

# Restating Environmental Law

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## INTRODUCTION

Although environmental law springs from deep roots in centuries of common law, during the last forty years in particular it has grown into a well-established and important legal field in the United States with enormous practical consequences.<sup>1</sup> Maturity, however, has also made it notoriously complex, and environmental law's overlapping statutory schemes and inconsistent federal and state programs have sparked recurring conflict, controversy, and criticism.<sup>2</sup> This fractured and complicated network of environmental laws and programs has become increasingly difficult to modify or update to account for emerging environmental

1. Economists have hotly debated the full extent of costs imposed on U.S. economic activity by federal environmental laws and regulations, but most generally agree that the costs viewed in isolation are significant. For example, one study estimates that the cost of compliance with environmental regulations equals roughly two percent of the gross domestic product of the United States. Joel Darmstadter, *Greening the GDP*, RESOURCES, Spring 2000, at 11, 13, available at <http://www.rff.org/RFF/Documents/RFF-Resources-139-greengdp.pdf> [<http://perma.cc/L8YD-7BTD>] (stating that environmental control expenditures such as scrubbers account for about two percent of GDP). EPA has also estimated that compliance costs under the federal Clean Air Act alone totaled approximately \$523 billion from 1970 through 1990. U.S. ENVTL. PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970 TO 1990, at ES-2 (1997) [hereinafter EPA CLEAN AIR ACT COST REPORT], available at [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0295-2.pdf/\\$file/EE-0295-2.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0295-2.pdf/$file/EE-0295-2.pdf) [<http://perma.cc/FY4J-3NFR>]. More recently, the General Accountability Office has asserted that the future economic health of the petroleum-refining sector will depend on developments of key Clean Air Act regulations. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-249, PETROLEUM REFINING: INDUSTRY'S OUTLOOK DEPENDS ON MARKET CHANGES AND KEY ENVIRONMENTAL REGULATIONS 12-20, 26-35 (2014), available at <http://www.gao.gov/assets/670/661710.pdf> [<http://perma.cc/Z48J-GYEG>].

While economists can readily assess direct costs of regulation, their ability to quantify the benefits of environmental protection often triggers fierce disagreement. See, e.g., EPA CLEAN AIR ACT COST REPORT, *supra*, at 53 (benefits of Clean Air Act compliance during same time period estimated to have exceeded \$22 trillion); WINSTON HARRINGTON, RFF DP-06-39, GRADING ESTIMATES OF THE BENEFITS AND COSTS OF FEDERAL REGULATION: A REVIEW OF REVIEWS (2006), available at <http://www.rff.org/Documents/RFF-DP-06-39.pdf> [<http://perma.cc/GJA3-YHSY>] (comparing estimates of benefits and costs of federal environmental regulation prepared by the Office of Management and Budget and the Small Business Administration).

2. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 16 (2008) ("For those who study, teach, or practice environmental law, its complexity is virtually a mantra."). See also *infra* Part I.A.

concerns. As a result, numerous experts, scholars, and advocacy groups have offered proposals to reform U.S. environmental laws, but these initiatives have failed to produce significant statutory advances or implementation.<sup>3</sup> In fact, Congress has not enacted major new environmental legislation since its passage of the Clean Air Amendments of 1990, and existing federal environmental statutes have remained essentially unchanged for over twenty years.<sup>4</sup>

Even without statutory action by Congress, a steady increase in regulatory actions has required courts to reconcile statutes with implementation. Scholars have recognized the increasing importance of clarifying existing environmental laws and policies as interpreted by state and federal common law to try and create an understandable body of environmental law as it exists.

One organization that has not yet offered its assessment or proposal for environmental law is the preeminent entity in the United States for the formulation and clarification of law: the American Law Institute (“ALI”). While the ALI’s Restatements and Projects have helped crystallize core U.S. legal doctrines,<sup>5</sup> mold

3. See *infra* Part I.A.

4. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 162 PENN. L. REV. (forthcoming 2014) (cited with permission), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2393033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2393033) [<http://perma.cc/QJF5-MAKV>]; CTR. FOR PROGRESSIVE REFORM, CPR FOR THE ENVIRONMENT: BREATHING NEW LIFE INTO THE NATION’S MAJOR ENVIRONMENTAL STATUTES 1 (2007), available at [http://www.progressivereform.org/articles/CPR\\_701.pdf](http://www.progressivereform.org/articles/CPR_701.pdf) [<http://perma.cc/T3WS-VHJK>]. See also Professor Richard Lazarus, Address at His Appointment as the Howard and Katherine Aibel Professor of Law at Harvard Law School: Environmental Lawlessness (April 10, 2013), available at <https://www.youtube.com/watch?v=50KY8eltQAs> [<https://perma.cc/KC35-C3M5>] (“But the nation’s principal environmental statutes show their age. New problems—how to deal with climate change, endocrine disruptors, and genetically modified foods—have arisen. Industry efforts to evade the law, inconsistent or toothless federal enforcement, and in recent years, blatant efforts by the Executive Branch to undermine the laws, have all taken their toll, significantly affecting the efficacy of the laws, in some cases, effectively undercutting them. At the same time, the past decade has seen little legislative progress on environmental matters. Each of the nation’s major environmental statutes is long past due for reauthorization.”). In contrast to the ongoing stasis in federal environmental statutes, federal environmental regulations have steadily expanded and now occupy a key role in environmental regulatory action in the absence of statutory dictates. See, e.g., Memorandum from President Barack Obama to the Adm’r of the Env’t. Prot. Agency, 78 Fed. Reg. 39,535 (June 25, 2013) available at <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards> [<http://perma.cc/83LA-YDER>] (directing EPA to undertake development of carbon pollution standards for new and existing power plants in the absence of Congressional statutory action).

5. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (1981); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); RESTATEMENT (SECOND) OF TORTS (1965–79). For a full listing of the ALI’s previously issued Restatements and Principles of the Law, see *Publications Catalog*

emerging fields of law,<sup>6</sup> and explore complex international and administrative topics,<sup>7</sup> the Institute has not undertaken any major projects to clarify environmental, natural resource, or energy law (even as some Restatements and Projects on other topics have included collateral environmental provisions).<sup>8</sup> The ALI's restraint may arise from several historical and policy factors,<sup>9</sup> which we will explore in this article. This article explores those factors and considers whether they militate against the ALI's exploration of environmental projects.

Against this backdrop of restraint, a debate within the ALI has emerged over the last few years about the usefulness and feasibility of a Restatement or Project on environmental, energy, or natural resource laws, and at least one leading scholar has argued that the ALI should not attempt to craft a broad Restatement of Environmental Law, because such a project could hobble the ability to make fundamental changes needed to better protect the environment.<sup>10</sup> Other scholars have also questioned whether the entire field of U.S. environmental law remains too immature and undeveloped to benefit from a comprehensive Restatement or broad Project.<sup>11</sup>

This article explores whether U.S. environmental law needs either a Restatement or other Project that would offer a

*Restatements and Principles of the Law*, AM. LAW INST., [http://ali.org/index.cfm?fuseaction=publications.categories&parent\\_node=999](http://ali.org/index.cfm?fuseaction=publications.categories&parent_node=999) [<http://perma.cc/ZHR5-VGBK>] (last visited Dec. 15, 2014).

6. See, e.g., PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010); INTELLECTUAL PROP. PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN INT'L DISPUTES (2010). Ongoing projects that have not yielded final statements of Principles or Restatements include the RESTATEMENT (THIRD) OF EMPLOYMENT LAW (Proposed Final Draft 2014) and the RESTATEMENT (THIRD) OF THE U.S. LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (Tentative Draft No. 3, 2013).

7. See, e.g., PRINCIPLES OF THE LAW OF LIABILITY INSURANCE (Tentative Draft No. 2, 2014); RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Discussion Draft No. 2, 2014).

8. The ALI has explored some collateral environmental implications of some provisions in its Restatements and Projects on other topics, but it has never fully delved into a dedicated environmental project or statement. See *infra* Part I.A.

9. See *infra* Part I.C.

10. Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 667–68 (2014). See *infra* Part III.

11. See, e.g., Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cinnamon Carlarne, *Maturity and Methodology: Starting a Debate About Environmental Law Scholarship*, 21 J. ENVTL. L. 213, 218 (2009) (“To put it bluntly—environmental law scholarship is characterised as immature. Moreover, these perceptions have not shifted in over two decades. Indeed, for environmental law scholars, environmental law scholarship seems to be like the Peter Pan of legal scholarship—‘the discipline that never grew up.’” (citations omitted)); A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213 (2004).

comprehensive analysis, and it overviews possible reasons why the ALI has not previously undertaken such a Project. Second, we report on an ongoing effort by a workgroup of ALI members to define a potential environmental or natural resource law Project that might offer the best opportunity for clarification or reform. This workgroup of nearly fifty ALI members includes leading environmental practitioners and academics, and it has proposed two carefully defined and limited Projects in the environmental law area.<sup>12</sup> If the ALI undertakes one of the more focused Projects suggested by the workgroup, however, the Institute would not foreclose its ability to develop a broader Principles of Environmental Law or a full Restatement in the future. Third, we assess arguments that any comprehensive analysis of environmental law by the ALI might do more harm than good because it would “freeze” environmental and natural resource law at a point where it still needs further fundamental reform. Finally, we discuss possible future steps to facilitate comprehensive work by the ALI on environmental issues.

## I. IS U.S. ENVIRONMENTAL LAW READY FOR A RESTATEMENT?

### A. The Current State of U.S. Environmental Law

U.S. environmental law<sup>13</sup> has enormous impact on our physical environment, society, and economy. It embodies an accumulation of complex legal and policy decisions intended to protect human health and the environment, it regulates particularly dangerous substances, and it expressly focuses on resources deemed particularly vulnerable such as endangered species. Not

12. The workgroup also received unofficial input on these proposals from attorneys outside of the ALI who work on environmental issues at government agencies or with non-partisan environmental advocacy groups. While we greatly appreciate the suggestions and information provided by these outside sources, the opinions expressed in this article are solely those of the authors.

