

MAGNA CARTA: 800 YEARS OF LAW & LIBERTY

From Scalia to Jay-Z.

United States Supreme Court Justice Antonin Scalia said of the Magna Carta, 'It is with us every day.'¹ In its 800th anniversary year, it is hard to deny this observation. Indeed, a recent *New Yorker* article detailed an entire industry that has developed in the lead up to the 800th anniversary. Magna Carta now has a Twitter username (@MagnaCarta800th) and exhibitions proliferate; 'the Library of Congress sells a Magna Carta mug; the National Archives stocks a Magna Carta kids' book.'²

On my own recent trip to the British Library, the gift shop was selling Magna Carta T-shirts and tea towels, inkwells, quills, and even King John pillows (as a member of the executive government, I can attest that the pillow does not aid restful sleep). Jay Z, the world's biggest rap singer, has entitled his latest album 'Magna Carta Holy Grail.'

Tours of Runnymede are now roaring trade. Whether true or merely apocryphal anecdote, a story does the rounds: A guide at a recent tour asked for questions, and an American tourist asked when the document was signed. The guide said 12.15, upon which the wife of the tourist turned to him and said, 'See, I told you we shouldn't have stopped for lunch. We just missed it.'

In the actual year 1215, the practical purpose of Magna Carta was that it should operate as a political settlement or, as some have described, as a peace treaty by stipulating essential rules for the future conduct of relations between the king and his barons. In this important sense, the document sought to bind the future to the past. Given this essential feature it is perhaps not unsurprising that in its 800th anniversary many questions have been posed along the lines of how much the document still actually does, or should, bind the present.

A recent essay by Justin Champion quoted John Gray, the liberal philosopher whom I was fortunate enough to have had as a lecturer at the London School of Economics. In Gray's estimate, the history of ideas obeys only one law, that of irony: 'Ideas have consequences, but rarely those their authors expect, and never only those. Quite often they are the opposite.'³

The essentially harmless commercialisation of the Magna Carta is one intriguing example of how the past has affected the present, 800 years on, in a way none of the originators would have conceived. Imagine what King John and his barons would make of a child in 2015, sucking on an 'ORIGINAL 1215 Magna Carta British Library Baby Pacifier'—a plastic dummy with all 3,500 words of Latin text.

This evening I simply wanted to offer an observation about this notion that the Magna Carta is with us every day, by a consideration of both the trivial and the more foundational ways in which this is true.

Clearly, the Charter is around us every day in a trivial sense through its relentless appropriation for modern causes. The tea towels, the kids' toys, and the dummies are one form of this appropriation; all for commercial purposes. To anticipate a conclusion to this speech I might state here that Jay Z's album,



The Hon Christian Porter MP was Parliamentary Secretary to Prime Minister Tony Abbott when this address was delivered at an event of The Centre for Independent Studies on 15 June 2015.

Magna Carta, interestingly, does not fall neatly into this crass commercial appropriation category, but this is something I will return to shortly.

In any event, in my observation, this commercialisation is perhaps largely benign. However, there is another ‘academic’ way in which the *Magna Carta* is appropriated, which is worthy of a little more scrutiny.

There is a vast continuum of political ideas in whose service the *Magna Carta* has been appropriated. It seems to start at the very broadest level; whereby the *Magna Carta* has been appropriated to advocate on a society-wide scale for whole ideologies and for entire classes of peoples. At this grand level, the coarsest of summary might be to note that the Charter has been adopted by both conservatives and radicals. The petitions provision at 61 has been argued as a basis for legitimising resistance to the status quo and encouraging protest to authority, for groups as disparate as the American Tea Party movement to the anarchists of the Occupy London movement.

Alternatively, conservatives have tended to perceive the document as support for the maintenance of stable known structures and procedures of liberal democracy; as supporting an institutional status quo. This divergent ideological use is perhaps not unsurprising because, in some sense at least, for the barons, their support for the Charter was both dissent against the unskilled and calamitous exercise of authority of King John, and so was in this sense radical protestation. But also it was in part an attempt to put things back to where they had been, or at least where the barons perceived them to have been. A place where previous coronation charters had established what were viewed as orderly process-driven relations between the monarch and the baronetcy.

