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Why Ohio Nixed The New Liability Insurance Law Restatement

By **Kim Marrkand** (August 10, 2018, 10:40 AM EDT)


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On July 30, 2018, Ohio Gov. John Kasich took the unprecedented step of signing into law an amendment to the Ohio Revised Code of Insurance, Title XXXIX, Chapter 3901.82, that provides:

> The "Restatement of the Law, Liability Insurance" that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice.

While this legislation is unprecedented — no other "Restatement" published by the American Law Institute has ever been rejected in its totality by such sweeping legislation — it is not surprising given the fact that, for years, the ALI chose to ignore the alarm governors and legislators, among others, had sounded about the Restatement of Law, Liability Insurance.[1] The immediate questions are how did this happen, why did it happen and will other states follow Ohio with similar legislation.

The answers are surprisingly simple. The RLLI is the first restatement to be published by the ALI to address liability insurance and thus, if not corrected and adopted as is by a state court in whole or in part, will have a significant impact upon consumers, policyholders, legislators, state budgets, insurers, regulators and common law courts. Because of the impact upon this diffuse range of constituencies, the RLLI has generated a great deal of controversy, so much so that legislators, judges, regulators, policyholders, insurers, various trade organizations — and even governors — have written to the ALI and the two authors of the RLLI, the reporters,[2] to urge a fundamental reworking of the RLLI and to question the very legitimacy of its proposed rules.[3]

Given this unprecedented response across a broad range of stakeholders,[4] it is fair to ask "how and why did this controversy happen," particularly given that the ALI (i) has written standards for restatements, (ii) has faced extensive criticism in the past about authors of restatements "abandon[ing] the mission of describing the law ... and chos[ing] instead to set forth their aspirations for what the law ought to be"[5] and (iii) at its annual meeting in May, 2017, in lieu of approving the RLLI, it recognized that the RLLI would benefit from further work over the course of the next year leading up to the annual meeting in May, 2018.[6]

Of particular significance is the April 6, 2018, letter to David F. Levi, president of the ALI, from the governors of South Carolina, Maine, Texas, Iowa, Nebraska and Utah, who expressed their "serious concerns over the direction" of the RLLI. Indeed, the governors, in their unprecedented letter to the ALI, said, in relevant part:

> Rather than offering a reliable and authoritative summary of existing law, the draft restatement proposes changes to established legal principles governing liability insurance contracts and disputes. Many of these proposed changes are properly within the prerogative of our state legislatures, at odds with established common law or both.... From deciding where to locate to whether to hire more employees, businesses frequently rely upon the stability of the insurance market. Thus, we are concerned that the Draft Restatement could negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market. If this trend continues, and courts embrace the ALI's aspirational approach, it could potentially jeopardize the availability and affordability of liability insurance. Therefore, if the ALI does not significantly revise or rescind the Draft Restatement, this implicit usurpation of state authority may require legislative or executive action.

As is now evident, the governors' letter correctly forecast the Ohio legislation. To understand why this outcome was so predictable, how and why this controversy happened and why the Ohio legislation rejected the legitimacy of the RLLI, one needs to know both the history of the RLLI and how the ALI works.[7]

The ALI

Turning to the ALI, while it has several thousand members, only a few hundred actually attend the annual meeting and vote on a given project. Of those several hundred,[8] it is completely understandable that they have not had the time or resources to read a restatement or, as relevant here, the 50-section, 500-page RLLI, let alone the hundreds of cases cited therein, the contrary case law, or the hundreds of submissions questioning various sections of the RLLI. Accordingly, in voting to approve a project — or considering an opposition to a particular section of a restatement — these members have to trust that the process and standards of the ALI for restatements have been followed.[9]

For restatements in general, the ALI process envisions a collaborative effort between the reporters and two formal groups ("advisers" and a "members consultative group"), comprised of ALI members who meet and confer with the reporters over the life of the project. For the RLLI, in addition to these two groups, the ALI also included a "liaison" for the American Insurance Association. In theory, these two groups and the liaison are not mere window-dressing. They exist so the reporters can hear and understand the competing considerations that should cause changes to be made before a draft is submitted to the council. Before a draft goes to the membership at the annual meeting, it must be submitted to the council for its approval.[10]

In the end, a restatement is supposed to reflect the collective wisdom of the courts and the ALI, not the personal beliefs or agenda of a reporter.[11]

