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Review of Private Property and the Constitution by Bruce Ackerman

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BOOK REVIEW

PRIVATE PROPERTY AND THE CONSTITUTION by Bruce Ackerman. New Haven and London: Yale University Press, 1977. Pp. ix, 303. \$4.95.

*Reviewed by John A. Humbach**

As the country becomes more densely populated, the pressure increases for greater state intervention into decisions involving land use. Principally, this intervention takes one of two forms: Either the state acquires property rights in the land and then controls its use like any other owner of an interest in land, or the state makes rules limiting the freedom of private owners to control the use of their respective parcels.

To private owners, the most striking difference between the two forms of state intervention is that the first (property-acquisition) constitutionally requires a payment to the person from whom the property is taken, while the second (rule-making) does not require payment.¹ This difference is obviously important from the private owner's point of view. If the state must make payments to a particular property owner, the taxes paid by all property owners may be higher as a result. On the other hand, if such payments are not made to the owners of the land which is the subject of state intervention, they stand to lose much, unless the adverse effects to them are offset by other benefits of some sort.

Of course, the offsetting benefits need not be in cash. For example, when the state intervenes by rule-making, a loss of land-use potential may be more than compensated by the advantage of having one's neighbors subject to the same new restrictions.² However, this type of compensation is more problematic because its "worth"

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1. The requirement of compensation for takings of property by the federal government is based upon the "just compensation" clause of the fifth amendment to the Constitution: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The requirement has also been made applicable to the states, and comparable requirements are of course a part of most if not (by interpretation) all state constitutions. See NICHOLS, EMINENT DOMAIN §8.1[2](1976).

2. It is not meant to suggest that any sort of parity is required between value lost and value gained, or indeed that any requirements at all of the "just compensation" clause necessarily apply to rule-making interventions. However, the possibility of "built-in" offsets can be understood as one justification for denying cash compensation in cases of rule-making.

to the recipient is far less certain than a sum of money. Thus, when the state intervenes in land use decisions, the affected owners are likely to want money. But money is only available if there has been a "taking" of "property" within the meaning of the Constitution.³ Hence, what is and what is not such a "taking" is a very important question.

It is perhaps surprising then that many observers consider the question to have been poorly answered in judicial decisions applying the "just compensation" clause of the Constitution.⁴ Led by the articles of Sax⁵ and Michaelman,⁶ a number of attempts recently have been made to provide some sensible basis for determining when just compensation is or ought to be required. The method has tended to be less descriptive than prescriptive: the author first develops a model of just-compensation law, rational and coherent to his satisfaction, and then critically evaluates the existing law in terms of his model.

Now, Bruce Ackerman has come forward with what is clearly calculated to be a major contribution to the debate. However, the debate to which he contributes is less clear. For rather than attempt to resolve the just compensation controversy, or to tie off some of its loose ends, he seems to take off in the headlong pursuit of an entirely different inquiry: What is the proper methodology for courts to use in selecting rules for the adjudication of cases?

He correctly notes that the style of decisionmaking almost necessarily affects the outcome of a decision.⁷ However, if the rationalization of just compensation law must await a general (and correct) agreement of how courts should decide cases, the wait may be long indeed. Presumably, Ackerman did not intend such a pessimistic conclusion, for the tone of the book is, in large part, quite the opposite. What he apparently did intend was to portray in fair detail two basic approaches to deciding just compensation cases—one contrived and essentially untried, and the other historically predominant. The contrived mode of decision is described by

3. For quotation of relevant language of Constitution, see note 1 *supra*.

4. See note 1 *supra*.

5. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

6. Michaelman, *Property, Utility and Fairness: Comments on Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

7. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 21-22 (1977) (hereinafter cited as ACKERMAN).

Ackerman as Scientific Policymaking; the historically predominant mode is called Ordinary Observing.⁸ The two rest their claims to validity on quite different philosophical underpinnings. Hence, the choice between them becomes a question of one's own philosophy about such things. Ackerman's own preference for Scientific Policymaking, if it is not immediately clear from the names which he has selected for the two approaches, certainly becomes clear a short distance into his analysis.

