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Why There Should Be No Restatement of Environmental Law

Dan Tarlock[†]

INTRODUCTION

There is no Restatement (First, Second, Third, or Fourth) of Environmental Law. Until 2012, the American Law Institute (ALI) had never considered preparing one or even considered an alternative such as a model act or white paper.¹ Should the ALI consider the preparation of a *Restatement of Environmental Law*? The easy answer is why not? Environmental degradation continues throughout the world and in the United States. The law-driven project of rolling back pollution (including greenhouse gases), reducing the risks of exposure to toxic substances that threaten the health of humans and ecosystems, and conserving biodiversity remains an important work in progress. Environmental law is a relatively new but already well-established and important practice area and academic specialty. Since the first modern environmental law case was decided in 1965,² there have been several thousand environmental

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¹ In 2012, a group of environmental scholars asked the ALI to consider two non-statement projects, a “Project or Report to summarize key principles of underlying environmental impact analysis,” and a similar undertaking on environmental enforcement. Memorandum from Dean Irma Russell et al. to the Honorable Lee Rosenthal and Professor Lance Liebman, Proposal for Project on Environmental Law (Oct. 3, 2012) (on file with author). The proposal illustrates the extent to which the ALI is using other means short of a full Restatement to reflect important new legal developments. Nothing in this article addresses the merits of ALI projects short of a full Restatement of environmental law.

² Modern environmental law began with the Second Circuit’s opinion in *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). For the first time, a court reversed an administrative decision, a Federal Power Commission license, because the agency had not fulfilled its “affirmative burden” to consider the environmental impacts of the project and alternative sources of energy. *Id.* at 620.

law judicial opinions.³ The subject is also supported by a strong academic community—even at Harvard⁴—that has strong ideas about its direction.⁵

This article examines several possible explanations for the ALI's historic lack of interest in a *Restatement of Environmental Law* and whether the Institute should consider the preparation of a *Restatement of Environmental Law*. It concludes that there are no insurmountable barriers to the preparation of a Restatement, but that the ALI should not do so because environmental law needs to be reimagined, not restated. The argument proceeds in two parts. Part I examines a set of objections based on the subject's newness, non-common law basis, positive nature, and the politically charged and contested, sorry state of contemporary environmental law.⁶ In brief, environmental law is neither a common law subject nor does it have a set of core substitute principles. However, the lack of traditional subject matter poses no insurmountable barriers to the preparation of a Restatement. Nonetheless, Part II argues that the ALI should not attempt a *Restatement of Environmental Law* because the subject is too far from the Institute's core mission of restating, cleaning up, and modestly reforming the common or quasi-common law.⁷

³ The Environmental Law Institute began publishing the Environmental Law Reporter in 1970 after the seminal 1969 Arlie House conference, which helped define the emerging field and identified the need for a special compilation of the rapid cascade of cases triggered by the passage of the National Environmental Policy Act of 1969. Phillip H. Hoff & Rep. Paul N. McCloskey, Jr., *Conclusion*, in LAW AND THE ENVIRONMENT 368 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970). BNA also began publishing the Environmental Reporter Cases the same year.

⁴ In 2005, Harvard appointed Professor Jody Freeman, currently the Archibald Cox Professor of Law, which was the school's first appointment of a major environmental law scholar. The appointment of the distinguished scholar Richard Lazarus as the Howard and Katherine Aibel Professor of Law followed in 2010.

⁵ Clark Boardman, now West Publishing, began publishing the Land Use & Environment Law Review in 1970. The Review is now in its 44th year. A two-level peer-review process selects the 10 or 11 best articles in the fields of land use and environmental law for publication in the Review. A. Dan Tarlock & David L. Callies, *Preface*, in LAND USE & ENVIRON. L. REV. at v (2012–2013).

⁶ The foundation of environmental law rests on four major statutes: The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (2011); The Clean Air Act of 1970, 42 U.S.C. § 7401 et seq. (2011); the Clean Water Act of 1972, 33 U.S.C. § 1251 et seq. (2011); and the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (2011). All were enacted between 1969 and 1973.

