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URBAN REDEVELOPMENT AND LAND REFORM:

Theorizing Eminent Domain after Kelo

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I. INTRODUCTION

So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. . . . [E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects.[1]

Thus Justice Clarence Thomas in Kelo v. City of New London. In *Kelo*, the Supreme Court held that states are sometimes free to seize private property for use by developers in view of the putative public benefits resulting from such seizures. *Kelo* began after a private development corporation created by the city of New London, Connecticut, planned a project in the vicinity of an anticipated industrial research facility. It was able to purchase most of the property needed for the project. But owners of fifteen parcels—ten residences and five investment properties[2]—refused to sell to the corporation, which then sought to acquire their properties using the eminent domain power.

*I am greatful to Deborah K. Dunn for calling the *Kelo* case to my attention and for helping me to frame the problem explored here; and to Stephen R. Munzer, Roger E. Rustad, Jr., and an anonymous reviewer for *Legal Theory* for assisting in various ways with the development of this article.

1. Kelo v. City of New London, 2005 U.S. Lexis 5011, 91–92 (2005) (Thomas, J., dissenting) (citation omitted).

2. *Kelo*, *supra* note 1, at 11.

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Upholding the compulsory purchase[3] of the property, the Court maintained that expropriation could be legitimate even when the immediate beneficiaries would be private developers. Given the economic impact of the projected development, the compulsory acquisition of property to facilitate it could be seen as undertaken for a public purpose as required by the Constitution.

The eviction of people from their homes so developers can construct office buildings and retail outlets is troubling, to say the least.[4] So is the fact that the burden of redevelopment schemes regularly falls on people who are poor and powerless. But one can share these and other concerns rightly raised by *Kelo* without endorsing radical limitations on the eminent domain power.[5] A satisfactory account of property rights can provide a principled basis for rejecting the compulsory purchase of people's homes to facilitate redevelopment projects while acknowledging that the eminent domain power can appropriately be used to benefit specifiable groups of private individuals.

One way of making the point is by contrasting the kind of compulsory purchase envisioned in *Kelo* with what might seem to be the much more radical use of the eminent domain power to implement a program of land reform. The Supreme Court approved the use of eminent domain to effect a land reform program in Hawaii Housing Authority v. Midkiff. In the wake of an essentially "feudal" history, residential property in Hawaii was concentrated in the hands of a very small number of people.[6] The Hawaii legislature created a mechanism under which a qualified person who owned and lived in a house on previously leased property could purchase this property from the state, which would acquire it using the power of eminent domain.[7]

A unanimous Supreme Court held that the legislature had acted appropriately. But it justified its decision by suggesting that the Hawaii program was designed to remedy a generalized social problem rather than to benefit a specifiable group of persons. Land concentration of the kind at issue in *Midkiff* is doubtless a society-wide problem. But while land reform programs are certainly designed to remedy problems of this kind, they serve especially enhance the lives of specifiable individuals—landless tenants.

3. The term of art employed in American constitutional law would typically, of course, be not "compulsory acquisition" but "taking." I avoid this term because I do not intend here to resolve questions of constitutional interpretation; this is an exercise in moral and political theory, not in constitutional law.

4. By characterizing what local governments are doing as benefiting private developers when they transfer properties to private developers under eminent domain schemes, I do not wish to suggest that they are necessarily pursuing the private benefit of political or economic cronies. My point is simply that the visible, direct, and immediate beneficiaries of transfer schemes like those under review here are private parties who are likely to be anything but needy.

5. *Cf.* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1692–1694 (1988).

6. *See* Hawaii Housing Authority *v.* Midkiff, 467 U.S. 229, 231–234 (1984).

7. *See Midkiff*, 467 U.S. at 234.

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This is perhaps more obvious if we consider recent land reform measures in Latin America, Africa, and Asia. These measures have broken up large agricultural estates and transferred land to tenant farmers. They may rightly be touted as fostering economic and social stability, but they serve primarily to reduce the poverty and increase the empowerment of a specifiable group of people.

I argue here that one can support such programs while rejecting the use of the eminent domain power approved in *Kelo*. I begin this essay in legal philosophy by sketching the skeleton of a theoretical account of property rights. I build on this account to explain how we might resolve questions regarding the suitability of compulsory purchase. Then I seek to show why the kind of compulsory purchase involved in a land reform program may, in general, be reasonable. Finally, I suggest reasons why, by contrast, we can rightly see the development-oriented expropriation at issue in *Kelo* as objectionable even if we understand a conventional land reform program as appropriate.

II. THE JUSTIFICATIONS OF PROPERTY

A satisfactory theory of eminent domain depends on a satisfactory theory of property. I seek here to outline the skeleton of such a theory and to use it to help us determine when the use of the eminent domain power is and when it is not reasonable.

A. Property Systems as Contingent Social Strategies for Furthering the Common Good

Property is, to a significant extent, a product of convention and social decision. The legal system determines what does and does not count as property. It shapes the transactions in which people acquire and dispose of property. And it shapes the economic environment within which people earn income and gain wealth—and thus the wherewithal to engage in these transactions. Social norms not necessarily embodied in legislation or judicial decision help to do the same. While moral principles can and should constrain property-related rules, there is still substantial latitude for different societies to craft morally appropriate structures and practices. Property rights thus depend to a significant extent on society-wide decisions—not, in general, discoveries—and on the consensus of relevant subgroups.

The recognition that property rights are rooted in societal decision and convention is related to but different from the recognition that these rights are intended to serve the common good. This does not mean that their purpose is simply to aggregate net social wealth, as the law and economics movement would have it, for the common good is the good of persons in

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community[8] and not the good of the community fantastically imagined as an undifferentiated whole. But the justice of the property system depends on its responsiveness to the needs of persons in community; it will not do simply to inquire about the fairness of particular features of particular transactions considered in the abstract. Rather, property rules must be crafted with the good of interdependent persons-in-community in mind. "Property should be in a certain sense common, but, as a general rule, private," Aristotle wrote, suggesting that property should be individually allocated precisely for the common good. "[F]or, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because every one will be attending to his own business. And yet by reason of goodness, and in respect of use, 'Friends,' as the proverb says, 'will have all things common.'"[9]

The fact that explicit rules and implicit conventions shape property rights and these rights are warranted to the extent that they serve the common good[10] is a function of the *roots* of property. The land and tangible objects that are our focal instances of property did not arrive in the world with title deeds attached.[11] In large part, constrained but contingent rules and conventions were *necessary* to determine their allocation. The allocative function of these rules and conventions is not, then, a disruption of a purportedly natural property system; rather, it provides an essential foundation for any such system.

