

Project Spotlight: ALI Launches Two New Projects

The American Law Institute's Council voted at the October Council meeting to approve the launch of Restatement of the Law, Constitutional Torts and Principles of the Law, High-Volume Civil Adjudication.

The Restatement of Constitutional Torts project will be led by Reporters John C. Jeffries Jr. of University of Virginia School of Law and Pamela S. Karlan of Stanford Law School. Principles of High-Volume Civil Adjudication will be led by Reporter David Freeman Engstrom of Stanford Law School.

RESTATEMENT OF THE LAW, CONSTITUTIONAL TORTS

This project will examine the law of 42 U.S.C. § 1983, which provides an individual the right to sue state government employees and others acting “under color of state law” in federal court for violations of federal law. Actions under § 1983 are the dominant vehicle for securing money damages for federal rights, especially constitutional rights. The project also will cover *Bivens*¹ actions, the analogous cause of action for violations by a federal officer. Among other topics, the Restatement will cover governmental immunities from suit, local government liability for official policy or custom, and restrictions on § 1983 actions imposed by the Prison Litigation Reform Act and the overlapping law of federal habeas corpus.

“We thought very carefully about the title of this Restatement and what it would cover,” explained ALI Director Richard L. Revesz. “We considered ‘The Law of 42 U.S.C. § 1983,’ but felt that would limit the project to only examine actors under the law of any ‘State or Territory;’ it would not apply to federal officers. Titling the project ‘Constitutional Torts’ broadens the

1 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

Two Important New Projects

This is an exciting time at The American Law Institute. At its October meeting, the ALI Council voted to launch two new projects: Restatement of the Law, Constitutional Torts and Principles of the Law, High-Volume Civil Adjudication.

The Restatement of Constitutional Torts will examine the law of individual rights to sue government employees and others “acting under color of state law” under 42 U.S.C. § 1983. It will also cover *Bivens* actions and restrictions on § 1983 actions imposed by the Prison Litigation Reform Act and the overlapping law of federal habeas corpus. The project will be led by Reporters John C. Jeffries, Jr., of University of Virginia School of Law and Pamela S. Karlan of Stanford Law School. John and Pam are two of the co-authors of *Civil Rights Actions: Enforcing the Constitution*, now in its fifth edition, which is arguably the most complete treatment available of constitutional tort actions under 42 U.S.C. § 1983 and *Bivens*.

The Principles of High-Volume Civil Adjudication will address a serious challenge facing state courts: the adjudication of high-volume, high-stakes, low-dollar-value civil claims. These types of claims, which arise in such areas as debt collection, evictions, home foreclosure, and child support, comprise a significant proportion of state-court cases and are shaping the lives of millions of Americans, particularly women and people of color. The project will be led by Reporter David Freeman Engstrom of Stanford Law School, a far-ranging scholar of the design and implementation of litigation and regulatory regimes whose work focuses on access to justice in these types of cases. David also co-directs the Deborah L. Rhode Center on the Legal Profession, one of the leading academic centers working to shape the future of legal services and access to the legal system.

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SEE PAGE 8 FOR MORE INFORMATION.

Principles of the Law, Policing

In November, the Policing Principles Reporters, and many of the project's Advisers came together to celebrate the completion of the project and discuss the ways in which the Principles may best be communicated to policing agencies, legislatures, and others.



ALI Council Member Raymond J. Lohier Jr. of the U.S. Court of Appeals for the Second Circuit has deftly led the Policing Principles Annual Meeting discussions throughout the project's development.

The dedicated Advisers to the Principles of Policing project are an extraordinarily impressive group drawn from a diversity of disciplines. Given the nature of the project, the Advisers have a wide experience in and around law enforcement, on all sides of the issues. The Advisers range from active and former police chiefs and prosecutors, to activists, public interest leaders, and experts on the technology of policing, in addition to prominent judges, academics, and practicing lawyers.

PICTURED ON RIGHT

- 1
Miriam A. Krinsky, Fair and Just Prosecution
- 2
Hassan Aden, The Aden Group
- 3
ALI Deputy Director Eleanor Barrett, ALI Council Member Scott Bales, and ALI Director Richard L. Revesz
- 4
Sylvia M. Moir, Marin County Sheriff's Office



Pictured project Reporters: **Brandon L. Garrett**, L. Neil Williams, Jr. Professor of Law at Duke University School of Law, is the Director of the Wilson Center for Science and Justice at Duke Law School. **Maria Ponomarenko**, Associate Professor of Law at University of Minnesota Law School, is Co-Founder and Counsel of The Policing Project at NYU Law. **Tracey Meares**, Walton Hale Hamilton Professor of Law at Yale Law School, is the Founding Director of The Justice Collaboratory at Yale Law School. **Barry Friedman**, Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at the New York University School of Law, is the Founder and Faculty Director of The Policing Project at NYU Law. **Rachel A. Harmon**, Harrison Robertson Professor of Law and Class of 1957 Research Professor of Law, is the Director of the Center for Criminal Justice at the University of Virginia School of Law. **Christopher Slobogin**, Milton R. Underwood Chair in Law and Affiliate Professor of Psychiatry at Vanderbilt Law School, is the Director of the Criminal Justice Program at Vanderbilt Law.

Not pictured: **Christy Lopez**, Professor from Practice at Georgetown University School of Law, is the Faculty Co-Director of the Center for Innovations in Community Safety at Georgetown Law.



THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

You can read more complete biographies for both projects' Reporters on page 5.

One of my goals when I accepted the role of ALI Director almost nine years ago was to recruit the leading academics in the country to serve as Reporters on our projects. The announcement of these three terrific Reporters is a testament to The American Law Institute's central role in our legal system; the respect that the academy, the judiciary, and others have for our work; our rigorous yet collegial process; and the ALI's members who dedicate their time, knowledge, and expertise to our projects. Typically, when I approach a potential Reporter to serve on one of our projects, which may consume many years of their time, I am met with enthusiasm to take on this role. I am grateful to Pam, David, and John for agreeing to lead these projects.

