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ESSAY

SOME REFLECTIONS ON THE DEVELOPMENT OF NATIONAL WILDLIFE LAW AND POLICY AND THE CONSUMPTIVE USE OF RENEWABLE WILDLIFE RESOURCES

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I. INTRODUCTION

[T]o waste, to destroy, our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them amplified and developed.

—Theodore Roosevelt

Concerns over our wildlife have not waned since President Roosevelt’s time. On the contrary, the question of what wildlife policy to adopt has become more pressing than ever before. The importance of protecting our natural resources demands that our responses be reasoned and farsighted as we move forward to the twenty-first century. This means relying upon professional and scientific management. If such management is observed, habitat degradation and destruction relative to the human demands of our society (the only actual threats to the successful future of the conservation of fish and game) can be controlled. The excesses of the nineteenth century in the harvest of wildlife shall never be repeated. Through a myriad of federal and state wildlife laws

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and regulations fostering a conservation policy that includes consump-
tive use of renewable wildlife resources, most of this nation’s fish and
game populations are stable and healthy. There are many dramatic ex-
amples of wildlife species that have suffered serious difficulties, but due
to professional wildlife management practices, populations materially in-
creased and became stable. Two species that achieved population recov-
er-y are the wood duck and the pronghorn antelope. Scientific wildlife
management has substantially enhanced other wildlife populations as
well. For example, there are probably more white-tail deer and wild tur-
key in the United States today than when Jamestown was founded in
1607. Wood ducks have been brought back from the edge of extinction,²
Canadian geese populations have almost doubled in the past thirty years,
and Rocky Mountain and Roosevelt Elk populations have increased dra-
matically since the beginning of the century.³

From the very beginning of the formation of this Republic, the con-
sumption of renewable wildlife resources has played an important role in
the commerce, culture, and subsistence of our society. Indeed, the first
European settlements in North America were established to trade in fur.⁴ Fish and game provided food and clothing for our pioneering
forebearers; fish, fowl, and wild meat are still significant food sources for
hunters, trappers, fishermen, and native populations. In 1991, forty mil-
ion people over sixteen years old took to our nation’s wilderness areas
to hunt, fish, and trap, fostering a $40.9 billion economic benefit to the
nation and producing millions of jobs.⁵

This conservation and economic success of the twentieth century
could not have been achieved without the farsightedness of conserva-
tionists and sportsmen who sought and secured reasoned laws and regu-
lations for wildlife management. But how did we reach this point in
creating a body of federal wildlife law, and more important, where will
we go with the authority to develop it?

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² Fish & Wildlife Serv., U.S. Dep’t of the Interior, Restoring America’s Wild-
life 89-103.
³ Id. at 145-46; 273-78.
⁵ Fish & Wildlife Serv., U.S. Dep’t of the Interior and Bureau of the Census,
U.S. Dep’t of Commerce, 1991 National Survey of Fishing, Hunting and Wildlife -
Associated Recreation 6 (1993).
II. Development of the Federal Government's Authority over Wildlife Law

This nation's federal wildlife law is ultimately rooted in the Constitution through the powers and responsibilities delegated to the executive, legislative, and judicial branches of government. Under the Tenth Amendment to the Constitution, those powers not specifically reserved by the federal government are "reserved to the states," and under that authority, states have developed their particular wildlife laws and regulations.

The evolution of our federal wildlife law has generally advanced through social and cultural forces stemming from Greek and Roman traditions and Anglo-Saxon law that, in turn, have influenced statutes and regulations in the common law as interpreted by the courts.

There are basically three areas from which the federal government derives its powers under the Constitution to enable the development of any body of federal wildlife law:

1. the exclusive federal power to regulate interstate commerce;
2. the exclusive federal power to enter into treaties; and
3. the exclusive federal power to regulate and control activity on federal lands.

As clear as these powers may seem, all have been challenged on the basis of our federated system of government.

