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MAGNA CARTA AND THE PATH FORWARD TO THE RULE OF LAW

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A Note on Sources

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 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 speech on August 11, 2014, commencing celebration of Magna Carta's 800th anniversary.

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I first pulled this speech together about two years ago, in a fit of inordinate and geeky fascination with Magna Carta and what was then a looming 800th anniversary. I have given it more than a half-dozen times, but the fact that I get to deliver it now to kick off your annual educational conference genuinely thrills—and slightly terrifies—me. I'm a lawyer whose entire private practice has been in Texas for the past 20 or so years. I never imagined that in one fell swoop I'd have the chance to … well, either succeed or fail beyond my wildest dreams before all of the assembled judges of the great State of Texas.

Some years ago, I organized and edited material for a course I titled Origins of the Federal Constitution. You see, when I clerked for Justice White barely a year after law school, I quickly became aware of a gap in my legal 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; thus, my course.

What I hope my students learn—because it is what I learn every time—is that those letters and tracts 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 submit provides the basis for a more conciliatory and respectful resolution of these issues than current discourse might suggest.

In mind of Magna Carta's significant anniversary, I was invited today to consider again 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% this morning to begin your conference.

I. Magna Carta (1215)

Eight hundred years. 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 (or more accurately, to pursue happiness) 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.

Yet some of his concessions are enforced in England to this day. "In the first place we have granted to God … for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate." Also, "the city of London shall have all its ancient liberties and free

customs, as well by land as by water." And unwittingly, King John forever placed himself and his successors within the rule of law. For while one passage may sound unfamiliar at first, it is of signal import when we consider—as lawyers and judges—the path it forged: "No free man shall be taken or imprisoned … except by the legal judgment of his peers or by the law of the land."

There shall be trials, and the King shall act not merely by decree, but only "by the law of the land." So said Magna Carta in the 13th century, to which Winston Churchill observed in the 20th that this was "reaffirmation of a supreme law," and that "here is a law which is above the King"—above the government—"and which even he must not break."

But of the many lessons taught by this document itself, I submit its greatest is the idea of repetition. Rights must be acknowledged if they are to be protected, and their repetition educates not just the people, but the government.

King John, you see, was a devious man. Having saved his own skin, he immediately re-launched his war against those same nobles, until fate—and a fatal bout of dysentery—determined that he would die the next year, as did Pope Innocent and his threat of excommunication. John's nine-year-old son, Henry III, was required to swear oath to recognition of Magna Carta upon his coronation—and seven more times before his death in 1272, due to his tumultuous reign. In 1265, it was decreed that Magna Carta would be read twice annually, so that no person—citizen or monarch—could claim ignorance of its words. In 1297, Henry's son, Edward I—Longshanks from "Braveheart"—was forced to accept a confirmation that planted the seed of judicial review, agreeing that any judgment or action contrary to Magna Carta "shall be undone, and holden for naught." By 1461, nine successive monarchs confirmed Magna Carta over forty times.

Our Founders learned from this and, as we shall see, preserved our rights in a context where government hasn't the ability simply to forget or ignore them. But in England, these early repetitions ensured the Crown would not forget, and must observe its prior gifts. A century on, a new body called Parliament existed, and when it set Magna Carta into statutory law in 1354, "by the law of the land" attained a phrasing that has now endured for over 650 years—"due process of law."

Could the nobles at Runnymede have imagined the force that "due process of law" would attain, from their demand that the King simply act "by

the law of the land"? Probably not. But that is the momentum of rights once recognized. How far or how fast they will carry is not known on the first push.

II. Sir Edward Coke and The Petition of Right (1628)

In tributes this past year to Magna Carta, Sir Edward Coke has come in for high praise as the defender—the redeemer—of the Great Charter in the 17th Century. Coke saw power from all sides during a remarkable career lasting 51 years, laboring first as Solicitor General and Attorney General to Queen Elizabeth I, a good Queen whose royal prerogative he defended; next, as a judge, justice, and champion of the common law on the Court of Common Pleas and the Court of King's Bench, clashing with James I whose exercise of prerogative he deplored; and last, as a leader of the House of Commons, during the early days of Charles I, who threatened to annihilate Parliament's ability to influence policy at all.

