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NUANCE AND COMPLEXITY IN REGULATORY TAKINGS LAW

Gregory M. Stein*

*[Presidential candidate John] Kerry also is a casualty of nuance-
itis, which is a kind of house mold prevalent in the north wing of
the Capitol.*

—George Will¹

You're either with us or against us

—President George W. Bush²

*[B]alancing—or, better, the judicial practice of situated judgment
or practical reason—is not law's antithesis but a part of law's
essence.*

—Frank Michelman³

INTRODUCTION

Firmness and certainty are in vogue. The most recent presidential election featured an incumbent President running as the more resolute candidate even in the face of evidence that he had resolutely relied on poor advice; he derided his opponent's concern with considering both sides of an issue as "flip-flopping."⁴ The intended implications of this view are that entertaining alternative ideas, rethinking preliminary conclusions as evidence rolls in, displaying a willingness to admit mistakes, and holding a viewpoint that is non-absolutist are signs of weakness.⁵

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¹ George F. Will, *Capitol Plague: Why Kerry Suffers from Senate Politics*, WASH. POST, Sept. 16, 2004, at A31.

² "You are either with us or against us," CNN.COM, Nov. 6, 2001, <http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/> (last visited Sept. 8, 2006) (discussing the fight against terrorism).

³ Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1629 (1988) [hereinafter Michelman, *Takings*].

⁴ Elisabeth Bumiller, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. TIMES, Nov. 4, 2004, at A1.

⁵ The 2004 election post-mortems emphasized this theme. *See, e.g., id.* ("Bush campaign

It follows from these implications that a strong leader cannot harbor inconsistent viewpoints, for hearing disagreement is the first step toward considering the merit of alternative perspectives. Recognizing shades of gray is akin to conceding a fight, which makes it a weakness not only to hold an opinion that is subject to qualification and exception, but even to acknowledge consideration of opposing points of view. One must insulate oneself from nuance, whether in the Oval Office, on the stump, or on the living room sofa. This rejection of complexity results in competing politicized news networks, a polarized electorate, and red and blue Americas, along with numerous momentous 5–4 Supreme Court decisions rendered over heated dissents.

Law professors, unshackled from the more typical roles of the attorney as advocate or counselor, are unusually free to hold absolutist positions and to ruminate without restraint. Once a lawyer enters the academy—and certainly once he or she is tenured—there is little to tether that professor to “fair and balanced” reporting. Legal academics need not persuade jurors, or voters, or electors, or even students and colleagues at their own institutions, of anything, and they are welcome to espouse any view at all. If politicians and journalists can discredit or disregard opposing evidence, law professors certainly can.

The sole restraint on law professors is the existence of a readership to be persuaded. But for far too many academic writers, that audience is predisposed to agree with the writer before reading the first word, through knowledge of an author’s earlier work, general agreement with the writer’s views, and recognition that certain journals prefer certain types of articles. Law professors may become complacent and sloppy, sensing that their readership, like pre-screened audiences at certain political rallies, has been culled of those who might challenge. By overlooking complexity and disregarding nuance, an author can fortify an extreme case with which only a portion of the overall reading public agrees. This accomplishment comes at the expense of persuading a wider readership of the general validity of much of his or her argument. The house mold of nuance-itis may not be prevalent enough in America’s legal journals.

That is why it is such a refreshing pleasure to review the writing of Professor Frank Michelman in the field of regulatory takings law over the last four decades. Professor Michelman is not just a prolific and thoughtful author capable of composing persuasive and articulate articles covering a wide range of subjects. He also is a writer whose work is significantly strengthened by his willingness to recognize and address the rigor of opposing arguments. Rather than detracting from his papers, these acknowledgments of the soundness of competing analyses force Professor Michelman to refine his reasoning, thereby making his own articles more convincing than they otherwise might be. The reader of an article by Frank Michelman always feels fully confident that

officials said they were helped by the man they called a dream opponent, Senator John Kerry, whose nuanced statements about Iraq gave them an opening, day after day, to attack him as a ‘flip-flopper.’”); Kathleen Slocum, Letter to the Editor, *N.Y. TIMES*, Nov. 18, 2004, at A30 (“[T]here are many of us—almost 60 million, in fact, who voted for George W. Bush—who believe that the world needs less ‘nuance’ and more resolve, strength[,] and unity . . .”).

the author has thought through the many layers of his argument, teased out the implications of every assertion he has made, conceded possible weaknesses and recognized potential criticisms, responded thoughtfully, and respectfully invited those who disagree to reply. He consistently demonstrates that this approach improves his case rather than weakening it. And he always does so in lucid style, with great linguistic efficiency and clear articulation.⁶ This Article will provide some illustrations of the rhetorical power of nuance and complexity from the regulatory takings work of Professor Michelman.

I. NUANCE AND COMPLEXITY IN THE MIDST OF CATEGORICAL RULES

A stellar example of Professor Michelman's approach is found in his 1993 article addressing some of the inconsistencies embedded within the United States Supreme Court's then-most-recent regulatory takings opinion, *Lucas v. South Carolina Coastal Council*.⁷ The article, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, highlights the challenges that face judicially conservative judges who wish to adhere concurrently to the principles of "the property project"—more commonly referred to today as "the property rights movement"—and federalism.⁸ Conservative federal judges who might be inclined to favor property owners in regulatory takings disputes may be the same judges who exercise restraint both in evaluating cases that fall within the province of the state courts and in overruling the decisions of local land use bodies.⁹ Professor Michelman concedes that this is "an old story, after all,"¹⁰ even though *Lucas* had just been decided. "The story in its broad outline is not new," he continues.¹¹ "My hope in these pages is to enrich it in detail and nuance."¹²

The simplistic approach to these contending arguments would be to argue "we're right, they're wrong," as cable television journalists, and far too many legal scholars, are wont to do today.¹³ But Professor Michelman goes three steps beyond this, first by conceding that a parallel problem may face liberal jurists in the context of liberty interests,¹⁴

⁶ See Margaret Jane Radin, *Property and Precision*, 39 TULSA L. REV. 639, 640 (describing one of Professor Michelman's articles as having "the highest idea-to-word ratio of anything I have ever read by a law professor").

