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Magna Carta's Freedom for the English Church

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MAGNA CARTA'S FREEDOM FOR THE ENGLISH CHURCH

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Have you heard the news? The royal couple in England is expecting a baby. If the child is a boy, what do you suppose the name will be? Here is some insider information you can take to Paddy Power: It will not be John. John is the simplest, strongest name in English, and yet it will not even be considered. The reason, oddly enough, has something to do with religious freedom.

King John the Only, who ruled England in the early part of the thirteenth century, left behind such a record of failures that no English monarch has ever wanted to take the chance that another English monarch with that name would become king. One of his legacies is getting himself in such trouble with the other nobles in England that they forced him to sign Magna Carta. One of the major flashpoints of Magna Carta was religion.

In the first chapter of Magna Carta, King John proclaimed that "we . . . [i]n the first place have granted to God and by this our present Charter have confirmed, for us and our heirs in perpetuity, that the English church shall be free [*quod Anglicana ecclesia libera sit*], and shall have its rights undiminished and its liberties unimpaired."[2] Originally, this meant, "free under the papacy from control by kings or barons."[3]

This freedom of the English church was also recognized in the last chapter of Magna Carta, chapter 63, which states, "Wherefore we wish and firmly command that the English church be free."[4] In the alpha and omega of Magna Carta, the catalogue of

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[1] Professor, University of Massachusetts School of Law—Dartmouth. I would like to thank my research assistant, Matthew Viana, for his help with this article, as well as our terrific library staff at UMass Law, especially Cathy O'Neill, for tracking down sources for me, and the best writer I know, Matthew McDonald, for his invaluable editorial suggestions.

[2] JAMES CLARKE HOLT, MAGNA CARTA 448–49 (2d ed. Cambridge University Press 1992) (quoting MAGNA CARTA, ch. 1).

[3] HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 263 (Harvard Univ. Press 1983).

[4] MAGNA CARTA AND THE RULE OF LAW 398 (Daniel Barstow Magraw et al. eds., A.B.A. Book Pub. 2014) [hereinafter Magraw].

rights vis-à-vis the sovereign, and the importance of religious freedom, at least in its institutional form, is highlighted.

Now, you may be asking, why does this matter? We are in America. Most Americans have never heard of Magna Carta. Most of those who have do not know what it is about. Most of those who have an idea of what it is about do not know exactly what it says. What effect does it have? The story of Magna Carta has a bearing on how we think today. It has helped influence our assumptions about how secular power ought to treat religious belief. Part of that story is how Magna Carta has been regarded through the past eight centuries.

English legal historian Frederic William Maitland called Magna Carta "the nearest approach to an irrepealable 'fundamental statute' that England has ever had."[5] He notes that "[t]he vague large promise that the church of England shall be free is destined to arouse hopes that have been dormant and cannot be fulfilled."[6]

While that may be true, at the beginning of English constitutionalism in the Middle Ages, there was a resounding affirmation that religious freedom as important and inviolable, much like that in the First Amendment of our own Constitution's Bill of Rights, which begins with religion. This symposium panel is entitled "Rights and Wrongs in Common Law." As we will see, freedom for the Church was a part of English common law from its beginning, as it was already recognized in Henry I's coronation oath of the year 1100. Of course, this does not mean that the rights of the Church were always respected throughout English history. There were plenty of historical wrongs to contradict the legal rights.

However at the time of the American founding, William Blackstone wrote in his magisterial *Commentaries on the Laws of England* that "Christianity is part of the laws of England"[7] in the context of discussing blasphemy laws. This is a view which Thomas Jefferson notably disputed.[8] But at the risk of baiting at common law and switching to constitutional law, this right of reli-

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[5] 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 173 (Lawyers Literary Club 1959).

[6] *Id*. at 172.

[7] 4 WILLIAM BLACKSTONE, COMMENTARIES *59.

[8] And which, of course, would be problematic under the First Amendment's free speech and establishment clauses.

gious freedom was even more basic than the common law or statutory law.

