

THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

# The American Law Institute and the U.S. Supreme Court

In an effort to show that the ALI's influence is not confined to the states, in my last letter I focused on the impact of our work on the development of federal common law, both in the Supreme Court and the U.S. Courts of Appeals. In this letter, I look more specifically at the use of ALI materials by the Supreme Court during the 2013 to 2015 Terms.

During the past three terms, the Supreme Court cited ALI publications in 50 separate opinions across 37 argued cases—roughly one-sixth of the total. Ten of these opinions were unanimous, one was per curiam, 19 were majorities, 12 were dissents, four were concurrences, and four were partial concurrences and partial dissents. Seventeen of those 50 opinions relied on more than one ALI publication. In total, there were 71 citations to ALI publications during these three Terms.

Justice Scalia was the most frequent author of opinions citing ALI publications, with nine opinions, followed by Justice Thomas with eight, and Justice Alito and Justice Kagan with six each. Each of the nine Justices wrote at least four opinions citing ALI publications.

Justice Scalia's reliance on ALI's work might seem surprising because in 2015, in a partial concurrence and partial dissent in *Kansas v. Nebraska*, he took issue with the majority's reliance on the Restatement (Third) of Restitution, and stated that "modern" restatements "are of questionable value, and must be used with caution." He acknowledged the authoritative quality of the original Restatements but indicated that, "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." In that opinion, Justice Scalia stated that the newer Restatements "should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar."

Nonetheless, prior to *Kansas v. Nebraska*, in the 2013 and 2014 Terms, Scalia cited to the newer Restatements—(Second) and (Third)—seven times in five cases. And, in the 2014 Term, following *Kansas v. Nebraska*, Justice Scalia went on to cite a newer Restatement, the Restatement (Second) of the Foreign Relations Law of the United States.

It seems fair to conclude that Justice Scalia depended a good deal on the Restatements and generally admired the work product of the ALI. His concern that the Reporters might impose their own normative vision has been addressed in recent years by the requirement, contained in our Style Manual that if a Restatement "declines to follow a majority rule it should say so explicitly and explain why." A possible explanation, for example, might be that a significant trend of recent decisions points in a different direction. Moreover, the Reporters' policy views

are confined to the Reporters' notes, which are not the official position of the ALI. In contrast, both the black letter rules themselves and the comments to the black letter, which are the only portions that constitute the ALI's position, must be adopted by both the ALI Council and membership body.

During the 2013 to 2015 Terms, the field of ALI work that the Court cited most frequently was Torts, with 18 opinions: five to the original Restatement, nine to the Restatement (Second), two to the Restatement of Torts (Third): Apportionment of Liability, and two to the Restatement of Torts (Third): Liability for Physical and Emotional Harm. Next, there were 10 citations each to the Model Penal Code and to Judgments (three to the original Restatement and seven to the Restatement (Second)).

ALI publications were cited in constitutional, statutory, and procedural cases. For example, on the constitutional front, in *Zivotofsky v. Kerry*, both the majority and the dissent relied on Restatements of Foreign Relations (Third and Second, respectively) to determine the scope of the President's power to recognize foreign states. With respect to statutory interpretation, a unanimous Court in *Tibble v. Edison International* relied on the Restatement (Third) of Trusts to decide whether actions taken by a fiduciary after the date contested investments were included in a mutual fund could constitute a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974. As to procedural matters, the majority in the high-profile case *Whole Women's Health v. Hellerstedt* relied on the Restatement (Second) of Judgments to reverse the Ninth Circuit's ruling that claim preclusion barred some of the plaintiff's challenges to the constitutionality of a Texas law regulating abortion clinics. Justice Alito's dissent in that case also cited to this Restatement to support the proposition that those challenges *were* barred by claim preclusion.

The Restatements of Torts and Contracts are often thought to be directed primarily—perhaps exclusively—at state common law. But the Supreme Court has relied on them to interpret particular federal statutory provisions. For example, as to Torts, in *Paroline v. United States*, the Court relied repeatedly on the Restatement (Third) of Torts: Liability for Physical and Emotional Harm to determine whether the mandatory restitution to a victim of child pornography under the Violence Against Women Act was limited only to those harms to the victim that were proximately caused by the defendant's actions. On the Contracts front, in *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund* the majority relied on the Restatement (Second) of Contracts (and the concurrence on the original Restatement) to determine that a statement of opinion could not constitute an "untrue statement of ... fact" for the purposes of the Securities Act of 1933.

In turn, while state legislatures are the main audience for the Model Penal Code, the Supreme Court has relied on it repeatedly to determine the scope of federal criminal law. For example, the majority in *Voisine v. United States* relied on the Model Penal Code to determine that a federal law prohibiting gun possession by individuals convicted of a “misdemeanor crime of domestic violence” also applied to those convicted under state laws requiring only a reckless mens rea.

I hope that this letter as well as my previous one help paint a broader and more accurate picture of the ALI's influence than the view that our influence is confined to the states. We should be very proud of our work!

**Editor's Note: A version of this Director's Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: [www.ali.org/news](http://www.ali.org/news).**