away. The protection for horses and carts applies only to free men, and here the right is stronger because consent has to be procured. Perhaps this result is

²⁰ MC cl. (28).

²¹ MC cl. (30).

²² MC cl. (31).

because there are multiple sources of horses and carts, so requisition from a particular individual is not needed. That may be less true with corn, the perishable, especially in times when crops are in short supply. The same can be said about taking wood for the castle, or any other purpose.

Yet it would be a mistake to think of these clauses as isolated episodes untethered to a single principle. The common element is that public need does not allow for the taking of these particular items without either consent or compensation. The protection against arbitrary seizure is thus preserved even if the mode of its protection varies across contexts in subtle ways. The basic pattern is reinforced by Clause (29), which deals with situations where the constable cannot ask anyone to pay for castle guard if that party is willing to undertake that job in person or supply a suitable substitute. We can think of this as a case where the protection duty is owed as part of a knight's service so that there is no simple option to just say no. Indeed, neither consent nor compensation is required in any of the variations that are mentioned in this passage. But instead we have a fine calibration to make sure that the scope of the duty is properly measured, including a final clause that says the guard duty is not owed if the knight is in service. There shall be no double-dipping by the Crown, which is a principled form of protection.

Magna Carta is equally attentive to other forms of liberty. It grants in Clause (13) the generalized protection to the City of London of ancient liberties, which does not look to be of any direct benefit to the barons. But they did benefit from it indirectly, along with everyone else, as greater competition raised overall wealth levels. The good sense of this provision is complicated by the niceties associated with the suspension of the merchant privileges in Clause (41). After the broad protection of "ancient and lawful customs," the provision calls for a suspension of that liberty whenever the King is at war with any other nation. But here the suspension is limited only to the merchants whose country is at war, and even then the Clause guards against using the war as a pretext for inflicting personal injury or expropriating property. The provision also contains a nice element of reciprocity: "If our own merchants are safe they shall be safe too." Left unstated is what happens if English merchants are not treated well, at which point it is clear that the

suspension of liberty and detention of property will continue. But it is uncertain whether any additional sanctions may be imposed on these merchants, which seems unlikely given that no express provision calls for it.

The same theme is equally evident in clause (42), which allows “any man” to come and go except in time of war, subject only to an exception for persons lawfully imprisoned. Again, there is no obvious sign of a public choice bias. Similarly, the odd-looking provision in Clause (33) that calls for the removal of fish-weirs²³ is best understood as provision to secure internal navigation against interference, and thus has instructive ties to the liberties protected in Clause (13).²⁴ Likewise the provision for “standard measures of wine, ale, and corn...throughout the kingdom” found in Clause (35) again is an obvious effort to facilitate a national market in key commodities. In no sense can any of these provisions be read as special-interest provisions. And, finally, it calls in Clause *(51) for the removal of foreign mercenaries from England once peace is returned as a means to avoid the expansion of royal power.

2.7 *The Forests* Magna Carta contains three provisions that deal with the forests. The topic was far more relevant than the exotic heading suggests, for somewhere between a quarter and a third of English land was deemed to be part of the forest, and the matter was truly contentious because King John, in the footsteps of earlier kings, had exerted royal power over the forest to the detriment of its denizens [36]. The entire matter was eventually taken up in greater detail in the Charter of the Forest, first in 1217 and revised in 1225 [37]. But the three forest provisions found in Magna Carta are all worthy of note. Clause (47) stated that all forests created by King John had to be “disafforested,” that is, returned to their legal status prior to the time that the King asserted his claim. The same was done with enclosed riverbanks. The same theme is elaborated in Clause *(53), which calls for a “respite” in deciding the claims that land be disafforested for claims against Henry and Richard until the crusades are over. It is a sensible provision for tolling a

²³ MC cl. (33).

²⁴ MC cl. (33)

certain claim without prejudice. These provisions of the forests work in tandem with Clause (33), dealing with the removal of river weirs.

There are also the usual jurisdictional issues. Clause (44) insulated people “who live outside the forest” from being subject to general jurisdiction of courts within the forest. In line with modern principles, they may only be haled into that jurisdiction against their will when they “are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.” The rules here are a clear anticipation of the modern distinction between general and special jurisdiction [38, 39]. Next, Clause *(48) calls for the investigation and removal of “[a]ll evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens . . .” Again, there are no special demands by the barons, only the restoration of the status quo ante, which, as on so many other issues, made it possible for them to maintain a uniform coalition.

Finally, it is worth noting that three Clauses—*(50), * (58), and * (59)—deal with the resolution of particular disputes with the Welsh and the Scots, which are resolved favorably to other groups.

Conclusion

The purpose of this article has been to apply the general tools of public choice theory to determine whether Magna Carta should be regarded as public regarding or special interest legislation. As the clause-by-clause analysis shows, the former dominates the later. In general the barons were able to keep their coalition together by using ancient customs as a focal point to solve two problems. That extrinsic reference point made their position defensible against King John; it allowed them to avoid choosing among different customs; and it gave them a chance to provide general systematic benefits to other social groups who could then be counted on to support the barons. This close examination of individual provision shows that they exhibited a high degree of technical excellence in identifying and fixing many weak features of the English feudal system.

In light of this history, the simplest explanation as to why Magna Carta survived is that it exhibits only a few traces of short-lived special interest legislation, chiefly those dealing with the Jews and the prohibition in Clause 54 dealing with the

disability of a woman to secure the arrest or imprisonment of any other person on charges of the death of another person. But for the rest, there is little support for the cynical view of how the document was put together.

The first point to note is that it is drafted with a high level of technical excellence in its individual provisions. So even if these are placed in a strange order, the overall content is strong. It is also the case that most are drafted with respect to particular issues, and the constant resort to ancient customs and practices plays two key roles in keeping the arrangements in working order. First, ancient customs and practices establish a baseline so that King John or any successor cannot claim that the barons are trying to extract some gain out of a difficult situation. Second, the constant reference minimizes the potential conflicts that might arise between the barons, which would have happened if the desirability of different customs had been put into play. In many public choice situations, there are strange alliances, broadly conceived between Bootleggers and Baptists, between people who support measures because of self-interest and those who do so out of deep moral convictions [40]. But there is no evidence of this dynamic in Magna Carta, which reflects practical solutions to serious difficulties in the operation of the feudal system.

Second, it is also worth noting that while many of these provisions deal with the intra-elite struggle between the King and the barons, many are not so confined. Ironically, King John was such an unfair king that the barons could get all that they wanted by making only the most reasonable demands on the Crown. There was really no need to ask for special privileges when protection against basic abuse was so important. In addition, there are many provisions that call for general liberalization in governance and trade, and others that extended protection to others who are not barons. To be sure, the intrigue that surrounded its early adoption gives rise to some compelling narrative, but in the long run Magna Carta survives because it is capable of fair application and principled extension. Both are reasons for celebration.

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