

Is it Time for the Restatement of Contracts, *Fourth*?

Peter A. Alces and Chris Byrne***

With the failure of the Uniform Commercial Code (U.C.C.) Article 2 Revision project, it is time to consider whether it is time for the Restatement of Contracts, Fourth. The First Restatement of Contracts, largely the work of Samuel Williston,¹ endeavored to formulate the contract law as it had evolved through the time of its promulgation. The second restatement of contracts was really Article 2 of the U.C.C., promulgated first in 1951² and then finally enacted in the states by 1967.³ The Restatement of Contracts, Second (which really was the third restatement of contracts), began in 1964, was completed in 1979 and imported many of the U.C.C. Article 2 principles to the contract law generally. After a relatively lengthy period of stasis, well, relative stasis, work began on revision of Article 2 and continued for more than a decade. The work was largely futile, though, as Revised Article 2 has yet to be enacted in a single state.

So here we are: the “current” Restatement is about thirty years old and we know that the keepers of the commercial contracting flame question its vibrancy (why else spend more than a decade on new commercial contracting legislation that would depart from the model (Article 2) for the last Restatement). It may be that it is difficult to make the case for Restatements of Contract and that all of the “action,” such as it is, will be in the form of piecemeal initiatives that focus on discrete, or at least divisible, contracting contexts.⁴ However, it would seem that if it is time for a new Article 2, or for Principles of Software Contracting, then it is also (or instead) time for a new Restatement of Contracts. Conversely, if it is not time for a new Contracts Restatement, then it may not be time for either a new Article 2 or for Principles of any type of contracting.

* Rita Anne Rollins Professor of Law, The College of William and Mary School of Law. The authors are grateful to Mark R. Wylie, J.D. 2009, Washington University – St. Louis School of Law, for invaluable research assistance.

** Head of Research and Instructional Services, Wolf Law Library, The College of William and Mary School of Law.

1. Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327, 1327-28 (1963).

2. National Conference of Commissioners on Uniform State Laws, A Few Facts About the Amendments to U.C.C. Articles 2 and 2A, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc22A03.asp (last visited January 16, 2009).

3. MARION W. BENFIELD, JR. & MICHAEL M. GREENFIELD, SALES: CASES AND MATERIALS 5 (2006) (noting that every state but Louisiana had adopted the U.C.C. by 1967).

4. See, e.g., American Law Institute, *Principles of the Law of Software Contracts* (Tentative Draft No. 1 March 24, 2008).

To consider those arguments, it is worthwhile to reflect on the relationship between the Contracts Restatement projects and the Uniform Commercial Code. And, it should not be *assumed* that the Restatement projects remain vital at all. It just may be that the time for the Contracts Restatements, at least as we have known them, has passed. And if that is true, then the urgency of new commercial legislation, not Restatements or Statements of Principles, is manifest. In this brief essay we shall consider the fit between products of the American Law Institute (the "ALI") and commercial legislation (a fit one of us first considered with Marion Benfield several years ago⁵) and suggest that perhaps the Restatement movement and (or?) the comprehensive commercial legislation movement may be dead. It will be necessary to describe the mechanics of the American Law Institute and National Conference of Commissioners on Uniform State Laws promulgation processes in order to reach any worthwhile conclusions about the future. That presentation will support conclusions about the nature of the work the ALI should do to make sense of the contract law generally, and the commercial contracting law more specifically.

I. THE MECHANICS OF PROMULGATION

Born during the progressive era, both the ALI and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have proven to be two of the most influential legal institutions in the United States. Each organization has been essential in improving the administration of law through efforts to simplify the law by distilling its best principles and making its application uniform throughout the states. The ALI has done most of this simplification through their Restatements of law, while NCCUSL has accomplished the same through uniform laws.

A Restatement "is a synthesis of the evolving law in a specific subject that is cast in a form similar to legislative rules."⁶ A Restatement primarily involves the common law, but can include statutory law. A uniform law is statutory law that state legislatures are encouraged to adopt, without amendment, to promote the uniformity of state law. The ALI often will partner with NCCUSL to create statutory schemes such as the Uniform Commercial Code. Courts choose whether they will adopt a particular Restatement and state legislatures do the same for uniform laws. Some Restatements and uniform laws have gained widespread adoption; others have not been as successful.

NCCUSL was created first. In 1889, the American Bar Association recommended that each state appoint commissioners to meet and discuss the

5. Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing the Wheel*, 35 WM. & MARY L. REV. 1405 (1994) (hereinafter Benfield, Jr. & Alces, *Reinventing*).

6. Geoffrey Hazard, *The American Law Institute Is Alive and Well*, 26 HOFSTRA L. REV. 661, 662 (1998).

creation of uniform laws. The first meeting of NCCUSL occurred in 1892, and by 1912 every state had appointed commissioners. The primary purpose of NCCUSL is to promote uniformity and clarity in state statutory law.⁷

The ALI was the final product of a committee of prominent lawyers, judges, and law school professors who met to create a juristic center. Chaired by Elihu Root, the former Secretary of State during President Theodore Roosevelt's administration, the committee consisted of such luminaries as Benjamin Cardozo, Learned Hand, Roscoe Pound, Arthur Corbin, Samuel Williston, and John Wigmore. A report the committee presented to a meeting of judges, lawyers, and law school professors in 1923 recommended the establishment of the American Law Institute.⁸

The founders of the ALI envisioned an organization that would improve and simplify the common law by eliminating its "uncertainty and complexity."⁹ According to the 1923 report, no other legal organization possessed the qualities necessary for the job.¹⁰ It is unlikely that the ALI's founders foresaw the organization's involvement in drafting model codes because NCCUSL had been doing just that for over thirty years by the time of the ALI's creation.

The ALI founders viewed the Restatements as the best "principles of law" distilled from existing common law and, in certain cases, statutory law.¹¹ The Restatements, although drafted in a code-like manner, were intended to be adopted by courts, not legislatures. The committee believed that statutes did not have the flexibility of the common law or the common law's ability to be fleshed out over time through court decisions.¹² Therefore, they regarded the nascent organization's purpose to be the promotion of uniformity in the common law.

However, within two years of its birth, the ALI became involved in drafting a model code. In 1924, the ALI began investigating the need for a Restatement of substantive and procedural criminal law. A report to the ALI Council recommended that state substantive criminal law be restated, but cautioned against restating the law of criminal procedure because criminal procedure is primarily statutory in nature, rather than common law.¹³

7. John McClaugherty, *The Uniform Law Process: Lessons for a New Millennium*, 27 OKLA. CITY U. L. REV. 535, 536 (2002); <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&taid=11>.

