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Book Review: Unfinished Business: A Civil Rights Strategy for America's Third Century. by Clint Bolick; Property and the Politics of Entitlement. by John Brigham; Regulatory Taking: The Limits of Land Use Controls. Edited by G. Richard Hill.

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for a court to tackle. The majority in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) thought not. Which was right? The Court has had many subsequent opportunities to intervene in representation questions, many of which are discussed in this book. It will doubtless have many more in years to come. This book tells us much about an important branch of the representation debate. But what does the branch tell us about the tree?

UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY. By Clint Bolick.[1] San Francisco, Calif.: Pacific Research Institute for Public Policy. 1990. Pp. xiii, 158. Cloth, $24.95; paper, $12.95.

PROPERTY AND THE POLITICS OF ENTITLEMENT. By John Brigham.[2] Philadelphia, Penn.: Temple University Press. 1990. Pp. xi, 223. Cloth, $39.95.

REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS.[3] Edited by G. Richard Hill.[4] Chicago, Ill.: Section of Urban, State and Local Government Law, American Bar Association. 1990. Pp. xix, 422. Paper, $49.95.

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As these books demonstrate, judicial and scholarly interest in

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3. This collection consists of the following essays: C. Thomas Williamson, III, *Constitutional and Judicial Limitations on the Community's Power to Downzone*; Robert E. Manley, *Inverse Condemnation Under 42 U.S.C. Section 1983*; Margaret V. Lang, Penn Central Transportation Co. v. New York City*: Fairness and Accommodation Show the Way Out of the Takings Corner*; Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land*; Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal to the Sum of Its Parts*; Ray Mulligan, Loretto v. Teleprompter Manhattan CATV Corporation*: Another Excursion into the Takings Dilemma*; Jonathan B. Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*; Robert H. Freilich, Alison M. Francis, and Steven L. Popejoy, *Excerpt from State and Local Government at the Crossroads: A Bitterly Divided Supreme Court Reevaluates Federalism in the Bicentennial Year of the Constitution*; Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*; David L. Callies, *Property Rights: Are There Any Left?*; John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*; Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*.

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the constitutional rights of property owners has recently awakened after decades of slumber. From the 1790's until the constitutional revolution of 1937, the federal courts championed property rights against legislative interference.[6] Following the political triumph of the New Deal, however, the Supreme Court largely withdrew from the field of economic rights. Yet, by 1990 there were signs of a sea change. Stressing the importance of property ownership as a bulwark of individual liberty and limited government, a group of scholars has forcefully urged the Supreme Court to resume its traditional role as the defender of property rights.[7] In a series of decisions the Supreme Court,[8] lower federal courts,[9] and leading state courts have given renewed vigor to the takings clause of the fifth amendment.[10] Even a critic of this trend has observed that courts are "more receptive to attacks on economic regulation than they have been in half a century."[11] These developments have stirred a lively debate about the place of property rights in contemporary constitutional thought.

The most ambitious and provocative of these works is Clint Bolick's *Unfinished Business: A Civil Rights Strategy for America's Third Century*. Bolick starts by taking to task "the contemporary civil rights establishment." He accuses the civil rights leadership of abandoning the original objective of equal treatment for individuals. Instead, the civil rights movement has increasingly stressed group entitlements and benefits conferred on the basis of race. According to Bolick, this strategy has failed, and has helped to shatter the national consensus favoring civil rights and equal opportunity.

Bolick advocates an alternative program to vindicate civil rights and assist the disadvantaged. He urges an empowerment

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6. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford U. Press, 1991).

7. Bernard H. Siegan, *Economic Liberties and the Constitution* (U. of Chicago Press, 1980); Stephen Macedo, *The New Right v. The Constitution* (CATO Institute, 1986).

8. E.g., *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). See also Justice Sandra Day O'Connor's separate opinion in *Preseault v. ICC*, 110 S. Ct. 914, 926 (1990).

9. E.g., *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), cert. den. 485 U.S. 940 (1988); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), cert. den. 112 S. Ct. 406 (1991); *William J. (Jack) Jones Insurance Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990).

10. E.g., *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160 (1988); *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), cert. den. 110 S. Ct. 500 (1989); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

11. Bernard Schwartz, *The New Right and the Constitution: Turning Back the Legal Clock* 256 (Northeastern U. Press, 1990). See also Alfred H. Kelly, Winfred A. Harbison and Herman Belz, 2 *The American Constitution: Its Origins and Development* 748 (W. W. Norton & Co., 7th ed. 1991) (noting that Rehnquist Court was "more sympathetic to property owners than any Court since the 1930s").

strategy that fuses economic liberty with individual rights, and emphasizes expanded economic opportunity rather than the redistribution of existing wealth. "Economic liberty is essential to individual empowerment," he asserts. Bolick is sharply critical of governmentally imposed entry barriers to new business enterprises and occupational licensing arrangements. In his view such regulations often foster de facto monopolies of entrenched interests and handicap those on the economic fringes. Bolick also disputes the post-New Deal practice of judicial deference to legislative control of economic matters. "The judicial nullification of economic liberty," he charges, "stands as one of the most pervasive and debilitating deprivations of civil rights in America today."

