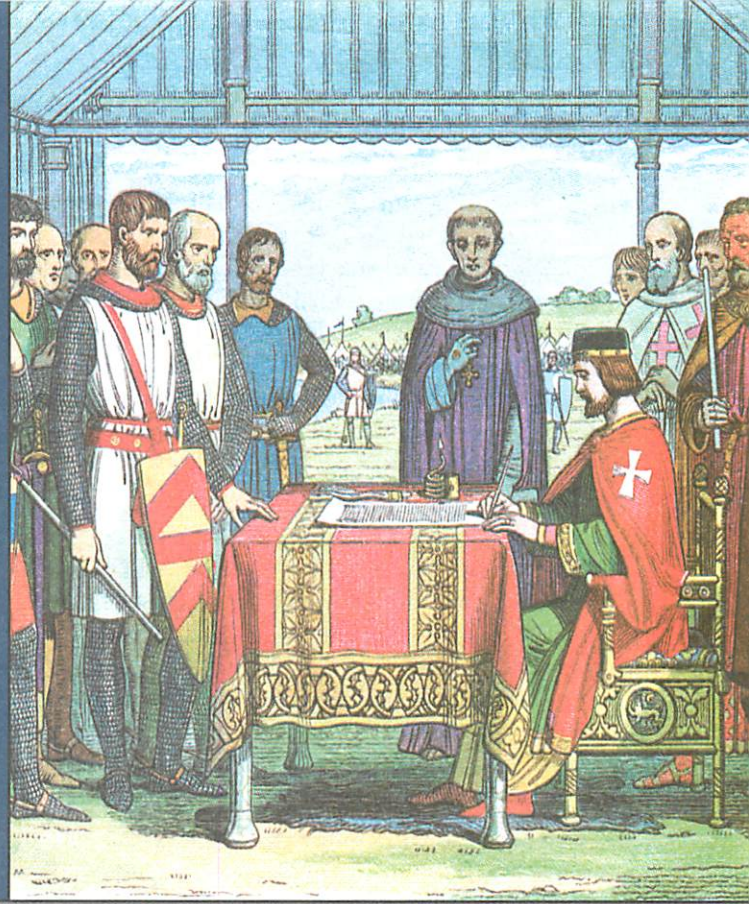


# 4

## WHAT WERE THE BRITISH ORIGINS OF AMERICAN CONSTITUTIONALISM?



### LESSON PURPOSE

This lesson describes the evolution of British constitutional government. It examines the early stages of English government in the feudal period, concluding with the Magna Carta of 1215. It traces the development of representative institutions in England, English common law, and the relationship between legal and constitutional structures. It also examines some of the differences between British and American constitutionalism.

When you have finished this lesson, you should be able to explain how rights and representative government evolved in England and how this evolution influenced the Founders. You also should be able to identify the origins of some of Americans' most important constitutional rights. Finally, you should be able to evaluate, take, and defend positions on the influence of the Magna Carta on the development of rights and the importance of habeas corpus and trial by jury.