His tours of duty through all three branches of government allowed Coke to understand—politically, pragmatically—that in civilized society sovereign power would and must reside somewhere. And he knew that supremacy of the law had proved itself a fragile thing over time—the path was not always clear; the signage was sometimes confusing. The Crown was at times cunning, and often brazen, in its expansion of power and overbearing of rights, depending wholly upon the scruples of the person on the throne.

During his final year of public service, Coke forced a reconsideration of the Great Charter's overall meaning and promise. Would the liberties of the English people continue to be an act of grace on the part of the King? Or were they to be matters of right, which the subject could demand? The King should have that which the Law gives him, and no more, answered Coke. For only the law is absolute, and if sovereign decree determines what to observe and what to ignore in Magna Carta, it weakens what he called the "Foundation of Law, and then the Building must needs fall." "Take we heed what we yield unto, [for] Magna Carta is such a Fellow, that he will have no Sovereign."

Coke made these arguments to Parliament in 1628 in favor of The Petition of Right, which asked Charles I to do a shocking thing—admit his conduct was contrary to existing laws, and promise he would stop. Taxes would levy only with Parliament's consent; military troops would not be quartered in private homes; and every citizen, guilty or innocent, would have a chance at trial, with bail and habeas corpus to empty the prisons of anyone put there arbitrarily. This was a dangerous course, and Coke had seen many of his contemporaries cast to the Tower of London on secret charge by the King.

But the Houses of Lords and Commons stood united, and the people's watchful eye was upon their King. Like John before him, what choice did Charles have? "*Soit droit fait comme il est desire*," he said. Let right be done as is desired.

Edward Coke retired the next year, and soon passed, after a long life where his self-interest could just as easily have kept him where he started—comfortably aligned with the Queen and Crown, and to defense of the established order. Instead, he challenged and defied kings, determined as he was to elevate the protections of law. But even when this great judge and lawyer was done … still he was not done. For it was only in his last years, writing the final passage of the final volume of his greatest work, the *Institutes of the Laws of England*, that he captured the meaning of his life's example. It is a magnificent quote, for this audience in particular:

> Honourable and reverend judges and justices, that do or shall sit in the high tribunals and courts or seats of justice … fear not to do right to all, and to deliver your opinions justly according to the laws; for feare is nothing but a betraying of the succours that reason should afford. And if you shall sincerely execute justice, be assured of three things; first, though some may maligne you, yet God will give you his blessing. Secondly, that though thereby you may offend great men and favourites, yet you shall have the favourable kindnesse of the Almighty, and be his favourites. And lastly, that in so doing, against all scandalous complaints and pragmaticall devices against you, God will defend you as with a shield.

With a word, Lord Coke summarized what it is that we mean by the rule of law. A shield. That which protects us and keeps us safe from harm. And Lord Coke speaks directly to you, the men and women gathered here who do your work on the bench, and then must submit to the political and electoral process back home. Just because it is a continuing lesson does not mean that it is easy. Take courage to see and do right to all persons at all times according to the law.

III. The Mayflower Compact (1620) and Body Of Liberties (1641)

Even as Coke reinvigorated Magna Carta in the struggles with Charles I, the religious intolerance of that King's father—James I—had already driven the Pilgrims out of England earlier that same decade. The Mayflower set off in September 1620, a month later than intended, aiming not for Massachusetts,

but for the Hudson River Valley. Two months later, with a harsh, early winter approaching, they were blown off course. Unable to round the shoals below Cape Cod, they headed for shelter in Massachusetts Bay. Starving, ill, cramped, and grouchy, the non-Pilgrims aboard threatened mutiny and violence—that the strong would take what they wanted from the weak, because they were coming ashore on lands outside their lawful charter.

Now, the "state of nature" is a concept in moral and political philosophy that starts by asking what the lives of people might have been like before societies came into existence. The idea of natural law and natural rights has its place in our American concept of liberties. This landing of The Mayflower is as pristine an example of the state of nature as we have in our history. And it proved to be our first great experiment under the rule of law.

