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# In Tribute: Frank I. Michelman

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# IN TRIBUTE: FRANK I. MICHELMAN

The editors of the *Harvard Law Review* respectfully dedicate this issue to Professor Frank I. Michelman.

*Judge Guido Calabresi**

It is easy to write a tribute to Frank Michelman. It is extremely difficult to write a tribute to Frank Michelman. It is easy because superlatives flow readily and appropriately. It is difficult because, if judged by the standards Frank applies to his own work, whatever one writes is bound to fall short.

I first got to know Frank in 1969, when I spent a year visiting Harvard Law School. He had been given tenure relatively recently and was already recognized as a rising star. Shortly before the fall term began, then-Dean Derek Bok gathered the faculty at a resort in the Berkshires to talk about the issues that might come up during a year that all expected would be marked by University-wide unrest. It was an odd event; I had not expected my Harvard visit to begin by being made to play volleyball with Louis Loss, the great securities scholar and perhaps the only Yale Law School graduate then on the Harvard Law faculty. The meetings and the topics discussed were, on the whole, tedious though probably necessary. What made them worthwhile, however, were Frank's occasional interventions. Gently, profoundly, but often shockingly, for a law school faculty which was not at that time accustomed to public expressions of disagreement, Frank probed and questioned, thereby making Derek's uncertain endeavor truly useful. He showed even then what a university citizen is and should be.

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At the end of the fall term, we got teaching evaluations from the students. I was pleased with mine, and said so to Frank while asking him how he had done. He gave me his to read, and they were splendid. Before I could congratulate him, however, he turned to me, with that expression full of concern that, from time to time, we have all seen him have, and said: "There are some students out there I haven't reached, whom I have not been able to teach." He was referring to the inevitable two or three whom he had not been able to inspire. Acting as an older colleague (despite my own youth), I pompously told Frank that the problem was certainly the students' own, and not Frank's teaching, adding that only two or three unhappy souls in the huge Harvard classes of the time was amazingly good. But he would have none of it. It was his responsibility to connect with every single student. And if he didn't succeed in that, he had, to some extent, failed. He understood, from the start, what a true teacher should strive for.

And then there was his review article of my first book, *The Costs of Accidents*.[1] Back then, the book seemed quite novel. Other reviewers, though perhaps respectful, did not fully understand it. Some, like Richard Posner, ultimately did. But in 1970 he began his review with a celebrated and, in retrospect from him, a quite laughable sentence. "Torts is not my field. But in one sense neither is it Guido Calabresi's . . . ,"[2] thereby expressing his doubts about the book's willingness to use economics to examine a traditional common law subject. Frank, instead, got what I was trying to do right from the start, and immediately pushed the quest further. His highly original application of my approach, to his own field of property,[3] not only deepened, by a lot, what I had tried to do but also altered once and for all how crucial aspects of property law would be analyzed. It also led to further writings on my own part, and especially to *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* (with A. Douglas Melamed),[4] a piece, written during my Harvard year, that derives directly from Frank, and that has itself spurred a huge literature.

I mention his great influence on me, though, not out of Guido-centeredness, nor even out of respect for his friendship to me. I note it, rather, as an example, because his unfailing insights have been at the core of any number of similar exchanges with other scholars, and of analogous developments in all of his fields of work: legal theory, constitutional law, and property. In each of these his contributions have particular characteristics. They always understand the whole

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[1] GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

[2] Richard A. Posner, Book Review, 67 U. CHI. L. REV. 636, 636 (1970).

[3] Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's* Costs, 80 YALE L.J. 647 (1971) (book review).

[4] 85 HARV. L. REV. 1089 (1972).

field and are respectful of what other people are trying to do, no matter how critical of their positions he may be. They are willing to use other disciplines, whether economics, philosophy, or whatever, with great skill while never becoming slave to them or to their often unfortunate self-imposed limits. They are truly original in the sense that they not only advance the field but also add something that will survive all of us. And they are stated in a way that may seem humble, because it bespeaks an ever-present generosity of spirit, but is actually, and at the same time, devastatingly powerful. In short, Frank is, if possible, an even greater scholar than he is a citizen and teacher.

But there is more, he is also a marvelous friend; one who understands what genuine friendship means. And it is with this in mind that, on this milestone, I say to Frank what Cicero wrote in *De Amicitia*, "Ad Multos Annos!"

## *Judge Dennis Davis**

On February 15, 1995, the South African Constitutional Court convened to hear its first case. Two weeks earlier, on January 23, 1995, the Centre for Applied Legal Studies hosted a seminar on critical issues relating to the bill of rights chapter of the newly drafted Constitution.[1] A panel of constitutional experts from the United States had been invited to facilitate these discussions. The leader of this group was Frank Michelman. The timing of the event could hardly have been more appropriate to the challenges facing the court.

It was Frank Michelman's first visit to South Africa. The seminar had been born out of an initiative between the Centre for Applied Legal Studies and Professor Karl Klare of Northeastern Law School. Professor Klare had insisted that the panel should be led by an influential constitutional theorist — a "big name." Frank Michelman was that "big name" and, thankfully, had little hesitation in accepting an offer to make the long trip to South Africa. Thus began Frank Michelman's significant commitment to the development of a progressive constitutional jurisprudence for South Africa.

At this meeting Michelman was asked to speak about constitutional interpretation to an audience that included all of the newly appointed judges of the Constitutional Court, together with many who would

* Judge President of the Competition Appeal Court of South Africa (hon.); Professor of Law, University of Cape Town.

[1] S. AFR. (INTERIM) CONST., 1993.

later appear as counsel before the court and others who would go on to write about the developing jurisprudence.

