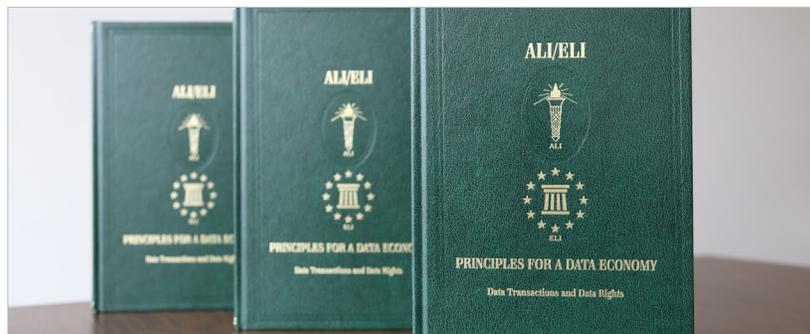


# THE ALI Reporter

THE QUARTERLY NEWSLETTER OF THE AMERICAN LAW INSTITUTE

VOLUME 46 NUMBER 1

WINTER 2023



## Principles for a Data Economy Is Available

ALI-ELI Principles for a Data Economy is a joint undertaking with the European Law Institute (ELI), which, much like the ALI, is a membership-based, independent nonprofit organization with the mission of providing guidance on legal developments. The Principles, adopted by both Institutes in 2021, have already reshaped global legal perspectives on data.

The project was overseen by two Reporters, one from each organization: Christiane C. Wendehorst of the University of Vienna, and Neil B. Cohen of Brooklyn Law School. To help coordinate the work of the two institutions, Lord John Thomas of Cwmgiedd, who until recently served as Lord Chief Justice of England and Wales and Steven O. Weise of Proskauer served as co-chairs of the project.

The law governing trades in commerce in the United States and in Europe has historically focused on trade in items that are either real property, goods, or intangible assets such as shares, receivables, intellectual property rights, licenses, etc. With the emergence of the data economy, however, tradeable items often cannot readily be classified as such goods or rights, and they are arguably not services. They are often simply ‘data.’

*continued on page 4*

THE AMERICAN  
LAW INSTITUTE

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SEE PAGE 8 FOR MORE INFORMATION.

### PRESIDENT'S LETTER

The end of any calendar year is a time for reflection, as well as an opportunity to look ahead. Often, it prompts us to make resolutions for the coming year. I am always in awe of what we accomplish together as an Institute, but this year calls for a deeper reflection as we leave our first century behind.

I begin with the Annual Meeting, where, in addition to the member discussions, debates, and votes on the various projects, we celebrated ALI's history. Members who walked through our 100th Anniversary exhibit were first met by the story of our founding, which in itself was a significant accomplishment. Then, progressing through the decades, we were each reminded of what ALI members before us have achieved—a first-of-its-kind Restatement series (beginning with Contracts in 1932 and ending with a fifth Property Volume in 1945); a Second Restatement series that included work in Contracts and Torts that together would be cited tens-of-thousands of times; the Uniform Commercial Code, which has promoted safe and reliable commerce throughout the U.S.; the Model Penal Code, which has transformed criminal law throughout the country; and a Third Restatement series, which produced the Prudent Investor Rule that transformed the law of trusts and other fiduciary investments and continues to generate important contributions to the rule of law.

The exhibit ended by celebrating our current work and recent successes —Principles projects in areas like Election Administration, Policing, Government Ethics, and Corporate Compliance; Restatements re-examining areas like U.S. Foreign Relations Law, Torts, and Conflict of Laws; as well Restatements in new areas for the ALI, like American Indian Law, International Commercial and Investor-State Arbitration, and Liability Insurance. I hope that when leaving the exhibit all members felt a sense of pride in all that we have achieved. I think our founders would have been pleased. They were aware of popular dissatisfaction with the administration of justice. They hoped for an Institute that would answer some of the causes of this dissatisfaction by clarifying

*continued on page 3*

# October 2023 Council Meeting Update

At its meeting on October 19 and 20, 2023, the 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. 9 containing a general Introduction; §§ 2.10, 2.11, 2.20 (Comment *l* only), 2.21, 2.45, 2.60, and 2.90 of Chapter 2, State Intervention for Abuse and Neglect; § 8.10 (Comments *k* and *l* only) of Chapter 8, Student Speech Rights; Introduction to Part III; § 13.61 of Chapter 13, Delinquency Proceedings; §§ 15.10-15.12, 15.31, 15.40 of Chapter 15, Juveniles in the Criminal Justice System; Introduction to Part IV; § 16.20 of Chapter 16, Medical Decision-making by Minors; and § 19.10 of Chapter 19, Juvenile Curfews.

## Corporate Governance

The Council approved the following material in Council Draft No. 2: §§ 1.13 and 1.27 of Chapter 1, Definitions, and § 5.05 of Chapter 5, Duty of Loyalty. The Council discussed but did not vote on § 5.04; the Reporters will revise the section for future consideration by the Council. Due to time constraints, the Council did not complete its discussion of the remainder of the draft.

## Property

The Council approved Council Draft No. 8, which contained §§ 2.1-2.19 of Chapter 2, Adverse Possession, of Division II, Possession, of Volume 1 on The Basics of Property.

## Torts: Medical Malpractice

The Council approved §§ 4, 5 (except Comments *b* and *c*), 8, and 13-15 of Council Draft No. 1. The Reporters will consult with the Council members who commented on the two excluded Comments and will revise those Comments for future consideration by the Council.

## Torts: Miscellaneous Provisions

The Council approved Council Draft No. 5, containing sections on: Spoliation of Evidence; Equitable Estoppel as a Defense to Tort Liability; Tort Liability Based on Estoppel; Prenatal Injury; and Bad-Faith Performance of First-Party Insurance Contract.

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.



*Leondra R. Kruger of the California Supreme Court, Virginia A. Seitz of Sidley Austin, Cristina M. Rodriguez of Yale Law School*



*Seth P. Waxman of WilmerHale and Larry D. Thompson of Finch McCranie*



*Daniel C. Girard of Girard Sharp and Robert H. Klonoff of Lewis & Clark Law School*

### EDITOR

Jennifer L. Morinigo  
(215) 243-1655  
jmorinigo@ali.org

### MANAGING EDITOR

Pauline Toboulidis  
(215) 243-1694  
ptoboulidis@ali.org

### ART & PRODUCTION

Kathleen A. Morton  
(215) 243-1612  
kmorton@ali.org

The ALI Reporter (ISSN 0164-5757) is published quarterly by The American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104-3099. Nonprofit U.S. postage paid at Langhorne, PA.

POSTMASTER: Send address changes and any other communications to 4025 Chestnut Street, Philadelphia, PA 19104-3099.

## PRESIDENT'S LETTER CONTINUED FROM PAGE 1

and simplifying the law while making it more knowable, accessible, and just. It was their fervent hope that through the many volunteer hours dedicated to the work of the Institute that the rule of law might be strengthened and preserved.

The Annual Meeting also gave attendees a look into the future of the law and our role in it as professionals, through a series of discussions designed to ask big questions and challenge us to think broadly about the future in the context of the law. These discussions focused on the ways that technology and innovation affect all aspects of our society, including human relationships, governments, institutions, access to justice, and the rule of law. These discussions helped cement how important the Institute will continue to be in our profession as the law requires continued reflection and development in light of our ever-changing society.

I am also looking ahead at the future of the ALI, well beyond 2024. The future of the ALI depends on its members. Most critically, it depends on members' engagement in our organization and our project work. Your perspective, wisdom, and expertise shape the Restatements and Principles of the Law, and your approval at the Annual Meeting gives lawyers and judges across the country assurance that they can rely on the work of the ALI. Working on ALI projects is also a lot of fun and can be the source of much professional satisfaction; it's an unparalleled opportunity to engage in close study, discussion, and debate of timely legal topics, with some of the leading minds of our profession, from different parts of the country and from all walks of life within the law, in an open and collegial way. I hope you'll join us, in person or on Zoom, for a project meeting and in San Francisco for our Annual Meeting in 2024.

