**The Social Vision of Magna Carta**

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I am honored to have the opportunity to close this wonderful conference on the Magna Carta – we Americans can’t help but add the “the,” if only to emphasize that we hold the Charter higher in our esteem than the English do: I’m reminded of Prime Minister David Cameron’s appearance on the David Letterman Show, during which he proved unable to explain what the term “Magna Carta” means. I can hardly hope to tell this expert audience anything it does not know about the origins of Magna Carta, or the meandering course of its creation, life, interpretations, and influence since 1215. But as mine is the last paper on the last panel of the last day of the conference – and as even the toughest scholarly *sitzfleisch* begins to grow weary after three days – I thought it would be apt to close with wider reflections on the social vision of Magna Carta, and on how the ways we have chosen to remember and celebrate the Charter neglect, or even diminish, that vision. Our sense of what is valuable and memorable in Magna Carta reflects the pre-occupations of this legalistic era. But law, today as in 1215, swims in a sea of society and culture, and focusing on the former can only distort the context provided by the latter. This sense of lost meaning is particularly appropriate given the previous two papers in this conference, both of which focused on the ways in which Magna Carta has ‘gone missing’ in parts of the world.

My starting point, therefore, is that, as I observed them, the emphasis in most commemorations of Magna Carta in 2015 centered, not always knowingly or explicitly, on its Chapters 39 and 40: “No free man shall be arrested . . . except by the lawful judgment of his peers or by the law of the land. . . To no one will we sell, to no one will we refuse or delay right or justice.” In other words, the commemorations followed the well-established tradition of understanding Magna Carta as the beginning of – or at least a milestone on – the road to resistance against arbitrary government. In this tradition, we commemorate the Charter because, in the form of a written constitution, it set out the idea that the law is above government. To return to Lord Denning’s famous summary, Magna Carta was “the greatest constitutional document of all time, the foundation of the freedom of the individual against the arbitrary authority of the despot.” And that is certainly the interpretation that has dominated the political use of Magna Carta since 1215, from Stuart-era jurists such as Sir Edward Coke to the Massachusetts Body of Liberties of 1641 to William Penn’s publication of the first edition of Magna Carta in the New World in 1687. As Penn put it, “In France, and other nations, the mere will of the Prince is Law . . . . But in England, each man hath a Fundamental Right born with him.”

Penn’s emphasis on “Fundamental Right” – like Sam Adams’ similar demand about natural rights in 1772 – sounds modern, or perhaps I should say American. And so it is. Protection from arbitrary government could in theory come from an administrative commitment to process, or from an institution like the House of Commons, which until quite recently had a limited franchise and was certainly not based on any idea that full participation in the political system was a natural, inherent right. Indeed, the British tradition has been to see Magna Carta as central to the rise of the parliamentary system. But today, we emphasize – just as Penn did – the importance of substantive, universal rights: I have been struck by how many speakers in this conference, starting with Dominic Grieve MP, have followed, or fallen into, this American tradition, not the British one. Thus, in commemorating Magna Carta, we tended to collapse the concept of limits on arbitrary power into a celebration of human rights. This is a triumph for the American interpretation, though admittedly the American interpretation itself, as Professor Dickinson pointed out, is also a radical English one born of 1689 and the radical belief that rights secured then were under assault in 18th century Britain.

True, some of the more though-provoking commentaries on the Charter’s 800th anniversary focused on the rise of the administrative state as the modern equivalent of King John: I am thinking here, in particular, of Philip Hamburger’s stimulating and important book *Is Administrative Law Unlawful?* But by and large, rights-talk now predominates. As British historian and politician Daniel Hannan put it, from Magna Carta flowed “all the rights and freedoms that we now take for granted: uncensored newspapers, security of property, equality before the law, habeas corpus, regular elections, sanctity of contract, jury trials.” Or, at the most ridiculous extreme, there is Salisbury Cathedral, which holds the finest surviving copy of Magna Carta, and which produced a leaflet for the 800th anniversary proclaiming that the Charter is a statement of “social justice.” Whatever Magna Carta is about, it is not about social justice.

In short, we are now a rights-minded people, and so we understand Magna Carta in the framework of our time – the framework of rights. And that is the problem. It is partly a problem, of course, because the concept of universal, substantive rights has nothing to do with the circumstances that produced the Charter. As Alexander Hamilton noted in *Federalist 84*, Magna Carta and other bills of right were “stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. . . . they have no application to constitutions professedly founded upon the power of the people.” In other words, far from being based on the notion that rights are inherent in the people, and that governments derive their just powers from popular consent, Magna Carta is, in form, a grant of liberties (or a confirmation of liberties) from the government (or the monarch) to selected groups of people. The Charter is not merely not a defense of rights in the universal sense that we understand them; it is a product of an entirely different world view, one in which ‘rights’ issue from, or at least are secured by, personal assurances from the monarch. This is an approach that has more in common with the civil law tradition than with the common law one to which Magna Carta supposedly belongs. But the rights-talk surrounding our commemoration of Magna Carta is also a problem because the danger to liberty in the West today is not arbitrary power of the sort exercised by King John, who offered no real theory for his depredations except that he needed the money. The danger to liberty today, ironically, comes from arbitrary power backed up by pseudo-sophisticated arguments based on rights-talk, of the kind that have recently been so prominent on American university campuses.