For example, on August 16, 1916, the United States concluded a treaty with Great Britain (on behalf of Canada) for the protection of migratory birds. The constitutionality of the Act implementing the treaty was immediately challenged on the ground that the states, not the federal government, should have exclusive jurisdiction over resident wildlife. In Missouri v. Holland, the United States Supreme Court firmly established that, under the Supremacy Clause of the Constitution,

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6. U.S. Const. amend. X.
7. Id. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .").
8. Id. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . . .")
9. Id. art. IV, § 3, cl. 2 ("The Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .")
the treaty and implementing legislation took precedence over any conflict between state and federal regulation.

Prior to *Holland*, and exclusive of treaty considerations, the courts had struggled with the question of who had the property rights in the wildlife—the states or the federal government? And, if it was the states, could any body of federal wildlife law ever be developed?

One of the earliest cases to explore the issue of wildlife ownership and, therefore, ultimate jurisdiction for regulation and legislation, was the 1842 case of *Martin v. Waddell*. The issue presented to the Court was the right of a riparian landowner to prohibit others from taking oysters from mud flats on the Raritan River in New Jersey. The property owner claimed ownership in both the riparian and submerged lands in the river and based his title on the grant from King Charles II of England to the Duke of York. Reaching beyond a mere interpretation of title to property, Chief Justice Taney reviewed the deed as "an instrument upon which was to be founded the institutions of a great political community." Based upon a historical review of the British law, the Court held that the King could not have transferred title to the property to the Duke (and ultimately to the plaintiff), because "dominion and property in navigable waters, and in the lands under them [were] held by the King as a public trust" and because the King could not make a private grant of such lands and waters under the terms of the Magna Carta signed in 1215.

The Court further observed that when the State of New Jersey "took possession of the reins of government . . . the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state." With this judicial framework, the concept of state ownership of wildlife was initiated.

The next judicial consideration to be addressed was the potential conflict between developing state law regulating wildlife and the exclusive power of the federal government to regulate interstate commerce. The Supreme Court addressed that issue under a variety of factual patterns and consistently upheld the prerogatives of the state to regulate its fish and resident wildlife. Contrary to this trend was the 1896 case of

13. *Id.* at 350.
14. *Id.* at 349.
15. *Id.* at 354.
Geer v. Connecticut, which traced the state ownership theory from Greek and Roman law, the civil law of Europe, and the common law of England. Justice Edward White, writing for the majority, declared that the states had the power "to control and regulate the common property in game . . . as a trust for the benefit of the people." As for interstate commerce, the Court stated that as long as it was affected "remotely and indirectly . . . the duty of the State to preserve for its people a valuable food supply" was a proper exercise of the police powers of the state.

From Geer, the courts analyzed state ownership versus the constitutional right of the federal government in terms of degree of impact on interstate commerce and the state's obligation to hold wildlife in trust. However, Congress initiated its first step in the development of a body of federal law only four years after Geer with the passage of the Lacey Act.

The Lacey Act based its authority on the exclusive federal power to regulate commerce between the states. This Act prohibited the interstate transportation of "fish or wildlife" taken in violation of state law. Clearly, the regulatory power of the states over wildlife was materially enhanced by Geer, but the Lacey Act specifically invoked the powers of the Commerce Clause to establish federal jurisdiction. Not until seventy-seven years later in Douglas v. Seacoast Products, Inc. did the Supreme Court firmly establish that the Commerce Clause would and could be invoked to establish federal jurisdiction over resident state wildlife when "there is some effect on interstate commerce."

Two years later, Douglas was reinforced by Hughes v. Oklahoma. In that case, where a state statute discriminated against interstate commerce, the Court held that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." The Court observed that "time has revealed the error" of the rationale con-

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19. Id. at 528-29.
20. Id. at 534.
22. See U.S. Const. art. I, § 8, cl. 3.
25. Id. at 281-82 (emphasis added).
27. Id. at 326 n.2.
28. Id. at 326.
tained in Geer. Although the Court recognized the legitimate state concern for conservation and protection of wildlife, Hughes clearly indicated that the Court would not continue to consider wildlife any different than other natural resources that entered into interstate commerce.

