Frank Michelman’s 1967 article, “Property, Utility, and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” 80 *Harvard Law Review* 1165, is the most influential article on the takings issue and one of the most-cited articles in law. This review is a description of the structure of his article and its major points. My purpose in publishing this is derived from my observation that Michelman’s article is usually presented to students of takings law by way of excerpts. The parts excerpted are almost always the utilitarian and Rawlsian criteria for deciding when to compensate disappointed claimants and when to leave their losses where they lie. Although these are important parts (and will be discussed below), the structure of Michelman’s whole article reflects an approach to takings that strongly qualifies his famous criteria. These notes reflect my opinions, not those of Michelman. The present note is intended primarily to induce students of regulatory takings to look at the rest of Michelman’s enduringly famous article. For that reason, it is brief, and I omit most citations that are found in his article.\(^1\) Parenthetical page numbers refer to those in 80 Harvard Law Review.

\(^1\) Scholarly commentary on Michelman is vast. My own views are in Fischel (1995, chap. 4) and Fischel (1988), as well as in two articles with Perry Shapiro (Fischel and Shapiro, 1988; 1989). Michelman was awarded the inaugural Brigham-Kanner Property Rights Prize by the William and Mary Law School in 2004. Commentary on his work on that occasion by distinguished scholars is contained in 15 William and Mary Bill of Rights Journal 369 (2006-2007). A small sample of works that critically build on his work (aside from those mentioned in the text below) includes Ackerman (1977), Miceli and Segerson (1996), Ghosh (1997), Dagan (1999), Eagle (2000), and Serkin (2006).
Michelman starts Part I with a philosophical conundrum. How can scholars reconcile philosopher Leonard Hobhouse’s rigid insistence that society should not sacrifice the well-being of a single person for the benefit of many with the “worldly wise” view of Oliver Wendell Holmes, Jr., that government should not sacrifice the citizen “more than it can help”? (p. 1166). Michelman goes on to indicate a line he will not pursue, which I would call “connect the dots” legal scholarship, which involves reviewing opinions, particularly those of the Supreme Court, and seeing if one can make a rule that fits the decisions (p. 1171). He motivates this with a review of the “jarring” decisions that are inconsistent with one another (p. 1170). His prime examples are the coal-mine case, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), in which compensation to the coal company for eliminating its right to mine so as to cave-in structures on the surface was held to be warranted, and the brickyard case, Hadacheck v. Los Angeles, 239 U.S. 394 (1915), in which compensation for closing a pre-existing brickyard was not required (p. 1170). Michelman is unsatisfied with the present state of takings law and wants to advance a better way: “I hope to show that the test of fairness...is not a truism; that departures from it in practice are common and can often be identified with confidence...” (p. 1172).

The next stage of the article—the beginning of the analytical part—is a discussion of “The Purposes of Collective Action” (p. 1172). It is telling to me that Michelman does not start with the principles of property. The takings problem arises from actions by the government. In starting here, it is as if he wants to convince readers that the government is up to something good now and then. (For a contrary view, affirming the centrality of the common law of property and evincing a profound skepticism of government intentions, see Epstein 1985.) Michelman gets right into the Kaldor/Hicks criterion so familiar to economists. The criterion holds simply that if the dollar value of the benefits of a public action exceed its costs, the action should be regarded as economically efficient (p. 1174). A revised zoning ordinance, for example, meets this if the gains to homeowners, as manifested by higher property values, from its additional protections exceed the costs—forgone profits—by would-be developers.

Michelman then asks, why, if the proposed project adds to the value of property within its jurisdiction, does the government not simply obtain the consent of the property owners who suffer losses (p. 1174)? I would take this to mean Pareto superiority, which holds that a change is desirable if someone is better off—as is usually implied by consent—and no one else is worse off. One of Michelman’s answers is that Pareto superiority is too hard to arrange, and society
would forgo all of the benefits of collective action if we rigidly adhered to it. He points particularly to the excess transaction costs of compensating everyone involved, citing (p. 1176) Coase (1960) and Calabresi (1965). I would note that Kaldor (1939) and Hicks (1939) came up with their now-famous criterion for the same reason—the transaction costs of compensating all the losers would have forestalled the adoption of nineteenth-century Britain’s most illustrious liberal cause, the abolition of the protectionist Corn Laws.

