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The Fair Market Value Method of Property Valuation in Eminent Domain: "Just Compensation" or Just Barely Compensating?

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THE FAIR MARKET VALUE METHOD OF PROPERTY VALUATION IN EMINENT DOMAIN: "JUST COMPENSATION" OR JUST BARELY COMPENSATING?

I. INTRODUCTION

In the 2005 decision, *Kelo v. City of New London*,[1] the United States Supreme Court upheld as constitutional the taking of individuals' homes in furtherance of an economic redevelopment plan.[2] The Court chose not to establish a bright-line rule classifying an eminent domain transfer of one citizen's property to another as a private use,[3] which has led to a common conception that all private property is in jeopardy.[4] *Kelo* led state legislatures across the nation to propose legislation and constitutional amendments designed specifically to protect their citizens from a result similar to that in *Kelo*.[5]

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1. 545 U.S. 469 (2005).
2. *Id.* at 484.
3. *Id.* at 486–87.
4. *See id.*
5. *See* Leonard Gilroy, *Eminent Domain: Voters Protect Property Rights*, MIAMI HERALD, Nov. 18, 2006, at A29, *available at* http://www.miami.com/mld/miamiherald/news/opinion/16043022.htm ("35 states have now passed laws to curb eminent domain abuse since the [*Kelo*] ruling."). Between January 1, 2006 and November 7, 2006, at least twenty-three state legislatures have proposed or enacted legislation, constitutional amendments, or both regarding eminent domain in which the legislative findings or legislative history explicitly mentioned *Kelo*. *See* H.B. 318, 24th Leg., 2d Sess. (Alaska 2006), 2005 AK H.B. 318 (NS) (Westlaw); S.B. 1206, 2005–06 Reg. Sess. (Cal. 2006), 2005 CA S.B. 1206 (NS) (Westlaw); Assem. J. Res. 44, 2006 Leg., Reg. Sess. (Cal. 2006), 2005 CA A.J.R. 44 (NS) (Westlaw); S. Const. Amend. 20, 2006 Leg., Reg. Sess. (Cal. 2006), 2005 CA S.C.A. 20 (NS) (Westlaw); H.B. 1099, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006), 2006 CO H.B. 1099 (NS) (Westlaw); S.B. 665, 2006 Gen. Assem., Feb. Sess. (Conn. 2006), 2006 CT S.B. 665 (NS) (Westlaw); H.B. 5810, 2006 Gen. Assem., Feb. Sess. (Conn. 2006), 2006 CT H.B. 5810 (NS) (Westlaw); S.B. 34, 2006 Gen. Assem., Feb. Sess. (Conn. 2006), 2006 CT S.B. 34 (NS) (Westlaw); H. Mem'l 1601, 2006 Leg.,108th Reg. Sess. (Fla. 2006), 2006 FL H.M. 1601 (NS) (Westlaw); S.B. 391, 148th Gen. Assem., Reg. Sess. (Ga. 2006), 2005 GA S.B. 391 (NS) (Westlaw); H.B. 960, 148th Gen. Assem., Reg. Sess. (Ga. 2006), 2005 GA H.B. 960 (NS) (Westlaw); S.B. 2986, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI S.B. 2986 (NS) (Westlaw); S.B. 3191, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI S.B. 3191 (NS) (Westlaw); H.B. 2135, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI H.B. 2135 (NS) (Westlaw); H.B. 2766, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI H.B. 2766 (NS) (Westlaw); S.B. 2939, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI S.B. 2939 (NS) (Westlaw); H.B. 2458, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI H.B. 2458 (NS) (Westlaw); H.B. 2233, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI H.B. 2233 (NS) (Westlaw); H.B. 3215, 23d Leg., Reg. Sess. (Haw. 2006), 2005 HI H.B. 3215 (NS) (Westlaw); S.B. 1429, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1429 (SN) (Westlaw); S.B. 1254, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1254 (SN) (Westlaw); S.B. 1242, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1242 (SN) (Westlaw); S.B. 1244, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1244 (SN) (Westlaw); S.B. 1245, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1245 (SN) (Westlaw); S.B. 1248, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1248 (SN) (Westlaw); S.B. 1249, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1249 (SN) (Westlaw); H.B. 2543, 81st Leg., Reg. Sess. (Kan. 2006), 2005 KS H.B. 2543 (NS) (Westlaw); H. Paper 1310, 122d

From coast to coast, state legislatures have proposed legislation in reaction to *Kelo* covering a variety of topics including revisions to condemnation procedures under current eminent domain statutes,[6] codified lists of what constitutes a valid "public use" for the purposes of eminent domain,[7] and even the placement of temporary moratoriums on the exercise of eminent domain for

