The Public Use Requirement and the Character of Consequentialist Reasoning

Gregory S. Alexander[[1]](#footnote-1)\*

How does expropriation fit into a human flourishing theory of property? If we take it that property owners owe members of their communities obligations to provide resources necessary to develop those capabilities that are essential to human flourishing, then what does this require of them in terms of the state’s power to expropriate?

Governmental power to expropriate land for the common good is ancient. It dates at least back to Roman law. Indeed, Susan Reynolds argues that “in any settled society in which individuals or groups have acknowledged rights in particular pieces of land there may be some occasions, like the digging of drainage or irrigation channels, or the building of roads or fortifications, on which such rights may come into conflict with the needs of the community as a whole, however it is defined and ruled.”[[2]](#footnote-2) Expropriation for the common good is found in most, although not all of such societies.[[3]](#footnote-3)

The existence of expropriation is one thing; its justification is another. Several rationales for the power to expropriate land have been suggested. In the United States, the dominant explanation is economic: what justifies the power of the state to force the sale of private property is economic efficiency.[[4]](#footnote-4) Expropriation is necessary to overcome monopolies that occur when desirable government projects are site-specific. To pick a familiar example, say a city plans to build a new airport on land that is privately owned by several owners. No other site is feasible, so the city must acquire each of these parcels. As economists have long pointed out, this means that each owner has a monopoly on an asset critical to the governments plan, and each is in a position to extract monopoly rents from the government in exchange for selling her/his parcel. Expropriation allows the government to achieve the benefit of building the airport at a lower cost to taxpayers than would be the case if the government had to acquire each parcel through market transactions.[[5]](#footnote-5)

The power to expropriation land for the common good can be understood in quite different terms, however, terms that focus on the obligations that private owners owe to their communities. The constitutions of several nation-states, including Germany[[6]](#footnote-6) and South Africa,[[7]](#footnote-7) include provisions in their property clauses that expressly recognize such a social obligation. Even in the absence of such an explicit form of legal recognition, however, the obligation exists, not as an externally-imposed limitation on property interests but implicit in the concept of ownership itself. Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. The social obligation norm is the legal recognition of this straightforward conceptual entailment of the way the legal system justifies the institution of private property itself. Another way of putting this point is to say that the very factor that makes the institution of private property a social good is also the very factor which renders its limits, i.e., human flourishing.

I. **Human Flourishing and Necessary Capabilities**

The best account of human flourishing is one that focuses on a person’s capabilities. It measures a persons well-being not by looking at what they have, but by looking at what they are able to do.[[8]](#footnote-8) The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction, or what Sen calls functionings, rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties. Social structures, including distributions of property interests and the definition of the rights that go along with the ownership of property, are to be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.

Sen distinguishes between the first-order patterns that constitute well-lived human lives (“functionings”) and the second-order freedom or power to choose to function in particular ways, which he calls “capabilities.”[[9]](#footnote-9) As he explains, “A person’s ‘capability’ refers to the alternative combinations of functionings that are feasible for her to achieve.”[[10]](#footnote-10) Among the capabilities that are necessary for a well-lived life are *life*, including certain subsidiary values such health, *freedom*, understood as including freedom to make deliberate choices among alternative life horizons, *practical reasoning*, and *sociality*. Although the actual achievement of these and other capabilities is a necessary component of any plausible conception of the well-lived life, the experience of choosing among a number of possible valuable capabilities (perhaps even including the choice not to function in certain ways) is *itself* an important capability.[[11]](#footnote-11)

The crucial point for my purposes is that no individual can acquire these capabilities or secure the resources to acquire them by him- or herself. This is because the physical process of human development mandates our dependence on others for a great deal of the time during which we are cultivating the necessary capacities. Life, freedom, practical rationality, sociality and their associated capabilities can meaningfully exist only within a vital matrix of social structures and practices. Even the most seemingly solitary and socially threatened of these capabilities, freedom, depends upon a richly social, cultural, and institutional context for the presence of which the free individual must rely on others.

Communities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities. As free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense with others with whom we are connected as members of one or typically more communities. Each of our identities is literally constituted by the communities of which we are members.

Just why does a person have an obligation to others in the community to promote the requisite capabilities? Several possible bases for this obligation exist. Within the Aristotelian tradition, the reason is directly related to the social character of human beings. Human flourishing requires not only virtues but also resources. Each of us desires resources to enable development of the capabilities that are essential for human beings. Being social animals, moreover, we want those resources not only for ourselves but also for others so that they develop the capabilities for flourishing as well. Hence, human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life (though not necessarily what they want).

Another possible basis for the obligation is some notion of long-term self-interest. The idea would be that the communities which aided and continue to aid the persons development as an autonomous moral agent depend for their well-being, and in turn, hers, on the persons helping it.

Acknowledgment of our human dependence upon others, on the social matrices that nurture the capacities that enable us to flourish, creates for us both a moral and a legal obligation to support these matrices. The major theoretical claim here, in short, is that our (and others) dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.

