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**Property Rights: From Magna Carta to the Fourteenth
Amendment, by Bernard H. Siegan**

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important. Cathy Whitlock and Margaret Knox make the most convincing argument for why the study of fire and native peoples is essential to the discussion of humanized versus pristine environment. Assigning native peoples an historical role in changing the natural landscape via fire provides a foundation for aggressive forest management advocates to argue that forests have already been completely changed, so forest management is appropriate. They argue that forest management is necessary to return to pre-Euro-American landscapes and might include both prescribed burning and fuel reduction through tree thinning (Whitlock and Knox, p. 222). Middle-of-the-road forest managers concede that some forest management is necessary where native peoples most heavily burned, but this necessity decreases in areas uninfluenced by native peoples, such as in some of the mountain highlands. Advocates for leaving the forests alone downplay the impact of native peoples on the natural landscape, claiming that the population was not significant enough nor were the anthropogenic fires frequent enough to make any real changes in the natural landscape.

Thus, while Vale proves his claim that there is a middle ground between pristine and humanized landscape with solid evidence, the reader is given only a few tidbits of why this academic argument is important to the study of natural resources. Much of the book is addressed to refuting the evidence of previous geographers, explaining the prejudices of nineteenth century explorers and mountain men, and presenting new physical evidence demonstrating the actual frequency with which native peoples used fire. The graphs charts are well done and explained thoroughly and believably. Yet, while *Fire, Native Peoples, and the Natural Landscape* is an impressive book, it lacks a compelling connection to the problems of our own century.

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Property Rights: From Magna Carta to the Fourteenth Amendment. By Bernard H. Siegan. Bowling Green, Ohio: The Social Philosophy & Policy Foundation, 2001. Pp. 329. \$49.95 hardcover.

Prospective readers need not be discouraged by the somewhat academic sounding title of this book. This remarkable work presents the subject of the origin of property rights in a clear and informative manner. Beginning with the Magna Carta and tracing the continuity of property rights through the founding of the United States to the Fourteenth Amendment, Bernard H. Siegan, professor at the University of San Diego School of Law, presents a thorough investigation of the roots in our legal system pertaining to and protecting private property. The book's premise is that countries that respect property rights also respect

individual freedom and are most likely to be politically and economically stable.

The cases selected by the author to illustrate application of the common law in the protection of personal and property rights range from occupational licensing to monopolies, from the individual's right to work to the king's prerogative powers, and from taxation for public works to duties on imported goods. Siegan uses the writings of esteemed legal commentators Edward Coke and William Blackstone and of the philosopher John Locke to explain and analyze the path that our country has taken in its protection of property rights. This book is a valuable contribution to our understanding of the causes behind America's economic prosperity and should lay to rest arguments regarding the supposed recent development of property rights in this country.

In 1215, King John signed a document called the Charter of Liberties (later the Magna Carta), which rescinded his earlier violations of common law against the English barons. He agreed to return properties and money received from the barons, stating that freemen would never again be punished excessively or for nonexistent rules or be deprived of their liberty or property. Provisions made in the Charter for redress are the foundation of checks and balances between our governmental branches, according to the author. He also sees a correlation between the takings clause of the U.S. Constitution and Chapter 28 of the Charter, which forbids the taking of provisions without payment. Similarly, the idea of equality under the law has its foundation in Chapter 40, in which the king promises not to refuse or delay rights or justice to anyone.

As support for the idea that the 1225 version of the Magna Carta was definitive and a basis of common law today, Siegan turns to distinguished legal commentator Edward Coke, who stated that the document had the clear purpose to protect freemen and villeins, as well as their rights and possessions, from governmental oppression. A 1363 statute of King Edward III ensures that no one may be deprived of his liberty or property without due process of the law. Coke, as jurist and commentator, upheld judicial authority in protecting the rights of individuals to freedom and property.

The author moves 150 years forward to William Blackstone, another English jurist and legal commentator, who substantially agrees with Coke regarding property rights but differs by viewing the Parliament as sovereign. Blackstone regards the rights of life, liberty, and property as absolute and founded on nature and reason. When a government interferes with these rights, it must compensate the owner. Any trespass or nuisance must likewise be compensated or abated.

The beliefs of Coke and Blackstone regarding natural rights and the government's fiduciary role in protecting those rights found their

counterpart in the theories of John Locke, who greatly influenced the writers of the Declaration of Independence, according to Siegan. Locke believed that in forming a political society men give some power to the government and, in turn, the government is charged with protecting the public good. Governmental powers could not infringe on the rights of Englishmen, rights that the settlers brought with them to the colonies in America.

Before turning to the Constitutional Convention, the author makes mention of a notable occurrence that affected the Framers—Shay's Rebellion in 1786, when Massachusetts farmers sought to stop courts from sitting in order to prevent the collection of debts and the inevitable loss of their farms. The rebellion failed, but the threat to order prompted the Framers to consider the establishment of an authority that would be sufficiently strong to protect the union without being oppressive. John Adams believed that separation of powers was the key to such authority; James Madison thought that it was not the inadequacy of the Confederation so much as the disregard of private property that brought about the Convention.

