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MAGNA CARTA'S AMERICAN ADVENTURE*

A. E. DICK HOWARD**

I spent a good part of the summer of 2015 in England, lecturing on aspects of Magna Carta. It seemed that every town, village, or crossroads with any connection to Magna Carta was celebrating the Charter's eight hundredth anniversary. It's not surprising to hear about celebrations in the country that gave birth to Magna Carta. But the question I want to put before you tonight is: why should Americans care? After all, Magna Carta's origins were a long time ago, in a very distant place, born of a struggle between King John and the barons. Why would an American remember Magna Carta?

When I was very small, one of the authors whose books I came to love was A. A. Milne. You Winnie the Pooh buffs will know about Milne. Perhaps you know Milne's *Now We Are Six*. One of the poems in the collection is "King John's Christmas." It begins,

King John was not a good man—
He had his little ways.
And sometimes no one spoke to him
For days and days and days.¹

For a little kid, the idea of being shunned—that nobody will speak to you—is really terrible. How could you be so awful that people won't even talk to you?

Well, I grew up and read some more about King John. I discovered that he *was* that bad—maybe worse. Not only was he bad in moral terms, he was also a bad king. John managed to make enemies throughout the realm and beyond. He quarreled with Pope Innocent III over the election of an Archbishop of Canterbury to the

* © 2016 A. E. Dick Howard. Edited transcript of an address delivered at the opening banquet of the *North Carolina Law Review* symposium, *Celebrating 800 Years of Magna Carta*, on October 1, 2015.

** White Burkett Miller Professor of Law and Public Affairs, University of Virginia. Professor Howard is the author of *The Road from Runnymede: Magna Carta and Constitutionalism in America* and *Magna Carta: Text and Commentary*. I would like to dedicate this essay to Sir Robert Worcester, who spent years of dedicated initiative to chairing the umbrella committee for the global commemoration of Magna Carta's eight hundredth anniversary. Sir Robert embodies the best traditions of the Great Charter.

1. A. A. MILNE, *NOW WE ARE SIX* 2 (1st ed. 1927).

point where the Pope put England under an interdict, suspending church services and sacraments. He quarreled with the townspeople of London. His military adventures abroad were total failures. Defeated at the Battle of Bouvines in 1214, he ultimately lost most of the Normans' landholdings in Normandy.

The barons had particular cause to be unhappy with King John. He imposed harsh demands for revenue on the barons in ways that were clearly not acceptable to them. At length, all these misadventures piled up on King John, resulting in the meeting at Runnymede on the fifteenth of June, 1215. King John was, to be sure, a totally unwilling and reluctant bargainer who didn't want to be there. But the result was the document whose eight hundredth anniversary we are celebrating.

King John never meant to keep the promises he made in Magna Carta. Indeed, having made up with the Pope, John persuaded him to annul Magna Carta several weeks after its making. The Pope said this was a bargain made under duress, and contracts made under duress are not legal. That could have been the end of the story. If so, we wouldn't be here this weekend, and I certainly wouldn't be at this lectern.

What happened then, however, was that King John died the next year, 1216. One of the chroniclers said that King John died of a surfeit of peaches and new cider. I was very relieved to see that the menu tonight did not include peaches and new cider. His successor, Henry III, was nine years old. This was the Middle Ages. How long might a nine-year-old king live? You could imagine the knives being sharpened. You've seen *Game of Thrones*; you know what it was like. So John's regent, William Marshal, hit on what our age might call a public relations gesture. He decided that Magna Carta should be reissued by way of affirming the new king's good faith with the people of England. Thus began the tradition over the years of each successive monarch's reissuing Magna Carta.

Like so much of the common law, Magna Carta evolved. It changed, some provisions were removed, but it remained very much part of the fabric of English law until, in 1297, it went on the statute books of England. In 1368, a law was enacted declaring that if any statute were inconsistent with Magna Carta, that statute would be null and void. One asks: how could one statute say that another one was superior? It may have been a canon of construction—that if a judge had a case and Magna Carta was in tension with another statute, the judge should prefer Magna Carta. However one reads that enactment,

it reflects the emerging notion that Magna Carta was not just any statute, it was superior to ordinary law.

