Book Review

PRIVATE PROPERTY AND THE CONSTITUTION. By Bruce A. Ackerman.*

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Pp. ix, 303. $12.95.

*Reviewed by James W. Torke***

To that great majority of the bar still travelling conventional, time-honored (or timeworn) paths of analysis and argument—statutory text, cases, history—Professor Ackerman's essay on the just-compensation clause of the fifth amendment may seem irrelevant, even impertinent; at best, addressed to legal philosophers rather than to lawyers and judges daily facing hard, real puzzles about "takings" and damages. Indeed, Ackerman does reject those conventional paths as beginning and ending in mystery.[1] Yet, it is the practicing bar and bench, those who finally must resolve just-compensation disputes, to whom he beckons most emphatically.

Ackerman begins with the proposition that our increasing concern with the environment, a concern manifested more and more frequently in governmental regulation, means that we can be "assure[d] that the compensation clause will return to center stage" of constitutional controversy.[2] Unfortunately, the present shape of "compensation law—after a long period of neglect"—is not adequate to the task ahead and "is in need of a fundamental reconsideration."[3]

The central problem in compensation cases, of course, is to determine when those called upon to sacrifice property interests for the public good may "justly demand that the state compensate them for the financial sacrifice they are called upon to make."[4] Insofar as present compensation law has lost touch with that fundamental question—that is, has become a bundle of rules, internally consistent, but otherwise afloat—a new beginning is needed. To the question, "Where do we begin?" Ackerman invites all of us, lawyers and scholars, to accept the premise that "law must become philosophical if it is to make sense of the demand for just compensation."[5]

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[1]B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5-9 (1977).

[2]*Id.* at 3.

[3]*Id.*

[4]*Id.* at 1.

[5]*Id.* at 189.

Now, if the law is to become philosophical, then "analysts must become philosophers if they wish to remain lawyers."[6] This is so because "philosophy decides cases; and hard philosophy at that."[7] Demonstration of this last assertion is, in fact, the major task of this book. That is, the author is setting out to "illuminate the relationship between general philosophical perspective and particular legal doctrine"[8]; though he is not trying to teach philosophy.[9] The claim that such a relationship exists is not, I suppose, very new; it may even be regarded as a truism. Yet as truths become truisms, they need enlivening by demonstration; and it is in this undertaking that the book gains importance. This task, however, is complicated by the special characteristics of his audience:

> The American lawyer continues to be surrounded by institutions and symbols that teach him to be skeptical of abstract and systematic thought, encouraging him instead to view himself as a hard-headed problem-solver who reacts to each practical situation in the light of his common-sense understanding of social expectations.[10]

This is doubtlessly true. What is more, this attitude has popularly been respected as a virtue, not only of American lawyers, but of Americans generally, being manifested at times in a mistrust of lawyers themselves.[11] Yet, I think Ackerman underestimates the conscious purpose underlying this skepticism and forgets that there is more beneath its surface than ignorance or sleepiness.[12]

In a sense, he admits as much when he characterizes present compensation law "as the work of a corps of Ordinary Observers who understood their judicial function in a rather *restrained* fashion."[13] As will be seen, the Ordinary Observer is one with a definite and, I assume, consciously chosen approach to legal problems. Nevertheless, he charges that the muddled state of modern compensation law is in part due to a failure to bear in mind its distinctive nature and the suppositions underpinning its early

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[6]*Id.* at 5.

[7]*Id.*

[8]*Id.* at 84. *See also id.* at 72, 221 n.7.

[9]*Id.* at 84.

[10]*Id.* at 187.

[11]*See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 81-88 (1973).

[12]Daniel Boorstin, in *The Americans: The National Experience*, records a noteworthy episode in which Jeremy Bentham offered his services to President Madison and various state governors. His proposal to construct a complete code for the country was rebuffed, in part, because it did not seem fitting for the American legal genius. D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 36 (1965).

