Eminent Domain  
Opposition Brief by Drew Magness 

*A 2005 photo shows Susette Kelo’s house near foundations from recently destroyed homes. Kelo’s home was eventually relocated.*

Eminent Domain is perhaps the most widely cited example in the Stoa LD resolution. And that makes sense! It’s a clear violation of private property rights for the public need. Earlier in the year, eminent domain was only cited by affirmatives claiming it’s necessity and benefits for essential government infrastructure. Since then, the dynamic has changed. Now it’s not just affirmatives who get to use eminent domain as an application, but negatives!

Negatives have been doing their research and finding wonderful sob-stories, statistics, quotes and court cases to say that eminent domain is unjust, impractical and outright horrendous. Now your job is to come back and show them how wrong they are. Monument is providing you the tools with which to do so. Use this brief perhaps in the same way you’d use a 2A brief in policy debate or throw the evidence in your 1AC; it’s totally up to you.

Basically, this brief does a few things. It shows that eminent domain isn’t some blank check being signed by the government. It requires public necessity, there are state limits on how it can and cannot be used. It’s not unlimited.

But those arguments merely mitigate. Get offensive! Show your judge how eminent domain is necessary for governments to function. We need it for energy, for national security, for national parks, for everything!

Use this brief as a jumping-off point to find your own research and ideas. Don’t use this brief as a crutch. Let it spark your creativity and begin to delve in and research eminent domain law, property law, founding fathers philosophy, court decisions and all of the intriguing aspects of this resolution.

Opposition Brief: Eminent Domain

Eminent Domain requires public necessity

Robert C. Bird & Lynda J. Oswald October 2009 “Necessity as a Check on State Eminent Domain Power” University of Pennsylvania Journal of Constitutional Law October 2009, Robert Bird is Assistant Professor of Business Law, Ackerman Scholar, University of Connecticut School of Business. Lynda J. Oswald Professor of Business Law and Michael R. and Mary Kay Hallman Fellow, Stephen M. Ross School of Business, University of Michigan. <https://www.law.upenn.edu/journals/conlaw/articles/volume12/issue1/BirdOswald12U.Pa.J.Const.L.99(2009).pdf>

For example, the Massachusetts Supreme Court stated in 1911 that: “The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein.”

Necessity, not public use is the meaningful check on Eminent Domain

Robert C. Bird & Lynda J. Oswald October 2009 “Necessity as a Check on State Eminent Domain Power” University of Pennsylvania Journal of Constitutional Law October 2009, Robert Bird is Assistant Professor of Business Law, Ackerman Scholar, University of Connecticut School of Business. Lynda J. Oswald Professor of Business Law and Michael R. and Mary Kay Hallman Fellow, Stephen M. Ross School of Business, University of Michigan. <https://www.law.upenn.edu/journals/conlaw/articles/volume12/issue1/BirdOswald12U.Pa.J.Const.L.99(2009).pdf>

For far too long, necessity doctrine has remained the dormant doctrine of eminent domain. While the necessity requirement has been largely ignored, the public use requirement has received significant attention. In the wake of the Kelo decision and the broad discretion of eminent domain power that case brings, the public use requirement has been largely neutered as a meaningful check on condemnation power. Necessity remains one of the few tools available.

Eminent Domain is necessary for infrastructure

Kinder Morgan Date N/A “Kinder Morgan Eminent Domain White Paper” Kinder Morgan is the largest energy infrastructure company in the United States. We own an interest in or operate approximately 84,000 miles of pipelines and approximately 155 terminals. Our pipelines transport natural gas, refined petroleum products, crude oil, carbon dioxide (CO2) and more. Our terminals store and handle petroleum products, chemicals and other products. <http://www.kindermorgan.com/content/docs/White_Eminent_Domain.pdf>

Eminent domain is based on historical precedent and legal case law. In some of its earliest uses, and even to the present day, eminent domain has been used by the government to acquire needed private property for public use, notably for such things as transportation, infrastructure and water supply projects, national parks, construction of public buildings and national defense, to name a few. The simple fact is that our key public infrastructure – such as highways, rail lines and airports – are vital to our modern mobility. But, at the same time, they cannot be constructed without using some private lands. Eminent domain, therefore, is necessary to ensure that no single landowner can block infrastructure of benefit to the public at-large.

