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BOOK REVIEW

The Next Generation of Legal Scholarship?

Richard A. Epstein*

PRIVATE PROPERTY AND THE CONSTITUTION. By Bruce A. Ackerman. New Haven and London: Yale University Press. 1977. ix + 303 pp. $12.95.

Within the past generation, we have witnessed a marked shift in the style and tone of legal scholarship, and nowhere is that shift more evident than in Professor Bruce A. Ackerman's recent study, *Private Property and the Constitution*. That the book differs in style and tone from the great treatises of Corbin and Wigmore is too obvious for comment, and too unimportant for analysis. That it should differ in many important ways from such books as the late Alexander Bickel's *The Least Dangerous Branch*[1] makes a more telling point about current trends in interpretive constitutional and legal scholarship. While Bickel was intent upon developing an overarching theory about his constitutional subject matter, his detailed analysis of both judicial and academic writings shows a firm link between traditional legal scholarship and the leading edge of legal thought. Ackerman, however, is quite a different matter. Even a quick overview of the book makes manifest the extent of his departure from the standard approaches to legal analysis. He makes no exhaustive effort to organize his subject matter into smaller doctrinal questions, each of which then can be resolved on its individual merits. With the

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1. Bickel's classic was published in 1962. Ackerman interestingly describes it as an instance of the "last generation's scholarship." P. 204 n.5. He also includes in that group: A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); L. HAND, THE BILL OF RIGHTS (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

exception of *Pennsylvania Coal Co. v. Mahon*,[2] he makes no effort to analyze and criticize the classical judicial responses to the eminent domain problem.[3] And, with the exception of some insightful comments on the important contributions of Professors Michelman and Sax,[4] he makes little effort to build upon the vast law review literature on the subject. All of these omissions are conscious and deliberate. To Ackerman, they all count as essential strengths of his approach, for it is precisely in the uncritical reliance upon traditional legal methods that Ackerman locates the great weakness in the prevailing interpretations of the eminent domain clause, interpretations that, in his words, amount to "a chaos of confused argument which ought to be set right if one only knew how."[5]

A clean break from the past by Ackerman is thus the first order of legal business, and to him that break can be made only by stepping back from the particulars of eminent domain law to obtain a broader overview of the subject. The first question thus becomes not what answer does the Constitution provide on any given substantive question, but rather, what mode of interpretation and analysis should be brought to it in order to improve the chances of reaching the correct substantive result. In one real sense, then, his book is as much, if not more, about methods of constitutional interpretation as it is about eminent domain law, for Ackerman intends his method to have wide application.[6]

I. THE FRAMEWORK

Ackerman begins with the applicable constitutional text, which provides: "[N]or shall private property be taken for public use

2. 260 U.S. 393 (1922). For discussion of *Mahon*, see text accompanying notes 50-54 *infra*.

3. Although Ackerman discusses a fair number of cases in the footnotes, they are clearly collateral to his main purpose, for the central arguments in the text seem nowhere to depend upon these discussions.

4. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Powers*, 74 YALE L.J. 36 (1964). *See, e.g.*, pp. 54-56 (critique of Sax).

5. P. 8. Ackerman cites as evidence for this general view within the profession the frequent conversations he has had with lawyers and judges. Although his position may be overstated, the frequency with which new articles appear on eminent domain problems suggests that there are indeed major difficulties in the area.

6. *See, e.g.*, pp. 168-85. This chapter, entitled *On the Nature and Object of Legal Language*, contains an utterly arid and abstruse discussion of, I suppose, the deeper philosophical issues, highlighted by the absurd reference to the "rival Popes temporarily quartered at Oxford, Chicago, and Yale"—*i.e.*, Ronald Dworkin, Richard Posner and Harry H. Wellington.

without just compensation."[7] In order to show the need for philosophical speculation about the content of the eminent domain clause, he first attempts, in a section entitled *The Limits of Legal Convention*,[8] to show the insuperable weaknesses of the more traditional modes of constitutional interpretation, at least as applied to eminent domain problems. First on his list is the "plain meaning" approach, which assumes that a close inspection of the text will reveal all of its unresolved secrets. Yet, for Ackerman, the search for the plain meaning in the end must be utterly unproductive because, whatever its intentions, the search reduces itself to "staring" at the text in a hollow effort to answer the essential questions that it raises: "[W]hen does an interest qualify as private property? [U]nder what conditions should the state be said to have 'taken' the interest? [W]hen does justice demand compensation and how is the adequacy of payment to be assessed?"[9]

A second method of interpretation, ascertaining the "intent of the framers," also is of no real help in filling in the gaps left by the text. True, the eminent domain clause is itself evidence that the framers recognized some special place for private property in the Constitution,[10] but beyond that point there is no strong clue as to how any of them, individually or collectively, would have resolved the many complex problems that subsequently have arisen in eminent domain litigation. As these two methods yield but limited fruit, the traditional legal scholarship has remaining only one place to turn: the cases decided under the clause. But these, as Ackerman points out, constitute the tangled web of argument that is the source of the well-nigh universal dissatisfaction with the current law.

Having thus dismissed the conventional forms of analysis, Ackerman argues that we can confront successfully the issues raised by the eminent domain clause only by systematically examining the various philosophical approaches that might be used to resolve them. Here his stated mission is not to pick and choose among these approaches,

7. U.S. CONST. amend. V.

8. Pp. 5-10.

9. P. 6.

10. At times Ackerman seems to equate the special place of private property under the Constitution with the perpetuation of the market economy, thus treating the eminent domain clause as the mechanism whereby the respective domains of the "capitalist economy" and the "activist state" are reconciled. *See, e.g.*, pp. 1-2. The eminent domain clause, however, has nothing to do with any particular type of economic organization, at least where the "public use" requirement places no independent constraint upon the power of the government to take private property; constitutionally, we could nationalize the automobile industry if we were prepared to buy off the stockholders.

but rather to give some accurate and analytical description of the different positions to which judges, in principle, should be committed by their basic philosophical orientations. Doing this "philosophical" work in turn requires Ackerman to formulate a complex terminology and an elaborate matrix of distinctions, as he believes the available language is not sufficiently precise to express the arguments he wishes to make.

