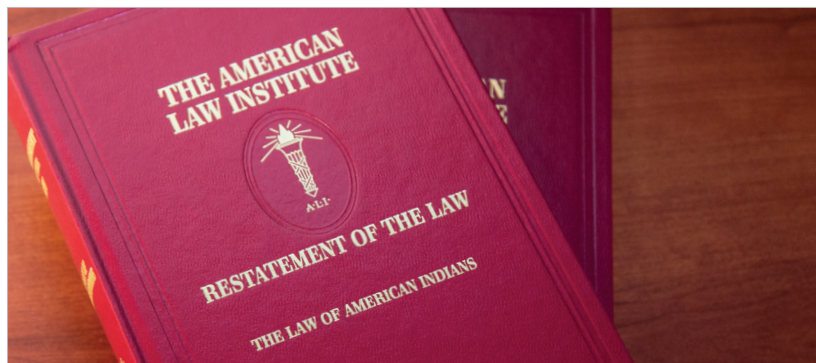


# THE ALI Reporter

THE QUARTERLY NEWSLETTER OF THE AMERICAN LAW INSTITUTE

VOLUME 44 NUMBER 4

FALL 2022



## Now Available: Restatement of the Law, The Law of American Indians

The Restatement of the Law, The Law of American Indians, is now available. Completed in 2021, this is the first Restatement on this important area of law. The project was led by Reporter Matthew L.M. Fletcher of University of Michigan School of Law, and Associate Reporters Wenona T. Singel of Michigan State University College of Law and Kaighn Smith Jr. of Drummond Woodsum.

This Restatement presents American Indian Law in six chapters: Federal–Tribal Relations, Tribal Authority, State–Tribal Relations, Tribal Economic Development, Indian Country Criminal Jurisdiction, and Natural Resources.

“This project is generally about Federal Indian Law,” explained Reporter Matthew Fletcher. “Federal Indian Law is the relationship between the United States, Indian tribes, and state governments. The first three chapters provide the big picture about federal, tribal, and state powers and prerogatives in the context of Federal Indian Law. Many of these principles have been around since the founding of the United States and really since the beginning of the

*continued on page 2*

THE AMERICAN  
LAW INSTITUTE

100

SEE PAGE 6 FOR MORE INFORMATION.

THE DIRECTOR'S LETTER BY  
RICHARD L. REVESZ

## Publicizing Our Projects

The American Law Institute is rightfully known for its deliberative process and the painstaking efforts and contributions of the Reporters, Advisers, Members Consultative Groups, Council, and members who generate our body of work and see our projects through to completion. But what happens next? After our projects are approved, where do they go?

At our founding 100 years ago, publication was the next step for our completed projects, and that remains true today. Our manuscripts are edited according to the ALI Style Manual and published in physical books as well as electronically in Westlaw, LexisNexis, and Hein Online databases. Judges, lawyers, and legal academics know that they can turn to their law libraries or one of these online resources to find our materials.

We also deploy a range of communication tools, from press releases and social media posts to website news items, features in the *Reporter*, and emails to keep our membership and the public apprised about project completion and publication.

Over the last several years, as the volume and breadth of our projects has increased, we have developed new channels and methods for getting the word out about our projects.

One such channel is ALI's podcast, *Reasonably Speaking*. The podcast features interviews with legal experts and covers legal topics of general interest. Recent episodes include a discussion among leading judges from the U.S. Courts of Appeals about the public's confidence in the Supreme Court and a conversation between ALI President David F. Levi and Justice Stephen G. Breyer. From time to time, *Reasonably Speaking* also presents in-depth discussions with Reporters and project participants about our projects: we have produced and published

*continued on page 3*

## RESTATEMENT OF THE LAW, THE LAW OF AMERICAN INDIANS CONTINUED FROM PAGE 1

constitutional era in 1789, but they are not necessarily well known. In chapter one, the project begins with a discussion of federal plenary power and all of the obligations the federal government has toward Indian people and Indian tribes. The project then covers the inherent powers of Indian tribes that federal law acknowledges, and also the state powers and the interaction primarily between states and local governments and tribes and tribal citizens.”

“While we were working on the project, it became clear that we needed to amend our original plan and add other topics,” continued Associate Reporter Wenona Singel. “There is a chapter on tribal economic activity, both describing tribes as economic actors and as economic regulators; one on Indian country criminal jurisdiction, which many know is now an exceptionally hot topic, but you may not realize that this has been a known area of law in need of clarification since early in U.S. history; and we finish the project with a chapter on native natural resources, which includes treaty rights, water law, hunting and fishing, and generally who owns the resources and the property on the reservation.”

The project was launched in 2012. Including this year’s Proposed Final Draft, which includes the complete project contents, 25 project drafts were produced by the Reporters and reviewed and edited by the Advisers and Members Consultative Group (MCG).

“We owe a debt of gratitude to the dedicated Advisers and MCG who reviewed and provided guidance to us, making the project stronger with each draft,” said Associate Reporter Kaighn Smith. “This is a difficult area of law, as many of us did not study this in law school, and so few lawyers practice in this area day-to-day. Yet, it is more often than we realize that transactions or litigation will cross into Indian Territory. The body of law that we call federal Indian law derives from federal treaties, statutes, and executive orders with Supreme Court decisions fashioning principles in the nature of federal common law. The decisions that we see have shifted quite a bit in the modern era. We see decisions reflect a commitment to upholding the sovereign powers of Indian nations so that they can better their economies and preserve their rich cultural ways. Law in this area is progressive, and it is the right time for the ALI to have taken on this topic. With the completion of the Restatement of the Law of American Indians, the ALI is lending its hand in articulating doctrines that take account of the hard lessons of history.”



*Leondra R. Kruger, 2018 project meeting*



*Gerald Torres, 2012 project meeting*



*Keith Harper, 2018 project meeting*



*Patricia Ann Millett, January 2020 Council Meeting*



*2017 project meeting*

“The completion of any Restatement is cause for celebrating the Reporters’ accomplishment,” said ALI Director Richard L. Revesz. “Making sense of a significant area of law and navigating the ALI’s system for institutional discussion and approval is always a complex and challenging endeavor. But the complexity and challenge are even greater when the Reporters are writing on a clean slate, with no prior Restatement to provide an organizing structure and guide their way. For this reason, I particularly admire the work that Matthew, Wenona, and Kaighn did on this very important and often misunderstood area of the law.”

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**THE DIRECTOR'S LETTER** CONTINUED FROM PAGE 1

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episodes relating to ALI projects on Policing, Children and the Law, the Law of American Indians, and Electoral Count Act Reform, just to name a few. With a dedicated listener base that stretches beyond our membership, these episodes have been a useful tool to educate the public about our ongoing work.