Against my right to free expression stands your supposed right not to be offended. My right to property must pay for your right to free health care. My right not to be discriminated against must give way to your right to be discriminated in favor of. Every demand for political power is now framed as an earnest plea for a new right, a morally bullying appeal too often backed up by a modern state with a reach beyond King John’s wildest fantasies. And so I fear that the celebration of Magna Carta as the origin of our modern rights does not contribute to limits on arbitrary power – instead, it fosters the idea that the Charter was the start of an unfurling of rights that must be continued and elaborated forever, and be backed up by the power of the state. We are very concerned with rights. We are not at all concerned with what in 1215, and today, was a far more serious problem: we do not worry about who guards the guardians of our rights.

In the West, most thinking about rights can be separated into two schools – the school of Locke and the school of Rousseau. The Lockeans treat rights as inherent in man, and as protected within a political state established by voluntary consent. Followers of Rousseau, on the other hand, take a much kinder view of the state of nature, and a much harsher one of the political state. To say that our commemorations of Magna Carta have centered on the ways that rights are protected and elaborated within a political state is merely to say that most of us are now instinctive Lockeans. When we talk about rights, we end up talking about the state – and when we talk about the state, we end up explaining that its role is to protect and advance our rights. So paradoxically, rights are both protected by the state, and the means of providing us protection from the state. The gap between those two conceptions is what rights-talk exploits to turn rights into a form of social, cultural, and political bullying, and to defend the creation of an administrative state that rests on the same form of arbitrary power as that employed by King John in his depredations eight hundred years ago. The problem here, in short, is that – at least in the United States – the administrative state proceeds through administrative courts which rest on a denial of due process and of procedural rights. The fact that this was exactly the problem that Magna Carta purported to solve – or at least to address – is yet another example of the ironic ways that our focus on rights ends up subverting much of what we claim to value about the Charter.

So I found it hard to fully enter into the spirit of our commemorations over the past year. No matter how true it is historically that Magna Carta is the origin of our rights, I fear that our understanding of rights is now so degraded that, in practice, nattering on about rights feeds the disease. But on the other hand, distorted or even invented memory is better than no memory at all. As Winston Smith emphasizes in George Orwell’s *1984*, memory is a great defense of liberty, because it recalls to mind institutions and social arrangements that predate the loss of liberty. Not for nothing do tyrants place so much emphasis on controlling the past by controlling the content of what is written and taught as history. Not for nothing is Magna Carta framed as a confirmation – as Article 41 puts it – of “ancient and right customs,” not as a statement of anything new. And not for nothing was Magna Carta so long understood, and politically deployed, as an effort to revive and defend the “ancient constitution” and its Anglo-Saxon liberties. As J.C. Holt has emphasized, there was in fact no “ancient constitution” in the sense we understand that term. But as Holt also points out, the claim to antiquity was a political one, made precisely because this was the best way the barons could come up with to reconcile the issuance of a Charter (which by definition had to be freely given by the monarch) with the need for that Charter to contain substantial if nominally voluntary concessions on the part of King John.

As a result, Magna Carta associated customs not with the concept of dignities – as the constitutions of Clarendon in 1164 had done – but with liberties. In this sense, our emphasis on Magna Carta as the start of the story of our rights is not misplaced – even if there is an enormous difference between the concepts of liberties in Magna Carta and our understanding of rights. But words matter, and by emphasizing the liberties, the *libertates*, of Magna Carta, we give short shrift to its customs, its *consuetudines*. Yes, the past implied by Magna Carta was “distorted [and] idealized.”[[1]](#footnote-1) But nonetheless, there were “existing procedures, long-establish principles, [and] ancient liberties” underlying particular chapters of Magna Carta. The word “customs” intentionally implied habitual practice. In our adherence to a model of liberty defined by Locke and Rousseau, we ignore the ways in which Magna Carta is based on a third alternative – a third way, to coin a phrase – that we might describe as customary and Burkean.

The difference between Lockean interpretations of Magna Carta and a Burkean one is easiest to see at the very start of the Charter. In Chapter 1, the Charter confirms that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” In American commentaries on 1215, the thought was frequently expressed that this was a statement that has some connection to our modern conception of religious liberty, which, of course, it does not. It was instead a recognition of the spiritual and temporal power – not necessarily in that order – of the Church, an institution closely connected with but yet separate from the Monarchy. As Americans, by the grace of the Constitution, lack an established church, we are probably particularly ill-suited to understanding this distinction. But the error is telling nonetheless: we are eager to see rights, when we should see customs and institutions.

