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# The Liberties of the Church and the City of London in Magna Carta

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*This article identifies the liberties of the Church and the City of London which were intended to be protected by Magna Carta from 1215. The liberties intended were a recognition of a form of autonomy for the Church and the City and have no connection with the individual freedoms that are identified for protection by modern human rights instruments. The clauses in Magna Carta conferring that autonomy are among the very few that have not been repealed, but they have not been asserted for hundreds of years. While the idea of church autonomy has resonance with the ideas of subsidiarity and sphere-sovereignty developed in Catholic and Calvinist social teaching from the late nineteenth century, recent American jurisprudence suggests that religious autonomy may be the best way to defend religious liberty in the future. This article suggests that, just as English kings were persuaded to provide towns, colonial endeavours and eventually corporate free enterprise with limited autonomy for a fee, so charters conferring limited autonomy on religious communities may provide a philosophical and practical basis from which to defend religious liberty in the future, even if the assertion of individual religious liberty becomes politically incorrect.*

**Keywords:** Magna Carta, liberty, autonomy, religious freedom

## INTRODUCTION

The word ‘liberties’ appears ten times in the 1215 version of Magna Carta. Once it is specific to the Church and twice to the City of London. One of the references is specific to Welshmen, another to Alexander, the erstwhile King of Scotland, but all the other references are generic references to the liberties granted or acknowledged under the Charter as a whole. The references to the liberties of the Church and of the City of London have not been the subject of a great deal of commentary despite the 800th anniversary. My purpose in this article is to try to part-fill that lacuna in the literature. I therefore set out the relevant text of the 1215 version of the Charter in full.<sup>1</sup>

<sup>1</sup> Note that, while the wording of the 1225 version varies slightly, the meaning so far as the Church and City of London are concerned is unchanged and that is true for the 1297 version as well. Though the versions of the Charter issued after 1215 removed reference to a baronial committee to oversee the king’s compliance with the Charter, no dilution of the rights of the Church or the City of London are detectable, confirming that these liberties were well known and accepted.

43        Thereafter I identify the particular privileges of the Church and the City of  
 44 London that seem to have been intended by those phrases and I explain what  
 45 they meant in practice. In particular, I explain that the idea of religious  
 46 freedom addressed in Magna Carta is quite different from the idea of individual  
 47 religious freedom which is expressed in modern bills and charters of rights. The  
 48 idea of religious freedom assumed in Magna Carta is more like the idea of reli-  
 49 gious autonomy said by some contemporary United States (US) commentators  
 50 to have been confirmed by the establishment clause in the First Amendment to  
 51 the US Constitution. I also explain the relative independence of the City of  
 52 London, how it came about, why it was respected in practice and why the city  
 53 grew. I then suggest that the idea of religious and urban autonomy in Magna  
 54 Carta may be a progenitor of the twentieth-century idea of subsidiarity or sphere-  
 55 sovereignty and I discuss whether those ideas together are durable enough to  
 56 assist in defending modern religious institutions, and I note that the clauses  
 57 that confirmed the ancient liberties of the Church and of the City of London  
 58 as independent institutions have not been repealed.<sup>2</sup> That review dismisses  
 59 the idea that the delegated but independent autonomy inherent in British char-  
 60 ters enabled the existence of ‘a state within a state’. But it does raise the question  
 61 as to whether contemporary Western governments could be convinced, for a fee  
 62 or otherwise, to charter semi-independent religious or political communities as  
 63 some did between the tenth and nineteenth centuries.

64        I conclude that, even though the idea of religious freedom expressed in our  
 65 most ancient British constitutional instruments has no relationship with the in-  
 66 dividual freedom celebrated in modern human rights instruments, the much  
 67 older idea of religious autonomy stands ready to enable a new evolution of reli-  
 68 gious liberty in the twenty-first century. In particular, I suggest that, while indi-  
 69 vidual religious rights may subside in the face of state insistence on  
 70 homogeneity and majority rule, associational religious liberty seems ready to re-  
 71 assert itself as groups of religious believers assemble to protect themselves  
 72 against contemporary attacks on their consciences.

#### 74        THE TEXT

75  
 76        The 1215 version of Magna Carta<sup>3</sup> includes the following clauses:

79        2    Note that the four unrepealed clauses of Magna Carta to which Lord Irvine referred (see nn 3–4  
 80 below) are to the 1225/1297 version of the Charter, and the Church and London liberties are there  
 81 set out in clauses 1 and 9 respectively.

82        3    In a December 2002 address delivered at Parliament in Canberra, Lord Irvine of Lairg, the former  
 83 Lord Chancellor of Great Britain, observed that ‘Magna Carta was re-issued four times, with various  
 84 amendments, and is now thought to have been confirmed by Parliament on almost fifty further occa-  
 sions’, citing F Thompson, *Magna Carta: its role in the making of the English constitution 1300–1629*,  
 (New York, 1972), ch 1.

- 85 1. FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter  
 86 have confirmed for us and our heirs in perpetuity, that the English  
 87 Church shall be free, and shall have its rights undiminished, and  
 88 its liberties unimpaired, and . . .
- 89 13. The City of London shall enjoy all its ancient liberties and free customs,  
 90 both by land and by water. We also will and grant that all other cities, bor-  
 91 oughs, towns, and ports shall enjoy all their liberties and free customs.

92  
 93 These are not the most well known clauses in the Charter.<sup>4</sup>

### 94 95 Liberties of the Church

96 The meaning of the first clause is clarified a little by the text that follows. It  
 97 continues:

98  
 99 That we wish this so to be observed, appears from the fact that of our own  
 100 free will, before the outbreak of the present dispute between us and our  
 101 barons, we granted and confirmed by charter the freedom of the  
 102 Church's elections – a right reckoned to be of the greatest necessity and  
 103 importance to it – and caused this to be confirmed by Pope Innocent  
 104 III. This freedom we shall observe ourselves, and desire to be observed  
 105 in good faith by our heirs in perpetuity.<sup>5</sup>

106  
 107 'The freedom of Church elections' is an oblique reference to a residue of the  
 108 long-running dispute between the Church in Europe and various kings and  
 109 emperors on that continent known as the Investiture Contest. The contest  
 110 was about who had the ultimate authority to select those who would hold eccle-  
 111 siastical offices in a kingdom. William the Conqueror had been in dispute with  
 112 successive popes for twenty years before he sailed for England. He settled his  
 113 personal dispute with Pope Alexander II with the help of Lanfranc, an Italian  
 114 cleric ministering in Normandy,<sup>6</sup> whom he later appointed as his first  
 115

116 4 The first clause cited here, which concerned the liberties of the Church, is one of four (1, 9, 29 and  
 117 37) which remain on the English statute books (Irvine (see n 2), citing *Halsbury's Statutes*, vol X, part  
 118 1, (London, 2001), pp 14–17). Note again, that Irvine's references are to the clause numbers in the 1225  
 version.

119 5 King John renounced Magna Carta as soon as the immediate threat of baronial force had passed and,  
 120 despite his ongoing argument with Pope Innocent III, the latter also renounced it as 'an affront to the  
 121 Church's authority over the King and the papal territories of England and Ireland and released John  
 122 from his oath to obey it': 'This day in history: August 24, 1215', *History Australia & New Zealand*  
 123 <<http://www.historychannel.com.au/classroom/day-in-history/771/pope-declares-magna-carta-invalid>>,  
 124 accessed 19 February 2016. According to this source, the Charter itself was created on 19 June 1215 and the  
 125 Pope renounced it on 24 August 1215. Other sources say that the king's seal was affixed on 15 June 1215.

