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Magna Carta and The Path Forward to the Rule of Law

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A Note on Sources

Charles Eskridge teaches a course on Origins of the Federal Constitution as an Adjunct Professor of Law at the University of Houston Law Center. In 2015, he joined the international litigation firm of Quinn Emanuel Urquhart & Sullivan, LLP as a partner to help open their new Houston office, and before that was a partner for nearly 20 years with the commercial litigation boutique of Susman Godfrey LLP. Mr. Eskridge is a graduate of Pepperdine University School of Law. He served as a judicial clerk to Justice Byron White at the U.S. Supreme Court, and to Chief Judge Charles Clark at the U.S. Court of Appeals for the Fifth Circuit. He also served as a special assistant to Hon. Howard Holtzmann, U.S. arbitrator of the Iran–U.S. Claims Tribunal in The Hague.

This address is an adaptation of a recently published essay, C. Eskridge, *Modern Lessons from Original Steps Towards the American Bill of Rights*, 19 TEX. REVIEW OF LAW & POLITICS 25 (2014). Nearly all citations from this address derive from the path traced there, from Magna Carta, to the English Bill of Rights, through to debates central to the American Constitution and American Bill of Rights. The primary source of material for this essay, and for the course on Origins of the Federal Constitution, consists of original documents from *The Founders' Constitution*, edited by Philip B. Kurland and Ralph Lerner (University of Chicago Press 1987). For an overall, accessible picture of the march of rights through time, *see* R. Perry, *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* (Chicago: American Bar Foundation 1978).

For concise but thorough consideration of the people and times leading specifically to Magna Carta, *see* L. Ottenberg, *Magna Charta Documents: The Story Behind the Great Charter*, 43 ABA JOURNAL 495 (1957), and R. Aitken and M. Aitken, *Magna Carta*, 35 ABA J. OF LITIG. 59 (2009). Chief Justice John Roberts referred specifically to Mr. Ottenberg's work for support of his recent speech on August 11, 2014, commencing celebration of Magna Carta's 800th anniversary.

MAGNA CARTA AND
THE PATH FORWARD TO THE RULE OF LAW

It is a privilege to address this audience of lawyers and judges who gather today and tomorrow to further study and perfect their skills on arguing and deciding appeals. I deeply appreciate the invitation, and I specifically thank Justice Bill Boyce for asking me to be on today's program. But I have to admit, this is a slightly terrifying privilege. I face a statewide audience of perhaps our best lawyers in Texas. Lawyers who are … maybe a little tired and cranky, fun as it is, to be kind of back in school. Lawyers who are … hungry, and I stand between them and their meal. Lawyers who I've been asked to entertain, if not enlighten, while you eat. So, please relax and do enjoy lunch, as you can now watch me … well, either succeed or fail beyond my wildest dreams.

When I clerked for Justice White barely a year after graduating, I quickly became aware of a gap in my law school education—a gap common to most lawyers. An extract in some prior opinion from a Federalist Paper, or a quote from Blackstone's Commentaries in a brief, would on its face be fairly dispositive. But I had no broad understanding of its place in the development of an issue, beyond what the opinions themselves said. Law school depends a great deal on historical reference, but it is not designed as an advanced history class. That always nagged at me a bit.

With apparently nothing better to do most evenings—and with an indulgent wife—I organized and edited what became a little over a thousand pages of material for a course I titled Origins of the Federal Constitution. I've taught it five times now, and am teaching it again this Fall. What I hope my students learn—because it is what I learn every time—is that those letters and tracts and enactments aren't some unsolved mystery from yesterday. The arguments weren't hidden or subtle when made, but were instead written plainly, to be understood by the people generally. Even if these documents don't directly resolve the difficult issues we continue to face, they do provide a common framework—one that I suggest provides the basis for a more conciliatory and respectful resolution of these issues.

In mind of the significant anniversary that Magna Carta had last year, I was invited today to consider historical steps that trace the broad movement towards the rule of law and the many liberties found in our Constitution and Bill of Rights. Along the way I was asked to try and be half historical, half practical,

and half inspirational. That challenged my math skills a bit. But I will do my best to deliver a full 150% as you enjoy your lunch.

I. Magna Carta (1215)

On June 15th of last year, England observed Magna Carta's 800th birthday. That span is hard to grasp—more than three times the age of our country. On that day in 1215, at a field called Runnymede on the River Thames outside of London, it was not known that the advent of English constitutional law was at hand, or that its child, American constitutional law, would emerge some 570 years later.

We could always start earlier, with Greek or Roman authors, or the Bible or other ancient texts. But the Dark Ages were dark for a reason. To the extent prior expressions of rights existed, they had not taken root. And so in 13th century England, the Crown was law—divine right; absolute prerogative. If some monarchs were known for benevolent rule, we know many were not, and among the worst was an early one, John I, King of England from 1199 to 1216.

John was a harsh and ruthless king. He taxed heavily, quarreled with the church, and constantly engaged England in wars he always seemed to lose. When the nobles finally had enough and refused further allegiance, John tried to turn his army on them, and ultimately lost all support among the people. To avert civil war, the Barons demanded—swords drawn—that King John (in the presence of the Archbishop of Canterbury) place his seal upon a unique charter carving out a limited array of sixty-three guarantees from the Crown. England at the time was Catholic, and the idea of limiting royal power was so inflammatory that when word reached Rome, Pope Innocent III decreed Magna Carta void and a subject of excommunication.

The Barons likely did not believe they were shaking the frame of government to its foundation—they just wanted John to observe the same customary rights and liberties that his predecessors did. And so most of Magna Carta's clauses are rather dated, listing items necessary to survive in the higher ranks of feudal life in England—rules respecting fisheries, forestry, dower and inheritance, wine measurements, and the like. And despite the swords, Magna Carta was not something claimed by right, or even royal duty, but was instead stated as a generous gift from John. So, he didn't part with much, and remained absolute over all areas not, at least in some sense, given by him back to the people.

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