Based on the concept that the states had ownership in their own wildlife, the right of the federal government to regulate wildlife on federal lands has also been challenged. The 1928 case of Hunt v. United States challenged the right of the Secretary of Agriculture to remove an excess population of deer in a national forest. The state relied upon the Geer rationale, but the Court ruled that "the power of the United States to thus protect its land and property does not admit of doubt... the game laws or any other statute of the state... notwithstanding."

It seems clear today that the courts have little difficulty in upholding the federal power of the Property Clause in regulating wildlife on federal lands. Although the courts will still review the degree of impact of state law and regulation upon interstate commerce relative to state concern for conservation of fish and resident game, it seems clear that state interests will not supersede federal prerogatives involved in interstate commerce.

Thus, the powers of the federal government under the Constitution as interpreted by the courts permitted a body of federal wildlife law to

29. 278 U.S. 96 (1928).
30. Id. at 100. The federal government exercised this power as early as 1894 when it prohibited hunting in Yellowstone National Park. Act of May 7, 1894, ch. 72, 28 Stat. 73 (current version at 16 U.S.C. § 26 (1988)).
31. See, e.g., Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (upholding the Endangered Species Act as it covered nonmigratory species on state land while suggesting that preserving a national resource such as an endangered species may be enough to rise to the level of a federal property interest); see also United States v. Brown, 552 F.2d 817 (8th Cir. 1977) (upholding federal prohibition of hunting on state waters within, but not part of, a national park under the Property Clause powers); New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir. 1968), cert. denied, 396 U.S. 961 (1969) (holding that damage to wildlife need not be shown in order to regulate the wildlife).
develop under the Commerce Clause,\textsuperscript{33} the Supremacy Clause,\textsuperscript{34} and the Property Clause.\textsuperscript{35}

III. WILDLIFE POLICY SHOULD BE BASED UPON SCIENTIFIC MANAGEMENT, NOT ON PERSONAL OPINIONS OF MORALITY

At this juncture, a relevant inquiry is which policy shall be applied to the power to develop federal wildlife law. One area of major concern is the issue of the continued consumptive use of renewable resources by hunters, trappers, and fishermen under federal law, and most important, federal policy. "Consumptive use" of game species is not a purely social or cultural issue. Although there is a well-financed and vocal minority in this country that would clearly like federal policy to end hunting, fishing, and trapping on "morality" grounds, the issue is clearly one of wildlife management.\textsuperscript{36}

To date, professional wildlife management policy has included harvest of surplus fish and game and has been an integral part of federal wildlife legislation and regulation. For example, when the National Wildlife Refuge System was created, hunting, fishing, and trapping were permitted on those refuges where it was deemed not inconsistent with its purpose.\textsuperscript{37} The Secretary of Interior can, under regulation, "permit the use of any area within the System for any purpose including but not limited to hunting, fishing, public recreation and accommodations whenever he determines that such uses are compatible with major purposes for which such areas were established."\textsuperscript{38}

For millions of sportsmen, these lands and waters provide the only access to quality hunting, fishing, and trapping. The Fish and Wildlife Service, in turn, considers such harvest as appropriate population control

\textsuperscript{33} U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{34} Id. art. VI, cl. 2.
\textsuperscript{35} Id. art. IV, § 3, cl. 2.
\textsuperscript{36} In 1991, the Humane Society of the United States (HSUS) brought an action against the Department of Interior in an attempt to block a white-tail deer hunt scheduled to cull the herd on the George Mason Neck National Wildlife Refuge in Northern Virginia. The Court perceptively observed that the suit was "animated primarily by the plaintiffs' fundamental philosophical and public policy disagreement with the government over the wisdom, and perhaps the morality, of the sanctioned killing of wild game on public lands." Humane Soc'y of the U.S. v. Lujan, 768 F. Supp. 360, 365 (D.D.C. 1991) (emphasis added). The Court held that such "wisdom" and "morality" cannot be substituted as to the proper use of the Refuge. \textit{Id.}
\textsuperscript{37} 16 U.S.C. § 668dd (1988). President Theodore Roosevelt established Pelican Island Refuge in 1903 by Executive Order, and it is considered the first refuge. Today, the National Wildlife Refuge system consists of 91 million acres of both land and water in all states and five territories.
\textsuperscript{38} \textit{Id.} § 668dd(d)(1)(A).
of fish and game as well as a significant part of wildlife management. Currently, there are approximately 1.1 million hunting and trapping expeditions, as well as five million fishing visits, taking place annually on refuges nationwide. Of the 487 refuges, hunting is permitted in 268, of which 149 are open to big game hunting and 142 for waterfowl gunning. Trapping is permitted on 195 refuges and is considered "a legitimate recreational and economic activity when there are harvestable surpluses of fur bearing mammals." 39

