Book Reviews

The Steel Seizure Reconsidered*

_Truman and the Steel Seizure Case: The Limits of Presidential Power._

Reviewed by William H. Harbaugh†

For more than two decades _Youngstown Sheet & Tube Co. v. Sawyer_¹ was regarded as sui generis or aberrant. Justice Black's holding that the seizure violated the separation of powers was so simplistic and the concurring opinions so diffuse that there seemed little possibility that _Youngstown_ would become a landmark. In disgust, Edward Corwin subtitled an article on the seizure "A Judicial Brick Without Straw." _Youngstown_ would be remembered, wrote Corwin, "as an outstanding example of the _sic volo, sic jubeo_ frame of mind into which the Court is occasionally maneuvered by the public context of the case before it."² Glendon Schubert predicted that the majority's evasion of the question of the existence of a national emergency, coupled with its failure to recognize a real conflict among statutory policies, would confine the decision "to its very special facts."³ Paul Freund, in a commentary that seems to have fixed the law professoriate's view of the case, even suggested that _Youngstown_ never should have reached the Supreme Court and that the Court should not have decided the validity of the seizure in the posture in which the case did reach the Court.⁴

* The author wishes to thank the members of the Faculty Legal History Seminar at the University of Virginia for their comments on an earlier version of this review.
† Commonwealth Professor of History, University of Virginia.
¹ 343 U.S. 579 (1952).
⁴ Freund, _The Supreme Court, 1951 Term—Foreword: The Year of the Steel Case_, 66 _Harv. L. Rev._ 89, 89-95 (1952).
Steel Seizure

Assuredly, the special interest in the separation of powers guaranteed Youngstown a continuing hearing in political science circles. But the interest was not, apparently, a strong one. Neglect of the case was even more pronounced among law teachers, presumably because the logic of Corwin, Freund, and others was too compelling and the professoriate's interest in civil and individual rights too consuming. More inexplicable, given the bent of historians for inclusiveness, was their disregard of the entire episode. Eric Goldman's racy account of the post-war decade fails to mention the seizure, and most twentieth-century textbooks contain not a single line on it.5

Now comes a fullscale historical study of the seizure and the flat assertion by its author, Maeva Marcus, that Youngstown is "one of the 'great' constitutional law cases." It is a great case, she contends, because it discussed the powers of the President at length and because it "breathed new life into the proposition that the President, like every other citizen, is 'under the law.'"6 Nor is that quite the sum of her brief. Youngstown, she suggests, spurred the Court to grapple with basic constitutional questions in such politically charged cases as Brown v. Board of Education,7 Baker v. Carr,8 and, most crucially, United States v. Nixon.9 Those are bold contentions, no matter how guardedly phrased. As Marcus realizes, their support rests not only on a demonstration of doctrinal linkage between Youngstown and later cases, but also on a thorough comprehension of the seizure in all its dimensions—political, economic, legal, and, not least, symbolic. She strives, accordingly, to recreate the Steel Seizure case in its entirety; and in some 350 pages of text and notes that correct, modify, and augment previous accounts, she fulfills her purpose in some, though by no means all, respects.10

5. E. Goldman, The Crucial Decade (1956). Of fifteen 20th-century textbooks examined by this writer, only three mention the seizure. Yet many of these textbooks describe, often with rare verve, Truman's ill-fated proposal to draft striking railroad workers in 1946 and John F. Kennedy's temporarily successful rollback of steel prices in 1962.

The two pioneering accounts of the steel seizure episode were too brief to attract attention. See G. McConnell, The Steel Seizure Case of 1952 (Inter-University Case Program No. 52, 1960); A. Westin, The Anatomy of a Constitutional Law Case (1958).

6. M. Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power 228 (1977) [hereinafter cited by page number only].

10. Cf. W. Harbaugh, Lawyer's Lawyer 462-82 (1973) (previous account of seizure); G. McConnell, supra note 5 (same); A. Westin, supra note 5 (same). Marcus's description of the events immediately preceding and following the strike omits three matters of general import. First, average hourly earnings in steel were $1.883 as compared to $1.987 in autos and $2.232 in coal. Second, the industry refused for three months, until the eve of the
Early in April 1952, Secretary of Commerce Charles Sawyer seized the nation’s steel industry on the order of President Truman. At the time, negotiations to end the Korean War were deadlocked. Industry leaders had rejected the Wage Stabilization Board’s proposal for settlement of a bitter labor dispute. And the United Steelworkers were scheduled to walk out on April 9. The President and his advisers feared that the slightest interruption of production would imperil the defense effort. But instead of seeking a Taft-Hartley injunction or invoking the seizure provisions of the Selective Service Act of 1948 or the Defense Production Act of 1950, Truman acted on the basis of what Department of Justice attorneys assured him were his “inherent” constitutional powers.

Few presidential actions have generated more intense controversy than Truman’s seizure order. Fourteen separate resolutions to impeach the President were introduced in Congress. Both the American Association of Newspaper Publishers and the United States Chamber of Commerce censured Truman, and only one major newspaper defended him. Senator Lyndon B. Johnson opined that the seizure showed a trend toward dictatorship, and John W. Davis declared in one of the most heartfelt oral arguments of his long career that the seizure was “a reassertion of the kingly prerogative.” Meanwhile, Truman botched a thoughtful explanation of his decision by remarking that “a lot of hooey” was being offered up.

Yet there were no such blatant pronouncements about presidential prerogatives, no such arrogant talk of selective compliance, as marked Richard M. Nixon’s conduct two decades later. On the contrary,

11. In fact, the Truman administration’s fears were probably unfounded. See p. 1280 infra.

12. Selective Service Act of 1948, § 18, 50 U.S.C. app. § 468 (1970 & Supp. V 1975) (as amended); Defense Production Act of 1950, § 201, 50 U.S.C. app. § 2081 (1952) (lapsed on June 30, 1953). Truman and his advisers believed that the eighty-day “cooling off” period of a Taft-Hartley injunction would be unfair to labor, because the union already had voluntarily postponed the strike and because the Truman administration felt that the steelworkers were entitled to some wage increase. Moreover, a strike of uncertain duration would occur during the mandatory fact-finding by a board of inquiry required by the Taft-Hartley Act. Although they never gave serious consideration to the condemnation provisions of the Defense Production Act of 1950, they considered and rejected seizure under § 18 of the Selective Service Act of 1948 because Department of Defense officials insisted that this provision’s procedures were much too time-consuming. See pp. 75-79.

13. See W. Harbaugh, supra note 10, at 469-70, 472; pp. 83-101. Although Marcus reports that Truman had decided not to seek reelection, p. 36, she fails to report this fact in chronological context or note that the date of the announcement was moved up because of the tension generated by the steel crisis.
Steel Seizure

Truman invited the Congress to supersede his order. Then, immediately after the Supreme Court ruled against him, he directed Sawyer to return the steel mills to their owners. Patently, Justice Frankfurter captured the essence of Truman when he said in his concurring opinion that it was "absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley." The popular view of *Youngstown* was that the Court "decided that the President . . . has no powers other than those named in the Constitution or derived from acts of Congress." But a majority of the Justices concluded no such thing. Only Justice Douglas accepted Black's view that the lawmaking power was entrusted "to the Congress alone in both good and bad times." Frankfurter deemed determination of that question unnecessary. "Rigorous adherence to the narrow scope of the judicial function," he wrote, "is especially demanded in controversies that arouse appeals to the Constitution. . . . [These] questions seem to exercise a mesmeric influence over the popular mind." Justice Burton accepted the concept of inherent powers by implication; or, as Marcus phrases it, he "did not totally repudiate the doctrine." And Justice Clark affirmed it with extraordinary fervor: "The Constitution does grant to the President extensive authority in times of grave and imperative national emergency. . . . I care not whether one calls it 'residual,' 'inherent,' 'moral,' 'implied,' 'aggregate,' 'emergency,' or otherwise."

Justice Jackson's long, complicated, and intellectually subtle opinion could be read, and here is read by Marcus, both ways. At several points Jackson explicitly rejected the inherent powers doctrine, yet he was unwilling to circumscribe the President's "lawful role" as Commander-in-Chief when confronted by a foreign threat. Suggesting that the question could only be settled by the "imperatives of events," he noted "the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis."

14. In response to the steel industry's media attack on Truman's seizure order, Truman sent a message to Congress immediately after the seizure stating his willingness to follow any congressional directive. Marcus convincingly argues that Truman was merely trying to forestall negative congressional action. Pp. 94-95.
15. 343 U.S. at 593-94.
17. 343 U.S. at 639 (Douglas, J., concurring); see id. at 589.
18. Id. at 594.
19. Id. at 594.
20. 343 U.S. at 659.
21. Id. at 649-53.
22. Id. at 657, 645.
23. Id. at 653. Marcus is not the first to describe Justice Jackson's opinion as "ambiguous." P. 216. See Corwin, *supra* note 2, at 63 ("Justice Jackson's rather desultory
Although the author's account of the Steel Seizure case contains much that is necessarily familiar, it is helpful to have the opinions and commentaries both summarized and collated. Moreover, she has ferreted out a number of new facts and set forth some controversial judgments of her own. She reports that early drafts of Burton's opinion indicate that he initially accepted the Government's contention that a strike would imperil national security. She notes that Learned Hand told Frankfurter that he would probably have upheld the seizure because the Taft-Hartley Act's "implications do not extend to a condition of war." She charges that Frankfurter acted "disingenuously" in emphasizing the House's defeat of a seizure amendment to the Taft-Hartley bill in 1947 while neglecting the Senate's passage of a similar provision in 1949. She speculates that the concern about the growth of executive power expressed by several Justices, notably by Jackson, was conditioned by their abhorrence of Nazism. And she asserts that their resolve to rule on the merits was stiffened by Truman's decision to take the nation into the Korean War without asking Congress for a declaration of war. In the end, she agrees with Corwin that Clark alone had come to the right conclusion for the right reasons: the President was obligated to follow the procedures authorized by Congress in the Selective Service Act, the Defense Production Act, or the Taft-Hartley Act.

Clearly, the main strength of this book is its research in the traditional vein. The author's five years of research in private papers, her exhaustive examination of governmental records, and her numerous interviews have yielded a great many nuggets, both small and large.

opinion contains little that is of direct pertinence to the constitutional issue.") But see Roche, Executive Powers and Domestic Emergency: The Quest for Prerogative, 5 W. POLITICAL Q. 592, 615-16 (1952) (perceptive analysis of subtleties and nuances of Justice Jackson's opinion).

24. In one draft Burton wrote, "I accept the Government's conclusion that [a strike] would imperil the national safety . . . ." P. 342 n.42.

25. P. 222.


29. P. 220; see Corwin, supra note 2, at 65.

30. These range from new information on the government's price proposals for the industry to partial clarification of the administration's refusal to promise the lower courts that it would maintain existing conditions of employment during the seizure. Pp. 121, 135; see especially p. 306 n.92. Marcus accurately points out that Secretary of Commerce Sawyer's recollection that District Court Judge Pine asked Assistant Attorney General Holmes Baldridge three times to promise that the government would not change the conditions of employment during the seizure is incorrect. See C. SAWYER, CONCERNS OF A CONSERVATIVE DEMOCRAT 261 (1968); cf. W. HARBAUGH, supra note 10, at 471 (incorrectly follows Sawyer). The question was raised three times, but not so directly as Sawyer and Harbaugh indicate. Sawyer and Harbaugh are also wrong in stating that Pine eventually
Steel Seizure

For present purposes, the most interesting of these is that the Supreme Court knew before the ruling that the administration had greatly exaggerated the shortage of steel and that there was no imminent military emergency. Of comparable importance was the "clamor" evoked by the charges and countercharges in the press and district court. Ordinarily, the rhetorical excesses of principals and adjuncts are of little moment. But as Marcus, following the lead of Corwin, persuasively argues, "the politics of the situation required a ruling on the merits" if the Court was to retain respect as an institution. This is hardly to say that the outcome was inevitable. Idiosyncratic factors, not inexorable forces, shaped proceedings in the district court; Judge Pine could have enjoined changes in working conditions pending a factual determination of irreparable harm. Once he ruled on the merits, however, public expectations compelled the Supreme Court to face the constitutional issue also.

Marcus's surface description of all this is eminently sound. Yet it lacks a sure appreciation of, and a proper emphasis on, the larger significance of the procedural irregularities in Judge Pine's court. That, plainly, was the thrust of the Freund and Corwin commentaries; and that, just as plainly, should be the focus of a historical account of this phase of the case. But instead of developing this point in all its fullness, the author provides a detailed narrative that misplaces responsibility for the direction of the district court hearing and deadens the reader's understanding of the intellectual richness of the true issue.

The key factor in Marcus's version of events in the district court was given this assurance. Surprisingly, Marcus fails to follow through on this finding in regard to Judge Pine's lack of interest in the equitable, as opposed to constitutional, issues in the case. See pp. 1278-81 infra.