126 6 The Catholic Encyclopedia records that Pope Alexander II had been Lanfranc's former student at Bec  
 in Normandy in France: 'Pope Alexander II', *Catholic Encyclopedia* <<http://www.newadvent.org/cathen/01286a.htm>>, accessed 19 February 2016. His chancellor, Hildebrand, who became Pope Gregory VII, succeeded him in 1073.

127 Archbishop of Canterbury.<sup>7</sup> The settlement of William's dispute with Pope  
 128 Alexander II saw him invested with 'a banner to crusade under' when he  
 129 invaded England, but William was never required to formally submit to Pope  
 130 Gregory VII's later demand that William 'swear fealty to him' even though  
 131 'William had sought a pope's permission to invade England'.<sup>8</sup>

132 The independence of the English Church asserted by William with Lanfranc's  
 133 support did not endure. Pope Gregory VII deposed the European Emperor  
 134 Henry IV in 1080 and with his successors gradually also asserted the 'independ-  
 135 ence of the clergy from secular control' in England.<sup>9</sup> However, the Church inde-  
 136 pendence in England referred to in Magna Carta was not really complete until  
 137 the reign of William's great-grandson Henry II. The dispute came to a head  
 138 when four of Henry's knights went to Canterbury in 1170 to 'rid him of that tur-  
 139 bulent priest'. After Archbishop Thomas Becket's death, Henry was only able to  
 140 avert the excommunication of England by the personal public penance of  
 141 'walking barefoot to Canterbury'<sup>10</sup> and by his submission in 1172 'to a papal  
 142 legate on the heights of Avranches . . . [where] before its cathedral [he] publicly  
 143 renounced those portions of his 1164 Constitutions of Clarendon which had  
 144 been deemed "offensive"<sup>11</sup> by the Pope.

145 There are direct and oblique references to Church privileges in six of the later  
 146 clauses in the 1215 version of Magna Carta, but none of those suggest any specific  
 147 local abuse beyond dabbling in Church appointments and King John's having  
 148 taken more tax or land than Edward the Confessor (r 1042–66) had done in  
 149 the early eleventh century.<sup>12</sup> There is no reference anywhere in the document  
 150 or elsewhere which suggests that John had interfered with religious confession

151  
 152  
 153 7 T Plucknett, *A Concise History of the Common Law*, fifth edition (London, 1956), p 11.

154 8 'William conquered England and its church', *Christianity.com*, <<http://www.christianity.com/church/church-history/timeline/901-1200/william-conquered-england-and-its-church-11629787.html>>, accessed 19 February 2016.

155 9 H Berman, *Law and Revolution* (Cambridge MA, 1983), pp 87 (quotation), 522.

156 10 *Ibid.*, p 256.

157 11 *Ibid.* J Baker, 'Magna Carta and personal liberty' in R Griffith-Jones and M Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, 2015), pp 81–108 at p 86, considers that the references to the liberties of the Church in the first chapter of Magna Carta would have been understood by all those who learned their law in the Inns of Court as confirming 'the freedom of the clergy from capital punishment for murder and felony'.

158 12 R Helmholz, 'Magna Carta and the law of nations', in Griffith-Jones and Hill, *Magna Carta*, pp 70–80 at p 78, says that Magna Carta 'established and fortified special privileges of Church and Clergy' in Chapters 14, 22, 27, 55, 60 and 61. Chapter 14 provided that the king had to give the high clergy (archbishops, bishops and abbots) an individual summons if he wanted to claim scutage (tax) from them. Chapter 22 provided that fines levied on ecclesiastical clerks would ignore their ecclesiastical income (benefices). Church jurisdiction in estate distribution was acknowledged in Chapter 27, and the Archbishop of Canterbury, Stephen Langton, was included in the committee of barons who would review cases where it was alleged that King John had previously taken fines unjustly (to determine whether they should be remitted) in Chapter 55 and to recover them by distraint if necessary in Chapter 61. Chapter 60 appropriately held that all the free men of the kingdom (including the clergy) would reciprocally observe the same principles in their dealings with others.

169 privilege, sanctuary or the practices which later became well known as ‘benefit of  
170 clergy’.<sup>13</sup>

171 Sealed religious confession was well established in England by about the elev-  
172 enth century,<sup>14</sup> even though it was not made binding upon the whole of the  
173 Church until the Fourth Lateran Council, which gathered at Rome’s Lateran  
174 Palace on 11 November 1215, five months after the first version of Magna Carta  
175 had been signed by King John.<sup>15</sup> Abuses of both religious confession privilege  
176 and sanctuary were addressed in the Statute *Articuli Cleri* of 1315 exactly a  
177 century later, but neither privilege seems to have been making waves during  
178 the reign of King John.

179 Magna Carta was not the first English charter in which the liberties of the  
180 Church were asserted and confirmed. When Henry I (the fourth son of  
181 William the Conqueror) took the throne in 1100, he had issued a charter  
182 which confirmed the law as it had stood in the time of Edward the Confessor  
183 and which confirmed the proprietary autonomy of the Church in these words:

184  
185 because the kingdom had been oppressed by unjust exactions, I, through  
186 fear of God and the love which I have toward you all, in the first place make  
187 the holy church of God free, so that I will neither sell nor put to farm, nor  
188 on the death of archbishop or bishop or abbot will I take anything from the  
189 church’s demesne or from its men until the successor shall enter it. And I  
190 take away all the bad customs by which the kingdom of England was un-  
191 justly oppressed.<sup>16</sup>

192  
193 Although William the Conqueror had been able to make ecclesiastical appoint-  
194 ments through the assistance of Lanfranc while Alexander II was pope, the pol-  
195 itical strength of subsequent popes saw the Church establish control of its  
196 appointments and property by the end of the twelfth century. At Runnymede  
197 in 1215, what the Church required was confirmation that King John’s new intru-  
198 sions into its affairs – including its exile of some of its leaders – should stop.  
199 The Church looked back to promises that had been made by John’s predecessors  
200 as its authority for the principle that it was supposed to be free from such con-  
201 tests with the king. John therefore promised that there would be no future inter-  
202 ference with the Church’s internal election procedures, no exile of its leadership  
203  
204

205 13 See, for example, ‘What is benefit of clergy?’, *The Law Dictionary*, <[http://thelawdictionary.org/  
206 benefit-of-clergy/](http://thelawdictionary.org/benefit-of-clergy/)>, accessed 19 February 2016.

207 14 A Thompson, *Religious Confession Privilege at Common Law* (Leiden, 2011), pp 64–65.

208 15 See n 1 for detail about the various versions of the Great Charter. The original 1215 version of the Great  
209 Charter was declared null and void and thus revoked within three months after it was issued in June  
210 1215. There was therefore no version of the Great Charter operative in England when the Fourth  
Lateran Council convened in Rome.

16 See <<http://www.nhinet.org/ccs/docs/char-lib.htm>> (accessed 19 February 2016), clause 1.

211 and no taking of Church property in the absence of its leaders.<sup>17</sup> Just as Henry I  
 212 had provided the Church with written assurances in 1100 that its property would  
 213 be sacrosanct, so the Church sought written assurance from John that its auton-  
 214 omy would be respected. In 1100, Henry I had referred to Edward the  
 215 Confessor's respectful relationship with the Church before his father (the  
 216 Conqueror)'s arrival as the precedent when it came to an acceptable relationship  
 217 between king and Church. King John was therefore probably referring to the  
 218 same standard, but his commitment in Magna Carta does not seem clear.  
 219 That perception may, however, be the result of our misunderstanding, since  
 220 church political power of that order is foreign to us.

