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REMARKS ON THE 800TH ANNIVERSARY OF MAGNA CARTA

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The significance of Magna Carta lies not so much in *what* it said, but *how* it said it and by *whom* it was said. The annals of the 12th and 13th centuries are replete with celebrated examples of monarchs solemnly bestowing privileges on their beleaguered vassals. The cast ranges from Frederick Barbarossa to Alonso of Naples and Andrew II of Hungary. These men acted pretty much for the same reason that King John did, albeit with considerably less duress; that is, to raise enthusiasm for, or to subdue opposition to, one foreign expansionist project or other.

Yet Magna Carta was different in some important respects. There are two virtues in the document itself that have contributed to its distinctiveness and longevity. First, Magna Carta was 'said' not once, but five times. Each iteration improved on the draftsmanship of its predecessor; by the final effort in 1297, Clauses had shifted and the phrase "lawful judgment of his equals or by the law of the land" had been transformed into the more mellifluous and memorable "due process of law." Second, Magna Carta has the wonderful incoherence of a document written by an unwieldy committee of twenty-five persons, meaning that its depths can be plumbed for almost any meaning at all. To give just two recent examples, hidden within the dense references to scutage and deforestation, Lady Justice Arden has detected the roots of the doctrine of separation of powers, while Chief Justice Roberts discerned the origins of judicial rectitude – even the need for limits on the sources of financing of judicial campaigns.

The truth is that many of Magna Carta's most treasured precepts were not new, even by the standards of the 13th century. Take for example, the due process of law. Its antecedents can be found in the *Lex Valeria* and the *Leges Porciae*, both enacted by the Roman Republic, which dealt with rights of appeal and freedom from cruel or unusual punishments. It was with the *Leges Porciae* in mind that St. Paul demanded immunity from corporal punishment and the right to appeal when he was forcibly brought before the provincial tribunal at Caesarea in the 50s AD (*Acts* 22.24-29).

Although only three vestiges of the 63 Clauses of Magna Carta given statutory force in 1297 are still found in the laws of England, Magna Carta remains a vital presence in US law. Derek Webb, one of our very able Supreme Court Fellows, determined that Magna Carta has been cited in US Supreme Court decisions no less than 166 times. (Following two recent Supreme Court decisions, the number now stands at 168). These references began in the early 1800s, spiked at the end of the nineteenth century and, after a period of dormancy, flourished again beginning with the Warren Court and continuing until today. Justice Scalia in his 2015 opinion in *Kerry v. Din*, an immigration case, devoted nearly two pages to a discussion of Magna Carta and the origins of due process, as interpreted by Edward Coke – a history repeated by Justice Thomas in his dissent to *Obergefell v. Hodges*, the right of gays to marry case. I find it significant that Magna Carta has been as often cited by the Supreme Court in property rights cases (33 times) as in cases discussing the right to due process (28 times).

To no small extent, Magna Carta's flourishment in American law is owed to the gloss it received from Sir Edward Coke. Chief Justice Coke's *Institutes of the Laws of England* (1628-1644), as the Supreme Court observed in 1967, "were read in the American Colonies by virtually every student of law." Coke's vision of Magna Carta as a limitation on monarchical power – "Magna Carta is such a fellow, that he will have no sovereign" – resonated with the Enlightenment ideas of the American revolutionaries. Coke also furnished the standard raised by revolutionaries like James Otis and John Adams who embraced Coke's concept of law as the ultimate restraint on the power of the State as exemplified by his *dictum* in *Dr. Bonham's Case* (1610), that any law enacted by Parliament that lacked in "common right and reason" would be void. These ideas laid the foundation for that noble cornerstone of American constitutionalism: the doctrine of judicial review. The famed opinion of Chief Justice Marshall in *Marbury v. Madison* (1803), cites both *Dr. Bonham's Case* and Magna Carta as precedential authority justifying the role of the Supreme Court as the guarantor of the US Constitution.

For a measure of just how influential Magna Carta has been in American law, one need not look much further than the Supreme Court building itself. Of the eight relief panels on the Court's Bronze Door, three are dedicated to Magna Carta and celebrate the sealing of the Charter and its enactment, as well as Coke himself, infused by Magna Carta, railing against the excesses of King Charles I. The original Grand Seal of the Commonwealth of Massachusetts symbolically unites the Magna Carta with the symbol of American independence and sovereignty, personified by a Patriot.

So, how do I see Magna Carta? To me, much of what makes the Great Charter different from other contemporary documents lies in the circumstances of its creation. Unlike other charters proclaimed in the early Middle Ages that emanated from the throne, the rights and privileges of Magna Carta were dictated by the governed.

From this thought, I read three special significances in my Magna Carta:

(i) Magna Carta is important because it enshrines the notion that fundamental rights arise neither from *noblesse oblige* – the concession of he who rules – nor from divine prerogative, nor even from God-given ideas of Natural Law. Instead, the Great Charter puts its emphasis on the people themselves, their customs, practices, and sense of community values, in other words, their Common Law.

(ii) Second, it is the first document of its kind to divine government not by the powers it possesses (or by those it is willing to concede) but by the powers that it does *not* possess. This is the spirit which underlies the American Constitution's Bill of Rights, which deals less with "rights" than with the limitations imposed by the people on the State. Hence, "Congress shall make NO law."

(iii) Third, it is the first document of its kind to grasp the inseparability of the right to property and the right to personal liberty, the "two expressions of the same principle" described by Daniel Hannan MP recently in an opinion piece in *The Wall Street Journal*. Coke, in summarizing the core guarantees of Magna Carta, listed immediately after freedom from false imprisonment, the promise that no man is to be "disseised of his lands, or tenements, or dispossessed of his goods, or chattels" or "put from his livelihood without answer." Blackstone a century later in his *Commentaries on the Laws of England* (1769), said much the same thing: that Magna Carta's freedoms consist of the right to personal security, the freedom to travel without imprisonment or restraint, and "the free use, enjoyment, and disposal of all his acquisitions."

In sum, Magna Carta is a document that transcends the times for which it was written and survives as a vibrant thread in the fabric of our law for reasons that the Twenty-Five Barons (many illiterate) who caused it to be committed to parchment could never have intended or imagined.