



Review: A Coat of Many Colors

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The Road from Runnymede: Magna Carta and Constitutionalism in America by A. E. Dick Howard

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BOOK REVIEWS

A COAT OF MANY COLORS

*Arthur E. Sutherland**

THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA. By A. E. Dick Howard. Charlottesville: University Press of Virginia 1968. Pp. xv, 489. \$10.00.

The author of this useful, readable book of constitutional history is Professor of Law and Associate Dean of the School of Law of the University of Virginia. He was General Editor of the *Magna Carta Essays* published for the Virginia Magna Carta Commission by the University of Virginia Press. In *The Road from Runnymede* he becomes the first to trace the influence of John's Great Charter in fundamental political thought and its constitutional restatements in the Anglo-American new world.

"The aim here," Professor Howard explains, "is to write a kind of biography of a document and the ideas it set loose—the document being Magna Carta and the most significant idea being constitutionalism."¹ In this aim, he has succeeded admirably. He has given the idea of Magna Carta a kind of personal history, followed its changing fortunes, sensed both its frailty and its capacity to endure, and perceived in its generalized and abstract nature the potential for great growth—growth so drastic, in fact, as to make the original Runnymede version of the Charter an ancestor "surprised to see what his progeny have become."² This is the story of an idea wrenched to the purposes and personalities of those who used it (including John and Samuel Adams, the former using the Charter in a refined and highly legal sense, the latter as part of his mixed bag of political debating points).³ And finally, there is in Howard's account an appreciation of the practical and sometimes happenstance considerations which contribute to the survival of great constitutional ideals. For example, the Crown inserted language evocative of Magna Carta in early colonial charters, not from any constitutional scruples but merely to serve a travel-poster purpose—to lure men into the New World.⁴

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¹ A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 6 (1968) [hereinafter cited as HOWARD].

² *Id.* 13.

³ *Id.* 156-69.

⁴ *Id.* 16-17.

The Road from Runnymede is more a book of constitutional theory than of legal history. The standard historical sets and backdrops which Howard employs⁵ do not drain attention from the central theme—the enshrinement in American jurisprudence of the Magna Carta ideal of a fundamental “constitutional” check on governmental abuses of individual liberties. Federal and state constitutions, most particularly the Federal Bill of Rights, and the concept of judicial review eloquently attest the success of the Charter’s guiding idea. But many particular provisions of Magna Carta have scored striking individual triumphs, and Howard has traced them well. “To noone will We sell, to noone will We deny or delay, right or justice”⁶ has evolved over the centuries into “Equal Protection of the Laws.”⁷ Chapter 28 of the original Charter has been invoked through the ages to compel compensation for the taking of private property⁸ and chapter 20 (fines to be measured by the offense) is, among other things, the distant predecessor of the eighth amendment’s cruel and unusual punishment clause.⁹ “Lawful judgment of his peers”¹⁰ immediately suggests trial by jury, though in King John’s day it meant no such thing.¹¹ Most importantly, “the law of the land”¹² is the medieval ancestor of today’s “due process of law.”¹³ Indeed, Magna Carta’s success in America might be deemed even greater than in the mother country. If in England, without its written constitution, Magna

⁵ Constitutional theory is particularly evident in Professor Howard’s description and interpretation of the events immediately preceding and following the American Revolution. See *id.* 139-43, 151-53. Indeed, Howard wisely decides that

[n]o effort . . . [will be made] in these chapters to plough new ground in the telling of the story of the American Revolution or the interpretation of what that event signified. Rather the attempt is to set Magna Carta, as understood and used by the colonists, into the pattern of colonial thought and action.

Id. 11-12.

⁶ MAGNA CARTA ch. 40. The original Charter was not divided into numbered chapters. That convenient division was a later gloss.

⁷ HOWARD 284-97. Mr. Justice Black explicitly traced the Federal Constitution’s guarantee of equal protection back to this section of the Magna Carta in *Griffin v. Illinois*, 351 U.S. 12, 16-17 (1956) (state must provide free transcript to indigent criminal defendant on appeal).

⁸ HOWARD 334-36, 372.

⁹ *Id.* 248-49; See *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958).

¹⁰ MAGNA CARTA ch. 39.

¹¹ HOWARD 340-44.

¹² MAGNA CARTA ch. 39.

¹³ Near the end of the volume Howard explores the impact of Magna Carta on every major dimension of the modern due process clause from its guarantee of “fair” trial procedures, HOWARD 326-31, to its overlap with the equal protection clause, *id.* 307-15, to substantive due process, *id.* 363-67, to the recent selective incorporation into the due process clause of the Bill of Rights. *Id.* 360-63.

