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## MICHELMAN AS DOCTRINALIST

Gregory S. Alexander\*

Frank Michelman, the theorist, is a figure known to judges and legal scholars literally around the world. Michelman's wildly successfully 1967 *Harvard Law Review* article, *Property, Utility, and Fairness*, invented the economic model of takings that is now the starting point for every economic analysis of the takings issue.<sup>1</sup> The same article is simultaneously the origin of a mode of analyzing takings disputes based upon a Rawlsian theory of fairness.<sup>2</sup> I can think of no other legal topic in which virtually the entire theoretical landscape was not simply described, but created by, a single piece of scholarship.

Michelman's subsequent writings on takings, such as, to pick only three examples, the magnificent 1987 *Iowa Law Review* article, *Possession vs. Distribution in the Constitutional Idea of Property*;<sup>3</sup> his keynote article in the 1988 *Columbia Law Review* symposium;<sup>4</sup> and his 1993 *William & Mary Law Review* comment on *Lucas*,<sup>5</sup> are similar examples of high legal theory at its very best. To put it as directly as I can, no one does theory better than Frank Michelman.

But I want to praise a different Michelman as well: Michelman the doctrinalist. With Michelman's dominance as a theorist of takings law as dominant as it is, it is easy to overlook or underplay his contribution to takings law strictly at the level of doctrinal and case analysis. At this level as well, Michelman has no rival.

Let's go back to the *Property, Utility, and Fairness* article. In this sprawling, complex, magisterial work (I sometimes think of it as takings law's counterpart to Mahler's *Symphony of a Thousand*), Michelman's powers as a doctrinal analyst are in full display. Two contributions are especially notable. The first is his account and critique of

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<sup>1</sup> Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, *Ethical Foundations*].

<sup>2</sup> *Id.* at 1219-24.

<sup>3</sup> Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

<sup>4</sup> Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988) [hereinafter Michelman, *Takings*].

<sup>5</sup> Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993) (discussing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

the permanent physical occupation test, commonly associated with the 1982 *Loretto*<sup>6</sup> decision.<sup>7</sup> Michelman anticipated not only *Loretto*'s categorical approach but facts similar to *Loretto* itself.<sup>8</sup> He pointed out that "courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical take-over."<sup>9</sup> He went on to say that

[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership. This may be true although the invasion is practically trifling from the owner's point of view.<sup>10</sup>

Michelman identified the two flaws with this rule of decision that are well-known today: the *fortuitousness* of the permanent physical occupation factor and its elevation of purely *nominal harms* to the level of a constitutional violation.<sup>11</sup> Both of these factors figured prominently in the withering criticisms that commentators leveled at *Loretto*.<sup>12</sup> In rejecting Justice Marshall's seeming elevation of form over substance, these critics were only restating points that Michelman had already made abundantly clear.<sup>13</sup>

The second doctrinal contribution of that article that I want to single out here concerns another familiar judicial test, the *Hadacheck*<sup>14</sup> doctrine. As we all know, that doctrine provides that government actions that prevent or abate public harms are non-compensable, even when that action inflicts very substantial losses on private owners.<sup>15</sup> The problem in this test is now familiar to all takings mavens: a government land-use restriction that is sustained on the ground that it prevents a public harm can just as easily be characterized as one that extracts a benefit for the public, an action that

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<sup>6</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

<sup>7</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1184–90, 1226–29.

<sup>8</sup> *Compare id.* at 1185 (discussing installation of subterranean utility lines), *with Loretto*, 458 U.S. at 422 (finding the installation of television cables on the roof and side of a building constituted a taking).

<sup>9</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1184.

<sup>10</sup> *Id.* at 1184–85.

<sup>11</sup> *Id.* at 1226–27.

<sup>12</sup> *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 613–14 (1984); John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465, 505–09 (1983); Elizabeth G. Patterson, *Property Rights in the Balance—The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 566–68 (1984).

<sup>13</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1185.

<sup>14</sup> *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

<sup>15</sup> *Id.* at 410–11.

presumably requires compensation. Whether the government is more aptly characterized as harm-preventing than benefit-conferring requires a neutral benchmark. Is a regulation forbidding roadside billboards, Michelman asked, one that prevents the harms of roadside blight and distraction or one that secures the public benefits of safety and amenity?<sup>16</sup> As Michelman put it, this test “will not work unless we can establish a benchmark of ‘neutral’ conduct which enables us to say where refusal to confer benefits . . . slips over into readiness to inflict harms.”<sup>17</sup> Joe Sax had recognized the problem and recast it in terms of his “enterprise/arbitration” approach.<sup>18</sup> Michelman showed that this approach is subject to the same basic challenge:

why should it be thought less odious for society to force a landowner to contribute without compensation to the welfare of his neighbors (those who suffer from his nuisance-like activities) than to the welfare of all of us (who suffer from his refusal to dedicate his land to public uses)?<sup>19</sup>

But Michelman did not throw the baby out with the bath. He recognized that there is a stubborn intuitive appeal to the distinction, and he dug deeper, much deeper than anyone else had or has since, to see if the harm-prevention/benefit-conferring distinction, which so many courts seemed to find sensible, indeed does usefully serve some other analytical purpose.<sup>20</sup> His answer, of course, was yes:<sup>21</sup> “The true office of the harm-prevention/benefit-extraction dichotomy is . . . to help us decide whether a potential occasion of compensation exists at all.”<sup>22</sup> The distinction does not help us decide what efficiency and fairness require by way of compensation, but it does help us recognize situations that do not raise any compensation issue at all because the social action in question is one that merely corrects some prior theft-like redistribution or deliberate redistributive gamble, rather than collectively pursuing an efficient use of resources.<sup>23</sup> The intuitive appeal of the distinction, Michelman saw, was that activities restricted by harm-preventing measures are usually of the theft or gamble-like variety, which are a matter of corrective justice or other non-efficiency reason; whereas activities restricted by public-benefit-conferring measures typically are efficiency-based, raising the compensation question.<sup>24</sup>

Now, characteristically, Michelman took pains to caution against drawing any sharp distinction between these two types of measures.<sup>25</sup> You should not always assume that

<sup>16</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1197.

