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LEX TERRAE 800 YEARS ON: THE MAGNA CARTA'S LEGACY TODAY

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I am grateful for the chance to join such distinguished company to discuss the legacy of the Magna Carta and the 800 Year Struggle for Human Liberty, but I may perhaps open with a quibble. When I told my wife that I had been invited to help commemorate the anniversary of Magna Carta she told me: "Well, take care you do not *over*-commemorate it."

She had a point. For all its symbolic importance, the Magna Carta was really only one early step toward what at long last, and after long struggle, culminated in such milestones of human liberty as the Declaration of Independence and the Nuremberg Trials. The concept of individual rights as we understand it is hardly to be found in the

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Magna Carta, and the guarantees it provided were not initially available to all Englishmen, let alone all humanity. It was aimed only at protecting the aristocracy and its privileges against royal interference. The Magna Carta is one of the "charters of liberty granted by power,"[1] that according to James Madison was superseded by American Revolution and its *novus ordo seclorum*.

While we should here give measured praise to the Magna Carta as the great-great-grandfather of the American Constitution, we should not lose sight of its shortcomings and the ways the generation of 1776 improved on its precedent. The Magna Carta was an important step toward a jurisprudence of freedom—one improved by the American Revolution, and which today's legal profession has, alas, largely abandoned.

I.

For the development of the Anglo-American common law, probably the most important provision of the Magna Carta is section 39, which promises that "no freeman shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."[2] This phrase, "law of the land," or *lex terrae*, eventually became the Due Process of Law Clauses in our state and federal constitutions.[3]

What made the *lex terrae* provision so crucial is that here the King acknowledged that his mere dictates are not the law. He is instead subject to, and bound by, the law. In this principle is the seed of all

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[1] James Madison, *Charters* (1792), *reprinted in* JAMES MADISON: WRITINGS 502 (Jack N. Rakove ed., 1999).

[2] Magna Carta, (1215) (Eng.).

[3] *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 71-93 (2014).

free government, just as the opposite notion—that the will of the ruler is law—is the seed of despotism. If the ruler's words are not *ipso facto* law, then that means that there must be some instances in which the ruler's commands do *not* qualify as law, and we must then decide in any particular instance whether or not the ruler's commands qualify as law.

We find ourselves in the dilemma described in Plato's dialogue, *The Euthyphro*,[4] in which Socrates asks what is the good, and is told that the good is that of which the gods approve. Do the gods approve of it because it is good, he asks, or is it good because the gods approve of it? If it is good because the gods approve of it, then goodness is arbitrary—goodness is simply a function of the gods' say-so. They might just as well say something is good one day and bad the next. Goodness as a real quality then does not really exist. On the other hand, if the gods approve of it because it is good, then they must be determining whether it is good by consulting some criteria of goodness, which we might also consult. Goodness is then an objective quality, and a thing might be good even before the gods recognize it.

By acknowledging that not all of his dictates are law, King John's signature on the Magna Carta likewise implicitly recognizes the objectivity of law. Something is not law just because the king says it, and that means that the people—and particularly the lawyers—are in a position to ask whether or not something the King has said qualifies as law. "The king can send a man to prison," an English court declared in 1540, "[b]ut whether the cause for which he sent him to prison is lawful or not may be determined by the law; the statute of Magna Carta [declares] . . . that the king cannot treat his subject contrary to law."[5] By allowing for the possibility that the ruler's acts may

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[4] Plato, *Euthyphro* 10a-11b, *in* THE COLLECTED DIALOGUES OF PLATO 178-79 (Edith Hamilton & Huntington Cairns eds., 1973).

[5] PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 156 (2010).

be deemed unlawful, and creating room for deliberation over what is or is not the law, the Magna Carta plants the seed that eventually can grow into free, open, and lawful government. The law is the not the will of the ruler, but an abstraction to be determined by reasonable inquiry into principles.

This was what Sir Edward Coke saw in the Magna Carta almost exactly four centuries after its signing when he wrote the *Institutes of the Common Law*, the textbook studied by generations of law students, including those who grew up to write the United States Constitution. The second part of the *Institutes* opens with a lengthy exegesis of the Magna Carta, which explains that by "law of the land," the Charter promises to respect "the liberties such as the subjects of England have,"[6] from being arbitrarily taken away. If they are to be deprived of their freedom, it must be according to law—that is, some generally applicable rational principle, or, as Coke defined the law, "an artificial perfection of reason, gotten by long study, observation, and experience."[7]

Coke was writing in revolutionary times, at the forefront of party that opposed to the Stuart monarchy with a force that eventually led to civil war. The Stuart dynasty sought to reanimate the arbitrary, absolute monarchy that Coke and his allies believed had been repudiated in the Magna Carta. The tension between him and King James I rose as the courts opposed this revanchism, until at a dramatic confrontation in 1608, Coke insisted that the crown was subject to the law and was not above it. This, James said, was treason—to which Coke replied, "Bracton [a contemporary of the Magna Carta] has said that the King should not be under man but under God and the law."[8] According to an observer, the king "fell in that high indignation as

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[6] 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND §47 (reprinted by Prof'l Books Ltd., 1986) (1817).

[7] 1 *Id.* § 97b.

[8] PETER ACKROYD, REBELLION 24 (2014).

the like was never known in him,"[9] and James shortly thereafter dismissed Coke as Chief Justice of England. A *bas relief* sculpture of that confrontation appears on the bronze doors of the U.S. Supreme Court building.

It was in the seventeenth century, and thanks largely to Coke, that the so-called "myth of Magna Carta" took flight. Common-law historians have observed that the Magna Carta was not particularly revolutionary in its time, and that both John and subsequent Kings either repudiated it entirely or sought to rewrite it.[10] But Coke and his allies helped to foster the idea that the Magna Carta formally acknowledged the king's subjection to the law—which meant, to the test of rational principle. And it would be the common law judges who would apply that test.

Thus began a sort of incipient system of checks and balances, pitting the king against the courts in the same way and at the same time that the king was being pitted against Parliament.[11] "If any man by color of any authority where he hath not in that particular case, arrest, or imprison any man, or cause them to be arrested or imprisoned," wrote Coke, referring to the Stuarts' jailing of dissenters, "this is against [the Magna Carta] and it is most hatefull [sic], when it is done by countenance of justice."[12] In determining whether the king's actions had been in accordance with the "law of the land," the judges could inquire into the principles of justice—abstract questions of political philosophy—as well as into the traditions of English government.

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[9] *Id.*

[10] *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 22-23 (1956).

