BOOK REVIEW


INTRODUCTION

In the opening pages of Private Property and the Constitution, Professor Ackerman presents judges, lawyers, and scholars of the just compensation clause not with a new comprehensive doctrine, but with a choice. The choice is a hard one:

In order to decide whether compensation law is basically sound or ripe for sweeping change it is necessary first to choose between two fundamentally different ways of thinking about law, each of which has roots in our present legal culture (p. 4).

To make this choice, Ackerman claims "analysts must become philosophers if they wish to remain lawyers" (p. 5). The remainder of Private Property and the Constitution purports to be philosophy. It is not. Though the names of philosophers crowd the text and citations to their work pad the footnotes, Ackerman studiously avoids discussion of their ideas. When he does venture into philosophy, either he stops where he should begin, with the statement of the key question, or he muddles the concepts the analysis should clarify. Private Property and the Constitution thus manages to be both too long and too short. To say what Ackerman actually says requires far less space; to address the questions dimly perceived through and suggested by the loose verbiage and irritating posturings would require a significantly more detailed and careful analysis.

This review will briefly summarize the "two fundamentally different ways of thinking about law" that Ackerman perceives. It will then attempt to untangle the confusions that result from Ackerman's "philosophy." Finally, it will make some tentative comments about the nature of the consolation of philosophy that Ackerman promised.

1 For instance, in 10 pages of text at the end of the book (pp. 175-85), Ackerman casually mentions Bentham, Hare, Hegel, Kant, Rawls, and Wittgenstein. The footnotes, of course, add substantially to the suggested readings implicit in the text.

2 Ackerman identifies two key questions: one for his "Ordinary Observer" (p. 95) and one for his "Scientific Policymaker" (p. 41). In each case, Ackerman leaves investigation of the question to others.

3 See pp. 1466-78 infra.

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I

THE ARGUMENT OF THE BOOK

The structure of *Private Property and the Constitution* clearly emanates from a mind comfortable in the arcane edifice of property law. To construct his two alternative theories of the compensation clause, Professor Ackerman largely proceeds by creating a series of little boxes in which to classify ideas and arguments. The boxes are of three types. The first reflects what Ackerman calls differences in legal objectives; a contemporary lawyer or judge may be either an "Observer" or a "Policymaker." While Observers form but one species, Policymakers come in two major varieties: the "Utilitarian" and the "Kantian." Policymakers and Observers may be further sorted into Ackerman's second type of box. Lawyers may use one of two kinds of legal language: "Ordinary" or "Scientific." Finally, Ackerman enumerates three polar dimensions along which to classify perceptions of the judicial role in the lawmaking process: "conservative-reformist," "differential-activist," and "principled-pragmatic."

After elaborating the above conceptual structure, Ackerman attempts to demonstrate that current controversy over takings doctrine is a dispute between "Ordinary Observers" and "Scientific Policymakers" (p. 4). (He does not find "Scientific Observers" or "Ordinary Policymakers" worthy of lengthy discussion.) The choice of perspective determines the types of questions asked in any takings dispute; each adherent finds different cases easy and different outcomes desirable. To summarize the views, I shall begin with the last investigated by Ackerman, the Ordinary Observer.

A. Ordinary Observer

An Observer is committed to the belief that "law should support dominant social expectations" (p. 94). An Ordinary Observer identifies these dominant social expectations through an analysis of ordinary language (id.). Ackerman acknowledges two problems faced by the Ordinary Observer. First, in a diverse culture, people may not use the same sentences in identical senses. Second, social systems have subordinate as well as dominant social institutions. Therefore, a

4 Unless specifically noted, I shall henceforth use "Ordinary Observer" interchangeably with "Observer."
complete Ordinary Observer jurisprudence “must specify with precision the criteria by which a judge is to recognize a particular interactional norm as one that has been generated by the dominant set of institutions, rather than some other set” (p. 96). This task Ackerman leaves to others.\(^5\)

To develop Ordinary concepts, Ackerman imagines a perfectly socialized middle class individual, “Layman.”\(^6\) According to Ackerman, an Ordinary Observer then asks when Layman would say he owned a particular thing. The answer given has two parts:

(a) Layman may, without negative social sanction, use the thing in lots more ways than others can; and (b) others need a specially compelling reason if they hope to escape the negative social sanctions that are normally visited upon those who use another’s things without receiving this permission (pp. 99-100).