Anticonsumptive use groups have consistently attacked consumptive use of wildlife within the Refuge System. 40 Their efforts have borne fruit. After a study spanning almost fifteen years, the Department of the Interior is considering seven alternatives on the future use of our national wildlife refuges. One of those alternatives would be to eliminate hunting, fishing, and trapping. 41

It is patently clear that the antispportsmen coalitions have imprinted their goals on the consideration of these alternatives. The coalitions have likewise influenced congressional action. In past sessions of Congress, legislation has been introduced to block all consumptive use of wildlife on refuges. In addition, the protectionist lobby was successful in having a provision placed in the Department of the Interior Appropriation bill for fiscal year 1993 42 to block a white-tailed deer hunt on the George Mason Neck Wildlife Refuge, even after public comment on a proposed rule in the Federal Register that resulted in a final rule 43 that the deer hunt was necessary to control burgeoning populations on the Refuge and after a federal court upheld the rule. 44 However, through the leadership of the Congressional Sportsmen's Caucus (CSC), an amendment was introduced to uphold the administrative decision and the judicial findings supporting the wildlife management decision to hold the hunt. By a bipartisan vote of 255-160, the provision was removed from the bill. 45

This is an illustrative example of a significant wildlife policy issue that involved all branches of the government under federal wildlife law. The clear issue was whether supposed "moral" philosophy on the one hand,

40. See, e.g., Lujan, 768 F. Supp. at 360-61.
41. See Fish & Wildlife Serv., supra note 39, at 4-91 to 4-117.
44. See Lujan, 768 F. Supp. at 365.
or wildlife management on the other, should shape domestic wildlife law and policy.

This policy dispute is also played out on the international scene, which in turn affects federal and state law and policy. For example, the Endangered Species Act passed in 1973 also implemented the Convention on International Trade in Endangered Species of Wild Fauna & Flora (CITES). As the name implies, CITES is a trade treaty. However, the protectionist community has made every effort to use this forum to block consumptive use of wildlife. A case in point involves the bobcat (Lynx rufus) and lynx (Lynx canadensis), both of which are commercially trapped in the United States.

CITES has a system of Appendices in which protected species are assigned to one of three Appendices. Those listed in Appendix I are considered endangered, and trade is prohibited. Species in Appendix II are considered "threatened" but may be commercially traded subject to various restrictions that such trade will not be detrimental to the survival of the species. Appendix III species are those that are regulated within each signatory nation's jurisdiction.

In response to a protectionist lobbying effort, the parties to CITES passed a proposal in 1976 by Great Britain to place the entire family Feliidae in Appendix II, stating:

_All cats are potentially involved in the fur trade, and the scale of this trade is such that all species must be considered as vulnerable, few populations now remaining unaffected. All wild species [of cat, except the domestic cat, Felix Catus], not in Appendix I should be on Appendix II, so that the scale of their occurrence in trade can be monitored._

Consequently, in the United States, bobcats and lynx suddenly became "threatened" species. This "fact" certainly came as a surprise to

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48. Id. art. II, § 1.
49. Id. art. II, § 2.
50. Id. art. II, § 3.
trappers and wildlife managers because the species was never treated as such in the United States (and Canada). The determination, moreover, was not based upon any scientific evidence presented to the parties as required under CITES.