This type of grand ideological appropriation is of genuine academic interest, at least in a historical sense, but also in understanding evolutions in the history of ideas. However, beneath the ideological appropriation has been the sectorial appropriation leading right down to the trend of arguing the Charter as the basis for instituting quite specific changes in niche areas of public policy. For present purposes I will simply call this ‘advocacy appropriation.’

As the historian Paul Johnson noted, ‘to appeal to *Magna Carta* became the one, great, unanswerable argument which any and every section of society could employ.’⁴ And so, as Johnson goes on to describe, Archbishops ‘have flourished it against the King in the defence of the rights of the Church; Edward I flourished it against the Pope in defence of the rights of the State; Parliament cited it against the Crown and the Crown against Parliament; unlettered peasants used it against their masters, masters against townsfolk, townsfolk against rural lords.’

The modern habit of arguing that the *Magna Carta* supports the desirability of quite specific changes in niche areas of public policy has gone into a sort of hyperdrive in the document’s 800th anniversary. One recent example of advocacy appropriation to support a specific and niche public policy outcome has been with respect to judicial appointment. In what could be fairly described as a call for radical reform of common law judiciaries, a Member of the English Court of Appeal, Lady Justice Arden, stated a strong preference for a judiciary, ‘which is more diverse in terms of gender, ethnicity and sexual orientation.’⁵

It was in part an attempt to put things back to where they had been, or at least where the barons perceived them to have been.

The link between the desired policy outcome and the *Magna Carta* was the direct title of the paper itself: ‘*Magna Carta and the Judges—Realising the Vision.*’ Selection of judges, it was argued, should be informed by what are described as the ‘traditions of the *Magna Carta*’ to directly address under-representations in the modern judiciary. Section 45, stating that justices should be appointed ‘that know the law of the realm and are minded to keep it well,’ was particularly said to require change to be consistent with the vision of the *Magna Carta*. And the change is, in turn, expressed as the need ‘to keep the qualities required of judges under review and up to date’ with the new necessary qualities described as ‘the need for social awareness and the need for knowledge of the case law of courts outside the UK.’

This is part of an important debate about limits to the role of judges which was highlighted with brilliance by Lord Sumption in his essay ‘The Limits of the Law.’⁶ Lord Sumption recognises both an inevitability that judges, to some extent, necessarily make law in performing their interpretative duty, but equally that this process should be rationally limited to avoid what he described as a democratic deficit. He outlined a process where the ever increasing creativity of some courts in the interpretation of written instruments has had the effect of seeing a greater tendency for judicial decisions on what are fundamentally, or at least have traditionally been, economic, social, or political questions.

As a means of illustrating the foundational point, it is helpful to return to the rap star Jay Z.

Lord Sumption characterises the Strasburg court as having become ‘the international flag bearer for judge made fundamental law extending well beyond the text which it is charged with applying.’ He takes the view that political or economic questions are not changed into legal questions by their being decided by courts and that something is lost when they are moved from the political to the judicial realm.

Those that ascribe to the view alternative to Lord Sumption’s, which prefer that courts, through more activist interpretative methods, have a greater role in determining the best outcome in political, economic or social problems, naturally will also argue for selection of judges with more ‘social awareness.’

Maybe more ‘socially aware’ judges should increasingly treat written parliamentary instruments as ‘living trees’ and should make more socially expansive decisions stretching the traditional meanings of the words of the particular living tree they are applying. I must say I doubt the wisdom of this point of view, but it is an important and meaningful debate, and there are persuasive points of view on both sides.

If the argument that more socially aware judges making broader social decisions is worth serious debate, I must confess that the idea that the Magna Carta somehow suggests, supports or should inspire one particular outcome is a considerably more trivial notion. At worst, it has a slightly comic quality, reminiscent of mediaeval monks poring over obscure scripture trying to discern the truth of transubstantiation, and so solve by creative interpretation of age old scriptures whether the sacrament is actually Christ’s blood or merely metaphor.