13. The critical initial step of defining which laws constitute “environmental law” could pose challenging practical and doctrinal challenges. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry into Legal Taxonomy*, 95 CORNELL L. REV. 221, 259–64 (2010) (outlining the difficulties of defining environmental law as a distinct legal field). Many fields of law overlap with environmental interests, and as a result any credible assessment of environmental law principles and doctrine will need to include some examination of important related concepts in tort law (e.g., nuisance, trespass, and strict liability for management of ultrahazardous materials), property law, foreign relations law, conflict of laws, remedies, and other fields. The ALI, of course, has already spoken in all of these arenas. *See supra* notes 5–8; *infra* note 46.

surprisingly, these wide-ranging goals and aspirations have spawned overlapping and often discordant legal doctrines.

While U.S. environmental law has roots in long-standing common law actions under tort, property, and contract law, its modern era began with the passage of several key federal statutes in the 1970s. In just over a decade, Congress passed virtually every federal law that continues to govern environmental law today. These statutes include well-known federal programs such as the National Environmental Policy Act<sup>14</sup> (“NEPA”) (which requires environmental impact assessments for major federal actions), the Endangered Species Act (“ESA”),<sup>15</sup> the Toxic Substances Control Act (“TSCA”),<sup>16</sup> the Resource Conservation and Recovery Act<sup>17</sup> (“RCRA”) (which governs solid and hazardous waste management), the Comprehensive Environmental Compensation and Liability Act<sup>18</sup> (otherwise known as the “Superfund Act” or “CERCLA”), the Clean Air Act,<sup>19</sup> the Clean Water Act,<sup>20</sup> and the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”)<sup>21</sup> (which regulates pesticides and herbicides). Other than reauthorizations and

14. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4347 (2012)).

15. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544 (2012)).

16. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2697 (2012)).

17. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (2012)). RCRA was implemented through an extensive revision to the prior Solid Waste Disposal Act, Pub. L. 89-272, 79 Stat. 997 (1965) (codified as amended at 42 U.S.C. §§ 6901-6992k (2012)), and RCRA in turn underwent significant modification through the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6917-6991i (2012)).

18. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (2012)) (significantly amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10 U.S.C., 26 U.S.C., and 42 U.S.C. (2012))).

19. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7515 (2012)) (significantly amended by the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7515 (2012))).

20. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1388 (2012)) (significantly amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1388 (2012))).

21. Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 94-140, 89 Stat. 751 (1975) (codified at 7 U.S.C. §§ 136-136y (2012)).

amendments to these statutes,<sup>22</sup> Congress has not passed a new major environmental statute since 1990.<sup>23</sup>

Although Congress implemented most of these laws within a narrow time frame, it did not attempt to integrate the laws into a consistent and comprehensive environmental program. As a result, federal environmental laws and regulations have overlapping jurisdictions that can create multiple and conflicting legal obligations as well as duplicative and confusing regulation.<sup>24</sup> Despite several proposals by scholars, public interest groups, and practitioners,<sup>25</sup> neither Congress nor any federal agency has

22. Some of the more notable reauthorizations and amendments include the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7515 (2012)) and the Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251-1388 (2012)).

23. The last major federal environmental legislation successfully passed by Congress and signed by the President was the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7515 (2012)). While this act technically only amended the prior federal Clean Air Act, it wrought such fundamental changes to the statute that most commentators and practitioners view it as a fundamentally new major environmental law.

24. Multiple federal environmental provisions may cover similar activities or materials and create a possibility for conflicting mandates. *See, e.g.,* *Coeur Alaska, Inc. v. Se. Ala. Conservation Council*, 557 U.S. 261, 283-86 (2009) (requiring memorandum of agreement between EPA and the U.S. Army Corps of Engineers to resolve permit obligations where conflicting potential regulatory requirements for mining materials discharged into waters of the United States). Commentators have also long noted that the federal environmental statutory framework's reliance on delegation to state authorities for implementation and enforcement can create complex and difficult challenges. *See, e.g.,* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1197 (1977). *See also* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 587-94 (1996) (describing structural mismatches between structure of proposed regulation and scale of environmental problem at issue, and how local entities may face regulatory incentives that fail to reflect the full scope of costs and benefits); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 786-800 (2006) (discussing the conflict between state efforts to innovate and expand environmental regulation and less ambitious federal policies); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1171-78 (1995) (analyzing modern models of environmental federalism approaches and difficulties of assuring sufficient state compliance); Richard L. Revesz, *Federalism and Environmental Law: A Public Choice Analysis*, 115 HARV. L. REV. 553, 583-630 (2001) (pointing out that many states adopt environmental programs even when not compelled by federal dictate, thereby contradicting public choice theory justifications for federal intervention into environmental policy).

25. *See, e.g.,* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333 (1985) ("The present regulatory system wastes tens of billions of dollars every year, misdirects resources, stifles innovation, and spawns massive and often counterproductive litigation."); Richard J. Lazarus, *Environmental Law After Katrina: Reforming Environmental Law by Reforming Environmental Lawmaking*, 81 TULANE L. REV. 1019, 1042-49 (2007); DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *BREAKING*

successfully consolidated multiple federal environmental programs into an overarching statute or unified regulatory program.<sup>26</sup> While some state agencies have implemented “one-stop” permitting procedures for certain facilities, these administrative programs do not address the underlying fragmentation of multiple environmental legal authorities.<sup>27</sup>

The potential for overlap and conflict arises in part from the fundamental federalist design underlying most major federal environmental statutes. These laws expressly reserve a prominent role for states to implement their own environmental programs within the federal framework. For example, the federal Clean Water Act, Clean Air Act, and RCRA allow states to seek authority to implement air, water, and waste programs under their respective state laws in lieu of the federal programs.<sup>28</sup> The principles of

THE LOGJAM: ENVIRONMENTAL REFORM FOR THE NEW CONGRESS AND ADMINISTRATION (2009) available at <http://www.breakingthelogjam.org/wpcontent/uploads/sites/23/2014/06/BreakingLogjamReportfinal.pdf> [<http://perma.cc/SL55-L4M2>]. See also Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y F. 253, 253 (2013) (“Major environmental policy reform is long overdue.”).

26. EPA and the U.S. Army Corps of Engineers have attempted to craft a unified framework for regulation of wetlands under multiple statutes, but those efforts have not yet yielded a final integrated statute or rules. As a result, EPA and other agencies have frequently relied instead on Memoranda of Understanding to clarify which federal environmental statute will take precedence in specified circumstances and to identify which federal agency will take the lead in addressing those situations. See, e.g., *Coeur Alaska*, 557 U.S. at 286. Congress has also set out a clear framework to identify lead agencies to coordinate responses to releases of petroleum or hazardous substances into the environment that warrant an emergency abatement effort or a removal action. See National Response Team, 40 C.F.R. § 300.110 (2014); Regional Response Teams, 40 C.F.R. § 300.115 (2014); On-Scene Coordinators and Remedial Project Managers: General Responsibilities, 40 C.F.R. § 300.120 (2014).

27. For example, Texas attempted to streamline and harmonize its environmental permitting programs by consolidating various state agencies with environmental authority into a single entity that would offer “one-stop” permitting. *The History of the TCEQ and Its Predecessor Agencies*, TEX. COMM'N ON ENVTL. QUALITY, <http://www.tceq.state.tx.us/about/tceqhistory.html> [<http://perma.cc/28A7-LSL9>] (last visited Dec. 16, 2014) (The Texas Legislature created the Texas Natural Resource Conservation Commission in 1993 to “make natural resource protection more efficient.”). While this approach minimized complexity and inefficiencies within the Texas environmental administrative system, it did not address the underlying difficulties posed by multiple statutory programs that impose different permitting obligations and procedures.

28. 42 U.S.C. § 6926(b) (2012) (authorized state programs under RCRA); 33 U.S.C. § 1342(b) (2012) (delegation of Clean Water Act discharge permit programs to states); 42 U.S.C. § 7410 (2012) (state implementation plan process for attainment of national ambient air quality standards under Subchapter I of the Clean Air Act). CERCLA does not allow states to seek delegation, but it requires that federal response actions meet applicable or relevant and appropriate requirements under state law. 42 U.S.C. § 9621(d)(2) (2012). States also frequently establish their own mini-Superfund programs to address contaminated



cooperative federalism have far-reaching implications. States that receive delegated authority under environmental laws must meet minimum federal standards and legal requirements. Moreover, the federal government generally retains independent oversight and enforcement authority when it delegates operating authority for an environmental program to a state.<sup>29</sup> These states can also impose more stringent requirements or their own varying regulatory mandates onto broader categories of activities and materials.<sup>30</sup> This arrangement has created situations where the law is unclear or in conflict, and it can raise unresolved issues arising from possible federal preemption of state law.<sup>31</sup>

While legitimate and foundational principles of sovereignty and federalism help explain the current structure of U.S. environmental law, the fragmented, overlapping, and diffuse distribution of statutory environmental authority can have significant negative consequences. Most obviously, the vitality and integrity of the environment play a critical role in protecting human health and biological systems, and those laws empower and guide governmental programs to protect rare and precious natural resources such as endangered species, pristine national parks, reserves, and biological and ecological assets.<sup>32</sup> The economic ramifications of environmental regulation are similarly profound: the implementation of this “complex array of rules and

sites that fall outside the CERCLA program. ENVTL. LAW INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY 7-9 (2002), *available at* <http://www.eli.org/sites/default/files/eli-pubs/d12-10a.pdf> [<http://perma.cc/4JTS-NBEL>].

29. 42 U.S.C. § 6926(b) (2012) (authorized state programs under RCRA); 33 U.S.C. § 1342(b) (2012) (delegation of Clean Water Act discharge permit programs to states); 42 U.S.C. § 7410 (2012) (state implementation plan process for attainment of national ambient air quality standards under Subchapter I of the Clean Air Act).

30. For example, states with delegation to implement their own hazardous waste regulatory programs in lieu of the federal requirements under RCRA can regulate some secondary materials as “solid wastes” even if federal programs would not classify them as hazardous. They can also regulate certain activities more strictly as long as their programs are (i) at least as strict as, and (ii) equivalent to federal standards. 40 C.F.R. § 271.4 (2014) (consistency requirements for state programs seeking delegation from EPA); *see, e.g.*, MD. CODE REGS. 26.13.05.19 (2014) (banning disposal of hazardous wastes in underground injection wells, which is typically allowed under federal regulations).