Although cautious about assuming "the role of instructor," Michelman provided some prescient advice. He warned against an uncritical acceptance of a strain of American constitutional theory that sought to construe the rights enshrined in a constitution to pertain exclusively to democratic process and procedure as opposed to the promotion of some form of morality and social justice. He suggested that the South African Bill of Rights

> may be much more strongly meant than was ours to serve as an opening towards a fundamentally reconceived society: a signpost along the road towards a revolutionized future. A future still to be chartered. And chartered in part through a process of law — that is, constitutional adjudication — that progressively instills concrete meaning into abstract rights statements with a view to realizing in actuality, in the lives of all people, in the still-and-for some-time-yet-to-come unfolding conditions of the new South African nation, the basic human interests for which the rights-statements stand as markers and commitments.[2]

Within the context, this was a bold argument. Consider the audience to which Michelman was addressing these remarks. Although the vast majority of lawyers in the room had fought tenaciously and often heroically against the racism, sexism, and general oppression of apartheid, all had been schooled in Westminster-style constitutional law and educated predominantly through the prism of a formalist-positivist approach to jurisprudence. Michelman was arguing way beyond the obvious, namely that the new Constitution was meant to represent a majestic commitment to a future based on the foundational values enshrined in the text: freedom, equality, and human dignity. He was seeking to persuade the newly appointed judges and the constitutional bar that it was the task of judges through law in general and constitutional adjudication in particular to pave the road toward this "revolutionized future." Here was a call to a transformative constitutional jurisprudence in which the challenges of substantive social justice would not be subordinated to democratic process and procedure.

In the same lecture, Michelman spoke both of the constraints imposed upon the judiciary by the constitutional text, which provided them with the power of judicial review, as well as the challenge to judges in historically developing constitutional systems to lift their gaze beyond the text and toward an animating view informed by "their own educated and considered sense of 'general ends' by which the contemporary nation finds itself able to claim a unifying sense of col-

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[2] Frank I. Michelman, *A Constitutional Conversation with Professor Frank Michelman*, 11 S. AFR. J. HUM. RTS. 477, 480 (1995).

lective or shared purpose, or moral character, or national identity or political coherence."[3]

Reading this lecture more than fifteen years after it was given, I am struck by its perceptive relevance to South African adjudicators who were about to commence the difficult journey toward a constitutional democracy from a still dominant societal position of racism, sexism, and unaccountable authority. With these remarks Frank Michelman began his own journey, or yet another in his own illustrious career: a sustained and creative engagement with the development of South African constitutional jurisprudence and its attempt to create sign posts along the road toward a revolutionized future. Many articles and presentation of seminars in South Africa have followed: far too many to mention.

Suffice to refer to his latest offering, *Liberal Constitutionalism, Property Rights and the Assault on Poverty*.[4] Here Michelman returns to the field of property law in which he has so distinguished himself. The object of this article is particularly challenging: an engagement with the challenges of constitutionalism and social justice, in particular whether a liberal constitutionalist transformative project will invariably be incongruent with a national project of distributive recovery from colonial and post-colonial injustice. In response, he provides a compelling justification to why South Africa was ill advised to include a property protection clause in the Constitution[5] and, in particular, the provision "no one may be deprived of property except in terms of law, and no law may permit arbitrary deprivation of property."[6] In an attempt to redress the problem caused by this provision, Michelman contends that if the word arbitrary were substituted with the word "unfair," it might be possible to reconcile that which would otherwise be a range of defensive property rights with a transformative constitution. He argues further that, even if a new form of politics dictated that a liberal/post-liberal constitution would prevent the recovery of social justice, the transformation of the economy and polity would still have to be carried out responsibly and its adverse impact upon society would have to be minimized. In this way, he forces a careful consideration of a form of politics that may replace a liberal/post-constitutional project but remains faithful to a commitment to a society based upon freedom, equality, and dignity.

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[3] *Id.* at 485.

[4] Frank I. Michelman, *Liberal Constitutionalism, Property Rights and the Assault on Poverty*, 23 STELLENBOSCH L. REV. (forthcoming 2012) (on file with the Harvard Law School Library).

[5] S. AFR. (INTERIM) CONST., 1993, § 25(1).

[6] *Id.*

Over a sixteen-year period of engagement with the South African constitutional project, Michelman has interrogated both the possibilities and limitations of progressive constitutionalism. His writings have consistently revealed a keen awareness of the dangers of constitutional fundamentalism and the problems of replacing politics with a juristocracy, while simultaneously challenging judges to instill concrete meaning into abstract rights claims so as to constitute a society based on substantive social justice for all.

This brief summation of Frank's contribution to South Africa does little justice to its full impact, which has been felt within both the judiciary and the academy. When in 1995, as the director of the Centre for Applied Legal Studies, I issued an invitation to Frank Michelman to facilitate the discussion on critical constitutional issues together with his colleagues, I hardly imagined that the South African legal community would have enjoyed so sustained and challenging a contribution to the development of South African law over the past sixteen years. South African lawyers can only hope that he will continue to make a similar contribution, for at least another sixteen years!

*Rosalind Dixon**

"Rash." That is what I recall Frank Michelman writing on a draft of mine when I was a graduate student working with him at Harvard Law School (HLS). Now, rash is something that Frank himself distinctly is not: witness forty years of the most careful, rigorous study by Frank of the status of "welfare" or socioeconomic rights in constitutional law,[1] or his continuous probing over almost as long of the relationship between constitutional law and liberal ideals of political legitimacy.[2] So you can imagine that I was worried — really worried —

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[1] *See, e.g.*, FRANK I. MICHELMAN, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663 (2008) [hereinafter Michelman, *Explaining America Away*]; Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003) [hereinafter Michelman, *Social Rights*]; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*]; Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Protecting the Poor*].

[2] *See, e.g.*, Frank I. Michelman, BRENNAN AND DEMOCRACY (2005); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

by the prospect that I had finally fallen down in the department that, as a student of Frank's, perhaps matters most: *the thinking department.*

There is certainly no shame as a student of Frank Michelman in *re*-thinking things. Frank is one of the leading exemplars in the American legal academy today of what it means to keep on thinking about, and thus rethinking, one's own ideas.[3] But there is definitely still the possibility in the Michelman school of, if not shame (Frank might want to rule out deliberately inducing that kind of response in his students on liberal, dignity-respecting-type grounds![4]), then serious disappointment if one does not think long and hard about the kinds of questions that matter most to Frank (questions, for example, about what constitutions can and do actually do in the world, and how and why they matter).

