

## Justice Kennedy and the Environment: Property, States' Rights, and the Search For Nexus

by Michael C. Blumm\* & Sherry L. Bosse\*\*

### Abstract

Justice Anthony Kennedy, now clearly the pivot of the Roberts Court, is the Court's crucial voice in environmental and natural resources law cases. Kennedy's central role was never more evident than in the two most celebrated environmental and natural resources law cases of 2006: *Kelo v. New London* and *Rapanos v. U.S.*, since he supplied the critical vote in both: upholding local use of the condemnation power for economic development under certain circumstances, and affirming federal regulatory authority over wetlands which have a significant nexus to navigable waters. In each case Kennedy's sole concurrence was outcome determinative.

Justice Kennedy has in fact been the needle of the Supreme Court's environmental and natural resources law compass since his nomination to the Court in 1988. Although Kennedy wrote surprisingly few environmental and natural resources law opinions during his tenure on the Rehnquist Court, over his first eighteen years on the Court, he was in the majority an astonishing 96 percent of the time in environmental and natural resources law cases—as compared to his generic record of being in the majority slightly over 60 percent of the time. And Kennedy now appears quite prepared to assume a considerably more prominent role on the Roberts Court in the environmental and natural resources law field.

This article examines Kennedy's environmental and natural resources law record over his first eighteen years on the Supreme Court and also on of the Ninth Circuit in the thirteen years before that. The article evaluates all of the environmental law and natural resources law cases in which he wrote an opinion over those three decades, and it catalogues his voting record in all of the cases in which he participated on the Supreme Court in an appendix. One striking measure of Justice Kennedy's influence is that, after eighteen years on the Court, he has written just one environmental dissent—and that on states' rights grounds, which is one of his chief priorities.

The article maintains that Kennedy is considerably more interested in allowing trial judges to resolve cases on the basis of context than he is in establishing broadly applicable doctrine: Kennedy is a doctrinal minimalist. By consistently demanding a demonstrated “nexus” between doctrine and facts, he has shown that he will not tolerate elevating abstract philosophy over concrete justice. For example, he is interested in granting standing to property owners alleging regulatory takings, but he is quite skeptical about the substance of their claims. Another example of his nuanced approach concerns his devotion to states' rights—which is unassailable—yet he has been quite willing to find federal preemption when it serves deregulation purposes. On the other hand, as his opinion in *Rapanos* reflects, Kennedy is far from an anti-regulatory zealot. But he does seem to prefer only one level of governmental regulation.

At what might be close to the mid-point in his Court career—and with his power perhaps at its zenith—Justice Kennedy is clearly not someone any litigant can ignore. By examining every judicial opinion he has written in the environmental and natural resources law field, this article hopes to give both those litigants and academics a fertile resource to till. Although Kennedy has been purposefully difficult to interpret in this field (writing very few opinions until lately), his record suggests that he may be receptive to environmental and natural resources

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\* Professor of Law, Lewis and Clark Law School. This article benefited from the comments of the participants at Lewis and Clark's faculty colloquium. Other comments may be sent to [blumm@lclark.edu](mailto:blumm@lclark.edu).

\*\* J.D. 2007, Lewis and Clark Law School; B.A. 1999, Northwestern University.

claims if they are factually well-grounded and do not conflict with Kennedy's overriding notions of states' rights. The article concludes with some comparisons between Justice Kennedy and Justice Holmes.

That Justice Anthony Kennedy sits at the center of the Roberts Court is hardly a secret.<sup>1</sup> After the retirement of Justice Sandra Day O'Connor, Supreme Court advocates know they must aim their arguments at Kennedy, who seldom finds himself in the minority.<sup>2</sup> In the environmental field (which we define to include natural resources and land use law), Justice Kennedy's pivotal role was cemented

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<sup>1</sup> See, e.g., Tony Mauro, *Eyes on Kennedy as Supreme Court Debates Global Warming Case*, LEGAL TIMES, Nov. 30, 2006; Lyle Denniston, *Analysis: Kennedy Key To Global Warming Challenge*, SCOTUS BLOG, Nov. 29, 2006, <http://www.scotusblog.com/movabletype/archives/2006/11/26-week/>.

Justice Kennedy was President Reagan's third nominee to replace Justice Lewis Powell, after the Senate rejected Robert Bork, and Douglas Ginsburg withdrew following revelations that he used marijuana. Kennedy, who had served on the Ninth Circuit Court of Appeals since his appointment by President Ford in 1975, was confirmed unanimously in February 1988. Kennedy owed his appointment to a longstanding relationship with Ed Meese, Reagan's Chief of Staff and Attorney General. Kennedy graduated from Stanford University in 1958 and Harvard Law School in 1961, then practiced law in Sacramento, where he also taught constitutional law at McGeorge Law School and worked with Meese on several projects, including a failed initiative to cut taxes and spending that was supported by Governor Reagan. See [http://www.oyez.org/oyez/resource/legal\\_entity/104/biography](http://www.oyez.org/oyez/resource/legal_entity/104/biography).

Unlike several of his colleagues on the Supreme Court, Kennedy never was a judicial clerk, entering private practice after graduation in San Francisco (1961-63) and Sacramento (1963-75). He taught Constitutional Law at McGeorge Law School from 1965 until he was confirmed as a Supreme Court Justice in 1988. See Cornell Law School Legal Information Institute, Supreme Court collection, <http://www.law.cornell.edu/supct/justices/kennedy.bio.html>.

<sup>2</sup> Of the seventy-six environmental decisions Justice Kennedy participated in that we consider in this study, Justice Kennedy voted with the majority a remarkable seventy-three times, or 96% of the time. See *infra* Appendix A case table. (These statistics include cases in which Justice Kennedy concurred in the judgment only, or in which he concurred in part and dissented in part.) Kennedy is a much better barometer of the Court's environmental thinking than he is in all cases: during his first eighteen years on the Court, Kennedy dissented a total of 354 times, out of the 874 decisions in which he took part, or 40.5% of the time.

Justice Kennedy's record for voting with the majority in close decisions further illustrates his pivotal role at the Court's center: Kennedy voted with the majority in 81% of the environmental cases included in this survey that were decided with a 5-4 vote. Of the seventy-six cases in this survey, fourteen rested on majority opinions joined by just five members of the Court. See *infra* Appendix A case table. Kennedy voted with the dissent in just three of these decisions. See *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004), discussed *infra* notes 150-60; *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), discussed *infra* notes 39-41; and *Idaho v. United States*, 533 U.S. 262 (2001), discussed *infra* note 81. Two additional decisions rested on Justice Kennedy's decision to provide the crucial fifth vote in the judgment only, but writing a separate concurrence in each case. See *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998), discussed *infra* notes 84-85; *Rapanos v. U.S. Army Corps of Engineers*, 126 S. Ct. 208 (2006), discussed *infra* notes 188-96. In another case, *Borden Ranch v. U.S. Army Corps of Engineers*, an equally divided Court affirmed a Ninth Circuit's decision after Justice Kennedy removed himself from the case. 537 U.S. 99 (2002).

By the end of the first term for the Roberts' Court, several commentators had recognized Kennedy's newly pivotal role alone at the Court's center. See Dahlia Lithwick, *A Supreme Court of One*, WASH. POST, Jul. 2, 2006 at B1 (discussing Kennedy's emergence as the swing vote on the Roberts Court and the controlling effect of his opinion in *Rapanos*); Linda Greenhouse, *Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, Jul. 2, 2006 at A1 (placing Kennedy both literally and figuratively at Court's center for the regularity in which he cast the deciding

by his recent opinions in the *Kelo* and *Rapanos* cases, where he cast the deciding votes.<sup>3</sup> While Kennedy's role in those cases has received quite a bit of commentary,<sup>4</sup> there is no systematic assessment of his entire environmental record.<sup>5</sup> In this article, we aim to provide that assessment by

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vote in split decisions in the Roberts' Court's first term).

<sup>3</sup> *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 2665 (2005) (joining the opinion Justice Stevens wrote for the 5-4 majority, upholding a city's decision to use its eminent domain power to condemn developed land for an economic development project because it fulfilled the "public use" requirement of the Fifth Amendment), *see infra* notes 179-84 and accompanying text (discussing Kennedy's *Kelo* concurrence); *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (providing the critical fifth vote for the majority when he concurred in the judgment). Kennedy refused to join Justice Scalia's plurality opinion in *Rapanos*, instead writing a separate concurrence that has more in common with Justice Stevens' dissent than with Scalia's opinion, *see infra* notes 187-96 and accompanying text (discussing Kennedy's concurrence).

<sup>4</sup> *See* Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81, 98 (2005) (discussing Justice Kennedy's concurrence in *Kelo* and the public use doctrine); Orlando E. Delogu, *Kelo v. City of New London--Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17, 42-46 (2006) (advocating the more stringent standard of review for eminent domain in economic revitalization projects that Justice Kennedy's *Kelo*'s concurrence suggested). *Kelo* prompted a vocal and widespread backlash, discussed *infra* note 172.

Justice Kennedy's concurrence in *Rapanos* generated a considerable amount of commentary in the press. *See* Linda Greenhouse, *Justices Divided on Protections Over Wetlands*, N.Y. TIMES, Jun. 20, 2006, at A1 (suggesting Kennedy's "significant nexus" may be the standard the Army Corps of Engineers adopts if it undertakes rulemaking to define its wetlands jurisdiction); Warren Richey, *Supreme Court splits over protecting wetlands*, CHRISTIAN SCIENCE MONITOR, Jun. 20, 2006, at USA 1 (discussing how Justice Kennedy's interpretation of "significant nexus" will allow for a greater degree of Corps' jurisdiction over wetlands than Scalia advocated in *Rapanos*); Charlie Tebbutt, Op-Ed, *Ruling befouls clean water efforts*, EUGENE REGISTER-GUARD, Aug. 20, 2006, at F1 (discussing the *Rapanos* decision and criticizing Kennedy's opinion for "muddi[ng] the waters" of wetlands jurisdiction); David G. Savage, *Déjà vu Once Again: Despite New Faces on the Supreme Court, Term's Ending Is Familiar*, A.B.A. J. Sept. 2006 at 12 (discussing how Justice Kennedy's seat alone at the Court's center made his vote the deciding factor in a number of prominent decisions, including *Rapanos*, during the Roberts' court's first term); *DOJ Plan for Dual Wetlands Jurisdiction Test Wins Cautious Backing*, 15 WATER POLICY REP., no. 16, Aug. 7, 2006 (discussing the U.S. Department of Justice's decision to use either Justice Kennedy's or Justice Scalia's tests to determine wetlands jurisdiction post-*Rapanos*); William W. Buzbee, *Supreme Court Decisions on Water Resources*, testimony before the Committee on Senate Environment & Public Works Subcommittee on Fisheries, Wildlife & Water, Aug. 1, 2006 (describing Justice Kennedy's opinion as the "key" to the Court's ruling in *Rapanos*).

<sup>5</sup> Richard Lazarus has, however, supplied a (now somewhat dated) assessment of the Supreme Court's environmental record as a whole. Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 812 (2000) (hereinafter Lazarus, *Environmental Law in the Supreme Court*) (rating Justice Kennedy's environmental record as 25.9%, prior to 1998). *See also* Richard J. Lazarus, *Environmental Law and the Supreme Court: Three Years Later*, 19 PACE ENVTL. L. REV. 653, 673 (2002). Lazarus' analytic data has been more recently updated by Jonathan Cannon, in his cultural analysis of the Supreme Court's environmental opinions. In that study, according to Cannon, Justice Kennedy raised his environmental record to 34.1%. Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 Ecology L. Q. 363, 441 (2006) (updating the environmental scores for the justices sitting on the current Court with data from recent environmental opinions as part of a cultural analysis of the Supreme Court's environmental opinions).

evaluating all of Justice Kennedy’s environmental opinions, including those on the Ninth Circuit, where he served for thirteen years before his 1988 appointment to the Supreme Court.<sup>6</sup>

One remarkable aspect of the Kennedy record is just how little there is of it. In a judicial career spanning more than three decades, Justice Kennedy has written only twenty-one opinions that can be characterized as within our broad definition of environmental law: twelve majority opinions, eight concurrences, and just one dissent.<sup>7</sup> Kennedy has been an active participant in the Supreme Court’s decisions concerning constitutional takings of property.<sup>8</sup> But apart from the takings area, Justice Kennedy has not seemed very invested in environmental issues, at least when they involve statutory interpretation.<sup>9</sup> Perhaps that apparent disinterest was broken by Kennedy’s decisive concurrence in *Rapanos*, where he refused to restrict federal jurisdiction over wetlands to relatively

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<sup>6</sup> See *supra* note 1.

<sup>7</sup> Justice Kennedy has voted on many more decisions than these, but we believe those cases in which he wrote opinions are the best reflections of his judicial disposition. At any rate, analyzing his opinions is much more telling than guessing at his silences. In *Eastern Enter. v. Apfel*, 524 U.S. 498, 542 (1998), Kennedy concurred in part, dissented in part. See *infra* notes 85-87 and accompanying text. This article counts that decision as a concurrence.

<sup>8</sup> See *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring) (arguing for a standard based on a landowner’s reasonable expectations, which would also take into account environmental factors); *Eastern*, 524 U.S. at 542 (Kennedy, J., concurring) (refusing to apply takings analysis to retroactive legislation); *City of Monterrey v. Del Monte Dunes at Monterrey*, 526 U.S. 687, 694 (1999) (approving the use of jury determinations in a regulatory takings case); *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (holding that the fact a landowner acquired his property after enactment of the challenged regulations did not automatically bar the landowner’s regulatory takings claim if a previous owner could not take the steps to make the claim ripe, although this result was tempered by the conclusion the landowner had not been deprived of all economic value of his property); *Lingle v. Chevron*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (joining Justice O’Connor’s majority opinion repudiating the court’s use of the substantive due process “substantially advances” test in takings cases but writing separately to highlight the possibility that some regulations “might be so arbitrary or irrational as to violate due process”); *Kelo v. City of New London*, 545 U.S. 469 (2005) (Kennedy, J., concurring) (arguing for heightened scrutiny for the use of eminent domain when the public use at issue is economic development) See also *infra* notes 229-46 and accompanying text (discussing Justice Kennedy’s role in the Court’s decisions in takings cases).

*Eastern* and *Lingle* both involved takings claims that did not occur in the context of land use decisions. (*Eastern* addressed the Coal Industry Retiree Health Benefit Act, discussed *supra* notes 82-87, while *Lingle* involved an oil company challenge to a Hawaii statute limiting rent oil companies could charge service stations, discussed *supra* notes 161-71. While not strictly environmental, both cases were included in this study because takings cases have such a profound impact on environmental law.

<sup>9</sup> Our colleague, Craig Johnston, pointed this fact out to us.

permanent or continuously flowing waterbodies, instead opting for federal jurisdiction wherever there was “a significant nexus” between a wetland and a navigable water.<sup>10</sup>

Even if his *Rapanos* opinion does not signal a change in Justice Kennedy’s interest in environmental issues, he remains the indispensable vote on the Court. Richard Lazarus has pointed out that Kennedy has an “astounding record” for being in the majority in environmental cases.<sup>11</sup> Advocates in environmental cases must tailor their arguments to win his vote or risk losing their appeals. Of the seventy-six Supreme Court environmental opinions considered for the purposes of this article, Justice Kennedy was in the majority in an astonishing seventy-three times, or ninety-six percent of the time.<sup>12</sup> There is thus much to be gained by carefully examining the Kennedy environmental record, for it may very well portend the future of environmental law in the Roberts Court.<sup>13</sup>

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<sup>10</sup> *Rapanos v. United States*, 126 S.Ct. 2208, 2236 (2006) (Kennedy, J., concurring).

<sup>11</sup> Lazarus, *Environmental Law in the Supreme Court*, *supra* note 5, at 714 (noting that Kennedy was in the majority in 56 of 57 cases decided between 1988 and 2000).

<sup>12</sup> *See infra* Appendix A (displaying tabular data of the Court’s environmental decisions during Kennedy’s tenure). We are indebted to Richard Lazarus, whose methodology in selecting cases for his analysis of the Court’s environmental opinions influenced our methodology for selecting the cases used in this study of Justice Kennedy’s environmental opinions. *See Lazarus, Environmental Law in the Supreme Court*, *supra* note 5, at 708 (stating the reasoning behind selecting cases to include in his study of the Court’s environmental opinions based on whether environmental protection or natural resources were at stake). We employed similar criteria to select additional cases in which the environment or natural resources are at stake in the decision, including boundary disputes between states, as well as cases involving areas of the law with a fundamental effect on jurisdictional issues in federal environmental laws, such as the Eleventh Amendment, Fifth Amendment takings, and Commerce Clause authority.

<sup>13</sup> At the beginning of the second term for the Roberts Court, a large number of commentators perceived Justice Kennedy as the most influential vote on the Court in a variety of areas, including the environment. *See The Kennedy Court? One man with caprice make a majority*, Editorial page, WALL ST. J., Oct. 7, 2006, available at <http://www.opinionjournal.com/editorial/feature.html?id=110009060> (noting the disproportionate attention being paid to Justice Kennedy at the start of the Court’s 2006 term as a symptom of his newfound prominence alone at the Court’s center); Warren Richey, *Will the Supreme Court Shackle New Tribunal Law?*, CHRISTIAN SCIENCE MONITOR, Oct. 16, 2006, at USA1 (discussing Justice Kennedy’s emerging role as the crucial vote in national security cases, as well as in decisions involving a number of other “hot-button social issues”); Warren Richey, *For Supreme Court’s New Term: Rise of a New Centrist*, CHRISTIAN SCIENCE MONITOR, Oct. 2, 2006, at USA2 (speculating on how Kennedy’s newly prominent role at the Court’s center may influence a number of key decisions during the 2006-07 term); Gregory Stanford, *A High Court Tilts and Your Rights Get Squashed*, MILWAUKEE J. SENTINEL, Jul. 30, 2006 at J4 (describing Justice Kennedy’s centrist stance as the “saving grace” of the Roberts’ court’s first term); Deborah Amos & Steve Inskip, *A Newly Conservative Supreme Court?*, NATIONAL PUBLIC RADIO, Oct. 2, 2006 (identifying

This article maintains that Kennedy is best characterized as a contextualist, attached to case-by-case fact-finding that links context to legal standards. His devotion to nexus between facts and rules, especially evident in Kennedy's standing opinions,<sup>14</sup> also dominated his recent interpretation of the scope of federal jurisdiction under the Clean Water Act.<sup>15</sup>

Kennedy is also committed to states rights. He was part of the Rehnquist Court majority which created the first limits on the federal commerce power in sixty years,<sup>16</sup> and which also

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social issues on which Kennedy assumes a more conservative stance than Justice O'Connor's centrist views). Bill Mears, *Justice Kennedy Works on His Swing*, CNN.COM, Sept. 29, 2006, at <http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html> (discussing Justice Kennedy's pivotal role as the Court's "man in the middle" in several divisive social issues).