Using the Ordinary Observer approach to analyze the takings question, the judge must first investigate this sense of ownership by asking: “[I]s it fair to say that the state has taken one of Layman’s things away from him?” (p. 101) (emphasis in original). An affirmative answer establishes a prima facie case of a taking. The Ordinary Observing judge, however, must make a second inquiry: “If a taking has occurred, can it be justified on the ground that it was necessary to stop Layman from engaging in conduct he ought, as a well-socialized adult, to have recognized as unduly harmful to others?” (p. 102).

Ackerman notes one further step in the Ordinary Observer’s analysis. To tell whether Layman has had one of his things taken, an Ordinary Observer judge will seek to determine whether that thing was social property or legal property. The distinction arises from social practice. In day-to-day life, Layman will “make countless decisions as to whether one thing or another belongs to him or somebody else. Yet it is a rare thing indeed for him to find it profitable to obtain carefully considered legal advice before making this decision” (p. 116). Those things over which Layman’s control is generally recognized by other well-socialized individuals constitute his social prop-

\(^5\) For example, Ackerman does not even raise the important prior question: How does the Observer justify his belief that “law should support dominant social expectations”?

\(^6\) The emphasis on “middle class” is mine. Ackerman’s choice of a perfectly socialized middle class individual, of course, implicitly answers the question he left to others; it significantly narrows the range of dominant social institutions. It also suggests a class bias in the law without offering any justification or explanation for that bias.
Newtonian judge seeks to protect Layman’s understanding of his property rights, takings of social property represent easy cases for the Observing judge. When the thing taken is legal property, however, the Ordinary Observer’s interpretation of the takings clause grows problematic. Legal property includes such things as rights to future use and rights to things not on the earth’s surface (pp. 122-23), matters not ordinarily discussed or recognized as part of Layman’s daily experience. While the taking of social property clearly requires just compensation, Ackerman argues that the taking of legal property presents an insoluble dilemma for the Ordinary Observer. If compensation is granted, the Observing judge deserts his methodology of rooting “the law in dominant social practice”; if compensation is denied, the predominant forms of wealth and support in contemporary society merit no constitutional protection (pp. 156-67). For Ackerman, the attraction of Scientific Policymaking lies in this inability of the Ordinary Observer’s analysis to cope with a “world in which ordinary citizens are increasingly dependent upon lawyers . . . [to] understand the nature of their entitlements” (p. 166).

B. Scientific Policymaker

Ackerman’s second strand of legal analysis is represented by the Scientific Policymaker: “an analyst who (a) manipulates technical legal concepts so as to illuminate (b) the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system” (p. 15).

Ackerman does not clearly identify any particular terms that make up a technical vocabulary “which disparages the property-talk of laymen” (p. 25) (emphasis added). What he asserts instead is that “one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership” (p. 26) (emphasis added). Thus, the key “technical” concept for Ackerman is that lawyers view property law as regulating

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7 I shall return to this shift from a discussion of “property” to one of “ownership” at pp. 1466-69 infra. Ackerman’s failure to articulate a well developed vocabulary, a specific set of words, supports my position that the heart of Ackerman’s different view is not a choice between natural (“ordinary”) and artificial (“scientific”) languages. His ordinary and scientific vocabularies are both uses of natural language, but, because of differences in focus and usage, Observers will select a different choice of core meaning from the family of concepts covered by the term “property” than Policymakers will.
relations between people rather than relations between people and things (p. 26). The Scientific lawyer speaks not of owners, but of holders of bundles of rights and entitlements.

To speak "scientifically" has important consequences in interpreting the just compensation clause. Since the taking of any right within the bundle held by an individual is, to the scientist, a taking of property, focus must shift from the taking language to the meaning of "just compensation." A literal reading of the clause's language coupled with the Scientific view of property would otherwise lead to the entrenchment of the status quo. Thus, "the clause, when read as a whole, suggests that payment is constitutionally required only when it will serve the purposes of justice" (p. 28).

To Ackerman, this reading of the constitutional text embodies "a mandate for the analyst to, first, impute a Comprehensive View to the legal system so as to determine the substantive principles of just compensation and, second, work out those compensation rules that will further the Comprehensive View in all litigated cases involving the taking of property rights, Scientifically understood" (p. 29).8

As he did in the case of the Ordinary Observer, Ackerman leaves the crucial question facing the Scientific Policymaker judge to others. Consequently, the methods by which the judge extracts the legally binding Comprehensive View from the plethora of conceivable Comprehensive Views remain enigmatic (p. 41). Rather than explore this basic problem, Ackerman offers two Views, the Utilitarian and the Kantian, which he perceives as dominating the discussion of contemporary American Scientific Policymakers.