B. Overlapping Rationales for a Satisfactory System of Property Rights

As I have already emphasized, a property system is subject to a variety of constraints. These constraints derive from the underlying values such a system can be seen to embody. These values can be understood as *rationales* for the system;[12] from another perspective, they can be seen as different sorts of *interests* people might be thought to have in various sorts of property. There are, I think, at least seven of these:

- *Identity*. Some relationships with potential elements of real and personal property help to constitute people's identities. It would be wrenching to deprive owners of identity-constitutive property without particularly good reason.[13]

8. *See* JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 169–171 (1980). I have learned a great deal from Finnis, but my theory is not his. The pluralist form of my approach reflects not only his influence but also that of Aristotle, Stephen Munzer, and Margaret Radin, among others. As will be apparent, I believe a property regime must reflect respect not only for the values to which Finnis gives primary attention but also to a range of others.

9. ARISTOTLE, POLITICS II.5 (Benjamin Jowett trans., 1905).

10. Which, again, means *neither* that they serve some imagined collective rather than particular persons *nor* that given the aptness of a set of property rules, it is consistently appropriate to reevaluate individual transactions in light of their impact on the common good.

11. *Cf.* FINNIS, *supra* note 8, at 187 n. 30.

12. *Cf. id.* at 170 ("the explanation of social institutions, and of the terms appropriate for talking about them, is primarily a matter of grasping their rationale.").

13. *Cf.* MARGARET RADIN, REINTERPRETING PROPERTY 35–71 (1993). The emphasis on identity, which is central to my argument, is perhaps the point at which my position most clearly diverges

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- *Autonomy*. Primary control over some real and personal property gives one the ability to act with relative independence from others' influence and control and the capacity to conduct a significant portion of one's live in private, away from their potentially judgmental scrutiny.[14]
- *Efficiency*. If someone in particular is responsible for a given element of property, especially if she is able to realize—whether in her own interests or in those of others—some specific benefits associated with ownership, the property is likely to be cared for more effectively than it would be if everyone were responsible for it. Relatively free transferability is probably an implication of efficiency. To be sure, it might be efficient in a particular case for someone's property to be allocated to someone else. But if this were a live possibility, no one would be as likely to care for her own property, since it would be much less clearly hers. Efficiency is thus promoted by a rule that assigns responsibility for given items of property to identifiable persons on a stable basis.[15]
- *Generosity*. The opportunity to exercise generosity through one's property is dependent on its transferability and thus on one's possession of significant control over it.[16]
- *Reliability*. All other things being equal, expectations ought to be honored. Someone's control over a given element of real or personal property can certainly be interrupted, but it ought not to be without some good reason.[17]
- *Reward*. Compensation is arguably due people for their labor, not just because compensation provides people with incentives to work, and so fosters efficiency, but also because it would be unjust not to acknowledge their efforts and contributions. Compensation may be given in the form of real or personal property or of money. But money must be exchangeable for property or services if it is to be useful.[18]
- *Creativity*. Some things emerge from human creative activity. And while the potential to engage this creative activity is not, of course, itself a creation of those who exhibit it, there is something to be said for honoring their creativity by conferring on them ownership interests in what they create.

The autonomy, efficiency, and generosity justifications are all warrants for *some kind* of property system. The autonomy and efficiency justifications

from Finnis's. His view of property treats it as instrumentally valuable. This seems to me largely correct. But I am inclined to think that there is something to be said for a relatively porous view of selfhood that allows the self to incorporate realities outside the bounds of one's skin. Relationships with persons and institutions can count as part of the self; so, too, I suggest, can ties with at least a few instances of real and personal property. *See* RAZIEL ABELSON, PERSONS: A STUDY IN PHILOSOPHICAL PSYCHOLOGY 91 (1977) ("[O]ne's self is what one identifies oneself with, what a person cares most about, the loss of which amounts, for him, to self-destruction, either partial or total").

14. *Cf.* FINNIS, *supra* note 8, at 169.

15. *Cf. id.* at 170; STEPHEN R. MUNZER, A THEORY OF PROPERTY 191–226 (1991).

16. *See* ARISTOTLE, *supra* note 9 ("there is the greatest pleasure in doing a kindness or service to friends or guests or companions, which can only be rendered when a man has private property"; "No one, when men have all things in common, will any longer set an example of liberality or do any liberal action; for liberality consists in the use which is made of property.").

17. This concern with *reliability* is related to though distinguishable from Joseph William Singer's focus on *reliance*; *see* Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). This interest has more to do with what I call the *identity* interest.

18. *Cf.* MUNZER, *supra* note 15, at 254–291.

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do not provide reasons for anyone to claim that any particular piece of property is or ought to be hers rather than anyone else's. However, the autonomy justification will establish a presumption against interference with existing property interests to the extent that reducing or denying them would significantly reduce autonomy. The generosity justification would establish a presumption of legitimacy for uncompensated transfers by gift. The reliability justification would treat present possessory interests as worth protecting, all other things being equal. The creativity justification would support strong arguments for some specific property rights but obviously not for many, since most people play a very limited role in creating most of the things they putatively own. The generosity justification will warrant the existence of stable property rights but will not justify anyone's claim to anything in particular—except, of course, what is given to her, since there would be no point in giving gifts if they could not be retained and used by the recipients. The reward justification would warrant a far greater number of existing property rights, presuming—as is clearly not always the case—that people are fairly compensated for their labor. The identity justification will warrant some property claims that might not otherwise be defensible at all and it will add strength to others.

While all of these rationales and the interests they reflect place limits on what kinds of property systems count as just, they leave great latitude for social and personal choice. For instance, a system that typically failed to reward people for their efforts and contributions or acknowledge their creativity would almost certainly be unjust. But it does not follow that rules of reason determine in any precise way what counts as just compensation. This is obviously context-dependent, reflecting not only variant market conditions but also societal and individual priorities. Rewards are required in justice, and justice likely places some limits on what will and will not count as a just reward, but specific metrics and algorithms for determining rewards are not required. Rather, they are contingent products of social and individual decision.

