

SECOND EDITION

◆ DOCUMENTS ◆

of American Constitutional *and* Legal History

VOLUME I

FROM THE FOUNDING THROUGH
THE AGE OF INDUSTRIALIZATION

MELVIN I. UROFSKY PAUL FINKELMAN

Documents of American Constitutional and Legal History

VOLUME I: FROM THE FOUNDING
THROUGH THE AGE OF INDUSTRIALIZATION



Second Edition

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For our children



Abby

Isaac

Philip and Melissa

Robert and Leslie

Preface



AT ONE TIME little could be found in books on constitutional history other than Supreme Court decisions. If an important constitutional issue did not appear in one of the Court's cases, then essentially there would be no trace of it in the materials. We now understand that often important constitutional decisions take place outside the Marble Palace, and this second edition of *Documents*, like the first, has a fair sprinkling of these other records—founding documents of the colonial era, state law and court decisions, presidential proclamations, articles of impeachment and occasional private writings as well. Like *A March of Liberty*, for which this collection is a companion, we have tried to take as broad a view of constitutional and legal history as possible.

Given the broad nature of the subject, we could have easily doubled or even trebled the size of these volumes, and no doubt teachers using this set will at one point or another say “Why isn’t that statute—or case—or proclamation in here?” The short answer is that it probably ought to be, but the economics of publishing make it impossible to put together a collection that included everything and still make it affordable to the student. So we have tried to include a sampling from as many different areas and topics as we can, leaving it to the individual user to fill in with supplemental materials when and if necessary.

We have been guided by our own sense of what is important, and our own understanding of the type of materials we think need to be included. Just as in *A March of Liberty* we tried to be as inclusive as possible within the boundaries of space provided to us, so we have tried to create a reader that addresses the same broad concerns.

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When John Lackland was crowned king of England in 1199, becoming King John I, he made a series of promises to his barons pledging not to abuse his powers. These amounted to little more than a restatement of the coronation pledges previous monarchs had made. But then King John seriously abused his authority: he heavily taxed the barons, engaged in foolish and unsuccessful wars with France, and thoroughly angered most of the nobles as well as many commoners. In 1215, a group of barons renounced their support for John until he reconfirmed, in writing, their liberties. Meeting him on Runnymede Island, the barons presented the king with a list of demands in the form of a charter of rights. Called the “Articles of Barons” at the time, it has since become known as Magna Carta. Many of the articles concerned feudal relationships no longer relevant to the modern world. All of the provisions were designed essentially to protect the barons and other elite members of society. But the general nature of the provisions, combined with the almost universal disgust at John’s greed and arbitrary rule, led to a broader reading of Magna Carta that ultimately came to include all people in England. In forcing King John to repeat and put his signature to those promises, the barons not only reasserted their own powers, but established cardinal principles of English law: that a natural law—fundamental and immutable—exists, and no one is above that law. Magna Carta includes many phrases and ideas that are key to the subsequent development of American law, including the concept that all judicial proceedings must be according to “the law of the land” and that no one can “sell” justice. At the time of the Revolution, Americans returned again and again to the ideas found in Magna Carta to shape the U.S. Constitution and the state constitutions.

See J. C. Holt, *Magna Carta* (1965); W. F. Swindler, *Magna Carta: Legend and Legacy* (1965); and A. E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (1968).

14. For obtaining the common counsel of the kingdom concerning the assessment of aids (other than in the three cases aforesaid) or of scutage, We will cause to be summoned, severally by Our letters, the archbishops, bishops, abbots, earls, and great barons; We will also cause to be summoned, generally, by Our sheriffs and bailiffs, all those who hold lands directly of Us, to meet on a fixed day, but with at least forty days’

Source: A. E. Dick Howard, *Magna Carta: Text and Commentary* (1964).

notice, and at a fixed place. In all letters of such summons We will explain the cause thereof. The summons being thus made, the business shall proceed on the day appointed, according to the advice of those who shall be present, even though not all the persons summoned have come.

17. Common Pleas shall not follow Our Court, but shall be held in some certain place.

18. Recognizances of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper counties, and in this manner: We or, if We be absent from the realm, Our Chief Justiciary shall send two justiciaries through each county four times a year, and they, together with four knights elected out of each county by the people thereof, shall hold the said assizes in the county court, on the day and in the place where that court meets.

