

GOVERNMENT TAKING OF PRIVATE PROPERTY FOR PUBLIC USE

by Stephen R. McAllister

Going back for centuries in English and American law, there has been a high regard for property rights. As William Blackstone (1765) observed, the “third absolute right, inherent in every Englishman, is that of property The original [right] of private property is probably founded in nature.” Furthermore, Blackstone observed that so “great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” Similarly, at the Constitutional Convention, Alexander Hamilton described “the security of Property” as one of the “great [obj]ects] of Gov[ernment].” Madison wrote, “that alone is a *just* government which *impartially* secures to every man, whatever is his *own*.” Property rights have always been important to Americans.

On the other hand, governments long have been deemed to have the inherent sovereign power to exercise eminent domain—the power to appropriate private property and devote it to governmental purposes, uses that might include building a school, a highway, a prison, or a hospital, for example, or creating a public park or other public facilities. In pre-constitutional America, some states exercised such power without necessarily even compensating the landowners whose property was taken, while other states required that government pay for appropriated private property. There was not necessarily a consensus in America on these questions prior to the ratification of the Constitution and Bill of Rights.

The Bill of Rights, however, strongly and clearly adopts the rule that government must pay a fair price for any private property that it takes for public use. Indeed, the Fifth Amendment expressly protects citizens’ rights in private property from governmental confiscation – known as a “taking” – unless two constitutional requirements are met: (1)

the property must be taken for “public use”; and (2) the government must pay “just compensation” for the property. The precise language of the Fifth Amendment’s Takings Clause is that “nor shall private property be taken for public use without just compensation.”

This unit focuses on two legal issues that have arisen under the Takings Clause, both of which have proven difficult to resolve and sources of public controversy. The question that the first two cases in the unit address is: When,

short of government physically occupying or seizing private property, does government *regulation* of private property amount to a “taking” that implicates the Fifth Amendment’s protections? Commonly referred to as a “regulatory taking” claim, rather than actual

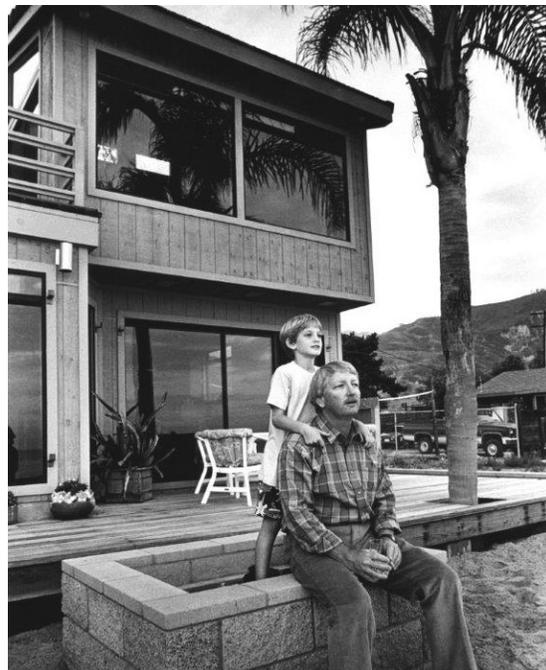
Governments long have been deemed to have the inherent sovereign power to exercise eminent domain.

physical occupation by the government – the latter of which is treated as a *per se* taking – answering the question of when the regulation of private property amounts to a “taking” for constitutional purposes is much more difficult than might at first be apparent. As discussed below, the Supreme Court has wrestled with that question for almost 100 years, and has not been able to provide a clear answer or a single test.

Nineteenth century decisions of the Supreme Court took the view that the Takings Clause applied only to a “direct appropriation” of private property, *Legal Tender Cases* (1871), or at a minimum the functional equivalent of dispossessing a private owner of the property, *Transp. Co. v. Chicago* (1879). Twentieth century cases continued to recognize that basis for a taking. For example, in *United States v. Causby* (1946), the Court found a taking that required just compensation when the federal government operated a military airbase next to a farm, with the result that the constant aviation activity significantly interfered with the farmer’s ability to raise chickens (the chickens kept killing themselves by flying into walls when the airplane noise scared them!) and even to live on the property. Another modern example is *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), in which the Court found a *per se* taking when the government authorized television cable lines to be run across the rooftops of privately-owned buildings, even though the intrusion was minimal and caused no real interference with use of the properties. The Court emphasized that actual physical occupation of land on a permanent basis by the government, no matter how small or slight, is a taking.

