

Cato's Letter

A QUARTERLY
MESSAGE
ON LIBERTY

SUMMER 2015
VOLUME 13
NUMBER 3

Magna Carta's Importance for America

ROGER PILON

As we gather to celebrate the 800th anniversary of Magna Carta, we Americans need to acknowledge the immense debt we owe to the nobles and clergy who met at Runnymede to wrest from King John several of the rights we enjoy today, to say nothing of the rule of law that followed, however unevenly. Yet we're also fond of believing that in 1776 America sprang fully formed ex nihilo, as if by immaculate conception. As I'll discuss shortly, there's truth in that idea. Indeed, we celebrate it across the nation every Fourth of July. But when the fireworks end, we should also recognize that for all their advances—many and profound—America's Founders drew much from the nation we left 239 years ago.



ROGER PILON, CATO'S VICE PRESIDENT FOR LEGAL AFFAIRS, FOUNDED THE INSTITUTE'S CENTER FOR CONSTITUTIONAL STUDIES. HE SPOKE IN THE F. A. HAYEK AUDITORIUM AT AN EVENT CELEBRATING THE 800TH ANNIVERSARY OF MAGNA CARTA IN JUNE.

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That inheritance begins with the common law, made over the centuries by judges adjudicating controversies between private individuals one case at a time—a law recognized expressly in the Constitution’s Seventh Amendment. In his classic *Harvard Law Review* essays on “The ‘Higher Law’ Background of American Constitutional Law,” the eminent legal historian Edward Corwin notes that the common law’s true beginnings predate Magna Carta. They arose in the third quarter of the 12th century when Henry II established circuit courts and a central appeals court, which over time made the law “com-

mon” to the realm,” as in chapter 12’s taxation provisions—and we have an adumbration, at least, of separated powers.

The story of Magna Carta’s travel abroad begins early in the 17th century, of course, but in the mother country, with the document’s reemergence from its eclipse under the Tudors and with the uses to which the great English jurist, Sir Edward Coke, would put the Charter in his struggles against the Stuarts and, somewhat less, with Parliament itself. Those struggles would unfold just as English colonists began settling in America—a fortunate accident of history. Thus the charter of the very first of those settlements, in Virginia in 1606, declared that the colonists and their posterity, as English subjects, were to enjoy “all liberties, franchises and immunities” to the same extent “as if they had been abiding and borne” in England—language we’d see repeated in charters from Massachusetts Bay in 1629 to Georgia in 1732.

Meanwhile, developments back in England over this period did not go unnoticed in the colonies: the 1628 Petition of Right, the 1679 Habeas Corpus Act, the 1689 Bill of Rights in the wake of the Glorious Revolution—each of which drew on Magna Carta’s “ancient rights.” Thus, William Penn, having survived his 1670 trial in England for preaching his Quaker beliefs, looked to Magna Carta when drafting his 1682 blueprint for Pennsylvania. A year later the colony’s assembly enacted laws drawing on both Magna Carta and Lord Coke’s writings on the Charter.

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A half-century later came Magna Carta, incorporating much of that nascent private law. Thus we get the rule of law in the form of a written document, brought into being not by an enactment but by a compact—a *political* act that established positive law binding the king by his own hand, albeit not without the pressures of the regnant feudal system. Add the hint of a future parliament—reflected in the idea of the king’s ruling in consultation with the “common counsel of the

But as relations with England deteriorated in the second half of the 18th century, Magna Carta came again to the fore, first as the basis for remonstrations to Parliament, then to inform state bills of rights and constitutions. Virginia led the way when its legislature protested the 1765 Stamp Act, citing the “ancient Constitution” with its right of English subjects not to be taxed without their consent and its right to trial by jury, which the Act had contravened. With the several Townshend Acts that began in 1767, relations grew worse, culminating in the so-called Intolerable Acts of 1774—Parliament’s reaction to the Boston Tea Party a year earlier. Still, when the Continental Congress met in September of 1774 to draft a set of resolves, the delegates rested their case not only on an appeal to natural law but even more on the principles of the English Constitution, charters, and compacts.