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Leg., 2d Reg. Sess. (Me. 2006), 2005 ME H.P. 1310 (NS) (Westlaw); H.B. 1410, 421st Gen. Assem., Reg. Sess. (Md. 2006), 2006 MD H.B. 1410 (NS) (Westlaw); S.B. 173, 421st Gen. Assem., Reg. Sess. (Md. 2006), 2006 MD S.B. 173 (NS) (Westlaw); S. Con. Res. 568, 2006 Leg., 121st Sess. (Miss. 2006), 2006 MS S.C.R. 568 (NS) (Westlaw); H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006), 2006 MO H.B. 1944 (NS) (Westlaw); Legis. Res. 252, 99th Leg., 2d Reg. Sess. (Neb. 2006), 2005 NE L.R. 252 (NS) (Westlaw); Assem. B. 3446, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ A.B. 3446 (NS) (Westlaw); S.B. 2088, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ S.B. 2088 (NS) (Westlaw); Assem. B. 3257, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ A.B. 3257 (NS) (Westlaw); S.B. 1975, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ S.B. 1975 (NS) (Westlaw); Assem. B. 3178, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ A.B. 3178 (NS) (Westlaw); Assem. B. 2423, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ A.B. 2423 (NS) (Westlaw); Assem. Con. Res. 138, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ A.C.R. 138 (NS) (Westlaw); S.B. 211, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ S.B. 211 (NS) (Westlaw); S. Con. Res. 40, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2006 NJ S.C.R. 40 (NS) (Westlaw); Assem. B. 4552, 212th Leg., 1st Ann. Sess. (N.J. 2006), 2004 NJ A.B. 4552 (NS) (Westlaw); H.J. Mem'l 52, 47th Leg., 2d Sess. (N.M. 2006), 2006 NM H.J.M. 52 (NS) (Westlaw); H. Mem'l 6, 47th Leg., 2d Sess. (N.M. 2006), 2006 NM H.M. 6 (NS) (Westlaw); S. Mem'l 3, 47th Leg., 2d Sess. (N.M. 2006), 2006 NM S.M. 3 (NS) (Westlaw); S.B. 1321, 2005 Gen. Assem., Reg. Sess. (N.C. 2006), 2005 NC S.B. 1321 (NS) (Westlaw); H.R. 1855, 2005 Gen. Assem., Reg. Sess. (N.C. 2006), 2005 NC H.R. 1855 (NS) (Westlaw); S. Con. Res. 59, 50th Leg., 2d Reg. Sess. (Okla. 2006), 2005 OK S.C.R. 59 (NS) (Westlaw); H.R. 597, 189th Gen. Assem., 2005–06 Reg. Sess. (Pa. 2006), 2005 PA H.R. 597 (SN) (Westlaw); S.B. 2155, 2006 Gen. Assem., Jan. Sess. (R.I. 2006), 2005 RI S.B. 2155 (NS) (Westlaw); S.B. 2785, 2006 Gen. Assem., Jan. Sess. (R.I. 2006), 2005 RI S.B. 2785 (NS) (Westlaw); H. Con. R. 4826, 116th Gen. Assem., 2d Reg. Sess. (S.C. 2006), 2005 SC H.C.R. 4826 (NS) (Westlaw); H.B. 4310, 116th Gen. Assem., 2d Reg. Sess. (S.C. 2006), 2005 SC H.B. 4310 (NS) (Westlaw); S.B. 982, 116th Gen. Assem., 2d Reg. Sess. (S.C. 2006), 2005 SC S.B. 982 (NS) (Westlaw); S.J. Res. 996, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN S.J.R. 996 (NS) (Westlaw); S.J. Res. 999, 104th Gen. Assem., 2d Reg Sess. (Tenn. 2006), 2005 TN S.J.R. 999 (NS) (Westlaw); H.B. 3775, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN H.B. 3775 (NS) (Westlaw); H.B. 2483, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN H.B. 2483 (NS) (Westlaw); H.B. 2428, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN H.B. 2428 (NS) (Westlaw); S.B. 2413, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN S.B. 2413 (NS) (Westlaw); S.B. 2420, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN S.B. 2420 (NS) (Westlaw); S.B. 2424, 104th Gen. Assem., 2d Reg. Sess. (Tenn. 2006), 2005 TN S.B. 2424 (NS) (Westlaw); S. Res. 8738, 59th Leg., 2d Sess. (Wash. 2006), 2005 WA S.R. 8738 (SN) (Westlaw); H.B. 3017, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA H.B. 3017 (NS) (Westlaw); S.B. 6701, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.B. 6701 (NS) (Westlaw); S.J. Mem'l 8036, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.J.M. 8036 (NS) (Westlaw); S.B. 6807, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.B. 6807 (NS) (Westlaw); S.B. 6808, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.B. 6808 (NS) (Westlaw); H.B. 2854, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA H.B. 2854 (NS) (Westlaw); H.B. 2626, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA H.B. 2626 (NS) (Westlaw); S.B. 6345, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.B. 6345 (NS) (Westlaw); S.B. 6388, 59th Leg., Reg. Sess. (Wash. 2006), 2005 WA S.B. 6388 (NS) (Westlaw).

6. *See, e.g.*, S.B. 1249, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1249 (SN) (Westlaw) (requiring "the condemning authority to disclose its assessment of just compensation to the property owner" prior to the condemnation proceeding).

7. *See, e.g.*, H.B. 318, 24th Leg., 2d Sess. (Alaska 2006), 2005 AK H.B. 318 (NS) (Westlaw) (setting forth thirteen specific categories of valid public uses).

particular purposes.[8] This legislation addresses much of the widespread concern regarding the issue of public use in eminent domain; however, it does not yet sufficiently address, and in many cases ignores, the important issue of just compensation.

Although several states have addressed just compensation in eminent domain,[9] none has enacted legislation that would take into account the subjective value of an individual's home. Subjective value in the home results from the personal dignity and social status that accompany homeownership, as well as the sentimental value an individual places on the home and surrounding land. Property owners develop a special attachment to the land they own and improve, especially when the land has been in the family for generations. This Comment proposes that if the state of South Carolina exercises its power of eminent domain, particularly when a home is taken away from an individual for slum clearance or urban renewal, courts should consider factors in addition to the fair market value of the property, such as the subjective value of the property, when determining what constitutes just compensation.

Part II of this Comment briefly discusses the origins and development of eminent domain in the United States and South Carolina. Part II also examines the judicial developments regarding the interpretations of just compensation in the United States and South Carolina. Part III analyzes the fair market value calculation of just compensation and its failure to adequately compensate landowners and suggests methods that South Carolina could employ to remedy this problem. Part IV concludes.

II. BACKGROUND ON EMINENT DOMAIN AND JUST COMPENSATION

A. Origins of Eminent Domain Power

1. The Federal System

The Fifth Amendment states that "[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[10] The Supreme Court has noted that eminent domain is an "incident of sovereignty" and the Fifth Amendment simply acts as a limitation upon the exercise of that power.[11] The Takings Clause

8. *See, e.g.*, H.B. 960, 148th Gen. Assem., Reg. Sess. (Ga. 2006), 2005 GA H.B. 960 (NS) (Westlaw) (proposing the placement of a temporary moratorium on exercise of eminent domain for the purpose of urban development).

9. *See, e.g.*, S.B. 1429, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1429 (SN) (Westlaw) (preventing a condemning authority from paying less compensation than its final pre-litigation offer); H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006), 2006 MO H.B. 1944 (NS) (Westlaw) (requiring the payment of additional compensation under certain circumstances).