### TERMS AND CONCEPTS TO UNDERSTAND

common law

rule of law

Magna Carta

*stare decisis*

precedent

writ of habeas corpus

redress of grievances

rights of Englishmen

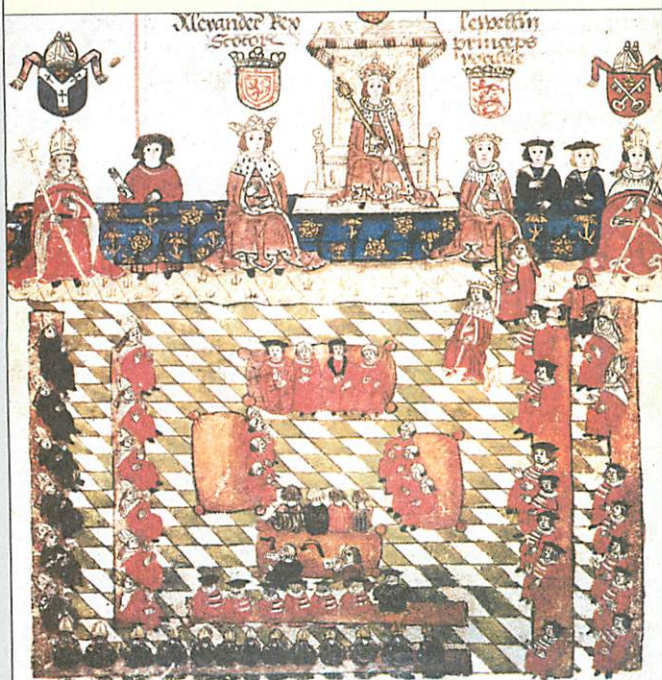


## HOW DID ENGLISH GOVERNMENT BEGIN?

For several centuries after the fall of the Roman Empire England was divided among a number of tribes. A king or other leader ruled each tribe. Eventually all the tribes of England were united under one king. But unification into a single kingdom did not significantly change most people's lives. England was too large for one person to rule. The English monarch had to let people in local areas tend to their own affairs according to customs they had developed over the years.

A major change in the way England was ruled took place in 1066, when William the Conqueror, the leader of the Normans—people from Normandy in France—invaded England and defeated King Harold II at the Battle of Hastings. As king of England William introduced feudalism into the country, but he and his successors also adopted and adapted many English practices in governing the English. These monarchs recognized that it would help to keep peace in the kingdom if they did not upset people by violating too many local customs.

Originally, English monarchs, either personally or through representatives, made laws, supervised law enforcement, heard cases—thus the term “royal courts”—and defended the kingdom. Frequently monarchs called on advisors to help them, especially when they needed to know local legal traditions and customs, and when they needed money. By the early thirteenth century groups of advisors and assistants were developing into separate institutions. They evolved into Parliament and the royal court.



When Parliament was first established, what benefits did it provide for the English Crown?

## HOW DID PARLIAMENTARY GOVERNMENT IN ENGLAND BEGIN?

Even before the Norman Conquest the English monarchs had brought together groups of advisors into councils of leading subjects, whom they relied on to advise them on various matters of state. These councils are the groups that came to be called *parliaments*, from the French word *parler*, which means “to speak.”

In 1295 King Edward I summoned what came to be called the Model Parliament. The Model Parliament consisted of two representative parts, or houses. The House of Lords represented the feudal nobility and major church officials. The House of Commons was composed of two knights from each shire, or county; two citizens from each city; and two citizens from each borough, or town. Although called the House of Commons, this body was composed of people who had wealth and status in the kingdom. They were not the common people, as we understand that term today.

Parliament developed into a consistent body over time, in part because the English Crown, or monarchy, found it to be an effective way to raise money. Parliament represented the various interests in the kingdom, thereby providing monarchs with a convenient way of negotiating with all the interests at once. As Edward I said in his summons to the members of the Model Parliament, “What concerns all should be approved by all.” In turn, English subjects found Parliament to be an effective way to voice their grievances and to limit or check monarchical power.

## HOW DID ENGLISH COMMON LAW DEVELOP?

When William the Conqueror became king of England, there were different systems of law in different parts of the country. This made hearing cases difficult for royal judges, who had to learn about each local system. William and his successors tried to provide a less confusing system of law that would be common to all parts of the kingdom—**common law**—and would be applied consistently by royal judges.

The system of law that William the Conqueror introduced required judges to publish their decisions so that judges in the future would know how earlier cases had been decided. Earlier rulings became **precedents**, or rules to guide future cases. The principle of following precedents is known by the Latin term *stare decisis*—“let the precedent (decision) stand.” This system gives predictability and stability to the law. Judges compare the facts of a case with cases decided earlier and attempt to rule in a way that is consistent with the earlier cases. Changes in judge-made law occur incrementally, as judges make minor changes in applying the law to the facts of each case.



