Rice lecture

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It is a pleasure to be here to deliver this year's lecture in honour of Justice Phillip Rice here in Alice Springs in the heart of this wide brown land, and which Phil Rice loved so much.

For some time it has seemed to me that there are, broadly speaking, three kinds of judges: those who remember that they were once advocates; those who don't remember that they were ever advocates, or at least don't remember accurately; and the third class, those who never actually cease being advocates.

Judges of the second class, that is, those who have forgotten that they were advocates once, sometimes exhibit a very selective form of amnesia. This condition first begins to exhibit itself shortly after appointment to the bench when it becomes apparent from the judge's comments to counsel, usually in the form of well-meaning suggestions as to how the presentation of counsel's case might be improved, that the judge is beginning to discover that he himself was one of the finest advocates who ever drew breath. This discovery is a source of great personal satisfaction to those who make it.

The second symptom of the emergence of this syndrome is the judge's willingness to share the joy of this growing realisation with the people appearing before him.

In cases where the syndrome is well advanced, and I am happy to say that I have known only a handful of these, the judge can become so captivated by this exhilarating discovery that the demonstration of the fact that the judge was the ablest advocate of his generation, and remains the cleverest person in the courtroom, becomes the most important aspect of each day in court—a state of affairs which is apt to alarm the clients who have the old fashioned idea that the case is all about them; and to discommode the lawyers appearing in the case, while they smile and grovel obsequiously in gratitude for the judge's display of wisdom, are desperately trying to get on with presenting the case.

You will notice that I have referred to the judges of this second class by the masculine gender. That is not mere laziness of expression. The fact is that I have never seen a female judge who exhibited this syndrome.

Judges of the third class are the most difficult of all for the lawyers appearing before them because they tend to give the appearance that they have some investment in the outcome of the particular case which predates the argument. Most advocates recognise that the cab rank rule obliges them to do their best for their client in a particular case; and so long as one works for a variety of clients, one can fairly easily maintain a degree of professional detachment so that one does not give the appearance of having taken a partisan commitment to the bench.

In earlier times in Australia, there were some eminent counsel who appeared so consistently for one side in a series of controversies that they seemed to internalise the arguments they put, not always successfully, as counsel for their clients. And once they came to the bench, old scores were settled—perhaps too efficiently, for everyone else's comfort.

Happily, this phenomenon is now no longer frequently encountered in this country. It may, however, be on the verge of a comeback with the emergence of plaintiffs' lawyers and defendants' lawyers who seem to act invariably for one side. This phenomenon is much more advanced in the United States, where experience suggests that any innovation in the conduct of the legal profession is something to be avoided.

The Hon Justice Phillip Rice was very much a member of the first class of judges. Perhaps that was because of the varied nature of his professional career and his broad experience of life. He spent two years in the Australian Navy as an able seaman. After completing his studies, he worked as a part-time academic, he served as an officer for many years in the Naval Reserve, culminating in two years as the Judge Marshall for the Royal Australian Navy. He made a major contribution to the legal profession, serving seven years as Chairman of the South Australian Bar Association. He served as a Justice of the Supreme Court of the Northern Territory from 1985 until his untimely death in 1991. In his conduct as a lawyer and a judge, he showed that he valued deeply the mutual respect shared between the bench and the legal profession and the symbiotic relationship which is the very lifeblood of our legal system.

I hope that most judges would like to be grouped with Justice Rice in the first category of judges.

Despite a peripatetic professional life, he chose Alice Springs as his home. It is fitting that this lecture should be delivered here. And it is an honour to have been asked to give this lecture in his memory.

As you all know, the 800th anniversary of the signing of *Magna Carta* took place in June this year [2015].

Over the last few months, you have no doubt heard a lot about *Magna Carta*. What you heard has, almost certainly, been quite positive, bordering on the wildly enthusiastic. And, in a way, that is fair enough because there can be no denying that *Magna Carta* was, in its way, an expression of the important idea that those who govern should themselves be governed in some way: government should be limited; there should be rules that impose limits on those who exercise power over others.

