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Howard: The Road from Runnymede: Magna Carta and Constitutionalism in America

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THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA. By *A. E. Dick Howard*. Charlottesville, Va.: The University Press of Virginia. 1968. Pp. xv, 533. \$10.†

Magna Carta, the most venerable and celebrated document in the history of the English speaking peoples, is alive and well in

† At the reviewer's request, this Book Review is being published in the precise form in which it was submitted; no editorial changes of any nature have been made.—Ed.

American constitutional law. *Duncan v. Louisiana*, decided by the Supreme Court in 1968, is recent proof. The states may try petty offenses without a jury, but if such an offense, simple battery, may be punished by two years in prison, defendant is entitled to a trial by jury notwithstanding that he was sentenced to only sixty days. The Court ruled that trial by jury is a fundamental liberty protected by the fourteenth amendment against state deprivation in any case that would come within the sixth amendment's guarantee if tried in a federal court. In support of this ruling the Court remarked that the impressive credentials of jury trial in criminal cases have been traced "by many" to Magna Carta, but added, in a fascinating footnote, "Historians no longer accept this pedigree."¹ Magna Carta as the talismanic symbol of the liberty of the subject has always been greater than its original meaning. Yet the Court would have been more to the point by adding that although the famous "judgment of peers" clause of the document of 1215, chapter thirty-nine, did not originally mean trial by jury, its meaning evolved to require precisely that.

A. E. Dick Howard, Associate Dean and Professor of Law at the University of Virginia School of Law, describes Magna Carta in this felicitously entitled book as a "dynamic" document. Its power owes much to its adaptability, as is true also of our own Constitution. An antiquarian historicism has not frozen their original meanings. Thus, our commerce clause, once thought not to empower a federally subsidized road, now applies to racial discrimination in motels, stock-exchange transactions, stolen cars, the wages of window washers, and telestar communication. So too Magna Carta became a source for the right against compulsory self-incrimination, religious liberty, bans on bills of attainder, the right to travel, and equal justice under the law. Like our Constitution, Magna Carta resembled Martin Chuzzlewit's grandnephew who, said Dickens, had no more than "the first idea and sketchy notion of a face." And like our Constitution, the power of Magna Carta to survive and grow in meaning derives also from the fact that it incorporates and symbolizes the political values of a free people and their basic rights. What Magna Carta became, not its initial character as a genuflection to reactionary feudal magnates, is what counts. Down the centuries there have been constant reaffirmations of the Great Charter as fundamental law, embodying the principle that government is subject to the rule of law, and as the security of individual rights held against government. That is what Sir Edward Coke meant in his imperishable remark that "Magna Carta is such a Fellow, he will have no Sovereign."²

1. *Duncan v. Louisiana*, 391 U.S. 145, 151 n.16 (1968).

2. Quoted in *ROAD FROM RUNNYMEDE* 120.

Justice Frankfurter once wrote, "Words being symbols do not speak without a gloss" which may be the "deposit of history" exacting "a continuous process of application."³ He was speaking of the due process clause of the fourteenth amendment, derived from the original "law of the land" clause of chapter thirty-nine. No clause of Magna Carta or of our Constitution has undergone more interpretation or change. In *The Road from Runnymede*, Dean Howard reminds us that the Supreme Court is still infusing fresh vitality in the clause of chapter forty (joined with thirty-nine as chapter twenty-nine in the revision of 1225), which read, "To no one will We sell, to none will We deny or delay, right or justice." In 1967 the Court decided the case of a Duke professor who had participated in a sit-in for the purpose of desegregating a restaurant. He was indicted on a charge of criminal trespass. After a mistrial, the local court ordered the case continued, but the prosecutor entered and received a "*nolle prosequi* with leave" which under North Carolina law left the case in a state of suspended animation until restored to the trial docket on the motion of the prosecution. Thus, the defendant, unable to get a verdict, lived under a cloud of suspicion, not knowing when or whether he might be retried. When he argued that he had therefore been denied a speedy trial, the state's high court held against him. The Supreme Court reversed this judgment, ruling unanimously that the sixth amendment's right to speedy trial, traceable to Magna Carta, was enforceable against the states under the fourteenth amendment in accordance with the same standards that protect defendants against federal violation.⁴ Thus in very recent and crucial cases in which the Court selectively incorporated provisions of the Bill of Rights into the fourteenth amendment, Magna Carta provided the pretext for nationalizing the relevant rights.