20. A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner a merchant saving his trade, and a villein saving his tillage; if they should fall under Our mercy. None of these amercements shall be imposed except by the oath of honest men of the neighborhood.

28. No constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment.

38. In the future no bailiff shall upon his own unsupported accusation put any man to trial without producing credible witnesses to the truth of the accusation.

39. No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

40. To no one will We sell, to none will We deny or delay, right or justice.

45. We will appoint as justiciaries, constables, sheriffs, or bailiffs only such men as know the law of the land and will keep it well.

63. Wherefore We will, and firmly charge, that the English Church shall be free, and that all men in Our kingdom shall have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely, quietly, fully, and wholly, to them and their heirs, of Us and Our heirs, in all things and places forever, as is aforesaid. It is moreover sworn, as well on Our part as on the part of the barons, that all these matters aforesaid shall be kept in good faith and without deceit. Witness the above named and many others. Given by Our hand in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of Our reign.

2

Letters Patent to Sir
Humphrey Gylberte (1578)

Elizabeth I issued a number of patents to men like Sir Humphrey Gilbert and Sir Walter Raleigh, authorizing them to establish colonies in North America and setting out their rights as proprietors, as well as their obligations to the Crown. It is worth noting that the “right” to claim and settle these lands was based on the fact that no other “Christian prince or people” were “actually possessed” of the lands. This clause was primarily designed to head off any claim by Spain to lands in North America. Under a Papal Bull of 1493, which was confirmed by the Treaty of Tordesillas (1494), Spain and Portugal had divided between them the recently discovered continents, with Spain laying claim to all of the Americas except present-day Brazil and Portugal claiming Brazil and Africa. Elizabeth’s patent was an attempt to avoid any conflict over this treaty, while asserting the obvious point that Spain had had nearly a century to perfect its claim, so any land not under Spanish control was open for a claim by any other European power. At the same time, the phrase “Christian prince or people” eliminated, in the minds of the English, any rights the native peoples of North America might have to the land on which they were living.

Two crucial clauses in these patents declared that settlers would retain the rights and privileges of Englishmen and that the settlements should be governed under laws compatible with those of England. At the time, neither the monarch nor the exploration companies paid much attention to this clause; what other law, after all, could apply in Her Majesty’s colonies than that of England? One could not expect people attempting to tame a wilderness to stop and write a new legal code when a perfectly fine one already existed. Later, however, colonists relied on these clauses in their claims to enjoy the full protection of English liberties and law.

See D. B. Quinn, *England and the Discovery of America* (1974), and A. L. Rowse, *The Expansion of Elizabethan England* (1955).

Elizabeth by the grace of God Queene of England, &c. To all people to whom these presents shall come, greeting:

Know ye that of our especiall grace, certaine science and meere motion, we have given and granted, and by these presents for us, our heires and successours, doe give and

graunt to our trustie and welbeloved servaunt Sir Humphrey Gilbert of Compton, in our castle of Devonshire Knight, and to his heires and assignes for ever, free libertie and licence from time to time, and at all times for ever hereafter, to discover, finde, search out, and view such remote, heathen and barbarous lands, countreys and territories not actually possessed of any Christian prince or people, as to him, his heirs & assignes, and to every or any of them, shall seeme good: and the fame to have, hold, occupie and enjoy to him, his heires and assignes for ever, with all commodities, jurisdictions, and royalties both by sea and land; . . . And wee doe likewise by these presents, for us, our heires and successours, give full authoritie and power to the saide Sir Humfrey, his heires and assignes, and every of them, that hee and they, and every of any of them, shall and may at all and every time and times hereafter, have, take and lead in the same voyages, to travell thitherward, and to inhabite there with him, and every or any of them, such and so many of our subjects as shall willingly accompany him and them, and every or any of them, with sufficient shipping and furniture for their transportations, so that none of the same persons, nor any of them be such as hereafter shall be specially restrained by us, our heires and successors. . . .