Another interesting nugget is the reasonably firm finding that the issue that forced the walkout and prompted the seizure was management's opposition to a union shop rather than, as commonly believed, dissatisfaction with the Wage Stabilization Board's wage-price proposals. Pp. 253-54. Cf. HOUSE COMM. ON RULES, THE STEEL SEIZURE CASE, H.R. Doc. No. 534 (pt. 1), 82d Cong., 2d Sess. 225 (1952) [hereinafter cited as 1952 Doc.]. G. McCONNELL, supra note 5, at 21, 34 (strong hints of importance of union shop issue). This important conclusion, like several others in this too evenly written book, is reported so routinely and so far out of chronological context that its significance is largely obscured. See p. 1279 infra. Marcus does mention the union shop issue three times while describing the events leading up to the seizure, but never in a way that suggests the issue's underlying significance. See pp. 58, 62, 65.

32. P. 225.
33. P. 223.
the performance of Assistant Attorney General Holmes Baldridge. An antitrust lawyer, "he was unfamiliar with, and ill prepared to discuss, the law concerning the pivotal issues in the steel seizure case." He and his colleagues submitted a hastily assembled brief that over-emphasized the President's constitutional right to seize private property. According to Marcus, this "critical error" encouraged the steel companies to respond to that issue at length; it further led Baldridge, badgered by Judge Pine, to make what one White House staff member called the "legal blunder of the century"—the statement that the seizure was based on "expediency backed by power." So outraged was the public by this extravagant claim that even Truman was constrained to back down—a little. He released a carefully phrased explanation of his position and had Senator Hubert Humphrey announce that Baldridge's argument was bad law. At the last moment Baldridge submitted a disingenuous supplemental memorandum to the district court designed to submerge the inherent powers question.

Indubitably, Marcus's strictures on Baldridge's oral performance are warranted; the hapless Assistant Attorney General himself admitted that he had made a terrible argument. But it is quite another thing to charge, as Marcus does, that Baldridge's brief and oral argument were primarily responsible for Judge Pine's decision to hear argument on the merits. Marcus terms the earlier arguments on the motion for a temporary restraining order before Judge Holtzoff a "microcosm" of those before Pine. Industry attorneys raised the constitutional issue briefly but forcefully at that time and Judge Holtzoff insisted, over Baldridge's strong objections, that the Assistant Attorney General address the constitutional question. Given this background, Baldridge would have been remiss had he not discussed inherent powers as forcefully as possible in the brief submitted to Judge Pine.

Conversely, Marcus's account of the hearing tends to spare Judge Pine the harsh judgments she levels against Baldridge. The reader is never told that Pine, a strict constructionist, seemed anxious to take the

35. P. 105.
37. Pp. 125-26; see A. WESTIN, supra note 5, at 67-68. This memorandum stated that "[a]t no time have we urged any view that the President possesses powers outside the Constitution, and our brief . . . is clear on that point. On the contrary we have urged that the President must act within the Constitution, specifically Article II . . . ." P. 306 n.89 (quoting Supplemental Memorandum of Defendant) (emphasis added).
38. P. 310 n.107.
39. P. 103.
Steel Seizure

case. Baldridge's well-founded complaint that the judge forced him to focus on the constitutional question is relegated to a footnote. And though Marcus does report that Pine cut off Baldridge's argument about the propriety of equitable relief, she fails to point up the extraordinary contrast between the judge's perfunctory treatment of that important matter and his relentless interrogation of Baldridge on the constitutional issue. Pine's conduct together with his impassioned opinion—which has been flippantly, but accurately, characterized as "more like a Liberty League tract than a realistic appraisal of the duties and responsibilities of the President of the United States in an era of permanent crisis"—should have guided the reader to the inescapable conclusion: Judge Pine conducted, in the guise of a hearing, a badly flawed "trial" on the merits because he was predisposed to rule on the merits, not because Baldridge led him astray.

Although the author sees much of this, she frequently fails to put facts and analysis into a context that establishes their relative weight. Not until the following chapter, for example, does she dutifully insert a merciless dissection of Pine's comportment by Max Lerner. The judge, wrote the New York Post columnist, "ruled quickly, as though he feared that if he allowed the government to improve its argument, he might find himself without a thunderous decision, and the republic might not need him as saviour." Marcus adds, in paraphrase, that had "Pine waited until a hearing on the merits, the government would have been given a chance to answer the complaint fully, a record would have been established, and a judgment based on fact instead of rhetoric would have been the result." That, of course, is the point. But by the time it is finally made, the impression that Baldridge shaped the course of the hearing and that Pine acted within acceptable norms is too firmly formed to be modified by what has the appearance of an afterthought.

More serious still, Marcus fails to perceive the ironic relationship of Judge Pine's conduct of the hearing to her central thesis: the rule of law. If it was desirable that the seizure be judged ultimately on the merits, it was imperative that the process by which the merits were

41. W. Harbaugh, supra note 10, at 470. Marcus accurately terms Pine a "conservative" with a "solid reputation." Pp. 108-09. She does not note that he served as confidential clerk to James Clark McReynolds when McReynolds was Attorney General and that he leaned toward McReynolds philosophically. See W. Harbaugh, supra note 10, at 470.
42. P. 305 n. 81.
44. Roche, supra note 23, at 613.
46. Id.
reached conform to normal procedure. The hasty disposition of Youngstown on all levels violated the maxim, recently restated by Charles L. Black, Jr., that "[j]udicial judgment on great constitutional issues . . . [should be] based on long and deeply informed reflection." 47 This hasty disposition also precluded full examination of the overriding evidentiary question: the supply of steel. Indeed, the day after Judge Pine's ruling, the Wall Street Journal reported a two month's supply of steel on hand.48 The accuracy of this and similar reports was confirmed by the fifty-five day strike that followed the Supreme Court's decision in June. As a National Production Authority study concluded, the effects of the strike "were not too serious; the economy functioned, [and] the defense program went forward."49 Contrary to Truman's Memoirs, moreover, the strike had little relation to a shortage of heavy ammunition that summer.50

Cross-examination by attorneys with access to company records in a full evidentiary hearing might have revealed the Government's exaggeration of the impending crisis.51 The Supreme Court's perception of the emergency (assuming that the case still would have reached that tribunal) would then have been based on the record instead of on leaks, rumors, and press reports. Meanwhile, an authoritative finding below that the emergency was not immediate would have destroyed the rationale for invoking the inherent powers argument, because the Government could not have argued reasonably that the statutory alternatives were too burdensome. This would have enabled the Court to speak more effectively—and surely in fewer than seven voices—on Truman's failure to resort to these alternatives. Yet the results in Marcus's terms, and I confess in my own, would have been substantially

49. P. 356 n.13 (quoting National Production Authority, Government Action in the Steel Dispute 12 (Dec. 1, 1952)).
50. Id.
51. Thus Secretary of Defense Robert Lovett emphasized the effects of a "prolonged" strike before warning also against one for "a short period of time." 1952 Doc., supra note 30, at 29, 31. Atomic Energy Commissioner Gordon Dean talked partly in terms of a "protracted cessation" of production. Id. at 32 (emphasis added). And National Production Authority Chairman Henry H. Fowler put the critical period at eight weeks. Secretary of Defense Lovett and several other officials, at a meeting on the afternoon of the seizure, expressed the opinion that Truman should invoke the Taft-Hartley Act. They did not press their views on the President because they sensed that he had already made his decision not to invoke the Act. G. McConnell, supra note 5, at 35. Thus, despite their warnings about the urgent need for steel, these officials were willing to tolerate a short stoppage while the Taft-Hartley machinery was started. Marcus does not mention this illuminating fact. Instead, she writes that "[i]n view of the military obligations of the United States, this interruption, as the many affidavits filed by the government demonstrated, would have been too costly." P. 123.
the same: "the President, like every other citizen, is subject to the law."\textsuperscript{62}

Marcus's view that \textit{Youngstown} was a "great case" rests partly on the contention earlier noted that it influenced the Court to hear \textit{Brown v. Board of Education}, \textit{Baker v. Carr}, and a succession of other important cases.\textsuperscript{53} This is thin ice, at least for the school segregation and apportionment cases, and some of it is simply not skateable. There is not a shred of evidence that \textit{Youngstown} influenced the Court's decision to take \textit{Brown},\textsuperscript{54} and the evidence on \textit{Youngstown}'s connection with \textit{Baker v. Carr} is only marginally better.\textsuperscript{55} Yet the ice did slowly thicken. Lower court judges often cited \textit{Youngstown} in Vietnam War cases, and Douglas referred to it in several bitter dissents to denials of certiorari.\textsuperscript{56} In \textit{DaCosta v. Laird}, for example, Douglas wrote: "We did not defer in the \textit{Steel Seizure Case}, when the issue was presidential power, in time of armed international conflict, to order the seizure of domestic steel mills. Nor should we defer here, when the issue is presidential power to seize, not steel, but people."\textsuperscript{57} Meanwhile, Chief Justice Earl Warren cited \textit{Youngstown} in declaring for the Court its right to rule on the House of Representatives' refusal to seat Adam Clayton Powell.\textsuperscript{58}

As the Nixon years advanced, writes Marcus, \textit{Youngstown} became an increasingly useful precedent because "the opinion of the Court denied inherent power in the President and because the ruling struck down a President's order."\textsuperscript{59} Justice Marshall's concurring opinion in the \textit{Pentagon Papers} case rested strongly on \textit{Youngstown}.\textsuperscript{60} In the electronic surveillance case, the court of appeals invoked \textit{Youngstown} to deny that the President could go beyond authorized wiretapping procedures.\textsuperscript{61} The \textit{Steel Seizure} precedent also figured importantly in

\textsuperscript{52} P. 260.
\textsuperscript{53} Pp. 228-29. \textit{See} p. 1273 \textit{supra}.
\textsuperscript{54} \textit{See generally} R. KLUGER, \textit{SIMPLE JUSTICE} (1976) (epic work does not mention \textit{Youngstown}'s influence). Marcus does not say directly that \textit{Youngstown} influenced the decision to take \textit{Brown}. She writes, for example, that changes in the Court's membership undoubtedly spurred its changed attitude. Yet she introduces \textit{Brown} in a way that virtually forces the reader to infer that the intent of the passage is to link the two cases. Pp. 228-29.
\textsuperscript{55} P. 230. The sole support for the connection with \textit{Baker v. Carr} is a passing mention of \textit{Youngstown} in a footnote to Douglas's concurring opinion. \textit{See} \textit{Baker v. Carr}, 369 U.S. 186, 246 n.3 (1962).
\textsuperscript{59} Pp. 235-36.
the impoundment cases, in Nixon's effort to dismantle the Office of Economic Opportunity, and in the Watergate cases. Judge Sirica relied heavily on *Youngstown* in the first of the Watergate cases, and the court of appeals termed *Youngstown* "the most celebrated instance of the issuance of compulsory process against Executive officials" in holding that *Youngstown* destroyed the notion that the President could not be party to a suit. Finally, in *United States v. Nixon*, Chief Justice Burger cited *Youngstown* as precedent for finding certain exercises of executive authority unconstitutional and quoted at length from Justice Jackson's concurring opinion in *Youngstown*.

Constitutional scholars will surely refine, and probably sever, some of Marcus's links. They will remark on her heavy reliance on dissents and concurrences. Only in *Powell v. McCormack* and *United States v. Nixon* did the opinion of the Court actually cite *Youngstown*. They will note that she gives equal emphasis to opinions on both sides of the inherent powers issue. And they will take sharp exception to her treatment of the electronic surveillance case. The significant point in that case is not that Justice Powell affirmed the judgment of the court of appeals; it is that Powell himself nowhere mentioned *Youngstown*, a fact that Marcus's page-long exegesis of Powell's opinion completely ignores. Similarly she seems not to perceive that Powell sought to underscore the inappositeness of *Youngstown* by twice stating that the surveillance case required no judgment on the scope of the President's power with respect to the "activities of foreign powers, within or without this country."