We also plan and support events focusing on our projects. These events often take the form of law school symposia, as with the terrific recent UCLA Law Symposium on the Restatement of the Law, Charitable Organizations, organized by project Reporter Jill R. Horwitz and attended by lawyers, academics, and nonprofit regulators from key states. Along similar lines, Reporter Mathew L.M. Fletcher has hosted two symposia over the last year on the Restatement of the Law, The Law American Indians, at the University of Wisconsin and University of Washington law schools. These symposia engaged tribal judges, tribal counsel, lawyers who practice in this area, and law students in conversation about the Restatement.

Partnerships with our Council Members and ALI CLE also offer ways to bring our work to general audiences. For example, ALI Council Member and United States Chief District Judge Lee H. Rosenthal hosted Reporter George A. Bermann of the Restatement of International Commercial and Investor-State Arbitration to present “The Role of the Restatement in an Area Governed by Treaties and Statutes” at the federal courthouse in Houston. And ALI CLE has produced and distributed CLE programs on the Restatements of International Commercial Arbitration, Liability Insurance, American Indian Law, Foreign Relations Law, and Children and the Law, among other projects. Federal and state judicial conferences are another promising venue for this type of program.

Increasingly, we also work to identify and communicate directly with specific organizations and experts who are most likely to use our work. So, for example, Bob Bauer, the Co-Chair of an ALI-convened, bipartisan group on Electoral Count Act reform, recently testified about the group’s work to the Senate Rules Committee on Electoral Count Act Reform. We partnered with the National Conference of State Legislatures to produce a conference on legislative approaches to restoration of rights and opportunities in connection with the completion of our Model Penal Code: Sentencing project. We also made our Children and the Law CLE program available for free to advocacy groups across the country.

And, occasionally, we proactively distribute relevant portions of our projects to selected audiences who may not otherwise know about or be able to access them. For instance, before the 2020 election, we distributed provisions from our Principles of Election Administration project to election officials across the United States on the topics of Early In-Person Voting and Open Absentee Voting. And for the last two years we have been distributing the Use of Force principles and other related Chapters from our Principles of the Law: Policing project to police departments and policy-setting organizations throughout the country.

This Fall, we are working closely with the Advisers for our Principles of the Law: Policing project to develop a comprehensive outreach strategy that takes advantage of these proven methods and, we hope, will explore new ones.

Our ability to fulfill our mission of clarifying and improving the law requires that judges, lawyers, scholars, and the general public are informed about and can access our work. As we look ahead to the ALI’s next 100 years, it is more important than ever to expand our projects’ reach beyond law schools and law libraries. We plan to continue our efforts along all the lines described above. I very much welcome your suggestions for other ways that we can ensure that our work reaches its intended audiences and achieves its greatest impact.

# UCLA Symposium Highlights Restatement of Charitable Nonprofits

*By Eleanor Barrett, ALI Deputy Director*

The Restatement of the Law, Charitable Nonprofit Organizations, was the subject of a symposium held at UCLA on Friday, September 30 and Saturday, October 1.

The symposium, organized by Reporter Jill R. Horwitz, brought together a group of about 40 leading academics and nonprofit lawyers, as well as regulators from Attorney General's Offices in California, Texas, New York, and Pennsylvania. It was sponsored by the ALI, the UCLA School of Law Lowell Milken Institute for Business Law & Policy, the UCLA School of Law Program on Philanthropy and Nonprofits, and the UCLA Law Review.

Symposium participants discussed papers on a wide range of topics covered by the Restatement including the use of Restatement illustrations to guide nonprofit board investment committee practices; whether and how restricted assets can or should be used during crises; and the feasibility and desirability of aligning a nonprofit's donor base with its purposes. The papers discussed will be published on the UCLA Law Review Discourse platform.

In addition to the substantive panels, the Symposium also featured two talks by ALI Council Members. President Emeritus Roberta Cooper Ramo discussed the Restatement process and the importance of the Nonprofits project in particular as a resource for state regulators and state courts, who in the coming years may increasingly be asked to work out questions about the role of nonprofit organizations in society. And Council Member Hon. Carolyn B. Kuhl, Judge of the Superior Court of the County of Los Angeles, offered a snapshot of the state courts' role as the "last refuge" for problems that cannot be solved elsewhere. Judge Kuhl offered a vivid example of how the Nonprofit Restatement can assist a state court judge in navigating civil disputes, particularly in cases involving small organizations and unrepresented litigants.

The Friday evening reception included a memorial for former ALI Reporter and Consultant Marion R. Fremont-Smith. Horwitz, Associate Reporter Nancy McLaughlin, Fremont-Smith's son E. Bradley Miller, and others shared remembrances of Fremont-Smith's life and work, including her leadership of and impact on the Restatement of the Law, Charitable Nonprofit Organizations.



*Roberta Cooper Ramo of Modrall Sperling; Nancy A. McLaughlin of University of Utah, S.J. Quinney College of Law; Jill R. Horwitz of University of California, Los Angeles School of Law; and Carolyn B. Kuhl of the Superior Court of California, County of Los Angeles*

The below is a list of symposium participants:

- Atinuke (Tinu) Adediran**, Associate Professor of Law, Fordham University School of Law
- Ellen Aprill**, Professor of Law Emerita, John E. Anderson Chair in Tax Law, Loyola Law School
- Eleanor Barrett**, Deputy Director, The American Law Institute
- Mary Beckman**, Chief of the Health Care and Fair Competition Bureau, Massachusetts' Attorney General's Office
- Jeffrey Blair**, General Counsel and Assistant Secretary, LACMA
- Carol Bradford Worley**, Senior Counsel, California Community Foundation
- David Brennen**, Frost, Brown & Todd Professor of Law, UK Rosenberg College of Law
- Terri W. Cammarano**, Senior Vice President, Legal Affairs, and General Counsel, Cedars-Sinai
- Ricardo Castro**, Vice President, General Counsel & Secretary, Robert Wood Johnson Foundation
- Rose Chan Loui**, Inaugural Director, Program for Philanthropy and Nonprofits, Lowell Milken Institute for Business Law and Policy, UCLA School of Law
- Harvey Dale**, University Professor of Philanthropy and the Law, Director, National Center on Philanthropy and the Law, New York University School of Law
- Nicolas Duquette**, Associate Professor, USC Sol Price School of Public Policy
- Kimberly Eney**, Partner, Morgan Lewis
- Rosemary Fei**, Principal, Adler & Colvin
- Joel Feuer**, Executive Director, Lowell Milken Institute for Business Law and Policy, UCLA School of Law
- Leslie J. Friedlander**, Texas Assistant Attorney General, Charitable Trusts Section, Consumer Protection Division

# Your Support Matters: Make a Year-End Gift Today

As a member of The American Law Institute, you understand how crucial ALI's work is to the legal profession and to society. In the last year alone, ALI publications—including Restatements of the Law, Principles of the Law, the Model Penal Code, and the Uniform Commercial Code—were cited more than 2,663 times by federal and state courts, including citations in five U.S. Supreme Court cases. To ensure the Institute will be able to continue producing our essential work over the next 100 years, we have embarked on a major fundraising effort to secure our future—the Second Century Campaign. One of the simplest ways you can support the Second Century Campaign is by including the Institute in your year-end giving plans.