Ackerman organizes most of his discussion around two distinctions. The first, between *Policymaking* and *Observing*, distinguishes between alternative approaches to legal problems. The second is a distinction between *Scientific* and *Ordinary* understanding of language. With respect to the first of these distinctions, Ackerman places on the Policymaking side "all those who 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."[11] "To qualify one *must learn to think of the legal system as if it were organized around a self-consistent set of abstract principles that comprise the system's Comprehensive View*."[12] The choice of a particular Comprehensive View, whatever its ultimate significance to Ackerman, is not important at the outset;[13] the mode of argumentation, not the substantive principles of argument, is decisive at this point.

In opposition to the Policymaker stands the Observer, who, far from being a simple realist, believes that "the test of a sound legal rule is the extent to which it vindicates the practices and expectations embedded in, and generated by, dominant social institutions."[14] The difference between the two types is that the Policymaker *necessarily* must relate all his decisions to this Comprehensive View; the Observer admits that such a view *possibly* exists, but acknowledges the unhappy possibility that it does not.[15]

Ackerman sets out the second of his central distinctions, that between Ordinary and Scientific understanding of legal language, in the following passage:

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11. P. 11.

12. P. 90.

13. Early on he warns the reader: "To forestall misunderstanding, I do not want you to think a Policymaker must impute to the legal system a Comprehensive View of a Highly Moral variety—like that imagined by Immanuel Kant or Myres McDougal. For present purposes, it will be enough for the analyst to worship a more mundane—if not more intelligible—God, like Bentham's Utility or Posner's Efficiency." P. 11.

14. P. 12.

15. *Id.*

> According to the first approach, legal language cannot be understood unless its roots in the ordinary talk of non-lawyers are constantly kept in mind. While legal specialists, naturally enough, will sometimes be called upon to make refinements generally ignored in ordinary language, recourse to everyday, nonlegal ways of speaking can be expected to reveal the basic structure and animating concerns of legal analysis—stripped of the excessive technicality generated by special pleading and adversary confrontation. In contrast, the Scientist conceives the distinctive constituents of legal discourse to be a set of technical concepts whose meanings are set in relation to one another by clear definitions without continuing reliance upon the way similar-sounding concepts are deployed in nonlegal talk. While the practitioner of Ordinary analysis will find that nonlegal discourse will provide a useful perspective upon basic concepts that may otherwise be lost in a sea of legalism, the Scientist will look upon such an appeal to ordinary talk as the surest sign of muddle.[16]

From these two distinctions we can generate four separate approaches. Of these, Ackerman is particularly concerned with the relationship between the Ordinary Observer and the Scientific Policymaker,[17] and it is in terms of this dichotomy that he states and defends the central thesis of his book.

Ackerman's basic position[18] runs roughly as follows: As a matter of historical fact, the tradition of Ordinary Observing has dominated the interpretation of the eminent domain clause, and it alone can account for most of the surprising, if contradictory, developments that have persisted in the cases. In spite of its historical dominance, however, the tradition is at an intellectual dead end because its internal contradictions and confusions are too obvious and too troubling for thoughtful modern judges to ignore. Enter Scientific Policymaking. Within that framework Ackerman identifies two dominant traditions, the Utilitarian[19] and the Kantian.[20] It

16. Pp. 10-11.

17. The other two combinations are the Scientific Observer and the Ordinary Policymaker. Ackerman does not presume it is impossible for any responsible thinker to assume either of these two postures, and he expressly notes the importance of those whom he would call "Scientific Observers" in American legal history. Pp. 18-22. Although Ackerman does not name the writers he had in mind, his reference to the years 1870 to 1920 suggests Ames, Langdell, Maitland, Thayer, and even the early Holmes. In any event, he regards these two classes of thinkers as less important to the modern tradition, and there is a certain plausibility to his view. Those who believe in ordinary language tend generally, I believe, to be more cautious about social innovation than those who have faith in "scientific" language and theory. The point is debatable, of course, but for present purposes it is best to concentrate upon what Ackerman has written, rather than to speculate about what he might have written.

18. For a convenient summary of the position, see p. 4.

19. Pp. 41-70.

20. Pp. 71-87.

is to one of these traditions we must turn, he insists, to find salvation from our current dilemmas. The thesis is written on a grand scale, and is, I think, subject to important, and perhaps fatal, objections. We must now consider Ackerman's main program.

II. Scientific Policymakers

The first substantive move in Ackerman's argument relates to the distinction between Ordinary and Scientific talk about property.[21] In his view, the Ordinary speaker of the language is "ignorant" because he is prepared to talk in an uncritical fashion about the ownership of "his" things. No one, at least no one who has had a first-year property course, accepts this type of speech as accurately describing legal realities. Indeed, far from "defining the relationship between a person and 'his' things, property law discusses the relationships that arise *between people* with respect to things. More precisely, the law of property considers the way rights to use things may be parcelled out amongst a host of competing resource users."[22] Armed with this account of property, Ackerman concludes that "it risks serious confusion to identify any single individual as *the* owner of any particular thing."[23] At best, the label "owner" serves "as a shorthand for identifying the holder of that bundle of rights which contains a range of entitlements more numerous or more valuable than the bundle held by any other person with respect to the thing in question."[24] Making this point gives the Scientific speaker the ability to identify a taking of property under the law: Any diminution of rights in the bundle of any holder, no matter what becomes of those rights,[25] amounts to a taking under the law. We now have found out in Scientific Talk what the property clause means. The Scientist first identifies the rights in the claimant's bundle before the intervention of the governmental activity; taking then means the deprivation of any rights in the bundle. To me, this is common sense; to Ackerman, science.