Obviously none of the overlapping rationales for a system of private property warrants anything like absolute property rights. The efficiency justification warrants property rights to the extent that they serve efficiency. Autonomy is not an absolute good and does not, in any event, warrant interference with the autonomy of others. And so forth. The point of elaborating these justifications is not to suggest that there can be no limits on private property or that there is no obligation to contribute in various ways to the common good. It is rather to suggest that the property system is not *simply* a matter of convention, though it is largely that. Undoubtedly law helps to create and define property rights, but the notion that a system that failed to embody some such rights, or something like them, would be just seems rather implausible. Concerns related to autonomy, generosity, reliability, reward, creativity, and identity will all help to create a network of property rights that is partly a *given* from the perspective of the legal system.

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The diverse, overlapping justification for private property rights do not yield a calculus that can enable moral actors to determine precisely how strong these rights are, which other rights they are likely to trump, and by which others they are likely to be overridden.[19] The relevant inquiries will necessarily be highly fact-sensitive. And they will involve an unavoidable measure of balancing, in light of a community's priorities;[20] there will rarely be a single right answer to a question about property rights. But respect for the basic values that undergird a system of property rights will impose significant limits on the extent to which it is just or reasonable for morally responsible state actors to interfere with these rights.

III. THE LIMITS OF EMINENT DOMAIN

The reasonableness of the use of the eminent domain power in at least some instances follows from the account of property rights I have already advanced. In Section III, I explain why this is so and highlight implications the diverse rationales for a private property system might have for the legitimacy of compulsory purchase in particular cases.

A. The Logic of Eminent Domain

It is difficult to imagine any organized society doing without the power of eminent domain. The authority to take real property held by private parties is essential if a variety of legitimate public goals is to be achieved. And this authority is perfectly legitimate, given the nature of property rights.

Property is a public trust. On the Aristotelian view canvassed earlier, much, even if not all, property is privately allocated for the public good. While the multiple overlapping rationales for a property system provide good reason for the maintenance of a robust set of property rights, they do not confer absolute privileges on any right-holder. Indeed, many of these rights are conferred and maintained by the legal system. This does not mean that they are not serious and are not deserving of substantial protection. It does mean, however, that no property rights currently exercised could be attributed to some prepolitical Lockean acquisition, even if such acquisition were conceivable or likely. They are real but relative. And because they are relative, they may reasonably be limited by means of regulation or extinguished through compulsory purchase.

This is because the system of property rights serves the common good and not simply the isolated interests of individual right-holders. And it is because

19. *Cf. id.* at 292–314.

20. A necessity acknowledged by thoroughgoingly realist and anticonsequentialist moral theorists; *see* John Finnis, *Commensuration and Practical Reason*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 225–228 (Ruth Chang ed., 1997). This will essentially take the form of a Golden Rule test.

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particular persons are morally obligated to contribute not only to their own good but also to the good of others. No person, it must be emphasized, is a servant of a universal, impersonal satisfaction system responsible for maximizing aggregate utility. But everyone has a duty in justice to attend meaningfully to the needs of others.[21] Each property owner is responsible for contributing to the well-being of her community and to the welfare of those inside and outside it, especially, though not exclusively, (1) those with whom she enjoys various special relationships, whether personal or professional; and (2) those who are especially vulnerable to social or physical accident because they lack resources. This obligation is, of course, in the Kantian sense, "imperfect"—there are infinitely many ways in which it can be fulfilled. It will, for instance, involve concern both for those with whom one participates in special relationships of various sorts and for distant strangers in need. It might involve anything from the giving of gifts, to the provision of grants and loans to persons in need or organizations that serve such persons, to various kinds of investments and the facilitation of opportunities for employment. In general, there will be diverse ways in which a general responsibility to care for the needs of others can be comparably fulfilled.

This does not mean, however, that the public has no role to play. A well-functioning tax system that supports institutions that foster the health, education, and welfare of the members of a society, especially its most vulnerable members, can relieve individual persons of the responsibility of assessing the merits of alternative strategies for social improvement. A society can coordinate its members' fulfillment of their responsibilities to strangers more effectively than they likely can do themselves. And it can employ mechanisms that ensure that members do fulfill this responsibility and that the more generous are not overburdened by the irresponsibility of free riders.

Ordinarily, the tax system will be the most effective means of ensuring that members of society contribute to the well-being of others. This will usually be the least disruptive and most effective means of ensuring that members of a community contribute fairly to its betterment. But there will clearly be times when tangible property may benefit the community in a way that money will not. When this is the case, it will at least be possible to consider whether the property in question should be acquired through compulsory purchase. The right of the community to make compulsory purchases flows naturally from the contingent nature of property rights, the fact that these rights are designed to serve the common good, and the fact that individuals are obligated to contribute to the well-being of others. Depending on the interests affected by the regulation or compulsory purchase, however, the burden of justification may be relatively high. No calculus will resolve the question whether a given instance of compulsory

21. *See* FINNIS, *supra* note 8, at 172–173, 177, 195; ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 189–206 (1996).

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purchase is appropriate or not. But a consideration of the various interests served by a system of private property rights will provide meaningful guidance to legislators, judges, and juries.

To be sure, just because property rights are contingent does not mean that the state may interrupt them at will. The efficiency and reliability interests both militate strongly against the state's terminating particular property rights simply on the grounds that doing so would lead to a net increase in marginal utility. Rather, to the extent that these rights are contingent, no one may appeal to some imagined natural alternative that precludes the use of compulsory purchase to ensure that persons fulfill their obligations. Given that compulsory acquisition is not ruled out absolutely by some purportedly absolute natural right, societies are free to *define* property systems that include provision for compulsory purchase. Whereas in situations of emergency or great injustice, unheralded compulsory purchase may, in any case, be appropriate, a system that provides for compulsory acquisition and that is constituted by rules that *allow for* compulsory acquisition will obviously pose less of a threat to the reliability and efficiency interests crucial to a satisfactory property regime.[22]

B. Eminent Domain and the Rationales for Private Property

The multiple overlapping rationales for a private property system canvassed here have diverse implications for the aptness of the use of the eminent domain power. The identity justification will count against the use of this power with respect to identity-constitutive property, though not with regard to fungible property. The reliability interest will count against any use of this power. The other interests will do so in particular instances but not in all.

