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The Brethren-Woodward & Armstrong

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BOOK REVIEWS

ACKERMAN—PRIVATE PROPERTY AND THE CONSTITUTION. New Haven, Conn. Yale University Press, 1977. Pp. 303.

In law school, I once came across a collection of readings on the economics of property law which was edited by Professor Ackerman.[1] He personally authored the introduction, and I was very pleasantly surprised to see a *lawyer* produce a superbly clear account of welfare economics—especially its limitations and (usually unstated) assumptions.

That favorable impression remained in the back of my mind until more recently, when I was introduced to this work on the theoretical aspects of the just compensation clause. I soon discovered the basic reason for my attraction to his writing—we are in complete agreement on a crucial and controversial premise. As stated by Ackerman:

> [I]t is only after resolving certain philosophical issues that one can make sense of the constitutional question, let alone pretend to expound a correct constitutional answer. Philosophy decides cases; and hard philosophy at that.
>
> Now this, I confess, represents my general view of the proper relationship between philosophy and constitutional law. It is moreover, a view that accords a role to theory far greater than that granted generally by the profession. Nevertheless, . . . analysts must become philosophers if they wish to remain lawyers.[2]

It is the distinctive accomplishment of this marvelously straightforward book that Ackerman shows, in the context of a very real legal problem, the illumination which is possible by imaginative yet careful philosophy. At stake is the raising of the level of discourse in legal education and, ultimately, the profession.

ACKERMAN'S THESIS

Consider the now ubiquitous phenomenon of governmental action which changes the relations of persons with respect to things in such a way to cause loss to some persons in the name of public welfare. The loser, it is assumed, goes to the courts to demand compensation, citing the fifth amendment's mandate: "Nor shall private property be taken for public use without just compensation."[3] Ackerman: "[I]t is the fate of

1. B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975).
2. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5 (1977).
3. U.S. CONST. amend. V.

those called upon to sacrifice for the public good that will concern us in this essay: When may they justly demand that the state compensate them for the financial sacrifices they are called upon to make?"[4]

The analysis is in two steps and is easily generalizable to any particular substantive question of law. First, Ackerman develops two broad approaches to adjudication from which an American judge of today would realistically be expected to choose in making the decision put before him.[5] These approaches, denominated that of the "Scientific Policymaker" and that of the "Ordinary Observer," are two of the four possible combinations of two independent choices. The first, "Ordinary" versus "Scientific," refers to a choice between attitudes toward legal language. The Ordinary adjudicator insists that one keep in mind that legal language is grounded in ordinary language; whereas the Scientific adjudicator is willing to accept and use legal language as developed into a technical vocabulary, with definitions which may retain little of the meanings of ordinary language from which the terms are originally drawn.

The second basis for comparison, "Observer" versus "Policymaker," refers to the adjudicator's attitude toward the normative aspects of the legal system as a whole. The Policymaker views his function as one of identifying the rules and principles describing the abstract ideals which the legal system furthers, a self-consistent whole denominated the "Comprehensive View." The Observer, who may or may not believe there is such a Comprehensive View, denies that analysis should begin by choosing one. Rather, he asserts that adjudication should vindicate the expectations generated by the dominant social institutions.

These two degrees of freedom are combined to form the Ordinary Observer, the Ordinary Policymaker, the Scientific Observer, and the Scientific Policymaker. After rejecting the Ordinary Policymaker and the Scientific Observer as too divergent from the current mainstream of American law, Ackerman sets out to outline the distinctive features of the other, more relevant two.[6]

In the second step of the analysis, Ackerman argues that the unintelligibility of the present "takings" law to critics (and judges) arises from their belief that a principled explanation of the decisions which have been made in the area must be in the form of a Scientific Policymaker's analysis. He demonstrates that the established jurisprudence can be *made intelligible* (not to say *justified*) by using the approach of the Ordinary Observer.[7] Notwithstanding its usefulness, however, Ackerman points out that the Ordinary Observer's approach suffers not only from inadequate theoretical elaboration but also from a declining popularity among academicians, himself included.