Providing an account of a taking of property does not, however, solve all questions under the eminent domain clause. There is still the need to specify the possible excuses or justifications—for example, abatement of a public nuisance—that might be advanced for

21. Pp. 26-29.

22. P. 26.

23. Pp. 26-27.

24. P. 27.

25. For the Scientist, it matters not whether they be retained by the state or transferred to another.

any admitted public taking.[26] Yet finding a suitable Scientific explanation that reconciles the basic command of the clause with its possible exceptions depends not only upon the methodological approaches to eminent domain issues, but also upon the particular substantive philosophical outlook brought to eminent domain questions.

From a large number of possible Comprehensive Views that might be brought to the eminent domain clause, Ackerman wisely limits his discussion to the two dominant schools of American legal thought. He focuses first on the Utilitarian tradition, which defines as the goal of society the maximization of social welfare, human pleasure, output, or efficiency. The difficulties in identifying or measuring the central good of any Utilitarian theory may be severe, but Ackerman is not concerned either with the internal disputes amongst Utilitarians or with whatever intellectual difficulties beset the entire tradition. Rather, his interest is with attitudes of the conscientious Utilitarian, however misinformed, toward eminent domain questions—with, in other words, the application of philosophy, not with the doing of it.

To determine how the good Utilitarian approaches cases under the eminent domain clause, Ackerman uses the example of wetlands regulations that forbid owners of marshland to fill in and develop their land. In this and other cases, he identifies two types of costs associated with government actions: The first cost, "General Uncertainty," is borne by individuals who are or who may become subject to government regulation and control; the second is the possibility of "Citizen Disaffection" in the event that compensation is not paid to those who have been singled out by government action. Ackerman then asserts that the good Utilitarian will compensate those adversely affected by legislation if the process costs of administering compensation (P) are less than the sum of Uncertainty Costs (U) and Costs of Citizen Disaffection (D), or $P < U + D$.[27]

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26. Ackerman recognizes the importance of justifications in eminent domain theory, but does so only through a highly questionable interpretation of the words, "without just compensation." Thus, he writes that "the clause, when read as a whole, suggests that payment is constitutionally required *only when it will serve the purposes of justice*." P. 28. Yet the word "just" in this phrase seems only to refer to the amount of compensation owed once the right to compensation is established. The separate issue of justification must be inferred from the fact that the clause sets out only the initial constitutional presumption, while leaving the courts to determine the limits to be placed upon it. Indeed, the failure to recognize the insistent need for implied exceptions in most constitutional and statutory materials is one of the major weaknesses of the "plain meaning" rule.

27. P. 48.

In opposition to the Utilitarians, Ackerman places the Kantians, who are thus described not because they bear any necessary allegiance to the principles of Immanuel Kant, but because they share an anti-Utilitarian bias, borne of the belief that the Utilitarian calculus does not respect the differences between persons when it sacrifices the rights of one individual for the advancement of some overall good. Ackerman's good Kantian, then, is one who takes seriously the principle that persons should be regarded as ends in themselves, and not as means for the advancement of others.[28]

Ackerman then schematizes the Kantian view of the clause, again in connection with the case in which the owners of undeveloped marshland are pitted against the others in society. He correctly notes that the attitude toward compensation is likely to be quite different. "Indeed, the mere fact that the Earthlings . . . have profited enormously by the legislative reassignment of property rights only makes the Kantian's case for compensation seem more, not less, compelling."[29] From this and other considerations, Ackerman then proposes another formula to capture the Kantian view: Compensation is to be awarded when the process costs of administering compensation (P) are less than the benefits (B) produced by the reassignment of rights minus the other costs of the project (C), or $P < B - C$.[30]

A. *The Utilitarian Approach*

In Ackerman's wetlands case, the government limitation upon the development rights in marshes clearly abridges previous property rights and thus constitutes a taking under the Scientific view of property. Yet it is easy to read Ackerman as putting to one side all this hard-gained wisdom about property rights in an effort to explicate the judicial stance of the Scientific Policymaker with a Utilitarian Comprehensive View. Thus, Ackerman is able to write:

> Eschewing all talk about the intrinsic rights of a property owner, the courts would self-consciously explore the 'real issue,' understood as the identification of the social group which can bear the burden entailed by the new legislative decision with the smallest loss in overall utility. Judicial discussion of the ease of insurance, the costs of disaffection, and the costs of settlement would abound.[31]

28. P. 72.

29. P. 73. Ackerman calls those people who do not own the marshland "Earthlings," as opposed, of course, to the Marshans.

30. P. 74.

31. P. 64.

To my mind, such a utilitarian approach represents a massive degeneration of property law because it treats eminent domain adjudication as an extension of politics by other means. The special place of private property conceded at the outset is reduced under this regime to the merest chimera, as all talk of rights and duties is replaced by freewheeling judicial selection of "winners" and "losers." Ackerman thinks that it is possible to be a "restrained" Utilitarian judge. But if the agenda is as he would set it, all judges would be required to strain beyond the limits of their institutional capacity in order to decide any of the cases that arise when modern legislation is attacked under the clause. Courts would have to reduce the tangled web of issues presented by marshland development restrictions to the "real issue" of identifying which group is to bear the loss. Is there one set of rules for the speculator who purchased marshland and quite another for the family trust that has held the land for years? And how do we treat the different shades of investment behavior that fall in between?[32] It seems clear that any marshland legislation must treat all marshowners the same way, regardless of the time of acquisition or the reasons for it. Any intermediate position would create complications beyond all reason as courts struggled to uphold the legislation with respect to some marshland owners but not to others. Yet, given the multitude of variables bearing on the "real issues" of the case, it seems doubtful in the extreme that any consistent pattern of results could be achieved by the faithful Utilitarian judge.