In early cases, the Supreme Court also recognized that governments may regulate the use of private property without being required to pay compensation for a “taking” if the regulation was designed to prevent a serious public harm, such as a use of the property that could cause harm to other citizens, *Mugler v. Kansas* (1887). A critical turning point under the Takings Clause was the Supreme Court’s decision in *Pennsylvania Coal Co. v. Mahon* (1922), a case involving a claim by a coal company that government had taken the company’s property by requiring the company to leave pillars of coal in its underground mines in order to lessen the risk that neighboring lands might subside or be adversely affected by nearby coal mines. In *Mahon*, Justice Holmes argued that government could not have unlimited power to redefine the legal rights of private property owners or else the Takings Clause could be rendered meaningless. Instead, Justice Holmes articulated the now firmly entrenched constitutional principle that “While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”

For the past 90 years, the Supreme Court has wrestled with the question of when



Patrick Nollan and his son in front of their house around the time his case was litigated. Courtesy of Pacific Legal Foundation.

“While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”

government regulation of private land has gone “too far.” An important decision in this line of cases is *Penn Central Transp. Co. v. New York City* (1978), in which the Supreme Court upheld a New York City ordinance that limited the development or alteration of historically significant buildings. When the owners of Penn Central station sought to build a massive multi-story building on top of the station and were denied permission by New York they sued, arguing that restricting their ability to develop

their property and obtain a return on their investment was a “taking.” The Supreme Court rejected the claim, concluding that in spite of the limitation on development the owners of Penn Central still could use the property in many valuable ways. The *Penn Central* decision is often noted for the proposition that the Court has no “set formula” for determining when the *Mahon* line of regulation that “goes too far” has been crossed. Instead, the Court typically has applied an “essentially ad hoc, factual” inquiry.

Two cases in this unit, *Nollan v. California Coastal Comm’n* (1987) and *Lucas v. South Carolina Coastal Council* (1992), illustrate the concept of a “regulatory taking,” and the principles the Supreme Court applies in such cases. In each case, you will see that the government had plausible and legitimate reasons for regulating coastlines, which are necessarily a limited and valuable resource in this country. At the same time, the government regulation had potentially severe effects on the rights and expectations of the citizens who owned and purchased private properties along ocean coastlines.

The second question the unit addresses follows the first: If there is a “taking” for purposes of the Fifth Amendment, is the government devoting the private property to a “public use”? There is no sliding scale under the Fifth Amendment that would, for example, allow government to expand the purposes for which it takes property if government pays more than just compensation. Rather, no matter how much government is willing to pay, the Takings Clause precludes the government from utilizing its power of eminent domain if the taking is not for a “public use.” Thus, the definition of “public use” is an important constitutional question.

In *Calder v. Bull* (1798), Justice Samuel Chase wrote that it “is against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.” For a long time, the “public use” limitation was understood to require that the government actually use the property it was taking, for example to build a road, a school, a hospital, a prison, or other government facilities. No one would seriously question that such purposes are within the meaning of “public use” as used in the Takings Clause.

But what if government takes private property because that property is run down, impoverished, deteriorating, or blighted and the government plans to redevelop the property to more valuable “private” uses? In other words, what if government seeks to transfer lower value properties to private developers who will construct new buildings, perhaps drawing in new business and new residents, as well as increasing the government’s property tax revenues as a consequence of the property becoming more valuable? Ultimately, this question has proven difficult and controversial for the Supreme Court.

The Court first addressed these issues in *Berman v. Parker* (1954), a case in which the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. where most of the housing was beyond repair. Part of the plan included the building of new streets, schools and public facilities, but the plan also provided that much of the property would be leased or sold to private parties for redevelopment. The Court unanimously held that the plan involved a “public use” because the plan, as a whole, served public purposes. Then, in *Hawaii Housing Authority v. Midkiff* (1984), the Court unanimously upheld a Hawaii statute that (with just compensation) redistributed private property among private owners in order to reduce the concentration of land ownership in Hawaii. The Court concluded that the redistribution served a public purpose.