You see, the wiser minds aboard quickly fashioned The Mayflower Compact, and made signature to it a condition of being permitted to even disembark. For those who would exit into this unknown land, they would exit together. All of the men signed for themselves and their families, and the simplicity and unanimity expressed should give us pause when political differences appear insurmountable.

One of those who signed the Compact that day, John Alden, in time was the forebear of two Presidents—John Adams and John Quincy Adams. Reflecting on it two hundred years later, the latter considered it "the first example in modern times of a social compact or system of government instituted by voluntary agreement conformable to the laws of nature, by men of equal rights and about to establish their community in a new country."

The core was but this single sentence. Government under the rule of law appeared from thin air, for the sake of survival, and "all due submission and obedience" would—or rather, must—be given to that government. What's more, the idea of majority rule was effectively established. The powerful would not simply command the feeble.

But in the same breath, the Compact constrained that majority in turn. Submission to authority would be owed only to laws protecting the rights of all, for all agreed that the majority could enact only "just and equal" laws. In a struggle for their lives in a distant land because they objected to the institution of state religion back home, the Pilgrim Separatists somehow found this simple way to assert, in a governing context, the Golden Rule—"Do to others what you want them to do to you." Just, and equal.

Twenty years on, the population of settlers in Massachusetts Bay grew to outnumber the Native Americans in all of New England. Rather than simply gather and enact a growing collection of laws issued under subsequent charters, a Puritan minister by the name of Nathaniel Ward drafted the Body of Liberties of the Massachusetts Colony in 1642. The document is far from perfect—for instance, punishments were harsh, and some capital crimes were set by Biblical citation.

But to its lasting credit, the Body of Liberties intended to establish a governing policy respecting the rights of all within its jurisdiction. Its preamble speaks with no less purpose today as in the moment pen was set to paper at the very midpoint of the 800 years between Magna Carta and today. Only the "free fruition" of liberties and privileges in society can provide tranquility and stability to churches and governments, and their denial leads to the ruin of both. And so these outcasts considered it their "duty and safety" to "collect and express all such freedoms as for present we foresee may concern us, and our posterity after us, and to ratify them with our solemn consent." The first two clauses immediately captured Magna Carta's guarantee of equal protection, trials, and due process of law. After that followed fifteen categories of rights addressing in no uncertain terms life, liberty, just compensation for property, freedom of speech, religious toleration, and more.

Of the 102 aboard the Mayflower, 52 did not survive that first, desolate winter. Let us pause and reflect on that—one more than half died in the first six months on this land. And the balance of the next twenty years also came at greater personal sacrifice than any we will ever have to face. Their experience imparts lessons that resonate and provide a lasting signal even today. From the Mayflower Compact, and the journey from England—that we must carry the rule of law with us wherever we go. And from the Body of Liberties, after securing a foothold on these shores—that before law will be commanded, rights should be established.

IV. The English Bill of Rights (1689)

As Americans, we tend to think of our Bill of Rights as "the one and only" Bill of Rights, proposed by James Madison in 1789. But it is not. Exactly 100 years earlier, Parliament brought an end to a time of great turmoil—the Glorious Revolution—with the English Bill of Rights.

In a brief three-year reign beginning in 1685, James II was a uniquely flagrant monarch who proved himself an object lesson on the need for separation of powers. Here's the list. He refused to be bound by duly enacted

laws. Suspended acts of Parliament. Collected unauthorized taxes. Undermined the independence of the judiciary by discharging judges who opposed his will. Interfered in the outcome of elections. Punished the right of petition. Attempted to impose Catholicism, persecuting and forcibly disarming Protestant dissenters. To top it off, James II dissolved Parliament, and then fled to Paris when civil war ensued.

The British had also found themselves without a king 40 years earlier when they publicly executed Charles I in 1649, who by then the Petition of Right could no longer tame. But their experience under the brutal excesses of Oliver Cromwell as Lord Protector of the Commonwealth was not one they longed to repeat. Better, they thought, to establish a succession of the Crown under limits and restraints protecting the people. And so, the former members of Parliament assembled to draft the English Bill of Rights.