There not only would be an abundance of hard cases, but also a marked absence of easy ones. Any admissible interpretation of the eminent domain clause should be able to identify simple cases that admit of no confusion or uncertainty. Thus, there is an easy case for compensation when a home or factory is torn down to make way for a post office, and I should be appalled if any adroit manipulation of process costs, disaffection costs, insurance costs, or any costs whatsoever persuaded even *one* court in *one* case to deny compensation. Likewise, I should be dismayed if even *one* court in *one* case awarded compensation to a firm that for years supplied the government with

32. The range of considerations that Ackerman regards as compelling is quite wide. For example, at pp. 67-68, Ackerman sets forth all the considerations that a Utilitarian judge might find relevant in the speculator's case, including that such land usually is acquired by speculators who are accustomed to taking these risks. The question is not whether they have taken the risk, but whether they should in principle be required to take it without compensation. A speculator takes the risk of vandalism and arson, but need not be deprived of legal remedies when such acts occur.

soldiers' uniforms under annual contracts when, after competitive bids, the new contract was awarded to a rival. These cases are easy. The first involves the taking of property and the second, whatever the economic consequences, does not. Any Utilitarian theory that obscures these clear results in a fog of verbiage about the "real issues" of eminent domain deserves not respect but rejection. If what Ackerman says about the Utilitarian approach to the eminent domain clause is correct, so much the worse for Utilitarianism.

It must be stressed that Ackerman is quite conscious of the Byzantine results yielded by the Utilitarian form of Scientific Policymaking, but to him that complexity is a sign not of its fatal weakness but of its obvious virtue and sophistication. Thus, he sees

> a gradual yet discernible increase in the Scientific Policymaking character of our legal culture, to the point where express reliance upon Ordinary concepts sometimes seems of questionable propriety. To any modern lawyer, there is an irreducible crudity about a decision that justifies compensation on the ground that the plaintiff has been deprived of something that formerly was "his."[33]

"Irreducible crudity"?! It is precisely the oversophistication that Ackerman brings to the eminent domain clause that should make it difficult for any modern lawyer with a moral sense to be happy with his casual nullification of its compensation requirement. It is not that every taking of private property requires compensation, but rather that any taking, even for public use, creates a strong presumption that compensation should be paid. The clause thus shifts the burden to the government to show, preferably under some general theory, why compensation is inappropriate in any particular case. Ackerman's effort to construct out of whole cloth a Utilitarian theory of the eminent domain clause while ignoring, if not mocking, its actual language draws him away from these central issues of justification for admitted takings. It is not surprising, given his impatience for traditional analysis, that his treatment of the police power and the public nuisance justifications for government regulations is both fragmentary and inadequate.[34]

The criticisms just made might be better expressed somewhat differently. Ackerman's explicit assumption throughout his book is that the Constitution places no constraint upon the basic political premises that a judge is entitled to bring to eminent domain cases. Both Kantian and Utilitarian interpretations of the basic clause seem

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33. Pp. 114-15.

34. *See* note 53 *infra* and accompanying text.

in his view equally permissible. Yet his very explication of the Utilitarian position is the most striking confirmation that the eminent domain clause demands its flat rejection. The Utilitarian tradition, whenever brought to bear on legal questions, has found both the question of rights, and that of compensation for their violation, to be of marginal concern.[35] For many Utilitarians, the overriding issue is that of efficient resource allocation; private rights take on importance solely in an instrumental connection, usually in determining whether public creation or assignment of property rights will increase social welfare. The text of the eminent domain clause, on the other hand, gives the compensation issue a centrality that suggests that no pure Utilitarian theory will ever be successful in unlocking its secrets.

B. *The Kantian Approach*

The tenuous relationship between Ackerman's Utilitarian analysis and the obvious concerns of the eminent domain clause should drive Ackerman's readers towards the Kantian tradition—which is marked by a greater concern for the vested rights that animate any private property system. But by defining the master test of this tradition as whether process costs are less than the net social benefits of rights—that is, whether $P < B - C$—Ackerman seems to miss the core concerns of most non-Utilitarian thinkers. The point is difficult to make with satisfactory exactness, because Ackerman lumps together so many individuals who disagree in major ways amongst themselves. For example, Robert Nozick's "historical theory of justice" makes it clear that some non-Utilitarians are more concerned with the antecedent conduct of the relevant parties—how they "come by" their wealth—than with the consequences of proposed government action.[36] A strict interpretation of such a theory, howev-

35. The relative unimportance of "compensation issues" to Utilitarians is brought out by the modern debates over the nature and function of tort law. Thus, my colleague Professor Posner, the unstinting champion of efficiency rationales, has dismissed the compensation question as a mere "detail" of tort theory. In his *Economic Analysis of Law*, he writes: "It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss. But that the damages are paid *to the plaintiff* is, from an economic standpoint, a detail. It is payment *by the defendant* that creates incentives for more efficient resource use." R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.9, at 78 (1st ed. 1972) (footnote omitted). It is interesting to ask: What is the importance to Posner that compensation in eminent domain cases be paid *to the owner*? Authors who have more traditional views on the corrective justice issues in tort theory regard the compensation question as much more central. *See, e.g.*, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

36. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). The key chapter for these purposes is Chapter 7, *Distributive Justice*, at pp. 149-231.