There is no longer unanimity on this question in the Supreme Court, as the third case in this unit demonstrates. In *Kelo v. City of New London* (2005), a sharply divided Supreme Court concluded that redeveloping a “distressed” municipal neighborhood was a “public use” that justified a city in taking private property and transferring that property to others for redevelopment. *Kelo* involved a debate between the Justices about the meaning of “public use,” with the majority equating that term with “public purpose,” as did *Berman* and *Midkiff*. The dissenters, in sharp contrast, argued that “public use” means just that – the government must “use” the property. Thus, transferring property to other private owners such as developers was not a “public use.”

Kelo provoked strong, negative responses from more than 40 states. Some responses have been statutory, with state legislatures enacting laws to limit the grounds on which government can exercise its power of eminent domain. Other responses have been judicial, with state supreme courts interpreting their state constitutions to adopt a narrower definition of “public use” than the definition the Supreme Court endorsed in *Kelo*, *Berman* and *Midkiff*. The result is that many states provide greater protection to private property owners than the Constitution requires. Notably, as *Kelo* and the public reaction to the decision make clear, property rights are just as important to Americans today as they were at the Founding.



Susette Kelo in front of her little pink house, which was saved and moved to a new location in New London. Photo courtesy of the Institute for Justice.

KELO V. NEW LONDON (2005)

DIRECTIONS

Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

CONSTITUTIONAL PRINCIPLES

*Limited government
Inalienable rights*

Case Background

In *Calder v. Bull* (1798), Justice Samuel Chase wrote that it “is against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.” For a long time, the “public use” limitation was understood to require that the government actually use the property it was taking, for example to build a road, a school, a hospital, a prison or other government facilities.

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In 1998, the pharmaceutical company Pfizer built a new facility in New London, Connecticut. Seeking to improve the economic outlook of the area, the city’s New London Development Corporation offered to sell Pfizer additional land where the drug company would build a large resort/marina/condominium complex. Most of the residents of the affected neighborhoods accepted the city’s offer to purchase their property. However, Susette Kelo was one of 15 property owners who refused to sell. They maintained that the government does not have the constitutional power to take private property in order to turn it over to a private developer. The city then invoked its power of eminent domain in order to take the land. In *Kelo v. New London*, the Supreme Court was asked to determine whether the “public purpose” as intended by city government was the same thing as the Fifth Amendment’s “public use.”

DOCUMENT A

Blackstone's *Commentaries on the Laws of England* (1765)

So great ... is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.

- 1. According to Blackstone, under what conditions may government take private property for the general good of the community?**

DOCUMENT B

The Fifth Amendment (1791)

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- 1. What protections for private property are listed in the Fifth Amendment of the U.S. Constitution?**
- 2. Are these protections meant to secure the rights of individuals (in the same way that other amendments protect freedom of religion, freedom of speech, etc.,) or are they meant to secure the collective rights of communities (i.e. those who would benefit from the government taking the property)?**

DOCUMENT C

James Madison's *On Property* (1792)

A man's land, or merchandize, or money is called his property ... a man [also] has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest....

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights....

- 1. How does James Madison define property?**
- 2. Put this statement in your own words: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."**
- 3. What does Madison say the U.S. government must do in order to be "wise and just"?**

DOCUMENT D

Berman v. Parker (1954), Unanimous Opinion

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle.

It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Once the object [goal] is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here, one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress, and Congress alone, to determine once the public purpose has been established....

The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers....

The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.

- 1. Traditional approaches to the power of the state to condemn (or seize) private property were based on needs related to “(p)ublic safety, public health, morality, peace and quiet, law and order.” How did the *Berman* decision expand on that concept?**
- 2. The *Berman* Court reasoned, “In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.” Do you agree? How deferential should Courts be to democratically-elected legislatures?**
- 3. The Court held that “*the entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers...*” What means other than government seizure of property could have brought about the resources needed and/or desired by the people in a community?**

DOCUMENT E

Poletown Neighborhood Council v City of Detroit (1981), Michigan Supreme Court

This case raises a question of paramount importance to the future welfare of this state and its residents: Can a municipality use the power of eminent domain ... to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?

[Poletown Neighborhood Council] challenge[s] the constitutionality of using the power of eminent domain to condemn one person's property to convey it to another private person in order to bolster the economy. They argue that whatever incidental benefit may accrue to the public, assembling land to General Motors' specifications for conveyance to General Motors for its uncontrolled use in profit-making is really a taking for private use and not a public use because General Motors is the primary beneficiary of the condemnation.

