

# Gossiping About Ideas

*Reconstructing American Law.* By Bruce A. Ackerman. Cambridge: Harvard University Press, 1984. Pp. viii, 118. \$16.00

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I do not know whether Tom Wolfe has reviewed Rawls' *A Theory of Justice*,<sup>1</sup> and I cannot remember a serious critique of Habermas or Horkheimer in recent issues of *People* magazine. It is this novel intellectual form, however, which the multi-talented Bruce Ackerman refines in *Reconstructing American Law*.<sup>2</sup> The book's bold objective is to account for the intellectual sources responsible for the expansion of federal governmental activity since the 1930's. But Ackerman is not interested in the inherent strengths or weaknesses of the justifications for government action, nor quite in the influence of these ideas on the actual growth of government. Instead, Ackerman is concerned with how policymakers, particularly lawyers, have talked about these ideas. The subject of consequence to Ackerman is the relationship over the last fifty years between justifications for government action and the content of what Ackerman calls, variously, "law-talk,"<sup>3</sup> "lawstuff,"<sup>4</sup> "legal discourse,"<sup>5</sup> "legitimated [legal] conversation,"<sup>6</sup> and the "new language of power."<sup>7</sup>

This unusual approach represents a new and significant synthesis of the central theme of Ackerman's scholarly work. In 1977, in the first book of the series, *Private Property and the Constitution*,<sup>8</sup> Ackerman described two world views competing for control of modern legal culture—views which he called "ordinary observing" and "scientific policymaking." According to Ackerman, each conception sought to dominate the characterization of modern legal issues by imposing different constraints on legal language. The battle between them would determine control over "the lin-

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1. J. RAWLS, *A THEORY OF JUSTICE* (1971).
2. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) [hereinafter cited by page number only].
3. P. 10.
4. P. 15.
5. P. 21.
6. P. 10.
7. P. 24.
8. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) [hereinafter cited as *PRIVATE PROPERTY*].

guistic practices of a special group of conversationalists . . . trained as lawyers."<sup>9</sup> Ackerman illustrated the hypothesis by showing that the various and confused approaches toward interpreting the takings clause were only different elaborations of one of the two competing linguistic methods.<sup>10</sup>

Ackerman's concern with language was generalized in 1980. In *Social Justice in the Liberal State*,<sup>11</sup> Ackerman employed the method of "constrained conversation" as a technique for drawing out the implications of his philosophy of neutrality.<sup>12</sup> Here again, it was language or conversation that dominated the presentation, although the link to Ackerman's concerns in *Private Property* was left totally obscure. In *Social Justice*, dialogue and conversation appeared to serve chiefly as an organizing conceit for Ackerman's argument. Ackerman hints in the book—although he never really develops the point—that the preoccupation with conversation about moral ideas is something more than conceit. Dialogue and conversation, of course, are methods of legitimating one's views about social policy. But there is also a suggestion that the process of conversation possesses moral significance in itself, derived in some way from its seemingly guaranteed success in leading individuals to confront and accept Ackerman's moral imperatives.<sup>13</sup>

*Reconstructing American Law* reveals the unity and ambition of Ackerman's vision over these many years. The book is a chronicle of a conflict that Ackerman claims has dominated legal culture since the 1930's, pitting the world view of the pre-1930's "reactive state" against the world view of the "activist state" inaugurated with the New Deal. The conceptual approaches of the reactive and activist states closely resemble ordinary observing and scientific policymaking of *Private Property*.<sup>14</sup> Moreover, the battleground for the competition between these contrasting conceptual approaches is the content of dialogue about legal issues. In *Reconstructing American Law*, however, the legal dialogue, the "law-talk," shows itself to possess a new significance. In his earlier books, conversation represented only a reflection of more substantive intellectual differences or a technique

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9. See Ackerman, *Four Questions for Legal Theory*, 22 NOMOS 351, 351 (1980) (describing ambitions of *Private Property and the Constitution*) [hereinafter cited as *Four Questions*].

10. *Id.* at 351-53.

11. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) [hereinafter cited as *SOCIAL JUSTICE*].

12. *Id.* at 8-10; see *Four Questions*, *supra* note 9 (elaborating conversation theme of *Private Property and the Constitution*).

13. See *SOCIAL JUSTICE*, *supra* note 11, at 357-75. For an effort to extend Ackerman's approach to dialogue beyond its role in *Social Justice* itself, see Agger, *A Critical Theory of Dialogue*, 4 HUMANITIES IN SOC'Y 7 (1981); see also Weale, Book Review, 65 MINN. L. REV. 685 (1981) (discussing role of conversation in *Social Justice*).