er, may permit *no* exercise of the eminent domain power: The individual whose property is to be taken has done nothing wrong to oblige him to yield to an exchange dictated by the state, no matter how fair its terms. Whatever the philosophical merits of this uncompromising position, however, it does not represent the proper interpretation of the eminent domain clause, which clearly permits takings for public use, *but only if* compensation is paid. The eminent domain clause thus appears to be an uneasy mix of Utilitarian and individualistic concerns. Its Utilitarian premise is that the government may use its discretion to decide whether particular property in private hands today will be better located in public hands tomorrow. The individualistic concern says that the state must pay compensation whenever it makes that decision. In the useful language of Calabresi and Melamed, the eminent domain clause serves in the public sphere to convert a "property right" into a "liability right," but not to extinguish all rights whatsoever.[37]

It seems unlikely, however, that any Kantian could think that the magnitude of public benefits has anything to do with the necessity for compensation. No matter how great the total benefits, compensation should be paid lest the state profit at the expense of one of its citizens. No matter how small the total benefits, compensation still should be paid lest the blunders of public officials be at the expense of the owners of private property. Thus, if the state decides to build a schoolhouse on private land, just compensation always should be measured by what has been taken, and lost, no matter whether the school is a tribute to civic foresight or a waste of public funds. The Utilitarian aspects of the eminent domain question figure only in the political decisions of the state and do not affect the property owner's right to compensation. The Kantian part of that equation demands that the right to compensation be independent of what the state chooses to do with the property once it has been taken for public use. A formula—$P < B - C$—that compares the process costs of condemnation with the net social value from condemnation is then but another unacceptable variant of a Utilitarian, or at least a consequentialist, calculus. The recurrent reliance upon relative costs and benefits also demands the same type of open-ended inquiry set into motion by the analogous Utilitarian formula, and is subject to the same set of objections. The fundamental difficulty with both formulas is that they do not address in explicit terms the question

37. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

raised by the Constitution—has there been a taking of private property for public use? The mass of evidence needed to decide every asserted claim for compensation deprives us of all sense of what is and is not an easy case, with the consequent loss in fidelity to both the language and the spirit of the clause. Although there is much to be said for trying to understand the eminent domain clause as an extension of a theory of individual rights that is truly Kantian in spirit, Ackerman's account does not aid that inquiry.

III. Restrained and Innovative Judges

The previous summary and criticisms of Ackerman's views proceeded on the assumption that he believed that all Kantian or all Utilitarian judges would bring the same premises and attitudes to every eminent domain case. Ackerman's own view of the subject is far more complex, as he thinks that it is possible not only to have Kantian and Utilitarian judges, but to have at least eight different species of each, all with their own subtle variations on the major themes.[38]

The key to this new element of complexity is the set of distinctions that Ackerman develops with respect to the judicial role. Reflecting the obvious influence of current constitutional theory, Ackerman notes that it is possible for any judge to take either a "restrained" or "innovative" approach to constitutional interpretation, with restrained judges obviously being less willing than innovative judges to override legislative or administrative decisions. Ackerman, in another display of his obvious fondness for typology, then refines this distinction by making three further subdivisions. Along the first of his three axes, judges must decide whether they believe that the distribution of property rights before the moment of government intervention ("at Time One") was reached in a well-ordered manner by the legal system. Those who so believe are called conservative; those who do not are called reformist. Along the second axis, judges must decide whether they believe that other governmental institutions act consistently with the judges' Comprehensive View of society. Those who believe that these institutions so behave are called deferential; those who do not are called activist. Lastly, on the third axis, judges must decide whether they believe that disappointed litigants generally will accept judicial decisions as legitimate. Those who are unwilling to take the sentiments of "bad losers" into account

38. Ackerman's development of these eight species is at pp. 31-39.

are called principled; those who are not are called pragmatic. Out of the two basic types, therefore, come eight possible variations, from conservative-deferential-principled, on the one extreme, to reformist-activist-pragmatic on the other.

It is difficult to resist the impression that the constant references to these distinctions in *Private Property and the Constitution* only make it more difficult to follow an analysis that in any event suffers from all the ills of overformalization. The obvious critical point is that the possible variations upon the basic theme raised by these eight types need only be taken into account if we are persuaded of the soundness of the basic Kantian or Utilitarian approaches. If, as I have argued, Ackerman's Utilitarian account misses the central concerns of the eminent domain clause, then there is little reason to trace the tortured logic of each of his learned variations. And if his interpretation of the basic Kantian position is indeed misguided, then there is no particular joy in reading eight different versions of the same cardinal error.[39] The proliferation of judicial types therefore has this dual vice: It impedes the flow of the discussion and it inhibits Ackerman from his more immediate task of rehabilitating his main line of analysis.

A second problem with Ackerman's rich store of distinctions is that, like his general schematic representations, they tend to obscure the interpretation of the eminent domain clause in a welter of tangential issues. Consider only Ackerman's case of development rights over marshland. How does any reformist judge, who believes that there is maldistribution of wealth in society, use that insight to pass on the constitutionality of a challenged statute? Should the judge be concerned with whether a particular claimant is a victim or a beneficiary of that alleged maldistribution? A widow owns land that the government wants for the construction of a schoolhouse. Should it make any difference whatsoever that her late husband took advantage of a special oil depletion allowance during the last 30 years of his life? Or that he profited from the illegal drug trade? And if these issues are not relevant to a reformist judge, then exactly what issues are?

Similar difficulties beset both activist and pragmatist judges. What must the activist judge do when he decides that the other organs of government do—or do not—generally act in accordance with the appropriate Comprehensive View? And how must a prag-

39. See p. 82 for an example of some particularly heavy and obscure writing.

matist judge proceed when there are strong interests and expectations on both sides of a given question? Surely it cannot be proper to take evidence on the extent and the intensity of possible individual responses to any judicial outcome.