Our American cousins, currently the most powerful of the English-speaking peoples, have always been very enthusiastic about *Magna Carta*, which they regard as the first great statement by human kind about the protection of human rights under the rule of law. When Eleanor Roosevelt launched the Universal declaration of human rights at the United Nations on 1 January 1949, she expressed her hope that the declaration "may well become the international *Magna Carta* for all men everywhere." After the assassination of President Kennedy in 1963, a monument was erected at Runnymede in tribute to his memory as a defender of free government.

But we should take all this enthusiasm for *Magna Carta* with a grain of salt. In particular, we should not be beguiled by the complacent notion that *Magna Carta* was a manifestation of a peculiarly English genius for constitutional government to be emulated worldwide by those of an inferior political imagination.

The idea of a government of laws, not of men, had been around long before 1215. It was older than Cicero, having been, quite obviously, the principal inspiration of the structure of the Roman Republic. And in its evolving medieval iteration, the idea was being actively championed by Europe's first law school at the University of Bologna for nearly one hundred years before King John met his barons at Runnymede.[1]

The much more radical idea, that the political authority of government comes from the community of the governed, rather than from divine authority mediated through the king as God's anointed, began to emerge in Europe at the end of the thirteenth century in the work of John Duns Scotus and his colleagues in Scotland and, a little later, in the works of Marsiglio of Padua in Italy. This was very much an international project, and it was a project of scholars rather than the political elite.

In sober truth, *Magna Carta* was not a declaration of human rights guaranteed by the rule of law to which we become heirs as part of an Anglophone birthright. In reality, it was not even a first step on that journey. It was calculated to preserve the feudal privileges of a tiny fraction of the population: the Norman barons and prelates of the church who were, collectively, among the least attractive people who have ever lived on the planet.

Professor Plucknett said many years ago that *Magna Carta* was a political deal between King John and his barons designed to prevent the Angevin kings playing "ducks and drakes with feudal custom."

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Professor Jenks, in a famous article debunking what he called *The myth of Magna Carta*[2], described the meeting at Runnymede as

> "a melodramatic and somewhat tawdry scene in a turgid and unwholesome drama."

The view of *Magna Carta* expressed by Yeatman and Sellar in their famous *1066 and all that*[3] is not so very far from the truth. Yeatman and Sellar said:

> "Magna Charter … was the first of the famous Chartas and Gartas of the Realm and was invented by the Barons on a desert island in the Thames called Ganymede. By congregating there, armed to the teeth, the Barons compelled John to sign the Magna Charter, which said:
>
> a. That no one was to be put to death, save for some reason (except the common people).
>
> b. That everyone should be free (except the common people) …
>
> d. That the barons should not be tried except by a special jury of other barons who would understand."

If we take, for example, the famous promise in cl. 39 that "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land," we can see that this promise offered no comfort to the unfree people, i.e. the 'villeins', who made up at least half, and perhaps even four-fifths, of the population.[4] Under the charter, the King and his barons remained perfectly free to treat their 'villeins', who were, of course, Englishmen, at their will.

In cl. 40, the King famously promised: "To no one will we sell, to no one will we deny or delay, right or justice." This did not help the 'villeins', or indeed even free men, in the courts of the barons. Clause 40 afforded no protection against the arbitrary power of the barons. At that time, the barons held their own courts and administered what they were pleased to call justice in them. The charter thus preserved to the barons a much exercised opportunity for irresponsible, arbitrary and, indeed, oppressive government. The grandiosity of the barons' demands should not conceal that they were asserting the brutal prerogative rights of local garrison commanders of an occupying power.