The identity justification provides good reason for providing substantial protection to property that helps to constitute people's identities and so good reason not to expropriate it. This kind of property certainly includes "personal" property in Margaret Radin's sense.[23]

By calling property "personal," Radin does not mean that it falls into the traditional legal category of property in things other than land. Instead, she means to emphasize that some property is more closely connected with people's identities than others and that this sort of property deserves special protection. By contrast, other sorts of property, which she calls *fungible*, can be exchanged for money with no or minimal loss. Personal property—a

22. For a seeming denial of this position in U.S. constitutional law, *see* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

23. M.J. Radin explicitly rejects the legitimacy of a decision like *Kelo* (though her focus is on sale directly to a corporation rather than on public acquisition of property for subsequent allocation to a corporation); *see* Radin, *supra* note 5, at 1690–1691. On the applicability of Radin's theoretical position in a related context, *see* Gary Chartier, *Friendship, Identity, and Solidarity: An Approach to Rights in Plant Closing Cases*, 16 RATIO JURIS 324 (2003).

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family home, say, or a wedding ring—is strictly irreplaceable, and the owner suffers a substantial loss if it is alienated, a loss that is not monetarily compensable.

Both of these factors are relevant: the loss is great, and, because the property interest is not fungible, money cannot properly make up for it. It seems fairly clear that interests in pieces of identity-constitutive property are nonfungible. For the identity-constitutive roles that these pieces of property play are grounded in agents' histories in particular ways. I might be given another ring—indeed, many other rings—but none of them will be *that* ring, with the particular history it has and the particular links it has to my history. But the loss will also be great to the extent that the property in question is identity-constitutive. Different items of property will contribute, if at all, in different degrees to constituting peoples' identities. But it seems intuitively plausible to me, at any rate, that some items of property will be at least as identity-constitutive as some body parts. A residence in which a family has lived for several generations might be as important to the identities of a member of the family as, say (to use a homely example), one of her toes. A deprivation of such a residence could be as violative as an attack on at least a more peripheral body part, and as comparably objectionable; both would amount to assaults on the self.[24]

The identity interest in property can reasonably be thought to extend beyond Radin's personal property. Consider, as in the film *Barber Shop*, a local business that plays a key role in fostering the common life of a neighborhood. Perhaps the business is the personal property of the owner in Radin's sense in a way that many businesses are not. Perhaps it should be protected against compulsory purchase for just this reason. But the owner's is not the only identity interest in the property. The identities of the members of the community that is home to the business are also wrapped up in it to some degree. What legal rights, if any, this fact ought to convey on them under ordinary circumstances is an open question that need not be resolved here. But it surely makes a difference from the standpoint of the identity interest when the compulsory acquisition of the land that is home to the business is being considered.[25]

The identity interest will count strongly against the use of the eminent domain power in a limited range of cases. It will do so when the property in question is personal property in Radin's sense. Compulsory purchase in

24. Whether this is so will prove a highly fact-sensitive inquiry. It will be necessary to determine both whether a given piece of property is actually identity-constitutive and, if so, just how central it is to the selfhood of the owner. We would not regard the compulsory clipping of a fingernail as morally comparable to the removal of an arm—and not just, I think, because of the arm's role in facilitating the exercise of agency.

25. Obviously, it will not do to propose the compulsory acquisition of all of the parcels in a neighborhood, only then to review claims about these parcels in isolation, in each case treating the fate of the rest of the neighborhood as given. One cannot, for instance, maintain in a case like this that since the neighborhood is set for redevelopment, the community can have no interest in the persistence of the business since the community itself will cease to exist.

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this case will deprive an owner of a nonfungible, incommensurable good. But of course it is not reasonable to expect that much real property is personal property. Many residences will be, but certainly not *all* will be. And presumably an even smaller number of commercial facilities will qualify as personal property.

Though there may be exceptions to it, an important principle constraining the use of the eminent domain power can be seen to follow from a recognition that not all property is fungible. This is the principle that only fungible property should ordinarily be subject to compulsory purchase in pursuit of other fungible goods.[26] In some cases, obviously, what is sought when the eminent domain power is exercised is merely revenue enhancement. If this goal is legitimate at all, the recognition of nonfungibility suggests, it provides far less reason for the compulsory purchase of nonfungible property than for that of fungible property.

A government might seek to preclude all identity-based claims against compulsory purchases by simply announcing that property could be taken at will or, at any rate, under almost all circumstances. A legal regime of this kind could, indeed, make it harder for people to claim identity-constitutive interests in properties potentially subject to eminent domain. However, it seems clear that, even when this sort of regime is theoretically in place, people will grow attached to particular properties if they retain these properties over time. Further, respect for other interests that ground a reasonable property system—for instance, those in reliability and autonomy—will tend to militate against the creation of a legal regime that provides people with relatively little security as regards at least some key property interests. Further, it must at least be asked whether a system that encourages people to sit light to their attachments is in principle a desirable one, or whether important values are not served by encouraging people to set down deep roots in particular places—or at least not *dis*couraging them from doing so. There are good reasons, then, I think, for avoiding the creation of property regime that dramatically reduces or eliminates identity-constitutive interests in property in order to minimize the likelihood of identity-based challenges to the use of the eminent domain power.

The autonomy interest will count against the use of the eminent domain power to the extent that, in a given case, compulsory purchase will prove to be disruptive of an owner's ability to make decisions about her own life. A compulsory purchase will not fall foul of the autonomy interest if it leaves someone from whom property has been acquired by compulsory purchase with as many options as she had before the purchase—apart from those involving the imposition of significant negative externalities on others. (A polluter whose factory has been purchased in order to be closed lacks

26. Compulsory purchase is obviously a more dramatic infringement on such property than mere regulatory limitation. To deny the legitimacy of much compulsory purchase of identity-constitutive property is not to preclude other kinds of reasonable constraints on the use of such property.

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grounds to complain if she is unable to find a site for a comparably polluting factory.)

Thus the impact of autonomy considerations on the legitimacy of using the eminent domain power in modern, developed economies is mixed. Provided fair market value is paid for compulsorily acquired property, the owner whose property is expropriated may retain access to equivalent productive capital that can continue to further her autonomy. In some economic environments, of course, possessing land confers a degree of independence that possessing liquid capital does not, and in these cases, the impact of compulsory purchase on autonomy would need to be carefully considered. In addition, interference with an owner's property can be disruptive. It can in various ways hamper her exercise of her freedom. So the autonomy interest will raise some questions about the employment of the eminent domain power, though it will not count strongly against it in all cases.