Additionally, to delist a species from an Appendix, it must be shown that the particular species experienced a "recovery."\textsuperscript{52} This in turn created a paradox; if a species that originally had a stable population was improperly listed as "threatened," how can you demonstrate a "recovery" to delist that species from an Appendix?

As would be anticipated, on the domestic level, this mislabeling by CITES resulted in reactive administrative action,\textsuperscript{53} protracted litigation,\textsuperscript{54} and, eventually, an amendment to the Endangered Species Act.\textsuperscript{55} Again, all three branches of government were involved in the development of federal law and policy. The issue was finally resolved when the United States unilaterally took the position that the species should not have been listed as threatened and would now be domestically treated only as a "look alike" species for monitoring purposes. The participants at the Fourth Meeting of the Conference of the parties of CITES acceded.\textsuperscript{56}

Although the problem was eventually resolved (after a protracted and unnecessary controversy), the CITES mislabeling shows the problems caused when "moral" philosophy replaces responsible wildlife management. In 1989, the bipartisan Congressional Sportsmen's Caucus (CSC) was formed to ensure that such problems are avoided in the future and that federal wildlife law and policy stem from sound scientific wildlife management principles. At this writing, more than forty percent of the entire Congress are members of the bipartisan CSC.

IV. EXPERIENCES OF UNITING THE CONTRIBUTIONS OF SPORTSMEN WITH SCIENTIFIC MANAGEMENT HAVE BEEN SUCCESSFUL

Sportsmen are an integral part of the scientific management of wildlife. They have been, and will continue to be, the motivation for much of the federal wildlife law as well as the financial support for wildlife programs. Such programs have been an unqualified success. For example,

\textsuperscript{52} Criteria for the Deletion of Species and Other Taxa from Appendices I and II (1976), CITES, \textit{supra} note 47, Conf. 1.2; see also 50 C.F.R. § 23 (1992).
\textsuperscript{53} 50 C.F.R. § 23 (1992).
sportsmen were the initiators and sponsors of the Duck Stamp in 1934.\textsuperscript{57} The Duck Stamp has raised millions of dollars through the annual sale of a federal waterfowl conservation stamp. The proceeds have been used to purchase four million acres of wetland habitat.\textsuperscript{58}

Sportsmen also contribute directly to conservation efforts through an excise tax placed upon hunting equipment. Sponsored by Senator Key Pittman of Nevada and Representative A. Willis Robertson of Virginia in 1937, the Federal Aid in Wildlife Restoration Act\textsuperscript{59} has raised over $25 billion for wildlife management and produces approximately $160 million annually.\textsuperscript{60}

Commonly referred to as the P-R Program, the excise tax assesses eleven percent on shotguns, rifles, ammunition, and archery equipment used in hunting, as well as ten percent on handguns. The money is distributed to state fish and game agencies for research, land acquisition and maintenance, and general operating funds. A portion of the funds is also used by the states for hunter education and shooting range activities. The numbers attest to the program's success: Approximately 700,000 new hunters complete a hunter education course annually.\textsuperscript{61}

A similar program was developed in 1952 for sport fishing with the passage of the Federal Aid in Fish Restoration Act\textsuperscript{62} (now referred to as D-J funds), sponsored by Representative John D. Dingle, Sr., of Michigan and Senator Edwin C. Johnson of Colorado. This concept was expanded in 1984 under the Aquatic Resources Trust Fund, sponsored by Senator Malcolm Wallop of Wyoming and Representative, now Senator, John Breaux of Louisiana. Referred to as the Wallop-Breaux Fund,\textsuperscript{63} the money raised is collected by the Treasury and distributed to the states by the Fish and Wildlife Service (FWS) of the Department of the Interior. Since enactment, these programs have distributed over $1.6 billion to the states for fish conservation and restoration.\textsuperscript{64}

An example of a recent action by the CSC to support the scientific wildlife management on an international level is the letter CSC leadership wrote to the Secretary of Commerce questioning a United States