The ALI's future also depends on its members' financial support, now more than ever. Like all organizations, we are affected by society's shift from traditional books and periodicals to the digital world. In many ways, this offers us an unprecedented opportunity: we may be able to reach many more people using a wider variety of formats, than ever before. At the same time, this change calls on us to re-imagine our revenue model. We must plan for a world in which the publication and digital research revenues to which we have become accustomed are likely to play a smaller part in our overall financial picture. The reasons for this change are complex. I can assure you, however, that they are not a reflection of a decline in demand or interest in our work. But the publishing industry has changed, and that in turn requires us to reconsider how, and through whom, we can best distribute our work product. We are thoroughly evaluating all of our options both on the revenue side and on the expense side, and we will be making appropriate adjustments in order to adapt without compromising our process, quality, or independence. In the coming years, it is safe to predict that we will need to rely more on our members' support.

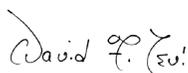
As 2023 comes to a close, I urge members to consider making the ALI a part of your year-end giving and to contribute to the ALI's Second Century Campaign.

There are many ways to support The American Law Institute and the Second Century Campaign. Your contribution of any amount—though an outright gift, multi-year pledge, Qualified Charitable Distribution from a retirement account, or as part of an estate plan or bequest—will have a meaningful impact on the ALI and our work.

I hope that all of our members will join in my New Year's resolution to help ensure that ALI and its members for years to come will carry forward our rule-of-law mission, particularly now in these deeply skeptical and polarized times.

It remains my honor to serve The American Law Institute and its members, particularly as we look to the future together. I am grateful for your continued commitment to the Institute, and I wish for all of us a new year of justice and peace.

David



**A SHORT FEATURE ON THE ANNUAL MEETING HISTORY EXHIBIT CAN BE FOUND ON PAGE 6.**

## In Case You Missed It, On-Demand Webinar Available Now on ALI CLE

On December 5, Reporters and Co-Chairs of the Principles for a Data Economy project led a webinar on the Principles, which discussed how the Principles are helping to make existing law in the field of the data economy more coherent and are providing clarity that is urgently needed. The webinar also featured commentary from esteemed leaders of international organizations on real-world impacts, including:

**Sarah Dodds-Brown**,  
EVP & Deputy  
General Counsel of  
American Express



*Sarah Dodds-Brown served as an Adviser on Principles for a Data Economy*

**Maja Bogataj Jančič**,  
Co-Chair of the Data  
Governance Working  
Group at The Global  
Partnership on Artificial  
Intelligence (GPAI)

**Anna Joubin-Bret**, Secretary of the United Nations  
Commission On International Trade Law (UNCITRAL)

**Atsushi Koide**, Delegate of Japan to UNCITRAL

**Dirk Staudenmayer**, Head of Unit for Contract Law of  
the Directorate-General Justice and Consumers of the  
European Commission

The program will walk through the Principles and showcase their uses today, including:

- How data transactions work
- Rights and duties of people engaged in traditional value chains where data is created
- Access and usage rights to data; security interests in data
- How to use data transnationally
- Real world examples of how the Principles work today

You may register to take the on-demand webinar at [www.ali-cle.org/course/VCFK1205](http://www.ali-cle.org/course/VCFK1205).

“As we all know, the modern economy is no longer just about goods or services, and other traditional commodities, to which our law has long adapted. The modern economy is, to a large extent, about data: collecting data, trading in data, analyzing data, and creating value with the help of data,” said Reporter Wendehorst. “So, our project looks specifically into how data transactions work and which terms should be governing them by default. We equally look into what kind of rights people have where data is created with their contribution.”

Both in the U.S. and in Europe, uncertainty as to the applicable rules and doctrines to govern the data economy is beginning to trouble stakeholders (such as data-driven industries; micro, small and medium-sized enterprises; as well as consumers). This uncertainty undermines the predictability necessary for efficient transactions in data, may inhibit innovation and growth, and may lead to market failure and manifest unfairness, in particular for the weaker party in a commercial relationship.

“The data economy now is almost exclusively governed by legal doctrines that were developed for other purposes; one of our major tasks is to adapt those doctrines so that they can be applied appropriately to the data economy going forward,” said Reporter Cohen. “One of the purposes of this project is to think not only about what the rules are but what the rules could and should be. Unlike preparing a Restatement, for which a lot of the work involves looking back into the history of legal doctrines—how did we get here and how is the law developing?—this Principles project needs to look at the present and to the future without any real guarantee of what the future will look like, because it’s changing so quickly.”

This project proposes a set of principles that may 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.

“We created a set of principles that works with whatever data protection, data privacy framework you are dealing with,” explained Professor Wendehorst. “One of the decisions we made at a very early stage in our project was to stay abreast of data privacy and intellectual property rights. And when you do that, you realize that the principles that are just about data transactions and data rights are very similar.”

VISIT THE ALI WEBSITE TO ORDER  
THE BOOK TODAY.

[WWW.ALI.ORG/DATA-ECONOMY](http://WWW.ALI.ORG/DATA-ECONOMY)

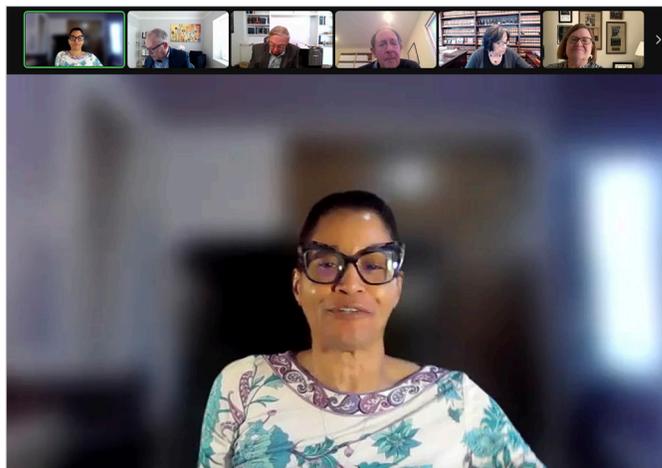
# Project Meeting Updates

On October 26, **Conflict of Laws** project participants met to discuss Preliminary Draft No. 8. The draft includes new Sections from Chapter 8 on the specific conflict of laws issues concerning capacity to contract and formalities for contracting, material from Chapter 11, including several Sections addressing the formation and recognition of marriage and other domestic relationships, and portions from Chapter 13 on choice of law rules for issues relating to business corporations.



(L-R) Associate Reporters Laura E. Little of Temple University Beasley School of Law, Christopher A. Whytock of UC Irvine School of Law, and Ann L. Estin of University of Iowa College of Law

The fall project meeting season ended on November 17 with **Torts: Remedies**. Preliminary Draft No. 4, which contains §§ 50-53, addressing reasons for refusing an injunction and leaving plaintiff to the damage remedy.



Carolyn H. Nichols of the Superior Court of Pennsylvania

## UCLA Law Review Issue on the Restatement of the Law, Charitable Nonprofit Organizations

Last fall, UCLA Law hosted a symposium on the Restatement of the Law, Charitable Nonprofit Organizations. The symposium—sponsored by 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*—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.

The papers discussed were recently published by the *UCLA Law Review*, featuring the below discussion papers:

“Preface to the UCLA Symposium on the Restatement of the Law, Charitable Nonprofit Organizations” by Jill R. Horwitz

“When Donor Meets Purpose” by Atinuke O. Adediran

“The Restatement of Charitable Nonprofits and the Changing Nature of the Modern Investment Committee” by Garry W. Jenkins

“Use of Restricted Assets During a Crisis: Is It Time to Raid the Endowment?” by Reporter Jill R. Horwitz

“Laws Governing Restrictions on Charitable Gifts: The Consequences of Codification” by Associate Reporter Nancy A. McLaughlin

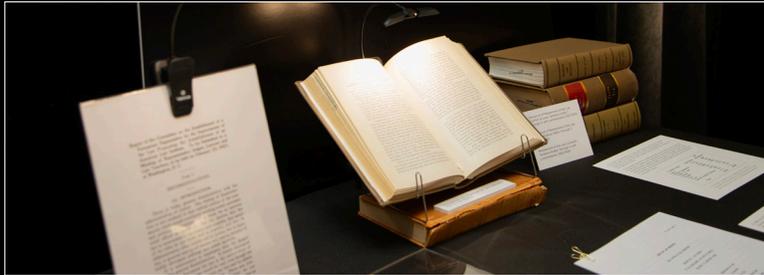
“Allocating State Authority Over Charitable Nonprofit Organizations” by Lloyd Hitoshi Mayer

THE PAPERS ARE AVAILABLE ONLINE  
AT [WWW.ALI.ORG/UCLASYMPOSIUM](http://WWW.ALI.ORG/UCLASYMPOSIUM).