<sup>14</sup> Justice Kennedy, writing for a five member majority in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, upheld a district court decision to submit a takings claim to a jury but rejected the more stringent "rough proportionality" test as a means of evaluating takings claims that do not involve exactions for the purpose of dedicating private property to public use. 526 U.S. 687, 703 (1999), discussed *infra* notes 88-102. In his concurrence in *Friends of the Earth v. Laidlaw Envtl. Serv.* Justice Kennedy stood alone in suggesting that citizen suit provisions in his view may interfere with powers conferred on the Executive branch by Article II of the constitution. 528 U.S. 167, 197 (2000) (Kennedy, J., concurring), discussed *infra* notes 120-21. Nearly a decade earlier, Kennedy disagreed with Justice Scalia's rejection of environmental plaintiff standing based on an "animal or vocational nexus" in *Lujan v. Defenders of Wildlife*, and instead wrote a separate concurrence expressing his willingness to consider standing on that basis should the Court be presented with different facts. 504 U.S. 555, 572 (1992) (Kennedy, J., concurring), discussed *infra* notes 55-57. However, later in his *Lujan* concurrence, Kennedy appeared to question the validity of standing under the citizen suit provision of the Endangered Species Act for its failure to "establish that there is an injury in 'any person' by virtue of any 'violation' of the statute. *Id.* at 580. As a member of the Ninth Circuit Court of Appeals, Judge Kennedy wrote an opinion holding that a plaintiff lacked standing in a Clean Water Act citizen suit because his injury was not redressable by injunctive relief, since the underlying purpose of the CWA citizen suit provision, protecting clean water and the environment, was not served by the suit. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982), discussed *infra* notes 29-31.

<sup>15</sup> See *Rapanos v. U.S. Army Corps of Engineers*, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring in the judgment) (writing separately to advocate requiring a "significant nexus" between a wetland and a navigable water to establish CWA jurisdiction over a wetland); see *infra* notes 188-96.

<sup>16</sup> See *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (joining the Rehnquist majority invalidating the Gun-Free School Zones Act, a federal law prohibiting firearms within 1000 feet of schools, because it overstepped the congressional Commerce Clause power and writing a separate concurrence to emphasize how the connection with interstate commerce was too attenuated to justify federal interference with state police powers). Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 131 (1995) (linking the Court's backpedaling from New Deal-era interpretations of expansive Commerce Clause powers and its decision placing limits on federal power in *Lopez* with earlier movements to federal power); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 644-47 (1996) (discussing the analytic approach the Court took in *Lopez* and its implications in other contexts); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 565-67 (1995) (discussing Justice Kennedy's interpretation of the federal power use the Commerce Clause to regulate non-commercial activity in his concurrence in *Lopez*); Bradley A. Harsch, *Brzonkala, Lopez, and the Commerce Clause Canard: A Synthesis of Commerce Clause Jurisprudence*, 29 N.M. L. REV. 321, 326 (1999) (criticizing *Lopez* as an underinclusive test for Commerce

discovered significant state immunity from federal court suits in the Eleventh Amendment.<sup>17</sup> Finally, as a professed property rights defender, Kennedy is a government planning skeptic.<sup>18</sup> These doctrinal minimalist, states rights, and property rights sentiments do not always point in the same direction, making Kennedy’s jurisprudence especially interesting to examine.

This analysis of the Kennedy record on the environment is in chronological order, beginning with Kennedy’s tenure on the Ninth Circuit, proceeding to consider his Supreme Court opinions before 2000, then examining his post-2000 decisions through 2004, and finally assessing his pivotal

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Clause legislation).

<sup>17</sup>Beginning in the mid-1990s, the Rehnquist Court issued a series of opinions interpreting the Eleventh Amendment to shield states from suits in a number of federal laws. In *Seminole Tribe of Florida v. Florida*, a slim five-member majority opinion authored by Chief Justice Rehnquist and joined by Justices Kennedy, O’Connor, Scalia, and Thomas held that Congress could not use the Indian Commerce Clause to abrogate Eleventh Amendment state sovereign immunity in the Indian Gaming Regulatory Act. 517 U.S. 44, 66 (1996). See Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1774 (2006) (discussing the Rehnquist Court’s Eleventh Amendment decisions expanding state sovereign immunity); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 703, 764-65 (2006) (characterizing the Rehnquist Court’s Eleventh Amendment decisions as the source of the “most aggressive limitations” on federalism in recent decades); David Milton Whalin, *John C. Calhoun Becomes the Tenth Justice: State Sovereignty, Judicial Review, and Environmental Law After June 23, 1999*, 27 B.C. ENVTL. AFF. L. J. 193, 194-95 (2000) (comparing the Rehnquist Court’s Eleventh Amendment revolution with the “nullification doctrine,” asserted that states could nullify acts of Congress that they, promoted most prominently by John C. Calhoun, the slavery defender from South Carolina).

Justice Kennedy’s prominence in this line of cases is demonstrated by his authorship of two subsequent opinions for the same five-member majority expounding on Eleventh Amendment state sovereign immunity. In *Coeur d’Alene Tribe of Idaho v. Idaho*, Justice Kennedy held that the state of Idaho was shielded from the tribe’s suit by the Eleventh Amendment. 521 U.S. 261 (1997), *discussed infra* notes 69-82. Kennedy wrote for another five-member majority two years later in *Alden v. Maine*, affirming a lower court dismissal of a suit that had been filed by probation officers against their employer, the state of Maine, alleging that the state had violated the federal Fair Labor Standards Act of 1938, on the grounds the suit was barred by Eleventh Amendment sovereign immunity. 527 U.S. 706, 712 (1999).

The same five-member majority banded together yet again in *Bd. of Trustees of Univ. of Alabama v. Garrett*, in an opinion by Chief Justice Rehnquist, holding that the Eleventh Amendment shielded a state from lawsuits under a federal law, this time preventing former employees of the state of Alabama from recovering damages from the state for its failure to comply with Title I of the Americans with Disabilities Act of 1990. 531 U.S. 356, 360 (2001). The five-member majority finally broke apart in the Court’s 2003 decision in *Nevada Dept. of Human Resources v. Hibbs*, when Chief Justice Rehnquist held that a state employee’s suit against the state for its failure to comply with the Family and Medical Leave Act was not barred by the Eleventh Amendment because Congress had enacted the legislation using its Fourteenth Amendment power to ameliorate past discrimination. Justices O’Connor, Souter, Ginsburg, and Breyer joined the opinion, and Justice Stevens concurred in the judgment. Justices Kennedy, Scalia, and Thomas dissented. 538 U.S. 721 (2003).

<sup>18</sup> See *infra* note 22 and accompanying text.

role in the environmental decisions of 2005-06, which spotlighted Kennedy's central role in environmental cases. Section I begins by discussing Judge Kennedy's Ninth Circuit environmental opinions, of which there are only a few. Section II turns to Kennedy's early years on the Supreme Court, from 1988 to 2000, including several important decisions on standing, takings, and preemption. Section III proceeds to evaluate Kennedy's opinions during 2000-04, highlighted by an important majority opinion on takings and Kennedy's sole written environmental dissent. Section IV examines the decisions of 2005-06, focusing on the *Kelo*, *Rapanos*, and *Lingle* decisions.<sup>19</sup> In section V, the article profiles Kennedy's contributions to discrete areas of the law, including standing and ripeness, federalism, takings, and environmental statutory interpretation. The article concludes that Kennedy is best characterized as doctrinal minimalist—attached to case by case fact-finding and requirements that fact finders to show “nexus” between rules and context<sup>20</sup>—a states' rights advocate,<sup>21</sup> and a property rights defender, who is quite skeptical of government planning.<sup>22</sup>

## I. Judge Kennedy on the Ninth Circuit

Judge Kennedy's environmental record on the Ninth Circuit is sparse. Appointed by President Ford in 1975, in over a dozen years on that court we were able to identify only four Kennedy

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<sup>19</sup> On *Kelo* and *Rapanos*, see *supra* notes 3-4, *infra* notes 173-85, 186-97 and accompanying text; on *Lingle v. Chevron*, 544 U.S. 528 (2005), see *infra* notes 161-71 and accompanying text.

<sup>20</sup> *Webster's* defines “nexus” as “a connection, interconnection tie, link; a connected group or series; a predicative relation or a construction consisting of grammatical elements either actually or felt as so related. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1524 (1986). For a discussion of the “nexus” requirement in the context of standing, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 201 (1992) (noting that Justice Kennedy indicated in *Lujan* that he might be willing to recognize standing based on some “nexus” theory); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1452-58 (1988) (discussing the Court's use of a “nexus” requirement to restrict standing).

<sup>21</sup> See *Alaska Dept. of Env'tl. Cons. v. EPA*, 540 U.S. 461 (2004), discussed *infra* notes 143-60 and accompanying text.

<sup>22</sup> See Robert A. Chaim, *Justice Kennedy Inaugurates the Archie Hefner Memorial Lecture Series*, MC GEORGE MAG., 1991, at 10-11 (quoting Kennedy as remarking that “property provides the structural vehicle through which we can protect ourselves against a blueprint for the future being imposed by government ... ever hungry for self-aggrandizement”).

environmental opinions. His first was a 1980 decision that overturned a lower court's rejection of a National Environmental Policy Act (NEPA) challenge by a citizens' group to the Federal Highway Administration's funding of a four-lane expansion on Highway 2, outside of Glacier National Park in Montana.<sup>23</sup> The lower court ruled that the environmentalists' suit was barred by laches, but a panel led by Judge Kennedy reversed on the ground that the plaintiffs had not actually delayed bringing suit for a decade, since the project had been expanded and final federal approval came some nine years after it was first proposed in 1969.<sup>24</sup> On the merits, Judge Kennedy concluded that the government's Environmental Impact Statement (EIS) on the project was deficient because it failed to analyze the secondary effects of the highway, and it did not include an adequate range of alternatives, since it failed to consider the alternative of improving the existing two-lane highway.<sup>25</sup>

Two years later, in another NEPA suit, Judge Kennedy affirmed a lower court in a panel decision upholding a Department of Housing and Urban Development determination not to prepare an EIS on a redevelopment plan that would displace local artists in San Francisco.<sup>26</sup> The plaintiffs alleged that displacing local artists would "irreparably damage the cultural character of the area," but Judge Kennedy rejected the notion that a significant effect on the cultural environment triggered an EIS, and he also noted that the plaintiffs failed to demonstrate a "causal nexus" between the redevelopment and any significant cultural impact, the first of many Kennedy opinions demanding "nexus."<sup>27</sup> This demand for the development of specific facts sufficient to show a close fit between

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<sup>23</sup> *Coal. for Canyon Preservation v. Bowers*, 632 F.2d 774, 778 (9th Cir. 1980).

<sup>24</sup> *Id.* at 780-81.

<sup>25</sup> *Id.* at 784.

<sup>26</sup> *Goodman Group, Inc. v. Dishroom*, 670 F.2d 182, 184 (9th Cir. 1982).

<sup>27</sup> *Id.* at 184.

the conflict at issue and the purpose of the environmental law would become characteristic of Kennedy's environmental jurisprudence, culminating in his 2006 *Rapanos* opinion.<sup>28</sup>

Another 1982 panel opinion of Judge Kennedy's affirmed a lower court's rejection of a challenge to the Environmental Protection Agency's allocation of wastewater treatment facility funding as being used by local government grantee for purposes unrelated to water pollution.<sup>29</sup> Unlike the lower court, which ruled that the expenditures were authorized by the Clean Water Act, Judge Kennedy concluded that the plaintiff lacked standing, since by the time the suit was filed the funds had been spent, and there was no guarantee of future funds.<sup>30</sup> Thus, injunctive relief would not redress the alleged injury, and the purpose of the statute's citizen suit provision—to protect clean water and the environment—could not be served by the plaintiff's suit.<sup>31</sup>

In still another 1982 panel opinion, Judge Kennedy upheld an Oregon district court's grant of a preliminary injunction preventing the Yakama Tribe from harvesting Columbia River salmon. The state of Washington sought the injunction in response to extremely low salmon counts at Bonneville Dam in the spring of 1980.<sup>32</sup> The tribe appealed the injunction, which included two fisheries located on the Yakama Reservation,<sup>33</sup> on the ground that the state's fishing closure extinguished the tribe's treaty fishing rights without protecting the salmon. Although the 1980 spring chinook salmon run

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<sup>28</sup> See *infra* notes 188-96 and accompanying text.

<sup>29</sup> *Gonzales v. Gorsuch*, 688 F.2d 1263, 1264 (9th Cir. 1982). This decision drew a concurrence from Judge Wallace, who emphasized the distinction between constitutional and prudential standing, maintaining that the Clean Water Act's citizen suit provision eliminated prudential standing barriers and gave standing to anyone who could meet Article III standing requirements. *Id.* at 1269 (Wallace, J., concurring).

<sup>30</sup> *Id.* at 1267 (“[N]othing in the legislative history indicates that Congress intended to ignore or to test the conventional requisites of justiciability.”).

<sup>31</sup> *Id.* at 1266, 1268 (“T[he CWA's] grant of standing does not extend to a review of appropriations where the review and any judicial decree would be ineffective to vindicate environmental concerns.”).

<sup>32</sup> *United States v. Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1982). The 1980 injunction and the ensuing litigation grew out of a suit filed by individual members of the Yakama Tribe in 1968 to protect treaty fishing rights for Columbia Basin tribes, in which the tribe later intervened. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The Yakama Tribe changed the spelling of its name from “Yakima” in 1993, in order to reflect its historic spelling.

was over, the Ninth Circuit panel ruled that the tribe's claim was not moot because, in light of the ongoing nature of litigation over Indian treaty fishing rights, the tribe had a "reasonable expectation" it could face a similar injunction in the future. Further, the sovereign immunity and jurisdictional issues the tribe raised were also likely to recur in the case.<sup>34</sup>

Reaching the merits, Judge Kennedy rejected the tribe's sovereign immunity, concluding that the tribe had waived its immunity when it intervened in the original suit.<sup>35</sup> He also rejected the tribe's argument that the injunction against fishing on reservation lands violated its treaty rights. Judge Kennedy reasoned that if states have the ability to regulate treaty fishing to further conservation interests without violating treaty rights, a federal court should have the same ability to do so.<sup>36</sup> This deferential treatment of the state's position in this case would be reflected in his later opinions on the Supreme Court.

Judge Kennedy's few environmental decisions on the Ninth Circuit were not those of a ideological jurist. He was not noticeably hostile to environmental claims, although he was hardly an enthusiast. He produced remarkably few environmental opinions during a dozen years on the court, a harbinger of his early years on the Supreme Court.

## **II. Early Years on the Supreme Court, 1988-2000**

Any significance in Justice Kennedy's role in environmental decisions during his first four years on the Court must be deciphered from his silence between 1988 and 1991. Of the thirteen

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<sup>33</sup> *Oregon*, 657 F.2d at 1012.

<sup>34</sup> *Id.* at 1012.

<sup>35</sup> *Id.* at 1014. In addition to intervening in the original suit, the tribe had entered into an agreement with the state of Washington in 1977, in which both the tribe and the state consented to resolve any disputes over Columbia River salmon management in Oregon district court. *Id.*

<sup>36</sup> *Id.* at 1016. Kennedy referred to the right to harvest salmon as the "res" of the treaty, concluding that "[s]ince the existence of the salmon was inextricably linked to the res in the court's constructive custody, the court was empowered to enjoin interference with that custody." *Id.* at 1015-16.

environmental decisions he took part in during those four years,<sup>37</sup> Justice Kennedy joined the majority without writing an opinion in all but one decision.<sup>38</sup> That exception was the Court's decision in

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<sup>37</sup> Justice Kennedy did not take part in several environmental decisions issued by the Court shortly after his confirmation. These included the Court's decision that states acquired title to lands within their borders that were submerged beneath tidal waters not navigable-in-fact when they joined the union, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); and the Court's holding that the Free Exercise clause of the First Amendment did not prohibit the United States Forest Service from approving a timber sale in Northern California on federal public lands that included sites sacred to the religions of several Native American tribes. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988).

<sup>38</sup> See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (opinion by Justice White holding that the Yakama Tribe did not have authority to regulate non-tribal lands within its reservation boundaries); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (opinion by Justice Stevens for a unanimous court holding that NEPA did not require a fully-developed mitigation plan or a worst-case scenario analysis in an environmental impact statement (EIS) prepared by the Forest Service analyzing a proposed alpine ski resort development in Washington state); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (opinion by Justice Stevens for a unanimous court, in a companion case to *Methow Valley*, holding that the Army Corps of Engineers complied with NEPA in the EIS on the Elk Creek Dam in Oregon's Rogue River Basin because a worst-case analysis was not required in the EIS, nor was a fully-developed mitigation plan; moreover, the Corps' decision not to supplement the EIS was within its discretion and was not arbitrary and capricious); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (opinion by Justice Stevens holding that a non-Indian corporation leasing Jicarilla Apache tribal lands for oil and gas production could be taxed by the state, as well as by the tribe, for the same activity); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (opinion by Justice O'Connor dismissing a citizen suit filed by a dairy farmer against the operator of a landfill on property adjacent to the farm for failing to meet the requirements of the Resource Conservation and Recovery Act because the farmer failed to comply with the law's sixty-day notice requirement for citizen suits); *New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) (opinion by Justice Scalia holding that a federal district court improperly abstained from exercising its jurisdiction when it characterized a suit filed by a utility against a local government for its failure to fully reimburse the utility for plant construction costs as a complex state regulatory matter under exclusive jurisdiction of the state); *General Motors Corp. v. United States*, 496 U.S. 30 (1990) (opinion by Justice Blackmun for a unanimous court holding that EPA's failure to approve a revised state implementation plan (SIP) under the Clean Air Act within the four-month statutory deadline did not prevent the agency from enforcing the existing SIP); *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490 (1990) (opinion by Justice O'Connor for a unanimous court holding that the Federal Power Act preempted state minimum instream flow requirements for the Rock Creek hydroelectric project); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (opinion by Justice Scalia holding that an environmental group's challenge to the Bureau of Land Management's "land withdrawal review program" for violating both the National Environmental Policy Act and the Federal Land Policy and Management Act failed because affidavits by the organization's members claiming that they used lands "in the vicinity" of the lands affected by the challenged decisions were insufficient to establish standing); *Wisconsin Public Intervener v. Mortier*, 501 U.S. 597 (1991) (opinion by Justice White holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt local government regulation of pesticide use when those regulations did not conflict with federal regulations); *Illinois v. Kentucky*, 500 U.S. 380 (1991) (opinion by Justice Souter settling a boundary dispute between the two states by declaring the boundary lies at the low water mark of the Ohio River as it existed in 1792).

In the final case from this era, *Oklahoma v. New Mexico*, Justice Kennedy joined all but one part of Justice White's majority opinion resolving a dispute over New Mexico's diversion of additional water from the Canadian River, which had been apportioned between it and Oklahoma and Texas by an interstate compact. 501 U.S. 221, 242 (1991). Kennedy also joined Chief Justice Rehnquist's opinion concurring in part and dissenting in part on the grounds that the Court's interpretation of the Canadian River Compact, which gave New Mexico unrestricted use of waters originating above the Conchas Dam but restricted its use below, was erroneous in that it considered water

*Pennsylvania v. Union Gas Co.*, where Justice Kennedy joined both Justice White’s dissent, which denied that Congress intended to waive state sovereign immunity in the 1986 amendments to the Comprehensive Environmental Response, Compensation, and Liability Act,<sup>39</sup> and Justice Scalia’s dissent, which denied that Congress had the power to waive the states’ Eleventh Amendment-protected immunity even if it intended to do so.<sup>40</sup> Kennedy’s joining Scalia’s dissent foreshadowed the overturning of the majority opinion in *Union Gas* just six years later in *Seminole Tribe v. Florida*,<sup>41</sup> the first in a series of opinions expanding state sovereign immunity under the Eleventh Amendment.<sup>42</sup>

Justice Kennedy’s first notable environmental law opinion on the Supreme Court came five years after his appointment, when he wrote a concurrence in *Lucas v. South Carolina Coastal Council*, in which the Court, in an opinion by Justice Scalia, ruled that the constitution required that landowners receive compensation for regulations which produced complete losses of economic value, subject to several exceptions.<sup>43</sup> This was quite a revealing opinion, for it indicated a significant

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spilled over the dam not to have originated above the dam, and thus was subject to the Compact’s use restrictions to ensure sufficient flows reach the downstream states. *Id.* at 244-45 (Rehnquist, C.J., dissenting).