I'll pass over the Tudor period. You've probably watched *Wolf Hall*. We don't remember the reign of Henry VIII as being a great period of constitutional government. I will, however, touch briefly on the seventeenth century before turning to the story here in America. The century began with James VI of Scotland coming to the English throne as James I. The Stuarts invoked the divine right of kings, putting them on a collision course with Parliament. That turbulent century saw the English Petition of Right, the execution of Charles I, the Cromwellian Commonwealth, and the restoration of the Stuarts. In 1688, the Glorious Revolution brought William and Mary to the throne, followed swiftly by the enactment of the English Bill of Rights in 1689. By the end of the seventeenth century, the shape of constitutional government in England was profoundly different from what it had been at the beginning of the century.

Before I leave the English story, I must mention Sir Edward Coke. A commentator on Magna Carta, Coke was a leader of the parliamentary forces opposing the pretensions of the Stuart kings. In the great debate leading up to the Petition of Right (1628), Coke said, "Magna Carta is such a fellow that he will have no sovereign."

That, in succinct form, is the English side of the story. What about America? How did Magna Carta get here, and why does it matter?

Let me begin with the Virginia Company Charter of 1606 and the colony at Jamestown. The Virginia Company was a commercial enterprise. It was a stock company—you bought shares and hoped to make money. But, commercial gain aside, there was one provision in the company's charter that is especially pertinent to our story. There was a guarantee that the emigrants to Virginia would enjoy the privileges, franchises, and immunities they would have enjoyed in England. Which is to say, you pull up roots in England, you go to this wilderness called Virginia, you don't leave your rights behind.

One may fairly debate what the framers of that language meant—what precisely were the "liberties, franchises and immunities" might elude definition. In any event, the colonists and their descendants took that language seriously. They understood that the corpus of English common law came with them and protected them in America.

The charters of the other English-speaking colonies had language like that I just quoted from the Charter of 1606. There were yet other ways that English law was being implanted in the colonies. Colonial

assemblies were instructed that their laws must be consistent with the laws of England. There were provisions requiring the transmission of American ordinances back to London to be approved. Given the time transmittal took in those days, it's not clear how effective the requirement was. Even so, the formal requirement was there.

As you can well imagine, notions of inherited rights evolved over time. When Americans began to evoke Magna Carta in the eighteenth century, claims were being made that, in the thirteenth century, John and the barons would not have recognized. A fair amount of mythologizing went on, but that's how constitutional ideas take form over the years.

On the eve of Revolution, consider the uses the colonists were making of Magna Carta and what they understood to be its protections against even acts of Parliament. In 1761 in Boston, James Otis made the famous argument against writs of assistance. You students of the Fourth Amendment will recognize that argument as having planted the seed of the Fourth Amendment. Otis represented Boston merchants who objected to writs of assistance, which allowed customs officials to enter homes or places of business and search for anything they liked. In his argument, Otis relied directly on Magna Carta and on Sir Edward Coke.

In *Dr. Bonham's Case* (1610), Coke said that acts of Parliament against "Common Right and Reason" were void. That was not a proposition that Britain's government in the 1760s would have accepted or understood. William Blackstone's *Commentaries on the Laws of England* declared Parliament sovereign. Parliament calls the shots. Whatever Parliament says is law. So there you have it—on one side of the Atlantic, Blackstone's jurisprudence, and, on the American side, Otis and others citing Coke's. Two totally different concepts of the constitution. Otis's argument in 1761 was, in our modern sense, a constitutional argument. He was saying that there are certain things the British Parliament can't do. The British and the Americans were talking past each other at this point. Small wonder that, in London, they said, "What are these Americans talking about?"

Then came the Stamp Act of 1765. This was the first time that Parliament had sought to impose an internal tax on Americans; up to that point, taxes had been external, such as customs dues. The Stamp Act produced an outpouring of resentment in the colonies. The cry was heard, "No taxation without representation." What followed is familiar history—the Boston Tea Party, the closure of the port of Boston, the quartering of British troops in Boston, and the dissolution

of the colonial assembly. Americans called these measures the “coercive” or “intolerable” acts; the other colonies came to the support of Massachusetts. In 1774, the Continental Congress passed resolutions, quoting from the early colonial charters—the promise of privileges, franchises, and immunities—and reminding the British that these rights descended down through the generations from the original colonists.

