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PROPERTY AS WEALTH, PROPERTY AS PROPRIETY

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Stephen Munzer's interesting and provocative chapter speaks of a "taking" of property as anything that "adversely affects" one's property rights, and he considers a variety of compensation devices that might offset governmental takings "fully" or something less than fully. But the concept of "taking" property does not really make sense unless we have some idea of what one's property right includes in the first place: without that underlying understanding, we couldn't really tell what measures might affect the right adversely, and certainly we couldn't tell what would be "full" compensation for adverse effects, or anything less than "full" compensation.

This is not an abstract or difficult point. In fact, it is amply illustrated in a number of examples from well-known "takings" law, particularly in some of the defenses that governmental bodies make when someone charges that a given regulation "takes" private property. For example, one governmental defense is nuisance prevention: your property is not "taken," the argument goes, if the regulation in question merely prevents you from perpetrating a nuisance.[1] The idea is that your property right never included nuisance activity in the first place, and

hence you have had nothing "taken" through the regulation. A second example is the antimonopoly defense: your property is not "taken" if a regulation simply imposes some restraints on the returns from your monopoly enterprise, and limits you to a reasonable return on your investment.[2] The theory of this defense is that your property right never included a right to charge monopoly prices, giving you unreasonably high returns at the consumers' expense, and your property right is thus not impaired by the rate regulation.

There are more takings defenses, and I will come back to some of them later. The specific ways that these defenses are used, followed, or rejected is not what matters. What matters is that these defenses show that "takings" jurisprudence depends on some underlying understanding of what your property right entitles you to do, and what it does not. You can only claim compensation for adverse effects to something that is within your property right. One might start, then, with the question, what "takes" your property; but one quickly arrives at a more general question, namely, what does your property right include?

But then, to answer this second question, we have to ask a third and even larger one: what is it that we are trying to accomplish with a property regime? If we know the answer to this most general question about property, we can begin to see what we include in property, and what we leave out, and so what kinds of governmental actions we deem to "take" property.

Munzer argues that three principles give direction to a property regime, namely, (a) preference-satisfaction (that is, a combined version of efficiency and utility);[3] (b) justice/fairness; and (c) desert. He further argues that these principles are pluralistic, because one principle cannot be reduced to another. My own position differs from Munzer's quite substantially. I do not think that he sets out a pluralistic system at all, because I think all three of his principles can be rolled into the first: preference-satisfaction.

Munzer's tilt toward preference-satisfaction is not really unusual, because some version of preference satisfaction has generally dominated the American vision of property. But there is also another and much older vision of property in our tradition,

and Munzer does not really discuss this vision at all. This second, traditional understanding is that property is aimed at securing to each person what is "proper" to him or her.

I shall begin with the dominant, preference-satisfying view, and will attempt to show that the principles that Munzer describes as pluralistic can all really be subsumed under the same cluster of moral and political ideas. I will then go on to the older but weaker vision of property as "propriety." My argument is that our pluralistic understandings of property derive not from any inevitable clash of Munzer's principles, which I think can all be understood in a way that is compatible with preference-satisfaction, but rather from the system that we actually live with. Our system is pluralistic because our dominant, preference-satisfying understanding of property is subject to constant, albeit often ill-articulated intrusions from the traditional and very different understanding of property as "propriety."

I. Property-As-Preference-Satisfaction

Munzer sets out three principles for a property regime: utility/efficiency, fairness, and desert. Both parts of utility/efficiency, he says, aim at preference-satisfaction, and on his own presentation, that rolled-together principle clearly outweighs the other two principles. Quite noticeably, he gives preference-satisfaction precedence in location, as well as in the length and sophistication of his discussion. Indeed the structure of his argument suggests that a property regime is aimed primarily at utility/efficiency—that is to say, some version of preference-satisfaction—even though this dominant principle is subject to the constraints of two other principles, namely fairness and desert.

I certainly agree with Munzer that preference-satisfaction can be seen as a goal of a property regime; indeed, most modern theorists focus on that goal. But I think that he is too cryptic about the means by which a property regime is thought to maximize preference-satisfaction. When we look more closely at those means, we notice that Munzer's other principles—that is, fairness on the one hand and desert on the other—are not independent constraints at all, but rather fit neatly into the

overall version of property as an institution that maximizes the satisfaction of preferences.

A. Maximizing Preference-Satisfactions

Munzer does not tell us much about how the maximization of preferences comes about through a property regime. It sometimes seems as if he envisions a finite number of good things in the world, a kind of big bag of resources, and he writes as if the way to maximize preferences would be to divvy up the contents of the bag in a way that most people would like. To extrapolate from his examples of public and private property, this would presumably mean that we would have public ownership of streets and wilderness areas (since, as he says without much explanation, some government projects advance preference-satisfaction), and presumably we would have private ownership of most other things, like clothes and dishes; one also supposes that there would be some disagreements about whether other items should be public or private. He seems to think that once we solve the issues about which things we prefer to have in which hands, our property regime should attempt to maximize preferences by getting those things in the relevant hands, although we modify this scheme by applying the constraining considerations of the other two principles, fairness and deservingness.

This analysis loses sight of the classic view of the role that property plays in maximizing preference-satisfaction. On that view, a property regime isn't just supposed to divvy up the contents of the bag; it is supposed to make the bag *bigger* and put more things in it.

