

Cambridge University Press  
978-1-107-11277-3 - Magna Carta and Its Modern Legacy  
Edited by Robert Hazell and James Melton  
Excerpt  
[More information](#)

---

**INTRODUCTION**

Cambridge University Press  
978-1-107-11277-3 - Magna Carta and Its Modern Legacy  
Edited by Robert Hazell and James Melton  
Excerpt  
[More information](#)

---

Cambridge University Press  
978-1-107-11277-3 - *Magna Carta and Its Modern Legacy*  
Edited by Robert Hazell and James Melton  
Excerpt  
[More information](#)

---

## 1

## Magna Carta . . . Holy Grail?

James Melton and Robert Hazell

Magna Carta is revered by citizens and human rights activists all over the world. It has become a symbol for limited government and constitutionalism used by political theorists, constitutional drafters, political elites and even ordinary citizens to justify constraining political power. Thus, when Jay-Z entitled his most recent album *Magna Carta . . . Holy Grail*, he was signalling his aspiration to constrain the power of the recording industry, just like Magna Carta was meant to constrain King John. The irony is that '[i]n 1215 Magna Carta was a failure'.<sup>1</sup> King John completely ignored the edicts set forth in the Charter, which led England into the very civil war that the Great Charter was meant to prevent. Why, then, do we celebrate this historic piece of parchment? Put differently, how has the significance of Magna Carta come to be equated with that of the Holy Grail?

This volume sets out to answer the question. In doing so, it makes two contributions to the extant literature. First, it commemorates Magna Carta's 800th anniversary by detailing its influence in the United Kingdom and abroad. The book reviews the existing historical and legal literature on Magna Carta as well as providing some new insights about its influence. These new insights are generated by moving to a more systematic conceptualisation of influence. Second, the volume begins a dialogue with the literature on constitutional design. This is a quickly evolving, interdisciplinary literature that spans economics, history, law, political science and sociology. We believe that those interested in constitutional design have much to learn from modern understandings of Magna Carta, and we therefore provide some examples of how reflecting on Magna Carta can provide lessons for those interested in modern constitutions.

<sup>1</sup> J. C. Holt, *Magna Carta*, 2nd ed. (Cambridge: Cambridge University Press, 1992), 1.

This introductory chapter proceeds in three sections. The first provides a bit of history about the making of Magna Carta and its contents. The second defines what we mean by influence and provides a typology for analysing the influence of Magna Carta. The third sketches out the plan for the rest of the volume.

#### THE MAKING AND CONTENTS OF MAGNA CARTA

There are two accounts of the making of Magna Carta. Traditionally, the story of Magna Carta paints King John as a tyrant who oppressed his people and deserved the insurrection that led to the Charter. This is the account told by Sir Edward Coke in his many writings, including the *Petition of Right* (1628) and the second volume of the *Institutes of the Lawes of England*. In these works, Coke used Magna Carta in his fight against King Charles I to argue that the Great Charter served as a repository of ancient common law rights that all English monarchs must respect. Coke was essentially drawing a parallel between his own dispute with King Charles I and the dispute between King John and his barons in 1215, so it is little wonder that he describes Magna Carta as a victory for the righteous barons over the tyrannical King John.<sup>2</sup>

Coke's version of the events surrounding Magna Carta has been retold many times. His narrative can be found in historical accounts of the writing of Magna Carta and has even found its way into children's literature. For instance, the story of *Robin Hood* pits righteous Robin against a greedy, oppressive King John, and the history of Magna Carta in *Our Island Story* not only tells our children that Magna Carta 'is the foundation of all our laws and liberty' but also that '[n]o king of England has ever been so bad as John'.<sup>3</sup> This is the narrative of Magna Carta that gives the Great Charter its symbolic power. It is a narrative that is engrained in us during childhood and gives us hope that a simple piece of parchment delineating the legal limits of executive power can tame even the most oppressive tyrants.

