Before I begin I would like to thank the Court for its invitation to speak today even though it was a little disconcerting to pick up the phone one day last month and hear: "This is the Supreme Court of Connecticut." After a moment of panic passed, I was pleased to learn that *Magna Carta* would be the centerpiece of the 2015 Law Day program because this year we celebrate the 800th anniversary of the famous document. I also received the clear message from the chief justice that the talk should last no longer than 15 minutes--and one should always listen to a chief justice even though trying to trace the origins and afterlife of *Magna Carta* in such a short time is a challenging task.

So, to begin: What is *Magna Carta*? Really, we should start with the narrower question: What is a *carta*? It is a word in Latin—the language used for official communication in medieval England and all of Europe for that matter—that means a document—what we usually translate as "charter." During the European Middle Ages, that is roughly from the 6th to the 15th centuries, a charter was used to make an official record of some kind of agreement, whether a donation of land to a monastery in return for the prayers of the monks, a treaty, the manumission of serfs, or various contracts produced in those societies. Charters would usually be preserved in the archive of the

church or monastery involved in the agreement or in the royal archives if the issues touched the king. A scribe would write the terms of the agreement on parchment—animal skin prepared to act as a writing surface—and then a person in authority (a bishop, abbot, lord, or king) who was acting as guarantor of the agreement or was one of the parties to the agreement, would attach a wax impression of their seal (for a king, usually a monarch seated on a throne or on a horse) —thus indicating their agreement to or certification of the terms of the charter.

So far so good. But given that there were thousands upon thousands of these kinds of agreements during the Middle Ages, why do we remember this one in particular, and why call it the *Magna Carta?* The Latin word *magna* can mean large or great. In this case, the word was understood at first to be simply large, in the sense of physical size, to distinguish a post-1215 version of *Magna Carta* from a smaller charter (called the Charter of the Forest) that was issued with it. The document only became "great" over the course of time. It is the journey from simply the large charter to the great charter that we will explore today.

What did this charter contain? It detailed the conditions agreed to in 1215 by the English king as the price to retain his throne in the face of a rebellion of the barons, the great men or territorial lords of the kingdom. The king in question, John, was the son of the dynamic king Henry II, whose judges had formulated many of the principles and procedures of what was becoming known as the common law, (to distinguish it from the canon law of the Church). The term also emphasized that the common law applied to *all* subjects of the king, overruling the prerogatives of the lords to judge their own vassals and dependents.

John was also the younger brother of the great crusading king, Richard the Lionhearted. As you can imagine, John was at a distinct disadvantage when compared to such a father and such a brother. It would have been difficult for anyone to live up to the achievements of his father, who had gathered together the lands in Britain and France that made up the so-called Angevin Empire, or his dashing hero of a brother who embodied the chivalric and crusading traditions of the age and who conveniently managed to die from a crossbow bolt in battle.

To make a long story short, John could not compete. He tried, but he failed miserably. He lost English crown lands in France to an aggressive French king. He wielded the administrative tools of his father—the common law courts and the treasury– to extract as much money as possible from his barons and other subjects to support his war. If he had been victorious, the barons might have forgiven him. He wasn't and they didn't. The barons felt they had been exploited and abused by a failed king. John's personality, which contemporary chroniclers described as mercurial, vicious, and untrustworthy sealed his fate with the barons. They rebelled and in order to stave off complete defeat, John acceded to baronial demands to change his behavior.

The conditions that the barons set out in the Charter, and to which John appended his seal when they met at Runnymede, covered a wide range of practices, almost all of which demanded that the king end specific abuses that had so enraged his subjects. Most would eventually disappear from the statute books as they only addressed the concerns of the barons in 1215. The Charter ensured John's compliance with a provision that allowed the barons to enforce the terms of the charter with appropriate violence against the king.

The Charter did include several provisions that would prove to have a long afterlife. John made the following promises in the Charter:

+ (39) No free man 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.

+ (40) To no one will we sell, to no one deny or delay right or justice.

No 'scutage' or 'aid' [essentially a tax] may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter.

This is the language that would make the Charter great. But that transformation was still far in the future.

The Charter was after all a treaty to end a rebellion, and as soon as he felt safe, John, with the aid of the Pope, repudiated the agreement. If John had ultimately prevailed in the subsequent armed struggle with the rebels, *Magna Carta* might have disappeared from history. As it happens, John continued to lose and after he died, when many barons were about to embrace the French prince as the new heir to the English throne, the few remaining loyal men around John's son, who was 9 at the time of his

father's death, deployed the *Magna Carta* to recover the loyalty of the English aristocracy.

In 1219, this boy, Henry III, or really his protector, the great knight William Marshal, re-issued the *Charter*; it served essentially as a coronation oath, a custom that had often expressed a king's commitment to rule justly. It was from that date that the text of *Magna Carta,* reissued in different editions and with various changes, became a part of political discourse in medieval England. Subsequent kings reissued the charter to affirm their commitment to its provisions, usually when they needed a special grant of money from the barons and eventually from the Commons when they gathered for a Parliament.

After 1215, the language of the Charter's key provisions preserved ideas about law and liberty that would reach far beyond the original intentions of the drafters—both the kings and the barons. The Charter, for example, did not create the right to trial by jury. Henry II's judges had originally empanelled juries of local men whose knowledge helped to resolve disputes over land tenure. Juries also gathered the names of notorious criminals whom the crown sought to prosecute. It was only after trial by battle, which

had been the primary means to resolve disputes over the rightful possession of land or to demonstrate guilt or innocence in criminal accusations, lost the sanction of the Church did trial by jury become the standard judicial procedure. The language of the Charter seems to have helped secure the right to a jury trial for all Englishmen once it became the standard method of discovering guilt or innocence.