31. *See infra* note 68 (describing potential preemption of state tort remedies by federal permitting regimes).

32. *See generally* J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, THE LAW AND POLICY OF ECOSYSTEM SERVICES 57-83 (2007) (providing an overview of economic approaches to valuation of ecosystem services).

regulations . . . costs the private sector approximately \$200 billion per year.”<sup>33</sup>

## B. The ALI’s Mission and Methodology

The ALI describes itself as “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.”<sup>34</sup> It currently has over 4,000 members (including about 2,700 elected members).<sup>35</sup> The elected members are nominated and elected to the ALI by existing members through a rigorous screening process. The appointed members are judges and deans of law schools. All of these members work on a wide range of projects to further the organization’s stated goals.<sup>36</sup> The ALI initially focused on the development of Restatements of core areas of law. According to the ALI, Restatements seek to address uncertainty in the law by providing a concise restatement of what the law actually was in those areas.<sup>37</sup>

After the adoption of its charter in 1923, the ALI spent twenty-one years developing its first set of Restatements on the central common law subjects.<sup>38</sup> After preparing subsequent additional Restatements in 1952, the ALI began drafting its set of Third Restatements in 1987 and has continued to work on them to this day.<sup>39</sup> These latest Restatements have expanded beyond traditional

33. ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 5 (7th ed. 2013). *See also supra* note 1 (discussing economic impacts of federal environmental regulation).

34. *About ALI: ALI Overview*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.overview> [<http://perma.cc/U6UR-7ZDB>] (last visited Dec. 16, 2014).

35. AM. LAW INST., ANNUAL REPORT 2013–2014, at 26 (2014), *available at* [http://www.ali.org/doc/ALI\\_Annual\\_Report\\_2014\\_web\\_2.pdf](http://www.ali.org/doc/ALI_Annual_Report_2014_web_2.pdf) [<http://perma.cc/5J93-LBKE>].

36. The ALI limits its elected membership of judges, lawyers, and law professors to 3,000. The membership also includes *ex officio* members, honorary members, and lifetime members that increase total overall membership to more than 4,400. *The American Law Institute Elects 45 New Members*, AM. LAW INST. (Jan. 24, 2014), [http://www.ali.org/index.cfm?fuseaction=news.release\\_01242014](http://www.ali.org/index.cfm?fuseaction=news.release_01242014) [<http://perma.cc/R9AM-FBKC>].

37. *About ALI: Overview: Projects*, AM. LAW INST., <https://www.ali.org/index.cfm?fuseaction=about.instituteprojects> [<https://perma.cc/U5L6-8G4J>] (last visited Dec. 16, 2014).

38. The initial Restatements summarized the law of “Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Securities, Torts, and Trusts.” *Id.*

39. The ALI recently began work on its initial Fourth Restatements of Law. *See The American Law Institute Announces Four New Projects*, AM. LAW INST. (Nov. 17, 2014), <http://www.ali.org/email/pr-14-11-17.html> [<http://perma.cc/AJV3-2A3G>] (announcing that the ALI has begun work on *Restatement (Fourth) of Property*); *Publications Catalog*:

common law practice areas to include a broad array of topics including American Indian law, employment law, non-profit governance, information privacy principles, and unfair competition law.<sup>40</sup>

The ALI has also expanded to other types of legal tools and pronouncements beyond Restatements to help clarify new areas of law. For example, the ALI has prepared Statements of Principles in legal areas that might need reform or modification.<sup>41</sup> These Principles typically result from intense legal analysis and debate, and convey in-depth recommendations for changes in that field of law. Such projects have dealt with relatively non-traditional legal fields outside core common law practice areas such as aggregate litigation, family dissolution, transnational insolvency, and software contracts.<sup>42</sup>

The ALI relies on an intensively collaborative process to develop its Restatements, Projects, and Principles. After selecting topics for work, the ALI appoints two or more Reporters who oversee and curate work on the project. An advisory board of leading practitioners and academics provides substantive support for the effort, and a larger consultative group allows multiple ALI members to participate in drafting and editing at key junctures. As the draft emerges from this collaborative process, the Reporters typically present portions of the effort for review and comment to the full ALI membership during the annual meeting. This process prizes broad and varied input to provide thorough and nuanced analysis of existing laws and principles, and as a result it can take extraordinary effort and time. The tendency to shy away from controversial topics which frustrate consensus can also foster the perception among outside parties (or even ALI members) that the

*Restatement of the Law Fourth, The Foreign Relations Law of the United States*, AM. LAW INST., [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=148](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=148) [<http://perma.cc/A7RY-7ZBR>] (last visited Dec. 16, 2014).

40. *See, e.g.*, RESTATEMENT OF THE LAW OF AM. INDIANS (Discussion Draft No. 2, 2014); RESTATEMENT (THIRD) OF EMP'T LAW (Proposed Final Draft 2014); RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGS. (Tentative Draft No. 4, 2013); RESTATEMENT OF DATA PRIVACY PRINCIPLES (in progress); RESTATEMENT (THIRD) OF UNFAIR COMPETITION (1995).

41. *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002); INT'L STATEMENT OF U.S. BANKR. LAW (2003); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS (2010).

42. *See supra* note 41.

ALI moves especially slowly with such issues, or that such controversies can even derail difficult aspects of some projects.<sup>43</sup>

### C. Prior Work by the ALI on Environmental Law

The ALI began its mission to reduce the complexity and uncertainty of U.S. law decades before the creation of the first modern environmental laws,<sup>44</sup> but it has not yet produced any major work focused directly on environmental or natural resource law. Nonetheless, prior Restatements and Projects have touched on important environmental issues in other contexts. For example, the *Reporters' Study on Enterprise Responsibility for Personal Injury* sparked an intense discussion on the appropriate scope of joint and several liability for environmental harms.<sup>45</sup> Other Restatements have discussed environmental liabilities or obligations within the context of unrelated legal fields such as trusts, restitution, torts, and judgments.<sup>46</sup>

The ALI has also prepared Projects that discuss legal issues related to U.S. environmental law. For example, its *Model Land Development Code* of 1976 addressed environmental issues related to

43. In addition to Restatement, Principles, and Projects, the ALI can also offer guidance on specific legal subjects through model codes. For example, the ALI's pioneering work on the *Model Penal Code* and its support of the *Uniform Commercial Code* has profoundly affected subsequent developments in criminal law and commercial law. The ALI has not broached any environmental topics through a model code project in the past, and the *Model Penal Code* does not contain any provision that specially addresses environmental injuries or offenses.

44. See *supra* notes 37–38 & accompanying text.

45. For example, Lois Schiffer, Assistant Attorney General for the U.S. Department of Justice's Environment and Natural Resources Division, submitted comments in her personal capacity to object to proposed language that arguably reduced environmental liability for certain joint environmental tortfeasors. Memorandum from Lois J. Schiffer, Assistant Att'y Gen., U.S. Dep't of Justice, to Reporters for Restatement (Third) of Torts: Apportionment of Liability (1998), available at [http://www.ali.org/ali\\_old/shiffer.htm](http://www.ali.org/ali_old/shiffer.htm) [<http://perma.cc/PZ25-2ZRA>].

46. A comprehensive compilation of the existing provisions touching on environmental aspects of other projects would be a worthwhile resource. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 86(f) (2007) (fiduciary duties of trustees faced with real property assets that might contain environmental contamination); RESTATEMENT (FIRST) OF RESTITUTION § 115 cmt. (1937) (referring to cases where plaintiffs sought restitution for cleaning up contamination caused by other parties); RESTATEMENT (SECOND) OF TORTS § 523 cmt. (1979) (liability for environmental cleanups discussed in cited cases); RESTATEMENT (SECOND) OF TORTS §§ 821B, 821D, 832, 849 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 39 cmt. (1982) (citing cases discussing preclusive effect of prior judgment for penalties and injunction against environmental violations); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 601–604 (1987); RESTATEMENT (THIRD) OF PROP. (SERVITUDES) §§ 7.11, 8.5 (2000) (modification and enforcement of conservation servitudes).

the management and development of real property.<sup>47</sup> The *Restatement (Third) of the Foreign Relations Law of the United States* includes extensive discussions of the environmental rights and obligations of littoral states with jurisdiction over adjacent water bodies,<sup>48</sup> and the *Restatement (Second) of Torts* outlines the potential use of public and private nuisance to abate threats to the environment embodied by incursions into the enjoyment of private property.<sup>49</sup> These collateral discussions of environmental issues within other legal fields, however, fail to provide the kind of comprehensive and ambitious assessment provided by the ALI for most major areas of U.S. law. As a result, a discipline of great importance to society and to the health of the public and the planet—environmental law—has fallen outside the ALI’s efforts to “clarify, modernize, and otherwise improve the law.” The current state of environmental law presents exactly the specter of disorganization that the ALI has sought to remedy as part of its mission.

#### D. Considering U.S. Environmental Law in Light of the ALI’s Expectations

To our knowledge, the ALI has not published official criteria or guidelines for how it evaluates and chooses new projects. On its public website, the organization describes in general terms its process of choosing projects and notes that the “nature, content, and scope of each project are initially developed by its Reporter in consultation with the Institute’s Director.”<sup>50</sup> While this description seems intuitive, it mingles the role of the project reporter (who remains unnamed until the ALI accepts the project) and the Director, and consequently it gives no insight into the factors that influence the Director to initially identify a particular project as worthy of pursuit. Likewise, the description points out that the “Director’s recommendations that particular projects be undertaken and designations of specific Reporters are subject to

47. See generally MODEL LAND DEV. CODE arts. 3, 7–8 cmts. (1976) (discussing, respectively, objectives of local land development planning, state land development regulation, and state land development planning).

48. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 511–517 (1987).