Indeed, in this symposium, The Career of Rights in the Anglo-American Legal Tradition, we should recognize and pay tribute to the important role that religious freedom has played in vindicating civil rights more generally—from Magna Carta to the Montgomery March, on the occasion of the 800th anniversary of Magna Carta (June 15, 1215), and the 50th anniversary of the Selma-to-Montgomery March (March 7-25, 1965). One need only point to the indispensable role played by the Reverend Martin Luther King, Jr. in the 1955 Montgomery Bus Boycott. Additionally to his role in the bus boycott, King along with the Southern Christian Leadership Conference played a vital role in the 1965 Montgomery March, which culminated in President Lyndon B. Johnson's proclaiming on March 15, 1965 that, "We shall overcome," in proposing and having Congress enact the Voting Rights Act of 1965.

I would like to note that 1965 is also the 50th anniversary of the Catholic Church's Declaration on Religious Freedom, issued by the Second Vatican Council. The Declaration of Religious Freedom recognized, in spite of a somewhat uneven history on the part of the institutional Catholic Church, that "the human person has the right to religious freedom . . . that all should be immune from coercion on the part of individuals, social groups and every human power so that, within due limits, nobody is forced to act against his convictions in religious matters in private or in public, alone or in association with others."[9]

Indeed, the very notion of religious liberty, founded in a notion of a transcendent deity that precedes nations and states and their laws but which calls for a free and loving response, was to prove a potent force for the recognition of civil rights in the laws of nations and states.

Why is that? Let us take an American example; Martin Luther King, Jr., King's connection to religion does not come primarily from the title "Reverend" before his name. Whatever his flaws, King was a believer and an authentic proclaimer, and his appeals to religious teachings to persuade Americans to accept civil rights

[9] AUSTIN FLANNERY, VATICAN COUNCIL II: THE CONCILIAR AND POST-CONCILIAR DOCUMENTS 800 (O.P. ed., Laurence Ryan trans., Costello Publishing Co. 1975).

were among his most effective. That is because at some level he and his listeners—even if they were also his opponents—spoke the same language. Religious beliefs gnaw at injustice over time, until the great tree falls with a thud.

Aside from civil rights, King was a believer in religious freedom, as are most Americans. How and why—even if we often disagree on the details—say a lot about who we are as a people.

Supporters of religious freedom come in two varieties. The first is the type that thinks all religion is hooey, so it does not matter what people believe and why not just let everyone do his own thing. The second is the type that finds religion true or at least valuable in some way, and therefore says it is vital that each person should be allowed to believe and worship in his own way. Both of these approaches agree on something fundamental, namely, that the dignity of each human being is so high that his freedom ought to be respected. Particularly when it comes to his conception of who he is, how he came to be, where he is going, and what (if anything) he needs to do to get there. That respect for freedom that most people have comes from the ultimate respecter of freedom—a personal God who never lets His omnipotence overpower our ability to say yes or no.

Recently, the United States Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*,[10] quoted the first chapter of Magna Carta. This case dealt with whether religious schools are entitled to a constitutional ministerial exemption from employment discrimination laws. The Court held that both the Establishment Clause and the Free-Exercise Clause of the First Amendment require such an exemption, thus guaranteeing religious groups the ability to designate their own teachers and ministers. Chief Justice Roberts noted "the very first clause of Magna Carta" in which "King John agreed that 'the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.'"[11] Indeed, the first chapter went on to explain, in illustration of the freedom of the English church, "the freedom of elections which is deemed to be the English Church's very greatest want, . . . which we ourselves observe and wish to be observed by

[10] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 702 (2012).
[11] *Id*. at 702 (citing MAGNA CARTA ch. 1).

our heirs in good faith in perpetuity." So Magna Carta recognized "a religious group's right to shape its own faith and mission through its appointments."[12]

Why did Magna Carta come about in the first place? A major reason is that King John overstepped his authority in a number of areas in English society and culture, including religious affairs. When Pope Innocent III duly appointed Stephen Langton as the Archbishop of Canterbury, King John refused to recognize the appointment.