They began with a formal enumeration of twelve grievances against James II as King—things he did, and why they were wrong by law and by reason. Thomas Jefferson later used this logical method of proof in his tour de force. But rather than declare independence from monarchy, the British paired their grievances to a declaration of thirteen rights and liberties. In this way, the Crown was offered to William of Orange and Mary, the daughter of James II, who promised to protect those rights.

Some are stated as absolute rights, and so the King cannot suspend execution of laws without consent of Parliament, and the right of petition is sacrosanct. But others are not absolute. Notice the crucial difference in these phrasings that parallel guarantees in our Bill of Rights. A right to arms, but only as "allowed by law," and as to a certain class of persons. A protection against punishment, but one which only "ought not"—as opposed to "shall not"—be disturbed. Many of the liberties in the English Bill of Rights were not wholesale a matter of <u>right</u>, but of continuing <u>discretion</u>—with that discretion shifted away from the Crown and to Parliament, rather than directly to the people.

Still, these thirteen guarantees—like Magna Carta itself—were deemed "the true, ancient, and indubitable rights and liberties of the people of this kingdom." One hundred years later, our Framers not only had to determine which rights to consider "true, ancient, and indubitable," but also the extent to which those rights should be absolute, and if not absolute, where to vest the power to define and limit them.

Read the headlines when the Supreme Court concludes its Term every June, and you know that as a society we wrestle with these same questions. Are there rights yet to be recognized, but which we may say are beyond doubt? If so, are those rights absolute, or subject to regulation? If subject to limitation, who decides those bounds? The President? Congress? Legislatures in the States? Or by the individuals directly affected, in litigation before neutral judges?

Jeremy Bentham once said, "The power of the lawyer is in the uncertainty of the law." The quote drips with more than a hint of sarcasm, and the truth. For that uncertainty means there will always be difficult questions to sort out with a lawyer's skill, which—like any power—we should remember must be exercised with restraint and studied care.

V. Sir William Blackstone

We all know Sir William Blackstone, or rather, at least by reputation of his *Commentaries on the Laws of England*. Why do his *Commentaries* exert such enduring influence? I think a clue is found in Blackstone's last years, as a member of Parliament, when he called himself as "amid the Rage of contending Parties, a Man of Moderation." As far as he could see it, Blackstone tried to leave partisan goals aside, and simply aimed for the trustworthy view. And so when cited, you can count on his *Commentaries* to be an objective chronicle of English legal history and an accurate statement of English law at an important time in our own history.

The *Commentaries* comprise four volumes. Book One's title is "Of the Rights of Persons." Chapter One's title is "Of the Absolute Rights of Individuals." This primacy is neither accident nor coincidence. From his first words, Blackstone expounds each of the absolute and relative rights of the English people. And he closes his opening twenty-five pages with a stirring summary of what he deemed "the liberties of Englishmen" drawn from his survey of Magna Carta, the Petition of Right, the English Bill of Rights and more. These consist, he wrote, "primarily, in the free enjoyment of personal security, of personal liberty, and of private property." The laws of Parliament must be supported and clear limits set to the royal prerogative. Should anyone attack or violate these rights, further rights entitle the subjects of England to seek the free course of justice in the courts of law; to petition King and Parliament for redress of grievances; and to have and use arms for self-preservation and defense. And in this way "all of us," wrote Blackstone, "have it in our choice to do every thing that a good man would desire to do; and are

restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens."

That on its own is a refreshing primer. But Blackstone determined to close with this: "All these rights and liberties it is our birthright to enjoy entire." This was and is a powerful idea—that of rights attained by birthright. In the five centuries since Magna Carta, the British had learned the central and enduring truth that the people's rights do not depend upon the form of government, but exist on their own—separate and complete—with the purpose of government being their recognition, their support, and their protection.

Approaching revolution, the Colonists in America knew what Blackstone stated to be their "birthright" as Englishmen. The four volumes of the *Commentaries* appeared between 1765 and 1769. A bookseller named Robert Bell published the first American edition in 1771, in Philadelphia. In March of 1775, Edmund Burke observed to Parliament that there were "nearly as many of Blackstone's *Commentaries* in America as in England," and this education in the law propelled what he called "this fierce spirit of liberty" in the Colonies.