49. See *supra* note 46.

50. *Projects: Overview*, AM. LAW INST., <http://ali.org/index.cfm?fuseaction=projects.main> [<http://perma.cc/45HB-Y3RT>] (last visited Dec. 16, 2014).

the approval of the Council or Executive Committee.”<sup>51</sup> As a result, the Director, the Council, and the Executive Committee appear to use reasonable general criteria to select projects, but the factors that weigh in their respective decisions on specific projects remain somewhat opaque.

Discussions at recent ALI annual meetings, as well as two informal articles from the *ALI Reporter*, have yielded a general description of the ALI’s current process and outlined some aspects of the ALI’s selection criteria.<sup>52</sup> Most notably, the ALI recently issued a listing of its current projects that discussed how it develops and drafts projects.<sup>53</sup> Its description of the ALI’s selection process notes that:

- 1) Project ideas are generated by the Director and the Program Committee. These ideas may include suggestions received from ALI members.

51. *Id.*

52. The ALI discussed its process to select new projects at a special session during its 2010 annual meeting, and it followed with another special session on new project development hosted by the chair of the ALI’s Programs Committee and the Executive Director. See *88th Annual Meeting Events and Speakers*, AM. LAW INST., <http://2011am.ali.org/events.cfm> [<http://perma.cc/7NZS-J24H>] (last visited Dec. 16, 2014) (2011 annual meeting); *87th Annual Meeting Events and Speakers*, AM. LAW INST., <http://2010am.ali.org/events.cfm> [<http://perma.cc/KYA2-4B4M>] (last visited Dec. 16, 2014) (2010 annual meeting). In addition, the ALI has included overviews of its selection process in recent issues of its newsletter. For example, immediate past Director Liebman recently noted that:

Second, and much harder, is the matter of what projects to start, no matter what they may be called. . . . In a concluding contribution [to a recent symposium at Brooklyn Law School], I wrote that, to be taken up by the Institute, “a subject of law must be substantial enough to need several years of intellectual effort to distill it into principles. It must be worthy of review by Advisers. . . . It must support interesting and constructive debate by the ALI Council and at annual meetings. And finally, it must be capable of being debated without descending into political dust-ups. The goal is work that benefits lawyers and judges, whether or not they are persuaded by every sentence.”

Lance Liebman, *My Time as Director and Possible Next Steps for the ALI*, A.L.I. REP., Spring 2014, available at [http://www.ali.org/\\_news/reporter/spring2014/03-My\\_Time.html](http://www.ali.org/_news/reporter/spring2014/03-My_Time.html) [<http://perma.cc/7ZYR-SDPS>]. See also Lance Liebman, *The Director’s Role*, A.L.I. REP., Winter 2006, available at [http://www.ali.org/ali\\_old/R3099-01-President.htm](http://www.ali.org/ali_old/R3099-01-President.htm) [<http://perma.cc/W6QM-EGCA>]. See also G. Edward White, *From the Second Restatements to the Present: The ALI’s Recent History and Current Challenges*, 16 GREEN BAG 305, 316–19 (2013), available at [http://www.greenbag.org/v16n3/v16n3\\_articles\\_white.pdf](http://www.greenbag.org/v16n3/v16n3_articles_white.pdf) [<http://perma.cc/HBJ9-5YGN>] (providing an overview of project selection and discussing the need to bridge gap between subject matter interests and techniques of legal academics and other sectors of the legal profession).

53. AM. LAW INST., *How a Project is Developed and Drafted*, in CURRENT PROJECTS OF THE AMERICAN LAW INSTITUTE 8–9 (unpublished newsletter distributed at the ALI Annual Meeting on May 18–21, 2014) (on file with Tracy Hester).

- 2) The Director investigates a potential project and develops a project proposal, which usually includes a prospectus from a proposed Reporter or Reporters.
- 3) The Director provides the project proposal to the Program Committee for its advice and recommendation.
- 4) An invitational conference might be held to discuss the scope of the project and to help identify potential Advisers. (This could instead happen after Step 5.)
- 5) The Director recommends the project and Report to the Council for approval.<sup>54</sup>

This process description highlights several important themes. The ALI selects topics and projects where its deliberative consensus process can yield a legal analysis and formulation within a workable timeframe, and that analysis can both help to clarify areas of confusion and ambiguity in the law and to foster any needed legal reforms. These guiding principles naturally generate some broad criteria for the desirability of a proposed new project. Professor Lance Liebman, formerly the long-time Director of the ALI, has provided a pithy summary of these factors: “[t]he key criteria for contemporary ALI work are relevance, need, competency, balance, and diversity.”<sup>55</sup>

Despite the absence of explicit selection criteria, several factors appear to influence the ALI’s choice of projects, including some of the following considerations.

#### 1. The Problematic Realm of Statutory Law

ALI members assert that the ALI’s approach does not mesh well with topics that are purely statutory in nature or too deeply rooted in statutes and regulatory dictates, because such subject areas seem better suited to efforts to craft model legislation or other legislative avenues. Under this rationale, legislation apparently demands pragmatic trade-offs that legal principles alone cannot explain. Other groups have taken the lead on efforts to craft model statutes or rules, although the ALI has also played an important role in crafting important model and uniform laws.

54. *Id.* at 8.

55. Liebman, *The Director’s Role*, *supra* note 52. The ALI recently named Professor Richard Revesz as the next Director, and he assumed his new duties at the ALI’s Annual Meeting in May 2014. See *About ALI: ALI Officers & Council*, AM. LAW INST., <http://ali.org/index.cfm?fuseaction=about.officers> [<http://perma.cc/N6CA-HVU3>] (last visited Dec. 16, 2014). To date, Professor Revesz has not made any statements or published any earlier writings that would reflect a different approach to the ALI’s process to select new projects.

While the ALI has undoubtedly balanced these concerns when it selected projects that may involve political or compromise statutory decisions along the lines noted above, the ALI nonetheless has historically made significant contributions in such areas. Indeed, some of these efforts have proven extraordinarily successful (e.g., the *Uniform Commercial Code*<sup>56</sup> and the *Model Penal Code*<sup>57</sup>). Other projects have helped influence future legal developments without becoming laws themselves (e.g., the ALI's *Model Code of Evidence*<sup>58</sup> and federal securities law statutory project<sup>59</sup>). Nonetheless, a perception that statutory treatments have dominated a legal field may discourage hopes that an ALI project could contribute to advancing the law of an area.

## 2. The Caveat of Unmanageable Complexity

Another characteristic that apparently militates against the ALI's pursuit of a particular subject is the field's reputation for unusual complexity. If a legal subject poses especially sprawling and broad complex issues that resist summary or reformulation, the ALI's leadership may conclude that it cannot readily distill that area into a Restatement or Project. This concern could justify refocusing the effort to a narrower subfield of the broader topic. Some descriptions of environmental law, including the assessments of the complexity of cooperative federalism noted previously, as well as other overviews of scalable authorities<sup>60</sup> and interests involved in environmental disputes, may add to this perception of complexity and discourage the ALI from entering the field.

On the other hand, the ALI has taken up work in areas of formidable complexity with success. For example, the current projects in progress on *Restatement (Fourth) of the Foreign Relations Law of the United States* include complexity of impressive dimensions.<sup>61</sup> An update of the twenty-five-year-old *Restatement*

56. THE AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE CODES, THE UNIFORM COMMERCIAL CODE 2013-2014 EDITION OFFICIAL TEXT AND COMMENTS (2014).

57. THE MODEL PENAL CODE (1962).

58. THE MODEL CODE OF EVIDENCE (1942).

59. THE FEDERAL SECURITIES CODE (Supp. 1981).

60. See, e.g., Hari M. Osofsky, *The Future of Environmental Law and Complexities of Scale: Federalism Experiments with Climate Change Under the Clean Air Act*, 32 WASH. U. J.L. & POL'Y 79 (2010).

61. *Projects: Current Projects: Restatement of the Law Fourth, the Foreign Relations Law of the United States*, AM. LAW INST., [http://ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=28](http://ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=28) [<http://perma.cc/32DJ-CFR2>] (last visited Dec. 16, 2014).



(*Third*) of the *Foreign Relations Law of the United States* includes daunting topics such as jurisdiction, the domestic effect of treaties, and sovereign immunity. Similarly, the current project on *Restatement (Third) of the U.S. Law of International Commercial Arbitration* includes an impressive array of difficult and intertwined issues, involving perplexing issues of extraterritoriality and tenuous jurisdiction of international arbitral proceedings in the United States, the enforcement of international arbitral from abroad, and arbitration under an international convention.<sup>62</sup>

The law of unfair competition also presents a dizzying combination of property, tort, and statutory law. Nevertheless, this topic is the subject of the *Restatement (Third) of Unfair Competition's* comparison and reconciliation of common law principles regarding deceptive practices with federal and state statutes, including the Unfair Trade Practice and Consumer Protection Act, the Lanham Act, and state anti-dilution acts.<sup>63</sup>

### 3. The Trap of Irreconcilable Controversy

The ALI's goal of consensus and its reliance on discussion among its members to reach conclusions mean that hotly disputed topics or fields of law may delay or even prevent agreement. Accordingly, even with a history of reconciling controversy and eventually concluding projects, there is perhaps a natural reluctance to pursue projects so controversial that a consensus is deemed impossible. If the leadership concludes that environmental law poses such a risk of heated disagreement, the ALI may avoid a project in the area because the effort's opportunity costs would outweigh the unlikely potential benefit of a success. Of course, this objection may prove self-fulfilling: concerns over the level of controversy in environmental law may foreclose the very debate and analysis needed to determine whether agreement and work in this field is possible. In addition, controversy certainly has not prevented the ALI from shouldering major projects in other difficult and controversial areas of the law. For example, the ALI is

62. *Projects: Current Projects: Restatement of the Law, the U.S. Law of International Commercial Arbitration*, AM. LAW INST., [http://ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=20](http://ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20) [<http://perma.cc/49MR-3GTF>] (last visited Dec. 16, 2014).

