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# FORUM

## THE BIRTH OF THE UNITED STATES CONSTITUTION: JUNE 15, 1215

J. Denny Moffett\*

Above the magnificent pillars on the face of the Supreme Court in Washington, D.C. the following words are etched in granite: "Equal Justice Under Law." In this year which marks the 200th year of our Nation, it is appropriate to review that legacy. That these are words of constitutional significance is no doubt understood by the jurists, the lawyers, and even the tourists who pass that great edifice daily. Yet upon reflection one has the distinct impression that these words are taken for granted. Certainly the idea, the concept, is well-founded and undisputed, even though not always applied, in the United States. But why those words? What was their origination? What do they mean? And what are their implications and ramifications? Was this concept always rooted in the mind of man or were things different once? At what period in mankind's history was this idea nonexistent? What were the circumstances of men who lived at that time and what forced the germination of this idea? How did the idea withstand the ages and, ultimately, reach America?

Professor F. W. Maitland wrote a course of lectures in 1887 and 1888 for undergraduates at Cambridge which answers these questions and many more. Because H. A. L. Fisher of Oxford published and edited these notes in *The Constitutional History of England*, the student of law (not to be necessarily distinguished from lawyers) today has the privilege of sitting in on Professor Maitland's class. Through the

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richness of his lectures two potentially dull subjects—history and law—are brought to life. The historical events take on new significance. The law is elevated and traditions of the legal profession, those “called to the Bar” as it were, are far removed from hot, dusty southern courtrooms and the streets of Manhattan. Through Maitland’s writings one lives history and most importantly one is aware of and understands what has occurred.

The professor explains the state of “public law” at five periods: (1) 1307, (2) 1509, (3) 1625, (4) 1702, and (5) about 1880. From before the Norman Conquest of 1066 up to the twentieth century, the history of English constitutional law is discussed. As we follow the professor he explains to us the genesis and evolution of many fundamental legal concepts and their historical significance. To touch all the interesting and enlightening points discussed would transcend the bounds and purpose of this article, but the history of Magna Carta deserves special consideration because it is among the least discussed but most important topics of English constitutional law. Its history and impact were never fully considered by even Maitland. Rather he chose to refer to the Magna Carta only tangentially and in an interspersed fashion, while concentrating his efforts elsewhere. In spite of this treatment, after reading Maitland, and assuming a working knowledge of United States constitutional law, it is incumbent upon the reader to reflect upon the values and legal concepts inherited from England.

In reading Maitland one discovers the origins and evolutionary history of the United States Constitution and our Bill of Rights. These concepts, deeply rooted in history, were not created in 1776 and 1787 as is sometimes assumed. Instead they were handed down to us over centuries.

The legacy of the Magna Carta spans the ages as the reader follows the historical sketch of Maitland. Today it symbolizes the basic elements of freedom from oppression and particularly the principle that all persons—from kings to paupers—are equal before the law. The Magna Carta supplied the inception of the principle that governments should be of law and not of men. Its importance to constitutional law and free society is unparalleled.

The history of English law, as any law, is founded upon the society from which it arose. Feudalism was the economic, political and social structure of early England. Many of the terms which plague lawyers today are “throwbacks” to those days. Tenure, fee, seisin, chattel, and

assizes, are but a few examples. In feudal society all land was held ultimately by the king. This meant that, save the king, no one held land who did not have a superior. The right to cultivate land was passed down to tenants who owed some service to a superior or lord. Tenants held the land by tenures of which there were six and the nature of these tenancies defined the rights of men. During this early period the majority of public rights, therefore, were inextricably interwoven with the tenure of land. With such an economic structure, it is clear that the king, as ultimate owner of all of England would be, likewise, all powerful. The lack of individual rights in relation to the omnipotence of the king was startling. This was the structure of society at the time of King John.

In 1215 "the king could do no wrong." The king was the law, ruling by divine right. John raised money through blackmail, slander, cruel levies and torture. His power, and his abuses, went unchecked. However, the reign of King John demonstrates the perplexing interaction between good and evil. Had John not been so peccant and wicked, the suffering of the English people might have continued for centuries. But insufferable treatment awakened the inventiveness of the leaders of the church and the feudal barons.

In searching for salvation, the Archbishop of Canterbury, uncovered an old charter of Henry I concerning certain privileges of his subjects. Although the charter was not binding on King John, as a precedent it was invaluable. At a convocation of the peers (nobilities which were created by a writ of summons, or later by letters patent) and ecclesiastics, Archbishop Langston read aloud the charter of Henry I, telling them that if they were willing to support that charter they could restore their long lost liberties. The gross abuses of King John easily convinced them.

When confronted with the demands of the barons, the king, now destitute and deserted, agreed to take various oaths. However the barons recognized this was not sufficient. Oaths had been sworn to and violated before. Facing the insurgency, the king attempted to retreat to London to avoid the barons, but the inhabitants opened the gates of the city and the king found himself in the Tower of London surrounded by the barons and their armies. King John, helpless, relented to negotiations and agreed to meet "in the meadow called Runnymede between Windsor and Staines" on June 15, 1215.