Your gift to ALI will provide critical funding to support all aspects of our work and our mission, while also ensuring our continued independence. This includes allowing us to

continue investing in new technology as we look to expand the accessibility of our work to members who might otherwise be unable to attend our meetings. A year-end gift to the ALI will also serve as a first line of defense in preparing for what we expect to be a steady decline in print revenues over the next 100 years.

You can make an end-of-year charitable contribution to ALI, or learn more about the Second Century Campaign, by returning the envelope enclosed in this newsletter, visiting [www.ali.org/support](http://www.ali.org/support), or calling 215-243-1660. Your gift will help us continue our work through which we serve the legal profession, the judiciary, and society as a whole, both now and in the future.

Thank you in advance for your generosity and best wishes for a happy and healthy 2023.

**Susan N. Gary**, Professor Emerita, University of Oregon School of Law

**Jill R. Horwitz**, David Sanders Professor of Law and Medicine, Faculty Director, Program on Philanthropy and Nonprofits, UCLA School of Law

**Tania M. Ibanez**, Senior Assistant Attorney General, Office of the California Attorney General, Charitable Trusts Law Section

**Garry Jenkins**, Dean and William S. Pattee Professor of Law, University of Minnesota School of Law

**Carolyn Kuhl**, Judge, Complex Civil Litigation, Superior Court of the State of California for the County of Los Angeles

**Melanie Leslie**, Dean, Dr. Samuel Belkin Professor of Law, Cardozo School of Law

**Cindy M. Lott**, Clinical Professor of Philanthropic Studies, Director, Professional Doctorate in Philanthropic Leadership (PhilD), Stead Policy Fellow, Lilly Family School of Philanthropy, Indiana University

**Ruth M. Madrigal**, Principal, KPMG LLC

**Douglas M. Mancino**, Partner, Seyfarth Shaw

**Jill Manny**, Executive Director, National Center on Philanthropy and the Law

**Stan Maron**, Senior Partner, Maron & Sandler

**Lloyd Hitoshi Mayer**, Professor of Law, Notre Dame Law School

**Nancy Assaf McLaughlin**, Robert W. Swenson Professor of Law, University of Utah S.J. Quinney College of Law

**Karl Mill**, Founding Attorney, Mill Law Center

**Joshua J. Mintz**, Vice President, General Counsel, and Secretary, John D. and Catherine T. MacArthur Foundation

**Mark A. Pacella**, Chief Deputy Attorney General, Charitable Trusts and Organizations Section, Pennsylvania Office of Attorney General

**Tracey G. Parr**, Associate Dean for Academic Programs and Strategic Planning, UCLA School of Law

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**Karin Wang**, Professor from Practice, Executive Director, Epstein Program, UCLA School of Law

**Robert A. Wexler**, Principal, Adler & Colvin

**LaVerne Woods**, Partner, Davis Wright Tremaine LLC  
*Representatives from UCLA Law Review*



## SAVE THE DATE

# 2023 Annual Meeting

May 22-24 Washington, D.C.

Join us at the Annual Meeting where we'll celebrate The American Law Institute's incredible legacy and look ahead to our future together

**May 21:** Pre-Meeting Programs

**May 22-24:** Project Sessions and Special Events



# ALI's Second Century Campaign

## Celebrating Our Legacy, Securing Our Future

In order to ensure that ALI is prepared for its next 100 years, we have undertaken a capital fundraising effort—the Second Century Campaign—with the ambitious goal of raising \$35 million by the end of 2023. The Institute has never embarked on a capital campaign of this magnitude, and is unlikely to do so again during our lifetime. In order to secure this critical funding, we need your help.

### Join the 100 for 100

As an important component of the Campaign, we recently launched the 100 for 100 program. The premise is simple: if 100 members who have the means, who cherish the rule of law, and who value our vital work, each commit to donating \$100,000 to the campaign, we will be within striking distance of the \$35 million goal. If you have not yet supported the campaign, every donation, no matter the size, is greatly appreciated. A successful Second Century Campaign will establish a solid financial foundation for ALI's future without compromising its independence.

#### 100 FOR 100 DONORS

Although the 100 for 100 challenge has only begun, we would like to recognize the inaugural donors. We are profoundly grateful for their generous support. We hope that you will consider joining the growing list below.

Apgar-Black Foundation	Carol F. Lee and David J. Seipp
Timothy W. Burns	Robert H. Mundheim
Evan R. Chesler	George and Joan Newcombe
J. William Elwin, Jr.	Stephanie Parker
Sharon and Ivan Fong	Douglas J. Pepe
Teresa Wilton Harmon	Roberta Cooper Ramo and Barry W. Ramo
Conrad and Marsha Harper	Yvonne Gonzalez Rogers and Matt Rogers
William C. Hubbard	Marsha E. Simms
Renee Knake Jefferson and Wallace B. Jefferson	Elizabeth S. Stong
Michael Alexander Kahn	Lori and Steve Weise

If you are interested in becoming a donor or would like more information on making a gift to The ALI's Second Century Campaign, please contact ALI Director Richard L. Revesz at [Director@ali.org](mailto:Director@ali.org).

Additionally, donations can be made online at [www.ali.org](http://www.ali.org).

We are exceptionally grateful to the following major donors who have supported the Second Century Campaign.

#### SECOND CENTURY VISIONARY (\$2.5 million or more)

Bennett Boskey  
Mary Kay Kane

#### SECOND CENTURY PATRON (\$1 million to \$2.49 million)

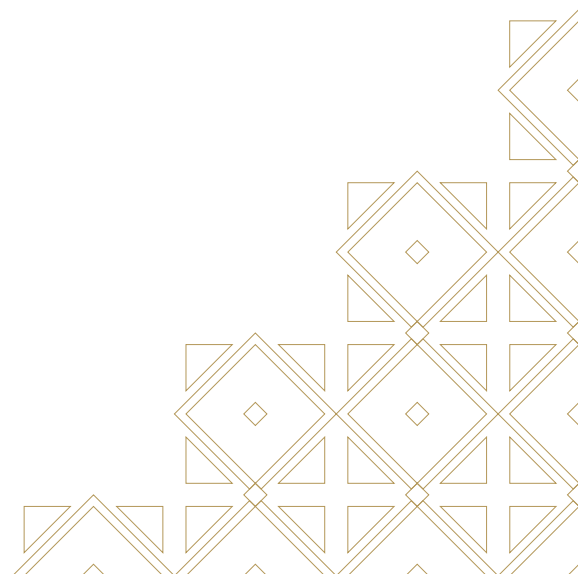
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#### SECOND CENTURY BENEFACTOR (\$500,000 to under \$1 million)

