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Kelo in South Carolina: Economic Development Is Not a Public Use for Purposes of Eminent Domain in South Carolina

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KELO IN SOUTH CAROLINA?: ECONOMIC DEVELOPMENT IS NOT A PUBLIC USE FOR PURPOSES OF EMINENT DOMAIN IN SOUTH CAROLINA

I. INTRODUCTION

The United States Supreme Court's recent decision in *Kelo v. City of New London*[1] created a flood of public criticism and activism concerning the Court's interpretation of the Fifth Amendment's restrictions on eminent domain. The Court's approval of the government's taking and subsequent selling of a middle class individual's non-blighted property to a private developer awakened a sleeping giant that has long lain within the settled federal interpretation of what constitutes a legitimate public use. Strong opposition and disapproval of *Kelo*, unlike other issues in today's bitterly divided America, has drawn together a diverse coalition of national leaders.

While part of the wave of public outrage is simple criticism of the Court's concept of what constitutes a public use, the more significant public reaction involves uncertainty of whether the laws of the individual states would permit a *Kelo*-style use of eminent domain. South Carolina Supreme Court precedent suggests that an "economic development" taking would violate the South Carolina Constitution.[2] However, many in South Carolina believe property rights need greater protections to foreclose the possibility that a *Kelo*-style taking might occur.[3] While there is no immediate danger that *Kelo*-type takings will occur in South Carolina, there is always the remote chance that the South Carolina Supreme Court may overrule its own precedent or a local government may abuse its powers to condemn private property.

Despite this remote chance, individuals who wish to ensure maximum protection from eminent domain abuse do have some options. Concerned citizens could lobby the South Carolina General Assembly to do three things. First, the General Assembly could propose an amendment to the South Carolina Constitution to prohibit takings for economic development purposes. Second, the General Assembly could clarify the vague statute that defines blight. Third, the General Assembly could pass legislation providing property owners a statutory right to repurchase their property if the government abandons its initial public use and attempts to utilize the land for a non-public use.

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1. 125 S. Ct. 2655 (2005).

2. *See* Ga. Dep't of Transp. v. Jasper County, 355 S.C. 631, 639, 586 S.E.2d 853, 857 (2003) (holding a proposed marine terminal "does not meet [the] restrictive definition of public use" because the general public would not have the right of public access to the marine terminal and profits from the terminal would primarily benefit the private developer); Karesh v. City Council of Charleston, 271 S.C. 339, 344–45, 247 S.E.2d 342, 345 (1978) (holding the City of Charleston could not use the power of eminent domain to build a convention center-hotel complex because the plan would primarily benefit the private developer and would only negligibly be a public use).

3. Neil Mellen, *Private Property in Post-*Kelo *South Carolina*, SOUTH CAROLINA POLICY COUNCIL 1 (2005), http://scpolicycouncil.com/publications/32.pdf.

Another concern landowners have is the effect of the presumption in favor of the condemning authority when landowners challenge condemnation.[4] To overcome this difficulty, individuals troubled by this barrier could urge the General Assembly to statutorily eliminate the presumption. The General Assembly could require the condemning authority to prove two things with reasonable certainty: (1) the necessity of the taking and (2) that the land taken would be used to satisfy that necessity. Although these solutions may protect against the small number of potential vulnerabilities inherent in South Carolina eminent domain law, none of the vulnerabilities should create a fear of rampant *Kelo*-style takings in South Carolina.

This Note examines the greater protections South Carolina law provides for landowners from the use of eminent domain powers for economic development takings than federal law. However, this Note argues that while South Carolina law provides adequate protections from the use of eminent domain for economic development, the use of eminent domain is still vulnerable to abuses in other areas. Part II outlines the development of the federal public use law. Part III examines the *Kelo* decision. Part IV looks at the strong public opposition to the *Kelo* Court's decision and the predictability of the outcome based on precedent. Part V examines the development of a strict public use standard in South Carolina and explains why economic development takings are unlikely to occur in this state. Finally, Part VI looks at three potential vulnerabilities in South Carolina eminent domain law South Carolinians should urge their legislators to scrutinize rather than pursuing legislation to combat *Kelo*-style takings.

II. THE FEDERAL PUBLIC USE REQUIREMENT BEFORE *KELO*

The Fifth Amendment of the United States Constitution states that "nor shall private property be taken for public use, without just compensation."[5] While the Fifth Amendment safeguards against arbitrary government takings, it also expressly permits the government to take private property without the owner's consent. At the time of the nation's founding, this was not a new governmental power. Both the Old Testament and Greek literature contain references to the government's ability to take private lands.[6] In 1625, Hugo Grotius, the Dutch jurist, first ascribed the name *dominium eminens* (eminent domain) to this power.[7] The Fifth Amendment Takings Clause is not a grant of eminent domain power to the government but rather a restriction placed on the government's inherent power to take private property.[8]

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4. *See* Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970) ("Whether there is a necessity, a permanent taking or a public use are primarily legislative questions, and there is a presumption that the use contemplated is a necessary, permanent and public one.").

5. U.S. CONST. amend. V.

6. Stephen S. Boynton, Note, *Components of Eminent Domain: An Ancient Tool for Contemporary Use*, 15 S.C. L. REV. 943, 944 n.4 (1963).

7. *Id.* at 944–45.

8. *See id.* at 945–46.

Because the federal government utilizes the power less frequently than local and state governments, eminent domain case law only began to develop when the United States Supreme Court found the requirements of the Takings Clause essential to the guarantee of due process found in the Fourteenth Amendment.[9] Thus, case law defining what constituted a valid public use developed when the Court aligned the Takings Clause with the Fourteenth Amendment—forcing the states to comply with its requirements.

A. Berman v. Parker

The recent controversy surrounding eminent domain focuses primarily on the Fifth Amendment's requirement that the government take private property only for a public use.[10] To determine what constitutes a public use, the United States Supreme Court has consistently applied a standard of review deferential to the condemning authority. In *Berman v. Parker*,[11] the Court stated the judiciary's role in determining whether a condemning authority's action met the public use test is "an extremely narrow one."[12] The Court further stated that "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[13] Additionally, the Court concluded, "Once the question of public purpose has been decided, the amount and character of land to be taken . . . rests in the discretion of the legislative branch."[14] To satisfy the federal public use requirement of the Fifth Amendment, the United States Supreme Court requires that the taking fulfill a public purpose or benefit, rather than the more restrictive view that the public actually "use" the land.[15]

Berman involved a department store owner in the District of Columbia who challenged the constitutionality of the District of Columbia Redevelopment Act, which included a provision taking his non-blighted land in a blighted area of town.[16] The plaintiff argued the District of Columbia did not have the authority to

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9. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

10. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003) ("[T]he text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner.").

11. 348 U.S. 26 (1954).