Ackerman concludes that there is an impending conflict, in which the age of "happy ignorance" in American law must yield to "methodological

4. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1 (1977).
5. *See id.* ch. 1.
6. *See id.* chs. 2-5.
7. *See id.* ch. 6.

self-consciousness" concerning the "relative merits of Scientific Policymaking and Ordinary Observing."[8] However, this self-consciousness would not necessitate a choice *between* these two approaches. There are several sections in the book in which Ackerman suggests hybrid possibilities.[9]

SOME ELABORATION AND SOME CRITICISM

At the certainty (not risk) of over-simplification, I shall exemplify the analysis. The takings clause infers that a taking by the state *is* acceptable if just compensation is made. This is accepted in both modes of analysis discussed by Ackerman; the empirical element of all alternatives considered is manifest, the goal being primarily to *ascertain* the law, not to posit the *best* law entirely free of constraints of history and institutions. Similarly, "private property" is assumed to refer to those forms of property rights actually recognized in Anglo-American law, as opposed to those forms which completely unrestrained versions of these philosophical approaches would consider justified.

For the Ordinary Observer all property can be divided into two categories: "social property" and "legal property." (This is the crucial distinction of the book.) Social property is the set of property rights familiar enough to the layman that he and his peers readily discern what belongs to whom: my book; his house; her automobile. Legal property is that which is of such a technical character that the layman knows that he must consult a lawyer to determine people's respective rights thereto: my subsurface mineral rights; your air and light easement; his patent; my speculative investment in undeveloped Blackacre. To the Scientific Policymaker, this categorization is interesting perhaps, but of no constitutional significance of its own. To the Ordinary Observer, however, this distinction is fundamental, for he will be significantly more inclined to give constitutional protection to property forms rooted in lay language and expectations—social property—than to other, more technical kinds.

For the Scientific Policymaker it is much more important, in determining when compensation is to be paid, to focus on the Comprehensive View that he imputes to the legal system. Ackerman considers two candidates for such a Comprehensive View, fully recognizing that two examples do not a universe exhaust.

The first is the Utilitarian Comprehensive View, exemplified by the analyses of Professors Posner, Michelman, and Sax. For the judge inclined to believe that this View is the one underlying our legal system, the crucial concern is the relationship between (1) (assuming compensation is to be granted), the *costs of processing compensation claims* and (2) (assuming a denial of compensation) the sum of *uncertainty costs* due to placing similarly situated property owners in fear of the non-judicial branches of government and the *costs of citizen disaffection* with a sys-

8. *Id.* at 168. *See also id.* ch. 7.
9. *Id.* at 76, 110-12, 183-84.

tem that does not follow their honest (though possibly wrong) opinion as to proper social-welfare maximization.

> The critical question, in any given class of cases, is whether $P > U + D$, where P = process costs, U = uncertainty costs, and D = the costs of citizen disaffection. If $P > U + D$, compensation should be denied; if $P < U + D$, it should be granted. To put the point in terms more useful to our courts, restrained Utilitarian judges should be more responsive to just compensation claims as process costs decline, as uncertainty costs increase, and as the general utility of the legislation is increasingly subject to reasonable doubt.[10]

Now, it would seem that a factor for citizen disaffection should appear on both sides of the formula, since such disaffection may just as well result, albeit in different persons, from a decision, or pattern of decisions, granting compensation. Neverthless, I agree with Ackerman's conclusion that these considerations show little similarity to established legal reasoning. And that is the point he wishes to make.

