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A Magna “Charter” for the Empire, resurrecting the myth of Magna Carta during the American revolution

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In this article I will argue that between 1765 and 1772, the myth of the English Magna Carta was resurrected with patriotic emotion, by some Anglo-American colonists who identified the so-called intent, solemnity, contractual form and political content of the original Magna “Charter” with their colonial charters. I will show that Samuel Adams and other patriots began to see their Royal charters, particularly the 1691 Massachusetts Bay charter, as a Magna “Charter” for the Empire. In doing so, in claiming some palimpsestic approach between the centuries’ old Charta and late 17th century colonial charters, patriots displayed an early American example of “constitutional patriotism”, by which they invested a lot of emotion in the original constitution, be it their own or the original Magna Carta.

Like the original Charter of yore, their royal charters came to symbolize liberties granted by a King to his English subjects, and as such it entitled them to resist arbitrary power through “due process” of law. In this paper, I will connect the American patriots’ reading of the original Magna Carta (particularly article 61) to the current political demands of the “American” colonists in the late 1760s and early 1770s by analysing Samuel Adam’s main writings at the beginning of the revolution. Adams believes American colonists received from the hands of the King in 1691, their (colonial) “charter” which recognized their rights and liberties as English-born subjects. In the same way as King John’s barons fought for their Charter in 1215, Adams by identifying the 1691 Charter with Magna Carta came to believe that likewise colonists should fight for its recognition in 1765 and afterwards.

I – The first Virginia Charter: a Magna “Charter” for the Empire (1606) and its subsequent revisions in the 17th and 18th century.

In the course of the 17th century, some original “commercial” charters were issued to English merchants to organise the first colonial “outposts” (Virginia was called the “first colony” and New England, the “second colony” in the original document). Under James I, the first colonial Charter which was issued in 1606 to the merchants of London and Plymouth, did take the form of a royal grant and consent given to some barons (here “knights”), to encourage and support their endeavour to extend his empire in America.

The document much resembled the grant of the original Carta in so far as it came from the King to his subjects listed in a hierarchical order, representing the people of the colony as in the 1295 version, starting with knights and church representatives, down to esquires, gentlemen and “divers others subjects as mentioned below in the 1606 Royal Charter founding Virginia and New England.

James, by the grace of God [King of England, Scotland, France, and Ireland, Defender of the Faith], etc. Whereas our loving and well-disposed subjects, Sir Thomas Gates and Sir George Somers, Knightes; Richarde Hackluit, Clarke, Prebendarie of Westminster; and Edwarde Maria Wingheilde, Thomas Hannam and Raleighe Gilberde, Esquiers; William Parker and George Popham, Gentlemen; and divers others of our loving subjects, have been humble sutors unto us that wee woulde vouchsafe unto them our licence to make habitacion, plantacion and to deduce a colonie of sondrie of our people into that parte of America (...)

In the same light, the original 1606 Royal Charter was very explicit on the way settlers were entitled to organise themselves in a local government in the distant American empire. For practical reasons, the King granted them the right to form a council of 13 members to better organise their local government, as long as they conferred to the law of the realm.

They were also granted some autonomy or independence, as they received a specific seal bearing the king's arms on the obverse and on the reverse the expression "*Pro Concilio primae Coloniae Virginiae*" which meant the council had the power to govern and order in local matters. In short, the first colonial councils, as councils were duplicated in the two regions delineated in the charter (i.e. the first and second colonies) received some delegated powers and councillors were legislating « on behalf » of the king. This was established in perpetuity by the Stuart sovereign :

And wee doe alsoe ordaine, establishe and agree for [us], our heires and successors, that eache of the saide Colonies shall have a Counsell which shall governe and order all matters and causes which shall arise, growe, or happen to or within the same severall Colonies, according to such lawes, ordinances and instructions as shalbe in that behalfe, given and signed with our hande or signe manuell and passe under the Privie Seale of our realme of Englande; eache of which Counsell shall consist of thirteene parsons and to be ordained, made and removed from time to time (...)¹

When time came to connect the lineaments between this first charter for the Empire, to the several colonial charters established and working in the 18th century, now challenged by the British government, Samuel Adams reminded American colonists that legislative independence and local representation of the settlers had been granted to them by the king as early as 1606 and confirmed in subsequent charters.

Some "liberal" Colonial charters for the colonies along Magna Carta principles – the 1691 Massachusetts Bay charter

It is interesting to keep in mind that the revision of the early American colonial charters² as well as the writing of new ones, took place at a time when Magna Carta was resurrected as a central contractual document founding the English Constitution, particularly in its definition of the prerogatives of Parliament. In the 1630s and 1640s indeed, Sir Edward Coke's legal prose and expertise³ was to be found in the elaboration of the Petition of Right⁴, the Grand Remonstrance and the "19 propositions" which the House of Commons addressed to the King, with the intent of reminding Charles I of the sacred binding features of Magna Carta, particularly article 61⁵.

¹ The First Charter of Virginia (1606), http://avalon.law.yale.edu/17th_century/va01.asp (retrieved November 14, 2015)

² For instance, in 1624, the first "commercial" colony saw its grant to merchants revoked and Virginia and New England were now placed back under Royal authority.

³ Edward Coke, *The Institutes of the Lawes of England*, (1628-1644).

⁴ The Petition of Right reaffirmed the liberties guaranteed in Magna Carta, prohibited the right to levy taxes without Parliament's consent, as well as extra-legal imprisonment, and guaranteed the privilege of the writ of habeas corpus.

⁵ The first American printed version of the Magna Carta goes back to 1687 in Philadelphia, when William Penn edited the 1295 version under the title *The Excellent Priviledge of Liberty and Property, Being the Birthright of the Free-Born Subjects of England*.