So you can also imagine how relieved I was when, after reading and re-reading my draft for several hours in search of the relevant (rash) words, it finally dawned on me that Frank was actually correcting an error in one of my footnotes: the case I was referring to, Frank was pointing out to me, was the voting rights case *Carrington v. Rash*,[5] not *Rush*. ("Rushed" footnotes, not rash thought, were thus my failing on this occasion.) The locus of criticism took me by surprise, because I wasn't expecting someone as distinguished as Frank actually to read my footnotes — or, at least, not in that kind of careful detail! But that, I discovered, was to make a quite fundamental mistake about the kind of scholar Frank is.

Frank might well be a brilliant thinker about abstract questions of political justice, but Frank is definitely not an abstract thinker, if what one means by that is someone who floats above the nitty-gritty detail of constitutional text and doctrine. Frank knows constitutional *law* better than almost anyone — in the United States and South Africa in particular, but also in a great many other countries, given his role in advising graduate students from around the world, and his increasingly global readership.[6] And it is also in no small part because of this

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[3] *Compare, e.g.*, Michelman, *Protecting the Poor*, *supra* note 1, *and* Michelman, *Welfare Rights*, *supra* note 1, *with* Michelman, *Social Rights*, *supra* note 1, *and* Michelman, *Explaining America Away*, *supra* note 1.

[4] *See, e.g.*, MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004).

[5] 380 U.S. 89 (1965).

[6] Frank's work has, for example, been published, or translated with additional commentary from Frank, in recent years into Chinese, Czech, French, German, Italian, Portuguese, and Spanish, among other languages.

expertise that, in recent years, Frank has become one of the leading "outside" voices on South African constitutional law.[7]

Another feature of Frank's intellectual outlook that explains this quite remarkable influence on South African constitutionalism is his commitment to "dialogue."[8] Dialogue is a concept that preoccupied me during my time working with Frank as a student at HLS, and which I have continued (inspired by Frank, of course) to think hard about since, as an Assistant Professor at the University of Chicago Law School. But Frank's idea of dialogue has a much longer pedigree, and indeed a simpler meaning, than do the ideas about interbranch constitutional cooperation I have been focused on: dialogue, for Frank, is simply the dictionary-type definition of the idea, namely an intellectual "*colloquy*" or "*[v]erbal interchange of thought between two or more persons*."[9] Frank has also brought exactly this kind of spirit — of respectful intellectual exchange — to bear in all his scholarly interactions, including those with foreign students, judges and constitution-makers.

When Frank engages in "constitutional conversation," it is certainly no mere exchange of constitutional pleasantries.[10] There is always some new argument, or perspective, to offer; and very often, a quite direct challenge to the audience's prior constitutional thinking. The challenge is also invariably powerful. For me, it was certainly conversations with Frank that first helped "shake up" my (particular Australian-style) formalist notions of the proper role of judges, and courts, under a constitution.[11] (Chicago, of course, has helped continue the process.) And for many South African constitutionalists, I suspect, encounters with Frank have had a similar effect.[12]

In challenging others in this way, however, Frank has also shown a deep humility about his own position as a constitutional outsider. "I tread on ground that for me must be uncertain," he has insisted to South Africans in talking about the relevance of American constitutional insights: "[I]t will be up to you," he tells them, "to say for yourselves how far what I suggest may be correct."[13] He has also shown profound respect for his conversation partners, as themselves capable

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[7] For discussion of this concept, see, for example, Rosalind Dixon & Vicki Jackson, "Extra-Territorial" Constitutional Interpretation: Outsider Interventions in Domestic Constitutional Contests (2011) (unpublished manuscript) (on file with the Harvard Law School Library).

[8] *See, e.g.*, Michelman, *supra* note 2; Michelman, *Social Rights*, *supra* note 1.

[9] OXFORD ENGLISH DICTIONARY, http://oed.com (enter "dialogue"; then click "Find Word") (emphasis added).

[10] *See* Frank I. Michelman, *A Constitutional Conversation with Professor Frank Michelman*, 11 S. AFR. J. HUM. RTS. 477 (1995) [hereinafter Michelman, *Constitutional Conversation*].

[11] This is the wonderful metaphor Frank employs in describing what is lacking in Dworkin's monologic, as opposed to dialogic, conception of the role of Hercules as a judge. *See* Michelman, *supra* note 2, at 76.

[12] *See, e.g.*, Michelman, *Constitutional Conversation*, *supra* note 10, at 480–81.

[13] *Id.* at 480.

of offering reciprocal insights about American constitutional law.[14] It is no wonder, then, that South Africans — like constitutionalists around the world — have continually sought out Frank as a partner in thinking through hard questions of domestic constitutional design and interpretation.

This same commitment to dialogue has also been extremely significant for those of us who were his students at HLS. Frank has had some pretty distinguished conversation partners over the years (including, of course, the likes of Professors John Rawls and Jürgen Habermas), so an invitation from Frank to engage in conversation carries a powerful symbolic message: the door really is open if you have something valuable to say. Hearing this message, I suspect, has had a significant impact on the scholarly path of many of those who, like me, came to HLS as "foreigners," and left as scholars of comparative constitutional law within the American academy. If comparative constitutional law gains a secure place as a field in the United States in the years to come,[15] therefore, I believe it really will be in no small part due to Frank — or the Michelman school of serious thinking, and intellectual exchange, across (all) borders.

## *Dieter Grimm*[*]

When I arrived at Harvard Law School as an LL.M. student from Germany long ago, Frank Michelman was already there as a teacher. I checked it in my yearbook of 1964–1965. The text explains why I did not take classes with Frank at that time. He taught property and local government, no subjects of particular interest to me. Over the last decades we have witnessed a number of epistemological turns in the academic world: the cultural turn, the iconographic turn, and so forth. At a certain point Frank's constitutional turn must have occurred. From that moment on I followed his writings. For me they

[14] *See, e.g.*, *id.* at 477; *see also* Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004).