There may be ways that these three distinctions—particularly that between activist and deferential judges—can be taken into account on particular issues of eminent domain law. The matter, however, needs a detailed exploration in connection with concrete cases, and it can assume significance only after the basic structure of eminent domain arguments is first worked out. The difficulties that beset Ackerman's Utilitarian and Kantian judges cannot be cured by abstract typologies of the judicial role.

IV. ORDINARY OBSERVING

We turn at last to Ackerman's treatment of the Ordinary Observing approach to eminent domain law, at once the most interesting and the most troublesome portion of his book. About this species of legal reasoning Ackerman has two distinct, but related, theses. The first is that the Ordinary Observer is better able than his Kantian or Utilitarian brethren to account for the twists and turns in the current eminent domain law.[40] The second is that the proliferation of new forms of property rights—be they stocks and bonds, or the complicated entitlements of the welfare state—create analytical complications that strain the capacities of ordinary methods in ways that cry out for an adoption of some form of Scientific Policymaking in eminent domain cases.[41]

To make his general point, Ackerman, in some of the best writing in the book, takes us through a nice set of hypothetical examples that are designed to illustrate the way in which Ordinary judges proceed from case to case, starting from the obvious and proceeding to the difficult. His chapter *Layman's Things*[42] is thought-provoking, and those who want to think about the eminent domain question would be well-advised to test their theories against the set of examples that Ackerman poses. But cleverness and skill in the choice of examples are not sufficient to carry the day, and despite his high level of ambition, Ackerman fails to demolish the Ordinary Observer, whoever he may be.

In order to understand the source of Ackerman's downfall, it is

40. P. 115.
41. *Id. See also* pp. 163-67.
42. Pp. 113-67.

necessary to hone in on the central distinction he draws in this portion of the book—that between *legal* and *social* property. This distinction is but an extension of Ackerman's earlier observations about the "ignorant" way in which ordinary people talk about property:

> As to social property, Layman will claim to be in a position to point to existing social practices which any well-socialized person should recognize as marking a thing out as *Layman's* thing. If, however, Layman does not believe himself justified in claiming something as his without appealing to the opinion of a legal specialist, then I shall say he has only legal, but not social, property, in the thing in question.[43]

The importance of this distinction to the eminent domain clause quickly emerges. "For if the Observing judge's principal objective is to protect Layman's understanding of his relationship to his things, this concern will apply with its full force only with regard to social property."[44] The Ordinary judge, then, defines the contours of eminent domain law by reference to the sensibilities and judgments of Ordinary citizens, as revealed in the way they think and speak about property relationships. All this, Ackerman insists, is at total variance with the way in which the Scientific Policymaker would approach this problem. The Ordinary technique makes discriminations between different bundles of property rights and types of property that are impermissible within Scientific Policymaking. We can get some sense of what Ackerman does—and what he does wrong—by looking in detail at the set of examples he uses to develop his central distinction between legal and social property.

The first of his examples concerns two different types of government control, both of which reduce the value of a $100,000 farm by $10,000.[45] In the one case, the government takes a strip of land from the edge of the farm for use as a public highway. In the second, the government flies military planes in the airspace 2 miles above the farmer's land, causing no sensible inconvenience to ground users. The economic effects of the two types of conduct, measured by diminution in value, are the same. Yet the competent lawyer, much to the bewilderment of the Scientific thinker, will recognize that $10,000 compensation is required for the road, but no compensation is required for the direct overflights. Ackerman insists that the intuitive justification behind these diverse judgments

43. P. 117.
44. *Id.*
45. Pp. 118-23.

lies in the fact that only in the highway case does the Ordinary Layman think it fair to say that the government has taken the farmer's social, as opposed to legal, property.

The first half of this example—taking for a highway—poses no particular difficulty because it represents the paradigmatic case of private land taken for public use, even to those who have never heard of the distinction between legal and social property. If theories are needed, they will have to be powerful enough to explain why, under the clause, compensation should not be awarded for takings, not why it should be.

The second half of the example—that of the military overflights—is much more difficult. Initially, there is something fishy about the example, because it never explains how the governmental use of upper airspace could cost the farmer $10,000 without constituting a nuisance. But that aside, the real problem in the case is that everyone, whether lawyer or layman, thinks that the farmer has no claim to the airspace. Ackerman tries to cloak the farmer's claim with legal respectability by offering us an imaginary dialogue between Layman—the farmowner—and his "fair-minded friend." The farmer is first asked to explain those "features of social practice which give social support to your subjective certainties." The dialogue continues as follows:

> *Layman*: Perhaps your doubts will be resolved once you look at this piece of paper. My lawyer says it entitled me to claim the airspace. He says: "*Cujus est solum ejus est usque ad coelum*." [Whose is the soil, his it is up to the sky.] "How about that?"
>
> *Friend:* Well, I think this mumbo-jumbo is something best left to lawyers. While your lawyer may be perfectly right on the matter, you have not come up with anything that makes it plain *to me* that the airspace is yours. In order to do that, you must point out an existing pattern of social practice in which ordinary folk respect your claim to the thing by refraining from using it without obtaining your permission except in extraordinary circumstances.[46]

The dialogue rigs the argument by reciting (without translating) the *ad coelum* maxim; in fact, both lawyer and layman do regard the appeal to the *ad coelum* maxim as "mumbo-jumbo" in this context. The decided cases as between private owners of land seem to make it very clear that ownership does not extend up to the heavens, but only—to use the phrase of that most sensible of lawyers, Frederick

46. P. 120.

Pollock—up to the level of "possible effective possession."[47] The farmer may show his deeds to the land, but that will not make a difference to anyone. The deeds only govern those portions of the world to which his predecessors in title had possession and thus not to the very airspace over which the farmer mistakenly claims ownership. What is needed is an account of the *ad coelum* doctrine, rather than imaginary bits of dialogue that misstate the current law.[48] Nothing in the decided cases points to the asserted tension between legal and social rights, and much in them suggests that the maxim, even for lawyers, was a thoughtless, if pardonable, overgeneralization of the early common law. The difference between the two halves of this example is quite clear. The farmer owns the land, but he does not own the upper airspace. Without ownership or possession, the overflights are neither a taking from nor a trespassing against the farmer. Layman got himself a bad lawyer.