The RLLI

Background of the RLLI

The ALI "approved the initiation of this project as a Principles project in May of 2010."[12] Apparently certain ALI members had been interested in publishing a work about insurance and decided to start with liability insurance because that is the "meeting ground between tort and contracts."[13]

Tellingly, it is clear this project was an academic-driven undertaking. There was no hue and cry from the bench or bar that the ALI immediately begin work on fixing a broken liability insurance system through a principles project, let alone years later that it be recast as a restatement. Given that context, and the fact that no industry has ever been singled out as the target of a restatement, the wisdom of Dean Farnsworth — that any restatement should present the consensus view of American courts — should have been the overriding principle guiding the RLLI. It clearly was not.

Content of the RLLI

The RLLI has four chapters. Chapter 1 covers "Basic Liability Insurance Contract Rules." Chapter 2 covers "Management of Potentially Insured Liability Claims." Chapter 3 addresses "General Principles Regarding the Risks Insured." And Chapter 4 addresses "Enforceability and Remedies." Each chapter has a series of topics. Chapter 1, in addition to containing definitions (section 1), covers three topics: Policy Interpretation (sections 2-4), Waiver and Estoppel (sections 5-6), and Misrepresentation (sections 7-9).

Chapter 2 covers three topics: Defense (sections 10-23), Settlement (sections 24-28), and Cooperation (sections 29-30). Chapter 3 also addresses three topics: Coverage (sections 31-33); Conditions (sections 34-36); and Application of Limits, Retentions and Deductibles (sections 37-43). Lastly, Chapter 4 has two topics: Enforceability (sections 44-46) and Remedies (sections 47-50).

As one commentator and ALI member noted, "[i]n the weeks leading up to the scheduled May 23 [2017] vote [to approve the RLLI], a firestorm of protest erupted from the defense community, ... along with state insurance regulators, trade industry associations, individual insurers, and outside defense counsel."[14] This firestorm lead to, among other things, a delay in approving the RLLI and, after two new drafts of the RLLI that resulted in no material changes, the submission of a nine-page letter from the liaison to Levi outlining material defects in the RLLI. Thereafter, the governors' letter was sent to Levi. The members of the ALI voted their approval of the RLLI at the May 2018 annual meeting, the vast majority completely unaware of these and similar prior communications expressing grave reservations about the RLLI.

The Ignored Alarms

In 1993, professor Jonathan R. Macey[15] published an article entitled "The Transformation of the American Law Institute."[16] Macey's article was prompted by the "often bitter fourteen-year battle" within the ALI regarding its efforts to set forth a set of rules about American corporate law.[17] Ultimately, the "Principles of Corporate Governance" were approved in 1992. The process, however, pitted a group of lawyers and law professors against the American business community. In analyzing that project, Macey asked, in Part I, why the ALI thought any reform was necessary. He concluded that there never was a satisfactory reason, other than "bureaucratic ... turf-grabbing,"[18] and that "there never was a consensus within the ALI about what was wrong with existing corporate law or why the ALI needed to direct its massive intellectual artillery toward changing it."[19] The same is true for the RLLI: there was never a justification as to what was so broken with existing liability insurance law that the ALI needed to direct its massive artillery toward changing it.

Macey addressed, in Part II, "The Structure and Institutional Bias of the ALI." In that section, he explained how law reformers sought, under the guise of a "Restatement," to change corporate law and that, "[u]nder heavy pressure from outside critics," the project was no longer characterized as a "Restatement" because of the "real danger the Reporters' views will be accepted by courts and legislators as a true 'Restatement' of existing law rather than the wish-list of reformers that it actually is."[20] Lastly, in Part III, Macey addressed "The Ethics of the Politics" and explained that, without input from the business community, the corporate governance project would reflect only the interests of the legal community comprising the ALI membership.[21] Again, the parallel to the RLLI is remarkable. Absent input from elected officials, regulators, insurers, and policyholders, it was inevitable the RLLI would reflect the legal interests of the ALI membership.