[15] For the recent renaissance of the field in the academy, see, for example, A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3 (2009). But for controversy surrounding the field in a judicial context, see, for example, Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004).

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differed from the majority of American constitutional scholarship by their philosophical foundations. I think it is fair to say that it was Frank who acquainted American law schools with John Rawls's work and also with Jürgen Habermas. Frank's discourse with Habermas (who had his own constitutional turn with *Between Facts and Norms* of 1992) belongs to the highlights of recent philosophical-constitutional debates. In addition, I see Frank among the leaders of a republican turn in U.S. constitutional law, a turn away from the predominant concern with rights to public will formation, which also brought him close to Habermas and his insistence on the idea that the submission of citizens to the law can be justified only if they are at the same time the authors of the law.

A few years ago I had the privilege to introduce Frank when he gave a speech at the American Academy in Berlin. Before preparing my introduction I asked some of my Yale colleagues how Frank is regarded in U.S. academic circles. One of them answered: he is "the voice of human decency" in American constitutional law — a reputation that he earned mainly by his reinterpretation of the Fourteenth Amendment as a protection of the poor,[1] one of two Forewords he wrote to the *Harvard Law Review*. This coincided with an understanding that brought him closer to European constitutional law theory than most American constitutionalists.

In general Frank is one of the American scholars who early developed a considerable interest in comparative constitutional law in a spirit of openness and curiosity. I think that our contacts became more intensive because of our shared interest in the seminal development of constitutionalism in South Africa after the end of the apartheid regime. We were both engaged in discussions about the role jurists had played in the old times in South Africa and how they should account for their behavior as a professional group, I at that time less so as an academic than as a justice of the German Constitutional Court, which served as a model for South Africa. The members of the South African Constitutional Court, immediately after having been appointed by President Nelson Mandela, traveled to Germany to discuss questions of constitutional adjudication with the members of the German court for a full week. When Frank and I taught a course in comparative constitutional law together at Harvard in the fall term of 2008, I could often observe the difficulty some of our students had when I tried to explain notions and methods of the German or European constitutional mindset. In situations like these Frank showed an extraordinary ability to translate what I tried to communicate in a way that it simultaneously

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[1] Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

became understandable but kept its otherness. This is why Frank is regarded in many parts of the world as a bridge builder between different legal systems — not the smallest of his merits in a globalizing world where more knowledge of foreign law and more mutual understanding are inevitable.

## *Patrick O. Gudridge**

We all know how lucky we are — those of us who have had the chance to engage Frank Michelman, in class or indeed in any mode of serious talk.[1] He is so attentive to the matter at hand, so conscious of the sequence of steps needing to be taken, and at the same time so democratic in his approach, welcoming of our involvement, careful and encompassing in his responses to our reactions and suggestions. We are raised up. We become collaborators in the given project, share in its ambition and its accomplishment.

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Frank Michelman is also over-the-top smart. Thirty years ago, Robert Ellickson — no slouch himself[2] — ruefully put the point more formally: "No law professor has greater analytic power and intellectual range."[3] Michelman's work indeed encompasses so many topics closely considered, so frequently and variously published, its sheer proliferation daunts. We may well wonder about our capacity to grasp it at large, assess it at all close to whole. The pertinent Harvard web page, the last time I visited it, listed only two books (ignoring translated compilations) — *Brennan and Democracy*,[4] and the celebrated *Government in Urban Areas* casebook,[5] a collaborative work with Ter-

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1 The first time I encountered Frank Michelman he was imitating a process server on the last day of Richard Field's civil procedure class (Field was retiring at the end of the semester) — theater both sentimental and surreal. Later on, I was lucky enough to serve as sidekick in Justice Brennan's seminar at the University of Miami in 1991 and 1992. Frank — along with Owen Fiss and Larry Tribe — was a principal recurring participant in the series of extraordinary conversations Brennan orchestrated, occasions of great good humor and affection, occasions also for teaching of the highest order.

2 *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

3 Robert C. Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602, 1602 (1982).

4 FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999).

5 FRANK I. MICHELMAN & TERRANCE SANDALOW, GOVERNMENT IN URBAN AREAS: CASES AND MATERIALS (1970).

rance Sandalow. But there are also 45 or so book chapters, and 113 articles.[6] Read all of this? It is a too-great mound of writing, a mountain really. *Mont Frank.*

Michelman has had to address this problem himself. *Brennan and Democracy* is a greatly interesting book in part precisely because Justice Brennan's legacy piles even higher — 1360 opinions,[7] obviously too many to take up together — and therefore the question of traverse, of which approach and what path, is inescapably front and center. The first chapter provocatively only occasionally discusses Justice Brennan's own formulations. Michelman begins with Alexander Bickel and the familiar countermajoritarian difficulty, sets some of Ronald Dworkin's ideas about right constitutional content as one form of response, finds in the more process-focused work of Robert Post an alternative, but treating each tack as incomplete, proposes another way forward. What matters in assessing the democratic warrant of constitutional adjudication is whether interpretations of constitutional precepts work to encourage and maintain a legal order open at every level "to the full blast of the sundry opinions on the question of the rightness of one or another interpretation" — "having your own opinions and interest-articulations registered," their value in some real sense acknowledged as "helping the process toward the right answer, a value that you will not self-respectingly suppose to be less than equal to that of other people's."[8]

At bottom, it should be apparent, the criteria to be used in assessing constitutional interpretations — the tests of registry and acknowledgement — must be preoccupied with *both* conceptions of substantive fairness and access to governmental processes, conjoin Dworkin and Post, and take into consideration *both* the "impress" and "press" of alternative views.[9] This path through or past Bickel's difficulty becomes the guideway across the Brennan corpus. Michelman's second chapter further details the route, overlaying the idea of "romantic liberalism," a gloss borrowed in part from Professor Roberto Unger, highlighting hazards posed by seemingly anodyne notions of tradition and community. "Everyone . . . has reason to welcome confrontation and challenge of his or her accustomed or habitual ways and values, from all quarters known and unknown."[10] For Brennan, "political

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[6] *See* Frank I. Michelman, Bibliography, HARVARD LAW SCHOOL, http://www.law.harvard.edu/faculty/directory/index.html?id=43&sh&show=bibliography (last visited Jan. 8, 2012).