14. The link between "ordinary observing" as a conceptual framework and the commitment of the reactive state to laissez-faire is made clear in *Four Questions*, *supra* note 9, at 367-69.

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for presenting a moral argument. In the current book, conversation itself becomes the central phenomenon of importance. The ideas that form the foundations of the contrasting world views are necessary to stimulate legal conversation, but it is the subsequent conversation or dialogue about the ideas that is truly important.

As we shall see, many unusual and peculiar conclusions result from Ackerman's focus on conversation about ideas, rather than on the ideas themselves. Indeed, Ackerman's approach initiates a truly novel form of legal scholarship: the Rona Barrett theory of intellectual history. According to this approach, specific ideas are worthy of little attention. How people talk about ideas is the matter of moment. Original ideas are only minor source points for creative elaboration, in the same way that knowing what Henry Kissinger *actually* mumbled at Studio 54 would spoil the fun.

### I. A THEORY OF THE ACKERMAN PROJECT

Ackerman's subject is the transformation of the concept of law from that of the "reactive state" of the 1930's to that of the "activist state" of today.<sup>15</sup> As Ackerman tells the story, policymakers prior to the 1930's had complete faith in the just and efficient operation of competitive market forces. They saw no need for the federal government to manipulate the country's economic welfare or concern itself with questions of social justice. Moreover, America's geographic isolation eliminated the need for more than minimal investments in military force.<sup>16</sup> The thoughtful lawyer viewed "self-conscious state intervention in the market economy as a relatively extraordinary event."<sup>17</sup> The only relevant law was the common law, whose role was dispute resolution.

This view of the world constrained the form and content of legal argument: "No legal argument [was] acceptable if it require[d] the lawyer to question the legitimacy of the military, economic, and social arrangements generated by the invisible hand."<sup>18</sup> The law served only to complement the market, and legal issues were conceived of in terms of their market analogues. The paradigmatic dispute was between two parties who together were "in the best position to develop the facts and values relevant to a just decision."<sup>19</sup> The dispute could be resolved in a manner consistent

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15. The core of Ackerman's book appears as an introductory essay to a Symposium sponsored by the *Yale Law Journal* on the role of the activist state fifty years after the New Deal. See Ackerman, *Foreword: Law in an Activist State*, 92 *YALE L.J.* 1083 (1983).

16. Pp. 24-28.

17. P. 7.

18. P. 25.

19. P. 26. Ackerman explicitly draws from the Kuhnian concept of paradigms. P. 60 n.16. Thus, it is odd that he regards a reluctance to challenge the legitimacy of some prevailing conceptual frame-

with governing principles of justice by asking a lay jury to determine which of the litigants "deviated" more sharply from established market norms.<sup>20</sup>

The New Deal fundamentally contradicted this view of the role of law. Most important, according to Ackerman, was "the sheer quantity" of New Deal legislation,<sup>21</sup> which reduced the common law from its preeminent position to "only one branch of a trinitarian legal system," which now also included "statutory enactment and bureaucratic practice . . . as constitutionally legitimate sources of general principle."<sup>22</sup>

Yet although the New Deal repudiated the laissez-faire foundations of the "reactive state"<sup>23</sup> and generated a completely new legal order, it did not affect the way policymakers talked about the law. Until roughly 1960, lawyers and policymakers continued to view the law in "reactive state" terms: to regard the competitive market as the norm and government intervention as the deviation. How was this possible? According to Ackerman, the post-New Deal contradiction between the law as it existed and the law as lawyers understood it was mediated by Legal Realism.<sup>24</sup>

Here, Ackerman's story becomes complicated. The intellectual mission of the Realists was to destroy the theory that the individual common law fields (property, torts, and contracts) were cleanly distinguishable and internally coherent.<sup>25</sup> The belief in a coherent common law had inspired the efforts of the first Restatements of Law, which were catalogues of principles of each of the common law subjects. The method of the Realists was to unveil the "so-called organizing concepts of the common law" as "empty boxes concealing a host of distinct fact situations that required a sensitive response by Realistic lawyers with situation sense."<sup>26</sup> According to Ackerman, the essence of Realism was skepticism about abstraction and confidence in intuition.<sup>27</sup> The Realists, however, were skeptical of all abstractions. As a consequence, they successfully destroyed the theory of a unified common law, but did not supplant it with their own affirmative conception of law. Moreover, the Realists' emphasis on particularistic complexity snuffed out all other efforts to create a theory of law consistent with the extensive governmental intervention of the New Deal. Legal Realism, according to Ackerman, was essentially "a culturally conservative

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work as characteristic of only the reactive state world view rather than of all world views.

