INTERPRETIVE METHODOLOGY AND DELEGATIONS TO COURTS: ARE "COMMON-LAW STATUTES" DIFFERENT?

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I. INTRODUCTION

It is hard to find consensus on questions of statutory interpretation. Debates rage on about the appropriate goals of interpretation and the best means of achieving those ends. Yet there is widespread agreement, even among traditional combatants on the statutory interpretation field, when it comes to so-called "common-law statutes." Textualists concede that text is not controlling;[1] originalists admit that judicial construction of common-law statutes need not be keyed to the specific intent of the enacting Congress;[2] and staunch defenders of strict statutory stare decisis allow frequent departures from precedent.[3]

So what *are* common-law statutes? It is easy enough to name a few, and courts and commentators often do. The list always begins with the Sherman Act,[4] and typically includes Section 1983,[5] the Taft-Hartley Act, and statutory provisions on securities fraud.[6] In the realm of intellectual property, scholars have argued that many of the major enactments make the cut.[7]

What is missing is any clear conception of what defines this special category, uniting common-law statutes and distinguishing them from the rest. The relevant case law and

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[1] *See* Miranda McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 Miss. L.J. 129, 134 (2008) ("Justice Scalia entirely suspends textualism in about a quarter of the cases in the study's sample because he believes that he is interpreting a statute that has granted common law authority to the courts.").

[2] *See* Frank Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983) (arguing that "the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process" except in the case of the Sherman Act and like statutes "that effectively authorize courts to create new lines of common law")

[3] *See* Guardians Assoc. v. Civil Serv. Comm'n, 463 U.S. 582, 641 & n.12 (1982) (Stevens, J., dissenting) (arguing that "when the Court unequivocally rejects one reading of a statute, its action should be respected in future litigation," but making an exception for common-law statutes like the Sherman Act and § 1983).

[4] *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899-900 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); Easterbrook, *supra* note 2, at 544 ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.").

[5] *See* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 421-22 (1989) (arguing that, because § 1983 "is silent on many important questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements[,] . . . the statute delegates power to make common law").

[6] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1052 (1989) (describing Section 301 of the Taft-Hartley Act and the anti-fraud provisions of the securities laws as "common law statutes"); *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("When we deal with private [securities fraud] actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.").

[7] *See* Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 Yale L.J. 1126, 1167 (2008) (describing the Copyright Act as a "common law statute"); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 Colum. J.L. & Arts 187, 198-99 (2004) (describing the Lanham Act and the Federal Trademark Dilution Act as "delegating" statutes); Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. Rev. 51, 53 (2010) (describing the Patent Act as a "common law enabling statute").

commentary reveal two features that are thought to qualify statutes like the Sherman Act for special treatment: Such statutes are written in broad terms[8] and build on a tradition of common-lawmaking.[9] In this Chapter, I argue that neither of the proposed distinctions is persuasive, as the relevant features are shared by many other statutes that do not appear on the privileged list. Any differences are in degree, not in kind.

Of course, it is hardly uncommon for the law to mistake points on a continuum for separate categories, and the "common-law" label may serve as an easy—if mildly inaccurate—shorthand for the group of statutes that actively embrace lawmaking by courts. I hope to show, however, that the label is not so benign. Instead, the continuing fiction that there is a categorical difference between common-law statutes and "normal" statutes like, say, Title VII of the Civil Rights Act of 1964,[10] works to obscure the difficult line-drawing problems that interpreters otherwise would have to confront. If statutes like the Sherman Act and Title VII coexist on a scale of statutory vagueness,[11] it is a mistake to suggest that questions of interpretive methodology switch on and off in an automatic fashion depending on whether the statute at hand is a common-law statute.

An additional problem with the "common-law" label is that it diverts attention away from significant questions concerning delegations of lawmaking power to the judiciary. How should the legal system identify such delegations? When are they a good idea, and when should Congress rely on agencies instead? The notion that delegations to courts can be identified, and justified, simply by drawing an analogy to the Sherman Act conceals those issues from view. But once the label is peeled back, it becomes clear that our current treatment of common-law statutes raises more questions than it answers about delegations to courts.