In the course of this article, we will see that Article 61 in Magna Carta, or at least its principles and legal interpretation, formed the basis of the early defence of the colonists who proclaimed through it, the validity and the contractual value of their charters. Clause 61 establishes the right of the barons' representation in an "assembly" (or Parliament), it introduces the idea of consent before tax collection, it clarifies the political liberties of the subjects, and the role of the representatives (in Parliament) in the protection of the liberties of the subjects against arbitrary rule. Last but not least, it guarantees the right for redress before the monarch or his representatives, which is granted to the King's subjects via their assembly, in case their liberties might be threatened.

(61) SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. (...) ⁶

Indeed article 61 granted the barons the creation of a Parliament to further their "security", as the elected barons were to observe and keep "peace and liberties". If the King or any of his officers erred or hurt these liberties, they were allowed to address (or petition the king) and to ask for redress.

New royal charters were issued to proprietors under the Restoration, while older versions of the first Royal charters for Virginia or New England were revised. But they kept the same original intent in terms of local representations with some delegated powers granted to local councils to legislate. For instance the first Massachusetts Charter (which we can identify in the 1606 Virginia Charter as the "second colony" or New England) was carved out of the first Charter and specifically granted to a joint-stock company of merchants from Plymouth "trading in Northern Parts" in 1620, with no alteration to the original text. A second revised charter was granted more specifically to Massachusetts Bay (Boston) in 1629 before an influx of Puritan settlers established villages. In 1635, the first "proprietors" of New England surrendered what they called their "Great Charter" to King Charles I, returning the colony to the English monarch.⁷ In 1662, Massachusetts was placed under a Royal Charter in order to curb Puritan rule over the colony. This was only achieved in 1685, when Charles II eventually placed Massachusetts under the authority of the unified Dominion of New England, thus giving the region its official denomination. By that time the Habeas Corpus had been voted in England thus allowing the updated colonial charter to include it as part of its statutory law.

After the "Glorious Revolution", William III issued Massachusetts Bay "and all the adjacent territories"⁸ which they united, a new Royal charter in 1691⁹, which reflected all the political

⁶ Magna Carta, 1215, full text at <http://www.constitution.org/eng/magnacar.htm> (underscore mine)

⁷ The Act of Surrender of the Great Charter of New England to His Majesty : 1635

⁸ « By these letter patents we Unite Erect and Incorporate the Territories and Colonies commonly called or known by the Names of the Colony of the Massachusetts Bay and Colony of New Plymouth the Province of

progress brought by the English Bill of Rights. The tone, style and intent of that colonial charter, echoed the original 1606 first charter as well as previous royal charters going back to Magna Carta, as the document insisted on the solemnity and contractual form of the grant of freedom and political liberties given by the King to his subjects residing in New England:

By Our Royal Charter (we intend) to Incorporate Our Subjects in Our said Colony and to grant and confirm Into them such powers privileges and Franchises as [in] Our Royal Wisdom should be thought most conducing to Our Interest and Service and to the Welfare and happy State of Our Subjects in New England.

It gave colonists the right of self-government by the creation of an assembly of local freeholders. What is interesting to notice here is that the King established no difference between the amount required to obtain the franchise between his subjects living in the colonies or in England (40 shillings). What can be considered as greatly novel and quite liberal in the charter was the fact that its popular assembly was placed under the supervision of a budding form of responsible government with an elected “Council” of settlers (28 altogether) working alongside the king’s representative,¹⁰ for : their protection and defence, the exercise of their political rights and the progress and prosperity of the Royal colony.

(We are) graciously pleased to gratify Our said Subjects And also to the end. Our good Subjects within Our Colony of New Plymouth in New England aforesaid may be brought under such a form of Government as may put them in a better Condition of defence and considering as well the granting unto them as onto Our Subjects in the said Colony of the Massachusetts Bay Our Royal Charter with reasonable Powers and Privileges will much tend not only to the safety but to the Flourishing estate of Our Subjects in the said parts of New England.

It is interesting to note that at this point in time, there is no metropolitan distrust of the settlers. In fact the governor is the only “outsider” or metropolitan representative, among the other English subjects who only seem to be living in a remote province of the kingdom. Besides the charter specifically mentions that the governor’s close councillors or assistants, i.e. local members of the council, might be asked to replace him. In his absence, they were granted by the King “full power and Authority to give and administer, the same to Our said Governor.” This goes to show that in the late 17th century, there was no suspicion regarding the colonists, who were English subjects first, and as such they could be entrusted or “empowered” with political rights, as the charter establishes.

Maine the Territory called Acadia or Nova Scotia and all that Tract of land lying between the said Territorys of Nova Scotia and the said Province of Main into One Reall Province by the Name of Our Province of the Massachusetts Bay in New England.”

⁹ The Charter of Massachusetts Bay, 1691, see website Avalon Project on Colonial charters : http://avalon.law.yale.edu/17th_century/mass07.asp

¹⁰ « We do further for Us Our Heirs and Successors Will Establish and ordeyne that from henceforth for ever there shall be one Governor One Lieutenant or Deputy Governor and One Secretary of Our said Province or Territory to be from time to time appointed and Commissioned.” (creating the position of colonial governor) 1691, Massachusetts Bay Charter. As for the executive Council : “Eight and Twenty Assistants or Councillors to be advising and assisting to the Governor of Our said Province or Territory for the time being as by these presents is hereafter directed and appointed which said Councillors or Assistants are to be Constituted Elected and Chosen in such form and manner as hereafter in these presents is expressed And for the better Execution of Our Royal Pleasure and Grant in this behalf.”

In fact if we compare the wording of the Massachusetts Bay colonial charter with the central articles of Magna Carta, as S. Adams would do it in the early 1770s, the similarities are very striking. The proposals and grants made by William III to his colonists much resemble the “writ of summons” sent out to barons and burgesses by Edward I, to convene the 1295 “model” Parliament. Here the text defines the way in which this assembly of freeholders (“the general court of Assembly”) must be organised. It details who qualifies to vote or to sit, the oath of allegiance which must be sworn, and the time when they shall convene with the Governor or Council to form the “Great and General Court of Assembly”:

We do ordain and Grant that there shall and may be convened held and kept by the Governor for the time being upon every last Wednesday in the Month of May every year for ever and at all such other times as the Governor of Our said Province shall think fit and appoint a great and General Court of Assembly Which said Great and General Court of Assembly shall consist of the Governor and Council or Assistants for the time being and of such Freeholders of Our said Province or Territory as shall be from time to time elected or deputed by the Major parse of the Freeholders and other Inhabitants of the respective Townes or Places who shall be present at such Elections Each of the said Townes and Places being hereby empowered to Elect and Depute Two Persons and no more to serve for and represent them respectively in the said Great and General Court or Assembly.