Several years later, in 1998, Charles Silver wrote an article entitled "The Lost World of Politics and Getting the Law Right" for a "Symposium on the American Law Institute. Process, Partisanship, and the Restatements of Law."[22] This arose in the context of Silver's and professor Kent Syverud's first academic study, in 1994, of the professional responsibilities of insurance defense lawyers[23] and its relationship to Section 215 of the Restatement (Third) of the Law Governing Lawyers, or the R3LGL. Silver's article catalogues a long history of unsuccessful overtures to the reporters of the R3LGL. He also describes becoming "unglued" when a draft of R3LGL's description of defense lawyers' professional duties was "completely ad hoc. Some elements ... were right, many were badly wrong and none of it fit together in anything approaching a thoughtful way. The language reflected fundamental misreadings of cases and a complete absence of anything that might be considered a view of the field."[24]

In the end, Silver concluded that he was essentially frozen out of the R3LGL. His article, however, raised serious questions about the very purpose of a restatement. He found that "Restatements are not scholarly works, but are instead more like statutes, regulations and other political outputs."[25] He thus encouraged ALI to "drop the pretense of being insulated from politics and ... present itself to the world as a source of legislation that is sophisticated, if not exactly scholarly."[26] As Silver reasoned, as long as the ALI is endorsing reformist positions, then it must expect impacted parties to respond and engage in what has become a political, not scholarly, undertaking. The caution expressed by Silver, however, went largely unheeded with respect to the RLLI.

In a 2011 article in The William Mitchell Law Review, "A Review of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm: Article: When the Restatement Is Not A Restatement: The Curious Case of the 'Flagrant Trespasser,'"[27] professor David A. Logan[28] revisited many of the same troubling issues raised by Macey and Silver about the role of the ALI in the context of the ALI's opting for a position that was "not even a minority rule, but rather [was] a novel formulation — the 'flagrant trespasser' in premises liability cases—that is, when the restatement does not 'restate' the law."[29] In his article, Logan provides the background for the founding of the ALI in the early 1920's — "to lock in contemporary principles and practices, an aspect of a broader effort to rebuff the mongrelization of the profession via the proliferation of night law schools that primarily served immigrant strivers"[30] — balanced against a recognition that the common law needed to be "tidied up."[31]

As Logan emphasized, the ALI has always been in tension with the role of a restatement: should it state the law as "it is," or what it "should be"?[32] The Restatement (Second) of Torts, involving 22 preliminary drafts, 41 council drafts and 23 tentative drafts produced over 22 years, was a massive undertaking, resulting ultimately in Section 402A's new doctrine of strict products liability in tort being adopted by the ALI in 1964. There was no question that Section 402A did not state the law as it is, but, rather what the ALI believed it should be, thereby "remaking," not "restating" the law. Section 402A involved only a single section. The controversy regarding the RLLI, however, was not confined to a single section, particularly where multiple sections are designed to "remake" the law.

Seeing the need to update the Second Restatement of Torts, the ALI embarked on a Third Restatement, albeit to do so in separate "chunks."[33] Putting aside the doctrinal flaws of a "flagrant trespasser" rule, Logan's article provides "lawmaking" and "legitimacy" critiques of the ALI. In the "lawmaking" critique, he explains that the ALI should be reluctant to remake the law on a number of grounds. First, citing to Arthur Corbin,[34] Cass Sunstein[35] and Guido Calabresi,[36] he explains that the common law is organic; it "relies upon many judges deciding many cases involving many variations in the facts over time."[37] He then identifies modesty, a preference for precedent and dialogue as the characteristics of common law judges:[38] modesty, in recognizing the risk of unintended consequences in exercising judicial power; the value of precedent, "a system characterized by 'evolution', not revolution"; and dialogue, where the "common law judge launches a 'trial balloon', whose virtue is then measured by the judges that later come to face a similar question."[39]

Turning to the "legitimacy" critique, Logan traces the very process problems already raised earlier where, as one reporter conceded: "The text of a restatement ... is largely the product of the reporter. The reporter must answer, of course, to a group of advisers, but their oversight is incomplete," given "limitations of time and expertise."[40] The Council, on the other hand, then weighs in, "but the level of understanding and preparation in this group may not be the match for a strong-willed reporter."[41] Finally, the ALI membership votes but, even if members were to read the voluminous material, let alone the relevant restatement itself, "on occasion, a provision is considered and passed by fewer than one hundred members."[42] Logan concludes by recognizing that it is of little comfort to a litigant — who is now burdened by a new rule — to argue that the rule is wrong.[43]

In the end, Logan's alarm that the flagrant trespasser category was "made without grounding in the product of many judges working on a problem on a case-by-case basis, the core strength of the common law process," was validated.[44] Twenty-six states passed legislation undoing that very provision.[45]

Any one of these articles could have been written about the RLLI. Consequently, it is not difficult to understand why the Ohio legislation was enacted. It is equally easy to conclude that Justice Antonin Scalia was correct that restatements that "remake" the law are of questionable value and must be used with caution.