<sup>39</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 28 (1989) (White, J., concurring).

<sup>40</sup> *Id.* at 57 (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justice O’Connor also joined this opinion. Kennedy’s decision to join even a partial dissent in an environmental decision is notable because it has been an infrequent occurrence during his tenure on the Court. *See supra* note 2 (discussing his remarkable record for voting with the majority in environmental decisions).

<sup>41</sup> 517 U.S. 44, 66 (1996). Chief Justice Rehnquist’s majority opinion in *Seminole Tribe* was joined by Justices Kennedy, O’Connor, and Scalia, all of whom joined Justice Scalia’s *Union Gas* dissent. The key fifth vote in *Seminole Tribe* came from Justice Clarence Thomas, who was appointed to the court two years after *Union Gas* by George H.W. Bush in 1991. Cornell Law School Legal Information Institute, Supreme Court collection, at <http://www.law.cornell.edu/supct/justices/thomas.bio.html>.

<sup>42</sup> *See supra* note 17 (discussing the Rehnquist Court’s Eleventh Amendment revolution, expanding the scope of state sovereign immunity).

<sup>43</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See generally* Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in ENVIRONMENTAL LAW STORIES 237, 278 (Richard J. Lazarus & Oliver A. Houck, eds. 2005) (thoroughly discussing the context and significance of the case, the latter of which Rose considered to be a prime example of “imbalanced propertization”). In what must be one of the prime examples of the law of unintended consequences, the *Lucas* exceptions have proved much more significant and enduring than the categorical takings rule the decision established. *See* Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 329 (2005).

divide separated Justice Kennedy from Justice Scalia.<sup>44</sup> Kennedy joined a six-member majority in *Lucas*,<sup>45</sup> but he wrote a concurrence to emphasize his disagreement with Justice Scalia concerning the scope of the exemptions from the *Lucas* compensation rule. According to Kennedy, Scalia's exemption from compensation for regulations preventing activities that would amount to common law nuisances<sup>46</sup> was too narrow, since the basic test for compensation for regulatory takings was "whether the deprivation is contrary to reasonable, investment-backed expectations."<sup>47</sup> Justice Kennedy's view was that because "courts must consider all reasonable expectations whatever the source," the "common law of nuisance is too narrow a confine for the exercise of a regulatory power in a complex and interdependent society."<sup>48</sup> He would therefore not subject all new regulatory initiatives to compensation requirements where they produced economic wipeouts because changed conditions and new ecological understandings might justify them; for example, coastal property "may present such

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<sup>44</sup> See Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, 57 HASTINGS L. J. 759, 801-03 (2006) (noting Kennedy chose a "very different analytic framework" to evaluate regulatory takings in his concurrence in *Lucas* from that advocated by Justice Scalia); Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule"*, 29 ENVTL. L. 939, 943-45 (1999) (discussing the "very different views" Justice Kennedy and Justice Scalia expressed toward regulatory takings in *Lucas*); F. Patrick Hubbard, Palazzolo, *Lucas*, and Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 487-89 (2001) (discussing the divide between the Scalia and Kennedy view of a property owner's reasonable expectations); Peter C. Meier, *Stevens v. City of Cannon Beach: Taking Takings Into the Post-Lucas Era*, 22 ECOLOGY L. Q. 413, 444 (1995) (arguing that courts should adopt Justice Kennedy's approach to defining total takings over that advocated by Justice Scalia in order to allow for a "broader understanding of regulatory power").

<sup>45</sup> Justice Scalia wrote for himself, Chief Justice Rehnquist and Justices White, O'Connor, Kennedy, and Thomas. The Court reversed a decision of the South Carolina Supreme Court, which had upheld the state's defense to a landowner's takings claim on the ground that the state Beachfront Management Act—which prohibited construction of dwellings on the landowner's barrier island property (rendering his lots "valueless," according to a trial court stipulation)—was a legitimate use of the police power and insulated from constitutional compensation by the so-called "nuisance exception" to the takings clause because the state was preventing a public harm. *Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895, 901-02 (S.C. 1991).

<sup>46</sup> *Lucas*, 505 U.S. at 1031.

<sup>47</sup> *Id.* at 1034 (Kennedy, J., concurring in the judgment). ("Where a taking is alleged from regulation which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.")

<sup>48</sup> *Id.* at 1035 ("In my view, reasonable expectations must be understood in light of the whole of our legal tradition.").

unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”<sup>49</sup>

His *Lucas* concurrence was a clear signal that Justice Kennedy was unpersuaded by Justice Scalia’s agenda to advance landowner rights in a single judicial decree.<sup>50</sup> Instead, Kennedy showed himself to be a judicial conservative (as opposed to the radical Scalia), a doctrinal minimalist,<sup>51</sup> with an affinity for fact-specific determinations.<sup>52</sup> His *Lucas* concurrence revealed Kennedy to be not philosophically opposed to regulation if the need for it was evident from the record. His mention of “fragile land[s]” as justifying regulation indicated that for Kennedy context was a key factor.

Another well-known 1992 case prompted another Kennedy concurrence. In *Lujan v. Defenders of Wildlife*, a six-member majority of the Court ruled that environmentalists lacked standing to challenge a Department of the Interior regulation exempting federal agencies acting in foreign countries from the obligation to engage in Endangered Species Act (ESA) consultation before undertaking proposals that could threaten species listed under the statute.<sup>53</sup> Justice Scalia again wrote

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<sup>49</sup> *Id.* at 1035 (“[The] Takings Clause does not require a static body of state property law.”). And indeed lower courts have not restricted the nuisance defense to common law nuisances, *see* Blumm & Ritchie, *supra* note 43, at 335.

<sup>50</sup> *See* Lazarus, *supra* note 44, at 787-88 (discussing Justice Scalia’s efforts on the Court to promote a property rights agenda).

<sup>51</sup> *See generally* Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (discussing trends in invoking minimalism on the Supreme Court).

<sup>52</sup> *See supra* notes 26-28 (rejecting an argument that a project with significant effects on the cultural environment required an EIS absent any “causal nexus” between the project and any significant cultural impact while sitting on the Ninth Circuit in *Goodman Group*), *infra* note 69 (ruling that the Gun-Free School Zones Act, invalidated by *United States v. Lopez*, was beyond the scope of congressional Commerce Clause authority because it lacked a “commercial nexus”).

<sup>53</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The case involved a challenge to a Department of Interior regulation exempting federal actions outside the U.S. from the ESA requirement that federal agencies insure their actions will not harm listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). The environmental plaintiffs challenged the application of this exemption to several federally-funded projects abroad, including U.S. involvement in rebuilding the Aswan High Dam on the Nile in Egypt and construction of the Mahaweli Dam in Sri Lanka, funded by the Agency for International Development. *Id.* at 563. A district court initially dismissed the suit on the grounds that the environmental plaintiffs lacked standing, but the Eighth Circuit reversed. On remand, the district court issued a judgment in favor of the environmentalists both on the

for the majority, conceding that “the desire to use or observe an animal species, even for purely aesthetic purposes, was undeniably a cognizable interest for purpose of standing,” but concluding that the environmentalists suffered no “imminent injury,” since past visits to the species’ habitats “prove[d] nothing,” and a mere intent to return in the future “without any description of concrete plans” for doing so was insufficient to create standing.<sup>54</sup>

Justice Kennedy concurred in most of the six-member majority opinion,<sup>55</sup> but he objected to Justice Scalia’s categorical rejection that someone interested only in studying or seeing endangered species “anywhere on the globe” could have standing under “animal nexus,” “vocational nexus,” or “ecosystem nexus” theories.<sup>56</sup> Although Kennedy agreed that the environmentalists in *Defenders* failed to demonstrate concrete injury, he was “not willing to foreclose the possibility...that in different circumstance a nexus theory similar to those proffered...might support a claim of standing.”<sup>57</sup>

Kennedy’s affinity to nexus showings was again evident.

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standing issue and the merits, which the Eight Circuit upheld. *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 118 (8th Cir. 1990). The only issue the Supreme Court addressed was whether the environmentalists had standing. *Lujan*, 504 U.S. at 558.

<sup>54</sup> *Lujan*, 504 U.S. at 562-64.

<sup>55</sup> Justice Blackmun, joined by Justice O’Connor, dissented, on the grounds that the plaintiffs had standing, since they had raised a “genuine issue” of material fact, and because the majority erred in broadly rejecting standing for procedural injuries. Blackmun stated, “I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing.” *Lujan*, 504 U.S. at 589-90, 606 (Blackmun, dissenting). Justice Stevens concurred in the judgment because he did not believe Congress intended the consultation requirements of the ESA to apply to activities outside the U.S., but he filed a separate opinion because he disagreed with the Court’s conclusion that the environmentalists lacked standing. 504 U.S. at 581-82 (Stevens, J., concurring). Justice Souter joined Kennedy’s concurrence. 504 U.S. at 579.

<sup>56</sup> *Id.* at 579. Justice Scalia considered such theories to be “beyond all reason.” *Id.* at 566. Justice Kennedy took more than six weeks to decide not to join Justice Scalia’s opinion because he wanted revisions to the section on redressability, objecting to Scalia’s effort to require “particularized injury.” Justice Scalia made some changes, but Justice Kennedy wrote a separate concurrence anyway, a decision which made Justice Scalia “irate,” considering it to have “scuttled” his majority opinion.” See Robert v. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10,637, 10659 (2005), citing Memorandum from Geoffrey M. Klinebert to Justice Blackmun (Jun. 2, 1992), Harry A. Blackmun Papers, box 591.

<sup>57</sup> *Id.* at 579. (Kennedy, J., concurring), citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231, n. 4 (1986), for the proposition that members of a whale-watching and studying organization would be adversely affected by continued whale harvesting.

Kennedy's *Defenders* concurrence also cautioned that the Court should not be understood to foreclose Congress from authorizing new causes of action: "As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."<sup>58</sup> He noted that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," but maintained that Congress must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."<sup>59</sup> Kennedy's concurrence suggested that Congress failed to identify the injury the citizen suit provision of the ESA sought to vindicate. Therefore, the ESA citizen suit provision did not obviate the need for plaintiffs to demonstrate injury for standing purposes because "while the statute purports to confer a right on 'any person...to enjoin...the United States and any other governmental instrumentality or agency...who is alleged to be in violation of any provision of this chapter,' it does not of its own force establish that there is an injury 'in any person' by virtue of any 'violation.'"<sup>60</sup> Although he agreed with the majority's conclusion that the plaintiffs failed to demonstrate a "concrete injury" requirement for standing, he was unwilling to foreclose the possibility that a "nexus" theory of standing might be appropriate under different circumstances. As in *Lucas*, Kennedy was unwilling follow the Scalian common-law model as a paradigm for resolving modern environmental controversies.<sup>61</sup>

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<sup>58</sup> *Id.* at 580.

<sup>59</sup> *Id.*

<sup>60</sup> The requirement that a plaintiff show a "concrete and personal" injury to establish standing, Kennedy wrote, both "preserves the vitality of the adversarial process" and "confines the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Id.* at 581.

<sup>61</sup> See Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 215-20 (1992) (criticizing Justice Scalia's tradition-bound arguments for a narrow concept of Article III standing requiring actual injury); Daniel J. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 555-58 (1997) (discussing Justice Scalia's "campaign against environmental standing" in decisions restricting the judicial role in environmental laws). Justice Scalia made

In another 1992 decision, a divided Court ruled that two Illinois hazardous waste licensing laws that required worker training were preempted by the federal Occupational Safety and Health Act (OSHA).<sup>62</sup> Justice O'Connor authored the five-member majority opinion, concluding that the federal statute impliedly preempted the state laws because they conflicted with the "full purposes and objectives" of OSHA, which indicated that "Congress intended to subject employers and employees to only one set of regulations."<sup>63</sup>

Justice Kennedy concurred in part, but he disagreed with Justice O'Connor's reliance on conflict preemption. Instead, he would have found express preemption, as he thought Congress in OSHA intended to displace state regulations, even where there was no actual conflict between state laws and federal regulations.<sup>64</sup> His willingness to broadly interpret the preemptive effect of OSHA on state hazardous waste worker training statutes showed that Kennedy's states' rights perspective did not extend to state laws he perceived to impose duplicative regulations on businesses.

1994 finally produced a Kennedy majority opinion in an environmental case, seven years after his ascension to the Court. In *Carbone v. Town of Clarkstown*, a town ordinance required all non-

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clear his support for constricting standing extra-judicially, in a much-cited 1983 law review article. Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983).

<sup>62</sup> *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). The state statutes aimed to "promote job safety" and "protect life, limb, and property" by requiring workers who may be exposed to hazardous wastes on the job to take at least forty hours of training under an approved Illinois program, pass a written examination, and complete an annual refresher course. *See id.* at 91. Federal OSHA regulations require hazardous waste workers to receive at least forty hours of training off-site and a minimum of three days of supervised field experience. *See id.* at 92.

<sup>63</sup> *Id.* at 98. *Gade* is among a number of Court decisions invalidating state statutes conflicting with federal laws under the doctrine of "obstacle preemption," in which a state law will be found unconstitutional if it interferes with the underlying purposes of a federal statute. *See* Robert A. Shapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 262 (2005) (discussing recent Court decisions invoking "obstacle preemption" to conclude a state law is unconstitutional although it does not conflict with the actual provisions of a federal law, because it conflicts with the underlying purposes of a federal statute).

<sup>64</sup> *Id.* at 109 (Kennedy, J., concurring). Justice Souter dissented, joined by Justices Blackmun, Stevens, and Thomas. He concluded that "traditional police powers of the State survive until Congress has made a purpose to preempt them clear." *Id.* at 121-22 (Souter, J., dissenting).

hazardous solid waste generated within the town to be deposited at a private waste transfer station that would collect the waste and separate the recyclable from the non-recyclable material. The ordinance in effect created a local monopoly by guaranteeing a minimum flow of waste to the station, which would then collect a fee in excess of the market rate and, after five years, sell the facility to the town for \$1.<sup>65</sup> A private recycler in the town, prevented by the ordinance from shipping to cheaper out-of-state processors, challenged its constitutionality, and the Court, in a 6-3 decision, struck the ordinance down as an undue burden on interstate commerce.<sup>66</sup>

For Justice Kennedy, even though the ordinance did not explicitly regulate interstate commerce, “it [did] so nevertheless by its practical effect and design.”<sup>67</sup> Such a burden could be justified if it were the only method available to advance a legitimate local interest, but since there were alternative ways of financing the town’s transfer facility, the ordinance could not, in Kennedy’s view, survive judicial review.<sup>68</sup>

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<sup>65</sup> C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 387 (1994).

<sup>66</sup> *Id.* at 384. Justice Kennedy wrote for Justices Stevens, Scalia, Thomas, and Ginsburg. Justice O’Connor concurred in the judgment, while Justice Souter wrote a dissent, joined by Chief Justice Rehnquist and Justice Blackmun.

<sup>67</sup> *Id.* at 394. Kennedy relied on a long line of cases he termed “local processing requirements that we have long held invalid.” *Id.* at 391-92, citing, *e.g.*, South-Central Timber Dev. Co. v. Wunnicke, 467 U.S. 82 (1984) (striking down an Alaska regulation that required all Alaska timber to be processed within the state prior to export). He observed that “[t]he essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state meat inspectors, or shrimp hullers, [are] deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource [for] the benefit of local businesses that treat it.” *Id.* at 392.

<sup>68</sup> Justice O’Connor’s concurrence faulted the majority opinion for characterizing the “flow control” ordinance as discriminating against interstate commerce, when in fact it discriminated against all competition, both local and interstate, but she concluded that it nevertheless imposed excessive burdens on interstate trade in relationship to the local benefits obtained. *Id.* at 401 (O’Connor, J., concurring). Justice Souter’s dissent (joined by Chief Justice Rehnquist and Justice Blackmun) emphasized the fact that the ordinance discriminated against both in-state and out-of-state providers, and “directly aids the government in satisfying a traditional governmental responsibility.” *Id.* at 410-11 (Souter, J., dissenting).

In 1997, during his tenth year on the Court, Justice Kennedy wrote his second majority environmental law opinion, in a case in which state sovereignty loomed large.<sup>69</sup> The Coeur d’Alene Indian Tribe sued the state of Idaho and several state agencies and officials in federal district court, claiming that an 1873 Executive Order—which defined the boundaries of the original Coeur d’Alene Reservation—recognized the tribe’s ownership of the bed and banks of Lake Coeur d’Alene long before Idaho became a state in 1890.<sup>70</sup> The district court dismissed the suit as barred by the Eleventh Amendment’s sovereign immunity protecting states from federal court suits.<sup>71</sup> But the Ninth Circuit revived the case under the *Ex parte Young* exception to the Eleventh Amendment, which allows challenges to state officials implementing unconstitutional laws.<sup>72</sup> The Supreme Court reversed, 5-4,

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<sup>69</sup> Between the *Carbone* and the *Coeur d’Alene* decisions, the Court decided *United States v. Lopez*, 514 U.S. 549 (1995), a non-environmental law decision but one with considerable implications for environmental law, since the Court limited Congress’s Commerce Clause power—the basis of most environmental statutes—for the first time in sixty years. For example, *Lopez* led to questions about the constitutionality of the application of the Endangered Species Act to so-called non-commercial species. But four circuit court decisions upheld the application of the statute to species with little or no commercial value on a variety of grounds. See Michael C. Blumm & George N. Kimbrell, *Flies, Wolves, Spiders, Toads, and the Constitutionality of the Endangered Species Act’s Take Provision*, 34 ENVTL. L. 309, 327-41 (2004) (discussing the circuit court decisions).

Justice Kennedy’s concurrence, joined by Justice O’Connor, supplied the deciding votes in *Lopez*. His opinion was quite revealing. Although he acknowledged that the history of the Commerce Clause “counsels great restraint” from reviewing courts, Kennedy thought the Gun-Free School Zones Act was beyond congressional power because gun possession had no commercial character, and the “purposes and designs” of the statute had no “commercial nexus.” Where legislation reached beyond commercial activity “in the ordinary and usual sense of the term,” the judicial role was to inquire whether the federal government was intruding on an area of traditional state control because otherwise the states could lose their role as “laboratories of experimentation.” *Lopez*, 504 U.S. at 668-83.

Kennedy’s search for factual “nexus”—echoing his willingness to entertain nexus theories of standing in *Defenders*, see supra notes 56-57, and his circuit court opinion in *Goodman Group*, supra note 27—would become characteristic over the next decade.