### 222 **Ancient liberties of the City of London**

223 The City of London's charterial history is of similar vintage. William the  
 224 Conqueror had issued the City of London with its first charter in 1066, the  
 225 year of his conquest. But, even though there is no record of an earlier charter,  
 226 the City of London had already established its identity and autonomy. The  
 227 towns and cities that remained in Europe before the eleventh century had  
 228 been administrative centres left over from Roman times.<sup>18</sup> Many of those admin-  
 229 istrative centres did not survive. But the revival of commerce and the needs of  
 230 the merchant classes spawned new centres which took advantage of unhappy  
 231 groups in the countryside looking for the opportunity to 'climb from one  
 232 [social] class to another'.<sup>19</sup> London survived as a 'trading settlement' with forti-  
 233 fied commercial quarters.<sup>20</sup> Other cities in Europe that operated similarly  
 234 included Naples, Salerno, Bari, Syracuse, Palermo, Venice, Durazzo, Cologne  
 235 and Milan.

236 The change and growth in London was typical and was the result of a combin-  
 237 ation of economic, social, political, religious and legal factors. Surplus artisans  
 238 and craftsmen congregated in the developing towns to provide services to the  
 239 merchants. The merchants traded with farmers for surplus food and raw mate-  
 240 rials, which resulted from the 'rapid increase in agricultural productivity in the  
 241

242 17 King John had achieved an 'open breach with the Church' after 1205, when he again interfered in  
 243 ecclesiastical appointments and 'secure[d] the bishopric of] Winchester for his henchman Peter de  
 244 Roches'. The Pope's resistance to similar efforts when a new archbishop was required at  
 245 Canterbury, King John's exile of the Pope's appointee, Stephen Langton, in 1208 and the Pope's con-  
 246 sequential interdict on England, which excluded the laity from the sacraments, was not ended until  
 247 King John 'knelt before the Pope's representatives . . . offered a perpetual annual tribute of 1,000  
 248 marks' and enabled the return of Archbishop Langton and other exiled clergy to England (N  
 249 Vincent, *Magna Carta: a very short introduction* (Oxford, 2012), pp 47–51).

248 18 Berman, *Law and Revolution*, p 357. Berman observes that, while the cities of ancient Greece 'had  
 249 been self-contained, independent city-states', the Roman Empire's 'thousands of cities . . . had  
 250 served chiefly as centers for administrative control . . . and had been governed by imperial officers'.

250 19 Ibid, pp 357, 360 (quotation). Berman observes that most of the Roman cities were gone by the ninth  
 251 century but some survived, particularly in southern Italy, because of Byzantine and Arab commercial  
 252 influence.

252 20 Ibid, pp 357–358.



eleventh century'.<sup>21</sup> Serfs, free peasants and apprentices who had become masters and successful craftsmen in their own right followed the yellow brick road to class mobility and fortune. Emperors, kings, dukes and lesser (seigniorial) rulers, as well as popes and bishops, improved their military position by chartering towns which then attracted immigrants from the countryside. Not all of the feudal lords were excited to lose their peasants, but they did not have the power to reclaim their lost tenants before they were protected by the cities and part of its fabric.

To avoid the risk that the cities and their inhabitants might become a law unto themselves, those chartering the new cities required promises of obedience to law in those documents. Control was problematic because these newly independent townsmen had also obtained and were keen to exercise 'the right and duty to bear arms' in defence of their new homes. While this city-based military service was voluntary in the sense that it was not paid and was extended in the cities to include the peasants, it was made obligatory as part of the set of covenantal obligations which all new arrivals in the towns had to accept before they were secure in their new places of residence.<sup>22</sup>

Harold Berman explains the religious and legal contribution to the rise and independence of the new European towns and cities in the eleventh and twelfth centuries, including London, writing that they

were religious associations in the sense that each was held together by religious values and rituals, including religious oaths. Many of them were sworn communes (*conjurations*, 'conspiracies'), and of these a considerable number had been founded by insurrectionary organizations. Those that were formed by merchants were often governed by a merchant guild, which was itself a religious association, dedicated to charitable and other religious works as well as to the regulation of business activities. Those that were established by imperial, royal, ducal, or episcopal (or other ecclesiastical) initiative were also conceived as brotherhoods and were held together by oaths.

To stress the religious character of the cities and towns is not to say that they were ecclesiastical associations. They were wholly separate from the Church, and in that sense were the first secular states of Europe. Nevertheless, they derived much of their spirit and character from the Church. Indeed it would have been astonishing if it had been otherwise, since they emerged during the era of the Papal Revolution.<sup>23</sup>

<sup>21</sup> Ibid, p 359.

<sup>22</sup> Ibid, p 360. Peasants 'had no such right military right or duty' in the countryside, although they could be called upon in special circumstances. Knights, conversely, had to be paid.

<sup>23</sup> Ibid, p 362.

295 The new eleventh- and twelfth-century towns and cities were also legal associa-  
 296 tions, since they were either formed or legitimised by their new charters.  
 297 Though London, as a leftover Roman administrative centre, had not been  
 298 founded by charter in the same way as some of the new European towns,  
 299 William's charter for the city did confirm 'the "basic liberties" of [her] citizens  
 300 ... including substantial rights of self-government'.<sup>24</sup> In this respect, London  
 301 and the new European towns stood in contrast with the developing cities of  
 302 the Middle East. The Islamic cities lacked corporate unity, were never sworn  
 303 communes, religious guilds or brotherhoods and were never incorporated or  
 304 given charters setting out the rights and liberties of the residents.<sup>25</sup>

305 The charters of Christian towns and cities were read aloud regularly and the  
 306 people who came to live in them became subject to covenant to adhere to their  
 307 charters.<sup>26</sup> These commitments had more in common with the feudal contract  
 308 of vassalage than any modern sense of a bargained exchange. Still, when a  
 309 peasant or a craftsman came to reside in a town or city, he obtained a new  
 310 status and became subject to the small patrician group that ruled the place.  
 311 The relationship was covenantal and almost sacramental. To breach one's cove-  
 312 nants and renounce one's civic obligations would be to declare oneself an outlaw  
 313 and beyond the protection of the local city authorities, exposed once again  
 314 perhaps to one's former and unhappy feudal lord.

315 William's 1066 charter to the City of London is very short. Like the Coronation  
 316 Charter given to England by his fourth son, Henry I, 34 years later, it identifies  
 317 the laws and practices of Edward the Confessor as the gold standard. It says:

319 William the King friendly salutes William the Bishop, and Godfrey the por-  
 320 treve,<sup>27</sup> and all the burgesses within London, both French and English.  
 321 And I declare, that I grant you to be all law-worthy, as you were in the  
 322 days of King Edward; and I grant that every child shall be his father's  
 323 heir, after his father's days; and I will not suffer any person to do you  
 324 wrong. God keep you.<sup>28</sup>

325  
 326 The City of London claims that it is 'the oldest continuous municipal democracy  
 327 in the world' and traces its 'ancient rights and privileges' to the time of Edward  
 328

329 24 Ibid.

330 25 Ibid, pp 362–363.

331 26 Ibid, p 393.

332 27 The name for the office which preceded that of mayor and eventually lord mayor. See G McBain,  
 333 'Liberties and customs of London: are there any left?', (2013) 1:2 *International Law Research* 32–95  
 334 at 35, <<http://www.ccsenet.org/journal/index.php/ilr/article/download/28685/17142>>, accessed  
 335 19 February 2016.