One thing I find interesting about those resolutions of 1774 was the debate over what sources Americans should point to as the bases for these American rights. Some delegates, for example, John Dickinson, said we should base our rights on natural law—inherent rights. Today we might call them “human rights.” Other delegates, being more legalistic, said, “No, better we cite the colonial charters.” Yet others said, “We should rest our claims of rights on the British constitution, in particular, on Magna Carta.” The delegates resolved the debate by sweeping all those sources into their resolutions, rather than choosing among them. Reading the resolutions of 1774, one finds eclecticism at play. Natural law, the word of God, the British constitution, Magna Carta, the colonial charters—here are our rights. The delegates were, in effect, saying, “Put what label you like on it, call it natural law or Magna Carta or whatever, but it all adds up to the same thing—we Americans have rights, and you British are not respecting those rights.”

So it was on the eve of Revolution. Then we pass to the making of the first state constitutions. The revolutionary convention that met in Williamsburg in May of 1776 instructed Virginia’s delegates in Philadelphia to introduce the resolution for independence. On the same day, they set to work on Virginia’s first state constitution. It was intuitive to those Virginians that, if you resolve to be independent, the first thing you do is write a constitution.

Actually, the Virginia convention set to work not on one document but on two. The members settled on George Mason’s famous Declaration of Rights for Virginia. Then they set to work on a second document, a frame of government. We are seeing John Locke’s notion of the social compact in action. First, you set down your inherent rights—they precede government, they don’t depend on government. Then you write a constitution. Today, you will find the Declaration of Rights as Article I in the Constitution of Virginia. It’s easy to overlook the fact that Article I began as an independent and distinctive document.

One of the people who didn’t like that first Virginia constitution was the founder of my university, Thomas Jefferson. I have to admit,

by the way, that it's written into my contract at UVA that I'm not allowed to make any public talk or lecture without somewhere citing Thomas Jefferson. So I want you to note that this is my obligatory mention of Jefferson. He spent the next fifty years condemning the first Virginia constitution for many reasons, among them, the limited franchise and unfair apportionment. But his most basic complaint was that the constitution was made by a body of men who were also passing ordinary laws for Virginia, confusing constitution-making with lawmaking. If that body could make laws and constitutions, then it could unmake them. The constitution is simply another law.

Here, I must give credit to Massachusetts for doing what we in Virginia did not. By the way, I was in Boston last fall at Faneuil Hall, giving the James Otis lecture. I told friends in Massachusetts that they are wonderful with words, but they're not so good at numbers. They don't quite understand that 1607 is a lower number than 1620. That probably didn't make me very popular in Boston. But I did tell them that their ancestors made history when they adopted Massachusetts's first constitution in 1780. It was written by a convention elected for the express purpose of writing a constitution, and it was then voted on by the people in a referendum. What Jefferson complained that Virginia had not done, Massachusetts did.

Thus, Americans had invented the constitutional convention. This was something that the Europeans had not contrived. Americans were responding to the question, "How do you make the constitution secure from and superior to ordinary law?" The Massachusetts Constitution blends American ideas about sovereignty with English ideas drawn from Magna Carta and British constitutionalism, for example, provisions, replicating, almost word for word, chapters 39 and 40 of the 1215 Charter.

What of the great Philadelphia Convention of 1787? We have no full transcript of the convention's debates. (We do have Madison's notes.) As far as I know, Magna Carta was never mentioned at the convention. There's certainly no record of it. Assuming that's true, isn't that startling in light of the story I have been telling? If Americans cared so much about Magna Carta—if they relied on it so firmly in the run-up to the Revolution—why didn't they talk about it in Philadelphia?

If I could pose this question to the Federalists, they would probably say that Magna Carta was a gift from the king, whereas the Constitution is ordained by "We the People." And they might add that Magna Carta bound royal power, whereas they were writing a

constitution binding all of the branches of government—executive, legislative, and judicial.