How does a property regime do that? Well, to get some idea, we should compare a property regime to a nonpropertized commons. Let's suppose some berry patch is an unowned commons. According to the classical view, the patch will be all right so long as there are a lot of berries and only a few berry-eaters.[4] But once the berry-eaters get numerous enough, they start competing, and they are likely to get into conflicts about who gets how many berries; and in the meantime, while everyone is grabbing and fighting over the berries, nobody cultivates new

berry bushes, the whole patch is depleted, and everybody is worse off.[5]

But let's suppose we institute a property regime for the patch: What happens now? Well, first of all, people stop fighting over the berries. The property regime has allocated the patch, or parts of the patch, to one person or another, so that everyone knows who has what, and stops wasting resources on grabbing and fighting, or *rentseeking*, as this sort of activity is now fashionably designated.[6] Second, individual owners are now secure in their little corners of the berry patch, and this security encourages each to labor on his or her corner to make it more productive. Finally, since everyone knows who has what, the various owners can trade berries, or even berry patches, so that the one who values the berries or the berry patches the most winds up with them. How does that person show that she wants the berries the most? The clearest signal she can give is that she offers the most for them, that is, the most in spuds, or hats, or tools, or whatever else her labor and foresight has allowed her to accumulate.

So the upshot of all this is that a property regime maximizes preference-satisfaction not just by divvying up resources, but by making resources *more valuable.* The property regime creates a bigger bag, because in a property regime, (a) we aren't wasting time and energy on fighting; (b) we are busily investing that time and energy in our own resources, and thus making them more valuable, knowing that we will get the rewards; and (c) we can trade the products of our efforts; that is, we can make a smooth set of Pareto-superior moves, whereby everybody is better off just because we all get the things we want the most. In a property regime, then, we are better off because we enhance resources instead of dissipating them, and because we can make gains sheerly from trading things we have, for things we want even more.

By the way, there are more public roads and other public goods in a property regime, too. Some resources are most economically produced and managed on a large scale, and because of these scale economies, they are best allocated to joint control rather than to individuals. In a well-oiled property machine, these kinds of products will wind up as joint property of some

sort—perhaps family property, or corporate property, or perhaps municipal or state or even national property. But we should note that this joint or public allocation also expands the total bag of goodies, because these kinds of resources are most productive in some kind of multiple ownership.

The need for larger-scale management, incidentally, is a standard reason for the power of eminent domain that Munzer considers, and this need provides a well-known example of a limitation on individual property rights. Your property does not include the right to extort a holdout price for property that is most productively managed by the public; hence you may have to sell your property to the public at fair market value, and you don't get compensated for any monopoly price you might otherwise have charged.[7]

So in short, Munzer's discussion perhaps unduly abbreviates the standard but powerful story about property as a preference-satisfying institution. According to that story, a property regime satisfies preferences not by divvying up a finite bag of resources, but rather by encouraging behavior that enhances resources' value, making the total bag a whole lot bigger and more diverse.

With that, I will turn to the second and third principles that Munzer locates in a property regime, namely fairness and desert, which he sees as pluralistic constraints on preference-satisfaction. My own view is that these principles do not necessarily imply anything pluralistic at all, in the sense that they are in some way incompatible with a preference-satisfying understanding of a property regime. On the contrary, they fit quite handily with a property regime whose purpose is seen as the satisfaction of preferences.

B. Justice or Fairness

Munzer treats the principle of justice, or fairness, as a tenet that requires a minimum set of holdings. But this understanding of justice or fairness is fairly easy to justify on preference-satisfaction grounds, if one supposes a diminishing marginal utility of wealth. Now, this is a controversial supposition, but it is at least reasonably plausible that an additional dollar would be worth more to a poor person than to a wealthy one. Some of the classic

economic thinkers, like Alfred Marshall, thought so, and the idea may be implicit in our graduated income tax as well.[8]

Again, this view is not uncontroversial, but if we accept it at least hypothetically, then some wealth transfers from the rich to the poor will maximize the total amount of preference-satisfaction, since the poor get more satisfaction than the rich out of the same resources. On the other hand, there is a preference-satisfaction limitation on such transfers: we wouldn't want to take so much from the rich that they get discouraged about investing, because if they do get discouraged, then the total bag of goodies shrinks too much, that is, it shrinks more than is warranted by the incremental satisfactions of the poor.

We should note that this point ties in with the idea of "demoralization costs" that Munzer takes from Frank Michelman, and that Michelman took from Jeremy Bentham.[9] If rich people have too many of their earnings taken, they will get discouraged, and ultimately they will quit working. Why will they get discouraged and quit? Munzer makes some interesting elaborations on this argument, but the basic reason is that their expectations are violated—that is, their expectations of keeping the things that they invested in and worked on.

But note that it is the property *regime* that gives them those expectations in the first place,[10] and it does so for utilitarian reasons. We call certain things "property rights," and foster the expectation that owners can control and enjoy the things they have worked for, in order to encourage both rich and poor to invest the labor, time, energy, and effort that will make resources more valuable and the total bag bigger. As Munzer notes in his interesting and valuable discussion, compensation is one tool we use to try to reduce the demoralization attendant upon "takings," and thus compensation has a utilitarian function.

But as Frank Michelman saw, our fairness and utilitarian considerations lead in the same direction.[11] It would be easy enough to imagine ourselves living under a different set of expectations. For example, we might expect that anytime an individual acquired a significant amount of anything, he or she would have to give it all up.[12] If we lived under such a system, nobody would have her expectations violated when her things

were confiscated, and the system would not be unfair or unjust in the sense of bait-and-switch, or pulling the rug out from under the citizenry.

Individuals in such a system wouldn't get demoralized about the confiscation of their investments. They just wouldn't invest effort and energy in the first place, which of course would mean that the system would be likely to produce a considerably smaller total bag of resources and goods. But, according to the classic property theory, that runs directly contrary to the result we are trying to achieve with a property regime. And so, we have what we call "fair" or "just" compensation for takings of property, in order that more investments will be made, and more aggregate preferences will wind up being satisfied.