20. P. 27. The similarity of thinking of the reactive state to ordinary observing described in *Private Property* is obvious. See *supra* note 14.

21. P. 7.

22. P. 14.

23. Pp. 17-18.

24. Pp. 12-22.

25. Pp. 11-22.

26. Pp. 15-16.

27. P. 13.

movement.”<sup>28</sup> Realism allowed the legal profession to “survive the political crisis [of the New Deal] with its basic discursive equipment intact.”<sup>29</sup>

The conceptual revolution that provided the vision for the modern activist state was the Chicago School law and economics of Ronald Coase. Coase provided “a model of a new form of power-talk,”<sup>30</sup> in which every human activity affects other human activities and all questions are questions of coordination. The Coasean approach compelled systemic, rather than particularistic, examination of every problem of social policy. Ackerman acknowledges the cautionary tenor of Coase’s original article.<sup>31</sup> But as Coase’s article has come to be understood by lawyers, caution is merited only in the absence of transaction costs.<sup>32</sup> In the real world, transaction costs are always present. As a consequence, Coase’s influence on the “conversational domain” was to show a world characterized by pervasive market failure.<sup>33</sup> After Coase, understanding what is truly at stake in a legal issue requires “the complex description of the ways in which actors, constrained by heavy transaction costs and bounded rationality, are likely to respond to an array of second-best legal interventions.”<sup>34</sup> For Ackerman, Coase’s Chicago School economics provides the conversational basis for massive governmental intervention in all sectors of human life.

Coase and the economists, however, provided no guidance as to the values which such intervention should express. Instead, fashioning affirmative values for modern legal discourse—what Ackerman calls reconstructing law—is the task of modern moral philosophers. Ackerman’s careful survey of modern moral philosophy identifies two philosophers in particular who have successfully influenced modern “Constructivist argument”: John Rawls in his well-known *A Theory of Justice*<sup>35</sup> and Ackerman himself in *Social Justice in the Liberal State*.<sup>36</sup>

It is Ackerman’s description of these two alternative moral approaches that reveals the deeper conception of the book and its position in Ackerman’s intellectual project of the past decade. Ackerman does not regard the modern moral conversation as complete; the reconstruction of American law is still in progress, and will continue for many years. As Ackerman rigorously compares Rawls and Ackerman as alternative philosophical pathways toward such a reconstruction, Ackerman finds Rawls

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28. P. 19.

29. P. 17.

30. P. 46.

31. P. 55; see Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

32. P. 55.

33. P. 58.

34. P. 56.

35. J. RAWLS, *supra* note 1; see pp. 93–99 (discussing Rawls and his contributions to filling Realist legal vacuum).

36. Pp. 99–101.

wanting. Ackerman criticizes the abstract and alien character of Rawls' technique of the veil of ignorance.<sup>37</sup> Moreover, according to Ackerman, the bargaining metaphors that attend the decision process behind the veil cannot be fully descriptive of "the basic terms of activist legitimacy,"<sup>38</sup> presumably because consensual bargaining is the essential feature of the now-deposed world of laissez-faire.

A superior way of determining the substantive values appropriate for our activist state is "legal disputation itself."<sup>39</sup> Ackerman invokes our nation's history as evidence: "When Americans think they have been deprived of their rights, they characteristically express their grievances in legal terms—and insist that courts, no less than legislatures, take their demands for justice seriously."<sup>40</sup> It is the legal process of complaint and answer that compels each citizen to frame "a legally acceptable response to the question of legitimacy: What gives you, rather than me, the right to the resource we both seek to employ?"<sup>41</sup>

Here, the connection between Ackerman's moral philosophy and the current book becomes clear. In *Social Justice in the Liberal State*, Ackerman claims that all exercises of power require justification, and that all questions of moral legitimacy can be resolved by invoking two principles of neutrality: (a) no citizen's conception of the good is better than that asserted by any other citizen, and (b) regardless of conception of good, no citizen is intrinsically superior to any fellow citizen.<sup>42</sup> The task of *Social Justice* is to apply these principles to the wide range of questions of social policy in order to define and justify the proper contours of our liberal state.

