

THE JURISPRUDENCE OF JUST COMPENSATION

BY

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Despite the complaints about the state's increasing regulation of our lives, I have no doubt that much good comes from all this activity: it cleans the water; it makes for decent homes; it provides a safer work place. The problem is that while a large number of people gain from the whirlwind, some people lose. And this fact provides us with the question: when will these losers be obliged to bear their injuries as best they can, and when will others be called upon to help them out and compensate them for their loss? This is a central question in the law of the activist state.

It should not be surprising that we have had great difficulty confronting the question, both as human beings and as lawyers. While the problem is hardly new, it has served as a central dilemma for a relatively brief period of time. It is, after all, only 40 years since the Old Court confronted the New Deal. And one of the things that this confrontation symbolized was the rejection of *laissez faire* as a fundamental principle of constitutional interpretation. *Laissez faire* was replaced with something else — the full legal acceptance of a mixed economy somewhere between Locke and Marx. Now this form of social organization is something to which we will only gradually accommodate ourselves. Indeed, it is not obvious whether there *is* anything between Locke and Marx. Nonetheless, while the answer is not obvious, at least the present generation is not scared of asking the question. We have lived long enough in the half light of public and private to recognize that it would be nice to make our way among the shadows. This general problem, which afflicts us in all confrontations with political life, is especially acute when the question of private property comes into focus, since it is a central symbol of the old order from which we have — to one degree or another — disassociated ourselves. While there is a general difficulty in trying to construct and impose limits upon the activist state, that difficulty is going to be most

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acute when we have to deal with a central symbol of the world that is past.

What we are talking about mostly is a confrontation with private property on the constitutional level: that part of the constitution that says cryptically, "nor shall private property be taken *** without just compensation." So far as the ordinary person is concerned, there are few things more important than his position in the economy. And it is the function of the "just compensation" clause to tell people when they have a right to protest about a substantial change in their economic environment. Not that they can say to the government: "You can't do that sort of thing; you can't regulate us at all," as they could under the pure laissez faire ideology. Instead, the clause invites a more modest, but nevertheless fundamental, claim, "Yes, I understand that what you're doing is in the public interest, but why should I be singled out to bear the financial burden of a measure that will benefit the general public?" In other words, "Pay me." It is this claim that is the subject of my latest book, *Private Property and the Constitution*.¹ I argued there that the present legal culture provides materials which enable the lawyer to construct two very different answers to the question raised by the just compensation clause. This is, of course, one answer too many for those who like their law easy. Yet the possibility of constructing two fundamentally different answers to the just compensation question should suggest to more thoughtful observers the existence of a deep ambiguity in our legal culture — a lack of coherence which may prevent lawyers from framing the compensation issue clearly — though society as a whole may be willing to confront it, debate it, even resolve it.

I want to explore the tensions in our legal culture by defining two forms of legal thought quite generally and then suggesting how these two different legal mentalities lead conscientious lawyers to interpret the grand abstractions of the takings clause in very different ways. I will define the two mentalities by asking two questions. The first one is: "What is the nature of legal language?" When lawyers talk, one can understand their talk in one of two ways. First, one can understand that a lawyer, when he talks as a lawyer, is talking the same language that he talks when he is just a human being, socialized in the good old U.S. of A.; he talks ordinary English about substantive problems. Now, if you think that (most

1. Yale University Press, 1977 [hereafter cited as *Private Property*].

people who aren't lawyers would never imagine that to be the case), but if you think that, I will call you an "ordinary" lawyer. In contrast, if you think that lawyers talk a specialized discourse whose principal components are defined clearly and distinctly vis-a-vis one another, I am going to call you a "scientist" and the first distinction I want to draw in this map of legal minds is that between an ordinary lawyer and a scientific lawyer.

