

# Eminent Domain or Eminent Disdain?

---

Brian W. Blaesser, Esq.

Robinson & Cole LLP

---

Boston • Hartford • Stamford • New York • White Plains • Sarasota

July 14, 2005

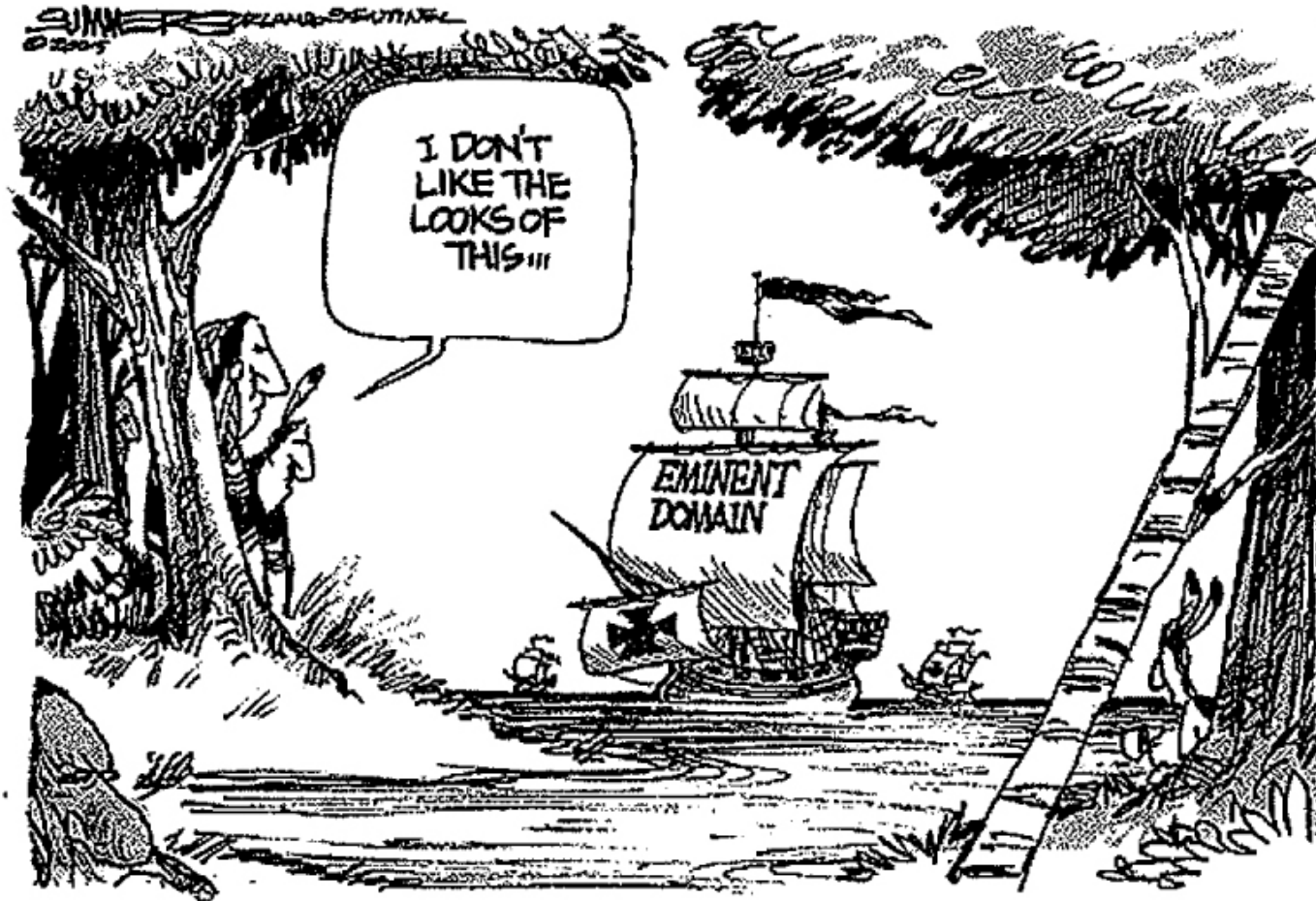
**CONDEMNED CONDEMNED CONDEMNED CONDEMNED CONDEMNED**

**CONDEMNED CONDEMNED CONDEMNED**



2005 Government Affairs Directors Institute





# Introduction/Overview

- Eminent Domain – Refresher on Definition
- Where We Were Before *Kelo*
- The U.S. Supreme Court's Decision in *Kelo*
- Where We are After *Kelo*
- New Battle Ground Over Use of Eminent Domain for Private Redevelopment
- Policy Issues and Strategies for Realtors®



# Eminent Domain

## Definition

Eminent domain is the power of government to take private property for “public use” without the owner’s consent.