King John came to recognize the Archbishop only after a protracted struggle between Church and State. Archbishop Langton, of course, became one of the leading bishops among the barons who negotiated the concessions made by King John to which he affixed his seal at Runnymede.

A key event in the prelude to Magna Carta was Pope Innocent III's placing the English Church under interdict until King John recognized Langton as duly-appointed archbishop of Canterbury. As the newly-published work on Magna Carta by Nicholas Vincent explains:

> Hoping to end the interdict, in 1213 John issued letters declaring his intention to quash all measures taken against "the custom of the realm or ecclesiastical liberty." This pre-empts the phrasing of Magna Carta by a full two years.[13]

Professor Vincent continues to explicate the significant difference between the opening chapter of Magna Carta guaranteeing freedom for the English Church and the stipulations that follow in Magna Carta by stating:

> Read carefully, the clause on Church freedom is not only the most solemn of the Charter's sixty or so clauses, granted not to man but to God, but the clause with the greatest lawyerly subtlety. The rest of the Charter offers a settlement clearly dictated by the circumstances of 1215 and the imminent threat

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[12] *Id.* at 706.

[13] NICHOLAS VINCENT, MAGNA CARTA: THE FOUNDATION OF FREEDOM 1215–2015 60 (Third Millennium Publishing 2014).

> of civil war. Clause 1, by contrast, is careful to distinguish the liberties of the Church, already conceded by King John by the winter of 1214-15, from anything agreed subsequently, after "the dispute that arose between us and our barons." In other words, whilst the King might later attempt to wriggle out of those clauses granted under threat of compulsion and the threat of civil war, the clause for the Church was guaranteed regardless of war or peace.[14]

The text of Magna Carta's chapter one continues:

> [W]e wish that this [the freedom, rights and liberties of the English Church] be observed as is evident from the fact that of our own free will, before the dispute that arose between us and our barons, we granted and confirmed by our charter freedom of elections, reputed to be of great importance and most necessary to the English Church, and obtained confirmation of this from the lord Pope Innocent III, which we shall observe and which we wish to be observed by our heirs in perpetuity in good faith.[15]

Chapter one is one of only four provisions of Magna Carta that is still on the English statute books, and as Vincent notes:

> [F]our clauses (clauses 1, 13, 39 and 40 of the 1215 Magna Carta . . .) still have effect in English law. The principles that they enunciate, however, are so general as to render it unlikely that they will ever be tested specifically in the English law courts.[16]

Recently a claim has been made, in a separate anthology on Magna Carta newly published by the American Bar Association's section on international law, that "there is, upon close examination, not even a trace of religious freedom provisions in the Great Char-

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[14] *Id.* at 72.
[15] *Id*. at 183.
[16] *Id*. at 155.

ter of Liberty."[17] If this merely means that institutional freedom for the Church is quite different from individual religious freedom, for example, as expressed in the Universal Declaration of Human Rights,[18] in Vatican II's Declaration on Religious Freedom, then that of course is obvious. However, I think that the freedom of the Church, which was understood in England as an institution, eventually migrated from the Roman Catholic Church in England under the authority of the popes; to the Anglican Church of the Reformation under the Supreme Headship of the King; to the Protestant Churches of the Seventeenth Century; and ultimately to the individual. This is the "trace" of religious freedom in Magna Carta that the *Hosanna-Tabor* case illustrates.

There are both Catholic and Protestant arguments for the devolution of religious freedom from the organized Church to the individual. In the letters of St. Paul, the Christian Church is the "body of Christ," with Christ as the head, and individual Christians as members of that body.[19] The Acts of the Apostles agree with St. Peter in saying that it is a Christian duty to obey God rather than man,[20] should the circumstances require. For Catholics, the upright Christian believer, using his or her well-formed conscience, was supposed to obey God and the Church, even at the cost of life—such were the martyrs throughout history. Thomas More, Lord Chancellor under Henry VIII, eventually sacrificed his life rather than recognize Henry's claim to be "Supreme Head of the Church of England." Yet, the Catholic Church did not formally recognize the principle of individual religious freedom until fifty years ago, in the decree of the Second Vatican Council of 1965 entitled "*Dignitatis Humanae*" on religious freedom.