Blackstone's *Commentaries* did not change or enact law. I mention it to emphasize the accelerating pace of this conversation about rights in America. Perhaps we can just take a lesson from the man himself. William Blackstone was not born to nobility, but instead distinctly middle-class in London, shortly after the death of his father, a silk mercer. He wasn't destined for a life of great learning, but his quick mind led to education at Oxford. Following his call to the bar in 1746, his practice as a barrister began slowly and not terribly successfully. And so he turned to legal scholarship, and eventually, to an absurd ambition to provide a complete and unified overview of English law. He then labored for 16 years, and succeeded beyond the wildest imaginings. With honest and accessible prose, he brought forth a revered treatise that opened the law—and rights under the law—to an understanding by laymen for the first time.

Each of you here has dedicated your career to public service. I know that this high calling is what animates your professional life. Yet still you may wonder—Does it make an impact? Is it worth the sacrifice? At such times, reflect upon Sir Blackstone's experience, who says to you, "Aim high."

VI. Declarations and Resolves (1774)

As Blackstone published in England, America reached the point of revolution. 1770 opened with the Boston Massacre. 1773 closed with the Boston Tea Party. In 1774, Parliament responded with what it called The Coercive Acts—closing Boston's Port, stripping Massachusetts of self-governance, moving trials of royal officials to London, and quartering British troops in and around Colonial homes. These were known in the Colonies as The Intolerable Acts. And they crystallized a perception about the rule of law—England simply did not believe that America had rights worth respecting.

Bunker Hill and the Revolutionary War were still a year away, and the Colonists' patience neared its limit with imperious rule from afar by a distant and disconnected King and Parliament. Various groups spoke sharply to the neglect of American rights over time—while trying to maintain at least the veneer of allegiance to the Crown.

In July of 1774, George Washington commissioned efforts from his home at Mount Vernon to, in his words, "define our Constitutional Rights." We didn't have a written Constitution, and hadn't even declared independence. Still, this was not a complicated task, and became the Fairfax County Resolves later that month. The first resolution plainly and simply declared that the rights won by our common ancestors had descended to us—our birthright, as taught by Blackstone—"and ought of Right to be as fully enjoyed, as if we had still continued within the Realm of England."

Truth be told, for the longest time, the citizens of the American Colonies wanted to be more English, not less. The Founders saw no reason that birth across an ocean deprived them of rights unquestionably due them, if not simply because they were born to the human race, then certainly because they had the good fortune to be born to enlightened England. They did not seek recognition of new rights, but rather, simple recognition that they were due the same rights—from Magna Carta forward—owed to every Englishman.

Later in 1774, the Continental Congress assembled, issued its own set of Declarations and Resolves, and then reached out with an Address to the Inhabitants of the Province of Quebec. Quebec had its own concerns under English rule and the fit of its French Catholicism with the Anglican Church. Congress asked them to join our cause, and in plain terms reviewed what it considered the preeminent rights of mankind. Entitlement to life, liberty, and property; religious freedom; protection of the common law and trial by jury; peaceable assembly and petition; and more.

The entire discussion led with this:

> [T]he first grand right, is that of the people having a share in their own government by their representatives chosen by themselves, and, in consequence, of being ruled by laws, which they themselves approve, not by edicts of men over whom they have no controul.

John Marshall gets a lot of credit for saying well what others said first, and with *Marbury v. Madison*, he cast the more memorable phrasing: "The Government of the United States has been emphatically termed a government of laws, and not of men." Marshall said this not merely to define and apply the power of judicial review. He asserted it as deriving from that "first grand right" claimed just prior to the Revolution respecting the very frame of government itself. Ours would—or rather, should; then, now, always—be a nation of just laws, determined by the people themselves, equally applicable and equally beneficial to all.

VII. The Virginia Declaration of Rights (1776)

The Declaration of Independence declared us to be a collection of free and independent States in the summer of 1776, with all ties of loyalty to England and her government dissolved. This led to several rather pressing questions: What on earth do we do now? The Crown didn't fit, but how will we govern ourselves? Parliament failed us, so how will we establish and protect our own rights?