# Eminent Domain

## Source of Power to Take Property for Public Use

- Belongs to every independent government.
- Inherent in the sovereign state and founded on the law of necessity.
- Requires no constitutional recognition.

# Eminent Domain

## Federal Just Compensation Clause

**Fifth Amendment to the U.S. Constitution**  
(Made applicable to the states through the  
Fourteenth Amendment)

“. . . nor shall private property be taken  
for public use without just compensation.”



# Eminent Domain

## Constitutional Limitations on Use of Power

- Payment of just compensation
- Due Process

# **Eminent Domain vs. Police Power**

---

**Is there a difference?**

---



# Eminent Domain vs. Police Power

**YES**

**Eminent Domain** = The power of the sovereign to take private property because of its need for the public use

**vs.**

**Police Power** = The power to regulate the use of property to prevent its use in a manner detrimental to the public interest



# Eminent Domain vs. Police Power

---

Was there a difference  
before *Kelo*?

---



# Not Really



2005 Government Affairs Directors Institute



# *Berman v. Parker*

## 348 U.S. 26 (1954)

### Public Purpose = Public Use

“Once the object is within the authority of [the legislature], the right to realize it through the exercise of eminent domain is merely the means to an end.”

# *Berman v. Parker*

## 348 U.S. 26 (1954)

### Public Purpose = Public Use

“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. . . [the legislature] alone to determine, once the public purpose has been established.”**



# *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984)

## Public Purpose = Public Use

“To be sure, the Court’s cases have repeatedly stated that one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”



# *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984)

## Public Purpose = Public Use

“But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.  
*See Berman v. Parker. . . .*”



# *Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984)

## Public Use

“The “public use” requirement is thus coterminous with the scope of a sovereign’s police powers.”



# Two Major Effects of *Berman* and *Midkiff* on Condemnation Law

- Expanded the definition of public use to include any conceivable public purpose.
- Contracted the scope of judicial review (i.e., greater judicial deference to government determination of public purpose justifying condemnation).

# Evolution of Expanded Scope of Condemnation

- **Slum clearance to improve housing.**
- **Slum clearance with the related purpose of commercial or industrial development.**
- **Clearance of economically viable property for more desirable private development.**

# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **FACTUAL BACKGROUND**

- **1990: City designated by state agency as a “distressed municipality” after decades of economic decline**
- **1996: Federal Government closed the Naval Undersea Warfare Center (Fort Trumbull Area), that had employed over 1,500 people**
- **1998: City’s unemployment rate nearly double that of the State**

# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **FACTUAL BACKGROUND**

- **1998: State authorized \$5.35 million bond issue to support economic development planning by the New London Development Corporation (NLDC) –private nonprofit entity**
- **1998: Pfizer announced it would build a \$300 million research facility on a site adjacent to Fort Trumbull area**
- **2000: City approved NLDC's development plan for Fort Trumbull area**

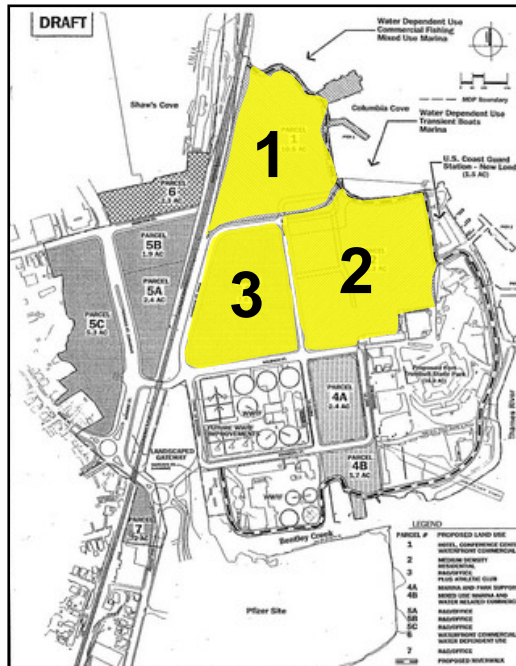
# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **FACTUAL BACKGROUND**