In short, it is pretty easy to see that our concepts of justice or fairness are not necessarily constraints on a preference-maximization version of property, but are rather part of the *very same* moral and political universe. We could easily look at these justice or fairness considerations as part of an overall design: the property regime is supposed to encourage investment and enterprise, and ultimately to get more preferences satisfied by encouraging the behavior that creates a bigger bag of more valuable things.

C. Desert

The third principle in Munzer's trio, desert, is even easier to justify on preference-satisfaction grounds. The reward to labor is an obvious corollary to a property regime that tries to increase the bag of goodies by encouraging the investment of effort and time. We should note, for example, that it is not just *any* old labor that gets rewarded, for example, sweeping sand into the ocean. On the contrary, the labor that gets rewarded is the labor that produces goods or services that people *want.* And so, the reward to "deserving" labor also falls into line with preference-satisfaction. The deservingness that counts is the labor that results in producing what people want.

In short, it seems entirely possible to construct a version of property, and of "takings" of property, that includes all three principles in Munzer's trio. The principles of preference-satis-

faction, fairness, and desert can easily be cast as a smooth and seamless whole—a whole that is entirely dominated by maximizing preference-satisfaction. In fact, I think Munzer's examples illustrate this, even though he uses them to show an irreducible pluralism among his three principles.

He uses the example of a vaccine whose distribution rights are taken from the hard-working discoverer. But when we compensate the discoverer, we do not depart in the slightest from utilitarian considerations. This is someone whose labor produces something highly desirable, and we certainly would not want to discourage such a person, or others who might follow his or her example; and so it is quite in order to accord the discoverer a measure of compensation to encourage such behavior. You can call it fairness, you can call it desert, you can call it encouragement of preference-satisfying behavior: they amount to the same thing.

As to the rather fanciful example of the century-old plant—enjoying at once an inexplicable monopoly grip on some product as well as on its own labor force—utilitarian principles would be exceedingly unlikely to suggest a monopoly payoff upon appropriation of such an entity. Why not? Because it does nothing for preference-satisfaction to encourage monopoly, except, perhaps, as a limited way to encourage innovators like our vaccine producer. Monopolists generally only restrict supply and charge higher prices, and thus they restrain rather than expand total preference satisfaction. And so we try not to reward them. Instead, we regulate their earnings to some rate that would seem "reasonable" to a nonmonopolist, so that monopolistic ventures do not seem particularly attractive. This kind of regulation is of course built into our standard takings law;[13] and once again, desert and preference-satisfaction do not diverge. Instead, they are part of the same strategy. The dominating partner in the strategy is preference-satisfaction; the conception of "desert," like the conception of "fairness," is tailored to encourage the behavior that maximizes that goal.

II. Property-As-Propriety

I have gone through the ways in which property, viewed as a vehicle for preference-satisfaction, subsumes a set of principles of fairness on the one hand and desert on the other. What I want to do now is to describe a completely different understanding of a property regime. It is an understanding based on a quite different conception of what property is good for. This understanding of property can also include principles of fairness and desert, but they come out quite differently from the ideas of fairness and desert that are incorporated in a preference-satisfying understanding of property.

What is the purpose of property under this other understanding? The purpose is to accord to each person or entity what is "proper" or "appropriate" to him or her. Indeed, this understanding of property historically made no strong distinction between "property" and "propriety," and one finds the terminology mixed up to a very considerable degree in historical texts.[14] And what is "proper" or appropriate, on this vision of property, is that which is needed to keep good order in the commonwealth or body politic.

A. Property, Propriety, and Governance

That "property" was the mainstay of "propriety" was a quite common understanding before the seventeenth and eighteenth centuries; and this understanding continued, albeit in abated form, even after the great revolutions at the end of the eighteenth century. One earlier example is in the work of Jean Bodin, a sixteenth-century French political theorist, who was commonly regarded as a monarchist and spokesman for the able French king Henry IV, and who was much quoted on the subject of sovereignty. Bodin, for all his monarchist proclivities, nevertheless thought that property was a fundamental restraint on monarchic power. We need to have property, he said, for the maintenance and rightful ordering of families; families in turn were necessary as the constituent parts of the commonwealth itself.[15]

This version of property does *not* envision property as a set

of tradable and ultimately interchangeable goods; instead, its proponents thought that different kinds of property were associated with different kinds of roles. The family property that Bodin was talking about was almost certainly land, and not just any land, but the specific landholdings associated with and "proper" to a specific family. The law itself acknowledged the "properness" of landholdings to specific families, and included a variety of restraints on alienation by individual family members, in effect treating those individuals as trustees for succeeding generations of their families.[16]

Moreover, in a European tradition at least as ancient as the Middle Ages, land was associated with males. Men might acquire control of property through their wives and female relatives, but women themselves generally lacked full control of land, and rather had property only in movables, which meant money and transient things; even their limited landholdings were treated metaphorically as "movable." In fact, Howard Bloch, speaking of medieval France, has made the point that females *were* money: they were transient beings, and the subject of family trades, as Bloch put it, "the kind of property which circulates between men."[17] But like money, women did not represent "immovable," "real" property. Property that was real was land, an attitude that continued well into the eighteenth century and beyond.[18]

What is perhaps most important, landownership and indeed property in general carried with it some measure of governing authority, and this authority had notably hierarchical characteristics.[19] Indeed, in the regime of property-as-propriety, property and entitlement formed the key element in what the modern Critical Legal Studies proponents might call the reproduction of hierarchy, though this phrase would not have seemed in any way damning to those who adhered to this traditional view of property.[20] Property "properly" consisted in whatever resources enabled one to do one's part in keeping good order; and the normal understanding of order was hierarchy—in the family,[21] in the immediate community,[22] in the larger society and commonwealth,[23] in the natural world,[24] and in the relation between the spiritual and the natural world.[25]