For Protestants, though, with their joint principles of individual or private interpretation of scripture, and "*sola scriptura*," or the Bible alone as setting the standard of belief, the logic was such that each individual believer ultimately could, in a way, become a church unto himself or herself. Thus religious freedom for churches ultimately came to rest in individuals. The Anglican Church, after the break with Rome, was a Church that accepted the

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[17] Magraw *supra* note 4, at 196.
[18] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[19] *Colossians* 1:18.
[20] *Acts* 5:29.

authority of creeds and bishops, and thus occupied an intermediate position or via media between Catholicism and more radical Protestantism.

"That the English church be free" is the obvious translation of "*quod Anglicana ecclesia libera sit"* in the original Latin of Magna Carta. This is easily verified from the scholarly *Dictionary of Medieval Latin from British Sources*, published for the British Academy by Oxford University Press.[21] Here, the adjective *Anglicanus* means "English." Therefore, it would be a misleading anachronism to translate *Anglicanus* to "Anglican," as in the Anglican Church that arose at the time of the English Reformation and the institutional split between it and the Catholic Church, because that did not happen until 316 years later.

Magna Carta begins, then, with a guarantee of freedom for the English Church. The phrase is usefully compared to the Coronation Charter of Henry I, given in 1100, 115 years before Runnymede. There, King Henry I promised to:

> [T]hrough fear of God and the love which I have toward you all, in the first place make the holy church of God free, so that I will neither sell nor put to farm [sic], nor on the death of archbishop or bishop or abbot will I take anything from the church's demesne or from its men until the successor shall enter in.[22]

The examples given in the oath are drawn from property law.

Professor Vincent comments, helpfully:

> In the months immediately prior to the making of Magna Carta in 1215, we are specifically informed by the chroniclers that Henry I's Coronation Charter was brought out of the archives by no less a figure than the archbishop of Canterbury Stephen Langton.

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[21] FASCICLES I (A-B) 85 (1975) (containing *Anglicanus*); FASCICLES III (D-E) 743–44 (1975) (containing *Ecclesia*); and FASCICLES V (I-J-K-L) 1595—96 (1975) (containing *Liber*).

[22] Magraw, *supra* note 4, at 397 app. A.

> It was thereafter employed to bind King John to the good laws of Henry I . . . .[23]

But there was a change from "holy church" to "English Church" between 1100 and 1215, in terms of recognizing liberty. Holiness, of course, is one of the four marks of the Church in the medieval tradition. The Church is one, holy, Catholic (meaning universal), and apostolic.[24] Obviously, one of the features of the medieval Christian Church was its unity under the authority of the pope or bishop of Rome. During this time, churches began forming outside the supervision of Rome, but these tended to be the orthodox Churches of the East, like the Greek Orthodox Church. It was only with the coming of the Protestant Reformation that such a phenomenon of national Churches spread to Western Europe.

Of course, in the background of any discussion of the freedom of the Church in Plantagenet England is the titanic struggle between John's father King Henry II and the Archbishop of Canterbury, Thomas Becket, who was martyred in 1170 in the Canterbury Cathedral by the king's henchmen and later canonized a saint in 1172.

Although the issues dividing them concerned more the "benefit of the clergy" than freedom of election of bishops, John of Salisbury reported that Becket had died for the freedom of the Church. John should know, because he was present in Canterbury at the time of the murder, and wrote a letter recounting the bloody events, reporting that among his last words, the archbishop had stated the following:

> And I am prepared to die for my God, to preserve justice and my church's liberty [*pro assertion iustitiae et ecclesiae libertate*] . . . I embrace death readily, so long as peace and liberty for the Church follow from the shedding of my blood [*dummodo ecclesia in effusione sanguinis mei pacem consequatur et libertatem*].[25]

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[23] VINCENT, *supra* note 13, at 33.

