Questions have been raised in recent meetings of our Advisers and Members Consultative Groups, particularly in connection with our newly launched Restatement of Copyright, about what role our Restatements can play in areas in which there is a comprehensive federal statute. Traditionally, our Restatements dealt with areas of state common law. Of course, they recognized the existence of state statutes but those statutes were generally treated as constraints that displaced discrete common law rules in particular jurisdictions. For the most part, we did not provide courts with guidance on how to interpret those statutes. But, more recently, we have undertaken significant efforts in areas in which federal statutes govern broad swaths of the coverage of our Restatements. For example, one of the three current components of our Restatement Fourth of the Foreign Relations Law of the United States deals with immunity issues covered by the Foreign Sovereign Immunities Act. Similarly, the Indian Child Welfare Act and the Indian Gaming Regulatory Act play an important role in our Restatement of the Law of American Indians. And, the Copyright Act is the most significant legal text for our Restatement of Copyright.

What we seek to do in those areas is to provide guidance to the courts where the scope for judicial discretion is broad, which can be the case even for statutes that are very detailed. And, because of the absence of intercircuit stare decisis and because the decisions of a district judge do not have stare decisis effect with respect to other district judges even in the same district, we can give guidance to multiple decision-makers, just as we do in common law Restatements. And, in this multijurisdictional context, conflicting lines of precedent can emerge, as is the case in common law areas.

For illustrations, I will focus on one area that is not the subject of any of our ongoing Restatement efforts: the Comprehensive Environmental Liability and Response Act (CERCLA), generally known as the Superfund statute, and I will give three examples of the kind of guidance that a Restatement that a Restatement in this area could provide. My first example concerns a provision that is not defined in the statute and where the scope of judicial discretion is essentially unconstrained by the statutory text. While CERCLA does not explicitly state whether there should be joint and several liability, the existence of a contribution provision in the statute has been interpreted to mean that, at least in some cases, joint and several liability must apply. Guided by the Restatement Second of Torts, courts have determined that joint and several liability should attach unless there are “distinct harms” or there is “a reasonable basis for determining the contribution of each cause to a single harm.” But, in the absence of further guidance, courts have struggled with how to apply these concepts to the particular characteristics of Superfund sites.

My second example concerns a situation in which the statutory text is specific rather than open-ended. CERCLA lists, among other potentially responsible parties subject to liability, the current “owner and operator of a vessel or a facility.” Courts have consistently read the word “and” in this provision as “or,” holding that liability may attach both to owners who are not operators and to operators who are not owners. They have done so for two reasons. First, the “owner and operator” provision is immediately followed by a provision establishing liability for those who previously “owned or operated” a facility, and courts have read both provisions disjunctively rather than assuming that Congress intended a different result for current owners than for prior owners. Second, the fact that the statute contains a definition of “owner or operator,” but not of either term standing alone, serves as further evidence for this disjunctive reading.

My third example deals with an ambiguous statutory definition, which has given rise to a longstanding conflict among the circuits that the Supreme Court has not resolved. Under CERCLA, individuals are potentially liable for the cleanup of a contaminated site if they owned or operated the site at the time the “hazardous substances were disposed of.” There is a split among the circuits over whether the passive migration of hazardous substances from one area of soil to another, without any human intervention, counts as “disposal.” The Third Circuit has held that such passive migration is not disposal, and the Fourth Circuit has held that it is. While both interpretations may be reasonable readings of the statutory definition of “disposal,” the Fourth Circuit’s interpretation is inconsistent with the structure of the statute. CERCLA provides an exemption to liability for current owners who purchased the land after the time of disposal and who also meet other criteria. The Fourth Circuit’s reading would render this exemption meaningless. If passive migration of hazardous waste counted as “disposal,” then disposal would be occurring constantly from the time the waste entered the soil until the time of cleanup, making it impossible for the owner at the time of the cleanup to have purchased the site after disposal.

So, if we were doing a Restatement for CERCLA, we would provide guidance for when joint and several liability should attach in Superfund sites. And we would have black letter provisions indicating that current “owners or operators” can be liable despite the statutory text to the contrary and would resolve the statutory ambiguity by determining that “disposal” does not include passive migration. The Comments would indicate where the black letter departs from the statutory text, just as we do in the case of black letter that departs from majority common law rules. In doing so, we would fulfill our mission to “promote the clarification and simplification of the law,” which is as important in the face of federal statutes as it is in common law areas.

In summary, what a Restatement in a statutory area should do is to provide the best interpretation of particular statutory provisions, which is exactly the inquiry that a court would engage in. It is not the function of a Restatement to say what a better statute might look like. I expect Reporters, Advisers, the Council, and our Members to be alert to this concern when we undertake a Restatement in such areas.