1996

# Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605

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# WHOSE DEMOCRATIC VISION OF THE TAKINGS CLAUSE? A COMMENT ON FRANK MICHELMAN'S TESTIMONY ON SENATE BILL 605

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Frank Michelman's eloquent testimony before the Senate Committee on Environment and Public Works shows yet again the intrinsic fascination of the takings problem and its long-term hold on the legal imagination.[1] Spurred on by his opposition to Senate Bill 605, Professor Michelman launched into a broader examination of the relationship of private property to the police power. In his view, Senate Bill 605 represents a form of "private-property absolutism" which is "contrary to historic American constitutional understanding; and without the absolutist

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1. *Private Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Environment and Public Works*, 104th Cong., 1st Sess. 34 (1995) (prepared testimony of Frank I. Michelman, Harvard Law School Professor). A slightly edited version of that testimony appears earlier in this issue. Frank I. Michelman, *Testimony Before the Senate Comm. on Environment and Public Works*, 49 WASH. U. J. URB. & CONTEMP. LAW 1 (1996) [hereinafter Michelman, *Testimony*]. For convenience, we cite in this Response to Professor Michelman's testimony as it appears in this issue.

premise to support them, 'property rights' laws themselves lack any robust public justification."[2]

My purpose here is not to defend Senate Bill 605, which in my view contains some serious deficiencies—albeit ones that are not identical to those identified by Professor Michelman.[3] Rather my target is his larger condemnation of the property rights movement for its alleged absolutism which Michelman believes to be at cross purposes with our traditional system of constitutionalism. The most obvious objection to Professor Michelman's position is that Senate Bill 605, for all its significance, is a statute, not a consitutional amendment. It represents an outgrowth of the same political process of give and take that Michelman celebrates in his testimony. Whatever the uniform line of Supreme Court decisions, *nothing* in them *prohibits* the state from supplying additional protections for property owners. Nor is there anything in the Supreme Court tradition that says that these protections have to be extended in all cases if they are extended in some. If someone wanted to single out wetland and endangered species regulation as crying out for some corrective political response, some narrow legislation could be introduced for that purpose alone. Hence, Michelman can oppose Senate Bill 605 or any more limited substitute for all sorts of practical reasons. But he is not on sound ground when he argues that this legislation, even if ill-conceived, somehow violates our long established constitutional traditions.

But in this short comment, I shall put this point to one side and argue that even at the abstract level that he conducts the discourse, he misunderstands the intellectual power behind the property rights movement. The source of my disagreement can be briefly stated. The very acceptance of the power of the government to take property *with* just compensation is, without more, conclusive evidence that a sensible version of the property rights movement does not move toward any absolute conception of property. The text of the Eminent Domain Clause

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2. Michelman, *Testimony*, *supra* note 1, at 2.

3. Let me mention two deficiencies here. First, the 30 percent threshold for diminution in value invites serious game playing by regulators who will move to keep just below the permissible levels. The intrinsic difficulties in valuation of regulatory restrictions will be compounded by the low tolerance of error: from 29 to 31 percent in diminution is worth 69 percent in combination. No assessor has eyes that keen in markets that undeveloped. Note also that there are no buyers for the government restrictions, only takers. Second, the bill is too much a states' rights piece of legislation in that it tolerates extensive local regulation that is itself wholly unprincipled.

may not settle all questions, but it does at least resolve this one: the state *may* take for a public purpose so long as it pays.

The absolutist position on property would not allow takings for just compensation, but would require the consent of the owner. That theoretical position is by no means devoid of respectable defense. I have heard too many stories of individuals who have been wiped out when their property has been taken *with* payment of compensation that is anything but just: no compensation for appraisal fees, litigation expenses, lost good will, moving expenses, anticipated renewal rights, and so on. The absolutist position guards against these risks which now routinely form a part of property ownership in the United States. And any rule that has that beneficial consequence cannot be all bad.