8. ALI, *1923 Report of the Committee on the Establishment of a Permanent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute* (1923) (hereinafter ALI, *1923 Report*), reprinted in ALI, *THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY* (1973), p. 15.

9. *Id.* at 15.

10. *Id.* at 40.

11. *Id.* at 26.

12. *See Id.* at 29-31.

13. ALI, *Report to the Council by the Committee on a Survey and Statement of the Defects in Criminal Justice*, at 51, 54 (April 1925). The report noted that "the Institute was founded and its present funds [were] secured primarily to make a restatement of the common law." One might ask why substantive law would be a more appropriate subject for a restatement when most states at the time had criminal codes. The report reasoned that, even in states with criminal codes, many questions of criminal law were still

The ALI abandoned, for the time being, their attempt to restate substantive criminal law, but did agree to draft a model code of criminal procedure after the American Bar Association, the Association of American Law Schools, and the American Institute of Criminal Law and Criminology requested that it do so.¹⁴ The ALI Council justified its involvement in code drafting by asserting that any organization undertaking such work needed to be composed of “leading representatives, from all parts of the country, of the bench, the bar, and the principal law schools.”¹⁵ The fact that the ALI was such an organization made “it practically impossible to form another association made up of essentially the same personnel.”¹⁶ Therefore, the Council reasoned that the ALI was the only organization that could undertake such work, a result that was not “foreseen when the Institute was created.”¹⁷

The ALI Council believed that drafting model codes required the same drafting procedures used for creating Restatements and, therefore, would place no additional administrative burden on the ALI. In fact, the Council predicted that, unlike the lengthy process of drafting Restatements, a model code of criminal procedure could be completed in a much shorter length of time: three years.¹⁸ The code was actually completed in 1930, after six years of work.¹⁹

Thus, for over fifty years, the Institute focused on two types of projects: model laws directed at legislatures, and Restatements of law aimed at the courts. In 1977, it began work on a third type of project, a Principles of Law project. Neither fish nor fowl, Principles of Law projects may include model statute provisions, Restatement provisions, and rules on best practices.

The first Principles of Law created by the American Law Institute was the *Principles of Corporate Governance: Analysis and Recommendations*. In the President’s Foreword to that publication, Roswell B. Perkins described the genesis of the corporate governance project. According to Perkins, in 1977 Herbert Wechsler, the Director of the ALI, presented to the Council his idea for an ALI project on corporate governance, recommending that an ad hoc advisory committee be created to consider the project. The committee’s conclusions in support of a project were summarized in a report to the Council by Wechsler. Four regional conferences were organized to consider the proposed project. According to Wechsler, the legal professionals at the con-

decided by courts using common law that was both inconsistent and uncertain. It was these common law principles that the Institute aspired to improve.

14. 3rd ALI Proc. 59 (1925). The ALI did begin the drafting process for a Model Penal Code in 1950. ALI, *Past and Present ALI Projects* (2007), http://www.ali.org/doc/past_present_ALIprojects.pdf.

15. 3rd ALI Proc. 59 (1925).

16. *Id.*

17. *Id.* Interestingly, the Council minutes did not mention NCCUSL.

18. *Id.* at 59-60.

19. ALI, *Past and Present ALI Projects* (2007), http://www.ali.org/doc/past_present_ALIprojects.pdf.

ferences indicated their support for a Restatement and recommendations for improvement in prevailing business governance law and practice.²⁰

The Council then invited Ray Garrett, Jr., former Chairman of the Securities and Exchange Commission, to define such a project. Garrett recommended that the project should consist of a Restatement of existing case law on corporate management and control with recommendations for corporate practices and statutory provisions. He envisioned the project as extending beyond Restatement treatment:

Where there is no judicial authority, or where the cases are unsatisfactory by modern standards either because of their antiquity, or the absence of compelling analysis, or because today they just seem wrong—resort must be had to other sources. These may include the literature on the subject, the better corporate practice in the view of those experienced in the field, not limited to lawyers, and ultimately the judgment of the Institute, aided by the Reporter and his Advisers. Where the Project is not in fact restating the cases, the Institute's views should take the form of recommendations which may include recommended statutory provisions, state or federal.²¹

The council authorized the president of the ALI to proceed with the project in 1978. Garrett and others concluded early on in the development of the project that corporate law could only be reformed effectively by including model statutes, restatements of case law, and recommended corporate practices.²² The initial title of the project, *Principles of Corporate Governance and Structure: Restatement and Recommendations*, drew criticism from those who thought the term "Restatement" was misleading because the project also encompassed recommendations of better corporate practices and statutory provisions. Accordingly, the title was changed to *Principles of Corporate Governance: Analysis and Recommendations*.²³

Although the name change may have better reflected the nature of this new, hybrid project, the criticism remained that judges and attorneys would

20. Roswell B. Perkins, President's Foreword to 1 American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, xi, xvi-xviii (1994).

21. *Id.* at xix, (citing The Garrett Memorandum addressing the subject of "A Restatement with Recommendations Regarding the Legal Duties Incident to Corporate Management and Control.") (May 13, 1978). Garrett was not alone in his recommendation that corporate law could not be adequately restated in its entirety. Professor Louis Loss also believed that although some parts of corporate law could be restated, others controlled by statute or corporate practices needed model code provisions and recommended guidelines. Donald E. Schwartz, *Genesis: Panel Response*, 8 CARDOZO L. REV. 687, 688 (1987) (citing Loss, Concluding Remarks, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE 553, 554 (D. Schwartz ed. 1979)).

22. See *supra* note 10; and Melvin Eisenberg, *An Introduction to the American Law Institute's Corporate Governance Project*, 52 GEO. WASH. L. REV. 495, 498 (1984); Eisenberg et al., *Panel Discussion*, 37 U. MIAMI L. REV. 319, 337 (1983) ("[C]orporation Law is a unique jurisprudential animal. Although most bodies of law are largely case or common law, or else are largely of statutory origin, corporation law is a hybrid."). Eisenberg was a reporter on the Corporate Governance Project.

23. Perkins, *supra* note 20, at xviii-xxi.

regard the Principles of Corporate Governance as having the same authoritativeness as Restatements of existing law despite the fact that Principles could involve significant changes to existing law. For some critics, portraying the Principles as being like Restatements could mask the extent of their innovation.²⁴ After having faced the initial criticisms to the Principles format, ALI presidents and directors have justified the use of that format in the introductions and forwards to the Principles of Law projects that have followed the Corporate Governance Project.²⁵

Recent directors of the ALI, such as Geoffrey Hazard and Lance Liebman, have found Principles projects more appropriate than Restatements in situations where the law is unsettled or where a more fundamental revision of the law is needed, especially in legal areas governed by both statutes and the common law.²⁶ Hazard noted that family law could not be addressed with a Restatement because of “the current disarray in family law.”²⁷ Similar to the Principles on Corporate Governance, the ALI’s *Principles of the Law of Family Dissolution* consists of a combination of Restatement provisions and model laws.²⁸ Using the Principles format allowed for recognition of new legal concepts and facilitated greater consistency in family law.²⁹

Another statement regarding the appropriate scope of a Principles project is in Lance Liebman’s Foreword to the *Principles of the Law of Aggregate Litigation, Discussion Draft No. 2* (April 6, 2007). Liebman asserts that the law of aggregate litigation lends itself to a Principles project and not a Res-

24. Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1216-17 (1993).