II. **The Public Use Requirement, The Social Obligation Norm and Expropriation**

With the theoretical foundation laid, we can now reexamine expropriation and its proper limitations. Expropriation is a legal and political process for determining just what that responsibility is. At its most general level, the power of expropriation represents the polity’s collective judgment that the state is justified in demanding transfer of title to our land to the members of the political and society community that nurtures us as flourishing individuals that under certain conditions we as landowners may have to sacrifice title to our land in exchange for just compensation.

Clearly, there must be limits to this obligation and the state’s power to expropriate. This is the main purpose of the requirement that expropriation be for the common good or for a public use. It is impermissible for the state to expropriate land with the intention of transferring it, say, to a private citizen who has contributed large sums of money to the dominant political party. But the terms “common good” and “public use” are hardly self-defining, and their ambiguity creates a serious challenge to a principled use of the power to expropriate, in particular exercises of that power that are consistent with the value of human flourishing.

The public-use requirement has been the topic of considerable controversy in the United States within the past several years. Until fifteen or so years ago, hardly anyone had paid attention to the requirement, and the conventional wisdom was that that the public-use requirement of the U.S. Constitution’s Fifth Amendment was a dead letter.”[[12]](#footnote-12) That state of quiescence ended in 2004 when the United States Supreme Court issued its decision in the widely-noted case of *Kelo v. City of New London, Connecticut.*[[13]](#footnote-13)In that case, the city of New London, Connecticut, approved a development plan that was intended to revitalize this economically-distressed but not blighted city. The plan involved acquisition of land by purchase or expropriation for a large multi-purpose project that was stimulated by the announcement that a large pharmaceutical firm (Pfizer) intended to build a research facility in the area. Much of the acquired land was to be used for residential and commercial purposes rather than more familiar public-use purposes such as public parks, roads, and the like. When some property owners refused to sell, the public development agency began expropriation proceedings. The petitioners brought a lawsuit that the expropriation would violate the constitutional public-use requirement. A narrowly-divided Supreme Court held that an expropriation for economic development purposes meets the public-use requirement.

In his majority opinion, Justice Stevens pointed out that some parameters of the public-use requirement are clear. On the one hand, the government may not simply expropriate land from a private owner solely to transfer it to another private part, even if compensation is paid. On the other hand, the government clearly may expropriate land if actual use by the public is intended, as in instances of expropriation for railroad rights-of-way or parks. But is “public use” confined to situations where the public actually uses or has a right to use the expropriated land? Such a view would greatly limit the state’s expropriation power, and American courts have not so narrowly the requirement, at least not since the 19th century.[[14]](#footnote-14) A far more relaxed view equates “public use” with “public benefit.” On this view, so long as the public enjoys any benefit from the intended use of the expropriated land, the requirement is met. A much narrower view holds that public use must involve provision of “public goods” in the technical economic sense. That is a very limited category of use because true public goods are rare. They have two characteristics: (1) Once the good is provided, it is impossible to prevent anyone from consuming it; (2) consumption by one person does not diminish or otherwise affect the ability of others to consume it as well.

Justice Stevens chose none of these. Rather, he stated that the test is whether the project in mind serves a “public purpose,” such as a plan to clear and reclaim an urban area in which some parts are blighted but others are not.[[15]](#footnote-15) Plans such as this are legitimate and traditional functions of the state.

Stevens’ opinion made a second point. The Court will not try to second-guess the judgments of legislative bodies regarding the need or importance of public projects that are the basis for expropriation. Rather, the Court will apply a deferential standard of judicial review that gives legislatures “broad latitude in determining what public needs justify the use of the [expropriation] power.”[[16]](#footnote-16) In the instant case the city of New London had, Justice Stevens said, “carefully formulated an economic development plan that it believe[d] w[ould] bring appreciable benefits to the community, including ─ but by no means limited to ─ new jobs and increased tax revenue.”[[17]](#footnote-17) In view of the plan’s comprehensive character and the “thorough deliberation” leading up to the plan’s formulation, the Court deemed it appropriate to resolve challenge to the plan in its entirety rather than piecemeal by looking at each owner’s land in isolation.[[18]](#footnote-18)

Justice Stevens was hardly the only voice on the Court to express an opinion in *Kelo*. Justice O’Connor wrote a dissenting opinion expressing the view that any expropriation for the purpose of economic development is not a public use. The public benefits from economic development, she contended, are incidental only and insufficient to constitute a public use.[[19]](#footnote-19) In her view the Court’s approach to the public-use requirement is far too broad. She reads the majority opinion to hold that “the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public ─ such as increased tax revenue, more jobs, maybe even esthetic pleasure.”[[20]](#footnote-20) The danger posed by that holding, she asserted, is that “nearly any lawful use of real private property can be said to generate some incidental benefit to the public.”[[21]](#footnote-21) The result, in her view, is that “[t]he specter of [expropriation] hangs over all property.” She suggests several possible scenarios: “Nothing is to prevent the State from replacing any Motel 6 [a chain of cheap American motels] with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”[[22]](#footnote-22)