12. *Id.* at 32.

13. *Id.*

14. *Id.* at 35–36.

15. *See* Rindge Co. v. County of L.A., 262 U.S. 700, 707 (1923) (stating to be a valid public use, "[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement" (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161–62 (1896))).

16. *Berman*, 348 U.S. at 31. The Court did not define blight but pointed to the language of the act that authorized the redevelopment and which defined substandard housing as "'any dwelling . . . for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is . . . detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.'" *Id.* at 28 n.1 (quoting District of Columbia Redevelopment Act of 1945, ch. 736, § 3(r), 60 Stat. 790, 792 (1946), *invalidated by* Berman v. Parker, 348 U.S. 26 (1954)).

condemn non-blighted land under a redevelopment plan.[17] The Court approved the taking and recognized "there is nothing in the Fifth Amendment that stands in the way" of a redevelopment plan with the goal of making areas within the District of Columbia "beautiful as well as sanitary."[18] As to the plaintiff's argument that his land was not blighted, the Court stated that "[p]roperty may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. . . . [I]t is the need of the area as a whole which Congress and its agencies are evaluating."[19] The Court further noted that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."[20] Thus, the Court held the Fifth Amendment placed no restriction on the condemning authority's ability to take non-blighted property as part of a redevelopment plan.[21]

B. Hawaii Housing Authority v. Midkiff

In *Hawaii Housing Authority v. Midkiff*,[22] the Court expanded the public use requirement. In *Midkiff*, a small group of landowners challenged the constitutionality of the Hawaii Land Reform Act of 1967.[23] This group of individuals owned a substantial amount of the land in Hawaii; the Hawaii legislature passed the Land Reform Act to specifically break up their monopoly of the housing market.[24] Through the Act, the Hawaii legislature set up a condemnation scheme to transfer ownership to the current tenants living on the condemned land.[25] Consequently, the landowners would lose their stronghold on the Hawaii housing market. The Court analyzed whether the Act was a constitutional use of the state's eminent domain power.[26] In its discussion of the definition of public use, the Court reaffirmed its deferential position to the condemning authority and stated that it "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[27] The Court seemed unmoved by the fact that this use of eminent domain involved the state's redistribution of land from one private individual to another private individual. The Court stated:

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not

17. Berman v. Parker, 348 U.S. 26, 31 (1954).
18. *Id.* at 33.
19. *Id.* at 35.
20. *Id.* at 33–34.
21. *Id.* at 35–36.
22. 467 U.S. 229 (1984).
23. *Id.* at 233–35.
24. *Id.* at 233.
25. *Id.*
26. *Id.* at 239–41.
27. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

> condemn that taking as having only a private purpose. . . . [The] government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.[28]

The Court determined that "'whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.'"[29] In other words, when a landowner challenges the government's use of eminent domain, the state carries no burden to prove the government will accomplish the intended public use but only that it is rational for the government to believe that it will accomplish that use. The Court concluded that "attack[ing] certain perceived evils of concentrated property ownership" was "a legitimate public purpose."[30]

By its decision in *Midkiff*, the Supreme Court firmly established the standard regarding what constitutes a public use. Due to the amount of deference given to a legislature's judgment, the only real restraint the Court seems to rigidly uphold involves a "purely private taking" that "would serve no legitimate purpose of government and would thus be void."[31] Otherwise, as long as some public benefit results from the project, the Court is likely to approve the exercise of the power of eminent domain. Moreover, under this standard, the Court is likely to uphold any legislative determination of public benefit—especially considering the Court's highly deferential standard of the exercise of eminent domain.

III. *KELO V. CITY OF NEW LONDON*: A BROAD PUBLIC USE STANDARD

Kelo v. City of New London[32] pitted a group of middle-class homeowners against the New London Development Corporation (NLDC), a corporation dedicated to the economic development of the City of New London, Connecticut.[33] The City Council of New London charged the NLDC with the responsibility of designing and implementing a plan of economic development for the city.[34] The city council also granted the corporation the power to purchase property and the ability to use eminent domain to achieve the economic development.[35] The NLDC's

28. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243–44 (1984).
29. *Id.* at 242 (alterations in original) (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981)).
30. *Id.* at 245.
31. *Id.* at 245.
32. 125 S. Ct. 2655 (2005).
33. *Id.* at 2568–60.
34. *Id.* at 2569; *see* CONN. GEN. STAT. § 8-188 (2001).
35. *Kelo*, 125 S. Ct. at 2660; *see* CONN. GEN. STAT. § 8-193 (2001).

board members were unelected and privately appointed,[36] but were required to seek the approval from the city council to use eminent domain.[37]

The redevelopment plan aimed to reverse the long economic decline of the city, which a Connecticut state agency declared in 1990 to be a "'distressed municipality.'"[38] The NLDC also sought to improve the city's unemployment rate, which was twice the state's average in 1998.[39] The plan called for the construction of a hotel, an urban village, research office facilities, a museum, residential housing, and a marina.[40] The NLDC planned these new developments to complement the construction of a new $300 million Pfizer research facility in the same area.[41] Referring to the potential benefits, Justice Stevens noted that "[i]n addition to creating jobs, generating tax revenue, and helping to 'build momentum for the revitalization of downtown New London,' the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park."[42]

To construct the new downtown area in New London, the NLDC had to acquire 115 privately owned properties.[43] The plan would re-divide these properties into seven parcels.[44] The NLDC easily purchased most of the homes in the area but met resistance from Susette Kelo and eight other property owners unwilling to sell their land.[45] The properties in dispute were within two parcels of the proposed plan.[46] On one parcel, the NLDC proposed building research and office space, and, on the other parcel, the NLDC proposed building "park support" or parking.[47] The property owners refused to sell not because they wished to receive more compensation or because they opposed the revitalization of the area but rather because they believed that economic development did not constitute a valid public use.[48] The property owners did not want to leave the homes that they had resided in for years. For example, one homeowner, Wilhelmina Dery, had lived in her house since her birth in 1918.[49] Eventually arriving at an impasse, the parties took their dispute to court, and the case made its way to the United States Supreme Court.

A. The United States Supreme Court's Analysis

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36. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).
37. *See* CONN. GEN. STAT. § 8-193.
38. *Kelo*, 125 S. Ct. at 2658–59 (majority opinion).
39. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).
40. *Id.* at 2659.
41. *Id.*
42. *Id.* (citation omitted) (quoting 2 Joint Appendix at 92, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108)).
43. *Kelo*, 125 S. Ct. at 2659.
44. *Id.*
45. Kelo v. City of New London, 125 S. Ct. 2655, 2660 (2005).
46. *Id.* at 2660.
47. *Id.* at 2671–72 (O'Connor, J., dissenting).
48. *Id.* at 2672.
49. *Id.* at 2660 (majority opinion).