⁷ This statement skips over the debate, which began with ALI's founding, over the function of a Restatement. Should Restatements be only quasi-codifications of existing law, or should they try to reform the law by bringing it in line with current social conditions? See Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 213–20 (2007) (summarizing the debate). I skip over this debate because it is irrelevant to my argument that the ALI's focus on

There is considerable debate whether environmental law lends itself to substantive principles.⁸ All students of the subject matter agree that, at present, the subject is a paradox. In one respect, environmental law is inherently dynamic because it must constantly adapt to new insights from the physical and social sciences. In another respect, for political reasons it remains frozen in time or is being rolled-back. Because the ALI process is primarily backward-looking, there is a risk that a Restatement would freeze the law in its current dysfunctional and anti-environmental protection mode. Consequently, a Restatement now would impede the greater goal of effectively incorporating new interdisciplinary insights to address the continuing challenges of environmental degradation and global climate change.⁹

I. ENVIRONMENTAL LAW: NEW AND POSITIVE

A. *The Romans Didn't Recognize the Subject*

Law schools and the ALI are still controlled by the legal silos of Roman law. Despite efforts to “enrich” the first-year law school curriculum or make it more street smart, the core curriculum still follows the Roman law categories of private and public law. With perhaps a single exception, the ALI during its first Restatement Era (1923–1944) logically concentrated on restating the private law subjects of the first-year curriculum and the related upper-division courses that followed. The core public law subject, criminal law, was ultimately addressed through the Model Penal Code rather than through a Restatement.¹⁰ The subjects of the first Restatements were agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts. During my law school years (1962–1965), agency, contracts, property, unjust enrichment and restitution, and torts were required first year courses. Judgments was taught as an element of civil procedure and trusts was a required second-year course.

The trend of concentrating on the first-year common law curriculum continued in the second Restatement Era (1944–1987), a period when the ALI mainly updated the Restatements

the common law, in an inherently backward-looking exercise, makes it incapable of contributing to a dynamic area.

⁸ See *infra* notes 54-60.

⁹ Judge Richard Posner has criticized the ALI for not being sufficiently interdisciplinary and forward-looking. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 304-07 (1999).

¹⁰ See *generally* MODEL PENAL CODE (1985).

that it had prepared in the first round.¹¹ However, during this time, the ALI also began to break free from the common-Roman law heritage and prepared the *Restatement of Foreign Relations*. Today, the ALI is increasingly less wedded to the common-Roman law heritage, but it continues its focus on judge-made, rather than positive, law. In the third Restatement Era (1987 to the present), the ALI has continued to restate Roman-law derived subjects such as suretyship and guaranty. But, the great project of restating the core of the common law is over. The ALI has progressively narrowed its focus to specific aspects of a previously restated law and only incrementally addresses emerging areas of law.¹² Using torts as an example, the ALI has tried to shape specific, dynamic areas that have more limited common or Roman law roots, such as products liability, apportionment of liability, physical and emotional harm, and unfair competition. Thus, the fact that a subject was not a historic Roman law derived first-year subject area is not a *per se* barrier to the development of a Restatement today.

B. The Real Problem is that Environmental Law is Positive Law

Environmental law suffers from a more serious defect than its shallow common law roots; it is positive, science-based law. The restatement or reform of judge-made law has been the historic focus of the ALI because the Institute was founded on the premise that law as articulated by an independent judiciary was a check on tyranny. G. Edward White accurately summed-up the dominant rule-of-law view of the ALI's founders when he stated that law was an "inviolable external" force, "an authoritative source of wisdom," and "independent of the authority of those who laid down the rules that governed disputes."¹³ Nazi Germany's perversion of the positivist "Rechtsstaat" tradition¹⁴ reinforced the idea that "real law" must be a set of relatively general,

¹¹ See Thomas W. Merrill & Henry Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

¹² Many of the suggested topics presented at the Symposium such as child abuse, voting rights, and children's rights illustrate the expansion of the ALI's gaze and its willingness to incrementally address new areas of law.

¹³ G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 172 (2002). This sentiment reflected Oliver Wendell Holmes definition of law as a prediction of what a judge would do. See *The Path of the Law*, 10 HARV. L. REV. 61 (1897).

¹⁴ E.g., Kenny Yang, *The Rise of Legal Positivism in Germany: A Prelude to Nazi Arbitrariness?*, 3 W. AUSTRALIAN JURIST 245 (2012), available at http://www.murdoch.edu.au/School-of-Law/_document/WA-jurist-documents/WAJ_Vol3_2012_Yang---The-Rise-of-Legal-Positivism.pdf.

stable principles.¹⁵ Environmental law does not meet this condition. Although environmental law has modest roots in the common law of nuisance,¹⁶ it is not the product of an organic evolution of nuisance law.¹⁷ The maze of federal and state statutes enacted since 1970, and the wildly varying judicial interpretations of them, constitute the corpus of environmental law. In fact, environmental law's most distinctive feature is the use of positive law to overcome the common law's inability to respond to the imperatives of environmental protection as defined by scientists.¹⁸