*Kelo* is an appropriate case to use as a vehicle for rethinking the public-use requirement and expropriation of land more broadly. It is useful in this respect for two reasons. First, it poses a particularly difficult set of circumstances for the public-use test: It is a case in which the state plans to expropriate land from one private owner and give it to another private owner, or, in short, to take from *A* and give to *B*. Second, the Court’s legal analysis in *Kelo* clearly exposes the character of American judicial reasoning in expropriation cases and its defects. Those defects become most clearly evident when the *Kelo* reasoning is compared with judicial reasoning used by other nation-states, in particular, the German Constitutional Court.

Cases that involve taking from *A* and giving to *B* are especially troublesome for the public-use requirement for the obvious reason that the benefit seems purely private. The German Constitutional Court has faced the question whether the public use, or public interest, requirement,[[23]](#footnote-23) can be met where *B*, the ultimate recipient, would profit from the expropriation, and its approach is illuminating. The Court has held that the fact of private profit alone does not prevent the public interest requirement from being met.[[24]](#footnote-24) The case involved expropriation of land for the purpose of providing electricity. Following expropriation, the state gave the land to a private firm which supplied electricity to its customers with whom it had a contractual relationship. This seems to be an easier case than *Kelo* because the ultimate use of the land ─ supplying electricity ─ is a function traditionally performed by public utilities. In this sense the recipient of the land, although a private firm, is a quasi-public entity. The same can hardly be said of the circumstances in *Kelo*, where the expropriated land was to be used for building hotels, apartments, stores ─ strictly private activities. From this perspective it becomes easier to understand why Justice O’Connor characterized the public benefits of increasing jobs and raising revenue as “strictly incidental.” The question in *Kelo*, then, boils down to whether increasing jobs and taxes have a sufficiently public character to constitute a “public use.” The German court has faced that question as well, reaching a different result than its American counterpart. In the *Boxberg* case,[[25]](#footnote-25) the state expropriated privately-owned land for the purpose of transferring it to the Daimler-Benz automobile firm that intended to use it as a testing ground for their new cars. The court held that the expropriation was unconstitutional despite the fact that, as in *Kelo*, the intended project would have created much-needed jobs and stimulated the economy in the local region. “Condemnation for the benefit of private persons . . . that serves the public interest only indirectly and presents an enhanced danger of abuse to the detriment of the weak poses particular constitutional problems,” the court said.[[26]](#footnote-26)

The second, more fundamental insight to be gained from studying *Kelo* concerns the reasoning by which courts decide whether and when land expropriation is in the public interest. Here a comparison with the German Constitution Court’s mode of reasoning reveals *Kelo*’s basic flaw. Despite the Court’s discussion of judicial deference to the legislature, the Court in *Kelo* relied on consequentialist reasoning to reach its decision. This is the aspect of the case that bears the greatest scrutiny, for it is the greatest weakness of the American approach to analyzing expropriation cases.

**Consequentialist Reasoning**

That the Court relied on consequentialist reasoning in *Kelo* comes as no surprise. Not only do judicial precedents strictly employ consequentialist reasoning, but the very concept of a public use as a limitation on the scope of the state’s power to expropriate land seems to compel inquiry into the intended effects of state expropriation. The problem is not with consequentialist reasoning as such but with the type or character of the Court’s consequentialist analysis. Consequentialism is not of a piece. There are different modes of consequentialism, and the characteristics that distinguish one form from another make it more or less persuasive, both analytically and normatively. We need to identify, then, these different modes of consequentialism.

Forms of Consequentialism

Stated in its most basic form, consequentialism is the theory of action which holds that in any given situation the right act for people to do is the one that will produce the best possible outcome.[[27]](#footnote-27) More precisely, this definition has two parts: (1) It provides some principle for ranking overall states of affairs from an impersonal point of view; (2) It then asserts that in any given situation the right course of action to take is the one that will produce the highest ranked state of affairs that the actor is capable of producing.[[28]](#footnote-28) The theory lends itself to as many variations as there are criteria for ranking overall states of affairs. Beyond agreement that the rightness of an act depends upon its consequences, action theorists debate about other requirements for a theory of action to be consequentialist. For example, some theorists argue that a theory of action cannot be properly considered consequentialist unless it is agent-neutral,[[29]](#footnote-29) that is, the reason for action can be fully expressed without referring back to the person for whom it is provided (if it cannot be completely stated without reference back to such a person, given the reason is “agent-relative.”).[[30]](#footnote-30) Other theorists deny that agent-neutrality is a requirement for any reason for action to be consequentialist.[[31]](#footnote-31) I hold with this latter view, for, as we shall see, the theory of value that I say endorse here is one that allows in aspects of agent-relativity.