The other Scientific approach considered is "Kantian" Policymaking. Ackerman's Kantian Comprehensive View encompasses a rather large bag of intellectual trends, including those associated with Rawls, Nozick, Wolff, Waltzer, Freed, and Dworkin. This simplification is not *too* gross, for, as Ackerman points out, they have in common a rejuvenated concern for individual rights, even to the point of denying social-welfare maximization if necessary. In this sense, the theories of such writers reflect a Kantian categorical imperative: that policymakers "are not to conceive of their fellow citizens as merely means to the larger end of maximizing social utility, but are instead to treat them as ends in themselves."[11] Reasoning from this, Ackerman concludes that a "Kantian judiciary (like a Utilitarian one) would tend to expand very considerably the contexts in which compensation would be constitutionally compelled."[12]

Although I agree once more with the conclusion, I have several criticisms here. I mention only those concerning Professor Ackerman's main example of Kantian analysis. He states that the "easy" case for the Kantian judge would be the one in which overall social utility rises by more than the loss in market value to the subject property owners. In such a case, market-value compensation would leave the property owner "no worse off" while still effectuating a social gain.[13] This analysis strikes me as peculiar in two respects. First, I see no reason to say that this case is any easier than the one in which market value compensation would equal or exceed the social gain. If the imperative has any content, certainly it is that the decision whether to grant compensation rests upon considerations wholly distinct from social utility. In fact, a Kantian may not even regard "social utility" as intelligible. The case posed is only easier for a

10. *Id.* at 48-49.
11. *Id.* at 72.
12. *Id.* at 86.
13. *Id.* at 73.

judge who is trying to reach a *compromise* between Utilitarian and Kantian Comprehensive views.

Second, as Ackerman belatedly recognizes,[14] market-value compensation, even computed without regard to the instant state project and its attendant increase in demand, ignores the fundamental operative force behind market exchanges: the differences between the values of a property interest to the seller (V_s) and buyer (V_b) and the value of the market price (P) to the seller (P_s) and buyer (P_b). Unless $V_s<P_s$ and $V_b>P_b$, there would be no free exchange. (It will be noted that I did not make the typical Utilitarian's mistake of formulating the condition as "$V_s<P<V_b$"; V_s and V_b are measured in noncomparable, subjective "utils," and P is typically in the units of a currency. This mistake is ubiquitous in welfare economics.) It is clear that if a property owner is not *willing* to sell at the market price (*i.e.*, $V_s>P_s$), then *forcing* him to accept the market price and give up the property can hardly be said to leave him no worse off.

Once more, these modifications do not seriously detract from Ackerman's basic thesis. He maintains that Scientific Policymaking adjudicators, of either a Utilitarian or Kantian persuasion, would not reason the way judges actually do; and the Ordinary Observer's distinction between social and legal property gives a better account of the resolutions, and the difficulties thereof, which are found in the decided cases. Ackerman's exemplifications of these propositions are contained in Chapter 6, and it is a showing that is highly illuminating. It is not, however, without difficulties, the most important of which, in my view, is an insufficient account of the possibility of a competing explanation based upon a "reformist" but "deferential" Kantian judiciary, one hostile to many of the existing forms of "legal" property. This criticism can only be understood after examining another portion of Ackerman's theory, to which I now turn.

THE THEORY OF JUDICIAL ROLE

I must apologize to Professor Ackerman for deleting from the foregoing his theory of judicial role. The judge's perception of his proper place in the constitutional scheme is an obviously critical element of the analysis. Ackerman's discussion of judicial role is interesting in its own right; it also introduces significant refinements into the analysis that has already been described. I will not attempt to develop these refinements here but shall be content to suggest the general character of his theory of judicial role.

The "First Principles of Role Theory"[15] reflect the basic features of the Ordinary Observer and the Scientific Policymaker discussed above. The emphasis of the Ordinary Observer upon understanding and reinforcing the layman's expectations leads to the "*First Principle of the Ordinary Observer's Judicial Role:* While the judge has it in his power to act like a *law-maker,* he should not use this power to further his own

14. *See id.* at 140-41.
15. *Id.* at 103-06.

personal predilections but should instead think about each lawsuit as if he were a *law-taker.*"[16]

To the Scientific Policymaker, acceptance of this principle constitutes "intellectual suicide" and an unjustifiable deference to laymen's expectations, "whose only claim to legitimacy lies in their brute existence."[17] Accordingly, the Scientific Policymaker's willingness to identify the Comprehensive View of the legal system leads to the *"First Principle of the Scientific Policymaker's Judicial Role":*

> While the judge has it in his power to act as a *law-maker,* he should not use this power to further his personal predilections, but instead should think about each lawsuit *as if he were an agent of the state charged with implementing the public good as it is defined in the legal system's Comprehensive View.*[18]

Of course, the Ordinary Observer sees this as an excuse for the judge using his own idiosyncratic notions of the public good.