The Charter in its liberality goes even further than simply recognising the necessity to create a colonial assembly, the King gave its elected members the right to choose, appoint and replace those who formed the upper council of 28 members, yearly. Here the Charter states: “once in every year for ever hereafter the aforesaid Number of Eight and Twenty Councillors or Assistants shall be by the General Court or Assembly newly chosen.”

Such a liberal prerogative will never be granted again to British colonies after the American Revolution, even to loyal colonists in Canada. For instance in the 1791 first Canadian Constitutions granted to Lower and Upper Canadas, members of the (upper) council were appointed by the governor without any consultation of the assembly. Demands for proper responsible government would be at the core of the 1837-38 uprisings in the two Canadian colonies. Ministerial government or responsible government, i.e. the right to appoint their “cabinet” councillors or ministers, was only granted to Canadians in 1848, when the Constitutional Act was revised by the British Parliament. As for Australian colonists they had to wait until the 1850s to be granted the right to organise an elected upper council in their several colonies.

To further the analogy found between the Charta and the American colonial charters, the Magna Carta in 1215 evokes the so-called power of preferment or nomination of officers which the King partly granted to his barons. In the same way, colonial British governors in royal colonies were only entitled to appoint Judges, Commissioners and Sheriffs after having received the agreement of the Council.

It is therefore not surprising that the original colonial charters were interpreted by Anglo-American colonists as legally binding documents between the monarch and his subjects, in the same way as Magna Carta had been a contractual engagement between the King and his people under Edward I. Such interpretations were circulating after Edward Coke’s *Institutes of the Laws of England*. His interpretation of the original charter, though not published in America before 1823, were discussed by Whig philosophers whose books were printed in

America along with the 1295 version of Magna Carta in the early 18th century as we will explain in the next section.

Colonial charters could indeed imaginatively be described, by colonists, as *Magna Cartas* for the Empire. Like Magna Carta, colonial charters issued by William III were written down and sealed, which states that they were legally binding. In 1691 and afterwards, the King and his Parliament issued the charter to their subjects, as a written contract, a “social contract” according to the Lockean interpretation used in the English Bill of Rights. In some further reading of the original 1691 Massachusetts charter by Samuel Adams during the Stamp Act crisis and its aftermath, we will see that the Charter was also very explicit on the rights and freedom of these subjects residing away from the metropole.

Among these liberties, they were explicitly guaranteed an important principle evoked in article 61 of Magna Carta: “the right to petition the monarch, should be without fear of retribution”. Petitioning for redress therefore became one of the earlier actions resorted to by the colonists, when the British Parliament voted the Stamp Act in March 1765. It was immediately perceived as an unfair tax imposed on the American colonists without their consultation or consent.

2) 1765, American colonial charters under threat – The Stamp Act crisis

Between 1691 and 1765, the original charters, at least in Massachusetts, guaranteed Anglo-American colonists the right to somehow govern themselves, under the supervision of an English governor whose authority was balanced by an elected council and an elected assembly. These sixty years or so, have been described by historians as a period of “salutary neglect” only interrupted by the 7 Years’ War which marked a turning point in the relationship between the mother country and its Empire.

Indeed, signs of tensions between Massachusetts and Britain were the results of the recent war. The imposition of the Sugar Act in 1764 and the Stamp Act in 1765 by the British Parliament - a means of collecting some indirect taxation to replenish empty British coffers -, was described as an unjust and unfair law which was forced onto the colonists without any consultation of their assemblies. So far the right to levy local taxations resided in the assemblies according to their charters, since they had no representation in the “imperial” Parliament.

I wish now to examine how Anglo-American colonists who were involved in local politics, reacted to the “attack” against their “colonial” constitution by the British government, which *de facto* undermined their status as “full” subjects of the King. In reading their political petitions, particularly the earliest ones issued by the people of Boston and their main drafter Samuel Adams, we can read between the lines some received knowledge or general understanding of Magna « Charta ». Which exegetic sources on Magna Carta were available in the American colonies at the time ?

Americans had at hand William Penn’s first American reprint of Magna Carta in 1687¹¹ under the title *The Excellent Priviledge of Liberty and Property, Being the Birthright of the Free-*

¹¹ See William Penn, *The Excellent Priviledge of Liberty and Property, Being the Birthright of the Free-Born Subjects of England*, Philadelphia, 1687.

Born Subjects of England, as well as Henry Care¹²'s « radical » reading of Magna Carta, which was first published in England in 1680, before being reprinted in Boston in 1721, by B. Franklin's brother, under the title *English Liberties or the Free-born subject's Inheritance*. Both texts refer to and insert a copy of the 1295 Carta. Henry Care quotes Edward Coke's interpretation of it as a contractual source defining the "fundamental laws of England". Henry Care develops Coke's interpretation that the Charter instituted the idea that some fundamental liberties were granted to English born men. Care reviews the Whig interpretation which he supports, according to which the charter is a legal support, a contract and a constitutional check on unlawful laws or taxation voted without the consent of Parliament. There was apparently no American reprint of William Blackstone's *Great Charter and Charter of the Forest*, published in England in 1759.¹³

Massachusetts, and the city of Boston particularly, was identified by British ministers as the most rebellious colony in evading the Sugar Act or in standing up against the Stamp Act¹⁴. One of the most reactive critics of Britain's arbitrary rule in that time period, was Samuel Adams, a Bostonian well-versed in political philosophy which he studied at Harvard, who had been elected tax collector by the Boston Town meeting in 1756. Adams also clearly made a name for himself in Britain where he was identified among the "insurgents" and rebels when he founded the Sons of Liberty in August 1765.