Magna Carta is based on the argument that the social and spiritual institutions of England should be restored to their traditional and proper places, as the barons and bishops wanted them to be understood. That is why the Charter goes on about not making people build bridges unless they are legally bound to do so (clause 23), the inheritance procedures for free men (clause 27), the clearing of fish-weirs (clause 33), and the need to allow merchants to travel (clause 41). All of these chapters express the assumption that England has many circles, each of which has its own role to play in the society as a whole. Together, these chapters, and the Charter as a whole, express a social vision: A well-ordered land is a house of many mansions, each of which is valuable on its own terms.

In this vision, the problem with arbitrary government is not precisely that it is lawless. The problem is that arbitrary government does not respect the boundaries between itself and the other mansions. The sense of Magna Carta is not based on a system of checks and balances, as embodied in the American Constitution. It is based, rather, on a broader sense that society has a balance that, for both practical and moral reasons, should not be wantonly disturbed, and which must be defended against such disturbances. The Charter also expresses a sense that the restraint on government – the means for the defense, when it is necessary – stems from the existence of interests (in this case, particularly but not only the barons, the bishops, and the merchants) who sit apart from the king. By this way of thinking, it is no criticism of Magna Carta to say that it was a baronial effort to constrain the king, not a charter of human rights. The barons acted precisely because they were the ones who had the power to act, and because they were the ones who were the most immediately threatened by King John’s lack of restraint. In a framework of rights, the barons are to be condemned as self-interested; in a framework of social institutions, the barons are to be praised for protecting their interests, and the interests of those sheltering beneath them.

Of course, the 13th century’s vision of how to define the interests is not ours: In this post-Enlightenment age, we are all, at least in theory, free men. What the age of Magna Carta understood as different and largely fixed social levels, we understand, in our age of greater social mobility, as separate circles. But yet we are not so far away from them after all, for there is a long tradition of thought — now largely understood as conservative, though it was originally liberal — that based itself not on rights, but on this kind of common-sense conservatism of the little platoon. This is why Burke condemned “Jacobinism by establishment,” which he described as a revolt against “the pre-existing laws and institutions” of a nation. And of these revolts, the more dangerous was the one against the institutions, both moral and physical, because — as the Jacobins knew — without those institutions, there was only the state. The term “civil society,” like the language of rights, has been so abused that it no longer has much meaning. But it still just about captures the sense that society is composed of many mountain peaks that, because they are connected at their base, have great stability and strength. The connections are not formal and legal — we make them naturally in our daily lives. The great sin is not to build new paths to the peaks, which Burke welcomed; the great sin is to deny that the peaks are and should be separate.

In short, Magna Carta is based on a particular sense of society, from which flowed the need to limit the king so that he would not traduce medieval English institutions. The fact that our institutions are very different from theirs does not diminish the value of society’s circles as entities that are separate from the state. Unfortunately, just as our concept of rights has collapsed into Locke, we no long accept that the peaks of the mountains should be separate. The characteristic argument of liberalism today is, first, that every institution — family, church, business, art, education, travel, leisure, entertainment — is fundamentally political, and so not really separate from the political realm at all. It is all politics all the way down, a claim that would (indeed did) horrify civil conservatives like British philosopher Michael Oakeshott. And that claim opens the door to a second one, which is that, as everything is political, all the peaks need to do the same job as the government — and if they do not, they will be forced to do so.

This is why, for example, we too often conceive of universities as institutions whose job it is to fix the (often exaggerated, and almost invariably misunderstood) ills of society. Universities self-evidently have a different role: to educate the young, an arduous task that might or might not contribute to addressing particular ills, but which in any case has a value of its own. But that is not how we justify the enormous sums we spend on education. Or take nonprofits, which are too often conceived of, to borrow a term from our British friends, as the “third sector” — with the implication that they are a wedge of the pie that sits alongside business and government, all working toward filling the same pie tin. There is no institution that cannot be politicized and then directed in this way, if your will is tyrannical enough.

In the end, I agree with those who memorialize Magna Carta as part of the long struggle against the enduring desire of government to find ways to make their own law, for our administrative courts today are merely King John in another guise. Even those more misguided souls who want to use it to talk about the ever-unfolding future of our state-enforced rights are not entirely bad, for even talking about rights in this way is talking about history – and if Magna Carta is to be used as a flame of liberty, it must at a minimum be remembered, as it was and will be. It was, after all, a political document from the start, and it remains so today. But ironically, it is a political document that grounds its vision on rejecting the argument that everything must be political, and that fact deserves to be remembered and celebrated as well. The social vision of Magna Carta is one where there is a good, wide world out there beyond the king. And that is a great vision worthy of a Great Charter.

1. J.C. Holt, “The Ancient Constitution in Medieval England,” in Ellis Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (2008), http://oll.libertyfund.org/titles/2180. [↑](#footnote-ref-1)