As the foregoing amply shows, the red flags have been waving for years about the ALI's over-reaching. When these flags rose again for the RLLI — and were ignored again — even in the face of the April 2018 governors' letter and NCOIL's resolution, the governor and legislature of Ohio took decisive action, rejecting any effort of the ALI to determine the "better rule" or public policy of Ohio and directing Ohio courts that they may not take notice of the RLLI. The only remaining question, therefore, is what state will be next in passing similar legislation.

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[1] All references to the RLLI are to Proposed Final Draft No. 2 (April 13, 2018), which was approved by the ALI at its annual meeting in May, 2018.

[2] The reporter is professor Tom Baker, University of Pennsylvania Law School. The associate reporter is professor Kyle D. Logue, University of Michigan Law School.

[3] To date, there have been over 200 submissions to the ALI and the reporters, many of which are posted on the ALI website. All submissions cited herein have been posted on the ALI website. See https://www.ali.org.

[4] For example, on Nov. 16, 2017, the Property and Casualty Insurance Committee of the National Conference of Insurance Legislators passed a "Resolution Encouraging the [ALI] to Materially Change the Proposed Restatement of the Law of Liability Insurance." On Dec. 1, 2017, twenty-seven general counsels of major corporations (on behalf of policyholders and insurers alike) wrote to David F. Levi, the president of the ALI, to "restate the serious concerns" they had raised previously regarding the RLLI (and the pending

Restatement of the Law Consumer Contracts) and to ask that he, as well as the ALI governing body (the "Council"), "assume a meaningful role in overseeing the development and direction of the [ALI's] work product to assure they are in accord with the ALI's own principles governing Restatements." See https://www.ali.org.

[5] Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part). In his opinion, Justice Scalia wrote separately "to note that modern Restatements ... are of questionable value, and must be used with caution." Id.

[6] In response to the direction to the reporters provided by the ALI at its May 2017 Annual Meeting, the reporters agreed to embark upon a self-described "listening tour." In early August 2017, however, a scant few months after the ALI's promise in May 2017 that more work was required on the RLLI, the reporters released a new draft of the RLLI, where, in their opening memorandum, they announced they had made virtually no material changes to the RLLI. See Preliminary Draft No. 4 (August 4, 2017), Reporters' Memorandum at xiii-xvii. Council Draft No. 4, released on December 4, 2017, again, made only minor changes.

[7] A restatement has three components: the "Black Letter" rules, the comments and the reporters' notes. The Black Letter rules and comments are approved by the ALI; the reporters' notes are not. Structurally, the reporters' notes are to contain not only the case law supporting the rules and Comments, but, critically, contrary authority. Where a Black Letter rule is neither the majority rule, nor reflects an emerging trend in the law, the relevant text must be transparent about any such departure; and must explain why a "better rule" is being proposed. ALI Revised Style Manual approved by the ALI Council in January, 2015 at (formally "Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work"), pp. 5-6, available at https://www.ali.org/publications/style-manual (last visited Feb. 1, 2018). The ALI offers no guidance concerning for whom a rule is "better." When it comes to weighing the "better" public policy, courts generally defer to the legislature, recognizing elected officials determine public policy, while courts enforce it. As discussed herein, the RLLI does not recognize any such constraint, which is why the Ohio legislation was enacted.

[8] Members are elected through a confidential nomination process. The ALI also has approximately 245 ex officio members who include the justices of the United States Supreme Court, the chief justices of the federal courts of appeal, the chief justices of the highest court in each state, the deans of every law school in the Association of American Law Schools and, among others, the Presidents of the American, Federal and National Bar Associations. ALI Annual Report 2012/2013 at 17 (2013). Absent the implied imprimatur of the ex officio members, one can fairly ask if a Restatement would be treated any differently than any other law review quality article. Given the numerous recent controversies around prior Restatements, and in particular the views of Justice Scalia that Restatement sections that constitute "novel extensions" of the law should be given "no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar," a related fair question is why such ex-officio members allow their stature to be used to legitimize "novel extensions" of the law in a Restatement in the first place. See Kansas v. Nebraska, supra n. 5.