It is also exciting to note that these projects reflect the continued diversification of the scope of the ALI's projects. I am thankful to the ALI Council and Projects Committee for continuing to seek ways in which the ALI can provide guidance on some of the most vexing problems facing our nation.

The new Restatement and Principles projects are now published on the ALI website's Projects page. Members interested in participating on the Constitutional Torts project should visit the site and join the Members Consultative Group (MCG). The scope of the High-Volume Civil Adjudication project is currently being considered; ALI members will be notified when the project's MCG opens.

During the course of the October Council meeting, the Projects Committee also made the recommendation to work with a small group of experts to determine the topics that might be included in a future Principles project in the area of elections, focusing on safeguarding democracy. Areas in this project could include voting mechanics, timing of vote counting, discretion of local officials to deal with emergencies, and procedures relating to mail-in ballots.

The first step in this process will be a conference to discuss the project's scope. The conference will be led by Samuel Issacharoff, who, in addition to currently serving as ALI Projects Committee Chair, is a leading scholar in civil procedure and the law of democracy, and previously served as the lead Reporter for Principles of the Law, Aggregate Litigation.

We are also exploring the ways in which we might follow up on the success of the Electoral Count Act (ECA) Reform working group. That working group, a bipartisan group of experts, convened with the help of the ALI, issued a set of recommendations that have been instrumental in drafting legislation currently pending before Congress. The group was assembled and completed its work within three months, and its recommendations were a product of the group members, not the ALI. This model allows for recommendations to be assembled quickly, when there is a pressing need for guidance. ALI President David Levi and I are now exploring the formation of a new working group with Bob Bauer (co-chair of the ECA Reform team; Distinguished Scholar in Residence, Co-Director of the Legislative and Regulatory Process Clinic, and professor at NYU Law; and former White House Counsel to President Obama) and Ben Ginsberg (Volker Distinguished Visiting Fellow at the Hoover Institution, and counsel to four of the last six Republican presidential nominees). This group would build upon and expand on other ongoing efforts to identify professional ethical standards that individuals administering the electoral process, like state secretaries of state and county clerks, should observe in the performance of their responsibilities. It will likely address areas such as public transparency, engagement with the community, and nonpartisanship.

In just weeks, the ALI will begin its 100th Anniversary year. It is remarkable for any institution to reach this milestone, but perhaps even more remarkable to stay as active, relevant, and vibrant as the Institute has remained. As we enter the second century, I am excited to try to envision what the ALI might accomplish in the next 100 years.

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ALI LAUNCHES TWO NEW PROJECTS CONTINUED FROM PAGE 1

scope to any analogous cause of action against federal officers, created in *Bivens*. Where *Bivens* actions lie, the all-important defense of qualified immunity is the same as for state officers sued under § 1983. Any Restatement of this field should cover both.”

“Whether under § 1983 or *Bivens*, immunity is the largest single topic in the law of constitutional torts,” said Reporter Jeffries. “The president has an immunity that no state officer can claim, but otherwise state and federal defendants are parallel. Legislative, judicial, and some prosecutorial functions trigger absolute immunity. The boundaries of absolute immunity are, especially for prosecutors, not always clear and are intensely controversial. These issues would be covered in detail. Executive officers enjoy qualified immunity, the contours of which are complicated and contested. Documenting the law of qualified immunity for various rights and in various situations is likely to be the largest single topic in the Restatement.”

“In addition to officer suits, one class of defendants, local governments, can be sued directly, but only for acts reflecting official policy or custom,” continued Reporter Karlan. “Respondeat superior is not allowed. When localities are amenable to suit, they have no immunity. Thus, the identity of the defendant determines the liability rule and greatly increases the incentive of plaintiffs to sue localities, rather than officers, whenever possible. On occasion, there is liability for policy-by-omission, for example, for failures to train government employees who then commit constitutional violations. Charting the line between these statements is exceedingly difficult and will be a major topic for the Restatement.”

Together with the core components of litigation under § 1983, there are several subsidiary topics to be covered. These include the relation of § 1983 to the Eleventh Amendment and the circumstances in which a suit properly pleaded against a state officer will nevertheless be found to be against the state itself and thus barred; damages (nominal, compensatory, and punitive); the meaning of 42 U.S.C. § 1988(a), which provides that certain “deficiencies” in federal law be filled by the law of the state where the federal court sits; the application of this approach to statutes of limitation; and the invalidity under the Supremacy Clause of certain state-law provisions affecting § 1983, including substitution of remedies, notice-of-claim statutes, and exhaustion of remedies.

The Restatement will also include two boundary constraints: the Prison Litigation Reform Act of 1995, codified at 4 U.S.C. § 1997e(a); and the overlap between § 1983 and federal habeas corpus, which has resulted in curtailment of the former for some situations in which both might apply.

The Restatement will not cover the provision of attorney’s fees under § 1988(b).

PRINCIPLES OF THE LAW, HIGH-VOLUME CIVIL ADJUDICATION

This project will address a serious challenge facing state courts: the adjudication of high-volume, high-stakes, low-dollar-value civil claims. These types of claims, which arise in such areas as debt collection, evictions, home foreclosure, and child support, comprise a significant proportion of state court cases. Such cases raise unique issues as they are frequently uncontested, resulting in high numbers of default judgments, and typically feature at least one party without a lawyer.

“State court dockets have become dominated by cases that, though smaller-scale and arguably less complex than other types of civil litigation, are decidedly high-stakes for many of the litigants. These cases are shaping the lives of millions of Americans, particularly women and people of color,” explained Reporter Engstrom. “The future of the civil justice system, and the legitimacy of the courts at its center, will turn on how—and how well—judges, court administrators, and an array of other policymakers respond to these new realities.”

Engstrom continued, “The project will define the issues raised by these claims and attend to the fundamental, and often competing, process values of efficiency, accuracy, and fairness that are implicated in their adjudication. It will articulate principles for procedure and case management, court administration, the use of technology, the supply of and demand for legal help, institutional design, and dispute prevention to help courts and policymakers chart a wise path forward.”

ALI’s Principles projects are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles will often take the form of best practices for either private or public institutions.

