

## Legacy of an Environmental Skeptic

*The late Supreme Court Justice Antonin Scalia's approach to environmental law reflected an intense concern about its constitutional legitimacy and worries about promoting elitism and restricting economic freedom and personal autonomy*



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Justice Antonin Scalia's recent death is enormously significant for environmental law. People no doubt have sharply different views on whether Scalia's influence on environmental law during his thirty terms on the Court was wonderfully positive or devastatingly negative. But no one can fairly question its significance. Scalia was, until the very end, environmental law's greatest skeptic on the High Court, punctuated by his very last official act as a justice. Only days before his passing, Scalia supplied the decisive vote in favor of staying what could fairly be described as the most ambitious environmental protection regulation in the nation's history, the president's Clean Power Plan aimed at restricting greenhouse gas emissions from the nation's existing power plants.

The only thing understated about Scalia's relationship to environmental law during his tenure on the Court was his entrance. In September 1986, the Senate voted unanimously in favor of his confirmation, 98-0. During the entire confirmation proceedings, Scalia was not asked any questions about environmental law. Indeed, neither the words "environmental law" nor the word "environment" appears even once in any of the nominee's hearings or in the Senate Judiciary Committee report recommending his confirmation. The latter was merely 76 words long. Needless to say, a lot has changed about confirmation politics in the nation's capital since 1986, which was transformed by the Senate's rejection of Robert Bork's nomination to the Court one year later.

What is especially remarkable about the absence of any discussion of environmental law during Scalia's confirmation is that he was hardly a stealth nominee. Nor did he "evolve" once he joined the Court to become someone with views strikingly different from those he previously harbored as a law professor, government official, or lower court judge. Scalia remained Scalia: celebratorily pugnacious, combative, and provocative.

Nor had he previously spared environmental law from his harsh, yet often entertaining rhetoric. In 1983, only three years before his confirmation, then D.C. Circuit Judge Scalia published a law review article that launched a full-scale attack on what he described as "the judiciary's long love affair with environmental litigation." The justice-to-be made clear his view that courts should raise, not lower, Article III standing requirements to guard against citizen suits that sought "strict enforcement of the environmental laws." Mocking environmental law's great judicial



**The late Justice Antonin Scalia on a hunting trip in western Nebraska last December. Photograph courtesy of Representative Jeff Fortenberry (R-NE).**

hero and his D.C. Circuit colleague, Skelly Wright, Scalia wrote that it would “of course” be “a good thing too” to lose environmental law’s so-called “important legislative purposes” in what Wright had described as “the vast hallways of the federal bureaucracy.” Indeed, “yesterday’s herald,” Scalia chided, is “today’s bore.”

**W**hy was Scalia so skeptical of environmental law? What clearly rubbed him the wrong way? What generated such disdain if not outright hostility? The reasons, I believe, are several. Some of that antagonism was rooted in the justice’s general aversion to liberal elitism, which he apparently identified closely with environmentalism. But it was more than that. Scalia plainly thought environmental law systematically undermined other lawmaking values, including how law should be made and administered, that were at the core of his beliefs about the proper role of law and the judiciary as envisioned by the Constitution’s framers.

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The justice’s identification of environmentalism with elitism was explicit. In that same 1983 law review article, then Judge Scalia wrote how “ensuring strict enforcement of the environmental laws” might meet with “approval in the classrooms of Cambridge and New Haven” — a not so thinly veiled barb directed at Harvard (Scalia’s alma mater for law school) and Yale, both elite academic institutions that the justice thought dominated by liberal politics. But, Scalia continued, such strict enforcement would not similarly be welcomed by those who worked “in the factories of Detroit and the mines of West Virginia.” A decade later, dissenting from a Court ruling in favor of an expansive view of the Endangered Species Act, Justice Scalia lamented the “financial ruin” that would result on “the simplest farmer.”

In this manner, Scalia contrasted the champions of environmentalism with those who engaged in the hard labor upon which the nation’s economy had been built. He likewise disparaged in 1983 the elitism of judges “in the seclusion of our chambers” purporting to know “what is good for the people better than the people themselves.”

The justice’s central concern, however, was unlikely with environmentalism per se. His skepticism instead seemed to derive from his view that environmental laws promoted certain lawmaking values antithetical to his own view of constitutionally defined bounds

on lawmaking. More simply put, environmental lawmaking in a host of constitutional contexts systematically cut against Scalia’s jurisprudential grain.

In particular, environmentalism promoted citizen suit litigation by parties lacking “imminent,” “concrete injuries” and clear chains of causation in contravention of Article III of the Constitution’s “case or controversy” requirement. For Scalia, such citizen litigation was also at odds with the Article II’s “Take Care Clause,” by furthering a “revolutionary new doctrine of standing that will permit the entire body of civil penalties to be handed over to enforcement by private interests” rather than government officials in the Executive Branch.