The barons came prepared with a series of liberties which were nonnegotiable. At first King John rejected the demands of the barons,

but bankrupt and without subjects he finally relented. The King's seal was affixed to a parchment which substantially incorporated the demands of the barons.

Yet King John, not pleased with the outcome of Runnymede, requested the protection of the pope who responded with a denunciation of the charter because it was obtained by duress and excommunicated thirty-two of the barons. John, relying on the influence of Rome, made war on the barons and attempted to annul the Magna Carta. Late in 1216, advancing toward Lynn for supplies, his army crossed the Wash. A rising tide swept away his whole train of provisions and supplies including his money, jewels, the crown and the seal. Finding shelter in an abbey he died of an unknown malady—most likely gluttony or poisoning. Seventeen of the worst years of English oppression had ended.

With his death the knelling of the bell for feudalism, inherently incompatible with the enumerated liberties of the Magna Carta, had begun. Out of despair, misery and suffering the barons found relief. They could not have known the impact of their product. The Magna Carta transcends the historical confrontation at Runnymede in 1215. It planted the seed of constitutional government, although, as Maitland informs us, the word "constitution" did not come into use until the seventeenth century.

Magna Carta's significance is clear when one considers the document itself. Maitland explains that the document is minutely detailed and "intensely practical." General declarations of rights were not required. This was no philosophical document. Rather, the grievances of King John's reign were enumerated *seriatim* and redress was promised. The barons wanted the law to be unquestioned and little interpretation was necessary. It is interesting to note, in contrast, that the United States Bill of Rights is broad and vague belying the circumstances of history. The Magna Carta makes the history of the time painfully clear.

Even though the document was specific and tailored to the needs of the day, it embodies fundamental legal principles which are the foundation of the free world today. Since the Magna Carta was a reaction against the king, the barons found it necessary to supplant the authority which the king had theretofore exercised. In binding the king with a contract, they established the principle of the predominance of law over man. As Maitland explains, "[t]he cry has been not that the law should be altered, but that it should be observed, in particular, that it

should be observed by the king. Henceforward matters are not to be left to vague promises; the king's rights and their limits are to be set down in black and white." The supremacy of law was established at Runnymede and through the ages the Magna Carta has been the symbol of what we now call the rule of law, government according to law, or constitutional government. In the famous case of *Marbury v. Madison*<sup>1</sup> John Marshall wrote: "The government of the United States has been emphatically termed a government of laws and not of men."<sup>2</sup>

The barons realized that obtaining the charter was not enough. Observation of the principles of the charter was also required. To accomplish this, the charter provides that the barons elect twenty-five representatives who would judge as to the infringement of the charter. This was an enforcement mechanism, a formal inducement for the king to obey the dictates of the charter.

Although Maitland's notes are not clear on this point, it appears that the 25 barons constituted the beginning of parliament, however rudimentary. The professor demonstrates the growth and change of this feudal assembly of barons. Over time it becomes an assembly of the three estates of the realm—clergy, lords, and commons. From this the knights of the shire are summoned in 1254 and representative burgesses in 1264. The Magna Carta implemented the doctrine of the separation of powers. And from such a relatively simple concept, although revolutionary in 1215, our present system of checks and balances evolved. To fully comprehend the impact of this provision of the Magna Carta we must remember that up until that time there was but one branch of government—the absolute sovereignty of the crown. What Montesquieu espoused in the eighteenth century was initiated five centuries earlier at Runnymede. Hence, there was established the second great structural principle of American constitutional law.

Closely related to the barons' new found power was the right to redress their grievances. This too is a fundamental concept of ordered liberties. As mentioned earlier, the primary fault of the charter of Henry I was that it imposed no sanction and could be violated with impunity. It is fairly said that without sanctions there can be no law. Then for the first time in English history a charter provides remedies; for the first time a charter is law.

The Magna Carta includes another provision containing a guaran-

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 163.

tee of personal liberty which formed the basis of the fifth and fourteenth amendments. The following clause from the Magna Carta has been the basis of legal thought in many parts of the world: "ITEM, that no man of what Estate or Condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of law." Centuries later Justice William Johnson writing for the Supreme Court explained the ultimate intent of that clause when he wrote:

As to the words from the Magna Charta . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.<sup>3</sup>

The importance of this provision was even broader, however. For the first time the proposition was established that the enumerated liberties extended to all men regardless of their "Estate or Condition." The covenants of the Magna Carta extended beyond the barons and the king to all men. Through time this concept has been expanded, but the idea of equality was firmly rooted at Runnymede.

From the common law the idea of double jeopardy was included. As Blackstone put it, "that no man is to be brought in jeopardy of his life, more than once, for the same offence." Later, Maitland tells us, in Lord Eldon's time the right against self-incrimination was incorporated within the concept of due process.