James Madison, in Siegan's view the most important delegate to the Constitutional Convention, was greatly influenced by the writings of David Hume, Adam Smith, and Adam Ferguson. Consequently, he envisioned a nation where commerce was free and property was protected. Separation of powers was key to achieving individual and political freedom as well as protection of private property and economic stability. Division of governmental branches by function would also ensure the checks and balances necessary in a just society.

Thus, according to Siegan, the judiciary would be charged with interpreting the Constitution and legislative powers would be curtailed in order to establish a free society and guarantee individual freedom and property rights. The failure of joint farming and property held in common at Plymouth colony was noted by James Wilson in supporting the property rights necessary to a free society. In the amendments to the Constitution proposed by James Madison in 1789, protection of life, liberty, and property is assured and no one can be deprived of these rights without due process of law. Therefore, the judiciary has the burden of protecting rights and the legislature is prevented from violating them, whether they are enumerated or not. To further protect property rights, the takings clause appended to the Fifth Amendment provides that no private property will be taken for public use without just compensation. According to the author, the Bill of Rights is property oriented since it protects possessions such as a home, land, firearms, and finances. The due process and takings clauses limit governmental powers and the judiciary bears the responsibility of applying and interpreting these clauses.

Central to the book is Chapter 4, on the judicial interpretations of property rights in the United States in the eighty years between ratification of the Constitution and ratification of the Fourteenth Amendment. Judges in both federal and state courts overwhelmingly favored property owners while successfully restraining the government from imposing unjust laws. Alexis de Tocqueville's opinion that Americans' love of property was unequalled elsewhere is confirmed, according to Siegan, in over 100 decisions in 33 states, and analysis of those cases shows that there was near unanimous agreement that compensation was due an owner for the taking of his property. The exception was South Carolina, where land acquired for roads was not compensated.

In view of this long and rich record of protection of property rights, Justice Harry Blackmun's dissent in *Lucas v. South Carolina Coastal Council* in 1992 is perplexing to the author and he devotes a section of Chapter 4 to present material omitted from the cases supporting the dissent. When the complete picture emerges, it is consistent with protection of property rights. Though Justice Blackmun apparently intended to prevent a nuisance, his rejection of an historical basis for the majority opinion was unfortunate.

When Siegan considers the federal courts, including the U.S. Supreme Court, he finds that they overwhelmingly championed property rights. He pays particular attention to their analysis of the due process clause, which does not refer simply to procedures but is intended also to restrain governmental power. Accordingly, due process and the law of the land prevented the government from infringing on property rights, and though due process was questioned in matters regarding slavery, it would soon be clear that protection of life, liberty, and property applied to everyone. In cases where a taking had occurred—as through a government regulation, a physical invasion, or by eminent domain—compensation was ordered.

Additional protection was secured by the privileges and immunities clause of the Fourteenth Amendment. Similar language appears in Article IV, Section 2, of the Constitution and the effect of both clauses is to protect fundamental rights. Initial judicial decisions, however, had the effect of limiting the number of fundamental rights envisioned by the framers of the Fourteenth Amendment as applied to corporations. Tellingly, Justice Stephen Field, who rejected certain rights of corporations in a case involving a Virginia decision, was among the dissenting judges in a later case involving rights of a business. Siegan traces these outcomes to the fact that a trade or occupation was not viewed at the time as property. While the debates presented illuminate the framers' intent, as Siegan points out, "intentions are subordinate to the language they have used to achieve their goals." Moreover,

interpretation of language used in amendments must be consistent with the interpretation of existing constitutional language. Thus, Siegan argues that the privileges and immunities clause must be interpreted as referring to fundamental rights, as it was understood by Justice Bushrod Washington in his 1823 opinion in *Corfield v. Coryell* and as it was understood by the framers of the Fourteenth Amendment. The author finds that the erratic judicial record of its interpretation, however, leaves the due process and equal protection clauses to safeguard the individual rights of life, liberty, and property.

Nevertheless, the respect accorded to property rights by the English settlers and rooted in the Magna Carta was evident in colonial America where freedom from governmental oppression guaranteed prosperity to the colonies. Ratification of the Constitution established the separation of powers in the U.S. government, introducing a system of checks and balances and furthering the public interest. The due process and takings clauses of the Fifth Amendment, the privileges and immunities clause of Article IV, Section 2, of the Constitution, as well as the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment assured U.S. citizens of their fundamental rights, including the rights of property.

The long historic record of property rights in this country and Professor Siegan's thorough analysis of that record and his presentation of the judicial decisions supporting it, as well as his illuminating commentary on the few decisions against it, dispel any questions regarding the validity of these rights. Why South Carolina was able to take private land for road building without compensating the owners is, therefore, all the more interesting and not entirely explained. In addition, by ending the book with the Fourteenth Amendment, many questions regarding private property arising later because of technological innovations remain unanswered. With the overhead trespass by planes, for example, property rights have had to be redefined. This reviewer hopes that Professor Siegan is already at work on a second volume, beginning where the first ends and addressing these and other pertinent issues. But a wealth of notes and references to hundreds of cases renders the present work invaluable to students of constitutional and property law, as well as to lawyers and judges involved in property rights litigation. The book should also be of interest to historians, and the readability of the text—a rare feat in such works—should make it accessible to the lay reader as well.

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