Now I want to ask a second question: "What is the object of legal analysis; what is a good judge supposed to think about after all the argument is done in the dispute before him?" I want to posit two responses to this question as well. The first kind of judge tries to resolve his lawsuit in a way that best fulfills the legitimate expectations of a typical layman who finds himself in the instant dispute. Of course, it is no easy matter to determine what this "typical" layman expects; for now, though, I wish merely to emphasize one formal characteristic of these ordinary expectations. It is fair, I think, to say that the typical layman's expectations tend to be rather concrete; people have a rather particular notion of what a good father is, how one should behave on the subway, and so forth. These concrete expectations change over time, of course. But I shall ignore this dynamic characteristic in the present discussion. For present purposes, it will be enough to note that many judges think the concrete expectations of the typical layman are important in reaching decisions. I want to call such judges "observers" since they are committed to keeping track of social mores in the non-legal world outside their courtrooms and giving them central importance in adjudication. The contrast that I want to make here is with a judge I'm going to call a "policymaker." A policymaker doesn't ask directly what people expect in this concrete way. Instead, he imputes a set of very abstract objectives to the legal system — objectives like "efficiency" or something called "equity." After defining these abstract concepts carefully, he will then frame a legal rule which best fulfills the basic ideals he understands the legal system to serve. While concrete expectations may be taken into account by the policymaker, they are never the bedrock of the analysis. For it is always possible that these expectations are unjust or inefficient or otherwise inconsistent with the law's abstract ideals — in which case it is the concrete expectations, and not the abstract ideals, which must give way.

So we have these two different questions. What is the nature of legal language? What is the objective of legal analysis? And from the different answers they give to these two questions, we can

define two types² of lawyer: one group who are *ordinary observers*; the other, *scientific policymakers*.

Now let's ask how a scientific policymaker thinks about the takings question. It's simple, actually. By the time he gets out of Property I, every law student has learned to be slightly embarrassed by the straightforward claim of ownership: "This is my car." Such talk is primitive. Rather than indulging such naive simplicities, he has been taught to talk in a clearer and better way. Instead of thinking that property describes the relationship between Bruce Ackerman and his Cadillac, all lawyers (at least all who have gone through Property I and passed) know that property is a name for a relationship between people with respect to things. Each of us has various bundles of rights. I have a right to use my Cadillac in various ways; the public — that is, the rest of you — have a right to control the use of my Cadillac in lots of other ways. And likewise with Blackacre and various other things. So here I am with this bundle of rights. Let us say that one of the rights that I have in my bundle is the right to drive my Cadillac 65 miles per hour. This is how the "scientist" views my relationship to my car at Time One.

Then something happens which marks the beginning of trouble. The legislature meets and decides that Cadillacs should no longer go 65 miles per hour. Efficiency will be served if I only drive at 55 or 25. To translate into scientific terms, the legislature has just taken a right out of my bundle; as a result, the cash value of the bundle, my Cadillac, has diminished. And that's the taking problem. My bundle used to be worth \$5,000 when the speed limit was 65, but now that the legislature has reduced the speed limit to 25, my bundle is only worth \$3,000. Why should I bear the burden of this \$2,000 diminution in value? Other people who take the train or bus to work aren't as seriously affected by the change in the law. Why should I lose \$2,000?

This question is answered by looking to some highly abstract conception of efficiency or justice. That is the "policymaking" move, as I defined it. One can ask, for example,³ whether the

2. Actually, it is quite easy to generate, by suitable permutations, two additional legal types: one group who are scientific observers and another composed of ordinary policymakers. These types are discussed in *Private Property* at 15-20. They need not be considered, however, in this introductory survey.

3. A comprehensive discussion of the options open to American scientific policymakers is presented in *Private Property*, ch. 2-4.

General Utility will be served by requiring Bruce to take the \$2,000 loss or whether utility is maximized if this loss is shifted in part to taxpayers who take the train or bus. This is where the concept of "demoralization" that Professor Hagman talks about enters in.⁴ If people become so demoralized by the uncompensated taking that the costs of paying them off are less than the costs of letting them get demoralized, then utility will be maximized if we compensate. It is this kind of analysis which typically calls into play one of the most important intellectual developments in American law today — the movement called "Law and Economics" — in the hope of generating plausible answers to our scientifically defined questions.

The other approach, which I want to associate with the classic tradition of Anglo-American common law, is the approach of the ordinary observer. How does the ordinary observer think about the takings problem?

Well, instead of forgetting all our ordinary talk about "owning" things, this kind of lawyer tries to exploit the structure of ordinary discourse in an effort to untangle the compensation question. For him, the beginning of wisdom lies in recognizing that most Americans are able to deal with the property system in their everyday lives even though they have never taken the trouble to pass Property I.