Their petitions to Parliament unanswered save by “fleets of armies, the blood of Lexington, and the fires of Charlestown and Falmouth,” as John Quincy Adams would later write, the colonists soon prepared to sever their ties with the motherland. Yet documents that both preceded and followed independence continued to draw on the principles first set forth in Magna Carta, as did the Declaration of Independence itself, with its catalogue of grievances not unlike those that gave rise originally to the Charter. From the Virginia Declaration of Rights to the new constitutions of

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South Carolina, Virginia, and New Jersey, all drafted or ratified before independence, to the new constitutions of Delaware, New York, and Massachusetts, drafted during the Revolution, we find provisions first found in Magna Carta: trial by jury; no taxation without consent; no excessive fines or punishments; no deprivation of life, liberty, or property without due process by the law of the land; no taking property without compensation; and no paying for justice.

But Magna Carta’s influence did not end with the Revolution. It continued on to the Constitutional Convention of 1787, which gave *Congress* the power to tax, not the executive, as in 13th-century England, but then rested the origination of that power in the House, the body closest to the people, reflecting Magna Carta’s prohibition on taxation without the “common counsel of the realm.” And two years later, Magna Carta’s influence was especially evident when the first Congress drafted the Bill of Rights.

A few examples will suffice. Chapter 1 hardly reflects our modern view on the separation of church and state, but neither did the First Amendment’s original applications. Yet by assuring that the king would not inter-

ferre with church elections, it surely foreshadows that understanding. Chapter 20 requires that fines and punishments fit the wrong at issue and so anticipates our Eighth Amendment's protections against excessive fines and cruel and unusual punishments. Chapters 28, 30, and 31 prohibit the taking of grain or other chattels without just compensation, a clear precursor of the Fifth Amendment's



Takings Clause—a principle just reaffirmed by the Supreme Court in *Horne v. Department of Agriculture*. Chapter 38 prohibits prosecutions based on a bailiff's say-so alone, without "faithful witnesses," while Chapter 40 promises neither to sell nor deny nor delay justice, thus anticipating the several guarantees our Sixth Amendment affords defendants in criminal prosecutions. And Chapter 39, the famous "law of the land" provision, is the clear precursor of our Fifth and Fourteenth Amendment Due Process of Law Clauses. Meant originally to protect only "freemen," it reached many others over the years, much as with our own Constitution.

With this brief canvass of Magna Carta's influence on American law, let me return to the point with which I began. Although America did not spring fully formed ex nihilo in 1776, there are nonetheless important and basic differences between legal developments in America and in England, going to the very theory underlying the two regimes. To be sure, the late-18th-century struggle in America, like that at Runnymede, began as an effort to wrest rights from the power in place—and in both cases in the name of ancient rights as loyal subjects. But the English nobles were rebelling against the *king*, whereas we rebelled against acts of *Parliament*, albeit enforced by the king, which explains why, once the rebellion took the form of independence, our fire was directed against the *king's* "long Train of Abuses and Usurpations." Note, too, how sovereignty in England moved gradually, and often uncertainly, from crown to Parliament, never fully to the people. Moreover, to this day England has nothing like our separation of powers: indeed, its High Court was only recently separated from the House of Lords.

But the differences are deeper than institutional, much deeper. In America, a radical shift unfolded between 1774 and 1776, culminating in the Declaration of Independence. There we addressed not the king or Parliament but "a candid World," justifying our independence *not* in the name of ancient English rights but of *the universal rights of all mankind*. As the Declaration plainly states, we dissolved the political bands that connected us to England and instituted new government—"by Authori-

ty of the good People of these Colonies.” Where did we get that authority? From no one, save our “Creator.” We were *born* with it—born free, with natural, unalienable rights to rule ourselves. Thus, the Declaration of Independence became *America’s* Magna Carta.

Drawing, ironically, on the writings of an Englishman, John Locke, whose ideas infused political thought in America long before independence, we grounded political legitimacy on the consent of the governed, but only if constitutionally limited, leaving us otherwise free. And when we reconstituted ourselves 11 years later, we returned to those principles, stating clearly in the new Constitution’s Preamble that sovereignty rests with “We the People.” *We* constitute and empower government—*by right*. Government doesn’t give us our rights: we give government its powers, such as we do, as enumerated in the Constitution we ratified.

Therein lies the fundamental difference between the two political systems. England had its Glorious Revolution, but it never led to so fundamental a break, and to reconstituting the polity from the ground up, beginning with the moral order, from which the political and legal orders would be derived. Nor did it lead, operationally, to the kind of judicial review that Lord Coke adumbrated in 1610 in his famous dictum in *Dr. Bonham’s Case*.