“I am thrilled to be able to announce the initiation of this Principles project,” said Director Revesz. “Small-scale but individually and systemically important cases are now a large proportion of state court dockets, and these cases are crucially important to the lives and livelihoods of millions of Americans and to the integrity of our legal system. The ALI regularly looks at the legal landscape to identify areas in need of reform where the Institute can provide trusted guidance. With David at the helm, this Principles project will surely provide great societal benefit.”

Director Revesz will now work with ALI Deputy Director Eleanor Barrett and Engstrom to identify Associate Reporters and Advisers to the project. Barrett explained, “We work diligently on each project to ensure consideration of diverse viewpoints and an unbiased examination of the law. Courts, legislatures, and others have come to rely on the ALI’s work due to its careful drafting process, its independence and integrity, and the intellectual caliber of those who participate in the projects.”

ALI will actively consult with judges’ organizations, court administrators, and other groups that are already engaging in important work in this area.

MORE ABOUT THE PROJECTS’ REPORTERS



David Freeman Engstrom is the LSVF Professor in Law and Co-Director, Deborah L. Rhode Center on the Legal Profession at Stanford Law School. He is a far-ranging scholar of the design and implementation of litigation and regulatory regimes whose expertise runs to civil procedure,

administrative law, constitutional law, law and technology, and empirical legal studies.

Engstrom’s current work focuses on access to justice, from complex, headline-grabbing mega-litigations to the smaller but highly consequential cases, including debt collection actions and evictions, that shape the lives of millions of Americans each year.

A particular focus is the role of technology in the civil justice system, including lawyers’ use of “legal tech” tools to serve their clients as well as a growing menu of new technologies designed to assist those *without* lawyers. Engstrom has published numerous articles on these topics and is the editor of the forthcoming volume, *Legal Tech and the Future of Civil Justice* (Cambridge University Press 2023). Engstrom is also the co-founder of the Filing Fairness Project, an ambitious and innovative effort that is bringing together six states to simplify filing procedures and eliminate barriers facing self-represented litigants. From 2020 to 2022, he served as a public appointee to the State Bar of California’s Closing the Justice Gap Working Group, tasked with proposing reforms to foster innovation in legal services delivery models. He is a member of The American Law Institute.



John C. Jeffries Jr. is the David and Mary Harrison Distinguished Professor of Law and Counselor to the President at the University of Virginia School of Law. Jeffries joined the Virginia law faculty two years after earning his law degree in 1973. His primary research and

teaching interests are civil rights, federal courts, criminal law and constitutional law. Jeffries has co-authored casebooks in civil rights, federal courts and criminal law and has published a variety of articles in those fields. He also wrote a biography of Justice Lewis F. Powell Jr.

In 1986, Jeffries was appointed the inaugural Emerson Spies Professor of Law, a position created to honor a long-time teacher and former dean. Jeffries has also held a variety of other academic appointments, including the Arnold H.

Leon Professorship. He served as academic associate dean from 1994 to 1999. In the fall semester of 1999, he was acting dean during the sabbatical of Dean Robert Scott. He became dean in the fall of 2001 and served until June 2008. In 2017 he received the Thomas Jefferson Award for excellence in scholarship; the awards are the highest honor given to members of the University community. From August 2018–January 2021 he was senior vice president for advancement at the University of Virginia. He now serves as counselor to UVA President Jim Ryan. He is a member of The American Law Institute and of the American Academy of Arts & Sciences.

During law school, Jeffries served as editor-in-chief of the Virginia Law Review. He received the Z Award for the highest academic average and the Woods Prize for the outstanding graduate. Immediately after graduation, he clerked for Justice Lewis F. Powell Jr. before serving in the U.S. Army as a second lieutenant.



Pamela S. Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law and the Co-Director of the Supreme Court Litigation Clinic at Stanford Law School. A productive scholar and an award-winning teacher, Karlan is co-director of the

school’s Supreme Court Litigation Clinic, where students litigate live cases before the Court. One of the nation’s leading experts on voting and the political process, she has served as a commissioner on the California Fair Political Practices Commission, an assistant counsel and cooperating attorney for the NAACP Legal Defense Fund, and a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice (where she received the Attorney General’s Award for Exceptional Service – the department’s highest award for employee performance – as part of the team responsible for implementing the Supreme Court’s decision in *United States v. Windsor*). Karlan is the co-author of leading casebooks on constitutional law, constitutional litigation, and the law of democracy, as well as numerous scholarly articles.

Before joining the Stanford Law School faculty in 1998, she was a professor of law at the University of Virginia School of Law and served as a law clerk to Justice Harry A. Blackmun of the U.S. Supreme Court and Judge Abraham D. Sofaer of the U.S. District Court for the Southern District of New York. Karlan is a member of the American Academy of Arts and Sciences, the American Academy of Appellate Lawyers, and The American Law Institute.

October 2022 Council Meeting Update

At its meeting on October 20 and 21, 2022, the ALI Council reviewed and discussed Council Drafts of five projects and approved drafts and portions of drafts as listed below. All approvals are subject to the discussion at the meeting and the usual editorial prerogative.

Children and the Law

The Council approved Council Draft No. 8 containing §§ 1.40 and 1.41 of Chapter 1, Parental Authority and Responsibilities; §§ 2.70, 2.71, and 2.80 of Chapter 2, State Intervention for Abuse and Neglect; §§ 13.20 and 13.60 of Chapter 13, Delinquency Proceedings; §§ 18.10 and 18.11 of Chapter 18, Minors' Civil Rights and Civil Liberties Outside the School Context; and § 20.20 of Chapter 20, Minors' Obligations and Responsibilities.

Conflict of Laws

The Council approved Council Draft No. 7, which contained §§ 5.20 to 5.24 of Topic 3, Substance-Procedure Distinction, of Chapter 5, Choice of Law; and §§ 6.01 to 6.10 of Topic 1, General Rules, of Chapter 6, Torts.

Government Ethics

The Council approved Council Draft No. 8 containing Chapter 1, Purpose, Scope, and Definitions; and Chapter 3, Conflicts of Interest and Outside Activities of Public Servants, subject to review of a revised version of § 303 by a small group of Council members. If the group is satisfied that the revised version reflects the discussion at the meeting, no additional approval by the Council will be required.

