

The Property Jurisprudence of Justice Kennedy

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I. INTRODUCTION

Justice Kennedy's property jurisprudence has largely been neglected by legal scholars,¹ a surprising omission given his pivotal role on the modern Supreme Court. In this Article, I offer a few reflections on the topic, without attempting to conduct a comprehensive analysis. Much like an artist painting a landscape in watercolors, I hope that a few analytical brush strokes will provide a quick—yet useful—impression of complex legal terrain.

Two challenges immediately appear. First, property issues surface only rarely in constitutional law, either directly in the context of the Due Process, Takings, and Intellectual Property Clauses, or indirectly, on occasion, in decisions which primarily involve other topics, such as the First Amendment or the Fourth Amendment. Second, and more problematic, it is often difficult to identify Justice Kennedy's personal views in such cases because he is almost always in the majority.² It is axiomatic that the best way to know a Justice is to read his or her dissents. But Kennedy rarely dissents, leaving scholars to glean what they can, in particular, from the concurring and majority opinions that he has written.³

As a preliminary matter, we can draw four broad conclusions about Justice Kennedy's property jurisprudence. First, he is a strong defender of private

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1. For example, FRANK J. COLUCCI, *JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY* (2009) and HELEN J. KNOWLES, *THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY* (2009) both discuss Kennedy's jurisprudence in depth, but neither one discusses his approach to property. Indeed, the word "property" does not appear in the index of either book. COLUCCI, *supra*; KNOWLES, *supra*. To date, no book or article has examined Kennedy's property jurisprudence as a whole. The only scholarly work that addresses his property jurisprudence in any depth is Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States' Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667 (2007), but that article merely discusses some of his Takings Clause decisions as they relate to environmental protection. *See id.*

2. *See* COLUCCI, *supra* note 1, at 1 (noting that Kennedy has been in the majority more than any other Justice).

3. *See, e.g.*, Kenneth M. Murchinson, *Four Terms of the Kennedy Court: Projecting the Future of Constitutional Doctrine*, 39 U. BALT. L. REV. 1, 43 (2009) (observing that Kennedy's six dissents during "the 2008 Term were the fewest of any Justice").

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property rights, with something of a libertarian bent.⁴ Second, he is at the center of the Court’s property jurisprudence, as in other areas. For example, during his tenure, the Court has decided fifteen significant cases on regulatory takings, and Kennedy has been in the majority in fourteen of those decisions—ninety-three percent of the time.⁵ Third, he is an incrementalist, generally reluctant to make sweeping changes based on ideology.⁶ Finally, he tends to favor fact-intensive tests that require case-by-case adjudication, rather than bright-line standards.⁷

In this Article, I explore three specific aspects of Justice Kennedy’s property jurisprudence that distinguish him from other current Justices on the Court: (1) the relationship between property and liberty; (2) the problem of defining “property”; and (3) the interplay between the Takings Clause and the Due Process Clause.

II. PROPERTY AND LIBERTY

*“We cannot ensure liberty unless we also guarantee the right to own and acquire . . . and keep private property.”*⁸

Liberty is the core of Justice Kennedy’s constitutional jurisprudence. As Frank Colucci has observed, “individual liberty, not equality, [is] the moral idea he finds central to the Constitution.”⁹ Kennedy stressed this point during his confirmation hearings:

[T]here is a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go. Now the great question in constitutional law is: One, where is

4. See *infra* Part II. But see Stephen O’Hanlon, *Justice Kennedy’s Short-Lived Libertarian Revolution: A Brief History of Supreme Court Libertarian Ideology*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 1, 29 (2008) (“Justice Kennedy has not respected the fundamental importance of property rights to the same degree that libertarians do . . .”).

5. See *infra* APPENDIX (listing these decisions).

6. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2615, 2617–18 (2010) (Kennedy, J., concurring) (rejecting plurality’s effort to “announce a sweeping rule that court decisions can be takings” in part because “[i]t is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by courts and commentators”).

7. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring) (supplementing plurality’s deferential “public purpose” test in eminent domain cases with a fact-based test which would also consider whether “the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose”).

8. Videotape: Archie Hefner Memorial Lecture—Property and Our Constitutional Tradition: Some Hobbesian Sticks in the Lockean Bundle (Anthony M. Kennedy 1991) (on file with the Gordon D. Schaber Law Library, University of the Pacific, McGeorge School of Law) [hereinafter *Hefner Lecture*].

9. COLUCCI, *supra* note 1, at 5.

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that line drawn? And, two, what are the principles that you refer to in drawing that line?¹⁰

Colucci argues that “Kennedy’s ideal of liberty transcends constitutional text and tradition,”¹¹ an interpretation which helps explain his decisions on such controversial subjects as abortion, the death penalty, gay rights, and school prayer.¹²

Consistent with this mindset, Kennedy often approaches property rights cases from the perspective of liberty—more so than any other current Justice.¹³ Here we can identify two key themes, each with a long history in property jurisprudence. First, he views private property as a prerequisite for political liberty, and thus, for democratic self-government.¹⁴ As Thomas Jefferson and other Founders reasoned, property rights give citizens the economic security necessary for them to exercise independent political judgment.¹⁵ Second, Kennedy suggests that property is necessary for the full development of the individual, that is, for true personal liberty.¹⁶ This justification for property is traditionally associated with the German philosopher Georg Hegel,¹⁷ but was more recently espoused by Margaret Jane Radin as the personhood theory of property.¹⁸

The political liberty theme is reflected in Kennedy’s concurrence in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.¹⁹ There, Florida landowners complained that the state’s beach restoration project converted their ocean-*front* lots to ocean-*view* lots, and asserted that the Florida Supreme Court decision upholding this action was a “judicial taking” of their property.²⁰ Although the United States Supreme Court had never previously held

10. *Hearings on the Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 86 (1987) (statement of Anthony M. Kennedy, Judge, 9th Cir.) [hereinafter *Hearings*].

11. COLUCCI, *supra* note 1, at 8.

12. *Id.* at 1–7.

13. The discussion below interprets Kennedy’s view of property in consequentialist terms, that is, the concept that we recognize property because it produces socially desirable results. Kennedy would presumably argue as well that society should recognize property as an end in itself, as a matter of justice.

14. For a discussion of this justification for property, see JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 19–20 (3d ed. 2012); D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 37 (2009).

15. See generally Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991); Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976).

16. For a discussion of this justification, see SPRANKLING, *supra* note 14, at 21.

17. See GEORG W. F. HEGEL, THE PHILOSOPHY OF RIGHT (T. Knox ed., Encyclopedia Britannica 1952) (1821).

18. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

19. 130 S. Ct. 2592 (2010).

20. *Id.* at 2600.

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that judicial action could constitute a taking, four Justices indicated their willingness to adopt this approach²¹—even though the members of the Court unanimously agreed that no taking had occurred on the facts of the case.²² Concurring in the result, Kennedy explained: “The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom.”²³

The personal liberty theme arose in Kennedy’s confirmation hearings when he expressed concern about government action that causes “the inability of the person to manifest his or her own personality, the inability of a person to obtain his or her own self-fulfillment, the inability of a person to reach his or her own potential.”²⁴ In a later lecture, Kennedy firmly connected this theme to property rights: “Property . . . is an end through which we can express our personality, engage in creative pursuits, follow our literary tastes, build, plan, and give.”²⁵ Writing for the majority in *United States v. James Daniel Good Real Property*, Kennedy again relied on the personal liberty theme.²⁶ He reasoned that even a convicted drug trafficker was entitled to notice and an opportunity to be heard before the federal government could seize his home where the illegal activity occurred: “[T]he case before us well illustrates an essential principle: Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.”²⁷ Kennedy struck the same theme in *Ali v. Federal Bureau of Prisons*,²⁸ where he dissented from the majority’s conclusion that sovereign immunity prevented an inmate from suing prison officials when personal property—including religious magazines and a prayer rug—was lost during the

21. *Id.* at 2602.