10. U.S. CONST. amend. V.

11. United States v. Jones, 109 U.S. 513, 518 (1883).

of the Fifth Amendment is "a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[12]

Scholars have discovered evidence of eminent domain dating back to Biblical times.[13] Under the common law, the English government possessed the power to obtain private land for its own use.[14] Upon winning independence from England, each original American state was vested with powers similar to those held by the English government, including the power of eminent domain.[15]

After states began drafting and ratifying their own constitutions, variations in constitutional language regarding eminent domain resulted in variations of judicial interpretation.[16] One aspect of the Takings Clause that American courts have never truly agreed upon is what constitutes a public use for the purposes of eminent domain.[17]

The United States Supreme Court discussed the use of eminent domain for the purpose of slum clearance in the landmark decision *Berman v. Parker*.[18] In *Berman,* the Court upheld the right of a congressionally-created entity to condemn a dilapidated area of Washington, D.C., for the sole purpose of redevelopment, notwithstanding that part of the development plan involved the introduction of new private enterprises to the area, and that several buildings within that area were not dilapidated.[19] Affected landowners contended that the taking transferred property "from one businessman for the benefit of another businessman."[20] In response to this argument, the Court 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—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[21] Thus, the Court's holding validated the notion that a transfer of property from one private entity to another could still be considered a public use under the Fifth Amendment, so long as the transfer would serve a public purpose.

Confronted with a similar question in *Kelo v. City of New London*,[22] the Supreme Court again upheld a transfer of privately owned property from one

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12. United States v. Carmack, 329 U.S. 230, 241–42 (1946) (citing United States v. Cooper, 20 D.C. (9 Mackey) 104, 116 (D.C. 1891), *aff'd sub nom.* Shoemaker v. United States, 147 U.S. 282 (1893); *In re* Rugheimer, 36 F. 369, 371 (E.D.S.C. 1888)).

13. 1 JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN §1.2[1] (rev. 3d ed. 2006).

14. *Id.* § 1.21.

15. *Id.* § 1.23[1].

16. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 504–06 (2006).

17. Mark C. Landry, Note, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 TUL. L. REV. 419, 423–24 (1985) (discussing the split among states using the "use by public" test and the more elastic "public advantage" test).

18. 348 U.S. 26, 31 (1954).

19. *Id.* at 33–36.

20. *Id.* at 33.

21. *Id.* at 33–34.

22. 545 U.S. 469 (2005).

private entity to another private entity by eminent domain and determined economic development to be a valid public use.[23] The petitioners argued that the failure to create a bright-line rule regarding what constitutes a public use in the context of economic development will enable a city to transfer "citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes."[24] The majority of the Court stated that such a situation "would certainly raise a suspicion that a private purpose was afoot,"[25] but chose not to create a bright-line rule.[26] In her dissent, Justice O'Connor argued that the majority's acceptance of a broad definition for public use was unwise, and that such a definition would place all private property rights in jeopardy.[27] Similarly, Justice Thomas argued for a literal interpretation of public use, stating "that the government may take property only if it actually uses or gives the public a legal right to use the property."[28]

Based on the decisions of the Supreme Court, a transfer by the government of property from private entity *A* to private entity *B* is constitutional as long as the condemning authority sets forth a valid public purpose. One of the public purposes that the Court has repeatedly found valid is economic development, which clearly applies to the situation of slum clearance or urban renewal.

2. *The South Carolina System*

As discussed previously, the American colonies essentially adopted the power of eminent domain from England.[29] Prior to the adoption of the South Carolina constitution in 1868, the South Carolina government carried out its power of eminent domain with no requirement or practice of compensating persons from whom it took private lands.[30] Since 1868, the South Carolina constitution has controlled the exercise of eminent domain with a provision similar to that found in the Fifth Amendment of the United States Constitution.[31] Article I, section 13 of the South Carolina constitution states that "[e]xcept as otherwise provided in this Constitution, 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."[32] Although the language of this

23. *Id.* at 488–89.
24. *Id.* at 486–87.
25. *Id.* at 487.
26. *Id.* at 486–87.
27. *See id.* at 494 (O'Connor, J., dissenting).
28. *Id.* at 521 (Thomas, J., dissenting).
29. SACKMAN ET AL., *supra* note 13, § 1.23[1].
30. *See* S.C. State Highway Dep't v. Miller, 237 S.C. 386, 390, 117 S.E.2d 561, 562–63 (1960) ("It was decided in this state, as early as 1796, that, in the absence of a constitutional requirement that compensation should be made, the Legislature has the power, in the exercise of the state's right of eminent domain, to take private lands for public highways without compensation." (quoting Wilson v. Greenville County, 110 S.C. 321, 326–27, 96 S.E. 301, 303 (1918))).
31. *Id.* at 390–91, 117 S.E.2d at 563.
32. S.C. CONST. art. I, § 13.

provision is very similar to the language of the Fifth Amendment of the United States Constitution, important distinctions exist.

The South Carolina provision, unlike the Fifth Amendment, contains language requiring the consent of a landowner in the event that the government takes land for private use. On its face, this requirement appears to be a dead letter as a result of *Kelo*, in which the Court interpreted a taking of property that was seemingly for private use as public use simply because the public would benefit. However, South Carolina courts have interpreted article I, section 13 in a much stricter manner than the way the United States Supreme Court has interpreted the Fifth Amendment:[33]

> 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. . . . '[P]ublic use' means the same as 'use by the public.'[34]

The South Carolina Supreme Court also stated that "[l]ands cannot be condemned for other than a public use of the same."[35] The court further noted that "[i]n still other states the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, as contrasted with the requirement of our constitution that it be for a public use."[36]

The South Carolina Supreme Court took the public use requirement one step further in *Karesh v. City Council of Charleston*.[37] *Karesh* involved the proposed condemnation of one city block in downtown Charleston, with the city to lease the condemned land to a private corporation for the construction of a parking garage and convention center.[38] Although the city imposed a requirement on the private corporation that a minimum of 90% of the parking garage must be available to the general public, the South Carolina Supreme Court disallowed the condemnation on the grounds that it was not a valid public use.[39]

Continuing its narrow interpretation of the public use requirement in *Georgia Department of Transportation v. Jasper County*,[40] the South Carolina Supreme Court explicitly stated that South Carolina courts "take a restrictive view of the power of eminent domain because it is in derogation of the right to

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33. *See* Young v. Wiggins, 240 S.C. 426, 432–33, 126 S.E.2d 360, 363 (1962).