Further in this regard, by cl. 34, the royal writ of 'Praecipe' was abolished to secure to the manorial courts of the barons the monopoly of suits concerning ownership of land.[5] And at this time, control of land meant control of the economy—land law was truly the law of the land. And it is a sobering thought in this regard that one-quarter of the freehold land in England is still owned by the descendants of the barons to whom William the Conqueror distributed it after 1066.

And so, in a very real sense, ordinary English people were actually victims, rather than beneficiaries of *Magna Carta*. This should hardly be surprising, given the kind of people who procured its execution.

The central socio-political fact about *Magna Carta* was that neither John, nor his barons, identified with or, indeed, shared any sense of community or fellow feeling with the people they ruled. None of John or his barons would even have identified himself as an Englishman. It is most unlikely that many, if any, of them spoke English. English would not be spoken at the King's Court until the time of Edward III in the mid-fourteenth century.

As you all know, John himself was a very bad man. Even by the standards of his time, he was remarkably deceitful and cruel. He had his nephew, Arthur, blinded and then, it is said, John murdered him with his own hands. He had Matilda de Briouze, the most eminent noblewoman of the time, and her eldest son, imprisoned and starved to death in Corfe Castle.

By any measure, John was also a bad king. In 1204 he lost the provinces of Normandy and Anjou to Philippe Auguste of France. He then spent ten years soaking his subjects with taxes to raise the funds to attempt to recover them: to that end, he tripled the revenues raised from the sweat of the English. He then failed ignominiously in his campaign on the continent in 1214 as a result of his own abject leadership which included, unusually for the Plantagenets, a display of personal cowardice.

John was such a bad king that, even though 'John' has been, for eight hundred years, by far the most popular English Christian name for male children, no subsequent English king, except John's own grandson Edward I, would name his first born son 'John'. No one wanted to tempt the fates by offering England another John as its King.

John's siblings, the Plantagenet children of Henry II, were referred to, by their contemporaries, as the 'Devil's Brood'. They were recognised at the time as terrible people. The best of them, Richard I, was a violent, feckless and irresponsible adventurer. He was, it is true, highly regarded by the Norman aristocracy, but only because they too were violent, feckless and irresponsible adventurers.

Richard spent only six months during his ten-year reign actually in England. On Crusade, Richard proved to be one of history's great oath breakers, murdering in cold blood 3000 Saracens who had surrendered on his promise of mercy. Later on, he was content to see his English subjects oppressed mightily to raise the enormous ransom necessitated by his irresponsibility.

And, because Richard did not see his way clear to doing his husbandly, and kingly, duty by his Queen, the fair Berengaria, they did not produce an heir to the throne. And so his realm was left, upon his death, to the tender mercies of brother John.

What we can say of the Plantagenet family is that they were God's way of saying that hereditary monarchy is a very bad idea; but this message seems to have been lost on the Normans.

The barons with whom John made his pact were little better than John himself. They were lawless brigands who chafed at any attempt to civilise them. *Magna Carta* was an expression of that recalcitrance. It was essentially a political reaction by the barons to the initiatives of Henry II whereby the common law being developed by his judges was to be applied equally to all his subjects including, indeed most especially, the barons.

If the common law needs heroes, it was not Archbishop Stephen Langton and the barons, but Henry II who deserves that status as the real founder of the common law. Henry II, as Winston Churchill said, sought to "curb

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the baronial independence … [and so] planned a system of royal courts, which would administer a law common to all England and all men."

As noted by Edward Rubin, the researches of Pollock and Maitland have amply demonstrated that, as a matter of history, it is to Henry II and his justiciars that we must look for the creation of the common law as a body of rules administered throughout the realm.[6] In this, the better historical view of the development of the common law, the king, and the sovereign power initially embodied in the king, was the true fountain of justice.

Henry, of course, was no saint. He bridled at the notion that he was king under the law. Henry's relationship with his lawyers was sometimes rocky. By all accounts he was a man of terrible temper: when thwarted, he would have fits of rage in which he would fall to the floor and tear the rushes, which served as medieval carpets, with his teeth.