Beyond these first principles, there are several ways in which Scientific Policymakers and Ordinary Observers can exercise judicial *restraint* or judicial *innovation.*[19] Depending upon their opinion concerning the general propriety, from the point of view of the appropriate "First Principle," of the distribution of property rights prior to the alleged "taking," judges may be *conservative* or *reformist.* Depending upon their opinion of the general propriety of actions by the other branches of government, they may be *deferential* or *activist.* And depending upon the extent to which they are willing to take into consideration the possible existence of a significant group of individuals who do not share the imputed Comprehensive View or dominant social expectations, they may be *principled* (*i.e.,* they assume no such group exists) or *pragmatic.*

This breakdown has the advantage of showing that judicial restraint and innovation have several components, and that judges may consistently be restrained in some ways and innovative in others. The components assumed make a great difference in the probable results of the adjudication of a takings question, and it is important, therefore, to know what can be said about the propensities of Utilitarian Policymakers, Kantian Policymakers, and Ordinary Observers toward restraint or innovation along each of the divisions indicated. Ackerman deals with these questions, but I will not attempt to do so here.

REVELATIONS

Lest the reader think that this book is totally dry and theoretical, it should be added that Ackerman provides along the way a few insights which are ironic and sometimes surprising, a situation which seems often to accompany increased understanding. One example will suffice. One

16. *Id.* at 105.
17. *Id.*
18. *Id.* at 106.
19. *Id.* at 31-39, 106-10.

would expect an activist utilitarian judge to be more disposed (than a deferential utilitarian judge) to grant compensation in the struggle between nonjudicial branches of government and property owners claiming under the just compensation clause. But there is an activist (or perhaps reformist) utilitarian interpretation which cuts the other way, suggesting (it is thought) a restriction in the scope of compensation. Ackerman attributes this to the later work of Professor Sax and argues that Sax's position is unfounded.[20]

Sax's position is that, due to the "free-rider" effect, groups representing small, diffuse interests of larger numbers of neighbors of the property owners in question will be at a disadvantage in the political arena *vis-a-vis* well-organized factions of such property owners. Therefore, it is said, maximization of social utility requires that help be given to the environmentalists, for example, to counterbalance a free-rider's reluctance to contribute resources to the cause. One form of such help is seen to consist of removing this compensation requirement as an obstacle in the environmentalists' path.

Ackerman responds that the primary reason for the organization of the property owners into an effective political force in opposition to the environmentalists is that these owners fear political action that will entail severe economic loss to them. If, however, compensation is liberally granted, such fear will be drastically reduced, with the consequence that the opposition which environmentalists face will be that of the taxpayers who fund the compensation. This group is surely no better able to organize effectively than the environmentalists. Thus a liberal compensation policy is quite probably advantageous to the environmentalists' cause.

Concluding Appraisal

Whatever the empirical rectitude of such specific points, Professor Ackerman's analysis is a first-rate contribution to the establishment of communication between philosophy and law. As such, it is a part of a broader effort to bridge that gulf which has arisen over the last hundred years or so between philosophy and the disciplines which are its offshoots. The pattern of this connection, in the context of law and political analysis, is discoverable in the copious "Notes" that Ackerman provides.

Unfortunately, the importance of the subject is matched only by what I perceive to be the difficulty of attracting the interest of persons in the *practice* of law. In fact, hostility is to be expected from practitioners since intellectual clarity, which exposes inconsistent ideas, often acts as a limitation upon the availability of verbal tools for the accomplishment of the client's and the judge's objectives. Although this effect may be offset by the potential for sophisticated original analyses, one must wonder whether jurists will ever decide that the pursuit of such possibilities is

20. *See id.* at 54-56.

economically preferable to the present convenient state of confusion.