Much of *Unfinished Business* is a call for renewed judicial protection of property rights and economic opportunity. Bolick maintains that natural law principles were incorporated into the Constitution, the Bill of Rights, and the fourteenth amendment. Thus, the central task is to reclaim natural rights, particularly economic liberty and contractual freedom. Echoing Justice Stephen Field's famous dissenting opinion in *Slaughterhouse*, Bolick contends that "the protection of basic economic liberty—the freedom to pursue a business or profession free from arbitrary or excessive governmental interference—was a foremost concern and object of the framers of the Fourteenth Amendment." Although the author applauds attempts to reinvigorate the takings clause,[12] his stress on entrepreneurial opportunity leads him to urge far-ranging judicial scrutiny of economic regulations under the privileges or immunities clause of the fourteenth amendment. Rather than casually accept legislative determinations at face value, courts should determine whether a given statute promotes a legitimate public purpose, and whether the law in fact achieves this end.

Although his focus is largely on economic liberty, Bolick also addresses the topic of racial equality. He has little patience with the current crazy-quilt pattern of affirmative action schemes and racial preferences. Arguing that race-conscious remedies sometimes have perverse consequences that harm minorities, Bolick forcefully maintains that "racial classifications are *never* reasonable." He favors, however, vigorous enforcement of the civil rights of individuals.

Bolick showcases *Brown v. Barry*[13] as an example of how his empowerment strategy both advances civil rights and strengthens

12. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harv. U. Press, 1985); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre Dame L. Rev. 1 (1989).

13. 710 F. Supp. 352 (D.D.C. 1989).

economic liberty. At issue was a District of Columbia ordinance that prohibited sidewalk shoeshine stands. Bolick's Landmark Legal Foundation combined economic liberty arguments with evidence that the ordinance was racially motivated in a legal challenge to the measure. The federal district court invalidated the ordinance on equal protection grounds, leading Bolick to see the case as part of his program "to restore protection for economic liberty as a fundamental civil right." As a possible next step, he recommends a challenge to the Davis-Bacon Act, which mandates payment of prevailing wages on federal contracts. Reasoning that the Davis-Bacon Act was intended in part to restrict competition by black labor on public works projects, the author sees the law as a violation of both civil rights and economic liberty.

In essence, Bolick has crafted a conservative civil rights agenda. He offers some fresh ideas to a civil rights debate that has become both stale and shrill. Bolick's proposals challenge the orthodoxies of the civil rights organizations and the assumptions of those who favor the racial status quo. Bolick has glimpsed the potential for change and enlarged opportunity inherent in the doctrine of economic liberty.

Although Bolick carefully grounds his economic liberty strategy on the privileges or immunities clause rather than the due process clause, his argument is strikingly similar to the doctrine of economic due process which prevailed from approximately 1890 to 1937. Hence, Bolick's proposal will likely be evaluated in the context of the debate over economic due process.[14] His plan would necessitate a high degree of judicial involvement in economic decisions, a troublesome point to champions of judicial self-restraint. A more conservative Supreme Court may well be receptive to the constitutional rights of property owners, but the Justices will no doubt be wary of assuming the activist role that Bolick seeks to assign them.[15] Nor is it clear that large numbers of disadvantaged minorities would benefit from the Bolick strategy. Members of the underclass may lack the skills and initiative to compete successfully for enlarged opportunities in the open market. Nonetheless, Bolick should be commended for pushing the civil rights dialogue in a new direction, and for recognizing the central place of economic advancement in a successful civil rights program.

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14. See Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv. L. Rev. 1363 (1990).

15. This theme is developed in James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in David J. Bodenhamer and James W. Ely, Jr., eds., *After 200 Years: The Bill of Rights in Modern America* (Indiana U. Press, 1992) (forthcoming).

John Brigham's *Property and the Politics of Entitlement* is an attempt to resuscitate the hotly-debated notion of "new property."[16] The author's essential complaint is that traditional property rights "have always been far more generous than the rights to property associated with the welfare state." Cavalierly dismissing the constitutional significance of John Locke's view that property ownership is a natural right, Brigham struggles to explain the source and nature of property rights. At several points he emphasizes that "constitutional property" rests upon "a model of legitimate expectation." Yet Brigham also inconsistently treats property ownership as dependent on the government.