<sup>17</sup> *Id.*

<sup>18</sup> Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 62–64 (1964).

<sup>19</sup> Michelman, *Ethical Foundations*, *supra* note 1, at 1201.

<sup>20</sup> *Id.* at 1235.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1239.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* at 1236–37.

no legitimate compensation issue is raised by a regulation that is ostensibly nuisance-abating or that a legitimate compensation question is always posed by a measure that seems to be a restriction on innocent activity for efficiency's sake.<sup>26</sup> The distinctive should not be determinative, but it should be considered in deciding whether there is a compensation question at all.<sup>27</sup> Once again, Michelman's strong instinct for standards and against categorical rules is in full view. Once again, Michelman rigorously explains how a conventional takings doctrine, properly understood, operates in a rational and fair way.<sup>28</sup>

Fast-forward to 1988. Michelman's lead contribution to the Columbia symposium, *The Jurisprudence of Takings*, dissected four major and well-known Supreme Court takings cases from the 1986–87 Term.<sup>29</sup> His aim, as he put it, was to “give a cogent account of the[] decisions,” rather than to “grandly theorize either them or the constitutional texts they construe.”<sup>30</sup> Specifically, he set out to see if the cases fit within an existing pattern of regulatory takings cases and to explain that pattern.<sup>31</sup>

The result was illuminating, to say the least. The pattern that Michelman saw was a reaction against the failure, over sixty-five years, for the Court's informal open-ended balancing approach to consistently yield victories for the claimant.<sup>32</sup> The Court was, as he put it, “moving noticeably towards a reformation of regulatory-takings doctrine.”<sup>33</sup> But it was not some crude version of legal formality that Michelman saw.<sup>34</sup> What he saw in the four cases was a much subtler and more limited variety of formalism.<sup>35</sup> He gave *Nollan*,<sup>36</sup> for example, a narrow reading that, as he put it, “fully explain[ed] the opinion and its result without, implausibly, turning *Nollan* into *Lochner redivivus*.”<sup>37</sup> It has since become clear that *Nollan*, even extended by its subsequent partner, *Dolan*,<sup>38</sup> was mostly certainly not “*Lochner redivivus*.” What nettled the Court in both cases was the coerced sacrifice of the owner's right to exclude the public, a fact that, as Michelman pointed out with respect to *Nollan*, put the cases in the vicinity of *Loretto*, with its per se takings rule.<sup>39</sup> Michelman's rendering of the

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<sup>26</sup> *Id.* at 1237–38.

<sup>27</sup> *Id.* at 1238–39.

<sup>28</sup> *See id.* at 1241.

<sup>29</sup> *See Michelman, Takings, supra* note 4.

<sup>30</sup> *Id.* at 1601.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1621–22. During this period, only two cases were decided in favor of claimants. *Id.* at 1621 n.105.

<sup>33</sup> *Id.* at 1622.

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>37</sup> Michelman, *Takings, supra* note 4, at 1609 (contrasting *Nollan* with *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>38</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>39</sup> Michelman, *Takings, supra* note 4, at 1608.

limited impact of *Nollan* seems to have been confirmed in subsequent decisional law, even taking *Dolan* into account.

Similarly, Michelman read *First English*<sup>40</sup> in a way that made the regulation's indefinite duration, the key to the case.<sup>41</sup> He rejected a broader reading (like Justice Stevens did) that would have made the case a broad endorsement of the principle of "conceptual severance by time shares."<sup>42</sup> Here again, subsequent developments have borne out the perspicacity of Michelman's narrow reading, for it squares nicely with Justice Stevens's analysis in *Tahoe-Sierra*.<sup>43</sup> In fact, at the end of his discussion of *First English*, Michelman posed a hypothetical that nearly matched the facts of *Tahoe-Sierra* itself, for a time-limited building moratorium.<sup>44</sup> As Michelman correctly predicted, the Court there "regard[ed] [the] case as presenting a new and unresolved question."<sup>45</sup>

I could go on with many more examples of Michelman's prescient and illuminating readings of cases and rules of decision in takings jurisprudence, but time is limited and I think my point is apparent by now. Let me close with a radical thought: rereading Michelman's analyses of takings doctrine in these and other articles made me think that there is a lot more coherence in takings law than conventional wisdom acknowledges. Those who repeat the conventional wisdom that there is no logic or order in takings need to spend some more time reading Michelman, the master doctrinalist.

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<sup>40</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

<sup>41</sup> Michelman, *Takings*, *supra* note 4, at 1616–17.

<sup>42</sup> *Id.* at 1617–19.

<sup>43</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

<sup>44</sup> Michelman, *Takings*, *supra* note 4, at 1621.

<sup>45</sup> *Id.*; accord *Tahoe-Sierra Pres. Council*, 535 U.S. at 320–21.