In his pursuit of "Efficiency," the Utilitarian considers three costs of any act: Uncertainty, Citizen Disaffection, and Process. If the process costs of correcting a given governmental action are less than the costs of uncertainty and citizen disaffection imposed by the act, the deprived property holder should be compensated (pp. 44-49).9

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8 Ackerman does not justify his argument as to the need for a Comprehensive View, though it hardly seems logically compelled. Obviously, the Scientist's reading of the compensation clause requires an elaboration of what is meant by "just." One could imagine, however, a judge adopting the Ordinary Observing approach to this task: What are the dominant social expectations as to justice in the given instance? The answer arrived at might not differ significantly from the answer Ackerman's Ordinary Observer gives the quite different question he asks about "ownership." See pp. 1468, 1471-74 infra.

9 Here again, Ackerman broaches an important question and then leaves it unaddressed: Why does a restrained Utilitarian judge find uncertainty, disaffection, and process costs the only ones relevant to a determination of whether governmental compensation is required.
To the Kantian, the Utilitarian "fails to take individualism seriously" (p. 71). People after all have "rights"; Kantian Policymakers\textsuperscript{10} must "not conceive of their fellow citizens as merely means to the larger ends of maximizing social utility, but are instead to treat them as ends in themselves" (p. 72). Thus, the Kantian judge will insist on compensation whenever the gain to the beneficiaries of the redistribution exceeds the cost to those who lose from it (as long as process costs do not eat up the entire gain). He will not compensate, however, in any other circumstance (p. 76).\textsuperscript{11}

\section*{SCIENTIFIC AND ORDINARY LANGUAGE}

Ackerman's distinction between "scientific property talk" and "Layman's property talk" does not withstand scrutiny, for Ackerman presents contradictory notions of the nature of scientific language. At the outset of Ackerman's discussion, "scientific property talk" consists of "a set of specialized and technical concepts, which did not depend upon the property talk of the untrained Layman and which enabled the profession to define the basic substantive problem posed by the compensation clause" (p. 39). Words such as "entitlement" acquire a precise, technical meaning, a meaning more restricted and less fluid than those meanings possible in ordinary use.

At the end of the book, however, we learn that "a certain reading of the later Wittgenstein may powerfully be employed" to defend the Ordinary Observer's claim that "the very notion of writing artificial languages, especially in fields like law, is deeply flawed" (p. 177). Are artificial languages the equivalent of technical vocabularies? If not, does the objection of the "later Wittgenstein" apply to both?

An artificial language involves more structure than a technical vocabulary. In an artificial language, one develops a symbolism and specifies rules by which that symbolism may be combined and ma-

\textsuperscript{10} It is not clear why the Kantians are wedded to the same Scientific language as the Utilitarians, or why either must use a Scientific language at all.

\textsuperscript{11} Ackerman's Kantian does not take individuals very seriously. Compensation will be paid in those cases in which the final outcome is pareto superior to the starting point, that is, everyone is at least as well off after compensation is made as before the governmental act, and some are better off. Since a pareto test would recommend itself to those loathe to make interpersonal comparisons of welfare, a Utilitarian judge, suspicious of legislative ability properly to compare utility levels of individuals might also adopt this "Kantian" rule. Further, the rule ignores the individual who is hurt by the governmental act in many, if not most, situations.
nipated. Certain combinations of symbols are ungrammatical; some
trans formations of syntactically correct strings of symbols are illegiti-
mate. The language's rules channel one's "thinking." Finally, one in-
terprets the symbolism or links each symbol or piece of the vo-
cabulary with some "real" thing in the world. The precision of the
artificial language clarifies logical relations, revealing logical conse-
quences and logical contradictions, that the ambiguities of natural
languages conceal.