Virginia showed the way. On June 12, 1776, Virginia formally adopted its own Declaration of Rights—sixteen rights it declared to be "the basis and foundation of government." Only then did it adopt its Constitution on June 29th, less than a week before July 4th. Delaware, Maryland, Massachusetts, North Carolina, Pennsylvania, and Massachusetts each thereafter prefaced their first constitutions with their own conception of rights. The newly-independent States came to fairly bristle with rights—over 150 phrasings of overlapping guarantees. Each of the individual liberties now in our Bill of Rights saw at least some phrasing in these earlier State declarations.

But many of those expressions of rights did not make our later, federal list. The breadth of those rights is a bit startling, and something to keep in mind when puzzling the plain dictates of the Ninth Amendment that other rights are retained by the people, and exist even though the Constitution does not enumerate them. I want to bring just one to your attention here.

Virginia started this ball rolling, yet the number one right on its list was not included. This is curious, and listen closely, for it anticipated the very best language from the Declaration of Independence:

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Perhaps its inclusion in our Bill of Rights in that form would have raised more questions than it answered. Do we all fully and equally enjoy our life and liberty? Are the means by which to acquire and possess property sufficient? Is everyone equally entitled to pursue and obtain their own happiness and safety in this world? Just imagine the traction a constitutional clause giving expression to rights in that form might have had in our history. Regardless, if we profess to care about rights, aren't these the very questions we should ask? And once asked, see to it they are answered thoughtfully?

VIII. The Northwest Ordinance (1787)

We arrive in 1787. The Constitutional Convention assembled in May and concluded its work on September 17th, with a draft Constitution transmitted to Congress and suggested for ratification by the States. But before taking that step, we need to stop just short. In a discussion of inalienable rights and liberties under the rule of law, we cannot just ignore the Constitution's clauses that accommodated slavery while avoiding even mention of its name: the "three-fifths" rule; the continuance of the slave trade; the recovery of runaways. Sanction of slavery was a terrible compromise thought necessary to establish and continue the Union. This was a conscious choice over the loud dissent of writers and orators who lamented the diminishment of persons among us, even as they were not deemed to be part of "we, the people."

Was another path available to us? If immediate ratification by every State was the absolute necessity, likely not. But politically, the Confederation Congress in New York actually cleared the path away from slavery even as the Framers were gathered in Philadelphia. On July 13, 1787, the Northwest Ordinance established the territorial government over lands that would go on to become the States between Ohio and Minnesota. For those pioneers, it was a place upon which a framework of government could proceed from a genuinely national perspective. And it was here that Congress set down what

truly could be called our first national bill of rights, decreed to "forever remain unalterable" in that territory.

These six articles guaranteed a familiar list: religious freedom, resort to habeas corpus, trial by jury, due process of law, no cruel or unusual punishment, and the like. But Article VI commands special respect: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes …."

In 1809 Abraham Lincoln was born in Kentucky to a family opposed to slavery. As a young man he moved to Illinois, and so he came of age within the promise of the Northwest Ordinance. In 1854 he looked to this document in his Peoria speech "against the extension of slavery," three years before *Dred Scott*, and seven years before Fort Sumter. He argued that created here was a policy of prohibiting slavery in new territory. This was evidence of original intent, he said, and Lincoln pleaded for the nation to recognize that the founding generation venerated individual rights, largely deplored slavery, and intended for it never to exist outside the original Colonies.

A persuasive argument, but still the Civil War came—a fate clearly foretold at the Constitutional Convention in 1787. Slavery was the focus of debate there at least three times. Opposing the Importation of Persons Clause, George Mason—credited as the author of the Virginia Declaration of Rights—argued: "Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes & effects providence punishes national sins, by national calamities."

The lessons of history come at painful cost to those who live through them. Magna Carta had not granted and protected rights equally. It was between the king and the noble born; if you were a serf or a vassal, you were out of luck. But over the centuries, the English had broadened that path they forged. We neglected that fact. Not nearly enough was done for these individual persons at the time of Framing. Resolution in 1787 within the fabric of the Constitution as in the Northwest Ordinance would have altered not just the history of our first hundred years, but also the history of our second hundred and through to today. These were opportunities missed, and George Mason was right. History will set straight the path, but that is not enough, for it should always be today's task.