Recall that the efficiency interest reflects the fact that allocating resources to particular people is likely to ensure that these resources are better cared for and rendered more productive than they would be if no one in particular were responsible for them and able to benefit from them. People will not invest the requisite level of care into their resources if they believe their investments will be lost. This is not necessarily a strong argument against the use of the eminent domain power but it will tend to militate against the use of this power to the extent that (1) people are inclined to *fear* that their property will be expropriated; and (2) transaction costs limit alternative uses for the money gained in compensation for an expropriated property. For in this case, people may be less inclined to care for property and employ it productively.

The efficiency interest will count against the use of the eminent domain power to the extent that people are less inclined to invest in properties at risk of compulsory purchase by the state. While everyone may need to reckon with this possibility, the power of eminent domain must be exercised infrequently enough that it does not threaten to undermine owners' confidence that they will be able to develop and dispose of their property at will. It will also militate against the use of the eminent domain power in respect of a given piece of property if it seems likely that the property in question will not be cared for as well after compulsory acquisition by the state as before or that compulsory purchase will created a targeted fear that the risk of the compulsory purchase of similar property is high.

The value of providing opportunities for generosity may or may not militate against the availability of compulsory purchase as an option in a given case. In general, of course, one may benefit another as much with a gift of money as with a gift of land. There are clearly cases in which this is not the case. When the land has particular value to the intended beneficiary or when transaction costs make finding suitable land difficult, a monetary gift may not be an adequate substitute. But if this is the case, then it will likely be because the property in question is identity-constitutive. And if it

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is, then it will be the identity interest rather than the generosity interest that is determinative. The generosity interest will not typically provide a *separate* argument for nonfungibility.

The reliability interest will count against the use of the eminent domain power to the extent that an owner has anticipated undisturbed enjoyment of her property. While owners can reasonably expect some regulatory "takings" to occur,[27] they will normally expect that, having acquired property, they will be able to retain it. Of course, the reliability interest clearly militates against the use of the eminent domain power when an owner has made plans for the use of a potentially expropriated property which it will be difficult to fulfill if the property is expropriated. In this case, the cost to the owner will clearly be greater than the market value of the property to a purchaser without these plans and the relationships associated with them. But the reliability interest will militate against the use of the eminent domain power even when tangible costs cannot clearly be associated with the employment of this power, simply because the disappointment of expectations is, all other things being equal, undesirable. Thus the worth of settled expectations also clearly provides a reason to avoid the compulsory acquisition of property in most cases. This will not necessarily be true, however, when the eminent domain power is simply used to acquire property that is already or is about to be placed on the market for a price lower than the owner would prefer to pay. It will also not necessarily be true if the owner was on notice at the time of her purchase that there was a significant chance that her rights in the property might be reduced or extinguished.

In addition, the fair market value of the property may not include the cost of replacing it. If one operates a business on a certain site, it may be difficult to find suitable substitute property: transaction costs may be high, and developing a new customer base may be difficult. Where the owner's interest is simply in maintaining capital of a certain value, replacement of the property with just compensation may not seriously affect her reliability interest. But the reliability interest in property will often militate against disturbing property interests through the use of the eminent domain power.

Real property may have been acquired as a reward for labor or with income derived from labor. But this fact alone does not create a substantial interest in the retention of a *particular* piece of property. Perhaps any other piece of property, or an equivalent asset, would have done as much to reward the owner as the piece of property in question. In cases like these, the reward interest can be protected whether the owner retains title to the property or not.

The creativity justification may suggest in some cases that property is unique. And unique creations may presumptively qualify as personal

27. I assume, *arguendo*, that losses in the value of a property due to regulation might under some circumstances be regarded as constitutionally scrutinizable "takings," but I adopt no position here on the substance of this issue.

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property—absent evidence that they were brought into being largely or exclusively for commercial purposes. But this is less likely to be true of *land*. The owner of a piece of property will not in any case have created the property of whole cloth. The owner, it is true, may have mixed her labor with the property in one way or another. But perhaps the owner went to work on this property to enhance its commercial value. If not, then the property may well qualify as identity-constitutive; but again, it will be the identity interest rather than the creativity interest that is relevant here. There is certainly a creativity interest in just compensation for expropriated property. But this interest itself provides no reason for regarding the property as nonfungible.

Broadly speaking, many of the rationales for a property system are neutral as regards the exercise of the eminent domain power. The generosity, creativity, and reward interests do not typically tell strongly against the use of eminent domain. This is true, at least, if (1) fair compensation can and will be paid; and (2) the transaction costs associated with making suitable alternate use of the resources derived from the compulsory sale of a piece of real property are low and are clearly warranted in light of the public benefits arising from compulsory purchase.[28] Where these two provisos are met, which of course they often may not be, three of the seven rationales for a private property system may often enough leave state actors free to inquire whether, all things considered, a compulsory purchase is in the public interest, however widely construed. This is not true, however, of the remaining four interests—the efficiency, autonomy, expectation, and identity interests. Here, the verdict is more mixed.

IV. THE REASONABLENESS OF LAND REFORM

In light of the general account of the eminent domain power offered in Section III, I suggest in Section IV that a land reform program designed to enable tenant farmers to own the land on which they work would constitute an appropriate use of the eminent domain power.

In the case of a land reform program like that contemplated in *Midkiff*, much less in the cases considered in Latin America, South Africa, the Philippines, and elsewhere, the overlapping rationales for a private property system will provide significant guidance. In general, the generosity and creativity justifications for such a system will not preclude the use of the eminent domain power to foster a land reform program. The reward justification may sometimes tilt in favor of the program. The efficiency and expectation interests will count against any act of compulsory purchase.

28. There is, of course, no neutral computational method for determining whether these costs *are* warranted, presuming the objective commensuration of the goods involved is impossible. While there are constraints on the reasonableness of decisions about such matters, they leave substantial scope for contingent societal judgment.

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But the basic needs of the vulnerable people to be served by a land reform program will tend to merit a higher priority than these interests.