22. *Id.* at 2612.

23. *Id.* at 2613 (Kennedy, J., concurring). Kennedy expressed the same vision in a 1991 lecture, noting that: “I know of no country that has been able to keep a democratic system without recognizing substantial rights of private property.” *Hefner Lecture, supra* note 8.

24. *Hearings, supra* note 10, at 180. Similarly, Kennedy began his landmark majority opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), with these words: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.” *Id.* at 562.

25. *Hefner Lecture, supra* note 8. Of course, as a general matter, government may restrict the scope of property rights—and thus personal liberty—through regulation designed to serve the public good. Thus, for example, in writing the majority opinion in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), Kennedy implied that an owner would not be permitted to subdivide her property into “parcels of exceedingly small size” because this would impair the alienability of scarce resources. *Id.* at 1230–31.

26. 510 U.S. 43 (1993).

27. *Id.* at 61; *see also* *Bennis v. Michigan*, 516 U.S. 442, 473 (1996) (Kennedy, J., dissenting) (reasoning that seizure of an automobile not used to transport contraband violated Due Process Clause). *But see* *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 139 (1993) (Kennedy, J., dissenting) (observing that innocent donee had no greater right to avoid forfeiture under federal drug enforcement laws than did culpable donor).

28. 552 U.S. 214 (2008).

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inmate's transfer to a new prison.²⁹ Finding that the language of the governing statute was "obscure," Kennedy wrote that "the Court ought not presume that the liberties of the person who owns the property would be so lightly dismissed and disregarded. . . . The seizure of property by an officer raises serious concerns for the liberty of our people. . . ."³⁰

One implication of this analysis is obvious: a liberty-based argument might help to secure Kennedy's vote in a property rights case.³¹ For example, in *Kelo v. City of New London*³²—one of the Court's most controversial decisions in recent decades—Kennedy joined the five-member majority in holding that a city's condemnation of property for the purpose of economic redevelopment was a "public use" under the Takings Clause, and hence constitutional.³³ This result was consistent with the Court's jurisprudence for over fifty years, which provided that as long as government took property for a public purpose, the public use requirement was satisfied.³⁴ Counsel for the property owners attempted to circumvent this standard by arguing for a "new bright-line rule that economic development does not qualify as a public use,"³⁵ but the Court found "no principled way"³⁶ to make this distinction. With the benefit of hindsight, an argument that a higher standard of review should apply when government encroaches on personal liberty by taking an owner-occupied home might have had a better chance of attracting Kennedy's support.³⁷

III. DEFINING "PROPERTY"

"[I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."³⁸

What is "property"? In particular, does property arise only through government action or can it arise through natural law? As Louise Halper notes, one of the key questions in regulatory takings law is "*what* lost value is compensable on account of a change in the law. Because property value is

29. *Id.* at 228.

30. *Id.* at 238, 242–43.

31. *See id.*

32. 545 U.S. 469 (2005).

33. *Id.* at 493 (Kennedy, J., concurring).

34. *See, e.g.,* *Berman v. Parker*, 348 U.S. 26 (1954).

35. *Kelo*, 545 U.S. at 484.

36. *Id.*

37. *Cf.* Thomas G. Sprankling, Note, *Does Three Equal Five? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 COLUM. L. REV. 112 (2012) (suggesting that the Third Amendment's special protection for the home supports heightened scrutiny when determining whether the government's seizure of an owner-occupied home is a taking for "public use" under the Fifth Amendment).

38. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring).

