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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*.

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/.

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0144-8188/

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; Plunckett, 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.

So, whether work is immortal or not, some maturation is evident in literary and, presumably, most creative work.

However, we can imagine another pattern—the flash in the pan. These are successes right out of the box, whose enthusiasts (if they ever were) dwindle after only a very short time. This is a common pattern in popular music, of course, and embodied by smash hits whose ephemeral appeal can seem puzzling, retrospectively at least, to future listeners (think Billy Ray Cyrus' "Achy Breaky Heart" from 1992, a reference relevant only to those of a certain age). The pattern is perhaps just as likely in literature (we can put Thomas Kyd in this category, with the caveat that we are not comparative literature scholars). Thus, literature is filled with three types of works: those rare cases that mature over time and are ultimately canonized (Shakespeare), those that mature and then dwindle after several generations (Chomsky, perhaps), and those that flame quickly, but just as quickly flame out (Kyd).

Law is full of such patterns. In the genre of judicial opinions, consider the great dissents. Free speech law traces its origins to Oliver Wendell Holmes' dissent in *Abrams v. United States*, in which he displays his pragmatist leanings and introduces the metaphor of the marketplace of ideas.[5] But virtually no one today (except of course the cognoscenti among our readers here) can name the justice who wrote the majority opinion (it was John Hessin Clark).

Works of legal scholarship, too, rise and fall with the times; for every Blackstone, whose *Commentaries on the Laws of England* was perhaps the most influential book on the common law around the time of the American founding, there is a Thomas Wood (1661–1722). Wood advocated the incorporation of law into the university curriculum and authored the *Institute of the Laws of England* in 1720, three years before Blackstone's birth. Wood, who influenced Blackstone, is essentially unknown today, while Blackstone has inspired names of everything from hedge funds to gangs on the south side of Chicago.

We might expect that constitutional texts fall into some of the same categories. Perhaps some are classics that are taken far more seriously today than they were even in their day (even the Constitution of the United States, whose drafters hardly expected their creation to endure such as it has). Some—probably the majority of cases—were introduced with great fanfare but failed to gain any traction and died quickly (think of most of the sixty or so constitutions produced on the island of Hispaniola in the last 200 years). Some constitutions probably did serve as models and became effective, only to decline in relevance as their provisions fell out of step with the fashion of the day (Venezuela 1958) or their authors lost political battles at home (Spain 1931).

The patterns above suggest clearly that the effect of age, depending upon the scope of the time horizon, may be non-linear. Even with such non-linearity, however, it can be useful to break the overall period into monotonic spells and think about what leads to positive or negative slopes of those lines. So, for example, which factors have led to Chomsky's period of growth and what factors might account for any possible decline in the popularity of his books post retirement? Our discussion of literature (or probably any cultural product, for that matter) suggests a few immediate explanations. One is availability: it takes some time for good books and their ideas to circulate. But, of course, ideas cannot expect to circulate forever; books can go out of print or simply fall out of the conversation if they are not included in school curricula. One might expect availability to take on an inverted U-shape across time—the ideas take time to circulate but then eventually fall out of circulation.

A second factor related to aging is the perceived authority of a work; any author knows the rhetorical power of citing a work that is centuries old. This sort of appeal to authority can sometimes seem empty and self-fulfilling, of course; recall Twain's definition of a "classic" as a work one cites but does not read. And of course the historical and intellectual gravitas of a work can be offset by its declining relevance to modern audiences. As such, the authority of a work would seem to follow an inverted U shape as well.

In this sense, decreasing returns with time seem just as intuitive. Recent work, depending upon the subject matter, can seem more relevant and advanced, especially if one assumes that knowledge (scientific or otherwise) is cumulative. If one wanted to cite authoritative work on the effects of, say, a medical treatment, one would probably not select something from the age of blood-letting and the like.

In this discussion, it is important to note both the symbolic and functional benefits of cultural products such as literature or music (and we will include constitutions shortly, though readers have likely already made that connection). One references a book, film, or piece of music not just to share its beauty and wisdom with others, but also as a form of representation. Guilty pleasures aside, our use of cultural products can have a very public component. In this sense, the age of the product can have a very real effect on its symbolic power, through the very mechanisms we identify above. And the ability of a product to "stand for something," to be identified with an idea, is central.