63. *Publications: Publications Catalog: Restatement of the Law Third, Unfair Competition*, AM. LAW INST., [http://ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=58](http://ali.org/index.cfm?fuseaction=publications.ppage&node_id=58) [<http://perma.cc/ARK9-5ALB>] (last visited Dec. 16, 2014).

currently addressing mandatory penal sentencing,<sup>64</sup> current death penalty practices, and a *Restatement of Employment Law*.<sup>65</sup>

#### 4. A Related Concern: Opportunity Cost

When a proposed topic will require significant time and resources, it may affect the organization's commitment to other proposed projects. As a result, the ALI may lean against selecting subjects that will likely require a commitment of resources that may detract from other projects. This observation assumes, of course, that the ALI members whose expertise and preferences would qualify them to work on a particular project (such as environmental law) could also instead devote that same time and effort to different unrelated projects.<sup>66</sup>

#### 5. The Limiting Factor of Specialization

Areas that are so narrow and specialized that few members or lawyers have occasion to need or be affected by the area are unlikely candidates for attention by the ALI. When a particular area of law is of such a specialized nature that few are involved and few interested, it is unlikely to spark interest by the ALI membership. While the ALI's membership is broad enough to support workgroups on a large number of legal areas, the current members may yet not include sufficient specialists in a particular area that the ALI has not previously explored.

\* \* \* \*

Whether environmental law matches up well or fails the hypothesized tests set forth above is a difficult and subjective judgment. While some would see environmental law as a clearly worthwhile choice for the organization's process, others have challenged this judgment and argue that the ALI should avoid the topic entirely or set a narrow scope for an initial environmental

64. *Projects: Current Projects: Model Penal Code: Sentencing*, AM. LAW INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=2](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=2) [<http://perma.cc/4CZ3-VVDX>] (last visited Dec. 16, 2014).

65. *Projects: Current Projects: Restatement of the Law, Employment Law*, AM. LAW INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=11](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=11) [<http://perma.cc/A33E-4P3P>] (last visited Dec. 16, 2014). *See also supra* note 6.

66. In light of the expressions of interest in an environmental project by over fifty ALI members who are currently environmental scholars and practitioners, the ALI may not face a significant opportunity cost if it pursues an environmental project. *See infra* Part I.D.5.

project.<sup>67</sup> Thus, we have an open question and one that has been considered by the leadership but neither rejected nor publicized for consideration by the membership. Several strong reasons, however, still militate in favor of a Restatement of Environmental Law or a Project on Principles of Environmental Law.

First, while U.S. environmental law undoubtedly has strong ties to federal statutes and regulations, it also has deep historical roots in common law tort that shape core aspects of its statutory and regulatory framework. For example, environmental law includes well-developed notions of nuisance, trespass, and negligence that operate in concert with statutory and regulatory claims to provide broader avenues of redress for environmental injury.<sup>68</sup> Second, the ALI has tackled other areas of law that spring from heavily statutory sources, and its work has yielded both Restatements and elaborations of Principles nonetheless.<sup>69</sup> Third, even common law fields of practice that the ALI has explored in the past are now dominated or heavily shaped by statutes and regulations. The presence of a legislative voice—especially if it is inconsistent in different areas and varies substantially over time—may actually increase the need for an authoritative distillation of the appropriate fundamental concepts that should drive future legislative and legal development.

More importantly, environmental law has also seen substantial elaboration and development at the state and local levels in both federal and state common law. At the federal level, questions of how to interpret statutory terms in varying contexts and among multiple statutes have become increasingly important as regulatory expansion of statutes increases.

At state and local levels, most major federal environmental statutes allow states to obtain authorization to operate their environmental programs in lieu of the federal program.<sup>70</sup> These state programs can impose varying and more stringent standards than the federal framework. As virtually every state has

67. *See, e.g.*, Tarlock, *supra* note 11.

68. The complex interplay of preemption doctrine, displacement caselaw, and federal statutory savings clauses makes the availability of common law remedies highly dependent on the specific environmental injury at issue and the statutory claim. *See, e.g.*, North Carolina *ex rel.* Cooper v. Tennessee Valley Auth., 615 F.3d 291 (4th Cir. 2010) (finding that federal Clean Air Act broadly preempted state law public nuisance and other tort claims against a facility that held a permit issued by a delegated state program).

69. *See supra* notes 40–41.

70. *See supra* notes 28–29.

implemented its own programs to regulate air, water, and waste pollution, environmental law has bloomed into a rich and fractious body of environmental decisions and standards. Some fields of natural resource law, by contrast, have remained deeply rooted in state law from their inception and have always varied widely between states (e.g., water law).

Second, environmental law has earned a well-deserved reputation for complexity, and it has led to the creation of a bar of environmental specialists who practice full-time in their respective fields.<sup>71</sup> Large portions of environmental law, however, rely on areas of litigation and common law principles that should ring familiar to all ALI members, regardless of their practice area. For example, portions of a Project that address environmental enforcement would likely draw on principles of litigation and defense that parallel other areas of law where the ALI members may have expertise (e.g., criminal law, corporate responsibility, and principles of restitution and equitable remedies). In addition, the ALI already has over 100 members who have identified themselves as practicing in environmental law or related fields.<sup>72</sup> These areas of complexity therefore should not bar the ALI from productively working on an environmental project.

Third, U.S. environmental law is not needlessly or insurmountably controversial. Some issues in environmental law are obviously contentious, and federal environmental programs frequently become the subject of political disputes and public scrutiny. Despite that controversy, typically most adversaries involved with environmental issues agree on the importance of protecting against pollution that causes injury or needless and expensive damage to ecosystems. Recent attempts to rationalize environmental law and promote reforms have attracted cooperative efforts from multiple parties with differing political views.<sup>73</sup>

71. See, e.g., Irma S. Russell, *The Sustainability Principle in Sustainable Energy*, 44 TULSA L. REV. 121, 134 (2008) (stating that the “patchwork of legislation and regulation” in environmental law raises the question of effectiveness and noting the need for “coordination between governmental entities”).

72. The roster of the ALI members who identified themselves as having an interest in environmental law is available in Tracy Hester’s files, although any distribution will be strictly limited by confidentiality policies and privacy expectations of the American Law Institute and its members.

73. For example, NYU Law School consulted with a broad array of stakeholders and opposing viewpoints when it prepared its BREAKING THE LOGJAM report. See SCHOENBROD, STEWART & WYMAN, *supra* note 25.

For example, while disputes in the United States over climate change law invoke deeply held beliefs and disputes over the existence and importance of anthropogenic climate disruption, recent federal judicial decisions so far have firmly established the viability of federal climate change regulation.<sup>74</sup> These rulings foreshadow future developments in this area even if politicized controversy continues over the extent and causes of climate change.

Last, a properly defined environmental law Restatement, Project or statement of Principles could have a workable scope. The proposed project or Restatement must encompass a task that the ALI can reasonably hope to complete in a productive and timely manner. While the ALI willingly enters into ambitious and lengthy projects—the *Restatement of Trusts* took over twenty-one years to complete—forays into fresh fields should probably first focus on discrete and achievable goals that members can support.

## II. FIRST STEPS: POSSIBLE PROJECTS OR PRINCIPLES ON SELECTED ASPECTS OF ENVIRONMENTAL LAW

If a full Restatement of Environmental Law poses daunting conceptual and logistical challenges, the ALI has a broad and sophisticated palette of alternative tools to help crystallize core U.S. environmental legal concepts. As noted previously, these options

74. *Massachusetts v. EPA*, 549 U.S. 497 (2007) (relying on uncontroverted factual assertions about damages from climate change to find standing by state governmental plaintiffs); *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (upholding EPA's finding under a deferential standard of review that greenhouse gas emissions endanger human health and the environment, and rejecting challenges to EPA regulations of greenhouse gas emissions from mobile sources and from stationary sources under the Prevention of Significant Deterioration program). While the U.S. Supreme Court granted certiorari to review the *Coalition for Responsible Regulation* decision, it only agreed to review the narrower question of whether the EPA correctly concluded that regulation of greenhouse gases under the Clean Air Act's mobile source program would require imposition of permitting under the Prevention of Significant Deterioration program for major stationary sources of greenhouse gases. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted sub. nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 418 (Oct. 15, 2013), (No. 12–1146). The Court's ultimate decision rejected EPA's claim that regulation of greenhouse gases emitted by mobile sources under Title II of the Clean Air Act automatically mandated subsequent regulation of greenhouse gas emissions from major sources, but the Court did not question *Massachusetts v. EPA*'s foundational conclusion that EPA had authority to regulate greenhouse gases as "pollutants" under the Clean Air Act. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). The Court also concluded that EPA and delegated states could regulate greenhouse gas emissions through their selection of Best Available Control Technologies in permits controlling emissions of other criteria pollutants. *Id.* at 2447–49.

include preparing a statement of Principles of Environmental Law rather than a full Restatement as well as a Project dedicated to a discrete subset of environmental law.

#### A. Principles of Environmental Law

The ALI typically pursues Principles in areas of law “thought to need reform”<sup>75</sup> and will seek to produce recommendations for changes to the law in the field.<sup>76</sup> Because of the wider latitude offered by this approach, the ALI has prepared (or is currently working on) statements of Principles in emerging or controversial fields of law including election law, aggregate litigation, nonprofit organizations, transnational insolvency, and corporate governance.<sup>77</sup>

Statements of Principles present a promising middle path by offering a normative or aspirational vision of a legal subject rather than an authoritative Restatement of its full body. Rather than attempting to capture the complex and shifting universe of federal and state environmental laws and regulations, a Statement of Principles would allow the ALI to focus on distilling that complexity into coherent sets of principles to guide interpretation and implementation of specific environmental legal requirements. As noted above, a Statement of Principles might also allow the ALI to avoid ensconcing outdated or harmful environmental legal concepts into a full Restatement by instead pointing out normative goals that environmental law should seek to achieve.

#### B. Taking a Smaller Bite: Stand-Alone Projects on Discrete Areas of Environmental Law

Alternatively, the ALI could also limit the scope of the investigation to a specific subject or subtopic of environmental law. This approach would generally yield a Project rather than a Restatement or Principles declaration. By preparing a Project on an important issue or domain within a larger field, the ALI can offer guidance on particular key questions while exploring the

75. See *supra* notes 41–42 & accompanying text (describing the purpose and scope of ALI statements of Principles of Law).