It would strain a point to argue that Magna Carta had a direct influence on the growing process of selective incorporation of the Bill of Rights, as Dean Howard acknowledges. He observes that when the Court in an earlier time measured due process by English standards, Magna Carta had precedential value, but when the Court moved to "the broader plane of 'fundamental' rights" to determine which should be incorporated, "Magna Carta became simply a genial godfather watching that same historical process in which Magna Carta itself underwent centuries of growth [to] carry the search for justice even further."⁵ This book is a study of that historical process, with the crucial distinction, difficult as it is to believe, that this is the first and only comprehensive study of Magna

3. *Rochin v. California*, 342 U.S. 165, 169-70 (1952).

4. *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).

5. ROAD FROM RUNNYMEDE 363.

Carta in America. "The burden of the present book," Dean Howard writes, "is to present one theme, but an important one, in American history. The aim here is to write a kind of history of a document and the ideas it set loose—the document being Magna Carta, and the most significant idea being constitutionalism."⁶ There are, of course, many notable American books on that idea, among them Andrew C. McLaughlin's *Foundations of American Constitutionalism* (1932) and his *Constitutional History of the United States* (1935), Arthur E. Sutherland's *Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas* (1965), Charles F. Mullett's, *Fundamental Law and the American Revolution* (1933), Benjamin F. Wright's *American Interpretations of Natural Law* (1931), Clinton Rossiter's *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (1953), and, above all, Rodney L. Mott's *Due Process of Law: A Historical and Analytical Treatise* (1926), which is closest in subject matter to Howard's and overlaps it in part.

Dean Howard has chosen a grand theme, and he seems to possess the qualities of mind, style, and experience to execute it grandly. He holds an M.A. from Oxford, as well as the LL.B., was a law clerk to Justice Hugo Black for two terms, is executive director of the Virginia Commission on Constitutional Revision, has edited *Magna Carta: Text and Commentary* (1964), and has published an outstanding study of the Virginia Constitutional Convention of 1829-1830.⁷ What Dean Howard appears to lack, however, is *sitzfleisch* or the capacity for sustained, arduous research. Parker of Waddington, Lord Chief Justice of England, in his foreword to the book describes it as a "scholarly contribution to the study of American constitutional law and of the lasting significance of Magna Carta in the world today."⁸ That substantially sums up my evaluation, though I would both add and detract from the statement. The book is in its own right a stirring libertarian document as well as the history of one, but its value as a work of scholarship is mixed. Dean Howard's achievement is that he has pulled together in fine literary form more about Magna Carta's life in America than has anyone else. On the other hand, his scholarship when judged by original research and fresh information is distinctly limited; I would even say disappointingly and inexcusably shallow.

I do not mean that he has not used primary sources, though with rare exceptions, and then only on tangential points, he has not touched manuscript sources. That is not, however, the burden

6. *Id.* at 6.