⁷ 505 U.S. 1003 (1992).

⁸ Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301 (1993) [hereinafter Michelman, *Lucas and Conservatism*].

⁹ See *id.* at 310–11.

¹⁰ *Id.* at 303.

¹¹ *Id.*

¹² *Id.* More recent commentators continue to discuss issues of federalism in the regulatory takings context. See, e.g., Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004).

¹³ Cf. Michelman, *Lucas and Conservatism*, *supra* note 8, at 306 (suggesting that the "resurgence of federal judicial resolve" to protect property rights might be "normal" and not "untoward").

¹⁴ *Id.* at 303 ("A modern paradigm is the Warren Court pruning back federalism in the

second by suggesting that “a conservative ‘property’ project [is] harder to bring off than the liberal ‘liberty’ project,”¹⁵ and last in observing that judicial conservatives might be attempting to resolve this predicament by seeking to nationalize the concept of property by “pour[ing] naturalistic content” into it.¹⁶ Instead of enlisting assertions to gloss over complexity, Professor Michelman uses this complexity to strengthen his argument. He acknowledges the merits of contrary views, observing that the similarities between the two varieties of cases are incomplete and that conservative judges face a more vexing conflict.¹⁷

“Warren Court judicial liberals”¹⁸ were able to federalize, standardize, and elevate certain liberty interests because lawyers view these liberty interests as “a category whose scope and content are known independently of current legal facts.”¹⁹ Property concepts, however, are shaped and defined by law, and by a law that constantly is evolving.²⁰ Liberty, in short, is naturalistic, while property is positivistic.²¹ Moreover, this positivistic property must be defined somewhere, and that somewhere is in the statehouse and the state courthouse.²² Thus, “effective national judicial protection for property must mean giving federal judges the last word on questions of the meanings of laws emanating from state authorities. But this seems to be a gross contravention of Our Federalism.”²³

The solution, for the judicial conservative, is to “renaturaliz[e] constitutional ‘property,’”²⁴ a project that will nationalize property concepts by imbuing them with fixed content. That, Professor Michelman concludes, is the process the Court was attempting to initiate in *Lucas*, placing a thumb on the “property” end of the balance and see-sawing the “federalism” side up into the air.²⁵ If property law can be reconceived as federal law, then striking down government actions as regulatory takings protects property without impairing federalism.²⁶

A government takes property when it “perpetrates a departure from some then-existent body of law, upon which the complaining party might appropriately have relied as securing to him or her some property-based advantage,”²⁷ and these bodies

field of race.”).

¹⁵ *Id.* at 304.

¹⁶ *Id.* at 307.

¹⁷ *See id.* at 307, 309–11.

¹⁸ *Id.* at 303.

¹⁹ *Id.* at 304.

²⁰ *Id.* at 305.

²¹ *Id.* at 304–05.

²² *Id.* at 305.

²³ *Id.* For a careful evaluation of the meaning of judicial conservatism in the context of federalism opinions, see Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 446–52 (2002).

²⁴ Michelman, *Lucas and Conservatism*, *supra* note 8, at 307.

²⁵ *See id.* at 314.

²⁶ *Id.* at 320–21.

²⁷ *Id.* at 309 (emphasis omitted).

of law are bodies of state law. It is impossible, then, to determine whether a government entity has taken property without knowing what the state defines as “property” at the time the alleged taking occurred.²⁸ This property standard not only is flexible, but also permits for significant variation among the states.²⁹

David Lucas claimed to have lost all or substantially all of the value of his property as a result of the operation of South Carolina’s new Beachfront Management Act.³⁰ While his two parcels undoubtedly retained only modest value after the Act became effective, the Court could not assess the lots’ depreciation without knowing their value before South Carolina acted, and that value was a direct function of the state’s property law at the time.³¹ The Court also recognized a related point in its description of what has come to be known as the nuisance exception and sent the case back to the state courts for an assessment of what South Carolina’s definition of property had encompassed prior to the Act’s enactment.³²

Professor Michelman wistfully imagines a feisty state court describing a system of state property law that has evolved, that continues to evolve, and that puts owners and their lawyers to the task of predicting what the owner’s bundle of rights is and will become over time.³³ The question for that court then would be whether the consequences of South Carolina’s challenged beachfront management law are “fairly prefigured by a prudent extrapolation of the precedential trajectories that are fairly legible in the material.”³⁴ Law is adaptive, not frozen, and must extend itself to meet changing conditions.³⁵

This imaginary approach would constitute a victory for state property law and federalism over the property rights movement. Professor Michelman argues that, as the author of *Lucas*, “Justice Scalia needs to explain why he should consider himself and his judicial colleagues any better qualified to answer [the question of what South Carolina’s property tradition actually *is*] . . . than nine people picked at random from the Charleston telephone book.”³⁶ The Court, of course, will have none of this, falling back instead on a rule requiring the State to demonstrate that the banned activities were already unlawful, an approach that serves to “nullify any principles of state law that might possibly warrant a more complex conclusion than simple ‘prohibition’ or ‘dictation.’”³⁷

²⁸ *Id.* at 310.

²⁹ *Id.* at 309–10.

³⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008–09 (1992). For a more detailed description of the facts in *Lucas*, see *id.* at 1006–10.

³¹ See *id.* at 1008–09.

³² *Id.* at 1027–32; accord Michelman, *Lucas and Conservatism*, *supra* note 8, at 313–14.

³³ Michelman, *Lucas and Conservatism*, *supra* note 8, at 314–16.

³⁴ *Id.* at 315.