In the same way, the language of the Charter certainly inspired common law judges to develop ideas of due process and *habeas corpus,* and the prestige of the Charter helped establish them as fundamental principles of the law. The same dynamic ran through the evolution of the idea of consent to taxation. The idea of consent to had always been part of the culture of medieval rulership: the king was expected to *request* aid from his barons. But it took centuries for the idea to take hold that one group of men in Parliament could actually speak for the whole kingdom and thus provide consent to royal requests for taxation. Still, it was convenient to have the precedent for consent articulated in the Charter.

Perhaps what mattered the most in the language of *Magna Carta* was the idea that even the king was not above the law. Scholars continue to debate how deeply that

essential message of *Magna Carta* affected the way kings behaved or how English people thought about the king and his relationship to law. The reissuings of *Magna Carta* did not eliminate threats of royal tyranny or guarantee the freedoms detailed in the Charter. The Charter certainly did *not* prevent English kings after 1215 from trying to rule without the advice of their great men, or the evolving institution of parliament, or to dispense justice according to their needs and whims, or to secure funds without any real process of consent from the people. However, the Charter remained on the statute books.

The Charter truly became Great in the fullest sense of the word *only* in the 17th century when the kings James I and then his son Charles I aggressively tried to extend the rights of the crown; they thought of themselves as ruling by divine right and seemed to dispense with the traditional lip-service paid to the idea of the rule of law articulated in the Charter. Parliament resisted their royal encroachments on individual liberties and the jurisdiction of the common law, sparking a struggle that ultimately led to revolution and many years of civil war. The man most responsible for elevating the status of the Charter in the first years of the contest between the crown and Parliament was a former

Chief Justice of the King's Bench, Sir Edward Coke (pronounced Cook). Steeped in the culture of precedent that animated the common law, Coke embraced the growing sense that English laws in fact derived from an even more ancient constitution, first propounded by the Saxon kings of England. The laws had then developed slowly and organically through the decisions of common law judges. According to Coke: "The auntient and excellent Lawes of England are the birthright and the most auntient and best inheritance that the subjects of this Realm have, for by them he injoyeth not only his inheritance and goods in peace and quietness, but his life and his most deare Countrey in safety."

Magna Carta became crucial for Coke's vision of the history of English law. The Great Charter was transformed in Coke's rhetoric from a treaty cobbled together to limit the power of one king, to a sweeping reconfirmation of pre-existing common law traditions and individual liberties. The re-issuings of the Charter were the public declarations by the kings of England that they accepted the fundamental idea of the rule of law. *Magna Carta* became a rallying cry for liberty in this time of rebellion against

perceived tyranny. As Coke said in Parliament: "*Magna Charta* is such a fellow, that he will have no Sovereign."

Coke made the centrality of the Charter explicit in one of his famous commentaries on English law: "This Charter of our Liberties or Freemans Birth-right, that cost so much blood of our Ancestors…is that brazen wall, and impregnable Bulwark that defends the Common Liberty of England from all illegal & destructive Arbitrary power whatsoever, be it either by Prince or State endeavoured." It helped that Coke and his fellow Englishmen were used to venerating a sacred text. They had embraced the Bible ever since Henry VIII had rejected the authority of the Catholic Church. Just as unmediated reading of the Bible revealed the way to salvation, so, too, did invocation of *Magna Carta* provide a map to individual liberty.

In the following century, American colonists who had grown up with Coke's vision of *Magna Carta* turned to the language of the Charter in their own growing dispute with the English crown and Parliament. For example, John Adams wrote a response to the Stamp Act in 1765 that argued in the language of the Charter: "By the great Charter no amerciament shall be assessed except by the oath of Honest and Lawfull

men of the Vicinage. And by the same Charter no Freeman shall be taken or imprisoned or be disseised of his Freehold or Liberties or Free Customs passed upon nor condemned but by the Lawfull judgment of his Peers or by the Law of the Land." The language and principles of the Charter helped animate American conceptions of liberty. More than 200 years later, we can even find references to *Magna Carta* in relatively recent decisions of the Supreme Court of Connecticut.

The Founding Fathers came to consider individual rights as natural and inalienable for all free men, a solution that freed American liberty from dependence on English precedents. However, the Charter was remembered as a crucial moment when the people claimed their rights. As Tom Paine wrote: "The Charter which secures the freedom in England, was formed, not in the senate, but in the field; and insisted on by the people, not granted by the crown." Interestingly, just as Americans embraced the natural origins of individual liberties in the 18th century, English legal culture saw the origin of rights in an increasingly powerful Parliament. In both settings, however, the Charter remained a symbol of the antiquity of the rule of law.

It should be clearer, now, I hope, that the way we usually remember the Charter is profoundly a-historical, that is: we are reluctant to see the Charter as a product of its particular time and place. The attractions of a simpler story, in which *Magna Carta* was the expression of ancient English liberties, are still undeniable. It is surely comforting to believe that our individual liberties and the rule of law are deeply rooted in our culture and history. But the truth is always more complicated--and more interesting. We should not be content just to celebrate the mythic *Magna Carta*. In fact, I think it is crucial to understand that *Magna Carta* is really part of a much longer struggle to establish the principles of the rule of law and individual liberty, and by doing so we find a salutary reminder that we should not be complacent. We need to be ready to defend those hard won rights, so as not betray the evolving legacy of *Magna Carta*.