He became the champion of the "Rights of the colonists as subjects" when in 1772 he wrote a pamphlet bearing that title, to be circulated among colonial correspondence committees, and which B. Franklin printed in London for British MPs and Lords¹⁵. But as early as 1764, when the Sugar Act was imposed on Boston, Adams became active in writing pieces of political advice to the Assembly representatives and the Boston people, before publishing articles setting forth the prerogatives and liberties granted to his fellow colonists and fellow subjects by the original Massachusetts charter. The 1772 *Rights of the Colonists* report simply compiled previous arguments Samuel Adams published in pamphlets and articles in the *Boston Gazette* in the 1760s and 1770s - during the Sugar Act and Stamp Act campaigns -, under various pen names such as "Vindex", "Determinatus", "a Chatterer"...¹⁶

Adams clearly reminded Boston citizens, and then American people, he often called "the subjects of America" in his articles, as well as the British Parliament and George III, that they were not "secondary" subjects because they lived away from the British Parliament. According to him, in Boston, the people had a House of Representatives, which was as legitimate as the metropolitan one. Adams found some legal justification for it, in the

¹² Henry Care, *English Liberties or the Free-born subject's Inheritance*, (1680), Boston, first print, 1721.

¹³ Blackstone's *Commentaries* (published in Oxford 1765) became available in Boston in 1769-1770.

¹⁴ Once the Stamp Act crisis was over, the Boston Massacre in 1770 also brought to the fore a debate in the colonies on fair trial and fair justice even when (or especially when) crimes were committed by British army officers. The political and legal debate was held on the ground that the Bill of Rights clearly stated : « jurors should be duly impannelled and returned, and jurors in high treason trials should be freeholders. » In the case of the Boston massacres, the officers who were convicted of attacking and murdering Bostonian on-lookers, saw their trial dismissed and transferred to an English court in the metropole (or so it was said), as the local Boston court was about to condemn them to death and the people of Boston refused to accept that only English magistrates and officers « packed » the court.

¹⁵ Samuel Adams, *The Rights of the Colonists* (taken from the report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772), Before him, Henry Care (1646-1688) had published *English Liberties, or, the Free-born Subject's Inheritance* of which we find a printed version in 1721 in Boston, published by Benjamin Franklin's older brother.

¹⁶ Samuel Adams, *The Writings of Samuel Adams*, collected and edited by Harry Alonzo Cushing, 3 volumes, New York, G.P. Putnam's Sons, 1904.

founding contract between the King and his subjects. Indeed the “Charter” as he calls the royal charter of 1691, delivered to them by William III made legally clear their “rights as subjects”¹⁷. As such, he writes in November 1765, their royal charter stands for an American Magna Charta :

This Charter is to be looked upon to be as sacred to them (American subjects) as Magna Charta to the people of Britain; as it contains a declaration of their rights founded on Justice.¹⁸

Indeed as noted earlier, there was no political distinction made between the subjects living in England and those living in a distant province or territory. The original charter, also called “our happy constitution” by Adams, stated that the King granted all liberties to his subjects living in or moving to America, as if they were born in England. No reference is made to a distinct status appertaining to a colonial space, quite the contrary:

Hereby (the King) Grant Establish and Ordain That all and every of the Subjects of Us Our Heirs and Successors which shall go to and Inhabit within Our said Province and Territory and every of their Children which shall happen to be born there or on the Seas in going thither or returning from thence, shall have and enjoy all Liberties and Immunities of Free and natural Subjects within any of the Dominions of Us Our Heirs and Successors, (...) as if they and every of them were borne within this Our Realm of England and for the greater Ease and Encouragement of Our Loving Subjects Inhabiting our said Province or Territory of the Massachusetts Bay and of such as shall come to Inhabit there.”

According to S. Adams, the “Charter” particularly insisted on the fact that the colonial assembly - like the original assembly of “King John’s barons” as mentioned by Adams in a 1772 pamphlet - was formed to protect subjects and guarantee their liberties. The assembly (called House of Representatives in Massachusetts) and the upper council had received the same powers as the two houses of Parliament combined in Britain.

Besides, Adams continues, it was the King who granted the charter to his American subjects, not a superior Parliament. The 1691 Charter indeed refers to a number of liberties granted to the local government such as: “liberty of conscience”, “the Habeas Corpus through full authority given to local courts forever, the right to appeal to the Privy Council in case of disagreement with local court and within fourteen days, the right to vote local laws¹⁹ as long as they do not contradict English laws upon which the King shall decide²⁰, and as long as they are voted “for the good and welfare of the Province and its people”, “the right to organise a local militia paid by “reasonable” local taxes which the assembly is allowed to levy, in order

¹⁷ Adams, « Instructions of the Town of Boston to his Representatives in the General Court », May 1764

¹⁸ Adams, Letter to Reverend G. W--, November 11, 1765, *Writings*, op.cit., vol. 1, p. 28.

¹⁹ « Hereby grant the said Governor and the great and Generall Court or Assembly of our said Province or Territory for the time being full power and Authority from time to time to make ordaine and establish all manner of wholesome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England) as they shall Judge to be for the-good and welfare of our said Province or Territory And for the Gouernment and Ordering thereof and of the People Inhabiting or who shall Inhabit the same and for the necessary support and Defence of the Government thereof.”

²⁰ « the said Orders Laws Statutes and Ordinances be by the first opportunity after the making thereof sent or Transmitted unto us Our Heires and Successors under the Publique Seale to be appointed by vs for Our or their approbation or Disallowance.”

to keep peace in the colony and with the natives, the liberty to continue fishing and trading in fish along the coast, along with the liberty to fell trees which up until then had been reserved for the use of the King”.