³⁵ *Id.* at 316; cf. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (discussing “the evolving standards of decency that mark the progress of a maturing society” in the context of the Eighth Amendment).

³⁶ Michelman, *Lucas and Conservatism*, *supra* note 8, at 323.

³⁷ *Id.* at 326.

Professor Michelman yearns for a more searching analysis than the Court is willing to provide. *Lucas*, after all, is a case in which the Court creates a categorical rule in an area of the law otherwise occupied by multi-factor balancing tests.³⁸ It was not clear at the time whether *Lucas* was an aberration or the beginning of a new trend toward over-simplicity in takings law. From the immediately post-*Lucas* perspective of 1993, “[w]e cannot tell yet how insistent the Supreme Court will be in this demand for simple, yes-no, specificity and resolution—red light or green light but no yellow (or yellow means green).”³⁹ But if *Lucas* signaled a significant change of direction, “its consequence is to federalize the law of land use in a peculiarly profound way. . . . [*Lucas* will] dictate to the States the jurisprudential spirit in which their general laws of property and nuisance are to be read and construed, whether contained in legislative enactments or judicial decisions.”⁴⁰ This, Professor Michelman fears, might lead states to shun appropriately complex principles in favor of more specific, more simplistic rules.⁴¹

II. NUANCE, COMPLEXITY, AND THE QUESTION OF PUBLIC USE

Professor Michelman responded to comments by columnist William Safire in a 1981 article entitled *Property as a Constitutional Right*.⁴² While it is easier to incorporate layers of complexity in an academic article, itself based on a lecture, than in a newspaper essay, the article serves to elucidate the ways in which snappy sound-bites may capture attention while overlooking important subtleties.

Mr. Safire’s column portrays the issue in *Poletown Neighborhood Council v. City of Detroit*⁴³ as “the sanctity of private property.”⁴⁴ True enough, Professor Michelman notes,⁴⁵ but true of every takings case. The central issue in *Poletown*, as any student of takings law will recall and as the United States Supreme Court itself recently revisited,⁴⁶ is the question of what uses are sufficiently “public” that property may be

³⁸ See generally *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–40 (2005) (summarizing various regulatory takings tests).

³⁹ Michelman, *Lucas and Conservatism*, *supra* note 8, at 327.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) [hereinafter Michelman, *Constitutional Right*].

⁴³ 304 N.W.2d 455 (Mich. 1981) (per curiam). For a brief exposition of the facts of *Poletown*, see *id.* at 457. *Poletown* has since been overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

⁴⁴ William Safire, *Poletown Wrecker’s Ball*, N.Y. TIMES, Apr. 30, 1981, at A31.

⁴⁵ Michelman, *Constitutional Right*, *supra* note 42, at 1098 (“I think Safire is right to spot the *Poletown* case as one touching a very sensitive constitutional nerve.” (italics added)).

⁴⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that takings for economic development meet the constitutional “public use” standard).

taken to further them.⁴⁷ “There are mysteries about the idea of constitutionally protected property rights of which Safire’s essay displays no inkling. Some of those mysteries I want to explore The exploration will lead us—or so I intend—to a better way than Safire’s of understanding the poignancy of *Poletown*.”⁴⁸

From this starting point, and with the luxury of more column-inches than most journalists enjoy, Professor Michelman speculates about the sources on which judges rely in determining whether a party actually holds a property right.⁴⁹ Legal recognition of property entitlements may arise from the reasonable investment-backed expectations of owners, the popular perceptions held by laypersons, or the traditional body of common law.⁵⁰ All three of these methods demand that a judge look to an external source to determine whether the entitlement merits legal protection.⁵¹ By contrast, during the *Lochner* era, property rights were understood to be those entitled to protection directly under the Constitution rather than by reference to an external source of law.⁵² These two approaches illustrate that we “are dealing with ‘two conflicting American ideals,’ both reflected in the Constitution: ‘the protection of popular government on the one hand’ and the protection of property rights on the other.”⁵³ Courts face a conflict here similar to the clash between federalism and property rights Professor Michelman would address head on twelve years later.⁵⁴

Professor Michelman points out the tension between the “implicit premise of the constitutional system that individual holdings are always subject to the risk of occasional redistributions of values through the popularly ordained operations of government”⁵⁵ and the “explicit premise of the system that people can have property, be owners, not only as among themselves but also vis-a-vis the people as a whole organized as the State.”⁵⁶ In so doing, he addresses the modern iteration of the question Justice Holmes

⁴⁷ The Takings Clause states, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

⁴⁸ Michelman, *Constitutional Right*, *supra* note 42, at 1098 (italics added).

⁴⁹ *Id.* at 1098–99.

⁵⁰ *Id.* at 1099–100.

⁵¹ *Id.* at 1100. Note how portions of Professor Michelman’s discussion here foreshadow some of the observations about *Lucas* and the nuisance exception that he would make twelve years later in Michelman, *Lucas and Conservatism*, *supra* note 8, discussed in Part I, *supra*.

⁵² Michelman, *Constitutional Right*, *supra* note 42, at 1101–02.

⁵³ *Id.* at 1109 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86–87 (1980)).

⁵⁴ See *supra* Part I. This is a topic Professor Michelman also discussed elsewhere. *E.g.*, Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher’s Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 298–99 (1980) [hereinafter Michelman, *Justice Brennan*] (“Federalism . . . is a device both for curbing remote and unaccountable power and for nurturing self-development through substantial participation in political life. In a parallel view, property would both assure the necessary material foundation for political competence and provide a haven for self-determination and self-expression. The two ideas are thus related, complementary.”).

⁵⁵ Michelman, *Constitutional Right*, *supra* note 42, at 1110.