To illustrate further his distinction between legal and social property, Ackerman draws his second example from the law of future interests:

> It is even more dangerous when a second intellectual deficiency of the Layman comes sharply into focus. For it appears that he is more willing to grant the privileged status of social property to a claimant who is capable of exercising dominion over a surface connected thing *at the very moment in time* he is claiming the thing as his. Thus, a person who has only a future interest in a thing—no matter how ample it will be on fruition—may very easily find himself in the position of the holder of legal rather than social rights, capable of evidencing his claim to a thing only by invoking a specialist opinion.[49]

Although Ackerman intends the example to be insightful, in fact it is incomprehensible. That lawyers are needed to draft, record and interpret legal instruments that create or convey future interests is understood even by laymen to whom the words "future interests" are a complete mystery. The need to consult a legal specialist, instead of calling into question the legitimacy of such dealings, only demonstrates the need for the division of labor in society. I doubt that any layman, on reflection, would have the slightest doubt that the taking of a future interest in real property or a trust was covered

47. F. POLLOCK, THE LAW OF TORTS 362 (13th ed. 1929).

48. Here, Ackerman would have done us far better service by tracing the common law development of the *ad coelum* doctrine. For an exhaustive discussion of the question, see Swetland v. Curtiss Airports Corp., 41 F.2d 929 (N.D. Ohio 1930), *modified*, 55 F.2d 201 (6th Cir. 1932).

49. Pp. 122-23.

by the eminent domain clause. To use the good sense Ackerman calls Scientific Talk, the owner of the land is entitled to compensation for its full value, based upon both its present and future use; analogous rules govern beneficial interests under a trust. Why then should the government's burden be lessened if the owner of the fee conveys out a remainder and keeps only a life estate? The owner has made a gift or sale to a third person; he has not made a gift to the state. Any layman who hears this argument would, I think, accept it without real question after he troubles himself to learn about fees and remainders from a trust officer or real estate broker. And the argument surely will be sufficient to persuade judges and lawyers who have spent most of their professional careers working with divided interests in trusts and real estate. The case is so easy, so far removed from the gray areas of eminent domain litigation, that it is odd to think Ackerman believes that it illustrates a major theoretical point.

Ackerman draws his final example from *Pennsylvania Coal Co. v. Mahon.*[50] He frames the issue in *Mahon* as

> a problem posed by the decision of a coal company to sell a homeowner rights to the surface while reserving to itself the right to mine subsurface minerals at some future time. Whatever else can be said about this problem, it would seem reasonably clear that, until the time the coal company began actual mining operations, its rights in the land were only legal, not social. That is, until mining commenced, the company could point to no observable pattern of interaction and restraint that would indicate to a fair-minded Layman that the subjacent coal belonged to the company rather than to somebody else. It is true that a search of the legal records would reveal a piece of paper reserving certain rights to the company—but this is sufficient only to establish legal property, not social property.[51]

It is upon his discussion of Holmes' analysis of *Mahon* that Ackerman largely rests his philosophical conclusions of the deep inadequacy of Ordinary Observing. Yet, about *Mahon*, Ackerman makes several very ordinary mistakes. First, he badly misuses the comparison between the air-rights case and the coal-rights case. He uses the air-rights case to establish that "legal papers" do not persuade the Layman of social ownership rights, when all the case establishes is that there are no present property rights, legal or social, of landowners in the upper airspace. From his wrong conclusion, Ackerman argues that the coal company only has legal rights to

50. 260 U.S. 393 (1922).

51. P. 121.

its unmined coal because it only has a paper title and not active use. From any sensible conclusion in the air-rights case, however, it follows that the coal company has full legal and social rights to the coal, as the Ordinary individual will recognize the force of the deed by which the coal company, upon payment of valuable consideration, first acquired the land, and the force of the subsequent deed in which it reserved those mineral rights. In *Mahon*, the deeds do govern the ownership of the coal; in the air-rights case, they do not govern the ownership of the heavens.

Indeed, to accept Ackerman's view of the coal-rights situation leads to difficulties, if not absurdities, for both lawyer and layman. Let it be assumed that the coal company does not have the social right to mine the coal in the future; then by what warrant does it acquire that social right when it actually begins mining? And by what warrant could it restrain any individual who first mines the coal from doing so? Would a system of squatter's or digger's rights prevail? And how could the coal company keep its coal in place for future exploitation, a common and sensible practice recognized by informed laymen? "Paper title" is a derisive phrase only when it is title to the paper. Deeds, which implement these arrangements, are important both as legal and social institutions.

Once the distinction between legal and social property is disregarded as mischievous and erroneous, the result in *Mahon* is easy on its facts. Ackerman himself sets out the decisive passage from Holmes' opinion:

> If [the city's representatives] have been so short-sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.[52]

How can one disagree? It is the future interest case all over again. The conveyance of a partial interest for consideration does not give the state the power to confiscate the rest without consideration, whether it takes adjacent land, a future interest or reserved mineral rights. Holmes does make some general remarks about the inability to frame a comprehensive test for takings, and undoubtedly he is correct: There are hard cases, especially when the state asserts the police power as a justification for a clear loss of property rights.[53] But *Mahon* contains not the barest hint of any

52. P. 164 (quoting 260 U.S. at 415).

53. That this is surely Holmes' position on eminent domain questions is illustrated by his opinion in Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889). The defendant had chal-

police power justification, unless, as Holmes himself points out, the state is justified in its refusal to pay because the public wants the support rights very much.