The peculiar feature of *Social Justice*, however, is the technique Ackerman adopts to define the implications of the neutrality principles. Ackerman is not content with simple explanation or straightforward reasoning. Instead, he addresses each issue by constructing an imaginary dialogue between two individuals, in which, invariably, one asserts a position that Ackerman opposes and the second invokes one of Ackerman's neutrality principles at the right moment, shocking the other discussant into silence. From my own experience, I suspect that many readers found these incessant dialogues distracting, and increasingly tedious, although some review-

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37. Pp. 94-96. Ackerman possesses a highly developed sense of the alien. Ackerman's philosophical technique is to present spaceship dialogues over the distribution of manna, moderated by his Space Commander. See, e.g., *SOCIAL JUSTICE*, *supra* note 11, at 44, 55-56.

38. P. 96.

39. *Id.*

40. Pp. 96-97.

41. P. 97.

42. *SOCIAL JUSTICE*, *supra* note 11, at 10-11.

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ers praised them as “fascinating” and characterized by “verve.”<sup>43</sup> At a minimum, the technique of “constrained conversation” appears to be a very peculiar stylistic device because it bears no obvious relation to Ackerman’s substantive premises and conclusions beyond satisfying the requirement of legitimation. Toward the end of *Social Justice*, Ackerman suggests a grander role for dialogue: Dialogue by itself can lead individuals to accept the neutrality principles because it requires acknowledgement of the autonomy of others and skepticism about the reality of transcendent meaning.<sup>44</sup> Thus, there may be a double-faceted interrelationship between dialogue and the neutrality principles: Dialogue as a legitimating method is constrained by the neutrality principles. In addition, the technique of dialogue requires its participants to confront their personal non-neutral predispositions and may lead to acceptance of the neutrality principles. But this argument is not fully developed.

*Reconstructing American Law*, however, reveals Ackerman’s deeper purpose and the unifying themes of his seemingly disparate scholarly work. Ackerman the lawyer is constructing a moral philosophy of lawyering, and demonstrating that this philosophy, with the intellectual apparatus of dialogue that fuels it, can explain the most important development in the United States and the western world of the past century: the tremendous expansion of government and the rise of the activist state.

As I interpret Ackerman’s idea (it has never been stated in these terms),<sup>45</sup> it is this: The legal process compels litigants to engage in a form of argument in which one party makes a claim of right to which another party must respond. This form of “conversation” leads parties to accept values similar to Ackerman’s neutrality principles.<sup>46</sup> Ackerman, of course, hopes to speed along this process by open advocacy of the neutrality principles. The fundamentally dialogic character of the legal process, however, suggests that it ought to be regarded as the central and fundamental source of moral value in a liberal society, because of its role as a source of moral training through argumentation and as the institution that expresses and applies moral values of the greatest legitimacy in contexts of competing moral claims. Certainly, the moral superiority of the legal process to the democratic political process is clear.<sup>47</sup> Conversation within the

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43. Agger, *supra* note 13, at 11; Walzer, Book Review, *NEW REPUBLIC*, Oct. 25, 1980, at 39, 40.

44. *SOCIAL JUSTICE*, *supra* note 11, at 357–75. Of course, dialogue is not a necessary condition for the acceptance of these principles.

45. Ackerman gives a somewhat different—though I believe incomplete—account of his project in *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1045 n.61 (1984) [hereinafter cited as *Discovering the Constitution*].

46. Presumably, the citizenry will accept these values once everyone becomes involved in litigation.

47. Ackerman’s preference for the judicial over the democratic process is criticized in MacRae, *Scientific Policymaking and Compensation for the Taking of Property*, 22 *NOMOS* 327 (1980).

democratic process is of a much different character. Claims of personal advantage, in some guise, are commonplace.<sup>48</sup> Moral precepts, such as the neutrality principles, may exert some suasion on the political conversation,<sup>49</sup> but they do not act as determinative constraints as they do over legal dialogue.<sup>50</sup>

Thus, changes over time in the content of conversation within the legal order describe the changing basis for the moral legitimacy of the state. Ackerman demonstrated in *Private Property and the Constitution* that the most important change in the legal conversation of the past century was the shift from a world view that embraced legal reasoning using the concepts of ordinary language and that was committed to laissez-faire to the New Deal world view of scientific policymaking, which justifies and legitimates today's activist state. The current book, *Reconstructing American Law*, presents the detailed history of this transformation in the legal conversation during the past fifty years. But because legal dialogue possesses an inherent moral significance, Ackerman's book is more than history: Ackerman's chronicle of law-talk is the record of our country's moral growth.