7. Howard, "For the Common Benefit": *Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816-902 (1968).

8. ROAD FROM RUNNYMEDE xii.

of my complaint. Perhaps the use of unpublished materials was unnecessary; we simply do not know what an intensive exploration of them might reveal. Dean Howard has relied on published records of the colonies, charters, statutes, convention proceedings, the writings of statesmen, court cases, legal treatises, a few tracts, and other easily accessible materials. The trouble is that he did not dig deeply enough into them. Most of the newspapers for the pre-1800 period are conveniently available in microform sets, but he did not use newspapers, though they can be an exceedingly valuable source. One of the charges against John Peter Zenger, for example, was that he had printed the accusation that the governor dispensed with jury trials as he pleased; and in that famous prosecution, which was fully reported, Zenger's counsel sought bail for him on the basis of Magna Carta and invoked its great name in his argument to the jury. Dean Howard used a few tracts, mainly obvious and well-known ones of the era of the American Revolution (1763-1789), but all tracts, by the thousands, printed in America before 1800 have now been made available in a microform set entitled *Early American Imprints*, an invaluable mine that he has not worked for its payload. Most surprisingly he barely makes use of the published records of the courts of the various colonies.

Almost four decades ago Richard B. Morris described the legal history of our colonial period as "the Dark Ages,"⁹ and Samuel Eliot Morison wrote: "Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the English colonies, no year-books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this side of colonial life"¹⁰ The situation today has improved considerably. There are now some excellent monographs on our early legal and, especially, constitutional history, and many legal records, once thought lost or nonexistent, have been discovered and printed. It is still true that for no colony have the judicial records been published for the whole span of the long colonial period, but there are now about seventy miscellaneous volumes in print, many with excellent and elaborate introductions, such as the *Supreme Court of Judicature of the Province of New York, 1691-1704*, edited in three volumes by Paul M. Hamlin and Charles K. Baker (1952-1959). Out of curiosity, while writing this Review, I pulled from my shelves, at random, one such set, *Records of the Suffolk County Court, 1671-1680*, and quickly found a petition to the General Court of Massachusetts by one Isaack Melyen in 1673, in which he said, "My Third Reason for a tryall heare,

9. *STUDIES IN THE HISTORY OF AMERICAN LAW* 13 (1930).

10. Morison, ed., Preface, *RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680* (1933).

being my due Right according to the cheife Law of our Magna Carta the first Law in the Booke, that noe mans person good name or Estate shall bee taken away without some Express Law of the Generall Court warenting it, and suffitiently published."¹¹ What would turn up of value in a thorough reading of all the colonial court records in print, as well as the records of prerogative courts such as that of governor and council, I do not know; but I believe that Dean Howard should have found out. As Michael G. Kammen observed in his valuable bibliographical review article on "Colonial Court Records and the Study of Early American History," the publication of these records "has already begun to reshape our thinking about the origins of American legal institutions."¹² Kammen's article, together with the works cited in his first footnote, provides a handy guide to these judicial records that Dean Howard has neglected. Because his research is so scanty, includes so few pre-Revolutionary cases, and is based on conventional sources, his book, though the first on the subject, is filled with familiar material. As I read it, I had that *deja vu* feeling as if I had read it once before. There is remarkably little in it that is new, and quite a bit of old knowledge that should be in it is absent. What Dean Howard might have turned up had he done the sort of herculean research that went into *Law Enforcement in Colonial New York: A Study in Criminal Procedure, 1664-1776* (1944) by Julius Goebel and T. Raymond Naughton is speculative, but surely *The Road from Runnymede* would have been vastly improved.

Dean Howard seems to lack the curiosity that would impel him to explore beyond immediate reach. For example, anyone working with the Virginia sources would check out Robert Beverley's *History and Present State of Virginia* (1705) as Dean Howard did. He discovered that a prisoner applied for a writ of habeas corpus in 1682 on the basis of chapters thirty-six and thirty-nine of Magna Carta, rather than under the Habeas Corpus Act of 1679, but he does not tell us, because he did not take the trouble of finding out, whether the prisoner got his writ or what the court said. The case is Dean Howard's sole example of Magna Carta being pleaded in a judicial proceeding in colonial Virginia. He does not even refer to the threat of Governor Francis Nicholson of Virginia, related in the same source, who in 1703 said the people "had no Right at all to the Liberties of English Subjects, and that he wou'd hang up those that should presume to oppose him, with Magna Carta about their Necks."¹³

11. 1 *id.* 366.