Environmental law is profoundly antithetical to both the function of the common law and to the Restatement tradition. One of the major functions of the common law is to administer corrective justice by compensating the victims of injuries to their health or property. By necessity, it looks backward, not forward. In contrast, at least two out of three of environmental law's broad, interrelated objectives are primarily forward-looking. The initial and continuing objective of environmental law is to roll back the use of air, soil, and water as waste sinks. This objective might seem to align reasonably well with the common law's focus on corrective justice, but it does not in fact fit within a corrective justice framework. In the process of curbing pollution, environmental law must limit, rather than confirm, historic *de facto* and *de jure* entitlements to pollute the air, soil, and water. And it must do so by forcing technological innovation.¹⁹ As we have learned about the scope of environmental degradation, the law's functions have broadened. Conservation, the protection of the integrity and survival of functioning ecosystems and the flora and fauna within them, is an equally important objective.²⁰ The imperative to preserve

¹⁵ These criteria are two of Lon Fuller's eight principles of the rule of law, LON FULLER, *THE MORALITY OF LAW* 39 (Rev. ed. 1969).

¹⁶ See generally NOGA MORAG-LEVINE, *CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE* (2003).

¹⁷ The RESTATEMENT (SECOND) OF TORTS made some effort to adapt the doctrine of public nuisance to citizen environmental suits. See Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of Special Injury*, 28 *ECOLOGY L.Q.* 755, 767, 835 (2001).

¹⁸ See Debora Brosnan, *Science, Law, and the Environment: The Making of a Modern Discipline*, 37 *ENVTL. L.* 987 (2006).

¹⁹ See e.g., *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1043 (D.C. Cir. 1978) (where no credit was given to dischargers for the quality of receiving water because the Clean Water Act makes "the right of the public to a clean environment . . . pre-eminent" unless treatment is impractical or unachievable).

²⁰ E.g., Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 *ECOLOGY L.Q.* 265, 265 (1991) (discussing the rationales for biodiversity protection).

biodiversity, however, has no common law roots.²¹ Living and non-living non-human entities have no legal personality. The common law offered (and continues to offer) virtually no protection for biodiversity. Instead, by creating property rights to exploit “nature,” the common law encourages its destruction. As a result, there is no distinctive quasi-common law of biodiversity protection for the ALI to restate.

Environmental law’s third function is completely forward-looking. The law seeks to protect humans and non-humans from a variety of future risks. The risks come from exposure to toxic substances, the loss of biodiversity, and climate change. A great deal of environmental regulation, from toxic pollutant standards to demands for environmental impact assessments, is an exercise in long-term risk assessment and management. The common law of torts, the closest analogy to pollution regulation, offers little precedential guidance. The law of torts focuses on redressing past injuries and offers limited protection from future risks. It is extremely difficult to convince a court to enjoin an activity that poses only a *risk* of future harm. As Professor Todd S. Aagaard has observed, “Courts have found that operationalizing reasonable foreseeability is extremely difficult.”²² Future risks have been cursed as “speculative” because they expose parties to liability for injuries that the parties may not in fact cause. For example, were the international community to make a serious effort to mitigate the projected adverse impacts of climate change, it would be doing so to protect future generations from a wide range of risks such as droughts, flood, biodiversity loss, and new disease vectors.²³ More generally, and as Hurricane Sandy illustrated, we are now experiencing the impact of global climate change, yet there is almost no judge-made law articulating a duty to mitigate the projected adverse impacts of climate change.²⁴

The ALI can, of course, look forward. To take one of many examples, the Institute has begun to put its foot into the swirling waters of risk protection in the *Restatement (Third) of*

²¹ See JOHN PASSMORE, MAN’S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS 5 (1974) (tracing to biblical origins the idea of “nature as a ‘captive to be raped’ rather than a ‘partner to be cherished’”).

²² Todd S. Aagaard, *A Functional Approach to Risks and Uncertainties Under NEPA*, 1 MICH. J. ENVTL. & ADMIN. L. 87, 106 (2012).

²³ The literature on the risks of climate change is enormous. See, e.g., BIODIVERSITY, ECOSYSTEM FUNCTIONING, & HUMAN WELLBEING: AN ECOLOGICAL AND ECONOMIC PERSPECTIVE (Shahid Naeem et al. eds., 2010).

²⁴ See David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FL. L. REV. 15, 77 (2012).