Ann and Daniel C. Girard  
Andrew Hendry  
Lee and Gary Rosenthal  
Anonymous

#### SECOND CENTURY SUPPORTER (\$250,000 to under \$500,000)

David F. Levi  
Judith Miller and Peter Buscemi  
Anonymous (2)



# Fall Project Meetings Are Underway

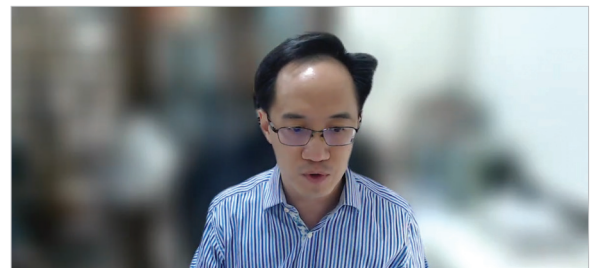
This year's fall project meeting season kicked off on September 15 with a two-day meeting for **Torts: Concluding Provisions**. The meeting featured discussions on a wide array of topics, including medical malpractice, vicarious liability, spoliation, and medical monitoring, among others.

It was announced at the project meeting that the medical malpractice sections of this project will be published as a standalone portion of the Restatement Third of Torts. This publication, tentatively entitled Restatement of the Law Third, Torts: Medical Malpractice, will contain the material originally presented for inclusion in Torts: Concluding Provisions. Led by Nora Freeman Engstrom of Stanford Law School, Michael D. Green of Washington University School of Law, and Mark A. Hall of Wake Forest University School of Law as Reporters, the aim is to present the remainder of this material at the 2023 Annual Meeting. Additional details will be shared as they become available.

**Property** participants met for their eighth project meeting on September 22. The meeting began with a discussion on the topic of concurrent ownership, spearheaded by new Associate Reporter Yun-Chien Chang of Institutum Iurisprudentiae, Academia Sinica, who joined virtually from Taiwan. Additional topics discussed include title and transfers of ownership, contracts for purchase and sale, deed requirements, leases, and creation of servitudes.



From left to right: ALI Deputy Director Eleanor Barrett, Henry E. Smith and Maureen E. Brady, both of Harvard Law School, and R. Wilson Freyermuth of University of Missouri School of Law at the property project meeting



Yun-Chien Chang of Institutum Iurisprudentiae, Academia Sinica

## New Edition of the *Trial Manual* Is Available

***Trial Manual 7 for the Defense of Criminal Cases*, authored by Anthony G. Amsterdam and Randy Hertz, both of NYU School of Law, is now available for purchase on Amazon. The downloadable version of this edition is available at [www.ali.org/trial-manual](http://www.ali.org/trial-manual).**

The *Manual* is designed as a how-to-do-it exposition for the general practitioner of the law and practice of criminal defense. It gives the lawyer who is relatively inexperienced in criminal proceedings a compact guide through the stages of a criminal case, from arrest and investigation to appeal. It identifies critical points in the proceedings, warns of rights to be asserted and interests to be protected at each stage, describes the practices and procedures necessary or useful for the assertion of those rights and the protections of those interests, and, in both narrative and checklist form, suggests steps to be taken or considered by defense counsel at the various stages.

The allocation of material among the three volumes of the book is intended to facilitate defense attorneys' use of the book:

**Volume One** provides an overview of criminal procedure and then focuses on the issues a defense attorney is likely to confront, and the steps s/he will need to take, at the early stages of a criminal case, including: the first steps to be taken to locate, contact and protect a client who has been arrested or summoned or who fears s/he is wanted for arrest; arguing for bail or other forms of pretrial release; conducting the initial client interview; developing a theory of the case; dealing with police and prosecutors; planning and overseeing the defense investigation; conducting the preliminary hearing; grand jury practice; challenging indictments and informations; obtaining discovery; filing motions; seeking diversion; and plea bargaining. This volume also addresses the additional considerations that may arise when representing a client who is mentally ill or intellectually disabled.



## New Zoom Conference Room



*Torts: Concluding Provisions meeting in new Zoom conference room*



*Project Adviser Abbe R. Gluck of Yale Law School virtually participating in the Concluding Provisions hybrid meeting*

In an effort to provide our members with a better experience when virtually participating in our work, ALI has upgraded its 4th floor conference room to a Zoom room.

Virtual participants can expect to see the dais on their computer screen, as well as the in-room participants when their microphone is turned on to speak. When a virtual participant is speaking, they will appear in the conference room screen so that in-person participants can see who is speaking.

The person moderating the in-person queue, usually the ALI Director, will also moderate the virtual queue. When an in-person participant is called to speak, they will push the microphone button, thus prompting the front cameras to direct to the speaker, allowing virtual attendees to see who is speaking from the room. Once the microphone is turned off (by pushing the button a second time), the camera will direct itself to the next in-person speaker.

A portion of the upgrades were available for the September project sessions, but the full room upgrade will be ready for the November project meetings. We understand that travel constraints or health concerns may keep you from attending a project meeting in person at this time. While we would love to see you in person at our project meetings, we hope you consider joining a project meeting virtually if you cannot make the trip.

**Volume Two** opens with an in-depth examination of the pretrial motions that defense attorneys commonly litigate in criminal cases. This includes lengthy chapters on suppression of tangible evidence, statements of the defendant, and identification testimony. These chapters provide detailed information about federal constitutional doctrines and a large number of state constitutional rulings that confer heightened protections. The chapters also provide suggestions for framing suppression arguments and conducting suppression hearings effectively. Volume Two then examines the immediate run-up to trial: issues relating to the timing of pretrial and trial proceedings; interlocutory review of pretrial rulings; and the concrete steps that counsel will need to take to prepare for trial. It begins the book's coverage of the trial stage, discussing the decision to elect or waive jury trial; jury selection procedures and challenges before and at trial; general characteristics of trials; and opening statements.

**Volume Three** covers evidentiary issues and objections at the trial of guilt or innocence; techniques and tactics for handling prosecution and defense witnesses; trial motions; closing arguments; requests for jury instructions; objections to the court's instructions; and jury deliberations. Issues, procedures, and strategies unique to bench trials are discussed in tandem with the parallel aspects of jury-trial practice. This Volume then discusses posttrial motions and sentencing and concludes with a short summary of appellate and postconviction procedures and a précis of the first steps to be taken in connection with them.

The structure and presentation of material are designed to facilitate the conversion of text into defense motions and other types of briefing. Three of the documents in the text are available for direct downloading from the ALI website: section 2.5's flow-chart of procedures in summary, misdemeanor, and felony cases; section 4.5's questionnaire for obtaining information pertinent to bail from the client; and section 6.15's checklist for interviewing the client. The bail questionnaire and the interview list are in Word format that can be edited and thus customized to an individual user's practice and/or turned into a form for use in taking notes in real time during client interviews.