[13]B. ACKERMAN, *supra* note 1, at 109 (emphasis in original).

development, which are the guiding precepts of the Ordinary Observer.[14] That the great number of persons engaged in any endeavor are unaware of the fact that they follow a tradition representing only one of several possible attitudes is commonplace and is as true among lawyers as among any other group. But this phenomenon does not necessarily lead the overall endeavor into a muddle, though some participants may always end up there. Present compensation law is not muddled simply because it has not yet accounted for new problems. After all, its basic premises may be said to resist providing solutions until the dispute is kindled and in court.[15]

On the other hand, if one rejects those premises and substitutes others, as does a Scientific Policymaker,[16] there may appear an incongruence properly labelled a muddle. In Ackerman's terms, the Scientific Policymaker will, for that very reason, find compensation law to be muddled.[17] Although in his last chapter Ackerman disclaims that he is writing a brief for either the Ordinary Observer or the Scientific Policymaker, I think his personal orientation toward the latter type pervades the essay. When he calls the present state of the law sorry and identifies it as the handiwork of Ordinary Observers, he is, at the least, suggesting that such an approach is no longer adequate to the pace and complexity of the times. He may be right, but as these two character types unfold, it may appear that he is but expressing a preference of a sort that has been present throughout history, has in some places and times become predominant, and is often favored by those with a scholarly bent.

What then are the distinctive traits of the Ordinary Observer and the Scientific Policymaker?[18] After defining these types, we will want to know whether choice of one or the other approach will affect the outcome of cases.[19] Despite Ackerman's preference noted above, formally speaking, he leaves the last task of choosing the best model or blend thereof to the reader.[20]

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[14]For a definition of the Ordinary Observer, *see id.* at 15.

[15]Again, Boorstin comments: "[T]his common-law approach to experience was to become a whole philosophy, or rather an American substitute for a philosophy. Its name was pragmatism. . . . There is some reason to suspect that the pragmatic philosophy itself began simply as a way of generalizing this common-law approach." D. BOORSTIN, *supra* note 12, at 42.

[16]For a definition of the Scientific Policymaker, *see* B. ACKERMAN, *supra* note 1, at 15.

[17]*Id.* at 168.

[18]However, we are all, if only unconsciously, a bit of both types. *Id.* at 110-11.

[19]*Id.* at 21.

[20]*Id.* at 103.

The Ordinary Observer and the Scientific Policymaker are distinguishable at two points: Language and principle. For the Ordinary Observer, the language of law cannot be understood apart from its ordinary and common meaning: "[L]egal language cannot be understood unless its roots in the ordinary talk of non-lawyers are constantly kept in mind."[21] By contrast, the Scientist defines legal language as a set of precisely related and clearly defined technical concepts independent of ordinary talk; in fact, an appeal to such "ordinary talk of non-lawyers" is the "surest sign of muddle."[22] To illustrate this difference, Ackerman describes an example of "ordinary property talk." A child growing up in America gradually learns that some things are his and that some are not. He owns the former and can do with them what he likes, subject only to the limit that he cannot use them in a manner unduly harmful to others. Those things he does not "own" can be used only with the owner's permission, except in emergencies.[23] The Scientist, however, "rebels at the thought that a single person can be properly identified as *the* owner of a thing."[24] Rather, "Scientific property talk" is concerned with

> the relationships that arise *between people* with respect to things. . . .
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> Indeed, so far as the Scientist is concerned it would be much better (but for the inconvenience involved in abandoning shorthand) to purge the legal language of all attempts to identify any particular person as "the" owner of a piece of property.[25]

The second fundamental difference turns on the source of principle to which the resolution of a particular dispute is to conform. Policymakers

> understand the legal system to contain, in addition to rules, a relatively small number of general principles describing the abstract ideals which the legal system is understood to further. It is this statement of principle, presumed by the Policymaker to form a self-consistent whole, which [this discussion will] call a Comprehensive View.[26]

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[21] *Id.* at 10.