12. 70 *AM. HIST. REV.* 732 (1965).

13. R. BEVERLEY, *HISTORY OF VIRGINIA* 107 (Wright ed. 1947).

The research seems to be haphazard. Though Dean Howard used the published *Archives of Maryland*, which includes fifteen volumes of judicial records plus many other volumes that give the proceedings of governor and council on review cases, he refers to only two cases to show that Magna Carta was pleaded in lawsuits in Maryland's courts. I do not know how he could have missed the very important and dramatic case of Sir Thomas Lawrence, Secretary of Maryland, a judge of the provincial court, and a member of the governor's council. Lawrence was convicted by the council by an outrageous procedure, appealed to the assembly on the basis of Magna Carta, and the assembly vindicated English liberties by supporting him on every point.¹⁴ In the course of my own research on the origins of the free press clause of the first amendment and of the self-incrimination clause of the Fifth Amendment,¹⁵ I often thought that I had chosen the wrong subjects for investigation, because my harvest for the colonial period seemed so slight. As I scanned the pages of the printed primary sources I had the vivid impression that if I had chosen trial by jury or Magna Carta generally, I'd have enough material for several volumes. Magna Carta cropped up in significant ways in numerous cases (related in my books) that were relevant for my purposes, including, for example, the prosecutions of Bradford and MacComb in Pennsylvania in 1693, Maule and Fowle in Massachusetts in 1695 and 1754 respectively, and Smith and Moore in Pennsylvania in 1758. Dean Howard mentions none of these, nor has he made an effort to review the colonial trials of others for the purpose of determining the uses to which Magna Carta was put by defendants and the interpretations of it by the common-law and prerogative courts.

His coverage of the pre-Revolutionary period, the first third of the book, characterizes most of it. What is done is done well, but the omissions make the result as spotty as a Dalmation. The history of Magna Carta in pre-Revolutionary Virginia ends abruptly and inexplicably with that unresolved case of an application for habeas corpus in 1682. About 110 pages and eighty-three years later, Virginia re-enters the narrative with resolutions against the Stamp Act in 1765. Was there no history of Magna Carta in the Mother Dominion during those more than four score intervening years? For Massachusetts, another major colony, the story ends with the adoption of the *Lawes and Liberties* of 1648 except for a sort of belated postscript on John Wise and the Ipswich "insurrectioners" of 1688 who invoked Magna Carta to prove the illegality of a tax

14. 19 ARCHIVES OF MARYLAND 8-14, 89-90.

15. L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) and ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968).

levied without the consent of their assembly. There are just five pages touching "other New England colonies," with the accounts ending almost as they begin, in 1662 for Connecticut, 1641 for New Hampshire, and 1673 for Rhode Island; and in all instances the only references are to formal charters and statutes. The use of sources for Maryland is far more varied, and the account, despite significant omissions, runs down to the Revolution. This is true of no other colony. The last references to pre-Revolutionary South and North Carolina are for 1703 and 1731 respectively. New York is accorded a mere three pages in a narrative that abruptly ends in 1685 with the disallowance of the Charter of Liberties and Privileges of 1684; there is no reference to the equally relevant and similar charter of 1691. The first reference to New York after 1685 is in connection with colonial opposition to the Stamp Act. The story of Magna Carta in New Jersey ends in 1702, shortly after it starts, when Jersey became a royal colony. There is a long chapter on William Penn and Pennsylvania, relating his trial in Old Bailey in 1670, his famous account of it which included an appendix of commentary on Magna Carta, his influence on the founding of Jersey and the colony named for him, his responsibility for the first publication in America of a commentary on Magna Carta, and the various colonial charters, statutes, and disallowances up to 1719, and then the history of Magna Carta in Pennsylvania is no more. The pre-Revolutionary coverage includes also a chapter on "English Laws and English History" and another on "Lawyers and Lawbooks." These discuss the extension of English laws to America, the Whig view of history, the colonial lawyer and his studies, and legal treatises, especially the works of Coke. The Whig view of history, as described by Dean Howard in relation to Magna Carta, omits the pre-eminently influential *Cato's Letters: Essays on Liberty, Civil and Religious* by John Trenchard and Thomas Gordon whose four volumes went through six editions between 1733 and 1755. Dean Howard supplements his superficial treatment with a footnote referring the reader to the excellent study by Trevor Colbourn,¹⁶ but there are no references to the equally excellent works of Caroline Robbins,¹⁷ Clinton Rossiter,¹⁸ and Bernard Bailyn.¹⁹ The question of the extension of English laws to America revolves almost exclusively on the views of Blackstone and his American critic, St. George Tucker. The omissions, once again, are major. Similarly, the anal-