Property

The Council approved Council Draft No. 6, which contained topics from Chapter 1, Ejectment and Trespass to Land, and Chapter 2, Privileged Entries on Land, from Division One, Property Torts, of Volume 2, Interferences With, and Limits on, Ownership and Possession.

Torts: Miscellaneous Provisions (formerly Concluding Provisions)

The Council approved § 18 A on Negligent Misrepresentation Causing Physical Harm and Sections on the Firefighter's Rule and Medical Monitoring in Council Draft No. 3. In addition, the Council approved §§ 5 and 6 of the Chapter on Liability of Medical Professionals and Institutions, and discussed but did not vote on § 4 of that Chapter. The Reporters will revise § 4 for consideration at the Council's January meeting.

Due to time constraints, the Council did not complete its discussion of the remainder of Council Draft No. 3.

Members interested in any of these projects can access drafts in the Projects section of the ALI website. Those who join a Members Consultative Group will be alerted when future meetings are scheduled and when drafts are available.



Patricia Ann Millett of the U.S. Court of Appeals for the District of Columbia Circuit at the Government Ethics Council session



Miscellaneous Provisions project session (clockwise from top): Chair Goodwin Liu of the California Supreme Court with Miscellaneous Provisions Reporters Nora Freeman Engstrom of Stanford Law School, Michael D. Green of Washington University School of Law, Mark A. Hall of Wake Forest University School of Law, Tanya D. Marsh of Wake Forest University School of Law, and Guy Miller Struve of Davis Polk & Wardwell LLP (Retired); Ivan K. Fong of Medtronic; and John H. Beisner of Skadden



Associate Reporter Solangel Maldonado of Seton Hall University School of Law addresses Council at the Children and the Law Council session.

Fall Project Meetings



Nancy E. Wolff of Cowan, DeBaets, Abrahams & Sheppard and Joshua L. Simmons of Kirkland & Ellis (Copyright)



Kannon K. Shanmugam of Paul, Weiss (Remedies)



Holly J. Fujie of the Superior Court of California, County of Los Angeles (Children and the Law)

Copyright

On October 14, project participants met to discuss Preliminary Draft No. 8, which includes 19 Sections covering the final remaining Sections from Chapter 4 on Copyright Formalities; the final remaining Section from Chapter 5 on Duration of Copyright; five Sections from Chapter 6 on Copyright Rights and Limitations; five Sections from Chapter 7 on Copyright Infringement; and two Sections from Chapter 8 on Secondary Liability.

Torts: Remedies

Project participants met on November 11 to discuss Preliminary Draft No. 3, which contains the revised §§ 5 and 12. Sections 5 and 12 were part of Preliminary Draft No. 1 (2020). They have been substantially rewritten in light of comments received thereafter, and in the case of § 5, significant resistance at the Annual Meeting. Section 5 on reasonable certainty encountered substantial resistance at the Annual Meeting and Reporters Douglas Laycock and Richard L. Hasan withdrew it without a vote.

The remaining material in this draft (§§ 23-28 of Chapter 1, §§ 38-42 of Chapter 2, and §§ 58-63 of Chapter 3) is new. It contains the rest of the Topic on injury to the person (wrongful death and related issues, wrongful birth and related issues, and defamation), the entire Chapter on monetary remedies other than compensatory damages (nominal damages, punitive damages, and restitution of defendant's gains), and the entire Topic on specific or in-kind remedies other than injunctions (ejectment, replevin, declaratory judgments, constructive trusts, rescission, and reformation).

Children and the Law

On November 18, project participants met to discuss Preliminary Draft No. 9. The draft includes two Sections and a Comment from Part I, Children in Families, Chapter 2, State Intervention for Abuse and Neglect; four Sections from Part III, Children in the Justice System, covering topics on delinquency proceedings and youths in the criminal justice system; and a Section on juvenile curfews from Part IV, Children in Society.

Meetings and Events Calendar At-A-Glance

Below is a list of upcoming meetings and events. For more information, visit www.ali.org.

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

Celebrating Our Legacy

ALI's 100th Anniversary is a wonderful time to reflect on all we have accomplished as an Institute. Our founders issued no small charge to ALI members: "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." ALI members have answered this call. From our early Restatements, citations to which number in the tens of thousands, to some of our groundbreaking work on projects like the Model Penal Code and the Prudent Investor Rule, to our most recent work in areas like Policing, Student Sexual Misconduct, and American Indian Law, the legacy of the Institute's first 100 years is worth celebrating.

1923

Founding of ALI

In the early 1920's, a group of prominent American judges, lawyers, and law professors formed "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law." The Committee reported to the members of the legal profession that the "law is unnecessarily uncertain and complex," and as a result, there is a "general dissatisfaction with the administration of justice."

According to the Committee, the law's uncertainty stemmed in part from a lack of agreement on fundamental principles of the common law, while the law's complexity was attributed to the numerous variations within different jurisdictions. Based on the recommendation of the Committee, The American Law Institute was incorporated in 1923.

1932

First Restatement Is Published

In 1923, work began on the first four Restatements, covering the subjects of Agency, Conflict of Laws, Contracts, and Torts.

The first official text of these projects to be published was the Restatement of Contracts.



1945

The Statement of Essential Human Rights

The Statement of Essential Human Rights was drafted with representatives from Britain, Canada, China, France, pre-Nazi Germany, India, Italy, Latin America, Poland, Soviet Russia, Spain, and Syria. Its goal was to define the indispensable human rights in terms that would be acceptable to all nations.

"The Statement broke new ground in identifying not only civil and political liberties, but also education, food, housing, and social security as human rights, and through its broad membership—from China, the Arab world, India, and Latin America—it anticipated and answered later critics who would claim that human rights are a product of western culture and history. That Statement is something I will come back to, because we need that approach now more than ever, at the start of this new century."



Mary Robinson, former President of Ireland and United Nations High Commissioner for Human Rights

1965

Foreign Relations Second Published

Although this area of law was apparent before the launch of the project, the Restatement is credited with formalizing foreign relations law as a legal field, and also legitimized the courts' role in this area.