In a 5-4 decision, the United States Supreme Court sided with the City of New London, holding that economic development constituted a public use within the meaning of the Fifth Amendment.[50] The Court agreed with the property owners that "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."[51] However, the Court stated, "[T]he City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[52] The Court specifically addressed the issue that the land may end up in private hands:

> [W]hile the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.[53]

Next, the Court reaffirmed that it "'long ago rejected any literal requirement that condemned property be put into use for the general public'" and "embraced the broader and more natural interpretation of public use as 'public purpose.'"[54] Thus, following precedent, the Court concluded this case turned on "whether the City's development plan serve[d] a 'public purpose.'"[55]

In determining whether a public purpose existed, the Court analyzed the City of New London's development plan using the reasoning of *Berman* and *Midkiff*.[56] First, the majority pointed out that the *Berman* Court "refused to evaluate [the] claim in isolation, deferring instead to the legislative and agency judgment that the area 'must be planned as a whole' for the plan to be successful."[57] Also, the majority quoted the *Berman* Court's assertion that "'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.'"[58] The only vital difference between the alleged public purpose in *Berman* and the alleged public purpose in *Kelo* was that *Berman* involved slum clearance, while *Kelo* involved economic development. Therefore, if the Court found that economic development was an acceptable public purpose, the Court would apply its *Berman* precedent to the *Kelo* situation.

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50. *Id.* at 2668.
51. Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005).
52. *Id.* at 2662 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).
53. *Id.* at 2661–62 n.6.
54. *Id.* at 2662 (quoting *Midkiff*, 467 U.S. at 244).
55. *Id.* at 2663.
56. *Id.* at 2663–64.
57. Kelo v. City of New London, 125 S. Ct. 2655, 2663 (2005) (quoting Berman v. Parker, 348 U.S. 26, 34 (1954)).
58. *Id.* (quoting *Berman*, 348 U.S. at 35).

The majority also discussed the *Midkiff* Court's holding—"'[I]t is only the taking's purpose, and not its mechanics,' . . . that matters in determining public use"[59]—to determine what constitutes a public purpose. The *Midkiff* Court "rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking."[60] Thus, according to *Midkiff*, as long as the taking served a public purpose, the fact that the land transferred from one private individual to another private individual was irrelevant.

In both *Berman* and *Midkiff*, the Court avoided determining whether something constituted a true public use by giving broad deference to the legislature. The majority in *Kelo* noted, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[61] The Court concluded the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation [was] entitled to their deference."[62] Lastly, the Court stated:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.[63]

The Court refused to adopt a bright-line rule that economic development does not constitute a public purpose because "[p]romoting economic development is a traditional and long accepted function of government."[64] The Court supported its position by stating there was "no principled way of distinguishing economic development from the other public purposes that [it has] recognized. . . . [and it] would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the . . . area has less of a public character than any of those other interests."[65] The Court rejected the contention that this case amounted to a private taking because "the government's pursuit of a public purpose will often benefit individual private parties. . . . 'We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.'"[66]

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59. *Id.* at 2664 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
60. *Id.* at 2664.
61. *Id.*
62. *Id.* at 2665.
63. Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005).
64. *Id.*
65. *Id.*
66. *Id.* at 2666 (quoting Berman v. Parker, 348 U.S. 26, 34 (1954)).

The property owners also urged the Court to adopt a test requiring the government to demonstrate "a 'reasonable certainty' that the expected public benefits will actually accrue."[67] The property owners argued that in order to take away one's fundamental right to own property, the government should have clearly defined reasons for needing the land. For example, the property owners were not satisfied with the government's reasons for needing the land because the NLDC was hardly confident in its proposed use for one of the parcels when questioned by the Court.[68] However, the majority stuck to precedent and reaffirmed the principle that if "'the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.'"[69] The majority argued that such a test would result in bad public policy because "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."[70] In the end, the Court did not adopt the property owners' proposed reasonable certainty test for two reasons: first, the Court disagreed with the contention that this case was distinguishable from *Berman* and *Midkiff*, and second, the Court continues to believe that legislatures should determine what constitutes a public use.[71]

Justice Kennedy provided the swing vote in favor of the result but disagreed with the majority concerning the landowner's proposed reasonable certainty test.[72] Although he did not call for the implementation of the reasonable certainty test in *Kelo*, Justice Kennedy suggested that "a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings."[73] In a case involving economic benefits, Justice Kennedy stated a court must examine the stated public purpose and determine whether the benefits to the public are incidental to the benefits to private developers.[74] He also noted that "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."[75] "Even the dissenting justices on the Connecticut Supreme Court," Justice Kennedy stated, "agreed that respondents' development plan was intended to revitalize the local

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67. *Id.* at 2667.

68. *Id.* at 2672 (O'Connor, J., dissenting) (citing Transcript of Oral Argument at 35–37, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108)).

69. Kelo v. City of New London, 125 S. Ct. 2655, 2667 (2005) (majority opinion) (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)).

70. *Id.* at 2668.

71. *Id.* at 2667–68.

72. *Id.* at 2669–70 (Kennedy, J., concurring).

73. *Id.* at 2670.

74. *Id.* at 2669.

75. Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring).

economy, not to serve the interests of . . . any other private party persuasive."[76] Thus, while Justice Kennedy stated that "[t]his [was] not the occasion for conjecture as to what sort of cases might justify a more demanding standard,"[77] he left open the possibility that such a class of cases exists.

B. Justice O'Connor: Distinguishing Berman *and* Midkiff

In her dissent, Justice O'Connor—joined by Chief Justice Rehnquist and Justices Scalia and Thomas—proclaimed that "[u]nder the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[78] She found that the majority's reasoning had "effectively . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment"[79] and that "[t]he specter of condemnation hangs over all property."[80] Thus, on the question of whether economic development takings are constitutional, Justice O'Connor stated, "I would hold that they are not."[81]

In reaching this conclusion, Justice O'Connor first had to distinguish *Berman* and *Midkiff* from *Kelo*. Important to the distinction was the fact that in *Berman* and *Midkiff*

> the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. . . . Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.[82]

Justice O'Connor thus concluded that *Berman* and *Midkiff* "endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence."[83] She explained that extending the meaning of "public use" to fit the facts in *Kelo* would effectively allow anything to qualify as a public use.[84] She stated, "[I]f predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude *any*

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76. *Id.* at 2670 (citing Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)).
77. *Id.*
78. *Id.* at 2671 (O'Connor, J., dissenting).
79. *Id.*
80. *Id.* at 2676 (O'Connor, J., dissenting).
81. Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005).
82. *Id.* at 2674.
83. *Id.* at 2677.
84. *Id.* at 2675.

takings, and thus do not exert any constraint on the eminent domain power."[85] Justice O'Connor then concluded that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[86]