[11] *See* FRANCIS STROUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 510-11 (2d. ed., 1790) (Under Magna Carta, "[t]he command of the king . . . doth not mean the king's private will, but a legal command, issued in his name, by his judges, to whom his judicial power is intrusted [sic]").

[12] COKE, *supra* note 6, §§ 53-54.

Consider, for instance, Coke's discussion of the *Case of Monopolies*.[13] This case predated the Stuart monarchy—it was decided under Queen Elizabeth's reign in 1599, the same year *Hamlet* premiered. It involved the validity of a monopoly on the sale of playing cards in London. The court found the monopoly invalid, on the grounds that any trade which "prevent[s] idleness (the bane of the commonwealth) and exercise[s] men and youth in labour, for the maintenance of themselves and their families" are "profitable to the commonwealth."[14] The government's efforts to restrict economic freedom simply to benefit those fortunate enough to obtain such favors are "against the common law and the benefit and liberty of the subject."[15] A person who uses government power to forbid free competition "regards only his own private benefit, and not the common wealth" and brings about "the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families."[16] The monopoly was thus "utterly void, *vide* Magna Charter [sic]."[17]

In another case that same year, the Court of King's Bench invalidated a rule of the Tailor's Guild that required members to have half of their cloth finished by other members of the Guild.[18] When a Mr. Davenant refused to comply, he was fined, and when he refused to pay, Guild members tried to seize his goods. He sued, and Coke represented him, arguing that the rule was invalid. The court agreed, ruling that the monopoly was void because it violated the "liberty [protected by the] grand charter."[19] This was the case Coke later used

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[13] The Case of Monopolies (Darcy v. Allen), (1602) 77 Eng. Rep. 1260 (K.B.); 11 Co. Rep. 84b.

[14] *Id*. at 1262-63.

[15] *Id*. at 1263.

[16] *Id.*

[17] *Id*. at 1265.

[18] Davenant v. Hurdis, (1599) 72 Eng. Rep. 769 (K.B.).

[19] *Id.* at 772.

in the *Institutes* as his primary example of the liberties protected by the Magna Carta.[20] And it was on the basis of these precedents that Coke would lead the charge against royal monopolies in the Stuart years, culminating in Parliament's enactment of the Statute of Monopolies,[21] a statute forbidding most arbitrary restrictions on economic liberty, and which Chancellor James Kent later called the "Magna Carta of British Industry."[22]

Courts applying the *lex terrae* provision thus developed a system of protections against arbitrary government rule that secured certain "liberties of the subject" against government authority. In other words, in the absence of a written constitution, English courts used the *lex terrae* doctrine to secure a whole series of what are today called "unenumerated rights"—rights that eventually became the cherished rights of Englishmen.

II.

Coke and his admirers envisioned the common law as a process of reasoning toward general principles, which together formed the law, and that, thanks to Magna Carta, took precedence even over the king's dictates. For the king to overthrow these principles to aggrandize his power was therefore more than a revolutionary act—it was a kind of impiety toward the national creed that was the English common law. The essential component of that creed was that the word of the king is not necessarily law, but that the lawfulness of the government's acts is to be determined by reference to broader principles that can be understood through reason. In his 1680 *Discourses on Government*, Algernon Sidney—the great martyr to the Whig cause in the

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[20] COKE, *supra* note 6.

[21] *See* Statute of Monopolies 1623, 21 Jac. 1 c. 3 (Eng.).

[22] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 272 (Oliver W. Holmes, Jr. ed., 1873).

Glorious Revolution[23]—explained the meaning of the Magna Carta to Whigs: "[I]t was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should any way encroach upon them: and it cannot be said that the power of kings is diminished by that or any other law; for as they are kings only by law, the law . . . can take nothing from them, because they have nothing except what is given to them."[24]

The Magna Carta therefore came to symbolize to the American colonists the proposition that government is subservient to law, and they adopted its language sometimes verbatim into their state constitutions. In one 1817 case, New Hampshire's highest court was asked to determine whether a law that allowed town selectmen to enforce Blue Laws[25] violated the state Constitution. The plaintiff had been traveling on a Sunday, and was stopped by a local officer. The plaintiff argued that this detention power violated the "law of the land" provision of the state Constitution. That provision, the court declared, "was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law."[26] New Hampshire's citizens "seem to have been extremely anxious" that their rights would be "surrendered only to the will of the whole, or in other words, to the law . . . . The whole amount of this is, that the citizens of this state are subject only to the

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[23] Alas, largely forgotten today, Sidney was executed as part of a plot to assassinate James II. His *Discourses*—which like Locke's *Two Treatises* were framed as an answer to Robert Filmer's *Patriarchia*—were confiscated and passages have still never been recovered. Thomas Jefferson admired Sidney enormously, listing him along with Aristotle, Cicero, and Locke, as the authors of the "elementary books of public right." Letter to Henry Lee, (May 8, 1825), *in* THOMAS JEFFERSON: WRITINGS 1501: AUTOBIOGRAPHY/ NOTES ON THE STATE OF VIRGINIA/ PUBLIC AND PRIVATE PAPERS/ ADDRESS/ LETTERS (Merrill D. Peterson ed., 1984).

[24] ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT (Thomas G. West ed., Liberty Fund 1990) (1698).

[25] Laws that prohibit commerce on the Sabbath.

[26] Mayo v. Wilson, 1. N.H. 53, 57 (1817).

law."[27] The passage from the Magna Carta quoted in the state Constitution was therefore intended as a guarantee against arbitrary action by the government, and an assurance that state officials would operate solely in accordance with the law (which the court found had not been violated).

But American common law courts, like their British predecessors, also viewed the *lex terrae* principle as incorporating basic principles of justice. Thus in a 1789 South Carolina decision, a trial judge refused to confiscate property—in this case, seven slaves—brought into the state illegally.[28] The owners argued that they had been traveling at the time that the time the prohibition went into effect, and that the previous law, on which they had based their decision to immigrate, had encouraged slaveholders to come to South Carolina by guaranteeing their right to keep their slave property there. "To deprive them, therefore, of their property under these circumstances, and subject them to so heavy a penalty in addition to it, would be such an act of injustice, as the legislature never could have intended," their attorney argued. To seize their slaves "would be contrary to common right" because it would be "no less than holding out a boon to decoy with one hand, in order to strike a fatal blow with the other."[29]

Citing the Magna Carta, the attorney argued that the court's duty was to "square its decision, with the rules of common right and justice. For there were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made against those principles, they are null and void."[30] The court agreed that a law that contradicted "the plain and