On what grounds does a "reading of the later Wittgenstein" at-
tack this notion of artificial language? Perhaps Ackerman refers to
Wittgenstein's notion of "family resemblance." In the Philosophical
Investigations, Wittgenstein attacked traditional conceptions of
"meaning" that mistakenly analogized the meaning of a "general word
to the bearer of a proper name."12 (The person at the Yale Law
School who answers to the name "Bruce A. Ackerman" is the bearer
of that proper name.) General concepts are more complex; for them,
"the meaning of a word is its use in language."13 People, however,
use words in a multiplicity of ways. This multitude of uses, according
to Wittgenstein, does not (or is it need not?) share common charac-
teristics. Wittgenstein takes "games" as an example.14 What, he
asks, is common to "board-games, card-games, ball-games, Olympic
games and so on"?15 Though any two games share characteristics, no
characteristic is common to all. These similarities are "family re-
semblances."16 Concepts then are very fluid; natural language users
have great freedom in their use of words. The difficulty with artificial
languages stems from the attempt to eliminate the choice of the
speaker and to restrict the flexibility of the concept. Precise definition
oversimplifies the complex structure of the family of uses of the con-
cept. Besides, the speaker may choose to use the word in a novel but
appropriate way.17

Since it lacks a syntax or rules of manipulation and combination,
the "Scientific property-talk" to which Ackerman refers hardly quali-
fies as an artificial language. Nevertheless, Wittgenstein's objection

12 Pears, Wittgenstein and Austin, in British Analytical Philosophy 17, 34 (B. Williams
& A. Montefiore eds. 1966).
14 Id. §§ 66-71.
15 Id. § 66.
16 Id. § 67.
17 See generally Pears, supra note 12, at 36.
to artificial languages might still apply to the semantical rules that constitute a technical vocabulary. Policymakers, however, do not use words like "entitlement" in fixed and rigid ways. Rather, they confine the use to some fairly wide class of circumstances. These circumstances do not cover the entire range of "property" circumstances. Instead, they carve out some part of the "property" family and create an "entitlement" subfamily. If we were to follow Austin's procedure of investigating ordinary language,\(^{18}\) we would search a dictionary for synonyms of "property" and related verbs such as "to possess" and "to have." The subfamily that corresponds to "entitlement" might arise from the nexus of words that include "to use," "to govern," or "to exercise restraint or direction."

Ackerman, then, does not ask lawyers to choose between two different concepts of language: natural ("ordinary") and artificial ("scientific"). Analysis reveals that Ackerman's "scientific property talk," which lacks both a formal syntax and rigid definitions of the technical vocabulary, elaborates a subfamily of concepts inherent in the word "property." For the Ordinary Observer's analysis of the word "to own," the Scientific Policymaker substitutes an analysis of the word "entitlement" or "entitled." The focus, not the method, of analysis differs. Thus, Ackerman's dichotomy of language requires lawyers to ask why legal use should concentrate on one area of the property family rather than another. To answer this question the lawyer must investigate not philosophical methods of linguistic analysis or theories of meaning but the purposes of the just compensation clause and the institutional limits of the judiciary. In fact, these purposes and limits might justify lawyers' and judges' eschewing the confines of ordinary uses and the concepts revealed in them. Even Austin noted that "lawyers and jurists are by no means so careful as to give our ordinary expressions their ordinary meanings and applications because of the institutional limits and functions of the law."\(^{19}\) If, as Wittgenstein suggests, to understand the meaning of a word we must look to its use, then the uses of the law, as framed by the institutional purposes and limits, must also be consulted.

Besides misunderstanding Wittgenstein's objection to artificial languages, Ackerman improperly employs Wittgenstein's method and wrongly invokes his name. Ackerman's analysis of the Ordinary Ob-

\(^{19}\) Id. at 188.
server suggests that the support of dominant social institutions is linked to the elaboration of concepts embedded in ordinary language. Wittgenstein advanced an argument about philosophic method; his objections to artificial languages attack their usefulness in critically explicating complex concepts. The method of ordinary language philosophy improves the quality of the criticism. It does not elevate the conventions and prejudices of ordinary language to substantive, normative standards. A critical explication of the concept of property performed in the manner of Wittgenstein does not imply that the social expectations embedded in the language are just, politically desirable, or legally required.

III

THE POLICYMAKER-OBSERVER DICHOTOMY

The distinction between Policymaker and Observer resists categorization in philosophical pigeonholes. Three possible interpretations of the significant difference may be offered. Observer and Policymaker might have (1) distinct ethical systems; (2) distinct political philosophies; or (3) distinct jurisprudential concerns. The selection of one of these alternative interpretations has important consequences since Ackerman desires that we choose between the Observing and Policymaking regimes on philosophic grounds. The interpretation chosen dictates the nature of the questions we shall ask and the literature we shall consult in applying the just compensation clause.