In distinguishing between judges who are Scientific Policymakers and those who are Ordinary Observers, the test is whether the judge has committed himself to a kind of political-legal *Weltanschauung*, referred to by Ackerman as a Comprehensive View.⁹ To qualify as a Scientific Policymaker, "one must learn to think of the legal system as if it were organized around a self-consistent [and fairly small] set of abstract principles that comprise the system's Comprehensive View."¹⁰ Thus, the Scientific Policymakers start by selecting a Comprehensive View and then proceed to decide cases in accordance with it. On the other hand, the Ordinary Observer, who sees social reality as too complex for any single normative view, seeks to apply the various norms which appear to correspond to existing social expectations.¹¹ In short, the Ordinary Observer tries to decide cases the way that most people would expect him to decide them.¹²

The most appealing aspect of the Scientific Policymaker's methodology is that it purports to bring, via the Comprehensive

8. *See id.* at 10-22.

9. Ackerman recognizes the possibility of a diversity of possible Comprehensive Views and does not make the adherence to any particular View a test of whether one is a Scientific Policymaker or an Ordinary Observer. *See id.* at 11.

10. *Id.* at 90. (Emphasis deleted). *See id.* at 11 and especially *id.* at 197-98, n. 21 for a discussion of the idea that a Comprehensive View should involve a "relatively small" number of abstract and general principles.

11. *Id.* at 12-15.

12. The other difference between Ordinary Observers and Scientific Policymakers, or between Ordinary and Scientific decisionmakers in general, concerns the matter of vocabulary. Thus, an Ordinary decisionmaker will prefer resort to ordinary (non-lawyer) talk for an understanding of the meanings of words, whereas a Scientific decisionmaker will regard such resort "as the surest sign of muddle." *See id.* at 10-11. For the legal Scientist, a sophisticated body of legal conceptions can be expressed only with a rather closely defined set of terminology, and the fact that such terminology happens to have homonyms in ordinary talk is a matter of no relevance to their *legal* meanings. *See id.* at 26-28.

For example, Ackerman emphasizes the distinction between "social" property and "legal" property. The former is property as understood by the layman, while "legal" property is a term of art applicable to some of the legal relationships recognized to exist between people with respect to things. *See id.* at 26-29, 116-18.

View, a self-consistency and philosophical justifiability to the law which common law casuistry seems to lack. But the key question of exactly how the Scientific Policymaker should select the Comprehensive View which will monocratically govern us all is one which Ackerman frankly avoids.¹³ He does specify that it is the *state's* Comprehensive View, not the individual judge's, which should be controlling.¹⁴ Beyond this we are told nothing explicitly,¹⁵ though we are given a hint. In his apology for demurring on this point, we are told that we have "a most remarkable scene" to consider merely by looking at the "powerful forces in our *present* legal culture—to explore the basic tensions in our *existing* legal system through an exploration of the compensation clause of our *existing* Constitution."¹⁶ In context, the implication is that a suitable Comprehensive View is likely to be found in the rich diversity of our existing constitutional heritage. The hint is, however, confusing. In selecting the Comprehensive View, he seems to suggest that the Scientific Policymaker act pretty much like an Ordinary Observer.

Following Ackerman's lead, and putting aside the central issue of how to select the operative Comprehensive View, we may wonder whether there is *any* conceivable Comprehensive View which might reasonably be expected to find acceptability in American legal circles¹⁷ and also plausibly account for a system of just compensation rules. Ackerman offers Comprehensive Views of two kinds, which he calls Utilitarian and Kantian.¹⁸ Because both of these general categories offer endless possibilities for specific, actual views,¹⁹ Ackerman wisely avoids defining either of them too closely. Thus, Utilitarianism is represented as the philosophy dedicated to maximizing "something-or-another-that-sounds-like-Social-Utility."²⁰ Kantian

13. *Id.* at 41. It is somewhat disconcerting that he ducks the issue, given the havoc which misplaced ideological commitments have caused in this century alone.

14. *Id.* at 182.

15. Implicitly, I think, Ackerman shows substantial partiality towards at least one or the other, perhaps an amalgam, of the two Comprehensive Views which he deals with in detail in the book. See text accompanying notes 20 and 21 *infra* for a brief summary of the two.

In any case, he pays no attention to the theocratic Comprehensive View despite its important historical following, nor to the View which holds that "private property is theft"—a view which was the late specter haunting Europe. See K. MARX and F. ENGELS, COMMUNIST MANIFESTO 1, 80-86 (Washington Sq. Press Ed. 1964). Adoption of the latter Comprehensive View would make easy work of the "just compensation" conundrum.

16. ACKERMAN at 42 (Emphasis in original).

17. See *id.* at 86.

18. *Id.* at 41-42 & 71-72.

19. *Id.* at 42 & 71.