UCLA Law also recently published a profile of Restatement Reporter Horwitz, available online at [www.ali.org/horwitz](http://WWW.ALI.ORG/HORWITZ).

# 100th Anniversary Exhibit

For those who did not have the opportunity to explore the exhibit at the 2023 Annual Meeting, below are some highlights from and fun facts displayed at the exhibit. To learn more about the Institute's history, please visit our online timeline at [www.ali.org/timeline](http://www.ali.org/timeline).



In 1928, ALI Director William Draper Lewis submitted to the Executive Committee of ALI a report making it clear that Lewis assumed and intended the Institute to be permanent.

Barely five years after its founding and before a single volume of the first Restatement had been published, Lewis wrote, "I believe we all feel that the time has arrived when those of us who are primarily responsible for the guidance of the Institute should begin to give serious consideration to its future."

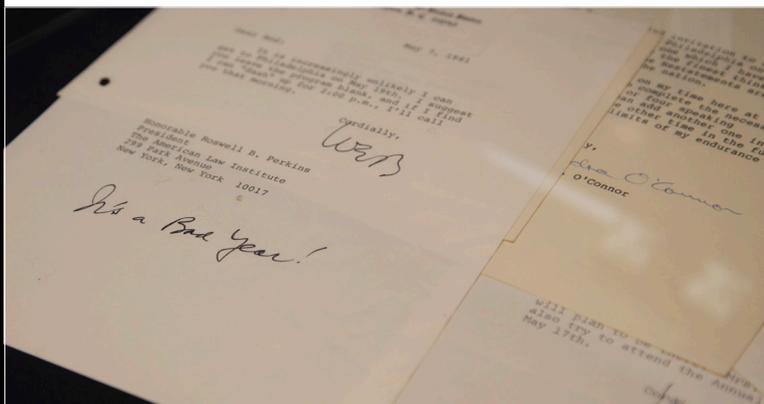
The Institute has had a longstanding relationship with The Supreme Court of the United States and many of the Justices of the Court. This can be seen through the numerous issued opinions over the years, as well as their connection to the Institute and shared investment in the rule of law.

For several decades, the star attraction of the Annual Meeting opening session was the appearance of the Chief Justice of the United States in which a report was presented on the business of the Court.

Two of the seven signers of our Certificate of Incorporation eventually became Chief Justices—William Howard Taft and Charles Evans Hughes.

Five ALI Council members have been appointed to the Supreme Court of the United States: Benjamin N. Cardozo, Ruth Bader Ginsburg, Ketanji Brown Jackson, Owen J. Roberts, and Harlan F. Stone.

A table dedicated to the ALI/SCOTUS relationship included correspondences, speeches, and videos from justices throughout the years, as well as a backdrop with various cases citing to ALI's works.



Several handouts and stickers were available in the exhibit, including the pictured mens rea stickers.



When people think of ALI's Model Codes, they tend to think of the Model Penal Code, which was completed in 1962. Few realize that Model Codes are nearly as old as the Institute itself. For example, work on the Model Code of Criminal Procedure actually began in 1924.



In 1947, at a time when WWII soldiers were returning to work, the American Bar Association asked ALI to undertake a national program of continuing education of the bar. The Institute immediately saw the importance of this request and agreed to the challenge. As a result, the effort that the ABA initiated and ALI undertook became ALI-ABA—The American Law Institute-American Bar Association Committee on Continuing Professional Education.

Full set of the first Restatement series.



*"Your restatement will no sooner be made than it will have to be torn down and made over. You are the Sisyphus of the century."*

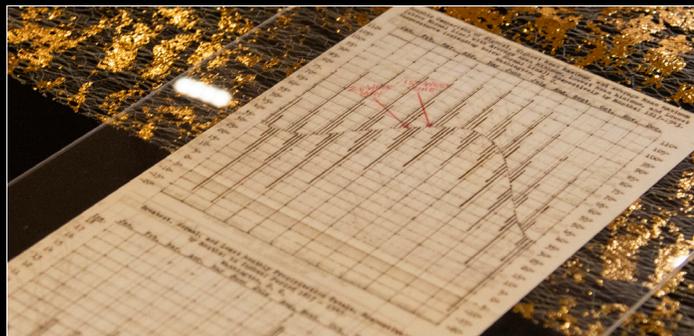
Benjamin N. Cardozo, membership of the N.Y. Court of Appeals, 1934 Annual Meeting

# ALI: A Centennial History, Book Talk and Discussion

On Monday, October 30, Brooklyn Law School hosted a book talk and discussion on the recently published *The American Law Institute: A Centennial History* (Oxford University Press, 2023), followed by a book signing and reception.

The discussion was moderated by Miriam H. Baer, Vice Dean and Centennial Professor of Law of Brooklyn Law School. She was joined co-editors and contributing authors Andrew S. Gold, Professor of Law of Brooklyn Law School and Robert W. Gordon of Stanford Law School, and ALI Council Member Richard R. W. Brooks of New York University School of Law.

*The American Law Institute: A Centennial History* collects together a series of original essays in honor of ALI's centennial. The essays are authored by leading experts in their fields, including current and former Restatement Reporters. The essays also provide a wide range of perspectives on specific ALI undertakings, including some of the more important Restatements and Codes; several leading Principles projects; statutory projects such as the Model Penal Code and the Uniform Commercial Code; themes that cut across substantive fields of law; and the ALI's institutional history over the past century.



When preparing to schedule the Annual Meeting ALI leadership considered climate data in an effort to select dates with the best likelihood of good weather. This photo shows markings where the choice was narrowed down to two weeks in May.



In a search of ALI's Annual Meeting Proceedings, longtime ALI Treasurer Bennett Boskey can be found making an early version of the Boskey at the 1971 Annual Meeting.

The exhibit featured a black and gold button where visitors could push to hear the audio of a recent Boskey motion.



Dean David D. Meyer of Brooklyn Law, Richard R. W. Brooks, Robert W. Gordon, and Andrew S. Gold

*"The inexorable clock warns me that your time has more than expired."*

ALI Vice President Benjamin Cardozo chairing the Contracts session at the 1925 Annual Meeting



*The American Law Institute: A Centennial History* is now available to order directly from Oxford University Press. With coupon code **ali40**, ALI members receive a 40% discount.

# 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 the legal system. Our publications have been cited in published decisions by U.S. courts more than 220,500 times. And their influence is as strong now as ever: in its last term, the U.S. Supreme Court cited fourteen different ALI publications—twelve Restatements, a Principles project, and the Model Penal Code—in sixteen separate opinions, written by six justices, across fourteen cases.

The ALI's operations and mission depend on continuing financial support from members like you. The shift away from traditional books and periodicals to the digital world and associated changes in the publishing industry are putting downward pressure on the publication revenues that historically have funded so many of our activities while, at the same time, inflation is increasing our operating costs. Adapting to this new reality means we will need to rely more and more on our members' support to continue our high level of activity and impact as the nation's pre-eminent law reform association.

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—the Second Century Campaign—to secure the Institute's future. We hope you will join us in this effort. One of the simplest ways you can support the Second Century Campaign is by including the Institute in your year-end giving plans.

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 advance our mission of clarifying and improving the law and support our work in service of the legal profession, the judiciary, and society as a whole.

Thank you in advance for your generosity and best wishes for a happy and healthy 2024.

## ALI's Second Century Campaign Focus on: Year-End Giving and the Second Century Campaign

### It's not too late to help us reach our goal.

All contributions made at year-end will count toward the Second Century Campaign, ALI's major fundraising effort that is currently underway in conjunction with the Institute's 100th anniversary.

We're hoping that all members will participate in this effort, and we ask that you consider joining one of the Member Giving Circles. These pledges can be paid in up to five years, which many members have found to be an easy way to make a big impact.

**To pledge your support, please visit [www.ali.org/priorities](http://www.ali.org/priorities).** Here, you'll find a link to donate, printable pledge forms, as well as a link to learn about other ways to give.

We hope that you will consider ALI in your year-end giving and support our Second Century Campaign. A successful campaign will establish a solid financial foundation for ALI's future without compromising its independence.