## II. LAW-TALK AND ITS SOURCES

I wish to make clear at the outset that I greatly admire Ackerman's ambition and the sustained seriousness of his scholarly project. The explication of the sources of the expansion of government in western society obviously is a subject of the greatest importance. To link the explication to a coherent and defensible moral philosophy would constitute a stunning intellectual achievement. Even on a more limited scale, a careful definition of the relationship between legal scholarship and some set of dominant conceptions of law is worthy of serious attention, and various of Ackerman's specific points are highly compelling. Yet there is a peculiar character to Ackerman's account of the activist state that calls for more detailed examination.

I have mentioned that Ackerman's approach cannot be described accurately as traditional intellectual history. Indeed, although Ackerman's subject is the influence of ideas on general conceptions of government, he devotes no attention whatsoever to the original ideas themselves. Despite the central role of Legal Realism—mediating the conflict between laissez-

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48. For abundant illustrations, see B. ACKERMAN & W. HASSLER, *CLEAN COAL/DIRTY AIR* (1981) [hereinafter cited as *CLEAN COAL*].

49. *SOCIAL JUSTICE*, *supra* note 11, at 275.

50. Ackerman's current project is to describe with more care those conversational constraints operative in the legislative and constitutional process. See *Discovering the Constitution*, *supra* note 45, at 1052-57.



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faire and the New Deal—there are only passing references to the writings of the Realists. Similarly, though Ronald Coase is the hero of the piece—because he provided the justification for the activist state—there are only two references to Coase’s writings, and none to any element of the massive literature debating and expounding Coase.

Of course, Ackerman should be judged according to his argument rather than his erudition, but the specific meanings that Ackerman attributes to these writings are most curious. According to Ackerman, the legal conversation has drawn from the writings of the Realists and Ronald Coase messages that are exactly the opposite of the messages intended by the authors and of the interpretations that most students of these authors have long accepted.

For example, Ackerman describes Legal Realism as essentially a conservative movement whose approach permitted the legal order to retain its commitment to laissez-faire principles and to ignore the revolutionary changes that the New Deal introduced into the legal system.<sup>51</sup> This is a very unusual interpretation of Realism. First, the most important writings of the Realists preceded the New Deal and, in particular, the “switch in time” that Ackerman has identified as marking the triumph of the activist state.<sup>52</sup> Indeed, the more common interpretation of Realism is that the movement helped prepare the way for the New Deal’s triumph.<sup>53</sup>

Ackerman concedes that Realist writings undermined the presuppositions of the conservative legal order of the 1930’s. But he characterizes the Realists as only debunkers and neglects the dominant normative theme of the Realist enterprise. Most Realists were strongly opposed to laissez-faire and were sympathetic to, if not an inspiration of, the legislative and regulatory ambitions of the New Deal. It was not commitment to laissez-faire economics and hostility to the activist state that put Jerome Frank and William O. Douglas at the Securities and Exchange Commission, Thurman Arnold at the Antitrust Division, and Walton Hamilton at the T.N.E.C. Investigation.

Moreover, it is impossible to reconcile the Realists’ empirical efforts—which were by far the most distinctive aspect of the movement—with sympathy to a laissez-faire legal regime. Realist empirical work sought to show how limited the relationship was between the free-market concerns of legal doctrine and the actual and more “realistic” concerns of legal administration. The empirical work of William O. Douglas

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51. Pp. 11–22.

52. See *Four Questions*, *supra* note 9, at 368; *Discovering the Constitution*, *supra* note 45, at 1052–57.

53. See Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFFALO L. REV.* 459, 569–74 (1979).

on bankruptcy<sup>54</sup> and that of Charles E. Clark on law administration<sup>55</sup> and automobile accidents<sup>56</sup> sought to demonstrate that the normative commitment of legal doctrine to laissez-faire principles ignored the most important issues that faced judges, juries, and magistrates in administering the law.<sup>57</sup> This work was intended radically to undermine the legal regime dominant in 1930, characterized by the approach of *Lochner v. New York*,<sup>58</sup> by showing that the principled coherence of the regime was desperately out of touch with the true problems of legal administration. The radical nature of the Realist vision may appear limited in comparison to modern critical thought. But it is the baldest form of anachronism to describe Jerome Frank, William O. Douglas, and Thurman Arnold as leaders of a conservative movement. Ackerman's focus on the Realists' faith in intuition and "situation sense" is appropriate only to the work of Karl Llewellyn,<sup>59</sup> eccentric and idiosyncratic even in its own time.