Carta has become "part of the common stock of ideas,"¹⁴ in America it is verbally embedded not only in the Federal Constitution but in state constitutions across the land.

As the biographer of an idea, Howard faced all the temptations of a biographer of men, among the foremost of which is the temptation to exaggerate the influence and importance of his subject. But Howard has wisely refused to press immodest claims for the Great Charter. He recognizes that it is but one strain in America's English legal heritage (which also includes such landmark documents as the Petition of Right, 1628, the Habeas Corpus Act, 1679, and the Bill of Rights, 1689),¹⁵ and he details those periods where the Charter was neglected or criticized,¹⁶ as well as those when it was almost universally applauded. The organization of the book is equally well proportioned and clear-sighted with a skillful blend of the chronological and topical¹⁷ so important to intellectual history, and with timely shifts from an individual focus¹⁸ to the social overview.¹⁹ This technique effectively reminds the reader that even in this age increasingly familiar with economic, behavioral and scientific interpretations of history, the sheer force of an idea can still shape the actions and lives of men. *The Road from Runnymede* will also be welcomed by those who believe that, however impressive Anglo-America's technological and scientific contributions to mankind, her most luminous gifts may still be ones of political practice and theory. Or for those who take a constitutional environment for granted, this book may be a reminder that it did not inevitably evolve for us.

The present system, in fact, is the product of long and often doubtful intellectual struggle. Professor Howard has emphasized two great crisis periods in Magna Carta's march from Runnymede to the present. The first concerned Magna Carta's voyage across the Atlantic to become for the colonies what it had lately been for England. The crossing to America was anything but automatic, and Howard cautions against the view that Magna

¹⁴ HOWARD 380, quoting I. JENNINGS, *MAGNA CARTA AND ITS INFLUENCE IN THE WORLD TODAY* 23 (1965).

¹⁵ See, e.g., HOWARD 9-10, 209-11, 214.

¹⁶ Examples of such times were Tudor England where Magna Carta was not "surrounded by the drama which had been its lot in the thirteenth century," *id.* 9, or more recently, the debates at the 1787 constitutional convention in Philadelphia where "Magna Carta was hardly relevant to the issues under consideration." *Id.* 219-20.

¹⁷ The book is more or less chronologically organized into four major sections: the Colonial period, roughly 1600-1760; the days immediately preceding the American Revolution (1760-1776); the immediate aftermath of the Revolution to about 1800; and 1800 to the present.

¹⁸ See HOWARD 78-90 (William Penn), 133-38 (James Otis), 156-64 (John Adams), 164-69 (Samuel Adams).

¹⁹ See *id.* 113-32 (*Lawyers and Lawbooks*, ch. VI), 256-83 (*American Law after the Revolution*, ch. XIV).

Carta or English common law underwent "some sort of instant and wholesale passage . . . to Virginia in the hip pocket of Captain John Smith."²⁰ Rather, there is a thorough exploration of the men and conditions that made transplantation possible and the considerable obstacles the Great Charter faced upon arriving in the New World. For here was Magna Carta in a strange and legally less sophisticated land, centuries after its original promulgation. It had to compete not only with indigenous American and civil law concepts, but, even more formidably, with the rival philosophy of natural law and the tendencies in theocratic New England colonies to adjudicate not on any "legal" or constitutional basis, but solely according to the "lawe of God."²¹

Yet Magna Carta persevered, and Howard's survival account of the Charter in the colonial period is one of the most revealing aspects of the book. The abstract, highly symbolic language of the Charter had given it inherent "adaptability and capacity for growth,"²² while simultaneously opening it to polemic and distortion (though, curiously, most of the "distortions" retained the germs of the original Charter's constitutional "truths"). Moreover, Sir Edward Coke's masterful use of Magna Carta in opposition to the Stuart Kings helped dramatize for the colonists the potential of Magna Carta as a general anti-authoritarian device.²³ Of further significance to the Charter's growth in America was the feeling that it somehow epitomized those "rights of Englishmen" which had been granted the colonists in their original charters but needed always to be guarded from subsequent infringement by king, Parliament, colonial governors and magistrates. Finally, Howard does not overlook the advancement of Charter ideals by those who in today's terminology must be "radicals"—men like William Penn, Edmund Porter, Samuel Adams, preachers whose "political" sermons were denounced as "daring and treasonable . . . audacious and wicked,"²⁴ and the unforgettable James Otis whom John Adams once described as "fiery and fev'rous. His Imagination flames, his Passions blaze. He is liable to great Inequalities of Temper—sometimes in Despondency, sometimes in a Rage."²⁵ Yet Howard demonstrates that Otis, and others like him, by tenaciously

²⁰ *Id.* 25.

²¹ *Id.* 35-48.

²² *Id.* 370.