[9] In January 2015, the Council issued new standards for Restatements. Now, instead of "restating" the law — as the very name "Restatement" suggests — Reporters are to follow a "process" containing four elements: (i) ascertain the majority rule, (ii) ascertain trends in the law; (iii) achieve more coherence in the law; and (iv) ascertain the desirability of competing rules. As for the fourth element, "social science evidence and empirical analysis can be helpful." ALI Revised Style Manual (January 2015), p. 5, available at https://www.ali.org/publications/style-manual. Recognizing that the ALI is an "unelected body ... [with] limited competence and no special authority to make major innovations in matters of public policy," "[w]ild swings [in the law] are inconsistent with the work of both a common-law judge and a Restatement" and thus any proposed changes should be "accretional." Id. at 6. In the end, however, the ALI believes it can and should determine the "better" rule; effectively rendering these guidelines as suggestions, not requirements. ALI Style Manual, pp. 5, 7.

[10] The Council is comprised of approximately 60 members; rarely are all its members able to attend Council meetings. Because of a very ambitious agenda where Council members are discussing multiple projects over two days twice a year, most projects, including the RLLI, are allotted only two hours for discussion. Indeed, as of 2017, the ALI had twenty projects underway, including eleven Restatements, six Principles projects, and three Model Codes.

[11] In the Winter 2017 Quarterly Newsletter of the ALI, Dean Ward Farnsworth, Reporter for the Restatement of the Law Third, Torts, Liability for Economic Harm, explained that he "consider[s] a Restatement in general to be an exercise in harnessing collective wisdom, not the wisdom of a Reporter .

... Our goal is to make the law as rational as we can, to understand not just where our courts are but the best reasoning they have been able to offer to explain why, and then to present their position — the consensus view of American courts — in the most rational and intelligent light we can." According to Dean Farnsworth, a Restatement "was never supposed to be about what I thought anyway. It's supposed to be about the best we can all create together." Ward Farnsworth, Reflection on Collective Thought, 40 A.L.I. REP., Winter 2013 no. 1, 14-15.

[12] RLLI, p. ix. A "Principles project" is one that is aspirational in nature; it is not bound by the ALI Style Manual, see n.7.

[13] Tom Baker works to define the field of liability insurance law, PENN LAW NEWS & EVENTS (June 20, 2016), https://www.law.upenn.edu/live/news/6274-tom-baker-works-to-define-the-field-of-liability (last visited Feb. 2, 2018).

[14] Michael F. Alyward, The Plain Meaning Problem: Should the American Law Institute Restate or Rewrite the Rules for Interpreting Insurance Policies? FOR THE DEFENSE (2017).

[15] J. DuPratt White (Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law at Yale University and Professor in the Yale School of Management. A.B. 1977 Harvard College, J.D. 1982 Yale Law School).

[16] Macey, Jonathan R., The Transformation of the American Law Institute, YALE FACULTY SCHOLARSHIP SERIES (1993), p. 1212, available at http://digitalcommons.law.yale.edu/fss_papers/1604 (last visited Jan. 31, 2018).

[17] Id.

[18] Other groups, such as the American Bar Association, were drafting statements on guiding principles of corporate law. Id. at 1214.

[19] Id. at 1215.

[20] Id. at 1216-17.

[21] Id. at 1229-30. The parallels to the RLLI are remarkable, with the exception that the liability insurance project remains a Restatement and its lifespan has been considerably less than fourteen years. On the other hand, input from governors, legislators, regulators, insurers and even judges was often treated as disfavored "lobbying," instead of being recognized as providing expertise and practical advice, particularly on the economic consequences of the RLLI should it be adopted as written.

[22] Prof. Charles Silver holds the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the School of Law at the University of Texas at Austin. See https://law.utexas.edu/faculty/charles-m-silver (last visited Jan. 31, 2018); see also The Lost World of Politics and Getting the Law Right, 26 HOFSTRA L. REV. 773 (1998).

[23] Kent Syverud is Chancellor and President of Syracuse University. See http://law.syr.edu/profile/kent-syverud (last visited Feb. 1, 2018). In the RLLI, Prof. Syverud is cited favorably, particularly regarding §24 (The Insurer's Duty to Make Reasonable Settlement Decisions).