⁵⁶ *Id.*

faced in *Pennsylvania Coal Co. v. Mahon*.⁵⁷ And he once again rejects the simplistic view that this is a simple yes-or-no question, especially in cases—such as *Poletown*—in which the compensation remedy cannot solve the problem.⁵⁸

The solution, he submits, is found in “seek[ing] a *rapprochement* of property and popular sovereignty in the idea that rights under a political constitution, including property rights, are first of all to be regarded as political rights.”⁵⁹ Mr. Safire laments that while “we are encouraging the Poles in Poland to turn toward capitalism, it is ironic to have Americans in *Poletown* facing expropriation of their property.”⁶⁰ The question is not, however, whether Detroit is permitted to take its residents’ land (which it plainly is) but whether it may do so to help General Motors assemble a large tract for a new plant,⁶¹ and the answer is heavily shaded. Thus, notes Professor Michelman, “it is a mistake to see property—as I gather William Safire sees it—as something categorically apart from—beyond the reach of—political action.”⁶² Instead, individual participation in the political process and regular give-and-take between citizens and their government will define and continually redefine the moving target of property.⁶³

Property rights are political rights. They guarantee that a person feels a part of the community and a fully-constituted citizen and individual,⁶⁴ and they allow that person to participate in the ongoing process of defining what property is. The problem in *Poletown* is not simply that the Michigan Supreme Court favors popular government over the protection of property rights, as Mr. Safire argues.⁶⁵ Rather, it is the more subtle and refined view that

⁵⁷ 260 U.S. 393, 413 (1922) (“As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”).

⁵⁸ See Michelman, *Constitutional Right*, *supra* note 42, at 1108–10.

⁵⁹ *Id.* at 1112.

⁶⁰ Safire, *supra* note 44.

⁶¹ See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

⁶² Michelman, *Constitutional Right*, *supra* note 42, at 1112.

⁶³ See *id.* Note, however, that this moving target cannot be permitted to move too quickly, for “sudden changes in the major elements and crucial determinants of one’s established position in the world” may constitute takings. *Id.* at 1113 (quoting Michelman, *Justice Brennan*, *supra* note 54, at 306). This comment seems to echo the Court’s then-recent exploration of the concept of “investment-backed expectations” in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123–27 (1978).

⁶⁴ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (“Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”).

⁶⁵ Safire, *supra* note 44 (“Why are we so reluctant, in these rights-minded times, to defend property rights? Possession of land or valuables is nothing to be ashamed of or to feel guilty about; we should lustily own up to ownership.”).

the obliteration of Poletown and the rupture of its society, with or without payments of money to the former inhabitants, may bear on their identity and efficacy as participants in the politics of Detroit, of Michigan, of the United States, in which are constantly being forged the conditions in which their, and our, future identity and efficacy will be determined.⁶⁶

III. NUANCE, COMPLEXITY, AND PROPOSED FEDERAL LEGISLATION

As part of the Republican Party's "Contract with America," Congressional leaders proposed several property rights laws soon after beginning their term in 1995.⁶⁷ In three published works—an article, a response, and a reprint of his testimony before the Senate Committee on Environment and Public Works⁶⁸—Professor Michelman addresses this legislation, criticizing it in his testimony as “rest[ing] on a mistakenly oversimplified, a mistakenly purist, view of the place of private property rights, basic and important as those certainly are, in our full constitutional scheme.”⁶⁹

Once again, and in this more highly politicized context, he attempts to strike a proper balance between political rights and property rights, demonstrating his willingness to embrace complexity rather than relaxing his analysis. The proposed legislation aimed to support the freedom of owners to use their property in any way they wish more vigorously than it defended the ability of government to safeguard the public interest.⁷⁰ “Such private-property absolutism is, however, contrary to historic American constitutional understanding; and without the absolutist premise to support them, ‘property rights’ laws themselves lack any robust public justification.”⁷¹

Professor Michelman does not deny the constitutionality of the two proposed laws he discusses in his testimony and his article.⁷² Rather, he focuses on the substance

⁶⁶ Michelman, *Constitutional Right*, *supra* note 42, at 1113.

⁶⁷ See Frank I. Michelman, *A Skeptical View of “Property Rights” Legislation*, 6 FORDHAM ENVTL. L.J. 409, 409 (1995) [hereinafter Michelman, *Skeptical View*].

⁶⁸ Frank I. Michelman, *A Brief Response to Richard Epstein*, 49 WASH. U.J. URB. & CONTEMP. L. 25 (1996) [hereinafter Michelman, *Response to Epstein*]; Michelman, *Skeptical View*, *supra* note 67; Frank I. Michelman, *Testimony Before the Senate Committee on Environment and Public Works, June 27, 1995*, 49 WASH. U.J. URB. & CONTEMP. L. 1 (1996) [hereinafter Michelman, *Testimony*] (reprinting text of his testimony).

⁶⁹ Michelman, *Testimony*, *supra* note 68, at 1.

⁷⁰ Professor Michelman unquestionably views this disagreement as a conflict between personal freedom and governmental responsibility. See *id.* at 8 (opining that one of the statutes “posits an overriding constitutional and moral commitment in this country to a level and sweep of proprietary freedom that decidedly outranks and subordinates the responsibilities of public government”).

⁷¹ *Id.* at 2; see also Michelman, *Response to Epstein*, *supra* note 68, at 25–26 (rebutting the claim that “such a rigid, sweeping, and governmentally crippling rule . . . is demanded by an American constitutional commitment to respect and protect private property”).