A person's property fixed his location in this hierarchy. Thus

a monarch had his own property in the royal domains, and in theory, though much less in practice, he should not need to tax the subjects, since the income from those domains would enable him, as the traditional phrase put it, to "live of his own." That is, his royal property would provide him with the wherewithal to exercise his role of overall governance.[26] The members of the noble estate in turn had their own lands, on which *they* were subrulers or "co-governors"; and other subruling orders had the property they also needed to maintain proper order within their respective jurisdictions.[27] For example, municipalities had their own endowments, which were managed by the ruling corporations of the "burghers" or "citizens," a class that by no means included all the residents of a given community, but only its leading members.[28] One should note that this pattern was brought to the New World cities as well; Hendrik Hartog's history of New York centers on the city's endowed property and its management by the ruling "corporation," and his work illustrates the pattern associating property with governance into the early nineteenth century.[29]

Elsewhere in the areas colonized by Europeans, one finds this same association of property with authority. The American colonial enterprises, as well as the East India Company, were initially organized on this principle: the proprietors and charter holders acquired not only monopolistic property rights in their respective colonial enterprises, but also the right and duty to govern the colonial charges and keep them in proper order.[30] In a way, property merged with authority in American "republican" thinking as well, a subject to which I shall return shortly.

Before the advent of modern centralized fiscal and bureaucratic techniques, both Old Regime Europe and to a somewhat lesser extent its colonies had a political organization that amounted to a kind of farming-out system, a system that fused property with "proper" authority.[31] Monopolistic guild privileges governed large segments of the economy—textiles, shoes, metalwork, and on and on; and in justification of their exclusive privileges, the holders of these monopolies were charged with keeping their respective enterprises in "good order and rule."[32] In France, public offices, notably judicial magistracies, could be purchased as hereditable property; as such, these magistracies

became the founding property for the so-called "nobility of the Robe," which came to dominate the French aristocracy in the eighteenth century.[33] In England too in the same era, some public offices were seen as freehold properties of the office-holders.[34] In short, in this tradition, all rights were in some measure seen as property, and property entailed some measure of "proper" authority, to be exercised ideally as a trust for those to whom one was responsible for governing.

Now let me come to a subject that touches on the theory of "takings": In the theory of governance in the Old Regime monarchies, when a ruler's ordinary revenues failed to cover the expenses of governance, the ruler had to *ask* his subjects for subsidies; even the king, it was said, could not just take their property as he wished.[35] But the reason was quite different from the reasons that are given by preference-satisfaction theories. It was not so much that confiscations from the subjects would discourage their industriousness, but rather that the things that were truly the subjects' property were things that were *proper* to them—proper because their property enabled them to take their appropriate roles, and to keep good order throughout each corner of the realm.[36]

Though royal practice deviated far from this theory by the eighteenth century, particularly on the Continent, a good deal of lip service was paid to the notion that the king could not simply appropriate the subjects' property. Certainly royal overreaching continued to be the subject of great bitterness and recrimination and even rebellion; the French Revolution itself was preceded by years of complaint by various propertied classes about royal inroads on their entitlements and "liberties."[37]

B. American "Republicanism" and Property

In America, a version of property-as-propriety can be located in a historic political mentality that is now much discussed, namely "civic republicanism." Republican property was not so hierarchical as monarchic property, because it was thought that in a republic, the people rule themselves, and as a consequence a much broader range of citizens needed to have property. Montesquieu's writing supported this position, and although he would

never have advocated such a thing for monarchic/aristocratic France, he noted that democratic republics entailed a much wider and more equal dispersal of property.[38] The reason, repeated again and again in the early American republic, was that property lent independence to individuals, and that independence enabled them to exercise the autonomous judgment necessary for their common self-rule.[39]

As to the persons who had little property, or who—like married women or slaves or children or madmen—were excluded from property ownership on principle because of their purported incapacities and "dependency": republican theory had few qualms about excluding such persons from the franchise.[40] Republicanism had its own pyramid of hierarchy, although perhaps a more flattened one than monarchy or aristocracy. But the logic was everywhere the same: ruling authority entailed property, and vice versa. Republicanism too divided the populace into rulers and ruled, and the rulers were those citizens who had the property necessary to independence, and therewith the ability to participate in governance.

It should be noted that in this republican idea of property, as in monarchic or aristocratic versions, not all property was alike. Jefferson's agriculturalism stemmed from the view that landed property particularly fostered independence, and Jefferson was not alone in a certain republican uneasiness about manufacturing and commercial forms of property.[41] Commerce entailed *inter*dependence, since one manufacturer or trader had to depend on another, and another, and another; thus the property acquired from these interdependent activities was suspect, precisely because it was not autonomous. In a way, American agrarians were not so far removed from the medieval view that land was genuine and real, while money was merely transient, dependent, effiminate, and unsturdy.

Notice as well that the republican vision of property was more or less indifferent to encouraging accumulation or aggregate wealth. Republicanism, like other "proprietarian" visions, associated property with governance and good order, but republican good order specifically entailed a certain sturdy equality among those who counted as self-governing citizens; great

differences of wealth might corrupt republican virtue, and were thus a special matter for republican alarm.[42]

Moreover, in republicanism as in all proprietarian understandings, governance and good order always included a duty of liberality to the larger community, for the sake of the common good.[43] For any version of property-as-propriety, it was understood that the ill-fortune of others presented the propertied with a duty to assist, and not with an occasion to revile or shame those in need. Though the practice of generosity and contribution was certainly subject to the predictable limitations of personal cupidity, there was little question that generosity was a moral and political duty of the haves to the have-nots—which was the same as saying, of course, that generosity was a duty of those with authority, to those without it.[44] Although there were certainly contrary murmurings earlier, it was not until the nineteenth century, and the ascendancy of a preference-satisfying moral and political theory, that political thinkers systematically cultivated the notion that generosity might induce perverse—that is, non-wealth-maximizing—incentives in the recipients.[45]

C. Justice and Desert Under Property-as-Propriety

If we were to take propriety and good order as the objects of a property regime, it is quite clear that considerations of "justice/fairness" and of "desert" would have different meanings than they do where the goal of property is taken as the maximization of preference-satisfaction.