34. *Id.* at 432, 126 S.E.2d at 363 (quoting Riley v. Charleston Union Station Co., 71 S.C. 457, 485–86, 51 S.E. 485, 496 (1905)).

35. Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 391, 175 S.E.2d 805, 811 (1970).

36. *Id.* at 392, 175 S.E.2d at 812 (quoting Edens v. City of Columbia, 228 S.C. 563, 570, 91 S.E.2d 280, 282 (1956)).

37. 271 S.C. 339, 247 S.E.2d 342 (1978).

38. *Id.* at 341, 247 S.E.2d at 343–44.

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

40. 355 S.C. 631, 586 S.E.2d 853 (2003).

acquire, possess, and defend property. It is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public."[41] Each of these cases demonstrates the unwillingness of South Carolina courts to accept a broad definition of public use in the context of eminent domain, unlike the United States Supreme Court in such cases as *Berman* and *Kelo*.

3. *Modification of South Carolina's Eminent Domain Power—The Inclusion of Urban Renewal as a Public Use*

As a result of the narrow definition of public use that South Carolina courts have historically employed regarding eminent domain, South Carolina governmental entities could not constitutionally condemn privately owned land and transfer that land to another private party, even if such transfer would benefit public welfare. To allow such transfers to take place in the context of urban renewal, the South Carolina legislature had to amend the state constitution. Article XIV, section 5 of the South Carolina constitution, which resulted from amendments that took place between 1967 and 1971, now authorizes the General Assembly to create laws allowing for local municipalities or any housing or redevelopment authority of specified counties to "undertake and carry out slum clearance and redevelopment work in areas which are predominantly slum or blighted, the preparation of such areas for reuse, and the sale or other disposition of such areas to private enterprise for private uses or to public bodies for public uses."[42]

This amendment to the South Carolina constitution makes the language found in article I, section 13 a dead letter with regard to situations in which the government has declared the property to be taken as slum or blighted. Although the taking entity must still provide just compensation to the landowner whose property is taken, no constitutional provision requires that the landowner must consent prior to the government taking his land for private use.[43] Article XIV, section 5 provides the government with constitutional authority to carry out takings like those in *Berman* by focusing on the area as a whole instead of individual structures.[44]

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41. *Id.* at 638, 586 S.E.2d at 856 (citations omitted).

42. S.C. CONST. art. XIV, § 5. For a similar provision affecting other counties, see also S.C. CONST. art. I, § 17. "Any [slum clearance] shall constitute a governmental function undertaken for public purposes, and the powers of taxation and eminent domain may be exercised and public funds expended in furtherance thereof." *Id.*

43. *See* S.C. CONST. art. XIV, § 5.

44. *See id.*; *supra* notes 19–21 and accompanying text.

B. *The Requirement of Just Compensation*

1. *The Federal System*

The United States Supreme Court has noted on multiple occasions that the requirement for just compensation found in the Fifth Amendment serves the purpose of preventing the government from forcing a small group of citizens to incur a cost that, in fairness, should be absorbed by society.[45] The Supreme Court has also stated that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it[] does from technical concepts of property law."[46] In determining the value of just compensation in any taking, courts must evaluate what the landowner would consider just, as well as what society, which is responsible for making the payment, would consider just.[47]

The United States Supreme Court has used the concept of "fair market value" to determine the amount of money the condemnor must pay the condemnee.[48] One method by which a court may determine the fair market value of a given piece of property is for the court to ascertain

> "the highest price estimated in terms of money that the land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable of b[e]ing used; the amount which land would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing, but not obliged to buy."[49]

For the majority of courts, the preferred method in performing the above-mentioned determination is a comparable sales analysis.[50] Under such analysis, appraisers look at data concerning the sales of similar properties and then adjust the valuation of the target property based on differences between the properties being compared.[51] The Sixth Circuit Court of Appeals held that comparable sales need not be identical sales "because each parcel of real property differs from

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45. *See* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

46. United States v. Fuller, 409 U.S. 488, 490 (1973) (citing United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950)).

47. *Commodities Trading Corp.*, 339 U.S. at 123 (1950).

48. *See* United States v. Miller, 317 U.S. 369, 373–74 (1943).

49. Detroit/Wayne County Stadium Auth. v. Drinkwater, Taylor & Merrill, Inc., 705 N.W.2d 549, 557 (Mich. Ct. App. 2005) (quoting Consumers Power Co. v. Allegan State Bank, 174 N.W.2d 578, 591 (Mich. Ct. App. 1970)).

50. *See, e.g.*, United States v. 819.98 Acres of Land, 78 F.3d 1468, 1471 (10th Cir. 1996) (citations omitted).

51. City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177, 182 (Tex. 2001).

every other parcel," but there must be some similarity between the parcels in question.[52] This fair market value analysis eliminates any consideration of the subjective nature of worth that an individual attaches to property at a given time.

Calabresi and Melamed, exploring other valuation tools, used economic analysis in investigating the difference between property rules and liability rules of entitlement.[53] A property rule protects an entitlement "to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[54] Under a liability rule, "an external, objective standard of value is used to facilitate the transfer of the entitlement from the holder to the [party desiring the entitlement]."[55] Focusing primarily on the issue of nuisance, Calabresi and Melamed assert that when transaction costs are low, courts should employ a property rule in determining compensation.[56] Conversely, when transaction costs are high, courts should ascertain compensation based on a liability rule.[57] These assertions are based on notions of economic efficiency and distributive goals.[58]

Applying the work of Calabresi and Melamed to the field of eminent domain, it is clear that American courts currently use a liability rule in determining just compensation for a piece of property taken by the government or a governmental entity. Calabresi and Melamed discuss the benefits of using a liability rule in the context of eminent domain, but they focus on a taking from a large group of individuals (one thousand) for a bona fide public use (the construction of a park).[59] While the application of a liability rule in this context seems logical considering the excessive amount of transaction costs, the same is not necessarily so for the taking of an individual's home, or even a small group of individuals' homes.