Torts. Risk is central to the related field of toxic torts, and *The Restatement (Third) of Torts* has not shied from dealing with the tension between traditional and probabilistic concepts of cause. However, the results of the ALI's endeavor illustrate the difficulty of fitting the "wicked" scientific uncertainty, which pervades environmental law, into a Restatement format. The Constitution gives the legislature considerable discretion to base health-protection regulations on the risk of future harm,²⁵ but judges have much less discretion to do so. Due process requires that responsibility for exposure injuries in toxic-tort suits must be assigned to a specific emitter and that the plaintiff establish that the exposure to a toxic substance caused a specific injury.²⁶ For this reason, and especially after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁷ courts have been reluctant to substitute probabilistic risk estimates for the traditional cause-in-fact analysis.²⁸

The Restatement (Third) of Torts reaffirms the "but for" test for causation in all tort cases, including toxic torts. It also recognizes, though, the special problems of proving that exposure to toxic substances can result in serious future health problems and that the injury can include the risk of serious future harm. Instead of a set of rules, however, the *Restatement (Third)* uses a Reporter's Note to provide guidance to courts grappling with the assignment of responsibility.²⁹ Comment c breaks new ground; it was prepared after extensive consultation with doctors and scientists. The Comment recognizes that exposure to toxic substances is a serious problem and that traditional definitions of causation make it extremely difficult for those who have been exposed to obtain any recovery.

The Comment does not endorse the notion that probabilistic cause can always be substituted for "but for" causation. It does recognize, however, that the law of torts cannot always demand complete short-term, casual certainty in

²⁵ *E.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (holding Section 109(b) of the Clean Air Act's mandate to the EPA to set ambient air quality standards to protect public health "allowing an adequate margin of safety" is a valid delegation of legislative power (citations omitted)).

²⁶ Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1474-75, 1514-24 (1986).

²⁷ 509 U.S. 579, 597 (1993) (finding that courts must exercise a gatekeeper function over the validity of proffered scientific evidence).

²⁸ Steve C. Gold, *The "Reshapement" of the False Negative Asymmetry in Toxic Tort Causation*, 37 WM. MITCHELL L. REV. 1507, 1520-33 (2011).

²⁹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARMS § 28, reporter's note, cmt. c(3) (2010).

toxic substance exposure cases.³⁰ The Comment recognizes that causation is a matter of degree and collapses the distinction between general (exposure) and specific (injury) causation in cases where the level of casual certainty falls below the “but for” standard. Comment c thus opens the door to proof of causation through the use of probabilistic estimates of risk.³¹ This development is a progressive step for toxic tort plaintiffs, but it also illustrates the difficulties of dealing with the scientific uncertainty inherent in environmental law through a rule-based format.

The ALI’s effort to stake out a position in a dynamic, science-based area could be a useful precedent for a *Restatement (First) of Environmental Law*. However, the positive nature of environmental law raises an even more fundamental problem. Environmental law is inherently dynamic because it is a product of both rational efforts to respond to new problems and raw, interest-based politics.³² First, dynamic, positive law is best synthesized in a treatise with frequent updates rather than in a set of black-letter rules supported by commentary designed to last for decades. Better yet, environmental law might be best served by an interactive web site, an enterprise not suited to the ALI’s deliberate, consensus process. Second, and as developed in Part II, any attempt to cabin a dynamic area creates the risk of freezing the law. This is especially problematic as environmental law has become bitterly politicized.³³ Participants at the symposium identified this as a problem with many ALI efforts. ALI projects have always had to negotiate among deeply entrenched interests that saw the adoption of a particular version of a rule as costly to their clients. However, as debates over climate change and the steady undermining of the environmental laws put in place between 1969 and 1980 illustrate, the political consensus that supported

³⁰ *Ranes v. Adams Labs, Inc.*, 778 N.W.2d 677, 688 (Iowa 2010) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARMS § 28, cmt. c).

³¹ Gold, *supra* note 28, at 1563-73.

³² One could cite numerous examples. One of my favorites is The Stop the War on Coal Act, H.R. 3409, 112th Cong. (2012), which was approved by a 233–175, primarily Republican, vote in the House of Representatives just before the November 2012 election. See *Final Vote Results for Roll Call 603*, OFF. CLERK U.S. HOUSE OF REP., <http://clerk.house.gov/evs/2012/roll603.xml> (last visited Oct. 10, 2013). The Act would effectively deregulate the coal industry by curbing EPA’s power to regulate greenhouse gas emissions and to review and reject state water quality standards. See H.R. 3409, 112th Cong. §§ 201, 501 (2012).

³³ For a history of the increasing opposition to environmental regulation, see generally JUDITH A. LAYZER, *OPEN FOR BUSINESS: CONSERVATIVES’ OPPOSITION TO ENVIRONMENTAL REGULATION* (2012).

the basic structure of environmental law has collapsed. ALI projects can wade into political thickets when the debates over the subject matter are at the margin, but not when they are at the core of an area.