## HOW DID THE "RIGHTS OF ENGLISHMEN" DEVELOP?

English law and the English constitution gave great importance to tradition, or custom. Once a rule was recognized as the law of the land, it was hard to change. Over the years English monarchs and royal judges came to recognize that subjects had certain personal rights, often referred to as the **rights of Englishmen**. These common law rights were fundamental in the sense that neither the monarch nor Parliament would dare to change or violate them.

Centuries of respect gave these rights a special status. They included the following:

- The right to trial by a jury of one's peers under the law of the land
- Security in one's home from unlawful entry
- Limits on government's power to tax

In 1100 an event occurred in England that was a precedent for a greater event a century later. In this year King Henry I issued a Charter of Liberties, which bound him to obey certain laws regarding the treatment of nobles and church officials. Early in the next century, one of the great charters of liberty in human history, based partly on Henry's charter, was drawn up. This newer charter was written because the king, the pope, and the English barons (the king's feudal vassals) disagreed about the king's rights. This came about after a chain of events in the early 1200s, when King John I tried to take back some rights and powers that his barons had been enjoying. The result was a civil war between the barons and their king. The barons won.

In June 1215, with the support of the Church and others, the barons forced King John to sign a new Charter of Liberties, which later became known as the **Magna Carta**, or "Great Charter." This charter addressed feudal relationships between the Crown and three classes of the population—barons, clergy, and merchants. In the charter the king promised not to increase feudal dues and other money payments to the Crown without consent and to respect various property rights. The charter did not grant new rights. Rather, it confirmed certain traditional rights. At least three principles contained in the Magna Carta were important in the later development of constitutional government:

- **Rule of law** The Magna Carta was perhaps the most important early example of a written statement of law. It expressed the idea that the monarch must respect established



What is the significance of the Magna Carta for the establishment of limited government?

rules of law. The term **rule of law** refers to the principle that every member of society, even rulers, must obey the law. Sometimes the phrase is rendered as "the supremacy of the law" because it means that rulers must base their decisions on known principles or rules instead of on their own discretion. The Magna Carta, for example, stated that no free man could be imprisoned or punished "except by the lawful judgment of his peers" and by the "law of the land." This meant that the government could not take action against the governed unless it followed established rules and procedures. Arbitrary government was outlawed.

- **Basic rights** The barons made King John promise to respect the "ancient liberties and free customs" of the land. The barons did not believe that they were making any drastic change in the position or power of the king. Their goal was to establish a way to secure **redress of grievances**, or compensation for a loss or wrong done to them, should the Crown infringe on their common law rights.



## ● Government by agreement or contract

The agreement in the Magna Carta was between the king and a limited number of his subjects. It did not include the majority of the English people. However, it did express the feudal principle of drawing up an agreement between parties as a basis for legitimate government.

Later generations would discover in the Magna Carta the seeds of other important constitutional principles. For example, the American colonists found the principle of no taxation without representation and consent in King John's promise not to levy certain feudal taxes without the consent of "our common counsel of the kingdom."

The Magna Carta also brought the law to bear against one law-breaking king. It gave King John's barons the right to go to war with him again if he broke the agreement. Going to war, however, was not a satisfactory method of ensuring responsible government. A better way began to develop in the next century.



What constitutional principles were embodied in the Magna Carta?

## WHAT DO YOU THINK?

People have fought and died to establish rights such as those described in this lesson. However, it is difficult to understand the importance of these rights merely by reading about them. Examine the following two articles of the Magna Carta and then respond to the questions about them.

● **Article 39** No freeman shall be taken or imprisoned or disseised [dispossessed] or banished or in any way destroyed, nor will We [the King: this is the "royal We"] proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land.

● **Article 40** To no one will we sell, to none will we refuse or delay...justice.