# The Institute in the Courts: Supreme Court of Delaware Adopts Sections of Contracts 2d

In *Geronta Funding v. Brighthouse Life Insurance Company*, 2022 WL 3654872 (Del. Aug. 25, 2022), the Supreme Court of Delaware adopted the “fault-based analysis” framed by Restatement of the Law Second, Contracts §§ 197 to 199 for considering “questions specific to insurance policies declared void *ab initio* as against public policy for lack of an insurable interest as the correct test” to determine whether insurance premiums paid to insurers should be returned.

The case arose in 2018 when the policy owner, which had purchased the policy as part of a bulk sale of life-insurance policies, discovered that the individual insured under the policy was fictitious. After the owner informed the insurer of the fraud, the insurer brought a declaratory action against the owner, arguing that it was entitled to retain all premiums that the owner and its predecessors paid because the policy was void *ab initio*; the owner counterclaimed to recover the premiums it paid to the insurer. After a bench trial, the trial court entered judgment in part for the owner, finding that the owner was only entitled to premiums it paid after it made the insurer aware that the insured individual was fictitious.

The Supreme Court of Delaware affirmed in part, reversed in part, and remanded to the trial court to determine whether the parties had inquiry notice of “facts tending to suggest the void nature of the policy,” using the framework set forth by Restatement of the Law Second, Contracts §§ 197 to 199. The court observed that the trial court correctly looked to § 198 in analyzing which party was more at fault to determine whether the owner was entitled to a return of premiums paid to the insurer, but that it erred in finding that the owner was more at fault, because it failed to consider whether the parties had inquiry notice of the suspicious nature of the insured individual.

The court explained that, as a general rule, contracts that were void for violating public policy did not entitle either party to any form of restitution, but the Restatement provided exceptions to that rule by focusing primarily on the respective fault of the parties. Under § 197, a party in such a void contract could be entitled to restitution if denial of restitution would cause disproportionate forfeiture. Meanwhile, under § 199, a party could be entitled to restitution if that party did not engage in serious misconduct and withdrew from the transaction before an improper purpose was achieved, or if denial of restitution would leave property that was the subject of the contract in the hands of a party whose control would violate public policy.

In this case, the court focused on § 198, under which a party could be entitled to restitution if it was excusably ignorant of facts and legislation in the absence of which the contract would

have been enforceable, or the party was not equally at fault with the other party. Factors the court looked to in determining whether a party was excusably ignorant included whether “the facts surrounding the policy put or should have put” a party on notice that something was amiss, whether the party “failed to notice red flags,” and whether a party’s expertise in relevant insurance fields “should have caused it to know or suspect that there was a substantial risk that the policy it purchased was void.” The court acknowledged the trial court’s conclusion that the insurer did not have actual knowledge of the lack of insurable interest until it was informed by the owner, but pointed out that § 198 also required factual findings as to whether the insurer had inquiry notice of the lack of insurable interest during the time it was paid insurance premiums. According to the court, certain “stipulated facts or factual findings . . . could support a finding that [the insurer] was on inquiry notice of facts tending to suggest that the policy was void,” such as the insurer’s internal communications noticing that the insurance policy had suspicious-activity flags, and press releases from state prosecutors stating that the insured individual’s purported son had pleaded guilty to insurance fraud and theft by deception after he submitted false applications for life-insurance policies on behalf of the same fictitious insured individual.

In making its decision to adopt §§ 197 to 199, the court observed that Delaware case law lacked a more nuanced resolution to the parties’ dispute than the extreme solutions found in common law of either leaving the parties in their current state or rescinding the insurance policy and returning all premiums. According to the court, adopting §§ 197 to 199 not only would place Delaware “in line with the majority of jurisdictions,” but, more importantly, would also be “more consistent with public policy considerations” governing insurance policies. The court explained that it “should take care to discourage” insurance policies that were void against public policy for lack of an insurable interest, and, while automatic return of premiums “discourage[d] insurance companies from hiding the invalidity of a policy for as long as possible in order to continue collecting premiums,” doing so would encourage “investors to continue purchasing life insurance policies without investigation into whether those policies [were] unenforceable policies . . .” The court reasoned that the Restatement’s approach would incentivize “insurers to speak up when the circumstances suggest[ed] that a policy [was] void for lack of an insurable interest because they [would] not be able to retain premiums if they stay[ed] silent after being put on inquiry notice,” and ensured that all players along the chain of insurance policies would behave in good faith.

## Notes About Members and Colleagues

**Anita L. Allen-Castellitto** of University of Pennsylvania Carey Law School and **Matthew L.M. Fletcher** of University of Michigan Law School have been elected to the American Philosophical Society.

**Catherine M. Amirfar** of Debevoise & Plimpton, **Sarah H. Cleveland** of Columbia Law School, **Brian J. Egan** of Skadden, Arps, Slate, Meagher & Flom, and **Duncan B. Hollis** of Temple University Beasley School of Law participated in ‘The Evolving Face of Cyber Conflict and International Law: A Futurespective,’ a symposium hosted by the Tech, Law, & Security Program of American University Washington College of Law on developments in international law and cyberspace.

**Deborah N. Archer** of NYU School of Law, **Wenona T. Singel** of Michigan State University College of Law, and **Shoba Sivaprasad Wadhia** of Penn State Law participated in the American Constitution Society’s annual Supreme Court Preview, offering insights into the upcoming United States Supreme Court Term.

**Donald B. Ayer** participated in a discussion on the Supreme Court Historical Society’s recent documentary *Marbury v. Madison*.

Following his retirement from the Supreme Court of the United States, **Stephen G. Breyer** has joined the faculty of Harvard Law School as the Byrne Professor of Administrative Law and Process.

**Lynda L. Butler** and **James Y. Stern**, both of William & Mary Law School, **Gregory S. Alexander** of Cornell Law School (Retired), **Vicki L. Been** of NYU School of Law, **Bethany R. Berger** of University of Connecticut School of Law, **Michael M. Berger** of Manatt, Phelps & Phillips, **David L. Callies** of University of Hawaii at Manoa, William S. Richardson School of Law, **Eric R. Claeys** of George Mason University Antonin Scalia Law School, and **Robert H. Thomas** of Pacific Legal Foundation participated in panels for the 19th Annual Brigham-Kanner Property Rights Conference hosted by William & Mary Law School.

**I. Bennett Capers** has been named the John D. Feerick Research Chair at Fordham Law School. The chair is awarded a Fordham Law faculty member who has achieved significant scholarly distinction through their publications and the impact of their work in their field.