Scalia’s constitutional concerns with environmental law, however, extended beyond citizen suits. He worried about “big” government restricting economic freedom and personal autonomy. In the context of environmental law, those concerns were expressed in Scalia’s invocation of the regulatory takings doctrine, notwithstanding that doctrine’s admitted lack of grounding in the framers’ “original intent” — adherence to which was a central thrust of the justice’s philosophy — to limit environmental protection restrictions that he concluded unduly burdened private property rights in violation of the Fifth Amendment.

Finally, federal environmental protection laws no less regularly triggered Scalia’s constitutional concerns by promoting what he perceived to be an all-too-powerful federal Environmental Protection Agency. He characterized EPA’s expansive views of its authority under federal environmental laws as based not merely on erroneous statutory interpretation but as transgressing fundamental principles of the separation of powers. And, he similarly faulted the agency for claiming regulatory powers that exceeded the scope of its legitimate authority under the Commerce Clause. In these respects, the scope of federal environmental protection was not just a matter for Congress to decide. The Constitution itself instead significantly limited how much authority EPA could possess.

All of these concerns are reflected in many of Scalia’s most prominent rulings. Soon after he joined the Court, he authored several opinions that embraced more aggressive application of the Fifth Amendment to limit environmental protection restrictions on the exercise of private property rights in natural resources, especially land. During his very first year, he supplied the critical fifth vote in *First English Evangelical Lutheran Church v. Los Angeles County* (1987), securing for private property rights advocates their long-awaited ruling in favor of a damages remedy for regulatory takings. And, that same term, he authored *Nollan v. California Coastal Commission*, striking



down as an unconstitutional taking a condition on an environmental restriction on development along the Pacific Coast. Scalia's most famous opinion for the Court on the taking issue, however, was the ruling five years later in *Lucas v. South Carolina Coastal Council* (1992), overturning a state supreme court ruling that had upheld a prohibition on residential development along the South Carolina beachfront.

Scalia also quickly made his mark in authoring opinions limiting environmental citizen suit standing. The justice authored in quick succession two Court opinions in *Lujan v. National Wildlife Federation* (1990) and *Lujan v. Defenders of Wildlife* (1992) that, dismissing citizen suits on Article III grounds, realized much of the promise of his 1983 law review article. Six years later, Scalia followed up with yet another ruling against environmental plaintiffs in *Steel Co. v. Citizens for a Better Environment* that seemed, in conjunction with his prior opinions, to place environmental plaintiffs in an untenable Catch 22. Their lawsuits were too soon, and therefore dismissed for lack of ripeness; too speculative, and therefore lacked standing; or too late, and therefore negated jurisdiction on mootness grounds.

The Scalia opinions sent shock waves in the environmental community. Before his arrival, environmental citizen plaintiffs had enjoyed increasingly relaxed standing barriers. Little time or prior effort was spent alleging facts necessary to demonstrate standing. Scalia's opinions for the Court made clear that the rules of federal litigation had abruptly changed, and environmental plaintiffs frequently found themselves on the losing end of standing rulings.

No less significant were rulings Scalia authored that favored significant reduction of the reach of federal government authority to restrict pollution. In *Rapanos v. United States*, writing for a plurality in 2006, the justice bemoaned how the government's untethered view of its Clean Water Act jurisdiction would amount to an "immense expansion of federal regulation of land use." He characterized the government as "exercis[ing] the discretion of an enlightened despot," and reaching outside the record of the case, asserted that "\$1.7 billion is spent each year by the private and public sectors in obtaining wetlands permits." Eight years later, in authoring the Court's opinion in *Utility Air Regulatory Group v. EPA*, limiting the reach of the Clean Air Act, Scalia criticized EPA's effort to "assert[] newfound authority to regulate millions of small sources — including retail stores, offices, apartment buildings, shopping centers, schools, and churches." Just last June, Scalia authored the final ruling of the term, striking down EPA's Clean Air Act Mercury Rule in *Michigan v. EPA*.

It was also more than the Court rulings themselves that were so significant. It was their accompanying rhetoric. Environmental plaintiffs in the 1970s and 1980s seemed at times to enjoy a special, almost favored status. That is of course precisely why then Judge Scalia had decried what he considered the "judiciary's longstanding love affair" with environmental plaintiffs. That affair was now plainly over.

During oral arguments and in his opinions, Scalia clearly relished mocking arguments made by environmentalists. The examples are legion. Here is just a sampling. In *Lujan v. Defenders of Wildlife*, Scalia's opinion for the Court ridiculed the standing arguments of the environmental plaintiffs as "inelegantly styled," and based "alas" on a "Linnaean leap." In rejecting EPA's view of the Clean Air Act's reach in *Utility Air Regulatory Group*, he wrote, "We are not willing to stand on the dock and wave goodbye as EPA embarks on this multi-year voyage of discovery."