Lastly, Justice O'Connor made a public policy argument that "the fallout from this decision will not be random"[87] and that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."[88] Justice O'Connor asserted that economic development takings, by their nature, target low-income areas where the property is cheaper for developers to acquire.[89] She concluded these types of takings are unjust and "[t]he Founders cannot have intended this perverse result."[90]

C. Justice Thomas: Advocating a Literal Public Use Standard

Justice Thomas wrote a separate dissent and concluded the majority's public purpose interpretation of the Public Use Clause is inconsistent with the Framer's intent and that the Court should restore a literal reading of the words "public use."[91] As to the long history of cases in support of the public purpose test employed by the majority, Justice Thomas stated, "I would reconsider them."[92] He believed "[t]he most natural reading of the [Takings] Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."[93] Thus, Justice Thomas stated that "[w]hen the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is 'employing' the property, regardless of the incidental benefits that might accrue to the public from the private use."[94]

Criticizing the Court's deference to state legislatures, Justice Thomas asked why the Court deferred to this public use determination but "would not defer to a legislature's determination of the various circumstances that establish . . . when a search of a home would be reasonable."[95] Contrasting the heightened review of Fourth Amendment search cases with the majority's deferential review for eminent

85. *Id.*
86. *Id.* at 2671 (O'Connor, J., dissenting).
87. Kelo v. City of New London, 125 S. Ct. 2676, 2677 (2005).
88. *Id.*
89. *Id.*
90. *Id.* at 2676.
91. *Id.* at 2677–78 (Thomas, J., dissenting).
92. *Id.* at 2678.
93. Kelo v. City of New London, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting).
94. *Id.*
95. *Id.* at 2684.

domain, Justice Thomas concluded, "Though citizens are safe from the government in their homes, the homes themselves are not."[96] He then addressed the majority's reluctance to second-guess the legislature:

> I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking.[97]

Thus, Justice Thomas believed strict adherence to the public use requirement would allow courts to avoid second-guessing legislatures. Determining whether a taking meets the public use requirement would be a less fact-intensive, more clear-cut inquiry—whether the land goes directly into private hands or not—than the majority's application of the public purpose standard.

Justice Thomas also put forth a public policy argument similar to Justice O'Connor's policy argument regarding those individuals the Court's decision will likely affect. He stated, "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."[98] Justice Thomas then concluded that "the predictable consequence of the Court's decision will be to exacerbate these effects."[99]

Justice Thomas asserted that "[w]hen faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning."[100] "If such 'economic development' takings are for a 'public use,' any taking is," Justice Thomas stated, "and the Court has erased the Public Use Clause from our Constitution."[101]

IV. LIMITED LEGAL CONSEQUENCES, BUT AN ENORMOUS PUBLIC OUTCRY FOLLOWING *KELO*

Kelo undoubtedly changed one thing concerning the Court's eminent domain jurisprudence: economic development is now a public use within the meaning of the Fifth Amendment. Although the Court had previously approved takings for

96. *Id.* at 2685.
97. *Id.* at 2686 (citations omitted).
98. *Id.* at 2687 (Thomas, J., dissenting) (citation omitted) (quoting U.S. v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).
99. Kelo v. City of New London, 125 S. Ct. 2655, 2687 (2005).
100. *Id.*
101. *Id.* at 2678.

slum-clearance[102] and breaking up a land oligopoly,[103] it had never decided any takings cases purely dealing with economic development. However, when considering precedent, it seems that any other conclusion would have been difficult to reach. Precedent supports the Court's deferential standard. Once the Court determines that a land use plan—clearing a slum, building a road, constructing a hospital, or creating a park—serves a public purpose, "the means of executing the project are for [the legislature] and [the legislature] alone to determine."[104] Furthermore, the Court stated that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[105] Lastly, the Court emphasized that "'whether *in fact* the [plan] will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [plan] would promote its objective.'"[106] Thus, the Court logically found that economic development pursuant to a redevelopment plan in a "distressed municipality"[107] served a public purpose.

Despite the logic in the Court's result based on the relevant precedent, waves of criticism coming from the political left and right broke immediately following the *Kelo* decision. The United States House of Representatives adopted "a highly unusual," but mostly meaningless, resolution criticizing the *Kelo* ruling by a lopsided vote of 365 to 33.[108] The House also passed the Private Property Rights Protection Act of 2005 that prohibits the allocation of federal economic development funds to any state that exercises its power of eminent domain for economic development.[109] Republican Senator John Cornyn of Texas introduced a bill with bipartisan support called the Protection of Homes, Small Businesses and Private Property Act of 2005.[110] Senator Cornyn's bill excludes economic development from the concept of public use.[111] Similar bills will likely flood federal and state legislatures because many Americans are passionate about finding a way to stop *Kelo*-type uses of eminent domain.

Perhaps the most egregious and underreported development after *Kelo* was the initiation of eviction proceedings brought by the City of New London and the

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102. *See* Berman v. Parker, 348 U.S. 26 (1954).

103. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

104. *Berman*, 348 U.S. at 33.

105. *Midkiff*, 467 U.S. at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

106. *Id.* at 242 (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981)).

107. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).

108. Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F01; H.R. Res. 340, 109th Cong. (2005).

109. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005).

110. Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005).

111. *Id.*

NLDC against Susette Kelo and the other homeowners involved in the *Kelo* suit.[112] In addition to eviction notices, the NLDC charged them "'use and occupancy' fees" for the years they lived in their homes while the courts considered the case.[113] Aggravating developments like this, along with the general panic and fear of having property condemned, may spur many politicians in federal and state legislatures to propose legislation attempting to limit the Court's ruling. These bills will probably gain bipartisan support because of the collective concern shared by those on the left and the right.

For many, this leads not to the question of *whether* South Carolina should protect its citizens from these types of takings, but *how* South Carolina can protect its citizens from eminent domain abuse. As far as *Kelo*-style takings are concerned, the South Carolina Supreme Court has twice ruled that takings where property transfers from one private property owner to another do not constitute a valid use.[114] Furthermore, the South Carolina Supreme Court interprets the "public use" requirement in a strict sense, similar to Justice Thomas's interpretation in *Kelo*.[115] Although the Federal Takings Clause may not provide this type of extra protection, it is within the power of every state to provide its own citizens with more individual protections than the federal government.[116] Although South Carolina provides protection from *Kelo*-type takings, this state's eminent domain laws are still vulnerable to misuse in many areas.