Nevertheless, there is no gainsaying Marcus's contention that the Nixon era gave *Youngstown* viability and that the case helped create

---

64. P. 238-48.
66. 487 F.2d at 709.
68. Marcus has Chief Justice Warren saying in *Powell v. McCormack* that *Youngstown* "was the prime example" of the Court's assumption of constitutional responsibility for settling separation of powers questions. P. 231. In fact, Warren did not cite *Youngstown* as a "prime example" although he did cite it as support for the proposition. See 395 U.S. at 549.
69. In discussing Zemel v. Rusk, 381 U.S. 1 (1965), for example, Marcus reports Justice Black's sweeping repudiation, in dissent, of the inherent powers doctrine and Justice Goldberg's repudiation, in a separate dissent, of the doctrine "in time of peace" without commenting on the significance of the distinction between the two dissents. Pp. 231-32.
71. 407 U.S. at 308, 321-22.
a judicial climate that transcends measure by frequency of citation.\textsuperscript{72} As she reports in a passage that warrants greater emphasis than its burial in a footnote suggests, attorneys in the Department of Justice’s Office of Legal Counsel “do not often cite the case, but it is always in the back of their minds.”\textsuperscript{73} A recent ranking of the \textit{Steel Seizure} case as nineteenth of the “milestones” of American law by some fourteen hundred respondents to an \textit{American Bar Association Journal} poll is further testimony to its general importance.\textsuperscript{74} Nor is it likely that Marcus’s central conclusion will be seriously challenged. \textit{Youngstown}, she asserts, “dealt a telling blow to the . . . doctrine . . . that each branch of government was the arbiter of its own powers and responsibilities.”\textsuperscript{75}

For all the strained quality of its linkage, and despite its deficiencies of emphasis and thus of interpretation, the factual contribution of \textit{Truman and the Steel Seizure Case} makes it a useful addition to constitutional history. It is reasonable to hope that its close account of the economic and political aspects of the seizure, along with its demonstration of the linkage between \textit{Youngstown} and several of the Nixon era cases,\textsuperscript{76} will stimulate among historians, political scientists, and law professors the interest the episode richly deserves. As Paul Freund said, the suit echoed “the ancient voices of Bracton and Coke proclaiming that not even the King is above the law; and this principle is so greatly to be cherished that perhaps its reassertion is never untimely.”\textsuperscript{77}

\textsuperscript{72} P. 228.
\textsuperscript{73} P. 358 n.31 (reporting telephone interview in 1974 with then Deputy Assistant Attorney General Leon Ulman, Office of Legal Counsel, Department of Justice).
\textsuperscript{74} Letter from William M. Amundson, West Publishing Company, to author (Dec. 27, 1977) (copy on file with \textit{Yale Law Journal}). Amundson estimates that about 10\% of the respondents were judges and perhaps 15\% law professors. Telephone conversation with William M. Amundson (Dec. 22, 1977) [notes on file with \textit{Yale Law Journal}]. The first 18 choices are listed in J. \textit{Lieberman}, \textit{Milestones} vii (1976).
\textsuperscript{75} P. 248.
\textsuperscript{76} The Carter Administration’s reaction to the prolonged coal strike of 1977-1978 graphically illustrates the deterrent force of \textit{Youngstown} and subsequent cases. At no time, reportedly, did the Administration consider seizure without specific authorization of Congress.
\textsuperscript{77} Freund, \textit{supra} note 4, at 89.
Undemocratic Legislation


Reviewed by Geoffrey C. Hazard, Jr.†

The general subject of this gentle and well-documented little book by Judge Jack B. Weinstein is the apparatus for drafting and promulgating that type of legislation known as “rules of court.” The specific agenda in Judge Weinstein’s discussion comprises the two forms of such apparatus that operate in the federal court system. One is the process that provides us with the Federal Rules—the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and (with some mis-carriage) the Federal Rules of Evidence. The other is the procedure for making local federal rules.

The Federal Rules are officially the product of the Supreme Court, acting in accordance with the Enabling Act of 1934, as amended. Under that Act, the Supreme Court is empowered to “prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions.”¹ A parallel authority is conferred with respect to criminal procedure.² In fact, however, the drafting of the Federal Rules is the immediate responsibility of the Judicial Conference, which consists of the Chief Justice of the United States, the chief judges of the courts of appeals, the Court of Claims, and the Court of Customs and Patent Appeals, and some district judges. This has evolved from a statutory duty imposed on the Judicial Conference to advise the Supreme Court and to make recommendations based on a continuous review of the Federal Rules.³ The Judicial Conference in turn has a Standing Committee on Rules, and that Committee has Advisory Committees on each of the principal sets of rules (Civil, Criminal, Admiralty, etc.). The committees are made up of leading federal judges, members of the bar, and law professors. Both the Stand-

† John A. Garver Professor of Law, Yale University.


1284
Undemocratic Legislation

ing Committee and the Advisory Committees are authorized to retain technical staff, the chiefs of which by convention have been law professors of standing. The Enabling Act further requires that proposed rules be presented to Congress for review before becoming effective, a procedure that is not an empty formality, as proved by the congressional revision of the Federal Rules of Evidence. The procedure for drafting and promulgating the Federal Rules has therefore come to involve the following sequence: professorial draft, Advisory Committee revision, Standing Committee review, public dissemination of Tentative Draft, further revision, presentation to the Supreme Court, presentation to Congress.

The situation with regard to local rules is quite different. The power to promulgate local rules is currently defined substantially the way it was in 1793: "That it shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules . . . to regulate the practice of the said courts respectively . . . ." That is all there is to it. The scope and subject matter of local rules is a matter of local judicial predilection, as is the procedure by which they are drafted and promulgated. The only legal control currently imposed on local rulemaking is the requirement that a rule be "consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." Even this limitation has proven not wholly effective. For example, the six-person civil jury was introduced into the federal system by a local rule that was apparently inconsistent not only with both an Act of Congress and a Federal Rule but also with the Constitution.

Judge Weinstein reviews this and other less famous instances of local rulemaking. It brings to mind another instance with which I am acquainted. Not long after Congress enacted the Federal Registration of Judgments Act, Judge James Alger Fee of the United States District Court for the District of Oregon promulgated a rule requiring that a party seeking to register a judgment from another district make a motion to have it registered. This motion procedure was not required by the Registration of Judgments Act and indeed was inconsistent with the purpose of the Act, which was to make a judgment of one district


court enforceable in another by a simple clerical procedure. Why then
did Judge Fee proclaim a local rule requiring an apparently superfluous
procedure? There is no legislative history, because local rulemaking
does not require any legislative process, but the reliable gossip was that
Judge Fee believed the Registration of Judgments Act was unconstitu-
tional and wanted an opportunity to so hold.

Most of the local rules in the federal courts are neither so idiosyn-
cratic in substance nor so frivolous in purpose. But Judge Weinstein
convincingly demonstrates that they are at least uneven in these re-
spects. Taken as a whole, local rules can best be described as measure-
ments of the chancellors' feet.

The present procedures for local federal rulemaking are thus virtu-
ally the antithesis of those for making the Federal Rules. The Federal
Rules are initially drafted by lawyer-scholars who are both technically
expert and free of role conflicts concerning what the rules ought to be;
the local rules usually are written by the judges themselves. The Federal
Rules require the assent of diverse constituencies in the bench and bar;
most local rules are essentially judicial fiat. The Federal Rules are sub-
ject to both closed and open debate; the local rules rarely undergo any
debate at all. The Federal Rules must avoid offending the sense of
justice of the Supreme Court and of Congress, as well as that of the
Department of Justice; the local rules need be meet in the eyes of only
one set of beholders.

Not surprisingly, the conclusion drawn by Judge Weinstein is that
the procedure for local federal rulemaking ought to be revised. In this
context he makes reference to the proposals of the American Bar As-
sociation's Commission on Standards of Judicial Administration.8 The
modest injunction of these Standards is that in making rules of court
there should be "a procedure that involves opportunity on the part of
members of the public and the bar to suggest, review, and make recom-
mendations concerning proposed rules."9 Judge Weinstein would
further require that all local rules be effective only upon approval by
the Standing Committee on Rules of Procedure of the Judicial Confer-
ence. This would parallel the procedure by which the Federal Rules are
submitted to Congress before becoming effective, and thus seems
eminently sensible. Indeed the proposal is hardly debatable if one ac-
cepts even a minimal concept of legislative due process. I predict, how-

8. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 18 (1977) [hereinafter
cited by page number only].
9. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO
COURT ORGANIZATION § 1.31 (1973).
Undemocratic Legislation

ever, that many judges will exhibit substantial resistance to the idea, perhaps because they do not really believe in law, the test of which is willingness to subject one's own behavior to the constraint of rules.

Fortunately, the local rules are of considerably less practical consequence than the Federal Rules. The latter, after all, are comprehensive regulations of the adjudicative process in the federal courts. These Rules have stood up remarkably well. The Federal Rules of Civil Procedure have been in effect for nearly forty years and the Rules of Criminal Procedure for more than thirty. The rest have a much shorter history but appear solidly established. Moreover, both the Civil and the Criminal Rules have been widely emulated in the states, where the only compulsion for their adoption is the persuasiveness of their worth. Except for such fundamentally difficult questions as the proper scope of discovery, the use of the class action, and post-judgment review of criminal convictions, criticism of the Federal Rules is mostly esoteric. Moreover, it can be said that current analysis of procedural due process under the Constitution essentially involves deciding how far non-judicial tribunals must go toward conforming to the judicial model as prescribed in the Rules.

That is a fair political record for any body of legislation. It is a very impressive one in an era that has seen an expansion of procedural justice and an unparalleled questioning of our institutions. The Rules may be Bleak House, but everyone seems to want to live there.

Why then is Judge Weinstein concerned not only about the procedure for making local rules but also about the procedure for making the Federal Rules? I confess that after reading him carefully I do not clearly understand the basis of his concern. The suggestions he makes for reforming the Federal Rulemaking procedure are restrained to the point of being exiguous. They are only these: (1) the period during which proposed rules must repose in Congress before becoming effective should be extended from ninety days to six months; (2) Congress should not redraft "details of the rules" but rather "should confine its involvement to the review of substantial principles"; and (3) the authority under which the rules are promulgated should be the Judicial Conference and not the Supreme Court.

The first of these proposals on its face is of such little consequence that in reality it is of almost no consequence at all. Under the present

10. See Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?, 70 F.R.D. 199 (1976).
11. P. 147.
procedure, no proposed Federal Rule has ever been presented to Congress with less than a two-year public exposure. If Congress has had any problem of oversight with respect to the Rules, it is not due to inadequate notice. Judge Weinstein's second suggestion is a comment rather than a proposal; I will speak to it later in this discussion. His final proposal is hardly of any greater moment than the first. If the Federal Rules were not issued "by" the Supreme Court, but "by" the Judicial Conference, the important question would be whether it would make much difference and if so what kind. The arguments advanced by Judge Weinstein suggest that it would not make much difference.

In arguing for the change to the Judicial Conference, Judge Weinstein asserts that the members of the Supreme Court lack expertise in the subject matter because they do not have much trial experience. Compared to whom? The Chief Justice and Justices Marshall, Powell, Rehnquist, and Stevens have had substantial personal experience in litigation; Justice Brennan was a judge in both the trial court and appellate division in New Jersey; and the other members of the present Court have had the kind of experience in practice that well informs a lawyer of what litigation is about. And, if they lack such experience, so what? They have plenty of informants. Furthermore, expert practitioners of the forensic art are not inevitably best qualified to fashion the regulations that should govern it, as the infamous Hilary Rules should always remind us. It is also argued that the Court lacks time to give the Rules adequate attention. No doubt true, but again so what? If the Court had a lot more time, I doubt that its members would accomplish much in revising proposed Rules. The argument most emphasized by Judge Weinstein is that the Court's imprimatur on the Rules "inhibits the Supreme Court and other courts from impartially construing the rules in accord with the Constitution, statutes, and appropriate federal-state relationships." The suggestion here is that by adopting the Rules the Court to some extent forecloses questions concerning their validity, particularly in relation to the Erie doctrine.

The last of these arguments actually, if not formally, contradicts the statement that the Court lacks the time to consider adequately the Rules before their adoption. The Court surely cannot have a heavy intellectual investment in material it has not studied. Apart from this,
however, the significance of the *Erie* question—the constitutional validity of federal adjective law as an exercise of federal authority—seems vastly inflated. To be sure, the question was raised insistently in *Sibbach v. Wilson & Co.* and in *Hanna v. Plumer.* But after *Sibbach* the question seems to have survived chiefly because of its theoretical interest to lawyers. Or are we to suppose that a rule varying the effect of a local statute of limitations should be regarded as an illicit invasion of the domain of state law, while the same is not true of the manifold procedural standards imposed on the states by the due process clause?

This is not to denigrate the *Erie* problem. I support its significance, just as—to borrow a phrase from Thomas Reed Powell—its significance supports me. But I have never thought that there was much to the *Erie* problem in the domain of “process” and “practice” and “procedure,” the terms used at various times to refer to the adjective law of the federal courts. This does not mean there are no interesting and engaging questions in locating the boundaries of “procedure,” as the problem of privileges in the *Federal Rules of Evidence* illustrates. These questions, however, are not different in kind or degree of significance from those arising out of rules such as the scope of “standing to sue” or abstention or deference to pending state court proceedings or regulation of the internal affairs of state government—rules that the Supreme Court must periodically reexamine even though it is more closely involved in their formulation than it is in the drafting of the Federal Rules.