Henry, although he could not speak English, was one of the better educated men of his time. A measure of how rustic his barons were may be gleaned from the fact that the relatively sophisticated Henry's favourite entertainer was a gentleman named 'Roland the Farter'.

If it be thought that I am indulging unfairly in hindsight against these people who were, after all, just men according to their own lights, it has to be said that those lights were very dim.

The charter was avowedly anti-Semitic in its protection of the barons' interests, with cll. 10 and 11 protecting landowners against the claims of their Jewish creditors. The barons' attack on England's Jews was particularly noteworthy for its stupidity, quite apart from its anti-Semitism. From 1175, there had been a level of Jewish immigration which was very beneficial to the English economy. It provided England with facilities for obtaining credit. Without Jewish credit, the economic development which had begun to take place in England could not continue, and no further credit would be available to the barons if they were to insist upon the right not to repay their debts. This simple fact of economic life seems to have been lost on these truly awful people.

And lest it be thought that I am indulging in a misplaced sense of Irish superiority about the Normans, I freely acknowledge that, at the time of *Magna Carta*, the only functioning mechanism of political change in regular use among my Irish forebears seems to have been fratricide.

But the Irish have always had the virtue of being honest. Dr Johnson thought so anyway. He said: "The Irish are an honest race, for they seldom speak well of one another."

And to speak honestly about *Magna Carta*, it is necessary to acknowledge that there was very little in it for anyone other than the barons or prelates of the church to celebrate. It was not an accident that the common people of England were barely mentioned in *Magna Carta*: their absence reflected the fact that they, and their interests, were not represented in the conflicts which it sought to resolve. And so for several hundred years, it did not loom large in public consciousness.

Indeed, *Magna Carta* was not even called the 'Great Charter' as a description of its legal significance. It came to be described as the Great Charter by virtue of the usage adopted by the clerics who were responsible for its custody because it was physically larger than its contemporary document, the Charter of the Forest, which had been written on a smaller piece of parchment. So *Magna Carta* was simply the big piece of parchment as opposed to the small piece of parchment.

It was Sir Edward Coke, in the course of his work as a parliamentary spokesman for what would later become recognisable as the Whig project in English politics, who became the sponsor of the adulatory view of *Magna Carta*, what Edward Jenks described as "The Myth of *Magna Carta*." Speaking of Coke's time, Jenks said:[7]

> "It was an age in which historical discoveries were received with credulity, in which the canons of historical criticism were yet unformulated."

"Doubtless, more than one of Coke's contemporaries (John Selden, for example) must have had a fairly shrewd idea that Coke was mingling his politics with his historical research. But, for the most part, those competent to criticise Coke's research were of his way of thinking in politics, and did not feel called upon to quarrel with their own supporter. Zeal for historical truth is apt to pale before the fiercer flame of zeal for political victory. It is a tribute to Coke's character and ability, that he imposed his ingenious but unsound historical doctrines, not only on an uncritical age, but on succeeding ages which deem themselves critical."

In the course of Coke's promotion of the Petition of Right, and in the second book of his *Institutes* written after he left the bench, he presented *Magna Carta* to the political nation as a guarantee of individual liberty and parliamentary government. Coke's work provided the foundational myth of the English State which inspired the English Whigs. And it was this inspiration which also drove the political imagination of the American colonists. It was Coke the visionary politician, and not Coke the judge, whose work was the great dynamic force in the movement to constitutional monarchy in England over the succeeding centuries.

In an address in March this year [2015] to the friends of the British Library, Lord Sumption observed that, before Coke, English ideas of limited government owed more to Aristotle and Thomas Aquinas than to *Magna Carta*. Until Coke began to trumpet the myth of *Magna Carta* as an original expression of the special English genius for constitutional government, *Magna Carta* had little claim on the English imagination. Lord Sumption made the telling point that in Shakespeare's play 'King John', there is not even a mention of *Magna Carta* or of the incident at Runnymede in June 1215.