C. *There Is No Common Law Substitute*

The lack of a developed common law is not a per se bar to restatement. The real significance of the common law is that it provides a substantive foundation, one developed over time, around which a consensus on basic principles has formed. There are other sources of law that can serve this foundational function. The *Restatement of Foreign Relations*, now in its fourth iteration, found its substantive foundation in positive international law. The development of a Supreme Court quasi-constitutional jurisprudence can also serve as a set of foundation principles. The upcoming *Restatement of Indian Law* is a good example of a non-common law, constitutional-based restatement.³⁴ It will be based on the Supreme Court's long, if inconsistent, tradition, which began with Chief Justice Marshall's work to protect the special status of tribes. His characterization of tribes as "domestic dependent nations"³⁵ has led to distinct law of tribal sovereignty within the confines of plenary federal authority.³⁶ Thus, the Reporter's hope is that the Restatement can "cement a set of generally agreed-upon foundational principles that could shape further developments in the field."³⁷

No such quasi-constitutional tradition exists in environmental law. Environmentalists have long urged the incorporation of environmental rights into the Constitution,³⁸ but such a scheme of rights faces two seemingly insurmountable problems. First, the Constitution is primarily a charter of negative liberties, and thus it imposes no affirmative duties on

³⁴ RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS (Discussion Draft 2013).

³⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³⁶ RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS § 3 ("The United States has a unique trust relationship with Indian tribes and individual Indians, authorizing the federal government to *inter alia* safeguard property rights of Indians and tribes, [and] preserve tribal autonomy" (emphasis added)).

³⁷ *ALI Begins Work on Three New Restatements*, A.L.I. E-REPORTER (Oct. 2012), http://www.ali.org/_news/reporter/12oct/12oct.html#ailaw.

³⁸ See, e.g., Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 828-29 (2002).

the state except to treat citizens fairly and with some dignity.³⁹ Second, even if this hurdle can be overcome, the content of any potential environmental right is too contingent compared to other rights to be characterized as fundamental. Once one concedes that citizens have no right to a zero-risk environment, it is not possible to specify with any level of confidence the content of a potential environmental right.⁴⁰ Despite several decades of scholarly advocacy,⁴¹ the idea of a constitutional right to some environmental state is dead in the water.

Although they are found in many constitutions throughout the world,⁴² standards such as a right to a healthy, clean, and minimal risk environment are hopelessly vague. To take one example, DNA research has shown that susceptibility to cancer arises from an unknown mix of environmental and genetic factors, which adds more complications to any effort to recognize a public health-based right.⁴³ The problems are magnified when one turns from health to the conservation of the physical environment. Flora and fauna have no legal personality. The common law did not recognize a right to a minimum level of “nature,” or ecosystem, conservation, and the 1789 Constitution provides no textual support for such rights.

³⁹ Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (finding that there is no constitutional text or precedent conferring a right). For a dramatic example of the application of the negative-affirmative distinction, see *Mazibuko v. City of Johannesburg* 2009 (4) SA 1 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2009/28.pdf>. The South African Constitutional Court refused to invalidate Johannesburg’s decision to use pre-paid water meters in parts of Soweto, a largely impoverished area, and to use post-use billing in the wealthy parts of the city. The Court found that only limited balancing is permitted for negative rights that constrain the state, but affirmative human social and economic rights require a balance between human dignity and the availability of public resources to fulfill them.

⁴⁰ Professor Cass Sunstein made this point in his book, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 90 (1990). For an early articulation of this view, see Ronald E. Klipsch, *Aspects of a Constitutional Right to a Habitable Environment: Towards an Environmental Due Process*, 49 IND. L.J. 203 (1974); see also J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245 (1999) (arguing that constitutional environmental rights are not desirable). But see Victor B. Flatt, *This Land is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1 (2004) (arguing that the common law tradition of the protection of the person can evolve to encompass an individual right to a clean and safe environment that constrains societal efficiency trade-offs).

⁴¹ Flatt, *supra* note 40, at 4-6.

⁴² DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 76-77 (2012).

⁴³ See, e.g., Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CALIF. L. REV. 171, 184 (2005). This conclusion continues to be challenged, see, e.g., Steve C. Gold, *The More We Know, the Less Intelligent We Are?—How Genomic Information Should, and Should Not, Change Toxic Tort Causation Doctrine*, 34 HARV. ENVTL. L. REV. 396-97, 421-23 (2010).