Ackerman's description of the influence of Ronald Coase is even more peculiar. As Ackerman tells the story, Coase is the founding father of the activist state because his work convinced the legal community that market imperfections were pervasive. Even the lay reader will appreciate that giving credit for the modern activist state to a central figure of Chicago School economics is, well, a novel insight.<sup>60</sup> But lay judgment aside, Ackerman's interpretation completely misreads Coase. There are two central lessons in Coase's famous article.<sup>61</sup> The first is behavioral. Coase demonstrates that regardless of the law or of any initial allocation of resources, the only obstacle to a subsequent reallocation is transaction costs. It follows that one can expect private parties to react to changes in the law by rearranging their mutual affairs to preserve the optimal allocation of resources (given transaction costs) and to seek always to reduce transaction costs in order to facilitate future rearrangements.

The article's second lesson relates to social policy. By a variety of nu-

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54. See Clark, Douglas & Thomas, *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932).

55. Clark, *Fact Research in Law Administration*, 2 CONN. B.J. 211 (1928).

56. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

57. See also Clark & Moore, *A New Federal Civil Procedure* (pts. 1 & 2), 44 YALE L.J. 387, 1291 (1935) (explicitly normative effort to reform civil procedure).

58. 198 U.S. 45 (1905).

59. See Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942).

60. Oddly, in an earlier book of Ackerman's, *The Uncertain Search for Environmental Quality*, Ackerman documented how various government agencies commenced a form of systemic, scientific policymaking with respect to pollution in the Delaware River during the 1950's nearly a decade before the publication of Coase's article. See B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974) [hereinafter cited as *UNCERTAIN SEARCH*].

61. Coase, *supra* note 31.

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merical examples, Coase shows that no governmental intervention or non-intervention can be shown to improve the allocation of resources. First, there are technical limitations on any demonstration of allocative improvement: Transaction costs cannot be measured; moreover, there is never sufficient information available to understand ultimate economic effects.<sup>62</sup> More importantly, because of the reciprocal nature of *all* incidents of social harm and the absence of adequately developed moral theories regarding the multitude of activities affected by the legal system, changes in welfare are always ambiguous. The particular implication of this conclusion is that the Pigovian imperative of internalizing the costs of each factor's operations in order to equate private and social costs is nonsense, and cannot be shown to improve social welfare systematically.

These two lessons provide a very strange blueprint for an activist state committed to curing market failures. Coase's message is ultimately nihilistic. After presenting repeated examples in which attempts to correct market failures only further reduce social welfare, Coase concludes that economics provides no guide whatsoever to social policy. "As Frank H. Knight has so often emphasized," Coase announces, "problems of welfare economics must ultimately dissolve into a study of aesthetics and morals."<sup>63</sup> In fact, Coase's moral judgments over the years were profoundly hostile to every form of the activist state. Coase explicitly dedicated his work as editor of the *Journal of Law and Economics* to the battle against governmental regulation.<sup>64</sup> In his earlier work, Coase severely criticized even the "expansion" of government in the sixteenth century to preempt the private market for mail delivery.<sup>65</sup> Coase's articles condemning government regulation<sup>66</sup> and those that he solicited and published in his *Journal* formed the intellectual foundation for the deregulation movement, which constitutes a sustained attack on the activist state<sup>67</sup> and the most serious commitment to laissez-faire since Mill's *Principles of Political Economy*.

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62. The argument of Coase's article is explained in more detail in Priest, *The Rise of Law and Economics*, J. LEGAL EDUC. (forthcoming).

63. Coase, *supra* note 31, at 43.

64. See Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 191-92 (1982).

65. Coase, *Rowland Hill and the Penny Post*, 6 ECONOMICA 423 (n.s. 1939); Coase, *The Postal Monopoly in Great Britain: An Historical Survey*, in ECONOMIC ESSAYS IN COMMEMORATION OF THE DUNDEE SCHOOL OF ECONOMICS 1931-1955, at 25 (J. Eastham ed. 1955).

66. E.g., Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Coase, *The Interdepartment Radio Advisory Committee*, 5 J.L. & ECON. 17 (1962); Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979).

67. Ackerman acknowledges the deregulation movement. See p. 32. He attempts to reconcile it with governmental activism by interpreting the objective of the movement as "eliminating misbegotten or obsolescent initiatives." *Id.* In my view, Ackerman's interpretation neglects the fundamental commitment of this literature to a return to laissez-faire of the reactive state in place of governmental activism.