The Policymaker is characterized by possession of a Comprehensive View. This Comprehensive View rests on some ethical system or notion of the “Good.” For the Utilitarian, the “Good” is social efficiency; for the Kantian, it is protection of individual rights. Although ethical notions distinguish among Policymakers, they do not provide a distinction between Policymaker and Observer. Ackerman’s Observer has no commitment to the “Good” and, hence, need not choose an ethical system.

While philosophers of ethics are unlikely to justify the Observer’s amorality, a political philosopher might. After all, both the enforcement of an ethical system and the enforcement and maintenance of expectations engendered by dominant social institutions sound like political imperatives.20 From where do these political imperatives

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20 Of course, once the lawyer or judge decides that Policymaking is the proper choice, an investigation of ethical systems might appear necessary. Appearances deceive. In enforcing the
derive? In particular, how does the philosophic system or a conception of the state that leads to an ethical demand differ from that which leads to a demand to preserve expectations?

This question of political philosophy clearly differs from jurisprudential concerns that focus on the nature of law rather than the nature of the state. Jurisprudence might investigate what distinguishes legal norms from social norms and valid legal arguments from invalid ones or from moral ones.

Unfortunately, Ackerman fails to distinguish adequately the two types of philosophical arguments. That Ackerman recognizes this contrast in Observer-Policymaker political philosophies is apparent in the book's final chapter:

Put in Hegelian terms, the Ordinary Observer's conception of property is rooted in the egoistic, individualistic consciousness of a member of civil (or market) society who is only marginally concerned with the ethical content of communal life. In contrast, the Scientific Policymaker's conception is characteristic of Hegel's ideal state official who seeks to reconcile the inevitable conflicts generated by the market society by referring to the community's fundamental ethical principles (p. 184).

Similarly, in the first chapter, he suggests a distinction based on jurisprudential differences:

Observers should be expected to disagree with Policymakers as to the degree legal principles ought to be abstract and general as well as the extent to which consistency criteria should be used to test the soundness of a particular legal outcome (p. 13).

In the intervening five chapters, however, Ackerman rarely argues on either jurisprudential or political philosophic grounds, or even recognizes these distinctions. Though he does state the crucial jurisprudential question for each type, he explicitly leaves discussion of these questions to others. The two political philosophies espoused receive little attention beyond the quotation cited above, and Ackerman of-

Comprehensive View, the Policymaking judge faces a political imperative, not an ethical one. The question for the legal system presumably should be either: (1) What ethical system does the political philosophy of the social structure to which the law belongs commit it? or (2) How does the nature and source of the law constrain the choice of ethical systems? Note that, though Ackerman acknowledges this second question, he considers it beyond the scope of the book (p. 41).

21 For the Policymaker at p. 41; for the Observer at p. 96.
fers no analysis of the sources of these philosophies or of the positions to which espousal would commit a lawyer. Despite Ackerman's own cavalier treatment of these distinctions, an understanding of the philosophical differences between Policymaker and Observer requires that they be investigated. I shall begin with Ackerman's purported political distinction.

A. Political Philosophy

The "Hegelian" distinction to which Ackerman alludes arises from two fundamentally different conceptions of the state, and encompasses one of the basic dichotomies of political philosophy. Apparently, an Observer understands the state differently than does Hegel; unfortunately for Ackerman's thesis, a Utilitarian Policymaker following Bentham and a Kantian following Rawls would vote not with Hegel, but with the Observer.

What is the nature of the state? A rephrasing of the question may help supply the answer: What is the purpose of the state? Does the state somehow exist independent of individual citizens? One may define the nature of the state by the aims and hopes of its citizens as individuals, thereby denying an independent existence to the state. Conversely, one may, with Hegel, attribute an independent existence and purpose to the state, the fulfillment of some universal end.

A Utilitarian seeks to maximize what Ackerman terms "social utility" (p. 42). Social utility, as Ackerman fails to make sufficiently clear, is some weighted combination of individual utilities rather than the utility of some superentity called "society" or the "state." Instead, this dependence of the social good on the individual good of personal satisfaction gradually emerges from Ackerman's analysis. Ackerman begins by noting the three "social" costs that a governmental act may impose. The first cost incurred by a reallocation of property rights is the uncertainty cost; individuals incur it: "Apprised of the fact that property rights have been redistributed . . . , these risk averse citizens will respond by investing extra resources in adaptive behavior that would have otherwise been spent obtaining positive utilities" (p. 44).