25. See Roswell B. Perkins, President’s Foreword to 1 American Law Inst., *Principles of Corporate Governance: Analysis and Recommendations* (1994); *Principles of the Law of Software Contracts*, *supra* note 4, at Introduction; and Foreword to American Law Institute, *Principles of the Law of Aggregate Litigation* (Discussion Draft No. 2 2007). The ALI web site, http://www.ali.org/doc/past_present_ALIprojects.pdf, currently lists 8 Principles of Law that it is involved in:

- Aggregate Litigation (2003-)
- Corporate Governance: Analysis and Recommendations (1977-1994)
- Family Dissolution: Analysis and Recommendations (1989-2002)
- Government Access to and Use of Personal Digital Information (2006-)
- Nonprofit Organizations (2000-)
- Software Contracts (2004-)
- Transnational Civil Procedure (1997-2006)
- World Trade Law: The World Trade Organization (2001-)

26. The ALI used the same rationale four decades before the first Principles project, when it abandoned a Restatement project on evidence because the state laws of evidence were deemed highly unsettled and poor law, in need not of restating, but of a “thorough revision” through the creation of a model code. Am. Law Inst., *Model Code of Evidence* at viii (1942).

27. ALI, *Foreword to Principles of the Law of Family Dissolution: Analysis and Recommendations*, at xiii (Proposed Final Draft, Part 1 1997). See generally James DiFonzio, *Toward a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923 (2001).

28. DiFonzio, *supra* note 27, at 924.

29. June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Law Dissolution, Compensatory Spousal Payments*, 4 J. L. & FAM. STUD. 43 (2002).

tatement because current law varies among the states, as well as between the states and federal government. However, even with these differences, “recent legal developments point in certain directions that can be sketched, predicted, and recommended.”³⁰ Given the current state of the law, Liebman believes that “appropriate recommendations should be aimed at legislatures and courts.”³¹ According to Liebman, all of these conditions point to the use of a Principles project and not a Restatement.

In his report to the Annual Meeting in 2006, Liebman notes the movement away from model codes to Principles of Laws. He regards it as a reaction to the state legislatures’ failure to adopt ALI model codes. Liebman approves of the ALI’s use of Principles of Law to speak to legislatures, courts, and agencies at the same time because the Principles format allows the reporter to build a coherent law out of existing statutes, regulations, and judicial rulings, as well as relevant legal research.³²

The unsettled nature of existing law has also served as a justification for a Principles project on the law of software contracts. The Introduction to the *Principles of the Law of Software Contracts, Tentative Draft No. 1* (March 24, 2008) explains that a Restatement treatment of the law “would be premature” because courts are still in the midst of deciding fundamental issues of software contracts.³³ A Principles project goes beyond restating the law by “account[ing] for case law and recommend[ing] best practices,” allowing the law to adapt to future conditions.³⁴ Courts, if they decide to use the Principles, can employ them as “definitive rules” or as an interpretation of existing common law or statutes.³⁵

The ALI has no explicit guidelines to determine whether a project should be a Restatement, Principles of Law, or model code. The only written guidance about the appropriate scope or topic for an ALI project is a reporter’s handbook and the statements by ALI directors, presidents, and fellow reporters. This lack of guidance essentially means that the form of ALI projects is chosen in an ad hoc manner.

The lack of guidance on the scope of projects does not correspond to a lack of process for the development of ALI projects. The ALI’s Program Committee Charter, adopted in May 2007, states that the Director of the ALI must seek the “advice and recommendation” of the Program Committee

30. ALI, *Foreword to Principles of the Law of Aggregate Litigation*, at xiii (Discussion Draft No. 2 2007).

31. *Id.*

32. REPORT OF THE DIRECTOR, ANNUAL REPORTS, 83RD ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE 1-3 (2006). See LIEBMAN, FOREWORD, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, at vii (2005) (“Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.”).

33. *Principles of the Law of Software Contracts*, *supra* note 4, at 2.

34. *Id.*

35. *Id.* at 3.

“[b]efore submitting a proposal for a new Restatement, Principle, statutory, or other substantial law reform project to the Council or Executive Committee for its approval”³⁶ In so doing, the Director should ordinarily provide, in advance to the Program Committee, a “prospectus that includes a description of the project’s purpose, need, and scope, and the *probable form* of the final work product” (emphasis added)³⁷

The ALI’s bylaws, as amended in May 2007, provide that the “primary functions of the Council are to determine projects, programs, and activities to be undertaken by the Institute, either alone or with other organizations; [and] to determine *the form* of Institute projects” (emphasis added)³⁸ Significantly, the phrase “determine the form of Institute projects” did not exist in the prior version of the bylaws. The prior version read, “[t]o determine projects, programs, and activities to be undertaken by the Institute, either alone or jointly with other organizations, including government agencies”³⁹

The charter and bylaws, taken together, outline a process in which the Director initiates a project by seeking its approval from the Council or Executive Committee after the project has been analyzed by the Program Committee. The Director indicates what form the project will take, presumably Restatement, Principles, or model code. The Council can then approve the project and determine its final form.

After the Council has approved the project, the Director selects a reporter and a group of ALI members to act as advisors on the project. The reporter, who is an expert in the area of law covered by the project, has the primary drafting responsibilities, while the advisors are also subject experts who provide the reporter with feedback and constructive criticism of the reporter’s various drafts of the project.

The reporter first creates a preliminary draft and meets with the project’s advisors and a consultative group to receive feedback. The consultative group consists of ALI members who have an interest in the area of law under consideration and have volunteered to assist with the project. Although both the advisors and the consultative group can provide helpful analysis of the draft, the sole responsibility for drafting remains with the reporter.

After revising the preliminary draft based on the comments received, the reporter produces a draft to be considered by the ALI Council. The reporter receives detailed feedback on this Council Draft. The Council, in contrast to the advisors or the consultative group, does have the authority to order the reporter to make changes to the draft. After incorporating any changes in-

36. http://www.ali.org/doc/Charter_Program_Comm.pdf.