V. SOUTH CAROLINA: STRONG PROTECTIONS AGAINST A *KELO*-STYLE TAKING

A. Eminent Domain Prior to the Takings Clause

Prior to the 1868 South Carolina Constitution, no state constitutional provision addressed just compensation in the event of the government's exercise of its eminent domain power.[117] Rather, the government utilized its inherent authority to seize lands for public use. For example, in *Lindsay v. Commissioners*,[118] the South Carolina Constitutional Court of Appeals held, "'Every freeholder, holding lands

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112. Editorial, *House Party*, INVESTOR'S BUS. DAILY, Aug. 24, 2005, at A14. The NLDC argues the homeowners have been living on city property since 2000, the year the NLDC condemned the properties, and therefore owe rent for the time they lived there. *Id.* According to the *Investor's Business Daily* report, the NLDC determined one homeowner owed more than $300,000 and Susette Kelo owed $57,000. *Id.* Also, the NLDC is attempting to collect any rent the homeowners collected from tenants who rented their properties after their condemnation. *Id.*

113. Joyce Howard Price, *Losers in Eminent Domain Case Face Hefty Fees*, WASH. TIMES, Sept. 20, 2005, at A03.

114. *See* Ga. Dep't. of Transp. v. Jasper County, 355 S.C. 631, 638–39, 586 S.E.2d 853, 856–57 (2003); Karesh v. City Council of Charleston, 271 S.C. 339, 344–45, 247 S.E.2d 342, 345 (1978).

115. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2675 (2005) (Thomas, J., dissenting).

116. *See id.* at 2668 (majority opinion) ("[M]any States already impose 'public use' requirements that are stricter than the federal baseline.").

117. *See* City of Spartanburg v. Belk's Dep't Store of Clinton, 199 S.C. 458, 471, 20 S.E.2d 157, 163 (1942).

118. 2 S.C.L. (2 Bay) 38 (S.C. Const. App. 1796).

under the state, holds them upon condition of yielding a portion of them, when wanted for the public roads and highways.'"[119] In *State v. Dawson*,[120] the South Carolina Court of Appeals reaffirmed *Lindsay*:

> "[T]here is a tacit reservation in every grant of a freehold of so much as may be necessary for the ordinary purposes of making roads and highways; and as a part of the eminent domain, the Legislature has a right to set it apart for that use, when the public convenience requires it."[121]

The *Dawson* court also determined that it was the well-settled law of the state "that the Legislature had the power to order roads to be opened, and to use so much timber, earth, or rock, as [is] necessary to keep the road in repair; and to do this contrary to the will of the owner, and without making previous compensation."[122] However, South Carolina added a takings clause to its 1868 state constitution.[123] Like the United States Constitution's Taking Clause, South Carolina's version allows the government to taking land only for public use and requires the government to provide just compensation.[124]

B. The Development of the Modern Public Use Requirement in South Carolina

Following South Carolina's adoption of a takings clause in its state constitution, the South Carolina Supreme Court has consistently utilized a narrow or literal interpretation of public use.[125] South Carolina's interpretation is truly unique. One commentator recognized that "only one state, South Carolina, requires property taken through eminent domain literally to be used or occupied by the public to satisfy the public use requirement."[126] Some commentators believe "that the people of South Carolina need not worry."[127] Others believe further guarantees that a *Kelo*-style taking will never occur are needed. These individuals do not plan

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119. *Id.* (quoting *Lindsay*, 2 S.C.L. (2 Bay) at 38).

120. 21 S.C.L. (3 Hill) 100 (S.C. App. 1836).

121. *Dawson*, 21 S.C.L. (3 Hill) at 105 (quoting Eaves v. Terry, 15 S.C.L. (4 McCord) 125, 127 (S.C. App. 1827)).

122. *Id.* at 102.

123. *See Belk's Dep't Store*, 199 S.C. at 471, 20 S.E.2d at 163.

124. S.C. CONST. art. I, §13 ("Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.").

125. *See, e.g.*, Riley v. Charleston Union Station Co., 71 S.C. 457, 485, 51 S.E. 485, 496 (1905) ("Some cases take the very broad view that 'public use' is synonymous with 'public benefit.' A more restricted view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain.").

126. Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1841 (2005).

127. Mellen, *supra* note 3, at 3.

on "[p]lacing [their] long term faith and hope in South Carolina's State Supreme Court."[128]

The Federal Takings Clause simply states that "nor shall private property be taken for public use, without just compensation."[129] The South Carolina takings clause, however, expressly provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."[130] The difference in language provides support for South Carolina's greater individual protections.

The seminal case in South Carolina regarding the public use doctrine is *Riley v. Charleston Union Station Co.*[131] *Riley* involved a railroad company, organized under an act of the General Assembl,y that possessed the power of eminent domain.[132] The company wished to use its eminent domain power to condemn an area of land to build a train station.[133] The South Carolina Supreme Court stated that "[a] more restrictive view [of the public use clause] would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain."[134] The supreme court reasoned that to qualify as a public use, "the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or corporation taking title under condemnation."[135] The court then held that because "[t]he public . . . has a fixed and definite right to use this station," the public use requirement for this taking was satisfied.[136]

In *Edens v. City of Columbia*,[137] decided two years after the United States Supreme Court's decision in *Berman*, the South Carolina Supreme Court made several important distinctions between South Carolina public use law and the law of other jurisdictions. *Edens* involved a plan to use eminent domain to acquire a "blighted" area in downtown Columbia, South Carolina and resell most of this land to private developers.[138] In striking down this proposed public use, the supreme court stated that while "in . . . other states the power of eminent domain may be exercised for a public purpose, benefit, or the public welfare," our constitution requires a taking to be for a public use.[139] The court also chose not to adopt the lesser "public purpose" requirement utilized by the United States Supreme Court, holding that "[p]ublic benefit and public use are not synonymous in the better and

128. *Id.* at 7 (emphasis removed).
129. U.S. CONST. art. V.
130. S.C. CONST. art. I, § 13.
131. 71 S.C. 457, 51 S.E. 485 (1905).
132. *Id.* at 484, 51 S.E. at 495.
133. *Id.* at 484, 51 S.E. at 495.
134. *Id.* at 485, 51 S.E. at 496.
135. *Id.* at 486, 51 S.E. at 496.
136. *Id.* at 486, 51 S.E. at 496.
137. 228 S.C. 563, 91 S.E.2d 280 (1956).
138. *Id.* at 567, 91 S.E.2 at 280–81.
139. *Id.* at 570, 91 S.E.2d at 282.

more clearly constitutional view. We think that the latter (public use) is necessary for the constitutional exercise of the power of eminent domain."[140]

In *Karesh v. City Council of Charleston*,[141] the City of Charleston planned to condemn land and enter into a deal with a private developer to build a hotel, department store, convention center, and parking garage that would be open to the public.[142] The supreme court again emphasized that "[w]hile in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision."[143] In describing this requirement the court stated that "'[m]ere benefit to the public or permission by the owner for use of the property by the public are not enough to constitute a public use, but it must appear that the public has an enforceable right to a definite and fixed use of the property."[144] As opposed to the deference afforded to the legislature by the federal courts, South Carolina law dictates that "[w]hat constitutes a public use is ultimately a judicial question."[145] However, the *Karesh* court conceded that "the term [public use] is an elastic one in order to keep abreast of changing social conditions, and presents a question of fact in each particular case."[146]