[7] *See* MICHELMAN, *supra* note 4, at 138 (quoting David H. Souter, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 1–2 (1997)).

[8] MICHELMAN, *supra* note 4, at 59–60. For an extended, appreciative discussion of this part of Michelman's analysis, see Mark Tushnet, *Resolving the Paradox of Democratic Constitutionalism?*, 3 GREEN BAG 225 (2000).

[9] MICHELMAN, *supra* note 4, at 61–62.

[10] *Id.* at 70–71.

freedom meant unprejudiced, emancipated access for all to the contestations of democratic public life."[11] Judicial review thus acquires "its own partisan cause," its own distinctive agenda, becomes "an edifice of liberal political prudence, not a logical entailment."[12]

This map marches Michelman and his readers to some well-known vistas — for example, *NAACP v. Button*[13] and its emphasis on "law's essentially fluid and contestable character";[14] *Texas v. Johnson*[15] and the question of respect for "agitation and eccentricity";[16] *Cruzan v. Director, Missouri Department of Health*[17] and the debate about state interests over and above individual interests;[18] and *Michael H. v. Gerald D.*[19] and the argument as to the role of tradition in constitutional analysis.[20] And there are notable unexpected visits — the discussion of *FTC v. Superior Court Trial Lawyers Ass'n*[21] is just one example.[22] But surprisingly, the hike moves quickly past or bypasses entirely other famous stops — for example, *Baker v. Carr*[23] (on which Justice Brennan and Frank Michelman as law clerk worked together!); *New York Times Co. v. Sullivan*;[24] *Goldberg v. Kelly*;[25] *Eisenstadt v. Baird*;[26] *Craig v. Boren*;[27] and *Plyler v. Doe*.[28]

What are we to make of this idiosyncratic tour? In a way, *Brennan and Democracy* is reminiscent of John Ely's *Democracy and Distrust*,[29] famously prompted by Ely's admiration of Chief Justice Warren and his great efforts.[30] But unlike Ely, Michelman does not try to celebrate through distillation and generalization. Just as plainly, Michelman is uninterested in the treatise form, reinvigorated by Laurence Tribe in *American Constitutional Law*[31] — even though Brennan's huge body of work might easily support such a project. *Brennan and*

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[11] *Id.* at 120–21.
[12] *Id.* at 134–35.
[13] 371 U.S. 416 (1963).
[14] MICHELMAN, *supra* note 4, at 72; *see id.* at 72–74.
[15] 491 U.S. 397 (1989).
[16] MICHELMAN, *supra* note 4, at 78.
[17] 497 U.S. 261 (1990).
[18] *See* MICHELMAN, *supra* note 4, at 92–95.
[19] 491 U.S. 110 (1989).
[20] *See* MICHELMAN, *supra* note 4, at 100–08.
[21] 493 U.S. 411 (1990).
[22] *See* MICHELMAN, *supra* note 4, at 79–81.
[23] 369 U.S. 186 (1962).
[24] 376 U.S. 254 (1964).
[25] 397 U.S. 254 (1970).
[26] 405 U.S. 438 (1972).
[27] 429 U.S. 190 (1976).
[28] 457 U.S. 202 (1982).
[29] JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
[30] *See* John Hart Ely, *The Chief*, 88 HARV. L. REV. 11 (1974).
[31] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1st ed. 1978).

*Democracy* instead presents Brennan *alongside* Dworkin and Post and quite a few other academics and Justices, all equally participant, each individually distinct. And *alongside* Frank Michelman too: it is after all Michelman who takes up the work of each contributor in turn, appreciatively pulls out what he judges to be the pertinent elements, and places each in relation to the others. And it is Michelman himself, of course, who through this process develops the distinctive idea of democratic representation and its concomitants that Justice Brennan's work (and that of all the others) we come to see as exemplifying — within *Brennan and Democracy* anyway.[32]

The form of Michelman's book, its display of "composite orders,"[33] is an endorsement of its substance, an illustration of the rewards in contingent, sometimes tense conjunctions of complex ideas and individuals. It is also proof of strategy, evidence of a workable way of approaching huge accumulations — Brennan's corpus, or American constitutional law at large, or indeed law generally — considered both as wholes and as in process variously assembling. We glimpse too a sketch of Frank Michelman's mountain — heterogeneous and complex, nonetheless fractally elaborating, organized and organizing. Finally, we recognize that this massif comes into view only virtually, as it were, as it is appropriated, however tumbled, inside our own efforts. Michelman's works, like ours and like the efforts of the writers he reads — Brennan, Bickel, Dworkin, Post, Rawls, Habermas, the rest — are pushed out and up as they are glimpsed, grasped, and put to use: become like landscape, geology, and cultural production simultaneously.

* * *

Ranges, not just mountains here and there — caught up in our particular projects, their juxtapositions and scrutinies, we even so come to recognize major peaks.

*Mont Frank*.[34]

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[32] Throughout his career, Frank Michelman has made heavy use of the juxtaposition and close critical reading of the important work of other writers in order to situate and sharpen his own perspective — indeed, Michelman may have employed this device more often and more centrally than other prominent constitutional theorists. This is not the occasion, of course, for any thorough survey. For a thorough survey of Michelman's scholarship, see, for example, *Legal Scholarship Symposium: The Scholarship of Frank I. Michelman*, 39 TULSA L. REV. 457 (2004). For examples early and late, see, for example, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part 1*, 1973 DUKE L.J. 1153; *Frankfurt Lecture III: Frank I. Michelman, The Case of Liberty*, NORMATIVE ORDERS, http://www.normativeorders.net/en/news/headlines/416-frankfurt-lecture-iii-frank-i-michelman.