"Justice" on this older understanding meant having that which is appropriate to one's station, as well as giving that which one's station demands. Property-as-propriety entailed governing authority in some domain; but because of that authority, property was a kind of trust as well. On such an understanding, it would not be considered unjust or unfair to request a sacrifice for the sake of a larger community, especially from those whose property extends beyond their proper needs, or whose propertied role makes them responsible for good order in the community.[46]

"Desert" on this understanding would also be based not on useful labor, but on status or station: one deserves to have that which is appropriate to one's role and station, but not more and not less. Many kinds of goods might hardly be considered very firm property at all, since they had no connection with the holder's role in keeping proper order, and were thus merely "acquired" and accidental.[47] Perhaps connected with that ideal, aggrandizement beyond one's station routinely met with outrage in the era before the great revolutions, as for example in the harsh treatment to "regrators" and hoarders in Stuart England, and in colonial America as well.[48]

This set of attitudes now seems quite antiquarian, as indeed it is. But we still hear some echoes, perhaps most notably in connection with welfare law and policy. One example is of course in Charles Reich's famous argument about the status of governmental benefits as property: his argument, among other things, is that benefit recipients are a part of the body politic, and as such have a "rightful claim" to hold these benefits as property, so that they can maintain their "independence" and participate in the commonwealth.[49] Cass Sunstein is currently working some of these themes into his own considerations of welfare law and, not surprisingly, he is doing so with a nod to the republican theory of seventeenth-century England and the early American republic.[50]

An attractive feature of the older view, for Sunstein and for others, is no doubt the concept of trusteeship that permeated the idea of property-as-propriety. Property endowed the "haves" not only with rights, but also with responsibilities about the disposition of property; their property was "theirs" only in trust for family, community, and commonwealth. A much more problematic feature of this older view, for Sunstein and other "republican revivalists," is of course the profoundly hierarchical character of the older ways of thinking about property—a flavor perhaps best captured in the ambivalence of our contemporary response to the phrase "noblesse oblige."[51]

Despite that ambivalence, one might well suspect that a substantial motivation in our welfare laws stems not so much from sophisticated preference-maximizing theory—the supposed declining marginal utility of wealth and all the rest of it—as from

the older conception of property-as-propriety. Many who support welfare may well do so out of a sense that poverty (and perhaps great wealth too) is a kind of disorder in the republic, that our poorer citizens should have the economic means to escape this disorder, and that our wealthier citizens have a duty to help out. In some measure the sense may be that the disorder of poverty brings scandal and disgrace to our community, and that the station of propertied persons obliges them to do something about it.

D. "Propriety" in Modern Property Law

At this point I will return to the "takings" issue, and to the question of which elements in "takings" law are pluralist and irreducible and which are not. It seems to me that the genuinely pluralistic character of our takings law stems from its reflection of two complete but different ideas about what property is good for. The first and dominating idea casts property as an engine for the maximization of preference-satisfactions; the second, now a weaker but still very stubborn idea, casts property as the vehicle for propriety and decent good order.

The preference-satisfying vision of property is so common that its arguments, and its "takings" applications, seem almost self-evident. Richard Epstein's book on *Takings* runs through these arguments with easy facility. The arguments really reduce to one: that uncompensated redistributions violate the very purpose of a property regime, namely, to increase the size of the bag of goods, or as Epstein puts it, the size of the pie.[52]

But property in the second sense, that is, property as "propriety," as the foundation of decency and good order, appears in our property law as well. Where does this occur? Some examples appear in commonly used judicial tests for governmental "takings" of private property. One test places special limitations on governmental actions that constitute "physical invasions" of individual property.[53] On a preference-satisfaction view, property is more or less all alike; a physical invasion is like any other adverse effect, raising only questions of dollar values and demoralization costs. But the matter looks different on a property-as-propriety view: a physical invasion is particularly repre-

hensible because it is a special affront to the owner of the property; it is a pointed violation of his or her understanding of decency and order.

An even more telling example lies in a kind of secondary test under the rubric of "diminution in value." Generally speaking, a regulation that drastically reduces the value of a property may be equated with a "taking" of that property, though the line-drawing on this issue is fraught with difficulty.[54] One subtest for "diminution in value" inquires whether the affected property can continue to produce a reasonable income after the regulation is in place; if so, on this test, the diminution has not crossed the line to a taking.[55]

This is a "test" that seems incomprehensible from a utilitarian or preference-satisfaction point of view, where the issue should be the effect on the proprietors' "demoralization" and future willingness to work and invest. But the underlying idea here is not preference-satisfaction at all. The presupposition is that the owner does not need more than a decent income, as opposed to a maximizing income, from his or her property; hence the legislature's imposition on the property may be treated as a legitimate demand on a citizen, so long as the citizen's decent and proper income is preserved.