More recently, a revisionist narrative has arisen to describe Magna Carta's creation. This alternate account is more sceptical (and probably more accurate) both about Magna Carta itself and about the villainy of King

<sup>2</sup> Take, e.g., these words from ch. 15 of the second volume of Coke's *Institutes*: '... that in the raigne of King John, and of his elder brother King Richard, which were troublesome and irregular times, diverse oppressions, exactions, and injuries, were inroached upon the Subject in these Kings names, for making of Bulwarks, Fortresses, Bridges, and Bankes, contrary to Law and right'. Here, Coke explicitly notes the oppression of King John and his brother Richard.

<sup>3</sup> Henrietta Elizabeth Marshall, ch. 36, 'The Story of the Great Charter', *An Island Story: A History of England for Boys and Girls* (New York: Frederick A. Stokes Company, 1920). Available at: <http://digital.library.upenn.edu/women/marshall/england/england-36.html>.

John.<sup>4</sup> According to this version, King John was a victim of circumstance. He had inherited a host of problems from his father and older brother. To start, both King Henry II and King Richard I expropriated large sums from their citizens. By the time of King Richard I's death in 1199, the King's 'exploitation of England for funds [had] reached unprecedented levels'. Given the early English state's financial obligations, King John had few options but to continue to exploit its resources.<sup>5</sup>

There were also changes in the structure of the state during the rule of the Angevin kings. As the state became larger and more complex, it became necessary for the royal household to employ a full-time, educated staff and to lay down new rules and regulations to manage the affairs of state.<sup>6</sup> These innovations formed the foundation for the common law institutions that we recognise in the United Kingdom today.<sup>7</sup> They were necessary to enable efficient governance of the growing nation, but they angered the aristocracy, which felt excluded from the new modes of governance created by the Angevin kings.<sup>8</sup> Not only did the barons have to compete with the King's new staff members for royal favour, and all of the benefits such favour entails, but the King had stronger control over the state, leaving the aristocratic class with fewer freedoms than under previous monarchs. The noble classes became acutely aware of the implications of this new form of government during the reign of King John because, after the loss of Normandy, he was forced to rule from England. This put him in a better position to enforce the rules of Angevin government than had been the case with his father and brother, who spent most of their respective reigns abroad, and formed one of the key grievances that led to Magna Carta.<sup>9</sup>

Lastly, King John inherited the wrath of Philip Augustus of France, who had vowed to unite all of France. At the time, Normandy was under the rule of the Angevin kings, so in order to unite France, Philip Augustus needed to take back Normandy. Philip Augustus's war with the English started during the reign of King Richard I, but he was unable to wrestle Normandy and other English-held French territory away from England until 1204. His success was a

<sup>4</sup> See in particular, Holt, *Magna Carta* (1992). See also Ralph Turner, ch. 2, 'Young John in His Brothers' Shadows', *King John: England's Evil King* (Gloucestershire: History Press, 1994); Alicia Mavor, 'Magna Carta: A Bitter Indictment of King John's Rule?' *History Today* (2013), available at: <http://www.historytoday.com/alicia-mavor/magna-carta-bitter-indictment-king-johns-rule>; Graham E. Seel, 'Good King John', *History Today* 62(2) (2012).

<sup>5</sup> Ralph V. Turner, *Magna Carta: Through the Ages* (2003), 34.

<sup>6</sup> *Ibid.* at 17.

<sup>7</sup> Holt, *Magna Carta* (1992).

<sup>8</sup> Holt, *Magna Carta* (1992).

<sup>9</sup> Turner, *Magna Carta: Through the Ages* (2003), 32; Holt, *Magna Carta* (1992).

major loss of both territory and resources for King John, who spent most of the rest of his reign preparing for and launching a campaign to retake Normandy. To finance this campaign, King John had to acquire even larger sums than his brother, King Richard I, had levied.