And for uniting in more perfect league and amitie of such countreys, landes and territories so to bee possessed and inhabited as aforesayde, with our Realmes of England and Ireland, and for the better encouragement of men to this enterprise: wee doe by these presents graunt, and declare, that all such countreys so hereafter to bee possessed and inhabited as aforesayd, from thencefoorth shall bee of the allegiance of us, our heires, and successours. And wee doe graunt to the sayd sir Humfrey, his heires and assignes, and to all and every of them, and to all and every other person and persons, being of our allegiance, whose names shall be noted or entred in some of our courts of Record, within this our Realme of England, and that with the assent of the said sir Humfrey, his heires or assignes, shall nowe in this journey for discoverie, or in the second journey for conquest hereafter, travel to such lands, countries and territories as aforesaid, and to their and every of their heires: that they and every or any of them being either borne with our sayd Realmes of England or Ireland, or within any other place within our allegiance, and which hereafter shall be inhabiting within any the lands, countreys and territories, with such license as aforesayd, shall and may have, and enjoy all the priveleges of free denizens and persons native of England, and within our allegiance: any law, custome, or usage to the contrary notwithstanding.

And forasmuch, as upon the finding out, discovering and inhabiting of such remote lands, countreys and territories, as aforesayd, it shall be necessarie for the safety of all men that shall adventure themselves in those journeys or voiaages, to determine to live together in Christian peace and civil quietnesse each with other, whereby every one may with more pleasure and profit, enjoy that whereunto they shall attaine with great paine and perill: wee for us, our heires and successours are likewise pleased and contented, and by these presents doe give and graunt to the sayd sir Humfrey and his heires and assignes for ever, that he and they, and every or any of them, shall and may, from time to time, for ever hereafter within the sayd mentioned remote lands and countreys, and in the way by the Seas thither, and from thence, have full and meere power and authoritie to correct, punish, pardon, governe and rule by their, and every or any of their good discretions and policies, as well in causes capitall or criminall, as civill, both marine and other, all such our subjects and others, as shall from time to time hereafter adventure themselves in the sayd journeys or voyages habitative or possessive, or that shall at any time hereafter

inhabite any such lands, countreys or territories as aforesayd, or that shall abide within two hundred leagues of any sayd place or places, where the sayd sir Humfrey or his heires, or assignes, or any of them, or any of his, or their associats or companies, shall inhabite within sixe yeers next ensuing the date hereof, according to such statutes, lawes and ordinances, as shall be by him the said sir Humfrey, his heires and assignes, or every, or any of them, devised or established for the better government of the said people as aforesayd: so alwayes that the sayd statutes, lawes and ordinances may be as neere as conveniently may, agreeable to the forme of the lawes & pollicy of England: and also, that they be not against the true Christian faith or religion now professed in the Church of England, nor in any wise to withdraw any of the subjects or people of those lands or places from the allegiance of us, our heires or successours, as their immediate Sovereignes under God. . . .

3

Virginia Rules on Conduct and Religion (1619)

Seventeenth-century England, while affording more personal liberty than probably any other European country except The Netherlands, still placed numerous restrictions on the conduct of individuals. The existence of an established church also led to many laws and regulations regarding church attendance and other matters that today we would see as entirely religious. Faced by a hostile wilderness, colonial leaders felt the need for similar rules to ensure social stability. Virginians, however, were far less concerned with religion than their peers in New England. The Rules were designed to enforce social control after near anarchy in the early years had almost led to the colony's extinction. Moreover, the managers of the Virginia Company hoped that the Rules would attract new settlers by making the colony appear more civilized and less a wilderness outpost. Note also that in the absence of ecclesiastical authorities, the Virginia Assembly assumed it had the power to define the duties of clergy.

See G. M. Brydon, *Virginia's Mother Church 1607–1727* (1947); Wesley F. Craven, *The Southern Colonies in the Seventeenth Century* (1949).

Against Idleness, gaming, drunkenness & excesse in apparel, the Assembly hath enacted as followeth:

First in detestation of idlers, be it enacted, that if any man be found to live as an Idler, though a freed man, it shall be lawful for the Incorporation or Plantation to which he belongeth to appoint him a Master to serve for wages till he shewe apparent signes of amendment.

Against gaming at Dice & cards be it ordained by this present Assembly that the winner or winners shall lose all his or their winnings & both winners and losers shall forfeit ten shillings a man, one ten shillings whereof to goe to the discoverer, & the rest to charitable & pious uses in the Incorporation where the faults are committed.