IX. The Constitutional Convention and Ratification Debates (1787)

When I teach my class on Origins, one of my favorite documents is somewhat lost now to the popular mind—Benjamin Franklin's speech on the last day of the Constitutional Convention. At age eighty-two, he urged not just unity, but unanimity when the final draft was presented for approval:

> I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.
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> …
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> I cannot help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument.

Franklin's was a call to reach across lingering differences, and to put aside vanity and individual preference in favor of the continued strength and security of a nation still seeking, in the words of the Declaration of Independence, "to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." But unanimity faltered, with three of the forty-two men still involved that last day refusing to sign—due most directly to objection that the Constitution provided no Bill of Rights.

So how big an issue was this, really? The example of the Virginia Declaration of Rights was freshly before them, and that example traced by long American tradition back to the Body of Liberties in Massachusetts. Before law would be commanded, rights would be established. Or so this tradition suggested.

Madison's notes from the Convention show that they took up the issue. Late in the process came a request for provisions protecting habeas corpus, prohibiting religious tests or qualifications, preserving the liberty of the press,

and forbidding the quartering of soldiers in homes. The first two found their way into later drafts; the latter two did not. This led George Mason in the final week to seek more, and to include the important rights from the State declarations that had not found an express place. "It would give great quiet to the people," he said. They had been at it since May, through a long, hot summer, and it was now mid-September. Not a single State supported the motion. That gap became the flashpoint for opposition.

The Federalists—those who favored ratification—argued that the very structure of the new government would protect and guarantee individual rights. For the first time in history, the people themselves would establish a government of limited and enumerated powers, and where that government did not receive power, it would not have the means to infringe rights. Alexander Hamilton expanded on this best, in Federalist, no. 84. Magna Carta and its many confirmations; the Petition of Right; the English Bill of Rights—Mr. Hamilton taught that these were "in their origins, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservation of rights not surrendered to the prince." The journey from Magna Carta to American Revolution, he said, worked a structural reversal. "Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations."

The Anti-Federalists utterly rejected the argument. They took pen in hand and the new Constitution at face value, and under pseudonyms argued almost from syllogism. Major premise, from Federal Farmer: The Supremacy Clause establishes that the national constitution, laws, and treaties will be the supreme law of the land, displacing every contrary State law. Minor premise, from Brutus: The Necessary and Proper Clause will come to mean that no limit exists on areas over which the federal government has power. Conclusion, from An Old Whig: The federal government will have power to trump everything in the various State declarations, and so the people's rights are at risk.

Thomas Jefferson followed the Convention and ratification process from Paris as Minister to France. In letters, he expressed the rippling discontent many felt with the idea of an implied protection of rights—an implication resting only upon the self-restraint of the new federal government itself. That had not been enough at the time of Magna Carta; it had never been enough in the centuries since; and it was not enough now. To James Madison, in December 1787: "Let me add that a bill of rights is what the people are

entitled to against every government on earth, … and what no just government should refuse, or rest on inference."

But unlike the Anti-Federalists—who really wanted nothing from the new Constitution except to see it voted down—Jefferson saw a way through. To another friend, in February 1788: "I wish with all my soul that the nine first Conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they be, may refuse to accede to it till a declaration of rights be annexed … These are fetters against doing evil which no honest government should decline."

The vote did not go down exactly that way, but it was a fair approximation. We would have a new Constitution aiming, in the words of the Preamble, to "establish Justice" and "secure the Blessings of Liberty to ourselves and our Posterity." But as always, hard work remained on that "more perfect Union" part.

X. Debate on Adoption of the Bill of Rights (1789)

We all like to believe we live in the most extraordinary of times, and so we commonly hear that our nation today is the most fractious in history. But by any measure, when the First Congress assembled in March 1789, all was not harmony and grace. Five States had ratified in short order. But Massachusetts ratified on a very close vote, and proposed nine amendments to, and I quote, "remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government." With that, a cascade began that called into doubt our ability even to form a stable union. South Carolina ratified, but proposed two amendments. New Hampshire, twelve. Virginia, twenty. New York, thirty-three, while barely ratifying by a 30 to 27 margin. When Congress first met, Rhode Island had refused even to consider ratification, and North Carolina refused to ratify until Congress considered its own declaration of 20 proposed rights and 26 amendments.