37. *Id.*

38. Bylaw 4.01(B). <http://www.ali.org/doc/Bylaws07.pdf>.

39. Bylaw 4.01(A). http://www.ali.org/doc/bylaw_2007.pdf.

initiated by the Council, a Tentative Draft is produced, which is presented to the ALI membership for approval.⁴⁰

As noted previously, NCCUSL is a partner with the ALI on some statutory projects, including the U.C.C., and has a similar drafting process. The project is assigned to a drafting committee, members of which are appointed by the NCCUSL president. The drafting committee members bear primary responsibility for the drafting process. Unlike their central role in the ALI drafting process, the reporters in a drafting committee perform research and create a draft document of the proposed legislation using the language developed by committee members.⁴¹ Outside advisors from the ALI and American Bar Association and other experts may also participate.⁴² Once a draft is completed, it is usually discussed during at least two NCCUSL annual meetings before being promulgated.⁴³

Joint ALI and NCCUSL projects must go through the approval process of each organization. The process differs slightly if the project involves amending the Uniform Commercial Code. ALI and NCCUSL have created the Permanent Editorial Board (the “Board”) for the U.C.C. The Board is responsible for amendments to the U.C.C. The Board can suggest amendments on its own, or a study committee from either the Conference or Institute can suggest amendments after consulting with the Board. If the Conference and Institute approve of a project to amend the U.C.C., then a joint drafting committee is appointed by both organizations. The reporter(s) for the drafting project are also jointly selected. Any draft produced is subject to the same approval process that any ALI project undergoes. Both organizations must adopt the amendment before it can go into effect.⁴⁴

NCCUSL produces both uniform laws and model acts. The main purpose of a uniform law is to promote the uniformity of law among the states. A model act can achieve its objectives without all states adopting it in its entirety.⁴⁵ NCCUSL has a process to determine whether a proposal should be a uniform law or a model act and criteria for making that determination:

2. DESIGNATION OF ACTS AS UNIFORM OR MODEL

(f) Criteria for designation:

(i) An act shall be designated as “Uniform” if

40. ALI, HANDBOOK, *supra* note 32, at 15-18.

41. Carlyle C. Ring, *The U.C.C. Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 288-89 (1994).

42. *Id.* at 290.

43. *Id.* at 298.

44. Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code (July 31, 1986, as amended January 18, 1998), <http://www.ali.org/doc/03-PEB%20for%20UCC%2003.pdf>.

45. <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=5&tabid=61>.

- (A) there is a substantial reason to anticipate enactment in a large number of jurisdictions; and
 - (B) “uniformity” of the provisions of the proposed enactment among the various jurisdictions is a principal objective.
- (ii) An act shall be designated as a “Uniform Law Commissioners’ Model” Act if
- (A) “uniformity” may be a desirable objective, although not a principal objective;
 - (B) the Act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the Act in its entirety; or
 - (C) the purposes of the Act can be substantially achieved, even though it is not adopted in its entirety by every State.⁴⁶

In contrast, the ALI does not have written criteria for the ALI Director and council to apply when determining the form of a particular project. The ALI has published a reporter’s handbook that sheds some light on the process in the following description:

The nature, content, and scope of each Institute project are initially developed by its Reporter in consultation with the Institute’s Director, generally on the basis of a prospectus or memorandum prepared by the Reporter at the invitation of the Director and subsequently reviewed by the Program Committee and either by the Council as a whole or its Executive Committee.⁴⁷

According to the Handbook’s formulation, “Restatements are addressed to courts and others applying existing law” and reflect current law, but “Principles [are] addressed to courts, legislatures, or governmental agencies.”⁴⁸ They express “the law as it should be,” and not necessarily how the law currently is.⁴⁹ The ALI, on its website, differentiates among Restatements, model laws, and Principles of Law as follows:

Restatements are addressed to courts and others applying existing law. They aim at clear formulations of common law and its statutory ele-

46. Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts (January 13, 2001), <http://www.nccusl.org/Update/Default.aspx?tabindex=3&tabid=42>.

47. ALI HANDBOOK, *supra* note 32, at 3.

48. *Id.* at 4.

49. *Id.*

ments or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement black-letter formulations assume the stance of describing the law as it is.

Model codes or statutes and other statutory proposals are addressed mainly to legislatures, with a view toward legislative enactment. Statutory formulations assume the stance of prescribing the law as it shall be.

Principles may be addressed to courts, legislatures, or governmental agencies. They assume the stance of expressing the law as it should be, which may or may not reflect the law as it is.⁵⁰

The ALI recognizes the similarities among the three different types of projects. Each covers a particular area of law and synthesizes it in a way that leads to the “better administration of justice.”⁵¹ All projects contain “black letter” legal statements with comments and illustrations.⁵² According to the ALI, the projects differ in the “stance toward the law assumed,” the legal institutions to which they relate, and their purposes.⁵³

The distinctions are blurred in practice. Restatements can include existing law as found in existing state or federal codes and can be written as if they are statutes. They not only state the law as it exists, but also express changes in the law or suggest better common law rules that have not been adopted yet by courts. The ALI drafts model codes to be enacted by legislatures, but they usually involve a revision of an existing statutory framework rather than a creation of a completely new one. The content of the provisions in a model code are not substantially different from those in a Restatement or Principles. Principles can be addressed to the three branches of government to propose changes to existing law. Principles can include Restatement and model code provisions, but they need not be tied to existing law or represent incremental change from existing law. A Principles drafter is free to formulate the law as it should be.⁵⁴

While more flexibility exists for a drafter of Principles, the composition of Restatements, model codes, and Principles are very similar. All can reflect proposed changes to existing law, all are written using similar formats, and all go through the same drafting and approval process.

Given the similarities, the differences among them may largely be semantic. For example, the reporter’s Handbook offers Sec. 48 of the Restatement of Contracts, Second to highlight the differences between a Restatement, model law, and a Principle: “Death or Incapacity of Offeror or Offeree - an

50. <http://www.ali.org/index.cfm?fuseaction=projects.main>. Similar descriptions of the three types of projects are in ALI, HANDBOOK, *supra* note 32.

51. ALI, HANDBOOK, *supra* note 32, at 3.

52. *Id.*

53. *Id.* at 4.

54. *See Id.* at 3-14.

offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract."⁵⁵

The phrase "is terminated" indicates the present tense of a Restatement expressing existing current law. Replacing the same phrase with "shall be terminated" indicates a statutory command, while "should be terminated" indicates a Principle or the way law should be, but does not currently exist.⁵⁶ Given the similarities of the three formats, creating guidelines on how to choose which one to employ may mean no more than deciding which auxiliary verb to use.