Indeed, I have two children and I can tell you that one of my fundamental jobs as a parent is to teach them the meaning of, "No, it isn't yours; it's somebody else's." Now what does that mean? Everybody who has a mother knows what it means. What it means is this: If something is "my" thing, I can do a lot of things with it and you have to ask me before you can do the same things with it. Of course, there are some things that even I can't do with it; I can't do things that a good boy shouldn't do with it. For example, if I were tooling along on my bike and I kept savaging my neighbor's marigolds and they said, "Bruce, don't do it," and I continued doing it, saying, "It's my bike, isn't it?"; if I kept on doing it, they'd take my bike away from me. Now this is very

4. See his contribution to the present symposium, at page 519 of this volume. The concept of demoralization cost was introduced by Professor Frank Michelman in his seminal essay, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), and is refined further in *Private Property* at 43-49.

primitive, but let's take this simple insight and consider how it may be used to interpret even so majestic a document as the Constitution of the United States.

Let's begin by applying the ordinary observer's insight to the Arab oil scenario we have just viewed from the perspective of scientific policymaking. At Time One, I am permitted to drive my Cadillac at 65; then the speed limit is cut to 25. The ordinary observer will ask, "Well, does it still make sense for Bruce to say that *it's my car?*" The answer is "yes", as you all know. It is still my car; I still can do a lot more things with it than anybody else can do with it.

This fact provides the ordinary observer with all he needs to reach a decision. The ordinary argument is this:

(a) At Time One, Bruce could properly say, "That's my Cadillac over there."

(b) After the new speed limit is passed, Bruce can *still* say, "That's my Cadillac over there."

(c) Therefore, since it is still Bruce's Cadillac, nothing has been "taken" from him that requires compensation under the takings clause.

* * *

"Therefore"? What a move of breathtaking simplicity, even simple-mindedness. Yet it is such reasoning as this that, I want to claim, motivates the prevailing interpretation of the compensation clause. Thus I take it that all competent lawyers would have little trouble saying that, under prevailing law, the Constitution does not require Bruce to be compensated for the \$2000 loss he has suffered as a result of the speed limit statute. Nor is this result reached through some complicated form of policy reasoning; it is simply considered obvious that the speed limit does not effect a "taking" but is merely a noncompensable "regulation." My ordinary argument is intended to suggest the kind of legal culture in which such a result could be treated as the bedrock of juridical certainty.

Let me put my thesis in a more general form. On the one hand, I wish to argue that the prevailing categories of takings law can best be understood as if they were organized around a series of very primitive insights which are of very great importance to ordinary observers. On the other hand, I wish to argue that the fundamental

premises of ordinary observation have become suspect in our legal culture; that the academic commentary and judicial utterances lawyers take seriously are increasingly cast in scientific policymaking terms. It is this subterranean clash between two very different forms of legal thought that lies at the root of the current professional uncertainty about the meaning and purpose of the takings clause. The scientific policymaking critique has advanced sufficiently to cause sophisticated lawyers a great deal of embarrassment when they confront a body of law based on primitive claims to "ownership" over things; but the hold of the ordinary observer on the legal mind remains sufficiently powerful to check a full-scale reorganization of legal doctrine along scientific policymaking lines. As a consequence, if you tap any knowledgeable lawyer on the shoulder, he'll say takings law is a mess. And judges are almost proud in confessing that their compensation decisions are motivated by little else than a vague perception that they ought to draw a line "somewhere." In short, before we can make sense of the takings clause (and much else besides), we shall have to surface the subterranean conflict and decide whether we should interpret the constitutional text with the eyes of a scientific policymaker or with those of an ordinary observer.

Now, it should be plain that I cannot attempt to establish this thesis in the short space available; indeed, even if I had time and space enough, I fear I would encounter a rather unhappy publisher on my return to New Haven if I spread my book on these pages. So let me give you a sense of the thesis by ringing a few changes on my relationship to my Cadillac.⁵

Suppose that there are three possible policy responses to the Arab oil embargo. The first is to impose a nationwide 25 mile per hour speed limit. The second is to seize half the cars in the United States and ship them to Los Angeles for storage. The third is the compulsory garaging option — a law which says that, if any person has two cars, he has to keep one permanently in his garage.

Let's imagine Bruce Ackerman has two Cadillacs at Time One, before the law is changed. Each of these Cadillacs is worth \$5,000. As a result of the operation of these three statutory options, each of my \$5,000 cars changes in value. Under the compulsory garaging option, one Cadillac becomes worthless and the other

5. A comprehensive analysis of existing doctrine is attempted in chapter six of *Private Property*.

moves from \$5,000 to \$6,000, since more people want to buy scarce Cadillacs. Similarly, when one of my cars is shipped to Los Angeles, it becomes worthless to me while the other is worth \$6,000. In contrast, under the speed limit option, I still have both my cars, but because I can only muddle along at 25 miles an hour, the value of each is reduced by \$2,000. So, in each of the three options, I lose a total of \$4,000.