## III. THE INTEGRITY OF LAW-TALK

It might be said that accusing Ackerman of misreading the Realists and Ronald Coase misses the point. Ackerman does not purport to present a standard intellectual history of the important literature of the past fifty years. Perhaps it is enough that Ackerman is interested in describing the dialogue or conversation between lawyers and policymakers that derived from the writings of Coase and the Realists. The original texts themselves should be considered only starting points.

This, I believe, is the most defensible reading of Ackerman's book, but its shallowness is apparent. Ackerman does not define the relationship between original ideas and the morally loaded dialogue of interest to him, in this book or in any other in the series. Nor does Ackerman present evidence confirming his hunches as to the content of the legal conversation. Clearly, Ackerman is not interested in dialogue between the original scholars themselves, which could be expected to be true to the ideas of the scholars. Nor does he seem to be interested in the dialogue about the original ideas within the secondary literature<sup>68</sup> which would closely follow the ideas. Ackerman does not explain how ideas are translated by policymakers or, at yet a lower level, lawyers, in any systematic way that identifies their dialogic positions.

What do we know about the development of dialogic content? From Ackerman's history, we can infer that the post-Realist and post-Coasean conversations bear no substantive relationship to the original texts from which they are said to derive. The dialogues of interest to Ackerman are in substance completely contradictory to the original ideas. One must conclude that at best these conversations are based upon impressions of the original texts, filtered and finally perverted, in subsequent accounts. Put more sharply, Ackerman's dialogue cannot be distinguished from unconstrained gossip about theories of government. The content of this gossip may or may not bear any resemblance to the original theories themselves.

Ackerman may believe his history of law-talk, but its implications are devastating to Ackerman's larger intellectual enterprise, if not to ninety-nine percent of modern legal scholarship. If Ackerman's description is accurate, he has shown that ideas have no coherent influence on social policy. He has demonstrated that in the world of governmental policy, a scholar will gain equal credit for an original idea or for its converse. Indeed, there is no link whatsoever between a theory or idea and how it will be interpreted by policymakers. Lawyers and policymakers have engaged for the last half-century in a dialogue inspired by the works of the Realists and Ronald Coase that entirely neglects the substantive conclusions of

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68. To which he makes no reference.

these works. Although the Realists were regarded in their own time as radicals, they were actually conservatives; Chicago School economists, while openly and bitterly hostile to all forms of governmental interference with the marketplace, actually elaborated upon and perfected today's activist federal state.

It follows from this conclusion that the efforts of lawyers and legal scholars to work out sensible and effective ideas about how the government might act to improve the lives of its citizens are futile. However brilliant and persuasive to scholars—and few scholars have failed to be persuaded by the Realist attack on formalism or by the Coase theorem—ideas have neither autonomy nor ultimate influence. Moreover, Ackerman's conclusion implies that to criticize government behavior as unreasonable or ill-founded<sup>69</sup>—that is, for its failure to conform to some set of rational principles—is a foolish waste of time, because it ignores the true source of influence. The dialogue from which policies are derived need not correspond to any logical implication of its original premises.

If Ackerman's account is to be believed, the role of dialogue itself is diminished from the lofty position suggested in *Social Justice*. If there is no necessary connection between the content of dialogue and the original principles that inspire it, how can we be assured of the moral integrity of the dialogic process? Why will dialogue generate a commitment to neutrality as opposed to a commitment to personal domination or other non-neutral positions? Must we not suspect that there are forces, other than the dialogic process or the neutrality principles themselves, that are defining the content of legal dialogue?

One might answer that I am still judging Ackerman too harshly. Perhaps Ackerman meant that the Realists and Coase serve only as emblems of different conversational styles: of the conservative legal thought that preceded the New Deal and of the systemic analysis characteristic of New Deal policymaking. But this justification, I believe, undercuts the foundation of Ackerman's project. If the Realists and Coase are emblems, then Ackerman's conception of conversation has no coherent content. Ackerman's definitions of the reactive and activist conversations become so broad that they embrace totally opposing views on the central issues that the conversations describe. The legal conversation of the reactive state embraces both a commitment to laissez-faire and Realist opposition to laissez-faire. The legal conversation of the activist state incorporates both New Deal regulation designed to supplant laissez-faire and Chicago-school commitment to laissez-faire designed to supplant New Deal regulation. Perhaps Ackerman has some deeper conception of activism and reac-

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69. For one example, see CLEAN COAL, *supra* note 48.

tivism that transcends the simple chronology hinged at the New Deal. But it remains unexplained.