II. COMMON-LAW STATUTES AND CONGRESSIONAL DELEGATIONS

In order to see what common-law statutes are and are not, it helps to begin with how they are treated. Most everyone agrees that common-law statutes represent delegations to courts.[12] (The harder question is *why*, and I turn to that below.) Thus, common-law statutes are "enabling" statutes: they authorize courts to make law.[13]

Understanding common-law statutes as enabling acts helps explain why interpreters of different stripes have been able to agree on a common methodology. Simply put, delegations to courts take many of the familiar arguments about statutory interpretation off the table. Consider the question whether courts should give effect to the intentions of the enacting legislators or interpret the statute dynamically in light of evolving norms. Whatever may be true in other circumstances, it makes little sense to insist on fidelity to original legislative intent where the only

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[8] *See infra* Part III.

[9] *See infra* Part IV.

[10] 42 U.S.C. §§ 2000e-1 to 2000e-17.

[11] For ease of exposition, I use the Sherman Act and Title VII throughout this Chapter as examples of "common-law" and "normal" (i.e., *not* common-law) statutes, respectively.

[12] *See, e.g.*, Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 Yale L.J. Online 47, 53 (2010) ("In the world of what are sometimes known as common law statutes, broad delegation to the judiciary is uncontroversial, and the legislature expects judges to develop the law over time by utilizing a free-form common law method."). For a discussion of delegations to courts generally, see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. Cal. L. Rev. 405 (2008).

[13] HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 52 (student ed. 1985) ("[T]he Sherman Act can be regarded as 'enabling' legislation—an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially efficient ways.").

discernible intent on the issue was to leave it to the courts.[14]

More fundamentally, much of statutory interpretation theory is focused on controlling or justifying a judicial role in the project of law creation and development. For example, textualists reject common-law approaches to statutory interpretation on the ground that "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and unelected judges decide what it is."[15] The argument assumes that judges have a choice: They can "stick[] close to the surface of statutory texts," thereby leaving policymaking in the hands of Congress, or they can embrace a policymaking role of their own.[16] But that choice evaporates when Congress delegates broad lawmaking power to the courts. The Sherman Act—the prototypical common-law statute—illustrates the point. Although the Act prohibits all contracts, conspiracies, and combinations "in restraint of trade,"[17] the Supreme Court long has held that the operative question is whether the conduct at issue restrained trade *unreasonably*.[18] A "reasonableness" standard plainly invites judicial policymaking. The standard requires further elaboration to clarify its contents, and even the Court's most committed textualists recognize that the text of the statute plays a minimal role in that process.[19]

Similar reasons explain the Court's relaxation of statutory stare decisis in the context of common-law statutes. Federal courts normally purport to apply a super-strong version of stare decisis to statutory precedents, on the view that once a court authoritatively interprets a statute, any change should come from Congress.[20] That view rests in part on the notion that the "'functional consequences'" of overrulings are "'legislative rather than judicial.'"[21] And it rests in part on an assumption that Congress "approves" of any interpretations it leaves in place.[22] Finally, super-strong statutory stare decisis reflects a sense that Congress is the appropriate body to weigh the advantages of updating the law against the likely disruption of public and private reliance interests.[23]

Each strand of reasoning suggests a discomfort with judicial lawmaking and a preference for

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[14] *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 46 (1985) (explaining how delegations to courts can coexist peacefully with an intentionalist approach to statutory interpretation).

[15] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997).

[16] Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 908 (2002).

[17] 15 U.S.C. § 1.

[18] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) ("While § 1 could be interpreted to proscribe all contracts, the Court has never taken a literal approach to its language. Rather, the Court has repeated time and time again that § 1 outlaw[s] only unreasonable restraints." (internal quotation marks omitted)).

[19] *See* Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. Contemp. Legal Issues 619, 621 (2004) ("[A]lthough textualists have sometimes been described as striving with missionary zeal to narrow the focus of consideration to the statutory text and its "plain meaning," this is hardly true in antitrust law." (internal quotation marks omitted)).

[20] *See* Amy Coney Barrett *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 348 (2004) ("[C]ourts most often assert simply that if a prior judicial interpretation does not capture the statute's meaning, Congress can—and therefore should—be the one to fix it."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1366-68 (1987) (describing the rationale for statutory stare decisis). *Cf.* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177, 200-19 (1989) (arguing that any judicial policymaking is countermajoritarian and should be avoided, and proposing that the Supreme Court shift policymaking responsibility back to Congress by applying an absolute rule of statutory stare decisis).

[21] Eskridge, *supra* note 20, at 1366 (quoting Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 Tex. L. Rev. 247, 250-51 (1947))

[22] Alex Hosiery Co. v. Leader, 310 U.S. 469, 488-89 (1940).