336 28 See 'The Conqueror's charter', <<http://www.elfinspell.com/PrimarySource1066.html>>, accessed  
 19 February 2016. McBain, 'Liberties and customs of London', p 36, says that the consequence of  
 this charter was 'that all the citizens of London were freemen' and were assured that their legal  
 rights in the courts were preserved according to law existing before the Conquest.

337 the Confessor as acknowledged in the words of William's Charter.<sup>29</sup> The City's  
 338 website also infers that the reason for William's acknowledgement of London's  
 339 rights was tied up in the fact that the City of London 'was the major source of  
 340 financial loans to monarchs, who sought funds to support their policies at  
 341 home and abroad' from 'medieval to Stuart times'.<sup>30</sup>

342 Financial practicality probably also explains why London and Winchester  
 343 were exempted from William's Domesday Book tax survey in 1086.<sup>31</sup> William  
 344 had made a collective agreement with London and was happy with the taxation  
 345 arrangements that flowed. The nature of those arrangements is not set out in  
 346 the text of the 1066 Charter, but their existence is obvious in Henry I's  
 347 expanded version of the Charter in 1129.<sup>32</sup> Berman says that 'the rights of  
 348 London citizens and of London as a city expanded dramatically' in the two gen-  
 349 erations after 1066: 'the two ruling "reeves" (sheriffs), previously appointed by  
 350 the king, were elected from among the citizens, and this right of election was  
 351 granted in perpetuity by' Henry's 1129 version. 'The city exercised its jurisdic-  
 352 tion through a folkmoot of the entire citizenry meeting three times a year and  
 353 through a smaller court called a husting.'<sup>33</sup> But in his new version of the  
 354 Charter, Henry I also agreed to reduce the annual tax from £500 to £300.  
 355 While the city's 24 aldermen managed the city's affairs independently,  
 356 Henry's version makes it clear that they did so under the auspices of the  
 357 king as the source of and the authority behind their Charter. That is, they  
 358 ruled the City with the king's blessing, 'by the law of the lord king which  
 359 belongs to them in the city of London, saving the liberty of the city'.<sup>34</sup>  
 360 Though the king's law applied in the City of London, the 1129 Charter confirms  
 361 that, by that date, the citizens could choose their own judges, and that those  
 362 judges alone and none others outside the city would determine cases involving  
 363 London citizens.<sup>35</sup>

364 Though there are suggestions that King Stephen (r 1134–1155) revoked the  
 365 earlier City of London Charters, that possibility is immaterial when interpreting  
 366 the meaning of Magna Carta, since King John had reissued the Charter on 5 July  
 367 1199 and had confirmed the annual payment to him at £300.<sup>36</sup>

371  
 372 29 'History of the government of the City of London', *City of London*, <<http://www.cityoflondon.gov.uk/about-the-city/about-us/Pages/history-of-the-government-of-the-city-of-london.aspx>>, accessed 19  
 373 February 2016.

374 30 Ibid. See also McBain, 'Liberties and customs', p 32.

375 31 Berman, *Law and Revolution*, p 381, n 10.

376 32 McBain says this charter was issued by Henry I in 1132.

377 33 Berman, *Law and Revolution*, pp 381–382.

378 34 Ibid, p 382, quoting from the text of the 1129 Charter.

379 35 Ibid.

380 36 McBain 'Liberties and customs', p 38. See also Berman, *Law and Revolution*, p 383.

### 379 Religious freedom in Magna Carta?

380 The religious freedom that was promised by King John and those who subse-  
 381 quently reissued Magna Carta was what we might now describe as ‘religious au-  
 382 tonomy’. While Magna Carta is often vaunted as ‘an original charter of human  
 383 rights’, save perhaps for the highest nobles, Englishmen and other Europeans in  
 384 the thirteenth century did not conceive of individual rights in any sense that  
 385 moderns would recognise. Indeed, the suggestion that, in 1215, Magna Carta  
 386 introduced a modern ‘freedom of conscience’ or confirmed it is grossly ana-  
 387 chronistic.<sup>37</sup> To suggest that it was acceptable for anyone who qualified as a  
 388 ‘free man’ under Magna Carta to go and worship in some other non-kosher  
 389 way would have been to endorse heresy, which was a crime as grievous as  
 390 treason against the person of the king.<sup>38</sup> Jews and Moslems were not so much  
 391 exempt as irrelevant.<sup>39</sup> They did not count as ‘free men’ to merit legal recogni-  
 392 tion at all, though they were very much recognised in commercial practice.<sup>40</sup>

393 To the extent that thirteenth-century Englishmen had modern rights at all,  
 394 they enjoyed their rights in communities and classes. Their rights were the  
 395 product of shared responsibility and the collective discharge of communal obli-  
 396 gations. Because the Church and the City of London were collectively strong  
 397 enough to withstand the prerogative demands of the king, they could bargain  
 398 with him on terms approaching equality. But individually no Church officer,  
 399 no matter how high, nor any baron or city official would dare to resist a  
 400 request or personal demand from the king. Their strength lay in their covenant

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 404 37 Baker, ‘Magna Carta and personal liberty’, pp 81 and 86. R Griffith-Jones and M Hill, ‘The relevance  
 405 and resonance of the Great Charter’ in Griffith Jones and Hill, *Magna Carta*, pp 3–18 at p 11, make a  
 406 similar point: ‘the most glaring omission was freedom of religion, the freedom to believe what one  
 407 believed. That was permitted only to Jews and infidels. Magna Carta, at the very beginning, con-  
 408 firmed the liberties of the Church, and those included its jurisdiction; and the Church, at the  
 409 time at least, was not tolerant of independent thought by Christians. Quite what the Church  
 410 meant by belief is difficult now to grasp, but it did not include an unbound exercise of sincere intel-  
 411 lectual judgment; that was forbidden on pain of death.’

412 38 See J Kilcullen, ‘The medieval concept of heresy’, <[http://www.mq.edu.au/about\\_us/faculties\\_and\\_departments/faculty\\_of\\_arts/mhpir/staff/staff-politics\\_and\\_international\\_relations/john\\_kilcullen/the\\_medieval\\_concept\\_of\\_heresy/](http://www.mq.edu.au/about_us/faculties_and_departments/faculty_of_arts/mhpir/staff/staff-politics_and_international_relations/john_kilcullen/the_medieval_concept_of_heresy/)>, accessed 19 February 2016, where Thomas Aquinas (1225–1274) is cited as the authority for the death penalty for heretics, since corrupting faith is worse than many other crimes which merit the death penalty.

413 39 Griffith-Jones and Hill, ‘Relevance and resonance’.

414 40 Although William the Conqueror valued ‘his Jews’ when he brought them with him from Normandy  
 415 in 1066, he and later kings treated them like chattels and could ‘mortgage them’. Twelfth- and  
 416 thirteenth-century English mortgages followed Jewish forms (J Rabinowitz, ‘The story of the mort-  
 417 gage retold’, (1945) 94 *University of Pennsylvania Law Review* 94–109); since Jews could not own prop-  
 418 erty, when land was eventually forfeit in consequence of an unpaid mortgage (the processes for such  
 419 forfeiture were drawn out and complicated), it was forfeit to the king, who was thus joined at the hip  
 420 with his Jews and had an incentive to protect them. This generalised understanding goes some way  
 towards explaining ‘the anti-Semitic chapters’ in Magna Carta (Chapters 9, 10 and 11 of the original  
 1215 version) which were an important part of what the barons did insist on extracting from the king,  
 and which the ancient Church did not appear interested in moderating.