In short, King John faced three major obstacles at the start of his reign: (1) a financially drained state, (2) an angry aristocratic class and (3) a war with France that he eventually lost. According to this account of Magna Carta, the three circumstances put King John in an impossible position. He had to raise large sums of money to pay the state's debts and to finance his campaign in France, but the aristocracy had already been heavily exploited by his father and brother and was unlikely to pay more willingly. Fortunately for John, his predecessors had already built a foundation for him to raise these funds: through a combination of even higher taxes; increasing amercements – penalties for wrongdoing; and taking full advantage of 'feudal incidents' – opportunities that allowed the king to levy additional revenue, such as payments to the king to recognise an heir's succession.<sup>10</sup>

These are the events that eventually led to the barons' insurrection against King John and the writing of Magna Carta. This revisionist account of Magna Carta is quite different from the traditional view. Instead of a righteous group of barons trying to restrain a tyrannical king, it sees Magna Carta as an attempt by self-interested barons to take advantage of a relatively weak king with few allies in Continental Europe.<sup>11</sup> In 1215, King John had just lost his campaign to retake Normandy against Philip Augustus, and only two years before that he had made peace with Pope Innocent III after the Pope imposed a five-year-long interdict on England for King John's insubordination. Thus, in 1215, the timing was ripe for King John's barons to try to lift the more oppressive taxes which had been introduced and to reclaim some of their ancient rights.

The revisionist version is generally accepted today as providing the background and historical context for Magna Carta. Not only does such an account correspond better with what we know of the historical context in 1215, but it also helps explain Magna Carta's text. The vast majority of the Charter is about ancient rights and duties, fees and taxes, comprehensible now only to medieval historians (the full text is reproduced in the Appendix). For instance, Articles 3–8 protected the inheritances of minors and widows from abuse by their guardians, limiting the damage that could be done to an estate in a feudal incident; Articles 12–16 regulated the use of scutages, fees paid by knights in lieu

<sup>10</sup> Ibid. at 16.

<sup>11</sup> Ibid. at 61.

of service to the king; Articles 20–22 limited the size of amercements. Feudal incidents, scutages and amercements are but a few examples of the means used by King John to raise revenue. *Magna Carta* was the barons' attempt to limit his ability to raise funds through such methods – at least without their approval. Thus, it is unsurprising that about two-thirds of *Magna Carta*'s provisions were concerned with setting limits on the use of the King's fiscal powers.<sup>12</sup>

Even *Magna Carta*'s most famous provisions – Articles 39 and 40 – can be read as a way for the barons to remove their financial well-being from the will of the King. These articles state that:

- (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 other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement 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.<sup>13</sup>

Articles 39 and 40 have been interpreted to mean that the criminally accused have the right to be tried by a jury of their equals, to protection from unjustified restraint, to due process of law and to a timely trial. However, in 1215, the meaning of these two articles was much more limited.<sup>14</sup> Although couched in the language of the free man, Articles 39 and 40 were primarily meant to transfer the settlement of disputes involving the barons from the king, who might use criminal accusations to extort them, to communal inquests, which were used throughout England at the time.<sup>15</sup>

As should be clear from the aforementioned discussion, the main beneficiaries of *Magna Carta* were the barons. Even Articles that claimed to protect all free men, such as Articles 39 and 40, were primarily meant to insulate the barons from the king. But *Magna Carta* soon acquired a wider, symbolic importance, being re-issued and re-confirmed many times in the thirteenth and fourteenth centuries before its resurrection by Sir Edward Coke in the seventeenth century.<sup>16</sup> It is *Magna Carta* as a charter of liberties, with those few

<sup>12</sup> Paul Halsall, 'The Text of *Magna Carta*', *Internet History Sourcebooks Project* (2014), available at <http://www.fordham.edu/halsall/source/magnacarta.asp>, see the introductory note.

<sup>13</sup> British Library, 'English Translation of *Magna Carta*' (accessed 13 November 2014), available at <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>; Articles 39 and 40 were eventually combined into Article 29 in the 1225 reissue of *Magna Carta*.