### ALI DIRECTOR RICHARD L. REVESZ NOMINATED TO LEAD OIRA

On September 2, President Biden announced his intent to nominate ALI Director Richard L. Revesz for the position of Office of Information and Regulatory Affairs (OIRA) Administrator.

OIRA is a statutory part of the Office of Management and Budget within the Executive Office of the President. OIRA is the central authority for the review of Executive Branch regulations, approval of Government information collections, establishment of Government statistical practices, and coordination of Federal privacy policy. The office is led by the OIRA Administrator, who is appointed by the President and confirmed by the United States Senate.

Revesz is a leading expert on environmental policy and regulation. He is the AnBryce Professor of Law and Dean Emeritus at NYU School of Law. He founded, and has led for more than a decade, the Institute for Policy Integrity, a think tank and advocacy organization that promotes desirable climate change and environmental policies.

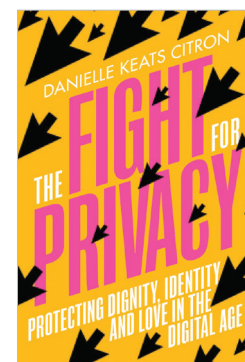
“President Biden has made a stellar choice in Ricky to fill the position of OIRA Administrator,” said ALI President David F. Levi. “In addition to deftly leading the Institute’s projects from inception to completion for nearly a decade, he is a brilliant writer and scholar and an expert in regulatory law and policy. We are all wishing him the best as the Senate confirmation process moves forward.”

Revesz was elected to The American Law Institute in 1991 and has served as the Institute’s Director since 2014. He will continue serving as ALI’s Director while he awaits confirmation.

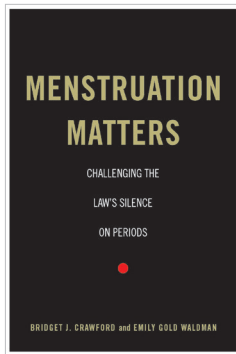
**Danielle Citron** of UVA School of Law has authored *The Fight for Privacy, Protecting Dignity, Identity and Love in our Digital Age* (W.W. Norton and Penguin UK 2022), discussing how the boundaries of privacy have shifted with the development of new technologies.

The U.S. Department of State has announced the National Group to the Permanent Court of Arbitration’s intention to nominate **Sarah H. Cleveland** of Columbia Law School to a seat on the International Court of Justice in 2023. If confirmed, Cleveland will be the second woman to represent the United States on the court.

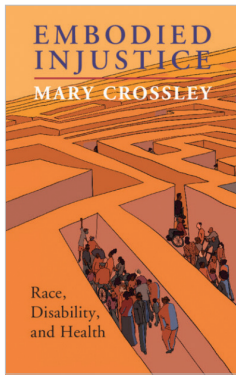
*Assessing George Stigler’s Economic Theory of Regulation*, an article by **Cary Coglianese** of University of Pennsylvania Carey School of Law, is included in the recently published eBook *George Stigler 50 Years Later* (Stigler Center 2022).



## NOTES CONTINUED FROM PAGE 13



**Bridget J. Crawford** and **Emily Gold Waldman** of Pace University, Elisabeth Haub School of Law have authored *Menstruation Matters: Challenging the Law's Silence on Periods* (NYU Press 2022), a book analyzing the law and social movements around menstruation. ALI members are eligible for 20% off and free shipping within the U.S. with the code **MENSTRUATION-FM** at [nyupress.org](http://nyupress.org).



**Mary A. Crossley** of University of Pittsburgh School of Law has authored *Embodies Justice* (Cambridge University Press 2022), a book discussing the disadvantages faced by certain groups in the U.S. health care system.

**Roopali H. Desai** was confirmed by the U.S. Senate to the U.S. Court of Appeals for the Ninth Circuit.

**Christine M. Durham**, retired chief justice of the Utah Supreme Court, has joined the law firm Wilson Sonsini Goodrich & Rosati as senior counsel.

**Deborah Enix-Ross** of Debevoise & Plimpton was sworn in as president of the American Bar Association at its August annual meeting.

**Muhammad U. Faridi** of Patterson Belknap Webb & Tyler is an honoree in the Litigation category for Bloomberg Law's "They've Got Next: The 40 Under 40" award.

**Matthew L.M. Fletcher** has joined the faculty of University of Michigan School of Law as the Harry Burns Hutchins Collegiate Professor of Law.

**Edward B. Foley** of Ohio State University, Moritz College of Law is leading one of the teams on the National Constitution Center's project 'Restoring the Guardrails of Democracy,' which aims to help identify institutional, legal, and technological reforms that may help address present threats to American Democracy. Foley presented his reform proposals and discussed other team proposals in a Town Hall event, with **Jeffrey Rosen** of the National Constitution Center serving as moderator.

## New Members Elected

On July 21, the Council elected the following 60 persons.

**Deborah N. Archer**, New York, NY  
**Aditya Bamzai**, Charlottesville, VA  
**Nikhil Bodade**, New York, NY  
**Samuel L. Bray**, South Bend, IN  
**Alan Jay Butler**, Washington, DC  
**Lynda L. Butler**, Williamsburg, VA  
**Laurence Paul Claus**, San Diego, CA  
**Robert E. Cooper, Jr.**, Nashville, TN  
**Caroline Mala Corbin**, Miami, FL  
**Sean H. Donahue**, San Francisco, CA  
**Joshua A. Douglas**, Lexington, KY  
**Deborah Enix-Ross**, New York, NY  
**Jane R. Flanagan**, Chicago, IL  
**Eduardo Gallardo**, New York, NY  
**Benjamin D. Geffen**, Philadelphia, PA  
**Terri Gerstein**, Cambridge, MA  
**Myriam Gilles**, New York, NY  
**Deborah S. Gordon**, Philadelphia, PA  
**Catherine M. Grosso**, East Lansing, MI  
**Patricia Guerrero**, San Francisco, CA  
**Luz E. Herrera**, Fort Worth, TX  
**John Patrick Hunt**, El Macero, CA  
**Aziz Zahirul Huq**, Chicago, IL

**Andrew M. Jacobs**, Phoenix, AZ  
**Melvin Christopher Jenks**,  
Arlington, VA  
**RonNell Andersen Jones**,  
Salt Lake City, UT  
**Roscoe Jones, Jr.**, Washington, DC  
**Michelle Shane Kallen**,  
Falls Church, VA  
**Kristin Graham Koehler**,  
Washington, DC  
**M. Hannah Lauck**, Richmond, VA  
**Leah M. Litman**, Ann Arbor, MI  
**Orlando Lucero**, Albuquerque, NM  
**Jody Lyneé Madeira**, Bloomington, IN  
**Araceli Martínez-Olguín**,  
Los Angeles, CA  
**Tom McDonald**, Washington, DC  
**Christopher J. McFadden**, Atlanta, GA  
**Anne K. McKeig**, St. Paul, MN  
**ReNika C. Moore**, New York, NY  
**Swithin J. Munyantwali**, Sandton,  
South Africa  
**Jennifer Gillian Newstead**,  
Menlo Park, CA