⁷² See Michelman, *Skeptical View*, *supra* note 67, at 420; Michelman, *Testimony*, *supra*

of the bills and weighs their protections for the two stakes potentially in conflict: the property rights of an owner and the public interest responsibilities of elected government.⁷³ Congress, acting in partisan fashion, selected the former as more worthy of protection, with this protection necessarily coming at the expense of the latter. Professor Michelman sees the many layers to the issue, which is “closely bound up with the question of how our Constitution has historically been understood to command both a due regard for private property and a due regard for representative government’s capacity for vigorous pursuit of environmental and other public interests.”⁷⁴

The bills’ supporters claimed that their proposals righted a wrong, rebalancing out-of-kilter scales in a way that would restore fairness and compensate those whose property has been taken by majoritarian inequity.⁷⁵ Professor Michelman recasts the bills as “sometimes send[ing money] to these owners, in circumstances where courts applying the Constitution alone would have allowed them nothing.”⁷⁶ Stated more baldly, the proposals create transfer payments from the public at large to a small group of property owners.⁷⁷ “To many who take a skeptical view of property rights legislation, it seems that to require in this way the handing over of public funds to private owners whose activities are restricted by otherwise valid laws . . . is tantamount to giving away public money for no good public reason.”⁷⁸

By rephrasing the issue in this way, Professor Michelman presents a second view of the legislation, one that causes the undecided reader to wonder which of these two seemingly inconsistent positions more accurately describes pending legislation that is not constitutionally mandated. From this point forward, the reader’s assumption, which the article will bear out, becomes that the reality is a highly complex mixture of two contending perspectives. The reader must synthesize his or her own conclusion after pondering these two plausible competing alternatives.

In the other articles examined above,⁷⁹ Professor Michelman placed himself in the role of mediator, considering the merits and flaws of opposing arguments, illustrating the attractive but misleading simplicity in each, and attempting to demonstrate how the consideration and melding of opposing arguments enriches discourse. Here,

note 68, at 4.

⁷³ See Michelman, *Skeptical View*, *supra* note 67, at 411–13; Michelman, *Testimony*, *supra* note 68, at 4–5.

⁷⁴ Michelman, *Testimony*, *supra* note 68, at 4–5 (emphasis omitted). He proceeds to call this point “crucial to my testimony.” *Id.* at 5.

⁷⁵ See *id.* at 7 (noting that supporters of these bills view property rights as “judicially under-protected”).

⁷⁶ *Id.* at 5.

⁷⁷ See *id.* (noting that a “very narrow segment” of the population would enjoy the bills’ protections).

⁷⁸ *Id.* at 7; see also Michelman, *Skeptical View*, *supra* note 67, at 413 (“What is supposed to justify conferral of this benefit at taxpayer expense on these statutorily sculpted subsets of citizens?”).

⁷⁹ See *supra* Parts I, II.

although his long-run goals appear to be the same—demonstrating the shallowness of arguments that may initially seem appealing and encouraging the embracing of complexity—his means of attaining those goals are necessarily different.⁸⁰ This is Congressional testimony, after all, and it is testimony on highly politicized bills that had just been proposed by a new legislative majority that believed it had assumed control on the strengths of its appeals to the public. Not only is he seeking to influence important legislation, he is attempting to provide a sensible and credible viewpoint that the proponents of the legislation may see as contrary to the argument that vaulted them to power.⁸¹

The “property rights” viewpoint is that protective legislation such as these two bills “is required and justified by respect for private property rights . . . [that currently are] under-protected rights”,⁸² that “the Constitution really does in principle demand absolute protection”⁸³ for these rights; and that these rights are “moral rights whose absolute protection is demanded by principles at the root of American constitutionalism.”⁸⁴ Professor Michelman’s goal in the remainder of his testimony is to provide support for the alternative position, so that Congress will consider these competing perspectives and attempt to combine them into a more coherent, nuanced whole before taking action.⁸⁵ Rather than giving property rights “to-the-hilt insulation . . . from public concerns,” he argues, thoughtful lawmakers will insist on “a much more sensitive mediation between two fundamental constitutional principles: respect for private property, and respect for representative government’s responsibility to discern and secure important interests of the commonwealth or of the public considered as a whole.”⁸⁶

Parsing *Lucas*⁸⁷ once again, Professor Michelman notes the points of disconnection between Justice Scalia’s opinion for the majority and the proposed takings legislation.⁸⁸ The *Lucas* Court stressed how the boundaries of takings law must be guided by citizens’ understandings of the ingredients of property rights and how those rights necessarily are restricted on occasion as the state exercises its police power.⁸⁹ In other words, we must “treat the bulk of these [disputed takings] as belonging to the normal give-and-take of a progressive, dynamic, democratic society, an ordinary part of the background of risk and opportunity against which we all take our chances in our roles as investors

⁸⁰ See Michelman, *Testimony*, *supra* note 68, at 15.

⁸¹ See *id.*

⁸² *Id.* at 7 (footnote omitted).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 15 (encouraging Congress to find “fair formulas for compensability”).

⁸⁶ *Id.* at 8–9; see also Michelman, *Skeptical View*, *supra* note 67, at 416 (recounting “[t]he tradition . . . of a law of property that is functionally oriented to contemporary community goals, as well as to protection of private advantage, and that relies on the police powers of legislatures, alongside common law adjudication by courts, to negotiate and mediate between the two”).

⁸⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

⁸⁸ Michelman, *Testimony*, *supra* note 68, at 9–12.

⁸⁹ *Id.* at 10–11.

in property.”⁹⁰ He sees in Justice Scalia’s opinion “a deep and ancient tradition of expected regard for other people’s and the public’s interest and concerns when you make use of your property.”⁹¹ For these reasons, Professor Michelman questions, and suggests that Justice Scalia also would question, “the central premise—the absolutistic property-rights premise—underlying the proposed legislation.”⁹²

Perhaps more strongly than in any of his other published works on takings law, Professor Michelman argues in favor of a particular position in these pieces.⁹³ He undoubtedly holds his own opinions about this legislation, which differ from the views of the majority of the members of Congress to whom he is speaking.⁹⁴ But instead of attempting a “my-position-is-superior-to-yours” approach, he seeks to persuade his listeners that a melding of his views and theirs will lead to policies that better advance the public interest.⁹⁵ He is not so much arguing in favor of a particular viewpoint as he is making it available to his listeners and readers.⁹⁶ He encourages them to hear the two discordant approaches, select the portions of each that are coherent, and fuse them into a workable whole.⁹⁷ Oversimplified legislation is not up to the task of resolving a quandary as vexing as this one: “The problem is obstreperously, recalcitrantly multi-factorial and contextual. It can only be handled at a more retail level, as courts have done with the balancing test.”⁹⁸

IV. NUANCE AND COMPLEXITY IN *PROPERTY, UTILITY, AND FAIRNESS*

Professor Michelman’s best-known work certainly is *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*.⁹⁹ On

⁹⁰ *Id.* at 11.