421 solidarity and they knew it.<sup>41</sup> Their opportunity to bargain with the king was the  
 422 fruit of an idea in the mind of the monk named Hildebrand who became Pope  
 423 Gregory VII as Pope Alexander II's successor. Berman writes that Hildebrand's  
 424 'new religious and legal concepts and institutions and practices' enabled urban-  
 425 isation and that they represent the watershed from which the whole Western  
 426 legal tradition has flowed. In time these ideas, institutions and charters would  
 427 generate demands for 'rational and objective judicial procedures, equality of  
 428 rights, participation in lawmaking, representative government and statehood  
 429 itself'.<sup>42</sup>

430 Though Magna Carta is popularly represented as an extraction wrought by  
 431 noble intimidation tactics, a more complete understanding of the context recog-  
 432 nises that the barons, the Church and the City of London institutionally made an  
 433 informal religious covenant that they would stand collectively and hold this  
 434 unruly, turbulent and meddling king accountable to grand principles  
 435 already well founded in custom. Magna Carta was new in England because of  
 436 the number of classes it drew together onto the face of one document. That  
 437 was also a reason why it was later considered the 'Great' Charter, though that  
 438 label at the time merely distinguished it from the smaller Forest Charter,  
 439 which was issued alongside the 1217 and 1225 versions of Magna Carta.<sup>43</sup> But  
 440 it was no novelty. Concords, treaties and charters had been used to resolve  
 441 similar and larger differences, normally seated in religious discord, on the  
 442 European continent for more than a hundred years.<sup>44</sup> Thus William I was  
 443 well familiar with the concept as an expedient way to manage large towns and  
 444 cities when he came to England in 1066. That is why he set out the heads of  
 445 his agreement with the aldermen of the established City of London in documen-  
 446 tary form in that first year.

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 450 41 Griffith-Jones and Hill, 'Relevance and resonance', pp 5–7, discuss the extent to which Magna Carta  
 451 was the realisation of Archbishop Stephen Langton's vision of 'a biblical, covenantal kingship in  
 452 England' and how he had invited the barons to St Paul's Cathedral and produced the Coronation  
 453 Charter of Henry I in August 1213.

454 42 Berman, *Law and Revolution*, p 363. Although these concepts were new in England in the twelfth  
 455 century, they have more ancient origins in the Judaeo-Christian tradition. Samuel appointed Saul  
 456 as the first Israelite King (1 Samuel 10 and 11) and then rejected him when he usurped Samuel's func-  
 457 tion in administering religious ordinances (1 Samuel 15:26), but there was no prophet or seer with  
 458 equivalent authority after Samuel to reject David when he did likewise.

459 43 Vincent, *Magna Carta*, pp 84, 86.

460 44 Berman, *Law and Revolution*, p 87, states that 'In 1075, after some twenty-five years of agitation and  
 461 propaganda by the papal party, Pope Gregory VII declared the political and legal supremacy of the  
 462 papacy over the entire church and the independence of the clergy from secular control. Gregory  
 also asserted the ultimate supremacy of the pope in secular matters, including the authority to  
 depose emperors and kings. The emperor – Henry IV of Saxony – responded with military  
 action. Civil war between the papal and imperial parties raged sporadically through Europe until  
 1122, when a final compromise was reached by a concordat signed in the German city of Worms.  
 In England and Normandy, the Concordat of Bec in 1107 had provided a temporary respite, but  
 the matter was not finally resolved there until the martyrdom of Archbishop Thomas Becket in 1170.'

463 Hildebrand's autonomy idea took root in England and spawned our modern  
 464 political institutions and power-sharing ideas. It is not my purpose to tease out  
 465 the length and breadth of that complex or the expanse of its legacy and influence,  
 466 but merely to observe that it was seated in the simple idea of Church autonomy –  
 467 the proposition that Church and State lived best together when they were autono-  
 468 mous, respected the integrity of the other and negotiated on terms of relative  
 469 equality when they had differences.

470 These ideas remain controversial. They were fought about as the Investiture  
 471 Contest of the twelfth century and they are now fought about as the culture wars  
 472 of the twenty-first century. John Rawls and Martha Nussbaum agree that the en-  
 473 during tension between church and state can only be resolved if it is accepted as  
 474 a 'fixed star' in Western jurisprudence that the state does not impose 'orthodoxy'  
 475 in matters of religion.<sup>45</sup> Nussbaum suggests that humans are forgetful and that  
 476 we need to relearn this solution in every generation because it is not  
 477 self-evident.<sup>46</sup>

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#### 481 SUBSIDIARITY, SPHERE-SOVEREIGNTY AND THE IDEA OF 482 AUTONOMY

483 Another indication that the fine detail as to how church and state are most wisely  
 484 separated is not self-evident can be seen in the evolution of the doctrines of sub-  
 485 sidiarity and sphere-sovereignty in the nineteenth century.<sup>47</sup> It is beyond the  
 486 scope of this article to set out all the nuances of those doctrines or how they  
 487 have most recently developed, but I will identify them sufficiently to show  
 488 that they may be regarded as the restatement of an underlying autonomy idea  
 489 that was well established in the eleventh century.

490 A connection between the idea of religious and urban autonomy and the ideas  
 491 of subsidiarity and sphere-sovereignty will not be obvious to readers who are  
 492 only familiar with these latter ideas from Catholic and Calvinist social teaching,  
 493 beginning with the papal encyclical *Rerum Novarum* in 1891. Nicholas Aroney  
 494 has, however, shown that the threads of meaning drawn together by Popes  
 495 Leo XIII, Pius XI and John Paul II, in 1891, 1931 and 1991 respectively, have

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499 45 J Rawls, *A Theory of Justice* (Cambridge, MA, 1971), p 181; M Nussbaum, *Liberty of Conscience*  
 500 (New York, 2008), pp 3–4 and 213. Both refer to the judgment of Justice Robert Jackson in *West*  
 501 *Virginia Board of Education v Barnette* 319 US 624 (1942) at 638.

502 46 Nussbaum, *Liberty of Conscience*, pp 359–360.

503 47 Since the purpose of this section is to suggest that there is a connection between these recent social  
 504 ideas and the ideas of autonomy already traced, differentiating between subsidiarity and sphere-  
 sovereignty is beyond the scope of this article. However, it is appropriate to observe that they are  
 related ideas that have grown in parallel with sphere-sovereignty, coming from a Calvinist–Dutch  
 background in the early twentieth century.

distant roots in Aristotle and Aquinas.<sup>48</sup> The same threads were also explored by de Tocqueville when he wrote *Democracy in America* in 1835.<sup>49</sup>

De Tocqueville noted that centralised power ‘accustoms men to set their own will habitually and completely aside’, and that the removal of any sense of individual responsibility for the welfare of the village enabled the individual to ‘fold his arms and wait till the whole nation comes to his aid’.<sup>50</sup> He also said that when a nation has reached the point where individuals

oscillate . . . between servitude and licence, [fear of central bureaucrats and expectation of benefit from their largesse], that nation must either change its customs and its laws, or perish; for the source of public virtues is dried up; and though it may contain subjects, it has not citizens.<sup>51</sup>

Undoubtedly similar insights into human character motivated the Conqueror in his ‘settlement’ with the City of London in 1066, but they do not explain the ‘freedom of the Church’ which was also recognised in Magna Carta. That concession of autonomy to the Church reads more like a species of mediaeval détente, as the powers that were saw that they must accommodate one another to avoid unending destructive conflict.