- 1998: NLDC finalized development plan for 90 acres in Fort Trumbull designed to capitalize on presence of Pfizer facility
- 2000: City approved NLDC's development plan for Fort Trumbull area
- 2000: City designated NLDC as its development agent and, per state statute, to purchase or acquire property by eminent domain in City's name

# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

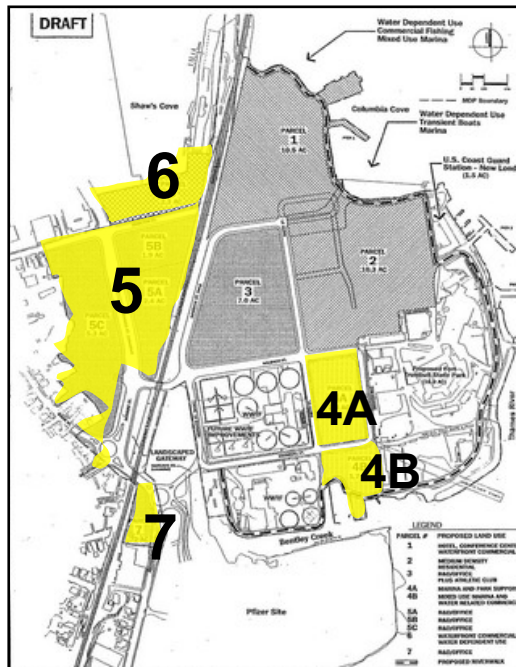
## FACTUAL BACKGROUND (The Development Plan)



- 90- Acre area with 115 privately owned properties plus 32 acres formerly owned by Naval facility (18 of 32 acres now = Trumbull State Park)
- 7 Parcels in Plan
- Parcel 1: Waterfront Conference Hotel
- Parcel 2: 80 New Residences
- Parcel 3 (north of Pfizer): 90,000 s.f. of R&D Office

# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## FACTUAL BACKGROUND (The Development Plan)



- Parcel 4A (2.4 acres adjacent to park): parking or retail services for visitors
- Parcel 4B: Renovated marina + River Walk
- Parcels 5, 6 & 7: Office & Retail space, parking and water-dependent commercial uses

# **Kelo v. City of New London**

---

## **The Petitioners**

---



# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **FACTUAL BACKGROUND** (The Development Plan and the Petitioners)

- The nine Petitioners owned 15 properties in the area
  - 4 in Parcel 3
  - 11 in Parcel 4A
- 10 parcels occupied by owner or family member
- 5 parcels are held as investment property

# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **FACTUAL BACKGROUND**

- 2000: NLDC successfully negotiated purchase of all most of parcels in 90-acre area except for those of Susette Kelo and 8 other Petitioner homeowners
- 2000: NLDC initiated condemnation proceedings against Kelo and the other homeowners



# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## U.S. Supreme Court's Decision

- **Issue:** Does the City's redevelopment plan serve a "public purpose"?
- **HELD:** YES
- **Because:**
  - 1) Plan is comprehensive
  - 2) Plan thoroughly deliberated prior to adoption
  - 3) Private developers required by contract to carry out the redevelopment plan
  - 4) Court has limited scope of review

**Susette Kelo, et al. v. City of New London, CT  
545 U.S. \_\_\_\_ (June 23, 2005)**

**Two Polar Propositions**

**“On the one hand...”**

**“ it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”**

**“On the other hand...”**

**“it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.”**



**Susette Kelo, et al. v. City of New London, CT  
545 U.S. \_\_\_\_ (June 23, 2005)**

**Key Distinction**

**“As for the first proposition, the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*...The taking before us, however, would be executed pursuant to a ‘carefully considered’ plan...[T]here was no evidence of an illegitimate purpose in this case.”**



**Susette Kelo, et al. v. City of New London, CT  
545 U.S. \_\_\_\_ (June 23, 2005)**

**Taking A's Property to Give to B**  
**Key Distinction**

**“Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.”**



# Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)