The "good" that is lost is the "sum" of the positive utilities each individual must forgo. Similarly, Ackerman's second type of disutility, Citizen Disaffection, is an outrage perpetrated on individuals as individuals. Ackerman reminds us that a Utilitarian judge "is in principle
equally mindful of concealed psychological affronts, as he is of more obvious forms of distress” (p. 47).

Finally, process costs must be considered because employing resources to settle disputes diverts the resources from other uses that provide satisfaction to individuals. Thus, for the Utilitarian, the good of society is just the “sum” of the “good” of its members. The communal good for the Utilitarian is not an Hegelian universal; it stems from the same source as the Ordinary Observer’s concept of the good: the “egoistic, individualistic consciousness of a member of civil (or market) society” (p. 184).

That Ackerman’s Kantian also relies on an individualistic conception of the “good” requires only a brief glimpse at Ackerman’s own characterization: “Utilitarianism, it is said, fails to take individualism seriously when it insists that the sum of social satisfaction be maximized regardless of its distribution among persons” (p. 71). Rights protect individuals and the protection of these rights is the purpose of the state, the “good” in society.

Thus, Observer, Utilitarian, and Kantian reflect a commitment to the state as an institution that promotes individual welfare. The Hegelian idea of the state as the universal will and the means to fulfillment of the general good does not distinguish Policymaker from Observer.

A second fundamental question of political philosophy offers a possible means of distinction, but it might classify Observer and Kantian together. One might ask why the individual should obey the state. Bentham and the Utilitarian Policymaker would have a simple answer: the individual obeys the state when obeisance provides more utility than rebellion. The Kantian, at least that of the Rawlsian variety, has a dramatically different, and significantly more complex, answer. The answer flows from Rawls’s view of the state as a social contract; it exists through consent of the governed. Individuals cede certain rights to a central government in exchange for a similar cession by others. Determination of when morality will compel civil disobedience or apparent violation of the contract requires a detailed investigation of the nature of the social contract. Since, arguably, the political philosophy of the Observer can be reconciled with that of the

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Kantian by reference to a social contract theory, the Observer might agree on circumstances that justify disobedience.

Let us see how an Observing political philosophy might rest on social contract grounds. Ackerman tells us that "the Observing style of legal thought fits more comfortably into a political theory in which the state is not marked out from society as an institution with a peculiarly important mission" (pp. 178-79). Similarly, Locke, in his discussion of the nature of the state, begins with three natural rights that precede political society or the state: (1) life; (2) liberty; and (3) property.

In addition to these rights, Locke mentions two institutions, the family and the society of master-servant, that also precede the institution of the state which he calls political or civil society. (Unlike Marx, Locke uses the two words interchangeably.) This third institution arose, not to criticize these two preexisting institutions, but to protect the third natural right: "The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government is the preservation of their property." Locke's political philosophy, then, singles out a peculiarly important mission for the state, but it is not a critical function. For Locke, the state protects private property, a preexisting natural right. Further, since the state arises from the consent of the governed, the state does not seek to impose "its" own notion of the good on its citizens. Thus, the nature of that consent determines the manner in which property will be regulated. Why may not the details of this consent be embedded within "the dominant cultural tradition into which the 'general population is socialized'" (p. 179), the object of the Observer's examination? An Observer should then be perfectly content with this political philosophy and the individualistic ethic to which it commits him.

Though Ackerman intimates that the Observer's political philosophy truly lacks a concept of the "good" or the "right," such a
political philosophy is hard to imagine. In fact, the preceding argument suggests that Observing is consistent with any natural rights political philosophy, even that which Ackerman labels "Kantian." Because each of these philosophies embodies some Comprehensive View, Ackerman's Observer must have some other reason for eschewing the search for a Comprehensive View and accepting the possibility of inconsistent social expectations. A political or jurisprudential theory that removes the search for consistency or the right and the good from judicial hands is of course both easily conceivable and consistent with Ackerman's perception of the Observer. Perhaps Ackerman's conception of judicial role will aid our understanding.