Today, of course, the elegant theory of legitimacy the Founders bequeathed us has been largely abandoned, particularly after Progressives

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effectively rewrote the Constitution exactly 150 years after it was actually written. In the aftermath of that rewrite—which reversed the presumption from “all that is not given is reserved” to “all that is not reserved is given”—we’re practically back in the fields of Runnymede, repeatedly importuning our government for relief from its assumption of plenary power. And it isn’t untethered executive power—arbitrary rule by the king—that worries us so much as executive power arising from majoritarian democracy—or, more realistically, from special-interest politics.

But to conclude on a more positive note in this celebratory year, although Magna Carta began as a distinctly English statement, its sheer endurance and fecundity over time has served to distinguish it not only as a touchstone of English and American liberties but as a symbol of the liberties of all mankind. It was a major step in the advance toward liberty, and an inspiration for our Founders as they created the United States of America. Thus it remains a document worthy of our continued celebration, as we do here today. ■



SCHOLAR PROFILE

Patrick G. Eddington

PATRICK EDDINGTON is a policy analyst in homeland security and civil liberties. Before joining Cato, he served as senior policy adviser to Rep. Rush Holt (D-NJ). Eddington's legislative portfolio included the full range of security issues, with an emphasis on intelligence reform. From 1988 to 1996, he was a military imagery analyst at the CIA's National Photographic Interpretation Center, where he received numerous accolades. His assignments included monitoring the breakup of the former Soviet Union and providing military assessments to policymakers on Iraqi and Iranian forces.

HOW DID YOUR TIME AT THE CIA HELP SHAPE YOUR POLICY VIEWS?

I came to understand the negative consequences of excessive government secrecy. Too often, the classification system is used to conceal waste, fraud, abuse, felonious conduct, and policy errors—not to actually protect truly sensitive sources. I saw this firsthand in how the federal government lied about chemical agent exposures among Desert Storm veterans. I saw it again while working in the House. The first time was when former National Security Agency director Keith Alexander lied to my then boss, Rep. Rush Holt, about the scope of NSA surveillance against Americans. I saw it again when I had the chance to review a still-classified Defense Department inspector general's report on then NSA director Michael Hayden's misconduct in dealing with two programs codenamed Trailblazer and ThinThread. Hayden killed the latter program, which was less expensive and more effective, in favor of a "beltway bandit" boondoggle that cost hundreds of millions of dollars and produced zero intelligence.

WHY DID YOU DECIDE TO TRANSITION FROM A CONGRESSIONAL POLICY ADVISER TO A POLICY ANALYST AT CATO?

In February 2014, Representative Holt announced he would not seek reelection. That put all of us on staff in the position of figuring out our next career move. The one thing I knew for certain was that I wanted to continue working on national security and civil liberties issues. I had been

following the work of Cato senior fellow Julian Sanchez, and as I explored the work of other scholars at the Institute, I began to realize that their worldview very much mirrored my own. When the opportunity to interview for a position here came along, I jumped at it. I started on November 3, 2014, and the experience to date has been all I could have hoped for and more. Few D.C.-based think tanks truly challenge the conventional wisdom in Washington. At Cato, we do it every day. What's not to love?

YOU WROTE RECENTLY THAT "CIVIL-LIBERTIES ADVOCATES ARE AT A DISADVANTAGE BECAUSE THEY ARE FIGHTING ON THEIR OPPONENTS' TERMS." WHAT DO YOU MEAN?

Many things, but I'll touch on two. First, civil-liberties advocates must reject the government's framing of this issue: that only more, and more intrusive, surveillance will protect us from terrorists. The "shoe bomber," the "underwear bomber," the Fort Hood shooter, the Boston Marathon bombers—these and other incidents put the lie to the notion that mass surveillance is an effective counterterrorism tool.

Second, civil-liberties advocates have to remind lawmakers, the press, and the public that mass surveillance is a hallmark of totalitarian or authoritarian regimes like Russia, China, Iran, and North Korea. Such surveillance is not only unconstitutional; it contravenes the very spirit of the American Revolution. We need to drive these points home every chance we get. ■

Free to Choose

As we ponder our legacy and consider what we can leave to our kids, grandkids, friends, and charity, most of us need not be too concerned about the impact of estate taxes. This stands in sharp contrast to the situation that existed not long ago. In 2001 estates exceeding \$675,000 were potentially subject to these federal taxes. However, the rules changed dramatically over the last few years and today the vast majority of us need not agonize over the impact of estate taxes. As such, it seems appropriate to take a step back and focus on the fact that that we can pretty much do as we please with the assets we have accumulated over our lifetimes. We are free to provide for our families and, perhaps, to leave a bequest to those charities, like Cato, that are important to us.