\textsuperscript{58} Fish & Wildlife Serv., U.S. Dep't of the Interior, The Duck Stamp Story (1993).
\textsuperscript{60} Fish & Wildlife Serv., U.S. Dep't of the Interior, Statistical Summary for Fish and Wildlife Restoration, Fiscal Year 1993, Table I-a (1993).
\textsuperscript{61} Fish & Wildlife Serv., supra note 2, at 215.
\textsuperscript{64} See Fish & Wildlife Serv., supra note 60, at Table III.
policy that would continue to oppose whaling of certain species when the Scientific Committee of the International Whaling Commission (IWC) unanimously found that limited harvest of minke whales was scientifically justified. The letter stated:

Science is the fundamental basis of professional and reasonable wildlife management that does include consumptive use of renewable wildlife resources. The U.S. should never base its domestic or international wildlife management pronouncements based upon perceived public opinion or, in this case, supposed Congressional opinion. Clearly, when moratoriums on the harvesting of wildlife are scientifically justified, they should be rigidly enforced and supported. However, when that same standard supports limited and controlled harvest, it should be supported and those nations who choose to do so be permitted without fear of criticism or trade sanctions. 65

As a matter of international federal policy, the United States could invoke trade sanctions (under the Pelly Amendment to the Fishermen’s Protective Act) if the President finds that a nation is engaging in an action that would diminish the effectiveness of the IWC. 66 Again, this example is a serious question of “moral” wildlife opinions versus scientific wildlife management under federal law and policy.

As a natural outgrowth of the legislative and regulatory oversight of the CSC, the Congressional Sportsmen’s Caucus Foundation (CSCF) was chartered in the District of Columbia in 1989. The goals and purposes of the CSCF are to “provide scientific research, wildlife management, public education and conservation information... for the wise use of renewable resources... [recognizing] the role of the sportsmen in conservation programs, policies and administration.” 67 The nonprofit CSCF received section 501(c)(3) status from the Internal Revenue Service, which permits contributions to be tax deductible.

The CSCF works closely with the CSC providing staff assistance, information, and research on various issues impacting the sportsmen of this nation. One of the many projects currently being undertaken by the CSC and the CSCF that will affect wildlife law and policy is the establishment of a Chair of Wildlife Law at a major university law school.

65. Letter from Congressmen Bill K. Brewster (Okla.) and Don Young (Ark.), Co-Chairmen, House Congressional Sportsmen’s Caucus, and Senator Conrad Burns (Mont.), Chairman, Senate Congressional Sportsman’s Caucus to Ronald H. Brown, Secretary of Commerce (July 12, 1993).
Many law schools now have well-developed curricula in environmental law. However, they often focus exclusively on issues dealing with clean air, land use, clean water, and waste control, and traditionally ignore other matters directly related to renewable wildlife resources. There does not seem to be any specific attention to legal issues of wildlife law and regulation. There is a real need for legal scholarship in the realm of wildlife law, and the CSC and the CSCF are working to encourage this development. The long-term goal is a structured curriculum in federal and state wildlife law and policy provided to all law schools.

V. Conclusion

This nation should be truly grateful for the farsightedness of those who preceded us in using scientific and professional standards to develop reasoned wildlife law and policy. However, federal wildlife law must be constantly monitored by scientific methods and reviewed to ensure that the protectionist policies do not endanger by mismanagement the very wildlife and habitat they seek to protect.

More than 365 years ago, the English jurist Sir Edward Coke observed that "[r]eason is the life of the law." 68 Reason, not supposed "moral" rhetoric, should be the basis of our federal wildlife law and policy as it relates to wildlife management. Since "[l]aw is not a science but is essentially empirical," the successful experience in wildlife management (which includes consumptive use of renewable wildlife resources) mandates that federal wildlife laws and policy be based upon acquired knowledge and not upon unreasoning sentiment. 69 Our precious wildlife deserves no less from our federal government.

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69. Oliver Wendell Holmes, Codes and the Arrangement of the Law, 5 Am. L. Rev. 1 (1870), reprinted in 44 Harv. L. Rev. 725, 728 (1931).