More directly to the point of Judge Weinstein’s suggestion that the Supreme Court should not promulgate rules whose validity it must subsequently assess, I wonder whether the legal position of the Federal Rules would be any different if they were issued by the Judicial Conference instead of the Supreme Court. If the principles governing the validity of delegated legislation were observed, there would be a

16. 312 U.S. 1 (1940).
18. This was the problem in *Hanna v. Plumer*, 380 U.S. 460 (1965).
presumption of validity accompanying Rules issued by the Judicial Conference at least as strong as any intimated for Rules promulgated under present procedure. Rules as they are now developed—drafted by academic technicians, approved by a committee of expert practitioners, widely disseminated for comment, and submitted to Congress—represent the product of a process markedly superior to that currently used to develop delegated legislation of infinitely greater variety and complexity, but entitled to a strong presumption of validity.\textsuperscript{25} Or should the Supreme Court subject procedural rules to greater scrutiny than administrative regulations because the Judicial Conference is an affiliated but subordinate judicial body, or because the rules deal with a subject on which every judge has an expert opinion? That is politically possible, of course, but legally incomprehensible. Moreover, consider the problems that have actually arisen. Would the Court have given the problem in \textit{Hanna v. Plumer}\textsuperscript{26} even the time of day if the regulation had been one issued by the Social Security Administration and dealt with distribution of unclaimed federal benefits?

This leads to a somewhat paradoxical conclusion: if the Supreme Court were no longer even nominally the author of the Federal Rules, its scrutiny of the Rules would probably be less than it is at present. If so, the quality of the process by which the Rules are made, and not merely the imprimatur under which they are issued, would become of even greater concern than it has been in the past. On this score, Judge Weinstein’s analysis of the process as it now exists is generally an approving one, a conclusion that probably is shared by most people familiar with procedural law.

Equally interesting in Judge Weinstein’s analysis of the Rulemaking process is what he does not argue. He does not argue that the Rules in the federal courts should be written by Congress, or that the present drafting procedure should be changed in any significant way. In this respect he is only slightly more restrained than Professor Howard Lesnick, who raised similar questions about Federal Rulemaking a couple of years ago.\textsuperscript{27} It is my impression that Professor Lesnick’s orientation to the law and lawmaking processes in general is radically critical. If that is so, one would expect from him a severe appraisal of the present procedures for formulating the Federal Rules. Yet Professor Lesnick comes down with only two specific proposals beyond those al-
ready mentioned. One is that there be wider "input" at the drafting and revising stages of the Rulemaking process. The other is that the Advisory Committees be less unrepresentative.

Professor Lesnick's proposals certainly are attractive—who could be against more public "input" or more "representative" Advisory Committees? Yet I wonder whether these proposals are really very substantial. As for inadequate "input" from various sectors of the public, the only specific instance cited by Professor Lesnick is the assertedly inadequate consideration of the question of a newsperson's privilege. This is a single instance and one that does not suggest that greater input would have changed the result. I doubt that the media people could have gotten their act together sufficiently to state a proposal on this subject; apparently most of them thought, probably rightly, that no rule is better than any rule. And if, as some have claimed, it was of dubious wisdom for the draftsmen of the Rules of Evidence to have dealt with privileges as they did, what would one then say if the draftsmen dealt with a newsperson's privilege? More generally, as Judge Weinstein notes, the actual problem of "input" is not that the "public" is denied an adequate opportunity to have its say, but rather that it does not bother to use the abundant opportunity that exists. This may suggest that the "public," and indeed most of the bar, has very little that is worth saying with regard to the Rules. That would be the simplest inference to draw, and possibly the soundest. Is it unthinkable?

Somewhat the same question suggests itself about the "representativeness" of the Advisory Committees. A committee on any subject as technical as procedural law must comprise people who at least can grasp the subject matter. The Advisory Committees should therefore consist mostly of lawyers. With this limitation, what theory of representation is to be used? The tokenist formula—a woman, a black, a "spokesman for the poor"—despite its wide usage is defensible neither morally nor intellectually nor functionally. What is one's position "as a black" on the problem of adequacy of representation in class suits or discovery of documents? Perhaps what is intended by Professor Lesnick is that the Committees include radical-activists in procedural jurisprudence (if there are such), so that a wider spectrum of opinion is considered. But

28. Id. at 580 n.3.
would that not result in the combination of paralysis and power politics exemplified in the struggle over privileges in the drafting of the Federal Rules of Evidence? Perhaps Professor Lesnick believes that by broadening the range of participation the extension would be toward the left, because the bench-bar "establishment" is indisputably conservative. I have doubts about this assumption, arising in part from witnessing the example of Judge Weinstein, who is at least a guest member of the establishment and who in matters of procedure is a radical in the classic sense.

Perhaps, therefore, it would not be inappropriate to turn the question of representation around: what proposals can anyone develop that were not considered in drafting any of the Federal Rules but that would have been considered by a differently composed set of Committees? In this I mean proposals that would have an appreciable chance of passing through the political gauntlet through which the Rules must move. Judge Weinstein does not suggest any, nor does Professor Lesnick, nor have I thought of any. (Of course, this may only prove that we share the lack of imagination that must explain the conservatism of the present Rulemaking structure.)

This leads to another point that Judge Weinstein helps illuminate: the role of Congress in Rulemaking. Judge Weinstein reminds us that of all the sets of Federal Rules, only those on evidence received substantial attention from Congress.\textsuperscript{33} The effect of this attention was profound perturbation of the Rulemaking process and the superficial repudiation of a carefully worked product. In substance, however, Congress adopted intact the work of the Rules drafting procedure, with these two exceptions: (1) the House Judiciary Committee made some minor changes reflecting the thought of some of its lawyer-members, and (2) the subject of privilege was simply avoided. Both actions reveal important limitations in the congressional aspect of the Rulemaking process.

The changes made by the House Judiciary Committee in the Federal Rules of Evidence exemplify the disproportionate influence that lawyer-legislators often have on procedural rules emanating from the legislature. The lawyer-legislators have influence as legislators because they are in the legislature; they have influence as lawyers because they present themselves to their fellow members in the legislature as professional experts in "lawyer's law," as the law of procedure may aptly be classified. The lawyer-legislators cannot be drawn into technical debate

\textsuperscript{33} Pp. 71-75.
by their professional peers, nor into debate over policy by their political peers. In my own experience, moreover, lawyer-legislators occasionally exhibit deep resentment at the superior professional stature of the elite of the bar found on the drafting committees. As a result, they sometimes allow themselves to legislate their professional grudges. In a somewhat parallel fashion, the lawyer-legislators when confronted with questions of procedure often project the opinions of that part of the bar that is seldom in court and that therefore wants a system where relative amateurs can maintain sway. This is an interest that deserves some protection and is one to which Rules committees, being composed of litigation specialists, are often inattentive. Yet on the whole the amateur interest is given excessive weight when the legislature has a strong, direct influence on the Rulemaking process. At any rate, it seems fair to say that it is not the superior expertise of the judiciary in such matters but rather these political circumstances that have been the real impetus for removing procedural Rulemaking from the legislature.

Perhaps recognition of these political facts explains why Judge Weinstein does not argue for changing the role of Congress in the Rulemaking process. Instead, he warns that Congress should not redraft details of the Rules and should confine itself to review of "substantial principles." Such also seems the only explanation for the hopeful but vacuous proposal that Professor Lesnick has put forth—that there be a "meaningful mode of congressional review that does not undermine the rule-making process itself."

In this connection the treatment of the matter of privilege in the Federal Rules of Evidence is worth special attention. What happened in the congressional revision of the Rules of Evidence had little to do with the Rule Committee's predilections and a great deal to do with those of key members of Congress. Senator McClellan of the Senate Judiciary Committee wanted to limit the scope of the criminal defendant's privileges and expand the scope of the prosecutor's privileges. Using his power as chairman of a pivotal subcommittee, the Senator blocked the proposed Rules until he succeeded in exacting the changes he thought needful. He accomplished this through backstairs negotiations with the Department of Justice and apparently, through it, with the Chief Justice. The product that resulted was then substituted for the proposals drafted by the Advisory Committee. Moreover, no opportunity for comment on the Senator's revisions was afforded to interested outsiders.

34. Lesnick, supra note 27, at 580.
This maneuver has since been referred to by those who criticize the Rulemaking procedure as being improperly cabined. That is fair enough. But the further inference has been drawn that the Rulemaking procedure is defective because “a small group of lawyers will make the critical decisions and these decisions will simply be endorsed at higher and higher levels, becoming law by inertia and by lack of effective public and professional participation.” That is at best a tenuous diagnosis. Presumably the remedy is more procedural democracy. But if so, one will have to take the bad part of legislative democracy—as exemplified in the logrolling over privileges—along with the good.

There are some who, thinking only of an idealized legislative process, would abandon the present expert-dominated procedure. Judge Weinstein does not reach that conclusion. On the contrary, he accepts the present Rulemaking procedure, subject only to the qualifications previously mentioned and to the suggestion that the documents flowing into and out of the drafting process should be more freely available to interested parties. As to the theory of political legitimacy that sustains exercise of such important power by such a cloistered group, he simply calls it “pragmatic.” Equally important, he does not suggest that the procedure be materially changed from what it has been. He thus appears ready to accept what Professor Lesnick is reluctant to acknowledge and what other commentators seem to find inadmissible: that a quite undemocratic legislative process has proven capable of producing a very satisfactory product. Correlatively, the archetype of institutionalized democracy—the legislature—has mishandled the same work when it has gotten into it.

Does this mean that professional elites may retain a legitimate place in policymaking?

35. Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 175-76 (1973) (statement of Charles R. Halpern and George T. Frampton, Jr.) (“Only a narrow spectrum of the legal profession itself was involved [in drafting the Federal Rules of Evidence], and even that segment had inadequate opportunity for scrutiny and comment . . . .”)
36. Id. at 176.
37. P. 17.
Talking about Taking*


Reviewed by James E. Krier† and Gary T. Schwartz‡

_Private Property and the Constitution_ talks about the "taking" problem—more precisely, about the different ways legal professionals talk and think about the problem. Thus the book's text is far less encompassing than its title. A broad range of constitutional property subjects is virtually neglected.¹ A number of issues central to the taking problem itself—for example, the meaning of "public use" and the measure of "just compensation"²—are put aside as "peripheral."³ We are not, then, dealing with "an encyclopedic survey of compensation law,"⁴ much less a definitive volume on the constitutional law of property.⁵ The book focuses instead on a single, central problem raised by the Constitution's language: under what circumstances should we say that property has been taken?⁶ For better or worse, Professor Ackerman reaches no answers to that question. His concerns are the differing perspectives from which the taking problem is viewed and the implications that follow from the choice of one perspective or another.

¹ There is little or no discussion of familiar questions about search and seizure or procedural and substantive due process, much less of such grand questions as the ultimate status of private property—and capitalism—in our constitutional system.
² U.S. CONST. amend. V, cl. 4 ("nor shall private property be taken for public use, without just compensation").
³ B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) [hereinafter cited by page number only]. A number of other issues, some of them very important ones, are treated in the same fashion—mentioned but left unattended. See, e.g., pp. 51-32, 41, 58, 96.
⁴ P. 190 n.5.
⁵ It is clear, though, that Ackerman believes his discussion to be relevant to legal analysis in general. See pp. 5, 168-75.
⁶ This problem has attracted the close attention of some of our best scholars, now including Ackerman. See, e.g., 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 Power, 74 YALE L.J. 36 (1964).
Having noted the narrow topic treated in *Private Property and the Constitution*, it would be misleading to leave unnoted the book's remarkable subtlety and depth of analysis. Ackerman's is an elegant and masterful work, marked throughout by intellectual dazzle and a lively, graceful style. We shall begin with a critical description of its primary aims and arguments, reserving more general assessment for the end of this review.

I

The taking problem is a consequence of the activist state—a consequence of particular concern since the advent of the environmental revolution. As government goes about promoting a better environment, not to mention many other good things, it inevitably harms some people for the benefit of others. Are these harms takings of property requiring payment of just compensation, or merely the unhappy, but noncompensable, results of valid police-power regulations?

The Constitution's answer is, of course, obscure. Payment is due when "property" is "taken," yet neither the Constitution's language, its history, nor its judicial interpretation provides sure standards for identifying just when that has happened. But, Ackerman argues, lawyers can do more than rely on conventional constitutional analysis. They can, and do, proceed on two divergent lines of inquiry, one leading to the conclusion that present taking doctrine is sensible, the other finding only nonsense. The problem, then, is to choose "between two fundamentally different ways of thinking about law." And that choice, Ackerman asserts, is a philosophical, not a legal, matter. "Philosophy decides cases; and hard philosophy at that." Thus his book is as much about philosophy as law; one of its central concerns is "the proper relationship" between the two.