And I am not alone in perceiving a kind of near meaningless interpretative stretch in this type of linking of specific provisions of the Magna Carta to the specifics of presently desired niche policy outcomes. An excellent recent essay by historian Nicholas Vincent notes that the problem with this interpretative stretch of broad historical words to support specific modern outcomes is that it cuts both ways. He writes:

Lady Justice Arden’s call, meanwhile, for a judiciary no longer drawn from the ‘establishment’ but from the liberal majority, seems to me directly to echo demands in the seventeenth century, that judges all be good Protestants, or in the eighteenth, that judges not only hate the Pope but serve the King. In all such instances, what is being demanded, surreptitiously or openly, is discrimination by the executive intended to interfere with the independence of the judiciary.⁷

Perhaps the real difficulty with all the shallow commercial and intellectual appropriation is that it tends to detract attention from the simpler, more foundational importance of the Magna Carta and so obscures what useful modern lessons might be drawn from it.

As a means of illustrating the foundational point, it is helpful to return to the rap star Jay Z. His is an appropriation that looks more trivial than it actually is.

Jay Z announced the title and release date of his twelfth solo album, *Magna Carta / Holy Grail*,

during Game 5 of the NBA Finals and, as part of the promotion deal, Samsung agreed to buy 1 million copies of the album that fans would receive for free via the Magna Carta app.

A Twittersphere debate emerged as to why the album and app were called ‘Magna Carta.’ The early preponderance of opinion was that, in an industry of rampant egotism, this was simply the next step in the ego wars; that Jay Z was saying he was bigger than the two biggest things in history. However, this is a misunderstanding. The music itself reveals a deep interest in the rules governing the relationship between state and citizen.

Indeed, an American law lecturer has designed an entire lecture series around the second verse of his song ‘99 Problems.’ I am not going to rap but it goes:

The year is ’94 and in my trunk is raw...

And I heard, ‘Son, do you know what I’m stopping you for?’

’Cause I’m young and I’m black and my hat’s real low?

Do I look like a mind-reader, sir? I don’t know.

Am I under arrest or should I guess some mo’?

I understand that ‘my trunk is raw’ means there were drugs in the trunk. The New Jersey State Police at the time had an active ‘drug courier profiling’ program. Here was a sharp criticism upon the validity of that profiling as a basis for a vehicular stop and its legitimacy as a contributing factor to probable cause (or, in our jurisdiction, the reasonable suspicion) required to justify a subsequent search.

The musical digression demonstrates that this is a man with an acute interest in the interface between state and citizen. Rather than egomania, the better explanation for the name of the album is provided by this blogging response:

It means: To rewrite the rules.

Label’s [sic] have forever taken liberties over artists and their dealings with releasing works. The Magna Carta (as you hopefully know) was a rewrite of the rules. Jay took this idea, and implemented it within his entire roster of artists, hence the internet release, the Samsung hype etc.”⁸

So Jay Z saw his album as rewriting the commercial rules between labour and capital in the music industry.

For all the advocacy appropriations pretending to enlighten us about the importance of the document, which are mostly just pushing a cause, a blog about a rap artist, in my observation, cuts right to the heart of what is fundamental about the Magna Carta and what underpins the profound source of its ability to reach 800 years beyond its own grave to be all around us today.

Prior to the Magna Carta, a theory of sovereign infallibility likely dominated the substantive practice of politics.

Magna Carta was not the first but, likely, it is the most historically important re-writing of the rules. Previous charters had been designed to deal with the question of what to do when, in practice, a King was inadequate or downright hopeless, which in a shockingly violent time was usually revealed by military ineptitude, as was the case with King John. Two hundred years earlier King Ethelred was only permitted to return to England on the condition that he signed a document promising substantial reforms in his methods of governance.

So, while not the first contract, its historical importance likely turns on the fact that prior to the Magna Carta, a theory of sovereign infallibility likely dominated the substantive practice of politics.