<sup>70</sup> *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 264-65 (1997), citing Executive Order of Nov. 8, 1873, reprinted in 1 C. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The executive order did not mention the lakebed, but it defined one of the reservation’s boundaries as the point where the Spokane River joined Lake Coeur d’Alene and “thence down along the center of the channel of said Spokane River ...” *Id.*

<sup>71</sup> U.S. Const., Amend. XI.

<sup>72</sup> *Coeur d’Alene Tribe of Idaho v. Idaho*, 42 F.3d 1244, 1248 (9th Cir. 1994).

with Justice Kennedy writing for the majority, although his opinion was fully joined only by Chief Justice Rehnquist.<sup>73</sup>

An ongoing violation of federal law is generally sufficient to invoke the *Ex Parte Young* exception.<sup>74</sup> But Justice Kennedy concluded that the applicability of the *Young* exception is a function of a case-by-case evaluation of the facts.<sup>75</sup> Under his factual scrutiny, the tribe's suit was the "functional equivalent of a quiet title action implicating special sovereignty interests."<sup>76</sup> Thus, the *Young* exception did not apply because an injunction against state officials would prevent the state from asserting jurisdiction over submerged lands, which were held in trust for the public, causing the state's sovereign interest in its waters to be "affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury."<sup>77</sup>

In part of the opinion joined only by the Chief Justice, Kennedy explained that the applicability of the *Young* exception must always be the product of "a careful balancing and accommodation of state interests."<sup>78</sup> Justice O'Connor, for Justices Scalia and Thomas, concurred in the result but did not agree with the balancing: where there is an ongoing violation of federal law, she thought there was no requirement that federal jurisdiction should be predicated on a judicial balancing

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<sup>73</sup> *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 263 (1997). Justices O'Connor, Scalia, and Thomas concurred, along with the Chief Justice. Justices Souter, Stevens, Ginsburg, and Breyer dissented.

<sup>74</sup> *Id.* at 281. *See also Ex Parte Young*, 209 U.S. 123, 155, 159 (1908) (holding that a federal court injunction preventing the Minnesota Attorney General from enforcing an unconstitutional state law did not violate the Eleventh Amendment because when violating the federal Constitution, the state official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct").

<sup>75</sup> *Id.* at 280. Justice Kennedy ruled that the only way the tribe's suit could proceed was under the *Young* exception, since state sovereign immunity applied to tribes because they have the status as foreign sovereigns under the Eleventh Amendment. *Id.* at 269.

<sup>76</sup> *Id.* at 262.

<sup>77</sup> *Id.* at 287. This quote nicely foreshadowed Kennedy's approach to the retroactive legislation at issue in *Eastern Enterprises*, *infra* notes 85-86 and accompanying text.

<sup>78</sup> *Coeur d'Alene*, 521 U.S. at 278.

of federal and state interests in suits seeking prospective relief.<sup>79</sup> Justice Kennedy and Justice O'Connor did not often disagree,<sup>80</sup> but in the *Coeur d'Alene* case, Kennedy showed himself to be more devoted to judicial balancing and state sovereignty than O'Connor.<sup>81</sup>

In 1998, the Court invalidated provisions of the federal Coal Industry Retiree Health Benefit Act of 1992 that required companies previously employing coal miners to pay some of their health care costs in retirement, even if the companies had left the coal mining business.<sup>82</sup> A four-justice plurality, in an opinion by Justice O'Connor, thought that the statute worked a compensable taking of property by "impos[ing] severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."<sup>83</sup> Supplying the decisive fifth vote to strike down the statute, Justice Kennedy disagreed with the plurality on the takings issue, finding that "the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking...."<sup>84</sup>

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<sup>79</sup> *Id.* at 291 (O'Connor, J., concurring). However, Justice O'Connor thought that the *Young* exception was inapplicable in this case because an injunction against state officials would amount to divesting the state of regulatory authority, the equivalent of a quiet title action to sovereign lands, and thus the suit was effectively against the state itself, and therefore barred by the Eleventh Amendment. *Id.*

<sup>80</sup> *See supra* note 155, noting that Justices Kennedy and O'Connor were in agreement 89% of the cases discussed in this study in which both participated. Their tendency to agree in environmental cases is also reflected in O'Connor's environmental protection score, as updated by Cannon, *supra* note 5, which as of the 2004 term was 36.1%, just 2% better than Justice Kennedy's score of 34.1%. *Id.*

<sup>81</sup> The tribe ultimately prevailed when it persuaded the federal government, which is not limited by the Eleventh Amendment, to file suit against the state, and a 5-4 Court upheld the tribal claim as a valid pre-statehood reservation. *Idaho v. United States*, 533 U.S. 262 (2001). Justice Souter wrote a majority opinion in the case, joined by Justices Stevens, Breyer, O'Connor, and Ginsburg. Justice Kennedy joined Justice Rehnquist's dissenting opinion, which took issue with the majority's opinion because the Chief Justice did not find sufficient evidence of congressional intent to convey the submerged lands beneath Lake Coeur d'Alene prior to granting Idaho statehood. *Id.* at 288 (Rehnquist, C.J., dissenting). This case was one of Justice Kennedy's three full environmental dissents. In *Eastern Enterprises* (*infra* notes 83-85) and accompanying text, Justice Kennedy concurred in the judgment but dissented in part. *See infra* Appendix A case table.

<sup>82</sup> *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998) (interpreting 26 U.S.C. §§ 9701-22).

<sup>83</sup> *Id.* at 528-29. Chief Justice Rehnquist and Justices Scalia and Thomas joined Justice O'Connor's opinion.

<sup>84</sup> *Id.* at 542 (Kennedy, J., concurring). Justice Thomas joined Justice Kennedy's concurrence.

In the absence of a specific property interest to trigger the takings clause, Kennedy maintained that the retroactive effect of the legislation was more appropriately evaluated under the due process clause, not the takings clause.<sup>85</sup> His reluctance to employ the takings clause to scrutinize the wisdom of legislation would eventually gain a majority of the Court in 2005 in the *Lingle* decision.<sup>86</sup> On the other hand, Kennedy's willingness to entertain a revival of substantive due process, at least in the case of a statute imposing retroactive liability, might be the product of his fidelity to factual analysis, as he was able to employ the substantive due process inquiry to balance the health problems of former coal company employees against the retroactive nature of the liability imposed on the companies in favor of the latter.<sup>87</sup>

In 1999, Justice Kennedy wrote his third environmental law majority opinion for the Court, concerning a long-running dispute over the proposed development of an environmentally sensitive thirty-seven acre tract of beach in Monterey, California, that had been formerly used as an oil terminal.<sup>88</sup> The developer originally proposed 344 residential units, which was scaled back during

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<sup>85</sup> *Id.* at 547-49:

Although we have been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects....The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process. [By] creating liability for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope.

The four-member dissent agreed with Justice Kennedy that the statute should be evaluated on due process grounds, but thought that the lifetime benefits required by the legislation were reasonable considering the profits that the coal miners provided to the corporation and the foreseeable nature of the miners' illnesses. *Id.* at 558 (Breyer, J., dissenting).

<sup>86</sup> See *infra* notes 161-71 and accompanying text.

<sup>87</sup> *Id.* at 549-50 ("While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost on [the employer's] business' which the employer had been able to avoid in the past ... The Coal Act, however, does not serve this purpose. Eastern was once in the coal business and employed many of the beneficiaries, but [their] expectation of lifetime benefits [was] created by promises and agreements made long after Eastern left the coal business ... [This] case is far outside the bound of retroactivity permissible under our law.")

<sup>88</sup> *City of Monterrey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 694 (1999).

five years of negotiations with the city to 190 units.<sup>89</sup> Even though the 190-unit development preserved roughly half of the acreage as open space, the city council ultimately denied land use approval, citing concerns over the adequacy of public access and environmental damage, especially destruction of habitat of the endangered Smith's Blue Butterfly.<sup>90</sup> The developer filed a federal suit under section 1983,<sup>91</sup> alleging a compensable taking. After an initial round of litigation over the ripeness of the city's appeal,<sup>92</sup> the district court submitted the developer's takings claim to a jury, which awarded the developer \$1.45 million in temporary taking damages.<sup>93</sup> The Ninth Circuit affirmed, ruling that the takings claim was properly submitted to the jury, and that the evidence supported the developer's contention that the city's repeated denials were disproportionate to the proposal's nature and effect.<sup>94</sup> The Supreme Court accepted *certiorari*.<sup>95</sup>

Justice Kennedy wrote for a narrow five-member majority, which upheld the appropriateness of submitting the takings claim to the jury, although the Court unanimously rejected the application of

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<sup>89</sup> *Id.* at 695-96.

<sup>90</sup> *Id.* at 662. The oil company that formerly owned the property had introduced non-native ice plant to help control erosion on the site. The ice plant crowded out native plants, spreading over a quarter of the property by the time of the proposed development. The invasive ice plant crowded out native buckwheat, habitat for the endangered Smith's Blue Butterfly (*Euphilotes enoptes smithi*). *Id.* at 695. The Smith's Blue Butterfly, which lives in two species of buckwheat on the California coast from Monterey Bay through Point Gorda was listed as an endangered species under the ESA in 1976, after invasive plants and coastal development destroyed much of its native habitat. 41 Fed. Reg. 22,041 (Jun. 1, 1976). See Essig Museum of Entomology, University of California at Berkeley, "California's Endangered Insects," <http://essig.berkeley.edu/endins/euphilsm.htm>.

<sup>91</sup> 42 U.S.C. § 1983 (making those who use the color of state law to deprive citizens of their rights under federal law liable to the injured party).

<sup>92</sup> The district court ruled that the developer's takings claim was not ripe because it failed to exhaust its remedies under state law, but the Ninth Circuit reversed on the ground that California law did not authorize compensation for a temporary taking. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506 (9th Cir. 1990).

<sup>93</sup> *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1435 (9th Cir. 1996). The developer won temporary taking damages, despite the fact that the value of the property increased substantially throughout the protracted litigation: selling for \$3.7 million in 1984, three years after the case was filed, and then selling again to the state for \$4.5 million in 1991. See Nancy E. Stroud, *Del Monte Dunes v. City of Monterey: How Far Does It Limit Rough Proportionality in Land Use Cases?*, ABA PROPERTY AND PROBATE MAG., <http://www.abanet.org/rppt/publications/magazine/2000/so00stroud.html>.

<sup>94</sup> *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996).

the “rough proportionality” test of *Dolan v. Tigard*<sup>96</sup> to land use decisions not involving exactions dedicating private property to public use.<sup>97</sup> However, the jury issue fractured the Court.

Justice Kennedy decided that the jury was not evaluating the reasonableness of the city’s land use regulations, just whether the city’s rejection of the Del Monte development was reasonably related to a legitimate public purpose.<sup>98</sup> Consequently, it was within the trial court’s discretion to grant a jury trial.<sup>99</sup> Further, Kennedy ruled that a federal suit seeking damages for an unconstitutional denial of compensation for a taking fell within the scope of the Seventh Amendment’s right to a jury trial.<sup>100</sup> But his opinion was careful to limit the scope of the Court’s decision availability of federal jury trials to section 1983 suits challenging the reasonableness of a specific governmental denial, not to challenge the reasonableness of the regulations themselves.<sup>101</sup> Justice Scalia’s concurrence advocated a much broader federal right to jury trials, while the four-member dissent, authored by Justice Souter,

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<sup>95</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 523 U.S. 1045 (1998).

<sup>96</sup> 512 U.S. 374, 391 (1994) (holding that conditioning a hardware store’s building permit on dedication of a public greenway and bicycle path lacked a “rough proportionality” to the public costs of the development, and thus was a taking under the Fifth Amendment). In a memo to Justice Blackmun regarding the case, Kennedy noted that he agreed with Scalia’s suggestion that Rehnquist include the phrase “rough proportionality” in the *Dolan* opinion because he felt the case needed stronger language to ensure that land use regulators sufficiently justified regulatory exactions, thinking “it important to state that the exaction must be commensurate, though not to the point of demanding exact mathematical precision.” See Percival, *supra* note 36, at 10,656, quoting a Memorandum from Justice Kennedy to Chief Justice Rehnquist (May 16, 1994), Harry A. Blackmun Papers, box 645. Blackmun included in his notes on the *Dolan* decision that Kennedy had remarked that “the cities are not hurting” and that the “burden of proof [is] on the city” to justify an exaction. *Id.*

<sup>97</sup> Both the majority, *Del Monte Dunes*, 526 U.S. at 703, and the dissent, *id.* at 733 (Souter, J., dissenting) agreed that *Dolan*’s “rough proportionality” test was not applicable to this case, since it involved no exaction requiring dedication of private land to the public.

<sup>98</sup> *Id.* at 706.

<sup>99</sup> *Id.* at 721.

<sup>100</sup> *Id.* at 720-21 (“whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question. ... in actions at law otherwise within the purview of the Seventh Amendment, this question is for the jury.” *Id.* at 721-22.)

<sup>101</sup> *Id.* at 721-22 (interpreting the scope of 42 U.S.C. § 1983 and distinguishing a takings claim from a condemnation claim, in which there is no right to a jury trial).

denied any federal right to a jury trial for takings claimants.<sup>102</sup> Characteristically, Justice Kennedy pursued a middle road between the Scalian position and that of the Court’s moderates.

Justice Kennedy authored another majority environmental law opinion—his fourth—also in 1999, involving public lands. The Coal Lands Acts of 1909 and 1910 reserved “coal” on certain public lands to the federal government, which the government then made available for homesteading, including lands the Southern Ute Tribe had ceded to the United States in 1880.<sup>103</sup> In 1938, the federal government conveyed any interest it had in the ceded lands, including its “coal” rights, back to the tribe. Subsequently, coalbed methane gas became an important energy resource, and oil and gas producers obtained rights to extract it from the homesteaders’ successors. In 1991, the Southern Ute Tribe filed suit, claiming that it owned the coalbed methane gas, since the gas was included in the government’s reservation in the 1909 and 1910 statutes.<sup>104</sup> The district court ruled against the tribe, but the Tenth Circuit reversed.<sup>105</sup>

In a 7-1 decision, Justice Kennedy’s opinion for the Court in *Amoco v. Southern Ute Tribes* reversed, rejecting the tribe’s claims.<sup>106</sup> Kennedy observed that the question was “not whether, given

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<sup>102</sup> *Id.* at 723 (Scalia, J., concurring); *id.* at 733 (Souter, J., dissenting).

<sup>103</sup> See *Amoco Prod. Co. v. Southern Ute Tribe*, 526 U.S. 865, 869-70 (1999) (citing Coal Lands Act of 1909, 35 Stat. 844, 30 U.S.C. § 81; Coal Lands Act of 1910, 36 Stat. 583, 30 U.S.C. §§ 83-85) (explaining the context of the Coal Lands Acts, which followed a 1906 withdrawal of 64 million acres of public land from homesteading by President Theodore Roosevelt to prevent coal companies from employing homestead laws to speculate in coal).

<sup>104</sup> *Id.* at 871.

<sup>105</sup> See *Southern Ute Tribe v. Amoco Prod. Co.*, 874 F. Supp. 1142, 1154 (D. Colo. 1995) (holding Congress intended the reserve solid rock coal, not coal bed methane gas, based on the plain meaning of the term “coal”); *Southern Ute Tribe v. Amoco Prod. Co.*, 119 F.3d 816, 826 (10th Cir. 1997) (holding the text of the Coal Lands Acts did not indicate one way or the other whether Congress intended to reserve coal bed methane gas, and ambiguities mineral reservations should be resolved in favor of the government). An *en banc* panel of the 10th Circuit upheld this decision. *Southern Ute Tribe v. Amoco Prod. Co.*, 151 F.3d 1251, 1256 (10th Cir. 1998).

<sup>106</sup> *Amoco*, 526 U.S. at 880. Justice Breyer did not take part in the decision. Only Justice Ginsburg dissented. *Id.* at 880-81 (Ginsburg, J., dissenting) (concluding that ambiguities in land grants should be construed in favor of the federal government, especially since at the time of the Coal Lands Acts, the gas was considered a potential liability that would have been the responsibility of whoever had title to the coal).

what scientists know today, it makes sense to regard [coalbed methane] gas as a constituent of coal but whether Congress so regarded it in 1909 and 1910.”<sup>107</sup> He concluded that Congress did not, since the “common conception” of coal when the statutes passed was solid rock; in fact, the associated gas was considered a dangerous and valueless byproduct.<sup>108</sup> This “natural interpretation” of the meaning of “coal” in 1909-10 as not encompassing the associated gas was sufficient to persuade Kennedy and the majority not to employ the public land law interpretive canon that “ambiguities in land grants are construed in favor of the sovereign or the competing canons relied on by [the tribe].”<sup>109</sup> Among the latter, which Justice Kennedy disregarded, was the Indian law canon that courts should construe ambiguities in favor of tribes and interpret statutes liberally in their favor.<sup>110</sup>

This result was strange, given that both the federal government and the tribe argued that the Coal Lands Acts reserved the methane gas. But Kennedy and the majority were unwilling to defer to the government, the public land canon, and the Indian law canons; instead, they favored a “natural interpretation” of the meaning of “coal” ninety years earlier.<sup>111</sup> Perhaps Kennedy viewed the case as the equivalent of an attempt to impose retroactive property loss on the oil and gas companies.<sup>112</sup>

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<sup>107</sup> *Id.* at 873.

<sup>108</sup> *Id.* at 875.

<sup>109</sup> *Id.* at 880.

<sup>110</sup> See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 119-24 (Nell Jessup Newton ed., LexisNexis 2005) (1982).

<sup>111</sup> *Amoco*, 526 U.S. at 880.

<sup>112</sup> Note the similarity to Kennedy’s aversion to retroactive regulation in *Eastern Enterprises*, *supra* note 87, as well as the sentiments he voiced in *Coeur d’Alene Tribe*, *supra* notes 79-81.

Dean David Getches has shown how the Court frequently employs subjective equitable balancing in Indian cases rather than employ foundational Indian law principles. David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit Of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 346-49 (2001). See also David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1644-45 (1996) (surveying Justice Kennedy’s Indian law jurisprudence, which includes joining every opinion denying tribal sovereign immunity, and noting that Justice Kennedy “has displayed a profound disinterest in Indian law”).

#### IV. Decisions of 2000-04

Whether environmentalists could maintain a Clean Water Act citizen suit for civil penalties drew a curious concurrence from Justice Kennedy in 2000 in *Friends of the Earth v. Laidlaw*. The environmentalists claimed that they fished in and recreated on waters polluted by a company's mercury discharges in violation of its Clean Water Act permit.<sup>113</sup> The district court agreed that company violated its permit and imposed a civil fine of over \$400,000, but it declined to issue an injunction because the company had achieved substantial compliance with its permit during the litigation.<sup>114</sup> The Fourth Circuit reversed, on the ground that the environmentalists' suit was moot, since the only available remedy, the payment of civil penalties to the government, would not redress any injury they suffered.<sup>115</sup>

The Supreme Court upheld the environmentalists' standing, reversing the Fourth Circuit in a 7-2 decision written by Justice Ginsburg,<sup>116</sup> who ruled that civil penalties in citizen suits do in fact redress a plaintiff's injuries, due to the deterrent effect they have on future violations.<sup>117</sup> The majority

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<sup>113</sup> *Friends of the Earth v. Laidlaw Env'tl. Serv.*, 528 U.S. 167, 704-05 (2000).

<sup>114</sup> *See id.* at 703.

