

Kennedy's Mark on Environmental Law Is Incalculable and Profound

Even in the midst of a president's tweeting "breaking news" seemingly every minute of a 24-hour cycle, Supreme Court Justice Anthony Kennedy's June announcement of his retirement was a bombshell. And for good reason. Kennedy has had outsized influence on the High Court ever since he joined its bench in February 1988.

Kennedy's impact on environmental law is no exception. Just the opposite. It deservedly adds an exclamation point to descriptions of the justice's historic significance to the law in general.

Since Kennedy joined the Court, the justices have decided approximately 100 environmental law cases. Kennedy was in the majority in all but two of those cases and the Court subsequently overruled its ruling in one of those (*Pennsylvania v. Union Gas*) in *Seminole Tribe of Florida v. Florida*. The only remaining case in which Kennedy's vote did not reflect the outcome was *Alaska v. EPA*, when he dissented from the ruling that the agency had lawfully rejected a state-issued Clean Air Act permit.

That's it. In every other case, how Kennedy voted foreshadowed the High Court ruling. To be sure, not all those cases were five to four. Some were unanimous, meaning that Kennedy's vote was not determinative. But many others did turn on the vote of a single justice, including many of the Court's most significant environmental rulings.

A quick review of the most important environmental cases underscores Kennedy's significance. For instance, although the justice plainly harbored a wariness of regulatory overreach, he did not reflexively shy away from respecting statutory language that backed EPA's broad authority. He supplied the critical fifth vote in support of the Court's historic ruling in *Massachusetts v. EPA*,

when the Court upheld the agency's authority to regulate greenhouse gas emissions under the Clean Air Act.

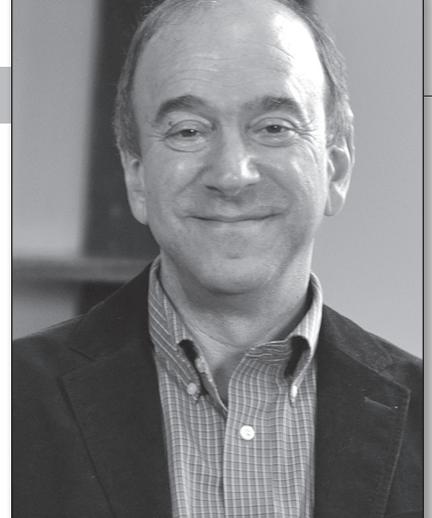
More recently, Kennedy voted with the majority in *EPA v. EME Homer Generation L.P.* to sustain the agency's Cross State Air Pollution Rule, one of its most significant regulatory programs ever. The rule curbed pollution in 27 upwind states that were causing violations of air quality standards in downwind states. The D.C. Circuit had struck down the EPA rule on the ground that it lacked sufficient congressional authority. Yet Kennedy sided with the agency when the case reached the Court. Because Judge Brett Kavanaugh authored the lower court ruling averse to EPA, the *EME Homer* case will no doubt be discussed during his Senate confirmation hearings this fall.

He was in the majority of virtually every environmental case decided since 1988

Justice Kennedy's influence on the geographic scope of the Clean Water Act was no less momentous. He deprived Justice Antonin Scalia of a majority in *Rapanos v. United States*. Kennedy rejected Scalia's rigid, dictionary definition of "waters," which would have dramatically cut back on the act's reach. In its stead, Kennedy proposed his version of a "significant nexus" test, which embraced a far more expansive view of the law's jurisdiction.

But these statutory-construction cases are not necessarily the most significant environmental law decisions in which Kennedy's voice dominated the Court. The justice appreciated the need for tough environmental restrictions necessary to protect especially fragile ecosystems such as wetlands, floodplains, and coastal areas. That understanding was reflected in a series of cases in which Kennedy blocked Scalia's efforts to place significant constitutional limits on environmental law's reach.

Kennedy rejected Scalia's attempt to limit Article III standing to enforce fed-



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eral environmental law in both *Friends of the Earth v. Laidlaw* and again in *Massachusetts v. EPA*. He explained in *Lujan v. Defenders of Wildlife* that the demands of environmental protection meant that citizens should be able to satisfy Article III standing requirements based on allegations of causation and redress more attenuated than that contemplated by the common law.

On similar grounds, Kennedy likewise impeded Scalia's effort to impose a Fifth Amendment regulatory takings test that would have rendered unconstitutional state and federal laws that restrict development in environmentally sensitive areas. Kennedy reasoned that government should be able to restrict such destructive activities without offending the no-takings guarantee even when, contrary to Scalia's claim, they would not amount to common law nuisances or otherwise transgress background principles of property law.

Of course, Kennedy was not an uncompromising environmentalist. He was a moderate who cared deeply about states rights, property rights, and excessive regulation. His votes and opinions reflect those longstanding concerns as well. That is why he was dubbed the swing justice, a label that Kennedy rejected but was nonetheless apt. Unlike some others on the Court, Kennedy's vote was always in play precisely because his contrasting perspectives on environmental law and other critical social issues affected by the law meant he did not come to cases with his mind already made up.