In the day of King John and before, the royal judges were royal servants, appointed and dismissed by the king. The positions were bought and sold with no requirement for legal background. The king could himself sit and give judgment or he could order the decisions of the judges. The king was, in effect, the court of law. It had not previously occurred that any other arrangement was possible.

The Magna Carta conceded that common pleas were not to follow the king's person, but were to be heard in some certain place. Also no sheriff, constable, coroner or others of bailiffs could hold pleas of the Crown. Pleas of the Crown (criminal law) and common pleas (between citizens), taken together, were what medieval lawyers meant by common law. Though disguised in the language of the thirteenth

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3. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

century, these two provisions provided the first step in the formation of an independent judiciary. Maitland explains that by the early 1700s in England the judiciary was completely independent of the Crown. The American Constitution formalized this independence by making the judiciary a separate but equal branch of government.

Eventually it evolved that judges should hold office on "good behaviour" rather than at the whim and fancy of a tyrannical king. In 1701, The Act of Settlement guaranteed this liberty which resulted from the Magna Carta. The barons of King John's day could never have realized the result of a clause which was primarily designed to make it more convenient for them to try cases.

At this point the impact of Magna Carta and its historical significance and interpretation are clear. The principles outlined in 1215 at Runnymede have transcended time to provide the foundation of American constitutional government. The rule of law, the separation of powers, due process of law, the right to redress for grievances, equality of men before the law, and the independence of the judiciary were established and formalized at Runnymede. Though often challenged during the ages, the wisdom of the barons has long since been vindicated.

These were the underlying principles established by the Magna Carta and defined by history. However, in response to particular abuses of King John, the great document included even more. The freedom of the English Church was guaranteed. Although not observed throughout English history, it was the beginning of the doctrine of separation of church and state. The right of the king to tax was limited, particularly as to the inheritance tax. Widows could no longer be compelled to marry, a practice commonly used to support a member of the king's court. Women's rights to inheritance and dower were defined along with the beginnings of intestacy statutes.

The barons delineated specific rights in the commercial area as well. A limited freedom of foreign commerce and free customs were granted. Foreign travel was guaranteed for all except criminals. Basic debtor and creditors rights were included in the Magna Carta. Standardized weights and measures were required.

The treatment of criminals was a cause of concern. Magna Carta required punishment in accordance with the offense. In today's terms however, Maitland demonstrates that this meant little until much later in history. Before Magna Carta, once arrested and put in prison a subject could languish indefinitely unless he was able to pay for an early trial.



Magna Carta ended this blackmail and planted the seed of *habeas corpus*. Maitland cites the Petition of Right, the *Darnel* case and finally the Act of 1641 which abolished the Star Chamber as the historical vehicles for the evolution of *habeas corpus*. But right to trial by a jury of peers was far in the future. The barons succeeded only in negotiating the privilege of being tried by a lord appointed for that purpose by the king and a small selection of peers nominated by this royal nominee. At least, however, the struggle for *judicium parium* had begun.

By the early 1500s the concept of trial by jury was at an interesting place in history. The jurors of civil cases were ceasing to be witnesses but rather judges of fact and were drawn from the district in which the suit was tried. However, if the jury of twelve gave a false verdict the case could be retried by a jury of twenty-four. And if the new verdict contradicted the old, the first jury of twelve was severely punished. Apparently this process of attainment was not formally abolished until 1825, although it had fallen into disuse earlier.

In retrospect, it seems incredible that the Magna Carta included so many liberties and fundamental concepts. Bailiffs were prohibited from making an arrest without at least one creditable witness. Royal officials were barred from taking corn or other goods unless volunteered. Taxes were to be imposed only with the counsel of the prelates and tenants in chief. The king could no longer force construction of bridges. Payment for castle guard could not be imposed on a man if he was willing to undertake the guard himself. Interestingly, no one was to be arrested on the appeal of a woman for the death of any person except her husband.

From what we have learned from Maitland, the breadth and enormity of the liberties obtained at Runnymede in 1215 is clear. In this writing Magna Carta has been focused on because it was the document that created "constitutional law." The evolution of those liberties is, by and large, the history of personal freedom and liberty. The various statutes and bills of English history gave new sanctions to liberty but they were only echoes of the Magna Carta. As demonstrated, the fundamental features of the United States Constitution and Bill of Rights were only an expanded version of Magna Carta written for the needs of the colonies.

Professor Maitland wrote on many subjects in his lectures on the constitutional law of England but none was laced throughout history to the degree of the Magna Carta. Indeed, none was more significant.

Maitland's lectures are the story of constitutional law. They are the story of constitutional history. To understand either we must have a knowledge of both. And most importantly, to understand the United States Constitution, it is helpful to journey back to Runnymede in 1215. The English barons would never know of America, but without them the words "Equal Justice Under Law" might never have existed.