As reminded at length by S Adams in the first petitions sent from Boston to the London Parliament in 1764 and 1765, these liberties and their protection by the “assembly”, had been granted in 1691 which clearly recognized and established the colonial assembly as possessing the same powers, though understandingly in a subordinate position regarding commercial bills, as the Houses of Commons and Lords, and which clearly positioned the Massachusetts assembly and council on the same footing as the metropolitan Parliament when it came to legislating local affairs. For Adams, the colonial charters guarantee stability and civil government and as such they are as sacred and immovable as Magna Charta, which he describes in typical Whig tradition as their “first constitution”. Parliament with the Stamp Act attacks the colonists’ properties and aims at destroying “the happiest frame of subordinate civil government expressed in our charter which amply secures to the Crown our allegiance, to the nation our connection and to ourselves the indefeasible rights of Britons.”²¹

But beyond this Charter, he explains in the first Massachusetts petition of October 1765, that their rights as British subjects go back to Magna Carta²². The people of Massachusetts “complain that the most essential rights of Magna Charta, to which as British subjects they have an undoubted claim” are injured by the Stamp Act, “that it wholly cancels the various conditions in which our ancestors settled this country and enlarged his Majesty’s Dominions with much toil and blood and at their own expense.”

Clearly by 1765, most colonial charters included all the elements of the Great Charter: the recognition of their rights as subjects of the English/British monarch in the colonies, the right for redress, the Habeas Corpus, self-government and some measures of “responsible” government in the fact that they were able to nominate or elect an upper council or govern in the stead of the British governor in case of illness or absence. Adams states the original charter has never been challenged or altered except in 1725 under George II.

These are some of the first principles of natural law and justice, and the great barriers of all free states and of the British Constitution in particular. It is utterly irreconcilable to these principles and to many other fundamental maxims of the common law, common sense, and reason that a British House of Commons should have a right at pleasure to give and grant the property of the Colonists. That the Colonists are well entitled to all the essential rights, liberties, and privileges of men and freemen born in Britain is manifest not only from the Colony charters in general, but in acts of the British Parliament²³.

However, what seemed to be lacking in the original charter of 1691 was a legal definition for the connection between the colonies and the metropolitan Parliament. In the text, the political relationship seemed to be defined between the colonies and the monarch himself (or his Privy Council) through the figure of the governor whose local supremacy over the colonial assembly was re-affirmed in an appendix to the Charter in 1725²⁴, in order to remove “the said

²¹ Samuel Adams, *Writings*, vol. 1, op.cit. p. 19

²² Massachusetts assembly’s response to the Stamp Act in October 1765, *Ibid*, p.21

²³ *Ibid*

²⁴ « Explanatory Charter of Massachusetts Bay », 1725, see website Avalon Project on Colonial charters : http://avalon.law.yale.edu/17th_century/mass07.asp

Doubts and Controversies” from the original 1691 Charter. But there was no explicit connection or relationship defined between the local assembly and the imperial Parliament. This became an important argument to complain about the fact that the London Parliament was trespassing the legislative boundaries established by the “Charter” in Massachusetts or in Virginia.

3) First “right for redress” petitions, a form of early “constitutional patriotism” ?

With the approval of the Stamp Act in March 1765, which was about to be imposed on the colonies on November 1, 1765, the colonists organised some political resistance for the first time. At the heart of their case, they place “the supremacy and validity of their Great Charters”. It is in this first petition sent to the King and to Parliament, that Bostonians particularly, interpreted Magna Carta as the basis for the first English constitution, which they use as an appeal or a reference text to read their own Charter. They also understand their “American” charters as the reaffirmation in written form of the first Charta granted to English people, and as such they are “sacred”. The Massachusetts colony was at the forefront of the more collective rebellion of several colonies. The debates held in Boston, which led to the drafting of the first petition to the King in October 1765, circulated throughout the other colonies. In the petition, Magna Carta is interpreted as defining their fundamental rights, – particularly the right of representation in their original colonial parliaments – and as establishing their right for redress.

Indeed Samuel Adams suggests that, in order to right the wrongs of the Stamp Act, colonists should normally resort to one of the central rights granted to free born English men by Magna Carta in article 61, the right for redress. Besides, this right was clearly restated in the Bill of Rights now confirmed by the British Parliament. Adams refers to the right for “redress” no less than 24 times in the first 12 months following the Stamp Act vote in London.

Here is an instance of the Massachusetts assembly’s response to the Stamp Act on October 21, 1765, in a long petition they address to their governor and eventually to the King. Adams who drafted the document reminds the Massachusetts governor that listing their grievances is not an attack against the Crown, but is part of their right to ask for “redress” which is part of their “happy constitution” which refers both to Magna Charta cited twice as a reference source in the text, and to the Bill of Rights²⁵. Adams reminds the governor that “when their sacred rights are infringed we feel the grievance” and they naturally claim the right for “redressing it” which is justifiable by the constitution which colonists know very well, he argues²⁶.

Indeed in their fourth resolve, they make clear that they understand their charter as the direct inspiration from Magna Charta or at least as symbolically equivalent to it.

“4. *Resolved* that this inherent right (to enjoy one’s estate) together with all other essential rights, liberties, privileges, and immunities of the people of Great Britain, have been fully confirmed to them by Magna Charta, and by former and later acts of Parliament.²⁷”

²⁵ The English Bill of Rights, 1689, “no taxes should be levied without the authority of Parliament ».

²⁶ Massachusetts assembly’s response to the Stamp Act in October 1765, Adams, Writings, vol.1, p.21.

²⁷ *Ibid*, p.24.

While the Massachusetts assembly was reminded by their British governor that the Stamp Act was “an act of parliament and as such ought to be observed », the delegates retorted that there was a great problem of jurisdiction or boundaries between their colonial powers granted by their Province charter. To the colonial subjects, the powers granted to the Provincial assembly were as supreme as those of the British parliament. « It by no means appertains to us to presume to adjust the boundaries of the power of parliament. But boundaries there undoubtedly are »²⁸.