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[27] *Id*. at 58-59.
[28] Ham v. McClaws, 1 S.C.L (1 Bay) 93 (1789).
[29] *Id.* at 93.
[30] *Id.* at 94.

obvious principles of common right, and common reason, are absolutely null and void,"[31] and refused to infer that the legislature had intended such a result. Instead, it interpreted the statute narrowly: "the legislature never had it in their contemplation to . . . subject the parties to so heavy a penalty for bringing slaves into the State, under the circumstances and for the purposes, the claimants have proved."[32]

But by far the most important consequence of the Magna Carta's incorporation into American common law was the principle that the government may not arbitrarily take property from one person and give it to another. In another South Carolina case, the trial court relied expressly on the Magna Carta to invalidate an act of the colonial assembly that had tried to resolve a land dispute.[33] Two property owners had claimed property under conflicting deeds, and in 1712, an act was passed to resolve the dispute by vesting title in one of the claimants.[34] Eighty years later, the heirs of the other sued, and argued that the 1712 act violated the Magna Carta because it deprived a person of property without allowing him (or his heirs) a judicial hearing. While there might be "great and urgent occasions" where the state could seize property through eminent domain, it could not justly "interfere with private property, by taking it from one man and giving it to another" without a fair trial.[35] In a one-paragraph opinion, the court agreed. The 1712 law had been "against common right, as well as against Magna Charta," because it took away the property of one person and gave it to another "without any compensation, or even a trial by a jury of the country, to determine the right in question." The

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[31] *Id.* at 95-96.
[32] *Id.* at 96.
[33] Bowman v. Middleton, 1 S.C.L. (1 Bay) 252 (1792).
[34] *Id.* at 251.
[35] *Id.* at 252 (argument of counsel).

law was therefore "void," and "no length of time could give it validity, being originally founded on erroneous principles."[36]

This rule—that government had no authority simply to take property from one party and vest it in another—would become one of the cornerstone principles of American law until it was crippled by the advent of rational basis scrutiny in the 1930s.[37] In his 1819 oral argument in *Dartmouth College v. Woodward*,[38] Daniel Webster would explain that the New Hampshire Constitution's "law of the land" provision protected the principles of lawfulness against arbitrary government acts—and therefore barred the legislature from transferring property from one party to another. Not every legislative enactment could qualify as the "law of the land"; that would beg the question, since it would mean that the legislature could pass unconstitutional statutes simply by passing such statutes. In other words, a constitutional provision forbidding the legislature from taking away liberty except by the "law of the land" could not mean that the legislature could deprive people of liberty by passing an act that deprived them of liberty. Such an interpretation would render the "law of the land" provision "an empty form, an idle ceremony," and make judges mere servants of the legislature—charged only with "execut[ing] legislative judgments and decrees" instead of "declar[ing] the law."[39]

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[36] *Id.*

[37] Though never expressly abandoned, the proposition that the government may not simply seize property from one party and transfer it to another has been reduced to a near-nullity by decisions such as *Kelo v. City of New London*, 545 U.S. 469 (2005), which by applying the rational basis test to the determination of whether a taking violates the Public Use Clause, have allowed the government to transfer property between private parties whenever the government asserts that its actions will benefit the general public in some fashion. *See also* TIMOTHY SANDEFUR & CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA (2d ed. forthcoming 2016).

[38] 17 U.S. (4 Wheat.) 518 (1819).

[39] *Id.* at 580-83 (argument of Mr. Webster).

Note the distinction Webster makes here between *declaring the law* and *executing legislative judgments*. To *declare the law* in Webster's sense meant to interpret, construe, comprehend and articulate the principles—both explicit and implicit—that comprise the rationality of the legal system. This he contrasted with the ministerial role of an administrator who simply applies statutes. Speaking from the *lex terrae* tradition, Webster envisioned the judge as an expositor of principles of reason, not as an enforcer of legislative proclamations.

The principles inherent in the "law of the land" were, according to Webster, both procedural and substantive: "By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."[40] But if the basic principles of lawful government meant that citizens must enjoy protection for their property under general rules, then any legislative act that redistributed property simply because those in power thought it preferable for the property to be held by someone else, or simply because some people had more votes than others and exercised the raw political power[41] to obtain a forcible transfer of property, must violate *lex terrae*. Accordingly, as Bernard Siegan demonstrated, courts regularly invalidated legislative redistributions of property on the grounds that they violated the principles inherent in lawful rule guaranteed by the Magna Carta or its progeny.[42] If a legislature were to declare "that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.," the Supreme Court declared in 1874, would be "none the less a robbery because it is done under the

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[40] *Id.* at 581 (argument of Mr. Webster).

[41] Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1692 (1984).

[42] Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 75-78 (2003).

forms of law." It would be "not legislation," but "a decree under legislative forms," and thus would violate the *lex terrae* principles of the Due Process of Law Clause.[43]

Although that particular manifestation of the principle has been undermined by the rise of rational basis theory,[44] general *lex terrae* reasoning can still be found today. Consider *Gideon v. Wainwright*,[45] the 1963 decision holding that criminal defendants have a constitutional right to an attorney paid for by the state. *Gideon* is a prime example of classic *lex terrae* reasoning. The Constitution makes no reference to a defendant's right to a public defender. Although the Sixth Amendment guarantees a person's right to counsel, that right refers only to an attorney the accused pays for. But *Gideon* held—not as a matter of the Sixth Amendment alone, but as a function of the Due Process of Law Clause of the Fourteenth Amendment—that a public defender is essential to the fair and just administration of the law. Legal process is so complicated that without counsel, it would appear to be an essentially arbitrary proceeding: "'[e]ven the intelligent and educated layman'" is typically "'incapable'" of defending himself in court,[46] and without an attorney an innocent person might be "'put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible'"—might be convicted not because of his guilt but "'because he does not know how to establish his innocence.'"[47] Due process of law thus requires that he be adequately represented. The concurring

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[43] Citizens' Savings & Loan Ass'n v. City of Topeka, 87 U.S. 655, 664 (1874).
[44] *See Kelo*, 545 U.S. 469.
[45] 372 U.S. 335 (1963).
[46] *Id.* at 344-45 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).
[47] *Id.* at 345.

opinions in *Gideon* sparred over the applicability of the right to counsel as an element of due process of law, but the majority was working well within the *lex terrae* tradition inaugurated by the Magna Carta.

III.