There is some discussion of the problem of public goods and free riders (p. 1175), but the question of how governments make decisions, which occupies the field of public economics, is not central to Michelman’s analysis. Nor is there any sustained discussion of the meaning of “public use” for which property is taken, which has exercised the takings issue so much since Kelo v. City of New London, 545 U.S. 469 (2005). Michelman proceeds in almost every instance with the presumption that the government’s proposed taking is valid and that the main question of interest is when to supply the remedy of “just compensation.”

Michelman makes a brief detour into the log-rolling theory that compensation is implicitly provided because *on average* losses will be offset by gains over time (p. 1177). (This has been explored by Farber 1992.) He does not go that route, even while admitting its attractions, because, as James Madison warned in the Federalist Papers and civil rights issues of the time demonstrated, there is good reason to be skeptical of the proposition that things just average out for everyone in the long run (p. 1178). Lack of compensation is also problematical because legislators have a problem calculating social efficiency without actually having to pay.

The ideal tests of social efficiency are unanimity or, if there are dissenters, compensation for those who do not consent (p. 1180). On this point, Michelman criticizes the view that government should not compensate because it will be too costly to the government: “What society cannot, indeed, afford is to impoverish itself” (p. 1181). He goes on, however, to justify coercive redistribution of wealth, but only if it “has a general and apparent ‘equalizing’ tendency....” (p. 1182). The possibility that an “equalizing tendency” might be carried so far as to cause society to “impoverish itself” is not explored, nor is the notion that taxation might also be seen as a taking of property. In this regard, Michelman’s analysis follows conventional legal principles, which keep taxes and redistribution analytically separate from property issues.

Leaving general principles, Michelman devotes **Part II** (p. 1183) to his famous critique of the common rules of takings decision, and he finds them all wanting. Michelman derides the
distinction between taking by physical invasion and taking by regulation as “wordplay” and “form-over-substance” (pp. 1185-86). He notes specifically that the distinction could allow for the substitution of regulation for taking in the case of scenic easements (1186). That is, instead of purchasing the land or an easement to keep it from being developed, the government burdens the landowner with a regulation that prevents development. He also points out that the distinction may result in overcompensation by some formulas, since often the physical invasion is trivial or even beneficial, as in taking the edges of parcels for a public sidewalk (1185).

Diminution of value, derived from *Pennsylvania Coal*, is suspect because the baseline from which compensation should be calculated is not clear (p. 1191). Should it be the use that existed previously; the use that maximizes sale value, regardless of its effect on neighbors; or the use consistent with neighboring uses? The diminution-of-value standard is also complicated by the divisibility of property interests (p. 1193), which could allow owners to carve out a stick from an otherwise profitable bundle that has been “taken” by the regulation.

The balancing test asks whether there is enough public gain to justify the private loss. This merely restates the Kaldor/Hicks criterion without resolving the compensation question (p. 1196). Another test, the harm-benefit rule, holds that government actions that extract benefits from the private sector should be compensated, but actions that prevent nuisances or other “harms” should not. The distinction is criticized on the basis of Michelman’s sympathy for the brickmaker in *Hadacheck* (who was made to shut his works down without compensation): “...there is no basis for a general rule dispensing with compensation in respect of all regulations apparently of the “nuisance-prevention’ type....” (p. 1197). *Miller v. Schoene*, 276 U.S. 272 (1928) which upheld the destruction of cedars in order to save apple trees (discussed below), is also invoked to show that cause of nuisance not so clear (p. 1198).

Having shown that the usual tests do not make much sense—though he does concede the intuitive appeal of several of them—Michelman turns in **Part III** to theories of property (p. 1202). (Recall he has already discussed theories of government.) The search is for a theory in which both compensation and noncompensation make sense. That is, it is easy to build a theory of property in which you always compensate (e.g., the usual reading of Blackstone) or never compensate (e.g., Marx). Michelman’s idea of property in this context hinges on “some degree of permanence of distribution” (p. 1203).
The first theories he examines are “desert” and “personality” (p. 1203). Personality theory regards property as extension of one’s self. Artistic creations, for example, are said not to be mere fungible commodities, and no amount of compensation would seem to offset deliberate injuries to property owners under these theories. John Locke’s labor theory is an ancient example of a “desert” theory: Mixing ones labor with something creates an entitlement to keep it. This class of theories share a common disregard for the social consequences of property ownership. Michelman concludes that the “absolutist implication” of such theories makes them unhelpful as the basis for a theory of compensation (p. 1204).