Similarly, another common "takings" test balances the owner's private loss against the public's benefit, but this is incomprehensible from the point of view of maximizing preference-satisfaction. Large public benefits might justify a compensated taking through eminent domain, but not an uncompensated taking. Why should the private owner lose expected rights simply because the public gains greatly?[56] But from the angle of vision of property-as-propriety, this balancing of public gain against private loss suggests that citizens have a duty to give up that which their representatives think the community can use better than they. This balancing test harks back to the underlying idea of property-as-propriety, namely that property carries the authority, but also the responsibility, of a trust to the larger community.

Conclusion

My own view then, is roughly as follows: first, that we have two different conceptions of the goals of a property regime, namely property-for-preference-satisfaction, and property-for-propriety; second, that these different postures toward property are not compatible; and third, that we can see their incompatibility at a number of junctures in our extremely confused law of "takings." Thus I agree with Munzer that the principles of takings compensation may be pluralist, or even "incoherent" in the sense that the elements may be in potential conflict. Our own law reflects that fact.

But I do not think that the incompatible elements of our law are the principles that he is talking about. On the contrary, his trio of principles can easily be subsumed under the overall viewpoint of preference-satisfaction. My own position is that in our law, the incompatible elements arise from the mixture of this dominant preference-satisfaction conception of property on the one hand, with a weaker but very different historical conception of property-as-propriety on the other. What we have, in short, is two quite different historical visions of the purposes for which we have a property regime in the first place, and our takings law muddles along with the consequences.

NOTES

1. See, for example, *Euclid v. Ambler Realty*, 272 U.S. 365 (1926); compare Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), 112–29, 132–33.

2. The classic case is *Munn v. Illinois*, 94 U.S. 113 (1877), discussed by Harry Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Perspectives in American History* (Cambridge: Harvard University Press, 1971), 5:329, 356.

3. As Munzer points out, the difference between these two revolves around the possibility of interpersonal comparisons of utilities. I will follow his head in putting this issue to one side, though it is of course,

an important problem that can, for example, divide utilitarians from libertarians.

4. John Locke, *Second Treatise,* in *Two Treatises of Government,* ed. P. Laslett (Cambridge: Cambridge University Press, 1960), § 31.

5. Jeremy Bentham, *Principles of the Civil Code,* in *Theory of Legislation,* ed. R. Hildreth (Bombay: Tripathic, 1975), 67–77.

6. Bentham, *Principles of the Civil Code;* on "rentseeking," see James Buchanan, Robert Tollison, and Gordon Tullock, *Toward a Theory of the Rent-Seeking Society* (College Station, Tex.: Texas A&M University Press, 1980).

7. Thomas W. Merrill, "The Economics of Public Use," *Cornell Law Review* 72 (1986); 61, 74–78, 82–85, 101–2.

8. Alfred Marshall, *Principles of Economics* (Philadelphia: Porcupine Press, 1982 [reprint of 8th ed.; London: Macmillan, 1920]), 80–81. On the income tax, see Walter Blum and Harry Kalven, *The Uneasy Case for Progressive Taxation* (Chicago: University of Chicago Press, 1953), 56–62, for a skeptical view of the declining marginal utility of income. See also Richard Posner, *Economic Analysis of Law,* 3d ed. (Boston: Little, Brown, 1986), 434–36, suggesting that an increasing marginal utility of wealth is equally plausible.

9. Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation,' " *Harvard Law Review* 80 (1967): 1165, 1211–14; Bentham, *Principles of the Civil Code,* 70–73, describing various "evils" of attacks on property, including "deadening of industry."

10. Bentham, *Principles of the Civil Code,* 67, stating that property is no more than a basis of expectation.

11. Michelman, "Property, Utility, and Fairness," 1222–24.

12. The potlatch may be an example, though this particular ceremony may have the function of preserving the peace among competing hunting groups; see D. Bruce Johnsen, "The Formation and Protection of Property Rights among the Southern Kwakiutl Indians," *Journal of Legal Studies* 15 (1986): 41–42.

13. See text at note 2 above.

14. J. G. A. Pocock, "The Mobility of Property and the Rise of Eighteenth Century Sociology," in Anthony Parel and Thomas Flanagan, eds., *Theories of Property, Aristotle to the Present* (Waterloo, Iowa: Laurier Press, 1979), 141–42. Forrest McDonald points out that even John Locke often exercised this usage: *Novus Ordo Seclorum. The Intellectual Origins of the Constitution* (Lawrence, Kans.: University of Kansas Press, 1985), 10–11. For the much-debated question whether Locke was a precapitalist preference maximizer rather than a "propriety"

advocate, see sources in McDonald, *Novus Ordo Seclorum,* 65–66, n. 22; and Carol Rose, " 'Enough and as Good'of What?" *Northwestern Law Review* 81 (1987): 417, 423–24, n. 30.

15. J. W. Allen, *Political Thought in the Sixteenth Century,* rev. ed. (London: Methuen, 1960), 424–25; see Bodin's *Six Bookes of a Commonweale* (Cambridge: Harvard, 1962 [facsimile University Press reprint of 1606 English translation]), 11–12, 110–11.

16. Ralph E. Giesey, "Rules of Inheritance and Strategies of Mobility in Prerevolutionary France," *American Historical Review* 82 (1977): 271–72, 275–77. Giesey discusses the lineage property *(propres)* of commoners; aristocratic land had different rules of succession but also kept landed property in the hands of the larger family.

17. Howard Bloch, "Women, Property, Poetry" (unpublished manuscript on file with this author, delivered at Conference on Property and Rhetoric, Northwestern University, 1986), 6–7; the paper is drawn in part from Bloch's *Etymologies and Genealogies: A Literary Anthropology of the French Middle Ages* (Chicago: University of Chicago Press, 1983).

18. Bloch, "Women, Property," 17; Pocock, "Mobility of Property," 153, notes that commerce was discussed in feminized terms in the eighteenth century, even by its proponents.