All that having been said, there is one aspect of *Magna Carta* which is indeed worth celebrating by those whose professional business it is to support the rule of law.

Clause 45 promised that: "We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well."

And cl. 17 provided that "common pleas shall not follow our Court, but shall be held in some fixed place." This meant that litigants and lawyers and the judges of the common pleas did not have to follow the king's progress around the country, and it also separated the Court of Common Pleas from the king's direct influence. It also helped to concentrate the lawyers in London with the result that the Inns of Court were established.[8]

These two clauses are worth celebrating because, in the long and disputed historical record of the common law, they proved to be, at one stroke, the birth notice of the legal profession and of the judiciary as an arm of government.

At the time John signed *Magna Carta*, the judges had a great deal of direct personal contact with the King himself. We know this because they "often marked their cases 'loquendum cum rege'[9]" that is, 'to be discussed with the king'. The practice reflected the political reality that the judges were not then independent of the executive government of the day; rather, they were directly dependent for their authority upon the king. Indeed, it seems that the practice of direct consultation with the king may have given rise[10], at least in part, to the grievance addressed by cl. 45 of *Magna Carta*.

Clause 45 did not make it into the 1216 re-issue of the charter or the third edition sealed by Henry III in 1225 but the idea of a professional judiciary supported by an independent legal profession had been unleashed. And it was unstoppable.

And so the idea that the exercise of the judicial power of the state should be entrusted exclusively to those with an expert understanding of the law gained through professional training and experience and imbued by that training and experience with a professional ethos of disinterested personal restraint, has been a central dynamic in the development of the common law since these very first moments of self-consciousness.

This really was important. The symbiotic relationship between the judiciary and the legal profession, the organised mutual dependence of each side of the profession upon the other, became the characteristic institution of the common law system distinguishing it from developments in continental Europe.

One obvious lesson of all this is that the rights of ordinary people have never been the free gift of heaven, much less of aristocracies. But there is another lesson to be learned from this time. It is that the rule of law which we enjoy is not the result of some home-grown English genius for self-government, but of the civilising work of scholars from several countries over hundreds of years in recovering the lessons of the past and envisioning the possibilities of the future. It was very much an international effort in which generations of scholars from different lands inspired each other to think hard about the idea that governments should be good, and that this idea involved responsibility to the governed.

In this regard, in this year's celebrations of *Magna Carta*, we should not lose sight of an instrument which was much more significant in establishing the rights of the governed against those who would govern. I am speaking of the Scottish declaration of independence, formally known as the *Declaration of Arbroath*.

The declaration was a letter to the Pope in which the Scottish nobles, then good Catholics all, urged His Holiness to lift the interdict on Scotland which Edward II of England had procured after the great Scots victory at Bannockburn under Robert the Bruce in 1314.

Bannockburn is, of course, the battle celebrated in the rugby anthem 'Flower of Scotland' in which Proud Edward and his army are sent homeward 'tae think again'. As a matter of history, they did go home, and they thought again, and then they came back and be at the tripes out of the Scots many times.

But the military defeats only generated greater popular defiance focused upon the great declaration of Scottish nationhood. At the time the declaration was signed, everyone knew what Bannockburn meant in terms of establishing a permanent Scottish resistance to English overlordship.

While none of John's barons would have called himself an Englishman, the Scots who signed the *Declaration of Arbroath* saw themselves quite unequivocally as Scotsmen: they identified themselves as members of a self-conscious nation.

For reasons which I cannot explain, the fact is that the Scots were the best educated people in Europe. Scottish noblemen grew up with, and were educated alongside the children of their fellow Scots.

And it did not escape the notice of these decent people that the children of the poor took to education as quickly as the children of the gentry. The church educated and then recruited these young people who became learned scholars like Duns Scotus and his pupils over these generations who ultimately came to write the *Declaration of Arbroath*.