20. *Id.* at 42.

philosophies are those which accept the Principle of Exploitation: people are not merely the means to the end of maximizing Social Utility but are, instead, ends in themselves—in short, there are things which are “wrong” to do to a person no matter how much good would result to others or to society in general.²¹ From these scant definitions, Ackerman adumbrates the two different Scientific systems of just compensation rules which they would respectively imply.

In reading the demonstration of how Scientific Policymaking might work based first upon Utilitarian, then the Kantian Comprehensive Views, there is little that will be strange to anyone who has read Michaelman's 1967 article on the subject²²—little that is strange, that is, other than the vocabulary. It is somewhat like reading a familiar poem in a recently learned foreign language.

In fairness, Ackerman's stated objective was to “develop a technical vocabulary”²³ to deal with “the fundamental substantive problems raised by the compensation clause, as they are seen by contemporary Legal Science.”²⁴ But the question still remains whether all that new vocabulary is necessary to illuminate the main distinction in his thesis—between Ordinary Observing and Scientific Policymaking.

One particularly wonders about the effort to identify and label the various ways in which judges may either be “restrained” or “innovative” in reaching their decisions: conservative vs. reformist,²⁵ deferential vs. activist,²⁶ or principled vs. pragmatist.²⁷ Of course, these fundamental differences in the ways judges view their own roles can affect decisions, and the resulting effects can be just as radical as differences in the judge's Comprehensive View.

21. *Id.* at 72.

22. Michaelman, note 6 *supra*. A good deal of the work of Sax, note 5 *supra*, is also recounted. ACKERMAN at 50-56.

23. ACKERMAN at 25.

24. *Id.* at 26. Also, in fairness, Ackerman acknowledges at great length his indebtedness to Michaelman. *See id.* at 209, where he admits that his “scholarly tokens do not measure the full compensation that would be due in a well-ordered academy.”

To his vast credit, Ackerman does not, like so many legal scholars, plod to rediscover the wheel, “proceeding as if the legal world were forever new.” *Id.*

25. With regard to wealth distribution, a “conservative” would tend to favor the status quo, and a “reformist” would see the need for some redistribution. *Id.* at 37.

26. A “deferential” judge would have greater confidence in the legislature and other organs of government and hence defer to them more often than the freely second-guessing “activist.” *Id.*

27. The “pragmatic” judge would tend to favor litigants who are expected to be sore losers. “Principled” judges would not. *Id.* at 37-38.

Indeed, it is hard to understand how a person's view of the judicial role can be sensibly separated from his truly *comprehensive* Comprehensive View.²⁸ A Comprehensive View which does not comprehend one's view of the judicial role is not really comprehensive at all.²⁹ On the other hand, if there is any special relation between these political-science considerations and just compensation law as such, that relation is not clear. Indeed, Ackerman himself practically drops the distinctions from further consideration when he moves on to his discussion of the Ordinary Observer approach.³⁰

Mainly, Ackerman uses his various restrained/innovative distinctions to show that the statistical correlation between choice of Comprehensive View and outcome of cases may not be that great after all, *i.e.*, the choice of Comprehensive View—at least as between the two choices he discusses—is only one of several, and perhaps not even an especially important determinant of case outcomes. In doing so, however, Ackerman raises a point which should cause at least momentary distress to anyone convinced of the superiority of the Scientific Policymaking approach: there appears to be no practical Scientific way for individual judges to select between the competing models of the judicial role.³¹ Thus, every “Scientific” decision must be importantly affected (and hence infected) by a quite un-Scientific determinant. It is like developing a perfect substantive law and then having the trials by battle.

What, then, *does* the book tell us about “private property and the Constitution?” We learn first of all that the decided cases in the “just compensation” area do not seem to be reconcilable with any identifiable, broad, but strictly followed ideological commitment (Comprehensive View).³² We are also told that, if the courts deliberately and carefully did adhere to any one ideological commitment, the “just compensation” cases would be more consistent.³³ None of this is new, but singing the praises of Scientific Policymaking resurrects a dangerous temptation that is very old: the temptation to sweep away the chaos of pluralism and replace it with the streamlined efficiency of political monism.

28. *Cf. id.* at 205, n. 2.

29. Furthermore, it may be noted that one must have a Comprehensive View that accepts judges as Scientific Policymakers before one is in a logical position to consider what kind of Comprehensive View ought to underlie narrower policies.

30. ACKERMAN at 106-10.

31. *Id.* at 205, n. 2.

32. *Id.* at 13.