Adams mentions Magna Charta several times, to remind Parliament that in previous situations when Commoners felt their rights and privileges might be infringed by the supreme authority of the King, they always advocated Magna Carta as a constitutional reference. Adams indicates that they are doing just that in this petition for redress. They too appeal to the supreme constitution, like the Members of the Commons in the 17th century, as they feel Parliament is now endangering their rights and liberties. (“We are ready to think that those zealous advocates for the constitution (MPs and Lords) usually compared their acts of Parliament with Magna Charta, and if it ever happened that such acts were made as infringed upon their rights, they were always repealed. We have the same confidence in the rectitude of the present Parliament.”²⁹)

To the actual supremacy of the « imperial Parliament » to make laws « for the American colonies » which the colonists did not contest (in considering here the commercial Commodity Acts and Navigation Acts not mentioned in their charter), they reminded the British government of the fact that their Charter, the constitution which they had been granted by the King: « invests the general assembly with the power of making laws for its internal government and taxation” and that challenging this written legal document would be highly anti-constitutional. So far they add: “this charter has never yet been forfeited.”

While reminding their governor that the local assemblies were entitled by their Charter to levy taxes, the colonists insist on the fact that the British Parliament is trespassing its boundaries and infringing on American assemblies’ constitutional powers: « The parliament has a right to make all laws within the limits of their own constitution; they (we) claim no more. »

It is very clear at this point that these colonial Great Charters have been perceived and understood over the years as a proper constitution never to be tampered with or revised by London. The central argument relies on the authority of the assembly granted by the 1691 Charter, and the fact that according to the Bill of Rights, there should be « no taxes levied without the authority of Parliament ». They remind Massachusetts Governor Francis Bernard about the fact that « there are certain original inherent rights belonging to the people, which the parliament itself cannot divest them of, consistent with their own constitution. Among these is the right of representation in the same body which exercises the power of taxation. » This is a clear reminder of the “right of representation” established by Magna Carta.

In the closing argument of their address to the Massachusetts governor, the members of the Massachusetts’ assembly made clear that in spite of the distance between England and the colonies « the people of this province (have) the strongest affection for his majesty, under

²⁸ Massachusetts assembly’s to the colonial governor, Francis Bernard, October 1765 - about the Stamp Act

²⁹ Adams, volume 1., p. 16,

whose happy government they have felt all the blessings of liberty: they have a warm sense of the honour, freedom, and independence, of the subjects of a patriot king (...)³⁰»

In other words, they (“the people”) share a sense of patriotism for their American colonies, for their “province”, and they must be consulted when decisions are made that might have an impact on its happiness. In their closing lines of the petition, they declare themselves « the subjects of America » and they insist on the fact that they « should exercise this power within themselves, otherwise they can have no share in that most essential right, for they are not represented in parliament ». In other words, self-government and political autonomy have created among them a form of “patriotism” (but also a form of “localism”) which place them apart from the metropole, thanks to their Charter. They insist very much on the idea of a direct connection between the King and their assembly, above and beyond Parliament.

Their legal interpretation seems perfectly clear and according to the statutes they were granted as English subjects, to say otherwise now would be an abuse of power on the part of the King and parliament : « The right of the colonies to make their own laws and tax themselves, has been never, that we know of, questioned; but has been constantly recognised by the king and parliament. » At this point, it is obvious that sixty years of « salutary neglect » and local constitutional powers under a British governor and a colonial Charter, had clearly developed a sense of local patriotism or « constitutional patriotism » to quote Habermas, for the now self-proclaimed Americans.

Constitutional patriotism is the construction of a (proto-)national ideology that is built partly on some emotional attachment or response to the form of local government under which a society has grown³¹. In the Massachusetts assembly’s address to the British governor (and the King) we have indeed a genuine political and patriotic reaction, as well as an emotional response, on the part of the assembly delegates who feel their system of government is under attack. Their grievances are clearly based on what they feel is an attack of their “constitution”.

A more collective response to the Stamp Act followed that first petition. It was provided by the “first” Continental Congress or Stamp Act Congress organised in New York later in October 1765 to devise a more unified protest, after the Massachusetts Bay assembly had sent a circular letter to the other colonial assemblies. Only 9 provinces were represented as some British governors refused that assemblies met to nominate or elect delegates. The result of the Congress debates was the writing of a « Declaration of Rights and Grievances », in which the colonists esteemed it their “indispensable duty to make the following declarations of our humble opinion respecting the most essential rights and liberties of the colonists and of the grievance under which they labour by reason of the several late acts of Parliament.” They list 14 points or statements which they consider must be consolidated or revised for the basis of the colonial and constitutional agreement which connect them to the British Parliament. They begin by restating their Great Charter rights to « petition » and to ask for redress, « it is the right of the British subjects in these colonies to petition the King, or either house of Parliament. » This collective petition is a further instance of constitutional patriotism born out of these colonial charters.

³⁰ All the quotes are taken from Massachusetts assembly’s response to the Stamp Act in October 1765, *Writings*, vol.1, p.21-28.

³¹ Müller, Jan-Werner, « A general theory of constitutional patriotism », *International Journal of Constitutional Law*, 6, (1), 2007, pp. 72–95

American colonists describe themselves as « liege subjects » (subservient) to the King and as such they have duties towards the King and Parliament, but at the same time, they remind the British government that it also has some duties towards them, in the same way as if they lived in the metropole, as they are “entitled to all the inherent rights and liberties of natural-born subjects within the kingdom of Great Britain.” They also remind the government of Great Britain that taxes cannot be “imposed on them but with their own consent, given personally, or by their representatives” indicating that they are not represented at this stage in the British Parliament and that they do not see how this could happen considering the physical distance that is placed between them and England.

In the line of the argument we just developed on “constitutional patriotism”, this statement goes to show that the colonists in 1765 had already established a sort of moral and physical distance, which could easily lead to political separation with the mother country. They write : “That the people of these colonies are not, and from their local circumstances cannot be, represented in the House of Commons in Great Britain.” They are content with their own assemblies and their Charters, which enable them to govern themselves. Contrary to what is often read in history books, American colonists did not seek any representation in the London Parliament.