A constitutional right to environmental protection is not, however, a necessary condition for a common law substitute. A quasi-common-constitutional law Supreme Court jurisprudence would serve as an adequate substitute, but the Supreme Court has not developed one for two major reasons. First, the Court does not view environmental law as a distinct area of the law to be further developed.⁴⁴ Most environmental cases ask the Court to reverse an agency decision or interpretation of its statutory or rulemaking authority. The Supreme Court has decided over 100 environmental cases since 1970, but these cases have not yielded a coherent set of “environmental” principles. Instead, the cases are treated as administrative law decisions or as mere exercises in statutory construction. In fact, the Court’s decisions involving issues of environmental law have been more important for the development of administrative law than for any particular environmental principles. For example, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁵ the Court announced a two-tiered approach to judicial review of agency constructions of its enabling legislation. This test has become one of the bedrock principles of modern administrative law, but the case misconstrued the Clean Air Act.⁴⁶ I leave it to others to decide whether the Court’s approach to statutory construction, which ranges from invented legislative history to arid dictionary searches to define a term,⁴⁷ should be restated.⁴⁸

Occasionally, a Justice will include a sentence that recognizes the broader significance of the issue for environmental protection.⁴⁹ But, for each statement, there is a subjective counter-

⁴⁴ *E.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978). *Vermont Yankee* ended the District of Columbia Circuit Court of Appeals’ attempt to supplement the minimal procedural guarantees of the Administrative Procedure Act in complex, science-based EPA rulemaking with a hybrid approach that recognized an ad hoc right of cross examination. *See Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629-32 & n.51 (D.C. Cir. 1973).

⁴⁵ 467 U.S. 837, 842-44 (1984).

⁴⁶ The substantive issue is whether stationary sources of air pollution in non-attainment, dirty areas could satisfy the new source review standards for plant modifications by aggregating all sources of pollution in a bubble. FREDERICK R. ANDERSON, ROBERT L. GLICKSMAN, DANIEL R. MANDELKER & A. DAN TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 478 (3rd ed. 1999), concludes that Justice Stevens’ reading of the Clean Air Act has little support in the legislative history.

⁴⁷ *E.g.*, *Rapanos v. United States*, 547 U.S. 715, 732-33 (2006) (using *Webster’s New International Dictionary* to decide the extent of federal power to regulate wetlands).

⁴⁸ *See* Lawrence Solan, *Is it Time for a Restatement of Statutory Interpretation?*, 79 BROOK. L. REV. 733 (2014) (arguing that there should not be such a restatement).

⁴⁹ *E.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). The issue was whether a programmatic environmental impact had to be prepared for planned coal leases in the Northern Great Plains. *Id.* at 408-09. The majority found that the Department of Interior

statement that often goes beyond the legislation at issue to roll back environmental protection.⁵⁰ The best environmental spin that can be put on the Court's "environmental jurisprudence" is that the Court has not completely undermined lower court precedents that have tried to base decisions on the purpose of the legislative programs. For example, the most that the leading scholar of the Supreme Court's environmental record can say in his revisionist look at the 17 cases dealing with the National Environmental Policy Act is this:

[A] close examination of the Supreme Court's NEPA precedent, including the archival papers of many of the Justices who decided those cases, tells a more interesting and less lopsided story. There were many important environmental victories within those losses, which have since played a role in NEPA continuing to serve as one of the nation's most important environmental statutes.⁵¹

The second factor contributing to the Court's failure to develop a quasi-common-constitutional environmental doctrine is the Court's well-documented indifference or hostility to the project of environmental protection. A synthesis of the Court's environmental cases would be better entitled *The Restatement (First) of Environmental Degradation*. The relevant constitutional jurisprudence that has emerged is a mixed blessing for the environmental protection project and it would be difficult to restate. It is confusing, inconsistent, and contested. There is no single foundational environmental protection case. *Massachusetts v. EPA*,⁵² which held that the EPA had the authority and a duty to regulate greenhouse gas emissions as pollutants, is the closest the Supreme Court has come to recognizing the importance of the environment to human kind. However, it is not a suitable foundation for a general law of environmental protection. The case is ultimately only a construction of a specific statute. The majority's recognition that global climate change is a real problem could be precedent for the Court's recognition of the broader context of the environmental law cases that come to

did not have an existing or proposed plan for the region and thus there was no need for large-scale EIS. Justice Marshall dissented and argued for a broader reading of NEPA because "this vaguely worded statute seems designed to serve as no more than a catalyst for development of a 'common law' of NEPA." *Id.* at 421 (Marshall, J., dissenting).

⁵⁰ In *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997), Justice Scalia characterized the purpose, "if not indeed the primary [purpose]," of the Endangered Species Act as the avoidance of "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."

⁵¹ Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1585 (2012).