A more fundamental distinction concerns the theory of value that underlies any consequentialist action theory, i.e., what outcomes the theorist seeks obtain. The most familiar version of consequentialism is utilitarianism, which in its classical form states that the best outcome from among any set of possible outcomes is the one that maximizes the net amount of human pleasure.[[32]](#footnote-32) Classical utilitarianism has been subject to criticism from several angles, of course, including the focus on pleasure. One widely-shared modern variant of classical utilitarianism substitutes preference-satisfaction for pleasure. It holds that the best possible outcome is the one that maximizes the satisfaction of aggregate individual preferences.

In analyzing expropriation questions both courts and legal scholars commonly rely upon some version of utilitarianism, usually without acknowledging so. Although they are seldom so explicit, courts and scholars tend to assess the merits of proposed state projects with regard to the public-use or public-interest requirement in roughly utilitarian terms. The often-unarticulated value that underlies their evaluations is aggregate social welfare, a variation of classical utility. What I wish to suggest here is not only that this value foundation for public-use evaluations is not the only available form of a consequentialist approach to public-use analysis but, more boldly, that it is normatively inferior.

An alternative that has emerged in recent years is the value theory briefly described at the outset ─ the human flourishing theory that I briefly described at the outset. That theory differs from all versions of utilitarianism in two important respects. First, it is pluralistic. That is, it denies that human flourishing can be reduced to any single foundational value. Utilitarianism supposes that all values can be reduced to a single foundation value, namely, utility, measured by pleasure, happiness, or preference-satisfaction. Hence, in the final analysis, all that matters is maximizing this basic value. By contrast, human flourishing, as the eponymous theory conceives it, is complex, comprised of multiple and irreducible values such as love, friendship, health, equality, community, and so on. Hard cases *are* hard cases, then, because they require the decision-maker to resolve conflicts between or among multiple values all of which are relevant to the human flourishing calculus.

The second distinguishing characteristic of the human flourishing theory is that it is objective. Utilitarianism is strictly subjective. Happiness, pleasure, and preferences are all purely matters of individual taste, not subject to objective judgment. This is not the case for the well-lived life, as the human flourishing theory conceives it. There are, of course, many way of living a well-lived life, but there are also many bad ways of living as well. Which ways of living are good, i.e., promote human flourishing, and which are not is not a matter of individual preference. The well-lived life is a life that conforms to certain objectively valuable patterns of human existence and interaction or what Amartya Sen calls “functionings,” rather than a life characterized merely by the possession of particular goods, the satisfaction of particular (subjective) preferences, or even, without more, the possession of particular negative liberties.[[33]](#footnote-33) Social structures, including distributions of property rights and the limitations on the ownership of property, are to be judged, at least in part, by the degree to which they foster the participation by human beings in these objectively valuable patterns of existence and interaction.

The objectivity of values does not necessarily mean that we do not take subjectivity or subjective judgments into account. The evaluation of values is *position-relative*, we might say, but this does not imply that values are relative.[[34]](#footnote-34) Valuation can be position-relative in the same way that the statement “The sun is setting” is. The truth of that statement varies with the position of the person, but it cannot vary from person to person among those standing in the same position.[[35]](#footnote-35)

Which of two varieties of consequentialist reasoning is better suited to analysis of the public-use requirement in expropriation cases? For reasons that I shall explain, the human-flourishing form of consequentialist reasoning is preferable to utilitarian forms of reasoning. To do so, I need first to turn to a related matter ─ purposive analysis in constitutional property cases.

Purposive Analysis

Purposive analysis is a general mode of constitutional interpretation. It is a method by which an interpreter handles the task of gleaning the meaning of constitutional terms and norms. By “purposive,” I mean that the analyst openly and systemically inquires what substantive value or values underlie the decision to make property a constitutionally-protected right. An interpretation is purposive when the interpreter openly and systemically asks what is the core purpose (or what are the core purposes) that can most plausibly be attributed to a constitutional property clause.

Within liberal theory there are, of course, competing views about the core goal of making property a constitutional right. Securing individual autonomy is one obvious candidate, but there are others as well. Indeed, one might plausibly conclude that a purposive theory of constitutional property that is most compatible with liberalism is one that is pluralist, recognizing multiple purposes inhering in the constitutional protection of property. The constitutional courts of Germany and South Africa have both engaged openly and systemically in this sort of purposive reasoning, and their experience points the way to an illuminating approach to constitutional property issues, including the public-use requirement. Before examining their experience, I need first to a quite different form of analysis that might also be called purposive. This form of reasoning was by the American Supreme Court used in *Kelo*, and it contrasts in important respects with that used by the German and South African courts.

Characteristically of American courts in constitutional property cases, the Supreme Court in *Kelo* (apart from its judicial deference rationale) was project-focused. That is, it examined the purposes or goals of the project in question, rather than the purposes of constitutional property itself. The Court asked whether economic development, the putative purpose of the city’s project in the case, created benefits that were sufficiently “public” to satisfy the public-use requirement despite incident private benefits. It then considered what those public benefits were, and then concluded that the character of the project’s purpose was, on balance, public.