16. *THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION* (1965).

17. *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN: STUDIES IN THE TRANSMISSION, DEVELOPMENT, AND CIRCUMSTANCES OF ENGLISH LIBERAL THOUGHT* (1959).

18. *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* (1953).

19. *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776* (1965); *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

ysis of law books for what they had to say about Magna Carta includes only Coke, Penn, Henry Care, and Blackstone. The discussion of what American lawyers and politicians read and possessed in their studies makes no reference to New York and to the only first-rate study we have of the subject, Paul M. Hamlin's *Legal Education in Colonial New York* (1939), which includes an appendix of twenty-six pages listing the law books that were in the libraries of leading New York lawyers—books which Dean Howard should have scrutinized for their uses of Magna Carta. Declaring at one point that in England the reliance on Magna Carta as a rallying cry on behalf of the liberty of the subject against Stuart tyrannies was not a novel phenomenon because it could be traced back, long before Coke, to a very considerable history, Dean Howard adds: "History was, in a sense, repeating itself in the American colonies. Through repeated, almost reflexive use—against proprietors, against governors, against judges, against lesser officials—England's liberty document was becoming America's liberty document."²⁰ I agree, almost instinctively, but on the basis of the slim evidence produced by Dean Howard, I must conclude that he has not proved his thesis.

The second third of the book treats the era of the American Revolution, from the writs of assistance case of 1761 to the shape of American law after the Revolution. These middle chapters cover the uses of Magna Carta in the development of the colonial constitutional argument against Britain and the influence of Magna Carta on the writing of the first state constitutions and the United States Constitution. Dean Howard's account, though elementary for scholars, is remarkable not because he has much that is new to say about a subject covered so exhaustively by others, but because he manages to remain interesting. Magna Carta in these chapters sometimes becomes lost or peripheral to the richly textured background. There are, for example, six pages on James Otis in which Magna Carta itself is mentioned only with reference to the fact that he owned a copy of Coke, though Otis's remarks on fundamental law are, of course, to the point. I am of the belief, however, that giving Otis twice as much space as the entire colonial history of New York, or that giving the Stamp Act controversy two and a half times as much space as the entire colonial history of the New England colonies, excepting Massachusetts, makes for a peculiarly proportioned book on the history of Magna Carta in America. The space allocations through much of the book bear no discernible relationship to the importance of topics or the availability of evidence. In these middle chapters I found most illuminating Dean Howard's remarks on the American blending of a natural rights argument with the authority of the British constitution. Chapter ten with earlier related material, at pages 166-69, is outstanding on the two traditions of natural

20. ROAD FROM RUNNYMEDE 97.

and constitutional law and their relationships. There are perspicacious observations too on the reasons that the period beginning with the framing of the United States Constitution was a watershed in the American odyssey of Magna Carta.