So far we have seen how the Magna Carta's guarantee of lawful rule established inchoate protections for individual freedom. Yet if in some sense the Magna Carta contained elements of natural *law* reasoning, it was *not* a natural *rights* document. On the contrary, the Magna Carta was one of those documents, like the English Bill of Rights or the Edict of Nantes, that represented only promises by the throne to respect certain specified freedoms of the subject. This made it one of what James Madison called "charters of liberty . . . granted by power," as opposed to "charters of power . . . granted by liberty" that marked the American system. The United States had "set an example"—a "revolution in the practice of the world"—by seeing liberty as the right of all people, and not a privilege granted by the sovereign. This reversal, Madison wrote, should be considered "the most triumphant epoch of [world] history."[48]

Madison and his contemporaries admired the Magna Carta as an early model for their own revolution, but however liberal it and other charters of liberty might be, they were still nothing more than pledges by those in power that could also be revoked by that same power. If freedom was only a privilege that the king gave to his people out of his own magnanimity, then freedom could also be taken away whenever the king chose. But as one American patriot wrote, the colonists "could not easily be persuaded that their . . . civil rights flowed from the munificence of Princes. Many of them had never heard of Magna Carta, and those who [did] . . . did not rest their

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[48] Madison, *supra* note 1.

claims to liberty and property on [it] . . . . They looked up to Heaven as the source of their rights, and claimed, not from the promises of Kings but, from the parent of the universe."[49]

The danger that "charters of liberty granted by power" could be too easily revoked was not just a theoretical objection. Monarchs had often changed their minds after issuing "charters of liberty," and had retracted them. The Magna Carta itself had been nullified almost immediately by King John, and several subsequent monarchs had either altered it or refused to acknowledge its authority.[50] Perhaps the most infamous example of the fragility of such charters came with the revocation of the Edict of Nantes. In 1598, King Henry IV had issued the Edict, promising religious toleration to Protestants. For decades, Protestants and Catholics had murdered one another, most infamously in the St. Bartholomew's Day Massacre of 1572, during which unknown thousands were slaughtered. Henry himself was only spared when he converted to Catholicism. (Three decades later, he was assassinated anyway, after more than a dozen attempts on his life.) Although the Edict proclaimed Catholicism the national religion, it also allowed Protestants to "live and abide in all the cities and places of this our kingdom . . . without being annoyed, molested, or compelled to do anything in the matter of religion contrary to their consciences," so long as they complied with the secular laws. This, the king proclaimed, would "leave no occasion for troubles or differences between our subjects."[51]

The Edict remained in place for nearly a century—until 1685, when King Louis XIV revoked it and proclaimed Protestantism ille-

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[49] David Ramsay, *The History of the American Revolution* (1789), *reprinted in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 719, 724 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

[50] PLUCKNETT, *supra* note 10.

[51] NOEL B. GERSON, THE EDICT OF NANTES 150 (1969).

gal. The country's Protestants fled the revival of religious persecution, perhaps as many as 400,000 of them emigrating to Britain, Sweden, and the North American colonies. Among them was Apollos Rivoire, whose son, taking the Anglicized name Paul Revere, became a leading Boston patriot. The revocation of the Edict terrified the Protestants of Great Britain, though, because at the time that country's king, too, was a Catholic, and he might very well use his powers to restrict Protestant rights there.[52] In looking back at the experiences of their forefathers, America's revolutionary generation had good cause to regard royal charters of liberty as pie-crust promises, which crumbled all too easily.[53]

Not only had monarchs proven willing to betray their promises of individual freedom, but they had even taken back the charters they had issued to the American colonies. The most stunning such instance came in the years after 1660, when the restored Stuart Monarchy—first Charles II and then his successor, James II—sought to reorganize the North American colonies and bring them more directly under the crown's control. This, they hoped, would ensure that the colonists produced more profit for the mother country. Charles II decreed that what is now Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut, were to be deemed the "Dominion of New England," governed under a single man who answered solely to the king. In 1684, Charles sent an agent, Edmond Andros, to take control of the new Dominion. Along with his deputy Joseph Dudley, Andros dismissed the Massachusetts colonial assem-

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[52] *See* ACKROYD, *supra* note 8, at 456.

[53] The term "pie crust promises" is probably best known from the film *Mary Poppins*, in which Mary uses the term to refer to promises "easily made, easily broken." But the term is much older. In her 1861 poem "Promises Like Pie Crust," Christina Rosetti urges her beau to "Promise me no promises, / So I will not promise you: / Keep we both our liberties, Never false and never true."

bly and instituted autocratic rule, jailing those who resisted and rejecting the colonists' assertions of British liberties. "You have no more privileges left you, than not to be sold as slaves," Dudley told one prisoner who asserted his right to due process of law under the Magna Carta.[54]

When, in 1687, Andros grew frustrated that Connecticut officials continued to operate under their colonial charter, he demanded that they hand it over, too. A few months later, New York and New Jersey were added to the Dominion, and their charters were also repealed. This one-man rule came to an end only by the good fortune of the Glorious Revolution of 1688, when English rebels forced James II from the throne. When New England colonists learned of the overthrow, they arrested Andros and sent him back to England. Only three years after it had been proclaimed, the "Dominion" was dissolved and the old colonies restored.

Almost a century later, good Massachusetts men like John Adams still seethed at the memory, and warned their countrymen that George III's ministers were "but the servile copyers of the designs of Andross [and] Dudley [*sic*]."[55] Adams had good cause for this allegation: in the Declaratory Act of 1766, Parliament had asserted its right to legislate for the colonies "in all cases whatsoever"[56]—a declaration that Pennsylvania's James Wilson called a "Sentence of universal Slavery" contrary to Magna Carta.[57] When it came time for the colonists to declare independence, they listed among Parliament's malefactions "taking away our Charters, abolishing our most valuable

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[54] 1 JOHN STETSON BARRY, THE HISTORY OF MASSACHUSETTS 490 (4th ed. 1856).

[55] John Adams, *Novanglus No. II*, *reprinted in* JOHN ADAMS: REVOLUTIONARY WRITINGS 1755-1775 at 397 (Gordon Wood ed., 2011).

[56] Declaratory Act of 1766, 6 Geo. III c. 12, 27 STATUTES AT LARGE 19-20 (Pickering ed., 1767).

[57] James Wilson, *An Address to the Inhabitants of the Colonies* (1776), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 48-49 (Kermit L. Hall & Mark D. Hall eds., 2007).

Laws … altering fundamentally the Forms of our Government … suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."[58]

These revocations proved to the colonists that the British monarchy, like all monarchies, depended fundamentally on the idea that subjects had only the freedoms given to them by the crown. That idea they could no longer abide. As a delegate to the North Carolina Ratification Convention would say in 1788, the Magna Carta was "only an act of Parliament," which "Parliament can at any time, alter . . . . In short, it is no more binding on the people than any other act . . . . The people of Great Britain have no Constitution to control their Legislature—the King, Lords and Commons can do what they please."[59] Noah Webster agreed: "Magna Charta may be considered as a contract [which] the King, Lords, and Commons may either amend or annul at pleasure."[60] True, Great Britain enjoyed a wider degree of freedom than virtually any other society, but those freedoms were no stronger than the paper on which they were written.