## **No Evidence of Illegitimate Purpose in Taking A's Property to Give to B**

### **Record Below Demonstrates Development Plan:**

- Not intended to serve the interests of Pfizer or any other private entity
- Intended to revitalize the local economy by
  - Creating temporary and permanent jobs
  - Generating a significant increase in tax revenue
  - Encouraging spin-off economic activities and
  - Maximizing public access to the waterfront

# **Susette Kelo, et al. v. City of New London, CT 545 U.S. \_\_\_\_ (June 23, 2005)**

## **No Evidence of Illegitimate Purpose In Taking A's Property to Give to B**

- **Because “while the City intends to transfer certain of the parcels to private developer in a long term lease, and developer, in turn, expected to lease to other private entities—unknown when the plan was adopted—Petitioners cannot accuse government of taking A’s property to give to B, when the identity of B was unknown.”**

# HUH?



**Susette Kelo, et al. v. City of New London, CT  
545 U.S. \_\_\_\_ (June 23, 2005)**

**Court Rejects Requirement  
of Literal Use by Public**

**“[T]his is not a case in which the City is planning to open the condemned land . . . 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 this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’”**



# **Kelo v. City of New London**

---

## **The Dissenters**

---



# Susette Kelo, et al. v. City of New London, CT

JUSTICE O'CONNOR (Joined by Rehnquist, Scalia and Thomas)

## KEY ARGUMENTS



- Three categories of takings that comply with public use requirement:
  - For public ownership (e.g., a road)
  - Private party to private party when (common carriers) that makes the property available for public's use (e.g., RR, public utility, stadium)
  - Private party to private party even if property destined for private use but only in certain circumstances

# Susette Kelo, et al. v. City of New London, CT

JUSTICE O'CONNOR (Joined by Rehnquist, Scalia and Thomas)

## KEY ARGUMENTS



- Third (private to private) category guided by precedent
  
- Precedent: Where “pre-condemnation use of property afflicted affirmative harm on society . . . and eliminating the existing property use was necessary to remedy the harm”:
  - *Berman* (“blighted” neighborhood even though Mr. Berman’s Dept Store not blighted)
  - *Midkiff* (condemnation scheme to redistribute title to land controlled by oligopoly)

# Susette Kelo, et al. v. City of New London, CT

JUSTICE O'CONNOR (Joined by Rehnquist, Scalia and Thomas)

## KEY ARGUMENTS



- Problem with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing
- Specifically: Any boon to the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs.
- If incidental public benefits are sufficient to satisfy the "public purpose" test, then it doesn't matter what inspired the taking in the first place!

# Susette Kelo, et al. v. City of New London, CT

## JUSTICE THOMAS

### KEY ARGUMENTS



- The Public Use clause as originally understood = meaningful limit on government's eminent domain power
- The Takings Clause of the Constitution prohibits government from taking property except "for public use."
- Based on meaning of "use" at the time of the adoption of the Constitution, the term "public use" meant that either the government or its citizens as a whole must actually "employ" the property which is more than receive "incidental benefits"

# **Kelo v. City of New London**

---

## **Justice Kennedy's Concurrence**

---



# Susette Kelo, et al. v. City of New London, CT

## JUSTICE KENNEDY

### KEY ARGUMENTS



- A court applying the Supreme Court's deferential standard of review (taking rationally related to a conceivable public purpose) can still strike down an eminent domain taking that confers benefits on particular, favored private entities, with only incidental or pretextual public benefits

# Susette Kelo, et al. v. City of New London, CT

## JUSTICE KENNEDY

### KEY ARGUMENTS



- A court must review the record where there is an allegation of impermissible favoritism to private parties
- Here the trial court concluded that benefiting Pfizer was not the primary motivation or effect of the development plan, but rather to take advantage of Pfizer's presence

# Susette Kelo, et al. v. City of New London, CT

## JUSTICE KENNEDY

### KEY ARGUMENTS



- I agree with Court that simply because the purpose of the taking is economic development, there should be a presumption of invalidity or that the taking should be subject to a stricter level of scrutiny.