2. *The South Carolina System*

South Carolina law requires that a condemning authority compensate a property owner for the value of the property taken, as well as any additional damage to the landowner's remaining property in the event that the government condemns only a portion of her property.[60] If the public project performed on the condemned land results in an increase in the value of the remaining land of the

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52. United States v. 103.38 Acres of Land, 660 F.2d 208, 211 (6th Cir. 1981) (quoting Fairfield Gardens, Inc. v. United States, 306 F.2d 167, 172–73 (9th Cir.1962)).

53. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1106–10 (1972).

54. *Id.* at 1092.

55. *Id.* at 1106.

56. *See id.* at 1106–10.

57. *See id.*

58. *Id.* at 1110.

59. *Id.* at 1106–07.

60. Gray v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 144, 150, 427 S.E.2d 899, 902 (Ct. App. 1992) (citing S.C. State Highway Dep't v. Bolt, 242 S.C. 411, 417, 131 S.E.2d 264, 266 (1963)).

condemnee, the determination of just compensation should reflect an offset equal to the amount of that increase.[61] The requirement for just compensation is codified in the South Carolina Code of Laws, which provides that a landowner shall be compensated for the value of the property taken and any damage to his remaining land, taking into account any benefits to the landowner.[62]

Following the federal approach, the South Carolina scheme bases the determination of just compensation on the fair market value of the property.[63] The South Carolina Court of Appeals held that "[f]air market value is the price which a willing buyer will pay a willing seller, neither being under compulsion to buy or sell and both being fully informed of all uses to which the property is adopted and for which it is capable of being used."[64] South Carolina also allows for the appraiser to determine just compensation on the basis of the highest and best use of the property, regardless of whether the property owner has, or had, plans for that use.[65] Once the condemnor takes the property, the condemnee is entitled to the market value based on what the appraiser determines to be the highest and best use of the property at that time, not merely the market value based on the condition of the property at that time.[66]

In summary, both federal and South Carolina courts require that a condemning authority provide just compensation for all property taken. Furthermore, the federal and South Carolina systems both use the fair market value method of calculating the appropriate amount for just compensation. Although the definition of public use may differ between the federal and South Carolina systems, two things remain clear: A landowner whose property the government deems to be slum or blighted is at risk of the government condemning that property under the constitutionally accepted public use of urban renewal, and compensation the market deems "fair" is all the landowner will receive in return.

3. *Current Status of Intangible Values in the Calculation of Just Compensation*

The fair market value approach raises questions about fairness because it does not reflect the subjective values that individuals attach to property, such as the values that arise from ownership, personal improvement, and family connection. The failure to include such values results in compensation that is anything but just.

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61. Smith v. City of Greenville, 229 S.C. 252, 259–60, 92 S.E.2d 639, 643 (1956) (citing Wilson v. Greenville County, 110 S.C. 321, 324, 96 S.E. 301, 302 (1918)).

62. S.C. CODE ANN. § 28-2-370 (2007).

63. *See* Housing Auth. of Charleston v. Olasov, 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct. App. 1984).

64. *Id.*

65. S.C. State Highway Dep't v. Bryant, 253 S.C. 400, 405–07, 171 S.E.2d 349, 351–52 (1969).

66. S.C. State Highway Dep't v. Westboro Weaving Co., 244 S.C. 516, 519, 137 S.E.2d 776, 777 (1964) (quoting City of Orangeburg v. Buford, 227 S.C. 280, 285, 87 S.E.2d 822, 825 (1955)).

Before examining the status of the inclusion of subjective values in the calculation of just compensation, it is appropriate to note that one need not do much examination of this topic to obtain a clear understanding of the law. A brief overview of federal case law regarding eminent domain quickly reveals the status of subjective values in the federal system. The United States Supreme Court stated that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner."[67] This language demonstrates the lack of cohesion between the federal test for just compensation and any special value that the owner places on property.

Turning now to state policies regarding just compensation in eminent domain, it is readily apparent that the states addressing this issue have been no more accepting of the inclusion of subjective values than the federal system. The Mississippi Supreme Court held that sentimental value cannot impact the determination of fair market value.[68] Similarly, the Alabama Supreme Court explicitly held that the sentimental value an individual attaches to a homestead is not applicable in the determination of compensation.[69] The cases demonstrate that courts confronting this issue, including the Supreme Court, have explicitly denied consideration of the subjective values of property when calculating just compensation.

In summary, the current methods of determining just compensation fail to adequately consider any subjective value an owner attaches to property. In *Coniston Corp. v. Village of Hoffman Estates*,[70] Judge Richard A. Posner eloquently described the meaning of just compensation:

> Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are "intramarginal," meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value . . . . Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it "personal") value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.[71]

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67. United States v. 50 Acres of Land, 469 U.S. 24, 35 (1984).

68. Miss. State Highway Comm'n v. Hemphill, 176 So. 2d 282, 285 (Miss. 1965) (citation omitted).

69. Popwell v. Shelby County, 130 So. 2d 170, 173 (Ala. 1960).

70. 844 F.2d 461 (7th Cir. 1988).

71. *Id.* at 464.

III. ANALYSIS

A. The Inadequacy of the Fair Market Value Method of Calculation and Possible Remedies

1. Steps in the Right Direction

While no court decision has expressly allowed for the inclusion of subjective values in the calculation of just compensation, many decisions have provided language setting the stage for a court to do just that. In North Carolina, for example, the supreme court held that "[i]f a tract, of which the whole or a part is taken for a public use, possesses a special value to the owner which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages."[72] This language provides the ideal support for the inclusion of subjective value in the calculation of just compensation. The foreseeable problem with the utility of this language is the inclusion of "which can be measured by money," as it will be difficult to provide proof that any subjective value can truly be measured by money. Nonetheless, the North Carolina Supreme Court has taken steps in the right direction.

Other courts have taken a step in the right direction by slightly departing from the standard comparable sales analysis in determining the market value of a piece of property.[73] By allowing the appraiser to conduct a different type of valuation in determining market value to account for the property's unique character or special purpose, courts have opened the door to allowing the consideration of the subjective value attached to one's home in the determination of market value.