**Victoria S. Nugent**, Washington, DC  
**Uma Outka**, Lawrence, KS  
**Mary Kelly Persyn**, San Francisco, CA  
**Jonathan A. Rapping**, Atlanta, GA  
**Margaret Raymond**, New York, NY  
**Sally Brown Richardson**,  
New Orleans, LA  
**Margaret Ann Rolando**, Miami, FL  
**Melissa Sawyer**, New York, NY  
**Andrea Kupfer Schneider**,  
New York, NY  
**Eric J. Segall**, Atlanta, GA  
**Fred O. Smith, Jr.**, Atlanta, GA  
**Paul M. Smith**, Washington, DC  
**James Y. Stern**, Williamsburg, VA  
**Paul David Stern**, Washington, DC  
**Franita Tolson**, Los Angeles, CA  
**Andrew W. Torrance**, Lawrence, KS  
**Razvan C. Ungureanu**, Houston, TX  
**Robin Walker Sterling**, Chicago, IL  
**Jeffrey B. Wall**, Washington, DC  
**Andrew McCause Wright**,  
Washington, DC

The American Bar Foundation has announced **Bryant G. Garth** of UC Irvine School of Law as the next interim director. Garth succeeds **Ajay K. Mehrotra** who will remain at ABF as a research professor and professor of law at Northwestern Pritzker School of Law.

The California Courts Commission on Judicial Appointments has unanimously confirmed the nomination of **Jeremy M. Goldman** to the First District Court of Appeal, Division Four, filling the vacancy left by **Alison M. Tucher**'s appointment as presiding justice of the First District Court of Appeal, Division Three.

**Michele Bratcher Goodwin** of UCI School of Law moderated UCI School of Law's 12th Annual Supreme Court Term in Review. **Erwin Chemerinsky** of UC Berkeley School of Law and **Mary Anne Franks** of University of Miami School of Law were among the participants.

**Paul A. Gowder Jr.** of Northwestern University Pritzker School of Law has been awarded the 17th annual Dorothy Ann and Clarence L. Ver Steeg Distinguished Research Fellowship Award. The award recognizes tenured faculty of Northwestern who have made major research contributions enhancing the national and international reputation of the university.

**Patricia Guerrero** has been confirmed to serve as the next chief justice of the California Supreme Court after **Tani Cantil-Sakaue** announced she would not seek re-election after 12 years as chief justice and 38 years of public service. Justice Guerrero must now be elected by voters at the Nov. 8 general election. If elected, she would be the first Latina to serve as chief justice of California.

UCLA School of Law has launched the Safeguarding Democracy Project, headed by **Richard L. Hasen**, aimed at ensuring free and fair elections in the United States. ALI members on the advisory board are **Floyd Abrams** of Cahill Gordon & Reindel, **Guy-Uriel E. Charles** of Harvard Law School, **Erwin Chemerinsky** of UC Berkeley School of Law, **Danielle Citron** of UVA School of Law, **Edward B. Foley** of Ohio State University, Moritz College of Law, **Michele Bratcher Goodwin** of UC Irvine School of Law, **Samuel Issacharoff** of NYU School of Law, **Leah Litman** of University of Michigan Law School, **Michael T. Morley** of Florida State University College of Law, **Nathaniel Persily** of Stanford Law School, **Richard Pildes** of NYU School of Law, and **Franita Tolson** of USC Gould School of Law.

After leading the Clinical and Advocacy Programs at NYU School of Law since 2002, **Randy Hertz** will step down in January 2023. **Deborah N. Archer** will become the program's next director. In addition to the director role, Archer will become the Associate Dean for Experiential Education and Clinical Program.

*continued on page 14*

## The Public's Confidence in the Supreme Court

The Supreme Court of the United States has historically received criticism from all sides of the political spectrum. However, recent Gallup polls suggest a significant loss in confidence by the American people in several institutions of government, including the Court. These ratings were from June 2022 before the last few controversial decisions of the U.S. Supreme Court were entered, including the abortion case *Dobbs v. Jackson Women's Health Organization* and the New York gun case *New York State Rifle & Pistol Association Inc. v. Bruen*.

The latest episode of *Reasonably Speaking* brings together U.S. federal judges in a conversation about judging, and the perception of the U.S. Supreme Court in particular, because of the loss of confidence by the American people in the Court.

The conversation is moderated by ALI President **David F. Levi**, who served on the U.S. District Court for the Eastern District of California from 1990 to 2007, including chief judge from 2003 to 2007. Joining him are **Raymond J. Lohier Jr.** of the U.S. Court of Appeals for the Second Circuit, **Jeffrey S. Sutton**, chief judge of the U.S. Court of Appeals for the Sixth Circuit, and **Diane P. Wood** of the U.S. Court of Appeals for the Seventh Circuit.



*Clockwise from left to right: Raymond J. Lohier Jr., Diane P. Wood, David F. Levi, and Jeffrey S. Sutton*

reasonably  
Speaking

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## NOTES CONTINUED FROM PAGE 13

The University of Pennsylvania Carey Law School highlighted the work of Penn Law professor **David A. Hoffman** and his co-authored study on eviction rates in Philadelphia.

**Ian C. Holloway** of University of Calgary, Faculty of Law received a Doctor of Laws, *honoris causa* (LLD) from the Law Society of Ontario.

**Robert H. Hu** of St. Mary's University School of Law has authored *Research Guide to Chinese Patent Law and Practice*, 2nd ed. (*William S. Hein & Company, Incorporated 2022*).

**Anthony Johnstone** of University of Montana, Alexander Blewett III School of Law has been nominated to the U.S. Court of Appeals for the Ninth Circuit.

**Jaynee LaVecchia** of McCarter & English received the 2022 New Jersey State Bar Foundation Medal of Honor. This award is given annually to two recipients who exemplify professional excellence, service to the legal community, and commitment to the citizens of New Jersey. LaVecchia served on the New Jersey Supreme Court for 21 years.

**Tamara F. Lawson** joined the University of Washington School of Law as the Toni Rembe Endowed Dean.

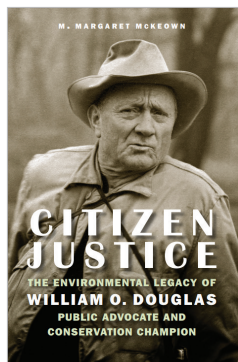
**Roberta D. Liebenberg** of Fine, Kaplan and Black, has been appointed to the boards of the American Bar Endowment and the American Bar Association's Rule of Law Initiative.