76. *Id.*

77. *Id.* The ALI recently announced that it would begin work on a new *Principles of the Law, Compliance, Governance and Enforcement for Corporations, Nonprofits, and Other Organizations*. See *The American Law Institute Announces Four New Projects*, *supra* note 39.

feasibility of the field for a fuller Restatement or Principles formulation.

To date, efforts within the ALI have focused first on identifying a promising subtopic or field for a project on environmental law. To explore a possible project or Restatement in environmental law, over fifty ALI members who practice or teach and study environmental or natural resource law formed a workgroup in 2012 to survey and rank possible environmental law projects. The workgroup first concluded that beginning with a full Restatement of Environmental Law would pose significant difficulties and resource demands. Accordingly, the workgroup suggested that an initial effort by the ALI in environmental law should focus on a manageable subtopic.<sup>78</sup>

The workgroup identified over thirty different potential projects, discussed and ranked each suggestion, and evaluated the entire array of concepts under consistent criteria.<sup>79</sup> After this process and several additional discussions, the workgroup identified two areas within environmental law as best suited for a Project: (i) a Project on the Law of Environmental Assessment (which would include environmental impact statements and might encompass international elements), or (ii) a Project on the Principles of Environmental Enforcement and Remedies.

#### 1. A Project on the Law of Environmental Assessment<sup>80</sup>

A project on the law of environmental impact assessment (“EIA”) would seek to restate and clarify the developing body of case law in the United States on the obligation to assess the environmental impact of activities likely to significantly affect the quality of the human environment. At the federal level this law predominantly arises out of the National Environmental Policy Act,<sup>81</sup> and federal

78. Memorandum from Professors Robert Percival, Irma Russell, Victor Flatt, Joel Mintz, and Tracy Hester to the Honorable Lee Rosenthal, Chair of the Programs Comm. for the Am. Law Inst. 5–17 (Oct. 2, 2012) (on file with Tracy Hester).

79. The workgroup expressly ranked each proposed environmental and energy project based on the project’s statutory nature, complexity, controversy, specialization, and overlap with other ALI Restatements and Projects. The ranking scores and comments for each proposed project are available in Tracy Hester’s files.

80. This discussion includes substantially most of the recommendations provided by the ALI Workgroup on a Project on the Law of Environmental Impact Assessments, which we provided to the ALI Program Committee in 2012. The original submission to the ALI is contained in the authors’ files. We especially wish to acknowledge the EIA Workgroup’s valuable work and thank its members for allowing the inclusion of its work in this article.

81. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2012) (“NEPA”).

agency regulations, litigation practice, and forty years of judicial opinions have provided substantial additional clarification. State and local laws set out similar statutes and regulations. Although NEPA is generally not delegable to States, currently seventeen states have their own laws that require an actor to prepare an environmental impact assessment for certain governmental and private actions.<sup>82</sup>

While the EIA Workgroup initially focused on U.S. environmental laws and remedies, the workgroup members did not decide whether to include potentially instructive laws or regulations from other nations or international legal instruments (beyond those that directly affect or influence U.S. legal requirements). Many countries adopted their own environmental impact assessment laws after the United States enacted NEPA in 1970.<sup>83</sup> In these nations, the EIA process in fact supplies the basis for project-specific standards and requirements, and as a result the EIA process plays a central role in their environmental governance regimes.<sup>84</sup> Environmental impact assessment has also become a central tenet to some international legal instruments.<sup>85</sup> Looking at other countries' laws and doctrines and the international usage of EIA may help illuminate strengths and weaknesses in the domestic U.S. approach.

The workgroup added that the scope of a Project on the Law of Environmental Impact Assessment should not include liabilities arising under tort law that might characterize such assessments as a

82. Office of NEPA Policy and Compliance, U.S. Dep't of Energy, *States with NEPA-Like Environmental Planning Requirements*, U.S. DEP'T OF ENERGY, <http://energy.gov/nepa/downloads/states-nepa-environmental-planning-requirements> [http://perma.cc/3YNA-SYLV] (last visited Dec. 16, 2014). These states include California, Connecticut, Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, South Dakota, Virginia, Washington, and Wisconsin. In addition to such states, the District of Columbia, Guam, Puerto Rico, and the City of New York have similar requirements for environmental impact statements. *Id.*

83. Nicholas Yost writes that "NEPA . . . may well be the most imitated law in American history." Nicholas Yost, *The Background and History of NEPA*, in *THE NEPA LITIGATION GUIDE* 1, 1 (Albert M. Ferlo, Karin P. Sheldon & Mark Squillace eds., 2d ed. 2012).

84. CHRISTOPHER WOOD, *ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW* 3 (2d ed. 2003) ("[A]bout two-thirds of the approximately 110 developing countries had enacted some form of [environmental impact assessment] legislation by the mid-1990s."); *see also* ANNIE DONNELLY, BARRY DALAL-CLAYTON & ROSS HUGHES, *A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES* (2d ed. 1998), *available at* <http://pubs.iied.org/pdfs/7785IIED.pdf> [http://perma.cc/D4VK-TQND].

85. *See, e.g.*, Protocol on Environmental Protection to the Antarctic Treaty art. 8, *opened for signature* Oct. 4, 1991, S. TREATY DOC. NO. 102-22, 30 I.L.M. 1455, *available at* [http://www.atsaq/documents/recatt/Att006\\_e.pdf](http://www.atsaq/documents/recatt/Att006_e.pdf) [http://perma.cc/FX5J-GSVV].



predicate for a duty of due care in certain circumstances. They also felt an EIA Law Project should exclude emerging law for due diligence in commercial contexts (e.g., ASTM standards for Phase I assessments) or brownfields redevelopment under CERCLA, RCRA, or similar state programs.

Congress passed NEPA in 1969 and President Richard Nixon signed it into law on January 1, 1970. NEPA inaugurated a long string of modern environmental laws passed in the 1970s, and it offered a unique and groundbreaking approach at the time of its enactment.<sup>86</sup> Unlike other federal environmental laws, NEPA contains no enforcement mechanism and no provision for delegation to States. Nonetheless, an active array of citizen suits over the past 40 years has spurred the development of a rich body of judicial opinions.<sup>87</sup> The U.S. Supreme Court has considered at least fifteen significant NEPA controversies.<sup>88</sup> Of the seventeen states with environmental impact assessment laws, many states enacted them in the 1970s shortly after the federal NEPA and imported procedural requirements similar to the federal statute's provisions. These state laws have also sparked considerable litigation since their enactment.

Notwithstanding the frequent characterization of NEPA as a primarily procedural statute, EIAs have proven enormously important as a substantive step to assure that governments act thoughtfully before causing significant alterations to the

86. In near-poetic prose, Section 2 of NEPA states that:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (2012).

87. "To a degree equaled only by the civil rights movement, lawyers and courts have been critical to the success of NEPA." Yost, *supra* note 83, at 7.

88. See, e.g., *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87 (1983); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289 (1975) (*SCRAP II*); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

environment. The U.S. Supreme Court concluded that NEPA requires federal agencies to take a “hard look” at environmental consequences<sup>89</sup> and has acknowledged that NEPA intends to be “action-forcing.”<sup>90</sup> An EIA has developed into a key step in virtually every significant federal action and has played a critical role in avoiding fundamental environmental missteps. Despite forty years of experience with implementing the statute, however, certain disputes have repeatedly recurred over fundamental questions of EIA law. Similar issues arise under the state laws or even local ordinances. These recurring foundational issues include the correct time to trigger an obligation to conduct an assessment, the appropriate document that an assessment should produce, the correct scope of an assessment, the best way to include cumulative impacts, the extent of obligations to assess indirect impacts (such as induced growth) and health or socioeconomic impacts, the proper weighing of remote yet catastrophic risks, and the adequacy of alternative impacts analyses.<sup>91</sup> Other key issues include the proper use of exclusions (e.g., categorical exclusions), the appropriate scope for the doctrine of functional equivalence, and the management of cross-border issues (for example, when—if ever—it is necessary to consider impacts outside the geographic borders of the United States for a federal EIA or outside the state for a state EIA).

In light of these numerous substantive issues, the EIA Workgroup concluded that the law of environmental impact assessment offers an important area where ALI can provide serious and substantive assistance.

89. *Kleppe*, 427 U.S. at 410 n.21 (citing *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

90. *Methow Valley Citizens Council*, 490 U.S. at 348.

91. See, e.g., COUNCIL ON ENVTL. QUALITY, NEPA AND CEQA: INTEGRATING FEDERAL AND STATE ENVIRONMENTAL REVIEWS 3–42 (2014), available at [http://www.whitehouse.gov/sites/default/files/page/files/nepa\\_ceqa\\_handbook\\_feb2014.pdf](http://www.whitehouse.gov/sites/default/files/page/files/nepa_ceqa_handbook_feb2014.pdf) [<http://perma.cc/ML5Y-WHCJ>] (last visited Dec. 16, 2014).

## 2. A Project on the Law of Environmental Enforcement and Remedies<sup>92</sup>

The Project on the Law of Environmental Enforcement and Remedies would seek to restate and clarify the developing body of law in the United States on the enforcement of environmental laws as well as the appropriate type and scope of remedies to address or prevent violations. This effort would include relevant state and local environmental laws that offer varying remedies and tools for enforcement.

While the workgroup members generally agreed to focus on U.S. environmental laws and remedies, they did not decide whether to include potentially instructive laws or regulations from other nations or international legal instruments (beyond those that directly affect or influence U.S. legal requirements). After discussion, the workgroup recommended that the ALI include some examination of international enforcement issues (particularly enforcement of international environmental treaty obligations that might affect U.S. legal rights or defenses), but this additional inquiry should focus on illuminating core principles of U.S. environmental enforcement law and providing helpful examples. This use of international environmental enforcement precedents would also need to avoid duplication of any impending work on the *Restatement (Fourth) of the Foreign Relations Law of the United States*. The workgroup also believed that this proposed scope for the Project on the Law of Environmental Enforcement and Remedies would avoid undue overlap with existing or pending Restatements or Projects that address certain categories of remedy or assess enforcement or remedies in other fields of law.<sup>93</sup>

At its heart, this Project would focus on the aspects of environmental enforcement that differ from traditional enforcement tools generally used in other fields of law. To do so, it would need to start with a workable and comprehensive definition

92. This discussion includes substantially most of the recommendations provided by the ALI Workgroup on a Project on the Law of Environmental Enforcement and Remedies, which we provided to the ALI Program Committee in 2012. The original submission to the ALI is contained in the authors' files. We wish to acknowledge the Enforcement Law Workgroup's excellent work as well and thank its members for allowing the inclusion of its work in this article.