1962

The Model Penal Code

Although not completed until 1962, the Model Penal Code was the product of a decade of intensive labor by the Institute. Led by Herbert Wechsler, the Model Penal Code project set out to draft a model criminal code that could be adopted by the states. After its publication, 37 states adopted parts of the Code, and several, including New York and New Jersey, adopted nearly all its provisions.

1952

The Uniform Commercial Code

The UCC is a joint project of the Uniform Law Commission (ULC) and The American Law Institute. In 1942, ALI accepted an invitation from the ULC to undertake this massive project. ALI named Karl Llewellyn Chief Reporter and Soia Mentschikoff Assistant Reporter. Published in 1952, the UCC was ALI's first publication post-WWII.



1978

First Principles Project Launched

ALI's first Principles project launched on May 16, 1978, after the Council voted to proceed with a project on the Structure and Governance of Corporations, with former SEC Commission Chairman Ray Garrett Jr. serving as the Chief Reporter.

1986

Introduction of Members Consultative Groups

In the 1980s, ALI President Roswell Perkins sensed frustration among members that wanted to play a more useful role in the functioning of the Institute. Similarly, new members often asked how they might become active and contribute to the evolution of the drafts, rather than reviewing a work product that was essentially in final form.

In 1986, the Institute's newly formed Committee on Member Participation approved an experimental program calling for the creation of a Members Consultative Group for some of its new projects. The Restatement of The Law Governing Lawyers was the first project to have an MCG.



1979

Torts Second and Strict Liability

The Institute finished its reexamination of the subject of torts with the completion of Restatement of the Law Second, Torts. Led by Reporter William Lloyd Prosser, this Restatement included § 402A on the topic of strict liability, approved at the 1964 Annual Meeting, which provides that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm" even if the seller has "exercised all possible care."

1992

The Prudent Investor Rule

In 1992, ALI published Restatement of the Law Third, Trusts (Prudent Investor Rule), which revised portions of the Restatement Second of Trusts. Since its approval, every state has adopted a version of the modern Prudent Investor Rule, dramatically transforming the law of trusts and other fiduciary investments. Rooted in the teachings of Modern Portfolio Theory (MPT), the Rule abolishes all categorical restrictions on investments and imposes a portfolio-as-a-whole standard of care that includes an augmented duty to diversify.

2021

ALI's Completes First Joint Project with European Law Institute

The Principles for a Data Economy project is the first of its kind. It was undertaken jointly by ALI and the European Law Institute and proposes a set of principles that might be implemented in any kind of legal environment, and are designed to work in conjunction with any kind of data privacy/data protection law, intellectual property law, or trade secret law, without addressing or seeking to change any of the substantive rules of these bodies of law.

To view the complete timeline of ALI's first century, visit ali.org/timeline.

Securing Our Future

As we enter our second century, we will build on our strengths and our successes and look for more ways to advance our founders' goals. But our important and challenging work demands more than our time and knowledge; it also requires substantial financial resources.

A successful Second Century Campaign will allow us to continue to reexamine areas of the law in response to change and expand our work to new and critical areas of the law not yet studied by ALI. Your support will allow the Institute to continue to work on Restatements, Principles, and Model Codes that have been identified as areas in need of clarification or reform and that will provide great legal and societal benefit, and will allow us to provide these resources to organizations and institutions in an environment where publication sales are increasingly uncertain.

If we hit our goal, we also will be able to make our work available more freely to under-resourced state courts and government agencies, further support broad member participation in our process, and continue to convene special working groups to produce reports or whitepapers that respond more quickly to developing events and fields of law.

The funds raised during the Second Century Campaign will also allow the ALI to continue to work with organizations like the European Law Institute, coordinating legal rules across borders to create transnational legal principles.



Restatement of the Law, Children and the Law (Ongoing)



Model Penal Code: Sexual Assault (Completed 2022)



Principles of the Law, Government Ethics (Ongoing)



Principles of the Law, Data Privacy (Published 2020)



Restatement of the Law, The Law of American Indians (Published 2022)



Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities (Completed 2022)



Principles for a Data Economy (Completed 2021)

Thank You for Supporting Our Campaign

Donors to The American Law Institute's Second Century Campaign play a vital role in funding the Institute's future. Our goal is to raise \$35 million by the end of 2023. We are incredibly grateful for the generosity of those who have already contributed.

SECOND CENTURY VISIONARY (\$2.5 million or more)

- Bennett Boskey
- Mary Kay Kane

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

- Elizabeth J. Cabraser
- Carnegie Corporation of New York
- Andréa W. and Kenneth C. Frazier Family Foundation
- Vester T. Hughes Jr.
- Victor E. Schwartz
- Anonymous

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
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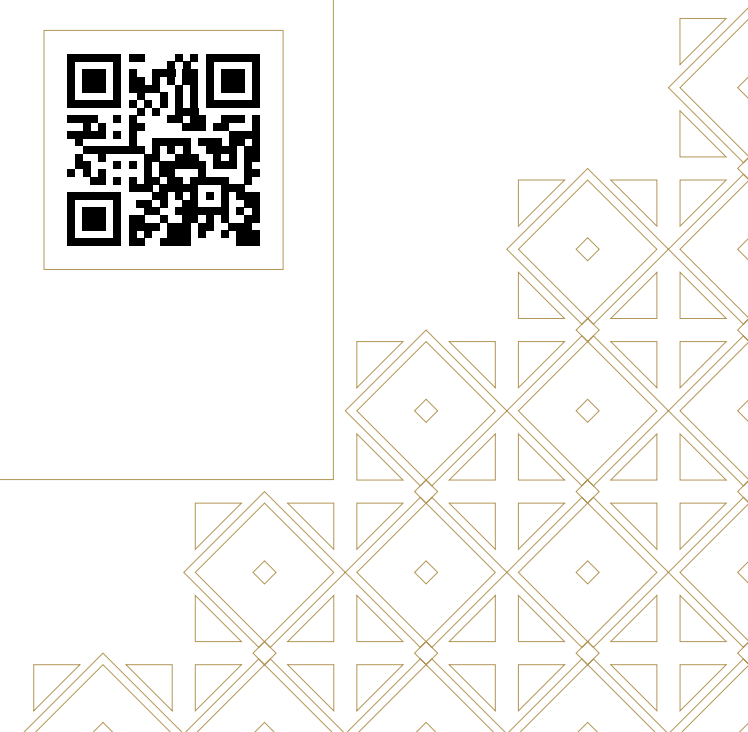
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Making a Donation to the Second Century Campaign

To donate now, scan the QR code or visit us online at ali.org/anniversary to learn more. To make a major gift to the campaign, please contact ALI Director Richard L. Revesz at director@ali.org, or call our development office at (215) 243-1660.