The Latin root of subsidiarity is *subsidio*, which literally means ‘to help’ or ‘aid’, but it is Catholic social teaching since 1891 that has provided the word ‘subsidiarity’ with its contemporary meaning. For example, in 1891 in his encyclical *Rerum Novarum*, Pope Leo XIII implied that, while the state was obliged to act against the secret combinations of men established for evil purposes, it had a greater obligation to encourage private associations focused on free enterprise and the common good.<sup>52</sup> Pope Pius XI fleshed out these ideas in his 1931 encyclical *Quadragesimo Anno*, which was subtitled ‘On the restoration of the social order and perfecting it conformably to the precepts of the gospel’.<sup>53</sup> This second encyclical treating subsidiarity included this statement:

it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice . . . and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can

48 N Aroney, ‘Subsidiarity in the writings of Aristotle and Aquinas’ in M Evans and A Zimmerman (eds), *Global Perspectives on Subsidiarity* (Dordrecht, 2014), pp 9–28 at p 12.

49 A de Tocqueville, *Democracy in America*, trans F Bowen (New York, 1994).

50 Ibid, pp 86 and 92.

51 Ibid, p 93.

52 Aroney, ‘Subsidiarity’, p 12.

53 Ibid, p 32.

547 do. For every social activity ought . . . to furnish help to the members of the  
548 body social, and never destroy and absorb them.

549 The supreme authority of the State ought . . . to let subordinate groups  
550 handle matters of lesser importance, which would otherwise dissipate its  
551 efforts . . . the State will . . . do all things that belong to it alone . . . directing,  
552 watching, urging restraining . . . [T]hose in power should be sure that the  
553 more perfectly graduated order is kept among the various associations, in  
554 observance of the principle of ‘subsidiarity function’ [to enable] . . . the  
555 happier and more prosperous condition of the State.<sup>54</sup>  
556

557 While it is doubtful that any English king considered that there was any moral  
558 turpitude in depriving a subject or institution of the opportunity to work or of the  
559 resulting work product if that deprivation served the public interest, all the kings  
560 had a self-interested understanding of the value of a productive economy.<sup>55</sup> King  
561 John and his successors acknowledged this much in Magna Carta when they  
562 agreed that they would not take or use property without compensation, and  
563 when they allowed the City of London to govern itself in return for an annual  
564 fee.<sup>56</sup> They neither wished to discourage industry or patriotism. But scholars  
565 in the US have observed a resurgence in the idea of the ancient freedom of  
566 the Church coming from another direction.

567 In the introduction to their recent book *The Rise of Corporate Liberty*,  
568 Schwartzman, Flanders and Robinson observe a transition in modern  
569 American understanding of religious liberty ‘from individual liberty [back] to  
570 [the] freedom of the church’ and ‘from freedom of the church to corporate  
571 liberty’ evolving as a response to the 1991 Supreme Court decision in  
572 *Employment Division v Smith*,<sup>57</sup> which had limited the exemption of individual  
573 religious practice in the face of generally applicable laws.<sup>58</sup> In the  
574 *Hosanna-Tabor* decision,<sup>59</sup> ‘Chief Justice Roberts emphasized that the First  
575 Amendment gives “special solicitude to religious organizations” and in  
576 *Hobby Lobby*,<sup>60</sup> Justice Alito suggested that corporations are ‘reducible ultimate-  
577 ly to the beliefs, values and interests of the people who compose them’.<sup>61</sup> For  
578

579 54 Ibid, p 35, quoting *Quadragesimo Anno*, pp 79 and 80.

580 55 See above n 31 and supporting text.

581 56 See, for example, clauses 28, 30 and 31 of the 1215 original version.

582 57 1 *Employment Division v Smith* 494 US 872 (1990).

583 58 M Schwartzman, C Flanders and Z Robinson, *The Rise of Corporate Liberty* (Oxford, 2016), pp xv and xvii.

584 59 *Hosanna Tabor Evangelical Lutheran School v EEOC* 565 US \_\_\_\_ (2012).

585 60 *Burwell v Hobby Lobby* 573 US \_\_\_\_ (2014).

586 61 Schwartzman, Flanders and Robinson, *Rise of Corporate Liberty*, pp xvi and xviii. The beginning of a  
587 similar thread of jurisprudence may also be detected in a case in the Federal Court of Australia  
588 decided in 2014 (*Iliafi v The Church of Jesus Christ of Latter-day Saints Australia* [2014] FCAFC 14).  
In that case, the appellants had argued that they had ‘a right to worship publicly in their native language’ (para 81) and that the respondent church’s decision ‘to discontinue Samoan-speaking wards



589 these authors, however, the *Hobby Lobby* case ‘has now become a symbol for  
590 something larger – about the role of corporations in constitutional law, about  
591 the role of religion in the United States, and about the confluence of the two’  
592 and the questions for religious liberty in the future will not be about individual  
593 religious liberty.<sup>62</sup> Rather, they will be about what government interests the  
594 ‘courts find sufficiently powerful to limit the freedom of religious organizations’  
595 and how to ‘strike the proper balance’ between those interests and the interests  
596 of third parties which may be harmed by them.<sup>63</sup>

597 When that forward-looking discussion is read alongside the observation that  
598 the oldest version of religious freedom known in Western jurisprudence is insti-  
599 tutional in nature, it is reasonable to suggest that religious liberty may be return-  
600 ing to where it began. If that is so, it is further reasonable to suggest that in the  
601 future religious liberty may be defended as the collective or the incorporated  
602 interest of groups of like-minded individuals associated together for religious  
603 or economic purpose. But the merger or confluence of religious freedom as  
604 an associational right with economic undertones has a well-established if forgot-  
605 ten jurisprudence of its own. In the final part of this article I will therefore note  
606 how the ancient idea of a charter with religious covenantal language contributed  
607 to England’s colonial expansion and the ring-fencing of her minority religions.  
608 Again, it is beyond the scope of this article to set out all the nuances of the under-  
609 lying legal doctrines or how they were developed, but I will provide examples to  
610 show that religious liberty and royal charters have been comfortable bedfellows  
611 for a very long time.

#### 614 AUTONOMY UNDER OTHER CHARTERS

615 Before there was any concept of a commercial legal entity, groups of individuals  
616 could not associate together for any reason, including trade, without royal sanc-  
617 tion.<sup>64</sup> Without commercial legitimacy, traders could not collect debts or enforce  
618 the promises that people had made when receiving goods for which they could  
619 not pay immediately. Since the crown was always interested in controlling the

623 ... impaired’ that right. The Court observed ‘that the right to freedom of religion does not ... guar-  
624 antee an individual’s right to worship publicly in a particular language of importance to that individ-  
625 ual’ (para 85), and that the appellants’ right to use their own language under A27 of the International  
626 Covenant on Civil and Political Rights was to be exercised consistently with other provisions in that  
627 Covenant. The appellant’s interpretation of A27 would interfere with the respondent church’s ‘right  
628 to freedom of religion [under A18] that [w]as being exercised by the Church on behalf of its adherents’  
629 (para 99).

628 <sup>62</sup> Schwartzman, Flanders and Robinson, *Rise of Corporate Liberty*, p xiii.

629 <sup>63</sup> *Ibid*, p xx.

630 <sup>64</sup> P Griffiths, *A Licence to Trade: a history of the English chartered companies* (London and Tonbridge, 1974), p x.