During oral argument concerning the scope of the Endangered Species Act in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* (1995), the justice complained, "Can't we pick an uglier example than the koala bear? . . . We pick the cutest, handsomest little critter." In questioning a state's standing in *Massachusetts v. EPA* (2007), Scalia gamely asked the commonwealth's lawyer, "When is the predicted cataclysm?" And, in refuting an environmental advocate's contention that a statutory violation of a limitation on the use of genetically engineered seeds required injunctive relief, Scalia mused, "This isn't contamination of the New York City water supply system. It's the creation of plants . . . [T]hat's not the end of the world."

Of course, Scalia also authored some of environmental plaintiffs' biggest wins. When his penchant for plain meaning ran squarely into skepticism he might otherwise have about environmental law, the former could prevail. In 1995, he authored the Court's opinion in *City of Chicago v. Environmental Defense Fund*, rejecting the view of both Chicago and EPA that the hazardous ash residue resulting from the burning of a mixture of household and nonhazardous non-household solid waste was exempt from federal hazardous waste management regulations. [The author happily represented EDF in that case]. And, in one of the Court's most significant cases, Scalia authored the unanimous ruling in *Whitman v. American Trucking Associations*, which rejected the claims that the Clean Air Act violated the nondelegation doctrine or that

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EPA misconstrued that act by not considering compliance costs in setting health-based National Ambient Air Quality Standards.

Nor did Scalia enjoy only success in his efforts to persuade his colleagues on the Court to cut back on environmental plaintiff standing, find environmental restrictions to be unconstitutional takings, or limit EPA's pollution-control authority. On balance, he dissented at least if not more often than he was in the majority in many of the Court's most significant environmental cases. His early opinions for the Court in both standing and regulatory takings cases were matched by subsequent rulings that favored environmental protection, in which Scalia dissented. These cases include *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002), involving regulatory takings, and *Friends of the Earth v. Laidlaw Environmental Services* (2000), a standing case. The justice also found himself in dissent in major Clean Air Act cases like *Massachusetts*, involving greenhouse gas regulation, *EPA v. EME Homer City Generation, LP* (2014), an interstate air pollution case, as well as in *Babbitt v. Sweet Home*, concerning the Endangered Species Act, and he could garner only a plurality in *Rapanos*, the wetlands case.

However, no essay about Scalia's relationship to environmental law can fail to note his obvious love for hunting, which extended to his final day. While some environmentalists might condemn him on that ground, many of the nation's most celebrated environmentalists have

clearly included those who not only enjoyed hunting but who further traced their passion for wildlife conservation and wilderness preservation to the profound personal attachment they felt to both based on their experiences as hunters.

No one, however, would accuse Scalia of being an environmentalist. Indeed, the environmental community's building animosity toward the justice prompted the Sierra Club in 2004 very publicly to try to force Scalia to recuse himself from hearing a major environmental case because of the company he kept while hunting. The case, *Cheney v. United States*, arose out of the vice president's development of his energy plan, which supported a major relaxation of environmental restrictions in application to the energy industry. The club formally moved for Scalia's recusal on the ground that he had traveled with the vice president and spent time with him on a recent duck-hunting trip in Louisiana.

In a 21-page memorandum opinion, Scalia took sharp issue with the notion that a justice's person-

al friendship or purely social activities should be grounds for recusal in a case raising otherwise generic issues of administrative law. In puckish fashion, he also pointedly noted that the "lead counsel for Sierra Club, a friend" had written him "a warm note" two days before the brief opposing Cheney's request for Supreme Court review had been filed, "inviting [Scalia] to come to Stanford Law School to speak to one of his classes" at Stanford's expense. The justice denied the club's motion.

It is, of course, far too soon to know what will be the justice's ultimate legacy for environmental law. There are no temporal shortcuts in discerning history. At the very least, however, what does seem clear is Scalia gave important voice on the Court to many legitimate concerns entitled to weight in the balance of justice. Some healthy judicial skepticism about government regulation is appropriate. And environmental law is not entitled to an exemption. There is value to environmentalists thinking more carefully about their injuries and related chains of causation. And there is similarly much value to guarding against undue burdens and unfairness in the administration of environmental law. That is "a good thing too."

Scalia also made us all better lawyers. Apart from what opinions he wrote, and the sometimes over-the-top nature of his rhetorical turns of phrase, the justice fundamentally transformed legal writing. He challenged the bar to make better, more rigorous, and more precise arguments, especially in the context of statutory construction. Because of Scalia, the arguments that lawyers make thirty years after he joined the Supreme Court are far better than they were before. And the same can be said of the legal reasoning of judges and justices. It borders on the embarrassing to look back now at the arguments made in briefs before and compare them to those made in briefs today. That is no small thing. And Scalia, more than any other member of the Court during his tenure, deserves great praise for that contribution to lawyering and judging.

The Court will also clearly miss the late justice tremendously on a personal level. He was a larger-than-life personality on the bench for almost three decades. The justice clearly loved the Court and he was plainly greatly admired, and adored by his colleagues, regardless of whether they voted the same way that he did in individual cases. They were more than professional colleagues. They were friends working together in a remarkably small and exceedingly intimate law office.

The Court is suddenly a far duller place with Justice Antonin Scalia's passing. **TEF**

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