# Susette Kelo, et al. v. City of New London, CT

## JUSTICE KENNEDY

### KEY ARGUMENTS



- BUT, a more stringent standard of review than the rational basis standard of *Berman* and *Midkiff* may be appropriate for a “narrowly drawn category of takings”
- For Instance: “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”

# *After Kelo*

---

## The Backlash

---





624

# *Kelo* has Unified the Political Spectrum

## Conservatives

Oppose government coercion  
and disrespect for private property

## Liberals

Object to exercise of government authority  
on behalf of powerful at expense of powerless



# Susette Kelo, et al. v. City of New London, CT

**THE BACKLASH**  
**(U.S. House of**  
**Representatives)**

- Resolution adopted 365-33 expressing “grave disapproval . . . Regarding the majority opinion of the Supreme Court . . . That nullifies the protections afforded private property owners in the takings clause of the Fifth Amendment.”

# Susette Kelo, et al. v. City of New London, CT

## THE BACKLASH (U.S. Senate)

- Senator Cornyn (R) has introduced Senate Bill (S1313: The Protection of Homes, Small Businesses and Private Property Act)
- Purpose: Bars federal funds for state and local governments that seize land for private development

# Susette Kelo, et al. v. City of New London, CT

## **THE BACKLASH** **(U.S. House of** **Representatives)**

- **June 30, 2005: House voted 231-189 in favor of amendment (H. Amdt. 427) attached to fiscal year 2006 appropriations bill (H. R. 3058) to prohibit use of any federal funds to implement the redevelopment plan addressed in *Kelo***



# Susette Kelo, et al. v. City of New London, CT

**THE BACKLASH**  
**(U.S. House of**  
**Representatives)**

- **House Judiciary Committee Chairman, James Sensenbrenner (R-Wis.) introduced bill to deny all federal funding, including block grants, to states that allow taking of property for economic reasons.**

# *After Kelo*

---

## Policy Issues and Strategies for Realtors®

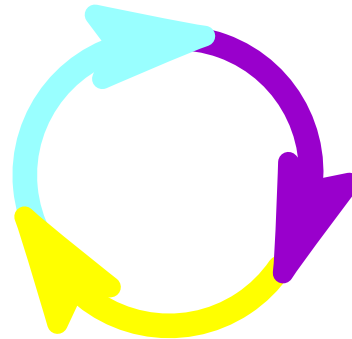
---



# Public Use and Judicial Review

## Reinforcing Effect

**Courts accept more government initiatives as valid public uses → fewer cases to decide → so Courts accept broader scope of public use.**



**Susette Kelo, et al. v. City of New London, CT  
545 U.S. \_\_\_\_ (June 23, 2005)**

**The Court's Invitation**

**“[W]e 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.”**

# POLICY QUESTIONS

- **Should use of eminent domain be limited to takings for public ownership (e.g., a road)?**
- **Should use of eminent domain for private to private transfers be limited to when the private party receiving the property is required to make the property available for public's use (e.g., RR, public utility, stadium)?**
- **Should the use of eminent domain for private to private transfers never be allowed when it is for economic development purposes?**

# POLICY QUESTIONS

- **Should use of eminent domain for private to private transfers be allowed only where there is a finding of “blight”?**
- **Should use of eminent domain for private to private transfers only be allowed where the property taken is, in its pre-condemnation use, causing a “harm” to the public?**

# POLICY QUESTIONS

- **Should the measure of value of private property taken by eminent domain include not only the fair market value of the property, but also all other reasonable and necessary costs generated by the condemnation (e.g., costs of legal counsel, temporary housing, and lost business revenue)?**
- **In the case of eminent domain for economic development, should the private property owner whose property is condemned receive the fair market value based on the ultimate use of his or her property as redeveloped?**