The [city of Detroit] contend[s], on the other hand, that creat[ing] an industrial site will ... alleviate and prevent conditions of unemployment and fiscal distress. The fact that it will be conveyed to and ultimately used by a private manufacturer does not defeat this predominant public purpose.

The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.

- 1. What arguments did the 4200 displaced Poletown residents make against Detroit's plan to take their property by eminent domain?**
- 2. What arguments did the city of Detroit make in favor of the plan?**
- 3. How did the Michigan Court answer the question?**

DOCUMENT F

County of Wayne v. Edward Hathcock (2004), Michigan Supreme Court

We have concluded that this Court’s *Poletown* opinion is inconsistent with our eminent domain jurisprudence and advances an invalid reading of our constitution. Because that decision was in error and effectively rendered nugatory [invalid] the constitutional public use requirement, it must be overruled. It is true, of course, that this Court must not “lightly overrule precedent.” But because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court’s eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people’s property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.

- 1. The Michigan Supreme Court held that its ruling in *Poletown* 23 years before had been “a radical departure from fundamental constitutional principles.” What principles do you think the Court meant?**

DOCUMENT G

New London (2004)



Susette Kelo's street before redevelopment. Image courtesy Voices of American Law, Duke Law (<http://web.law.duke.edu/voices>).



Fort Trumbull street scene. Image courtesy Eric McAfee, American Dirt (<http://dirtamericana.blogspot.com>, November 25, 2009)

- 1. Do these images depict “Miserable and disreputable housing conditions”? Do they depict “distressed” conditions?**
- 2. Do these images depict businesses likely to bring significant new tax revenue to the city of New London?**

***Kelo v. New London (2005)***

[T]his is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this “Court long ago rejected any literal requirement that condemned property be put into use for the general public.” Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time.

Not only was the “use by the public” test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as “public purpose.”...

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose.” Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. 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....

In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. This Court’s authority, however, extends only to determining whether the City’s proposed condemnations are for a “public use” within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

- 1. How did the Court explain its interpretation of “public use” as “public purpose”?**
- 2. In what ways was this case similar to *Berman*?**
- 3. In what ways was this case similar to *Poletown*?**
- 4. The 5-4 ruling observes that the city had “carefully formulated an economic development plan that it believes will provide appreciable benefits to the community.” What means other than government planning are available for ensuring that a community thrives economically?**
- 5. What does the Court say about how its ruling may apply to states?**

DOCUMENT I

Kelo v. New London (2005), Dissenting Opinion

The specter of condemnation hangs over all property. Nothing 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.

Finally, in a coda, the Court suggests that property owners should turn to the states, who may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

- 1. According to this dissenting Justice, how was the Court neglecting its responsibility?**

DOCUMENT J

Kelo v. New London (2005), Dissenting Opinion

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities....

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself...

According to this dissenting Justice:

- 1. on what did the Court base its decision?**
- 2. on what should the Court have based its decision?**
- 3. which communities will be most harmed by the ruling?**

DOCUMENT K

“A Wreck of a Plan,” Charlotte Allen, July 17, 2005

The sorry truth is that governments aren't very good at rejuvenating neighborhoods. Revitalization is strictly a job for the private sector, as our own experience here in Southwest Washington is proving....

Think of Detroit demolishing the entire ethnic neighborhood of Poletown in the 1980s to build a General Motors plant that never delivered on its promised 6,000 new jobs....

Government entities, for all their subsidies, bond issues and eminent domain powers, almost always fail badly at effective urban revitalization, and those failed attempts almost always exact an appalling human cost in the form of lost homes, neighborhoods, businesses and jobs. In the District, the most spectacular recoveries of moribund urban zones – Capitol Hill over the decades, downtown and Columbia Heights almost overnight – have occurred almost entirely by way of individual consensual transactions, building by building.

- 1. What is Allen's general assessment of urban revitalization projects over time?**
- 2. What does Allen believe is the best solution to urban blight?**

DOCUMENT L

Newspaper Accounts (2009)

“Pfizer to leave city that won land-use case.”

New York Times, November 12, 2009

“Look what they did,” [Michael] Cristofaro said on Thursday. “They stole our home for economic development. It was all for Pfizer, and now they get up and walk away.”