Against drunkenes be it also decreed, that if any private person be found culpable thereof, for the first time he is to be reprooved privately by the Minister, and second time publicly, the Third time to lye in boltes 12 houres in the House of the Provost Marshall & to paye his fees, and if he still continue in that vice, to undergo such severe punishment, as the Governor & Councell shall think fitt to be inflicted on him. But if any Officer offende in this crime, the first time he shall receive a reproof from the Governour, the second time he shall openly be reproved in the Church by the minister, & the third time he shall first be committed & then degraded. Provided it be understood, that the Governour hath always power to restore him when he shall in his discretion thinke fitt.

Against excesse of apparell, that every man be assessed in the Church for all publique contributions, if he be unmarried according to his apparell, if he be married, according to his owne & his wives or either of their apparell.

For Reformation of Swearing, every freeman and Master of a family after thrice admonition shall give 5 shillings to the use of the church where he dwelleth: and every servant after the like admonition, except his Master discharge the fine, shall be subject to whipping. Provided that the payment of the fine notwithstanding, the said servant shall acknowledge his fault publicly in the Church.

All persons whatever upon Sabaoth days shall frequente divine service & sermons both forenoon and afternoone; and all suche as beare armes shall bring their pieces, swordes, power, & shotte. And Every one that shall transgresse this Law, shall forfeit three shillings a time to the use of the Church, all lawful & necessary impediments excepted. But if a servant in this case shall willfully neglecte his Masters commande he shall suffer bodily punishmente.

All Ministers in the Colony shall once a year, namely in the month of Marche, bring to the Secretary of State a true account of all Christenings, burials & marriages, upon paine, if they faile, to be censured for their negligence by the Governour & Councell. Likewise, where there be no ministers, that the commanders of the place doe supply the same duty.

No maide or woman servant, either now resident in the Colonie, or hereafter to come, shall contract herselfe in marriage without either the consente of her parents or her Master or Mistress, or of the magistrate & Minister of the place both together. And whatsoever Minister shall marry or contracte any such persons without some of the fore-said consentes shall be subjecte to the severe censure of the Governour & Counsell.

All ministers shall duely read divine service, and exercise their ministerial function according to the Ecclesiastical Lawes and orders of the church of Englande, and every Sunday in the afternoon shall Catechize suche as are not yet ripe to come to the Communion. And whosoever of them shall be found negligent or faulty in this kinde shall be subject to the censure of the Governour and Councell.

The Ministers and Churchwardens shall seeke to prevent all ungodly disorders, as suspicions of whoredoms, dishonest company keeping with weomen and such like; the committers whereof if, upon goode admonitions and milde reproofe they will not forbear the said skandalous offences, they are to be presented and punished accordingly.

If any person after two warnings doe not amende his or her life in point of evident suspicion of Incontinency or of the commission of any other enormous sinnes, that then he or shee shall be presented by the Churchwardens and suspended for a time from the Churche by the minister. In which interim if the same person do not amend and humbly submitt him or herselfe to the churche, he is then fully to be excommunicate, and soon after a writt or warrant is to be sente from the Governour for the apprehending of his person & seizing all his goods. Provided alwayes, that all ministers doe meet once a quarter, namely at the feast of St. Michael the Arkangell, of the nativity of our Saviour, of the Annuntiation of the blessed Virgin, and about midsomer, at James Citty or any other place where the Governour shall reside, to determine whom it is fitt to excommunicate, and that they first present their opinion to the Governour ere they proceed to the acte of excommunication.

4

Blacks and Slavery Come to Virginia (1619–1640)

By the time the British settled North America, the enslavement of Africans was common throughout the New World. The continental powers, such as Spain, Portugal, and France, were at least theoretically familiar with slavery because of their Roman law traditions. Anyone trained in the law in those places knew about slavery and understood how it would fit into their own legal culture. But the English had no slavery. Because of this lack of experience with slavery, as well as for economic reasons, the English were slow to adopt slavery. The following documents illustrate the complexity of the law of race and slavery in this period.

See Edmund Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (1974); Thomas D. Morris, *Southern Slavery and the Law, 1619–1865* (1996); Paul Finkelman, *The Law of Freedom and Bondage* (1986); A. Leon Higginbotham, *In the Matter of Color: Race and the American Legal Process, the Colonial Period* (1978); and William M. Wiecek, “The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America,” 34 *William and Mary Quarterly* 258 (1977).