Brigham is persuaded that a major revival of judicial protection for property rights is underway. "[F]or federal judges," he tells us, "property has again become top dog." Brigham appears unhappy about this trend. He decries "the Lochnerizing of the modern Court" and predicts the emergence of a new double standard with "two levels of constitutional property protection in the Supreme Court, one for the wealthy and one for the poor." Taking a page from the Progressive songbook, Brigham even accuses the Justices of "a class-based empathy" for "the upper class property owner." This revelation will surely come as news to employers and landowners, who have seen the Supreme Court sustain numerous legislative schemes designed to redistribute economic interests at the expense of property holders.

As might be expected, Brigham gives particular attention to *Goldberg v. Kelly*[17] and its progeny. He recognizes that the Court has retreated from the concept of "new property," and strengthened legislative control of benefit programs. But he nevertheless insists that statutory benefits are a constitutionally protected form of property despite ample evidence to the contrary. To his mind, a reduction in the level of welfare benefits represents a taking of property for which compensation is required under the fifth amendment. Support for such a position is conspicuously lacking. Indeed, the Supreme Court has frequently rejected the "new property" theory. There is in fact no judicial or societal consensus that welfare benefits are a form of property.[18] Indeed, Brigham accurately notes that "the entitlement claims suggested in the late 1960s and early 1970s failed to sustain their initial aspiration."

Brigham's stress on government authority over property cuts

16. See Charles A. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

17. 397 U.S. 254 (1970).

18. See R. Shep Melnick, *The Politics of the New Property: Welfare Rights in Congress and the Courts*, in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and the Future of Constitutional Development* 199-240 (State U. of N.Y. Press, 1990).

directly against this argument. It is exceedingly unlikely that "new property" will be accorded greater protection than traditional property. If the government holds unrestrained sway over land use and business enterprise, surely it holds the same power over the extent of governmental benefit programs. Logically then Brigham should welcome rather than begrudge renewed judicial interest in the rights of property owners.

There are still other difficulties with Brigham's approach. It seems questionable that welfare recipients have any legitimate expectancy that benefits will be continued indefinitely at a given level. Benefit programs are necessarily dependent upon future appropriations, and thus are subject to modification. In short, there is no credible assurance that benefits will remain fixed. Moreover, Brigham entirely fails to address the criticism that advocates of "new property" are simply promoting the liberal political agenda. These critics maintain that the drive to gain recognition for "new property" is little more than a bid to constitutionalize the welfare state, and thus immunize welfare benefits against policy changes.[19] Brigham also seems oblivious to the larger practical implications of his thesis. All levels of government currently face financial constraint and widespread resistance to higher taxes. Consequently, one may doubt whether the United States could afford to operate a social welfare system without the flexibility to reduce benefits in order to meet future contingencies. Brigham would have done well to address the administrative problems and unforeseen adverse effects of constitutionalizing "new property."[20]

One can hardly be surprised that the federal courts have been more solicitous of traditional property rights than welfare benefits. The Constitution, after all, contains several provisions expressly guaranteeing the rights of property owners. Moreover, there is a fundamental distinction between judicial protection of property rights against legislative infringement and the notion of "new property." By guarding the rights of property owners the courts are acting in harmony with the central constitutional principle that governmental authority over individuals is restrained. The purpose of the Bill of Rights was to safeguard individual liberty, including economic rights, from governmental intrusion. Welfare rights, on the other hand, represent an affirmative claim to governmental assistance. Recognition of such rights would lead to judicial super-

19. Martin Shapiro, *The Supreme Court's 'Return' to Economic Regulation*, 1 *Studies in American Political Development* 91 (Yale U. Press, 1986).

20. Jerry L. Mashaw, *Due Process in the Administrative State* 33-34 (Yale U. Press, 1985).

vision of the budgetary process, thus altering the basic constitutional scheme of divided powers.

Unfortunately, clarity of expression is not one of Brigham's gifts. The text is repetitious, jargon-ridden, and cluttered with reference to the work of other scholars. Opaque sentences abound. More vigorous editing would have spared readers such puzzling observations as:

> It is not enough to acknowledge the world outside the authority of the state; we need to know the extent to which the law is actually autonomous and the extent to which the state reaches in to influence choices that might seem to be beyond the reach of the law, such as political strategies in the feminist antipornography movement. Due process rights, especially as they are becoming evident in the administrative context, rely on a vision of what it means to be a person.

Even worse, chapters 2 and 6 fit poorly with the rest of the volume. These chapters probe such unrelated topics as tax assessments for agricultural land, the mechanics of the referendum establishing the California Coastal Commission, and a comparison of economic development strategies in Portland and Halifax. Their inclusion is a mystery, except insofar as they permit Brigham to recapitulate some of his earlier studies.