Tenant farmers have often acquired "sweat equity" in the land they farm. Their investment in the land may increase their interest in this land. At the same time, the fact that their labor has almost certainly been obtained at exploitative rates means that they have been undercompensated, and provision to them of the land on which they work may seem like appropriate compensation for their labor. They might thus be thought to have a reward interest in the property, much like the slaves to whom it was proposed that the plantations they had worked be given in the wake of the Civil War. Of course, landowners will also have invested personal effort and capital in maintaining their estates and rendering them productive. To the extent that tenant farmers have been exploited, the reward interest will count in their favor, but it does provide some support for claims on both sides.

As regards the efficiency interest, a land reform program is not likely to continue on an indefinite basis and it will, in any case, affect only a limited number of landowners. Because of its focused, targeted nature, it need not disrupt the general confidence in the stability of the property system and the resulting willingness to care for individual pieces of property whose value the efficiency interest reflects. Further, a land reform program will vest responsibility for particular pieces of property in a large number of individual owners, each of whom will be specifically charged with the care of a manageable, identifiable piece of land. Thus the concern with the focused care for individual assets that the efficiency interest embodies may in some cases be served more effectively after the implementation of a land reform program than before.

A land reform program will clearly affect an owner's expectation interest in her property. Supporters of such a program must finally judge that the empowerment of those benefited by the program and the improvement in their economic and political circumstances warrant infringement on this interest when no alternative to compulsory purchase will prove as effective or nearly so. Recall, in any case, that no owner has a reasonable expectation interest in being able to avoid fulfilling her responsibilities to others. While these responsibilities will ordinarily be fulfillable through the tax system, it will sometimes be the case that they can be fulfilled only through the kind of redistribution a land reform program involves.

The autonomy rationale which justifies protecting individual property interests can itself provide a reason for overriding them if they form part of a legal regime that reduces or restricts the autonomy of the many in the interest of the few. The autonomy interest may be clearly affected by a land reform program. Almost unavoidably, such a program will leave a property owner with less power than before, even if it compensates her for expropriated property. Indeed, it will likely fail if it does not do so, since it is designed to empower former tenants over whom a former property owner will doubtless have less influence. Again, it is crucial to recognize the

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landowner's responsibility to contribute to the empowerment and welfare of the vulnerable members of her community; by implementing an otherwise just land reform program, the state is simply asking the owner to do her duty. The fact that a property system exists in part to foster personal autonomy means, in addition, that since the reallocation of nonpersonal property under a land reform program can be a vital means of promoting autonomy, such redistribution could be justified by direct appeal to a value internal to the property system itself.

The identity interest in property will play a special role in relation to a land reform program. It would count strongly against the compulsory purchase of a traditional family residence. Recognizing the importance of this interest would entail respect for a family's long-standing association with a particular piece of property. But to the extent that agricultural property beyond the residence were held simply to enhance the family's economic and social power, there would not be an identity interest of the ordinary kind in such property.

The *latifundia* of Latin America[29] are not, in general, personal property in Radin's sense and therefore do not implicate the identity interest. It will be difficult to make the case that land that is neither residential nor developed plays a key role in constituting the owner's identity. Even if land *is* developed, however, it will not follow that it forms part of the owner's identity. Instead, the owner may have an arm's-length relationship with the property, which is understood to exist for commercial purposes.

The property to which a land reform program is intended to apply may be held for some noncommercial purposes, of course. But this will not necessarily render it nonfungible. And even if it is nonfungible, the purposes for which it is held may not be ones the law should endorse. Land may be held in order to control productive assets—not only to increase the owner's wealth but also to ensure power over those who need to use these assets to generate income. Control over key productive assets can give a landowner a vastly disproportionate amount of power over both tenants and others to whom she is more indirectly connected economically. This may be a crucial interest on the part of the property owner. But this interest is one of those the land reform program is doubtless designed to affect.

Perhaps in some cases the function of landholding in such cases may be expressive—the owner wishes to be thought of as a person with the power and status that come from the possession of land. This kind of purpose arguably makes the land in question more constitutive of the owner's identity than land would be that was held for purely commercial purposes. But it will not secure the land against all uses of the eminent domain power.

Land held to impress others is unlikely to play as central a role in constituting the owner's identity as would a residence, so its claim to be personal property would likely be less than that of a residence. We can reasonably

29. *Cf.* FINNIS, *supra* note 8, at 172.

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ask as well whether a democratic society should accord favored status as a matter of policy to desires, like those for status-conferring property, that run counter to efforts to form inclusive and democratic communities from which subordination and hierarchy are absent. Finally, classification of property as *personal* in Radin's sense need not confer on the owner a trump card to be used against all potential claims of public benefit. Rather, it need only be understood as raising the threshold a presumed public benefit would need to cross in order to justify use of the eminent domain power. There will surely be times when even a deeply valued piece of residential property might justifiably be subject to eminent domain. If this kind of property can sometimes be taken for public use, then surely property valued for its capacity to impress others with the owner's status can as well.

The assumption here is that the owner of property taken as part of a land reform program enjoys what can be seen as legitimate title to the property. If the property has been acquired as a result of unjust expropriation—say, by colonial powers or their representatives—then this historical origin may be seen as vitiating the existing title, since it might be thought that an owner can transmit to others no better title than she herself has received. "The foundation of apartheid" in South Africa, for instance, "was a system of racial zoning that reserved eighty-seven percent of the land for ownership and occupation by whites, who ... [constituted] approximately thirteen percent of the population."[30] The fact that such a system obtains raises serious questions about the validity of land titles acquired under a legal regime of which it was a pervasive feature. A serious moral defect in the chain of title need not be thought to be sufficient to extinguish all property claims. And there will obviously be reasons for respecting settled expectations under other circumstances. But if a land reform program is likely to make a substantial contribution to the achievement of social justice, this kind of defect in the title to agricultural land will surely serve to strengthen the case for the use of the eminent domain power. It will also likely warrant a reduction in the compensation to which an owner could reasonably claim to be entitled.[31]

Ironically, the identity interest may often provide an additional positive reason *for* land reform programs. Those who work the land may have long-standing intergenerational attachments to the land they till. These attachments may well give them an identity interest in the land, just as those who work in an industrial plant may have an identity interest in the plant that should confer special rights on them should the plant be threatened with closure.