93. See *supra* note 46 for prior ALI Restatements or Projects that touch on environmental remedies or specific enforcement options relevant to environmental interests (e.g., Restitution, Judgments, Torts, and Property).

of environmental law as a foundation for its analysis.<sup>94</sup> This definition would include areas of law addressed by traditional federal and state environmental statutes and regulations as well as common law tort actions that focus on environmental concerns (public and private nuisance). It would also include both civil and criminal violations. For now, however, the workgroup assumes that the definition would exclude related legal areas that overlap with environmental law but raise substantially different concerns and historical legal principles. Some of these excluded areas would include natural resource law, water law, environmental impact assessment law, and general criminal law.

Some of the most notable features of environmental enforcement and remedies arise from distinct and unusual aspects of the underlying environmental laws that drive them. In general, environmental statutes and regulatory requirements share the basic concepts of causation, proof, and liability that underlie other substantive fields of law. As a result, this Project would necessarily focus on those legal areas that go beyond these core concepts and are strongly associated with environmental law. In particular, environmental laws have fostered distinct enforcement doctrines in three areas:

*How can persons incur liability for environmental violations?* For example, environmental enforcement and remedies have built strong legal doctrines for the imposition of strict liability for civil violations and certain environmental crimes, expanded misdemeanor liability for crimes rooted in simple negligence (under certain environmental statutes) and gross negligence, and felony liability for “knowing” violations which only require a showing of general intent.

*Who can be a liable party for an environmental violation?* Like other legal fields, environmental enforcement relies heavily on particular doctrines that expand the universe of parties who can face enforcement liability. For example, environmental law has made extensive use of the doctrine of *respondeat superior* to establish liability for corporate defendants, and it has relied on the responsible corporate officer doctrine to reach management as well as corporate officers and executives for environmental criminal misdeeds.

94. See *supra* note 13.

*Who can seek enforcement of environmental requirements?* Environmental enforcement relies on a federalist structure for enforcement to an unusual degree. For example, most states have received delegation to implement and enforce environmental programs, and the federal government retains authority to oversee and overfile on state environmental programs to assure their effectiveness. Similar issues arise when different government agencies retain overlapping authority as trustees for wildlife and natural resources under various environmental laws. Environmental law also has served as the primary legal field for the development of citizen suits for enforcement by affected individuals and non-governmental entities.

The workgroup concluded that environmental enforcement and remedies law offers an important area where the ALI could offer serious and substantive assistance. First, and most fundamentally, environmental enforcement is absolutely essential to the effective implementation of environmental programs and obligations. Without credible enforcement, environmental laws and regulations would offer only an illusion of protection of public health and natural resources. Given estimates that the private sector spends over \$200 billion annually to satisfy environmental compliance requirements,<sup>95</sup> environmental enforcement and remedies law has enormous implications for economic activity as well as the protection of public welfare, vital ecosystems, and historical and cultural values shared by most of the public.

More directly, environmental enforcement programs now involve the allocation of billions of dollars in civil and criminal penalties as well as the funding of large-scale governmental enforcement programs at the federal and state levels. Environmental enforcement leads to the direct incarceration of numerous individuals in the United States every year. In fiscal year 2013, enforcement efforts by the U.S. Environmental Protection Agency led to the imposition of \$1.1 billion in administrative and civil judicial penalties,<sup>96</sup> over \$1.2 billion in commitments to remove or

95. See *supra* note 1 (discussing economic impacts of federal environmental regulation). See also PERCIVAL ET AL., *supra* note 33.

96. U.S. ENVTL. PROT. AGENCY, OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, FISCAL YEAR 2013 EPA ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS 3, available at <http://www.epa.gov/compliance/enforcement/annual-results/eoy2013.pdf> [<http://perma.cc/K6JL-DGXZ>] (last visited Jan. 8, 2015). Over \$1 billion of this total arose from enforcement actions related to the Deepwater Horizon disaster. *Id.*

remediate hazardous waste sites under the Superfund program,<sup>97</sup> and over \$7 billion in injunctive relief to require investments to improve environmental performance.<sup>98</sup> These figures do not include the results of parallel enforcement activities by other federal agencies and state environmental compliance programs.

### C. Current Status of Proposals to the ALI for an Environmental Law Project

After each subgroup prepared its assessment and proposals for focused projects on environmental enforcement principles and environmental assessment law, the full workgroup prepared a collective report that summarized the full rationale for proceeding with an effort. The workgroup submitted its report and suggestions to the ALI's Programs Committee in 2013. In its submittal, the members offered to participate and support a symposium or workshop by the ALI to explore the feasibility of environmental or natural resource law for additional work by the ALI.

The ALI recently declined the workgroup's proposals for immediate work, but it has not ruled out a future effort on environmental law. The ALI continues to evaluate proposals for potential future work, and its process to identify and select topics has no deadlines or timeframes for action.<sup>99</sup>

## III. SHOULD THERE BE A FULL RESTATEMENT OF ENVIRONMENTAL LAW?

While the discussion within the ALI of a Restatement of Environmental Law arose only recently, some scholars have already raised objections to the entire enterprise. Their concerns, as cogently outlined by Professor Dan Tarlock in a recent article, fall into four general categories.

*The ALI hasn't done it that way historically.* The first critique points to the ALI's historical focus and preference for subject areas with a strong body of judge-made law. At heart, this objection highlights the ALI's original choices for restatements, which consisted of core common law subjects with roots in Roman law that constituted the heart of traditional first-year law school curricula. While the ALI's

97. *Id.* at 7.

98. *Id.* at 8.

99. E-Mails from Judge Lee Rosenthal, U.S. Dist. Court for the S. Dist. of Tex., to Tracy Hester (Oct. 30, 2014 & Mar. 30, 2014) (on file with author).

agenda has since evolved to include complex and novel subjects that fall outside this traditional agenda, the disjuncture with the ALI's historical practice and current preferences offers some difficult—albeit surmountable—difficulties.<sup>100</sup>

*Environmental law pursues goals at odds with core common law precepts.* According to this critique, the positivist nature of environmental law requires it to use a forward-looking perspective to forestall and avoid future environmental damage. This central quality of environmental law allegedly poses a fundamental problem for the entire enterprise of restating it: the principles of environmental law are “profoundly antithetical to both the function of the common law and to the Restatement tradition.”<sup>101</sup> In essence, this position contends that environmental statutes respond to the shortfalls of prior common law doctrines and allocations of property entitlements that allowed the use of air, water, and soil as dumping grounds. In addition, environmental law seeks to protect functioning ecosystems and wildlife that common law historically had tended to destroy<sup>102</sup> and also seeks to protect against a constellation of future or emerging risks. Common law doctrines and concepts of due process, by contrast, require proof of “but for” causation and linkages between specific conduct by defendants and identifiable consequences to plaintiffs. As a result, the courts have struggled with crafting effective legal responses to risks of future harm that have not yet materialized.<sup>103</sup>

*The courts have not created a true quasi-constitutional environmental body of law that would support a Restatement.* Moving to environmental caselaw, the third argument attacks the feasibility of distilling U.S. environmental decisions into a Restatement at all because those rulings lack a developed core of foundational principles that a Restatement could readily capture. As an outgrowth of positive law created predominantly by U.S. federal statutes, environmental judicial law purportedly has failed to

100. Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 10, at 666 (“[T]he fact that a subject was not a historic Roman law derived first-year subject area is not a *per se* barrier to the development of a Restatement today.”).

101. *Id.* at 667.

102. *Id.* at 668.

103. *Id.* at 669 (“The Constitution gives the legislature considerable discretion to base health-protection regulations on the risk of future harm, but judges have much less discretion to do so. Due process requires that responsibility for exposure injuries in toxic-tort suits must be assigned to a specific emitter and that the plaintiff establish that the exposure to a toxic substance caused a specific injury.”).

coalesce around the type of judge-made principles that underlie other areas where the ALI has focused its efforts.<sup>104</sup> In contrast to the forward-looking positivist nature of environmental statutory law, traditional U.S. environmental common law based in tort seeks to “administer corrective justice by compensating the victims of injuries to their health and property”<sup>105</sup>—and restating the principles from those cases would necessarily require a backward-looking perspective incompatible with principles from the statutes.

*There is no substantive environmental law at all.* This line of objection climaxes with a startling claim: because current environmental laws result from the messy intersection of rational responses to novel and emerging problems with the raw jostling of interest-based politics, any attempt to identify common fundamental legal principles from them strains to discern a coherent set of axioms that simply don’t exist.<sup>106</sup> At heart, this view of environmental law concludes that there isn’t a “there” there to restate.<sup>107</sup> Because environmental statutes offer a positivist response to fast-moving problems and developing science through the lens of current political expediencies and dysfunctions, they essentially must resort to procedural solutions that assure fairness without providing a substantive core. These types of procedural fields of law, according to the critique, necessarily offer poor grist for the Restatement process.<sup>108</sup>

These criticisms understate work by other scholars that points to the link between environmental statutes and prior common law principles. For example, one of us has urged further examination of those links to guide the proper application of environmental statutes.<sup>109</sup>

104. *Id.* at 671–75.

105. *Id.* at 667. Professor Tarlock adds further that common law not only fails to provide protection for biodiversity, it actively encourages its destruction through creating property rights that foster its exploitation. He concludes that “there is no distinctive quasi-common law of biodiversity protection for the ALI to restate.” *Id.* at 668.

106. *Id.* at 670–71.

107. Tarlock, *Is There a There There in Environmental Law?*, *supra* note 11, at 213.

108. Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 10, at 671.