**To donate now, scan the QR code or visit us online at [ali.org/anniversary](http://ali.org/anniversary) to learn more.** If you would like more information about making a general donation to the Second Century Campaign, please contact ALI Deputy Director Eleanor Barrett at [ebarrett@ali.org](mailto:ebarrett@ali.org).

# Thank You for Supporting the Second Century Campaign

Donors to The American Law Institute's Second Century Campaign play a vital role in funding the Institute's future. 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  
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Anonymous (2)

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# Member Spotlight: Brandon Garrett

Duke Law Professor Brandon Garrett is an Associate Reporter on Principles of the Law, Policing (currently in production for publication). He is also the Faculty Director and Founder of the Wilson Center for Science and Justice at Duke Law, which “works to advance criminal justice and equity through science and law. The Center’s work is non-partisan and evidence-informed.” The Center focuses on three key areas: improving the accuracy of the evidence used in criminal cases, promoting fair and equitable outcomes in the criminal legal system, and improving behavioral health outcomes for persons who encounter, or are at risk for encountering, the criminal legal system.

**Before we talk about your work at Duke Law and the Wilson Center, let’s talk about ALI’s Policing Principles project. The Reporter team is currently working to produce policies and procedures that work alongside the Principles to provide guidance to law enforcement organizations. Can you tell us a bit more about this?**

The Principles of Policing, since they were designed to inform law enforcement practices first and foremost, need to be supplemented by the types of policies that can be implemented on the ground. The Principles cover so many crucial challenges in modern policing and as a result, the hard work will continue for many years to come. Sometimes detailed ground-work needs to be done in advance of that implementation work. In collaboration with the Quattrone Center, the Wilson Center has done a review of nearly all law enforcement agency policies in Pennsylvania, over 1,000 agencies, on the topics of police interrogations and eyewitness identifications. We have presented the results regarding videotaping interrogations, a central recommendation in the Principles, to lawmakers, who are presently considering legislation. But we also hope that this work can inform model policies that agencies will adopt voluntarily, once they see what the options are. We have similarly crafted model policies and principles on the topic of forensic evidence. We are launching a toolkit for community organizers on forensic evidence and policing in the next year. We have done the same on the topic of informant evidence, including with materials geared towards prosecutors, to inform their use of police informants. We are also doing work to study and implement programs to divert people with behavioral health needs from arrest, and have studied such programs in North Carolina, as well as advocated for their creation and expansion.



2019 Principles of the Law, Policing project meeting



Brandon Garrett, 2017 Annual Meeting

In future work, we are looking for additional jurisdictions to study patterns in low-level traffic and misdemeanor arrests. One part of the Principles focused on fines, fees, and the need for law enforcement to focus on public safety, not revenue generation. I have collaborated on large-scale studies of low-level policing disparities, and the impact of reforms, in Harris County, Texas, as part of my work as the court-appointed monitor of the ODonnell Consent Decree which resulted in implementation of comprehensive misdemeanor bail reforms. We have found that those reforms have resulted in positive outcomes for public safety, with reduced arrests and rearrests, as well as a dramatic reduction in jailing people in low-level cases. We have done a series of studies examining court debt in North Carolina, particularly in traffic cases, and disparities in outcomes that result from such high-volume filings. Most of these low-level cases are eventually dismissed, but the burdens can be substantial on those who cannot afford to pay fines and fees, or who do not appear in court. We are looking to study jurisdictions, like Harris County, that have implemented reforms in how they approach such low-level criminal cases.

**Which portions of the Policing Principles were you most involved in drafting?**

My focus in the Principles was on the sections concerning how police collect evidence in criminal cases, including interrogations and questioning witnesses, forensic evidence, eyewitness evidence, but also the sections concerning police use of force, which we released very early on in the project, and other sections, including concerning fines and fees. Of course, all of our work was highly collaborative, among the reports, and we benefitted every step of the way from incredible feedback from our Advisers, who included leading police professionals, policymakers, judges, and lawyers.

**Your research takes you into many different areas of criminal justice—death penalty, DNA Evidence, even corporate criminal activity. Recently, the Wilson Center completed a year-long study called the “Plea Tracker.” What did this project aim to do?**

Plea tracking work involves recording the terms of pleas and their rationales. The vast bulk of criminal cases are now negotiated and resolved through plea bargaining. Yet, traditionally, neither prosecutors or defense lawyers have routinely documented the plea process, and typically only the final plea terms are entered in court. I view it as something that should be basic to all sound prosecution and defense work: documenting plea offers and terms. Indeed, citing to our work, the American Bar Association recently emphasized that data collection regarding pleas should be a best practice; other professional organizations have done the same.

**Were you successful, and if so, how?**

This year, we published in the *Stanford Law Review* a piece titled “Open Prosecution,” describing how a team of us at the Wilson Center worked with the Durham, NC and Berkshire, MA prosecutors offices to open the “black box” of plea bargaining, to document the terms, and the reasons supporting, plea agreements entered by prosecutors. The goal was to unpack how plea offers change during negotiations and to document the factors that prosecutors rely on during plea bargaining. We have also published reports describing our findings in both jurisdictions in more detail. In both places, we uncovered patterns that the prosecutors were not aware of and which provided real insights into how to improve their work. For example, the role of mitigation evidence from the defense really stood out in the Durham data, suggesting the power of communication between prosecutors and the defense.

The work in Durham, NC continues and, with a refined and much simplified second-generation plea tracker, we plan to reach out to many more prosecutors’ offices in the next year, as we expand this work. We are also reaching out to public defenders and view plea tracking as highly beneficial to their role as well. The plea tracker is freely available, on our Wilson Center website, to all who want to use it, on the prosecution and defense side. We hope that in the years to come, tracking pleas becomes standard practice.

**What else is the Center currently examining?**

I have just finished the first draft of a new book manuscript, titled “Overdue Process,” focusing on old and new challenges to procedural due process rights, and forthcoming from Polity Books. Procedural due process cases like *Mathews v. Eldridge* are increasingly not taught in law school. Yet, procedural due process issues continue to multiply in a wide range of settings, and judges increasingly lack the tools to respond to them. New work on how people weigh due process values suggests why it is so challenging to focus on the process, rather than the outcomes that people may understandably want in court. In an era of political polarization, people may care more about fairness for their side, than impartial justice. Further, artificial intelligence

and automation pose special new challenges to longstanding due process rights. The book hopes to renew interest in the need to safeguard fundamental procedural due process rights.

**Looking ahead, what issues do you see at the forefront of law and criminal justice?**

A new area of our work focuses on artificial intelligence (AI) and criminal justice. I have been collaborating for several years now with my computer science colleague Cynthia Rudin, who has done groundbreaking work showing that fully interpretable AI, that users can understand, is as accurate and high-performing as “black box” AI that people cannot understand. We have written a series of articles describing how this has enormous implications for criminal justice, where in so many settings, law enforcement and courts have used AI that is simply not designed for any users, or criminal defendants, to understand what it did and what factors it relied on. This is an even greater concern, not just because of the criminal procedure rights implicated by failure to discuss the basis of an AI decision, but because criminal justice data is so riddled with administrative errors. If AI miscalculated a person’s risk because of quite common errors in someone’s criminal history, there is no way to know it, if the AI is black box. Given the growing interest in regulating AI in high stakes settings, and growing engagement by judges in ruling on AI evidence used by the government, we believe that correctly addressing AI in court means insisting that the government satisfy a substantial burden to use AI that is not fully interpretable.

**Outside of academia, what keeps you busy? What do you do for fun?**

I have been a painter for many years, and am trying to find more time to create new work. I birdwatch, and saw all sorts of new species last year. I love paddleboarding, long distance hiking and running, and tennis. In a first, our Duke faculty tennis team made the North Carolina state tournament last year; I had never played in a tournament before, and it was a fun challenge.



*Figs (2014)*

# The Institute in the Courts: The American Law Institute and State Courts

State courts across the country continue to be guided by the work of The American Law Institute. During the 2022-2023 fiscal year, the highest courts of seven different states—Arizona, Delaware, Idaho, Montana, South Carolina, West Virginia, and Vermont—adopted one or more Sections of the Restatements of the Law.