The second property theory Michelman considers is “social functionary” (p. 1206), which holds that production would be impossible (or too costly) without property. Property in this view is defined largely by what it accomplishes as an ingredient of production. But this theory does not preclude some rather arbitrary redistributions (p. 1207). All sorts of demoralizing losses might not be compensable if the social value of the regulation exceeded the loss of incentive effects of noncompensation. This is not quite the same as the Kaldor/Hicks criterion (where benefits just have to exceed costs), because a social functionary approach would insist on considering more than just the dollar costs of resources taken; the adverse incentive effects would have to be calculated as well. The difference between social functionary theory and the next theory to be considered, utilitarianism, seems to be that individuals do not count by themselves, but only for their value as agents of social production. That there might be a special, additional loss from failure to compensate—“demoralization costs” under the utilitarian rubric next considered—is not counted under social functionary theory.

The theory that comes closest to dealing in a balanced way with compensation issues is utilitarianism, as developed by Jeremy Bentham (p. 1208). Michelman takes Bentham as providing “the germ of a theoretically satisfying approach to the compensation questions” (p. 1211). The realization that stability of expectation is useful is what condemns unprincipled transfers (p. 1211). It is not that property is absolutely necessary for production that makes security important, but that security itself is a good thing. This distinguishes utilitarianism from social functionary theories. The latter would jettison property (and compensation) if doing so aided production, while utilitarianism would hesitate before doing so because the (ex ante) feeling of insecurity would still remain.
The loss of well-being of an individual who thinks of himself or herself as being treated arbitrarily counts for something in utilitarianism, but not necessarily in social functionary theory. This is implicit in Bentham’s theory of property as “a basis of expectations” (p. 1212). Property is not itself an expectation, for some expectations might be unreasonable or unwarranted. The existence of property is instead the institutionalization of feelings of security. Undermining such a basis is itself a bad thing because of the anxieties it creates in individuals.

**Part IV** (p. 1214) presents the famous tests for compensation that are so often reprinted in property texts. Their separation from the previous parts of Michelman’s article in casebooks probably explains why they are so poorly understood. The reader who has not had to wrestle with the theories of the state, the paradoxes of existing compensation tests, and competing theories of property is usually puzzled by the utilitarian criteria that form the first test of compensation, which is based on Bentham’s utilitarian theory.

The test is simple. Assume a project is efficient in that it meets the Kaldor-Hicks criterion that total social benefit (B) exceeds the opportunity costs (C) of the resources involved. That is, we initially assume that the government is up to something with positive net social benefit, B>C. Whether compensation should be made depends on comparing demoralization costs, D, with settlement costs, S. Demoralization costs are all the bad (for a utilitarian) things that happen when compensation is not made. They include two elements: the disutility (measurable in dollars) of those not compensated (and that of their sympathizers), plus the lost value of future production caused by their acting on this new knowledge. (I would note that a social functionary theory would count only the latter loss—forgone future production—in deciding whether to compensate.) Given that utilitarianism emphasizes the sense of security that property provides, one might call demoralization costs “insecurity costs.”

Settlement costs arise when society *does* decide to make compensation. These are the transaction costs of identifying losers, winnowing out false claimants, negotiating, having a trial (if that’s the method), and raising taxes (with their associated deadweight losses) to pay for the project or foregoing some other public project. Once these two costs (demoralization and settlement) are ascertained, the utilitarian rule is to pay if D>S, but not if S>D. It’s simple economics: choose to endure the lower costs.