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WOODWARD & ARMSTRONG—THE BRETHREN. New York, N.Y. Simon and Schuster, 1979.

The United States Supreme Court is the most private of our public institutions; and *The Brethren,* hyped as an investigative exposé of the Court's inner workings, has naturally excited great interest among both the legal profession and the general public. The book is in fact a clerk's eye view of the Court, for it was the clerks who were "Deep Throats" for authors Armstrong and Woodward. The book is scarcely an exposé, however, for it reveals little that the average Court watcher did not already know or suspect. It is nevertheless a significant book because it confirms what until now one could only surmise from Court opinions and corridor gossip: namely, that the present Court is corrupt to the core, from its clerks to its Justices.

Since *The Brethren* could not have been written but for the clerks' betrayal of confidences, their corruption is evident on every page. The young men and women who obtain a Supreme Court clerkship know that the mere fact of having clerked for a Justice will open many professional doors to them. The clerks know, furthermore, that every Justice has many connections and that he may open other professional doors for them that would have otherwise remained closed. These are among the chief reasons a young law graduate seeks a Supreme Court clerkship. A clerk who trades on his position and his Justice's connections and then talks behind the Justice's back demonstrates little sense of loyalty to the Court or to the man. He also demonstrates an astonishing disregard for the kind of confidentiality that is essential to the just and fair functioning of the Court. During the tenure of these loose-lipped clerks, more than one premature disclosure troubled the Court. On one such occasion, an incensed Chief Justice suggested that the clerks be given lie-detector tests. The clerks, incensed that the Chief doubted their integrity, protested. Like Lady Macbeth, they may have thought that if they bleated loudly enough about their integrity, no one would notice its absence.

Perhaps the clerks simply believed that they, the *creme de la creme* of recent law school graduates, were bound neither by the professional rules that bind the ordinary lawyer nor even the normal social conventions that constrain decent human beings. They reek with self-importance. In their self-serving revelations, the clerks insinuate that but for their prodigious research efforts and their indefatigable negotiations with each other, the Court would not be able to function as well as it does. They tell us that Stewart and Marshall are "lazy." Burger "can't remember," and Blackmun "can't decide." Rehnquist "distorts." White is a "bully." And so on. The clear implication is that but for the hard-working (very hard-working) and intelligent (very intelligent) clerks, these nine badly flawed beings could not adequately discharge their responsibilities. It strains credulity to believe that nine men as old, as experienced, and as successful as Supreme Court Justices play pawn to not-yet-dry-behind-

the-ears youngsters, however bright and energetic.

In fact, the battalion of clerks who now man the offices of the Justices may have contributed immeasurably to the declining quality of the Court's work product. Concurring and dissenting opinions, which inevitably dilute the effectiveness of the Court's opinion, have proliferated in direct proportion to the proliferation of clerks. Where once there was none and then but one, there are now three or more clerks busy preparing memoranda. Thereafter, the Justices feel compelled to submit those memoranda as a concurring or dissenting opinion as a reward, if nothing else, to the clerk who has so diligently prepared the memorandum. Law clerks are inordinately fond of confiding that the one good opinion of Justice Woeful is in fact a product of their mind and pen.

A Justice may also avoid doing his own research or his own opinion writing so long as he can assign those tasks to one of the ubiquitous clerks. Indeed, he may come to act more as a senior partner in a law firm than as a judge. His opinions may suffer as a result, for there is no "better test for the solution of a case than its articulation in writing, which is thinking at its hardest."[1] In many recent decisions, the Justices cannot have thought as hard as they should have. Moreover, there is ample evidence in *The Brethren* that the Justices are not doing their work as it ought to be done. That the clerks broke the trust which ought to have bound them to Court and Justice is not perhaps so surprising in view of their role models, for the Justices themselves have violated their duty to decide cases according to the Constitution and the laws.