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created by law, this question and its answer are circular; there is no uncontroverted account of value that avoids this circularity.”³⁹ Justice Kennedy has wrestled with this issue to a greater extent than any other current Justice.⁴⁰

Writing in 1651, Thomas Hobbes argued that property rights originated in the sovereign: It “is annexed to the sovereignty the whole power of prescribing the rules whereby each man may know what goods he may enjoy”⁴¹ Building on the Hobbes approach, Jeremy Bentham famously stated: “Property and law are born together and die together. Before laws were made, there was no property; take away laws, and property ceases.”⁴² Today, most authorities agree that the American property law system is founded on legal positivism—property rights exist only to the extent that they are recognized by government.⁴³

Conversely, natural law theory posits that property rights arise in nature, independent of government.⁴⁴ As John Locke reasoned in 1690:

[E]very Man has a *Property* in his own *Person*. . . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with . . . and thereby makes it his *Property*.⁴⁵

Accordingly, Locke argued that “the Law of Nature stands as an Eternal Rule to all Men, *Legislators* as well as others.”⁴⁶ Under this view, government exists to protect property rights that arise through natural law.⁴⁷

When Kennedy joined the Court in 1988, American courts uniformly used the test set forth in *Penn Central Transportation Co. v. City of New York*⁴⁸ to determine if a regulatory taking had occurred. Under this ad hoc approach, the Court evaluated three factors: (1) “[t]he economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with [the

39. Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 34 (1996); see also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (discussing the tension between legal positivism and natural law theory).

40. In contrast, Kennedy would agree that copyright and patent rights arising under the Intellectual Property Clause of the Constitution are created by government action. See, e.g., *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2073 (2011) (Kennedy, J., dissenting) (noting that “the purpose of the patent law is a utilitarian one”).

41. THOMAS HOBBS, *LEVIATHAN* 110 (Rod Hay ed., McMaster University 1999) (1651).

42. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 69 (Richard Hildred trans., Oceana Publications, Inc. 1975) (1802).

43. SPRANKLING, *supra* note 14, at 18.

44. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 285–91 (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

45. *Id.* at 287–88 (emphasis in original).

46. *Id.* at 358 (emphasis in original).

47. See *id.*

48. 438 U.S. 104 (1978).

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claimant's] distinct investment-backed expectations"; and (3) "the character of the governmental action."⁴⁹ One difficulty with this test was its inherent circularity; if the law determined the claimant's investment-backed expectations, then perhaps a government entity could avoid takings liability simply by redefining what constituted "property."⁵⁰

Concurring in *Lucas v. South Carolina Coastal Council*⁵¹ in 1992, Kennedy became the first Justice to diagnose this circularity problem.⁵² The majority opinion adopted the rule that "regulation [which] denies all economically beneficial . . . use of land"⁵³ was a taking, unless "background principles of the State's law of property and nuisance"⁵⁴ already placed the same limitations on ownership. For the majority, these background principles were to be found in case law, through "an *objectively reasonable application* of relevant precedents."⁵⁵

Kennedy's concurrence, however, rested on the traditional *Penn Central* standard.⁵⁶ Even where a regulation deprives property of all value, he explained, the appropriate test is "whether the deprivation is contrary to reasonable, investment-backed expectations."⁵⁷ He then addressed the circularity issue:

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. . . . The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition. . . . The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law. . . .⁵⁸

49. *Id.* at 124.

50. *See Halper, supra* note 39, at 34.

51. 505 U.S. 1003 (1992).

52. *Id.* at 1034 (Kennedy, J., concurring).

53. *Id.* at 1015.

54. *Id.* at 1029.

55. *Id.* at 1032 n.18.

56. *Id.* at 1034 (Kennedy, J., concurring).

57. *Id.*

58. *Id.* at 1034–35.