109. Victor B. Flatt, *This Land is Your Land (Our Right to the Environment)*, 107 W. VA. L. REV. 1 (2004). *But see* Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 15, at 672 nn.40–41 (citing Professor Flatt, but concluding that “[o]nce one concedes that citizens have no right to a zero-risk environment, it is not possible to specify with any level of confidence the content of a potential environmental right”).



But more fundamentally, this argument goes to the heart of the debate over whether the ALI should pursue a Restatement or other environmental law Project. While modern U.S. environmental law springs predominantly from statutory sources and suffers from conflicting goals and processes, it undeniably exists.<sup>110</sup> A vast array of treatises, textbooks, articles, and scholarly advice have already recognized long-standing common law principles in the area and have created a deep body of work describing environmental law precepts; the existence of those writings strongly implies that critical facets of environmental law can be captured in a systematic form through a Restatement or Principles Project. These materials should also considerably smooth the transition of those core principles into work by the ALI. To the extent that environmental law also includes procedural elements as a surrogate for substantive goals that elude political consensus, a Restatement or Principles Project could note that interaction and—more importantly—identify the limits where even a properly followed procedural path typically will not intrude on a substantive goal.<sup>111</sup> Claiming that it is impossible to restate or capture the principles of environmental law—like many a historical pronouncement that a task simply cannot be done—only highlights the need to actually make the attempt.

On a more tactical level, these objections also minimize the ALI's capacity and flexibility to tackle areas of law that lie outside traditional common law spheres. As noted above, the ALI has already produced groundbreaking work in disparate topics as far flung as software contracts, unfair competition, international commercial arbitration, and family dissolution. While the ALI's early efforts undeniably focused on traditional common law fields, nothing about the ALI's current deliberative approach and consensus-based process makes it unfit for other fields of law that arise from statutory roots. The core prerequisites—richness of caselaw, complexity of issues, and need for clarity—apply equally to

110. See, e.g., Aagaard, *supra* note 13, at 223 (“There is no doubt that something we call *environmental law* exists.”).

111. For example, NEPA famously imposes only a procedural requirement that federal agencies rigorously assess the potential environmental impacts of their major actions without setting substantive limits on agency actions after that review is complete. This simple formulation, however, fails to account for the critical role that this procedural process plays in invoking and buttressing substantive limits on judicial review of arbitrary and capricious final agency action under other federal statutes (including environmental laws).

code-driven law that has spurred the development of its own dense caselaw and regulatory framework.

More importantly, the ALI can expressly mold its approach to reflect the novelty or lack of doctrinal development within a legal subject. If the ALI believes that the area needs substantial reform or normative analysis, it can choose to adopt its work through a Project or a Principles statement rather than a full-bore Restatement.<sup>112</sup> As Professor Tarlock notes, the ALI has already successfully wrestled with some of the concerns during its *Restatement (Third) of Torts* on toxic torts and has expanded concepts of causation to the use of probabilistic risk.<sup>113</sup>

The final critique raises a policy concern rather than a legal one. Assuming that the ALI could readily capture positivist and prospective environmental law principles in a Restatement, critics question whether such a full Restatement would do more damage than good. This critique builds on the larger belief that the ALI's efforts can have the perverse effect of freezing developing fields of law in undesirable and stunted positions.<sup>114</sup> Environmental law, as a response to emerging science and often fast-moving risks, is still evolving and needs the flexibility to expand and adapt to environmental dangers. By attempting to capture current U.S. environmental law principles in a Restatement, according to this criticism, the ALI may unintentionally solidify current standards

112. In fact, several members of our workgroup have expressed a preference to pursue a Project on Principles of Environmental Law rather than a full Restatement for these very reasons. We note, however, that the ALI's Projects have apparently wielded less influence than its Restatements. See Liebman, *My Time as Director and Possible Next Steps for the ALI*, *supra* note 52 ("I allowed 'Principles' to grow to about half the agenda, because a number of projects seem to have as their audience legislators and administrators as well as common law judges. . . . We now know two things: that Principles projects receive fewer court citations than Restatements, and that the boundary [between Restatements and Principles and Projects] is not clear. . . . There is a strong argument for staying with 'Restatement,' the word our founders brilliantly contributed to the legal vocabulary.").

113. Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 10, at 668–70 ("The ALI's effort to stake out a position in a dynamic, science-based area could be a useful precedent for a *Restatement (First) of Environmental Law*.").

114. See, e.g., *id.* at 665 ("Because the ALI process is primarily backward-looking, there is a risk that a Restatement would freeze the law in its current dysfunctional and anti-environmental protection mode. Consequently, a Restatement now would impede the greater goal of effectively incorporating new interdisciplinary insights to address the continuing challenges of environmental degradation and global climate change."). See also Kristen Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 214–15, 226–30 (2007) (summarizing criticisms that the ALI's mission to restate or summarize existing law leaves the ALI ill-equipped to act progressively when change to that law is needed).

that are too meek or timorous to effectively address fundamental environmental challenges such as climate change, biodiversity loss, or the expanding integration of synthetic toxic chemicals into the environment.<sup>115</sup>

This bleak view of current U.S. environmental law, however, generates its own riposte. It eschews a fundamental study of environmental law to identify its most important core principles and doctrines in the hope that future developments might lead to stronger standards. But that same argument posits a lack of a current political consensus and an ability of special interests to frustrate stronger environmental standards that will likely continue for the indefinite future absent an effort to identify and address shortfalls in current law. By holding onto today's dross in hopes of future gold, such a cautious strategy might forego the opportunity to make significant progress now.

In addition, the ALI can forthrightly seek to point out future actions and doctrines to strengthen environmental law to respond to anticipated or emerging future threats or needs. Restatements have the ability to include normative directions for additional legal clarification and growth.<sup>116</sup> While the ALI typically subordinates its efforts at legal reform when it undertakes a Restatement in pursuit of accurately capturing the current state of law, it can nonetheless identify areas where existing legal practices are in conflict and identify the preferred choice between them. Given the number and significance of conflicting approaches and precedents between federal and state environmental programs, the ALI may find an unusual degree of freedom to identify areas where U.S. environmental law can be improved.

Even if the ALI does not wish to freeze existing U.S. environmental law because of its shortfalls, the ALI can still tackle

115. For example, this criticism surfaced during floor comments on the draft Principles of Labor Law during the ALI Annual Meeting in 2011. Kristen Adams, *Loyalty By Any Other Name?*, AM. LAW INST. ANNUAL MEETING BLOG (May 17, 2011, 7:30 PM) <http://2011am.ali.org/blog.cfm?startrow=11> [<http://perma.cc/D3RQ-UPQU>] (“As other bloggers have noted during this meeting, this is one of the important recurring debates in the American Law Institute: Should an Institute project—and especially a Restatement project—seek to mirror existing law and existing terminology or seek to influence the direction of the law and, as part of that effort, seek to change the vocabulary we use to describe that law?”).

116. When Restatements or other ALI pronouncements have fallen into obsolescence or contain damagingly outdated legal statements, the ALI has also demonstrated a commendable ability to update and reform its conclusions even in areas as controversial as the death penalty and sentencing for sexual offenses. See, e.g., MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Tentative Draft No. 1, 2014).

these concerns expressly by pursuing other approaches short of a full Restatement. In particular, a Principles of Environmental Law project would explicitly acknowledge areas where U.S. environmental law needs reform or clarification, and even a Project in a limited subset of U.S. environmental law would provide clarity in important areas without risking calcification of other fundamental environmental law doctrines.

#### IV. NEXT STEPS AND POSSIBLE FUTURE DIRECTIONS

The question of a full Restatement remains on the table. The benefits of such an effort seem clear, and its drawbacks—while acknowledged—can be managed and overcome. The ALI currently has a proposal before it to undertake a limited Project on important aspects of U.S. environmental law such as environmental assessment law or environmental enforcement law. If the ALI adopts either of these suggested Projects, however, its work in the foreseeable future will likely focus on relatively modest goals.<sup>117</sup>

The approach and content of a Principles of Environmental Law statement fall outside the scope of our current work, but we can assay some possible fruitful directions for initial drafting efforts. For example, even parties holding deeply opposing views about the basis and goals of environmental law will agree that the legal field seeks to protect a valuable public good: the environment itself. As a result, the likely first tenet of any statement of environmental law principles will be that the environmental law accords protection to the environment apart from the benefits or property rights held in it by individuals or private entities.<sup>118</sup> A natural corollary to this opening axiom would be that the degree of protection accorded to

117. When considering other potential subject areas to study, the ALI has recently begun to convene exploratory panels or symposia to develop background information for a proposed project and to assess the scope of a workable proposal. For instance, a workshop was convened in 2012 for the ongoing *Restatement of the Law of American Indians*. Of course, independent work on possible avenues for restating or reforming U.S. environmental law could proceed in parallel or independently with such a workshop.

118. This principle, however, could face the challenge that current U.S. environmental common law actively refuses to accord any protection to natural resources beyond the assignment of private property rights that can hasten their degradation. Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 10, at 668 (“The common law offered (and continues to offer) virtually no protection for biodiversity. Instead, by creating property rights to exploit ‘nature,’ the common law encourages its destruction.”).

the environment depends on the nature of the environmental value at issue.<sup>119</sup>

Restatements and Projects have helped not only to clarify the existing law, but also to highlight where legal growth needs to occur and offer wisdom on the best paths to reach those goals. A Restatement of Environmental Law, or a Project on the Principles of Environmental Law, can dispel doctrinal conflict and confusion and help provide a clear path ahead in an area of law that, by its very nature, touches us all.

119. See, e.g., Dan Tarlock, *Is a Substantive, Non-Positivist United States Environmental Law Possible?*, 1 MICH. J. ENVTL. & ADMIN. L. 159, 192–207 (2012) (suggesting that any principles of environmental law principles must assure that procedural duties promote substantive outcomes, and that environmental decisions should seek to implement core concepts such as the polluter-pays principle, the use of best available technology, and the incorporation of accepted standards of sustainable development). In fairness, Professor Tarlock has also emphasized that this “small core of mixed procedural and substantive rules” does not detract from his belief that “current United States environmental law is not suitable for restatement.” Tarlock, *Why There Should Be No Restatement of Environmental Law*, *supra* note 10, at 676 n.58.