[22] *Id.* at 10-11. The classic example of Scientific language, thus defined, are the writings of Wesley Hohfeld. *Id.* at 11, 194 n.15 (citing W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919)).

[23] B. ACKERMAN, *supra* note 1, at 97-100.

[24] *Id.* at 99 (emphasis in original).

[25] *Id.* at 26-27 (emphasis in original).

[26] *Id.* at 11 (footnotes omitted).

And it is this Comprehensive View that provides the Policymaker's standards for evaluation of legal rules. Of course, the solution to a particular problem depends upon the particular Comprehensive View chosen. But whether it be Kantian[27] or Utilitarian,[28] the direction of appeal to authority is the same.

Observers, on the other hand, test a legal rule by measuring the extent to which it

> vindicates the practices and expectations imbedded in, and generated by, dominant social institutions. . . . Rather than grounding his decision in a Comprehensive View stating the ideals the legal system is understood to serve, the Observer will instead seek to identify the norms that in fact govern proper conduct within the existing structure of social institutions. Having articulated the existing pattern of socially based expectations as sensitively as he can, the Observer will then select the legal rule which, in his best judgment, best supports these institutionally based norms.[29]

Edmund Burke[30] and Justice Holmes fit the pattern of the Observer.[31]

The difficulty a reader may have in envisioning the types in action is mitigated to a substantial extent by the devotion of the major portion of the book to demonstrating the consequences, in the context of just-compensation cases, of selecting one or the other approach. But before proceeding to this demonstration, Ackerman introduces another set of variables: The judge's perception of his role as judge. A judge may be either restrained or innovative. The totally restrained judge makes certain assumptions, the major of which is that the dispute brought before him must be treated *as if* it had

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[27]*See id.* at 71-87. Professor Ackerman explains that his use of the term "Kantian" is somewhat specialized. By it, he is describing a recent trend among political theorists —*i.e.*, Rawls, Nozick, Dworkin—that is roughly anti-utilitarian, and harmonic at least insofar as it agrees that the central flaw of utilitarianism is, in Dworkin's phrase, its failure to "take rights seriously." *Id.* at 83, 227 n.30.

[28]*See id.* at 43-70.

[29]*Id.* at 12. The author anticipates the contention that his terms may produce another pair: The Scientific Observer, and the Ordinary Policymaker. He explains that he need not take them into account because the Scientific Observer is likely only to succeed in telling the Ordinary Analyst what he already knows. As for the Ordinary Policymaker, his basic assumption, that social practices are organized around a Comprehensive View, is empirically false. Ackerman does not, however, deny the existence, then and now, of these types. *Id.* at 17-20.

[30]*See, e.g.*, E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), for a representative work of this eighteenth century political thinker.

[31]B. ACKERMAN, *supra* note 1, at 179. *See also* sources discussing Holmes in *id.* at 282 n.40.

been generated by a set of perfectly functioning institutions.[32] The innovative judge, however, takes into account as part of his calculus that the world falls far short of perfection. He will thus use his office to improve the existing state of the law.[33] For example, the totally restrained Policymaking judge assumes that property rights are distributed consistently with the operative Comprehensive View, and that the organs of government as well as private citizens conform in their actions and faiths to that Comprehensive View. He is thus conservative regarding the state of the law, deferential to nonjudicial organs, and principled because he trusts that litigants and other concerned citizens accept the Comprehensive View to which the decision conforms. His innovative brethren, by comparison, are respectively reformist (believing that the law is not right), not deferential, and pragmatic where adherence to principle seems to produce results unacceptable to significant interests in the system.[34]

This analysis of types seems to me a helpful contribution to the description of judicial behavior, particularly as it identifies varieties of restraint and innovation which can coexist in a single judge who thereby resists typing as simply restrained or simply innovative as the case may be. A full-scale development of these characteristics would in itself be a worthwhile offering to legal scholarship, but Ackerman is chasing another theme to which we must now return: The consequences of being an Ordinary Observer or a Scientific Policymaker, whether restrained or innovative.