<sup>115</sup> *Friends of the Earth v. Laidlaw Env'tl. Serv.* 149 F.3d 303, 306-07 (4th Cir. (1998).

<sup>116</sup> Although Justice Ginsburg attended Harvard Law School for a year, she graduated from Columbia Law School. When she was nominated by President Clinton, Kennedy sent a note to Justice Blackmun (like Kennedy, a Harvard Law School graduate) that the court was still one vote short of a Harvard Law School majority (with Ginsburg replacing Byron White, a Yale Law School alum), although he did state, "But if you are patient, we shall prevail. Tony." *See Percival, supra* note 36, at 10,661, *citing* Note from Justice Kennedy to Justice Blackmun (Jun. 14, 1993), Harry A. Blackmun Papers, box 116. And Justice Kennedy was correct: with the appointment of Chief Justice Roberts, Harvard Law School now has a five-member majority on the Court.

<sup>117</sup> *Friends of the Earth*, 528 U.S. at 185. The Court distinguished *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (no standing for environmentalists to bring a suit for civil penalties because the company agreed to comply with the permit, so no redressability) on the ground that in *Steel Company*, there was no allegation of any continuing or imminent violation, whereas in *Laidlaw* the violations were "ongoing at the time of the complaint" and "could continue into the future if undeterred." *Id.* at 188. Justices Scalia and Thomas dissented because they believed *Steel Company* should have controlled, since "a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish [standing]." *Id.* at 717. Justice Kennedy joined the majority in *Steel Company*, but he also joined Justice O'Connor's concurrence which cautioned against interpreting the Court's opinion to apply to list an "exhaustive list of circumstances under which a federal court may exercise judgment" in assuming jurisdiction, an apparent effort to preserve trial court discretion and limit the reach of

also held that the suit was not moot, since the company failed to prove that it was “absolutely clear” that the permit violations would not recur.<sup>118</sup>

Justice Kennedy issued a cryptic concurrence in *Laidlaw* raising the question of the constitutionality of civil penalties in citizen suits: “Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.”<sup>119</sup> With these words, Kennedy seemed to open the door for constitutional challenges based on congressional interference with Article II’s directive that the President “take care that the laws be faithfully executed.”<sup>120</sup>

Another Kennedy 2000 environmental opinion, this one for a unanimous Court—his fifth environmental law majority opinion—returned to the issue of preemption. In *United States v. Locke*, the Court invalidated Washington state laws, passed in the wake of the *Exxon Valdez* oil spill, regulating oil tankers in the state’s waters.<sup>121</sup> An oil tanker trade association challenged the state’s regulations on the grounds that federal uniformity preempted state authority to regulate vessels. After

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the majority’s opinion. *Steel Company*, 523 U.S. at 110 (O’Connor, J., concurring).

<sup>118</sup> *Id.* at 193.

<sup>119</sup> *Id.* at 197 (Kennedy, J., concurring).

<sup>120</sup> U.S. Const., Art. II, § 3.

<sup>121</sup> 529 U.S. 89, 98 (2000). Washington created a state Office of Marine Safety and directed it to devise standards for spill prevention plans which provided the “best achievable protection” from oil spills. The ensuing regulations developed by the agency regulated tanker design, equipment, reporting, and operating requirements. If a vessel failed to comply with these regulations, it could be subject to penalties, restrictions on its ability to operate in the state’s waters, or be barred from access to the state’s waters. *Id.* at 97. See Wash. Rev. Code § 88.46.040(3) (directing the Office of Marine Safety to develop oil tanker standards); Wash. Admin. Code §§ 317-21-130, 317-21-200–265 (providing requirements for oil tankers operating in Washington waters); Wash. Rev. Code §§ 88.46.070, 88.46.080, 88.46.090 (establishing possible sanctions for violating the operating requirements).

the district court upheld the state regulations, the federal government intervened on behalf of the tanker operators, but the Ninth Circuit upheld all but one of the state regulations.<sup>122</sup>

The Supreme Court reversed. Justice Kennedy interpreted the savings clause in the Oil Pollution Act (OPA) of 1990,<sup>123</sup> legislation Congress passed as its own reaction to the *Exxon Valdez*, to create only a limited exception to the general rule of federal preemption in maritime law, allowing states to continue to enforce liability rules against companies responsible for oil spills.<sup>124</sup> Subject to this limited exception in the OPA, Kennedy ruled that the Ports and Waterways Safety Act of 1972<sup>125</sup> controls vessel regulation, and the OPA did not affect the 1972 law's preemptive effect on conflicting state regulations.<sup>126</sup> While a state may have a legitimate interest in passing regulations to prevent an environmental disaster such as an oil spill, he maintained that the Court must inquire as to whether the local laws are consistent with the federal scheme, informed by the context of the 1972 statute which established a federal objective of providing "uniformity of regulation for maritime commerce."<sup>127</sup> The Court therefore invalidated some of the Washington regulations as preempted by federal law and remanded the remainder for reconsideration by the district court. Justice Kennedy did acknowledge the potential widespread harm to the environment that the state was attempting to avoid, but he maintained that the Court had to focus on "political responsibility," and he made no effort to determine whether the federal laws alone provided adequate protection to the marine environment.<sup>128</sup>

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<sup>122</sup> *Locke*, 529 U.S. at 98, *citing* Int'l Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996) and Int'l Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053 (1998).

<sup>123</sup> 33 U.S.C. § 2718.

<sup>124</sup> *Locke*, 529 U.S. at 105.

<sup>125</sup> 33 U.S.C. §§ 1221-1232(a).

<sup>126</sup> *Id.* at 107.

<sup>127</sup> *Id.* at 108.

<sup>128</sup> *Id.* at 116: "When one contemplates the weight and immense mass of oil ever in transit by tankers, the oil's proximity to coastal life, and its destructive power even if a spill occurs far upon the open sea, international, federal, and state regulation may be insufficient protection. Sufficiency, however, is not the question before us."

In 2001, Kennedy issued another important environmental law majority opinion, his sixth, when he wrote for a 5-4 majority that overturned the Rhode Island Supreme Court's rejection of Anthony Palazzolo's takings claim concerning the state's denial of his plans to develop his coastal property by filling wetlands—actually, a salt marsh subject to tidal flooding.<sup>129</sup> The Rhode Island Supreme Court upheld a trial court decision rejecting Palazzolo's argument that the state's wetland regulations worked a taking of his property because 1) his claim was not ripe, 2) he had no right to challenge regulations that pre-dated his acquisition of the site,<sup>130</sup> and 3) the uplands on his property remained developable, thus providing Palazzolo with substantial economic value.<sup>131</sup>

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<sup>129</sup> Palazzolo v. Rhode Island, 533 U.S. 606, 611-14 (2001).

<sup>130</sup> Palazzolo's corporation actually acquired the site in the 1950s, before enactment of the state's wetland regulations. But by the time the state dissolved the corporation in 1978 (because of tax delinquency), and title passed to Palazzolo as an individual, the state's wetland regulations were in effect. *See id.* at 614.

<sup>131</sup> Palazzolo v. Rhode Island, 746 A.2d 707, 717 (R.I. 2000). The court reached its conclusion that Palazzolo's takings claim was not ripe because he had never applied for a permit to develop the seventy-four lot subdivision he used as the basis for his claim. Nor had he applied to develop the land in a manner that would involve less intensive filling of wetlands.

Writing for a fractured Court,<sup>132</sup> Justice Kennedy reversed on the ripeness and pre-existing regulation grounds. As in *Del Monte Dunes*,<sup>133</sup> Palazzolo had submitted multiple unsuccessful applications, and because of the “unequivocal nature” of the state’s regulations, Kennedy concluded that submission of further development plans would have been futile, and therefore the suit was ripe.<sup>134</sup> Moreover, the majority overturned the state court rule barring a takings challenge because of regulations pre-dating the landowner’s acquisition of the property, declaring that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle.”<sup>135</sup> Thus, the Court rejected the so-called “notice rule,” by which government defendants could categorically defeat takings claims where the landowner acquired after promulgation of the restrictive regulation.<sup>136</sup> According to Justice Kennedy,

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<sup>132</sup> Although Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas joined Justice Kennedy’s majority opinion, both Justice O’Connor and Justice Scalia filed separate concurring opinions. *Palazzolo*, 533 U.S. at 610. Justice O’Connor’s concurrence emphasized that the Court’s holding that post-regulatory acquisition of a property did not automatically bar a takings claim should not be interpreted to mean that the prior existence of the regulation was not relevant to whether a taking occurred within the framework of *Penn Central* balancing (*see infra* note 138 and accompanying text) as elements of the regulation’s effect on both investment-backed expectations and the character of the government action. *Id.* at 633-34 (O’Connor, J., concurring). Justice Scalia’s concurrence objected to this notion that an existing regulation should be considered as part of the investment-backed expectation inquiry because, in his opinion, *Penn Central* balancing “should have no bearing” in determining whether there was a “total taking.” *Id.* at 637 (Scalia, J., concurring). *See also infra* note 138.

Justice Stevens joined the majority opinion in its determination the takings claim was ripe because the regulations at issue prohibited any development of the wetlands. But because Palazzolo gained title to the property only after the regulations had become effective, Stevens thought he lacked standing to challenge regulations pre-dating his ownership of the property. *Id.* at 642-43 (Stevens, J., concurring in part and dissenting in part). Justice Ginsburg filed a dissent, joined by Justices Souter and Breyer, disagreeing with Justice Kennedy’s ripeness conclusion. She agreed with the Rhode Island Supreme Court that Palazzolo’s takings claim was not ripe because he had never sought to develop only the upland portion of the property that was not affected by the state wetlands regulations. *Id.* at 647 (Ginsburg, J., dissenting). Justice Breyer filed a separate dissent to note that while acquisition of a parcel of land after the adoption of restrictive zoning regulations may not automatically bar a takings claim, that fact should be evaluated using *Penn Central* balancing, endorsing Justice O’Connor’s conclusion. *Id.* at 655 (Breyer, J., dissenting).

<sup>133</sup> *See supra* note 86 and accompanying text.

<sup>134</sup> *Palazzolo*, 533 U.S. at 625-26 (“Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted...federal ripeness rules do not require the submission of further and futile applications....”).

<sup>135</sup> *Id.* at 627. *See infra* note 235 (describing the meaning of “Hobbesian”). For an insightful reexamination of property as a bundle of rights, including rights of the state, see Myrl Duncan, *Reconciling the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL L. 773 (2002).

<sup>136</sup> *Palazzolo*, 533 U.S. at 628 (“A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate what is taken.”). On the so-

the proper inquiry for takings purposes was whether a landowner's predecessor could have successfully maintained a takings claim.<sup>137</sup> This position did not represent a majority of the Court, however, as Justice O'Connor's concurrence emphasized that landowner notice of existing regulations was a highly relevant factor in determining the reasonableness of a landowner's investment-backed expectations and the regulation's economic effect under the dominant takings test, the so-called *Penn Central* balancing.<sup>138</sup>

The result proved to be a Pyrrhic victory for the landowner, for Justice Kennedy did not disturb the Rhode Island Supreme Court's ruling that Palazzolo retained substantial value in the unregulated upland portion of his property.<sup>139</sup> Consequently, the Court remanded the case to the Rhode Island courts to determine whether the wetlands regulation worked a *Penn Central*-type taking.<sup>140</sup> Palazzolo was unsuccessful in this effort.<sup>141</sup> Nevertheless, although Palazzolo was unable

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called notice rule, see Danaya C. Wright, *A New Time For Denominators: Toward A Dynamic Theory Of Property In The Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. REV. 175, 188-90 (2004); Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 534 (2002); Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 143-44 (2002).

<sup>137</sup> *Palazzolo*, 533 U.S. at 627 (“[w]ere we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”).

<sup>138</sup> *Id.*, at 635 (O'Connor, J., concurring). The *Penn Central* balancing test was inaugurated by Justice Brennan's opinion in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). See Lazarus, *supra* note 42, at 767-72 (discussing how the Court developed the *Penn. Central* test); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 875-83 (2006) (tracing how the historic trend of construing substantive due process claims as takings contributed to the *Penn Central* result); Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 334 (2006) (discussing how different Supreme Court justices have adapted the *Penn Central* test to reach desired conclusions).

Justice Scalia, also in the majority, wrote a separate concurrence largely criticizing Justice O'Connor's approach, suggesting the pre-existing notice of regulatory restrictions should have no effect on whether a regulation worked a taking, except where it formed a “background principle” of state property law, so that a *Penn Central* takings claim would be unaffected by transfers of title. *Id.* at 636-37 (Scalia, J., concurring). See Lazarus, *supra* note 44, at 817 (stating that Justice Scalia's wrote his separate concurrence in *Palazzolo* for the “purpose of taking deliberate and harsh aim at O'Connor.”)

<sup>139</sup> *Id.* at 632.

<sup>140</sup> *Id.* at 630.

<sup>141</sup> *Palazzolo v. Rhode Island*, 785 A.2d 561 (R.I. 2001). Following the Court's decision, the Rhode Island

to destroy the wetlands in pursuit of his proposed development, Justice Kennedy’s opinion was largely favorable to the landowner, relaxing ripeness rules, eliminating the regulatory notice as a categorical governmental defense, and demonstrating considerable suspicion of the state’s “Hobbesian” environmental regulations.<sup>142</sup>

2004 witnessed the only dissent Justice Kennedy wrote among the seventy-seven environmental cases in this survey. At issue was whether the Environmental Protection Agency (EPA) could issue Clean Air Act compliance orders against the state of Alaska to stop the construction of a polluting facility after EPA concluded that the state’s determination of “best available control technology” (BACT) to reduce plant emissions was unreasonable.<sup>143</sup> EPA and the states make BACT determinations on a case-by-case basis, considering energy, environmental, and economic factors.<sup>144</sup> Each state administers its own EPA-approved clean air program, but EPA has enforcement authority as well, and the Clean Air Act authorizes EPA to take remedial action against any state not in compliance with the statute, including issuing “an order prohibiting construction.”<sup>145</sup> EPA invoked this authority to prevent the Alaska state agency from issuing a permit to the facility,

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Supreme Court remanded the case to the state state superior court to analyze the takings claim under *Penn Central*. *Id.* The superior court concluded that the proposed development’s negative effects on nearby Winnapaug Pond constituted a public nuisance. *Palazzolo v. Rhode Island*, 2005 WL 1645974, \*5 (R.I. Super. 2005). Further, since half of Palazzolo’s property fell below the mean high tide line, under the state’s public trust doctrine, the state holds these lands in trust for the public. Thus, Palazzolo had no right to fill any wetlands below mean high tide line without state legislative permission, significantly diminishing any reasonable investment-backed expectations he might have for developing the property. *Id.* at \*8.

<sup>142</sup> See *supra* notes 134 (ripeness), 136 (notice rule), 135 (Hobbesian state power) and accompanying text.

<sup>143</sup> *Alaska Dept. of Env’tl. Conservation v. EPA*, 540 U.S. 461, 468 (2004). Under the Clean Air Act’s “prevention of significant deterioration” program for airsheds in compliance with national ambient air quality standards, construction of any facility resulting in “major” emissions must be equipped with BACT. *Id.*

<sup>144</sup> See *id.* at 468, citing Clean Air Act, 42 U.S.C. § 7479(3) (2000).

<sup>145</sup> 42 U.S.C. § 7413(a). See also *id.* § 7477 (“prevention of significant deterioration” provision also authorizing EPA to issue “an order...to prevent the construction of a facility” that does not meet PSD requirements).

alleging that the state-prescribed BACT measures were unreasonable.<sup>146</sup> The state maintained that under the Clean Air Act only a state has authority to decide which technology is “best available.”<sup>147</sup>

A five-member Court majority, in an opinion by Justice Ginsburg, sided with EPA, even though it refused to give *Chevron* deference to EPA guidance documents.<sup>148</sup> Nonetheless, the Court considered EPA’s interpretation of its enforcement authority to be reasonable, based on an administrative record that showed the state’s BACT would produce considerably more emissions than alternative technology, and no evidence indicating that such an alternative was economically infeasible.<sup>149</sup>

Justice Kennedy, for a four-member dissent that included Chief Justice Rehnquist and Justices Scalia and Thomas, thought that EPA lacked authority to take enforcement action against a state exercising its statutory discretion.<sup>150</sup> Instead, he believed that EPA should have challenged the state’s BACT determination in state proceedings.<sup>151</sup> He also charged the majority with giving the EPA interpretation inappropriate deference, maintaining that the majority “opinion is chock-full of

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<sup>146</sup> See *Alaska Dept. of Env'tl. Conservation*, 540 U.S. at 480 (describing the exchanges in the permitting process for Red Dog Mine, a zinc concentrate mine 100 miles north of the Arctic Circle, which led to EPA’s 1999 order).

<sup>147</sup> See 42 U.S.C. § 7479(3) (defining "best available control technology" to mean “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation ... which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant”).

<sup>148</sup> *Alaska Dept. of Env'tl. Conservation*, 504 U.S. at 487. Under *Chevron v. Nat. Resources Def. Council*, 467 U.S. 837 (1984), courts give deference to reasonable agency interpretation of statutory ambiguities if promulgated as part of a public accessible process, like notice and comment rulemaking. In this case the Court accorded the EPA guidance only “respect,” as called for by *Christensen v. Harris County*, 529 U.S. 576 (2000) and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>149</sup> *Alaska Dept. of Env'tl. Conservation*, 504 U.S. at 501-02.

<sup>150</sup> *Id.* at 503 (Kennedy, J., dissenting).

<sup>151</sup> *Id.* at 509.

*Chevron*-like language.”<sup>152</sup> In Kennedy’s judgment, the majority abrogated the cooperative federalism scheme Congress constructed in the Clean Air Act. He declared that “federal agencies cannot consign the States to ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight.”<sup>153</sup>

The *Alaska* decision is a telling one. Justice Kennedy not only issued his only written dissent in an environmental case,<sup>154</sup> he also departed from his fellow centrist, Justice O’Connor, a rare event.<sup>155</sup> Moreover, while the case turned on the intricacies of a complex federal statute, one would have thought that those intricacies supported the respect the majority gave to the agency charged with the administration of the statute, even if *Chevron* deference was inappropriate. Further, the text of the Clean Air Act twice authorized EPA to enforce against noncomplying states and facilities.<sup>156</sup> But neither that text, nor the statute’s complexity mattered as much to Justice Kennedy as his conception of the federal-state balance implicit the statute’s structure. Although quick to find federal preemption of state tanker safety and hazardous waste worker training requirements,<sup>157</sup> and willing to strike down a local recycling as an unconstitutional interference with interstate commerce,<sup>158</sup> Kennedy saw in the Clean Air Act a kind of “reverse preemption” in which state action foreclosed federal action. He

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<sup>152</sup> *Id.* at 517.

<sup>153</sup> *Id.* at 518.

<sup>154</sup> Professor Lazarus, the closest observer of the Court’s environmental law opinions, considers Justice Kennedy “the most significant Justice in environmental cases, at least to the extent he has been in the majority more often than any other Justice, often providing the decisive fifth vote.” Richard J. Lazarus, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L. J. no. 3 (forthcoming, 2006).

<sup>155</sup> Of the cases we consider in this study, O’Connor and Kennedy agreed in 67 of the 75 cases in which both participated, or 89% of the time. These statistics count only agreement with the majority or the dissent, not separate concurrences.