# NAR's Policy Position on Eminent Domain

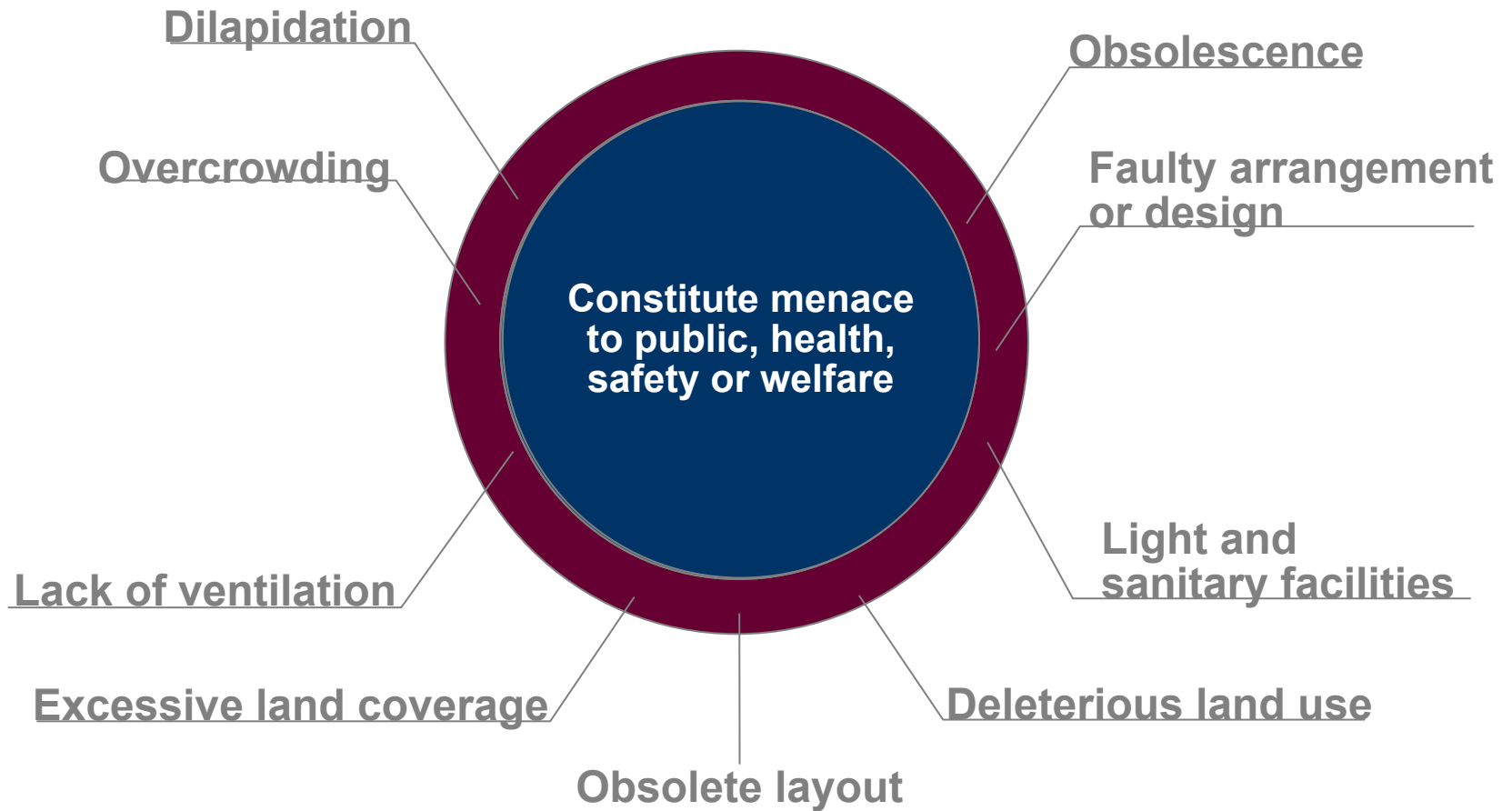
## When Government Exercises Eminent Domain

- Use eminent domain only when necessary to materially advance a real and substantial public purpose or benefit
- Demonstrate substantial public purpose or benefit by means of objective evidence
- Just compensation should include not only the value of the property condemned, but also all other reasonable and necessary costs generated by the condemnation (e.g., costs of legal counsel, temporary housing, and lost business revenue)