631 economy, the issue of charters on terms including payment was a mutually  
 632 beneficial exercise.<sup>65</sup> The export of wool to the Low Countries began well  
 633 before the Norman Conquest. Statutes and charters were issued to protect  
 634 foreign merchants and would exempt them from some local tolls in exchange  
 635 for payment of higher customs dues than were imposed on English  
 636 merchants.<sup>66</sup>

637 As a tool which provided the crown with a stream of revenue and a measure of  
 638 control over the economy while also giving autonomy and profit opportunity to  
 639 various collectives, the uses of charters proliferated. The new English colonies  
 640 on the American continent were also authorised and controlled by royal  
 641 charter. While it is not clear that the king was entirely aware of the non-  
 642 conforming mission of the first inhabitants of New England, Charles I  
 643 granted the New England Company a charter in March 1628 which provided  
 644 the new settlement with the legitimacy that enabled their support of continued  
 645 and increasing Puritan emigration.<sup>67</sup> That charter remained in force for 55  
 646 years, until Charles II revoked it in 1684. Because its terms did not follow the  
 647 custom of requiring its board to sit in England, the New England company  
 648 had a practical independence which enabled its board to follow Puritan covenant  
 649 practices with very little royal oversight.<sup>68</sup> Virginia's charter was granted earlier,  
 650 on 10 April 1606. Eight named individuals were authorised to create a colony, to  
 651 spread the Christian gospel among the infidels and savages.<sup>69</sup>

652 The history of the Church of Jesus Christ of Latter-day Saints in North America  
 653 also includes a famous charter. The Mormon people had been hounded from the  
 654 State of New York to Ohio, to Missouri and then to Illinois. In Illinois they were  
 655 initially received as refugees from religious persecution and allowed to develop a  
 656 malaria-infested swamp town called Commerce on the banks of the Mississippi.  
 657 But they were industrious and the town grew and was renamed Nauvoo. While  
 658 the people of Illinois were still sympathetic and the town was prospering, the  
 659 Latter-day Saints sought and obtained a charter from the legislature of Illinois  
 660 that had City of London spiritual genealogy. It was intended to enable local inde-  
 661 pendent city government and to protect the religious freedom of its citizens.  
 662 William E Berrett has written that Nauvoo's charter

663  
 664 provided for broad legislative power resting in a city council consisting of a  
 665 mayor, four aldermen, and nine councilors elected by the qualified voters  
 666 of the city.  
 667

668 65 Schwartzman, Flanders and Robinson, *Rise of Corporate Liberty*, p ix.

669 66 Griffiths, *Licence to Trade*, pp 5–6.

670 67 W MacDonald, *Documentary Source of American History 1606–1898* (New York, 1908), p 22.

671 68 Ibid.

672 69 See 'First charter of Virginia', available at <<http://www.bartleby.com/43/5.html>>, accessed 19 February 2016.

673 It provided for a municipal court, independent of any but the Supreme  
674 Court of the State and the Federal Courts.

675 It provided for a city militia to be known as the Nauvoo Legion, to be  
676 equipped by the State and officered by citizens of Nauvoo.<sup>70</sup>

677

678 Like the City of London, within its city limits, ‘the city was independent of all  
679 other agencies in the state. Only the repeal of the charter by the state legislature  
680 could curtail these powers.’ Though others disagree, Berrett continues that ‘No  
681 other municipality in America before or since has enjoyed such complete  
682 control of its own affairs.’<sup>71</sup> The Nauvoo Charter protected its citizens from  
683 the Missouri mobs, who still hounded the Latter-day Saints even though they  
684 had departed at gunpoint in accordance with the extermination order of  
685 Lieutenant-Governor Lilburn W Boggs in late 1838.<sup>72</sup> Under the Charter,  
686 Nauvoo citizens could apply by writs of habeas corpus for independent review  
687 of proceedings brought against their citizens in other jurisdictions, and this  
688 power protected Joseph Smith from many attempts to extradite him back to  
689 Missouri: though he had been released from one of their gaols when it  
690 became obvious that there was insufficient evidence to convict him on any criminal  
691 charge, it took many years for Missourian anti-Mormon hatred to abate.

692 Because of the generosity with which the Latter-day Saints were received by  
693 the State of Illinois in Nauvoo, they renounced the isolation they had adopted  
694 to survive in Missouri. The First Presidency of the Church in Nauvoo pro-  
695 claimed that ‘fellow citizens of every denomination’ were welcome, as this  
696 place was intended as a haven for people of good will from anywhere. One of  
697 the first ordinances passed by the city council protected people of all faiths in  
698 their undisturbed enjoyment of religious freedom, but another prohibited the  
699 sale of hard liquor, effectively making Nauvoo an early prohibition town.<sup>73</sup>

700 Though Nauvoo experienced huge growth (though it never became as large as  
701 Chicago, as some reports have suggested<sup>74</sup>), the Nauvoo experiment did not last.  
702 As in Missouri, the growing size of Nauvoo threatened the previous political  
703

704 70 W Berrett, *The Restored Church: a brief history of the growth and doctrines of the Church of Jesus Christ of  
705 Latter-day Saints*, fifteenth edition (Salt Lake City, UT, 1973), p 158.

706 71 Ibid. However, Berrett appears to have been exaggerating just a little. J Walker, ‘Invoking habeas  
707 corpus in Missouri and Illinois’ in G Madsen, J Walker and J Welch (eds), *Sustaining the Law: Joseph Smith’s legal encounters* (Provo, UT, 2014), pp 357–399 at pp 363 and 376, observes that two  
708 of five other city charters granted by the State of Illinois included habeas corpus protections for their citizens. See also J Kimball, ‘Protecting Nauvoo by Illinois charter in 1840’ in *ibid*, pp 297–  
709 307 at p 302.

710 72 Berrett, *Restored Church*, p 141. The ‘extermination order’ (Missouri Executive Order 44) was not formally  
711 revoked until 1976. See ‘Extermination order rescinded’, <[https://www.lds.org/ensign/1976/  
09/news-of-the-church/extermination-order-rescinded?lang=eng](https://www.lds.org/ensign/1976/09/news-of-the-church/extermination-order-rescinded?lang=eng)>, accessed 8 June 2016.

712 73 Berrett, *Restored Church*, p 159.

713 74 L Arrington and D Bitton, *The Mormon Experience: a history of the Latter-day Saints*, second edition  
714 (Urbana, IL, 1972), p 69. In June 1844, the church historian Franklin D. Richards ‘placed the population at 14,000’ (Berrett, *Restored Church*, p 160).

power of non-Latter-day Saints communities in Warsaw and Carthage. Those towns also resented the autonomy which the Nauvoo Charter provided to its citizens and particularly to the Mormon leader, Joseph Smith. After Smith's assassination on 27 June 1844, the Nauvoo Charter was revoked by the legislature on 29 January 1845 and soon thereafter, when it became clear that no peace was possible between the Latter-day Saints and other locals, the Church leaders negotiated a truce with their neighbours so that they could prepare for yet another exodus, this time to the Salt Lake Valley in what is now the State of Utah.<sup>75</sup>

#### WHAT FUTURE FOR CHARTERS AS INSTRUMENTS OF RELIGIOUS AUTONOMY AND FREEDOM?

The City of London's original charters saw aldermen, merchants, craftsmen and other service providers make covenants together about peace and protection that were sourced in mutual religious understanding. Although they were separate from the Church, they drew their understanding and values from the Church. In many eleventh- and twelfth-century European towns and cities, these covenant obligations were confirmed with oaths of loyalty and obedience to law. Covenant solidarity secured citizens against military and other action by other powers. In August 1213, Archbishop Stephen Langton envisioned 'a biblical, covenantal kingship in England' when he invited the barons to St Paul's Cathedral and unfolded the terms of Henry I's coronial charter of 1100 to them anew.<sup>76</sup> The New World citizens of Virginia and Boston also secured their safety and their religious freedom through the autonomy enabled by charters issued by English kings. The City of Nauvoo in nineteenth-century Illinois gained its autonomy and religious freedom through a charter issued by the State of Illinois.