In teaching these concepts for many years, I have found that even economics students are easily confused about the settlement costs of taxes. It is not the amount of taxation that is the
settlement cost. If compensation is perfect—if it pays for all costs—and thus eliminates all
demoralization cost, the taxes (or other public revenue) raised are simply a transfer whose value
is equal to the term C in the B ≥ C efficiency criterion. The settlement cost elements of taxation
comprise the additional administrative costs of raising new tax revenue and the deadweight loss
of tax avoidance from higher taxes (or from forgoing other public projects). This is not an easy
number to calculate, but just using taxes themselves is both economically wrong (because
deadweight loss might be greater or less than tax collections) and inconsistent with Michelman’s
categories.

What is seemingly noneconomic about Michelman’s utilitarian criteria is the element of
disappointment and insecurity in demoralization costs. Economists overlook this element
because it is so hard to measure: Individual demoralization is “private information” that can
easily be overstated. Economists are much more comfortable with the lost future production
element of demoralization cost, but that then puts economists into the social functionary
category. Many economists may be comfortable with that, but they should not be. Modern
demand theory uses utilitarianism to a larger extent than we like to admit. If it was only the loss
of measurable future production that counted in demoralization, we could indeed fall into the
habit that Hobhouse proscribed, that of sacrificing individuals for the benefit of the larger
number or at least, in Holmes’s formulation, sacrificing them more than can be helped.

Michelman in an important note (p. 1215, n. 100) says that courts do not necessarily have to
make calculation about settlement and demoralization costs. Indeed, doing so could greatly raise
settlement costs. What Michelman suggests is that courts carve out some core areas that
the political process is apt not to balance. (How the politics works is discussed later and hardly ever
adverted to in the legal literature.)

Michelman realizes that demoralization costs are tricky, so he goes on to describe them in
more detail. “Deliberate” social actions from “majoritarian exploitation” are most serious (p.
1216). The “only one possible way” to justify the special majoritarian anxiety is that it is
“purposive,” as opposed to random (p. 1217). Insurance can handle the random hazards. Here
again is a reason for reading the previous sections of Michelman’s article. Economists are apt to
treat all losses as insurable (most notably Blume and Rubinfeld 1984), but the utilitarian’s
concern about security of possession makes losses deliberately caused by the majority seems
especially bad (Fischel and Shapiro 1988). Michelman in fact adverts to Calabresi’s (1965) analysis of risk in an earlier footnote (p. 1169, n.5):

There is, however, an important difference, warranting separate treatment, between compensating for individualized losses which are the foreseeable results of deliberate collective choices, and compensating for losses which are, from society’s collective vantage point, pure accidents. The former practices, but not the latter, may imply a distinctive policy of forestalling exploitation, or the suggestion thereof, by the many of the selected or identified few. It could be said to be a subsidiary purpose of this article to clarify and elaborate upon this distinction.

The famous list (more nuanced than a list, of course) of contributors to demoralization costs starts on p. 1217. Demoralization costs are larger (even if unintentional) if:

(1) Settlement costs are low. This seems to mix the other side of the compensation ledger (settlement costs themselves), but not really. When it would have been easy to compensate losers but society decides not to, it is obvious that the victim sustains a disproportionate loss, and general feelings of insecurity are heightened.

(2) It appears doubtful that B>C, so that the government action looks more like unprincipled redistribution than one done for the public weal. This implies that efficiency itself is partly a balm for demoralization.

(3) The individual burden is especially large, not of the type that are typically scattered around.

(4) The burden is not offset by some reciprocity of advantage, such as the gain a homeowner gets from a zoning law that forces both her and her neighbor to forego certain types of use. This actually amounts to the possibility that compensation has been paid in the form of the benefits of the regulation itself, though one cannot just wave one’s hands about the benefits of a civilized society or the whole basis for compensation is undermined.

(5) Most interesting to me, demoralization costs are larger if the victim lacks influence in the political process to have extracted some concessions “in kind” that might not be noticeable from the particular action in question (p. 1218).

To put the abstract criteria in a more concrete perspective, consider a famous but puzzling takings case whose background and denouement I have researched (Fischel 2007; I had earlier
The case is Miller v. Schoene, 276 U.S. 272 (1928), which Michelman calls “celebrated” (p. 1198). In 1914, the Virginia legislature passed a law that required the cutting down of red cedar trees whose proximity to apple trees resulted in a damaging fungus or “rust” that harmed the apple crop but did no harm to the cedar trees. The botanical peculiarity of the fungus was that its life cycle required a back-and-forth trip between the apples and the cedars. If the two species were not within a mile or two of one another, the rust was not produced at all. Despite the ambiguity of which species was the victim of the other, the Virginia and U.S. Supreme Courts upheld the measure, for which no compensation to the owners of the cedars was constitutionally required.