The differences between the three types of projects are meaningful in terms of limiting or expanding the scope of projects. Restatement and model law projects have existing law as a starting point. They are constrained, to an extent, by current law. Principle projects, while taking into account current case and statutory law, can ignore that law if there are rules that make more sense. In other words, reporters of Restatements are restrained by the settled law that they seek to restate, but there are fewer constraints for the drafters of Principles because the existing law is unsettled.

The area of law may also determine the type of project a reporter chooses. An area of law dominated by common law lends itself to a Restatement in the same manner that law governed by statutes requires a model code. With the growth of the regulatory state there are fewer areas of law that are either purely common or statutory law. Principles projects are better equipped to provide a complete solution to these complex areas of law.

Articulating how the ALI determines the appropriate form for a project, Michael Traynor, a former president of the ALI, recently wrote that the distinctions among the various project forms as described in the Handbook were "pertinent" to the determination.⁵⁷ Echoing previous statements about the appropriateness of different project forms, Traynor reasons that established and well-settled law is ripe for Restatement treatment, but lesser developed law may be better suited for Principles treatment.⁵⁸

So how should an ALI reporter, director, or Council determine when to use one project format over another? Restatements can be employed in areas where there is settled common law. If common law is unsettled or bad law, then a model law or Principles format can be used. But how does one choose between the two? Obviously, model laws are purely statutory, whereas Principles can be a combination of model statutes, Restatements of common law, and other standards. In the absence of explicit ALI guidelines, the necessity of using one format over another is still unclear. Only the Handbook and the statements made by the ALI directors, presidents, and

55. ALI, HANDBOOK, *supra* note 32, at 6.

56. *Id.*

57. Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 160-61 (2007).

58. *Id.* at 162.

reporters regarding existing projects provide some written guidance to future reporters, directors, and presidents.

The ALI Council should consider developing criteria for the use of different project forms just as NCCUSL has done with uniform and model laws. Having official criteria eliminates inconsistencies that can result from making such decisions on an ad hoc basis. Official criteria will force the ALI to consider the purpose of their project forms and to decide whether those forms currently meet the goals of the organization and the needs of society.

II. RECENT ANCIENT HISTORY

Nearly fifteen years ago, the ALI and NCCUSL embarked on a project to revise Article 2 of the Uniform Commercial Code. During the study phase of that project, it became clear that the shifting transactional landscape would render revision of Article 2 alone—at least Article 2 restricted to its original scope, the sale of goods—crucially deficient. That is, transactional patterns, urged on by evolving technologies, had obscured whatever good reason there may once have been for distinguishing sales of goods from other, analogous transactions. Indeed, the promulgation of Article 2A, governing leases of personal property, confirmed that essential Article 2 principles (even if not necessarily extant Article 2 formulations⁵⁹) could apply with similar vigor in analogous transactional contexts.

Insofar as “the object of the Article 2 Revision Committee [was] to achieve symmetry and coordination within the commercial law,”⁶⁰ there had to be good reason to limit the scope of a Revised Article 2 as severely as had been the original promulgation. The reasons for Original Article 2’s scope limitation would have to be retested and justified once more, or, so it would seem, the limitation could not endure. And, of course, the promulgation of Article 2A confirmed that there was nothing necessary or inevitable about limiting the commercial contracting law to sales of goods rather than including a wider sample of transactions.

Fairly early on, the drafters of the Revision determined that the best way to accommodate the coordination of fundamental commercial contracting principles and transactional idiosyncrasy was to adopt a “hub and spoke” approach:

The hub and spoke approach assumes certain over-arching fundamental principles of commercial contracts which are formulated as a ‘hub.’ From that hub emanates a series of ‘spokes,’ each pertaining to differ-

59. See, e.g., Peter A. Alces, *Surreptitious and not-so-Surreptitious Adjustment of the UCC: An Introductory Essay*, 39 ALA. L. REV. 559, 564-65, n.24 (1988) (observing that U.C.C. § 2A-201, pertaining to the statute of frauds, “does not follow its Article 2 analogue . . .”) (hereinafter Alces, *Surreptitious*).

60. Benfield, Jr. & Alces, *Reinventing*, *supra* note 5, at 1406.

ent and distinguishable species of transaction, each sufficiently distinct from the transactions covered by the other spokes to support separate treatment, and each sufficiently similar to the other spokes to warrant application of the same hub principles. The hub could consist of basic contract formation principles, such as a writing requirement, extrinsic evidence rules, and unconscionability. The spokes would concern topics as broad as sales of intangible personal property, licenses of intellectual property, and intellectual property service agreements.⁶¹

There certainly was at least superficial attraction to a method that would reconcile all that could be reconciled and draw distinctions that the law could just not do without. But when exposed to the harsh light of reality, and perhaps some cynicism, the potential flaws became manifest: “The hub and spoke approach . . . will fragmentize the law, leaving it scattered among the special interests that certainly will undermine the hub (or hubs) by adjustment of the spokes, the patience of state legislatures willing.”⁶²

A hub and spoke approach would lead to the disintegration of commercial law, and would in fact undermine consistent principled treatment of recurring transactions in recurring transactional contexts. Whether the distinctions would be drawn along lines determined by the form of property (tangible versus intangible), transactor sophistication (merchant versus consumer), or transaction type (wholesale versus retail, service versus res), even summary consideration of the practicalities supported the conclusion that “the revisers’ attraction to multiplication rather than consolidation . . . avoided the focus on principle and fundamental affinities that should animate a comprehensive codification of the commercial law.”⁶³ The hub and spoke approach would have *obscured* principle, and would have actually undermined efforts to reveal the essential substance of the commercial contracting law. That would, in turn, have empowered special interests to prune the trees to their liking with no thought whatsoever of the forest. For those who think that there is something of fundamental concern that underlies commercial contracting, indeed perhaps all of contracting, hub and spoke would have been a giant leap backward in the commercial codification movement.

To be fair, and perhaps more clear, it was not the slightest hint of “hub and spoke” that caused concern. After all, the current form of the U.C.C. might be understood as following the hub and spoke form. Article 1 contains definitions⁶⁴ and provisions⁶⁵ of general application, and the substantive articles that follow provide the rules governing specific transactional

61. *Id.*

62. *Id.* at 1409.

63. *Id.* at 1414.

64. See, e.g., the definition of “contract,” U.C.C. § 1-201(b)(12) (2003) (cross-referenced in Article 2, U.C.C. § 2-102, Article 3, U.C.C. § 3-303, Article 7, U.C.C. § 7-102, etc.).