4) The *Rights of Colonists as Subjects* (1772) – Magna Carta in defence of the rights of American subjects again.

The British Parliament eventually repealed the Stamp Act in March 1766. Their reasons were more economic than political. They considered and took into account the numerous petitions they received from British merchants whose trade was affected by this hindrance.

However, the “Declaration of Rights and Grievances” addressed by the colonists to the King and to Parliament, asking for “redress”, did not fare well in Westminster. The Lords dismissed it right away and the Commons refused to read and discuss it as they described it as emanating from an unconstitutional assembly. The petition was seen as an open act of contest against the powers of Parliament. Did Parliamentarians perceive the rise of a form of colonial patriotism and the beginning of some distance between the colonists and the mother country?

In order to better assert Parliament’s imperial authority over colonial charters and colonial legislatures, the British Parliament passed the Declaratory Act³² the same day the Stamp Act was repealed, on March 18, 1766. In doing so the British Parliament brutally answered the first Congress’s grievances and indicated its poor opinion of the constitutional issues raised by the colonists. They somehow trampled part of the rights established by Royal Charters while revising the so-called “boundary” problem. The Declaratory Act stated “the said colonies and plantations in *America* have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and Parliament of *Great Britain*”. It further established that Parliament “had hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America in all cases whatsoever”.

Such an open act of anti-constitutionality both against the colonial Charters and Magna Carta – if we refer to American interpretation of the texts –, triggered several angry answers in

³² “An Act for the Better Securing the Dependency of His Majesty’s Dominions in American upon the Crown and Parliament of Great Britain” , 6 George III, c. 12, *The Statutes at Large*, ed. Danby Pickering (London, 1767), XXVII, 19-20

America and in England. Many pamphlets criticized the Declaratory Act as an attack by Parliament on the colonists' fundamental rights to govern themselves and against their liberties to petition and to ask for redress. Among the English Whigs who criticized it, the most famous public reaction must be that of Lord Camden who published the speech he delivered before his fellow peers, in the press. Camden's speech also became well-known in the American colonies where it was reprinted, thus leading to a heated debate in local newspapers between loyal supporters of the British Parliament versus patriots like Samuel Adams. All arguments refer at some point to the legal validity of charters, starting with the very first one, Magna Charta.

In his "Speech on the Declaratory Bill of the Sovereignty of Great Britain over the Colonies" published in the *London Magazine* in February 1767, Lord Camden claims that: "*taxation and representation are inseparable.*" For that he was heavily criticized by his peers and even accused of introducing some "radical" views in Parliament. He believed the Declaratory Act denied the fundamental laws on which the English constitution was built :

This bill, the very existence of which is illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this constitution? A constitution grounded on the eternal and immutable laws of nature; a constitution whose foundation and centre is liberty, which sends liberty to every subject that is or may happen to be within any part of its ample circumference. Nor, my Lords, is the doctrine new, 'tis as old as the constitution; it grew up with it; indeed it is its support; taxation and representation are inseparably united; God hath joined them, no British Parliament can separate them.

Camden more particularly reminds his fellow Lords, that "*There is a history written by one Carte, a history that many people now see through.*" The history of Magna Carta, he continues, also began because of illegal taxes collected on Barons who did not agree to it. Camden even heralds "the end of Kingdoms" as the Lords have just entered into a war against the people and their constitution.

Samuel Adams in turn published an article in the *Boston Gazette* supporting Lord Camden's defence of the colonists and his genuine reaction against the power to coerce the London Parliament wished to use over colonial legislations. Adams like Camden, reviews the principles of Magna Charta once again and the so-called power to tax the people it placed in Parliament. If the original Charta indeed gave the right to tax the people in Parliament where they are represented, their own colonial Charter did not place the right of representation of the colonists in the London Parliament but in their local legislation. Criticizing those who write that "by the powers of Magna Charta and the Bill of Rights, the King may tax his subjects with the consent of Parliament", Adams retorts that "the people of America never were represented in the parliament of Great Britain, consequently the consent of the Commons of Great Britain to tax them cannot be said to be their consent."³³

When some colonists rejoiced over the repeal of the Stamp Act, Samuel Adams and James Otis in Massachusetts (or Patrick Henry in Virginia) believed that the Declaratory Act would bring more laws to control American subjects since such a doctrine, as Adams wrote in several pamphlets, completely denied the essence of their original charters, of the Anglo-Saxon liberties and in short of the spirit of Magna Carta. In a pamphlet published in

³³ Adams, Pamphlet in the *Boston Gazette*, April 1767, vol. 1, p. 289

September 1769, under the pen name “Alfred” (in reference to King Alfred?) Adams denounces the quartering of British troops in Boston. Bostonians feel like prisoners in their own home and estates, as they are dealt with by the British Parliament as some “tawny aboriginal people”, with “an array of soldiers stationed in our very bowels.” Adams encourages American subjects to break the bonds of slavery and to resist, “Where is the bill of rights, where is Magna Charta and the blood of our venerable forefathers. In that dilemma to what terrible alternative we are reduced: *To resist this tyranny or submit to chains.*”³⁴

In the *Boston Gazette* under the pen name “Candidus”, Adams builds his patriotic response against British attacks on some English philosophical, legal and historical concepts borrowed from Edward Coke and William Blackstone, he calls “Justice Blackstone” whenever he refers to some legal interpretation of the charters³⁵. Magna Carta is often quoted and referred to by Adams as the mother of all charters. But it is also attacked by some loyalists like Chronus who establishes the fact that Americans cannot have received a “proper” constitution in their Royal Charters and that these Charters are just a piece of legislation.