Eminent Domain necessary for national parks and national security

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In the 1930s, eminent domain was used by the federal government to acquire land for the Mammoth Cave, Shenandoah and Great Smoky Mountains national parks, and later for military bases and naval stations during World War II. Also, it was used after the Sept. 11, 2001, terrorist attacks to obtain space for federal agencies whose offices were demolished when terrorists flew airliners into the World Trade Towers. Land has also been acquired along the United States-Mexico border to improve inspection and enforcement and provide additional border facilities for use by U.S. government agencies.

States have limited Eminent Domain

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It is instructive to note that in the 10 years after Kelo, 45 states have considered or enacted legislation to limit the use of eminent domain. One limitation often proposed is to limit transfers in commercial projects to private parties that are common carriers – such as pipelines.

Eminent Domain is a Last Resort

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Opponents of energy projects incorrectly and unfairly like to label eminent domain a “seizure” or a “land grab,” but that is far from the truth. The use of eminent domain condemnation actions, always with just compensation to the landowner, is a rare last resort. We go to court only if all attempts to obtain easements for right-of-way are unsuccessful and mutually beneficial agreements with landowners cannot be reached.

Kelo v. New London is an Outlier

Abraham Bell and Gideon Parchomovsky 2006, “The Uselessness of Public Use.”, Abraham Bell is a Visiting Professor, Fordham University School of Law; Lecturer, Bar Ilan University, Faculty of Law Gideon Parchomovsky is a Professor, University of Pennsylvania Law School; Visiting Professor, Bar Ilan University, Faculty of Law. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=903805>

The political response to Kelo has been broad and far reaching. Several states have already refined their state constitutional standards for eminent domain to reject Kelo and impose a narrower test of public use, while others have taken up bills to do the same. Both houses of Congress have considered, and the House of Representatives has approved, proposed legislation that would force states to adopt a narrower definition of public use at the penalty of losing federal funds. Kelo remains a popular punching bag in the media, and the decision came up for criticism repeatedly in confirmation hearings for the recently appointed Chief Justice Roberts and Justice Alito.

Eminent Domain is the least offensive way to take property

Abraham Bell and Gideon Parchomovsky 2006, “The Uselessness of Public Use.”, Abraham Bell is a Visiting Professor, Fordham University School of Law; Lecturer, Bar Ilan University, Faculty of Law Gideon Parchomovsky is a Professor, University of Pennsylvania Law School; Visiting Professor, Bar Ilan University, Faculty of Law. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=903805>

Limiting the ability of government to use eminent domain to further economic goals will not prevent the government from using its more invasive powers to inflict identical harms on private property rights, but without compensation. Contrary to public sentiment, then, eminent domain should be seen as the least offensive of government’s property related powers

Eminent Domain is preferable to taxation and regulation

Abraham Bell and Gideon Parchomovsky 2006, “The Uselessness of Public Use.”, Abraham Bell is a Visiting Professor, Fordham University School of Law; Lecturer, Bar Ilan University, Faculty of Law Gideon Parchomovsky is a Professor, University of Pennsylvania Law School; Visiting Professor, Bar Ilan University, Faculty of Law. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=903805>

Importantly, the government is required to pay compensation to the private property owner only when its action is classified as a taking. Otherwise—insofar as the Constitution is concerned—the property owner must simply bear the cost. Thus, from the vantage point of private property owners, eminent domain is preferable to both taxation and regulation, as it offers them compensation for the taken property. This fact is reflected by property rights advocates’ embrace of doctrines of regulatory takings and an attendant surfeit of inverse condemnation actions.

There is a need for the government to take private property

Steven Shavell December 2002 “An Economic Analysis of Property Rights.” Steven Shavell is a Samuel R. Rosenthal Professor of Law and Economics at Harvard John M. Olin Center for Law, Economics and Business. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=370029>

But the requirements of the state for roads, schools, libraries, and the like, will vary and are in important respects unpredictable. For that reason, there will be a continuing need for the state to acquire property from private parties.

Bargaining fails. Eminent Domain is necessary

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However, the problem of an impasse in bargaining may become severe when there are many private owners who own parcels and when, if any one of them does not sell, the whole project would be seriously affected or halted. In the building of a road, for example, the ability of essentially any individual on its planned path to prevent the project from going forward could cause serious bargaining problems for a government agency that must acquire land through purchases