Viewing *Mahon* in this light, it is incredible what Ackerman, as a prisoner of his own distinction between legal and social property, does with Holmes' decision:

> Having rejected a position that could possibly be extended "until at last private property disappears" [the consequence of finding no taking], Holmes had no option left but to assume that Lawyer's things should be treated as if they were Layman's things for purposes of takings law. Since the regulation had left a Lawyer's thing worthless, and Holmes could find no Ordinary justification for the state's action, compensation was foreordained within the framework of Ordinary adjudication. Of course, even the most committed Ordinary judge cannot be affirmatively happy with this result, since it is Ordinary only in form and not in substance. As a consequence, it is not surprising to observe Holmes—often so eager to lay down hard and fast objective-looking rules—insisting that the issue before him turns on "a question of degree and therefore cannot be disposed of by general propositions." Having vindicated the constitutional status of Lawyer's things, Holmes senses that he is on uncertain ground and refuses to hand down a rule of any generality to govern the taking of legal, as opposed to social, rights.[54]

Were Holmes alive today, I think he would be utterly astonished to learn of the superstructure imposed upon his opinion in *Mahon*. The distinction between legal and social property is vintage Acker-

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lenged as a taking a spite fence statute that declared any fence "unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property" to be a private nuisance. About the statute, Holmes commented, "It may be assumed that under our constitution the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the common wealth dependent upon what a jury might find to have been the past or to be the present motives of the owner. But it does not follow that the rule is the same for a boundary fence, unnecessarily built more than six feet high. It may be said that the difference is one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined." *Id.* at 369, 19 N.E. at 392. In a word, Holmes did not change his mind one whit in the almost 40 years between the two opinions. Indeed, when faced with a hard question, Holmes often retreated into this posture. For additional expression of these attitudes, see Holmes' partial concurrence in LeRoy Fibre Co. v. Chicago, Mil. & St. P. Ry., 232 U.S. 340 (1913), a damage action for flax burned by fires started by a railroad, with the railroad claiming the flax was stored too close to the boundary line, in which he remarked: "I do not think we need trouble ourselves with the thought that my view depend[s] upon differences of degree. The whole law does so as soon as it is civilized. Negligence is all degree . . . ." *Id.* at 354.

54. Pp. 164-65.

man, not vintage Holmes, and the dilemmas it raises trouble only the author of the distinction, not the author of the opinion. Intellectual history is hard enough even when we do not rewrite it in our own image.

In sum, it is perhaps useful to isolate the weakness in Ackerman's mode of analysis that pervades this part of his book. In talking about the system of Ordinary analysis, Ackerman's strategy is to emerge victorious in a battle with a strawman. His account of Ordinary analysis requires us to assume that judges and laymen both think that this mode of thought compels the judge to accept as binding the sentiments of "well-socialized" individuals, even those who, in Ackerman's words, are burdened with the "intellectual limitations of legal ignoramuses."[55] Nothing could be further from the truth, for either laymen or judges. The essence of the Ordinary method is to direct the attention of the judge or scholar to the expectations, usages and problems perceived of as central within the general culture. Thereafter, the success of the method depends in large measure upon the sophistication of its users. If the original, unexamined sentiments of "ignoramuses" control, we will have an ignorant and uninformed legal system. There is no reason to assume, however, that regard for Ordinary practices forces judges and scholars to be passive receptacles of each piece of everyday foolishness. Laymen can be questioned about both the premises and implications of their beliefs. They can be informed about the standard practices of social institutions, and about their strengths and weaknesses. And they (like first-year law students) can be taught the fundamentals of stocks, bonds, deeds, and even future interests. In a word, it is both possible and desirable to distinguish between unthinking and considered responses. Ackerman's insistence notwithstanding, Ordinary Observing need not be Ignorant Observing.

V. CONCLUSION

It is difficult in the end to suppress a keen sense of disappointment in *Private Property and the Constitution*. Ackerman simply has not delivered the theoretical framework that will enable us to advance the analysis of eminent domain problems. His constant tendency to force individual thinkers, regardless of the nuances of their positions, into categories of his creation tends to falsify the world

55. P. 122. The full sentence is: "The idea that the intellectual limitations of legal ignoramuses should be given legal importance in their own right—independent of *any* Comprehensive View—is, however, the last thing that would seem to him reasonable."

about which he speaks, culminating in a totally unacceptable account of the ordinary modes of adjudication. His refusal to deal seriously with the decided cases makes it impossible to note the extent to which the current errors could be corrected by better use of traditional techniques instead of the wholesale adoption of new ones. His constant reliance upon various rhetorical devices—cute turns of phrase, code words, overcapitalization, and imaginary dialogues—makes it hard to isolate and analyze his own position.

The most important weakness of the book is illustrated by the plight of one Sibson, who, we are told at the outset, was prohibited from developing his marshlands by the New Hampshire Water Resources Board. At the book's end, we still do not know whether Ackerman thinks his claim for compensation was rightly denied. The exclusive emphasis upon abstract methodology and philosophy, however, must be made to bear fruit, and we need to know how Ackerman would decide this and other cases under some reasonably complete version of his own rival theory. He should give us some sense of *which* Kantian or Utilitarian theory he prefers, the reasons he prefers it and the superiority of its results on the troublesome substantive questions in eminent domain law.

In one sense, the criticisms of Ackerman's work all converge upon a single point: *Private Property and the Constitution* would have been a better book if it had adhered more closely to the traditional modes of legal scholarship. As it is, we have a serious, if self-conscious, intellectual effort with some excellent individual passages and some fine textual footnotes. Yet we also have a book that fails in its major mission because it contains too much dubious philosophy and not enough good law, or, for that matter, good common sense.