33. *Id.* at 11-15.

Inconsistency in our laws is a price we pay for tolerating political diversity. So long as there are variations in people's views (Comprehensive Views or otherwise) there will be political diversity, and so long as we are unwilling to ascribe ultimate "correctness" to any particular view, such diversity must be permitted.³⁴ Thus, it does not signal an inadequacy in the judicial process that the "just compensation" cases (or any other body of cases) cannot be reconciled, but it is a sign rather that access to our law-making process is open to all, including those who may have dissident or minority Comprehensive Views.

Ackerman no doubt correctly identifies the tendency in modern decisionmaking to seek the policies to be served by law outside the body of the law itself—a turn to purpose-oriented decisions, or return to naturalism or, in any event, a turn away from the inward looking formalism of the preceding century. This looking outside the law for the law's policies is the essence of Policymaking. However, instead of seriously evaluating this trend or demonstrating its dangers (especially when combined with Ackerman's monistic version of "Science"), Ackerman seems to embrace it uncritically as the antidote to the unscientific "policy-following" approach of the fairly recent past. It may go too far to see Scientific Policymaking as a form of crypto-autocracy, but undoubtedly judicial dedication to a single Comprehensive View leaves little place for dissenters from that View.

Apart from these substantive difficulties, two other matters should be mentioned. One is Ackerman's unconventional and sometimes confusing use of capital letters. Certainly, when pains have been taken to define terms critical to an analysis, it surely helps the reader if those terms are distinguished by capitals whenever they later appear.³⁵ However, when a generic term, "Layman," is first defined as the name of a hypothetical person and then later is *capitalized* and used in its generic sense, the result is simply confusing.³⁶ In contrast, certain words are capitalized for no apparent reason at all—e.g., Highly Moral,³⁷ Efficiency,³⁸ Legal Science,³⁹ Law

34. This last assertion reflects my Comprehensive View which holds that there is no "correct" Comprehensive View save, of course, that there is no "correct" Comprehensive View.

35. Thus, there can be no quarrel with Ackerman's use of capitals for such terms as Ordinary, Scientific, Observer, and Policymaker, all carefully defined. ACKERMAN at 10-20.

36. Compare ACKERMAN at 97, with, e.g., ACKERMAN at 123, 147 or 151.

37. *Id.* at 11.

38. *Id.* at 42 & 184.

39. *Id.* at 26.

of Just Compensation,⁴⁰ Social Utility⁴¹ and Utilitarian⁴²—giving the impression that they carry greater import than they in fact do.

Another objection is that the book is used as a forum for airing non-germane viewpoints which are obviously dear to Ackerman but which offer little concerning the main subject matter. For example, Ackerman—who has been known to talk (privately) of the rights of fish⁴³—spends over two pages⁴⁴ on the question of whether “well-socialized” laymen ought to be taught that “Nature” and “Tradition” have rights too. Although he ignores the intriguing question of whether local birds, foxes, etc. are entitled to be paid “just compensation” when a new dam floods their habitat, he does claim to have “come upon one of the deeper legal paradoxes” of the environmental revolution: the restoration of Nature to its proper place means the triumph of Artifice.⁴⁵ Incidentally, as may be seen in the preceding usage of capitalization which follows that of the book, this is another area where Ackerman has had difficulty keeping his shift-key under control.

All in all, however, the book is at the very least a handy recapitulation for anyone who wants to get a deeper understanding of the recent thinking about “just compensation” law. Certainly, watching Ackerman disappear into pitfalls will assist others to avoid them. But the book is perhaps most important for the insights which it offers concerning the more general sort of jurisprudence or political philosophy. The two become, in discussions such as these, very close. By identifying the Scientific Policymaking mode of deciding cases, he warns us of its dangers. By demonstrating some of the incongruities produced by Ordinary Observing, he has warned against being entirely satisfied with that approach to law as well. But what are we to choose? Scientific Observing? Ordinary Policymaking? Ackerman raises both of the possibilities but dismisses them.⁴⁶ Perhaps there really is no fully satisfactory approach. Some, however, may be worse than others.

40. *Id.* at 29.

41. *Id.* at 42.

42. *Id.* at 144 & 172.

43. As reported in a letter to this reviewer dated September 7, 1977 from Stephen P. Dresch, Research Director of the Institute for Demographic and Economic Studies, Inc., confirming earlier conversations.

44. ACKERMAN at 155-56 & 262-64.

45. *Id.* at 156.

46. *Id.* at 17-20.