<sup>14</sup> Holt, *Magna Carta* (1992), 6.

<sup>15</sup> Holt, *Magna Carta* (1992), 331.

<sup>16</sup> The original *Magna Carta* was only in force for a few months before being set aside by King John. It was subsequently reissued in 1216, 1217, 1225 and 1297; see Holt, *Magna Carta* (1992), 1–2. The 1297 reissue is still in force in the United Kingdom today, although most of its provisions have been repealed; see <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents> for the statutes currently in force.

provisions that have been interpreted to enshrine wider legal principles, that has reverberated down through the ages, giving the Great Charter its mythical status. It is because Magna Carta has come to be seen as a declaration against arbitrary rule and a defence of the principles of freedom and equality before the law that it acquired its subsequent importance.

### MODES OF INFLUENCE

The world is poised to celebrate the 800th anniversary of Magna Carta in 2015. One reason for such a celebration is the Great Charter's 'influence'. In the words of Sir Robert Worcester – writing on behalf of the Magna Carta 2015 Committee – Magna Carta 'has influenced constitutional thinking worldwide including in France, Germany, Japan, the United States and India as well as many Commonwealth countries, and throughout Latin America and Africa'.<sup>17</sup> According to the celebration committee, then, Magna Carta has shaped theories of constitutionalism, and perhaps even the contents of constitutions, in virtually every corner of the world.

Despite the claims of the celebration committee, Magna Carta's influence is unclear, because the term *influence* itself is unclear. By claiming that Magna Carta is influential, is the celebration committee suggesting that the Charter's famous Article 39 has been copied into constitutions all over the world? Is the committee suggesting that the rights entrenched in Magna Carta have become prevalent in modern constitutions, albeit in different terms? Or is it suggesting an even more elusive (and tenuous) form of influence: that the principle of constitutionalism has been widely accepted? It is easy to speculate that Magna Carta has been influential all over the world, but it is far more difficult to pinpoint precisely how it has been influential. In order to do so, one must first define influence and the modes through which it operates.

By influence, we mean that Magna Carta has shaped those countries' constitutions in some way. However, this definition is still quite vague because it does not tell us *what* has been influenced. Magna Carta might affect the *actual* contents of a country's constitution, or its influence might be more *symbolic*, merely affecting the principles underlying the text. These different types of influence, then, tell us what aspects of a constitution have been affected by Magna Carta – its contents or the underlying principles. One

<sup>17</sup> Robert Worcester, 'Why Commemorate 800 Years?' *Magna Carta Today* (2013), available at <http://magnacarta800th.com/magna-carta-today/objectives-of-the-magna-carta-800th-committee/>; see third paragraph.

	Direct	Indirect
Actual	United Kingdom and New Zealand, where Magna Carta is still in force; early English statutes	United States Bill of Rights; legal protection for the accused in modern constitutions
Symbolic	Debate over the United States Bill of Rights; constituent assemblies in Brazil	General references to constitutionalism or the rule of law

FIGURE 1 – Modes of Magna Carta’s Influence in the United States Constitution

can also differentiate influence by the degrees of separation between Magna Carta and the text being influenced. Was Magna Carta or its text a direct source of influence, or did it influence a given text via another document? In the former case, its influence is *direct*, and in the latter, its influence is *indirect*. Together, one can think of these alternatives as two distinct dimensions of influence (as illustrated in Figure 1) leading to four modes of influence: (1) direct, actual influence; (2) indirect, actual influence; (3) direct, symbolic influence; and (4) indirect, symbolic influence.

