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Eduardo M. Penalver

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Cover Page Footnote

Associate Professor of Law, Fordham University School of Law; Visting Associate Professor, Yale Law School. This paper was originally presented at the twelfth annual Gallivan Conference at the University of Connecticut School of law. Special thanks to the participants in that conference and to Jeremy Paul for organizing an interesting discussion of eminent domain.

ESSAY

PROPERTY METAPHORS AND *KELO V. NEW LONDON*: TWO VIEWS OF THE CASTLE

*Eduardo M. Peñalver**

Metaphor occupies something of a fraught position within legal discourse. As Robert Tsai has put it, “[l]egal scholars have traditionally understood metaphor as, at worst, a perversion of the law, and at best, as a necessary but temporary place-holder for more fully developed lines of argument.”¹ Jeremy Bentham, for example, condemned metaphor as the very antithesis of legal reasoning.² And Benjamin Cardozo expressed a similar suspicion when he said that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”³ The strenuousness of these objections to the use of metaphor is a testament to metaphor’s power to guide, or distort, the way we think about legal categories.

Bruce Ackerman has famously distinguished the property discourse of “scientific policymakers” from that of “ordinary observers.”⁴ Although hostility to the use of metaphor in legal theory is often tinged with elitism, the use of metaphor within the discourse of property is not limited to Ackerman’s “ordinary observers.” Rather, both “scientific policymakers” and “ordinary observers” make ample use of metaphor in their discussions and analyses of property. The problem—and this may go a long way towards explaining some of the controversy and confusion surrounding the now infamous case of *Kelo v. New London*⁵—is that the two groups rely on fundamentally different metaphors.

For the scientific policy maker, the dominant property metaphor is the “bundle of sticks.”⁶ From their first year in law school, lawyers are taught that, contrary to what they may have thought, property does not refer to

* Associate Professor of Law, Fordham University School of Law; Visiting Associate Professor, Yale Law School. This paper was originally presented at the twelfth annual Gallivan Conference at the University of Connecticut School of Law. Special thanks to the participants in that conference and to Jeremy Paul for organizing an interesting discussion of eminent domain.

1. Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 Geo. L.J. 181, 186 (2004).

2. *See id.*

3. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

4. *See generally* Bruce Ackerman, *Private Property and the Constitution* (1977).

5. *Kelo v. New London*, 125 S. Ct. 2655 (2005).

6. *See* Carol M. Rose, *Property and Persuasion* 278 (1994).

things in the world, or even to the relationship between an owner and his stuff, but rather to discrete rights among people with respect to things. Moreover, those rights, although they tend to come in prepackaged bundles, can, on this view, be infinitely disaggregated and repackaged. I may own a parcel of land in fee simple, but I can peel off a few years and sell them as a leasehold, or slice off the right to build a second story on my house and sell it to my neighbor as a negative easement. Viewing property in this flexible way is extremely helpful for lawyers, who are often called upon when owners want to fine-tune their property arrangements in some subtle and fine-grained way.

But, as Thomas Grey observed in his famous article, "The Disintegration of Property," taken too literally, the "bundle of sticks" metaphor can lead to the destruction of property itself as an intelligible category.⁷ By incorrectly suggesting that all property rights are equivalent to one another, the bundle of sticks metaphor ignores the fact that, as Carol Rose has noted, some property rights are likely to be more significant or fundamental than others.⁸ And it disregards the possibility that, as Thomas Merrill and Henry Smith have argued, it might be very costly to move away from a finite number of standard property forms towards the bundle of sticks' image of limitless malleability.⁹ For all its shortcomings, however, the bundle of sticks metaphor continues to serve a useful function for lawyers trying to get their minds around the complexities of property doctrine and, consequently, is not likely to disappear any time soon.

The same is true for the metaphor that dominates the property discourse of "ordinary observers," the notion that a person's home is her castle. The conception of one's home as a castle conjures a whole host of ideas about the nature of private ownership. At the outset, however, it is important to distinguish between two different versions of the castle metaphor: the castle as dominion and the castle as dignity.

The castle metaphor understood as dominion conceives of the homeowner as exercising a virtually unlimited power over his property, a "sole and despotic dominion," as William Blackstone put it.¹⁰ The dominion version of the castle metaphor calls to mind the image of impenetrable fortress walls. On this reading, the castle metaphor yields a very robust, perhaps even absolute, conception of the owner's right to exclude.¹¹ This right to exclude encompasses private parties—who are excluded through, among other things, the laws of trespass—as well as the

7. See Thomas C. Grey, *The Disintegration of Property*, in *Property: Nomos XXII*, at 69 (J. Roland Pennock & John W. Chapman eds., 1980).

8. See Rose, *supra* note 6, at 280.

9. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L.J.* 1, 35-37 (2000).