In deciding the city's proposed plan was not a public use, the court held: "We believe the proposed plan would allow the City to join hands with a developer and undertake a project primarily of benefit to the developer, with no assurance of more than negligible advantage to the general public."[147] Referring to the city's claims that the project was highly desirable, the court stated that "however desirable the project [was] from a municipal planning viewpoint, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases."[148] Because the proposed plan would give almost exclusive control to the private developer, the court concluded that "[t]he guarantee that the public will enjoy the use of the facilities, so necessary to the public use concept, [was] absent."[149]

In *Goldberg v. City Council of Charleston*, the South Carolina Supreme Court determined the city council "removed the constitutional impediments" present in *Karesh*.[150] In *Goldberg*, the court approved a modified version of the plan disputed

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140. *Id.* at 573, 91 S.E.2d at 283 (quoting Bookhart v. Cent. Elec. Power Coop., 219 S.C. 414, 431, 65 S.E.2d 781, 788 (1951)).

141. 271 S.C. 339, 247 S.E.2d 342 (1978).

142. *Id.* at 341, 247 S.E.2d at 343.

143. *Id.* at 342, 247 S.E.2d at 344.

144. *Id.* at 344, 247 S.E.2d at 345 (quoting Tuomey Hosp. v. City of Sumter, 243 S.C. 544, 551, 134 S.E.2d 744, 747 (1964)).

145. *Id.* at 342, 247 S.E.2d at 344 (citing Edens v. City of Columbia, 228 S.C. 563, 576, 91 S.E.2d 280, 285 (1956)).

146. *Id.* at 342, 247 S.E.2d at 344.

147. Karesh v. City Council of Charleston, 271 S.C. 339, 343, 247 S.E.2d 342, 344 (1978).

148. *Id.* at 344–45, 247 S.E.2d at 345.

149. *Id.* at 344, 247 S.E.2d at 345.

150. Goldberg v. City Council of Charleston, 273 S.C. 140, 141, 254 S.E.2d 803, 804 (1979).

one year earlier in *Karesh* as an acceptable public use.[151] The court's approval of the condemnation in *Goldberg* turned on the fact that the city would own and operate the parking garage as opposed to leasing it to the private developer.[152] In approving the proposed use, the court held:

> The constitutional vice of a municipal corporation joining hands with a private developer to undertake a project primarily of benefit to the developer is not present in this project. By retaining exclusive ownership and control over the parking facility the City Council has simultaneously avoided both the joining of hands with a private developer and the undertaking of a project primarily of benefit to a private developer. The fact that business patrons of the private developer, as members of the general public, will also possess the enforceable right to use the parking facility does not defeat the constitutional validity of this project.[153]

Thus, the city council "fully complied with the requirements of the constitution" by retaining ownership of the parking facility.[154]

In 2003, the South Carolina Supreme Court decided *Georgia Department of Transportation v. Jasper County*, the most recent public use case in South Carolina.[155] Jasper County attempted to condemn land along the South Carolina side of the Savannah River, which the Georgia Department of Transportation used for dredging activities.[156] Jasper County intended to lease most of the condemned land to a private developer for a period of ninety-nine years, and, in return, the developer would construct a maritime terminal along the river.[157] Jasper County argued that the maritime terminal would serve a public purpose because of the economic benefits it would bring to the area.[158] Specifically, the proposed project would be valued at $400 million when completed—accounting for forty percent of the county's tax base—and diversify the county's job market.[159]

In response to the economic benefits argument, the court stated that "[a]lthough the projected economic benefit to [the] County is very attractive, it cannot justify condemnation."[160] Furthermore, the court emphasized that

> "[t]he public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the

151. *Id.* at 142, 254 S.E.2d at 804.
152. *Id.* at 141, 254 S.E.2d at 804.
153. *Id.* at 141–42, 254 S.E.2d at 804.
154. *Id.* at 142, 254 S.E.2d at 804.
155. Ga. Dep't of Transp. v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003).
156. *Id.* at 633, 586 S.E.2d at 854.
157. *Id.* at 633–34, 586 S.E.2d at 854.
158. *Id.* at 637, 586 S.E.2d at 856.
159. *Id.* at 637, 586 S.E.2d at 856.
160. *Id.* at 638, 586 S.E.2d at 856.

> due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it."[161]

The court held the project was not a valid public use and explicitly stated that "it is the lease arrangement in the context of a condemnation that defeats its validity."[162] Thus, like in *Goldberg*, Jasper county has the option to return to the court with a modified plan that complies with the public use requirement—a plan that affords the government a sufficient amount of control over the condemned property.

The South Carolina Supreme Court's narrow interpretation of public use virtually eliminates the possibility of a *Kelo*-style taking in South Carolina. However, even though the court has upheld its strict interpretation and is unlikely to change it, the court in *Karesh* implied that public use is "elastic . . . in order to keep abreast of changing social conditions, and presents a question of fact in each particular case."[163] In light of this sliver of uncertainty, there is an argument that the constitutional requirements need to be more clearly articulated to provide stronger protections for property owners.[164] However, even if the state's constitution is not amended to expressly forbid takings for economic development, the court would have difficulty reasoning around its own precedent and the explicit text of the constitution, which expressly forbids the taking of private property for private use without the owners' consent. Before embracing the draconian measure of adopting an unnecessary amendment to the state constitution, lawmakers should first dispose of other vulnerabilities inherent in South Carolina eminent domain law.

VI. SOUTH CAROLINA LAW: SOME POTENTIAL VULNERABILITIES

A. The Blight Statute

Instead of focusing on a constitutional amendment, South Carolina lawmakers should first consider clarifying the vague statutory definition of blight. The South Carolina Supreme Court first considered blight condemnations in *McNulty v. Owens*.[165] In *McNulty*, the Columbia Housing Authority proposed a project to demolish a slum residential area and build a low-income housing project in its place.[166] Some residents in the area sued to enjoin the Columbia Housing Authority from carrying out the plan, arguing it did not constitute a valid public use.[167] In its

161. Ga. Dep't of Transp. v. Jasper County, 355 S.C. 638, 639, 586 S.E.2d 853, 856–57 (2005) (quoting Edens v. City of Columbia, 228 S.C. 563, 572, 91 S.E.2d 280, 283 (1956)).

162. *Id.* at 639, 586 S.E.2d at 857.

163. Karesh v. City Council of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978).

164. Mellen, *supra* note 3, at 7.

165. 188 S.C. 377, 199 S.E. 425 (1938).

166. *Id.* at 382–83, 199 S.E. at 427–28.