II

As a philosopher, Ackerman reveals a penchant for dualism. Two principal dualisms, for example, form the centerpiece for his evaluation of legal reasoning. The first contrasts competing approaches—Ordinary and Scientific—to legal language. The Ordinary enthusiast

7. Ackerman's view is that the history is "unilluminating." P. 7. For a strong argument to the contrary, see F. Bosselman, D. Callies & J. Banta, The Taking Issue 51-138 (1973).
9. P. 5. "[A]nalysts must become philosophers if they wish to remain lawyers." Id.
10. Id.
11. A reader's guide to the dualisms in *Private Property and the Constitution* would note, in addition to Ordinary versus Scientific, the following: Observer versus Policymaker,
looks for the fundamental sense of legal language in the everyday talk of nonlawyers; he believes that “nonlegal ways of speaking can be expected to reveal the basic structure and animating concerns of legal analysis.” In the Scientific view, on the other hand, the essence of legal language is “a set of technical concepts whose meanings are set in relation to one another by clear definitions.” What the lay person might do with or make of the language is of little interest.

Ackerman’s second principal dualism deals with conflicting attitudes—Observing and Policymaking—about the objectives a legal system should pursue. The Observer measures a legal rule by “the extent to which it vindicates the practices and expectations embedded in, and generated by, dominant social institutions.” He is interested in the generally accepted social norms and in the rules that best support those norms. In contrast, the Policymaker assesses legal rules by the extent to which they conform to “a relatively small number of general principles describing the abstract ideals which the legal system is understood to further.” These principles form a self-consistent whole that Ackerman terms a Comprehensive View; the View provides the measure for legal rules.

Although the Observer and the Policymaker are each impatient with the other’s starting point, the ultimate contest is not between them any more than it is between Ordinary and Scientific analysts. Rather, forces are likely to be joined such that the central conflict pits Scientific Policymakers against Ordinary Observers. When presented with the

Utilitarian versus Kantian, social property versus legal property, and restrained versus innovative judges (within the latter are more particular contrasts between deferential and activist, conservative and reformist, and principled and pragmatic judges). The occasional capitalization is Ackerman’s. One might suppose that it is intended, Milne-like, to reify his concepts and ideas, though Ackerman explicitly warns against “the fallacy of misplaced concreteness,” p. 15, later called “reification,” p. 27.

14. P. 11. The scientist’s concepts “do not gain their warrant from ordinary contemporary discourse but from a specialist’s claim that his particular methods”—whether of anthropology, history, psychology, or sociology—“will generate superior insight.” P. 18.
15. P. 12.
16. Id.
17. P. 11 (footnotes omitted).
18. Id.
20. These are not, of course, the only possible alliances, but Ackerman argues that they are the only plausible ones. Thus Scientific Observers and Ordinary Policymakers are put aside. See pp. 16-20. We, however, shall return to them. See pp. 1315, 1316-17 infra.
Constitution's ambiguous instructions on the taking problem, the first resorts to a highly technical (Scientific) examination of the problem's essential structure in order to lay bare the competing considerations that must be reconciled in accord with the Comprehensive View (Policymaking). The second relies on common (Ordinary) understanding to reveal the nature of the problem and on social expectations to suggest its resolution (Observing). The contending forces thus put the problem differently and are likely in many cases to reach different results.

III

The confrontation sketched above is only the major battle. Scientists might differ on which technical language or discipline offers the greatest insight; more important, Policymakers may disagree widely about Comprehensive View. And two judges who otherwise stand on common ground might nevertheless diverge on judicial role. The nature of these conflicts becomes apparent through an examination of the Scientific Policymaker.

A

We noted above that Scientists might disagree about language, but Ackerman believes that this is unlikely in the particular case of "property." Although there are "many Scientific languages that may be proposed... for the analysis of legal problems," such as the vocabulary of law and economics, or of McDougal and Lasswell, or of Hohfeld, at least as to property there is a clear consensus. "Instead of defining the relationship between a person and 'his' things, property law discusses the relationships that arise between people with respect to things. ... Each resource user is conceived as holding a bundle of rights.

22. Id.
Taking vis-à-vis other potential users . . . . .”

According to Ackerman, it follows for the Scientist that whenever the state removes any right from one user's bundle and puts it in that of another, a constitutional taking has occurred prima facie. It does not follow, however, that payment is necessarily due. The Constitution forbids takings only if they occur “without just compensation.” For Ackerman this “suggests that payment is constitutionally required only when it will serve the purposes of justice.”

This is a quirky and somewhat troublesome interpretation of the constitutional language. A straightforward reading of the Fifth Amendment surely suggests that “just” is the measure of “compensation,” not the determinant of a taking. And it would be odd for Ackerman's Scientist, having conceived a highly refined and unOrdinary explication of “property,” then to give such an Ordinary meaning to “taking.” To be sure, Ackerman’s peculiar interpretation leads easily into “the implications of the very abstract idea of just compensation in [a] wide variety of disputes.” Notice, however, that his approach necessarily means that the Scientific Policymaker is to work the problem out solely in terms of justice, for compensation must be paid only when justice demands. On the other hand, the more typical (and compelling) line—that which separates the deprivation from the taking—admits of resolutions based on efficiency, and thus accommodates more comfortably than does his own interpretation Ackerman's later analysis of the taking problem in Utilitarian terms.

29. P. 26 (emphasis in original).

Notice that Ackerman's source for a Scientific language of property is the way law-trained people discuss the subject. Elsewhere he suggests that Scientific inspiration might be drawn from any number of disciplines. See note 14 supra. Had he investigated these other fields, however, he might have discovered more disagreement about technical language. Some economists, to be sure, define property as Ackerman suggests—relationships between people about things. See, e.g., Demsetz, Toward a Theory of Property Rights, in Papers and Proceedings of the 79th Annual Meeting of the American Economic Association, 57 Am. Econ. Rev., May 1967, at 347, 347. Others seem to think of property as a relationship between a person and a thing. See Kohr, Property and Freedom, in Property in a Humane Economy 47, 49 (S. Blumenfeld ed. 1974). Legal philosophers can diverge along these same lines. Compare 1 J. Bentham, Theory of Legislation 137-38 (Boston 1840) with Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 373 (1954). For some reason, however, Ackerman has cast the lawyer as the paradigmatic Scientist. In any event, we are not convinced that the “consensus” of which Ackerman speaks actually exists, even among lawyers—let alone among “the dimmest law student[s].” p. 26.

30. P. 28 (emphasis in original).

31. The Fifth Amendment permits deprivations of property if accompanied by “due process of law,” but takings must be accompanied by “just compensation.” U.S. Const. amend. V, cls. 3, 4. The problem is to distinguish between a deprivation and a taking, rather than to differentiate one taking from another.


33. See pp. 41-70. One could argue that Utilitarianism—at least as originally conceived—was the prescription for a just society. But Ackerman seems to have in mind not
Scientific Policymaking judges, even if they agree on language, might still differ widely on judicial role and Comprehensive View. As to the first, bear in mind that judges enter the taking drama after numerous governmental actors have already denied the erstwhile owner his claims for just compensation. Whether the judge is inclined to defer to those earlier decisions or to make an independent judgment will depend on whether he is, in Ackerman's terms, restrained or innovative.

If a judge reviews the decisions of other legal actors as if those decisions were the products of a perfectly functioning legal system, that is, a system operating in strict conformance with the Comprehensive View, then that judge is perfectly restrained. He never finds reasons to overturn challenged decisions; he never even feels it necessary to look. Judges are unlikely, however, to be perfectly restrained. Ackerman finds a model of realistic restraint in Rawls's image of a "well-ordered society," one whose basic structure and general performance conform to the Comprehensive View, despite occasional error. The realistically restrained judge assumes the responsibility to correct the government's occasional errors in implementing the Comprehensive View. But he claims no right "to fashion legal doctrine for the purpose of leading society down the road to Utopia. This aspiration can, by definition, never be indulged by the judge who acts as if he were already in a well-ordered society."

In contrast, the innovative judge believes it proper to consider not simply whether others have erred but also to inquire whether society is indeed well-ordered. He acknowledges that society may be funda-

“Bentham's Utility" but "Posner's Efficiency." P. 11. (We say this with some hesitation; despite his scolding others for confusing the two concepts, see p. 278 n.28, Ackerman himself is not perfectly clear. See, e.g., pp. 42, 213 n.36.) Few would claim efficiency to be the first word (much less the last) on justice. But see R. POSNER, supra note 26, at 189-91.

34. Much of Ackerman's book is about judges—it is an ambitious and inventive effort to describe what judges do—but surely it is not written for them as a primary audience. The book does not pretend to tell judges how to do their job. Moreover, it is written in a code (e.g., "Posner's Efficiency," p. 11; "the Carolene Products footnote," p. 30) that may not be easily accessible to many.

35. Pp. 34-39. Ackerman's role models largely ignore the limited competence of courts to acquire knowledge of relevant facts and to develop and administer flexible remedies. See Michelman, supra note 6, at 1215 n.100, 1248-56. Michelman's point is merely noted at pp. 208 n.16, 225 n.62.

36. This might be because he believes the system perfect, but it is enough if he believes that correcting imperfections is the responsibility of other governmental branches.


38. P. 36 (emphasis in original).
mentally out of agreement with the Comprehensive View and assumes an obligation to improve the situation as necessary.39

C

We have now only to consider the Comprehensive View, for in discussing it we can sketch Ackerman’s vision of how Scientific Policymaking judges will deal with the taking problem. Unlike the choice of a judicial role, choice of a Comprehensive View is not a matter of taste or predilection.40 The View that the judge is to “impute” to society is the one that has been “adopted by the legal system.”41 But Ackerman offers no solution to the puzzle of exactly what criteria should be used to recognize the prevailing Comprehensive View.42 He finds, however, that lawyers “willing to talk like Policymakers” limit themselves to two distinct Views: the Utilitarian and the Kantian.43

Ackerman begins his analysis of the Utilitarian View by considering the position of the generally restrained judge.44 Committed to maximizing social satisfaction, the Utilitarian judge is especially concerned to avoid the costs that might attend a governmental reshuffling of

39. Ackerman renders his abstract notions of restraint and innovation more concrete by contrasting judicial responses to three propositions about a well-ordered society. Pp. 37-39. The first proposition is that the existing property distribution is generally consistent with the Comprehensive View. The restrained judge assumes an appropriate distribution; he is a conservative. The innovator instead adopts the reformist’s skepticism. The second proposition is that government generally acts in a way consistent with the Comprehensive View. The restrained (deferential) judge assumes such actions while the innovative (activist) judge does not. The last proposition is that citizens accept the Comprehensive View and tolerate governmental decisions that they believe accord with the View but happen to work to their disadvantage. The restrained (principled) judge assumes that society is made up of such “good losers” and has no patience with those who carp about the burdens of a well-ordered society. The innovator (pragmatist), on the other hand, will consider overturning an error-free decision that has disaffected a group that rejects the Comprehensive View.

Ackerman claims that he takes “no particular joy in this proliferation of labels.” P. 38. Perhaps so, but he clearly takes intellectual pleasure in building the models that make the labels necessary.

40. Ackerman provides no normative guidelines for the choice of judicial role, thereby suggesting that it is simply a matter of personal preference.

41. Pp. 11-12, 182, 283 n.46.

42. P. 41. The choice of Comprehensive View is critical. The View offers the Policymaker’s only clear guide to when government must pay for a taking; choice of language and of judicial role are secondary. If Ackerman’s purpose were to advise us how to distinguish meritorious claims, then his failure to devise “rules of recognition,” p. 41, for a Comprehensive View would be devastating. His aims, however, are much more limited. See p. 1295 supra.

43. P. 42. Ackerman uses the more general terms “efficiency” and “fairness” as apparent synonyms for the Utilitarian and Kantian Views. See, e.g., pp. 42, 77, 269 n.116.

44. Pp. 44-49.
property rights. Two costs will be of particular interest.\textsuperscript{45} The first is the cost of General Uncertainty: governmental activity might increase the risks of property ownership and thereby impose costs on risk-averse citizens. The second is the cost of Citizen Disaffection: the demoralization cost borne by View-adhering citizens who believe themselves the victims of one of the well-ordered society's occasional errors.\textsuperscript{46} Neither large uncertainty costs ($U$) nor large demoralization costs ($D$) will necessarily suggest to the restrained Utilitarian judge that compensation is due. He will go on to compare the sum $U + D$ with the process costs ($P$) involved in requiring compensation—the transaction costs of determining who deserves payment and in what amounts. If the costs of making compensation would be higher than the costs that compensation would avoid, then to require compensation would make society, on balance, worse off.\textsuperscript{47}

\textsuperscript{45} This argument builds on Michelman, \textit{supra} note 6. Ackerman acknowledges Michelman's contributions at p. 49.

\textsuperscript{46} Pp. 44-47. See p. 1300 \textit{supra}. The disaffected citizen's claim of error need not be well founded in order to interest the restrained Utilitarian judge, so long as it is sincerely believed. See note 39 \textit{supra}. But the more the judge considers a decision to have been sound in Utilitarian terms, the less likely he is to regard a claim of error as sincerely advanced. See pp. 47-48.