19. For some examples from the late Holy Roman Empire (Germany), see Carol Rose, "Empire and Territories at the End of the Old Reich," in James Vann and Steven Rowan, eds., *The Old Reich: Essays on German Political Institutions 1495–1806* (Brussells: Librairie Encyclopédique, 1974), 62–63, 67–70.

20. Robert Darnton, "What Was Revolutionary about the French Revolution?" *New York Review of Books,* Jan. 19, 1989, p. 4, notes our present difficulty in comprehending the pre-Revolutionary "mental world" in which "most people assumed that men were unequal, that inequality was a good thing, and that it conformed to the hierarchical order built into nature by God himself."

21. See William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979 [reprint of 1765 ed.]), 1: 416–20, 430–32, describing head of household's authority over servants, wife, and children. This is probably most dramatically represented by the principle of coverture, according to which the wife loses her separate legal identity during the time of marriage.

22. See Peter Laslett, *The World We Have Lost: England before the Industrial Age,* 2d ed. (New York: Scribners, 1971), 21, 62–66. Laslett compares the dominance of the English local gentry to the looser structure of the English colonies, but compare Rhys Isaac, *The Transfor-*

mation of Virginia 1740–1790 (Chapel Hill: University of North Carolina Press, 1982), 131–35, describing Virginia gentry.

23. Laslett, *The World We Have Lost*, 31–32, for seventeenth-century perceptions of English gradations. The "body politic," with a governing head as well as arms, feet, and so on, was a dominating metaphor for larger social and political organization; see, for example, Conrad Russell, *The Crisis of the Parliaments: English History 1509–1660* (London: Oxford University Press, 1971), 41–43; and J. R. Hale, *Renaissance Europe* (Berkeley and Los Angeles: University of California Press, 1977), 167–68.

24. Arthur O. Lovejoy, *The Great Chain of Being* (New York: Harper, 1936); on the eighteenth-century use of this naturalistic metaphor, see especially 183–207 et seq.

25. See John Calvin, *Institutes of Christian Religion*, in *On God and Political Duty*, 2d ed. (Indianapolis: Bobbs-Merrill, 1956), 47–49, referring to civil magistrates as God's viceregents, and opposing those who would dispense with political authority.

26. See Roger Lockyer, *Tudor and Stuart Britain, 1471–1714* (London: Longmans, 1964), 27–28; Allen, *Political Thought*, 418.

27. For the term "co-governor," see Dietrich Gerhard, "Problems of Representation and Delegation in the Eighteenth Century," in *Liber Memorialis Sir Maurice Powicke* (Louvain: Nauwelaerts, 1965), 123 (quoting Roland Mousnier).

28. See, for example, Gerald Strauss, *Nuremberg in the Sixteenth Century* (New York: Wiley, 1966), 50–51, 74–84, describing the city's property and the patriciate, respectively.

29. Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law* (Chapel HIll: University of North Carolina Press, 1983), 21–22, 33–34, 40; see also Carol Rose, "Public Property, Old and New" (review), *Northwestern Law Review* 79 (1984): 216, 219–22.

30. J. H. Parry, *The Age of Reconnaissance* (New York: Mentor, 1964), 215, 284–85; Charles M. Andrews, *The Colonial Period in American History* (London: Oxford University Press, 1967), 28–45, 259. For an example of a proprietary charter, see "The Charter for the Provence of Pennsylvania, 1681," in Michael Kammen, *Deputyes and Libertyes* (New York: Knopf, 1969), 164–66. For the transformation of the chartered corporate analogy into a metaphor of political responsibility, see Akhil Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96 (1987): 1425, 1432–35.

31. See generally Rose, "Public Property," 219–21.

32. See E. M. Heckscher, *Mercantilism*, trans M. Shapiro (London:

Allen & Unwin, 1935), 1: 254, 285–86, quotation at p. 286 from a seventeenth-century English document concerning a guild lawsuit.

33. See generally Franklin L. Ford, *Robe and Sword. The Regrouping of the French Aristocracy after Louis XIV*, 2d ed. (New York: Harper, 1965).

34. J. H. Plumb, *The Growth of Political Stability in England 1675–1725* (Baltimore: Penguin, 1969), 38–39.

35. Allen, *Political Thought*, 418–19; Blackstone, *Commentaries*, 1:135–36.

36. Allen, *Political Thought*, 421. Montesquieu, in *Spirit of the Laws* (London: Gryphon, 1984 [facsimile reproduction of authorized 1751 edition]), generally argued against confiscation, and cited Bodin favorably to say that in criminal cases any confiscation should be limited to alienable "acquired" personal property (1:79); Bodin's discussion, *Six Bookes*, 581, had made very clear that this kind of property was not "proper" in the way that land was proper to particular families. Similarly, in discussing taxes Montesquieu favored taxation of salable things rather than inalienable family land (e.g., 1:260).

37. See Robert R. Palmer, *The Age of Democratic Revolution* (Princeton: Princeton University Press, 1959–64), 1: 448–65. For non-French examples, see 1: 341–48, 377–84, on the disturbances in Belgium and Hungary set off by the attempts of the Austrian emperor Joseph II to revoke, respectively, guild and aristocratic privileges.

38. Montesquieu, *Spirit of the Laws*, 50–53; cf. the inequalities inherent in monarchies, 1: 66–67, 88–89.

39. McDonald, *Novus Ordo Seclorum*, 74–75. McDonald makes the point that Southerners were more likely than New Englanders to favor wide distribution of landownership; see also Lacy K. Ford, Jr., *Origins of Southern Radicalism: The South Carolina Upcountry, 1800–1860* (New York: Oxford University Press, 1988), 50–51. Readers are also recommended to an extended discussion of the republican tradition of property in Gregory S. Alexander, "Time and Property in the American Republican Legal Culture," *New York University Law Review* 66 (April 1991).