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In this passage, Kennedy seems to be forging a rough compromise between natural law and legal positivism.⁵⁹ On the one hand, he explains that we should define “property” based on the “expectations” of owners, a view which suggests that property rights can arise under natural law.⁶⁰ Indeed, Kennedy’s concern that “property tends to become what courts say it is”⁶¹ is an implicit rejection of pure positivism. On the other hand, the protected “expectations” must be “reasonable” given our legal tradition—as created, among other things, by case law, statutes, and regulations—a view which indirectly reflects positivism.⁶² In particular, Kennedy accepts that, under some circumstances, legislators may adopt new statutes that deprive property of all value without incurring takings liability.⁶³

Kennedy returned to the definitional challenge nine years later when writing the majority opinion in *Palazzolo v. Rhode Island*,⁶⁴ another regulatory takings case. There, Palazzolo claimed that the state had “taken” his eighteen acres of wetlands by adopting a wetlands preservation statute that allowed him to build only one home on the land, lowering its value by ninety-four percent.⁶⁵ Part of the state’s defense was that Palazzolo acquired title only after the statute was enacted, so he could not have a “reasonable” expectation of using the land in violation of that statute.⁶⁶ But Kennedy rejected this approach:

The theory [that no taking occurred] seems to run on these lines: Property rights are created by the State. . . . So, the argument goes, by prospective legislation the State can shape and define property rights . . . and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. . . . Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are

59. *See id.*

60. *See id.*

61. *Id.* at 1034.

62. *See id.* at 1034–35. This portion of Kennedy’s analysis partially echoes the Court’s approach to constitutional property in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972): “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .” *Id.*

63. *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

64. 533 U.S. 606 (2001).

65. *Id.* at 615–16.

66. *Id.* The case was more complex than this summary suggests. Before the statute was adopted, Palazzolo was the sole shareholder in the corporation that owned the property. *Id.* at 613. After the statute was enacted, the corporation failed to pay its state income taxes; its charter was revoked; “and title to the property passed, by operation of state law, to [Palazzolo] as the corporation’s sole shareholder.” *Id.* at 614. Thus, an argument can be made that the notice defense was irrelevant because Palazzolo acquired his beneficial interest in the land before the statute was enacted. *See id.*

unreasonable and do not become less so through passage of time or title.⁶⁷

Scholars agree that Kennedy's reference to the "Lockean bundle" reflects the natural law theory of property.⁶⁸ Thus, at least to some extent, he seems to agree that property rights can arise independently of government action—as his *Lucas* concurrence suggests.⁶⁹ Yet Kennedy does not repudiate legal positivism in *Palazzolo*.⁷⁰ His point is that the state may not impose "so potent" a limitation on Lockean property rights.⁷¹ This language implies that *some* governmental limitations on property—that is, "less potent" Hobbesian sticks—are permissible, just as he acknowledged in *Lucas*.

Kennedy deserves credit for both highlighting the circularity problem and attempting to resolve it by reconciling natural law theory with legal positivism. Yet this effort remains a work in progress. As Kennedy observed: "[T]he Court must . . . continue to see if it can discover some neutral, stable, extrinsic definition for property of the Lockean kind."⁷²

IV. TAKINGS CLAUSE VERSUS DUE PROCESS CLAUSE

*"[W]e should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible."*⁷³

A third distinctive feature of Justice Kennedy's property jurisprudence is his attempt to shift the analytical framework for deciding certain disputes from the Takings Clause⁷⁴ to the Due Process Clause.⁷⁵ In this regard, he has acted as a brake on the efforts of a more conservative plurality to expand the reach of the Takings Clause, as exemplified by his concurring opinions in *Eastern*

67. *Id.* at 626–27.

68. See, e.g., Susan Ayres, *The Rhetoric of Takings Cases: It's Mine v. Let's Share*, 5 NEV. L.J. 615, 635 (2005) ("This metaphor somewhat cryptically expresses [Kennedy's] natural law view of . . . property rights."); Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 349 (2006) (explaining that Kennedy's majority opinion "rejected a particularly stark assertion of legal positivism").

69. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032–36 (1992) (Kennedy, J., concurring).