The Idaho Supreme Court issued two opinions incorporating Sections of two different Restatements into Idaho law. In *Gestner v. Divine*, 519 P.3d 439 (Idaho 2022), the Idaho Supreme Court expressly adopted Restatement of the Law Third, Property: Wills and Other Donative Transfers § 8.3, under which a presumption of undue influence arises if the alleged wrongdoer is in a confidential relationship with the donor and there are suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer. In that case, the court found that two adult stepchildren of the settlor of a family trust failed to establish that the

settlor's decision to amend the trust to remove stepchildren as beneficiaries was the result of undue influence.

In *Whitham Trustee of Kent G. Whitham and Linda M. Whitham Revocable Trust v. Creamer*, 525 P.3d 746 (Idaho 2023), which involved a dispute between a servient-estate owner who installed a French drain to help prevent erosion of a private road easement on his property and the dominant-estate owner who filled the drain in with rocks in the belief that the drain would make it difficult to plow snow from the road, the Idaho Supreme Court adopted Restatement of the Law Second, Torts § 929 for its guidance in calculating damages to restore property to its previous state. The court determined that the servient-estate owner was entitled to recover the full cost to repair the drain and return it to the condition it was in before the dominant-estate owner filled it with rocks, rather than limiting damages to out-of-pocket expenses incurred in installing the drain.

## Upcoming ALI CLE Video Webcast: Uniform Conflict of Laws in Trusts and Estates Act: What's New and What's Next

In 2020, the Uniform Law Commission (ULC) formed a committee to draft a uniform law to address contemporary problems of conflict of laws in trusts and estates. A draft of a Uniform Conflict of Laws in Trusts and Estates Act will have its first read at the 2024 ULC annual meeting. This webcast will provide insights into what went into this Act, how it modifies the traditional common-law approach to conflict of trust and estate laws, what is next, and what it could mean in practice.

In this ALI CLE video webcast, cosponsored by The American College of Trust and Estate Counsel (ACTEC), attendees will hear directly from the reporter for the drafting committee, as well as the committee chair, vice chair, and an observer—all Fellows of ACTEC. Topics up for discussion include:

- Collapsing the distinction between real and personal property
- Eliminating distinctions between testamentary and inter vivos trusts
- Removing the distinction between matters of trust construction versus interpretation
- Preserving the distinctions between trust validity and administration

### Featured Panelists:

**Turney P. Berry**, Wyatt, Tarrant & Combs LLP (moderator)

**Jane Gorham Ditelberg**, Assistant General Counsel, The Northern Trust Company

**Ronald J. Scalise Jr.**, John Minor Wisdom Professor of Civil Law, Tulane Law School

**Robert H. Sitkoff**, Austin Wakeman Scott Professor of Law and John L. Gray Professor of Law, Harvard Law School, ALI Council Member

**JANUARY 18, 2024**  
**12:00-1:00 PM ET**

Learn more about this program and register online by visiting [ali-cle.org](https://ali-cle.org).

The Delaware Supreme Court was the state court that adopted the most Sections of a single Restatement—§§ 197, 198, and 199 of the Restatement of the Law Second, Contracts—when, in *Geronta Funding v. Brighthouse Life Insurance Company*, 284 A.3d 47 (Del. 2022), it adopted restitution under a fault-based analysis as framed by those Restatement Sections as the test to determine whether an insurer should return insurance premiums when a party presented a viable legal theory, such as unjust enrichment, and sought the return of paid premiums as a remedy.

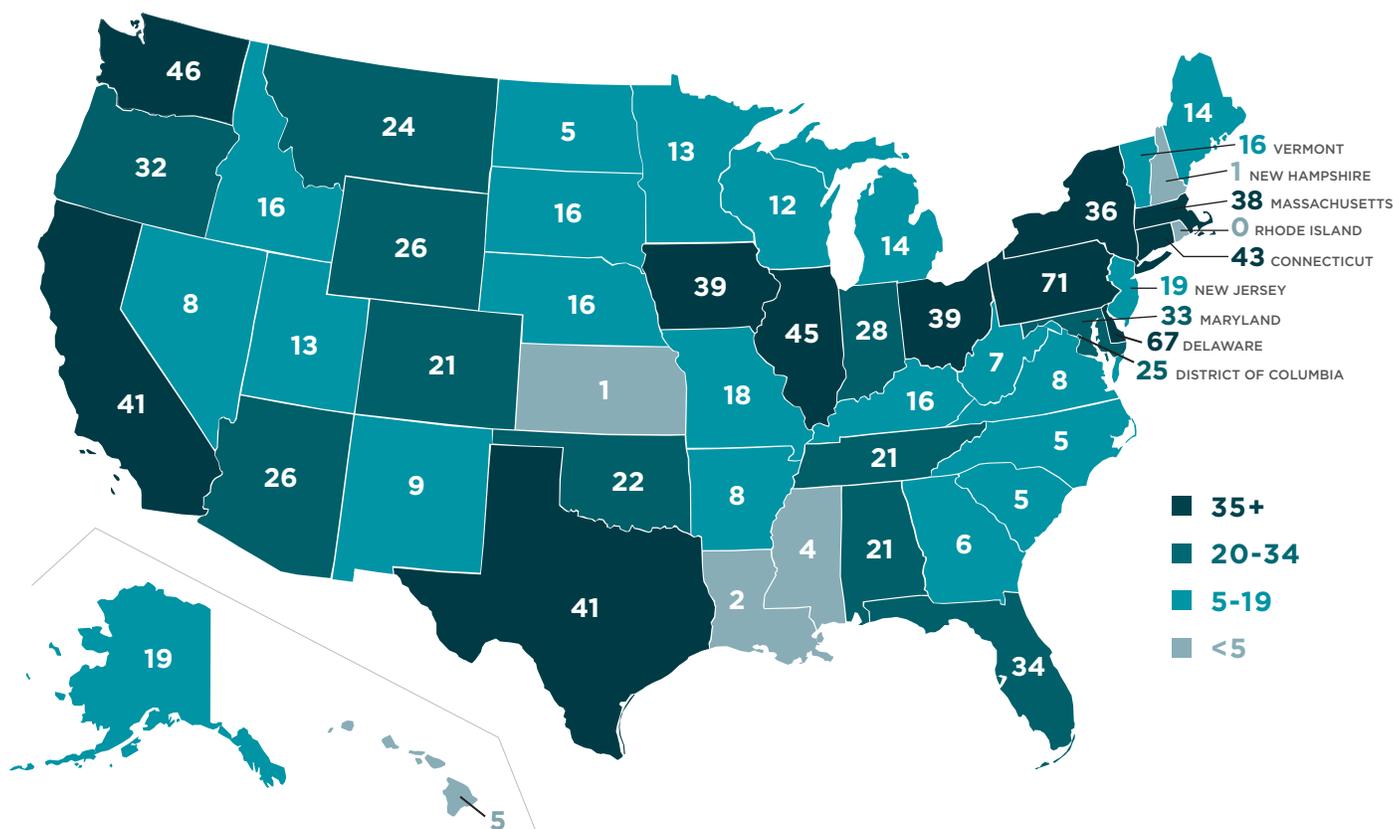
The Restatement of the Law Third, Restitution and Unjust Enrichment, was the publication with the most Sections adopted by the highest courts of different state jurisdictions; specifically, the Supreme Court of Appeals of West Virginia adopted § 29 of that Restatement in *L&D Investments, Inc. v.*

*Antero Resources Corporation*, 887 S.E.2d 208 (W. Va. 2023), and the Vermont Supreme Court adopted § 2 of that Restatement in *Beldock v. WVSD, LLC*, 2023 WL 4280767 (Vt. June 30, 2023).

During the same fiscal year, courts in 49 states and the District of Columbia cited the Restatements of the Law and Principles of the Law over 1000 times. Pennsylvania state courts had the greatest number of citations to the Restatements and Principles, with 71, followed closely by Delaware state courts, which mentioned the Restatements and Principles 67 times. Seventy-two percent of the state courts that referred to the Restatements and Principles did so on 10 or more occasions. The most cited subject was the Restatements of Torts, which appeared in state-court opinions 462 times, followed by the Restatements of Contracts, which were cited by courts across the country 175 times.

## State Citations of ALI’s Work

Below is a breakdown of state citations of ALI publications and drafts for the 2022-2023 fiscal year.