Members may support the campaign by:

- Making a one-time gift
- Making a pledge (to be paid in up to 10 annual installments)
- Including ALI in your estate plans



The Institute in the Courts: State Courts Look to Recent ALI Work

Courts continue to be guided by the work, new and old, of The American Law Institute. Some examples of citations to recent publications follow:

In *Dhital v. Nissan North America, Inc.*, 2022 WL 14772909 (Cal. Ct. App. Oct. 26, 2022), the California Court of Appeal held that claims for fraudulent inducement were not barred by the economic-loss rule as defined by Restatement of the Law Third, Torts: Liability for Economic Harm § 3. The case was brought by consumers who alleged that they purchased a vehicle with a defective transmission system from the defendant manufacturer, and that the defendant, “by fraudulently concealing the defects, induced them to purchase the car.” The court explained that the plaintiffs’ claim for fraudulent inducement fell within an exception to the economic-loss rule because the defendant’s fraudulent inducement violated a duty that was “independent of [its] alleged warranty breaches.” Citing § 9 of the Restatement, it observed that the expectation of honesty during negotiation of the purchase contract called for remedies not customarily available from the law of contract or restitution, because “parties to a contract generally [did] not treat the possibility that they [lied] to each other as a risk for the contract to allocate.”

In *Woodson v. Commonwealth*, 871 S.E.2d 653 (Va. Ct. App. 2022), the Court of Appeals of Virginia cited Restatement of the Law, Children and the Law § 3.24 (Tentative Draft No. 1, 2018) in upholding the parental privilege to use reasonable corporal punishment on the ground that it would protect low-income and Black families from excessive state intervention. The court reversed and dismissed a mother’s conviction for assault and battery, holding that the government failed to set forth sufficient evidence that the mother striking her children’s buttocks, leaving no serious injuries, was excessive or immoderate such that she lost her parental privilege to use corporal punishment. The court looked to § 3.24 to explain the purpose of that privilege, pointing out that a substantial number of low-income and Black families continued to use physical punishments such as spanking. “Limiting the significant costs on the family that accompany state interference” was an important goal in light of the fact that such families, without the privilege to use moderate corporal punishment to discipline their children, would be disproportionately impacted by “incarceration or invasive community supervision.”

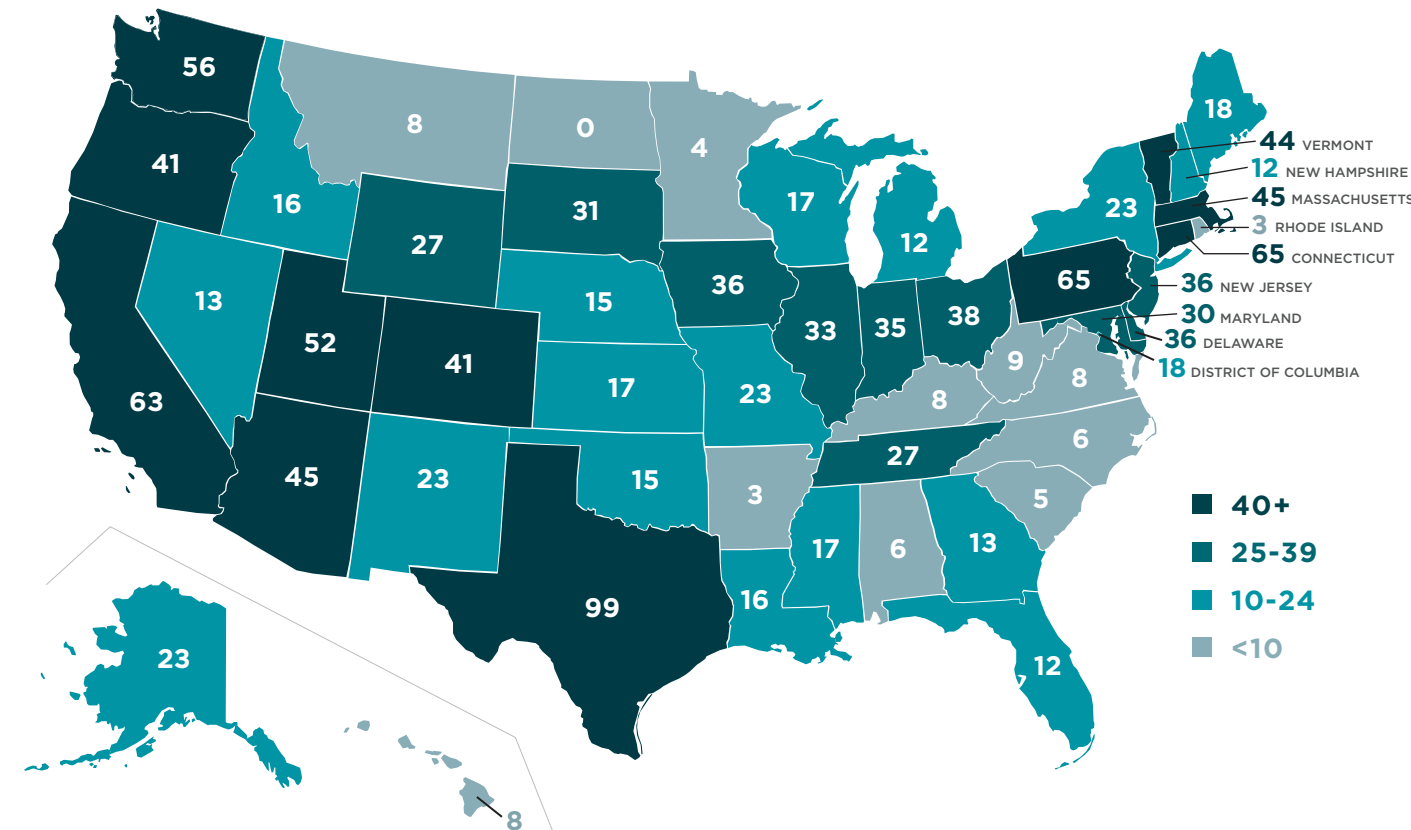
In *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323 (Del. 2022), the Supreme Court of Delaware acknowledged the difficulty of The American Law Institute’s task of clarifying the law. The court—in its discussion of whether Delaware had a common-law insolvency exception to the general rule that a board of directors of a corporation was required to obtain shareholder approval before selling all corporate assets—opined that “[a]scertaining the initial question of what the common law is often is not an easy task.” This, the court noted, “is evidenced by the painstaking work done by [T]he American Law Institute in formulating the various Restatements of the Law.” The court quoted from the Institute’s Style Manual, as excerpted in the front matter of Restatement of the Law, Corporate Governance (Tentative Draft No. 1, 2022), which acknowledges:

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

In this case, the court noted, “given the complete absence of any Delaware case support, it is not entirely clear that the exception was ever adopted in Delaware in the first place. It follows, that before addressing whether a statute supersedes the common law, it must be established that the exception was indeed part of the common law in that jurisdiction.”

State Citations of ALI’s Work

Below is a breakdown of state citations of ALI publications and drafts for the 2021-2022 fiscal year.



Continuing Our Work in Our Second Century: Join an MCG Today

One of the highlights of being an ALI member is having the opportunity to engage in thoughtful discussions at a high level about legal issues affecting not just the legal system, but society as a whole. Members who participated in this year’s fall project meetings were introduced to our new Zoom Conference Room, expanding the opportunity to participate in ALI’s work when you are unable to attend a meeting in person.

As we enter the new year and begin work on newly launched projects (see page 1), now is a great time to consider joining a Members Consultative Group (MCG). MCG participants contribute in a variety of ways—by reviewing drafts, attending project meetings, and submitting comments. No expertise in the project area is needed to join an MCG. In fact, participation by nonexperts is essential because the Institute’s work must be useful for a broad audience. Members may join an MCG by logging in to the ALI website and visiting the project page at www.ali.org/projects.

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, 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.

Notes About Members and Colleagues

Anita L. Allen-Castellitto of University of Pennsylvania Carey Law School has been named a recipient of the 2022 Bioethics Founders’ Award. Given by the Hastings Center, the award recognizes individuals that have made significant and sustained contributions to bioethics, of which has advanced thinking and practice in medicine, life sciences, and public policy.

Susan A. Bandes of DePaul University College of Law was interviewed on the podcast *Excited Utterance: Evidence and Proof Community*, where she discussed her article “Empathy and Remote Legal Proceedings.”

Jeffrey Bellin of William & Mary Law School has authored *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover* (Cambridge University Press 2022), a book discussing mass imprisonment and its impact in the United States.

John B. Bellinger III was the lecturer for the 2022 Brand-Manatt Lecture at George Washington University School of Law. **Dayna Bowen Matthew** and **Sean David Murphy**, both of GW Law School, delivered welcoming remarks.

The American Lawyer’s New York Legal Awards event honored **Max W. Berger** of Bernstein Litowitz Berger & Grossman and **Robert L. Haig** of Kelley Drye & Warren with the Lifetime Achievement award; **Mitchell S. Eitel** of Sullivan & Cromwell with Dealmaker of the Year; and **Lisa J. Sotto** of Hunton Andrews Kurth with Distinguished Leader.

Susan G. Braden of the Office of Judge Susan G. Braden LLC (Retired)’s recent article *Section 1498(a) Is Not A RX To Reduce Drug Prices*, will be published at 77 Food and Drug Law Journal 274. In October, Braden was inducted into the Academy of Court-Appointed Neutrals and appointed to the Advisory Board of the Bayh-Dole Coalition. In December 2022, she will speak at the Sunwater Institute on the *Future of Intellectual Property Rights*.

Erwin Chemerinsky of UC Berkeley School of Law has authored *Worse Than Nothing: The Dangerous Fallacy of Originalism* (Yale University Press 2022), a book discussing the political ideology originalism and how it is used for constitutional interpretation.

Robert M. Dow Jr. has been appointed new counselor to **John G. Roberts Jr.**, Chief Justice of the United States, succeeding **Jeffrey P. Minear**, who retired on September 30.

Roger A. Fairfax Jr. of American University Washington College of Law has joined the board of directors of the Lawyers’ Committee for Civil Rights Under Law. **Danielle R. Holley** of Howard University School of Law and **Roscoe Jones Jr.** of Gibson, Dunn & Crutcher have joined the organization’s executive committee.

Douglas M. Fasciale has been confirmed by the New Jersey Senate as an associate justice of the New Jersey Supreme Court.

Matthew L.M. Fletcher of University of Michigan Law School gave a talk, entitled “The Dark Matter of Indian Law: The Duty of Protection to Indian Tribes,” for the 16th Annual Rennard Strickland Lecture at the University of Oregon Environmental and Natural Resources Law Center.

Brooklyn Law School hosted the panel Work Law as Privatized Public Law Series: On Critical Wage Theory using *Critical Wage Theory* (University of California Press 2023), a forthcoming book by **Ruben J. Garcia** of University of Nevada, Las Vegas, William S. Boyd School of Law.

Roger Gregory of the U.S. Court of Appeals for the Fourth Circuit and **Goodwin H. Liu** of the California Supreme Court are among the recipients of the ABA’s Spirit of Excellence Award, given to lawyers that promote a more racially and ethnically diverse legal profession.

John C.P. Goldberg of Harvard Law School and **Benjamin C. Zipursky** of Fordham University School of Law are the recipients of the 2023 William L. Prosser Award from the Association of American Law Schools, Section on Torts & Compensation Systems.