Which is not to say that the rule is fully justified. The reason why sober minds are willing to run the risk of insufficiently compensated property is that the dangers are greater on the other side. Often times property owners sit astride land that increases in value solely because of its neighborly relationship to some larger project of the government's creation.[4] In these circumstances, to allow the landowner to hold out is to grant to him the lion's share of a socially beneficial project to which he has made little or no special contribution. However, paying the owner what he has lost, rather than giving him what the state has gained, allows the project to go through without wiping out any individual landowner forced to make some tangible contribution to the common venture. And if the compensation rules are altered in cases of outright takings, as they surely should be, then we have managed to find a middle path between individual holdouts from community ventures on the one hand and majoritarian excesses on the other. The state keeps all the gain for the citizenry at large, some of which may redound to the owner whose property is taken. The individual in question is not forced to bear any special burden. His resistance to the state program should be disarmed in part by the full compensation, at least to the extent of his market loss, so that political frictions can be avoided by eliminating the demoralization costs from uncompensated takings to which Professor Michelman drew attention in his classic examination of the just compensation

4. *See, e.g.*, United States v. Miller, 317 U.S. 369 (1943) (excluding from computation of just compensation for land taken the increase in value attributable to the authorization of railroad relocation project).

question nearly thirty years ago.[5] So what is wrong with this synthesis? Why does it not represent the *ideal* reconciliation of individual with community interests?

Looking at judicial decisions, it seems clear that this intermediate position has been rejected: Let the state give a good reason—make that any reason—for doing what it wants, and it can inflict disproportionate burdens on individuals who have stood in its way. With ever greater frequency state powers are typically not directed toward the prevention of nuisances: Often they stop newcomers from engaging in the same practices that incumbent residents have engaged in for years, as by requiring them to build only on large lots to preserve the views from present residents that occupy smaller ones.[6] But the Court has spread its majestic mantle of deferential approval over systems of regulation that should, and do, bring stench to the nostrils. Professor Michelman and I do not disagree about the current state of the law. Both of us recognize "the Supreme Court's sustained refusal over the decades to open wide the gates to regulatory taking claims."[7] But we do have strong disagreements about its desirability. He sees difficulties with the property legislation insofar as it seeks to upset the "American social contract—what Justice Scalia has called 'the historical compact recorded in the Takings Clause that has become part of our constitutional culture.'"[8]

The starting point for Professor Michelman's position is the conceptual observation that it is difficult to say that the government has taken your property when it leaves you in possession of it after the dust has settled. He does not go so far to say that this argument defeats all claims for a regulatory taking, for he thinks, as the law now recognizes, that some restrictions on use can indeed go "too far." He only makes the conceptual argument as a preliminary barrage to soften the outer barricades of the property rights position. In light of this puzzle, shouldn't defenders of property rights be more cautious in staking out a strong position against these regulatory takings? Shouldn't they look with some sympathy on Justice Scalia's position in *Lucas v. South*

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5. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1217 (1967).

6. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (holding a zoning ordinance preventing erection of high-rise condominiums in open space did not effect a taking).

7. Michelman, *Testimony*, *supra* note 1, at 8.

8. Michelman, *Testimony*, *supra* note 1, at 8-9.

*Carolina Coastal Council*, namely, that the only regulations that draw constitutional scrutiny are those leading to a complete wipeout of property,[9] and even these are insulated from an owner's challenge if designed to protect against a common law nuisance? The explanation for his position is not some analytical necessity, but an understanding that the American compact tolerates "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 in property, and from which we all as actual or potential property investors also reciprocally benefit."[10]

Beautifully stated, but ultimately false. The first point is: Why doesn't our ubiquitous American compact leave the total wipeout case to the same dynamic democratic process as the partial regulatory taking? Here the owner could take his chances that his property will be spared, and will benefit reciprocally when others' property is taken. If the democratic principle works so well when 99 percent of the value of property is lost to regulation, why stop at 100 percent? Why not, in other words, rely on these same dynamic processes to combat the perils of outright confiscation? If the tradition is as vibrant as it seems, then it should be possible to make it intelligible. But neither Justice Scalia nor Professor Michelman shows that the peculiar compromise decision in *Lucas* represents anything more than last year's ad hoc rationalization for bad takings law. Neither shows that Scalia's position has made any sense.

The reason for this gap is, Scalia's position doesn't make sense. Start with the text. Suppose that we have two identical plots of land: one owned by A and the other by B. Now the government takes the plots from each of them, but does not compensate in cash. Instead, it places by law powerful restrictions on what may be done with each plot, restrictions that go beyond the ordinary nuisance constraints, and then gives B's plot to A and A's to B. It does so because other individuals in the community, those who have orchestrated the change, benefit from the parallel restrictions on both: neighbors can now enjoy the view over the A/B lands. Yet A and B are worse off in virtue of the exchange that has been forced on them against their will. Should both receive from the community compensation in cash to offset the reduction in value, so that

9. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894, 2900 (1992).