# Friedman Addresses the American College of Trial Lawyers

Paul L. Friedman of the U.S. District Court for the District of Columbia addressed the American College of Trial Lawyers in October on the topics of 1) the vanishing jury trial and the resulting effect on the courtroom and 2) the increasingly vitriolic and personal attacks on judges, on the courts, on judicial independence, and ultimately on the rule of law. An excerpted portion of his address can be read [here](#); you may read the complete transcript at [www.ali.org/friedman-actl](http://www.ali.org/friedman-actl).

**Judge Paul L. Friedman:** ... First, [I'll address] the vanishing jury trial and its effect on our professional skill set: In a 2017 article by Jeffrey Q. Smith and Grant R. MacQueen, entitled “Going, Going, But Not Quite Gone” that appeared in *Judicature* magazine, the authors pointed out that “while trial remains a theoretical possibility in every case, the reality is quite different.” And the authors identified several reasons why. The first is the Federal Rules of Civil Procedure and decisions by the Supreme Court interpreting and applying the Rules. As those of you who litigate civil cases know, in 1986 the Supreme Court decided a trilogy of cases saying that summary judgment should no longer be considered “a disfavored procedural shortcut, but should be used when appropriate to secure the just, speedy, and less expensive way to resolve a case.” Federal judges got the message. And so today, approximately 19 percent of civil cases in federal courts are resolved by summary judgment.

The Supreme Court's summary judgment cases were followed by two decisions—*Twombly* in 2007 and *Iqbal* in 2009—that seemed to raise the pleading standards needed to state a viable civil claim. Dismissal of cases now was encouraged to reduce the unnecessary expenditure of time and money by the parties and the courts. As a result, dispositions by motions to dismiss are also granted more readily today than ever before. In addition, as we all know, discovery has become more expansive and expensive, particularly after the advent of electronic discovery, email, social media, and the like. Yale Law School professor John Langbein believes that the current discovery provisions in the Federal Rules of Civil Procedure, and the emphasis on judicial case management and settlement contained in Rule 16, “have had the effect of displacing trial in most [civil] cases.” Indeed, he says, “precisely because discovery allows such far-reaching disclosure of the strengths and weaknesses of each side's case, discovery often has the effect of facilitating settlement.”

These three developments—encouraged summary judgment, heightened pleading standards, and more expansive and expensive discovery—have dramatically reduced the number of civil jury trials in the federal courts. A study by the Civil Justice Research Initiative, part of the UC Berkeley School of Law, reported that in 2019 juries disposed of just 0.53 percent of filed federal civil disputes. And the study found that in the state courts, civil jury trials were even rarer.

The pattern in federal criminal cases is similar. Following the passage of the Federal Sentencing Guidelines, the percentage of criminal cases resolved by trial in the federal courts significantly declined. And in my view, the decline in criminal trials is the direct result of three things: the advent of the Federal Sentencing Guidelines; mandatory minimum sentencing statutes; and the resulting increase in prosecutorial power in both charging decisions and plea



Paul L. Friedman

negotiations. For some defendants, the stakes have become just too high to risk going to trial.

As a result, we have seen the virtual disappearance of the criminal trial in the federal courts. In the late 1960's and early 1970's, nearly 20% of all criminal defendants charged in federal court exercised their constitutional right to a trial. Today trials occur in only about 2% of federal criminal cases. And the most dramatic drop in the number of trials and increase in the number of pleas occurred almost immediately after the Sentencing Guidelines and mandatory minimum sentences firmly took hold.

As the College recognized in its 2004 report on the vanishing trial, with the diminishing numbers of both civil and criminal trials, we are at risk of losing both a genuine trial bar and a genuine trial bench. ... I bemoan the lack of trials not only because— as those in this room know so well— the art of trial advocacy is worth preserving for its own sake, but also because skilled, effective, persuasive advocates can make a real difference to your client and often to the very outcome of a case. ...

And there are institutional concerns as well; a transparent and public court system requires effective advocacy by skilled and competent professionals as counsel for both sides in a case. Quality advocacy promotes the legitimacy and fairness of the courts, the entire justice system, and the real-life meaning of the rule of law. The decline in trials is a great loss for society. As distinguished lawyer John Kecker put it: “Trials let light into the process, helping keep prosecutors honest, cops more honest, judges in check.”

Now, pivoting to my second topic, threats to judicial independence and the rule of law, let me start with the Constitution itself. As you all know, the idea of separation of powers was thought to be one of the unique contributions of those who

wrote our Constitution. Unlike other countries, the Founders created three separate and co-equal branches – the Executive, the Legislative, and the Judicial. Because the Founders were concerned about guarding against a too powerful and overreaching Legislative branch – and also wanted to ensure that the rights of the minority were protected against a tyranny of the majority – they made the Judicial branch independent of the other branches in order to keep the other two in check. To assure such independence, the Framers provided that federal judges would be appointed for life – technically, for good behavior – that Congress could not reduce the compensation of federal judges, and that we could only be removed from office by impeachment for high crimes and misdemeanors. In other words, they created a judiciary that was immune, by and large, from political pressure.

The Founders thought these safeguards necessary because – as Alexander Hamilton noted in Federalist No. 78 – the Judiciary does not have the power of the purse nor the power of the sword. It wields “merely judgment.” And just as important as the Judiciary’s actual independence is its perceived independence. As Justice Ginsburg observed 214 years after Hamilton, “[b]ecause the courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.” Judicial independence can only be maintained, she noted, when the public has “confidence in the integrity and impartiality” of its judges and “accepts and abides by judicial decisions.”

Judicial independence as the Framers saw it – and as we recognize today – obviously doesn’t mean a lack of accountability. Certainly, we federal district court judges know we are not free agents. We are all too often reminded of that by our friends on the courts of appeals who review our decisions. Judges must follow the law and the Constitution, not our own political or philosophical predilections. And we are expected to approach each case with an open mind and render unbiased judgments. Judicial independence is the ability of judges to

be free from outside pressure so we can decide cases impartially, without fear or favor. Chief Justice Rehnquist said that “[t]he Constitution protects judicial independence not to benefit judges, but to promote the rule of law.”

Judges at the state court level, however, are not so insulated from outside pressures. Today 38 states elect judges, a practice that is virtually unknown to the rest of the world. And, because of the fallout from Supreme Court decisions ..., many are elected in heavily financed, often vitriolic campaigns – campaigns that literally invite future conflicts of interest for judges. ... Margaret Marshall, former Chief Justice of the Supreme Judicial Court of Massachusetts, put it this way: “When litigants enter the courtroom hoping their attorney has contributed enough to a judge’s election coffers, we are in trouble, deep trouble.” Chief Justice Nathan Hecht of the Supreme Court of Texas has said: “[W]hen partisan politics is the driving force, and the political climate is as harsh as ours has become, judicial elections make judges more political, and judicial independence is the casualty.”

Predictably, both state and federal judges have in fact increasingly become targets for unsatisfied politicians who serve in the other branches of government. Some government officials seem to reject the notion that a judge should be responsive only to the laws, to judicial precedents, and to federal and state constitutions – not to public opinion and public or political pressure. And, sadly, it appears the drumbeat of this message from politicians running for office or serving in government has resonated with the public. A number of recent polls show that the public’s respect for judges, courts, judicial decisions – and ultimately the rule of law – has plummeted throughout the country in recent years. ... Clearly, we have a serious and growing public perception problem. And it doesn’t help that government officials and candidates for office are fueling the fire.

Let me be clear: I am not suggesting in the least that the work of judges and courts should go unexamined. Judges certainly make mistakes and we federal judges do deal with some hot-button

issues. Our decisions must always be open to thoughtful, principled – maybe sometimes harsh – criticism. It comes with the territory. But even though developing a thick skin is part of the job, it is hard for me to remember a time when judges and courts have been subjected to so much gratuitous personal criticism, vitriolic commentary, and purposely misleading attacks. And it is particularly problematic when such criticism comes from presidents, governors, and members of Congress.

Going back in history we see that criticism of the Judiciary is not new – even from Presidents. As early as President Thomas Jefferson, some presidents have railed against judges with whom they disagreed ... Criticism from members of Congress is not new either. ... But what I know concerns the American College of Trial Lawyers – and so many lawyers and judges today – is that the number of attacks on judges has grown exponentially, and the attacks have gotten more partisan, more personal, more threatening, and more purposefully misleading than ever before. *[historic and current examples removed for brevity, but can be read in the full document] ...*

As Judge Barbara Lynn, former Chief Judge of the U.S. District Court for the Northern District of Texas, recently said: At once point “virtually everyone recognized how inappropriate it was to threaten the life or security of a judge because of a disagreement with the judge’s decisions. Now there are a lot of people who don’t think there’s anything wrong with that.” Widely disseminated personal attacks on judges by politicians and candidates for office, as magnified through social media, undoubtedly have contributed to this trend, even though – and let me emphasize – I am aware of no politicians or government officials who have themselves personally threatened judges with physical violence.