A nearly fatal mistake was made at Philadelphia—the omission of a bill of rights. This was part of the British tradition that got neglected. Elbridge Gerry, of Massachusetts, and Virginia’s George Mason wanted a bill of rights, but the convention rejected that proposal. Some delegates thought a bill of rights was not necessary to bind a government of delegated powers. Maybe they were tired; it was one of those hot, muggy summers in Philadelphia. In any event, in rejecting a bill of rights, they handed the so-called “Anti-Federalists” a signal argument. Opponents of the proposed Constitution could say, “Look at these people! They’re not providing for our rights, this new Constitution doesn’t talk about rights!” During the ratifying contest, Madison said, “Ok, we get the point. Just ratify the Constitution, and then, at the first Congress, we will propose amendments to create a bill of rights.” As you know, that’s what they did. We got the first ten amendments to the Constitution.

The story of these events in America is a blend of innovation and tradition. Federalism, judicial review, checks and balances—these are very American. Tradition embraces the legacy of Magna Carta, the Petition of Rights, the English Bill of Rights, the common law—all blended together in the American state and federal constitutions.

What is the legacy of Magna Carta in American constitutionalism? I would suggest the following. First, Magna Carta is the iconic way of talking about the rule of law, not only in America and England, but around the globe. We lawyers use the phrase “rule of law” as if it were somehow self-revealing. I remember being in Leningrad, now St. Petersburg, consulting with drafters at work on Russia’s first post-Soviet constitution. (Those were the days when we thought that Russia was going to join the family of liberal democratic constitutional regimes. Now it seems like a long time ago.) I don’t speak Russian. In Leningrad, we were working through a very good translator. I discovered at one point that she was translating the English phrase “rule of law” as “socialist legality.” I had to say, “Well, no, that’s not exactly what we mean when we talk about ‘rule of law.’ ” So, you see, the notion of “rule of law” is not quite self-evident.

Magna Carta’s second legacy is the articulation of fundamental rights. We Americans are intensely rights-conscious. Constitutions around the world talk about rights, but in America in particular we have internalized the idea. We turn garden-variety disputes into lawsuits and those lawsuits into constitutional claims. I sometimes

think that our national motto should be something like, “I’ll see you in court.” We complain about courts, but when we think our rights are being violated we are the first ones to go to court.

Thirdly, there is the idea of a written constitution. Magna Carta, the Petition of Rights, the Bill of Rights, the Constitution—all are examples of putting it in writing. In America, that tradition may be reinforced by the strong religious impulse that brought so many settlers here, carrying with them the notion of The Book.

Fourthly—here we’re getting to the nub of the matter—Magna Carta has a lot to do with putting us on the road to constitutional supremacy. This entails the notion of a constitution that is a super-statute and not ordinary law. Recall James Otis’s arguments in Boston—the constitutional claim that even Parliament’s powers were limited. Already, we were on the road to the Supremacy Clause of the United States Constitution—the Constitution and all laws “made in pursuance thereof” shall be “the supreme law of the land.”

People often treat John Marshall’s opinion in *Marbury v. Madison* (1803) as if it had sprung from the brow of Zeus. In fact, judicial review was an idea fully formed by the time of *Marbury*. For law students here, do you remember the first time you read *Marbury*? I’m tempted to cold-call some people at that table over there. Give me the facts and holding in *Marbury*. But this is a social occasion; I’m not going to do that to my young friends here. But, do you remember the first time you read *Marbury*? Were you struck by the fact that Marshall begins with general principles of jurisprudence? Then he goes on as if it’s obvious; you write a constitution, of course it’s supreme! What do you expect? Then, fairly late in the opinion, he reminds you of the language of the Supremacy Clause. Marshall saw his reasoning as basic: This is all about constitutions. If you write one, of course the court has to treat it as being fundamental law.