70. See *id.*

71. Compare *id.*, with *Palazzolo*, 533 U.S. at 626–27.

72. *Hefner Lecture*, *supra* note 8.

73. *E. Enters. v. Apfel*, 524 U.S. 498, 546 (1998) (Kennedy, J., concurring and dissenting).

74. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

75. U.S. CONST. amend. V ("No person shall . . . be deprived of . . . property, without due process of law . . ."); *id.* amend. XIV, § 2 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

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*Enterprises v. Apfel*⁷⁶ and, more recently, *Stop the Beach Renourishment, Inc.*⁷⁷ Kennedy is the foremost exponent of this view on the current Court.⁷⁸

One of the rationales that Kennedy offers for the substantive due process approach is prudential. Scholars generally agree that the Court's takings jurisprudence is incoherent.⁷⁹ As John Fee summarizes: "If there is a consensus today about regulatory takings law, it is that it is highly muddled."⁸⁰ Accordingly, Kennedy is reluctant to extend the reach of the Takings Clause.

For example, *Eastern Enterprises*⁸¹ involved a federal statute that created a mechanism to fund health care benefits for retired coal miners by assigning liability to their former employers.⁸² This law imposed retroactive liability on Eastern Enterprises, which had sold its mining business many years before the statute was adopted.⁸³ The plurality held that the statute was a regulatory taking.⁸⁴ Kennedy concurred in the result, but criticized the plurality's rationale, arguing that the case should be analyzed under the Due Process Clause.⁸⁵

Kennedy reasoned that a "constant limitation" in the Court's past regulatory takings cases was that "a specific property right or interest has been at stake."⁸⁶ Yet the statute at issue did "not operate upon or alter an identified property interest;" rather, it "simply imposes an obligation to perform an act, the payment of benefits."⁸⁷

76. *Id.* at 539.

77. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010).

78. Thus, Benjamin Barros observes: "Justice Kennedy is unique among the current Justices in that he is both sympathetic to the use of substantive due process in individual liberty contexts and sympathetic in many cases to the protection of economic rights. Consistent with both positions, Justice Kennedy has advocated for an increased role for substantive due process in various takings contexts" D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903, 937 (2011).

79. See, e.g., Ayres, *supra* note 68, at 615 (noting the "incoherence and inconsistency" of takings jurisprudence); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–63 (1984) (describing takings jurisprudence as "a muddle").

80. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003).

81. 524 U.S. 498 (1998).

82. *Id.* at 514.

83. *Id.*

84. *Id.* at 529–37.

85. *Id.* at 545 (Kennedy, J., concurring and dissenting). The four dissenters in *Eastern Enterprises* agreed with Kennedy that the Takings Clause did not apply, but that substantive due process analysis would be appropriate. *Id.* at 554–58. Lower courts have encountered difficulty in attempting to discern whether the plurality opinion or Kennedy's concurrence is controlling. See, e.g., *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) (discussing other cases addressing the issue, but concluding that: "Our independent evaluation of the case law leads us to agree with Justice Kennedy that the takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money.").

86. *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring and dissenting).

87. *Id.* at 540.

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Kennedy argued that extending the takings doctrine to this new context was unwise:

The difficulties in determining whether there is a taking . . . even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity. . . . The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts.⁸⁸

Twelve years after *Eastern Enterprises*, Kennedy expressed similar concerns in *Stop the Beach Renourishment, Inc.*, where the plurality indicated a willingness to expand the regulatory takings doctrine to judicial action.⁸⁹ He first cited his *Eastern Enterprises* concurrence for the proposition that regulatory takings cases are “among the most litigated and perplexing in current law.”⁹⁰ He then examined three specific prudential concerns: (1) the plurality approach “might give more power to the courts, not less”;⁹¹ (2) as a practical matter, “it may be unclear in certain cases how a party should properly raise a judicial takings claim”;⁹² and (3) “it is unclear what remedy a reviewing court could enter after finding a judicial taking.”⁹³ In conclusion, he observed that it “is not wise, from an institutional standpoint, to reach out and discuss questions that have not been discussed at much length by courts and commentators.”⁹⁴