That the choice makes a difference is, of course, critical to Ackerman's whole enterprise; and so he properly devotes the major portion of the text to demonstrating the difference. The reader will have to decide for himself whether he makes his case, though I found the argument persuasive. An illustration may give a sense of the whole.

Consider the case of the owner of two Cadillac automobiles, each worth $5,000. In response to the world energy crisis, suppose the government considers two measures: (a) Setting the maximum speed limit at twenty-five miles per hour (alternative A), or (b) leaving the speed limit intact but taking possession of one-half of the nation's automobiles (alternative B). Assume further that under alternative A the value of each car will depreciate by $2,000, leaving our owner

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[32] *Id.* at 34.

[33] *Id.* at 36.

[34] *Id.* at 34-39. Of course, a given judge's assumptions may vary so that while he may assume a perfectly functioning set of institutions, he will not always assume citizens will suffer an adverse decision without a grievous sense of loss. Thus, while conservative and even deferential, he may not always be principled, but rather pragmatic. We thereby have eight possible varieties of judges. *Id.* at 39, 204 n.8.

$4,000 poorer. Under alternative B, the loss is the same because, though one car is lost, the decrease in cars causes his remaining Cadillac to increase in value from $5,000 to $6,000. Yet, though the economic loss is the same, present compensation law, which, we must recall, is largely the product "of a corps of Ordinary Observers who understood their judicial function in a rather *restrained* fashion,"[35] will regard alternative B as a "taking" that will likely call for compensation, while under alternative A our Cadillac owner will be left to suffer the loss as best he can. Such an apparent disparity accords with the ordinary understanding of what constitutes a compensable "taking" of property and what constitutes only a regulation,[36] and hence is but slightly, if at all, disturbing to those who talk "ordinary property talk" (which is the great majority of people).

The Scientific Policymaker, however, balks at this seemingly oversimplified view. For example, the Utilitarian Scientific Policymaker, at least one of the restrained variety, given the redistribution of property rights that has occurred, will consider the Appeal to General Uncertainty:[37] that is, that increased economic uncertainty may cause particularly risk-averse individuals to adapt their behavior to less risky forms of wealth or at least to insure against a new risk. This uncertainty cost must be compared to the process cost: that is, to the cost of eliminating the uncertainty by providing a compensation system. There is also to be considered the possibility and cost of citizen disaffection. If uncertainty and disaffection costs exceed process costs, then the Utilitarian Scientific Policymaker will award compensation.[38]

The Kantian Scientific Policymaker perceives other problems. The principle that no individual should be used merely as a means to satisfy another's ends requires a comparison of the net benefit generated by the redistribution and the process cost of a compensation system. If the latter are less than the former, compensation may be forthcoming.[39]

Even assuming that each of our types would demand compensation under alternative B, calling for the seizure of automobiles by the government, differences would exist in determining the proper measure of compensation: the Policymaker being apt to award the

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[35] *Id.* at 109 (emphasis in original).

[36] *Id.* at 124-29. We are talking only of the establishment of a prima facie case of "taking." It is still to be decided whether the taking was necessary to prevent recognizable anti-social conduct, in which case compensation might be denied, even under alternative B. *See, e.g., id.* at 126, 243 n.30. *See also* text accompanying note 18 *supra.*

[37] B. ACKERMAN, *supra* note 1, at 44.

[38] *Id.* at 48.