\textsuperscript{47} Pp. 45-49. The compensation payment itself is ignored in this formulation because that payment merely involves a redistribution from one sector of society to another. Redistribution between the government and landowners may, however, raise a question of fairness. Ackerman's Utilitarian Policymaker is oblivious to all (non-Utilitarian) fairness concerns, even though scholars Ackerman considers to be Utilitarians, see pp. 49-50, 209 note 22, would insist that the takings clause contains an inevitable fairness dimension. See Berger, \textit{A Policy Analysis of the Taking Problem}, 49 N.Y.U.L. Rev. 165, 167-69 (1974); Michelman, \textit{supra} note 6, at 1218-24; Sax, \textit{Takings and the Police Power, supra} note 6, at 57, 60, 64-65. All of this suggests to us the artificiality of the pure Utilitarian Policymaker.

Readers familiar with the Michelman article, \textit{supra} note 6, on which Ackerman builds will note a number of similarities and differences in the two analyses. Michelman addresses the issue whether the taking decision being litigated should simply be invalidated without regard to compensation. It should be if the benefits of the transferred rights in their new use ($B$) are less than the total costs—the sum of the value of the rights to pretransfer holders ($C$) plus the smaller of $P$ or $U + D$. Once the project passes this test, the compensation question turns, as for Ackerman, on whether $P$ is larger or smaller than $U + D$. Ackerman's analysis, as sketched thus far, treats only the issue of whether compensation is due. Later, however, he considers the invalidation issue and resolves it in the same fashion as Michelman. See p. 224 n.15. He also asserts, however, that in a certain sense compensation will always follow where $U + D$ is larger than $P$. If $B > C + P$, the project will go forth with compensation; if $B < C + P$, the project will be invalidated and the complaining party's property rights will be returned. Id. See note 55 \textit{infra}. But the two situations are different. If the project is invalidated, the complaining party gets back his rights together with any subjective value he may attach to them over and above fair market value (consumer surplus). If the project goes forth with compensation, on the other hand, he suffers the involuntary transfer and, since compensation is measured in terms of fair market value, he may lose consumer surplus. Either result, of course, might be quite demoralizing. These observations suggest some troubling points about the meaning of demoralization cost in the taking context. Presumably demoralization arises from having one's property taken \textit{without compensation}, not from suffering an involuntary transfer or a loss of con-
Taking

Having laid this restrained groundwork, Ackerman proceeds to consider what happens when an element of judicial innovation is introduced.\(^4^8\) We leave his discussion unattended not because it is uninteresting—hardly—but because it would fail to profit from our efforts to summarize. Perhaps it is enough simply to note that the labels “restraint” and “innovation” should not be taken, in Ackerman’s scheme, to mean “generally against” and “generally in favor of” compensation, respectively. The restrained Utilitarian judge—notwithstanding his inclination toward deference—might insist on compensation in many instances where the innovator would not.\(^4^9\)

D

The Kantian is a Scientific Policymaker and thus shares both the Utilitarian’s faith in a Scientific language\(^5^0\) and his commitment to a Comprehensive View. The major difference is that the Kantian View insists that individuals have rights not to be sacrificed to Utility; people are not to be exploited as means to some grand end.\(^5^1\)

sumer surplus when compensation is paid. Otherwise, the concept says nothing about whether compensation is due. But the demoralization costs of an involuntary transfer or loss of consumer surplus raise the very real possibility that a project approved—even on the condition that compensation be paid—because it will increase social satisfaction will in fact do just the opposite. This possibility suggests to us that the Michelman-Ackerman analysis of demoralization cost is incomplete and that the measure of compensation is more important than their inattention to it implies.


49. This much is clear from Ackerman’s discussion, but other matters are not. Tastes as to judicial role might reflect a number of combinations of restrained and innovative elements. P. 204 n.8; see notes 39 & 40 supra. It is not clear how one predicts the behavior of a judge whose tastes as to one element—say he is an activist—incline him to require compensation while his tastes as to other elements—say he is a reformist pragmatist—incline him to deny it. This ambiguity is especially troubling given Ackerman’s belief “that the weight of constitutional opinion on judicial role has its center of gravity at neither of the polar extremes” (pure restraint nor pure innovation). P. 44. Despite such problems, the discussion of judicial role stands as a rich and provocative contribution.

50. Ackerman assumes that Kantians and Utilitarians share faith in the same Scientific language. Although we agree that Utilitarians generally manipulate the bundle-of-rights language he attributes to them, it is not clear that Kantians do. The Kantian concern with exploitation might attract them to the notion that property refers to a relationship between a person and his things. See, e.g., R. Nozick, Anarchy, State, and Utopia 57-58 (1974) (notion of boundary crossings); Kohr, supra note 29, at 49. Our skepticism is further aroused when we note that Bentham himself used something very much like person-and-his-things language. See 1 J. Bentham, supra note 29, at 137-38.

51. Ackerman does not claim to apply the details of Kant’s philosophy; rather, Kant’s name is chosen as a “symbol” of the fundamental non-Utilitarian principle of respect for people as “ends in themselves.” Pp. 71-72. Ackerman’s Kantian View is largely inventive; we know of no compensation commentary that adopts what Ackerman calls the Kantian perspective. Michelman did discuss fairness, but according to Ackerman that discussion was Rawlsian, not Kantian, extended Rawls too drastically, and “has turned out to be a dead-end.” P. 227 n.33.

1303
As with the Utilitarian, Ackerman begins his account of the Kantian View by considering the restrained judge.\textsuperscript{52} The Kantian judge is not satisfied simply to learn that some governmental decision has increased net utility by transferring rights from one group to another whose members value them more; the first group, after all, has been exploited. If the judge believes, however, that the net gains from the transfer exceed the process costs of fully compensating the first group, then by requiring compensation he can avoid the exploitation that would otherwise result. This leaves group two better off, and group one no worse off, than before the transfer.\textsuperscript{53} No one has been made the means to anyone else's end.\textsuperscript{54} If, on the other hand, the judge believes that process costs exceed net gains, he faces a quandary. If he requires compensation, group two will be worse off than before the transfer, but if he decides not to compensate group one, its members will be worse off. This is a Kantian dilemma, for it appears that the judge must decide who is to be the means to whose end. Ackerman argues that in this situation the restrained Kantian will defer to the other branches of government and permit the transfer without compensation. In contrast, the Utilitarian would compare $P$, $U$, and $D$, with compensation depending on the numbers.\textsuperscript{55}

\textsuperscript{52} Pp. 72-76. And as with the Utilitarian, he then goes on to consider what happens when a taste for innovation is introduced. Pp. 77-85.

\textsuperscript{53} Ackerman's analysis leads him to a rather ironic tie between "Kantian jurisprudence" and the economic concept of Pareto-superiority (denoting transfers that make someone better off and no one worse off). See p. 222 n.11. Observe, however, that taxpayers probably will be footing the compensation bill. If taxpayers in general are not the beneficiaries of the property rights transfer, then they will have been exploited for the sake of groups one and two. The idea of Kantian exploitation of the general taxpaying public seems somewhat bizarre, however, and calls the whole notion of exploitation into question. Ackerman appears to be aware of some dimensions of the problem. See p. 222 n.12.

\textsuperscript{54} Compare the Kantian and Utilitarian approaches. The restrained Kantian will require compensation whenever the benefits of a project ($B$) less its costs ($C$) are larger than $P$. See note 47 supra. The Utilitarian will do so only if, in addition, $P$ is smaller than $U + D$, for if it is larger, there is more utility in not compensating. A Utilitarian judge will be inclined to require compensation where $P$ is very low, whereas the Kantian will tend to compensate so long as $P$ is not terribly high. P. 74. The Utilitarian's inclination will result in some exploitation; the Kantian's will let some utility escape.

\textsuperscript{55} The Kantian, then, will sometimes require compensation where the Utilitarian will not, and vice versa. The Kantian, Ackerman asserts, will insist on compensation only if he believes that $B - C > P$, see note 54 supra; the Utilitarian will do so whenever $U + D > P$, although the Utilitarian's "compensation" will be by invalidation of the transfer in those situations in which $P > B - C$, see note 47 supra. The same will hold where $P > U + D > B - C$.

Ackerman's conclusions here seem incorrect in two respects: (1) in concluding that a restrained Kantian will never require compensation where $P > B - C$; and (2) in concluding that in such cases there is a dilemma with no unique Kantian solution. See pp. 75-76. Simply assume, as does Ackerman, see note 47 supra, that invalidation is a kind of compensation because it returns rights to those who held them prior to transfer. If $P > B - C$
Taking

Whatever the differences between them, Scientific Kantianism and Scientific Utilitarianism stand together in their rejection of the mode of analysis revealed in conventional taking doctrine. Indeed, any plausible Policymaking approach finds little more than nonsense in the conventional treatment. Is the conventional mode senseless, or merely different—with its own coherence? Ackerman believes the latter, for reasons that should be clear from a brief look at that master of convention, the Ordinary Observer.

IV

The Ordinary Observer thinks about law the way ordinary people do; since regular folks do not reflect by some technical means upon the larger relationships between the legal system and one or another View, neither will he. Quite to the contrary, the Ordinary Observer has an affirmative commitment “to the notion that law should support dominant social expectations as these are expressed in ordinary language.”

A

Despite differences among the ways in which they speak, Ackerman believes one can abstract “Uniformities” from the varying talk of regular, well-socialized people. In “Ordinary property talk,” a thing is a person’s “property” when the “owner” can, without disapproval or sanction, use the thing in many more ways than can other people, and when other people need some compelling reason (or the owner’s per-
simply because \( C > B \) (rights, that is, have been transferred to a group that values them less than the original holders), then the Kantian should “compensate” by invalidating the transfer, which would leave no one worse off than prior to the transfer (Ackerman’s point of reference in all his examples). Thus there will be “compensation” even though \( P \) (which may be zero) > \( B - C \), and the “compensation” (by invalidation) provides a unique Kantian solution to Ackerman’s Kantian dilemma.

To summarize Ackerman’s observations and our additions, a restrained Utilitarian will compensate where \( U + D > P \); he will invalidate where \( U + D > B - C \), or where \( P > U + D > B - C \), or where \( C > B \). A restrained Kantian will compensate where \( B - C > P \); he will, presumably, invalidate where \( C > B \), and thus where \( P > B - C \). Note that if our analysis is correct, the restrained Kantian would never permit a project to go forth without compensation! This suggests to us that Ackerman’s analysis of Kantian exploitation needs further elaboration. See, in addition, note 53 supra.

56. P. 94. See pp. 1296-98 supra.
57. See pp. 97-100. The regular, well-socialized people happen to be well-socialized members of the middle class. Thus there is an assumption that society’s dominant expectations are middle class, a proposition that cannot be tested without settling on the criteria by which to recognize dominance. Ackerman chooses to “tiptoe around” this “master question.” P. 96. Recall the similar treatment of Comprehensive View, discussed at p. 1301 supra.
mission) to use the owner’s thing without disapproval or sanction. A well-socialized owner recognizes, however, that he cannot do just anything (something very harmful to others, for example) with his property; moreover, in exceptional cases (an emergency, for example) other people might be free to use his property even though it is still his and not theirs.

Given this conception, we can picture how the Ordinary Observer sees the taking problem. A person has some thing regarded by all as his—it is “property” that he “owns.” Then the government either destroys or reduces the value of the property or transfers it to itself or someone else, thereby changing the relationship between the person and his thing. The erstwhile owner claims in court that compensation is due. The Ordinary Observing judge will consider the worth of that claim in the following way: is it fair to say that the government has, in the circumstances, taken the owner’s property? If the answer is “no,” then there has been no compensable taking. An affirmative answer, however, only makes a prima facie case for the claimant, since well-socialized owners recognize that they cannot use their property in ways unduly harmful to others. If the government has merely prevented the claimant from using his thing in an unduly harmful way—from creating a nuisance, for example—then denying compensation would hardly be improper.

B

The Observer, like the Policymaker, will acknowledge that he is not to decide cases on the basis of personal predilection. The difference is that the Observer’s objective is legal rules that serve dominant expectations, while the Policymaker wants rules that serve the prevailing Comprehensive View. Ordinary Observing will seem to the Scientific Policymaker an illegitimate effort to protect the status quo without regard to its “larger normative sense.” Scientific Policymaking will suggest to the Ordinary Observer an unjustified fascination with abstract principles unrelated “to the existing structure of social life.”

Ackerman goes on to sketch briefly the Ordinary variants of judicial restraint and innovation. To get the sense of his analysis one need only refer to the treatment of these points in the Scientific Policymaking

58. P. 101. We take “fair” here to mean “proper” as opposed to “just.”
59. P. 102.
60. Pp. 105-06. Of course, if a single Comprehensive View is in fact so entrenched that it dictates dominant expectations, the Observer and the Policymaker will, but for differences in language, apply the same rules. See note 19 supra.
Taking context, and substitute "dominant expectations" wherever "Comprehensive View" appears. Ackerman himself feels it unnecessary to trace how variations in judicial role would change the shape of doctrine, and we are happy to mimic him in this regard. Suffice it to say that present taking doctrine reflects the product of Ordinary Observing judges who are generally restrained.