In this regard, consider *Magna Carta* as against Liber Augustalis. The latter work, known also as the Constitutions of Melfi, was a collection of fundamental laws drafted for the Kingdom of Sicily, and is considered by some to be the oldest surviving written constitution in the Western world. Adopted as part of centralizing reforms by Emperor Frederick II in 1236, the text restated the principle of equality before the law and adopted several rationalizations to criminal procedure, including outlawing several ordeals and increasing the role of witness testimony. The text, described by the great jurist Kantorowicz (1957) as "the birth certificate of the modern administrative state," was considered by some to be of even greater influence than *Magna Carta* in the 13th century. *Liber Augustalis* remained in use until the 19th century (Percy, 1973: 403). Its contents, like *Magna Carta*, are a "long and disorderly jumble" of promises (Thorne, 1965: 4), but include many important liberties for church and nobles, even as the effect is to consolidate monarchical authority. Of the two, *Liber Augustalis* is considered to have provided greater protection for women, whose only mention in *Magna Carta* is for the purpose of limiting testimonial power and to confirm some customary rights for widows.[6] [7] While the *Liber Augustalis* is known only to historians today, *Magna Carta* is synonymous with liberty. Why? We offer two general factors that would seem to predict when some legal texts will sustain their relevance while others will not.

First, it helps to have a powerful advocate who takes an interest in a particular text. A champion with a strategic interest in

[5] 250 U.S. 616, 630 (1919) ("...when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.... The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.") See Healy, 2013 for a full discussion.

[6] Clause 54 of *Magna Carta* ("No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.")

[7] Clause (7) reads "At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her." Clause (8) provides that "No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of."

promoting a cultural product will help to keep the flame alive, even if the original producer is long gone. Mendelssohn's role in promoting Bach, Alan Lomax's efforts on behalf of folk musicians, or the disc jockey Alan Freed's role in promoting rock and roll provide examples. These actors lashed their own destinies to the material they were promoting. No doubt the same is true in law. A powerful judge or legislator citing a text can give it new life and change its symbolic value. Often the exponent will champion the source for their own purposes; thus a certain ambiguity might help a document be utilized in different ways in different contexts.

Second, it helps to be imperial. Without the success of the British Empire and its American successor, it is highly unlikely that *Magna Carta* would come to global attention. Surely if we were living in a world in which the Hungarians or Japanese were the dominant power, we might be conferring on the occasion of the several hundred year anniversary of the Golden Bull or the Shikimoku. But that is not our world. The particular utility of *Magna Carta* to the British self-conception, and especially to the ideas associated with the American founding, helped to provide an image of universal impact.

With these general considerations in mind, let us return to the influence of *Magna Carta*.

4. Magna Carta's revival

With respect to our first factor, *Magna Carta* seems likely to have been perpetuated by powerful champions. The conventional understanding is that it is the revival of the document in the early 17th century that puts it on the path toward its current iconographic status. Members of parliament and the famous lawyer, Sir Edward Coke, revived the document in their struggle with the Stuart rulers to enhance an argument that free Englishmen had "always" enjoyed a set of rights and privileges that had been disrupted by a series of events beginning with the Norman Conquest. *Magna Carta*, in their view, embodied these rights as part of the "ancient constitution," representing a glorious past. It helped that *Magna Carta* had been modified at various times to reflect different formulations of liberties; for example, the version in the statute books by the 16th century included such phrases as "due process of law."

Through Coke's treatises, *Magna Carta* travelled across the Atlantic, where it took on an even greater role than it had in its homeland. William Penn published an edition in 1687, making the claim that the charter embodied individual liberties of all Englishmen, which of course included the colonists. In the 18th century several colonies enacted *Magna Carta*—in whole or in part—into their law. Many of the initial state constitutions, including those of Delaware (1776), Maryland (1776), Massachusetts (1780), New Hampshire (1984), New York (1777), North Carolina (1776), South Carolina (1778) and Virginia (1776)—drew directly from Articles 39 and 40 of *Magna Carta*, which provided for the lawful judgment of equals (Lerner, 2015). With the Stamp Act of 1765, the imagery of a tyrannical government impinging on ancient rights proved useful to both John Adams and Benjamin Franklin, who invoked different provisions of *Magna Carta* in calling for the act's repeal (Adams, 1765; Reid, 1995). The founding fathers sought inspiration from *Magna Carta* in producing the Declaration of Independence and the Bill of Rights, which we see reflected in provisions on habeas corpus (whose origins predate *Magna Carta*) and the phrase "due process of law" which had been added to the statutory *Magna Carta* in the 14th century (Turner, 2003: 162, 209; McIlwain, 1914). Historians have noted that we tend to see the present in the text of *Magna Carta*, and this seems to have been the case since Coke's revival (Helmholz, 1999, 2015). But it also helps that these projects of re-visioning the ancient document were *successful*.