⁹¹ *Id.* at 12.

⁹² *Id.* at 15.

⁹³ See *supra* notes 67–68.

⁹⁴ See Michelman, *Skeptical View*, *supra* note 67, at 409–10.

⁹⁵ Professor Michelman makes no bones about his distaste for absolutism of this type. See *id.* at 413–14 (noting that, instead of honestly arguing for these bills on policy grounds, supporters instead “claim a loftier, more peremptory ground: that of constitutional morality and obligation”). To his credit, he does not seek to expound any such absolutist views of his own.

⁹⁶ See Michelman, *Testimony*, *supra* note 68, at 15 (suggesting that problems of this type demand finely tailored solutions).

⁹⁷ See *id.*

⁹⁸ *Id.*; see also Michelman, *Skeptical View*, *supra* note 67, at 416 (noting how the constitutional compact the Court identified in *Lucas* “contain[s] other terms that tend, whether this pleases us or not, to make regulatory takings claims hard to deal with reasonably by any kind of categorical rule”); *id.* at 420 (“In part, the problem is the cheapening of the rhetorics of property, conscience, and compact. It likely is not a long-run service to constitutional government to misuse them so flagrantly.”).

⁹⁹ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter Michelman, *Property, Utility*]. Recent citation surveys confirm the influence of this article. See Fred R.

just the second page of the article—one of his earliest published works—he establishes the pattern to which he will adhere in many of his later academic writings, by describing apparently conflicting views of the regulatory takings conundrum as “different versions of the same truth.”¹⁰⁰ Already, he is welcoming disparate views and attempting to highlight their similarities while synthesizing their differences. Although he claims—too modestly—to make no “efforts to arrive at a systematic restatement of legal doctrine, or to reformulate doctrine, redirect it, or overhaul it,”¹⁰¹ this early work already demonstrates Professor Michelman’s trademark precision and sophistication.

Professor Michelman makes his own perspective clear in this article, just as he later will do much more directly in his Senate testimony.¹⁰² But rather than using his own words to subdue those who hold opposing opinions, he finds the strengths in these counterpoints and manages to unify them with his own views, to merge them into a better whole. He also shows an uncanny ability in this 1967 article to predict the sub-issues within regulatory takings law that would become contentious in the coming years and to zero in on truths that seem self-evident today but were far more disputed at the time he was writing.¹⁰³ In fact, one of the reasons they seem so undeniable now is that this article has become part of “the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property,”¹⁰⁴ and thus part of the background of takings law against which contemporary authors write.

This warm reception of complexity is evidenced by Professor Michelman’s discussion of the term “property” itself, in the context of physical invasions.¹⁰⁵ In his summary description of some of the earliest takings cases, including those addressing straightforward physical occupations, he begins with a direct assertion that most laypersons would accept: “‘Property’ suggests a thing owned, and ‘taking’ suggests physical appropriation.”¹⁰⁶ In a footnote, however, he clarifies that “[s]uch usage is not fashionable in academic circles, where there is a preference for a [more sophisticated use of ‘property’ to denote legal relations among persons with respect to things, rather than the things themselves which are the ‘subjects of property.’”¹⁰⁷

Writing in a venue that will appeal to only the most intrepid non-lawyer, he takes great care here to remind his readership—primarily law professors, judges, and

Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1550 (1985) (listing article as eighth most-cited); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996) (listing article as twelfth most-cited).

¹⁰⁰ Michelman, *Property, Utility*, *supra* note 99, at 1166.

¹⁰¹ *Id.* at 1167.

¹⁰² *See supra* Part III.

¹⁰³ *See, e.g.*, Michelman, *Property, Utility*, *supra* note 99, at 1233–34 (anticipating conceptual severance problem that courts continue to address).

¹⁰⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

¹⁰⁵ *See* Michelman, *Property, Utility*, *supra* note 99, at 1185–86.

¹⁰⁶ *Id.* at 1185 (footnote omitted).

¹⁰⁷ *Id.* at 1185 n.41.

lawyers—that “property” may mean something different to them than it does to most others.¹⁰⁸ This may be an admonition to the reader more familiar with legal terminology that laypersons often lack the technical training necessary to recognize some of the nuances of an important legal term; just as likely, it is a warning to legal experts that they need to pay closer heed to popular conceptions about the law of property. Any reasonably proficient academic could construct a plausible argument limiting the Fifth Amendment compensation requirement to physical appropriations, but that argument would fail the straight-face test many non-lawyers would apply. Even for lawyers, the argument is a weak one, for “[w]ordplay—in short dogged adherence to the constitutional formulas of ‘taking’ and ‘property’—cannot justify any sharp line of distinction” between physical takings and negative limitations.¹⁰⁹

Judicial decisions in this area may sometimes produce results “surprising to the uninitiated,”¹¹⁰ but even the experienced scholar will find it difficult to synthesize some of the Court’s work-product and fit the latest case into the provisional model that seemed to make sense until that case shook its foundations. “It is understandable, therefore, that the energies of legal scholars should have focused on analysis and rationalization”¹¹¹ Professor Michelman, however, hopes to perform a different task here. His goal is to establish fairness as the yardstick by which the need for compensation is assessed.¹¹² He also uses this fairness critique as a springboard for importing economics concepts into regulatory takings law, thereby adding further complexity to the discussion.¹¹³