C

Legal scholars have long been interested in "explaining" or "rationalizing" lines of cases, in demonstrating the larger sense that underlies a surface of doctrinal chaos. Thus far Ackerman hardly has indulged the old tradition: Scientific Policymaking simply does not characterize present taking doctrine—however much, perhaps, it should. Ordinary Observing, however, is another matter. Using it as an organizing concept, Ackerman can rationalize present case law.

Ackerman's illumination of conventional taking doctrine is rich and persuasive. It represents in our judgment the most successful and convincing account to date of the fundamental sense—that is, the coherence and consistency—of the apparently senseless. This hardly means that Ordinary Observing so neatly organizes all the cases that the proper resolution of every one stands out clearly. Quite to the contrary, "hard" cases remain precisely because the methodology of Ordinary Observing—as opposed to that of Scientific Policymaking—lacks sufficient power to resolve them. It is a point on the side of Ordinary Observing as a legal reality, however, that its hard cases are in fact those of present law.

The analysis of Ordinary Observing relies on a distinction between "social property" and "legal property." Social property refers to those things well-socialized people recognize as the owner's property; legal property means those things that an owner can claim as his only on

61. See pp. 1300-01 & note 39 supra.
62. That is, these judges are principled (everyone's expectations are assumed to conform to the dominant norm), conservative (the existing distribution of property rights is assumed to be consistent with dominant expectations), and generally deferential (the other branches are assumed to understand dominant expectations at least as well as courts do). Cf. note 39 supra (judicial role alternatives for Policymakers). At least one of the judicial role alternatives—reformism—seems incoherent in the Observer setting. See p. 234 n.18.
63. See, e.g., pp. 85-87. But see Michelman, supra note 6, at 1224-45 (conventional doctrine reflects much of what Ackerman would call Scientific Policymaking). Ackerman notes his disagreement with Michelman's observations at p. 69.
64. This is not to say that Ackerman prefers the Ordinary Observing approach. See p. 113. He does succeed, however, in showing that conventional doctrine has its own rhyme and reason; his rationalization works.
the basis of legal advice. Since the Ordinary Observer’s concern is to support common understandings and practices, social property will receive more solicitude than legal property.\textsuperscript{66}

Regarding social property, Ackerman can demonstrate that application of Ordinary Observing concepts to a variety of governmental interferences with property ownership leads to conclusions that match those actually reached by the majority of American courts. Thus, governmental action that literally takes an owner’s property and transfers it to another or destroys it will result in compensation, whereas governmental action that simply limits the use (and thus the value) of the property generally will not—even though the monetary loss to the owner is the same in each case. In the first instance the owner’s thing is no longer his in any Ordinary understanding; whereas in the second it quite clearly is. Both of the foregoing cases are easy for an Ordinary Observer, as they usually are for conventional judges.\textsuperscript{67} They might or might not be easy for a Scientific Policymaker. We can say with confidence, though, that a Scientific Policymaker would approach the two cases in a manner very unlike that of the Ordinary Observer. A Policymaker would tend to treat the two cases in the same way, while the Observer will treat each in a different way.\textsuperscript{68}

Ackerman’s analysis of Ordinary Observing rationalizes very neatly the line of cases denying compensation when the government is merely

\textsuperscript{66} Pp. 116-18. The distinction between social and legal property must be a dynamic one. Once a series of professional opinions and judicial holdings becomes ingrained in dominant social practices, property previously legal becomes social. See p. 257 n.15. Some of the things Ackerman regards as legal property might in fact deserve the status of social property. If they do, then the Ordinary Observing rationalization of present taking cases becomes to that extent less convincing. We do not have the data to judge just how sophisticated present Ordinary understandings are.

\textsuperscript{67} Pp. 124-26. Suppose, however, that social property is neither taken away literally nor utterly destroyed, but that governmental action has rendered it virtually useless. This poses a very hard case for the Observer. The owner still has his thing, but to say this is really just a “bad joke,” since the owner cannot in any substantial sense use what is “his.” See pp. 136-45. Here judicial role becomes important: a restrained (deferential) judge, see note 62 supra, for example, will be impressed that no literal taking has occurred, and will be mindful that other governmental actors have denied the owner’s compensation claim; an innovator (activist) will look closely for subtle clues about what dominant expectations might say about the case. If the common expectation is that owners can use their things, and this owner cannot, it is as though his property has been taken or destroyed. The activist might look not to how much the property’s market value has declined, but to how much it is still worth in absolute terms. For if it is still worth quite a bit in absolute terms, then it may still be meaningful to say that the owner has a thing of some advantage to him. In this way Ackerman makes sense of cases that deny compensation where the value of property is reduced by $800 million (from $100 to $20 million), yet grant it where the reduction is $80 (from $100 to $20), even though the first loss is magnitudes larger and the percentage diminution in the two cases the same. See pp. 141-45. Needless to say, a Scientific Policymaker would find this very odd indeed.

\textsuperscript{68} See pp. 125-26.
Taking controlling "nuisances." It also makes clear why certain hard cases—such as those involving behavior that is perfectly well socialized at one time but less so later—are difficult. The classic example, of course, is the brickworks established in a rural setting but later surrounded by residential development. The difficulty arises because denying compensation in essence asks an owner to foresee more than any ordinary person would, whereas granting it may appear to condone unduly harmful conduct.

Ackerman anticipates another class of hard cases arising with regard to conduct that is unduly harmful, not to other people, but to the environment. He finds it revealing, given old patterns of socialization, that efforts to defend environmental regulations have typically relied on the human interests at stake. With the new emphasis on the need to protect the environment for its own sake, however, he ventures the opinion that Ordinary Observing judges may come more and more to accept the protection of nature as part of the dominant social practices. Or they may, on the other hand, find it so difficult to reach any judgment about dominant practices in this context that they will feel forced to adopt a Policymaking approach to compensation issues raised by environmental regulation.

This brings us to a final point. In suggesting that environmental problems may lead Ordinary Observers to pursue Scientific Policymaking, Ackerman notes that "if there is a Scientific revolution in the making, it is only to be expected that the first signs should manifest themselves . . . where Ordinary conceptions of justification are most in flux." The remark applies as well to the Ordinary Observer's ability to deal with problems of legal property. Unlike the social property we have thus far discussed, finds its status in professional opinion rather than social practices. It has to do with ambiguous conceptions of air rights and subsurface rights as opposed to surface rights, with present and future interests in estates as opposed to the good old fee simple. Legal property, in short, is defined by tech-

69. See pp. 150-55.
70. See pp. 155-56.
71. Thus Ackerman can note the irony that "a movement that seeks to restore Nature to its proper place may well serve as one of the catalyzing events that inaugurates the triumph of Artifice in legal thought." P. 156.

Ackerman raises in several places the possibility of an eclectic approach whereby the Ordinary Observer resorts to Scientific Policymaking, but only after the Observer concludes that his usual mode of analysis yields no coherent result. See, e.g., pp. 110-12, 155-56, 163, 267 n.105. Such an approach could result in invalidation of a law on Scientific Policymaking grounds. See note 47 supra. He does not discuss when, if ever, a pure Ordinary Observer would invalidate.
72. P. 156.
73. See pp. 118-23, 156-67.
The legal culture is suffering from a “prevailing schizophrenia.” There is a “subterranean conflict” between Ordinary Observing and Scientific Policymaking as modes of legal thought—one that “expresses itself on the surface of professional life by the common perception that takings law is incoherent, its principles altogether mysterious.” The conflict is one of the “master issues” that places the law at a dramatic “moment

74. P. 166.
75. He might approach legal property problems as a Scientific Policymaker, see note 71 supra, or he might indulge the fiction that legal property is social property. Either involves an abandonment of the Ordinary Observer’s methods. P. 163.
76. See pp. 166-67.
77. Our description is, of course, not complete. Ackerman’s own effort to summarize some of the high points of his book suggests that even he cannot do it full justice in a brief span. See Ackerman, The Jurisprudence of Just Compensation, 7 ENV'T’L L. 509 (1977).
78. P. 175; see p. 168.
79. P. 168.
80. P. 175.

1310
Taking

of reappraisal—of rediscovery and creation.”81 An understanding of the conflict provides us with “the key”82 to the taking problem’s mysteries, and “almost everything depends”83 on how the conflict is resolved.84

These claims represent Ackerman’s main conclusions; their logical foundation is his structure of basic concepts—Ordinary, Scientific, Observing, and Policymaking. The Utilitarian, Kantian, and judicial role concepts are essentially superstructure and have little to do with the central conflict Ackerman depicts. As we saw in tracing its application to the taking problem, the structure (and superstructure) of concepts is imposing and valuable: it orders diverse ideas and provokes numerous insights. In our judgment, however, it does not support Ackerman’s main claims, which begin to appear excessive as soon as one examines the concepts beneath them with a skeptical eye. The concepts, on close scrutiny, become ambiguous and problematic in ways suggesting that Ordinary Observing and Scientific Policymaking are not nearly so irreconcilable as Ackerman asserts. Ironically, however, the contributions of his book remain in our opinion largely intact.

A

Ackerman’s depiction of Ordinary versus Scientific is a near mirror image of a larger conflict, one that has existed among philosophers since the 1930s.85 One philosophical school (Ackerman would call it the Scientific) is associated with early Wittgenstein and the logical empiricists. It urged philosophers to adopt “an ideal, artificial language in which concepts are precisely defined and propositions unambiguously” expressed.86 The competing school, developed around the later Wittgenstein and the work of such philosophers as Moore and Austin, has insisted that “ordinary language” should be the basic subject of philosophical inquiry. This focus has been justified in various ways. Some philosophers maintain that a careful parsing of common talk can

81. P. 189.
82. P. 5.
83. P. 4.
84. Professor Epstein reads Ackerman as holding that Ordinary Observing is at a “dead end” and that Scientific Policymaking offers “salvation.” Epstein, Book Review, 30 STAN. L. REV. 635, 639-40 (1978). We take Ackerman’s discussion at face value, as quite deliberately leaving the choice between the two an open question. Ackerman does, though, occasionally intimate his own personal preference for Policymaking. See p. 113.
85. The historical development of the conflict is nicely described in Chappell, Introduction to Ordinary Language 1 (V. Chappell ed. 1964). This and some of the other works to which we refer below are cited by Ackerman. No doubt he is aware of the philosophical debate that we discuss, but we do not recall that he describes it.
dissolve a number of traditional philosophical problems by revealing that they merely result from confusion in the uses of language. Others advance a more affirmative case and argue that ordinary language should be considered because of the fundamental wisdom it is believed to contain. "[O]rdinary language," as Austin put it, "embodies . . . the inherited experience and acumen of many generations of men." 88

Ackerman's Scientific and Ordinary alternatives can be seen, then, as a creative effort to import a longstanding philosophical debate into legal and constitutional studies. 89 Philosophers are likely to regard it not merely as a rewarding application of the basic philosophical concepts but also as a significant elaboration of the concepts themselves. Thus, Ackerman's chapter on "Layman's Things"—on the way common people talk and think about their "property" and its being "taken"— could become, as has Austin's famous essay on "excuses," one of the little classics of the Ordinary genre. 90 Similarly, Ackerman's discussion of the complex relationship between diversity and uniformity in the patterns of everyday talk may involve an advance in the philosophical literature. 91

In other ways, however, the discussion of Ordinary versus Scientific language is not so satisfying. It is not entirely clear why a legal analyst should even consider resorting to Ordinary language. Ackerman does not take the negative position that fundamental constitutional questions can be dissolved by careful study of everyday talk; such a claim would not be credible. If, then, Ackerman is relying on the affirmative case for Ordinary language, it is important to ask just how sophisticated and discriminating that language is. Is it, for example, sufficiently rich and subtle to capture mankind's "inherited experience"? Here, of course, there is enormous room for disagreement. 92 Just who are the "ordinary persons" who utter "ordinary language"? At times they are the "natives," 93 in which case the brief for Ordinary language involves

87. See, e.g., id. at 75-76.
89. For a briefer attempt by one of us to use this philosophical distinction, see Schwartz, The Logic of Home Rule and the Private Law Exception, 20 U.C.L.A. L. Rev. 671, 673-74 (1973).

That a choice exists between common and "scientific" legal language was suggested in the early 19th century by Savigny, as he reflected on the codification movement. See F. Savigny, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 27-30 (A. Hayward trans. London 1831).
90. We refer to Ackerman's Chapter 6 and to J. Austin, supra note 88.
91. See pp. 97-99.
92. Is the talk we hear the incisive commentary of the man on the street, see, e.g., S. Terset, WORKING (1972), or is it the confused "gibberish," see p. 170, of the masses?
Taking an appeal to rough folk wisdom. At other times Ordinary people are the "(enlightened) 'middle-classes,'" who presumably speak a more respectable tongue. Without further elaboration of the fundamental sense of common talk, the suggestion that Ordinary language can provide the proper resolution of legal problems is appealing but incomplete. To be sure, Ackerman's Ordinary analysis makes sense of conventional taking doctrine; we congratulated him for that very interesting achievement. That achievement alone, however, does not establish that Ordinary language (or Ordinary doctrine) is appropriate or preferable as an approach to lawmaking.