65. See, e.g., U.C.C. § 1-304 (2001) (providing that every contract within the Uniform Commercial Code “imposes an obligation of good faith in its performance and enforcement.”).

contexts. But the division among the substantive articles of the current U.C.C. is the product of history more than anything else. That is, had the drafters of the U.C.C. begun from whole cloth it is not obvious that Article 1 could not have been more extensive and the specific rules within each of the substantive rules more limited and focused. Indeed, it is clear that within each of the substantive articles as they currently exist, there could have been more specific spokes, thereby drawing distinctions provided or suggested in the current law.⁶⁶

In fact, the promulgation of Article 2A made quite clear the disintegration of principle that could (would inevitably?) attend the comprehensive execution of the hub and spoke strategy: “There are substantial similarities between a sale of goods and a lease of goods, nevertheless, only fifteen out of eighty-seven Article 2A sections are identical to those of Article 2.”⁶⁷ And the differences between Article 2 provisions and their Article 2A analogs are not consistently a function of transactional distinctions between a sale and a lease.⁶⁸ There are also examples among the other substantive articles of distinctions that do not obviously reflect transactional context as much as they do drafter and drafting inconsistency.⁶⁹ The failure of hub and spoke notwithstanding, there was a perceived need for legislation to govern evolving transactional patterns. Accordingly, it was clear that the fit between such legislation and extant commercial contracting law and principles would have to be reconceptualized.

III. EXIT UCITA AND ENTER PRINCIPLES OF SOFTWARE CONTRACTING

Following the failure of the hub and spoke initiative, the ALI and NCCUSL began work on an Article 2B of the U.C.C., which would have governed computer information transactions.⁷⁰ Dean (then Professor) Raymond Nimmer was the Reporter for the project, which ultimately lost ALI

66. Of course, to an extent, there are: *see, e.g.*, U.C.C. § 2-201(2) (2003) (applying a different Statute of Frauds requirement to merchants than non-merchants); U.C.C. Article 3 (2002) (employing different contract rules for different forms of negotiable instruments); U.C.C. §§ 9-308 – 9-314 (2003) (basing form of perfection on type of collateral).

67. Benfield, Jr. & Alces, *Reinventing*, *supra* note 5, at 1419.

68. Alces, *Surreptitious*, *supra* note 59, at 564-65 n.24 (questioning the Official Comments to U.C.C. § 2A-201 explanation that the Article 2A statute of frauds provision contains no special rules for merchants, as does the Article 2 analogue, § 2-201(2), because “the number of such transactions involving leases . . . was thought to be modest”); Benfield, Jr. & Alces, *Reinventing*, *supra* note 5, at 1421 (explaining differences between Article 2 and 2A (e.g., battle of the forms, requirements for warranty of merchantability, and unconscionability) that do not arise out of the transactional differences between a sale and a lease).

69. Benfield, Jr. & Alces, *Reinventing*, *supra* note 5, at 1428-29.

70. Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683, 1686-87 (1999) (noting that a NCCUSL drafting committee to address software transactions was born out of NCCUSL leadership’s 1995 decision that the hub and spoke concept was unworkable.).

co-sponsorship.⁷¹ Unscathed, the NCCUSL continued with the project, denominated the “Uniform Computer Information Transactions Act” (UCITA), until that too failed⁷² after gaining passage in only two states and provoking a strong negative reaction from many of the other states that refused to even allow enforcement of contracts incorporating UCITA within their jurisdictions.⁷³

After the Article 2B and UCITA projects, the perceived gap in the law that precipitated the effort to provide preemptive and comprehensive statutory law governing computer information transactions remained. Courts could rely on Articles 2 or 2A by analogy,⁷⁴ or fall back on common law contracting principles such as those provided in the Contracts Restatement. But that was not, and is not, optimal, at least in the estimation of those uncomfortable with the uncertainty that might prevail during whatever amount of time it would take for the common law to catch up with the new transactional forms.⁷⁵ Of course, it will always be difficult to know when “it is time” for comprehensive codification of a new area of law, indeed, when a new area of law has in fact emerged. It is also likely that the affected transactors could disagree about the need for comprehensive codification: so long as courts are reaching conclusions with which you and similarly interested parties are comfortable, all is well; but if courts are imposing risks on your business model that impair your investments’ profitability, all is not so right with the world.

The ALI concluded that, notwithstanding the dynamic nature of the law governing software transactions, the prominence of four unresolved issues, in particular, warranted reconsideration of the legal principles implicated:

- (1) the nature of software transactions;
- (2) the lawfulness of current practices of contract formation and the implications of these practices for determining governing terms;
- (3) the relationship between federal intellectual property law and private contracts governed by state law;

71. See, e.g., The ALI Reporter (ALI Phila., Pa.), Spring 1999, at 1.

72. See Statement, K. King Burnett, Statement by NCCUSL President Burnett to ABA House of Delegates Regarding UCITA (Feb. 10, 2003), available at http://www.nccusl.org/nccusl/ucita/UCITA_withdrawal.pdf (last visited Jan. 28, 2009).

73. “Bomb-shelter” legislation has been adopted in several states to prevent the enforcement of contracts incorporating UCITA. See, e.g., IDAHO CODE ANN. § 29-116 (WEST 2008); IOWA CODE ANN. § 554D.125 (WEST 2008); N.C. GEN. STAT. ANN. § 66-329 (WEST 2008); VT. STAT. ANN. tit. 9, § 2463(a) (WEST 2008); W. VA. CODE ANN. § 55-8-15 (WEST 2008).

74. See, e.g., *Stanley A. Klopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 809 (E.D. Pa. 1981) (adopting the general standard of good faith by analogizing the U.C.C. to a sale of franchise rights); *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1375 (Mass. 1980) (applying, by analogy, the U.C.C. principles of good faith and unconscionability to a franchise agreement where the U.C.C. was otherwise inapplicable).

75. Peter A. Alces, *W(h)ither Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design*, 87 CAL. L. REV. 269, 271-72 (1999) (hereinafter Alces, *W(h)ither Warranty*).

and (4) the appropriateness of contract terms concerning quality, remedies, and other rights.⁷⁶

Because transactions involving software present unique challenges, extant bodies of law are not sufficient to provide transactors the guidance they need.⁷⁷ And to the extent that formulation of essential principles can provide certainty, transaction costs are reduced, wealth and welfare are increased.

That object is a worthwhile one and this article will not take issue with the reasons supporting the ALI's decision to go forward with the Principles of Software Contracting project. The concern we voice here is with the fit among the various statements and Restatements of law and legal Principles insofar as they erode the coherence of a body of law, such as Contract. We believe that there is both a reason for concern, and a different way to proceed that is considerate of the risks that the multiple iterations of "contract laws" present. It is worthwhile at the outset to offer a couple of concrete illustrations of the potential challenges.