B. Jurisprudence

Observer and Policymaker, I have argued, cannot be clearly distinguished either by the approach to language or by the conception of the state. Both types may be understood to have isolated a particular sense of "property" in their elaboration of takings doctrine; and both could rest on similar political philosophies. Yet any lawyer reading *Private Property and the Constitution* will agree that the two types differ; further, the exposition suggests that the difference lies in the very different questions at the center of each jurisprudence. Ackerman says that the Policymaker must "sift the legally admissible Comprehensive View from all the others that are in fact passionately held in the world today, not to speak of those that merely seem plausible" (p. 41). The Observer, on the other hand, must identify the "dominant set of social institutions" in contemporary society (p. 96). Observing judges thus have a different task or function than Policymaking judges. The distinction Ackerman desires rests in the specification of this task. The task may be characterized, however, as jurisprudential, which is probably Ackerman's implicit choice, or as political theory. Unfortunately, Ackerman does not explicitly discuss either Observing and Policymaking jurisprudence or Observing and Policymaking political theory. He does discuss, however, a problem

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29 Ackerman's position is very confused. While an Observer supposedly has no Comprehensive View, Observer techniques are easily adaptable to a search for one and might be adopted by a Policymaking judge. Unless the state conception of right has been imposed from outside after social institutions have evolved, the good should reflect or be reflected in the dominant social institutions and the expectations aroused thereby.
of judicial role that might have illuminated both. A summary of Ackerman's argument is needed.

1. The Problem of Judicial Role

Ackerman treats the problem of judicial role twice: in the chapter on Scientific Adjudication (pp. 31-39), and in the chapter on Ordinary Adjudication (pp. 103-10). The two discussions are somewhat inconsistent. I begin with the discussion buried in Ackerman's treatment of "Scientific Language."

According to Ackerman, the posture of just compensation cases (as appeals from decisions of other governmental officials) forces the Policymaking judge to "come to terms with his peculiar position as constitutional decisionmaker of last resort: to what extent and in what ways is he entitled to make an independent judgment on the merits of the dispute before him?" (p. 31). Generally, a judge answering this question can adopt either a "restrained" or an "innovative" attitude in the exercise of his job (p. 32). Prior to elaborating the distinction between restraint and innovation, Ackerman defines a "perfectly restrained judge" as one "who always reviews the challenged decision before him as if it had been generated by a set of perfectly functioning institutions" (p. 34) (emphasis in original). Perfectly functioning institutions, of course, always generate "a decision that best furthers the Comprehensive View guiding the legal system" (p. 34). In contrast, the innovative judge acknowledges that the decisions he reviews have arisen in very imperfect institutions. Further, the innovative judge will act on this knowledge and "use him his judicial office to improve the existing legal state of affairs" (p. 36).

To refine the distinction between restrained and innovative judges, Ackerman identifies three dimensions along which the functioning of society may be measured. Thus to evaluate how well-ordered his society is and to decide how and when he must innovate,
every judge must answer three questions: (1) to what extent is the prevailing distribution of property rights prior to the governmental act in question just; (2) to what extent do the nonjudicial organs of government act rightly; and (3) to what extent do the citizens perceive the government as functioning well? The first dimension is the "conservative-reformist" one; the second, the "deferential-activist" one; and the third, the "principled-pragmatic" one (pp. 34-38).32

Problems arise with Ackerman's analysis when we turn to his discussion of judicial role and the Ordinary Observer. This second discussion is problematic because Ackerman asserts that "an Ordinary Observer will find his rival's role theory deeply misconceived" (p. 104). That is, Ackerman implies that the dimensions along which Observer and Policymaker must take a stance are not the same, yet he persists in using the same words to describe both theories. For example, Ackerman asserts that the Ordinary Observer

will be obliged to consider whether he should read the takings clause in a restrained or an innovative way. These terms are, of course, the same as those used earlier to describe the Scientific Policymaker's basic problem in role definition. Yet, though the words may be the same, they will have a very different meaning when read in the light of different first principles (p. 107) (emphasis in original).

The Observer's first principle is "to think about each lawsuit as if he were a law-taker" (p. 105) (emphasis in original), while the Policymaker must "think about each lawsuit as if he were an agent of the state charged with implementing the public good as it is defined in the legal system's Comprehensive View" (p. 106) (emphasis in original). To act as a law-taker apparently means to enforce the dominant set of social expectations, a definition that hardly advances the argument. Nor do these first principles shed much light on Ackerman's three dimensions of judicial role.