<sup>156</sup> See *supra* note 146 and accompanying text.

<sup>157</sup> See *supra* notes 122-29, (discussing *U.S. v. Locke*), notes 63-64 (discussing *Gade*) and accompanying text.

<sup>158</sup> See *supra* notes 65-70 and accompanying text (discussing *Carbone*).

accused the majority of taking “a great step backward in Congress’s design to grant States a significant stake in developing and enforcing national environmental objectives.”<sup>159</sup> For Kennedy, the priority in doubtful cases is not environmental protection but preservation of state autonomy. And he’s strident about it.<sup>160</sup>

## V. Decisions of 2005-06

Of the two celebrated property rights cases of the 2004 Supreme Court term, *Lingle v. Chevron* received decidedly less press attention than *Kelo v. New London*, although it is not clear that the result is less significant. *Lingle* concerned an Hawaiian statute enacted in response to the state’s highly concentrated gasoline market that produced extremely high consumer prices. The statute capped the maximum rent an oil company could charge dealers leasing its service stations.<sup>161</sup> Chevron, one of only six wholesalers in the state, claimed the statute prevented it from recovering its expenses and failed to “substantially advance” a legitimate state interest,<sup>162</sup> a showing which the Supreme Court seemed to require the government to demonstrate in its 1980 *Agins v. Tiburon* decision.<sup>163</sup> Chevron challenged the regulation, the district court twice ruled in favor of the oil company, and the Ninth Circuit twice affirmed, all upholding the relevance of the “substantially advance” test.<sup>164</sup>

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<sup>159</sup> *Alaska Dept. of Env’tl. Conservation*, 504 U.S. at 516 (Kennedy, J., dissenting).

<sup>160</sup> Professor Lazarus, *supra* note 154, at \*28, observed that Kennedy’s *Alaska Dept. of Env’tl. Conservation* dissent “relied on remarkably strident rhetoric.” Lazarus suggested that Kennedy’s dissent erred by not considering the reasons congressional distrust of state regulation in Clean Air Act: “what Justice Kennedy perceived as a problem may better have been understood as a solution.” *Id.* at \*30.

<sup>161</sup> *Lingle v. Chevron*, 544 U.S. 528, 533 (2005).

<sup>162</sup> *See id.* at 534.

<sup>163</sup> *See Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (holding that a landowner’s takings claim failed because the ordinances at issue substantially advanced a legitimate state interest by protecting residents from the “ill effects” of urbanization).

<sup>164</sup> After the district court initially ruled in Chevron’s favor, the state appealed to the Ninth Circuit, challenging the “substantially advance” test. The appeals court affirmed on the appropriateness of the standard, although it remanded as to its application. *Chevron v. Cayetano*, 224 F.3d 1030, 1042 (9th Cir. 2000). The district

Somewhat surprisingly, a unanimous Supreme Court proceeded to repudiate the “substantially advance” test for regulatory takings.<sup>165</sup> Justice O’Connor’s opinion for the Court denied that the test had any “proper place in takings jurisprudence.”<sup>166</sup> The test’s focus on the effectiveness of a governmental regulation was, she maintained, actually a due process clause test, which was “logically prior to and distinct from” whether its effect produced too great a burden on an individual property holder.<sup>167</sup>

Justice Kennedy wrote a concurrence to emphasize that the Court’s abandonment of the “substantially advance” test for a regulatory taking did not preclude the possibility that “a regulation might be so arbitrary or irrational as to violate due process,” citing his *Eastern Enterprises* concurrence.<sup>168</sup> His *Lingle* concurrence was a reminder that Kennedy—whose puzzling *Laidlaw* concurrence indicated an evident hostility to governmental control<sup>169</sup>—was more than willing to erect a

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court then concluded that the statute was unconstitutional by failing to advance a legitimate state interest, since the effect of the statute would be to actually increase gasoline prices, not lower them. The Ninth Circuit again affirmed, upholding the use of the “substantially advance” test. *Chevron v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004).

<sup>165</sup> *Lingle*, 544 U.S. at 540. Justice Kennedy had been complaining about the *Agins* “substantially advances” test as early as *Lucas*, when he argued in conference that the “*Agins* language is not correct and has to be explained.” See Percival, *supra* note 36, at 10,654-55, citing Notes of Justice Blackmun (Feb. 29, 1992 & Mar. 1, 1992) Harry A. Blackmun Papers, box 599.

<sup>166</sup> *Id.* at 540. The Court made an exception to the statement in the text for land use exactions, such as those involved in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring a “rough proportionality” between the effect of proposed developments and requirements to dedicate land for public purposes), discussed *supra* notes 96-97.

According to Justice O’Connor, the purpose of regulatory takings jurisprudence is to identify regulatory actions that are “functionally equivalent” to physical takings of property by focusing on “the severity of the burden” the regulation imposes on private property. *Id.* at 539.

<sup>167</sup> *Id.* at 543. This conclusion vindicated longstanding arguments by John Echeverria. See John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1050 (2000) (criticizing the “substantially advances” test as the source of error in takings decisions, and analogizing the test to Due Process Clause means-ends analysis); John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999) (arguing the “substantially advances” test has no place in takings analysis); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 716 (1993) (arguing for the establishment of a new takings standard distinct from due process analysis).

<sup>168</sup> *Id.* at 548 (Kennedy, J., concurring). On his *Eastern Enterprises* concurrence, see *supra* notes 84-85 and accompanying text.

<sup>169</sup> See *supra* notes 119-20 and accompanying text.

new era of substantive due process review, in which federal courts would police the wisdom of local land use regulations. Justice Kennedy’s apparent moderation in the takings context<sup>170</sup> hardly seems evident outside that context.<sup>171</sup> Upon close inspection, Kennedy seems more of a regulatory skeptic than a moderate.

Far more celebrated (or notorious) than *Lingle* was the well-known *Kelo* decision, involving whether condemnation for economic development can qualify as a public use, a case which has inspired a widespread political revolt.<sup>172</sup> The city of New London, Connecticut—which had purchased most of the land necessary for a redevelopment project in an economically depressed area—decided to condemn fifteen “holdout” properties as part of its plan to revitalize an ailing economy.<sup>173</sup> Unlike most condemnations, however, much of the condemned land here would be used for private residential and commercial use, including a resort hotel and conference center.<sup>174</sup>

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<sup>170</sup> See *supra* notes 131-42 (discussing *Palazzolo*) and accompanying text.

<sup>171</sup> See *supra* notes 150-60 (discussing *Alaska Dept. of Environmental Conservation*) and 168-71 (discussing *Lingle*) and accompanying text.

<sup>172</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005). See Timothy Sandefur *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?* MICH. ST. L. REV. (2006) available at SSRN: <http://ssrn.com/abstract=868539> (summarizing legislation passed in more than twenty states in response to *Kelo* to restrict eminent domain powers); Eric Claeys, *That '70s Show: Post-Kelo Eminent Domain Reform and the Administrative Law Revolution*, SANTA CLARA L. REV. (2006) available at SSRN: <http://ssrn.com/abstract=925678> (urging states to amend eminent domain statutes to require heightened means-ends scrutiny); Bernard W. Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165 (2006) (discussing ways Congress could restrict states’ ability to exercise eminent domain power); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings* 29 HARV. J. L. & PUB. POL’Y, 491 (2006) Available at SSRN: <http://ssrn.com/abstract=888404> (calling on states to amend their constitutions to bar the use of eminent domain for economic development); see also *supra* note 4, discussing commentary about Justice Kennedy’s role in *Kelo*.

<sup>173</sup> Most of the properties necessary to carry out the city’s plan were acquired by purchase; only a few required condemnation. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005). The city was clearly authorized under state law to condemn land—even if it was already developed—for economic development if it were for a “public use” and in the “public interest.” *Id.*, citing Conn. Gen. Stat. § 8-186 *et. seq.* (2005).

<sup>174</sup> See Peggy Cosgrove, *New London Development Corporation* (prepared for the American Assembly), available at [http://www.clairegaudiani.com/Writings/documents/NLDC\\_Case\\_Study.pdf](http://www.clairegaudiani.com/Writings/documents/NLDC_Case_Study.pdf).

The holdouts filed suit in Connecticut court, challenging this use of the eminent domain authority. The trial court granted relief as to some parcels, but the Connecticut Supreme Court reversed, ruling that all the condemnations were permissible public uses and in the public interest.<sup>175</sup>

A fractured Court upheld the city's plan on a 5-4 vote.<sup>176</sup> The majority opinion, written by Justice Stevens, decided that the city's determination that the neighborhood warranted an economic revitalization program deserved a high degree of judicial deference.<sup>177</sup> According to Justice Stevens, the city's carefully considered development plan ensured that there would be no illegitimate taking of property from one owner to another without a public benefit.<sup>178</sup>

Justice Kennedy's concurrence supplied the deciding vote in the case.<sup>179</sup> He did not share the majority's position concerning deference to the city, instead suggesting a need for heightened judicial scrutiny of certain declarations of public use in order to guard against condemnations that amount to "favor[s] to a particular private party, with only incidental or pretextual public benefits."<sup>180</sup> In cases of possible impermissible favoritism to private parties, Kennedy called for "a careful and extensive

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<sup>175</sup> *Kelo v. City of New London*, 843 A.2d 500, 527 (Conn. 2004), relying on *Berman v. Parker*, 348 U.S. 26 (1954) (upholding condemnation for urban redevelopment); and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding condemnation to break up a land oligopoly).

<sup>176</sup> *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005).

<sup>177</sup> *Id.* at 2665.

<sup>178</sup> *Id.* ("The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue").

<sup>179</sup> Justice O'Connor wrote for the four-member dissent that included Chief Justice Rehnquist and Justices Scalia and Thomas. She thought the majority had taken her opinion in *Midkiff* (upholding the use of eminent domain to break up a land oligopoly) too far in authorizing eminent domain for economic development, "since nearly any lawful use of real private property can be said to generate some incident benefit to the public." *Id.* at 2675 (O'Connor, J., dissenting). She would restrict its use to programs aimed at curing "public harms" like blight (as in *Berman*) and land oligopoly (as in *Midkiff*). Without such limits, she predicted that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, she claimed that the government now has license to transfer property from those with fewer resources to those with more." *Id.* at 2677. Justice Thomas wrote a separate dissent on originalist grounds. *Id.* at 2678 (Thomas, J., dissenting).

<sup>180</sup> *Id.* at 2669 (Kennedy, J., concurring).

inquiry” of whether the development plan would satisfy what amounted to a seven-factor test.<sup>181</sup> This fact-intensive inquiry seemed to be an effort to transform the minimum scrutiny advocated by the plurality into something approaching intermediate judicial scrutiny—what Kennedy referred to as “meaningful rational basis review”<sup>182</sup>—in keeping with his interest in reviving substantive due process review, evidenced in *Eastern Enterprises*,<sup>183</sup> and his fidelity to fact-based determinations, epitomized in *Coeur d’Alene*,<sup>184</sup> among other opinions.

The final decision in this study was the most closely watched environmental law case of the Court’s 2005 term. Again, Justice Kennedy supplied the deciding vote. The controversy concerned two cases involving four Michigan wetlands, all lying near ditches or man-made drains that emptied into traditionally navigable waters. In one case, the government brought an enforcement action against a developer who filled without a permit; in the other, the government denied the developer a permit. In both cases different district courts concluded that there was federal jurisdiction over the fills. The Sixth Circuit affirmed, because one of the cases involved wetlands “adjacent” to navigable waters, and the other involved a wetland that had a hydrological connection to a navigable water.<sup>185</sup>

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<sup>181</sup> *Id.* at 2670 (Kennedy, J., concurring) (calling for investigation as to whether 1) the primary beneficiaries of the plan were the developer and private businesses; 2) there were more than incidental benefits to the city; 3) there was evidence of depressed economic conditions; 4) there was a substantial commitment of public funds before identifying most of the private beneficiaries; 5) the government reviewed several alternative development plans; 6) the government selected the developer from a variety of competitors, not one identified beforehand; and 7) the private beneficiaries were identified beforehand).

<sup>182</sup> *Id.* at 2670. Kennedy suggested that the trigger for this more stringent standard of review was when 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.” *Id.*

<sup>183</sup> See *supra* notes 85-87 and accompanying text.

<sup>184</sup> See *supra* note 757 and accompanying text.

<sup>185</sup> *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 709-10 (6th Cir. 2004) (affirming a lower court decision upholding a Corps decision not to grant a permit to fill a wetland that was adjacent to a tributary to navigable waters); *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) (affirming the district court decision which held that a developer was required to apply for a permit to fill several wetlands).

Under the Clean Water Act (CWA), landowners are prohibited from discharging fill into the “navigable waters” without first obtaining a permit from the Corps. 33 U.S.C. § 1344(a) (2006). For the purposes of the CWA,

A divided Supreme Court split 4-1-4. Characteristically, Justice Kennedy was the pivotal vote. Justice Scalia’s opinion for a four-member plurality would have swept away thirty years of consistent Clean Water Act interpretation, relying on a 1954 dictionary to conclude that federal jurisdiction was restricted to “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’”<sup>186</sup> This interpretation would have precluded federal regulation of intermittent or ephemeral waterbodies that are not permanent or continuously flowing—characteristic of many Western streams—in the service of the plurality’s view of protecting state and local authority allegedly threatened by federal Clean Water Act jurisdiction.<sup>187</sup>

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“navigable waters” include a much greater scope of waters than navigable-in-fact waterways, as the CWA defines the term to encompass “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). And the statute’s legislative history indicated that the term should be construed to the fullest extent of federal Commerce Clause jurisdiction. See S. Conf. Rep. No. 92-1236 (Sept. 28, 1972), as reprinted in 1972 U.S.C.C.A.N. 3776, 3821 (amending the original Senate bill to define the term “navigable waters”); S. Rep. 92-414 (Oct. 28, 1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3773 (calling for enlarging the federal role in water pollution control to include navigable waters, groundwater, and waters of the contiguous zone).

The Corps and EPA issued identical longstanding regulations defining the scope of “waters of the United States” for purposes of CWA jurisdiction to include: (1) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) all interstate waters including interstate wetlands; (3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.... (4) all impoundments of waters otherwise defined as waters of the United States under the definition; (5) tributaries of waters identified in paragraphs (a)(1)-(4) of this section; (6) the territorial seas; (7) wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.” 33 C.F.R. § 328.3(a) (Corps); 40 C.F.R. § 122.2 (EPA).

These regulations have been the source of a number of recent challenges to Corps jurisdiction over wetlands, most notably in *Solid Waste Agency of Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), where the Supreme Court invalidated Corps jurisdiction over so-called “isolated” waters that provide habitat for migratory birds (the Migratory Bird Rule). *Id.* at 174. Lower courts have split over how broadly the holding in *SWANCC* applies. The Fifth Circuit narrowly construed the scope of Corps jurisdiction by requiring findings that a wetland is “truly” adjacent to a jurisdictional water. *In re Needham*, 354 F.3d 340, 345-46 (5th Cir. 2003). Other circuits interpreted *SWANCC* to have no limiting effect on Corps wetlands jurisdiction beyond invalidating the Migratory Bird Rule. See *Rapanos*, 376 F.3d at 638. As the Sixth Circuit noted in *Carabell*, *SWANCC* did not overrule the Supreme Court’s earlier decision upholding Corps jurisdiction over “adjacent wetlands” in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). *Carabell*, 391 F.3d at 909.

<sup>186</sup> *Rapanos v. United States*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2208, 2225 (2006). Justice Scalia wrote for himself, Chief Justice Roberts and Justices Thomas and Alito.

<sup>187</sup> *Id.* at 2225.

But Justice Kennedy—whose opinion was controlling, as Chief Justice Roberts made clear<sup>188</sup>—was unwilling to rely on a half-century old dictionary to resolve such an important question of federal jurisdiction. Instead, he concluded that the Sixth Circuit correctly determined that a wetland is subject to federal jurisdiction if it possessed a “significant nexus” to navigable waters, but the appeals court had failed to consider all the factors necessary to ascertain whether the wetland in fact had the requisite nexus.<sup>189</sup> Kennedy claimed that “in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty,” adding that “[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act’s text and structure.”<sup>190</sup>

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<sup>188</sup> *Id.* at 2236 (Roberts, C.J., concurring), noting that “[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis,” but “[t]his situation is certainly not unprecedented;” under *Marks v. United States*, 430 U.S. 188, 193 (1977), “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....’” Lower courts are now wrestling with what to make of the rule in *Rapanos*.

One of the first post-*Rapanos* district courts to reach a wetlands jurisdictional determination interpreted the fragmented decision to indicate that courts should find Corps jurisdiction if a wetland meets either Kennedy’s “significant nexus” standard or the plurality’s “continuous surface connection” test. *United States v. Evans*, 2006 WL2221629, \*20 (M.D. Fla. 2006). The First Circuit agreed in *United States v. Johnson*, 467 F.3d 56, 58 (1st Cir. 2006) (either the *Rapanos* plurality’s test or Kennedy’s test is sufficient for federal jurisdiction). But both the Ninth and Seventh Circuit upheld federal jurisdiction based only on Kennedy’s test. *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1030-31 (9th Cir. 2006) (applying Justice Kennedy’s “significant nexus” test to determine jurisdiction over a pond adjacent to a river, but finding that “nexus” in the form of a surface connection between water seeping over a man-made levee from the pond into the river); *U.S. v. Gerke Excavating*, 464 F.3d 723, 725 (7th Cir. 2006) (employing Kennedy’s test as “the least common denominator,” since the court thought it would be a “rare case” where the *Rapanos* plurality and dissent would both find jurisdiction but Justice Kennedy would not).

<sup>189</sup> *Id.* at 2236 (Kennedy, J., concurring). Chief Justice Rehnquist first brought the phrase “significant nexus” into the Court’s wetlands jurisprudence when he wrote in his *SWANCC* opinion that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA” in *Riverside Bayview Homes, SWANCC*, 531 U.S. at 167.

<sup>190</sup> *Id.* at 2249-50. Kennedy seemed to have exempted wetlands adjacent to navigable waters from his “significant nexus” showing: “As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*.” *Id.* at 2248. However, a Ninth Circuit panel recently ruled that adjacency of wetlands to navigable waters is no longer sufficient to justify Clean Water Act jurisdiction, since the panel interpreted *Rapanos* to narrow the scope

Kennedy's concurrence had much more common ground with Justice Stevens' dissent, which called for judicial deference to longstanding and reasonable administrative practice, than with the plurality.<sup>191</sup> Kennedy even referred to the plurality opinion as "inconsistent with the Act's text, structure and purpose," a rather curious conclusion in a concurrence.<sup>192</sup> He spelled out the "significant nexus" test he called for in the following terms:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'<sup>193</sup>

Kennedy faulted existing Corps of Engineer regulations for their "overbreadth" and called for new regulations concerning wetlands that are adjacent to tributaries of navigable waters, in order to ensure the requisite ecological connection.<sup>194</sup> Pending the promulgation of such regulations, the Corps would have to make jurisdictional determinations on a case by case basis.<sup>195</sup>

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of the Court's *Riverside Bayview* decision. The court instead required a showing of a "significant nexus" between the adjacent wetlands and traditionally navigable waters. *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1031 (9th Cir. 2006).

<sup>191</sup> *Id.* at 2252-53 (Stevens, J., dissenting). Justice Stevens wrote for himself and Justices Souter, Ginsburg, and Breyer.