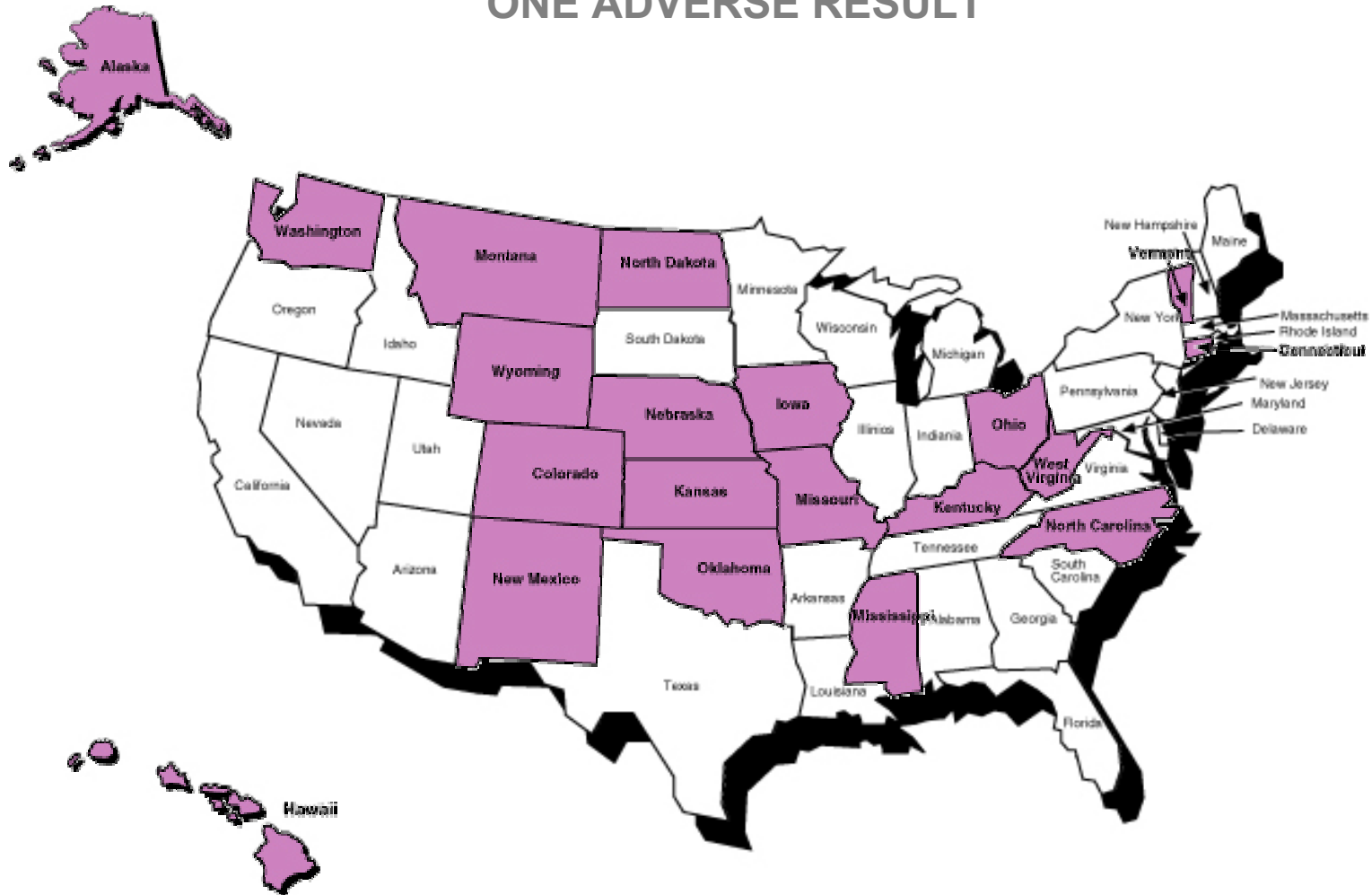
# Blight – State Statutes

BLIGHT FACTORS LEAD TO  
MORE THAN ONE ADVERSE RESULT



# Blight – State Statutes

BLIGHT FACTORS – LEADS TO MORE THAN ONE ADVERSE RESULT



# Blight – State Statutes

## COMBINATION TEST BY TYPE OF AREA

Dilapidation, deterioration,  
age, or obsolescence

High density of  
population and  
overcrowding

Conductive  
to ill health,  
transmission of  
disease, infant  
mortality, juvenile  
delinquency, and crime  
and are detrimental to  
the public health,  
safety, morals,  
or welfare

Inadequate  
provision for  
ventilation, light,  
air, sanitation,  
or open spaces