Even after the Revolution was over, the founders were so skeptical of paper pledges of rights that Madison, Wilson, and other Federalists would at first demur when Americans demanded that the Constitution include a Bill of Rights. In their view, such pie-crust promises had proven worthless in times of crisis. "The celebrated magna charta [*sic*] of England was broken over and over again," said Benjamin Rush at the Pennsylvania Ratification Convention in

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[58] THE DECLARATION OF INDEPENDENCE para 3 (U.S. 1776).

[59] *The Debate on Congressional Elections Continued: Britain and America Contrasted, reprinted in* 2 DEBATE ON THE CONSTITUTION 863 (Bernard Bailyn ed. 1993).

[60] Noah Webster, *Giles Hickory* No. 1 (1787), *reprinted in* 1 *supra* note 59, at 672.

1787.[61] Nor were bills of rights necessary in a government which proceeded not from the king but from the people.[62] Better to focus instead on designing a government to include checks and balances and other structural protections to prevent the government from acting tyrannically. These men changed their minds when they decided that a Bill of Rights would at least cause little harm, but they never altered their belief that freedom could never be secured solely through charters. And they took care to frame the Bill of Rights so as not to imply that these rights were being granted to the people, but that the list was simply an acknowledgment of rights the people already possessed.[63]

IV.

The American patriots saw freedom not as a privilege the government provides, but as a birthright it must protect. And that meant that the Magna Carta—limited as it was to England and later to Great Britain—could not suffice as a pronouncement of freedom. With the Declaration of Independence, they shifted the foundation of their claim to liberty away from the chartered rights of Englishmen, and toward the universal principles of justice applicable to all human be-

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[61] *Benjamin Rush Speaks against a Bill of Rights*, *reprinted in* 1 *supra* note 59, at 816.

[62] *See, e.g.*, THE FEDERALIST No. 84 at 578 (J. Cooke ed., 1961) (Alexander Hamilton); James Wilson, *Remarks at the Pennsylvania Ratification Convention, reprinted in* 1 HALL & HALL, *supra* note 57, at 195-96.

[63] Thus the Bill of Rights does not grant freedom of speech, but promises that the government will not "abridge" that freedom, U.S. CONST. amend. I; does not give people the right to possess firearms, but promises not to "infringe[]" that right, *id.* amend. II; does not give people the right to be secure in their persons, but promises not to "violate[]" that right, *id.* amend IV; does not give people property, but promises that it will not be "taken" except through legal process, *id.* amend V—and, most of all, does not purport to list all of the rights of the people, but on the contrary, insists that the "enumeration of certain rights" must not be taken as "deny[ing] or disparag[ing] others retained by the people." *Id.* amend. IX.

ings. As John Quincy Adams observed, "the Great Charter of Runnymede with all its numberless confirmations … never ascended to the first foundation of civil society among men."[64] Thus, in July 1776, the revolutionaries dispensed with "all claims to chartered rights as Englishmen. Thenceforth their charter was the Declaration of Independence. Their rights, the natural rights of mankind. Their government … founded on the self-evident truths proclaimed in the Declaration."[65]

Political philosophers have argued over many arcane and subtle aspects of the theory of natural rights for which the founders pledged their lives, fortunes, and sacred honor, but its basic propositions are easily understood. George Mason put the point succinctly in June 1776, when he wrote in the Virginia Declaration of Rights that "all men are by nature equally free and independent and have certain inherent rights," which include "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[66] Government does not give people these rights—people already have them, and they "cannot, by any compact, deprive or divest their posterity" of them.[67] Jefferson would put it even more concisely a month later in the Declaration, when he wrote that "all men are created equal," and are "endowed" with "inalienable rights," which include "life, liberty, and the pursuit of happiness." Government exists to "secure" rights, not to grant them, and if it turns instead to destroying those rights, "it is the right of the people to alter or to abolish it."

When the founders spoke of all people being created free and equal, they were not merely uttering slogans or platitudes. They were making important statements about human nature and the nature of

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[64] JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 12-13 (1839).
[65] *Id.* at 9.
[66] Virginia Declaration of Rights § 1 (1776).
[67] *Id.*

politics. Their starting point was equality: every person possesses himself or herself, and no person is singled out to rule another person by automatic right. There are exceptions—adults are the natural governors of children, for example—but even this is not really an exception, since it is only a temporary and limited condition, and parents do not *own* their children.[68] Human beings in the abstract—normal, mature adults, who communicate with one another and use reason—have no fundamental entitlement to rule one another. As Jefferson put it, nobody is born with a saddle on his back, and nobody is born wearing spurs.[69] Rather, anyone who purports to govern another must justify his right to do so. Merely making the assertion is not enough. As the Continental Congress put it in 1775, "If it [were] possible for men who exercise their reason, to believe that the divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others … the inhabitants of these Colonies might at least require from the Parliament of Great Britain some evidence, that this dreadful authority over them has been granted to that body."[70]

This was the idea Madison considered the "most triumphant" achievement of the American Revolution. The presumption of freedom ran counter to the principles which underlay the British monarchy and which gave rise to the Magna Carta itself. Those principles held that freedom was restricted unless the subject could persuade the monarchy to give him some freedom or other. In a society where "charters of liberty are granted by power," the citizen bears the burden of proof and must justify his or her right to be free. But where

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[68] *See* John Locke, *Second Treatise of Civil Government* ¶ 118 (1689), *reprinted in* JOHN LOCKE: TWO TREATISES OF GOVERNMENT 346 (Peter Laslett ed., rev. ed. 1963).

[69] Letter to Roger C. Weightman, (June 24, 1826), *in* Peterson, *supra* note 23, at 1517.