Now one remarkable fact about American law today is that these three options will each be treated differently if the citizen claims a "taking" has occurred and demands just compensation. Two of them present "easy cases." When the car is shipped to Los Angeles, that is a "taking"; the car goes away and I get \$5,000. I get \$5,000 because that is what the car was worth before the "taking" occurred. That means I end up with \$11,000, even though the whole bundle (both cars) was worth only \$10,000 before the seizure occurred. Despite this fact, however, the case would be decided with remarkably few of the visible signs of judicial agony that usually accompany the decision of "hard cases."

In contrast to the \$1,000 windfall I receive when they ship my car to Los Angeles, I will be forced to accept a \$4,000 loss if the state responds to the oil crisis by passing a 25 mile an hour speed limit. For, as we have already seen, this represents an easy case of "regulation" in contrast to "taking." Finally, the hard case arises under the compulsory garaging statute. Here is where the courts will agonize a good deal before they split half and half.⁶

The striking thing about the decision of these three simple cases is the way they correspond to the judgments that would be reached by my ideal ordinary observer. When they take my car and send it to Los Angeles, I can no longer say in ordinary conversation that it is "my" car. In contrast, when I'm driving 25 miles an hour in my Cadillac, it is still my Cadillac. That's why I get paid in the first case and not in the second. The third case, which is the hard case, is one in which it is something of a joke to say that the Cadillac is still "mine." I guess I could still use it as a free standing sculpture; or I could make it into a playhouse; but basically it's a pain in the neck, certainly not what I ordinarily have in mind when

6. Environmentalists of the ecological, rather than the energy, persuasion can substitute marshland for automobiles. For a collection of "hard cases" involving marshes that are quite analogous to the compulsory garaging hypothetical discussed in the text, see *Private Property* ch. 3, note 54.

I claim something as mine. You can see how this kind of case will cause difficulty for the courts, so long as ordinary observing reigns supreme.

In contrast, all three of these cases seem quite similar when viewed from a scientific policy point of view. I have a bundle of rights attached to these Cadillacs, and some of them are taken out. I lose \$4,000 in each case. Should I get paid? It is very surprising to the scientific policymaker that in one case the answer is certainly "yes" — courts order compensation with hardly an effort at rationalization; in another case, the answer is certainly "no," with reasoning little better than the slogan, "It's just a regulation, not a taking;" and in the third case, there are contortions. Moreover, these incongruities do not dissolve on further scientific scrutiny. Thus, in the compulsory garaging case and the shipping-to-Los Angeles case, the settlement costs involved in paying people off are almost identical, yet one case is easy to decide and the other is hard. For present purposes, however, I am not interested in deciding which cases should come out which way. Instead the important claim is that only judges who were ordinary observers could remain untroubled by the traditional pattern of decision.

Yet as soon as the over-all pattern is raised to the forefront of attention, it does seem rather a crazy quilt, doesn't it? And it is this sense of embarrassment which both feeds, and is fed by, the scientific policymaking impulse. Instead of suppressing our embarrassment and muddling through, however, I think it is important to face the source of the difficulty squarely — for at stake is the task of defining fundamental limitations upon the activities of the activist state. It should be emphasized, moreover, that I am not interested in limiting the activist state as the first step in a larger war for its dismantlement. My intention rather is to generate reasonable limitations so that people can live with this Leviathan which exists for very powerful reasons.

This is a difficult job, and the legal profession has an important role to play in its execution. Not that we can simply hand down answers to the larger society; but at least we can help define the question with some clarity. Yet we will fail even in this humble task if we do not become more self-conscious about our own legal culture. If we are to be ordinary observers, we shouldn't be embarrassed about "primitive" reasoning, about paying people off when they no longer can say, "That's my X." We should say instead: "Here is an area of the law which should conform to ordinary expectations as ordinary untrained folks understand them, despite

the wild incongruities that appear from a more technical and comprehensive view." If, on the other hand, we are to be scientific policymakers, we should think very carefully and clearly about the abstract ideals to which our law is dedicated: What do we mean by efficiency? What do we mean by justice?