- 1 What rights, values, and interests are expressed in Articles 39 and 40?
- 2 In what ways do these rights limit the monarch? Why would the English nobles want to place such limits on the monarch?
- 3 Do you have any of these rights? If so, where are they written?
- 4 Do you think a declaration of rights is enough to protect individuals from unfair and unreasonable treatment by their government? Why or why not?

## WHAT IS THE BRITISH CONSTITUTION?

The British constitution is not a single written document. It consists of common law, important acts of Parliament, and political customs and traditions. The central principle of the British constitution is respect for established rules and procedures—that is, for the rule of law. Many provisions of the British constitution grew out of a long series of political struggles between monarchs and Parliament.

Three great historical documents are important in the development of the British constitution and the rights of the British people. In addition to the Magna Carta in 1215, these include the Petition of Right in 1628 and the English Bill of Rights in 1689. All three documents were written at times when the struggle for power between monarchs and Parliament was especially intense.

By 1600 Parliament had become so important to English government that it could challenge the Crown's ability to act without its support. But monarchs did not easily give up authority. In the seventeenth century the Crown and Parliament quarreled over a variety of issues,





What was the significance of the Habeas Corpus Act of 1679, passed during the reign of Charles II?

including money, religion, and foreign policy. At the heart of these struggles was the key constitutional issue: Did the Crown have to accept the supremacy of laws made by Parliament?

The first outcome of these struggles was a constitutional document almost as important as the Magna Carta, called the Petition of Right of 1628. King Charles I needed money to fight wars against France and Spain. He sought to raise funds without the consent of Parliament. Parliament responded by forcing Charles to agree to the Petition of Right, which confirmed that taxes could be raised only with the consent of Parliament. The Petition of Right guaranteed English subjects other rights, such as a prohibition against requiring people to quarter soldiers in their homes and the right to *habeas corpus*, which will be explained later in this section. King Charles's acceptance of the Petition of Right strengthened the idea that English subjects enjoyed fundamental rights that no government could violate.

The Petition of Right, however, was not successful in quelling strife between the people and their king. Civil unrest ensued. The English monarchy fell in 1649 and Charles I was executed. Oliver Cromwell instituted the

Commonwealth period, serving as Lord Protector until his death in 1658. He was briefly succeeded by his son Richard, until the monarchy was restored in 1660, and Charles II, the son of Charles I, came to the throne. Thus it was during the reign of King Charles II that the right to habeas corpus gained new authority.

The Habeas Corpus Act of 1679 made consistent a number of previous habeas corpus acts and confirmed the right of British subjects to apply for a legal document called a **writ of habeas corpus**. A writ is a court order to a government official commanding that official to do something. A writ of habeas corpus orders an official to deliver—"habeas"—a person—"corpus," meaning "the body"—who is in custody to a court of law to explain why the person is being held. If the government cannot justify keeping the individual in custody, then the person must be set free. The writ of habeas corpus is one of the most important limitations on government power, because it means that no government official—not even the Crown—can hold someone in prison arbitrarily or indefinitely.

Eventually Parliament became the branch of government that represented the most powerful groups in the



kingdom. By the end of the seventeenth century Parliament, not the Crown, was recognized as the highest legal authority in England. Parliament's struggle with the monarchy ended in a bloodless revolution known as the Glorious Revolution of 1688. Under the Revolution Settlement Prince William of Orange of the Netherlands and his wife Mary were invited to be joint monarchs and to preserve the power of Parliament. Among other things Parliament required them to agree to the English Bill of Rights, which in 1689 became a cornerstone of the British constitution.

The English Bill of Rights contained a number of provisions, ranging from limitations on the Crown's power to raise money to guarantees of free speech and debate in Parliament. The Bill of Rights also expressed two important principles that influenced constitutional development in America:

- **Rule of law** The English Bill of Rights restated the idea in the Magna Carta that the rule of law is the foundation of legitimate government.



What events contributed to the shift in power from the Crown to Parliament?