[70] Declaration of the Causes and Necessity of Taking Up Arms (1775), 2 JOURNALS OF THE CONTINENTAL CONGRESS 140 (1905).

people are presumptively free, they may choose to create a government by writing a constitution—a "charter of power granted by liberty." The government's powers are the exception—freedom the general rule. And that proposition—the idea that people are fundamentally free and equal, and that they create government to protect their freedom, rather than vice-versa—marked the revolutionary core of the Declaration of Independence. That is why, unlike the Magna Carta and similar charters, which speak in humble terms, praying that the king grant the people certain freedoms, the Declaration uses bold language—"candid[ly]" submitting "facts" to the world out of "decent respect" for public opinion, but asking leave of no man. Such "freedom of language and sentiment," wrote Jefferson, "becomes a free people claiming their rights, as derived from the laws of nature, and not as the gift of their chief magistrate." To "flatter" kings in hopes of receiving freedom would "ill beseem those who are asserting the rights of human nature . . . . [K]ings are the servants, not the proprietors of the people."[71]

The patriots of 1776 did not regard the Magna Carta lightly, of course. They admired it, like the Petition of Right and the English Bill of Rights, as a step toward the establishment of free government—one of mankind's "happy dawnings of Liberty," in the words of an anonymous patriot in 1778, which "must be considered as imperfect Emblems of the Securities of the present grand period."[72] To use an analogy John Quincy Adams might have appreciated,[73] the tradition

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[71] Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *reprinted in* Peterson, *supra* note 23, at 120-21.

[72] 1 Hyneman & Lutz, *supra* note 49, at 457.

[73] *Cf.* ADAMS, JUBILEE, *supra* note 64, at 119 ("Fellow citizens the ark of *your* covenant is the Declaration of Independence."). John Quincy Adams adhered to more orthodox Christian beliefs than his father did. *See generally* FRED KAPLAN, JOHN QUINCY ADAMS: AMERICAN VISIONARY (2014). The senior Adams took care to emphasize that the American founding was a wholly secular enterprise and that the founders "never…had interviews with the gods, or were in any degree under the inspiration of Heaven, more

of Magna Carta was the Old Testament of legal liberty to the chosen people; the *novus ordo seclorum* would be its New Testament, a promise of freedom to all mankind. The American Revolution came not to abolish the law but to fulfill it[74]—to supersede it and secure the liberties at which the Magna Carta had aimed, and fallen short. And that freedom would be the birthright of all people, not the cultural inheritance of a few.

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than those at work upon ships or houses, or laboring in merchandise or agriculture." John Adams, *Defence of the Constitutions of Government of the United States of America, reprinted in* 4 CHARLES FRANCIS ADAMS, ED., THE WORKS OF JOHN ADAMS 292 (1851). The federal and state constitutions, he wrote, "were contrived merely by the use of reason and the senses." *Id.* There is no reason to think John Quincy Adams disagreed with this.

The Declaration of Independence gracefully bestrides the religious and secular worlds, being based on the laws of both nature and nature's god. This is because while one might base a belief in natural rights on religious premises, such a connection is not necessary. As Adams' reference to mechanical or agricultural trades suggests, natural rights theory rests on propositions about human nature which might themselves be the result of God's will, but only in the sense that the mechanical laws of shipbuilding or the agricultural laws of farming might ultimately be an expression of divine will. None of these theories is in any sense supernatural. *See further* Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights,* 20 HARV. J.L. & PUB. POL'Y 655, 659 (1997) ("one can no more disparage the idea of natural law (or natural rights) because eighteenth-century thinkers attributed their origin to a divine power than one can disparage the laws of physics because eighteenth-century scientists believed that such laws were also established by God."); Harry V. Jaffa, *Equality as a Conservative Principle, in* HOW TO THINK ABOUT THE AMERICAN REVOLUTION 13, 42 (1978) ("[w]hile not supposing for a moment that the Founders did not believe in the actual existence of God, their assumptions about Equality—which include assumptions about the subhuman and the superhuman—are independent of the validity of any particular religious beliefs."); Ayn Rand, *Man's Rights*, *in* THE VIRTUE OF SELFISHNESS 124, 126 (1964) ("The Declaration of Independence stated that men 'are endowed by their Creator with certain unalienable rights.' Whether one believes that man is the product of a Creator or of nature, the issue of man's origin does not alter the fact that he is an entity of a specific kind—a rational being— that he cannot function successfully under coercion, and that rights are a necessary condition of his particular mode of survival.").

[74] *Matthew* 5:17.

V.

Sadly, today's lawyers—both conservative and liberal—have largely abandoned both the *lex terrae* reasoning of the Magna Carta tradition as well as the natural rights theory of the Declaration of Independence. Instead, today's leading legal intellectuals employ a purportedly more "realistic" Positivism, which scrupulously avoids abstract principles and is doubtful toward claims of individual freedom. In large part, this jurisprudence—which I call the Dogma of Deference[75]—aims to minimize the role of the courts, seeing them as "counter-majoritarian institutions,"[76] and hence fundamentally suspect. Rather than using the tools of the common law to discover and apply the artificial reason of the law and limit the state's power to deprive individuals of their liberties, the Dogma of Deference seeks to foster effective democratic decision-making. The result of this approach is largely to abandon whole categories of individual rights to the "vicissitudes of political controversy,"[77] not withstanding the Constitution's promises of protection.

This Positivism is essentially a resolute anti-intellectualism that scoffs at abstractions (the search for principles was just "churning the void in the hope of making cheese," said Positivism's godfather, Oliver Wendell Holmes[78]), and sees *lex terrae* reasoning as essentially corrupt. Under this view, for a judge to delineate the basic principles of justice and bar government from engaging in arbitrary actions that violate those principles on the grounds that they do not qualify as "due process of law," is a sham; the judge is really only imposing his

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[75] *See* Timothy Sandefur, *Disputing the Dogma of Deference,* 18 TEX. REV. L. & POL. 121 (2013).

[76] *See generally* Ilya Somin, *Democracy and Judicial Review Revisited*, 7 GREEN BAG 2d 287 (2004).

[77] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[78] Letter to Alice Stopford Green, (Aug 20, 1909), *in* THE ESSENTIAL HOLMES 116 (Richard a. Posner ed., 1992).

personal, subjective values from the bench. But it is not the alleged subjectivism that is the problem here: on the contrary, to the Positivist, *all* values are subjective, and it is the role of the government to impose the populace's *aggregated* subjective preferences that are, by definition, the law. One leading spokesman for this position, Fourth Circuit Court of Appeals Judge J. Harvie Wilkinson III, adheres to it to such an extreme that he contends that "[t]he judicial commitment to rationality and logic may [should] invade a democracy's right to select 'flawed' reasons for its actions so long as they meet with popular consent."[79] Another adherent of this view, Justice Antonin Scalia, echoed this claim not long ago when he argued that "[o]ne of the benefits" of judicial deference to the majority's decisions "is that the people, unlike judges, need not carry things to their logical conclusion"[80]—that is to say, voters may act without regard to principle.