[33] *See generally* STUART CURRAN, POETIC FORM AND BRITISH ROMANTICISM (1986).

[34] *Cf.* Ferdinand Hodler, LAKE GENEVA AND MONT BLANC WITH PINK CLOUDS (1916), *available at* http://www.flickr.com/photos/centralasian/5687448013/ (last visited Jan. 8, 2012).

*Martha Minow**

> Shake off all the fears of servile prejudices, under which weak minds are servilely crouched. Fix reason firmly in her seat, and call on her tribunal for every fact, every opinion.
>
> — Thomas Jefferson[1]

What law review pages can best honor a superb scholar whose own words have memorably enlivened so many pages of this and so many other scholarly publications? It will not do to simply list and admire Frank Michelman's pathbreaking works on constitutional law and theory, comparative constitutional law, property law, and poverty law which are read and studied across the world in English and in Chinese, Czech, French, Italian, German, and Portuguese. Nor is it sufficient — though it is crucial — to note his extraordinary capacity to span the most practical and the most theoretical. Justices at the United States Supreme Court and other constitutional courts rely on his work. The American Philosophical Society awarded Frank its Henry M. Phillips Prize in Jurisprudence; an interlocutor for John Rawls and Jürgen Habermas, he pays no less attention to the arguments and questions from scores of students and scholars, earning passionate devotion. South Africans acknowledge his pivotal role as interlocutor and advisor to drafters of their post-apartheid constitution. All of this is remarkable and commendable. Yet Frank's superb work and career, I think, call for more than recitation of accomplishments. Instead, the best tribute, I think, is engagement, in kind, asking good questions and wrestling with them always with one foot in theory and another foot in practice, attending to real consequences, in real contexts, in a messy world.

For Frank Michelman asks great questions. He also pursues them with care to illuminate not only all sides of an issue, but as many levels of analysis as reasons can reveal. In his hands, the question "May a private university act against racially stigmatizing speech on campus?"[2] becomes a subtle and self-reflective analysis of doctrinal legal arguments, the dynamics between

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[1] Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in* THOMAS JEFFERSON: WRITINGS 902 (Merrill D. Peterson ed., 1984).

[2] Frank I. Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 356 (1992).

courts and legislatures, and the possibility that universities consider becoming places that make democracy a daily practice enough to warrant potential exception from an across-the-board ban on censorship, folded into a savvy assessment of how courts, legislatures, and universities are unlikely to pursue the options demanding the most of them.[3]

In his now-classic 1969 Foreword to the *Harvard Law Review*'s Supreme Court issue — in the midst of judicial consideration of War on Poverty policies — Frank enacted his hope that "propounding such questions might affect the elaboration of constitutional rights pertaining to the status of being poor."[4] He presciently asked whether a focus on the hazards in an unequal society would better serve the courts than would a focus on avoiding extreme unequal treatment, thereby anticipating the turn to preoccupation with classification that has, from the perspective of some, taken constitutional adjudication away from inquiries into justice.[5]

So, here's my question: what is the method Frank Michelman adopts — and what does it teach about law and life?

Evident in Frank Michelman's work is his insistence on digging beneath the familiar and the unexamined.[6] Equally present is his persistence in subjecting his own initial arguments to renewed scrutiny.[7] His analysis might travel through geometry,[8] political

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[3] *Id.* at 350–53, 355–62, 367–69.

[4] Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 16 (1969).

[5] With the classification focus in equal protection treatments of race, the United States Supreme Court has turned away from constitutional deliberation over the status of being poor. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See generally* Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

[6] *E.g.*, Frank I. Michelman, *Postmodernism, Proceduralism, and Constitutional Justice: A Comment on van der Walt and Botha*, 9 CONSTELLATIONS 246, 246 (2002) ("Maybe we think we all agree on the most basic guaranties of human rights that compose our constitutional bills of rights, such as guaranties of equality of citizenship and freedoms of conscience and expression. But what is it, then, that we agree on?").

[7] Thus, in 2002, he wrote, "The constraint of public reason — the guarantee that the right questions, at least, will be posed and sincerely debated — itself thus becomes one of the constitutional essentials." Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?*, *in* HABERMAS AND PRAGMATISM 112, 122 (Mitchell Aboulafia et al. eds., 2002). Commenting on these words four years later, he wrote, "Well, *what* spirit? *What* right questions?" Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 151 (2006).

[8] Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* ETHICS, ECONOMICS, AND THE LAW 3, 14 (J. Roland Pennock & John W. Chapman eds., 1982) (comparing oblong subdivisions with honeycomb clusters to explore the social relations and negotiations likely to result from different land-planning patterns in allocating property).

philosophy,[9] economics,[10] or psychology,[11] but it will always press for reasons and justifications; indeed, Frank's gifts include often making better versions of the arguments with which he disagrees than do his opponents. Frank probes and insists on dialogue, imbuing analysis of ideas with deep understanding of the human beings who form and live with them. Indeed, the commitment to dialogue is so pervasive that it informs Frank's prose style[12] and his constitutional theory.[13]

In this vein, a truly remarkable document captures Frank's comments when he led a team of constitutional experts from the United States in a journey to South Africa to discuss issues related to that nation's interim Constitution. In *A Constitutional Conversation with Professor Frank Michelman,*[14] Frank explains that the discussion cannot involve one-way instruction by the scholars from the United States who lack the knowledge and involvement of South Africans in the project of constitutional work.[15] Frank further notes that the U.S. scholars could share knowledge of judicial behavior and conventional modes of legal interpretation but that successful legal interpretation would require appraisal of consequences "in the light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing."[16]

Sharing this sense that law is enacted not discovered, even as it reflects a conception of justice unfolding in part through the legal acts of interpretation, Frank's comments to that group in South Africa also show how the effects of engagement with South African lawyers af-

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[9] *E.g.*, Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003); Frank I. Michelman, *Machiavelli in Robes? The Court in the Election*, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000, 256 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

[10] Frank I. Michelman, *Microeconomic Appraisal of Constitutional Law: A Methodological Preface*, *in* ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 137 (Daniel Rubinfeld ed., 1979).