[24] *See generally* CATECHISM OF THE CATHOLIC CHURCH, ¶ 811–70 (2d. ed. 1997).

[25] 2 W.J. MILLOR & C.N.L. BROOKE, THE LETTERS OF JOHN OF SALISBURY 730–31 (Oxford University Press, 1979).

Freedom of the Church, then, was a dearly-bought right in this era. Of course King John only agreed to Magna Carta under duress, and so he in practice disregarded it, and appealed to the Pope, Innocent III, to annul it.

In his papal bull, *Etsi Carissimus* issued August 24, 1215, Pope Innocent III, feudal overlord of England at the time, declared that Magna Carta was null and void. Whereas in the past King John,

> grievously offended God and the Church . . . the king at length returned to his senses, and humbly made to God and the Church such complete amends that he not only paid compensation for losses and restored property wrongfully seized, but also conferred full liberty on the English church"[26] ["*verum etiam plenariam libertatem contulit Ecclesiae Anglicanae*."][27]

Thus, in the process of invalidating Magna Carta, Pope Innocent affirms chapter one on the freedom of the English Church, even using the same language as Magna Carta. He actually strengthens it, since he says John granted "full freedom," not just freedom, to the English Church. This is a bit of papal spin, as it seems clear that the Church had to wrest its freedom (of election of bishops and otherwise) from the hands of King John, just as the barons had done in Magna Carta. But it indicates that all parties seem agreed on the principle of freedom of the Church from royal control. It also shows what the phrase "English Church" meant at the time the "Catholic Church in England", if the pope himself used such a term, as opposed to the term "Anglican Church or Church of England", as it came to be understood at the time of the English Reformation.

King John ignored Magna Carta, and Pope Innocent III invalidated it on the substantive constitutional-law grounds that it was "illegal and unjust, thereby lessening unduly and impairing [King John's] royal rights and dignity," and on the procedural contract-law grounds of it having been agreed to only because of du-

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[26] Magraw, *supra* note 4, at 401 app. E.

[27] *Etsi carissimus* (24 Aug. 1215), *in* FOEDERA I, i.67 (3rd ed., Gravenhage 1745).

ress and fear.[28] Notwithstanding that, the death in 1216 of John, and the ascendancy to the throne of his junior son, Henry III, caused Magna Carta's reissue in 1216.

Magna Carta, at least in the abbreviated form of the 1225 reissue, was repeatedly issued throughout the thirteenth century, and entered into the English statute rolls in 1297.[29] This was the first and foundational cornerstone of religious freedom of the Church from government control in our Anglo-American legal tradition, and was used by Thomas More in his defense in his 1535 trial for refusing to swear to the King's position as Supreme Head of the Church of England. As Robert Bolt imaginatively constructed More's closing argument at his trial:

> The indictment is grounded in an act of Parliament which is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy! And more to this the immunity of the Church is promised both in Magna Carta and in the king's own Coronation Oath.[30]

This is true to the historical record, inasmuch as More's son-in-law, William Roper's *Life of Sir Thomas More,* published around 1556, gives what is considered the best historical account of the trial. It does so by explaining More's defense: "So farther showed he that it was contrary to both the laws and statutes of our own land yet unrepealed, as they might evidently perceive in Magna Carta, *Quod ecclesia Anglicana libera sit, et habeat omnia iura sua integra et libertates suas illaesas*."[31]

The pertinent point is that More's objection was overruled. As Justice Michael Tugendhat commented:

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[28] William Hamilton Bryson, *Papal Releases from Royal Oaths*, 22 J. OF Ecclesiastical Hist. 20 (Jan. 1979).

[29] *See* 25 Edward I c. 1 (1297), available at http://www.legislation.gov.uk/aep/Edw1cc1929/25/9?view=plain.

[30] ROBERT BOLT, A MAN FOR ALL SEASONS 159 (Vintage Books, 1990).

[31] A THOMAS MORE SOURCEBOOK, 60 (Gerard B. Wegemer & Stephen W. Smith eds., Catholic Univ. of America Press, 2004) [hereinafter *Wegemer*].