That one reviewer after another could conclude from this book that the Court is not corrupt only demonstrates how little we have come to expect of public officials in general and of judges in particular. Apparently it is enough that the Justices do not take bribes and still recuse themselves from cases in which they have a personal stake. That they decide cases on the basis of their personal assessments of what is good for the country rather than on the basis of the Constitution and the laws they have solemnly promised to uphold is apparently no cause for concern. Rather, it is cause for praise among those who agree with the results which the Court decrees. Such critics invariably describe the Justices as "statesmen"—that is, as men who have exercised great political skill in the management of government. However much such men may be needed in public life, a Justice who faithfully discharges his responsibilities cannot satisfy that need. While the statesman must of necessity balance competing interests and reconcile them in a manner that advances the public weal, the judge must perforce accept as a given, except in the rarest of instances, the balance thereby struck. Even in those rare instances in which he is obliged to overrule the balance struck in the contemporary political process, he is justified only because he is enforcing another, earlier, and superior balance struck by the people in their Constitution. After all, the belief that Justices are constrained by the Constitution and

1. Los Angeles Times, Aug. 6, 1980, § 5, at 1, col. 5.

the law alone justifies the discretionary authority they exercise. Any Justice who forsakes his oath to respect that constraint corrupts his high office. By that criterion the present Court is corrupt, for its decisions represent the exercise of the statesman's will rather than a judge's reason.

Roe v. Wade,[2] the abortion decision, is illustrative. In that case the Court held that states could not generally prohibit abortions. Mr. Justice Blackmun, who wrote for the Court, conceded at the outset that people differed deeply about the extent to which abortion should be permitted if at all, that one's view on the question was influenced by his moral values, and that any resolution of the question necessarily involved judgments about many other related issues. In our system such complicated questions are resolved in the political process, and the courts must respect and enforce any legislative resolution that does not violate the Constitution. It thus should not have surprised Mr. Justice Powell that the Constitution provided no guidance on the abortion question because it was never intended to provide such guidance. Legislators who daily decide myriad questions of public policy must look to sources other than the Constitution for guidance; and they are presumably free to fashion whatever solution commends itself to their collective judgment so long, of course, as the solution does not violate the Constitution.

Instead of concluding that the Court should therefore defer to the legislative judgment that a woman could not obtain an abortion except in the most unusual circumstances, Armstrong and Woodward state that Mr. Justice Powell allegedly concluded that he would have to vote his "gut." Since he thought that the abortion laws were "atrocious," he would vote to invalidate them if he could find a rationale. If the Justice meant only that he would insist on some rationale that might reasonably be derived from constitutional text or precedent, his position might be defensible. Unfortunately, however, he had already concluded that the search for a constitutional rationale would be futile. He was, then, looking not so much for a rationale as a rationalization. In other words, he wanted to conceal the real ground of decision—his personal belief that the abortion laws were atrocious—with some clever legal rhetoric. Dishonest is the most charitable way in which to describe that mode of deciding cases.

It is especially troubling that the Justice who is most consistently described as an apostle of judicial restraint and who has been hailed as a worthy successor to Mr. Justice Harlan (who, not surprisingly, was recognized by one of his colleagues as the only *judge* with whom he had ever served), should so easily assume the role of statesman. Elsewhere, of course, Justice Powell has assured us that he understands that judges make law and that the belief that the Constitution and laws cabin his discretion is a naive and quaint myth. The Justice learns quickly. He had initially thought otherwise. In the death penalty cases, Powell thought that the soundness of his legal argument would persuade his colleages that the Constitution did not forbid capital punishment. But justices who

2. 410 U.S. 113 (1973).

cheerfully embrace the role of statesmen care little about the mere soundness of a legal argument. They care only about the result. Thus Mr. Justice Marshall, ever alert to the problems of the poor, especially the black poor, objected to an early draft of the abortion opinion which did not make viability the determinative criterion because he feared states could "effectively ban abortions in the [second trimester] under the guise of protecting the woman's health."[3] Marshall apparently believed that a viability test would "better protect the rural poor."[4] Were Justice Marshall a Congressman, he might legitimately see himself as having been sent to Washington by his poor black constituents to represent their interests. The Court is not a third chamber of the national legislature, however; and the Justice was not appointed (at least he should not have been appointed) to represent the interests of black men and women in Court deliberations.