This is an unduly narrow approach to examining purposes. Obviously the project’s purposes are relevant, but they are not dispositive. A broader, more nuanced purposive analysis of the public-use requirement would begin with the basic purpose of that requirement itself ─ *to prevent the state from forcing sales of land in circumstances which would sacrifice the values of property as a legally-protected, especially as a constitutionally-protected, interest*. The public-use requirement does work that the compensation cannot do, and that is to assure that the fundamental values that property rights serve are not sacrificed for the sake of promoting private interests. The public-use requirement represents a recognition that property’s core values are not compensable by monetary damages but can be adequately protected only by preventing the state from acting in the first place. In the terminology coined by Calabresi and Melamed, property’s values can be protected against sacrifice for private benefits only through a “property rule” rather than a “liability rule.”[[36]](#footnote-36)

Property’s Values

The work of protecting property’s core values requires close examination of just what these values are and how they relate to the property interest immediately involved. Precisely what those values are is, of course, a highly contestable matter. I argue here that the best purposive account of property is one that expresses property’s values its terms of human flourishing, which, as we have seen, is itself a pluralistic concept that includes multiple values. We can identify at least five private law values that are at the core of human flourishing and that are commonly considered to be among property’s main aims ― autonomy, personal security/privacy, self-determination, self-expression, and personal responsibility. Although this is by no means an exhaustive list, it captures those values that I take to be central to the instrumental fit between property and human flourishing.

*Autonomy* will perhaps be the least controversial of the five values that I identify as private values that are property’s ends. Many, if not most, property theorists identify individual autonomy as an important value that property serves. Among property theorists, some, notably libertarians and Kantians, place autonomy at the core of property’s raison d’être. But even those who do not view autonomy as the foundational end of property still view it as an important aspect of the justification for private property rights. [[37]](#footnote-37)

*Personal security* is the second core goal. Property, it has long been thought, provides a person a safe haven.[[38]](#footnote-38) As Jeremy Waldron observes, “Humans need a refuge from the general society of mankind.”[[39]](#footnote-39) Property, especially landed property, supposedly provides that refuge to its owners.

An important aspect of the security that is thought to result from private ownership of property is privacy. The connection between privacy and property is familiar, of course. The home, for example, is perhaps the most familiar nexus between property and privacy. Indeed, the home is the *locus classicus* linking property, security, and privacy with autonomy (or freedom).[[40]](#footnote-40)

A third value underlying property is *self-determination*. Self-determination is “a power to act from determinate ends that are themselves coherent expressions of freedom because they are neither adopted unreflectively nor imposed by an external will.”[[41]](#footnote-41) Here is another brief explanation: “When we . . . view[] our desires as material to be regulated and ordered in line with desires of a high order still (for example the desire not to be the kind of person we see ourselves being or becoming) we reach a clearer understanding of the slippery concept of self-determination.”[[42]](#footnote-42)

The connection between this understanding of self-determination and property comes through in the notion of ordering our desires. Because we live in communities with others, we will use our property in pursuing our considered goals, but we do so in full recognition of others’ legitimate claims to respect.[[43]](#footnote-43) Ordering our desires also means that in pursuing our goals through property, we will develop and rely on a system of norms regulating the scope of property rights.[[44]](#footnote-44)

The point to emphasize about this approach to self-determination is how social it is. Self-determination cannot occur atomistically or in isolation from society. Self-determination is a process that is deeply dependent upon community for its higher and higher realization.

The fourth value of property is *self-expression*. By “self-expression,” I mean to include a capacious range of forms and senses by which people assert who they are, what they desire, and so on. Possession is one of property’s techniques of self-expression. As Carol Rose reminds us, possession constitutes a mode of communication.[[45]](#footnote-45) “Possession as the basis of property ownership,” Rose suggests, “seems to amount to something like yelling loudly enough for all who may be interested.”[[46]](#footnote-46) It is a matter of communicating a claim in a particular sort of way, a mode of expression that carries a great deal of meaning regarding the claimant’s psychological attachment to the object in question.

*Responsibility* is the final value of property that I shall identify. The connection between property ownership and personal responsibility can be developed on the basis of diverse strands of thought. One is the tradition of positive liberty.[[47]](#footnote-47) From this perspective a person is not truly free until his desires, plans, and goals are stabilized so that there is continuity between the plans and actions of his past and those of his future.[[48]](#footnote-48) The person who acts on the basis of whim, who flits from one impulse to another, is not truly free but instead is a hostage to such unstable urges. Such a person has no real sense of enduring identity. Even his moral agency is subject to doubt. Private ownership of property, the argument goes, fosters a deeper sense of freedom by stabilizing a person in particular ways. The idea is that a regime of private ownership inculcates in individuals a sense of personal responsibility because they realize that they must effectively manage their own property if they are to satisfy their own needs. Through ownership individuals acquire not only certain skills but, more important, particular habits of thought ― forward-looking, calculating, and mindful of alternatives ― that free them from caprice and whim and give them an understanding of what T.H. Green called the “permanent good.”[[49]](#footnote-49)