A 1992 decision of the Georgia Court of Appeals has a similar potential effect. In his opinion, Judge Beasley stated that a "property owner may recover compensation for the value of his property where the property has a unique value to him such that fair market value does not represent just and adequate compensation."[74] Although the opinion goes on to note that pecuniary value, rather than sentimental value, is all that the court should consider in determining the value to the owner,[75] a person wishing to include various items of subjective value in the determination of the property's value can now make an argument

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72. Brown v. W.T. Weaver Power Co., 52 S.E. 954, 958 (N.C. 1905) (quoting 15 CYCLOPEDIA OF LAW AND PROCEDURE 724 (William Mack ed., 1905)).

73. *See, e.g.*, Conti v. R.I. Econ. Dev. Corp., 900 A.2d 1221, 1237 (R.I. 2006) ("We have allowed for the departure from this preferred method . . . at the discretion of the trial justice, when the fair market value established through comparable sales did not adequately reflect 'just compensation' because the condemned property was 'unique or suited for a special purpose.'" (quoting J.W.A. Realty, Inc. v. City of Cranston, 399 A.2d 479, 484 (R.I. 1979))).

74. Taylor v. Jones County, 422 S.E.2d 890, 892 (Ga. Ct. App. 1992) (citing CHARLES N. PURSLEY, JR., GEORGIA EMINENT DOMAIN §§ 5-12, 6-3 (1982)).

75. *Id.* at 892–93.

for such inclusions, assuming that individual is able to attach a comprehensible monetary value to the various items.

2. *Arguments for the Inclusion of Intangible Values in the Calculation of Just Compensation*

To appropriately understand the subjective value that an individual attaches to a home, it is important to first revisit the age-old metaphor of "the home as a man's castle." Professor Eduardo M. Peñalver has posited that there are actually two versions of the castle metaphor, one that focuses on the "castle as dominion," and the other that focuses on the "castle as dignity."[76] The version portraying the castle as dominion exemplifies the "conception of the owner's right to exclude."[77] Under the castle as dignity metaphor, the focus is on the "inherent dignity of homeownership."[78] This dignity results from the subjective importance and social standing that goes hand-in-hand with owning a home.[79]

Peñalver argues that governmental takings intrude upon the "castle as dominion" metaphor in two ways.[80] First, when the government forces someone to sell property, the person obviously loses the exclusive control of the property implicit in the concept of the castle as dominion.[81] Second, the current method of calculating just compensation rejects any subjective value that a homeowner attaches to a home, thus violating the concept of the "modest home" as a castle.[82] After understanding the metaphors of the home as dignity and dominion and the impact of eminent domain on the same, the need to include subjective property values in the calculation of just compensation becomes evident. Subjective values that can be monetized must be part of any compensation that is just. While this argument by no means seeks a bright-line rule against eminent domain in its entirety, it does insist upon the state exercising its eminent domain power "in a manner that gives due regard to the importance of the property in question to the lives of the people being displaced."[83]

Professor Christopher Serkin has discussed a similar argument, relying on what is termed the "personality theory" of property.[84] Serkin contends that government should employ takings law that is "responsive to a contextual

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76. Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2972 (2006).

77. *Id.*

78. *Id.* at 2973.

79. *Id.*

80. *Id.*

81. *Id.* at 2973–74.

82. *Id.* at 2974.

83. *Id.* at 2975.

84. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 722–25 (2005) (discussing MARGARET JANE RADIN, *Diagnosing the Takings Problem*, *in* COMPENSATORY JUSTICE (John W. Chapman ed., N.Y. Univ. Press 1991), *reprinted in* REINTERPRETING PROPERTY 146, 146–65 (Univ. of Chicago Press 1993)).

inquiry into the personhood of the property taken."[85] Under this view, "[f]air market value . . . is inherently inadequate to vindicate the personal connection people may have with [deeply personal] property."[86] Serkin quotes Radin's argument that "[e]xactly what has been taken, and from whom, matters."[87]

Utilizing the same reasoning employed by Calabresi and Melamed in justifying a liability rule for a large scale taking,[88] it is equally convincing to assert that courts should use a property rule for the taking of an individual's home. When the number of parties the condemning authority must bargain with is few, the transaction costs involved should be extremely low. Thus, a court should use a property rule, instead of a liability rule, in determining the amount of just compensation where the government takes a home for the purposes of urban renewal. However, this is not to say that a court should employ a pure property rule in this instance. A pure property rule carries with it the inherent burdens of holdouts and excessive claims by landowners.[89] To avoid these problems, courts should utilize a hybrid rule that makes use of the characteristics of both property rules and liability rules. Stated differently, courts should balance the consideration of subjective elements of value with the current method of objective valuation. The court could then make a reasonable decision considering all of the factors affecting the property value, including subjective values such as sentimental attachment.

Assuming minimal transaction costs, if the condemning authority values the property more than the landowner, the condemning authority will have no problem purchasing that entitlement for the amount the landowner believes the entitlement is worth.[90] If the condemning authority, or society, does not value the land as much as the landowner, no transaction will take place. Thus, the use of a property rule where a home is taken from an individual would serve two purposes. First, the landowner would potentially receive what he believes to be just compensation in the event that the land is taken. Second, the use of a property rule would guarantee that the only property taken would be that which society has a true interest in taking. Such an approach would serve as a check on the potential arbitrary takings of property under the guise of urban renewal or slum clearance.

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85. *Id.* at 722.

86. *Id.* at 722.

87. *Id.* at 722 n.202 (quoting RADIN, *supra* note 84, at 146, 154).

88. *See supra* notes 53–59 and accompanying text.

89. *See* Calabresi & Melamed, *supra* note 53, at 1106–07.

90. Subjective values that a court would consider in a condemnation—easily monetized values—should not add significant transaction costs.

B. Methods by Which South Carolina Can Address Subjective Valuation

1. Judicial Methods that South Carolina Courts Could Use

In searching for methods by which South Carolina can address the inclusion of subjective values, it is important to start with existing case law in the area of eminent domain. While South Carolina courts have not explicitly approved the inclusion of subjective values in the calculation of just compensation, language exists in various opinions that can lead toward an eventual inclusion of subjective value considerations.