**Orly Lobel** of the University of San Diego School of Law has authored *The Equality Machine: Harnessing Digital Technology for a Brighter, More Inclusive Future* (Public Affairs 2022), a book on technological developments and how they may be used to benefit democracy.

**Solangel Maldonado** of Seton Hall University School of Law and **Maxine Eichner** of North Carolina School of Law were interviewed by *Lehigh Valley Press News* on the Restatement of the Law, Children and the Law project. Maldonado and Eichner serve as Associate Reporter and Adviser, respectively, for this Restatement.

**Linda A. Malone** has accepted a position as visiting scholar at the Environmental Law Institute in Washington, D.C. She has authored the 30th supplement to her book *Environmental Regulation of Land Use* with Wolters Kluwers.

**M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit received the 2022 American Inns of Court Professionalism Award for the Ninth Circuit. This award is given annually to a lawyer or judge whose life and practice demonstrate character and integrity as well as dedication to the legal profession and the rule of law. McKeown has authored *Citizen Justice: The Environmental Legacy of William O. Douglas – Public Advocate and Conservation Champion* (Potomac Books, University of Nebraska Press 2022), a book on the life of William O. Douglas, the longest serving justice on the Supreme Court of the United States.



**Ajay K. Mehrotra** of the American Bar Association and **Lawrence A. Zelenak** of Duke University School of Law were featured on *Tax Notes*, a daily publication of tax news, analysis, and commentary. They discussed the memoirs of Stanley S. Surrey, who is known as one of the greatest American tax scholars.

**Timothy Meyer** has joined the faculty of Duke University School of Law as a professor of law and co-director of the Center for International and Comparative Law.

**Harriet E. Miers** of Locke Lord, **Carter G. Phillips** of Sidley Austin, and **James J. Sandman** of University of Pennsylvania Carey Law School have been chosen as recipients of the Lifetime Achievement Award from *The American Lawyer*. **Kannon Shanmugam** of Paul, Weiss, Rifkind, Wharton & Garrison has been selected as a finalist for Litigator of the Year.

**Jennifer Mnookin** is the Chancellor of the University of Wisconsin-Madison.

The University of Arizona James E. Rogers College of Law has created the Robert H. Mundheim Professorship of Law and Business, an endowed professorship to honor **Robert H. Mundheim** of Shearman & Sterling. The inaugural professorship was awarded to **Barak Orbach** of University of Arizona James E. Rogers College of Law.

**Melissa Murray** of NYU School of Law was interviewed on 'Morning Edition,' NPR's news radio program, to discuss the upcoming U.S. Supreme Court case *Moore v. Harper*, a voting case arising from North Carolina's efforts to draw new congressional maps.

**Maury B. Poscover** of Husch Blackwell (retired) has been elected president of the American Bar Association Retirement Fund Program Board.

**Richard J.R. Raleigh Jr.** joined the Government Contracts team for Womble Bond Dickinson's Huntsville, AL office.

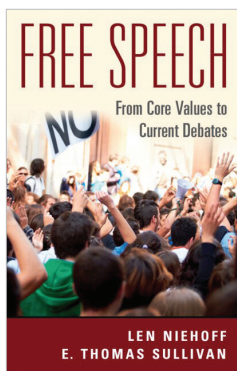
**Jennifer E. Rothman** has joined the law faculty at University of Pennsylvania as the Nicholas F. Gallicchio Professor of Law with a secondary appointment at the Annenberg School for Communication. Rothman's most recent article, "Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption," was published in the *Harvard Law Review*.

Following her retirement from the U.S. District Court for the District of South Carolina, **Margaret B. Seymour** has joined the law firm of Saxton & Stump in their Charleston, SC office.

**Mary L. Smith** is president-elect of the American Bar Association. She will begin her role as president at the conclusion of the 2023 ABA Annual Meeting.

**E. Thomas Sullivan** of University of Vermont has coauthored *Free Speech: From Core Values to Current Debates* (Cambridge University Press 2022), a book overview of free speech and the First Amendment.

**Paul B. Stephan** of UVA School of Law was interviewed for an article in *CQ Roll Call* where he discussed potential constitutional concerns around the proposed proceedings for seizure and liquidation of assets owned by Russian oligarchs.



**Macey Reasoner Stokes** of Baker Botts received the 2022 Gregory S. Coleman Outstanding Appellate Lawyer Award from the Texas Bar Foundation.

**Palmer Gene Vance II** of Stoll Keenon Ogden is chair of the ABA House of Delegates, the policymaking body of the ABA, and will serve a two-year term.

**Sarah S. Vance** of the U.S. District Court for the Eastern District of Louisiana is the recipient of the 2022 Edward J. Devitt Distinguished Service to Justice Award.

**Verna L. Williams** is the new CEO of Equal Justice Works.

**Clark S. Willingham** of Howell & Willingham received the 2022 National Golden Spur Award in recognition of his dedication to the ranching and livestock industries.

**Notes related to nominations are up to date as of October 6.**

**If you would like to share any recent events or publications in the next ALI newsletter, please email us at [communications@ali.org](mailto:communications@ali.org).**

## In Memoriam

### LIFE MEMBERS

**Mark G. Arnold**, St. Louis, MO; **Lawrence R. Brown**, Portland, OR; **Richard R. G. Hobson**, Alexandria, VA; **Anna Williams Shavers**, Lincoln, NE; **William K. Slate**, Mt. Pleasant, SC; **Gary Randall Smith**, Atlanta, GA; **Clint Stuntebeck**, Phoenixville, PA

### EX OFFICIO

**Max Baer**, Harrisburg, PA

# Meetings and Events Calendar At-A-Glance

Below is a list of upcoming meetings and events. For more information, visit [www.ali.org](http://www.ali.org).

## 2022

### November 11

Restatement of the Law Third, Torts: Remedies  
Philadelphia, PA

### November 18

Restatement of the Law, Children and the Law  
Philadelphia, PA

## 2023

### January 19-20

Council Meeting - January 2023  
Philadelphia, PA

### March 23

Restatement of the Law Third, Torts: Defamation and Privacy  
Philadelphia, PA

### March 24

Restatement of the Law Third, Conflict of Laws  
Philadelphia, PA

### March 30

Restatement of the Law, Corporate Governance  
Philadelphia, PA

### May 22-24

2023 Annual Meeting  
Washington, DC

### October 19-20

Council Meeting - October 2023  
New York, NY

**JOIN US AS WE  
CELEBRATE ALI'S  
100TH ANNIVERSARY.**

**2023 Annual Meeting**  
May 22-24 | Washington, D.C.

**May 21:** Pre-Meeting Programs  
**May 22-24:** Project Sessions and Special Events

## SAVE THE DATE

# 2023 Annual Meeting

May 22-24 | Washington, D.C.

**May 21:** Pre-Meeting Programs

**May 22-24:** Project Sessions and  
Special Events