The second rationale that Kennedy offers for his approach is based on the structure of the Constitution, turning on whether the particular governmental action is *permissible* or *impermissible*.⁹⁵ His thesis is that substantive due process is the principal standard for deciding whether a particular governmental action is permissible.⁹⁶ Thus, because the Takings Clause implicitly recognizes the ability of the “political branches—the legislature and the executive—” to take private property, it should not be utilized *unless* the government action is first found to be permissible under the Due Process Clause.⁹⁷

88. *Id.* at 542.

89. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010). Interestingly, about one-fourth of the plurality opinion is a response to the points raised by Kennedy’s concurrence. *Id.* at 2604–08.

90. *Id.* at 2615 (Kennedy, J., concurring) (citing *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring and dissenting)).

91. *Id.* at 2615.

92. *Id.* at 2616.

93. *Id.* at 2617.

94. *Id.* at 2617–18.

95. *Id.* at 2614.

96. *Id.*

97. *Id.*

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Accordingly, in his *Eastern Enterprises* concurrence, Kennedy explained that the Takings Clause “operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge,”⁹⁸ presuming that the government action is constitutional. Because the constitutionality of the statute turned on “the legitimacy of Congress’ judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause.”⁹⁹ He concluded that the Court “should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible.”¹⁰⁰

Seven years later, a unanimous Court seemed to adopt this approach in *Lingle v. Chevron U.S.A. Inc.*,¹⁰¹ holding that a challenge to a Hawaii statute limiting the rents that could be charged to service-station lessees should be analyzed under the Due Process Clause, not the Takings Clause.¹⁰² The Court emphasized that the Takings Clause “requires compensation ‘in the event of otherwise proper interference amounting to a taking.’”¹⁰³ In contrast, “if a government action is found to be impermissible—for instance, because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”¹⁰⁴

Kennedy utilized a similar structural argument in his *Stop the Beach Renourishment, Inc.* concurrence.¹⁰⁵ He first noted that the Takings Clause “implicitly recognizes a governmental power”¹⁰⁶ to take private property, and that the legislative and executive branches were given substantial discretion to determine when property should be taken.¹⁰⁷ Potential abuses of this power were constrained by political accountability: these “branches are accountable in their political capacity for the proper discharge of this obligation.”¹⁰⁸ In contrast, courts do not “have the power to eliminate established property rights by judicial decision.”¹⁰⁹ Accordingly, quoting his *Eastern Enterprises* concurrence, Kennedy reasoned that where judicial action is concerned, “the more appropriate

98. *E. Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting).

99. *Id.*

100. *Id.* at 546.

101. 544 U.S. 528 (2005); see also Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006) (noting that *Lingle* “brings a remarkable coherence to the Court’s confused regulatory takings doctrine”).

102. *Lingle*, 544 U.S. at 543–45.

103. *Id.* at 543 (emphasis in original) (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)).

104. *Id.* at 543.

105. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592 (2010).

106. *Id.* at 2614 (Kennedy, J., concurring).

107. *Id.*

108. *Id.* at 2613.

109. *Id.* at 2614.

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constitutional analysis arises under general due process principles rather than under the Takings Clause.”¹¹⁰

Writing for the *Stop the Beach Renourishment, Inc.* plurality, Justice Scalia responded to Kennedy’s approach, in part, by asserting that substantive due process would provide insufficient protection for property rights because “it never means anything precise.”¹¹¹ But it seems probable that Kennedy would apply a more rigorous standard of review in property cases than the traditional rational basis test. As Timothy Mulvaney observes,¹¹² evidence of this approach can be found in Kennedy’s *Kelo* concurrence, where he describes the standard of review he espoused in *Eastern Enterprises* as a form of “heightened scrutiny.”¹¹³