#### IV. RECONSTRUCTING ACKERMAN

These criticisms should not be read to suggest that Ackerman's project is unredeemable or hopelessly confused. No one doubts that the explanation of the rise of the modern activist state is perhaps the central question of modern political economy. Moreover, Ackerman's distinction between the world views of ordinary observing and scientific policymaking are powerful explanations of much of modern legal discourse. Prominent scholars besides Ackerman have attempted to define the unique moral forces of the legal process,<sup>70</sup> and, in my view, Ackerman's insistence on neutrality is a promising starting point.

Yet Ackerman's work in its current form stands as something less than a coherent project. Each of the books contains insights that are imaginative and that have influenced legal scholarship. But Ackerman aspires to produce more than a collection of insights, and his readers should demand more as well. In my view, Ackerman must elaborate five aspects of the theory before it forms a comprehensive and coherent intellectual project.

First, Ackerman must define more clearly the moral significance of the dialogic process itself. What moral force inheres in dialogue that is independent of the moral argument of the dialogue itself?<sup>71</sup>

Second, Ackerman must define more clearly the moral significance he finds inherent in the legal process. Except as metaphor, the complaint and answer of modern litigation, couched in strategic formality, do not closely resemble a moral dialogue. Can Ackerman identify some moral content to the legal process that is separate from the moral content of the legal rules?

Third, Ackerman must elaborate the relationship between the dialogic character of the legal process and theories of the appropriate role of government. *Private Property and the Constitution's* review of litigation involving the takings clause demonstrated persuasively to me that dominant theories of government influence the structure of legal argument. But the character and direction of the relationship has never been made clear. Has the dialogic process of litigation somehow generated different theories of government? Or is the legal process only a medium for the expression of conceptions of government derived from other sources?

Fourth, Ackerman must consider how a new vision of government can arise when preexisting conceptions of the world constrain the legal conver-

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70. See, e.g., L. FULLER, *THE MORALITY OF LAW* (1964); Pound, *The Economic Interpretation in the Law of Torts*, 53 *HARV. L. REV.* 365 (1940).

71. Michael Walzer makes a similar point in Walzer, *supra* note 44, at 40.

sation as tightly as he suggests. More specifically, Ackerman must offer an account of the origins, conversational or not, of the New Deal. The rise of the New Deal and of scientific policymaking is the central phenomenon of Ackerman's entire enterprise. Yet Ackerman, to my knowledge, has never attempted to explain the New Deal in terms consistent with his theory. In *Reconstructing American Law*, Ackerman provides savvy commentary on intellectual currents from mid-nineteenth century reactivism to late-twentieth century law and economics. But the New Deal and its scientific policymaking remain strangely (and damagingly) exogenous to the account.

Finally, Ackerman must provide more convincing evidence that the actual growth of government is related to ideas about government—to the translation of these ideas in the legal conversation, as well as to some feature of the legal process. Ackerman seems committed to idealistic, rather than materialistic, explanations of behavior and, in particular, of government behavior. Yet his elaborate praise of Ronald Coase and the central position he gives in many of his works to the economic approach toward behavior<sup>72</sup> seem contradictory. Ackerman attempts to reconcile the contradiction in *Reconstructing American Law* by characterizing economic analysis as only relevant to a conception of facts, while some richer philosophical framework can control policymaking.<sup>73</sup> If world views and societal conceptions are as dominant as Ackerman believes, this approach is untenable. For Ackerman's project to be convincing, he must show the superior force of idealism to materialism as a determinant of government behavior and, perhaps, of individual behavior as well. The casualness of his treatment of ideas in *Reconstructing American Law* suggests the contrary.

These problems stand as substantial obstacles to the completion of Ackerman's project. But consider the context of these criticisms. However imposing the obstacles seem, the project Ackerman has conceived is of far greater dimension. Indeed, the ambition and sustained seriousness of the author are extraordinary. There will be sufficient insight in any book by Bruce Ackerman to make it worth reading. But Ackerman promises much more.

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72. See, e.g., PRIVATE PROPERTY, *supra* note 8, at 168-75; CLEAN COAL, *supra* note 48, at 66-74; UNCERTAIN SEARCH, *supra* note 60, at 9-165.

73. Pp. 46-71.