[11] Frank I. Michelman, *Integrity-Anxiety*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241 (Michael Ignatieff ed., 2005).

[12] *See* Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1833 (1994) (discussing how a reading of John Rawls' *Political Liberalism* can be useful for instruction on ethical wisdom, he writes that "[t]he challenge is to divest yourself, if you can, of belief that constitutional democracy is, in fact, the right form of political ordering for you and your kind. Nothing in Rawls's argument would require you to answer the question that obviously now looms: whether (for this purpose) *your* kind is anything less than the human kind. Nevertheless, you might feel some pressure to respond." (footnote omitted)).

[13] Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76–77 (1986).

[14] 11 SOUTH AFR. J. HUM. RTS. 477 (1995).

[15] *Id.* at 478.

[16] *Id.* at 485.

fected his own understanding of American law.[17] For he further tells his South African interlocutors that the visiting Americans come from a legal system that never intended its expression of rights to serve as vehicles for general social transformation — but South Africa's might do just that.[18] The humility and honesty informing Frank's remarks not only indicate hard-won lessons about limitations of court-based law reform in the United States but also demonstrate why he has become so sought after in constitutional discussions across the globe. His great personal qualities of generosity, curiosity, and empathy are manifest in his written work, as is his personal commitment to stretching and challenging old ideas — including his own. Receptive to new theoretical developments, he has become a trusted guide and honest critic of Rawlsian theories of justice, critical legal studies, feminist legal thought, republicanism, critical race theory, law and economics, and Habermasian conceptions of liberalism. Frank notoriously improves other people's theories in both his sympathetic and critical retellings.

In the context of evaluating whether economic analysis offers a basis for preferring private property arrangements, Frank concludes one article with a statement that exemplifies what makes his work so commendable. He writes: "With that provisional view, you might want to keep on investigating, rather than considering the matter closed."[19] There could be no better exemplar of the commitment to using reason to pursue truth and justice. Honored to salute Frank's career, I look forward to continuing to learn with and from his superb questions.

*Margaret Jane Radin**

I came to know Frank Michelman from the printed page. As a first-year law student I was unsettled by the all-transaction-costs-all-the-time approach of my property teacher, and I sought alternatives in the library. I came upon Frank Michelman's piece, ***Property, Utility, and***

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[17] This paragraph draws on Martha Minow, *Just Education: An Essay for Frank Michelman*, 39 TULSA L. REV. 547 (2004).

[18] *Id.* at 479.

[19] Michelman, *supra* note 8, at 34.

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*Fairness*,[1] and as I made my way through his pages, both meticulous and passionate, I became a Michelman fan. After reading his article, I felt better about welfare theory and property theory in general. It was complicated, not simple; it was polytonal, not monotonal; it was open ended, not frozen.

In just a few years, I became a property theorist myself. I cannot say that Frank was the cause of my becoming a property teacher, because honestly, in the beginning it was largely a fluke. I didn't go to law school intending to be an academic, but while I was a student, academics grabbed and held me, and then a very nice teaching job hit me over the head in the spring of 1976 when I was still a 3L. The school needed "a woman" to replace "a woman" who had had to withdraw her acceptance in March, and through a chain of coincidence that would seem unrealistic if it showed up in a novel, I got the call. I asked the dean for a first-year course, and Property was the one available, and I took it.

I do believe, however, that Frank's example of what property scholarship could be was a constant inspiration to me as I started to learn how to teach and what to write in this field. He remained an inspiration even as I found my own niche. I have looked to him always as a role model of meticulousness, scholarly integrity, imagination, and just plain commitment.

Little did I know at the time I first read it that *Property, Utility, and Fairness*, published in 1967, was Frank's first big foray into the world of scholarship. It became one of the few such works with lasting impact. We still use its terms (such as "demoralization costs"), even if we have forgotten where they came from; and we have come to understand more and more, as he asked us to realize then, that not all costs are dollar costs, and in fact that many human costs are not.

I came to know Frank as a person a couple of years after I made his acquaintance through his scholarship. In the summer of 1978 I participated in a program in legal philosophy at Harvard for a few weeks. Because I admired Frank as a scholar, and because at that time I had some nascent thoughts running around in my head about the relationship of property to personhood, I contacted him and asked for an opportunity to speak with him. He invited me to his office. There he spent considerable time engaging in discussion about property theory with a young scholar unknown to him who hadn't yet published anything in that field.

I think I may not have realized at the time, but certainly do realize now — having experienced how pressed for time we academics are

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

and how little room we have for such meetings with people who show up out of the blue — that he was simply astonishingly generous. I now know that Frank has always helped other scholars, always been astonishingly generous with his time and commitment. I imagine that for him, engagement in scholarly dialogue is simply and naturally an integral part of being a scholar. This sort of openness to discussion is, of course, part of the ideal of scholarly community; but also, of course, it is a rare quality to find in practice. It is a character trait, one that identifies a true scholar. (And indeed, a true gentleman.) It's particularly significant for me that Frank was especially supportive of women scholars, at a time when that was not the norm.

Frank is also a committed teacher. I don't know how he got a 5.0 rating from sixty first-year students the year he visited at Stanford. I have often wished I did know. If it was magic, I would have liked to replicate it. But maybe it was simply this: the response I have always had to his genuine commitment, integrity, meticulousness, articulateness, and deep and broad-ranging knowledge is just the unanimous response. (At least sometimes, with those who really want to listen.)