This leads to our second factor: empire. *Magna Carta's* global spread, discussed below, is likely driven by the tremendous influence Britain itself has had, as well as the importance of American ideas of constitutionalism. Nearly a third of the world's independent states are former British colonies. The British Commonwealth remains a force for celebrating shared heritage. And Britain's imperial successor, the United States, adapted *Magna Carta* for its own ends. As an ancient written document that could be seen as offering theories of restraint on power, *Magna Carta* travelled along with ideas of written constitutionalism. No doubt one would not expect the *Golden Bull* of Hungary or the *Go-Seibei Shikimoku* of Japan to have such influence, simply because those countries' empires were less global.

5. Influence on, and relevance to, national constitutions

As preliminary matter, it is important to note that influence is always relational—that it involves a source and target document, and that statements of general influence are really aggregations of different dyads. So the influence of *Magna Carta* could register loudly on one text but not at all on another. Of course, one of the more interesting research questions revolves around the conditions (associated with either target, source, or their relationship) that affect the transmission of ideas. At the same time, one can think of *Magna Carta's* aggregate influence on some set of texts.

Another sticky issue that we should dispatch with quickly is that of ignorance, which always seems to abound in the domain of constitutions. In this case, we are dealing with an 800-year-old document, which very much fits the Twain definition of classic above (a work that is cited but not read). As one indicator of a knowledge gap, consider the simple matter of the definite article. Many readers should be forgiven for the inclination to add "the" in front of *Magna Carta*. But just a quick trip to Wikipedia will remind us of that rookie mistake, but also remind us that most of us know little about the great charter. But ignorance of a text's contents does not mean that it does not continue to exert influence. For one thing, ideas that once grew from *Magna Carta* have been transplanted and cross-pollinated many times over: if we could identify *Magna Carta* as the original source of those ideas, that would mean something. For another, the text probably wields considerable rhetorical power, whether or not (and perhaps because) no one is familiar with its contents. In a moment, we will revisit the content of the document and compare it with that of the world's constitutions. We are not prepared to say that the world's constitutions would look any different today were it not for *Magna Carta*. However, it is clear to us that in many important respects, *Magna Carta* is more relevant today than it has been in the last 200 years.

Conceptualizations regarding the diffusion of ideas abound (see, e.g, Elkins, 2009). In the context of *Magna Carta*, Melton has developed (with Robert Hazell) a basic typology of different kinds of influence, which is useful for our purposes here. A legal document might influence the actual text of another, or its influence might be simply symbolic, operating at the level of underlying principles and ideas. Furthermore influence can be direct or indirect; the latter implies that the influence has been channelled through another document. Putting these two dimensions together delivers the four combinations depicted in Fig. 1 (drawn from Hazell and Melton, 2015).

As an example of *direct/actual* influence, Hazell and Melton give the example of New Zealand, where the Imperial Laws Application Act (1988) provides that parts of the *Magna Carta* remain in force in

	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

Fig. 1. Modes of *Magna Carta's* influence.

New Zealand.[8] Lerner (2015) notes that language from *Magna Carta* remain in force in the criminal procedure provisions in many U.S. state constitutions even today.[9] *Indirect/actual* influence is much more common, and the large literature on the influence of *Magna Carta* on the Bills of Rights of early North American colonies are good examples. Provisions on "due process" and private property, while each arose at different points of English history, are often linked to *Magna Carta* because they appeared there in some form as well.

