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
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
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.
LUCAS V. SOUTH CAROLINA COASTAL COUNCIL (1992)

Case Background

David Lucas bought some beachfront property in South Carolina in 1986, and planned to build two homes on the land. Two years later, the South Carolina legislature banned new construction on the land Lucas had purchased, in an effort to combat beach erosion and other environmental concerns.

Lucas filed suit and his case eventually went to the Supreme Court. He argued that the state should pay him just compensation for depriving him of all economic use of his land. South Carolina countered that the ban on construction was designed to prevent public harm due to frequent flooding, and Lucas was owed nothing. Lucas asked the Supreme Court to rule that, since the South Carolina government had taken his land, he should be compensated for it.

Lucas v. South Carolina Coastal Council (1992) illustrates the concept of a “regulatory taking,” and the principles the Supreme Court applies in such cases. 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.
**Magna Carta Excerpts (1215)**

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

1. **List some types of property protected in the Magna Carta.**

2. **According to these passages, if the King's officers take property from an individual, what must also happen?**

3. **This document is from 1215. What does this reveal about the importance of property rights in Western Civilization?**
**DOCUMENT B**

**Federal Farmer, December 25, 1787**

The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it...

1. According to this document, what kinds of laws are required for secure property rights?

2. According to this document, under what conditions can government take private property? What must the property owner receive when private property is taken for public use?

**DOCUMENT C**

**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)?
**Pennsylvania Coal v. Mahon (1922), Majority Opinion**

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. ... One fact for consideration in determining such limits is the extent of the diminution [loss of property value resulting from the law]. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. ... A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

1. According to this ruling, does government need to actually take away someone’s property in order for it to be a taking? How do you know?

2. Under the Fifth Amendment [Document C], what must government provide to owners if it takes their property?
U.S. v. Causby (1946), Majority Opinion

We have said that the airspace is a public highway. Yet it is obvious that, if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted and even fences could not be run....

The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land ... the fact the he does not occupy it in a physical sense—by the erection of buildings and the like—is not material...

We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it....

[It has been] established that there was a diminution in value of the property, and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude [taking] has been imposed upon the land.

1. According to this ruling, do property owners “own” the air space above it?

2. According to this ruling, does government need to actually take away someone’s property in order for it to be a taking? How do you know?

3. Under the Fifth Amendment, what must government provide to citizens if it takes their property?

A use restriction on real property may constitute a “taking” if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner’s use of the property.

The [Landmarks Preservation Law] embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city.

The [Landmarks Preservation Law] does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits, but contemplates, that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. ...More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment.

We conclude that the application of New York City’s Landmarks Law has not effected a “taking” of appellants’ property. The restrictions imposed are substantially related to the promotion of the general welfare, and not only permit reasonable beneficial use of the landmark site, but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

1. According to this ruling, what kinds of use restrictions may be considered “takeings”?

2. What was the Landmarks Preservation Law?

3. According to this ruling, was New York City Landmarks Preservation Commission’s denial of Penn Central’s proposal to build a 55-story office building above the terminal a taking? How do you know?

The record is clear that the proposed office building was in full compliance with all New York zoning laws and height limitations. ...Although appellants’ architectural plan would have preserved the facade of the Terminal, the Landmarks Preservation Commission has refused to approve the construction....

The Fifth Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” In a very literal sense, the actions of [New York] violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its “air rights” over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in any form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which appellants, despite good faith attempts, have so far been unable to obtain....

Over 50 years ago, [the Court’s opinion in Pennsylvania Coal Co. v. Mahon] warned that the courts were “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” The Court’s opinion in this case demonstrates that the danger thus foreseen has not abated.

1. Why does the dissenting opinion cite Pennsylvania Coal Co. v. Mahon [in Document D]?

2. How do laws that affect how property acquired in the past can be used in the future square with the Federal Farmer’s view [Document B] that people have the right to enjoy their property according to “known, standing laws”? Explain.
Beachfront Management Act, South Carolina Department of Health and Environmental Control Summary (1988)

In 1988, the South Carolina “Beachfront Management Act” (Coastal Tidelands and Wetlands Act, as amended, §48-39-250 et seq.) established a comprehensive statewide beachfront management program. The Act included several key legislative findings, including (summarized):

The importance of the beach and dune system in protecting life and property from storms, providing significant economic revenue through tourism, providing habitat for important plants and animals, and providing a healthy environment for recreation and improved quality of life of all citizens...

• Unwise development has been sited too close to and has jeopardized the stability of the beach/dune system...

• The Beachfront Management Act then established eight state policies to guide the management of ocean beaches

• Protect, preserve, restore, and enhance the beach/dune system;

• Create a comprehensive, long-range beach management plan and require local beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system....

1. List some reasons South Carolina established a comprehensive statewide beachfront management program.

2. When was this program enacted?
Lucas v. South Carolina Coastal Council (1992)

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single family homes such as those on the immediately adjacent parcels. At that time, Lucas’s lots were not subject to the State’s coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State’s police power, the ban on construction deprived him of all “economically viable use” of his property and therefore effected a “taking” under the Fifth and Fourteenth Amendments that required the payment of just compensation.

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist [paying the owner] compensation only if the ... proscribed use interests were not part of his title to begin with.

In the case of land ... we think the notion pressed by the South Carolina Coastal Council that title is somehow held subject to the “implied limitation” that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

1. What did Lucas intend to do with the land he bought in 1986?

2. Did he have legal title to do this at the time?

3. Why was he unable to carry out his plans?

4. How do laws that affect how property acquired in the past can be used in the future square with the Federal Farmer’s view [Document B] that people have the right to enjoy their property according to “known, standing laws”? Explain.

5. The 6-2 ruling asserts that the idea that government can regulate away all the economic value of land someone owns without compensating them for their loss is contrary to our “constitutional culture.” What does this mean? Do you agree? Explain.
Lucas v. South Carolina Coastal Council (1992), Dissenting Opinion

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development. The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner’s property was part of the beach or flooded twice daily by the ebb and flow of the tide. ...Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development....

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner’s property without compensation. The decision rested on two premises that until today were unassailable -- that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality....

I find no evidence in the record supporting the trial court’s conclusion that the damage to the lots by virtue of the restrictions was “total.”

...In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could....

I dissent.

1. This dissenting Justice asserts that “the State has the power to prevent any use of property it finds to be harmful to its citizens.” What evidence was there that building on Lucas’s land could have been harmful?

2. List two other objections that this Justice raises against the majority opinion in this case.
Lucas’s Property (1994)

Photos Courtesy of William A. Fischel, 

1. The dunes in the first photo are in front of Lucas’s lot. Do you observe signs of erosion or other factors that might have made construction unsafe?

2. Can you identify the two vacant lots owned by Lucas in the second photograph? Do there appear to be many vacant lots?
The Site of Lucas’s Former Property (2000)

1. The state purchased Lucas’s land from him in a settlement of his lawsuit, and the state then subsequently sold the land to a developer without building restrictions. What differences do you observe in this picture compared to the ones from 1994?

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
How much should government be able to regulate property before it becomes a “taking” requiring just compensation?
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.

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Name</th>
<th>Decision</th>
<th>Score</th>
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<tr>
<td>1215</td>
<td>Magna Carta</td>
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<td>1787</td>
<td>Federal Farmer</td>
<td>Majority</td>
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<tr>
<td>1791</td>
<td>Fifth Amendment</td>
<td>NY Majority</td>
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<td>1922</td>
<td>PA Coal v. Mahon</td>
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<td>1946</td>
<td>U.S. v. Causby</td>
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<td>Penn Central v. NY</td>
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