If this is a "benefit," it comes at the expense of the entire *lex terrae* tradition. That tradition held—and our Due Process of Law Clause mandates—that the government is *not* above the law, but that it must abide by the law and act in a consistent and principled manner. The *lex terrae* tradition—and its heir, the theory of "substantive due process"—held that it is possible to discern real principles in the law, to correctly answer legal questions, and to say that an act purporting to be law is in reality *not* law, even if promulgated in accordance with all procedural rituals of legislating. Modern jurisprudence abandons this principle and concludes not only that there are no right answers to legal questions, but that there is *really no such thing as law*: there are only commands issued by the ruler, in this case the majority. The difference between law and the will of the ruler—the great advent of

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[79] J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law,* 56 U. CHI. L. REV. 779, 793 (1989).

[80] Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

Magna Carta—is thus abandoned, and there is nothing left for lawyers to reason about. The essential nihilism of this position becomes clear in Judge Wilkinson's recent book, *Cosmic Constitutional Theory*, which announces that *all* legal theory is essentially meaningless—there simply *is no* valid, consistent body of reason behind the law.[81]

To reiterate the point I made at the outset, the Magna Carta's pronouncement that not everything the ruler does qualifies as "law" is the crucial seed from which free government may potentially grow. Positivism denies this, and asserts that law is fundamentally the command of the ruler—and rights are only permissions granted by the ruler. But laws are not commands, as the influential legal philosopher H.L.A. Hart (who called himself a Positivist) proved. First, laws are general rules, while commands are directed to specific people for particular reasons, and are usually temporary, while laws remain in place indefinitely. Second, laws are not always backed up by punishments: there is no punishment if a person fails to sign a will, for instance, even though it is a law that a will must be signed to be valid. Marriage laws require a person to get a license, but there is no *punishment* for those who fail to do so, and some laws even recognize unlicensed "common law marriages." The rules for entering into a marriage or for writing a will are laws even though they cannot plausibly be called "commands," and they are not backed up by punishment.[82]

Another way in which laws are not commands involves what the legal philosopher Lon Fuller called "the force which ideas have without reference to their human sponsorship."[83] To answer legal questions, citizens and judges do not ask the ruler to issue a command; they consult the law, which has an internal logic from which they can

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[81] J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2013).
[82] H.L.A. HART, THE CONCEPT OF LAW 19-23 (2d ed., 1961).
[83] LON L. FULLER, THE LAW IN QUEST OF ITSELF 110 (1966).

decide whether or not something is legal. If asked to determine whether some past event was legal or not, a judge will not pronounce a command, but will instead determine that the thing that was done—the contract that was signed, or the will that was drafted—was legal or illegal *at the time that it was done*. Even when the Supreme Court issues controversial constitutional rulings, it pronounces that the logic of the Constitution *has always* meant such-and-such, that its natural logic *has always* provided this answer, even if nobody realized it at the time. Law has a quality of permanence that commands lack. That is why we speak of a "legal system." Commands do not hold together as a "system."

But if laws are not commands, then the rights secured by laws are not simply manufactured by decree. Rights, beginning with our right to own ourselves, are qualitatively different from privileges the state grants and may abolish. The right to oneself is "inalienable" in the sense that no matter how much we try, we cannot give up our own minds, our own responsibility, our own hopes and fears. Even if it were possible to imagine that the government gives each of us our rights, *where did it get them?* If rights are the gift of the state, then the state must either have acquired them from us to start with, or must have simply manufactured them by fiat. The first option would imply that we have rights to begin with—which Positivism denies. But the latter option only makes sense if the government is qualitatively different from us commoners, so that it can create rights, but we cannot.

In this theory, government is fundamentally superior, deriving its powers by mere *ipse dixit*. Jeremy Bentham, another ur-Positivist, endorsed this when he wrote that law is only "a discourse, expressive of the wish of a certain person, who, supposing his power independent of that of any other person, and to a certain extent sufficiently

ample … is a legislator."[84] In other words, law is whatever the person with the most power declares it to be. The ruler may then parcel out rights among the people as he sees fit. This theory answers the *Euthyphro* dilemma by concluding that whatever the gods praise is good because the gods praise it—and thus there is no such thing as goodness.

One of the most effective spokesmen for the Dogma of Deference, the late Robert Bork, believed indeed that law is a form of command, dictated by the legislature, which the judge should interpret, but not question. He denounced the theory of substantive due process that our Constitution inherits from the Magna Carta, because it enables courts "to judge the constitutionality of law by deciding, without any criteria to structure the judgment, that the substance of what the law commanded was not 'due.' There could be no intellectual structure to substantive due process because its existence was unjustified, indeed, contradicted, by the text" of the Constitution.[85] This was not true—the "criteria to structure the judgment" are the longstanding rules of *lex terrae* reasoning—but as a resolute moral skeptic, Bork believed that there are no such things as moral truths, only purely subjective value-judgments, and therefore nothing for courts to inquire into.[86] Consequently, he turned away from the essence of the common law tradition, concluding that the job of a judge is not to do justice—to employ the principles of reason and tradition that form the basic legal structure guaranteed by the Due Process of Law Clause—but simply "'to apply the law.'"[87] This was precisely the dismal fate Daniel Webster predicted in his *Dartmouth College* argument, when he said that accepting any legislative decree as *ipso facto* law would render constitutional guarantees "an idle ceremony" and

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[84] 3 WORKS OF BENTHAM 223 (1843).
[85] ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 55 (2003).
[86] *See* SANDEFUR, CONSCIENCE, *supra* note 3, at 128-30.
[87] ROBERT BORK, THE TEMPTING OF AMERICA 6 (1990) (quoting Oliver W. Holmes).

leave judges with the task of "execut[ing] legislative judgments and decrees" instead of "declar[ing] the law."[88]

Bork argued for "judicial restraint" because he feared that judges are frequently tempted to abuse their office and impose their own vision of right by invalidating actions of the legislature. This he thought a dangerous step toward autocratic rule by unelected judges. "The attempt to define individual liberties by abstract moral philosophy," he wrote, "is actually likely to make them more vulnerable."[89] Yet Bork supported this argument in an interesting and revealing way, by quoting a passage from Robert Bolt's classic play, *A Man for All Seasons*. In fact, that play, a brilliant meditation on the relationship of individual judgment and the demands of the law, actually stands for the opposite position, and reveals with remarkable clarity the flaws in Bork's quest for judicial restraint.

As Bork describes the scene, More is pressured by his daughter and her fiancé, Roper, to arrest a man they suspect of spying. They have no evidence, but More's daughter says "that man's bad."