I found that the law as originally written did offer compensation for the supposedly small set of cedar owners whose trees had economic value as windbreaks or ornamental hedges. Most other cedars were volunteers that sprung up in fence rows and untended farm fields and had little value to their owners. I found, however, that offers of compensation to a few induced many more cedar owners to demand compensation, and this threatened the financial viability of the rust control program. In response, the apple growers persuaded the courts to eliminate compensation, though the orchardists continued to pay for disruptions to cedar owner’s farming operations caused by the teams of cedar cutters. Cedar owners acceded to this, I argue, because they recognized the high value of apples as compared to cedars and that the apple industry was important for the local economy.

In terms of Michelman’s utilitarian criteria, the original law (calling for compensation but requiring cutting) can be thought of as regarding settlement costs to be lower than demoralization costs. Demoralization costs were not especially high because it was clear to almost everyone that benefits exceeded costs; the widespread distribution of usually-low-value cedars mitigated feelings of being singled out; there was a general reciprocity of advantage in that the apple industry was widely accepted as the basis for local (Shenandoah Valley) agricultural prosperity (even complaining cedar owners conceded this); and cedar owners, though unorganized (there were no cedar plantations), enjoyed political representation in the legislature that passed the laws. (My most dumbfounding discovery was that the plaintiff in the case, Dr. Casper Otto Miller, had served in the legislature and voted for the cedar-cutting law.)

Despite the modest demoralization costs, proponents of the law—mainly the apple orchard owners, who were well organized—understood that owners of ornamental cedars should be
compensated for their cutting. The orchardists thought that this would involve only modest settlement costs, and they were actually willing to tax themselves (and not Virginians as a whole) to pay for compensation when damages were warranted. Thus, apple orchard owners originally conformed to the utilitarian prescription that held that compensation was warranted when \( D > S \), assuming, as was clearly true in this instance, that \( B > C \). But the orchard owners found after a few years experience that settlement costs were spiraling out of control. Owners of cedars that contributed almost no value to their property were demanding compensation for their cutting. Apple-orchard taxes were rising so much that enduring cedar rust was seeming preferable to cutting cedars.

In this chastened and alarmed mood, the orchardists attempted to limit the compensation from their open-ended law against a determined and deep-pocketed plaintiff, Daniel Kelleher, in *Kelleher v. Schoene*, 14 F.2d 341 (1926). Kelleher almost certainly financed Dr. Miller’s litigation, and Miller’s was the case that reached the U.S. Supreme Court. Both the Virginia and U.S. Supreme Courts brushed off the plain language of compensation in the 1914 act and held that compensation was not required under any circumstance. Despite this victory, apple orchardists continued to pay for the cutting themselves and also a limited set of consequential damage (disruption of farming from cutting cedars) until advances in fungicide technology after World War II made cedar cutting unnecessary.

Leaving the utilitarian concern, Michelman takes up his equally famous (though not mutually exclusive) Rawlsian criteria (p. 1218). This is remarkable in part because Rawls was not yet famous as a social philosopher for his *Theory of Justice* (1971). Michelman got an early read on Rawls from philosophy journals of the type law professors seldom read. His motive for invoking Rawls was apparently unease with utilitarianism, a doctrine that modern philosophers were increasingly inclined to criticize (p. 1219).

Under Rawlsian thinking, the question of compensation is removed far from the historically determined roots of property law and its utilitarian concern for security. The issue of compensation (among many other social practices) is to be viewed as part of the creation of a social contract in a hypothetical “convention of the circumspect” (p. 1220). The convention meets behind a veil of ignorance about who owns what. Behind this veil, members of the polity have to make rules for when the veil is lifted. Knowing that they may be on the bottom of the wealth distribution, they become, it is assumed, highly equalitarian. They regard each other as
equals behind the veil and agree to continue such equality once it is lifted. This is the “equal liberty” principle. However, such equality could be unproductive, so they agree to adopt only those measures that make the least-advantaged person better off. Inequality in social arrangements is acceptable, but only if its effect is to make poorest better off. This is what Rawls later called the “maximin” principle.