The real question before us is a counterfactual one: would contemporary constitutions today look much different if *Magna Carta* had never come to be? Given the eight-century distance between *Magna Carta* and today, this sort of exercise is tantamount to tracing the effect of the proverbial butterfly's flapping its wings (of chaos-theory fame). The counterfactual is undoubtedly difficult to tease out. Of course, if world constitutions looked nothing like *Magna Carta*, then we could very easily reject the notion of any effect. But as you will see, current constitutions *are* similar to *Magna Carta* in important ways. But it could very well be that the kinds of things that are in *Magna Carta* were just a reflection of evolving practice at the time. In that sense, writing such ideas down was simply that – less a matter of creating norms than in recording them. This epiphenomenal idea is a common critique of constitutions. The knock is that they don't shift values themselves so much as consecrate the obvious. But were Magna Cartian ideas so obvious at the time? We are not sure, but we *can* say something about their relation to current constitutional ideas of today.

Indeed, our comparative advantage is that we have spent untold hours reading and recording the content of each of the world's constitutions since 1789. As such, we are uniquely positioned to take on the perhaps unenviable task of comparing *Magna Carta* to its successors in different corners of the world. The backbone of this endeavor, the Comparative Constitutions Project (Elkins et al., 2016), is a complete, and regularly updated, chronology of world constitutional history for independent states since 1789. We have collected almost every text associated with each of those changes. We, and have have developed a conceptual inventory with which we code the contents of more than 900 constitutions and more than 1000 amendments thereof.

In comparing *Magna Carta* to the modern Constitution, we can begin with the matter of style. *Magna Carta* is undoubtedly timeless, but one is struck by the highly pragmatic and even ordinary nature of its contents. The most striking example might be the ban on fish weirs in the river Thames. In its specificity, *Magna Carta* may have more to do with constitutions of the 21st century than they do those of the early 19th century. Documents from the 19th century tend to be highly general, framework charters. By contrast, the modern constitution has increasingly more to say about concrete policy issues – think the sports programs and specific interest rates specified in the Brazilian Constitution of 1988. In some sense, this is one of the ironies of *Magna Carta*. While the document is very much written in a small-bore way like ordinary legislation, its reach is somehow fundamental and general.

Given that *Magna Carta* has its share of context-specific elements, one wonders how many traces of it are left in modern constitutions? In Table 1, we have identified several aspects of contemporary constitutions that, either directly or indirectly, correspond to provisions in *Magna Carta*. If we were to make minor adjustments for contextual language, it is clear that much of *Magna Carta* is alive and well.

For example, the text is quite clear (and prescient) about judicial independence, something that is the now mainstay of democratic constitutionalism. As Table 1 attests, some 79 percent of constitutions that are currently in force have a specific declaration of judicial independence. Chapter 17 of *Magna Carta* expresses something similar in terms just as stark, and with particular attention to physical independence, as well as ideational. Chapter 17: "Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place." A simple statement, perhaps, but a critical one. It was important to the Barons that the court be fixed and not attached to the King's traveling circus, in the same way it is important the modern judiciaries maintain their autonomy from executives and legislatures.

If we turn to particular rights and liberties, traces of *Magna Carta* abound (see Table 1). But not only do they abound, but *Magna Carta* rights seem to have increased in popularity since the dawn of modern constitutionalism (the beginning of the 19th century). Fig. 2 illustrates the prevalence of the four legal process rights commonly associated with *Magna Carta*—protection from unjustified restraint, the right to a jury trial, the prohibition on ex post facto law, and the right to a speedy trial—in all national constitutions written from 1789 to 2015. Each panel in the figure depicts the percentage of national constitutions with a given right in force in a given year.

As Fig. 2 suggests, most but not all of the *Magna Carta* "rights" have increased in popularity over time. Trial by jury, for example, although a hallowed feature of *Magna Carta* and early 19th century constitutions, has not been favored by modern drafters. But if one expands the range of rights that are arguably referenced

[8] 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.

[9] Massachusetts's 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).

[13] Data from the Comparative Constitutions Project (CCP) and is available to download from http://comparativeconstitutionsproject.org/. The following variables are used in Fig. 2: habcorp, jury, expost, speedtri.

Table 1
Magna Carta Rights.