Frank has a particular sense of humor that I have to call Michelmanic. As we got to know each other better during the year I visited at Harvard (1984–1985), I learned to detect a unique combination of irony, passion, and amusement (or perhaps, bemusement). In a passage I'm fond of quoting, for instance, Frank was aiming to nail home an idea (understood since Hobbes but often forgotten): even if one supposes that we are all just self-interested maximizers who can never trust each other, and thus that we need a strong private property regime, we need a state to organize cooperation because it is in everyone's self-interest; but nevertheless, it takes cooperation to organize the state; and where does this ability to cooperate come from if we are perspicuously imagined as trustless self-interested maximizers? Here's the passage:

> What is private property . . . but a particular form of regulation . . . ? But then come the questions: Instituted (fashioned, decided upon) by whom? Policed and enforced by whom? Obeyed by whom, and why? Because if (and only if!) I don't obey, the constable will catch me, the prosecutor try me, the magistrate convict me, the sheriff punish me? Who will make them? Where can the regress end, if not in uncoerced cooperation, the untragic commons of constitutional practice founded on a "rule" that there is no one to enforce but that people on the whole adhere to, though adherence is in the interest of no one who does not trust that (most) others will adhere to it . . . . In other words: no trust, no property.[2]

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[2] Frank I. Michelman, *Ethics, Economics, and the Law of Property*, *in* NOMOS XXIV: ETHICS, ECONOMICS, AND THE LAW 3, 30–31 (J. Roland Pennock & John W. Chapman eds., 1982), *reprinted in* 39 TULSA L. REV. 663 (2004). I have quoted this passage before, in Margaret Jane

If you know Frank, you can hear his voice here, as he declaims these questions, each one louder and more insistent than the one before, and you can hear the undercurrent of irony, and (I think) humor — at least bemusement — too.

During my year at Harvard, Frank invited me to lunch a few times, as is customary for faculty members engaged with the process of trying to make visitors feel comfortable, which Frank certainly did. His counsel about how to navigate the shoals of Harvard was very valuable to me. We had lively discussions of legal theory, which was wonderful. The most amusing thing that happened during my visit took place at a Chinese restaurant in Harvard Square. When Frank opened his fortune cookie, it said, "This will be your final meal." I'm sure Frank has forgotten this episode, and indeed my memory is pretty hazy at this point. (But I don't think I'm clever enough to have made this up.) One thing I'm sure of is that Frank thought this amusing and curious. (I think it turned out that a jokester had infiltrated the cookie production facility from which the restaurant obtained its supply.) Luckily, fortune cookies don't really tell fortunes. (They aren't actually cookies, either.)[3]

As Frank and I came to know each other, we found that we shared a deep love of music. One of my favorite recollections is that Frank quizzed me at a dinner party by playing "drop the needle." (This is a game where one asks the person being quizzed to identify the piece of music or the composer from the portion heard where the "needle" is dropped. Of course, this terminology relates to the bygone era before CDs.) The excerpt Frank played was clearly an art song, for voice and piano, in the tradition of the songs of Schubert, Schumann, and Mendelssohn, but in the idiom of the later nineteenth century, and in English. I had an inspiration. I guessed that the composer was Sir Arthur Sullivan because I knew that Sullivan wrote "serious" music in addition to operettas and in fact wished that he could be remembered

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Radin, *Property and Precision*, 39 TULSA L. REV. 639, 645 (2004); in fact, this was an earlier Michelman appreciation essay. (Anytime appreciation of Michelman is the order of the day, I will show up.) In that essay, the *Tulsa Law Review* was persuaded to reprint Michelman's piece so that it would be available online, after I said that to my mind it is possibly the best piece of property theory published in the twentieth century. I said there (and still hope) that studying this piece might help restrain subsequent writers from assuming tragic commonses all over the place, or from assuming that more propertization is always better. It might also make us think about the proposition that propertization can create trustlessness rather than alleviate it. (By the way, Michelman in this essay also originated the term "anticommons.")

[3] A few years ago I put the cookie episode to its ultimate use by weaving it into a contracts exam. One of the characters got such a cookie with his takeout meal, and right after he opened it at home, he had a heart attack and wound up in intensive care. The question made students address, inter alia, whether being in intensive care would be an excuse relieving someone of contractual duties. But the question also invited consideration of whether such a cookie would violate the implied warranty of merchantability.

for his "serious" music instead of operettas (though in fact his "serious" music is now all forgotten, while the operettas live on). Frank was sly, as well as musically erudite, and indeed amusing, in propounding this quiz. (I was right about Sullivan.)

On the topic of what one is remembered for, something Frank and I have in common is that we receive obligatory cites for early pieces that became hits, with perhaps frustratingly less attention to later pieces that were (in my case) more mature, or (in Frank's case) about different and no less important topics. After his early hit with *Property, Utility, and Fairness*, Frank could have stayed with welfare theory and usefully explored its nuances and combated its prevalent oversimplifications. But he didn't. He wrote about property using perspectives other than welfare theory.

Frank also mastered other fields besides the one he first mastered. I am not a constitutionalist, and legal philosopher, and historian. But Frank is. He probably has the best understanding of anyone of how John Rawls's political theory might intersect with constitutional legalism; and he is one of a very few law professors who have a thorough understanding of Jürgen Habermas and the relationship of his communicative action theory to law. Moreover, unlike most legal academics of his age cohort, Frank has embraced globalization and made significant contributions to constitutionalism in places and legal cultures other than our own.

I seem to recall that Frank and I share, in addition to legal theory and music, a certain love of baseball. In fact, we might have had a Rawlsian discussion at one point about whether what is played in the American League should even count as baseball, because I argued that the use of designated hitters is not actually "baseball." Of course, with a Red Sox fan that would be a lively discussion. On a trip to Maine, I saw a bumper sticker that said, "I root for the Red Sox, and anyone who is playing the Yankees." That could be the sentiment of both of us. (Even though I tend to root for the National League, where they do play "baseball," I certainly root for anyone who is playing the Yankees.) I'm pretty sure Frank is the one who introduced me, along with other visitors that year, to Fenway Park. I think I understand the enduring significance of the CITGO sign.

Frank's career at Harvard has lasted well beyond the time it took for the Red Sox to overcome the Curse of the Bambino and win the World Series. Frank has contributed indelibly to the education of thousands of practicing lawyers, as well as to several generations of legal scholars. By his works he is specially honored and will continue to be. Thank you, Frank, for everything.