The concluding chapters covering the era of the Revolution spill over into the years of the early republic in the nineteenth century. Here Dean Howard is working less familiar ground; that is, the subject has not been treated so many times before, and as a result the book takes on an increasing freshness in content, while the painful gaps of the earlier pages appear far fewer. Nevertheless, the chapter on the adoption of British statutes necessarily is indebted to *British Statutes in American Law, 1776-1836* by Elizabeth Gaspar Brown (1964); and, the chapter on "The Shape of American Law after the Revolution," covering the debate over the common law, post-Revolutionary study of law, American commentaries, and Magna Carta as one of the sources of judicial review, attempts too much in such brief compass. While sketchy, it is an admirable epitome. The section on commentaries would certainly have benefitted from use of Elizabeth Kelley Bauer's definitive study, *Commentaries on the Constitution, 1790-1860* (1952).

The last third of the book is more analytical than historical. With very few exceptions, the sources cited are judicial decisions, state and federal, from the early nineteenth century to the present. This third of the book is an admirable treatise or commentary on Magna Carta as part of American case law. The chapters include "Justice Neither Sold, Denied, Nor Delayed," the transition from "law of the land" to "due process of law," due process in relation to attainders and fair procedure, due process in relation to property and jury trial, and substantive due process ranging from the old-fashioned kind in *Lochner v. New York*²¹ to the newer civil libertarian kind of the Warren Court. These chapters are remarkably comprehensive and succinct, in effect bringing up to date Mott's *Due Process of Law*, although in a style incomparably more readable. In these chapters, as in earlier ones, Magna Carta sometimes gets submerged in tangential discussions, even in pertinent discussions of the many meanings of due process of law. Now and again, I think, Dean Howard stretches a point to make it relevant. The material on attainders may be used to illustrate. Viewed broadly, a legislative infliction of punishment without judicial trial violates due process of law by definition. On the other hand, though counsel in *Cummings v. Missouri*²² invoked Magna Carta and won his case, the opinion of the Court did not mention Magna Carta nor the due process clause of the fourteenth amendment; and, in the com-

21. 198 U.S. 45 (1905).

22. 71 U.S. (4 Wall.) 277 (1866).

panion Test Oath Case, *Ex parte Garland*,²³ also discussed by Dean Howard, neither counsel nor the Court considered a due process issue. Both cases went off expressly on the attainder and ex post facto clauses. Similarly, Dean Howard discourses on the "landmark" case of *United States v. Brown* in which the Court held unconstitutional, as a bill of attainder, an act of Congress making it a crime for a member of the Communist Party to serve as an officer of a labor union.²⁴ But the opinion of the Court does not rest on the due process clause of the fifth amendment, and Magna Carta itself puts in no appearance. In effect, perhaps, Dean Howard has suggested a way for the Court to have improved or buttressed its opinion. His final chapter, entitled "Epilogue," restates his aims in writing this book, his principal findings with respect to the adaptability and capacity for growth of Magna Carta, and its main uses, new and old, in American constitutional history. The summation is enlightening, the rhetoric stirring.

The text itself ends at page 382. Interspersed in this handsomely produced book are sixteen pages of black and white illustrations, though the relationship of quite a few to Magna Carta is far-fetched. Footnotes are where they should be, at the bottom of the page, and are rarely discursive. There is no bibliography. Following the text proper is over a hundred pages of documentary materials, beginning with "relevant" chapters of Magna Carta. Some of these documents have been published so often and are so liberally treated in the text itself that I think their reproduction in the appendices is superfluous. For example, half the documents are familiar staples of the coming of the American Revolution, such as various resolutions against the Stamp Act and the Virginia Declaration of Rights of 1776. On the other hand the excerpts from Penn's tract of 1687, Drayton's "Rights of Englishmen" of 1775, Schley's commentary on Magna Carta from his 1826 *Digest of English Statutes of Force in the State of Georgia*, and the various tables showing state constitutional provisions and statutory compilations based on Magna Carta are valuable. The book concludes with a table of cases and a useable index. My own conclusion is that the book itself is valuable as far as it goes, but that it does not go far enough; that is, it lacks depth and proportion as a work of history, but until something better comes along, it will have to serve as the best introduction to the subject despite its faults, mainly of omission.

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23. 71 U.S. (4 Wall.) 333 (1866).

24. 381 U.S. 437 (1965).