It seems questionable whether a compelling argument can be made that governmental benefits should be treated as property. This disappointing volume certainly fails to make the case.

G. Richard Hill's *Regulatory Taking: The Limits of Land Use Controls* is a collection of twelve articles which originally appeared in the *Urban Lawyer* between 1980 and 1988. Taken as a group these essays provide a useful introduction to the complex topic of regulatory takings in the land use context. Despite a slight bias toward the pro-regulatory side, the volume contains a fair balance of viewpoints.

Articles dealing with the fast developing field of regulatory taking often have a short shelf life. Seven of the essays were written before the important takings decisions of 1987, and thus have been overtaken by events. Several of the earlier essays, notably those by Robert E. Manley and Kenneth B. Bley, correctly forecast the emergence of section 1983 actions as a landowner's remedy for excessive regulations.[21] Despite her undue confidence in transferable development rights as a source of just compensation, Margaret V.

21. Eugene J. Morris, *New Developments in Federal Takings Law*, 7 Pace Envir. L. Rev. 309, 314-16 (1990).

Lang's article offers a helpful analysis of Justice Brennan's confused opinion in *Penn Central*. Nonetheless, this batch of essays seems already dated and remains useful primarily as background reading. Since all of the articles are readily available to scholars and practitioners, it is unclear that they warranted reprinting.

Predictably, the more recent articles focus on how to interpret the 1987 takings decisions, with particular emphasis on *First English* and *Nollan*. Nathaniel S. Lawrence believes that *Nollan* broke new ground and may signal heightened scrutiny for some takings cases. Although he asserts that the Supreme Court is struggling for more definite criteria to determine takings issues, Lawrence is uncertain whether the Justices will read *Nollan* broadly in the future. David L. Callies worries that governmental interference with private property has steadily increased. He details the use of building permits and impact fees to obtain funding of public facilities at the expense of private developers. Callies is concerned that recent lower court decisions have taken a restrictive view of *Nollan* and "do not reflect much change in judicial attitude toward regulatory takings." Indeed, he finds it necessary to remind readers that private property is one of the "values and rights enshrined in the Constitution."

In an innovative article John Mixon predicts a wave of section 1983 actions against local governments for excessive land use controls. To handle this situation, he proposes the creation of specialized land courts or agencies to hear regulatory takings cases on an expedited basis. These new tribunals, he maintains, should be designed "to avoid intrusive entry of federal courts into ordinary zoning disputes."

Michael M. Berger's vigorously argued essay hails the new direction in takings jurisprudence. He twits advocates of land regulations who predicted dire consequences from the *First English* and *Nollan* decisions before they were rendered, and thereafter reversed gears and sought to minimize the significance of these rulings. Berger outlines the new rules governing taking questions, and concludes that the Supreme Court has heightened the standard of judicial review for land use cases. Urging a broad reading of the fifth amendment, he contends that there is no principled distinction between physical and regulatory taking. The underlying concern is the protection of individual property owners from governmental action, not the nature of the government's conduct.

One comment in Lang's article cuts to the heart of the regulatory taking controversy. "Cities," she tells us, "simply cannot afford to pay just compensation for the landmarks worthy of

preservation." What this really means is that the general public does not assign a sufficiently high priority to historic preservation to pay taxes for the acquisition of historic buildings through eminent domain. Much the same could be said for low-income housing, access to privately-owned beaches, or a host of other public facilities. Accustomed to a large degree of judicial deference, land use planners have devised aggressive schemes to compel private landowners and developers in effect to finance projects for which taxpayers are unwilling to pay. This practice brings to mind Justice Oliver Wendell Holmes' warning that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[22]

The purpose of the takings clause, as explained by the Supreme Court, is to prevent the "government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Singling out a handful of property owners to carry the expense of providing public facilities and amenities violates the takings clause. Yet this is the effect of numerous land use regulations. Indeed, Lang acknowledges that New York City's historical landmark law places "an unfair burden on the Railroad." A broad understanding of *Nollan* would, of course, curtail the ability of land use planners to achieve ulterior purposes through regulation rather than purchase.[23]

Spurred by renewed judicial interest, the dialogue over the constitutional protection of property ownership is likely to continue. None of the volumes under review offers the final word, but they do illustrate the wide range of perspectives that participants bring to the debate.

THE FOURTH ESTATE AND THE CONSTITUTION. By Lucas A. Powe, Jr.[1] Berkeley: University of California Press. 1991. Pp. xii, 357. Cloth $29.95.

Donald M. Gillmor[2]

Unreconstructed liberalism shines through this historically agile, closely reasoned, brightly written and largely satisfying piece of

22. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).
23. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. Ct. Rev. 1.

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