167. *Id.* at 383, 199 S.E. at 428.

reasoning, the supreme court placed substantial weight on the legislative findings that the poor living conditions in Columbia contributed to the city's high death and infant mortality rates.[168] The court concluded that the city's "obvious need" for habitable low-income housing and the absence of private capital to finance this type of housing made the Columbia Housing Authority's exercise of eminent domain a valid public use.[169]

Two years after the United States Supreme Court decided *Berman*, the South Carolina Supreme Court disapproved many phases of a slum clearance plan in *Edens v. City of Columbia*.[170] In *Edens*, the Columbia Housing Authority sought to take property within a blighted area of the city, demolish the structures in that area, and then sell the majority of the property to private persons and corporations for light industrial use.[171] The plaintiffs in *Edens* owned some of the low-rent dwellings within the area and contested the constitutionality of the Columbia Housing Authority's use of eminent domain.[172] The court distinguished *Edens* from *McNulty*, stating the Housing Authority's plan was "not a slum clearance project within the authority of *McNulty*" because "[t]he project does not contemplate erection of housing upon the land for the present residents of the area."[173] Both *McNulty* and *Edens* involved the taking of private residential property. However, unlike *McNulty*, the court in *Edens* found no valid public use because the Columbia Housing Authority did not plan to construct low-income housing for the displaced residents.[174]

The *Edens* court determined "the purpose [of the plan was] not to provide better, low-cost housing to the present occupants of the area, or indeed any housing at all; but [the purpose of the plan was] to transform it from a predominately low-class residential area to a commercial and industrial area."[175] The court thus concluded that "[h]owever desirable the object is from a municipal planning viewpoint, it cannot be attained by [the] exercise of the power of eminent domain."[176] Lastly, the court pointed out that although this did not constitute a public use under the South Carolina constitution, such a use "might . . . be authorized by an enabling amendment of the [South Carolina] constitution."[177]

After *Edens*, between 1967 and 1971, the state constitution was amended to give municipalities in certain counties the ability to use eminent domain to accomplish redevelopment in blighted areas.[178] Article XIV of the South Carolina Constitution carved out this exception to the otherwise narrow interpretation of

168. *Id.* at 385–86, 199 S.E. at 429.
169. *Id.* at 386–87, 199 S.E. at 429–30.
170. 228 S.C. 563, 573, 91 S.E.2d 280, 284 (1956).
171. *Id.* at 567, 91 S.E.2d at 280–81.
172. *Id.* at 568, 91 S.E.2d at 261.
173. *Id.* at 568, 91 S.E.2d at 280–81 (citation omitted).
174. *Id.* at 573, 91 S.E.2d at 283–84.
175. *Id.* at 573, 91 S.E.2d at 284.
176. Edens v. City of Columbia, 228 S.C. 563, 573, 91 S.E.2d 280, 284 (1956).
177. *Id.* at 576, 91 S.E.2d at 285.
178. 18 S.C. JUR. *Eminent Domain* § 9 (1993).

public use.[179] In Article XIV, Section 5, the South Carolina Constitution gives the General Assembly authority to enact laws allowing municipal, housing, and redevelopment authorities to carry out slum clearance or blight removal. The Article also provides that these authorities can use eminent domain to condemn property essential to the redevelopment.[180] But, the Article also includes the following restrictions: 1) any property condemned must be essential to a pre-approved redevelopment plan and 2) just compensation must be paid to the original owner.[181] Oddly, the Article only bestows this authority on the General Assembly for use in Spartanburg, York, Charleston, Richland, Laurens, Greenville, and Florence Counties.[182]

South Carolina Code section 31-10-20(2) defines "blighted area." However, this definition is unclear because it is one hundred and fifty seven words long and difficult to understand.[183] According to the statute, an occupied area qualifies as blighted if any five of the following sixteen factors apply:

> age; dilapidation; obsolescence; deterioration; illegal use of individual structures; presence of structures below minimum code standards; excessive vacancies; overcrowding of structures and community facilities; lack of ventilation, light, or sanitary facilities; inadequate utilities; excessive land coverage; deleterious land use or layout; depreciation of physical maintenance; [and] lack of community planning. [184]

The statute also provides that the combination of any two of the following factors will qualify a vacant area as blighted: "obsolete platting of the vacant land; diversity of ownership of such land; tax and special assessment delinquencies on such land; deterioration of structures or site improvements in neighboring areas adjacent to the vacant land."[185]

This definition of blighted area potentially allows a "wide range of interpretations."[186] The South Carolina Policy Council pointed out that "an apartment building [might be] 'blighted' for being 'overcrowded,' if not it may well be for having 'excessive vacancies.' If a property does not take up too much room ('excessive land coverage') it could simply display what is amorphously titled a 'lack of community planning.'"[187] Furthermore, any "deteriorating" or "aged" building is likely to also suffer from a "depreciation of physical maintenance" and "dilapidation." These four factors are likely to exist concurrently. Coupled with the

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179. S.C. CONST. art. XIV, § 5.
180. *Id.*
181. *Id.*
182. *Id.*
183. *See* S.C. CODE ANN. § 31-10-20(2).
184. *Id.*
185. *Id.*
186. Mellen, *supra* note 3, at 6.
187. *Id.*

vagueness of some of the other factors, it seems likely that landowners with an older building on their property might be safer with no structure at all. Also, if landowners possess too much vacant property ("lack of diversity of ownership") and the adjacent property is developed ("site improvements in neighboring areas"), the landowners may be in danger of having their land condemned under the blight statute. The South Carolina Policy Council argues that "[t]his is the sort of vague and generalized understanding of 'blight' that gives the advocates of eminent domain so much latitude."[188] Additionally, many landowners who own property in blighted areas are not likely to possess the economic resources to challenge the validity of the use of eminent domain. Therefore, the General Assembly should investigate whether abuses have occurred and simplify the definition of blight to ensure abuses will not occur in the future.

B. The Roadblocks to Prevailing at Trial

In addition to the vague blight statute, South Carolina residents are vulnerable to eminent domain abuse because of the difficulties South Carolina law creates for landowners challenging the use of eminent domain. Like the United States Supreme Court, the South Carolina Supreme Court defers to the legislature and employs a presumption that the "use contemplated is a necessary, permanent and public one."[189] The state supreme court did preserve its ability to intervene and overturn the condemning authority, stating that "[i]f there is no necessity for the use or the condemnation proceeding's purpose is to cloak some sinister scheme, then the courts may interfere with the taking."[190] But there are problems with this standard. One problem is that the standard may require the plaintiff to prove a lack of necessity where the condemning authority essentially defines the necessity. Similarly, a plaintiff may have difficulty accessing information to prove a "sinister scheme." Certainly no records of any such scheme would exist. This presumption presents an almost impossible burden for a plaintiff in any eminent domain case to overcome. Additionally, the standard fails to provide any protection for landowners against the government abandoning its initial proposal and subsequently using the land for an invalid purpose.