MC Chapter	Modern expression	Percent of constitutions in force with provision (2015)
39	Right to jury trial	18
39	No unjustified restraint	78
39	Nulla peone sine lege	66
39	Ex post facto	81
33;41;42	Right to conduct business	40
41	Freedom of movement	86
3-9; 27	Inheritance rights	32
17; 40	Independent judiciary (explicit declaration thereof)	79
28-31	Limits on expropriation	90
1;63	Provision on state/religion relationship	93
35	Weights and measures	18
13	Local governance	73
23	Fiscal relationship between state and local jurisdictions	32
39	Due process	19
40	Equality before law	98

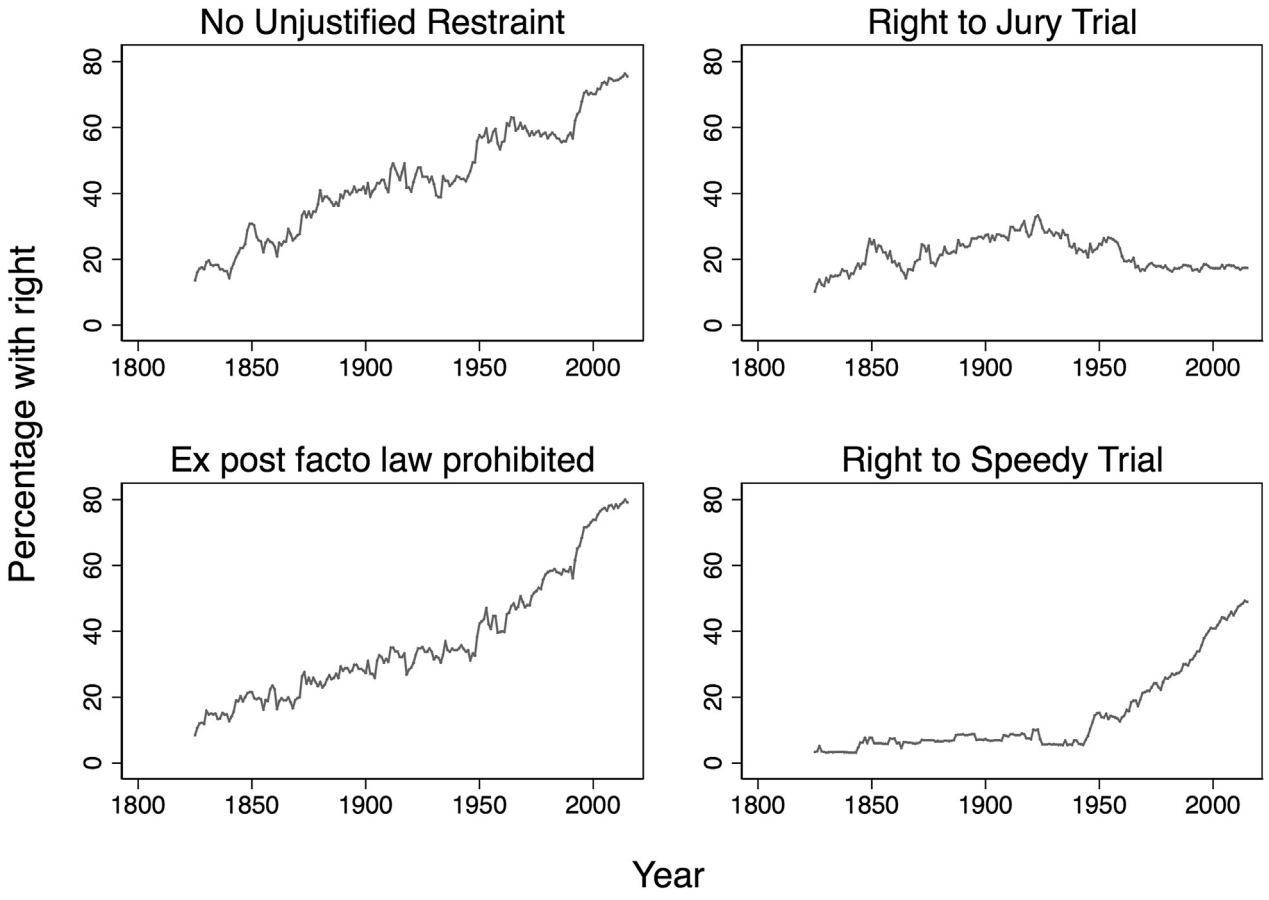

Fig. 2. Prevalence of select *Magna Carta* rights in National Constitutions, 1825–2015.[13]

or foreshadowed in *Magna Carta* (beyond these four), influence appears even stronger. To be sure, many such rights likely reflected broader origins, including ideas of natural law (Helmholz, 2015). But because they were often ascribed to *Magna Carta* in subsequent developments in the common law, the association seems tenable.