Another strand of thought connecting property with responsibility focuses less on responsibility to oneself than responsibility to others. There is a very old tradition of property theory that is concerned with the responsibilities that individual owners owe to their societies. Connected with ideas of ownership (especially of land) as stewardship, the tradition dates back at least to Biblical texts.[[50]](#footnote-50) The idea that owners owe responsibilities to their societies is a major theme in property theory in many jurisdictions. In some civil-law jurisdictions there is an important tradition in property legal theory emphasizing the “social function of property.”[[51]](#footnote-51) This tradition, whose origins are usually traced to the French legal theorist Leòn Duguit,[[52]](#footnote-52) views property not in terms of a right but rather as a social function.[[53]](#footnote-53) Not only does the owner owe responsibilities to put the property to the service of the community, but the state should protect property only to the extent that the owner fulfills this social responsibility.[[54]](#footnote-54) The connection between property and responsibility to others is the basis of the social obligation idea in American property legal theory. The major difference between that idea and the civil-law social function doctrine is that the latter is externally imposed on owners, unlike the social obligation norm which is conceived as internal to the concept of ownership itself.

*Linking Property’s Values with Property’s Types*

The next step is to discern which of the values that ground property are at stake in the disputed plan of expropriation. It might seem at first that this inquiry implies that public-use analysis must proceed on an ad hoc, or case-by-case basis. That is not necessarily so, however. Different values implicate different types of property so that it is reasonable to develop legal presumptions about outcomes based substantially on the type of property involved.

A practice of the German Constitutional Court is highly instructive here. As mentioned previously, the property clause of the German Basic Law includes a social obligation provision.[[55]](#footnote-55) A key practice that the courts have developed in applying this provision is the so-called scaling function (*Abstufung der Sozialpflichtigkeit*). The court scales, or grades, the social-obligation norms limitation on property according to its relation to the individual owner. As one observer explains, [T]he closer the specific property right is involved in providing security for the personal liberty of its holder, the narrower the restrictions which prevent the legislature from interfering with that right; and the further a specific property right is removed from the sphere within which the personal liberty of its holder is preserved, the easier it becomes for the legislature to regulate the limits of that right.”[[56]](#footnote-56) As part of this analysis, the court inquires whether and to what extent other persons are dependent on the use of the owners property. The greater the degree of dependency, the greater the social function and, consequently, the greater the degree of legislative freedom to define the individual owners zone of autonomy more narrowly.

As a result of this scaling function, the German court has created a hierarchy of types of property interests, granting stronger protection to some, relatively weaker protection to others, depending upon the social functions they serve. Property interests whose function is primarily or even exclusively economic, that is, private wealth-creating, receive minimal protection under German constitutional law. Such interests are viewed as not immediately implicating the fundamental values of personal autonomy and self-realization. Other interests, those that immediately implicate the owners autonomy and self-realization interests and her opportunity to practice self-governance receive stronger protection. So, for example, the interest of a landlord who does not personally reside on the premises is given lesser weight than that of her tenant, whose opportunity to remain in possession is considered essential to autonomy, security, and self-governance values.

Does this mean that commercial interests always receive weaker protection than non-commercial or personal property interests? Not necessarily. Some commercial interests may implicate many of the same values embedded in personal interests. Small, family-owned businesses, for example, involve autonomy, security, and self-realization interests much in the way that residential property does, and they should receive relatively strong protection.

*Purposive Analysis Is Dynamic*

Another aspect of the German Court’s purposive approach that is instructive is its recognition that purposes change over time. The Court’s scaling analysis is functionally dynamic. It is functionally dynamic in the sense that the courts consider social and economic changes that have affected the purposes that particular resources serve over time. An influential treatise on German constitutional law aptly captures this focus on the functional change of property and its relevance to constitutional protection:

As a basis for the individual existence and individual conduct of life as well as a principle of social order the individual ownership of property has lost its importance. Modern life is based only to a limited extent on the individual power of disposition as the basis for individual existence, with respect, for example, to the peasant farm or the family enterprise. The basis for individual existence is usually no longer private property as determined by private law, but the product of ones own work and participation in the benefits of the welfare state.[[57]](#footnote-57)