V. CONCLUSION

For Justice Kennedy, the protection of private property is a core constitutional value, inextricably intertwined with personal liberty. At the same time, he recognizes that the scope of property rights cannot be frozen in time, but rather must continue to evolve in response to “changing conditions.”¹¹⁴ This concept is central to our “common-law tradition that allows for incremental modifications to property law.”¹¹⁵

But how can the Constitution safeguard “property” if the meaning of “property” changes over time? This is the most difficult question in modern property law. More than any other current Justice, Kennedy understands the conundrum. He does not offer an easy solution, but perhaps he provides us with an agenda for future action. First, work toward developing a “neutral” and “extrinsic” definition of property.¹¹⁶ Second, resist the rapid expansion of the

110. *Id.* at 2614–15. A number of commentators have briefly mentioned Kennedy’s focus on using substantive due process instead of a takings analysis. *See, e.g.,* Fee, *supra* note 80, at 1004 (noting that “[o]ur regulatory takings doctrine today functions more like a substantive due process right”); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 746 (2002) (stating that Kennedy’s “demarcation of the line between takings claims and substantive due process claims makes a great deal of sense”); Merrill, *supra* note 39, at 998 (observing that Kennedy’s approach “offers a potentially useful line of division between takings claims and substantive due process claims”); Elizabeth G. Wydra, *Constitutional Problems in Judicial Takings Doctrine and the Supreme Court’s Decision in Stop the Beach Renourishment*, 29 UCLA J. ENVTL. L. & POL’Y 109, 125 (2011) (“[T]he Due Process Clause provides an appropriate avenue for redress and a new “judicial takings” doctrine is unnecessary.”). For a more detailed examination of Kennedy’s approach, see Barros, *supra* note 78, at 936–40 (discussing Kennedy’s concurrence in *Stop the Beach Renourishment, Inc.*).

111. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2608.

112. Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 255 n.40 (2011).

113. *Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

114. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

115. *Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2615 (Kennedy, J., concurring).

116. *E. Enters. v. Apfel*, 524 U.S. 498, 546 (1998) (Kennedy, J., concurring and dissenting).

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Court’s “muddled” Takings Clause jurisprudence, and instead, channel property disputes toward resolution under the Due Process Clause.¹¹⁷

117. *See supra* notes 85–100 and accompanying text.

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APPENDIX

Year	Case Name	Citation	Kennedy's Role
2010	Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.	130 S. Ct. 2592	Wrote concurring opinion
2005	Lingle v. Chevron U.S.A. Inc.	544 U.S. 528	Wrote concurring opinion
2005	San Remo Hotel, L.P. v. City and County of San Francisco	545 U.S. 323	Joined majority opinion
2002	Brown v. Legal Found. of Wash.	538 U.S. 216	Wrote dissent
2002	Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency	535 U.S. 302	Joined majority opinion
2001	Palazzolo v. Rhode Island	533 U.S. 606	Wrote majority opinion
1999	City of Monterey v. Del Monte Dunes at Monterey, Ltd.	526 U.S. 687	Wrote majority opinion
1998	E. Enters. v. Apfel	524 U.S. 498	Wrote opinion concurring in result, but dissenting in part
1998	Phillips v. Wash. Legal Found.	524 U.S. 156	Joined majority opinion
1997	Suitum v. Tahoe Reg'l Planning Agency	520 U.S. 725	Joined majority opinion
1994	Dolan v. City of Tigard	512 U.S. 375	Joined majority opinion
1992	Lucas v. S.C. Coastal Council	505 U.S. 1003	Wrote concurring opinion
1992	Yee v. City of Escondido	503 U.S. 519	Joined majority opinion
1990	Preseault v. Interstate Commerce Comm'n	494 U.S. 1	Joined concurring opinion
1989	Duquesne Light Co. v. Barasch	488 U.S. 299	Joined majority opinion