There has been a persistent tension in the commercial contracting law between the autonomy interests of those who sign consumer and commercial agreements and the utility to be realized from enforcement of such standard forms.⁷⁸ On the one hand, those who would be bound by what they sign want only to be bound to the extent that they intend to be bound. On the other hand, those who use form agreements want to be able to rely upon the enforceability of those forms even if they reflect something less than a "bargain in fact."⁷⁹ The argument on the side of requiring substantial intent to be bound is the "agreement" requisite itself. While we probably do not require an absolute "meeting of the minds,"⁸⁰ there is obvious good reason to want something more than an empty gesture. But that "something more" comes at a cost, and the question remains whether that agreement, or some reasonable

76. *Principles of the Law of Software Contracts*, *supra* note 4, at Introduction.

77. *Principles of the Law of Software Contracts*, *supra* note 4, at Introduction ("Software vendors and copyholders of all types can perform their various roles confidently and efficiently only after the clarification of applicable rules.").

78. See, e.g., Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511 (2007); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679 (2004); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420 (2001).

79. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

80. See, e.g., 216 Jamaica Ave., LLC v. S & R Playhouse Realty Co., 540 F.3d 433, 440 (6th Cir. 2008) ("the meeting-of-the-minds formulation often requires far less than it suggests. As in most jurisdictions, Ohio law does not require contracting parties to share a subjective meeting of the minds to establish a valid contract . . ."). See also *Booker v. Robert Half Int'l Inc.*, 315 F. Supp. 2d 94, 101 (D.D.C. 2004) (holding that when a party signs an agreement they are presumed to know its contents); *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (holding that "the mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial . . .").

facsimile thereof, is ultimately worth the candle. Form agreements reduce transaction costs and thereby,⁸¹ so the story goes, increase wealth and *perhaps* welfare too, depending on what you understand welfare to be.

The commentators have had a difficult time accommodating the autonomy interest vindicated by agreement with the welfare loss such actual agreement would entail. And it seems that there is more discussion about what the empirical evidence would reveal than there is effort to develop that evidence.⁸² What is clear, though, is that there is nothing about the agreement calculus in the form contracting setting that is *necessarily* limited to transactions involving software, even if the complexity of some software transactions would suggest a basis of distinction. We may imagine that even a horse and buggy contract could be “complex,” so long as we understand complexity, in this sense, to be a function of the contract price/allocation of risk calculus.

The forthcoming *Principles of the Law of Software Contracts* suggests an accommodation of the conflicting interests that need not, at least need not *obviously*, be limited to the software contracting context. The Principles, as you recall, are the Institute’s effort to pick up the thread left off in Article 2B and UCITA. UCITA was originally envisioned as Article 2B to the U.C.C., but later became a free-standing uniform law. Section 2.02 of the Principles is captioned “Standard-Form Transfers of Generally Available Software; Enforcement of the Standard Form” and bears reproduction at length here:

- (a) This Section applies to standard-form transfers of generally available software
- (b) A transferee adopts a standard form as a contract when a reasonable transferor would believe the transferee intends to be bound to the form.
- (c) A transferee will be deemed to have adopted a standard form as a contract if
 - (1) the standard form is reasonably accessible electronically prior to initiation of the transfer at issue;
 - (2) upon initiating the transfer, the transferee has reasonable notice of and access to the standard form before payment or, if there is no payment, before completion of the transfer;
 - (3) in the case of an electronic transfer of software, the transferee signifies agreement at the end of or adjacent to the electronic stan-

81. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

82. See, e.g., Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2008); Oren Barr-Gill, Exchange, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749 (2008); Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111 (2006) (hereinafter Epstein, *Behavioral Economics*).

standard form, or in the case of a standard form printed on or attached to packaged software or separately wrapped from the software, the transferee does not return the software unopened within a reasonable time after the transfer; and

(4) the transferee can store and reproduce a standard form if presented electronically.

(d) Subject to § 1.10 (public policy), § 1.11 (unconscionability), and other validating defenses supplied by these Principles or outside law, a standard term is enforceable if reasonably comprehensible.

(e) If the transferee asserts that it did not adopt a standard form as a contract under subsection (b) or asserts a failure of the transferor to comply with subsection (c) or (d), the transferor has the burden of production and persuasion on the issue of compliance with the subsections.⁸³

The section provides an alternative safe harbor, of sorts: “failure to comply does not absolutely bar a transferor from otherwise proving transferee assent.”⁸⁴ The apposite comments explain that the provision would apply to all transferees whether business (large or small) or consumer: “drawing lines between what constitutes a large or small business or between businesses in the same position as consumers and businesses with a better bargaining position would be difficult and largely arbitrary.”⁸⁵ The drafters of the Software Principles seem to suggest that their object is deontological: “Increasing the opportunity to read supports autonomy reasons for enforcing software standard forms”⁸⁶ It is not, though, so clear that the provision relies on deontological rather than consequentialist premises. The focus is not on the particular transferee, but is instead on whether the standard term is *reasonably* comprehensible. So, such a term will bind the transferee even in the absence of actual agreement. This provision, then, represents a departure from the traditional agreement conception and seems to defer to the type of market forces Judge Easterbrook⁸⁷ and Professor Epstein⁸⁸ trust, while affording somewhat less attention to the concerns raised by others.

Another, and perhaps equally fundamental, crux in contracting law involves the admissibility of extrinsic evidence when the parties have reduced their agreement to tangible form—the so-called “parol evidence rule.”⁸⁹ The

83. Epstein, *Behavioral Economics*, *supra* note 82, at 163-64.

84. *Id.* cmt. c, at 171.

85. *Id.* at 165.

86. *Id.* at 159.

87. *See, e.g., ProCD*, 86 F.3d at 1453.

88. *See, e.g., Epstein, Behavioral Economics*, *supra* note 82, at 131.