- **Representative government** The English Bill of Rights established the idea that only representative government is legitimate. In England that meant the representation of social classes in Parliament, or a mixed constitution, composed of the monarchy (the rule of one), the aristocracy in the House of Lords (the rule of the few), and the House of Commons (the rule of the many).

Debates about who should be represented in government would be taken up in America. In the end the Americans would make a key decision by rejecting the feudal idea of representation by social classes, as the English Parliament did, in favor of the idea of social equality.

## CRITICAL THINKING EXERCISE

### Evaluating the Importance of Habeas Corpus and Trial by Jury

Work in groups to examine the rights of habeas corpus and trial by jury. Each group should read one of the selections below and then answer the questions that accompany it. Discuss your responses with the entire class.

## SELECTION 1: HABEAS CORPUS

The writ of habeas corpus has been called the "Great Writ of Liberty." One constitutional scholar called it the "greatest guarantee of human freedom ever devised by man."

Suppose you were arrested and imprisoned by the English monarch. Although you have the right to be tried by the law of the land, the monarch's jailors keep you in prison. They refuse to bring you before a court and to inform you of the charges against you. How could the right to a writ of habeas corpus protect you from such treatment? How could the jailors be forced to bring you into a courtroom for a fair hearing?

Suppose you had a family member, a friend, or a lawyer who knew you had been arrested and were being kept in prison. That person could go to court and ask the judge to issue a writ of habeas corpus. This writ would be an order by the judge to your jailor to bring you to court and present evidence that you have broken the law. If there were evidence, you would be held for trial. If there were no evidence, you would be set free.

## EXAMINING THE RIGHT

- 1 What limits does the right to a writ of habeas corpus place on the monarch?





How might the right to habeas corpus protect individuals from the abuse of power by government?

- 2 Why would the English Parliament want to place such limits on the monarch?
- 3 What arguments can you make for this right today?
- 4 What examples of situations in the United States or other nations can you identify that uphold or violate this right?
- 5 Under what conditions, if any, do you think this right should be limited?
- 6 Is this right included in the Constitution of the United States? If so, where can it be found?

### SELECTION 2: TRIAL BY JURY

The right to a trial by jury of one's peers is one of the oldest and most important of the fundamental rights of Englishmen. It has become an essential right in a free society.

Suppose you were arrested and imprisoned by the English king. A judge, appointed and paid by the king, has examined the evidence against you and decided that you should be tried for breaking the law.

The English constitution guarantees you the right to be tried by a jury of your peers. This means that a group of people from your community will listen to the evidence that the king's prosecutor has against you. They also will hear your side of the story. The jury has the authority to decide if you are guilty or innocent of breaking the law. Its verdict must be unanimous to find

you guilty. The jury also has the power to find you not guilty—even if you have broken the law—if the jurors believe that the law is unfair.