This flexibility and freedom is possible because the last decade saw a major overhaul of federal estate tax laws. The estate tax is a tax on the transfer of assets of a deceased person—hence, “death tax” is a frequent moniker. Because these assets have typically been taxed during life—either as income and capital gains—Cato scholars and many others argue that the estate tax should be repealed in its entirety because it amounts to double taxation. Despite the logic and merit of this position, the estate tax remains with us, albeit in a less onerous form. A total repeal would take agreement in the House and Senate, as well as a president willing to sign the legislation.

The mechanism that allows most of us to avoid the estate tax is called an “exemption.” For 2015, \$5,430,000 can be given by an individual without incurring federal estate taxes. This \$5,430,000 is per person, so a couple can give up to \$10,860,000. As a result, only the largest



2 percent of estates have to pay federal estate taxes. The exemption is indexed for inflation so it will keep on growing. And you can use your exemption at death or you can use it to make tax-free gifts during your lifetime. Once you go beyond the exemption limit, estate taxes click in at a pretty hefty rate of 40 percent. Rather than pay this to the Feds, wealthy individuals have a couple of options because the estate tax does not apply—in tax parlance, you get a “deduction”—for assets left to a spouse or charity.

Many states have also cleaned up their act and repealed state death taxes. (Nineteen states still retain some form of estate or inheritance tax, however—so keep that in mind when you do your planning.) Since the states are constantly tinkering with their rules, it’s best to have your tax adviser verify whether or not you live in a state that still imposes some form of death tax. These exemption levels tend to be much lower than the federal level, so states can take a bit out of even a relatively modest estate. Folks have been known to move to another state just to avoid these taxes, just as many people have moved to avoid burdensome state income taxes.

Nevertheless, our reformed, “minimalist” estate tax leaves most of us free to remember family, friends, and charities as we choose. That is as it should be. Ideally, of course, all Americans would be free of estate taxes and Cato will continue to advocate for that policy. ■

IF YOU HAVE QUESTIONS ABOUT ESTATE PLANNING OR WOULD LIKE TO LEARN MORE ABOUT MAKING A BEQUEST TO THE CATO INSTITUTE, PLEASE CONTACT GAYLLIS WARD, ASSOCIATE VICE PRESIDENT OF DEVELOPMENT, AT (202) 218-4631 OR GWARD@CATO.ORG.

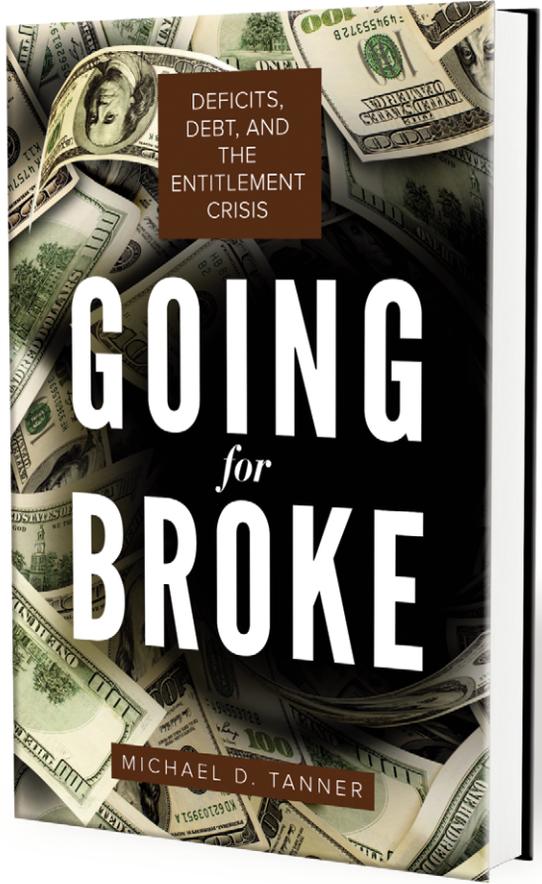
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