The South Carolina Court of Appeals has noted that "[t]he compensation to which the owner is entitled is the full and perfect equivalent of the property taken."[91] While this language is by no means dispositive, it lends support to the argument that a court could potentially consider any subjective value that the owner places on property. Although a monetary valuation of subjective value may be difficult to ascertain, the owner could use a property rule and declare a personal value of the property. If the condemning authority deems the property to be worth that value, it can purchase the property for that price.

A second place to look for support for the inclusion of subjective value in the calculation of just compensation is South Carolina court decisions from other areas of property law. In 2005, the South Carolina Supreme Court confronted the issue of determining whether to partition a certain piece of land in kind or by sale.[92] Although the court held that the "pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or allow a partition by allotment[,]" the court noted that "equitable considerations such as the length of ownership and sentimental attachment to the property may be considered."[93] The supreme court's recognition of the importance of the subjective value an individual attaches to property demonstrates a potential willingness to extend such value considerations to the area of just compensation for condemned property.

A second South Carolina property case containing language that supports the inclusion of subjective value in the calculation of just compensation is *Wall v. Huguenin*.[94] In *Wall*, an action to quiet title, the supreme court determined whether to allow the enforcement of an option to repurchase a piece of property.[95] In holding the option enforceable, the court considered one of the important factors to be the "highly personal attachment of the . . . family to [the property], their homeplace for two centuries."[96] If it chose to do so, a South Carolina court could take from this language the ability to consider subjective

91. S.C. Dep't of Transp. v. Faulkenberry, 337 S.C. 140, 148, 522 S.E.2d 822, 826 (Ct. App. 1999) (quoting Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923)).

92. Zimmerman v. Marsh, 365 S.C. 383, 385, 618 S.E.2d 898, 899 (2005).

93. *Id.* at 388, 618 S.E.2d at 901.

94. 305 S.C. 100, 406 S.E.2d 347 (1991).

95. *Id.* at 100, 406 S.E.2d at 348.

96. *Id.* at 103, 406 S.E.2d at 350.

value in making a judicial determination and allow for the consideration of such aspects as sentimental value in calculating just compensation.

Turning to another area of law, some of South Carolina's tort decisions certain certain language that seems to support the notion of consideration of subjective value in calculating just compensation. In *Vaught v. A.O. Hardee & Sons, Inc.*,[97] the South Carolina Supreme Court held that where a party negligently ignited a fire that subsequently destroyed neighboring property, the trial court could consider replacement costs of destroyed noncommercial trees when awarding damages.[98]

> One person's unsightly jungle may be another person's enchanted forest; certainly the owner of such land should be allowed to enjoy it free from a trespasser's bulldozer. Indeed, a trespasser should not be allowed, with impunity, to negligently or willfully wreak havoc on a landowner's natural woods, and the landowner's attempted recovery for such injury should not be entirely frustrated by the fact that the market does not reflect his personal loss.[99]

Vaught demonstrates the willingness of the South Carolina Supreme Court to extend valuation of property beyond fair market value in determining how to compensate the aggrieved party. Although *Vaught* is a tort case, a South Carolina court could transfer the rule of law allowing for the consideration of replacement costs to the field of eminent domain. Doing so would allow a court to consider such intangible values of property as sentimental value and sheer desire to retain one's home when calculating just compensation. A just recovery in tort should inform the court's notion of just compensation. A landowner suffering loss as a result of a property condemnation should not be in a worse position than a tort victim suffering a similar loss.

In another tort case involving owner recovery for lost, damaged, or destroyed possessions, the South Carolina Supreme Court held that "[a]n owner can recover for property destroyed or damaged by fire such damages as will restore him to the same property status that he occupied before his property was burned."[100] In *Nelson v. Coleman Co.*, the court went on to note that when property that has no market value is lost or destroyed, the owner may recover "its actual or reasonable value, or its special value to him."[101] This holding seems applicable to the situation in which an individual's home is taken for the purpose of slum clearance or urban renewal. If the condemning authority has

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97. 366 S.C. 475, 623 S.E.2d 373 (2005).

98. *Id.* at 480, 623 S.E.2d at 375.

99. *Id.* at 482–83, 623 S.E.2d at 377 (quoting Keitges v. VanDermeulen, 483 N.W.2d 137, 143 (Neb. 1992)).

100. Nelson v. Coleman Co., 249 S.C. 652, 659, 155 S.E.2d 917, 921 (1967) (citing Hall v. Seaboard Air Line Ry., 126 S.C. 330, 333, 119 S.E. 910, 911–12 (1923)).

101. *Id.* (citation omitted).

deemed the area in which the property is located to be slum or blighted, the possibility exists that the market value of the property is low. Under the current method of determining just compensation, the owner of the property designated as blighted could receive next to nothing in exchange for the government condemnation. However, if a court were to apply a rule similar to that used in *Nelson*, the owner of the property would be able to assert a special value to the court for determining the appropriate amount for just compensation.

2. *Statutory Methods that the South Carolina General Assembly Could Use*

Article XIV, section 5 of the South Carolina constitution vests a tremendous level of authority in the legislature to enable municipalities to take private property in blighted areas.[102] The legislature, however, also has the power to pass legislation requiring courts to consider intangible values when calculating just compensation. The current South Carolina Code of Laws requires a condemning authority to attempt negotiation with the property owner whose land it seeks to condemn.[103] In an effort to more adequately compensate a condemnee, the South Carolina General Assembly could propose legislation similar to that recently enacted in Idaho. The Idaho legislature has set a floor for the just compensation amount at the level of the condemning authority's last offer prior to the property owner's instigation of litigation.[104] While a provision such as this will probably never reach the full amount the property owner desires, it could provide for a potential determination of some amount higher than fair market value or a better opportunity for just compensation.