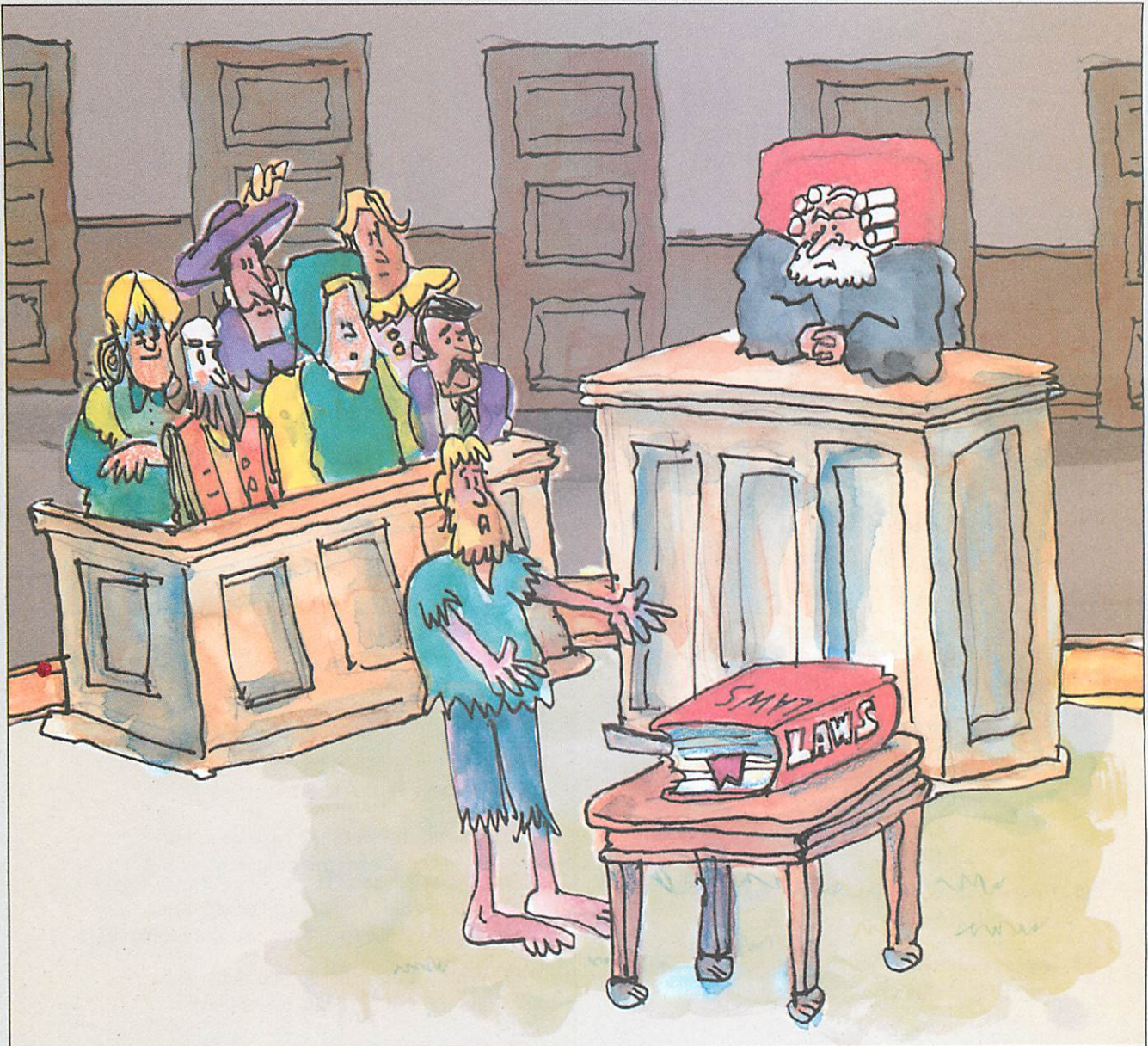
### EXAMINING THE RIGHT

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- 6 Is this right included in the Constitution of the United States? If so, where can it be found?

### REVIEWING AND USING THE LESSON

- 1 What is the common law of England? Why is it sometimes called "judge-made law"? How did the common law develop?
- 2 What is meant by the phrase "rights of Englishmen"? How were these rights established?





How might the right to trial by jury protect individuals from the abuse of power by government?

- 3 What is the Magna Carta? How was it created? How did it contribute to the development of constitutional government?
- 4 One constitutional scholar called the writ of habeas corpus the "greatest guarantee of human freedom ever devised by man." Why is this right so fundamental?
- 5 Among the key documents in the struggle for power between king and Parliament were the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689. Explain how and why each of these documents contributed to the development of constitutional government in England.
- 6 How are the ideas in the Magna Carta, the Petition of Right, and the English Bill of Rights related to natural rights philosophy and classical republicanism?
- 7 What rights and other principles of government in the U.S. Constitution or in your state's constitution can you trace back to the Magna Carta?