After Bannockburn, Edward II tried to achieve through religious pressure what he could not achieve by force of arms. He sought the Pope's assistance by imposing an interdict which meant that the Scottish could not administer the holy sacraments in territory ruled by Robert the Bruce.

In 1320, Bruce was excommunicated by the Pope for the second time (the first occurred after his murder of his rival, John Comyn, in a church). Robert the Bruce was a man's man.

All Scots, from the highest churchman down to the lowliest farmhand, chose to ignore the Pope's interdict. With the recapture of Berwick on Tweed by the Bruce, Scotland was now free of the English invader and this was the time for the Scots to make a statement. It was decided to do so in a letter to Pope John XXII.[11]

The declaration was signed by eight earls and forty-five barons. The men who signed the declaration took it upon themselves to speak for all Scots, and in doing so, advanced an unusual view of the relationship between the governed and those who govern them.

The declaration says of King Robert that:

> "Him, too, divine providence, his right of succession according to our laws and customs which we shall maintain to the death, and the due consent and assent of us all have made our Prince and King …
>
> By him, come what may, we mean to stand."

This was a new idea: that the authority of the king came, not as God's anointed, but from the people he ruled, and what the people had given, they could take back.

And they made it plain that they would not tolerate any king, even one as great as the Bruce, who made peace with the English. The declaration went on:

> "Yet if he should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours, and make some other man who was well able to defend us our King; for, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom—for that alone, which no honest man gives up but with life itself."

The declaration thus:

> "Placed an entirely new concept, democratic nationalism, above the modified feudalism which hitherto was characteristic of [Scottish] society and which, as absolute and complete feudalism, was current everywhere else in Europe. Next, it declared the will of the people of all strata of society for independence. There had never been anything like this before. It proclaimed a doctrine that the king ruled by consent of the ruled which, for that time and long thereafter, was alike to heresy … No other people had dared to say such a thing, and no other were to do so for a long time, and certainly not with the consent of the ruler himself."[12]

The second great idea in the declaration is the notion that political freedom is in no way dependent on the good grace of the ruler towards particular social or racial groups. It is an entitlement which we all share, in virtue of our common humanity. And by all, the declaration meant all of us. As the text of the declaration tells us, in the eyes of the providence that put us all upon the Earth: "There is neither weighing nor distinction of Jew and Greek, Scotsman or Englishman."

The enduring power of these appeals to a universal sense of humanity is undeniably inspiring. And the contrast with the narrow-minded, reactionary self-interested provisions of *Magna Carta* is obvious.

But by far the most unforgettable line of the declaration is the quiet threat that: "As long as a hundred of us remain alive, never will we on any conditions be brought under English rule."

Largely by loans raised from Italian bankers, the English were able to muster, as best we can tell, about 30 000 soldiers at Bannockburn. Only a fraction of these were front line troops, of course; but at the time everyone knew that, in terms of its ability to raise an army, England could put as many as 30 000 people in the field. In medieval terms, this was an enormous host.

The *Declaration of Arbroath* sent a powerful message to the Pope. The Scots were not saying that they were prepared to fight to the last man: that might well have been seen as an empty boast because rebels usually say that sort of thing. Rather, the Scots were coolly making the point to the Pope that they regarded odds of three hundred to one as perfectly acceptable. So that if the odds were no worse than three hundred to one, the slaughter of good Catholics on both sides would continue.

It was a brilliant stroke of diplomacy. And it worked—the Pope lifted the interdict.