89. The common law, the Uniform Commercial Code, and the Restatement (Second) of Contracts contain differing but essentially similar renditions of the parol evidence rule. *See, e.g., Shultz v. Delta-*

rule has assumed various formulations, both in the statutory commercial law⁹⁰ and in the common law decisions. Further, even commentators who proceed from a consequentialist perspective acknowledge that there may be good *consequentialist* reasons for the rule to mean different things in different contexts.⁹¹ Interestingly, the most recent iteration of the ALI's *Principles of the Law of Software Contracts* includes a provision which would provide a parol evidence rule to govern software contracts irrespective of the relative sophistication of the contracting parties:

(d) The court should determine whether a term in a record is ambiguous In making this determination, the court should consider all credible and relevant extrinsic evidence, including evidence of agreements and negotiations prior to or contemporaneous with the adoption of the record. If a term or terms is ambiguous, extrinsic evidence is admissible to prove the meaning of the term or terms.⁹²

Now there may well be reason to distinguish software contracting from contracting about other forms of property that militates in favor of a particular predisposition toward the introduction of extrinsic evidence in the software contracting setting. Certainly the complexity of software contracts, at least until they have become more familiar and standardized,⁹³ could matter to the law's attitude toward such evidence. A challenge that should remain for the ALI and the Reporters of the Software Principles will be to offer

Rail Corp., 508 N.E.2d 1143, 1150 (Ill. App. Ct. 1987) (stating that “[a]n agreement reduced to writing must be presumed to speak the intention of the parties who signed it. The intention with which it was executed must be determined from the language used, and such an agreement is not to be changed by extrinsic evidence.”); 67 Wall St. Co. v. Franklin Nat’l Bank, 333 N.E.2d 184, 186 (N.Y. 1975) (recognizing that the parol evidence rule in New York “requires the exclusion of evidence of conversations, negotiations and agreements made prior to or contemporaneous with the execution of a written lease which may tend to vary or contradict its terms . . .”); RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

90. U.C.C. § 2-202 (2003); U.C.C. § 2A-202 (2003).

91. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 547 (2003) (concluding that a “textualist theory of interpretation, however, will not suit all parties all of the time. Therefore, courts should use narrow evidentiary bases when interpreting agreements between firms, but also should comply with party requests to broaden the base that is applicable to them.”) (hereinafter Schwartz & Scott, *Contract Theory*).

92. *Principles of the Law of Software Contracts*, supra note 4, at § 3.08(d). On the question of whether even business transactors are subject to the same negotiating pressures as consumers, see generally Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295 (2005) and Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006). For the argument that the computer software context presents particular opportunities for overreaching, see Jay P. Kesan & Rajiv C. Shah, *Setting Software Defaults: Perspective from Law, Computer Science and Behavioral Economics*, 82 NOTRE DAME L. REV. 583 (2006) and Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643 (2003).

93. See, e.g., Alces, *W(h)ither Warranty*, supra note 75, at 271-72 (“Because the technology that a uniform software license law would govern has not reached anything even approaching repose, it is impossible to draft a U.C.C. software article in the best Llewellynesque tradition.”).

convincing arguments to distinguish the software contracting setting from other transactional contexts.⁹⁴

IV. ARE PRINCIPLES OF CONTRACTING POSSIBLE?

It is difficult to make much sense of the categories that the ALI has adopted to distinguish its various legal reform initiatives. While there might be good reason to understand that Restatements capture what the law declares itself to be, uniform laws prescribe what the law is, and Principles more candidly urge the law in some direction, it is very clear that the province of those three project categories are not discrete; in fact, they very obviously do, and indeed should, overlap. Why would we not want the law to aspire to be better than it is? Why would we want the keepers of the law's flame to settle for the status quo? Insofar as there is something necessarily aspirational about all three types of projects, we are not surprised that the province of each cannot remain discrete. We do not think that it would serve the noble objectives of the Institute were each of its projects and products not aspirational in just the way that the descriptions of each type suggest. To restate the law is to read it in light of its best interpretation;⁹⁵ to certainly provide the law is to draw on what practice has revealed; and to offer fundamental principles you necessarily mine the legal landscape in order to discover what should be discovered and bury what should be buried. We are simply not convinced that the categories have the intellectual integrity to which they would seem to aspire. There is more that brings them together than there is to distinguish them, and that is as it should be.

But we believe that there *is* more important work for the Institute (and perhaps even NCCUSL, in some way) to do than it has been doing. We believe that the Institute, despite an inclination to do so obscured by the project labels, has not moved ambitiously enough beyond the objectives of its original founders. While the original Restatement projects may well have done what was mid-Twentieth Century legal rocket science—collected in one manageable place the best understanding of discrete areas of law—the organization has come to a crossroads and must respond to Twenty First Century challenges to law and legal theory. That is, the Institute must more carefully delineate the object of its different project types and understand

94. See Memorandum to Reporters, Director, Advisors, Consultative Group Members and Member of the Institute, from Micalyn S. Harris, May 16, 2008, re: Principles of the Law of Software Contracts — Comments on Discussion Draft of March 24, 2008 (arguing that the Institute has not demonstrated “why general contract principles are or should be inapplicable to contracts involving software”) (on file with author). See also, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 495 (2002) (concluding that “existing contract law is up to the challenge” of regulating contracting in an electronic environment.).

95. This is the interpretive theory, generally, and a Dworkinian idea, specifically; see, e.g. STEPHEN A. SMITH, *CONTRACT THEORY* 5 (2004) (interpretive theory “helps to ‘make sense’ of the law—and thereby helps us better understand it.”).

Principles projects as efforts to come to terms with the fundamental issues. In the case of commercial contracting, the Institute must try to do the fundamental research to help us better understand what theory of contract works or, if none does, what theory or theories explains the fit among the various contestants.⁹⁶ The ALI has continued to assemble cars when it needs to go back and discover what should replace the internal combustion engine.

That is not work for the faint of heart or even for the conscientious student of case law alone. Contract is more than case law, and in some important way it may even be less than case law. We need the talent, and the unique perspective, of the American Law Institute to help us resolve the fundamental deontological and consequentialist tensions. While the original Restatements may have filled a gap in the literature, advances in legal research techniques and technologies have accomplished what the Restatements endeavored to accomplish. The ALI can and must now do more than it has tried to do before, and the work will likely be more difficult.

The failure of the Article 2 revisions projects provides an opportunity for the ALI to reinvent itself. The organization, with or without the aid of NCCUSL, should begin a new project, and not a Restatement of Contracts, Fourth. The ALI membership should confront the challenge that the contract law presents by reconsidering its mission. In order to remain at the forefront of contract law reform, the ALI should begin a comprehensive review of the case law and commentary to identify the foundation of the consensual undertaking in terms that could, and would, resonate through myriad contract contexts. A piecemeal approach to systemic conundrums is not sufficient, even if it has been, and at the outset might be, necessary.

96. Deontological theories generally focus on Kantian notions of autonomy. The most prominent would be CHARLES FRIED, *CONTRACT AS PROMISE* (1981). More recent iterations of the contract as promise perspective are found in DORI KIMEL, *FROM CONTRACT TO PROMISE* (2003); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 *HARV. L. REV.* 708 (2007); and Daniel Markovits, *Contract and Collaboration*, 113 *YALE L. J.* 1417 (2004). Consequentialist theories generally focus on transaction cost reduction or welfare maximization as the object of exchange transactions. *See, e.g.*, Schwartz & Scott, *Contract Theory*, *supra* note 91; Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489 (1989).