As one might expect, it is difficult to identify examples of direct, actual influence of an 800-year-old document originally written in Latin. The best examples of Magna Carta’s actual, direct influence come from the United Kingdom. Not only are some provisions of Magna Carta still in force in the United Kingdom, but Magna Carta was highly instrumental in the writing of numerous early English statutes, many of which are still in force today.<sup>18</sup>

Examples of Magna Carta’s direct, actual influence outside of the United Kingdom are harder to find. There are some places where Magna Carta is actually used as law. For instance, in New Zealand, the Imperial Laws Application Act (1988) lists a number of British laws, including parts of the Magna Carta, which remain in force in New Zealand.<sup>19</sup> As another example, Renée Lerner notes in her contribution to this volume that many U.S. states – for example, Delaware (1776), Maryland (1776), Massachusetts (1780), New Hampshire (1984), New York (1777), North Carolina (1776), South Carolina (1778) and Virginia (1776) – borrowed language directly from Articles 39 and 40 of Magna Carta when writing their first constitutions. Remnants of the language

<sup>18</sup> See the Observance of Due Process of Law Act (1368), the Petition of Right (1628), the Habeas Corpus Act (1679) and the Bill of Rights (1689).  
<sup>19</sup> New Zealand Parliamentary Counsel Office, *Imperial Laws Application Act* (1988), available at: <http://www.legislation.govt.nz/act/public/1988/0112/latest/whole.html#DLM135091>.

from Magna Carta remain in many of those states' constitutions.<sup>20</sup> All of these are examples where the language from Magna Carta is in force in modern constitutions, demonstrating its continued direct, actual influence.

Instances of indirect, actual influence are easier to find than instances of direct, actual influence. Perhaps the best example is the United States Bill of Rights. More than half of the articles in the U.S. Bill of Rights can be traced to documents influenced by Magna Carta. For instance, we know that James Madison relied on both early English statutes – for example, the English Bill of Rights – and early U.S. state constitutions when crafting the American Bill of Rights, and we have already noted that those documents were, in turn, directly influenced by the text of Magna Carta.<sup>21</sup> We can plainly see this influence when looking at the text of the first ten amendments to the United States Constitution. Take, for example, the Fifth Amendment to the U.S. Constitution. It provides for 'due process of law' and that 'private property shall not be taken for public use, without just compensation'.<sup>22</sup> These phrases are present in a number of early English statutes as well as in U.S. state constitutions, but the roots of this language can be traced to Articles 28 and 39 of Magna Carta.<sup>23</sup>

<sup>20</sup> Massachusetts' constitution still states that 'no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land' (Article 12). New York's constitution still states that '[n]o member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers' (section 1). North Carolina's constitution still states that '[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land' (section 19). Virginia's constitution still states that no man 'shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers' (section 8).

<sup>21</sup> Amar, Akhil Reed, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

<sup>22</sup> Zachary Elkins, Tom Ginsburg and James Melton, 'United States of America 1789 (rev. 1992)', *Constitute: The World's Constitutions to Read, Search and Compare* (2014), available at: [https://www.constituteproject.org/constitution/United\\_States\\_of\\_America\\_1992#139](https://www.constituteproject.org/constitution/United_States_of_America_1992#139).

<sup>23</sup> Due process of law is simply 'law of the land' from Article 39 of Magna Carta rephrased into more modern terminology; see Eric T. Kasper, 'The Influence of Magna Carta in Limiting Executive Power in the War on Terror', *Political Science Quarterly* 126(4) (2011): 547–78. The phrase 'due process of law' originates in the Observance of Due Process of Law Act (1368) of the United Kingdom, which spells out the meaning of 'law of the land' in Article 39 of Magna Carta. Thus, the framers of the American Constitution borrowed 'due process of law' indirectly, because the phrase was from an act that was inspired directly by the Magna Carta.

Article 28 of Magna Carta states that '[n]o Constable nor other Bailiff of ours shall take the corn or other goods of any one without instantly paying money for them, unless he can obtain respite from the free-will of the seller.' The sentiment of Article 28 is almost identical to that of the Fifth Amendment, even though Article 28 is specific to 'goods' rather than the broader wording of 'private property' in the Fifth Amendment.