The real power of the declaration is in the irresistible dignity of that quiet threat to the power of the established order: to the Pope himself, as well as to the military might of the English. As Duncan MacNeill said:

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> "The kingdom is 'our' not 'his' kingdom;

and even the Pope himself is enjoined to remember that he, like every other human being, is answerable for his actions. The spirit which animates it from first to last is a spirit which has none of the arrogance of a feudal superior, none of the servility of a feudal slave; it is the spirit of a nation purified and strengthened by a prolonged struggle against almost over-whelming odds, (and which has, however improbably, been crowned with victory). It is the spirit of Wallace."[13]

The ideas that found expression in the *Declaration of Arbroath* found their first articulation in the work of John Duns Scotus in the twelfth century, but they were truly the product of generations of scholars who went before him. And later, generations of his disciples gave them practised application. With the exception of the Bishop of St Andrews, who was the principal draftsman of the declaration, the names of most of Duns Scotus' disciples who developed and applied his insights are no longer known to us. Nor are the names of those who established the system of education which led Europe out of the darkness.

There are two things which the *Declaration of Arbroath* and *Magna Carta* have in common. Each was written in Latin, and the calligraphy of each was in the style known as 'Carolingian minuscule', that is the style of longhand that some of us still use today. Each of these features is noteworthy. And we do know the name of the scholar to whom we owe a particular debt in both respects. He was Alcuin of York. He was educated in the school at Yorkminster in the late eighth century. We know that some of the scholars by whom and with whom he was educated were Irish. His own talent was such that he became Charlemagne's chancellor. In that capacity he popularised, if he did not invent, Carolingian minuscule.

Alcuin inspired, in the name of the Emperor, educational reforms that would shape not only handwriting, but also the world-view of those who would write both *Magna Carta* and the *Declaration of Arbroath*. In Charlemagne's name, in about 785 AD, the 'Epistola de litteris colendis' (Letter on the Cultivation of Writing) and in 789 AD, the 'Admonitio generalis' (The General Admonition) directed that Latin should be taught throughout the Empire as the common language of its many peoples because, under Charlemagne, the Empire encompassed most of Western Europe.

And soon Latin became taught, not only in the lands of Charlemagne's Empire (which contracted rapidly after his death), or the old Roman Empire, but in Scandinavia and Eastern Europe, areas where Rome had never ruled, because the knowledge of Latin meant that an educated person in Stockholm would communicate with an educated person in Lisbon or Frankfurt. It meant that over the next few hundred years all of educated Europe contributed to the development of the ideas that over the centuries would enlighten the world.

And at the same time, Alcuin's legible script, in which these ideas were more readily communicated, became the common calligraphy of Europe, replacing the awkward, ugly and impossible-to-read Gothic and uncial scripts. It was the most important technological change in communication before the invention of the printing press.

The initiatives of Alcuin and his fellow scholars at Charlemagne's court at Aachen meant that future generations of scholars could look back to the great works of the Roman Republic and empire for models of law and government. But even more importantly, Europe's warlords became unintentionally but irretrievably committed to a dependence on scholars and were gentrified and sensitised by the classic works of Roman law and government to carry out the task of administering government in Europe. That was, fortuitously, because Latin was no one's mother tongue; and it could be mastered only by long years of dedicated and concentrated study.

Unlike the Athenians and the Romans, whose political elites were among the most literate and best educated of their people, the European warlords were as ignorant as they were brutal, and so their rule became dependent on the scholars who were the sons of ordinary people who learned to read and write and think. It was their dependence on the scholars that helped to civilise their rule and to require them to rule well, while at the same time sowing the seeds of their own elimination.

The facilities required for the long periods of protracted study necessary for literacy in Latin were provided by scholars who came from varied backgrounds, including the

bourgeoisie and the peasantry, and whose outlook was not in sympathy with that of the sons of the warlords and their brutal minions.

Focus on an event like *Magna Carta* should not cause us to lose sight of these less glamorous, but far more important historical developments, or of the truth that limited government is not necessarily good government.

It must be rare in human history that the laws and the government of a country so catastrophically failed to secure the peace and welfare of a people as in Ireland in the mid-nineteenth century when, in a five-year period, a million people starved and another million emigrated in what the Imperial government at Westminster was pleased to call the Famine.