<sup>192</sup> *Id.* at 2246. Moreover, Kennedy noted that since "the dissent is correct to observe that an intermittent flow can constitute a stream,...[i]t follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." *Id.* at 2243. Also, he observed that the plurality's conclusion that navigable waters may not be intermittent was "unsound." *Id.* at 2243. And he agreed with the dissent that "the fact that point sources may carry continuous flow undermines the plurality's conclusion that covered 'waters' may not be discontinuous." *Id.* at 2243. Finally, he rejected the plurality's exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters. *Id.* at 2244. *See also* Donald Kennedy & Brook Hanson, *What's a Wetland, Anyway?*, 313 SCIENCE no. 5790, at 1019 (Aug. 25, 2006) (criticizing Justice Scalia for looking to an outdated dictionary, rather than to contemporary environmental science—as Justice Kennedy did—concerning the scope of federal wetlands jurisdiction in *Rapanos*).

<sup>193</sup> *Id.* at 2248.

<sup>194</sup> *Id.* at 2248 (calling for the Corps "to identify categories of tributaries, whether by volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations.") He specifically approved the Corps' existing regulations concerning wetlands adjacent to navigable waters because there was "a reasonable inference of ecological interconnection" with navigable waters. *Id.*

<sup>195</sup> *Id.* at 2249.

Kennedy did not conclude that the wetlands at issue in *Rapanos* were beyond regulatory reach. In fact, he suggested that they were probably jurisdictional wetlands, noting that “the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above . . . [thus,] the end result in these cases and many others to be considered may be the same as that suggested by the dissent.”<sup>196</sup> Why, in light of these sentiments, Justice Kennedy concurred in the plurality opinion was not at all clear.

## **VI. The Kennedy Profile**

The chronology above illustrates Justice Kennedy’s increased role in environmental cases in the 21<sup>st</sup> century. In the twelve years between 1988 and 2000, Kennedy wrote only nine opinions, or just .75 per year.<sup>197</sup> In the six years since 2000, Kennedy wrote eight environmental law decisions, or 1.3 per year, an increase of roughly 75 percent.<sup>198</sup> Moreover, Kennedy’s role is increasingly outcome determinative: of the nineteen post-2000 decisions examined in this study, five were decided on 5-4

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<sup>196</sup> *Id.* at 2250.

<sup>197</sup> *See supra* §§ III-IV.

<sup>198</sup> *See supra* §§ IV-V.

votes, and Kennedy was in the majority in all but one.<sup>199</sup> And of course Kennedy has written only one environmental dissent.<sup>200</sup>

But this chronological presentation, while useful in understanding the development of Justice Kennedy's thinking and in illustrating his growing importance to the Court's environmental law decisionmaking, may fail to capture the contributions Justice Kennedy's opinions have made in discrete areas of environmental law, such as standing and ripeness, states-rights federalism, takings, and environmental statutory interpretation—four areas of his most prominent contributions. This section discusses each in turn.

#### A. Standing and Ripeness

Three standing cases figure prominently in Kennedy's environmental portfolio: concurrences in *Defenders* and *Laidlaw* and his majority opinion in *Del Monte Dunes*.<sup>201</sup> In *Defenders*, one of Justice Kennedy's more telling early opinions, he was unwilling to join in Justice Scalia's dismissive treatment of the plaintiffs "animal and vocational nexus" theories of standing, reserving the right to

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<sup>199</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 611 (2001) (writing for a majority that included Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, and which Justice Stevens also joined in part); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (joining Chief Justice Rehnquist's majority, which was also joined by Justices Thomas, Scalia, and O'Connor); *Kelo v. City of New London*, 545 U.S. 469 (2005) (filing a concurring opinion and joining Justice Stevens' majority opinion, which was also joined by Justices Souter, Ginsburg, and Breyer); and *Rapanos v. United States Army Corps of Engineers*, 126 S. Ct. 2208 (2006) (concurring in the judgment, but filing a separate concurring opinion from the plurality authored by Justice Scalia and joined by Chief Justice Roberts and Justices Alito and Thomas). Justice Kennedy's pivotal role in wetlands cases can be also deduced from the 4-4 result in a California wetlands case from which he had recused himself. *Borden Ranch v. United States Army Corps of Engineers*, 537 U.S. 99 (2002) (affirming the Ninth Circuit's decision that EPA had jurisdiction to enforce the CWA when a developer engaged in "deep ripping"—intensive and very deep plowing through water features—without a permit on a former ranch with numerous water and wetland features, although that jurisdiction did not extend to vernal pools, which the Ninth Circuit determined to be "isolated" wetlands of the type exempted from CWA jurisdiction in *SWANCC*).

<sup>200</sup> *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 502 (2004), discussed *supra* notes 143-60 and accompanying text.

<sup>201</sup> See *supra* notes 55-61 (*Defenders*), 119-20, (*Laidlaw*), 96-102 (*Del Monte Dunes*) and accompanying text.

consider them at a later date, under other facts.<sup>202</sup> He also dismissed the Scalian proposition that Congress could not establish standing for new causes of action.<sup>203</sup>

In *Del Monte Dunes*, Justice Kennedy’s majority opinion rejected the application of the more stringent “rough proportionality” test employed in exaction cases, but he upheld the lower court’s submission of the takings claim to a jury.<sup>204</sup> And his odd concurrence in *Laidlaw* suggested that citizen suits might violate the executive prerogatives contained in Article II of the Constitution.<sup>205</sup> The Kennedy standing record is thus a mixed bag—as is the Court’s record in general<sup>206</sup>—perhaps reflecting his reaction to the substantive merits of the environmental claim, although his intimation in *Laidlaw* has to be of considerable concern for environmental plaintiffs.<sup>207</sup>

Kennedy’s chief ripeness decision was *Palazollo*, in which his majority opinion concluded that rejection of the landowner’s repeated development applications indicated that the state was unlikely to ever approve his proposed development, and therefore the takings claim was ripe.<sup>208</sup> Kennedy’s *Del Monte Dunes* majority decision did not disturb a lower court decision which found the city’s numerous denials of a beach development to be ripe.<sup>209</sup> He clearly is quite interested in

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<sup>202</sup> See *supra* notes 56-57 and accompanying text.

<sup>203</sup> See *supra* notes 58-59 and accompanying text.

<sup>204</sup> See *supra* notes 98-102 and accompanying text.

<sup>205</sup> See *supra* notes 119-20 and accompanying text.

<sup>206</sup> See, e.g., Richard H. Fallon, Jr. *The Linkage Between Justiciability and Remedies--and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 663-70 (2006) (discussing the Supreme Court’s use of standing in decisions as a way to avoid undesired remedies); David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 HARV. ENVTL. L. REV. 79, 85 (2004) (arguing for a fundamental shift in standing jurisprudence which recognizes potential injury to the environment as a foundation for standing); Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 180-86 (2006) (discussing trends in the Court’s environmental standing cases).

<sup>207</sup> See *supra* note 119 and accompanying text.

<sup>208</sup> See *supra* note 135 and accompanying text.

<sup>209</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 722 (1999) (noting the “shifting ad hoc restrictions previously imposed by the city” as an example of the “unreasonable government action” the developer used as the basis of the takings claim). See *supra* note 92 and accompanying text.

removing ripeness burdens to landowners who submit numerous proposals to local governments and claim that repeated governmental rejections work takings.<sup>210</sup>

Kennedy appears to be fairly evenhanded in his standing and ripeness decisions. While opposed to setting high hurdles for landowners claiming takings, he is not an adherent to the Scalian common law model. He is willing to entertain animal and vocational nexus theories of standing,<sup>211</sup> and he believes that Congress has the authority to define injuries and chains of causation sufficient for standing.<sup>212</sup> Although he has raised questions about citizen suit enforcement as possibly unconstitutionally interfering with the Executive's Article II prerogatives,<sup>213</sup> he seems largely committed to allowing both landowners and citizen enforcers to have their day in court.

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<sup>210</sup> See *supra* note 134.

<sup>211</sup> See *supra* note 56 and accompanying text (discussing *Defenders*).

<sup>212</sup> See *supra* note 59 and accompanying text (discussing *Defenders*).

<sup>213</sup> See *supra* note 119 and accompanying text (discussing *Laidlaw*).

## B. States-Rights Federalism

Justice Kennedy's interest in federalism is intense, of considerably greater magnitude than his interest in environmental protection.<sup>214</sup> But his record is a mixed one. His early concurrence in *Gade* supplied the deciding vote to preempt an Illinois hazardous waste worker-training statute, apparently viewing avoiding dual regulation as a higher priority than preserving state police power. This concurrence advocating a broader preemption—based on the text of the statute—than the conflict preemption endorsed by Justice O'Connor's plurality opinion. Similarly, Kennedy's majority opinion in *Locke* preempted Washington state tanker safety regulations not on the basis of federal-state conflicts but on his interpretation of federal policy.

Kennedy's 1994 *Carbone* decision—his first environmental law decision for the Court—was also surprising for a professed states' rights advocate.<sup>215</sup> He viewed the Town of Clarkstown's ordinance aimed at promoting recycling as a protectionist measure, interfering with the flow of interstate commerce, not as a measure aimed at managing the town's waste problems.<sup>216</sup> This perception led the states' rights defender to conclude that the local recycling ordinance substantially interfered with his expansive notion of the dormant federal commerce power.<sup>217</sup>

These surprising decisions favoring federal hegemony stand in contrast to the more prototypical Kennedy states' rights position exemplified in the 1997 *Coeur d'Alene Tribe* case—another majority opinion—in which he broadly interpreted state immunity from suits and read narrowly

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<sup>214</sup> See *supra* notes 16-17 (discussing the Rehnquist Court's limitations on the federal commerce power and the Eleventh Amendment revolution during the mid-1990s).

<sup>215</sup> See *supra* note 16 (states' rights advocate), notes 65-70 and accompanying text (discussing *Carbone*).

<sup>216</sup> See *supra* notes 67-68 and accompanying text.

<sup>217</sup> See *supra* note 68.

an apparently relevant exemption from this liability.<sup>218</sup> His endorsement of case-by-case balancing concerning the applicability of state Eleventh Amendment immunity from federal suits was not shared by Justice O'Connor, who thought that federal jurisdiction should not be premised on judicial balancing of federal versus state interests in suits seeking prospective relief.<sup>219</sup> Kennedy's unsympathetic approach to tribal property issues was again evident two years later, when his opinion for the Court rejected the Southern Ute Tribe's claim to coalbed methane gas reserves.<sup>220</sup> In so doing, he ignored interpretative rules favoring tribes and federal retention of public resources in favor of what he viewed as a "natural interpretation" of the definition of coal ninety years earlier.<sup>221</sup> And Kennedy's states' rights perspective dominated the only environmental dissent he wrote, as he overlooked the text of the Clean Air Act and deference to EPA's interpretation of the statute in favor of promoting his vision of an active state role in environmental policy.<sup>222</sup>

Kennedy's states-rights federalism is certainly a hallmark of his jurisprudence,<sup>223</sup> but his states-rights philosophy has clear bounds. He is more than willing to preempt state statutes, even

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<sup>218</sup> *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), discussed *supra* notes 68-80 and accompanying text.

<sup>219</sup> See *supra* note 79 and accompanying text.

<sup>220</sup> *Amoco Prod. Co. v. Southern Ute Tribe*, 526 U.S. 865 (1999), discussed *supra* notes 106-12 and accompanying text. While *Amoco* does not directly address states' rights, it nonetheless reflects Kennedy's attitudes toward federalism. Although not parties to the suit, western states stood to lose considerable tax revenue if the Tenth Circuit's holding in favor of the tribe was upheld. The states of Montana, New Mexico, North Dakota, Utah, and Wyoming submitted an amicus brief to the Court in support of the oil company, emphasizing the hardship the states would experience if they were to lose tax revenue collected from the oil companies. Brief for the State of Montana et al. as Amici Curiae Supporting Petitioners at 16, *Amoco Prod. Co. v. Southern Ute Tribe*, 526 U.S. 865 (1999) (1999 WL 115533).

<sup>221</sup> See *supra* notes 110-11 and accompanying text.

<sup>222</sup> *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), discussed *supra* notes 150-60 and accompanying text.

<sup>223</sup> Among Kennedy's states-rights contributions was his deciding vote in *United States v. Lopez*, 514 U.S. 549 (1995), a non-environmental decision striking down the federal Gun-Free School Zones Act of 1990 as beyond the power of the Commerce Clause, the first time in sixty years the Court found a federal statute to exceed the commerce power. Kennedy's concurrence (joined by Justice O'Connor) emphasized that gun possession lacked commercial character and that neither the purposes nor the design of the statute had a "commercial nexus." *Id.* at 578.

where they do not conflict with federal law.<sup>224</sup> And his broad interpretation of the negative Commerce Clause allowed him to strike down a recycling ordinance as protectionist in *Carbone*, even though the restrictions imposed by the ordinance were felt more in-state than out-of-state.<sup>225</sup> On the other hand, Kennedy's states' rights pedigree was evident in his expansive view of state immunity from federal suit in *Coeur d'Alene Tribe*.<sup>226</sup> He also overlooked both federal land and Indian law canons in rejecting the Southern Ute Tribe's claims to coalbed methane gas, in an anti-federal if not a states' rights opinion.<sup>227</sup> And his interpretation of the Clean Air Act would have effectively allowed a state to displace federal action.<sup>228</sup> So, although Kennedy is a card-carrying member of the states' rights club, he has shown a proclivity to dispense with state police power where not doing so might produce dual regulation.

### C. Takings

The aggressiveness evident in Justice Kennedy's standing and federalism opinions is not very apparent in his approach to takings, which instead has been characterized by moderation. In *Lucas*, he refused to join Justice Scalia's effort to erect a significant categorical takings rule, opting instead in a concurrence for a litmus test grounded on reasonable landowner expectations that could account for changed conditions, new ecological understandings, and protection of what he termed fragile lands.<sup>229</sup> This sort of fact-intensive inquiry is characteristic of Kennedy's takings jurisprudence.<sup>230</sup>

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<sup>224</sup> See *supra* notes 123-28 and accompanying text (discussing *Locke*).

<sup>225</sup> See *supra* notes 67-68 and accompanying text (discussing Kennedy's *Carbone* concurrence).

<sup>226</sup> See *supra* notes 70-81 and accompanying text (discussing *Coeur d'Alene Tribe*).

<sup>227</sup> See *supra* notes 106-11 and accompanying text (discussing Kennedy's *Southern Ute Tribes* opinion).

<sup>228</sup> See *supra* note 150-60 and accompanying text (discussing Kennedy's dissent in *Alaska Dept. of Envtl. Conservation*).

<sup>229</sup> *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992), discussed *supra* notes 43-49 and accompanying text.

<sup>230</sup> See *supra* note 52 and accompanying text (discussing Kennedy's affinity for fact-specific analysis).

Fidelity to factual analysis also helps to explain Justice Kennedy’s concurrence in *Eastern Enterprises*, in which he refused to apply a takings analysis concerning apparently retroactive legislation, choosing instead to conclude that the statute failed to satisfy substantive due process.<sup>231</sup> Kennedy reiterated his desire to revive substantive due process analysis in his *Lingle* concurrence.<sup>232</sup> This willingness to revive substantive due process echoes some of his readiness to suggest that citizen suits might be intrude on the Executive’s Article II powers in his *Laidlaw* concurrence.<sup>233</sup>

Kennedy’s interest in ensuring that landowners get their day in court motivated his ripeness ruling in *Palazzolo*,<sup>234</sup> when he eliminated the prior notice rule that gave governments a categorical defense against takings claims, referring to the government as Hobbesian.<sup>235</sup> He also approved jury determinations of takings claims in *Del Monte Dunes*, while refusing to apply a “rough proportionality” test outside the exactions area.<sup>236</sup>

Another Kennedy concurrence supplied the decisive vote in *Kelo*, ratifying public use takings for economic development.<sup>237</sup> But he objected to the plurality’s call for great judicial deference to the city’s redevelopment plan, calling for a “careful and extensive inquiry” to ensure that the public

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<sup>231</sup> *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), discussed *supra* notes 85-87 and accompanying text.

<sup>232</sup> *Lingle v. Chevron*, 544 U.S. 528, 548-49 (Kennedy, J., concurring); *see supra* note 168 and accompanying text.

<sup>233</sup> *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring); *see supra* notes 119-20 and accompanying text.

<sup>234</sup> *See supra* notes 202-04 and accompanying text.

<sup>235</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *see supra* note 135 and accompanying text. Thomas Hobbes was an English philosopher who wrote *Leviathan* in 1651, which suggest that man may avoid destructive wars through social contracts that establish governments as absolute authorities. According to the Merriam-Webster Online Dictionary, Hobbesian refers to “the theory that people have a fundamental right to self-preservation and to pursue selfish aims but will relinquish these rights to an absolute monarch in the interest of common safety and happiness.” <http://www.m-w.com/cgi-bin/dictionary?va=Hobbism>.

<sup>236</sup> *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 523 U.S. 1045 (1998); *see supra* notes 88-102 and accompanying text.

<sup>237</sup> *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring).

benefits were substantial and the private benefits incidental.<sup>238</sup> This sort of fact-based scrutiny is, of course, familiar.

Kennedy's commitment to contextualism is quite evident in the takings cases. In *Lucas*, he opposed categorical decisionmaking because it was not sensitive to changes in ecological understandings and fragile lands.<sup>239</sup> Factual analysis was also central to his acceptance of eminent domain for economic development<sup>240</sup> and whether a regulation "substantively advanced" a public purpose, a test he convinced the Court was more appropriate for substantive due process than takings analysis.<sup>241</sup> He also wrote the Court's opinion approving juries as determiners of whether the application of a regulation to a property produces a taking.<sup>242</sup> On the other hand, Kennedy refused to approve a categorical taking rule in *Del Monte Dunes*,<sup>243</sup> and his conception of the scope of the exception to the categorical rule created in *Lucas* was much more expansive than Justice Scalia's.<sup>244</sup> Thus, while Kennedy may sympathize with the Lockean landowner confronted by the Hobbesian state,<sup>245</sup> he is unwilling to side with the landowner categorically.

#### D. Environmental Statutory Interpretation

Justice Kennedy's review of environmental legislation is probably best characterized as indifferent. He has written only a couple of influential opinions: his sole environmental dissent and the deciding opinion in the 2006 wetlands case. In *Alaska Dept. of Environmental Conservation*,

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<sup>238</sup> See *supra* note 181 and accompanying text.

<sup>239</sup> See *supra* note 48-49 and accompanying text (discussing *Lucas*).

<sup>240</sup> See *supra* note 181-84 and accompanying text (discussing *Kelo*).

<sup>241</sup> See *supra* note 85-87 and accompanying text (discussing *Eastern Enterprises*), note 169 and accompanying text (discussing *Lingle*).

<sup>242</sup> See *supra* notes 98-101 and accompanying text (discussing *Del Monte Dunes*).

<sup>243</sup> See *supra* note 96 and accompanying text (rejecting application of the *Dolan* "rough proportionality" rule).

<sup>244</sup> See *supra* note 46 and accompanying text (discussing Kennedy's concurrence in *Lucas*).

<sup>245</sup> See *supra* note 135 and accompanying text (discussing Kennedy's opinion in *Palazzolo*).