Of course the Justice may have been right as a matter of public policy that the poor should be able to obtain abortions as easily as the rich. Additionally, he may have balanced the equities so sensitively and fairly that he qualifies as a statesman. The rub is that he took an oath to judge cases according to the Constitution, and one searches its text in vain for any indication that viability is the constitutional test for determining when a state may prohibit abortions. As in *Miranda v. Arizona*,[5] where the Court extrapolated from the guarantee against self-incrimination a detailed code regulating police interrogation of criminal suspects, the Court in *Roe v. Wade* extrapolates from the right to privacy a detailed code regulating abortions. Under this constitutionally dictated legislative scheme, the state may not prohibit abortions during the first trimester. It may regulate them during the second trimester only to protect the mother's health. In the last trimester, it may prohibit them. That the right to privacy is nowhere mentioned in the Constitution does not preclude the Court from recognizing it as one of those ninth amendment rights retained by the people, but it does underscore the obvious fact that the Court would have to demonstrate that the right to privacy embraced the right to abortion on demand. Whether Justice Blackmun's review of historical practices in Rome, Greece, and seventeenth-century England proves that line of thought is, to say the least, doubtful. Certain it is that he could not have argued that abortion on demand reflected the evolving traditions of the American people, the standard usually invoked when text and history fail. At the time *Roe v. Wade* was decided, all fifty states prohibited abortions. That fact alone might have given judges some pause, but it would not trouble statesmen who thought that the community would nevertheless accept their decision. Indeed, pragmatic prediction of that kind is part of the statesman's art. Justice Stewart, for one, had allegedly concluded that "[t]he public was ready for abortion re-

3. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 232 (1979).
4. *Id.*
5. 384 U.S. 436 (1966).

form."[6] The fact that this alleged shift in public attitudes had not yet manifested itself in any significant legislative revision of state abortion laws apparently was irrelevant. What the Justice really meant was that the public would accept abortion reform decreed by the Court.

Judges who decide cases on the basis of pragmatic predictions about what the community will tolerate forget the obligations of their office and constitute a menace to our civil liberties. A Court which husbands its moral authority can and should assert that authority to protect the constitutional rights of individual citizens from infringement by the majority. A Court of prudent statesmen will not, however, enforce constitutional rights if they feel that the community will not tolerate their exercise. Judicial statesmen will, for example, sustain the confinement of American citizens in relocation centers for no reason other than that the citizens have yellow skin and slanted eyes. The statesmen will sustain the lawfulness of investigative witch-hunts that invade the associational rights of those whose left-wing views make them attractive scapegoats. In short, a Court of statesmen follows the election returns rather than the Constitution.

Typically, the Justices do not admit that they act as statesmen rather than judges. With a disingenuousness all too characteristic of the Court's recent work product, Justice Blackmun intoned piously in the opening passages of his *Roe v. Wade* opinion:

> Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. . . . We bear in mind, too, Mr. Justice Holmes' admonition [that the Constitution] "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[7]

Contrary to his assertion, Blackmun did not decide the case on the basis of constitutional text, tradition, or principle. The first draft of his opinion "did not settle on any analytical framework [and did not] explain on what basis [he] had arrived at the apparent conclusion that women had a right to privacy, and thus a right to abortion."[8] Whatever their personal reasons for favoring the result (Justice Stewart was said to have concluded that abortion was a reasonable solution to the population problem!), the Justices seized almost as an afterthought upon the conveniently vague right to privacy as a justification for their decision. The but-recently-discovered right had apparently been written into the Constitution in an invisible ink discernable only to the eye of judicial statesmen like Justice Douglas who had first reported discovering it in *Griswold v. Connecticut.*[9] Douglas was pleased now that "[t]he right to privacy was being given con-