10. William Blackstone, 2 *Commentaries* *2.

11. See Joseph William Singer, *The Ownership Society and Regulatory Takings: Castles, Investments, and Regulatory Takings*, *Harv. Envtl. L. Rev.* (forthcoming 2006) (manuscript at 7-8), available at <http://ssrn.com/abstract=845904> (discussing the despotic dominion conception of the castle metaphor).

state, whose entry into the home is resisted through any number of legal doctrines, including the Fourth Amendment. The state can of course attempt to “enter” one’s property in a multitude of ways—for example, by regulating what goes on inside one’s castle. Unsurprisingly, the castle metaphor rejects these as well, relying on other legal doctrines, such as regulatory takings law, to accomplish the task.

In contrast to this notion of the castle as a “despotic dominion,” as a bulwark against third parties, and, perhaps most importantly, against the state, there is an alternative interpretation, one that is often overlooked or erroneously lumped in with the dominion conception. On this alternative view, the castle metaphor is a statement not so much about the power of the property owner to do as he pleases, but about the inherent dignity of homeownership. Apart from, or perhaps in addition to, any connotation of unqualified power, the statement that one’s home is a castle can be understood as a statement about the subjective importance and status that our society attaches to homeownership. Consider the famous nineteenth century ballad, “Home, Sweet Home,” with its assertion that, “Be it ever so humble there’s no place like home!”¹² The dignitary reading of the castle metaphor evokes precisely the same irony of the attachment homeowners develop with their property: You may think this home of mine is a worthless shack, but this is my home, and therefore to me it’s a castle.

The contours of the castle metaphor help to explain a great deal of the public reaction to the *Kelo* case, which concerned the contours of the state’s power of eminent domain. That power, enshrined in the Fifth Amendment’s Takings Clause, permits the state to take one’s property “for public use” upon the payment of “just compensation.”¹³ This power is anathema to the despotic dominion version of the castle metaphor for two reasons. First, the very fact of being forced to sell one’s property—at any price—violates the metaphor’s vision of an owner’s absolute and exclusive

12. John Howard Payne, *Home Sweet Home*, in *Yale Book of American Verse* 34 (Thomas R. Lounsbury ed., 1912). The ballad, written in 1823 as part of an operetta, achieved remarkable popularity in a very short period of time after its publication. See Peter Goodman, *Hampton, Sweet Hampton*, *Newsday*, Mar. 22, 1998, at H30. Needless to say, it has, in the intervening century, become an American cultural icon as an unapologetic ode to the humble dignity of homeownership:

Mid pleasures and palaces though we may roam,
 Be it ever so humble there’s no place like home!
 A charm from the sky seems to hallow us there,
 Which, seek through the world, is ne’er met with elsewhere.
 Home! home! sweet, sweet home!
 There’s no place like home!
 An exile from home, splendor dazzles in vain:
 O, give me my lowly thatched cottage again!
 The birds singing gayly that came at my call,—
 Give me them,—and the peace of mind dearer than all!
 Home! home! sweet, sweet home!
 There’s no place like home!

Payne, *supra*, at 34.

13. U.S. Const. amend. V.

control over his property. Second, as if to add insult to injury, the constitutional measure of “just compensation” for eminent domain—fair market value—implicitly rejects the high subjective attachment presupposed by the castle metaphor’s identification of the modest home with the stately castle.

The important thing to note about this tension between the castle metaphor and the power of eminent domain, though, is that it has little to do with the use to which the property is put. The castle metaphor, understood as “despotic dominion,” makes no allowance for involuntary dispossession, whether the use to which the community wishes to put the home is noble and public, or venal and private.

Like the bundle of sticks, the castle metaphor, particularly the despotic dominion version, has its own shortcomings. As Joseph Singer, Eric Freyfogle, and others have argued, the most extreme and literal version of despotic dominion is an impossibility.¹⁴ To begin with, owners can never have absolute property rights, understood either as the absolute right to do as they please with their property (to be absolute masters within their castle), or as the absolute right to be left alone (to be protected by impenetrable castle walls). This is because, as a physical matter, most property does not much resemble castles. What one owner does, whether it be refusing to mow his lawn or playing loud music, will inevitably have some impact on neighboring owners. When owners prove unwilling or unable to sort out disagreements about such spillover effects on their own, the state will have to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take, even within the walls of their castles. In addition, the fact is that we are social beings and that we affirmatively care what our neighbors think of us. We simply cannot live healthy human lives by retreating behind the walls of our castles to live in isolation from others. Accordingly, even within the safety of our castle walls, we are susceptible to pervasive and, at times, coercive social pressures that will constrain the ways in which we can make use even of those property rights recognized by the state.¹⁵

Despite these conceptual problems, there is no denying that the castle metaphor remains alive and well in popular conceptions of property. The public reaction to the U.S. Supreme Court’s *Kelo* decision permitting the exercise of eminent domain for economic development was swift and virtually unanimous. Polling data collected in the weeks following the decision measured public opposition to the decision at approximately ninety percent.¹⁶ People are serious about protecting their homes against eminent domain, and the broadly shared view of the private home as a castle plays no small role in that phenomenon.