> More did refer to Magna Carta. It is not clear on what basis he referred to it. If he meant that it made Henry VIII's legislation illegal and void, that would not be an argument that a modern English judge could accept. But if More referred to it as giving rise to a presumption that Parliament did not intend that the provisions of Magna Carta be infringed, then that would today be an acceptable argument in law, in principle. But it would be difficult to persuade a judge to accept that argument given the plain words of the statute. Henry VIII's Parliament did not repeal Magna Carta, and the provision of it which More cites remains in force in England to this day.[32]

As Roper's account details:

> Now when Sir Thomas More, for the voiding of the indictment, had taken as many exceptions as he thought meet, and many more reasons than I can now remember alleged, the Lord Chancellor [Audley], loath to have the burden of that judgment wholly to depend upon himself, there openly asked advice of the Lord Fitz-James, then Lord Chief Justice of the King's Bench, and joined in commission with him, whether this indictment were sufficient or not. Who, like a wise man, answered, "My lords all, by St. Julian" (that was ever his oath), "I must needs confess that if the act of Parliament be not unlawful, then is not the indictment in my conscience insufficient." Whereupon the Lord Chancellor said to the rest of the lords: "Lo, my lords, you hear what my Lord Chief Justice saith," and so immediately gave [t]he judgment against him.[33]

The *Thomas More Source Book* draws attention to the conditional clause with a triple negative, with which the Chief Justice

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[32] THOMAS MORE'S TRIAL BY JURY A PROCEDURAL AND LEGAL REVIEW WITH A COLLECTION OF DOCUMENTS 117 (Henry Angstar Kelly et al. eds., Boydell Press, 2011).
[33] *See Wegemer*, *supra* note 31, at 61.

spoke,[34] weaselly words if there ever were any, but sufficient to make the point that the Act of Parliament was supreme, even over Magna Carta, "if the [A]ct of Parliament be not unlawful."[35]

Interestingly, but not surprisingly, Thomas Cromwell, chief prosecutor of More for Henry VIII, showed interest in the words '*libera sit*' ["that it shall be free"] of chapter one.[36] They were of obvious relevance to the proceedings against More, Bishop, Fisher, and the others.

Before More, Archbishop Warham in 1532 protested against the "questionable legality of proceedings of the crown" under the Reformation Parliament. Charged with *praemunire,* that is, an illegal appeal to the pope in Rome from England, the archbishop argued "the liberties of the Church are guaranteed by Magna Charta, and several kings who violated them, as Henry II. [sic], Edward III., Richard II., and Henry IV., came to an ill end."[37]

Let us reflect on the significance of what happened at More's trial in June of 1535. His appeal to chapter one of Magna Carta seems obviously on point. The freedom of the English Church originally meant freedom from royal control. More's refusal to swear to royal supremacy over the Church should have been protected as a core illustration of the freedom of the Church in England. The practical problem with this defense is the absence in the English system of judicial review. Parliament was assumed to be the last word on legislation. The later statutes on royal supremacy and the obligation to swear to it were indeed contrary to Magna Carta, but appealing to Magna Carta to invalidate contrary statutes was unavailing.

However, to the extent that Magna Carta and its chapter one were still on the statute books, though, there was a necessary (and radical) shift in interpretation. Obviously, with the English Reformation and the King assuming the supreme control of the Church of England, the understanding of the provision necessarily

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[34] Id.

[35] *Id*.

[36] ANNE PALLISTER, MAGNA CARTA: THE HERITAGE OF LIBERTY 101 (Oxford, 1971) (citing R.B. MERRIMAN, LIFE AND LETTERS OF THOMAS CROMWELL 102, i. 102 (OXFORD, 1902)).

[37] FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300-1629 138 (Sutton Press, 2008).

changed to mean freedom from papal and foreign control, rather than from royal control.