Sarah Hammer of the Wharton School moderated the ALI CLE webcast “Cryptocurrency Fraud: What Banking, Business, and Securities Lawyers Need to Know.” The on-demand course is available for free to ALI members at ali-cle.org.

Simpson Thacher & Bartlett has launched the Conrad Harper 2L Diversity Fellowship in honor of retired partner **Conrad K. Harper**.

The National Law Journal 2022 Legal Awards awarded **Sheila Slocum Hollis** of Duane Morris the Lifetime Achievement Award and **Michelle Shane Kallen** of Jenner & Block with the DC Rising Stars honor.

Sherrilyn Ifill is the 2023 recipient of the Brandeis Medal from the Louis D. Brandeis School of Law, given to individuals whose lives reflect a commitment to individual liberty, concern for the disadvantaged and public service. She will receive the medal at a ceremony in March 2023.

Catherine Kessedjian of University Panthéon-Assas Paris II is chair of the organizing committee for the International Law Association’s 150th anniversary, which will take place in Paris in June 2023.

Thomas H. Lee of Fordham Law School has been selected as a member of the Department of Defense’s Defense Advisory Committee on Diversity and Inclusion.

Wayne A. Logan of Florida State University College of Law has authored *The Ex Post Facto Clause: Its History and Role in a Punitive Society* (Oxford University Press 2022), a book that delves into the U.S. Constitution’s Ex Post Facto Clause, analyzing its history and the significant role it can have on American legislatures.

Bridget M. McCormack of the Michigan Supreme Court has joined the Future of the Profession Initiative at University of Pennsylvania Carey Law School.

The National Constitution Center hosted an event where **M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit and **Jeffrey S. Sutton** of the U.S. Court of Appeals for the Sixth Circuit discussed McKeown’s recently published book *Citizen Justice: The Environmental Legacy of William O. Douglas—Public Advocate and Conservation Champion*, with **Jeffrey A. Rosen** of the National Constitution Center as moderator.

Carrie J. Menkel-Meadow of UC Irvine School of Law has authored *Negotiation: A Very Short Introduction* (Oxford Press 2022), a book discussing different approaches to negotiation.

Janet Napolitano of UC Berkeley Goldman School of Public Policy and **Erwin Chemerinsky** of UC Berkeley School of Law are both members of UC Berkeley’s new ‘Our Better Web’ initiative, aimed at advancing efforts to study and combat online harms as they relate to political disinformation as a threat to democracy.

Norman M. Powell of Young Conaway Stargatt & Taylor has been elected for a term as secretary of the American Bar Association’s Business Law Section.

Stephen Lee Saltonstall has authored *Renegade for Justice, Defending the Defenseless in an Outlaw World* (University Press of Kansas 2022), a memoir detailing Saltonstall’s career as a public interest lawyer.

The Obama Foundation conducted an interview with **Mary L. Smith** on the Carolina and Ora Smith Foundation, an organization founded by Smith to promote, sponsor, support, and train Native American girls and women in STEM fields across the United States.

Stephanie M. Wildman of Santa Clara University School of Law has begun to author children’s books. Her first two books, *Brave in the Water* (Lawley Publishing 2021) and *Treasure Hunt* (Lawley Publishing 2022), are available now.

President Biden has appointed **Stephen N. Zack** of Boies Schiller Flexner to the President’s Advisory Committee on the Arts.

If you would like to share any recent events or publications in the next ALI newsletter, please email us at communications@ali.org.

New Members Elected

On October 11, the Council elected the following 32 persons.

Olufunmilayo B. Arewa, Philadelphia, PA
Katharine K. Baker, Chicago, IL
Eleanor Barrett, Philadelphia, PA
Robert Bauer, New York, NY
Pamela Bookman, New York, NY
Jacquelyn L. Bridgeman, Laramie, WY
Stephen B. Bright, New Haven, CT
Michael R. Bromwich, Washington, DC
Nannette Jolivette Brown, New Orleans, LA
Janet S. Chung, Seattle, WA
Elena J. Duarte, Sacramento, CA
Douglas M. Fasciale, Newark, NJ
Paul J. Fraidenburgh, Irvine, CA
Ruben J. Garcia, Las Vegas, NV
Carlos Gómez Ligüerre, Barcelona, Spain
Stephen E. Henderson, Norman, OK

Peter Lee, Davis, CA
Jennifer Lynn Levi, Springfield, MA
Michael E. Levine, Miami, FL
Susan M. Lin, Philadelphia, PA
Daniel P. Maguire, Woodland, CA
Randal S. Milch, Chilmark, MA
Valerie M. Nannery, Washington, DC
Douglas George NeJaime, New Haven, CT
Bertrall L. Ross, Charlottesville, VA
Amy J. Schmitz, Columbus, OH
Kevin S. Schwartz, New York, NY
Micah J. Schwartzman, Charlottesville, VA
David Allan Singleton, Cincinnati, OH
Kara H. Stein, Washington, DC
Nicholas O. Stephanopoulos, Cambridge, MA
Lauren D. Sudeall, Atlanta, GA

In Memoriam

LIFE MEMBERS

Margaret Slocum Bearn, New York, NY; **Marion W. Benfield, Jr.**, New Braunfels, TX; **Richard H. Borow**, Los Angeles, CA; **Gene Carter**, Portland, ME; **Avern Cohn**, Detroit, MI; **Richard S. Gallagher**, Milwaukee, WI; **Donald B. Hilliker**, Chicago, IL; **Melvin F. Jager**, Fort Myers, FL; **J. Michael McWilliams**, Baltimore, MD; **Gilbert S. Merritt**, Nashville, TN; **John A. Spanogle, Jr.**, Washington, DC; **Richard B. Stone**, New York, NY; **Richard L. Thies**, Urbana, IL; **Thomas A. Troyer**, Washington, DC; **James Lowell Underwood**, Columbia, SC; **Harry L. Wallace**, Milwaukee, WI; **Wayne W. Whalen**, Chicago, IL

EX OFFICIO

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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

Special Events, Speakers, and
Celebrations to be announced.