Kennedy's dissent objected to the federal EPA effectively overturning the state's interpretation of "best available control technology" under the Clean Air Act.<sup>246</sup> He seemed especially concerned that under EPA's – and the majority's – interpretation, both the federal and state governments could actively enforce the statute simultaneously, inconsistent with his understanding cooperative federalism.<sup>247</sup> But since simultaneous enforcement by the federal and state governments has long characterized implementation of environmental statutes like the Clean Air Act,<sup>248</sup> Kennedy's complaint seemed more appropriate for a legislator than a judge.

The wetlands case concerning the scope of Clean Water Act jurisdiction appeared to animate Justice Kennedy, who again supplied the pivotal vote. Quite predictably, although he thought the Corps of Engineers regulations were overbroad, his solution was individualized fact-finding to establish a "significant nexus" between the wetland at issue and navigable waters.<sup>249</sup> Although this search may impose considerable administrative burdens on the regulatory agencies, the workability of Kennedy's nexus requirement was not his concern.

Although there are not many Kennedy environmental statutory interpretations, what we have reinforces Kennedy's commitment to state autonomy, which is clearly more important to him than administrative deference or environmental protection.<sup>250</sup> Also reinforced was perhaps the overarching

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<sup>246</sup> *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 468 (2004) (Kennedy, J., dissenting).

<sup>247</sup> See *supra* notes 150-53 and accompanying text.

<sup>248</sup> See, e.g., Joel Mintz, *The Future of Environmental Enforcement: A Reply to Paddock*, 21 ENVTL. L. 1243 (1991) (arguing that federal-state enforcement provisions will continue to rely on federal enforcement); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 777 (2006) (discussing the ways in which the Supreme Court has narrowed enforcement of federal environmental laws in recent years).

<sup>249</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring).

<sup>250</sup> See *supra* notes 150-60 and accompanying text (discussing *Alaska Dept of Env'tl Conservation*).

theme of Kennedy’s jurisprudence: a commitment to judicial factual inquiry in the form of a search for nexus.<sup>251</sup>

## VII. Conclusion

This study reveals Justice Anthony Kennedy to be a jurist skeptical of sweeping doctrinal changes and attached to incremental case-by-case decision making, in which judges are entrusted with balancing factors and charged with explaining the connection between doctrine and context. Kennedy may be a doctrinal minimalist, but he is not a judicial minimalist, possessing considerable faith in the judiciary’s ability to balance factors like environmental protection, economic profit, and individual liberty.

Kennedy’s willingness to entertain nexus theories of citizen standing and his acknowledgment of congressionally-created standing<sup>252</sup> reflect his commitment to judicial decision making, although he has questioned the constitutionality of citizens suits under Article II.<sup>253</sup> On the other hand, he is impatient with government allegations that landowners’ takings claims are not ripe.<sup>254</sup> He is eager for takings claimants to have their day in court, and he is willing to have juries decide takings cases.<sup>255</sup>

Kennedy’s devotion to case-by-case balancing was evident in his rejection of the “notice rule,” which had given government defendants in takings cases a categorical defense prior to his *Palazzolo* opinion.<sup>256</sup> He was also skeptical of the breadth of the categorical takings doctrine Justice Scalia announced in *Lucas*. Kennedy instead called for a broad exception to categorical takings that would

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<sup>251</sup> See *supra* notes 188-95 and accompanying text (discussing *Rapanos*).

<sup>252</sup> See *supra* notes 56-58 and accompanying text (discussing Kennedy’s *Defenders* concurrence).

<sup>253</sup> See *supra* notes 119-20 and accompanying text (discussing Kennedy’s *Laidlaw* concurrence).

<sup>254</sup> See *supra* note 134 and accompanying text (discussing *Palazzolo*).

<sup>255</sup> See *supra* notes 98-102 and accompanying text (discussing Kennedy’s majority opinion in *Del Monte Dunes*, upholding the lower court’s decision to submit a takings claim to a jury).

<sup>256</sup> See *supra* notes 135-37 and accompanying text (discussing the Court’s rejection of the “notice rule” barring takings claims where a landowner acquired the property after the restrictive rule was in place as sufficient to

consider contextual factors like changed conditions and sensitive lands.<sup>257</sup> Such factors can also be balanced in substantive due process analysis, which Kennedy has sought to revive as a partial antidote to an expanded takings doctrine.<sup>258</sup>

Kennedy is a determined states' rights enthusiast, a vital participant in the Rehnquist Court's federalism revolution.<sup>259</sup> He rejected Indian tribal land claims in favor of a broad application of state sovereign immunity under the Eleventh Amendment,<sup>260</sup> and the only environmental dissent he has written was the product of his fidelity to states' rights: Kennedy thought that the federal EPA should not overrule the state of Alaska's regulatory decisions, despite statutory text apparently authorizing just that.<sup>261</sup> Yet his *Carbone* decision showed him willing to invalidate a local recycling ordinance on Commerce Clause grounds,<sup>262</sup> and he was quick to preempt Washington tanker safety and Illinois hazardous waste worker-training laws.<sup>263</sup> Apparently, Kennedy's devotion to states' rights does not extend to what he considers to be overregulation: while he prefers state regulation to federal regulation, he prefers one level of regulation to two, and the market to regulation. His states' rights advocacy may actually be part of a larger deregulatory preference.

But while Kennedy favors less regulation, he is not interested in dismantling all regulation. That is clear from his pivotal *Rapanos* concurrence, where he refused to agree with the plurality's

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defeat a takings claim in *Palazzolo*).

<sup>257</sup> See *supra* notes 43-49 and accompanying text (discussing Kennedy's *Lucas* concurrence).

<sup>258</sup> See *supra* notes 84-85 and accompanying text (discussing Kennedy's *Eastern Enterprises* concurrence, suggesting a revival of substantive due process analysis for evaluating retroactive legislation, rather than the takings clause) and *supra* notes 168-69 and accompanying text (discussing Kennedy's *Lingle* concurrence again articulating a willingness to revive substantive due process review).

<sup>259</sup> See *supra* notes 16-17 and accompanying text (discussing the Rehnquist Court's federalism revolution).

<sup>260</sup> See *supra* notes 75-81 and accompanying text (discussing Kennedy's opinion refusing to apply the *Ex Parte Young* exception to allow a suit filed by the Coeur d'Alene Tribe's to proceed against the state of Idaho).

<sup>261</sup> See *supra* notes 150-60 and accompanying text (discussing Kennedy's dissent in *Alaska Dept. of Env'tl. Conservation*).

<sup>262</sup> See *supra* notes 65-68 and accompanying text (discussing the *Carbone* decision).

<sup>263</sup> See *supra* notes 123-28 and accompanying text (discussing the Court's decision in *Locke*).

effort to categorically scale back Clean Water Act jurisdiction, instead (and quite characteristically) opting for case-by-case determinations of the relationship between wetlands and navigable waters.<sup>264</sup> He also approved economic development condemnations in his deciding *Kelo* concurrence, although characteristically he would have established a detailed fact-based inquiry to ascertain that the condemnation was not for impermissible private gain without public benefit.<sup>265</sup>

Whether Justice Kennedy's recent endorsement of environmental regulation is indicative of a trend is hardly clear. But as long ago as 1992 he was fashioning rules to protect sensitive lands and to account for unforeseen changes.<sup>266</sup> He is certainly not as sensitive to environmental protection as he is to fact-based decision making, states' rights, or minimal regulation.<sup>267</sup> But he is not anti-regulation. As a professed devotee of private property rights,<sup>268</sup> perhaps the best way to characterize Justice Kennedy is as someone who, while not dismissive of environmental regulation, will subject it to hard-look judicial review. The architects of hard-look review would not likely have anticipated its application against environmental regulation,<sup>269</sup> but that may well portend its future in the Roberts Court.

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<sup>264</sup> See *supra* notes 188-96 and accompanying text (discussing the *Rapanos* concurrence).

<sup>265</sup> See *supra* notes 179-84 and accompanying text (discussing Kennedy's concurrence in *Kelo*).

<sup>266</sup> See *supra* notes 43-49 and accompanying text (discussing Kennedy's *Lucas* concurrence, which recognized that changed conditions and ecological concerns may frustrate some takings claims and justify land use regulations).

<sup>267</sup> See Cannon, *supra* note 5 (noting that Kennedy voted for the position benefiting the environment just 34.1% of the time in environmental cases).

<sup>268</sup> See *supra* note 22 and accompanying text (discussing extrajudicial remarks Kennedy has made in support of private property rights).

<sup>269</sup> Hard look judicial review emerged during the 1970s when the D.C. Circuit, in response to a substantial increase in administrative law cases, began to emphasize review of the substance of agency decisions, not merely the procedure. See Reuel Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1156 (2001) (describing the advent of hard-look review in D.C. Circuit Judge Leventhal's opinion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970)). See also Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PENN. L. REV. 509, 555 (1974) (advocating that courts to subject federal agency environmental decisions to "hard look" in order to ensure "the principled integration and balanced assessment of both environmental and non-environmental considerations in

At the end of the day, Justice Kennedy seems to be Holmesian in several respects. Like Justice Holmes,<sup>270</sup> he is a devoted case-by-case balancer. He is also skeptical of regulatory improvement,<sup>271</sup> but he is largely unwilling to impede regulatory innovation. And, like Holmes, he is relatively non-ideological, except that his commitment to states' rights is quite un-Holmesian, making Kennedy's jurisprudence appear much more activist than Holmes' call for judicial restraint.<sup>272</sup> Still, when Holmes wrote, "the life of the law has not been logic: it has been experience" as a critique of Christopher Columbus Langdell's jurisprudence,<sup>273</sup> he could have been describing Justice Kennedy's attitude toward Justice Scalia. Holmes' critique may very well help explain the divide between the two justices. How this divide—between Scalia's categorical distinctions and Kennedy's fact-based consequentialism—plays out may well characterize the nature of the jurisprudence that the Roberts Court is about to create.

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federal agency decisionmaking"); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (discussing the emergence of "public law litigation"—civil disputes over constitutional or statutory questions, rather than private party litigation—and the development of a more active judicial role in such cases).

<sup>270</sup> See OLIVER WENDELL HOLMES, JR., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) ("I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundations of judgments inarticulate, and often unconscious...."). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 131 (1992) (attributing to Holmes' article, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894), the first "fully articulated balancing test [in] American law," marking "the beginning of modernism in American legal thought" and "the demise of the late nineteenth century system of legal formalism.").

<sup>271</sup> On Holmes' skepticism, see Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 254 (1962-63).

<sup>272</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.). On Holmes' commitment to judicial restraint and to majoritarianism, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 327-30, 343, 363, 391, 487 (1993).

<sup>273</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881). Holmes referred to Langdell, the Harvard Law School Dean and founder of the casebook method of legal instruction, as "the greatest living theologian," *Book Review*, 14 AM. L. REV. 233, 234 (1880).

**APPENDIX A:**  
**Supreme Court Environmental Decisions 1989-2006**<sup>274</sup>

<b>Year</b>	<b>Case name</b>	<b>Citation</b>	<b>Kennedy's role</b>
1989	<i>Pennsylvania v. Union Gas Co.</i>	491 U.S. 1	Joined in both Justice White's and Justice Scalia's partial dissents from the 5-4 decision
1989	<i>Brendale v. Confederated Tribes &amp; Bands of Yakima Indian Nation</i>	492 U.S. 408	Joined majority
1989	<i>Robertson v. Methow Valley Citizens Council</i>	490 U.S. 332	Joined unanimous majority
1989	<i>Marsh v. Oregon. Nat. Resources Council</i>	490 U.S. 360	Joined unanimous majority
1989	<i>Cotton Petroleum Corp v. New Mexico</i>	490 U.S. 163	Joined majority
1989	<i>Hallstrom v. Tillamook County</i>	493 U.S. 20	Joined majority
1989	<i>New Orleans Public Service Inc. v. City of New Orleans</i>	491 U.S. 350	Joined majority
1990	<i>General Motors v. United States</i>	496 U.S. 530	Joined majority
1990	<i>California v. Fed. Energy Reg. Comm'n</i>	495 U.S. 490	Joined majority
1990	<i>Lujan v. Nat'l Wildlife Fed'n</i>	497 U.S. 871	Joined 5-4 majority
1991	<i>Wisconsin Public Intervenor v. Mortier</i>	501 U.S. 597	Joined majority
1991	<i>Illinois v. Kentucky</i>	500 U.S. 380	Joined unanimous majority
1991	<i>Oklahoma v. New Mexico</i>	501 U.S. 221	Joined parts of the majority opinion and also Chief Justice Rehnquist's partial concurrence and dissent

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<sup>274</sup> This case table includes environmental decisions issued by the Court during Kennedy's tenure. Case names which appear in boldface type indicate decisions in which Kennedy wrote an opinion. Although the overall vote count was not included for each decision, the table does note which cases which were decided with a slim five-member majority. A small number of cases included in the tabular data indicate Kennedy wrote an opinion for the case, but are not discussed in the article text. These decisions are marked with an \*. We omitted these cases from the discussion either because while the decision had a significant effect on environmental law, the case itself did not involve environmental issues (*United States v. Lopez*; *City of Bourne v. Flores*), or because the decision involved an original jurisdiction state boundary dispute (*Louisiana v. Mississippi*; *Alaska v. United States*).

1992	Chemical Waste v. Hunt	504 U.S. 334	Joined majority
1992	Arkansas v. Oklahoma	503 U.S. 91	Joined unanimous majority
1992	United States Dept. of Energy v. Ohio	503 U.S. 607	Joined majority
1992	Brulington v. Dague	505 U.S. 557	Joined majority
1992	<b>Lujan v. Defenders of Wildlife</b>	504 U.S. 555	Wrote concurrence
1992	Robertson v. Seattle Audubon	503 U.S. 429	Joined majority
1992	<b>Gade v. National Solid Waste Mgmt. Ass'n</b>	505 U.S. 88	Wrote 5-4 concurrence
1992	Mississippi v. Louisiana	506 U.S. 73	Joined unanimous majority
1992	Wyoming v. Oklahoma	502 U.S. 437	Joined majority
1992	New York v. United States	505 U.S. 144	Joined majority
1992	United States v. Alaska	503 U.S. 569	Joined majority
1992	Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources	504 U.S. 353	Joined majority
1992	<b>Lucas v. South Carolina</b>	505 U.S. 1003	Wrote concurrence
1992	Yee v. City of Escondido	503 U.S. 519	Joined majority
1993	South Dakota v. Bourland	508 U.S. 679	Joined majority
1993	Nebraska v. Wyoming	507 U.S. 584	Joined unanimous majority
1994	Key Tronic Corp. v. United States	511 U.S. 809	Joined majority
1994	<b>C&amp;A Carbone v. Clarkstown</b>	511 U.S. 383	Wrote 5-4 majority
1994	Oregon Waste Systems v. Oregon Dept. of Env'tl. Quality	511 U.S. 93	Joined majority
1994	Jefferson County PUD No. 1 v. Wash. Dept. of Ecology	511 U.S. 700	Joined majority
1994	Chicago v. Environmental Defense	511 U.S. 328	Joined majority
1994	Dolan v. City of Tigard	512 U.S. 374	Joined 5-4 majority
1995	<b>United States v. Lopez*</b>	514 U.S. 549	Concurred in 5-4 majority opinion but wrote separate concurrence
1995	Babbitt v. Sweet Home Chapter of Communities for a Great Oregon	515 U.S. 687	Joined majority
1995	<b>Louisiana v. Mississippi*</b>	516 U.S. 22	Wrote majority
1995	Kansas v. Colorado	514 U.S. 673	Joined unanimous majority
1995	Nebraska v. Wyoming	515 U.S. 1	Joined majority
1996	Seminole Tribe of Fla. v. Florida	517 U.S. 44	Joined 5-4 majority

1996	Meghrig v. KFC Western	516 U.S. 479	Joined unanimous majority
1997	Amchem Products v. Windsor	521 U.S. 591	Joined majority
1997	Bennett v. Spear	520 U.S. 154	Joined unanimous majority
1997	<b>Idaho v. Coeur d'Alene Tribe</b>	521 U.S. 261	Wrote 5-4 majority
1997	United States v. Alaska	521 U.S. 1	Joined majority
1997	Suitum v. Tahoe Regional Planning Agency	520 U.S. 725	Joined majority
1997	Babbitt v. Youpee	519 U.S. 234	Joined majority
1997	<b>City of Boerne v. Flores*</b>	521 U.S. 507	Wrote majority
1998	United States v. Bestfoods	524 U.S. 51	Joined unanimous majority
1998	South Dakota v. Yankton Sioux Tribe	522 U.S. 39	Joined unanimous majority
1998	Alaska v. Native Village of Venetie Tribal Gov	522 U.S. 520	Joined unanimous majority
1998	New Jersey v. New York	523 U.S. 767	Joined majority
1998	Steel Co. v. Citizens for a Better Environment	523 U.S. 83	Joined Justice O'Connor's concurrence
1998	Ohio Forestry Ass'n v. Sierra Club	523 U.S. 726	Joined unanimous majority
1998	<b>Eastern Enterprises v. Apfel</b>	524 U.S. 498	Wrote opinion concurring with 4-member plurality's judgment and dissented in part
1999	<b>Amoco Production Co. v. Southern Ute Tribe</b>	526 U.S. 865	Wrote majority
1999	<b>City of Monterey v. Del Monte Dunes</b>	526 U.S. 687	Wrote 5-4 majority
2000	<b>United States v. Locke</b>	529 U.S. 89	Wrote majority
2000	<b>Friends of the Earth v. Laidlaw Environmental Serv.</b>	528 U.S. 167	Wrote concurrence
2001	Whitman v. American Trucking Ass'n	531 U.S. 457	Joined majority
2001	Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers	531 U.S. 159	Joined 5-4 majority
2001	Idaho v. United States	533 U.S. 262	Joined Chief Justice Rehnquist's dissent

			from a 5-4 decision
2001	<b>Palazzolo v. Rhode Island</b>	533 U.S. 606	Wrote 5-4 majority
2002	Borden Ranch v. U.S. Army Corps of engineers	537 U.S. 99	Justice Kennedy did not take part in this 4-4 decision
2004	<b>Alaska Dept Env'tl. Cons. v. EPA</b>	540 U.S. 461	Wrote dissent from 5-4 decision
2004	Engine Manfu. Ass'n v. South Coast Air Quality Management Dist.	541 U.S. 246	Joined majority
2004	Cooper Industries v. Aviall Serv.	543 U.S. 157	Joined majority
2004	South Florida Water Management v. Miccosukee Tribe	541 U.S. 95	Joined majority
2004	U.S. Dept. of Transportation v. Public Citizen	541 U.S. 752	Joined majority
2004	Norton v. Souther Utah Wilderness Alliance	542 U.S. 55	Joined majority
2004	BedRoc Ltd. V. United States	541 U.S. 176	Joined majority
2005	<b>Alaska v. United States*</b>	545 U.S. 75	Wrote majority
2005	<b>Kelo v. City of New London</b>	545 U.S. 469	Wrote concurrence to 5-4 decision
2005	<b>Lingle v. Chevron</b>	544 U.S. 528	Wrote concurrence
2006	S.D. Warren v. Maine	547 U.S. ___	Joined majority
2006	<b>Rapanos v. U.S. Army Corps of Engineers</b>	126 S.Ct 208	Wrote an opinion concurring with the 4-member plurality's judgment