As George Bernard Shaw later pointed out, one cannot have a famine if there is actually plenty of food for people to eat, but the government allows it all to be exported. Limited government, of the kind envisaged in Sir Edward Coke's myth of *Magna Carta*, was no help to these millions. I can, I think, confidently assert that not one of them ever expressed his or her satisfaction that the British government at Westminster was a government limited by laws.

Patrick Joseph Lee, an Irish immigrant arriving at the Boston docks in 1893, spoke for these millions when he looked around him, and exclaimed: "If there's a government here, I'm agin it."[14] Government is not good simply because it is limited. It is only democracy, that is, government responsible to the people, that can make government good.

America welcomed these desperate and despondent people; and became a stronger and better country as a result. John Fitzgerald Kennedy, born in Boston only one generation after Patrick Lee's arrival and brought up there, loved the Commonwealth of Massachusetts and the great democratic ideals of good government which it had championed from its earliest foundation. JFK was constant in his admiration for the historic role of Massachusetts as the exemplar of the best in American democracy. He knew that it was democracy more than any other system which requires government to be good and offers the best guarantee that it be so.

In his famous 'City upon a hill' address to the Massachusetts State Legislature on 9 January 1961, eleven days before his inauguration as President of the United States, Kennedy said: "For what Pericles said of the Athenians has long been true of this Commonwealth: 'We do not imitate the laws and constitutions of others, but provide a model for them to follow'."

Kennedy was, of course, quoting from the speech which the historian Thucydides attributed to Pericles.

JFK knew his Thucydides well. In the typed draft of this speech, which is kept in the Kennedy library, only the beginning and end words of the quotation from the speech appear. Plainly, JFK knew the quote by heart.

We may flatter ourselves that, like the Athenians and the Commonwealth of Massachusetts, our legal institutions provide a model for others to emulate: but we should never presume to foist our legal traditions upon those of different cultural and historical experiences.

With unfeigned respect for Mrs Eleanor Roosevelt, we should certainly not be so impertinent as to wish a *Magna Carta* moment upon anyone.

We should recognise that our conception of democracy, in which the idea of good government depends on government by the people, owes much more to scholars like Duns Scotus and Alcuin of York and their now anonymous teachers and pupils from all over Europe than to the reactionary warlords of Runnymede. Just as the practical preservation of that particular idea of good government in the future depends on people like you.

1 Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology,* (1957) at 104.
2 Jenks, *The Myth of Magna Carta,* (1904) 4 Independent Review 260 at 272.
3 Yeatman and Sellar, *1066 And All That,* (1930), Ch XIX Magna Carta.
4 Jenks, *The Myth of Magna Carta,* (1904) 4 Independent Review 260 at 268.
5 Jenks, *The Myth of Magna Carta,* (1904) 4 Independent Review 260 at 270.
6 Rubin, *Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges,* (2010) 29 University of Queensland Law Journal at 106 107.
7 (1904) *4 Independent Review* 260 at 272-273.
8 Yale Law Lectures on English Law and Jurisprudence, (1894) Yale University Law Journal 34 at 43.
9 Turner, The English Judiciary in the Age of Glanvill and Bracton, (1985) at 159.
10 It seems cl 45 was a response to a particular grievance relating to French advisers of the King: McKechnie, Magna Carta, A Commentary on the Great Charter of King John, 2nd ed (1914).
11 Alexander Klieforth and Robert Munro, *The Scottish Invention of America, Democracy and Human Rights*, (2004) at 175.
12 Ibid at 188.
13 MacNeill, *The Scottish Realm: An Approach to the Political and Constitutional History of Scotland,* Glasgow: A&J Donaldson, (1947), at 94 955, cited in Klieforth at 189.
14 R E *Lee, In the Public Interest: The Life of Robert Emmett Lee from the FBI to the FCC,* (1996) University Press of America at 3.