The relevance of functional changes of property to constitutional protection is illustrated by the *Small Garden Plot Case* (*Kleingartenentscheidung).[[58]](#footnote-58)* In that case the Court struck down a federal statute that severely limited the right of landowners to terminate garden leases. The historical background of the statute and changes in social conditions are crucial to understanding the decision. At one time in German history it was common for large landowners, particularly on the outskirts of cities, to lease to people who owned little or no land small plots for the purpose of small gardens. These garden plots were an important method of feeding the German public. As the dominant means of agricultural production shifted to large-scale commercial productions, these individual garden plots lost their original social purpose and indeed became something of an anachronism. The individual landowners in the case wanted to change the use of their land from agricultural purposes to commercial development because the amount of annual rent from the leasehold had become insubstantial. They applied for a permit to terminate the garden lease on their land, but the regulatory agency refused to grant the permit because the federal statute did not recognize this sort of change of circumstances as a permissible basis for terminating leases. The Court held that the statute was unconstitutional because the magnitude of the restriction on the owner’s freedom of use was disproportionate to the public purpose to be served. While the original function of these garden allotments was to provide a source of food in times of social emergency, the purpose had by modern times become no more than to be a source of recreation, a social function that the court regarded as decidedly less weighty than its original purpose. Comparing the weakness of the new function with the severity of the restriction on the owners’ use, the court had little difficulty in concluding that the statute was unconstitutional.

*Purposive Analysis Is Comprehensive*

There is one final aspect of the purposive approach that needs to be mentioned. Purposive reasoning requires consideration of the implicated values as they apply to both parties, i.e., the owner whose land the state seeks to expropriate and the intended beneficiary(ies) of the expropriation. Purposive reasoning is comprehensive, and the purposes of all affected property interests and their attendant values matter in the public-use calculus. Such a comprehensive approach is necessary if the basic commitment to promoting human flourishing is to be taken seriously. Equality is itself a constituent element of human flourishing, and treating all of the affected parties as equals requires that we give each of them their due in terms of evaluating their interests at stake.

Capabilities, Values, and Resources

How do the capabilities that I briefly discussed earlier relate to this purposive analysis of property’s values? Stated put, the capabilities as the means by which the relevant values are protected and realized. As I indicated previously, human flourishing is constituted by multiple values which cannot reduced to any single foundational value. These values are themselves realized through certain human capabilities. Different values depend upon different, and sometimes multiple, capabilities, in order to be realized.

Capabilities themselves sometimes require particular resources for their nurturing and development. The capabilities of life and freedom, for example, are virtually meaningless if someone does not have a place they are entitled to be.[[59]](#footnote-59) An abode, a home, is essential for the development of these capabilities, their attendant values, such as personal autonomy, and ultimately a well-lived life. A homeless person does not live a well-lived life even if it is his preference to be homeless. Such a person, accustomed to receiving little more than abuse or neglect, may come to expect little more out of life. As Amartya Sen points out, A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfillment if he or she has learned to have realistic desires and to take pleasure in small mercies.[[60]](#footnote-60) Certain basic resources, then, are essential for human flourishing, and, given property law’s commitment to human flourishing, those essential resources warrant legal protection.

***Kelo* Revisited**

With the theoretical foundation laid, we can now return to *Kelo* and revisit the public-use question in that case. The human-flourishing theory shifts the focus away from the government project involved, which was the Court’s sole concern, to the values of property as a legally-protected, especially as a constitutionally-protected, interest. The theory asks which of property’s ends are implicated in the planned expropriation and what are the human capabilities that attend those values? In *Kelo*, the asset that the city intended to expropriate had a particular and special function; it was the petitioner’s personal residence, her home. As the German Constitutional Court recognizes, the home merits relatively strong legal protection because of its core purposes, individual autonomy and personal security. No one can live a well-lived life lacking security or under continual conditions of subordination in one’s personal sphere.

The home involves other values as well. Consider self-expression. People express themselves in many ways, of course, non-verbally as well as verbally. Dress and conduct are obvious non-verbal expressions of oneself. So also are possessions, including the home. Indeed, for many people, one’s home is a primary mode of self-expression. Others can frequently grasp an immediate sense of a person’s identity by looking at his home, what type it is, where it is located, how it is decorated, and so on.

Responsibility is another of property’s ends that the home involves. Whether owned or rented, the home requires the individual to acquire skills and forward-looking and forward-looking and deliberative habits of thought that free him from caprice and whim and give him an understanding of the long-term, stable good. At the same time I indicated earlier that responsibility also involves responsibility to others and that the state should protect property only to the extent that the owner fulfills this social responsibility. The basic question in *Kelo*, of course, concerned the scope of Kelo’s social responsibility ─ whether it implied subordination to the community’s need for economic development. We shall return to that question shortly, but first we need to consider the values and attendant capabilities at stake on the other side, the city and the ultimate beneficiaries of the intended expropriation.

This is the stage at which the Court’s focus on economic development gains salience. Still, the Court’s analysis of the community’s interest in economic development seems unilluminating. Recall that the Court mentioned only jobs and taxes as the aggregate social benefits that the city hoped to reap from the development project. That tells us little or nothing about the property values at stake in the city’s planned project or the human capabilities necessary to realize those values. What, then, are those values and capabilities?