40. See generally Robert Steinfeld, "Property and Suffrage in the Early American Republic," *Stanford Law Review* 41 (1989): 335–76. See also McDonald, *Novus Ordo Seclorum*, 25–27; Christopher Hill, "The Poor and the People in Seventeenth-Century England," in Frederick Krantz, ed., *History from Below: Studies in Popular Protest and Popular Ideology* (Oxford: Blackwell, 1988), 29ff. (Noting seventeenth-century republican view that excluded the poor from definition of the "people").

41. Alexander, "Time and Property"; L. Ford, *Origins of Southern Radicalism,* 52, 73–74. See also Montesquieu, *Spirit of the Laws,* 1: 56–57, noting that the republican spirit of frugality supported commerce, but that the resulting riches and inequalities of wealth might undermine that spirit; see also 1: 344, on the subject of money.

42. See Montesquieu, *Spirit of Laws,* 1: 52–57; Montesquieu gave some quite extreme examples of this concern, noting somewhat disapprovingly that some founders of republics redistributed all land for the sake of equality (1: 52), but speaking more favorably of other republican methods of preserving equal property (1: 53–58). He also argued that the greatest security for liberty and equality occurred where there was no money at all and hence no possibility of accumulation (1: 344). Some at least mildly leveling sentiments appeared in comments of the Antifederalists, for example the "Federal Farmer," Letter of October 13, 1787, in Herbert Storing, *The Complete Antifederalist* (Chicago: University of Chicago Press, 1981), 3: 251. See also Carol Rose, "The Ancient Constitution vs. the Federalist Empire: Antifederalism from the attack on 'Monarchism' to Modern Localism," *Northwestern University Law Review* 84 (1989):74, 92–93. For further ambiguities in the American republican attitudes to virtue and equality, see Gordon Wood, *The Creation of the American Republic* (New York: Norton, 1969), 65–75.

43. Montesquieu argued that republicans should vie in service to the common good (*Spirit of the Laws,* 1: 50), and claimed that it was relatively easy to increase tax levels in republics, since the citizens thought they were really only giving to themselves (1: 265).

44. See Roger Tawney, *Religion and the Rise of Capitalism,* 3d ed. (New York: Mentor, 1965), 216–19; for the example of one city-state, Strauss, *Nuremberg,* 195–99; for American republican attitudes, see Wood, *Creation of the American Republic,* 63–65, 68–70.

45. Tawney, *Religion and the Rise of Capitalism,* 219–25; see also, for example, David Ricardo, *Principles of Political Economy,* vol. 1 of *Complete Works,* ed. P. Sraffa (Cambridge: Cambridge University Press, 1951), 105–7 (arguing that poor relief impoverishes all, "invites imprudence" in the poor, and noting general hardening of view about poor relief since eighteenth century). For the shift from republican to preference-satisfaction theories in the United States, particularly with the experience of the War of 1812, see Steven Watts, *The Republic Reborn: War and the Making of Liberal America, 1790–1820* (Baltimore: Johns Hopkins University Press, 1987); see also the discussion of the thought of Noah Webster in Alexander, "Time and Property."

46. See, e.g., Tawney, *Religion and the Rise of Capitalism,* 216–17; Erasmus's advice to Charles V, urging light taxation on the poor and

heavy duties on the luxuries of the rich, cited in Hale, *Renaissance Europe,* 163; and William Tyndale's *Obedience of a Christian Man* (1535), cited in Russell, *Crisis of the Parliaments,* 43, exhorted agricultural landlords to restrain rents and fines and to "be as fathers to your tenants."

47. See note 36 above, concerning Bodin's and Montesquieu's acceptance of the uncompensated taking of "acquired" goods; see also Vivian Gruder, "A Mutation in Elite Political Culture: The French Notables and the Defense of Property and Participation, 1787," *Journal of Modern History* 56 (1984): 598, 611–12, on the French "Notables' " views on taxing rentier' profits.

48. McDonald, *Novus Ordo Seclorum,* 14.

49. Charles Reich, "The New Property," *Yale Law Journal* 73 (1964): 733, 785–86.

50. Cass Sunstein, "Beyond the Republican Revival," *Yale Law Journal* 97 (1988): 1539, 1551. See also Akhil Amar, "Republicanism and Minimal Entitlements," *George Mason University Law Review* 11 (1988): 47–51; and Frank Michelman, "The Supreme Court, 1985 Term—Forward: Traces of Self-Government," *Harvard Law Review* 100 (1986): 4, 40–41.

51. See Richard Epstein's criticism in his "Modern Republicanism —or The Flight from Substance," *Yale Law Journal* 97 (1988): 1633, 1635–36; Mark Tushnet, "The Concept of Tradition in Constitutional Historiography," *William and Mary Law Review* 29 (1987): 93, 96–97.

52. Epstein, *Takings,* 3–6. For further consideration of constitutional institutions promoting wealth-maximization, see *Symposium, The Constitution as an Economic Document, George Washington Law Review* 56 (1987): 1–186; particularly relevant is the article by Richard Posner, "The Constitution as an Economic Document," 4–38.

53. See, for example, *Nollan v. California Coastal Comm.,* 107 S.Ct. 3141 (1987); and *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

54. For some of the writings on these difficulties, see Carol Rose, "Mahon Reconstructed: Why the Takings Issue Is Still a Muddle," *Southern California Law Review* 57 (1984): 562, nn. 5–6.

55. See, for example, *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978).

56. See Robert Ellickson and A. Dan Tarlock, *Land-Use Controls* (Boston: Little Brown, 1982), 136, n. 3.