Finally, summing up Magna Carta’s legacy, I think that the tradition of organic, unfolding, evolving constitutional law flows from Magna Carta. Mr. Dean, Justice Scalia is not here tonight. If he were, I suspect I would be inviting an argument. I refer, of course, to what we call the “living Constitution.” One may object to the notion of the “living Constitution,” but that’s what we have.² Think about Eighth Amendment cases on cruel and unusual punishment. Today, the

2. Justice Scalia died after this talk was given. He was a friend (a former colleague on the University of Virginia’s law faculty). I respected him for his bold contributions to constitutional dialogue. I will miss his distinctive voice, and readers of the U.S. Reports will find those pages less lively.

Eighth Amendment is not read as forbidding only those practices that were banned in 1791. The Supreme Court continues to see the concept of cruel and unusual punishment as evolving. I think, for example, of two 1989 cases upholding the death penalty for the somewhat mentally retarded and for youthful offenders. Within twenty years, the Supreme Court had overruled both of those precedents.

Even more pertinent to the Magna Carta story is the use, over the years, of due process of law. The requirement, in chapter 39 of the 1215 charter, that procedures be in accordance with the “law of the land” evolved into what we call today “due process of law.” When you think about the history of the Due Process Clause and the ways in which it has been used over the years, you see the essence of the living Constitution. Let me quote from Justice Kennedy in *Lawrence v. Texas* (2003), the case in which the Court struck down Texas’s antisodomy law. Kennedy said that those who drew and ratified the Due Process Clause “did not presume” to know

the components of liberty in its manifold possibilities They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³

Consider, then, Justice Kennedy’s majority opinion in *Obergefell v. Hodges* (2015), the same-sex marriage case. Near the end of that opinion, one finds, almost word-for-word, the language I just quoted from 2003. Justice Kennedy didn’t think it necessary to put the language in quotation marks or to refer back to his own opinion in *Lawrence*. He simply said it as if it had now become an accepted part of the corpus, of the fabric, of American constitutional law. There you have a current reminder of the power of the ideas that flow all the way back to Magna Carta.

What about Magna Carta, the document itself? There are seventeen extant copies of the Charter, from the four that survive from 1215, through the year 1297, when the Charter went on the statute books of England. Some years ago I was flying to London. My seatmate was a lawyer from Texas. He was Ross Perot’s personal lawyer. He told me the story of how Perot, a man of some means, decided he would like to have a copy of Magna Carta. He had heard

3. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

that there was a family in England who owned a copy of the 1297 charter. So, he sent this lawyer over to England to bargain for and to purchase that copy. He paid \$1.5 million. This was back in the 1980s, so the price was, for most of us, not pocket change.

After some years had passed, Ross Perot decided he didn't need this copy of Magna Carta anymore. So he put it on auction at Sotheby's in New York. Another man of some means, David Rubenstein, a philanthropist who has been very generous to Montpelier and Monticello and other places, heard about the auction. For this copy of Magna Carta, he bid \$21.5 million. I then had a call from the National Archives. They were going to put this copy of Magna Carta on display; they asked if I would come up and give a lecture. I said, "Sure, I'd be happy to do that." Well, from time to time, the Washington Post has a little box mentioning three or four things in the next week that you might find interesting. The week before my lecture at the Archives, the box said something like, "Professor A. E. Dick Howard, of the University of Virginia, on Tuesday, March 10, at 7:30 p.m., will be at the National Archives to talk about his book, *The Road from Runnymede*, and his purchase of Magna Carta for \$21.5 million." That evening, I went home to my wife, Mary, and I said, "Mary, we're going to start getting some very interesting phone calls—invitations to some very fancy dinners and parties. They will think, 'If Professor Howard can pay that kind of money for Magna Carta, there's a lot more where that came from.'" I said, "Don't ask any questions, just say 'yes' and accept those invitations."

So there you have Magna Carta in America. We don't live in feudal times. I don't think even the worst of our public officials can match King John. We're not worried about the pretensions of monarchs. But we are pursuing in our day and time our own quest for ordered liberty, a quest that invokes values and aspirations that lie at the heart of Magna Carta's legacy. I salute the law school here at the University of North Carolina for hosting some very distinguished people for this symposium. I commend the *Law Review* for making the symposium possible and for publishing its deliberations. And I thank all of you so much for your characteristic Carolina hospitality.*

* The descendants of the barons of Runnymede confirm their gratitude. I have been unable to reach anyone to speak for King John.