The identity rationale provides little reason not to exercise the eminent domain power to foster a typical land reform program as long as primary residences and other instances of legitimately identity-constitutive property

30. Catherine M. Coles, Comment, *Land Reform for Post-Apartheid South Africa*, 20 B.C. ENV'L AFF. L. REV. 699, 701 (1993).

31. *Cf.* Timothy Milton Hanstead, *Philippine Land Reform: The Just Compensation Issue*, 63 WASH. L. REV. 417 (1988).

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are not affected. The reward and reliability rationales do not count strongly against such a program, and each can be seen as providing some support for it. A landowner's autonomy interest does not provide an especially strong reason not to implement such a program, and the parallel autonomy interest of affected tenant farmers provides an especially strong reason to do so. The fact that a history of exploitation and subordination often underlies rural landholding patterns provides a reason to regard landowners' titles as deserving of less respect than they might otherwise merit. And it provides a further reason, in addition to current poverty and powerlessness, to see a land reform program as desirable on remedial grounds.

V. THE INADEQUACY OF *KELO*

It is quite possible to affirm the justice of a potentially sweeping program of land reform, including one significantly more radical than the one reviewed in *Midkiff*, without justifying the seizure of the *Kelo* plaintiffs' homes to benefit private developers. In Section V, I emphasize the significance of these rationales, explaining why they make the proposed compulsory purchase of residential property reviewed unreasonable. And I highlight a number of significant differences between the use of the eminent domain power to effect a land reform program and the use of this power to promote urban redevelopment.

A. Property Rights, Urban Redevelopment, and Eminent Domain

Given the rationales for private property canvassed here and the interests in which those rationales are rooted, there is little justification for the compulsory purchase of personal residences simply to enrich private developers whose activities have the potential to exert an indirect positive effect on the public coffers.

Two things are likely to strike us as particularly objectionable about the kind of compulsory acquisition authorized in *Kelo*. First, it required Kelo and the others to give up their homes. Second, it did so to benefit private entities whose well-being was tenuously linked with that of the public.

The majority of the parcels at stake in *Kelo* were residential. And it is doubtless the identity rationale that counts most clearly in favor of the plaintiffs. "Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, ... Charles Descend, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift."[32] Both individuals' attachments to their own homes and the community they have been able to create in the

32. *Kelo*, *supra* note 1, at 47.

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neighborhood threatened by the developer implicate the identity interest and tell strongly against the use of the eminent domain power.

It is important to stress, as the NAACP does,[33] that personal property interests reflect not only ties to specific pieces of land but also to communities where landowners reside. The right to remain in a home in which one has lived for years—in which one's family may have lived for generations—is a right to remain rooted in a community. It is, indeed, a right vested not only in the individual homeowner but also in the community, since the compulsory sale of property will lead to the compulsory dissolution of many traditional communities. People will often be unable to reestablish these traditional communities if they are forced to sell their property to support eminent domain projects. These projects will often dramatically increase housing prices and make it impossible for people to find housing near their former residences. Thus they will be forced to disperse. While public policy should not preclude their doing so voluntarily, it should recognize the value of maintaining stable communities and avoid uprooting these communities where possible.[34]

Given the importance of the identity interest, mere economic benefit to New London would not justify the compulsory purchase of their property. Especially for those with lengthy histories of association with a community, expulsion from their homes can be devastating. This interest will be enough to protect the *Kelo* plaintiffs from the use of the eminent domain power in cases in which it is designed primarily to benefit economic interests.[35] This conclusion follows from the general and plausible principle

33. Brief of Amici Curiae National Association for the Advancement of Colored People *et al.* at 4, 14, Kelo (No. 04-108).

34. Similarly, a group of long-term tenants may have an independent identity interest in the continued existence of an apartment building in which they or their families have lived on an extended basis. Whatever their interests as regards their landlord, their identity interests as regards the state should clearly be recognized when an exercise of the eminent domain power is being contemplated. The condemnation and destruction of the building that contains their homes could, in principle, be very disruptive to them. The autonomy interest of such tenants could also clearly be compromised by the use of the eminent domain power. *They* will not be compensated, should they be evicted from their apartment building. And in some markets, they may be unable to find alternative comparably located housing. They will therefore have good reason to object to the use of the eminent domain power, and they should. For another recent argument that nonowners might enjoy (identity-based?) property rights, *see* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. Rev. 1061 (2005).

35. In *Poletown*, disturbingly similar to *Kelo*, Detroit asserted the right to take the homes of the residents of a city neighborhood for the benefit of General Motors. *See* Poletown Neighborhood Council *v.* City of Detroit, 410 Mich. 616 (1981). The identity interest is plausibly recognized in the *Poletown* dissent. The exercise of the power of eminent domain can bring about "great social dislocation" and "can entail, as it did in this case, intangible losses, such as severance of personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character." *Poletown*, 410 Mich. at 682–683 (Ryan, J., dissenting). *Poletown* has recently been overruled by the Michigan Supreme Court in County of Wayne v. Hathcock, 684 N.W.2d. 765 (2004). *Cf.* Ilya Somin, *Overcoming* Poletown*: City of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005 (2004).

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that when purely fungible interests are to be promoted by the use of the eminent domain power, property owners should not normally be asked to give property up unless it, too, is fungible.

The autonomy interest will provide little or no positive reason *for* the use of eminent domain in a case like *Kelo*, since it is not being used to empower the disfranchised as it might be in a land reform program. And it will clearly exert a negative impact on the autonomy of those affected. They may be unable to find alternate housing in a location of their choice, and the loss of their homes can exert a negative effect on their psyches that can impair their capacity to exercise autonomous judgment. It is also important to consider the political impact of disrupting poor people's residence patterns. Some minimal degree of political efficacy is a consequence of residential concentration. The dispersion of poor people will therefore likely reduce their strength as a voting bloc even further.[36] By reducing their control over their lives, it unavoidably constrains their autonomy. So the autonomy interest may count against the use of the eminent domain power to foster redevelopment programs in this way as well.

Obviously, the efficiency and reliability interests will largely tilt in favor of the *Kelo* plaintiffs. The plaintiffs' reliability interest tilts squarely against compulsory purchase, as it will in almost all cases. While efficiency might be served in this case were Pfizer, for example, allocated the plaintiffs' land, it clearly would not be if similarly situated plaintiffs believed that they held their property on sufferance.