A second example of how South Carolina could potentially require the award of just compensation to consider aspects beyond fair market value is seen in a bill the Missouri legislature recently enacted.[105] Under House Bill 1944, the Missouri legislature has created two important additions to the determination of just compensation.[106] The first addition is a new requirement for situations the bill refers to as "homestead takings."[107] Whenever the government or a governmental entity takes an individual's primary residence, a court is to provide the homeowner with 125% of the fair market value for just compensation.[108]

The second addition is the requirement for what the bill terms a "heritage value."[109] When calculating just compensation for real property the same family

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102. *See* S.C. CONST. art. XIV, § 5.
103. S.C. CODE ANN. § 28-2-70(B) (1991).
104. *See* S.B. 1429, 58th Leg., 2d Reg. Sess. (Idaho 2006), 2006 ID S.B. 1429 (NS) (Westlaw).
105. H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006), 2006 MO H.B. 1944 (NS) (Westlaw).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

has owned for fifty or more years, a court must add a heritage value equaling 50% of the property's fair market value.[110] Stated another way, if a family has owned a piece of real property for fifty or more years, and the government or a governmental entity takes that property, that family will receive 150% of the property's fair market value as just compensation.

The South Carolina General Assembly could propose legislation similar to Missouri's House Bill 1944 to more adequately compensate individuals whose homes are taken for the purpose of slum clearance or urban renewal. While the creation of a percentage increase such as that used in the Missouri legislation may seem arbitrary, it is easy to apply and the courts could not invalidate it for ambiguity. This type of legislation is most likely to succeed as it sets a clear standard for the courts to determine just compensation but begins to account for the underlying subjective value that an individual or family places on the home.

3. *Constitutional Methods that the South Carolina General Assembly Could Use*

The final method by which South Carolina could rectify the current inadequacies of just compensation in eminent domain is a constitutional amendment. This method would be more difficult to employ, but the legislature could attempt to amend the constitution to require the government to compensate the landowner beyond the fair market value of the taken property. The California State Legislature has proposed an amendment to their constitution that would take a step in this direction.[111] Under California Senate Constitutional Amendment 20, the California Constitution would be amended to read that just compensation includes, but is not limited to,

> the cost of acquiring comparable property; all costs and losses incurred due to the condemnation, including, but not limited to, loss of income, loss of business good will, and relocation costs; and attorney's fees upon determination that the amount offered by the public agency was less than the amount ascertained by the jury, or the court if a jury is waived.[112]

While a constitutional amendment similar to that proposed by the California Senate does not fully account for the subjective value one attaches to property, it at least provides additional compensation beyond fair market value.

In June 2006, the South Carolina legislature approved the submission to the public of a proposed amendment to the eminent domain provisions in the South

110. *Id.*
111. S. Const. Amend. 20, 2006 Leg., Reg. Sess. (Cal. 2006), 2005 CA S.C.A. 20 (NS) (Westlaw).
112. *Id.*

Carolina constitution.[113] First, article I, section 13 would be amended by including language limiting allowable condemnations to those only for public use and by adding language to allow condemnation for the purpose of remedying blight.[114] The amendment would define blight as "property [constituting] a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors."[115] Second, the amendment would delete the eminent domain provisions currently found in article I, section 17 and article XIV, section 5 of the South Carolina constitution, which currently provide the express authority to use eminent domain for slum clearance purposes.[116]

On November 7, 2006, South Carolina voters overwhelmingly supported further protection of property rights with 86% of voters approving the proposed constitutional amendment.[117] Prior to becoming an official amendment to the South Carolina constitution, the legislature must ratify the amendment, which will likely be a mere ministerial process due to the vast public approval.

While the proposed amendment to the South Carolina constitution seeks to protect private property rights, it does not begin to scratch the surface of the issues involving just compensation. Furthermore, the amendment, perhaps by design, appears to destroy the government's ability to condemn land for the purpose of slum clearance or urban renewal. While the current language of the South Carolina constitution regarding this ability, found in article I, section 17 and article XIV, section 5, focuses on blighted areas and slums,[118] the language of the proposed amendment seems to focus on individual structures.[119] By focusing on individual structures, the condemning authority must make an individual determination for each piece of property it wishes to condemn, even if the purpose and result is the condemnation of an entire blighted area. A constitutional amendment such as the one proposed in California,[120] or perhaps one that incorporates provisions similar to the bill recently passed by the Missouri legislature,[121] would be superior to South Carolina's current proposal

113. S.J. Res. 1031, 116th Gen. Assem., 2d Reg. Sess. (S.C. 2006), 2005 SC S.J.R. 1031 (SN) (Westlaw).

114. *Id.*

115. *Id.*

116. *Id.*; *see supra* note 42 and accompanying text.

117. Les Christie, *Kelo's Revenge: Voters Restrict Eminent Domain*, CNNMONEY, Nov. 8, 2006, http://money.cnn.com/2006/11/08/real_estate/kelos_revenge/index.htm; *see also* Leonard Gilroy, *Eminent Domain: Voters Protect Property Rights*, MIAMI HERALD, Nov. 18, 2006, at A29, *available at* http://www.miami.com/mld/miamiherald/news/opinion/16043022.htm (providing a list of states in which voters passed amendments similar to the amendment in South Carolina).

118. *See* S.C. CONST. art. XIV, § 5; S.C. CONST. art. I, § 17; *supra* note 42 and accompanying text.

119. S.J. Res. 1031, 116th Gen. Assem., 2d Reg. Sess. (S.C. 2006), 2005 SC S.J.R. 1031 (NS) (Westlaw) (describing blight in terms of a property's characteristics).

120. S. Const. Amend. 20, 2006 Leg., Reg. Sess. (Cal. 2006), 2005 CA S.C.A. 20 (NS) (Westlaw).

121. H.B. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006), 2006 MO H.B. 1944 (NS) (Westlaw).

since the state would be able to both maintain urban renewal and provide fairness to homeowners.

IV. CONCLUSION

The current method of using fair market value to determine the compensation owed to a homeowner involved in a governmental taking grossly underestimates the true value to that homeowner. By failing to account for the subjective value of the property to the individual, governmental entities are failing to adequately compensate for what is commensurate to the taking of part of the individual. As governments across the nation move forward in their attempts to enhance private property rights, they should reconsider the method by which they determine the value of the home. Through the use of a hybrid property rule and liability rule analysis, courts could consider all of the important aspects of property value in making their determination. Whether by judicial, statutory, or constitutional design, South Carolina should revise the way courts calculate just compensation so that perhaps one day an individual whose home is taken by eminent domain can at least say that the compensation received was just.

Lucas J. Asper