Because Rawls’s theory was later embraced as a defense of the modern welfare state, it is an odd theory to invoke in defense of property. It must be understood, however, that under its conditions, the “lifting of the veil” assumes that a satisfactory distribution of wealth has been agreed upon (p. 1221). Hence deviations from it for the common good should not alter the distribution. When collective improvements require the sacrifice of someone’s well being, the equal liberty principle requires full compensation, since lack of compensation would leave some people unequally benefited by the measure. However, Rawls’s second principle—the maximin—allows for the possibility that those left uncompensated might themselves realize, at some remove, that they would be better off if sometimes the government did not to pay compensation. The conditions under which this is acceptable is that disappointed claimant ought to be able to have seen that in the long run, she would be worse off if the rule were always to compensate (p. 1221).

This leads to Michelman’s famous triple-negative rule: “A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such 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” (p. 1223). How he ought to appreciate it is essentially to invoke the aforementioned utilitarian criteria, which is to minimize the sum of demoralization and settlement costs, subject to the condition that an action’s net benefits are deemed to be greater than either cost.

This rather round-about convergence of Benthamite utilitarianism and Rawlsian contractarianism is not perfect. Michelman points to two situations in which they might give different results. In one, government might be able to deceive other people about an individual loss and thus not spread demoralization costs, which would then warrant less compensation on the everyday utilitarian calculus (pp. 1223-24). Michelman points out that this is an unlikely condition in an open society. The other divergence arises if those not compensated are stubborn about not seeing their long run advantage, as they should have in the Rawlsian convention of the
circumspect. Because utilitarians supposedly take people as they are, not as philosophers would like to see them in a thought experiment, the utilitarian approach is actually more likely to offer compensation than the supposedly more equalitarian Rawlsian principle (p. 1224).

**Part V** (p. 1224) revisits the judicial rules (e.g., physical invasion, diminution of value) in light of the “parallel” utilitarian and fairness criteria (p. 1226). The traditional judicial rules do not look so absurd in this context, though all of them are only partial clues to how to settle the takings issue. Physical invasion adverts to the disproportionate burden of demoralization costs and the settlement cost of line-drawing (p. 1227). But Michelman still has little to say in favor of it as an exclusive criterion, and it cannot by itself meet the fairness test (p. 1229).

Diminution of value is defended gingerly as a way of identifying the “crystallized” or “investment backed” expectations that seem more important than potential gains and losses (p. 1233). Michelman is clearly uneasy with this, even though he uses it to justify the process of grandfathering nonconforming uses in zoning. Here is another point at which the fame of Michelman’s article is misunderstood. Several commentators and Supreme Court opinions (e.g., *Penn Central v. New York*, 438 U. S. 104, 128) cite without qualification “investment-backed expectations” as a principle that Michelman supports and apply it to a regulation that does not seem to meet his criteria.

The rule about balancing social gain against private loss (that is, the Kaldor/Hick test) is seen as an imperfect effort to identify situations in which the gain is so especially large that the individual’s demoralization costs might be reduced, but Michelman still finds little aid in this rule (p. 1235). Harm and benefit is rehabilitated as establishing a potentially efficient benchmark from which to judge compensation. Activities judged “harmful” are akin to being “theft-like” and hence require no compensation (p. 1236). But Michelman does not move to the economists’ notion of least-cost avoider, which endorse the harm-benefit distinction (Ellickson 1973). Instead, Michelman deprecates the harm-benefit rule by criticizing the Hadacheck decision, in which the neighborhood “harm” of brickmaking was reason not to pay for shutting down the brickyard. The notion that Hadacheck should have anticipated that his formerly isolated factory would be surrounded by residential uses is met with quiet exasperation: “But he is, after all, a brickmaker” (p. 1243).