[39] *Id.* at 72-73.

net loss of $4,000; the Observer, the $5,000 value of the lost Cadillac.[40]

So far as this and many other examples demonstrate that what is a "sensible" solution depends on the choice of the source of "sense," we see the reality underlying the tension which Ackerman perceives as coloring the present state of legal thought. While most of present compensation law is the product of Ordinary Observers,[41] —though the "deeper structures" of precedent have been "lost from view"[42]—Ackerman finds that an increasing number of sophisticated lawyers and judges are thinking and writing about law, consciously or not, as Scientific Policymakers.[43] Scientific Policymaking, he contends, has been particularly triumphant in the law schools—a phenomenon bound to radiate increasing influence as new generations of lawyers so schooled rise to positions of prominence in the profession. Thus, Ackerman argues, we are not confronting "some theological dispute between rival Popes temporarily quartered at Oxford, Chicago, and Yale."[44] If that were the case,

> it would be of no practical importance to lawyers. Yet if, as I suspect, the conflict between Scientific Policymaker and Ordinary Observer is emerging as one of the master issues in the professional practice of law, lawyers cannot afford to view these academic exercises in mutual incomprehension with casual disdain or idle curiosity.[45]

The author's quest to "establish a relationship between philosophy and constitutional law"[46] seems to me successful. As well, his analysis of the tension in American legal thought, a tension to some extent exemplified by the cold war between the bar and the academy, is also insightful. The lines, however, are not drawn neatly. I wonder whether his assessment of the clear predominance of the Scientific Policymaker in the law schools is not confined somewhat to the type of "Papal residence" he refers to, though this predominance may well emerge in the majority of law schools in the future. Elsewhere, the tension is being manifested in a type of skirmish of which he takes little note: The growing demand from the bench and bar for graduates with "lawyering skills." The burgeoning of clinical programs represents, in part, the schools' concessions

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[40] *Id.* at 127.

[41] *See* text accompanying note 35 *supra*. *See also* B. ACKERMAN, *supra* note 1, at 168.

[42] B. ACKERMAN, *supra* note 1, at 168.

[43] *Id.*

[44] *Id.* at 175.

[45] *Id.*

[46] *Id.* at 72, 273 n.7.

to this demand—a demand which translates, in Ackerman's terms, into a young lawyer "skeptical of systematic thought," who is a "hard-headed problem-solver," and who depends upon "his common-sense understanding of social expectations"[47] to solve problems. Of course, lawyering skills are not inherently incompatible with an appreciation of the importance of philosophy in law, or of Scientific Policymaking as I understand it. Nevertheless, it seems that champions of such programs are not infrequently apt to be impatient with the systematic, more profound, or "theoretical" concerns of law. Technicians seem more in demand than social engineers. And it is not uncommon, even in the schools, to hear that the future of legal education lies in the teaching of practice skills. So far as "Oxford, Chicago, and Yale" and other centers of intellectual power are set on a different course, we might anticipate an increasingly deeper running division in the bar between the technician and the planner, the latter group, as it gravitates to centers of political power, taking on the characteristics of an elite.

Professor Ackerman makes a stout effort to keep his essay from becoming a broadside in favor of Scientific Policymaking.[48] His formal concern is with the possibilities and ramifications of fundamentally different modes of legal thought, though I think his preference for the Policymaker shows through. Nevertheless, he provides a language technique which clarifies a tension which many lawyers have sensed, but only dimly understood. He displays possibilities, not goals. While in a time of uncertainty and faithlessness the logic and comprehensiveness of philosophical systems may seem almost irresistible, the nation's very diversity—a diversity reflected in its law schools—may nourish sufficiently the bedrock skepticism which has made American legal thought so characteristically modest and so committed, if unconsciously, to the vantage of the Ordinary Observer. Whatever the future, this book serves an essential purpose of illuminating available directions, and at its most practical level, it is a valuable appraisal of just-compensation law.

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[47]*Id.* at 187. This is not, of course, a new phenomenon. *See, e.g.*, D. BOORSTIN, *supra* note 12, at 44 (a bibliographic note commenting on the American law schools' "myopic preoccupation with what is in current demand by practitioners").

[48]*See, e.g.*, B. ACKERMAN, *supra* note 1, at 176-84.