In a pre-Magna Carta essay, Henry II’s Treasurer wrote: “Though abundant riches may often come to Kings, not by some well attested rights ... [but] even by arbitrary decisions made at their pleasure, yet their deeds must not be discussed or condemned by their inferiors.”⁹

Arguably, Magna Carta is the pivot point at which the contract theory of the state ends the dominance of this type of thinking and becomes a replacement paradigm for society's conception of its relationship with sovereign power. The process and outcome of the events in Runnymede uncannily mirror three central elements of what political philosophers now would call the contract theory of the state:

- The relationship between citizen and state should be conducted according to known and knowable rules to which everyone is subject;
- the rules are a form of fundamental bargain or contract between the citizens and the state to whom citizens cede the monopoly power of compulsion (which was in the first instance their own); and
- the rules can and are to be rewritten from time to time and from issue to issue, with the critical proviso that rewriting must only be the product of agreement in what becomes a never ending process of negotiation, compromise, and bargain.

The power of the Magna Carta to effect and inform the modern is not in the result of the 1215 negotiation, but in the fact of the negotiation itself.

Barons for and against the King, each with intermediaries lay and clerical; landowners for and against the King; Church parties for and against the King; and the Pope, represented by his legate, sought to influence all those present—both those for and against special legal protection for the Catholic Church and the aristocracy; tax breaks for the wealthiest; freeing capital cities from regulatory oversight; total freedom of elite immigration; and placing the burden of infrastructure maintenance on local communities instead of government.

The most important point is not whether the outcome of negotiation produced a sound blueprint for the good governance of the England

in 1215. Least of all is the point whether the negotiation produced words that can now provide guidance or clues or inspiration for how we solve specific modern controversies around the evolving relationship between state and citizen in 2015. The power of the Magna Carta to effect and inform the modern is not in the result of the 1215 negotiation, but in the fact of the negotiation itself.

If the Charter's fundamental importance is in constituting a pivot point in the history of ideas, this means there is perhaps more to be learned by consideration of how the document came to be than what was in it. And so, a few observations about the negotiation process.

The actual five days at Runnymede are rather unclear. In fact, the one historical point that is perhaps now clear is how unclear it must have been to the many participants as to what precisely was going on. There were things of great importance to the parties that went in, and things of equal importance got left out.

The whole point for the Northern barons (after John's disastrous continental forays) was a 'limitation on overseas service clause.'¹⁰ Conceded in a preliminary draft, this was left out of the final document and many barons left in disgust before the document was even signed.

Perhaps the overwhelming identifying feature of the process that led to the Magna Carta was that it was a colossal mess. In 2013 a new word entered the Oxford English Dictionary. This word gained popularity in political circles to describe the general process of modern government in formulating policy. The word was 'omni-shambles.' It took 800 years to invent the perfect word to describe what happens in the democratic negotiation processes designed to produce workable compromise in public policy outcomes—but this is it.

To give you some modern perspective, likely the process at Runnymede was so messy it may have even made Kevin Rudd's 2020 summit look well-organised. Believe me, I experienced two days of the Wayne Swan tax summit—two days of my life I will never get back.

The historian Paul Johnson argues that so eclectic and failed a compromise was the document itself that had John not got in first to repudiate it, likely

the barons would have denounced it in their turn. He described the result as:

a spatchcocked compromise which did not represent the attitudes of any of the parties—or rather represented bits of all of them—and was therefore unworkable as a political settlement. The story of the Magna Carta, in fact, is not of a negotiation which succeeded but one that failed.¹¹

We know the king repudiates the document a month after Runnymede when he realises the barons mean to enforce the ‘security clause.’

As an aside, in modern politics we hear a lot of claims of sovereign risk. King John’s repudiation of the fundamental contract of governance negotiated only a month before always reminds me of Paul Hogan’s great line, ‘That’s not a knife, *this* is a knife.’ I like to think of King John lying his head on his King John pillow thinking, before repudiation, ‘That’s not sovereign risk, *this* is sovereign risk.’

So, Magna Carta may have been a negotiation that failed to provide a governance blueprint for immediate use in 1215. But the negotiation has been an amazing success in providing a blueprint for how to create governance blueprints.

