



On the influence of *Magna Carta* and other cultural relics



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ABSTRACT

Magna Carta's status as a touchstone of modern thinking about the rule of law rests on several well-known myths. This article evaluates the influence of *Magna Carta* on modern constitutions, both in terms of formation as well as content. The analysis confirms that *Magna Carta's* relevance is, if anything, on the rise, even if the causal chains linking it to current developments are weak-linked and distant. We speculate on the mysterious processes that produce influence among legal texts, arguing that champions and empire are crucial factors in the case of *Magna Carta*.

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1. Introduction

Magna Carta has become synonymous in the English-speaking world and beyond with fundamental rights, the rule of law, and limited government. So powerful is its influence today that it is celebrated by everyone from the Tea Party and Ted Cruz to Jay-Z, whose 2015 album, *Magna Carta, Holy Grail*, links the document with another mysterious icon.¹ Yet as generations of scholars have shown, *Magna Carta's* fame rests on several myths (Holt, 1992; Carpenter, 2015). As we remind readers below, the document was ineffective, hardly democratic, and not the actual source for many of the rights associated with it. Why then is *Magna Carta*, a deal among feudal elites, upheld as the wellspring of modern constitutionalism and the rule of law? The puzzle is a general one: why is it that some legal documents become singularly identified with a proposition and some do not? This question is not confined to law, but simmers in other cultural domains as well.

In this article, we speculate on the question of influence and iconography, and we identify factors that might predict influence in law. We then examine a set of rights identified with *Magna Carta* and show their frequency in the realm of written national

constitutions today, a quantity that says something about *Magna Carta's* indirect influence on contemporary constitutions. As a shorthand for the broader traditions of English liberty, the document surely marks an important touchstone. And yet that influence is somewhat contingent. We argue that powerful advocates who used *Magna Carta* for their own ends represent one crucial factor in explaining influence. Another factor is a self – reinforcing one. Nothing breeds success like success, and the British empire – at least by its geographical reach – was nothing if not successful. In that sense, empire may be the overarching factor that explains why *Magna Carta* is so frequently discussed in diverse contexts as the origin of ancient liberties. That is, influence flows not so much from the intrinsic qualities of the document as from the influence of those who championed it at later dates.

2. *Magna Carta* and its myths

First, let us review some of the myths of *Magna Carta*. The first is that its provisions actually constrained the behavior of the sovereign. The document was crafted by a group of Barons with the objective of restraining the unpopular King John, who in their view had squandered the royal treasury and lost valuable continental lands. The King had sought to raise taxes to pay for these adventures, provoking open rebellion by the Barons who threatened his replacement. By today's standards, we might call the document an elite pact, though one that ultimately bound no one. Almost

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¹ <http://www.magnacartaholygrail.com/>.

immediately upon the document's unveiling in 1215, it was repudiated by King John, leading the aggrieved Barons to restart their revolt. Had John not had the good fortune to die early, he may have been deposed, thus diverting the line of the English monarchy. As it was, his nine-year old successor Henry III (or at least his regent) re-issued the document in a revised form, and it was re-adopted at the end of the baronial war in 1225. Again re-issued in 1297, it was hardly perceived to be a foundational document of Western civilization, but rather one of a set of documents that restated traditional liberties. So, not only did the document do very little to constrain power, but it was also hardly very original or prominent, in a symbolic sense. Indeed, "Magna" merely referred to the size of the paper on which it was inscribed in 1217, in contrast with the smaller Charter of the Forest issued at the same time (White, 1915).

Another myth is that the document was the source of many of the important rights in the Western tradition. Woodrow (1908: 2–6) identified the signing of *Magna Carta* as the very beginning of constitutional government. But in fact, *Magna Carta* was only one of many documents from the period, in England and elsewhere, which codified limitations on government power. Only medievalist scholars would remember the Statute of Pamiers of 1212, which dealt with many of the same problems as *Magna Carta*, such as inheritance rights, protections for the church, and prohibitions on the sale of justice. Similarly, the Constitutions of Melfi, promulgated in 1231 in Sicily, contained many of the same rights found in *Magna Carta*, including guarantee of trial by peers, promises of "upright" judges, guarantees of weights and measures, and the protection of church interests. It went beyond *Magna Carta* by including a right to representation by lawyers, several centuries before England adopted this norm (Helmholz, 1999; Plunkett, 1956: 14–15). One might also mention the *Libri Feudorum* of Lombardy 1150 which compiled feudal laws and included a provision about the judgment of peers (Helmholz, 1999). The Golden Bull of Hungary (1222) has been oft-noted as a contemporary equivalent to *Magna Carta* (Holt 1992: 519). Even in England itself, some of *Magna Carta*'s provisions were foreshadowed by the Charter of Liberties issued by King Henry I in 1100, which made promises to treat the nobility well, and the Assize of Clarendon of 1166, which laid out legal rules and foreshadowed habeas corpus.