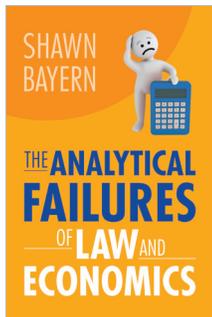
Such threats like these are not just reprehensible; they don’t just undermine the reputations of judges who have dedicated themselves to the administration of justice. They are, as my colleague Judge Trevor McFadden said, “nothing less than an attack on our system of government.”

## Notes About Members and Colleagues

**Kenneth S. Abraham** of UVA School of Law is the recipient of the 2024 William L. Prosser Award from the Association of American Law Schools Section on Torts and Compensation Systems.

**Gregory S. Alexander** of Cornell Law School (Retired) received the 2023 Brigham-Kanner Property Rights Prize from William & Mary Law School.

**Miriam H. Baer** of Brooklyn Law School has authored *Myths and Misunderstandings in White-Collar Crime* (Cambridge University Press 2023), a book discussing public response to white-collar crime and how that response affects lawmaking and enforcement. The book was featured in an episode of the Business Scholarship Podcast. Baer was featured in a book talk and discussion at Brooklyn Law School with **Samuel W. Buell** of Duke University School of Law participating as a discussant.



**Shawn J. Bayern** of Florida State University College of Law has authored *The Analytical Failures of Law and Economics* (Cambridge University Press 2023), a book that evaluates the assumptions and arguments in the law and economics movement.



**John B. Bellinger III** of Arnold & Porter has been awarded the Ordre national du Mérite, National Order of Merit, from France for his contributions to international law.

**Richard J. Bonnie** of UVA School of Law has retired after over 50 years of teaching.

**Susan G. Braden** of The Office of Judge Susan G. Braden (Retired), **John G. Buchanan III** of Covington & Burling, **Michael Chertoff** of Chertoff Group, **Ivan K. Fong** of Medtronic, **Bridget M. McCormack** of the American Arbitration Association-International Centre for Dispute Resolution, **Andrew Perlman** of Suffolk University Law School, **James J. Sandman** of University of Pennsylvania Carey Law School, **Lucy L. Thomson** of Livingston, and **Seth P. Waxman** of WilmerHale have been appointed to

the advisory council of the ABA Task Force on Law and Artificial Intelligence to “identify guiding principles and recommend best practices that lawyers need to navigate this complex technology.”

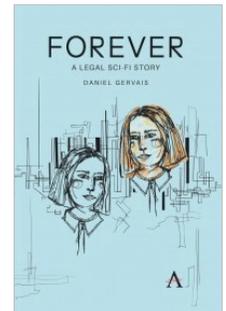
**Susan G. Braden** of The Office of Judge Susan G. Braden (Retired), **Sherrilyn Ifill** of Howard Law School, **Wallace B. Jefferson** of Alexander Dubose & Jefferson, **Linda A. Klein** of Baker, Donelson, Bearman, Caldwell & Berkowitz, **Melissa Murray** of New York University School of Law, and **Thomas M. Susman** of the American Bar Association were members of the ABA Task Force on Law, Society and the Judiciary, which has recently released its findings and recommendations.

**Anthony M. DiLeo** of Anthony M. DiLeo APC has written the cover article for the *Louisiana Bar Journal*, “Important Chances in the 2022 Commercial Arbitration Rules.” DiLeo is helping to draft proposed revisions to Louisiana law on arbitration for the Louisiana Legislature. He has been listed on the 2023 Chambers USA ranking for mediators as one of fewer than 50 nationally recognized mediators.

**Jordan Elias** of Girard Sharp recently authored a pair of articles addressing issues in complex civil litigation.

**Heather Gerken** of Yale Law School, **Kermit Roosevelt III** of University of Pennsylvania Carey Law School, and **Peter J. Rubin** of the Massachusetts Appeals Court provided commentary on a podcast episode of *More Perfect*, discussing Justice David H. Souter’s time on the Supreme Court of the United States.

**Daniel J. Gervais** of Vanderbilt University Law School has authored *Forever, A Legal Sci-Fi Story* (Anthem Press 2023), a book exploring the legal and philosophical questions surrounding the idea of transferring a person’s mind into a synthetic or humanoid body.



President Biden has nominated **John Gleeson** of Debevoise & Plimpton for commissioner of the United States Sentencing Commission.

**Richard L. Hasen** of UCLA School of Law has authored *A Real Right to Vote: How a Constitutional Amendment Can Safeguard American Democracy* (Princeton University Press 2024), a book on the constitutional right to vote.

**Chris Jay Hoofnagle** of University of California, Berkeley Center for Law & Technology participated in “Faculty Perspectives,” a series from the Association of American Law Schools on the topic of generative AI policies at universities.

**Melissa B. Jacoby** of University of North Carolina School of Law and **Samir D. Parikh** of Lewis & Clark Law School appeared as witnesses and provided testimony during a U.S. Senate Committee on the Judiciary hearing discussing mass tort bankruptcies and the potential need for legislative intervention.

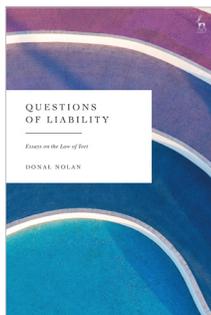
**Wallace B. Jefferson** of Alexander Dubose & Jefferson has authored “Inheritance of Hope,” the feature article in Volume 107, Number 2 of *Judicature*.

**Herbert I. Lazerow** of University of San Diego School of Law has authored *Mastering International Sales Law* (Carolina Academic Press 2023), an introductory book on international sales contracts. He is the coauthor of *International Business Negotiations in a Nutshell* (West Academic Publishing 2023) on the differences between international business and their differences from domestic negotiations.

**Thomas S. Leatherbury** of Thomas S. Leatherbury Law received the Harry M. Reasoner Justice for All Award from the Texas Access to Justice Commission. He is now Clinical Professor of Law and director of the First Amendment Clinic at Southern Methodist University Dedman School of Law.

**Suzette Malveaux** of University of Colorado Law School has been awarded the 2023-2024 Gilbert Goldstein Faculty Fellowship.

**Donal Nolan** of University of Oxford, Worcester College has authored *Questions of Liability, Essays on the Law of Tort* (Bloomsbury Publishing 2023), a book divided into several parts that explores topical issues in core areas of tort law. Members can order through [www.bloomsbury.com](http://www.bloomsbury.com) and use the code **GLR AQ7** for **20% off**.



**Kenneth Ross** of Bowman and Brooke LLP celebrates 50 years of practicing law this year. Recently, he has authored articles for *In Compliance Magazine* entitled “Product Liability Law and Its Effect on Product Safety” and “The Legal Perils of Customer Service.”

**James R. Silkenat** of the World Justice Project has authored “Defining the Rule of Law: A Global Imperative for the 21st Century,” an article in the 2023 issue of *Middle Templar Magazine*, the annual journal of Middle Temple Inn in London, England.

**Christopher Jon Sprigman** of NYU School of Law has coauthored *Antitrust: Principles, Cases, and Materials*, an openly-licensed antitrust law textbook.

**Robert A. Stein** of University of Minnesota Law School interviewed **Amy Coney Barrett** of the Supreme Court of the United States on the topic of judicial ethics.

**E. Thomas Sullivan** of the University of Vermont has coauthored two articles: “The Everyday First Amendment” for *The American Bar Association* and “Can Trump Be Kept Off the Vermont Primary Ballot this March?” for the *Addison County Independent*. Sullivan is coauthoring a book with **Richard W. Painter** of University of Minnesota Law School on the U.S. Presidency, to be published by Cambridge University Press.

*continued on page 18*

## FRIEDMAN ADDRESSES THE AMERICAN COLLEGE OF TRIAL LAWYERS

CONTINUED FROM PAGE 15

...