⁵² 549 U.S. 497, 528-33 (2007).

them. However, there is no evidence in post-*Massachusetts* cases that the Court will do so.⁵³

The Supreme Court's standing jurisprudence is the most prominent example of the lack of consensus on a foundational principle of environmental law. Modern environmental law is largely the product of guerilla litigation that challenged a wide variety of government actions. These lawsuits, which make up the corpus of the judge-made environmental law, were made possible when the Court partially decoupled one's standing to sue from the merits of the action.⁵⁴ Citizen suits remain one of the most distinctive, and globally admired, features of environmental law. Shared private-public enforcement of statutory compliance is environmental law's most distinctive contribution to public law. However, in the seminal case *Sierra Club v. Morton*,⁵⁵ Justice Stewart rejected the argument that the Article III case or controversy standard requires only that the court be presented with a legal issue ripe for resolution. Instead, he held that Article III standing requires some nexus between a specific plaintiff's interest and the subject of the lawsuit, leaving only resource users with the standing to sue.⁵⁶ The Court has vacillated between treating this requirement as a fiction and a fact to be specifically alleged and proved.⁵⁷

D. *There Is No Substantive Law, Period*

The existence of some core substantive law is a necessary condition for any Restatement. Pure process-based subject matter has not been the subject of restatements. For example, there is a *Restatement (Second) of Judgments*, but no *Restatement of Civil Procedure*. The imbalance between general principles and the wide variety of technical rules makes it difficult to restate process-based legal subjects. Environmental law faces this problem. As Professor Aagaard has persuasively

⁵³ See, e.g., *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013); *Sackett v. U.S. Evtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710 (2013); *Decker v. Nw. Evtl. Def. Ctr.*, 133 S. Ct. 1326 (2013).

⁵⁴ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

⁵⁵ 405 U.S. 727, 734-35 (1972).

⁵⁶ *Id.*

⁵⁷ Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (noting that plaintiff must submit affidavit showing where listed endangered species were being threatened and that plaintiff would be directly affected by the contested action), with *Friends of the Earth, Inc. v. Laidlaw Evtl. Servs., Inc.*, 528 U.S. 167, 181-83 (2000) (noting that allegations that plaintiffs who used river would be adversely affected by future pollution violations sufficient to meet user equals standing test).

argued, environmental law seems fated to be entirely a law of dispute-resolution process.⁵⁸ His basic argument is that there are two primary and two secondary distinctive features of environmental law.⁵⁹ The primary features are the mediation of public and private conflicts between shared natural resources and the internalization of the external costs of human consumption and resource use.⁶⁰ The two secondary facets to environmental law are the wicked conditions under which these conflicts must be resolved. These include the spatial and temporal disconnects between cause and effect and persistent scientific uncertainty.⁶¹ The problem is compounded by what Professors Ruhl and Salzman have described as regulatory accretion.⁶² Regulatory statutes have become more complex and tend to be changed piecemeal rather than comprehensively reformed. The result is a mass of increasingly obsolete and lengthy statutes, unintegrated with each other, that do not lend themselves to a coherent restatement of their objectives.

The inability of the United States Congress to address climate change mitigation illustrates the drag of the two secondary features.⁶³ The net result of Professor Aagaard's analysis is that it is impossible to define a core of substantive principles because "environmental protection sits in a position of constant tension with countervailing interests and values."⁶⁴ This argument echoes the conclusion of the late Lon Fuller in his critique of positivism. His influential book, *The Morality of Law*, attempted to revive natural law in the face of the desecration of German, positive civil law by the Nazis. Professor Fuller concluded that a set of procedural guidelines to establish the legitimacy of complex decisions, which he styled "a procedural version of natural law," is

⁵⁸ Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 282 (2010). I have responded to this argument by suggesting a few core principles, derived in part from international environmental law. Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENVTL. & ADMIN. L. 159, 162 (2012). Nothing in my argument that a small core of mixed procedural and substantive rules might be possible detracts from the argument that current United States environmental law is not suitable for restatement.

⁵⁹ Aagaard, *supra* note 58, at 264.

⁶⁰ *Id.* at 264-66.

⁶¹ *Id.* at 270-71.

⁶² See James Salzman and J.B. Ruhl, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003).

⁶³ See J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 67 (2010).

⁶⁴ Aagaard, *supra* note 58, at 263.

all that we can expect of a just legal system.⁶⁵ He accurately predicted the course of environmental law.