Further afield, there is the interesting case of the *Shikimoku*, the legal code that emerged in medieval Japan, and imposed limits on government authority and has been described as "constitutional" in character (Mass, 1976, 1999; Ginsburg, 2012). The 1336 Kemmu Formulary, passed in 1336 by the Ashikaga shogunate, limits the commandeering of private houses, and protects property rights, requires regular court sessions, and emphasizes the need to admonish official negligence. In short, we observe contemporary documents limiting government even in cultures which could have had no conceivable contact with medieval England. These parallel developments suggest a reading of *Magna Carta* as simply the English version of a set of legal devices that arose early in the second millennium of the common era (and may well have appeared periodically well before this time) to codify relationships between the monarch and subject. *Magna Carta* seems less interesting in this view, except that it somehow served as an important inspiration for future legalisms later.

A final myth is that of *Magna Carta* as a paragon of democracy. We note above that the document could be characterized as an elite pact instituted by the Barons. Indeed, many passages reflect the Barons' particular interests against those of the common man. Consider the famous jury clause (39), which protected a free man (a tiny portion of the population in the 13th century) from state sanction "except by the lawful judgment of his equals or by the law of the land." This provision is seen as the forerunner of the modern jury, but in fact, juries were rare and hardly used during the relevant period. Furthermore, the likely alternative to "equals" sitting

in judgment of the accused was not a judgment by the powerful, but rather by commoners appointed as judges by the English Kings in their early state-building efforts. In short, the likely effect (and, presumably, the design) of this clause at the time was to protect status and privilege, not to undermine it.

Moreover, although *Magna Carta* contains some general rights claims that many associate with the democratic canon, it also includes some highly particularist passages that detract from its status as a general higher law. Consider, for example, the idiosyncratic tenth clause, which prevents Jews from charging interest on a debt held by an underage heir. Another clause (33) requires the removal of fish-traps from the Thames. One doubts that these are what Ted Cruz had in mind in 2014 when he asked supporters to "raise up our voices to demand our leaders fulfil the promise *Magna Carta* made so long ago."²

How then has *Magna Carta* come to be so influential? To understand this, we need to first elaborate on the general patterns of influence that we might observe.

3. What is influence?

How do we know what influence is? One simple way to examine the question is to look at popularity over time. Some works are popular from the first moment they are produced. Jay-Z's latest album, referred to above, embodies this model, as it sold some 528,000 copies in its first week and was eventually certified as double platinum.³ But will it endure? It is too soon to say, of course. Jay-Z could well have created music that will continue to enchant listeners for years to come. But future performance is not always well predicted by past performance. History has many examples of other artists who have taken some time to develop their impact. Consider Johan Sebastian Bach, who was a relatively unknown when he died in 1750. Mendelssohn reintroduced him to music lovers in 1829 and the rest is history. "Bach" is now a household name and he is thought by some to be the world's greatest composer.⁴ Then there is William Shakespeare, whose plays are now performed every night around the world, but paled in popularity to the now forgotten Thomas Kyd's *Spanish Tragedy* during their era.

Data on purchases and citations should tell us something more generally about the basic patterns of maturation and decay of creative work. For example, more and more scholars each year cite Noam Chomsky's 1965 book, *Aspects of a Theory of Syntax*. In the first ten years after publication, the book was cited roughly 250 times per year. The citation rate has increased each year and in 2014 alone, a whopping 24,555 works cited the book. According to an analysis carried out twenty years after the publication of *Aspects* (Garfield, 1987), the book was then the fifth most cited scholarly work of all time. These stories of increasing returns with time are not unusual. At the extreme end of maturation lie some of the "great" American novels (e.g., *Moby Dick*, *Grapes of Wrath*, and *Lord of the Flies*), which were apparently panned and ignored in their day. It is hard to imagine that these novels, canonized in American literature, will ever go out of fashion. Clearly, some creative work gains enough cultural momentum that acclaim is self-reinforcing and, thus, immortal. However, most products are not Shakespeare and, generally, what goes up must come down (the relevant business concept is "sales curves," not "sales lines"). Indeed, the typical citation pattern in academic work is for scholars' work to grow in impact during their career and to tail off shortly after their retirement or death (if you are reading this paper in 2050, we thank you).

² <https://www.facebook.com/tedcruzpage/posts/10152504723697464>.

³ https://en.wikipedia.org/wiki/Magna_Carta_Holy_Grail.

⁴ <http://www.bbc.com/culture/story/20140917-can-any-composer-equal-bach>.

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