6. THE BRETHREN, *supra* note 3, at 167.
7. 410 U.S. 113, 116-17 (1973).
8. THE BRETHREN, *supra* note 3, at 183.
9. 381 U.S. 479 (1965).

stitutional foundation in a major opinion."[10] One would have thought that the document rather than the Court gave a particular right its constitutional foundation, but that is perhaps a mere technicality that troubles only judges who take too narrow—*i.e.*, unstatesmanlike—a view of their responsibilities.

In truth, facts rather than constitutional principle or tradition proved decisive. Mr. Justice Blackmun, having closeted himself in the library of the Mayo Clinic during the Court's summer recess, decided that abortions could be performed safely. Mr. Justice Powell, who also devoted his summer recess to a study of the abortion problem, decided that medically performed abortions were better than "unsanitary butchers and coat-hanger abortions."[11] Both conclusions seem eminently reasonable, but the question the Justices never seemed to have asked themselves was whether those facts were constitutionally relevant. While such facts might well convince a legislature to adopt an abortion statute much like the one imposed by the Court, they do not by themselves establish the existence of a constitutional right to abortion. The Court simply cannot assume that its conception of sound social policy is embodied in the Constitution. That is precisely what Holmes meant in the passage from his *Lochner* dissent[12] quoted by Justice Blackmun. Justice Holmes, the "Great Dissenter," believed that the Justices misconstrued the due process clause when they read it to forbid wage and hour legislation merely because they thought the legislation unwise. He would have shaken his head in disbelief to see his argument cited as authority for the proposition that the Court could construe a nonexistent clause of the Constitution to forbid abortion legislation merely because it thought the legislation unwise.

As *The Brethren* makes all too clear, the Court routinely decides cases in the same manner in which it decided *Roe*. In *Frontiero v. Richardson*[13] Mr. Justice Brennan wrote a plurality opinion which he knew would have [had] the effect of enacting the Equal Rights Amendment."[14] He allegedly saw "no reason to wait several years for the states to ratify the amendment."[15] In the Richmond desegregation case Mr. Justice Stewart reportedly "was . . . deeply affected by nonjudicial considerations"[16]—in particular, the fact that "[t]he mainstream of society opposed forced integration of the schools when it meant busing."[17] Since Mr. Justice Marshall viewed capital punishment as "a penalty designed for poor minorities and the under-educated [and] the ultimate form of racial discrimination,"[18] his vote to abolish such punishment in *Furman*

10. THE BRETHREN, *supra* note 3, at 235.
11. *Id.* at 230.
12. Lochner v. New York, 198 U.S. 45, 74-76 (1905).
13. 411 U.S. 677 (1973).
14. THE BRETHREN, *supra* note 3, at 254.
15. *Id.*
16. *Id.* at 267.
17. *Id.*
18. *Id.* at 205.

v. Georgia[19] was foreordained. Thus do those who have sworn to do justice to the rich and poor alike dispose of the cases entrusted to their decision under the Constitution and laws of the United States.

That almost all Justices have acted, at least on occasion, as statesmen does not justify the practice, though it may be thought to render any protest against the practice futile, if not naive. If the Justice's perception of his role affects the way in which he decides cases, however, the protest is neither futile nor naive. A Justice who believes that he is obliged to decide cases in conformity with the Constitution will often reach a different result from a Justice who believes that he is free to decide cases in conformity with prevailing notions of sound public policy. On the basis of *The Brethren,* one can only conclude that we have at last reaped what the legal realists sowed—a Court of statesmen who believe that they cannot escape their own biases and prejudices and who therefore have decided to indulge rather than to restrain them. The prospect is not bright that this Court will help maintain here what has so rarely survived anywhere—a government of laws rather than of men.

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19. 408 U.S. 238 (1972).

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