Under Queen Elizabeth I, the Anglican bishop of Worcester—later to become Archbishop of Canterbury as a favorite of the Queen—used chapter one to protest against her practice of granting patents for finding out supposed concealed lands, which "deprived Churchmen, Bishops, and others, of great part of their revenues, and left the state of the Clergy . . . in a very mean state."[38]

Similarly, the Anglican Doctor Cosins employs chapter one to show "that the Church [originally] had these rights and liberties then, (which are now claimed)."[39]

Author Faith Thompson summed up the ecumenical way in which arguments from chapter one were employed in English history:

> Whereas Warham and More had invoked chapter 1 of Magna Carta on behalf of the Catholic Church, and Whitgift and Cosin had used it in defence of the Anglican establishment, it remained for Francis Johnson and John Penry to invoke it for the separatists' conception of the "true church of Christ."[40]

As she explains,

> Penry was apprehended in the spring of 1593 and tried for felon in violating the Act of Uniformity, convicted, and executed May 28, 1593. "In his defense, as in his last tract, he maintained that the Queen was bound to rule in accordance with the law, both divine and human. Ordinances contrary to either were of no validity." "'Her Majesty' (he declared) hath granted in establishing and confirming the Great Charter of England that the church of God under her should have all her rights and liberties inviolate forever."[41]

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[38] *Id*. at 208–09 (quoting STRYPE WHITGIFT, I, 172-73).
[39] *Id*. at 228.
[40] *Id*. at 225.
[41] *Id.*

Magna Carta also figured prominently in the English Civil War of the seventeenth century, which contested the Stuart's claims to Divine Right and asserted that the king was subject to law rather than above the law. Sir Edward Coke notably wrote a treatise on Magna Carta, which the King prevented from publication. In 1642, eight years after Coke's death Parliament published his treatise. It forms the first section of the second part of Coke's *Institutes of the Laws of England*.[42]

Using the 1225 edition of the Magna Carta, an abbreviated version of the 1215 original that was promulgated by King John's son Henry III, Coke gives the Latin original, together with an English translation and commentary. Fortunately, chapter one is the same in both the 1215 and 1225 versions, though the section on freedom of election and the reference to Pope Innocent III have been removed. Here is how he explains the key provision that the English Church be free:

> That is, that all ecclesiasticall [sic] persons within the realm, their possessions, and goods, shall be freed from all unjust exactions and oppressions, but notwithstanding should yield all lawfull duties, either to the king or to any of his subjects, so as *libera* here is taken for *liberata*, for as hath been said, this charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted (to be discharged of lawfull tenures, services, rents and aids) but a restitution of such as lawfully they had before, and to free them of that which had been usurped and incroached [sic] upon them by any power whatsoever; and purposely, and materially, the charter faith *ecclesia*, because *ecclesia non moritur* ["the church doesn't die"], but *moriuntur ecclesiastici* ["ecclesiastics die"], and this extends to all ecclesiasticall [sic] persons of what quality or order forever.[43]

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[42] EDWARD COKE, CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES: THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (Omni Publications 1998) (1797).

[43] *Id.* at 2.

He adds:

> And true it is, that ecclesiasticall [sic] persons have more and greater liberties than any other of the king's subjects, wherein, to set down all, would take up a whole volume of itself, and to set down no example, agreeth not with the office of an expositor; therefore some few examples shall be expressed, and the studious reader left to observe the rest as he shall reade them in our books, and other authorities of law.[44]

The examples Coke gives include: 1) exemption from the duty of holding civil offices; 2) privilege of not serving in war; and 3) freedom from taxation for their ecclesiastical goods (what he calls "tolles and costomes, average, pontage, paviage and the like").[45]

Even after eight centuries, this provision of Magna Carta is one of the few that remains in effect. A statement of principle that the Church in England should be free from outside domination, it is an ancestor of our American belief in separation of Church and State and the guarantee of free exercise of religion contained in the First Amendment.

In English history, people died for this principle, on various sides of the denominational divides. It was not always vindicated in practice. But, since at least the end of the thirteenth century, it has ever been on the statute books of England as a reminder of the moral integrity of the religious realm.

It might also remind us that if your name is John, you cannot be king of England, and why.

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[44] *Id*. at 3.
[45] *Id.*