In my opinion Mr. Hadacheck’s willingness to go to jail (the writ was habeas corpus, not certiorari) rather than comply with the shut-down rule should not obscure the general virtues of
the harm-benefit rule as one that the convention of the circumspect (as well as everyday utilitarians) might easily choose. And Hadacheck’s famous civil disobedience may have been the reason that the nascent law of zoning was soon altered to allow pre-existing nonconforming uses to persist (Weiss 1987, p. 87). One might say that the display of demoralization by Hadacheck was sufficient to subsequently change zoning practice.

The most neglected section of Michelman’s article is Part VI: “Institutional Arrangements for Securing Just Compensation” (p. 1245). Michelman first points out that the fairness problem would not arise if public decisions were decided on by unanimity. The biggest fairness problem arises when there are “stable factions able to engage in a more or less systematic ganging-up—a malfunction most difficult to prevent under simple majority voting” (pp. 1245-46). This hazard would most often arise in local government (Ellickson 1977), but Michelman never invokes the local/state/national distinction or distinctions as to types of politics beyond the majoritarian model. Courts of law have shown no interest in the distinction, either (Rose 2007). Although Michelman starts with takings as a problem of fair politics, variations in the nature of political processes are not explored further.

Michelman frames the problem as choosing between a “fairness machine” (fair politics) and a “fairness discipline” (judicial review). His general argument is that legislatures have to shoulder more responsibility for imposing a fairness discipline on themselves. This is because of the complexity of the issues involved, which makes it difficult for judges to decide what is fair, and because reliance on the judges makes the legislators ethically lazy: They may think that if it’s about fairness, it’s for the judges to decide (p. 1251).

Michelman briefly invokes another law and economics device: Try to resolve a case as if there were a fairness machine operating (p. 1248). (This would be similar to deciding the optimal amount of nuisance if emitter and victim were the same or were on property owned by a single party.) But judges have a difficult time making subjective judgments like that because the idea behind judging is the supposedly objective, impersonal application of external criteria (p. 1249). This accounts for the formal rules (e.g., physical invasion) that are so unsatisfying. Michelman then goes on to suggest that judges at least try for a decision rule that goes part of the way, and it sounds remarkably like the decision patterns adopted in U.S. Supreme Court cases: “compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value which did not originate under clearly
speculative or hazardous conditions” (p. 1250). Michelman thinks this was already in force. “But it rather clearly leads to denial of compensation in cases where fairness requires otherwise” (p. 1251).

Michelman nonetheless thinks that political authorities can and should take up fairness more than they have. He points out that they already do so to some extent, offering compensation in private bills that are not constitutionally called for (p. 1252). (I would add that it was the Virginia legislators, not the courts, who called for compensation in the cedar-apple controversy in Miller v. Schoene.) He goes on to point out that legislatures can cobble together compensation schemes that would be beyond the ability of courts, and that these schemes may reduce both demoralization and settlement costs (p. 1254). He points to urban renewal relocation costs as an example of this need, and he indicates that some such costs are compensated. His example of administrator’s overlooking the demoralization costs to tenants (not owners) of running a highway through a block of modest dwellings (p. 1257) has also been addressed, with predictable economic results: The higher cost of building highways indeed discouraged their construction (Cordes and Weisbrod 1979).

Conclusion

This essay has been brief so as to help readers see the larger structure of Michelman’s 1967 classic and to encourage them to read the original article. The continuing relevance of the article is due to its comprehensive, scholarly view of the just compensation question. However, Michelman’s hope that “the test of fairness” could serve as “a guide to public policy” (p. 1172) seems largely unfulfilled. Passage of the Environmental Protection Act of 1970 and related state and local expansions of the scope of property regulation raised the stakes for takings claims. Claims of the past (those Michelman considered) had largely been localized and episodic. After 1970 they were nationalized and pervasive. “Just compensation” now appeared as a cudgel to beat back the government, a possibility that delighted libertarians and alarmed environmentalists. Presented with cases that had stakes that were large and whose remedies were difficult to cabin, courts have largely fallen back to formulaic rules such as physical invasion and elimination of all economic use, as in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). A process that balances the interests of private owners and the public at large, which is at the heart of Michelman’s endeavor, seems beyond the capacity of most judicial and legislative bodies. That
such balancing remedies are still appealing to scholars is one reason for the durability of Michelman’s 1967 article.

References