Pfizer, the giant drug company, [has] announced it would leave the city just eight years after its arrival ... It would leave behind the city’s biggest office complex and an adjacent swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built.

“After the Homes are Gone.”

San Francisco Chronicle, November 28, 2009.

The land where Susette Kelo’s little pink house once stood remains undeveloped. The proposed hotel-retail-condo “urban village” has not been built. And earlier this month, Pfizer Inc. announced that it is closing the \$350 million research center in New London that was the anchor for the New London redevelopment plan, and will be relocating some 1,500 jobs.

- 1. Describe Pfizer’s presence in New London eight years after the ruling in *Kelo v. New London*.**
- 2. How much economic development did New London gain from its deal with Pfizer?**
- 3. How does the fact that the promised economic benefit never materialized affect your assessment of the case? If an economic boom had followed, would that have justified the takings?**

DOCUMENT M

Satellite View of Fort Trumbull (2010)



1. What signs of economic development can be seen in this satellite photo of property seized for economic development?

DIRECTIONS

Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.

KEY QUESTION

Evaluate the Court's ruling in *Kelo v. New London*.

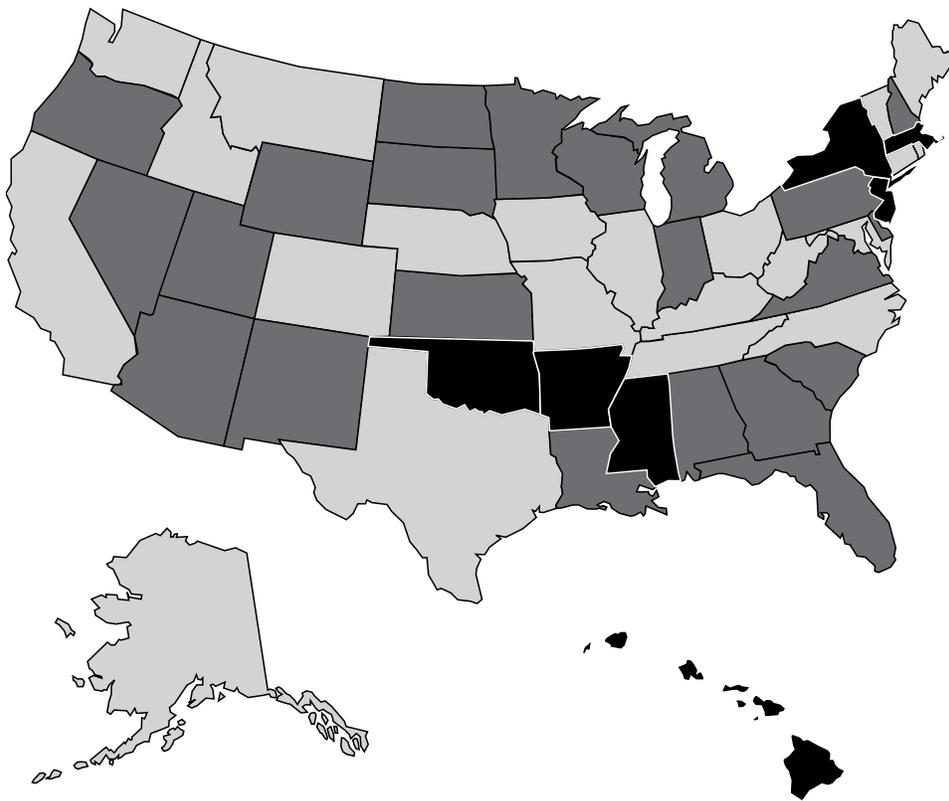
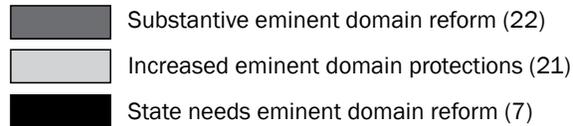
GRAPHING PROPERTY RIGHTS KELO V. NEW LONDON

For each document or case listed on the table below, assign a score on a scale of 1 – 10, showing to what extent property rights were supported.



THE ISSUE ENDURES

Eminent Domain Status Legislation Since *Kelo*, 2012



1. How does this map illustrate the principle of federalism?
2. This map was created by Institute for Justice, which represented Susette Kelo in the *Kelo v. New London* case. Why do you think they label some states the map in terms of states that “need eminent domain reform.”?