So profound was the division that George Washington in his first inaugural address urged Congress to amend the fledgling Constitution after considering how best to "impregnably fortif[y]" the people's liberties while "safely and advantageously promot[ing]" public harmony. But he expressed every confidence that Congress would ably discern and pursue "the public good," never endangering "the benefits of an United and effective Government," and would keep at heart "a reverence for the characteristic

rights of freeman" and "a regard for the public harmony." Reverence for rights; regard for the public harmony. Take note of that. It was important to our first President.

It was likewise important to the First Congress. Another favorite speech is from the floor of the First Congress, in the 12th week of its very first session, when James Madison rose to move that body towards a Bill of Rights. Madison said he considered himself "bound in honor and in duty" to seek amendments to "render [the Constitution] as acceptable to the whole of the people of the United States, as it has been found acceptable to a majority of them." Like Franklin at the Convention, Madison said strive for unanimity, because many that struggled with us through the Revolutionary War feared that this new Constitution could not adequately protect the liberties for which we all fought. "We ought not to disregard their inclination," he said, "but, on principles of amity and moderation, conform to their wishes, and expressly declare the great rights of mankind secured under this constitution."

On first glance, the lesson seems obvious enough. This matter of rights—in its origin—was not about what sets apart each from the other. This was not about wedge issues or partisan goals. Our Founders viewed this conversation about rights as the means by which to draw this Nation more closely together. And so, this lasting impulse regarding rights that all persons of good faith feel is one on which we should patiently seek agreement together.

I think we can all admire that sentiment, even if we don't know quite what to make of it, or at least, how to achieve it today. It is so contrary to modern dialog and politics. What's more, I am keenly aware that I speak to a judicial audience. Every day you confront litigated cases on a host of important issues where agreement could not be reached, and perhaps never can be reached in a manner satisfactory to all. And is that really so surprising? Our entire discussion today about the history of these rights—their recognition; their protection—reflects bitter acrimony and difficult lessons obtained over centuries. It was, after all, only drawn swords that compelled King John to accept Magna Carta. Those battles were hard-fought, as are the battles before you today.

Before preparing my class, if I had heard of Roger Sherman, it hadn't stuck. From Connecticut, Roger Sherman is the only person to sign all four great charters of the United States. You've seen this painting, and there he is front and center, standing second from left between John Adams and, in the red waistcoat, Thomas Jefferson, together with Benjamin Franklin and Robert

Livingston presenting the Declaration of Independence—which he helped to draft—to John Hancock at the Continental Congress.

At the Constitutional Convention, Madison recorded Roger Sherman as the only spoken opposition to Mason's call for a Bill of Rights. Sherman did not oppose the idea of guaranteed rights; far from it. He simply believed the States' declarations of rights to be sufficient, since they were not repealed. But Sherman was also on the floor as a member of the First Congress when Madison spoke that day. He thought it impossible that a Bill of Rights could be drafted agreeably to the chamber, and even if it could, that it would never obtain the three-fourths support necessary in the States. In this, Sherman had no illusions:

> I do not suppose the Constitution to be perfect, nor do I imagine if Congress and all the Legislatures on the continent were to revise it, that their united labors would make it perfect. I do not expect any perfection on this side the grave in the works of man; but my opinion is, that we are not at present in circumstances to make it better.

Even with those doubts, Roger Sherman brought that day's debate to a close by inviting Madison to commence work towards a Bill of Rights in consultation with each and every member of Congress. Madison did, and so, Congress set its face towards our Bill of Rights. We know the results, and the Constitution was brought one step closer to its principal purpose of forming that "more perfect Union."

Of Roger Sherman, Thomas Jefferson later said, "That is Mr. Sherman, of Connecticut, a man who never said a foolish thing in his life." Let us take this last lesson from Mr. Sherman. Perfection will elude us in this world, but that is not reason to pause. We can—and we should—continue to seek it, together, as Americans.

Thank you.