With a presumption in favor of the condemning authority and the staggering burdens on the plaintiff, the condemning authority will win almost every time. However, landowners may not have the resources to fight the condemnation of their properties. As Justice O'Connor noted in *Kelo*, "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process."[191] For these reasons, if the General Assembly wishes to protect private property owners, it should eliminate the judicial presumption in favor of the condemning authority. In addition, the General Assembly should require the condemnor to prove

188. *Id.*
189. Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970).
190. *Id.* at 396, 175 S.E.2d at 814.
191. Kelo v. City of New London, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

with reasonable certainty that the land is necessary to the government's plan and will in fact be used in furtherance of that plan. While plaintiffs would still have the burden of proving the taking did not satisfy the public use requirement, these changes would give plaintiffs a fair chance to prove their case and prevent the state from easily defeating plaintiffs by saying one thing in court and actually doing another.

C. Abandonment of the Government's Proposed Use

Compounding the problem of the relative ease for the state prevailing at trial, the South Carolina Supreme Court has ruled that property owners who initially fail to get an injunction against a condemnor cannot later sue to reacquire their land if the government subsequently decides to abandon its initial proposal. In *Timmons v. S.C. Tricentennial Commission*, the court established that "[t]he subsequent abandonment of the original purpose for which the lands were taken would not affect the validity of the title of the condemnation. 'The validity of title is determined by the conditions existing at the time of the taking.'"[192] The court affirmed this rule in *Indigo Realty Co. v. City of Charleston*.[193] In *Indigo Realty*, the city purchased a building, under the threat of eminent domain, to widen Market Street in downtown Charleston, South Carolina.[194] After purchasing the building, the city experienced financial difficulties and abandoned the plan.[195] After the city abandoned the plan, the plaintiffs asked the city to sell the property back to them at the original purchase price.[196] A few months after the plaintiffs' request, the city council announced plans to convey the property to a private developer in exchange for other property.[197]

In denying the property owners' request to compel the resale of the land, the South Carolina Supreme Court stated, "It is the general rule of common law that, when a fee simple is acquired by purchase or by eminent domain and the original use is abandoned, there is no reversion."[198] The court also refused "to place a cloud on the title of each parcel of property obtained through [the] exercise of the eminent domain power by creating an equitable right of repurchase."[199] Instead, the court decided to defer to the legislature.[200] Thus, as the law currently stands, property owners in South Carolina must overcome a substantial burden to stop any type of scheme concocted by a local government and also have no rights to stop a

192. *Timmons*, 254 S.C. at 391, 175 S.E.2d at 811 (quoting Higginson v. United States, 384 F.2d 504, 507 (6th Cir. 1967)).
193. 281 S.C. 234, 314 S.E.2d 601 (1984).
194. *Id.* at 235, 314 S.E.2d at 602.
195. *Id.* at 235, 314 S.E.2d at 602.
196. *Id.* at 235, 314 S.E.2d at 602.
197. *Id.* at 236, 314 S.E.2d at 602.
198. *Id.* at 236, 314 S.E.2d at 602.
199. Indigo Realty Co. v. City of Charleston, 281 S.C. 234, 237, 314 S.E.2d 601, 603 (1984).
200. *Id.* at 237, 314 S.E.2d at 603.

subsequent sale of their property to a private developer where the initial proposal was a public use.

South Carolina law still lacks the repurchase provision that the *Indigo Realty* court found essential to the right of a property owner to repurchase property. In a footnote, the *Indigo Realty* court pointed to a Minnesota statute that requires the state highway department to first offer any land condemned, but later not needed, to the previous owner.[201] A similar statute in South Carolina requires the state to give the former owner of property condemned for sewerage services a one-year opportunity to repurchase any portion of the property, for the original purchase price, if the condemning authority does not use the land for its original purpose within five-years of the original condemnation.[202] Also, in York and Florence counties, the original landowner has the first right to purchase land condemned under the blight statute but later sold for private reuse.[203] Thus, under the current law, no property owner in South Carolina whose land is initially condemned for a valid public use has a right to repurchase their land if the initial use is abandoned. That is of course, unless their property was condemned for sewerage services,[204] or condemned under the blight statute in York or Florence County.[205]

South Carolina Code section 58-7-25 avoids the problems of a clouded title that the South Carolina Supreme Court cited in support of its holding in *Indigo Realty*.[206] The statute gives the state five years to put the property to use.[207] If, after five years, the state has not yet utilized the land, the former owner has a one-year period to exercise the right to repurchase the land for the original just compensation paid by the state.[208]

To protect South Carolina landowners, the General Assembly should give former owners the right to repurchase their property in all instances where the initial public use is abandoned and the state does not utilize the land to pursue another valid public use within a reasonable time thereafter. A statute encompassing all takings and constructed similar to section 58-7-25 would further protect private property owners. Additionally, such a law would properly balance the interest of a citizen's right to own private property with the concern for keeping clear titles for property obtained through eminent domain.

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201. *See* MINN. STAT. § 161.44 (2005).

202. *See* S.C. CODE ANN. § 58-7-25 (1990).

203. *See* S.C. CONST. art. XIV, § 5 ("in cases of condemnation of land, where reuse is for private purposes, the condemnee shall be given the first opportunity to purchase the land when it is sold by the condemnor for such reuse").

204. S.C. CODE ANN. § 58-7-25 (1990).

205. S.C. CONST. art. XIV, § 5.

206. S.C. CODE ANN. § 58-7-25 (1990).

207. *Id.*

208. *Id.*

VII. CONCLUSION

The United States Supreme Court's decision in *Kelo* did not change substantive South Carolina law concerning the protection of private property rights. However, the *Kelo* decision made the entire country aware that the Federal Takings Clause did not provide as much protection from eminent domain as they once may have thought. As other states start tightening their protections on private property, they likely will look to how South Carolina has restricted the use of eminent domain. However, simply because South Carolina is ahead of most other states in restricting the use of eminent domain does not mean the law in South Carolina is perfect. Given this state's high regard for private property rights, one should expect many legislators to lead the charge in protecting their constituents from *Kelo*. While *Kelo* is not a threat in South Carolina and probably never will be, state legislators should investigate the smaller vulnerabilities that exist in South Carolina law. Those concerned with strengthening private property protections in South Carolina should urge the General Assembly to clarify the blight statute, remove the obstacles that prevent a landowner from having a fair opportunity to prevail in court, and adopt a statutory repurchase provision for abandoned public uses. Unlike a bill proposing an amendment to the state constitution, these reforms have a strong likelihood of passing into law and would do more than simply pay lip service to the further protection of private property rights in South Carolina.

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