After 25 years as a practicing lawyer observing judges in action and then nearly 30 years on the Bench, I believe that most judges, whatever their political backgrounds, do take their oaths of office seriously. Most federal trial judges understand that we are not legislators or policymakers and that we are meant to operate under significant constraints: to interpret the laws as written by Congress and faithfully to apply the legal precedents announced by the Supreme Court and the courts of appeals. Now I fully acknowledge that there are some people appointed to the Bench who do, in fact, come to the job with agendas of their own. But I would like to think that the vast majority of judges believe and act as did the late D.C. Circuit Judge (and former Senator) James Buckley – who died a couple of months ago at age 100. Judge Buckley said: “I think a lot of the law I am required to apply is awful. But I view my oath as requiring me to come out with the result the lawmakers intended. I take my orders from the Constitution and from the Supreme Court.”

...

As I conclude these remarks, let me emphasize again, it is not just the independence of judges but the rule of law itself that I believe is at serious risk. As I have discussed, people today simply do not trust the courts and the impartiality of judges and their rulings as they have in the past. Too many now increasingly question judges’ motives, integrity, politics, and commitment to principles of neutrality and nonpartisanship. So, it is more important than ever that we work together to restore respect for the judgments of the courts. As my friend, retired D.C. Circuit Judge Thomas Griffith, said at the ceremony for the unveiling of his portrait last week: “When we are beset by a toxic political polarization that poses an existential threat to the Constitution,” it “is up to the judiciary” – and I would add, the leaders of the Bar – “to show the nation how to engage in reasoned argument with respect for one another.”

It is my fervent hope that – with your help and that of other respected members of the Bar – the judiciary under attack will overcome this moment in time. Together we must attempt to restore our nation’s commitment to such reasoned, respectful argument in our mutual quest to help renew the public’s faith in the integrity and impartiality of our courts. Now more than ever before we judges need leaders in the profession – like the Fellows of the American College of Trial Lawyers – to come to the defense of the courts, their independent role, and the rule of law itself.

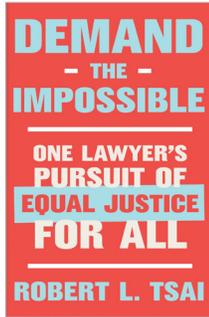
## NOTES CONTINUED FROM PAGE 17

**Thomas M. Susman** of the American Bar Association has been awarded the Lifetime Achievement Award from the National Institute for Lobbying & Ethics.

**Robert L. Tsai** of Boston University School of Law has authored *Demand the Impossible, One Lawyer's Pursuit of Equal Justice For All* (W. W. Norton 2024), a book about the legal career of **Stephen B. Bright** of Yale Law School.



*Thomas M. Susman*



*ALI members R. Patrick Vance and Sarah S. Vance (center), with Janis van Meerveld (far left) and Edward H. Bergin (far right)*

The Federal Bar Association-New Orleans Chapter has honored **R. Patrick Vance** of Jones Walker with the 2023 Jack Martzell Professionalism Award. This award “recognizes an attorney who best exemplifies outstanding professionalism in the practice of law.”

**Mary Jo Wiggins** of University of San Diego School of Law authored “Supremacy Lost?: Zoning, Covenants, and the Evolution of Single-family Ownership” in Volume 128 of the *Penn State Law Review*. She participated in a conference on *The Jurisprudential Legacy of Justice Ruth Bader Ginsburg* at the University of New Hampshire Law School where she discussed Justice Ginsburg’s perspectives on and contributions to the fields of bankruptcy and debtor-creditor law.

**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).**

## DAVID F. LEVI AMONG JUDGES SWORN IN TO DATA PROTECTION REVIEW COURT

On November 14 Attorney General Merrick B. Garland held a formal investiture ceremony for the Data Protection Review Court (DPRC) at the Justice Department, formally swearing in six judges of the eight-member, fully independent court, following the Constitutional oath they have already taken, and marking another milestone in the EU-U.S. Data Privacy Framework (DPF).

ALI President **David F. Levi**, ALI Council member **Virginia A. Seitz** of Sidley Austin, and ALI member **Thomas B. Griffith** of Hunton Andrews Kurth are among the judges.

“In October 2022, I issued new regulations establishing the Data Protection Review Court to serve as the second level of a new redress process established by the President’s Executive Order on Enhancing Safeguards for United States Signals Intelligence Activities,” said Attorney General Garland. “Although this court has been established at the Department of Justice, its judges will independently decide what remedies, if any, are appropriate for the cases in front of them, and the intelligence agencies will be expected to abide by their decisions.”

Last October, the Attorney General issued regulations creating the DPRC within the Office of Privacy and Civil Liberties at the Department of Justice. “The Data Protection Review Court was established by the Attorney General under authority of an Executive Order issued by President Biden for the purpose of safeguarding the legitimate privacy interests that individuals have in their personal information,” said David F. Levi, newly announced Judge to the DPRC and President of The American Law Institute. “I am honored to work with this group of distinguished judges and thank the Attorney General for this opportunity for public service.”

For full bios and more information on the Data protection Review Court, visit [www.justice.gov/opcl/redress-data-protection-review-court](http://www.justice.gov/opcl/redress-data-protection-review-court).



*Pictured: James E. Baker, Virginia A. Seitz, Rajesh De, Didier Reynders, Merrick Brian Garland, David F. Levi, James X. Dempsey, Thomas B. Griffith*



## In Memoriam: Sandra Day O'Connor

Sandra Day O'Connor, the first woman to sit on the Supreme Court of the United States, has died at 93. She was sworn in as Associate Justice on September 25, 1981, and served until 2006. Before her appointment to the Court, she sat on the Arizona Court of Appeals and on the Maricopa County Superior Court, served in the Arizona Senate, and acted as a state assistant attorney general.

The American Law Institute is proud to have had a long relationship with the Justice. A life member of the Institute, she addressed the membership at three Annual Meetings—1983, 2002, and at a special ceremony honoring her service during the 2006 Meeting.

At the 2006 ceremony, Mary M. Schroeder of the U.S. Court of Appeals for the Ninth Circuit said of the Justice,

“For five years, Sandra and I were the first and still the only all-woman team of circuit justice and chief circuit judge in the federal courts. I have seen Sandra off to countless barbecues, luncheons, teas, cocktail receptions, dinners, and even a fishing expedition-for trout, not documents-and through it all and for the past 25 years Sandra has constantly been in the spotlight and always surrounded by admiring throngs, particularly of young women and girls.

Raised with cowboys in the West, she found herself in a more public role of decisionmaker than any woman in our nation's history. This must have been an enormous burden, but Sandra handled it all with unceasing grace and charm. To our generation, Sandra, and to the much larger generations of women in the law that followed ours, you will always be the role model's role model. Thank you, Sandra Day O'Connor, very much.”

After leaving the bench, Justice O'Connor was a tireless advocate for fair and impartial courts, judicial independence, advancing the rule of law in developing democracies, and civic education of the nation's youth.

The complete memoriam and ceremony remarks are available online at [www.ali.org/occonnor](http://www.ali.org/occonnor).



# 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).

## 2024

### January 18-19

Council Meeting - January 2024  
Philadelphia, PA

### February 29

Restatement of the Law, Corporate Governance  
Philadelphia, PA

### March 22

Principles of the Law, High-Volume Civil  
Adjudication  
Philadelphia, PA

### April 5

Restatement of the Law Third, Torts:  
Defamation and Privacy  
Virtual

### April 12

Restatement of the Law, Copyright  
Virtual

### April 19

Restatement of the Law Fourth, The Foreign  
Relations Law of the United States  
Chicago, IL

### May 20-22

2024 Annual Meeting  
San Francisco, CA

### October 17-18

Council Meeting - October 2024  
Philadelphia, PA

## In Memoriam

### LIFE MEMBERS

**Mark Harry Berens**, Chicago, IL; **Stephen V. Bomse**, San Francisco, CA; **Albert I. Borowitz**, Cleveland, OH; **Benjamin R. Civiletti**, Baltimore, MD; **Joseph R. Gladden, Jr.**, Atlanta, GA; **Ridgway M. Hall, Jr.**, Washington, DC; **John G. Harkins**, Philadelphia, PA; **Sandra Day O'Connor**, Washington, DC; **Blaise Pasztory**, New York, NY; **William F. Young**, Larchmont, NY

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