II. PLEASE, NO RESTATEMENT OF ENVIRONMENTAL LAW

Despite the many problems sketched above, the ALI could undertake a *Restatement of Environmental Law*. The Institute continues to move into recent fields as illustrated by its forthcoming *Restatement of Employment Law* and its ongoing *Restatement of Consumer Law*. A *Restatement of Environmental Law*, however, would not be a good idea for two reasons. First, although the ALI does nudge courts toward new rules grounded in contemporary society, any Restatement is inherently backward-looking. There must be something to restate. Second, there must be something worth restating. For example, despite the confusion in current American Indian law, the *Restatement (Third) of The Law of American Indians*' stated objective is "to cement a set of generally agreed upon foundational principles that could shape further developments in the field."⁶⁶ Or, as the Reporter has put it, the ALI intends "to bring clarity to the field and to highlight its importance."⁶⁷ These stated objectives strike fear into the hearts of most tribes and tribal lawyers. Clarity in the form of a Restatement could freeze Indian law into the series of Supreme Court decisions that jeopardize the federal government's current Indian policy of maximum tribal autonomy. When compared with Indian law, the problem of finding something worthwhile to restate for environmental law is even worse.

The basic problem for environment law is, as the previous discussion indicates, that there is very little to cement or restate. There is no common law or any constitutional or quasi-constitutional environmental law jurisprudence. Further, the many federal appellate and Supreme Court cases construing the various statutes that make up positive environmental law have failed to produce a set of coherent environmental law principles that could be restated.

There are many reasons for this state of affairs. The root of the problem is that our view of nature is radically

⁶⁵ FULLER, *supra* note 15, at 96.

⁶⁶ ALI *Begins Work on Three New Restatements*, *supra* note 37.

⁶⁷ Shannon Duffy, *Q&A with Professor Matthew Fletcher*, A.L.I. REP. (Fall 2012), http://www.ali.org/_news/reporter/fall2012/05-professor-matthew-fletcher.html.

changing.⁶⁸ Originally, it was assumed that nature was perfect and that as much of it as possible should be fenced off from human intervention. This view has been eroded by the emergence of more sophisticated theories of ecosystem behavior, which recognize the dynamic nature of ecosystems. Thus, the objective, according to these theories, is not to preserve ecosystem stability but to maintain their resilience over time. As a leading ecologist explains, “some of the most telling properties of ecological systems emerge from interactions between slow-moving and fast moving processes and between processes that have a large spatial reach and processes that are relatively localized. Those interactions are not only non-linear; they generate alternating stable states.”⁶⁹ As a result, the original concept of resilience as a near equilibrium steady state has been replaced, and ecologists try to measure resilience “by the magnitude of disturbance that can be absorbed before the system changes its structure by changing the variables and processes that control behavior.”⁷⁰ For law, this means that all attempts to manage nature are experiments; each experiment will have different targets and protocols. This pushes the law from substantive to procedural.⁷¹

CONCLUSION

To grapple with the continuing challenge of environmental law, we must look forward rather than backward. Environmental history teaches that humans, since at least the time of the Ancient Greeks, have viewed the earth as a treasure chest to be exploited to sustain human welfare irrespective of the social costs and limits.⁷² The conclusion that we students of environmental protection have drawn is that, in order to reverse this history of exploitation, we must develop a

⁶⁸ See Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 HARV. ENVTL. L. REV. 169, 172-74 (2012) (discussing the different views of nature that have emerged and how these views influence environmental law).

⁶⁹ C.S. Holling et al., *In Quest of a Theory of Adaptive Change*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS 3, 9 (Lance H. Gunderson & C.S. Holling eds., 2002).

⁷⁰ C.S. Holling & Lance H. Gunderson, *Resilience and Adaptive Cycles*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS, *supra* note 69, at 25, 28.

⁷¹ See J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 VAND. L. REV. 1 (2011).

⁷² *E.g.*, JENNIFER A. ANDERSON, MAHOGANY: THE COST OF LUXURY IN EARLY AMERICA (2012).

new relationship between humans and what we now realize are our life-support systems in the air, soil, and water. To do this, the treasure-chest view, which is once again in the ascendancy, must be replaced with a science-based stewardship norm.⁷³ A crucial step in the stewardship process is the further development of environmental law. In short, environmental law should not be restated. Instead, it must be rethought, reimagined, and adapted to the preservation and enhancement of the planetary life support systems.

⁷³ See e.g., J. DONALD HUGHES, AN ENVIRONMENTAL HISTORY OF THE WORLD: HUMANKIND'S CHANGING ROLE IN THE COMMUNITY OF LIFE 226-27 (2001); Gilbert F. White, *Reflections on Changing Perceptions of the Earth*, 19 ANN. REV. ENERGY & ENVIRON. 1, 9 (1994); PASSMORE, *supra* note 21.