Before he can reach the core of his argument, Professor Michelman first must examine the nature of property.¹¹⁴ Turning from the “deck clearing [of refuting some of the

¹⁰⁸ He also takes care to raise this same issue when writing for an audience consisting largely of lawyers and scholars who are not American. See Frank Michelman, *Construing Old Constitutional Texts: Regulation of Use as “Taking” of Property in United States Constitutional Jurisprudence*, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 227, 244 (Eivind Smith ed., 1995) (advising the reader that the Supreme Court’s “members doubtless feel some responsibility for adjudicating in ways conducive to sustained public confidence in the lawful and constitutional character of governance in the United States—in the integrity of the system of laws and in the sincerity and reliability of ‘the historical compact,’” and referring in the next paragraph to the Court’s “share of responsibility for the country’s constitutional morale”).

¹⁰⁹ Michelman, *Property, Utility*, *supra* note 99, at 1186–87.

¹¹⁰ *Id.* at 1169. Again, the “uninitiated” may include lawyers less familiar with the American legal system. See Frank I. Michelman, *Socio-Political Functions of Constitutional Protection for Private Property Holdings (In Liberal Political Thought)*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 433, 444 (G.E. van Maanen & A.J. van der Walt eds., 1996) (“At least to an Americanized ear, then, a call for ‘constitutional protection for private property’ can only be one for judicial protection of holdings against government actions that would reduce them or their value as gauged by what is claimed to be the existing law.”).

¹¹¹ Michelman, *Property, Utility*, *supra* note 99, at 1170.

¹¹² See *id.* at 1171–72.

¹¹³ See *id.* at 1173–83.

¹¹⁴ *Id.* at 1203.

extant tests] to theory building or, more accurately, to theory hunting,”¹¹⁵ he scrutinizes property owners’ expectations, a study that foreshadows the Court’s discussion of this topic in *Penn Central Transportation Co. v. New York City*.¹¹⁶ Professor Michelman also reminds us that property is not just a “thing owned,”¹¹⁷ nor is it merely “legal relations among persons with respect to things.”¹¹⁸ Now we also must consider the temporal dimension of property—its duration, whether “an existing distribution should normally have a degree of permanence”¹¹⁹—a question he describes as fundamental.¹²⁰ The issue is not just what legal rights the owner possesses at any time, but how long she reasonably may assume these rights will endure without significant legal redefinition.¹²¹ “Property, then, is a conventionally recognized stability of possession”¹²²

With these cards carefully dealt, Professor Michelman now can play out the hand. In detailed mathematical fashion, he describes for the first time his compensation equation, one that balances the efficiency gains to be garnered by government action, the settlement costs a government will incur if it decides to compensate, and the demoralization costs a failure to compensate would bring about.¹²³ Although the article is frequently cited today for this detailed algebraic proposition, it is worth remembering that in the immediately succeeding section he adds yet another layer of particularity by tying the discussion of compensation and utility to John Rawls’s principle of “justice as fairness.”¹²⁴ Under a fairness analysis,

[a] decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such

¹¹⁵ *Id.* at 1202–03.

¹¹⁶ 438 U.S. 104, 123–27 (1978). The *Penn Central* Court cites Professor Michelman’s article twice. *Id.* at 128.

¹¹⁷ Michelman, *Property, Utility, supra* note 99, at 1185; *see supra* text accompanying note 106.

¹¹⁸ Michelman, *Property, Utility, supra* note 99, at 1185 n.41; *see supra* text accompanying note 107.

¹¹⁹ Michelman, *Property, Utility, supra* note 99, at 1203; *see also* Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 U. CHI. L. REV. 91, 100–01 (1992) [hereinafter Michelman, *Liberties*] (“[I]n a common-law based ‘culture of property,’ the possibility of change, of evolution, is ‘always understood.’ For these or other reasons, a democratic constitution may well leave the precise contours of property protection, or some of them, to ongoing political hammering-out within rather broad limits.” (citations omitted)).

¹²⁰ Michelman, *Property, Utility, supra* note 99, at 1203.

¹²¹ *See id.* at 1210.

¹²² *Id.* In this portion of his analysis, Professor Michelman relies heavily on the work of David Hume. *See generally id.* at 1208–11, 1209 n.94.

¹²³ *Id.* at 1214–18.

¹²⁴ *Id.* at 1219 (citing three different works by John Rawls); *see also id.* at 1181 (describing the need to consider the government’s distribution function, as isolated from its allocation function, as “intellectually most satisfying and productive”).

decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.¹²⁵

We now can see what issues the utilitarian and justice-as-fairness modes of analysis force us to address, and the question becomes whether these two approaches to the takings puzzle lead to the same results.¹²⁶ The answer turns out to be a conditional “yes.”¹²⁷ The property owner who is refused compensation might be somewhat mollified if a decision to deny this remedy meets the utilitarian criteria for non-compensation.¹²⁸ But the owner’s reaction “will depend on the behavioral assumptions which are plugged into the utilitarian equation, and on whether utilitarian decision makers are required to assume that their decisions will be widely publicized and sensitively construed.”¹²⁹ This owner is most likely to accept the absence of compensation, then, when regulatory takings decisions are broadly disseminated and understood.¹³⁰ The diffusion of legal knowledge presumably would have helped to shape her expectations in the first place, making a decision not to compensate less surprising. Similarly, the failure to compensate her will help to shape the expectations of future participants in the property marketplace, thereby leading to greater predictability and less disappointment going forward. In these instances, utilitarianism and justice as fairness lead to similar outcomes.¹³¹

Professor Michelman does not shy away from complexity, building two distinct and detailed models that he shows will converge on a single solution when certain conditions are met.¹³² He then is able to apply these models to the actual case law.¹³³ As a means of validating his proposed test, he demonstrates that much of the Court’s takings jurisprudence conforms to his structure, while indicating those areas where there is discordance between the two.¹³⁴

The article also shows the dangers of conceptually severing a property estate into component sub-estates, a process Professor Michelman describes as “functional division of spatially unitary property.”¹³⁵ In addition, he notes the superficial attractiveness and

¹²⁵ *Id.* at 1223.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.* at 1221–22.