2. Jurisprudence and Political Theory

The tasks of jurisprudence are primarily twofold. First, jurisprudence seeks to define the nature of law and legal rules as distinct

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32 The Ordinary Observer judge can surely ask questions two and three. Though Ackerman phrases the ability to act rightly as conformance to the Comprehensive View, the Ordinary Observer need only substitute his deity of dominant social expectations. An Observer could, of course, ask the first question as well. Its relevance, however, is unclear, since a just income distribution may not be part of the dominant pattern of social expectations.
from morality and moral rules and from other social institutions and social sanctions. Second, jurisprudence hopes to explicate the methods of legal argument and hence to distinguish among good and bad, legitimate and illegitimate, and complete and incomplete legal arguments. Political theory has far different goals. Political theorists attempt to explain how actual states are structured and behave. Thus, the theorist identifies who wields power, how and when that power is to be manipulated, and how it is restrained.

Each formulation of the problem of judicial role can be viewed either as a jurisprudential statement or as one in political theory. The first principles of the Observer and of the Policymaker may be interpreted as a prescription of how the judge is to reason and hence a test of the legitimacy of a legal argument. Alternatively, these two principles might be regarded as rough gauges of how power is divided between the courts and the rest of the government.

Similarly, Ackerman’s three dimensions of restraint and innovation may be given either interpretation. From a jurisprudential perspective, the three answers to the three questions determine the validity of any legislative act; that is, they are criteria for recognizing valid laws. Alternatively, Ackerman’s admonition to the judge to consider the justice of the initial distribution of wealth, the efficiency of other branches of government, and the loyalty of the citizenry might simply be rules of thumb for the exercise of power. Thus, first principles and the three dimensions constitute the twin halves of a jurisprudence, criteria for legitimate legal argument and for identifying laws, or two aspects of a political theory, the division of power between judiciary and other governmental organs and rules for the exercise of judicial power. Unfortunately, Ackerman does not distinguish between political theory and jurisprudence, nor does he explicate the logical relations between his first principles and his notion of judicial role.

The roots of the “two fundamentally different ways of thinking about law,” (p. 4) thus lie either in different jurisprudences or in different political theories. Ackerman has not, however, excavated the assumptions that underlie these competing theories or even clearly articulated the logical connections among their premises. Rather, he has for each way of thinking about law, simply designated its position on the political spectrum.

Implicitly, Ackerman has placed the Observing judge within a political system that allots the judiciary a conservative role, defense of
the dominant pattern of social expectations, while the Policymaking judge inhabits a more active role. The Policymaker, like the Executive and legislature, can actively promote an overarching good; he is not consigned merely to moderate the march of change.

CONCLUSION

I do not need your library with glass walls and ivory decoration, but I do need my place in your mind. For there I have placed not books, but that which gives value to books, the ideas which are found in my writings.

Lady Philosophy in Boethius, The Consolation of Philosophy Book One prose 5

In the last section, I identified three areas of philosophy that may aid the lawyer: (1) ethics, which deals with the nature of morality and of justice; (2) political philosophy, which deals with the nature of the state and of the individual's relation to it; and (3) jurisprudence, which deals with the nature of law and of legal argument. These areas obviously overlap and a specific answer in one area may entail a particular response in another. In the context of the takings clause, a careful probing of the assumptions embedded in the case law or scholarly literature in any one of these philosophical fields could easily clarify not only what lawyers do and have done, but also what they should do.

More important than these areas of investigation, however, may be the manner of investigation. Philosophy is a critical endeavor; it seeks to reveal errors and traps in the simplest and most commonsensical assumptions. It probes beneath the habits of practice for justification. As Ackerman points out, but fails to accomplish, an interpretation of the takings clause requires an elaboration of the concepts of "property" and "just compensation." A philosophical criticism of these concepts investigates to what the lawyer's underlying principles commit him and the coherence of these principles. Thus, philosophy may force one to choose between incompatible principles or to reformulate beliefs in a consistent fashion.

These methods are not alien to the lawyer. Any attempt to rationalize a line of cases involves a search for a consistent set of rules in a mass of precedent. As the analysis proceeds further and compares the discovered rules to the demands made by political and social institutions, by the existence of various individual rights, and by
differing notions of the nature of law and the state, the legal analyst begins to stray into territory that the philosopher may have prepared.

The failure of *Private Property and the Constitution* lies in Ackerman's inability to get beyond the names of philosophers to their ideas. Consequently, his "criticism" of takings doctrine is at best shallow and at worst muddled and misleading.

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