The merits of the Ordinary versus Scientific debate are taken up by Ackerman, though not at great length, in the final chapter of his book. He points out that the Scientific approach is unfortunate insofar as it deprives citizens of the opportunity to understand the legal doctrines that affect their lives. That the accessibility of law is a major value in any democratic society is an important point, though not, of course, an original one. The value of accessibility, however, clearly is not absolute; the law must sometimes become technical to reach appropriate results. Moreover, it is doubtful that a reasonable Ordinary judge would be as unremitting as Ackerman's discussion suggests. Consider, for example, Austin's position. "Certainly ... ordinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it is the first word." Austin's willingness to permit the Scientific supplementation and even supersession of original Ordinary findings seems to us an attitude that any temperate Ordinary analyst would share. And this goes a long way toward reducing the all-out conflict between the Ordinary and Scientific approaches that Ackerman depicts.

94. P. 230 n.8.
95. See pp. 168-89.
96. See pp. 176-77.
98. J. Austin, supra note 88, at 133 (emphasis in original) (footnote omitted), quoted at p. 285 n.50.
99. Contrast Ackerman's Ordinary Observing judge, who would tolerate the Scientific Policymaking approach only when Ordinary Observing yielded intractably ambiguous or incoherent results. See pp. 110-12.
100. Michelman's scholarship, see F. Michelman & T. Sandalow, Government in Urban Areas xiii (1970); Michelman, supra note 6, embodies an Austin-like position. Starting with judicial opinions as data about how real judges react to legal problems, he meditates upon and amplifies the case law in a highly theoretical (and Scientific) way.

There will be Scientists, of course, who will reject the Austrian accommodation for the priority it places on conventional thinking and the possibility that it will stifle creativity. See, e.g., E. Gellner, Words and Things 195-96, 263-65 (1959). Without more knowledge of the adequacy of the stock of existing Ordinary ideas and the chances of profundity in genuinely new ideas, this criticism is difficult to evaluate but impossible to ignore.
B

Ackerman's Policymaker and Observer categories are also problematic. The Policymaker turns out to be a puzzling hybrid of normative and positive. He clearly has a normative dimension—as the very title “Policymaker” suggests. Not only does he approve of the procedure of explaining legal rules in terms of a Comprehensive View, but he finds such legal rules “proper”\textsuperscript{101} and his Comprehensive View evidently deserving of “worship.”\textsuperscript{102} Thus, the friend of the downtrodden who views the legal system as an elaborate, systematic expression of capitalist values\textsuperscript{103} apparently does not rank as a Policymaker, despite his professed recognition of a pervasive Comprehensive View. Yet since this analyst is plainly not an Ordinary Observer, Ackerman's categories do not clarify his status.

Despite this normative element, the Policymaker is also strongly positive: the Comprehensive View he takes into account is supposed to be the one he finds prevailing out there in the legal system, rather than the one of which he may personally approve. Consider, then, the analyst who has made up his mind about a proper Comprehensive View (say he is a socialist or a monarchist), but has no clear idea as to what the legal system's governing principles in fact are, except that they are not his. This fellow cannot be a Policymaker, but he is also very unlikely to proceed as an Observer. As important as his type is, for him too there is no place in Ackerman's universe.\textsuperscript{104} Or consider those economists who claim that all of the common law can be understood in terms of economic efficiency, but who also suggest that the legislative process is driven by a different engine.\textsuperscript{105} Since the legislature is clearly an integral part of the legal system,\textsuperscript{106} such economists cannot be complete Policymakers, although Ackerman appears to consider them so.\textsuperscript{107}

As a positive analyst, the Policymaker must be able to “impute”\textsuperscript{108} a

\textsuperscript{101} See, e.g., M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).
\textsuperscript{102} Id.
\textsuperscript{103} See, e.g., R. Posner, supra note 26, at 404-05.
\textsuperscript{104} See p. 11.
\textsuperscript{105} Id., e.g., id.
\textsuperscript{106} Id.

1314
Taking

Comprehensive View to the entire legal system, according to the proper "rule of recognition." Ackerman's failure to set forth the rule or to explain in any way the process of imputation prevents us from fully understanding the positive dimension of the Policymaker's role.

The stringent requirements of a unitary, pervasive, and obligatory Comprehensive View threaten the coherence of the Policymaker category. Early in his book, Ackerman considers the possibility of "Ordinary Policymaking" and rejects it. "[N]o modern society has institutionalized any single Comprehensive View"; instead, societies contain coexisting "institutional clusters," each of them organized around its own special "principles." But if this observation eliminates the Ordinary Policymaker, what room does it leave for his Scientific counterpart? Ackerman tries to make space by distinguishing between the "social practices" that concern the Ordinary Observer and the "legal system" that is the Scientific Policymaker's concern. He does not tell us how he draws the line, nor why the legal system should not likewise contain diverse "institutional clusters." If it does, any perceptive analyst must conclude that there are several "Comprehensive Views" prevailing in society. He is then at best a "quasi-Policymaker"; the likelihood of such a modified status dilutes the strength of the Policymaker category.

Ackerman's strong statement of the Policymaker's position thus strikes us as difficult to accept. His "Observer" category is likewise not free of problems. The Observer, remember, regards the basic function of the legal system as the fulfillment of expectations generated by dominant social institutions. Ackerman appears to assume that these institutions and expectations are exogenous to the law. But this basic assumption is obviously incorrect. In any number of ways the law creates or at least contributes to the social institutions that generate expectations. The law influences emerging social practices and values at the same time it reflects existing ones. Once this is recognized, the pure Observer's position becomes somewhat untenable. So long as the

110. See pp. 19-20.
111. P. 13.
114. Consider universities, or labor unions, or marriage. In addition, Ackerman apparently assumes that all Ordinary expectations are based on "dominant institutional practice." P. 15. Others would say that expectations are also derived from shared community values that are not necessarily the products of any institution. And here again, the law plays a fostering role. See Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 9 (1977) (citing E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933)).

1315
law is at least partly responsible for common expectations, it follows
that even the expectation-oriented analyst cannot escape the question
of what the law should be. If our analyst does attempt escape, the effort
will serve only to reinforce the status quo, whatever it may be.115 Thus
Ackerman's pure Observer reflects a severely conservative philosophy
that few in the American tradition would be willing to endorse.116

If the pure Observer's position is not perfectly viable, neither is it
altogether independent of the position that a Policymaker would likely
take. There are few judges or legal scholars, no matter how theoretical
their interests, who would dispute the idea that responding to valid
expectations is one of the important obligations of a legal system.
Ackerman regards this proposition as "almost self-evident" in the
Ordinary Observing context,117 but it is not less so in any other. Con-
sider, for example, Michelman's concept of "demoralization costs,"
upon which Ackerman draws in his development of Utilitarian Policy-
making.118 According to Michelman, if the failure to afford compensa-
tion "demoralizes" a property owner by undermining his "expecta-
tions," there results a disutility that any welfare-utilitarian calculus
should take into account. This reasoning effectively brings social ex-
pectations into the Policymaking picture.119

C

Our doubts about the credibility of Ackerman's typology are en-
ha  on its application to major legal scholars; after all,
a working test of a system of classification is whether it is effective or
illuminating as a classifier. Ackerman does not identify a single prom-
inent legal scholar who is clearly an Ordinary Observer, and we can

ordinary language philosophy for implicit endorsement of status quo). See Ackerman's
mention of this problem at pp. 105, 179.
116. See pp. 105, 178-81. Ackerman's chapter on "Layman's Things" is quite successful
in explaining existing taking doctrine. Does our noting the conservative partiality of the
Observer approach suggest then that existing doctrine is suspect? Possibly so; this is a
concern that Ackerman recognizes. P. 105. Ackerman also suggests that the takings clause
bears an inherent conservative bias. Pp. 60, 114. If so, then the match-up of the takings
clause and the Observer perspective may not be inappropriate after all.
117. P. 179.
118. See p. 1302 supra.
119. Moreover, taking account of the inherent unreliability and unverifiability of
demoralization claims, Michelman concludes that only those that are "justified" in the
sense that they would be asserted by "ordinarily cognizant and sensitive members of
society" merit attention. Michelman, supra note 6, at 1213, 1215-16. This refinement of
the Policymaker's demoralization cost concept brings it even closer to the central concerns
of the Ordinary Observer.
Taking

think of none.120 As for Scientific Policymakers, Ackerman sees Professors Posner, Dworkin, McDougal, and Rawls all as members of this class; disagreements among them are merely “within the family.”121 Yet apart from their ties to strong universities, we doubt that they or others would recognize this family status. Our colleague Professor Fletcher is referred to both as a Scientific Kantian and as an anti-Scientific traditionalist.122 This confusion is not, we think, accidental. We agree that Fletcher relies on the moral idea that Ackerman describes as Kantian. That idea is, however, rather simple in its basic outline; it does not require ambitious Scientific language for its expression. Thus scholars like Fletcher can be Policymaking Kantians and yet remain at least somewhat Ordinary in their language selection.

It appears, then, that Ackerman’s basic concepts, taken as pure types, do not really hold up. We saw that Ordinary language advocates are willing to entertain Scientific proposals, while Scientists are not entirely hostile to certain Ordinary values. Observing alone cannot be a sufficient approach to legal problems; happily, however, the Policymaker (confusing as his position can be) seems hospitable to some of the Observer’s concerns. If these remarks are accurate, then the striking conflict on which Ackerman insists does not really exist.123 The two modes of Ordinary Observing and Scientific Policymaking can instead be recognized simply as different but not mutually exclusive styles of legal analysis.124 As such they are quite capable of being blended by lawyers and judges in any number of stable and satisfactory ways. In the real legal world, scholars and judges are already choosing their blends every day, not self-consciously and without schizophrenia or other disaster.125

120. Ackerman refers to Professor Epstein not as an Ordinary Observer but rather as a traditional anti-Scientist. Pp. 170, 275 n.14. Since Epstein’s early articles rely on the power of simple statements like “A caused B harm,” Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 166 (1973), he can perhaps be regarded as Ordinary. But both the implications he draws from such statements and the processes by which he draws them do not seem at all like Observing. See, e.g., id. at 174-89. In his provocative review of the Ackerman book, Epstein comes close to supporting Ordinary Observing—but only on condition that the Observer be subjected to a considerable education, one with an evident Kantian orientation. See Epstein, supra note 84, at 646-47, 656.

121. P. 15.


123. Note that Michelman, a model of Ackerman’s Scientific Policymaker, is ultimately able to conclude that the seemingly Ordinary Observing case law does make sense after all—and in Scientific Policymaking terms. See note 63 supra.

124. Ackerman occasionally talks about judicial “eclecticism,” but the opportunities for an eclectic approach are considered to be very limited. See pp. 183-84, 267 n.105; note 71 supra.

125. Likewise, we suspect they are blending Utilitarian and fairness (or Kantian) concerns acceptably. Ackerman’s pure Utilitarian seems artificial, see note 47 supra, and his pure Kantian, taken far enough, tends to run aground. See notes 53 & 55 supra.
This is not to say, however, that Ackerman's efforts to clarify the different styles of legal analysis have not been worthwhile. Quite to the contrary, the understanding and amplification that he achieves represent contributions of the very first rank. There can be no question that a greater sensitivity to distinct styles will further legal expression and analysis.126 We should not, however, put ourselves in the position of having to choose one style over another.127 The resolution of most legal problems will call for a little Ordinary Observing and a little Scientific Policymaking, a bit of Utilitarianism and a bit of Kantianism.128

Despite our observations, Ackerman's book is a marked success in two rather ironic ways. First, in recent years a highly theoretical brand of legal scholarship has threatened to drive out or discredit not only traditional doctrinal analysis, but also normative efforts that rely on a commonsense approach rather than some elaborate conceptual framework. It is to Ackerman's great credit that his discussion of Ordinary Observing has revived the commonsense tradition—has, indeed, given it a new rigor and vitality. The irony is not that Ackerman may not have intended this; it is that he achieved it with such a formidable structure of concepts. The second irony is that, despite his failure in our view to carry his major claims, Ackerman has helped to demystify the taking problem. Equipped with his rich bag of insights, future analysts should be able to see light where before they saw only darkness.

126. But an excessive sensitivity can be disabling. As Ryle said in discussing the obsession of some philosophers with language studies, "[w]e run, as a rule, worse, not better, if we think a lot about our feet." Ryle, supra note 93, at 185.

127. Contra, p. 4: "My thesis, then, is this: 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 . . . ."

128. Ackerman admits of, and apparently endorses, a very limited sort of Kantian-Utilitarian eclecticism—one in which Utilitarianism is resorted to only when Kantianism fails to yield a clear result. See note 71 supra. For his brief discussion, see pp. 76, 85 & 225 nn.17-19.