Chronus criticizes all references to Magna Carta that come up here and there in various pamphlets. He seems to deny its importance in constitutional history. Adams attacks his views and establishes that by denying the original charter and its American “avatars”, Parliament has lost its *raison d’être* :

Chronus talks of Magna Carta as though it were of no great consequence than an act of parliament for the establishment of a corporation of buttonmakers. Whatever low ideas he may entertain of that Great Charter, and such ideas he must entertain of it to support the cause he has espoused, it is affirmed by Lord Coke, to be declaratory of the principal grounds of the fundamental laws and liberties of England. (...) Parliament thus derives their authority from the constitution, how then can they change it without destroying the foundation of their own authority ?³⁶

By undermining its own authority and validity, Parliament opened the door for contest. Samuel Adams was one of the founders and main activists within the “Sons of Liberty” in Massachusetts. He believed that by organising pockets of political resistance every where in the colonies, the British government might be impressed and recognise their just demands: “if the enemies should see the flame bursting in different parts of the country and distant from each other, it might discourage their attempts to damp and quench it.”³⁷

On November 20, 1772, a list of resolutions, describing the “Rights of the Colonists as Men”, was written by Samuel Adams³⁸. The text reminded whoever needed to be remembered that colonists had received rights in their Royal Charters, and that these rights were directly attacked by the Crown and Parliament. However natural philosophy inspired by “Mr Lock” during the Glorious Revolution, pointed to the right of subjects to remove a form of government when it became injurious and acted against their rights.

³⁴ Adams, « Alfred », *Boston Gazette*, October 2, 1769, *Writings*, vol.1, p. 392

³⁵ When Adams mentions Blackstone it is only in his reference to the charters, and not to the idea that the British Parliament is supreme over all other legislatures, a view which Blackstone defends.

³⁶ Samuel Adams, « Candidus », *Boston Gazette*, January 27, 1772, in *The Writings of Samuel Adams*, volume II, (1770-1773), p.. 193.

³⁷ Samuel Adams to John Adams, November 10, 1772, p. 209.

³⁸ *The Rights of the Colonists* taken from the report of the Committee of Correspondence to the Boston Town Meeting, Nov. 20, 1772, *Writings*, vol II, p. 210-223 (all subsequent quotes are taken from this text).

Here again Samuel Adams evokes the “rights of the colonists” as those irrevocably and “unalienably guaranteed” by Acts voted by the British Parliament (Toleration Act, Habeas Corpus, Bill of Rights), granted to American subjects by their colonial Charters. Adams clearly reminds his readers that prior to their provincial charters there existed a more important Charter, Magna Carta :

Magna Carta itself is in substance but a constrained Declaration, or proclamation, and promulgation in the name of King, Lord, and Commons of the sense the latter had of their original inherent inalienable natural Rights, as all those of free citizens equally perdurable with the other.

In this short summary of why the rights of “colonists” as men and subjects need to be written down and restated, Magna Carta is described as fundamental and for that purpose Adams quote “Justice Blackstone”: “That great author, that great jurist, and even that Court writer Justice Blackstone holds that this recognition was justly obtained of King John sword in hand; and peradventure it must one day sword in hand again rescued and preserved from total destruction and oblivion.”

In his closing argument, Adams evokes the possibility of fighting for a new Magna Carta, in which American people would take up arms to defend it or reclaim it from Crown and Parliament in the same way as John’s barons. The pamphlet had some impact as it was printed in London by Benjamin Franklin and distributed in the colonies through correspondence committees. It became the political inspiration for the soon to be held Continental Congress. Adams ends the text on a last allusion to Magna Carta or to their Magna Charters : “Let us convince every Invader of our freedom, that we will be as free as the Constitution of our Fathers recognized.”

But, in this very important pamphlet, Adams also encourages colonists to write their own Charter, in which the rights of the subjects would be guaranteed by their own legislature, their own “parliament” established near the people. (“How long such treatment will, or ought to be born, is submitted.”) Adams states that colonists can not be governed at a distance by “a house of commons three thousand miles distant from them, and who cannot be supposed to have the least care or concern for their real interest.³⁹”

Conclusion

In this article, I tried to analyse the various interpretations and references made to Magna Carta by American patriots, particularly by prolific writer Samuel Adams, in early pamphlets and petitions addressed to the London government, in the late 1760s. The myth of Magna Carta as a fundamental contract between the King and his people, which American colonists saw as embodied in clause 61, seems to have inspired colonists throughout their protest against British authoritarian policies.

At first, they interpreted their own original colonial Charters as a reproduction of Magna Carta. (“This Charter”, Adams wrote, “is to be looked upon to be as sacred to them (American subjects) as Magna Charta to the people of Britain; as it contains a declaration of their rights founded on Justice”). The charters were understood by colonists, as legal “constitutions” granting them the same liberties as any English-born subjects. Colonists also interpreted these

³⁹ Ibid, p. 214.

charters as the basis for self-government as it founded local legislatures, and empowered colonists in their every day business, which led to the rise of a form of constitutional patriotism.

We saw that these “happy constitutions”, these original charters, were challenged by the London Parliament in the vote of the Stamp Act in March 1765. The Act denied the validity of the colonial charters which, like Magna Carta, had given the right of representation to the people, placed in their local “parliament” which had received the right to vote taxes in their name. Relying on the principles of their colonial charters, on the English Bill of Rights and on clause 61 in Magna Carta, colonists thus wrote some petitions relying on their “right for redress”. But this was denied to them by Crown and Parliament which in turn established the supremacy of the Westminster Parliament over subaltern legislatures, and denied the validity of the original charters, by the Declaratory Act.

At that point, American patriots developed a new series of arguments based on their interpretation of Magna Carta, - and that of some prominent Whig jurists like Coke, Locke or Blackstone. They established that colonists might take up arms to claim back their Charter like King John’s barons had in 1215. They believed they could rid themselves of a Parliament that undermined its own powers and position by denying the legal principles of Magna Carta. Indeed by denying the validity of the original American contractual charters with the King, Parliament had denied England’s fundamental laws found in Magna Carta. Their authority or King George III’s over the colonies could then no longer be established or guaranteed.