The centrally important identity interest counts strongly against the exercise of eminent domain with respect to the *Kelo* plaintiffs' property, as do the reliability and autonomy interests. The only one that might be thought to count in favor of compulsory acquisition of their property would be the efficiency interest and, understood as a principle favoring stable allocation in the interests of efficiency rather than the direct promotion of efficiency in individual cases, it proves not to support the city's position either.

The *Kelo* plaintiffs' case is obviously less strong where their investment properties are concerned. Here the substantial protection of the identity interest is not likely to be available, since such properties will characteristically be fungible. Of course, the efficiency and reliability interests count against any kind of compulsory acquisition. And it is thus especially relevant that the link between benefits to developers and benefits to the public are indirect and that the benefits to the public are uncertain to materialize. Thus an unavoidably fact-sensitive analysis will tend to count against the compulsory purchase even of nonresidential property to foster urban redevelopment programs, though it need not, of course, do so decisively.

Further, on the facts in *Kelo*, if the residential properties in question were not subject to compulsory acquisition, the remaining properties would not likely be situated in ways that would make their use by developers feasible.

36. *Cf.* Brief, *supra* note 33, at 15.

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Their value would be diminished, and efforts to acquire them through compulsory purchase might well end. In general, of course, this may be true of nonresidential urban properties near residential ones: if the residential properties cannot be acquired for redevelopment purposes, it will often be impractical to expropriate the nonresidential ones. So there will frequently be de facto protection for such properties as well. However, the core of the outrage directed at the *Kelo* decision is rightly evoked by the fact that New London has proposed the compulsory purchase of *residential* property. And the theory outlined here makes sense of our instinctive revulsion at the compulsory purchase of this kind of property.

The fact that legal title to property acquired in the manner *Kelo* approves will be transferred to private developers is not central to this analysis. While this kind of transfer may heighten the risk of corruption and the appearance of egregiousness, the real problem is the use of the property for economic development, a problem that would persist if a municipality retained ownership of property acquired using the eminent domain power and developed this property itself. The community benefits from redevelopment schemes are too tenuous and the harms to the interests of many residential property owners and established communities are too great (presuming that the identity interest is treated as significant) to render the use of the eminent domain power simply or primarily to foster redevelopment warranted under ordinary circumstances.

B. Distinguishing Urban Redevelopment and Land Reform Programs

It is relatively easy to distinguish the circumstances in *Kelo*, which do not warrant the use of the eminent domain power, from those that might prompt a land reform program, which do.

In many cases, landowners affected by land reform programs have acquired their property as a result of violence and exploitation. By contrast, in *Kelo* and in most urban redevelopment projects, there is no reason to think residents acquired their property unjustly. Further, whether the current property owners acquired their titles unjustly or not, they almost certainly did not act unjustly in relation to private developers. In addition, the tenant farmers who work the land and are the victims of injustice will be the direct beneficiaries of a land reform program. These tenants both have been the victims of the injustice the land reform program seeks to remedy and will be beneficiaries of the program once it is implemented. The effective transfer of property to the developers does nothing to remedy any injustice committed by the *Kelo* plaintiffs or suffered by the developers.

Also important is the fact that a land reform program serves to remedy a wrong, to undo a harm. It is reasonable to maintain that, where a high

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concentration of wealth and power exists, power is vested unjustly in a limited number of persons. They exercise an oligopoly over not only land and presumably also wealth but also social power. The system of property rights obtaining in many environments in which land reform programs are implemented is fundamentally unjust. It is unjust because it was often acquired in the first place through exploitation, because this exploitation often affected precisely the ancestors of those now working the land, because the distributional impact of the property regime is likely to be counteregalitarian, and because it offers landowners excessive power over tenants.

Unlike that of a land reform program, the distributional impact of an urban redevelopment project is likely itself to be counteregalitarian: poor people will lose resources, while rich people will gain them. Further, not only have the plaintiffs in *Kelo* not wronged the developers in the past, the existing property regime gives them and other landowners affected by redevelopment projects no exploitative power over developers. While perhaps there are cases in which such landowners have unjust power over even poorer neighbors, expropriating their property to benefit developers in connection with urban redevelopment projects will not benefit these poorer neighbors.

Further, a landowner affected by a typical program of land reform has arguably failed to do what she ought to have done. She has failed to treat an appropriate fraction of her fungible property as a public trust and to use it to benefit others. Given the disparities in wealth that characteristically prompt land reform programs, we can say that such programs arise out of real need and that property owners have often created this need by unjustly appropriating land and using unjust means to retain it. We can also say that even if they have not done so, they are effectively positioned to do something about the problems created for their tenants by lack of land ownership. By contrast, the typical residential landowner whose property might be taken to promote a development scheme has almost certainly not done wrong by failing to surrender her property to a municipality and has no general obligation to maximize the city's wealth.

In addition, tenant farmers benefited by a land reform program are already working the land they are likely to receive under the program, and they have a quite specific claim to it because of their ties with it. By contrast, there is nothing in particular that gives a private developer a particular claim to the land she is likely to receive under an urban redevelopment plan.

A redevelopment plan like that contemplated in *Kelo* does not implicate interests that justify the compulsory purchase of residential property. The various rationales for a system of private property provide substantial reasons against the compulsory purchase of the *Kelo* plaintiffs' homes. And a variety of morally significant factors distinguish the kind of compulsory acquisition sought in *Kelo* and the kind undertaken to foster a typical land reform program.

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VI. CONCLUSION

A satisfactorily multifaceted account of the nature and value of private property would not preclude land reform programs like the one under review in *Midkiff* or those undertaken in Asia, Africa, and Latin America in recent decades. It would place limits (not necessarily decisive ones) on the expropriation of ancestral homes but not on the compulsory acquisition of fungible agricultural property and of such property regarded as nonfungible but in conflict with the autonomy interest a property system is designed to foster. It would, however, rule out the use of eminent domain in a case like *Kelo*, where it serves only, at best, to enhance a city's economic well-being at the cost of identity-disrupting losses to individuals. A full-orbed theory of property will not treat property rights—including rights in identity-constitutive property—as absolute and will interpret them in light of the underlying rationales for a private property system in ways that may justify curtailing or ending them on occasion. But it will also take seriously the value of such a system in honoring people's expectations and preserving their autonomy and their identities.

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