The existence of  
conditions which  
endanger life or  
property by fire

Any combination of these factors

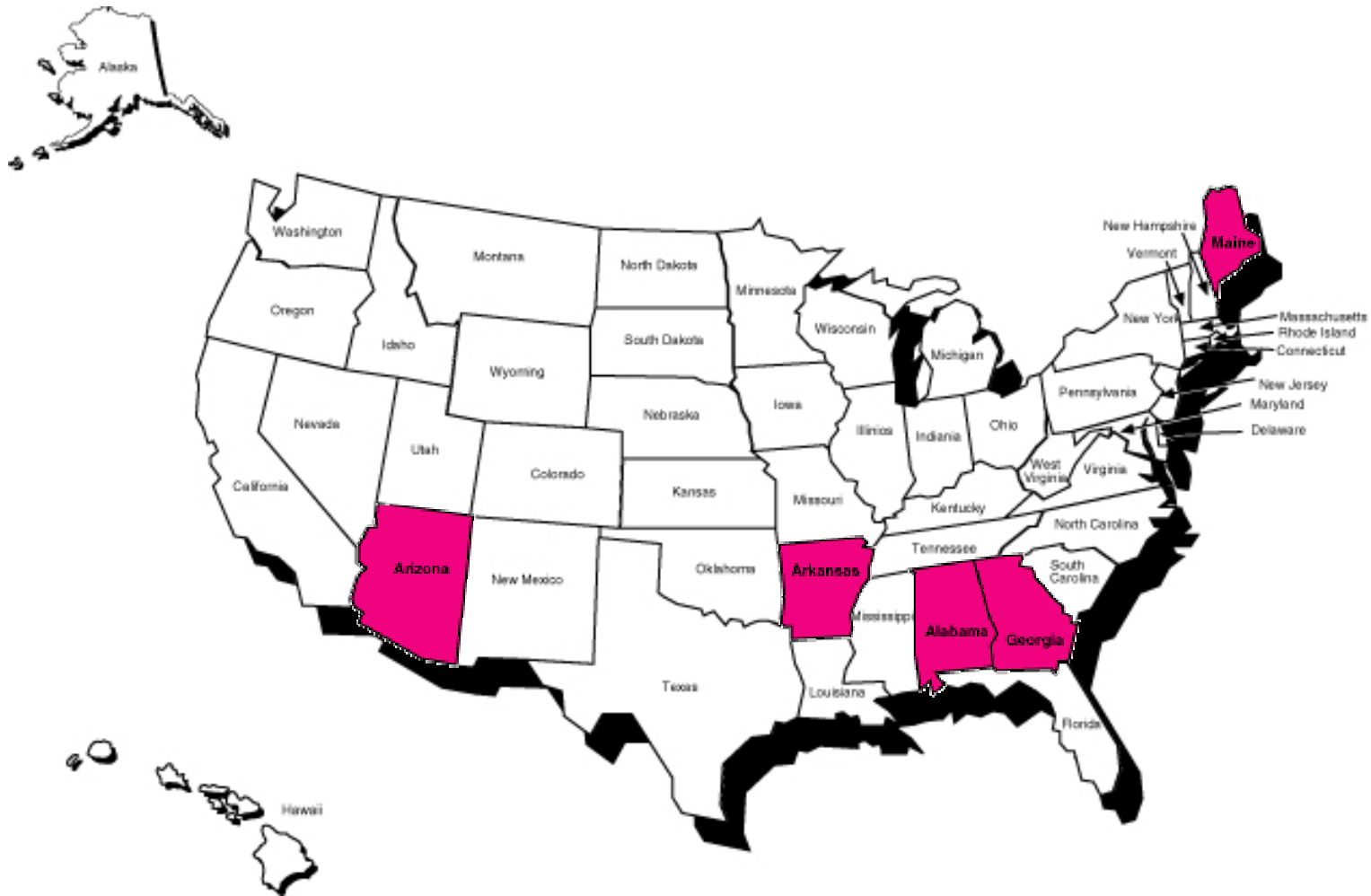
# Blight – State Statutes

## COMBINATION TEST BY TYPE OF AREA



# Blight – State Statutes

## COMBINATION TEST BY TYPE OF AREA



# One Solution–Limit Redevelopment to Where There is “True” Blight

- Require more than one blight factor
- Require a combination of one or more meaningful adverse impacts as a result of various blight factors
- Require a numerical test – e.g., finding that 2/3 of all buildings in area are blighted (North Carolina)

# Eminent Domain or Eminent Disdain?

---

Brian W. Blaesser, Esq.  
Robinson & Cole LLP

---

Boston • Hartford • Stamford • New York • White Plains • Sarasota

July 14, 2005