Nowadays, when we speak of charters, we intend more aspirational documents. Formal legal protection is more often provided by statutes, but it was not always so. Magna Carta is the most famous example of an instrument which followed earlier precedents and was intended to confirm and secure autonomy for various groups against excessive government intervention in their affairs.

Most Western democracies now seek to protect values with bills of rights and constitutions. But charters have their place. Consider Australia, where there is no national bill of rights but where the State of Victoria and the Australian Capital Territory have passed bills of rights to remedy a perceived lacuna in

<sup>75</sup> The Illinois legislature issued a statement of regret (Resolution 627) to the Church of Jesus Christ of Latter-day Saints in April 2004. See '160 years later, Illinois ready to offer Mormons an apology', *Chicago Tribune*, 7 April 2004, <[http://articles.chicagotribune.com/2004-04-07/news/0404070268\\_1\\_mormons-armand-mauss-latter-day-saints](http://articles.chicagotribune.com/2004-04-07/news/0404070268_1_mormons-armand-mauss-latter-day-saints)>, accessed 19 February 2016.

<sup>76</sup> Griffith-Jones and Hill, 'Relevance and Resonance', pp 5–7.

757 the protection of civil liberties.<sup>77</sup> The State of Victoria calls its bill *The Charter of*  
 758 *Human Rights and Responsibilities Act 2006*. The South African Constitution also  
 759 anticipates the issue of further charters to protect citizen rights and freedoms  
 760 more fully, including religious freedom.<sup>78</sup>

761 Human rights instruments have proliferated around the world since the end  
 762 of the Second World War, and the Universal Declaration of Human Rights set  
 763 out aspirational standards intended to avoid further world wars. But, at the  
 764 same time as countries have aspired to prevent war with Magna Carta-like  
 765 written instruments, the world has been balkanising in consequence of imperial  
 766 decolonisation and as groups of people within nations have sought autonomies  
 767 different from those they inherited as their political birthright. Some countries  
 768 resist any suggestion of such autonomy with violence.<sup>79</sup> Others find democratic  
 769 solutions.<sup>80</sup> William the Conqueror's 1066 London Charter balanced his eco-  
 770 nomic interests against the desires of the people of that city for limited auton-  
 771 omy. Later sovereigns have also used charters and charter-like agreements to  
 772 balance economic and political interests in the interests of peaceful co-existence.

773 Magna Carta created an idea that arrived internationally when Eleanor  
 774 Roosevelt described the Universal Declaration of Human Rights (UDHR) as  
 775 'the international Magna Carta for all mankind'.<sup>81</sup> But the idea of rights which  
 776 the UDHR introduced and claimed for the world is also evolving as groups of  
 777 people seek new forms of autonomy and self-determination. Examples of  
 778 those new interests are identified when we consider current maps showing  
 779 the twentieth-century nations and ask how the boundaries will be changed as  
 780 the decades of the twenty-first century unfold. Will there be homelands for  
 781 Palestinians, Armenians and Kurds? Will the European Union survive to be  
 782 joined by more Eastern European nations and will the United Kingdom leave  
 783 after its experiment of more than 40 years? Or will the European Union be frac-  
 784 tured by debt? Just as Pope Gregory VII's revolution in the twelfth century  
 785 spawned the idea of nation-states, so the insight that groups of people have col-  
 786 lective rights that may be more important than the rights of the individuals who  
 787 compose those groups seems set to transform the world again.

789  
 790 77 G Sawyer, *Australian Federalism in the Courts* (Melbourne, 1967), p 208, called Australia 'the frozen  
 791 continent' since it was so averse to constitutional change. More recently, G Williams, S Brennan  
 792 and A Lynch, *Australian Constitutional Law and Theory* (Leichhardt, NSW, 2014), para 26.38, observed  
 793 that 'Australia is now the only democratic country without a national Bill of Rights'.

794 78 Section 234 of the Constitution of the Republic of South Africa 1996 provides: 'In order to deepen the  
 795 culture of democracy established by the Constitution, Parliament may adopt Charters of Rights con-  
 796 sistent with this Constitution.'

797 79 For example, Chinese resistance to the religion of the Dalai Lama and Falun Gong suggest Chinese  
 800 Communist Party concern with any organisational authority that could challenge the party's legitim-  
 801 acy, however benign.

802 80 For example, the secession referenda in Western Australia (1933), Quebec (1995) and Scotland (2014).

803 81 See 'A brief history of human rights', *United for Human Rights*, <<http://www.humanrights.com/what-are-human-rights/brief-history/the-united-nations.html>>, accessed 19 February 2016.

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## 799 CONCLUSION

800 In this article I have observed that the idea of ‘freedom of the Church’ may be on  
 801 the cusp of a resurrection. Renewed interest in freedom of the Church is not the  
 802 primary product of the advocacy of religious liberty, though in the US it does  
 803 respond to the narrowing of individual religious exemptions from state action  
 804 following the Supreme Court’s decision in *Employment Division v Smith*.  
 805 Modern freedom of the Church is rather a manifestation of the idea that associ-  
 806 ational freedom is at least as important as individual freedom and may be even  
 807 more important, since the rights of a group of human individuals must be more  
 808 important than the individual rights of one member of the group. That larger  
 809 idea of association freedom has not yet trickled down to inform religious  
 810 liberty debates in democratic nations beyond the US. However, such trickle-  
 811 down seems inevitable, as international interest in the idea of association  
 812 freedom is manifest in post-colonial lobbying for homelands for various indi-  
 813 genous peoples and in the jockeying of countries that wish to join and leave  
 814 the European Union.

815 This article suggests that, if associational freedom does gain a foothold as a  
 816 tool in the hands of religious liberty advocates, there is a vast deposit of associ-  
 817 ational understanding waiting to be mined. That understanding includes the  
 818 recognition that it was associational freedom that underlay the establishment  
 819 and the success of both the City of London and the British Empire.

820 While Magna Carta was not the first Anglo-American charter, there are  
 821 several senses in which it was the greatest. Certainly it was larger than the  
 822 Forest Charter, following the subdivision of Magna Carta’s clauses in 1217; and  
 823 it was the largest English charter ever conceived in the sense that it drew to-  
 824 gether the king, the lords, the merchants, the townsfolk and free men generally.  
 825 But its meaning as an icon and as an emblem of liberty continues to exceed its  
 826 written terms. It is and has been larger than life since it was first reissued by the  
 827 new king in 1217.

828 The suggestion of this article is that two of its four unrepealed clauses are  
 829 ready and waiting to contribute another round of human freedom to the  
 830 world. For Magna Carta’s idea that the Church and the City of London were  
 831 always entitled to associational freedom and autonomy despite the demands  
 832 of King John as the state executive has timeless resonance. Those clauses  
 833 confirm that successful states do not have to rule or control every aspect of  
 834 human life and association.

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