10. Michelman, *Testimony*, *supra* note 1, at 11.

if each lot with the encumbrances are worth $100 and each lot without them is worth $500, the community has to fork over $800, $400 to each.

Here the doctrinal argument for compensation is clear enough. Both lots have been taken. Some compensation has been afforded by the property that each owner has been given in exchange. But the owners are still not made whole, so compensation is required for the rest. These are physical takings, outright dispossession, that fall within the admitted scope of the Takings Clause, as interpreted by the supposed social contract. If this case cries out for compensation, what difference results if A and B thereafter *exchange* lots on even terms, so that when the dust settles, each now has his original lot back but is $400 poorer unless that compensation is paid? So we have each party back in possession of his own lot. No one, I submit, can explain why this even exchange should excuse the government from paying the $800. How then could anyone defend a simple regulation that cuts out the first forced exchange and eliminates the need for the second voluntary one, simply by imposing an identical regulation that just reduces the value of each plot by $400? Can the difference in the route taken, chosen unilaterally by the state, defeat its obligation to compensate? If indeed these two cases are part of a seamless web, then we can demand that this so-called social contract distinguish between the physical taking and the regulatory taking: every regulatory taking can be regarded as a physical taking, with the same property returned in partial compensation. Practically and conceptually the two outcomes are indistinguishable.

Should we want to do this? Of course. If one asks why the dangers of physical takings, the answer is twofold. One is that it is unfair to one owner to have to bear the disproportionate burden of public improvements. That unfairness is no less acute when use is constrained than it is when property is taken. Is it really fair for the neighbors who each live on one-half acre plots to zone the newcomer who lives on a five acre plot, by majority vote *before* the newcomer moves in? Second, there is an efficiency justification. To allow the state to regulate down the value of land is to create a private loss. But it is wrong to treat it as just a private loss. It is a private loss that goes to the bottom line. And should be treated as such.

But suppose that we insist that compensation is required, how would the politics play out in a democratic society that labors under this constitutional restraint? Better I think than the ostensibly democratic politics of the Michelman world. To see why consider two cases, both of which require a community of ten equal owners to set aside ten

percent of their lands for wetlands. In one case, the wetlands are divided ten percent across each owner. In the second case, the wetlands are found solely on the lands of J, the tenth member. Now ask how the deliberations will proceed in the two situations. In the first case, they will be done sensibly. All individuals will know that they will have to contribute to the common fund in order to require like sacrifices by their neighbors. Each will have an incentive to trade off social gain against private loss. Cash compensation will be irrelevant, for why should anyone assess each owner a tax equal to ten percent of the property in order to pay back that same amount when the land is so used? The outcomes therefore have built in procedural protections that guard against majority confiscation.

The second case will have very different consequences depending on whether a just compensation requirement is in place. If none is there, the citizens can discover by debate how well off they will be by imposing the regulation on one politically defenseless neighbor. Paying no compensation, they will have no incentive to regard him with the respect accorded other members of the community. They will posture about the great values that they hope to achieve because they know they will get them for free. And they may well take the land when the gain to them is smaller than the loss that they impose on the one hapless neighbor. Can any one argue that the level of deliberation with skewed burdens is lower than what it would be in the first situation of equal burdens? Hardly.

Well it is never costless to restore the equal burden rule, but the compensation principle will strengthen democratic processes. Now that the cash has to be paid over, the citizens will know that each of them has to surrender one-tenth his holdings to achieve the common good. The same incentives for honest valuation and deliberation are created: Public discourse is no longer a question of forming alliances to step on the isolated person. It has to be a search for the best social solution. Such is a better world. And it is a better world whether the restrictions imposed on the one are merely regulatory or possessory.

It is also a democratic world. Most emphatically, it is one that does *not* put courts in charge of society. The question of whether the land should be taken is an exclusively political function, to be initiated by the political process. The sole judicial constraint, one that says "take and pay," beats a world of just plain "take." No longer will courts have to pass on the raft of justifications put forward for the taking or the regulation. It can insist that the price be paid and content itself with the

less intrusive task of real estate valuation. A proper democratic society requires this allocation of power when the land is occupied. It requires it when regulations on use are tantamount to partial takings without just compensation. Whatever the defects of Senate Bill 605, there is no coherent defense for the communitarian vision that leaves us with the worst of both worlds: confiscation of property and a degradation of political discourse.