If Runnymede was a bit of an omnishambles, the mess is nevertheless marked by two serious virtues that made it historically significant. First, unlike the Rudd 2020 summit, it actually produces a result; something tangible, readable and knowable, if not always clear. And second, it produces a result capable of evolution by further negotiation; the rules get rewritten and reissued multiple times by the next generations of sovereigns by variants on the same messy process.

Finally and by way of conclusion, there is another feature of the negotiation process that has implications for modern governance. As well as being shambolic, the process produces a document which in many respects is quite vague—mostly about the important stuff.

If we were still bartering for haberject, then the Magna Carta’s feudal fastidiousness in standardising measures for this hemp-like substance would see us knowing exactly what to do in 2015 in the haberject market. But if we are

looking to the Magna Carta for guidance as to the appropriateness of offender profiling as a basis for vehicular searches or the optimal role for judges and the optimal method for selecting the judiciary, then the charter is much less clear.

The negotiation has been an amazing success in providing a blueprint for how to create governance blueprints.

Recourse to phrases such as that imprisonment will require ‘lawful judgment of his Peers or by the Law of the land,’ or that Justices should be appointed who ‘know the law of the realm and are minded to keep it,’ in truth is not terribly helpful in determining what specific rules are agreeably consistent with the concepts of fair conduct in the justice system in 2015.

The messy process of contractual governance leads to government practices and governance documents that tend to be better at getting consensus around specifics for weights and measures than consensus around specifics for really important issues.

Contractual government seems to be like a good academic: finding it much easier to get more and more specific about less and less.

But this is so only because modern governance reflects the features of people governed. It reflects that the contract of governance is a messy compromise required to build a political consensus between different interests with different views, where everyone ends up dissatisfied to some extent with the end result.

A great lesson, as true today as it was 800 years ago, is that a primary feature of contractual government is that we can all agree with a fairly high level of consensus on the little things like weights and measures but equally rational people will often fail to agree with detail and precision on big things. So foundational documentary agreement occurs at the level of greatest generality and the details of general principle are the subject of ongoing negotiations and determinations.

Issues like judicial roles and selection and offender profiling are contestable and the way

in which we resolve these contested issues will not likely be aided much, if at all, by recourse to the words of the Magna Carta. But they can be resolved by recourse to and an understanding of the processes that underpinned the Magna Carta.

A government could certainly choose now to stand for policies that are at least arguably clear in the words of the Magna Carta. However, such a party would be taking what Sir Humphry would describe as a ‘courageous decision.’

But if, as John Gray argues, ideas have consequences that rarely reflect what their authors expect, perhaps one exception is the Magna Carta. This is because, in one sense, its legacy is exactly what was expected by the barons in 1215: that contentious issues can be resolved, but only after the thrashing out, the debating, the subjecting to argument and re-litigation and revision, and even then imperfectly, in the messy real world process of politics.

Endnotes

- 1 In his opening of the 2014 National Lawyers Convention on 13 November at the Mayflower Hotel in Washington, DC, in a discussion of the importance of Magna Carta.
- 2 Jill Lepore, ‘The Rule of History: Magna Carta, the Bill of Rights, and the hold of time.’ *The New Yorker*, 20 April 2015.
- 3 John Gray, ‘The Original Modernizers.’ *Gray’s Anatomy* (2009), p. 263–274, 263.
- 4 Paul Johnson, *The Offshore Islanders: A History of the English People* (Phoenix, 1995), p. 122.
- 5 The Right Honorable Lady Justice Arden DBE, ‘Magna Carta and the Judges—Realising the Vision,’ p. 16. Available at <https://www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf>.
- 6 Available at <https://www.supremecourt.uk/docs/speech-131120.pdf>.
- 7 Nicholas Vincent, ‘Comment on Justin Champion.’ Available at the Online Library of Liberty, <http://oll.libertyfund.org/pages/libertymatters-mc>.
- 8 Available at Yahoo! Answers, <https://answers.yahoo.com/question/index?qid=20130702070656AA5Xiim>.
- 9 Quoted in Johnson, p. 118.
- 10 *ibid.*, p. 121.
- 11 *ibid.*, p. 121.

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