The capabilities necessary for individuals to flourish as autonomous moral agents require the existence not only of social networks within which individuals carry out the activities that enable them to experience individual freedom but also what Charles Taylor calls the mundane elements of infrastructure without which we could not carry on these higher activities . . . .[[61]](#footnote-61) These elements of infrastructure include just the sorts of public projects for which the power of eminent domain is typically exercised: roads, airports, utility lines, public buildings, parks, communication systems, and the like. This infrastructure is literally the foundation upon which our society, our culture, and our polity rest. It is no exaggeration to say that without this infrastructure, our society, the very society that nurtures those qualities through which we experience ourselves as free individuals capable of making choices among alternatives and defining for ourselves our wants, needs, and values, would not exist. Each of us as a member of a particular political community, then, depends upon the continued effectiveness of this infrastructure, and that dependence requires that we bear some responsibility for maintaining it. That is the purpose of and justification for expropriation.

The problem now is how to resolve this conflict of property values, i.e, between Kelo, the property owner, and the city and its intended beneficiaries. The German scaling approach is useful at this point. As we previously discussed, in applying the social obligation term the Constitutional Court scales, or grades, the social-obligation norms limitation on property according to its relation to the individual owner. The closer the specific property interest is involved in providing security and autonomy of its holder, the greater the degree of constitutional protection the interest is given.[[62]](#footnote-62) So, for example, the interest of a landlord who does not personally reside on the premises is given lesser weight than that of her tenant, whose opportunity to remain in possession is considered essential to personal security, autonomy, and self-governance values.[[63]](#footnote-63) The home, the Court has said, is critical to these ends.

By contrast, the city’s planned project did not directly implicate property’s core values. Jobs and taxes are important to society’s well-being, to be sure, but are they sufficient reasons to overcome the strong property values attached to one’s home? The home is not sacrosanct. There are occasions when and reasons why it may and must be sacrificed. In terms of human flourishing the home may and at times must be sacrificed when this is essential for creating and maintaining the requisite background conditions that are necessary for the development of those human capabilities that are constitutive of a flourishing life. The intended aims of the New London, Connecticut, project would maintain those conditions only indirectly by expanding the city’s tax base and creating new jobs, which in turn would generate more taxes. Compare a more typical example of use of the expropriation power ─ an expropriation for purposes of a road. Public projects such as roads are essential components of the background material infrastructure that supports society and its culture. Here the public benefit gained from the expropriation is direct, and it is vital to enabling the capabilities that are necessary for a well-lived life. A project of this sort[[64]](#footnote-64) may require that even a personal residence, a home, be sacrificed, despite the great importance attached to that interest’s values.

In situations where there are two competing property interests each supported by strong property values, it is useful again to follow the lead of the German courts. In applying the public-interest requirement the German courts have said that the requirement means that expropriation is the only possible means of meeting a particular public need. Moreover, the proportionality principle requires that expropriation must be strictly necessary to accomplish that need.[[65]](#footnote-65) This less-invasive-means test might be used to resolve cases the property interests on both sides involve strong property values, particularly values associated with the personal residence. Sacrifice of the personal residence would then be required only no other means of achieving the public goal is available. That will be true in cases of expropriation for public projects like roads and airports. Projects such as these are not only essential they are site-specific, meaning that there is usually no readily available alternative location for them. This is why such projects nearly always satisfy the least-restrictive-alternative test.

Can the same be said of the development project in *Kelo*? Assuming for the sake of argument that the project was the only means by which the city could increase taxes and create more jobs, it is not clear that the project required the exercise of the expropriation power. The development area was 90 acres in size, comprised of 115 parcels.[[66]](#footnote-66) The planners originally had prepared six alternative plans for the project.[[67]](#footnote-67) The final development plan divided the total area into seven parcels, each having a different use purpose (residential, retail store, hotel, etc.). Pfizer, the large pharmaceutical firm that was the driving force behind the development project, had never made any demands regarding the location of any of the particular uses within the development plan.[[68]](#footnote-68) The trial court found that one of the seven parcels was not essential to the project.[[69]](#footnote-69) At least one of the expert witnesses testified that the disputed expropriations were not necessary to the project’s success, and some of the alternative plans would have permitted the petitioners’ homes to remain undisturbed.[[70]](#footnote-70) Given this evidence, there is reason to doubt that the least-restrictive-alternative test would have been met in *Kelo*.

This is not to say that attempted expropriations of a home would never succeed under this approach. Suppose that the home in question is a second home, a vacation home where the owner lives only for limited periods of time each year. Under these circumstances the values associated with the primary residence are not in jeopardy to nearly the same extent as they are where the owner’s sole or main abode is threatened, and so they do not weigh as strongly in the calculus of human flourishing and attendant capabilities. Depending upon the nature of the interest on the other side, it is entirely possible that the property values associated with that interest will be sufficiently important to prevail.

**Conclusion**

The public use requirement need not be the anemic doctrine that currently is in the United States. The consequentist mode of reasoning described here, one informed by the experiences of courts of other countries, particularly the German Constitutional Court, permits a more structured and more principled application of that doctrine, one that requires the court to attend to underlying property values at stake in the disputed expropriation matter. The ultimate strength of this approach is that it promotes human flourishing, the real foundation of property.

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