[24] The Lost World of Politics and Getting the Law Right, 26 HOFSTRA L. REV. 773, 782-84 (1998). Apparently the Reporters were particularly disturbed by Prof. Silver's use of the deposition testimony of one of the Reporters who testified as an expert in a legal malpractice case against an insurance defense lawyer. While the ALI has an extensive "Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects", there is no bar to a Reporter accepting an engagement as a paid expert, while still working on a Restatement, to testify in support of the very positions she or he is advocating in a pending Restatement. Given the ALI's goal of transparency, it only makes sense that such engagements be publicly disclosed.

[25] Id. at 796.

[26] Id. at 799.

[27] D. Logan, A Review of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm: Article: When the Restatement Is Not A Restatement: The Curious Case of the 'Flagrant Trespasser, 37

WM. MITCHELL L. REV. 1448 (2011).

[28] David A. Logan in a Professor of Law at Roger Williams University School of Law, where he previously served as its Dean. See https://law.rwu.edu/faculty/david-logan (last visited Feb. 2, 2018).

[29] D. Logan, A Review of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm: Article: When the Restatement Is Not A Restatement: The Curious Case of the 'Flagrant Trespasser, 37 WM. MITCHELL L. REV. 1448, 1449-50 (2011).

[30] Id. at 1450 ("The President of the Association of American Law Schools (AALS) was blunt: 'As long as our doors were entered chiefly by immigrants of cognate blood, the common law as it was studied by Story and Langdell might safely be left to develop and adapt itself to each changed condition. But within the last twenty years a horde of alien races from Eastern Europe and from Asia has been pouring in on us ...'").

[31] Id. at 1454.

[32] Id. at 1452.

[33] Product Liability, Apportionment, Liability for Physical and Emotional Harm, and Economic Harm. Id. at 1460. The "flagrant trespasser" rule addressed in Prof. Logan's article fell under the "Liability for Physical and Emotional Harm" chunk.

[34] D. Logan, A Review of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm: Article: When the Restatement Is Not A Restatement: The Curious Case of the 'Flagrant Trespasser, 37 WM. MITCHELL L. REV. 1448, 1476 (2011) ("Corbin, who urged the ALI of the 1930s to proceed cautiously in its law reform efforts: 'The best way to turn mores into law is to do it piecemeal by the 'molecular motion' of the courts.'").

[35] Id. ("This general preference for incrementalism over bold strokes was well described by Cass Sunstein: 'Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues. . . . It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations ... . It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection ...'").

[36] Id. ("Guido Calabresi described how the 'slow, unsystematic, and organic quality of common law' meant that 'no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people.'").

[37] Id. at 1475.

[38] Id. at 1476-77.

[39] Id. at 1477.

[40] Id. at 1481.

[41] Id.

[42] Id. at 1482.

[43] Id.

[44] Id. at 1484.

[45] S.D. Codified Laws §§ 20-9-11.1 through 20-9-11.6 (2011); N.D. Cent. Code §§ 32-47-01 through 32-47-04 (2011); Tex. Civ. Prac. & Rem. § 75.007 (2011); Okla. Stat. tit. 76 § 80 (2011); N.C. Gen. Stat. §§ 38B-1 through 38B-4 (2011); Wis. Stat. § 895.529 (2011); Ariz. Rev. Stat. § 12-557 (2012); Tenn. Code Ann. § 29-34-208 (2012); Ala. Code § 6-5-345(2012); Ohio Rev. Code § 2305.402 (2012); Mo. Rev. Stat. § 537.351 (2012); Va. Code § 8.01219.1(2012); Utah Code §§ 57-14-102, 57-14-301 (2012); Ga. Code § 51-3-3 (2014); Kan. Stat. Ann. § 58-821 (2014); Mich. Comp. Laws Ann. § 554.583 (2014); W. Va. Code § 55-7-27 (2015); Wyo. Stat. §§ 34-19-201 through 34-19-204 (2015); Ind. Code §§ 34-31-11-1

through § 34-31-11-5 (2015); Nev. Rev. Stat. § 41.515 (2015); S.C. Code Ann. § 15-82-10(2015); Miss. Code Ann. § 95-5-31 (2016).

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