When one broadens the perspective even further to look at indirect and symbolic influence, *Magna Carta* seems quite influential due to its association with principles like constitutionalism and the rule of law. At the American founding, the ambiguity of *Magna Carta* is evidenced in that it was deployed rhetorically on both sides of debates over a Bill of Rights. Evoked by Hamilton in Federalist 84, it was also used by Brutus who claimed that *Magna Carta* has 'long been the boast, as well as the security,' of England.[10]

Magna Carta is also frequently referenced in constitutional debates outside the United States. In Table 2, we provide the number of mentions of *Magna Carta*, and several other symbolic texts, in the six Brazilian constituent assemblies since the country's independence. Early in the modern constitutional era, constitutions in the United States, France, and Portugal were the most referenced texts; *Magna Carta* was barely mentioned. However, over time, mentions of *Magna Carta* have become more prevalent, and by the

[10] The Anti-Federalist, Brutus #2, 1 November 1787.

Table 2
Mentions of select symbolic texts during Brazilian Constituent Assembly debates.[14]

Referenced text	Brazilian Constituent Assembly					
	1823	1890–91	1933–34	1946	1966–67	1987–88
Magna Carta	0.01	0.06	1.27	2.11	8.24	6.94
Bible	0.01	0.03	0.05	0.06	0.13	0.60
UDHR	–	–	–	–	0.18	0.47
United States Constitution	0.13	2.23	3.68	4.51	6.18	6.70
French Constitution	0.24	0.81	2.61	2.23	3.82	4.69
Portuguese Constitution	2.28	0.51	1.24	2.65	2.34	6.10
Number of days	149	70	165	167	38	306

Notes: Cells represent the number of times per day each text is mentioned.

drafting of the 1967 and 1988 constitutions, the Great Charter was mentioned more than any other document listed. Further reading of the *Magna Carta* mentions suggests that in many modern cases, *Magna Carta* was referenced by Brazilian delegates as shorthand for "constitution" or "charter," which in some sense captures the symbolic power of the document. *Magna Carta* has thus, at least in Brazil, become a *proprietary eponym* much like Kleenex or Hoover (in the UK).

Today, *Magna Carta* remains a touchstone for lawyers. *Magna Carta* has become more and more popular in U.S. court citations, taking off after 750th anniversary celebrations which featured the American Bar Association's restoration of Runnymede. The very month of the 800th anniversary, Justice Thomas cited *Magna Carta* in his dissent in *Obergefell v. Hodges*, the gay marriage case decided in 2015.[11] Thomas identified Chapter 39 of the *Magna Carta* as the origin of the due process clause of the 14th amendment of the U.S. Constitution, and traced the history of the American adaptation of *Magna Carta's* ideas.[12]

6. Conclusion

Where would we be without *Magna Carta*? The complicated causal chain by which one document, in a long series of medieval developments, affects modern constitutional texts is probably unfathomable. But regardless of its actual level of influence, it is clear that *Magna Carta* has become remarkably important as a symbolic shorthand for liberty. In that sense, its pattern of influence is clearly more like that of Shakespeare than that of Thomas Kyd: *Magna Carta*'s contemporaries may not have appreciated the document's significance, but time has ushered the document firmly into the canon of constitutional law. A touchstone for development of statutory rights in early England, *Magna Carta* was revived by the powerful polemic pen of Lord Coke, and thence adopted by the early American colonists. From there, it became associated with the very core ideas of written constitutionalism, so that it is invoked by constitution-makers in diverse contexts well beyond its homeland. That historical progression led to the point of departure for our inquiry. Given *Magna Carta* as a heavily freighted symbol of constitutional democracy, what can we say about its actual influence and relevance for modern texts? Our evidence suggests that *Magna Carta's* importance rests not only in symbolism, but also in practice. That is, whether or not we can draw a clear causal line from Runnymede to sites of modern constitutional drafting, it is evident that the ideas of *Magna Carta* are as relevant as ever. Vestiges of the document remain firmly instantiated in constitutional texts drafted today.

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[14] Data from Zachary Elkins, "*Magna Carta* Abroad," presentation at the National Archives in Washington D.C. on 17 February 2012.
[11] 576 U.S. ... (2015).
[12] Id at 4–6.