²³ What Americans from the first settlements to the eve of Revolution knew of the Great Charter, they knew, with due allowance to Henry Care and others, because of Coke. Had Coke not brought his antiquarian interests and intellectual powers to bear during the constitutional struggles against the Stuarts, the present book probably would not have been worth writing.

Id. 369-70.

²⁴ *Id.* 185.

²⁵ *Id.* 135.

invoking the Charter against established orders, spoke eloquently for a higher content in the law.

Magna Carta's second great crisis came in the immediate aftermath of the American Revolution. Prejudice against English law was high, and many questioned the Charter's applicability to America. Magna Carta, it was now said, involved a grant of royal power to barons, whereas in America it was for the people to grant power to government. Magna Carta, moreover, was a check only on the crown, not on Parliament, and Americans now sought to check tyranny in whatever guise, be it executive, legislative or judicial. In the debates at the 1787 constitutional convention "Magna Carta may never have been mentioned at all,"²⁶ and Howard notes that "now it was not a form of sacrilege to say that Magna Carta was not, after all, the alpha and omega."²⁷ Yet any decline in the Charter's fortunes in the days following the Revolution was momentary. Its central ideal—that of protecting individual rights and liberties against the state—helped inspire adoption of the Federal Bill of Rights²⁸ and John Marshall's enunciation in *Marbury v. Madison*²⁹ of the principle of judicial review.³⁰ With such achievements, the Great Charter's place in American jurisprudence was secured.

As time went on, the Charter itself largely faded from political discourse, its mission accomplished. Howard closes by analyzing the recent forms which the Charter's ancient guarantees have taken. The bulk of attention is on "due process of law" which Howard fittingly describes as a

coat of many colors. It has, in its time, been a coat to protect the propertied classes from the inclement weather of state social and economic legislation, it has been wrapped about criminals and society's outcasts who felt they did not have their day in court, it has restored ousted officeholders to their offices, it has comforted conservatives and liberals alike (though usually at different times in its history), it has been voice of the past and social conscience of the future. It has, in short, had a pervasiveness in American history that no other constitutional provision has come near doing.³¹

Whatever its elusive and multi-purpose nature, Howard makes clear that "due process" has, on the whole, been more than faithful to the ideal of the Charter which gave it birth:

²⁶ *Id.* 220.

²⁷ *Id.* 237.

²⁸ *Id.* 221-40.

²⁹ 5 U.S. (1 Cranch) 137 (1803).

³⁰ HOWARD 276-83.

³¹ *Id.* 302.

Though it has never been static, due process has, even to the present day, carried with it some connotations of tradition or history, in the sense that people have come to expect certain things of a system of justice and, whatever else the concept may include, due process at least seeks to satisfy those minimal expectations.³²

The most used and useful legacies given to us by the Charter have proved to be phrases without much literal meaning. The clauses we remember best today are those so general as to be little more than symbols of vindication against tyrants, and of these the most famous, *legem terrae*, actually bears little verbal relation to "due process of law" in the fifth and fourteenth amendments, and none to the gloss of natural law and general resistance against outrageous government which appears in such decisions as *Griswold v. Connecticut*.³³ But Professor Howard rightly points to the sense of traditionalism which "law of the land" and "due process" evoke:

In history as written by Sidney, in law as illumined by Coke, the American colonists saw Magna Carta idealized. In history and tradition Americans were apt to find the weapons with which to fight what they saw as tyranny. Their use of history is a reminder that history is by no means necessarily on the side of reaction and the status quo; it can equally be, and often has been, used as a liberating, creative force. History in the hands of Coke, and history in the hands of eighteenth-century Americans, should suggest as much.³⁴

Such abstract constitutional symbols are much more useful than specific prescriptions precisely because of their lack of specificity; their abiding value lies in their general negation of tyranny and their connotation of a centuries-old tradition of freedom from overbearing government. The due process clause, for instance, is an authorization for judges to negate government in whatever tyrannical activity it may engage. And because all men resent what from time to time appears to them as tyranny, the Charter has always been a symbol which they have invoked, in England and in America, whenever they have come, as Burke put it, to snuff tyranny in a tainted breeze.³⁵ Professor Howard has traced this process through the centuries on both sides of the Atlantic. His book demonstrates vast labor³⁶ and never

³² *Id.* 345.

³³ 381 U.S. 479 (1965). For a comment on man's desire for such symbols of the indefinable, see Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283 (1965).

³⁴ HOWARD 374.

³⁵ In his speech "On Conciliation with the Colonies" delivered before the House of Commons on March 22, 1775.

³⁶ Professor Howard's labor is well evidenced by the appendices where he has compiled selected chapters of the Great Charter, the 1606 Charter of the Virginia Company