> *More*: There is no law against that.
>
> *Roper*: There is! God's law!
>
> *More*: Then God can arrest him . . . . The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal . . . . The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate . . . . But in the thickets of the law, oh, there I'm a forester …. And he should go, if he was the Devil himself, until he broke the law!
>
> *Roper*: So now you'd give the Devil benefit of law!

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[88] Trustees of *Dartmouth College* v. Woodward, 17 U.S. (4 Wheat.) 518, 580-83 (argument of Mr. Webster).

[89] BORK, TEMPTING, *supra* note 87, at 353.

> *More*: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> *Roper*: I'd cut down every law in England to do that!
>
> *More*: Oh? … And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down— . . . d'you really think you could stand upright in the winds that would blow then?[90]

Note that in this scene, More is embracing the *lex terrae* tradition—*not* loyally enforcing the will of the executive authority in the manner Bork considers to be the judicial duty. The "laws" More refuses to cut down are not the statutes of Parliament, but the unwritten "law of the land" protected by Magna Carta. Indeed, the whole point of *A Man for All Seasons* is More's steadfast application of the demands of the moral principles that he believes are embedded in the law. More insists that King Henry's marriage is *unlawful*, notwithstanding the contrary assertions of the sovereign authority. Not everything the ruler does is law, he declares: "if [the world] is flat, will the King's command make it round? And if it is round, will the King's command flatten it?"[91] When told that he is threatened with justice if he refuses to obey, he answers, "Then I'm not threatened."[92] The King's actions are unlawful because they are "directly repugnant

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[90] ROBERT BOLT, A MAN FOR ALL SEASONS 37-38 (Vintage Books 1962) (1960).
[91] *Id.* at 77.
[92] *Id.*

to the Laws of God . . . and more to this the immunity of the Church [as] promised . . . in Magna Carta . . . ."[93]

Where Robert Bork believed it to be the task of judges "to apply the law as it comes to them from the hands of others," and to "ensur[e] that the democratic authority of the people is maintained in the full scope given by the Constitution,"[94] Robert Bolt's character believes that the judge has a more important role: to determine whether the ruler's acts qualify as "law" by discerning and applying the principles of justice that inherent in the law, guided by the light of his reason and conscience. "Conscience" here means the application of judgment about the principles of lawful rule. In the absence of that judgment, a judge becomes only a servant of the ruler's will, "apply[ing] the law as it comes to them from the hands of others."[95] Bork considers that a virtue. But Bolt recognizes that it subverts the rule of law and replaced it with the rule of men. "[W]hen statesmen forsake their own private conscience for the sake of their public duties," declares More, "they lead their country by a short route to chaos."[96] And, as Paul V. Niemeyer writes, "[t]he same chaos" results from "judicial decisionmaking without resort to conscience."[97]

Obviously judges should not impose their own subjective preferences as law. Neither should the legislative or executive branches. Our constitutional system does not give the lawmaking authority *carte blanche*, but instead pledges it to a system of normative principles which all branches must respect. An engaged judiciary is crucial

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[93] Id. at 92. More did, in fact, cite Magna Carta in his defense. *See* William Roper, *Life of Sir Thomas More, Knight* (c. 1556), *reprinted in* A THOMAS MORE SOURCE BOOK 16, 60 (Gerard Wegemer & Stephen W. Smith eds., 2004).

[94] BORK, TEMPTING, *supra* note 87, at 4.

[95] *Id.*

[96] BOLT, *supra* note 89, at 13.

[97] Paul V. Niemeyer, *Law and Conscience*, 69 NOTRE DAME L. REV. 1011, 1012 (1994).

to enforcing that system and protecting our freedoms, by determining whether a government action that purports to be law satisfies the normative tests for lawfulness. A properly engaged judiciary must employ moral reasoning—must employ conscience—to perform this task. This consists not of a judge's own personal views, but of the "artificial perfection of reason, gotten by long study, observation, and experience."[98] "At some point," writes G. Edward White "any appellate judge . . . confronts the paradox that judging is ideological, and because it is ideological it requires in its practitioners efforts to show that the ideological position being advanced in a given case is a position based on sources external to its author, a position others with different preconceptions can share."[99] The conscience the judge must employ is the conscience of the Constitution.

In reality, it is Bork and other critics of substantive due process who, by making war on the *lex terrae* tradition—a tradition central to the constitutional system of checks and balances—endeavor to cut down the laws to get at the Devil. It is from that tradition, incorporated into our Constitution in the form of substantive due process, that such individual rights as the right to be secure against arbitrary deprivations of life, liberty, and property, derive. Whatever their Devils might be—for Bork, the elitist liberal morality reflected in cases like *Roe v. Wade*,[100] and for more left-leaning judges, the precedent protecting property or contract rights, such as *Lochner v. New York*[101]—enemies of substantive due process are willing to cut down eight centuries of common law tradition to get at those Devils, and establish in place of that legacy the idea that government acts are law

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[98] COKE, *supra* note 7.

[99] G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 367 (Oxford University Press, rev. ed. 2007) (1988).

[100] 410 U.S. 113 (1973).

[101] 198 U.S. 45 (1905).

simply because the government has chosen to act. Bolt's play counsels us against chopping down substantive due process, and replacing it with a passive judiciary that loyally enforces whatever edicts are handed to it by the legislature. Where would we all hide, the independent judiciary being flat?

Judicial review is necessary to forcing our government to operate subject to the law, instead of above the law. Cutting down judicial review would leave everyone exposed to the daunting, irresistible power of shifting, unpredictable legislative majorities. That is why the founders thought independent courts so essential, to serve as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[102] Without judicial review, without an engaged judiciary, the Constitution's promises of security would be valid only so long as the legislature chose to abide by them, and the instant the legislature chose to violate them, those protections would be rendered worthless. In some areas of the law, that fate has nearly become a reality.[103] In eminent domain cases,[104] in cases involving economic liberty,[105] and in many others, the laws have already been laid flat, and citizens have few places to hide when legislatures or administrative agencies decide to deprive them of those rights.[106]

Today's fight against substantive due process is essentially a fight against lawfulness itself—against the centuries-old tradition set in motion by the Magna Carta and which culminated in our own constitutional system. This anniversary should return our attention to

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[102] THE FEDERALIST No. 78, *supra* note 61 at 521-30 (Alexander Hamilton).

[103] *See* TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 123-40 (2010).

[104] *See, e.g., Kelo, supra* note 46.

[105] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[106] *See further* Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society's Values*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 381, 402-03 (2012).

the enterprise of law as an active engagement with the principles of reason that bind us by their logic. We owe our ancestors, and our descendants, nothing less.