14. See, e.g., Eric Freyfogle, *The Land We Share* 1-9 (2003); Joseph William Singer, *Entitlement* 7-9 (2000).

15. See Eduardo M. Peñalver, *Property as Entrance*, 91 *Va. L. Rev.* 1889 (2005).

16. See Castle Coalition, *The Castle Coalition Polls Are In*, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Mar. 3, 2006).

Given the problems with the castle metaphor, however, why would this be the case? It seems likely that the castle conception remains a touchstone for popular discussions of property precisely because it taps into important truths about the way in which people relate to their homes. As a consequence, the metaphor serves a crucial rhetorical purpose that itself functions as something of a political shield protecting this unique category of property. But this rhetorical power of the castle metaphor is likely rooted as much in the dignitary understanding of the castle metaphor as the despotic dominion conception. And that dignitary understanding is not vulnerable to the same objections correctly leveled against despotic dominion.

Primarily for the dignitary reasons identified above, people do really think of their homes, however humble, as their castles. Owners devote attention on their homes, investing substantial resources in even the most modest of dwellings. To fail to treat someone's home with the respect that it deserves is to seriously insult their sense of dignity and self-worth. Far more than they expect to be free from any state interference in their use and enjoyment of their homes, people expect their homes and their homeownership to be treated with the respect and dignity appropriate to the significance it has in their lives.

Rooting opposition to eminent domain in the second, dignitary understanding of the castle metaphor yields a substantially more flexible stance towards the power of eminent domain, one that is not opposed to eminent domain across the board. Instead, it simply demands that, when the state exercises the power of eminent domain against private homeowners, it does so in a manner that gives due regard to the importance of the property in question to the lives of the people being displaced. The state can satisfy this requirement both by refraining from the exercise of eminent domain against homeowners except when necessary to accomplish important public objectives, and by recognizing the value of the property owner's interests by adequately compensating owners for their losses. When the state deprives owners of their homes for reasons that appear to be insufficiently weighty or ill-considered, or when it offers them patently insufficient compensation, eminent domain becomes an affront to the dignity reflected in my second interpretation of the castle metaphor. But eminent domain that is appropriately sensitive to the significance of homeownership in the lives of owners is far less objectionable.

From the point of view of this second interpretation, the exploitation of the castle metaphor by property rights activists in the wake of *Kelo* is understandable but at the same time problematic. In the days after the *Kelo* decision, for example, the Institute for Justice's "Castle Coalition" web site became a clearinghouse for information about efforts to limit eminent domain through legislative action.¹⁷ The manipulation of the castle metaphor by the Institute for Justice and others is understandable because,

17. Castle Coalition, <http://www.castlecoalition.org/> (last visited Mar. 3, 2006).

however hyperbolic their advocacy, it is consistent with an important insight concealed within the metaphor: that government action depriving people of their homes is serious business. The advocates and practitioners of eminent domain must carefully consider the power they wield, using it only when necessary to accomplish important public goals. In addition, they must effectively communicate to the public that they understand and respect the importance of the private home and that they will not lightly dispossess owners, however politically vulnerable.

But at the same time, the use of this rhetoric by property-rights advocates is problematic for the reasons Cardozo gave for his suspicion of metaphor.¹⁸ All too often, metaphor develops a force of its own, making it easy to slip from an initial application that is perfectly reasonable to one that does not make much sense. And, indeed, there is something of a disconnect between the substance of the castle metaphor—properly limited to the special dignity of the private homeowner—and the contours of the policy prescriptions property rights advocates are promoting in response to *Kelo*.

For example, the Institute for Justice has posted model eminent domain reform legislation on its web site.¹⁹ That model legislation limits eminent domain quite dramatically, but the limitation would not apply solely to protect people's homes, their castles.²⁰ Instead, it would apply to any private property, anywhere. This is no small point, because less than ten percent of privately owned land in the United States is used for homes. The vast majority of privately owned land in this country is held, not by private homeowners, but by large agricultural and mining interests, many of whom are active donors to property rights advocacy groups. Providing heightened protection against eminent domain for all private land is an unnecessarily over-inclusive way of protecting people's castles; it permits a politically powerful, well-funded, and well-connected set of property owners to piggyback on the rhetorical power of a conception of property that has nothing to do with their own relationship to the land. Your home may be your castle, but Alcoa's aluminum mines do not possess, and should not be understood to share, the same lofty status.

In short, there is no denying that metaphors provide powerful and illuminating insights into the ways in which people relate to property, both as lawyers and laymen. The notion that a person's home is her castle is likely to remain a powerful, pervasive, and enduring conception of ownership that policy makers fail to take seriously at their peril. But as lawmakers try to understand and respond to the public reaction to the *Kelo* decision, it is important to keep in mind not only the power of the castle metaphor, but also its limits.

18. See *supra* note 3 and accompanying text.

19. Castle Coalition, <http://www.castlecoalition.org/legislation/index.html> (last visited Mar. 3, 2006).

20. See John Fee, *Eminent Domain and the Sanctity of the Home*, 81 *Notre Dame L. Rev.* (forthcoming 2006).