¹²⁹ *Id.* at 1223.

¹³⁰ *Id.* at 1224.

¹³¹ *See id.* at 1223–24.

¹³² *See id.*

¹³³ *See id.* at 1224–45.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1234; *see* Pa. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) (noting that assessment of diminution in value will be difficult because “values are relative” and “[t]he rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil”). *See generally* Margaret Jane Radin, *The*

hidden dangers of a test that relies on the illusory distinction between the prevention of nuisances and the creation of public benefits.¹³⁶ A rule that rests the decision whether to compensate on that definitional difference risks focusing on a false target: “Such a rule has overgeneralized from relevant considerations which are somewhat characteristic of, but not logically or practically inseparable from, measures in one or the other class.”¹³⁷ Glossing over complexity in this way can lead to unjust results, and “[i]f the relevant considerations can be kept in view without the oversimplified rule, then the oversimplified rule is merely a menace to just decision and should be dismissed.”¹³⁸

The legal-realist critique of common-law judging has never been far below the surface in the area of regulatory takings law, and it is to this final complexity that Professor Michelman turns near the close of his article. “Fairness . . . is a subtle compound, whose presence in any given situation we can often sense . . . but only through a mental chemistry hard to reconstruct except through impressionistic, almost conclusory discourse.”¹³⁹ This standards-based means of judging does not sit well with those who seek harder-edged rules to guide and bind judicial discretion.¹⁴⁰ Not only may the use of standards lead to impenetrably dense opinions, it also can cause the reader to wonder or fear precisely what is directing a case’s outcome.

Perhaps, Professor Michelman suggests, judicial discretion truly is being guided by a search for fairness, given the imperfect alternatives available.¹⁴¹ But even if we find a fairness standard to be an appropriate guidepost, “we need to search . . . for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate.”¹⁴² The danger of this approach, once again, is

Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1676 (1988) (defining the term “conceptual severance” to mean “delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken”).

¹³⁶ Michelman, *Property, Utility*, *supra* note 99, at 1238.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1249.

¹⁴⁰ See Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (contrasting “hard-edged” rules with more ambiguous standards for decision); cf. Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 59 (1997) (questioning Professor Epstein’s assertion that “a common law baseline for unconstitutional property encroachment . . . promises . . . the kind of rigor and objectivity required for effective judicial restraint of majoritarian excess without undue politicization of the judiciary”).

¹⁴¹ See Michelman, *Property, Utility*, *supra* note 99, at 1249–50; cf. Michelman, *Takings*, *supra* note 3, at 1622, 1625 (observing that “[t]here are further signs in recent developments that the Court is finding its open-ended balancing posture hard to maintain and so is moving noticeably towards a reformation of regulatory-takings doctrine,” but concluding that this arises from the Court’s inability “to reconcile private property . . . with democracy”).

¹⁴² Michelman, *Property, Utility*, *supra* note 99, at 1250. He refers to this search as “doctrinal packaging.” *Id.*

that it creates just another false target, as judges apply a rule that approximates their desired standard instead of directly applying the standard itself, a method that will lead to wrong decisions in those instances in which the rule and the standard diverge.

CONCLUSION

Regulatory takings law—the “hunt for the quark”¹⁴³—is not an area of inquiry that is well-suited to those who seek simplistic solutions. The quest for black-letter rules and straightforward tests is a noble one, but it has not yet succeeded in this field and perhaps never will. Rather, the ideal judge or scholar engages in balancing and rebalancing, constantly recalibrating as unanticipated fact situations and fresh ideas are added to the mix. Initial impressions regularly prove to be wrong, and the capacity to reconsider one’s earlier positions in light of later developments is an essential attribute of the first-rate takings scholar or judge.¹⁴⁴ Similarly necessary is a recognition that good arguments may be scattered among divergent views.¹⁴⁵

This makes regulatory takings law an ideal field, though not the only ideal one,¹⁴⁶ for Professor Michelman. His willingness to acknowledge the strengths of opposing perspectives, his respect for those holding different viewpoints,¹⁴⁷ and his clear and articulate exposition of his arguments are well suited to this treacherous area of the law. The academic work of Frank Michelman has helped to advance the understanding of the complex and highly nuanced world of regulatory takings law, a fact that many thousands of readers—law students, lawyers, law professors, policy makers, judges, and Justices—have recognized from the time they first tackled it.

¹⁴³ CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 875 (4th ed. 1989) (observing that “[t]he attempt to distinguish ‘regulation’ from ‘taking’ is the most haunting jurisprudential problem in the field of contemporary land-use law—one that . . . may be the lawyer’s equivalent of the physicist’s hunt for the quark”).

¹⁴⁴ “There is no way of putting a stop to the endless succession of hard cases—cases that, being fairly debatable either way under today’s corpus of constitutional law, require for their disciplined resolution a new elaboration of constitutional principle that becomes a part of tomorrow’s corpus.” Frank I. Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 414 (1981).

¹⁴⁵ As Professor Michelman notes in a somewhat different context, “A myth is not a falsehood, it is a warped truth.” Michelman, *Liberties*, *supra* note 119, at 107.

¹⁴⁶ See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

¹⁴⁷ See, e.g., Michelman, *Liberties*, *supra* note 119, at 92 (writing, in a response to an article by Professor Richard Epstein, “Professor Epstein, as usual, argues his case with vigor and rigor. As usual, illumination results. We see normative shapes, structures, symmetries—contestable as many of us find them—where before we had not glimpsed their possibility.”).