[23] Eskridge, *supra* note 20, at 1357.

congressional action. But such reasoning seems out of place in contexts like antitrust, where the Court has been thrust headlong into a lawmaking role. Why insist that Congress make *this* decision, when courts have made so many others? Recognizing as much, the Court has treated the Sherman Act and other common-law statutes as exceptions to statutory stare decisis.[24] Since common-law courts would not apply an especially strict version of stare decisis when developing the law, the Court assumes that the same should be true of common-lawmaking pursuant to statute.

All of this makes sense if common-law statutes are viewed in isolation from the rest of statutory law. But a puzzle emerges if we consider such statutes alongside their cousins in the administrative sphere—statutes that delegate to agencies. The comparison reveals that, while the methodological consequences of a delegation are similar in the judicial and administrative contexts, the means of identifying delegations are significantly different.

At first blush, delegations to agencies seem to support the methodological approach courts have taken to common-law statutes. We do not expect agencies to adhere to the specific intentions of the enacting Congress, because we recognize that Congress may have chosen open-textured commands over specific directives so that the agency could work out the details. We do not expect agencies to "stick[] . . . to the surface of the text" of the statutes they implement, because we recognize that the text is often vague or incomplete. And we do not expect agencies to set their statutory interpretations in stone, because we recognize that the relative flexibility of administrative decisionmaking is one of its primary advantages over legislation.

These views are captured in the Court's seminal decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[25] which acknowledges that an agency's resolution of statutory ambiguity inevitably entails an exercise of discretion. The agency's job, the Court explained, "necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress."[26] When Congress's intent is unclear, the agency has no choice but to make "policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency . . . ."[27]

The prevailing approach to common-law statutes effectively empowers courts to act like agencies do. Courts develop the law in the context of specific cases and controversies[28] rather than via generally applicable regulations,[29] and judge-made law may differ in important respects from agency-made law.[30] Nevertheless, the notion that congressional delegations call for an interpretive approach that is both flexible and sensitive to policy unites the worlds of agency-administered and common-law statutes.

The difference lies in how courts identify the triggers for judicial and agency lawmaking. Some agency statutes make the authorization explicit, directing agencies to enact regulations implementing the terms of the statute and in some cases making clear that the statute will have no

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[24] *Id.* at 1377-81.

[25] 467 U.S. 837 (1984).

[26] *Id.* at 843.

[27] *Id.* at 865.

[28] U.S. Const'n, Art. III.

[29] *See* Administrative Procedure Act, § 5 U.S.C. § 553 (detailing the procedural requirements for agency rulemaking).

[30] *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 387-433 (2010) (discussing differences between the Supreme Court's and the EEOC's interpretations of Title VII).

legal effect until the agency acts.[31] Explicit delegations of substantive lawmaking power to courts are rare.[32] But courts long have recognized that delegations may be implicit as well as explicit.[33] Under *Chevron*'s famous test, if "the statute is silent or ambiguous with respect to the specific issue," the court must defer to the agency's answer so long as it is "reasonable."[34] Thus, statutory ambiguity is "agency-liberating" in the sense that it converts the administrative inquiry from a search for what the statute means to a determination of what it ought to mean.[35] Provided that Congress has vested the relevant agency with the authority to act with the force of law,[36] the only question for the reviewing court is whether the agency "acted within the scope of its discretion."[37]

Matters look very different in the judicial context. Although statutory ambiguity may open the door to non-textual sources of statutory meaning, it is hardly the case that all judges take ambiguity as an implicit authorization for them to make law in the freewheeling manner permitted agencies and associated with common-law statutes. Textualist judges see ambiguity as a challenge that can be surmounted by reference to statutory context and the canons of construction. For intentionalist judges, textual ambiguity simply means that other indications of congressional intent must be consulted. The goal remains the same, however: Identify what the statute means and give effect to that meaning.[38] Moreover, while agencies are free to change their interpretations of ambiguous statutes, courts are not.[39] It is only in the realm of common-law statutes that these constraints on judicial decisionmaking can be avoided without controversy. The location of the dividing line is far from clear, but it is clearly not the line that courts have drawn in the administrative sphere.

Courts' treatment of common-law statutes therefore begs the important question why the

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[31] *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 Colum. L. Rev. 369, 381 (1989) (discussing agency statutes that are intransitive in application).

[32] Congress sometimes explicitly empowers the federal courts to create procedural law. *See, e.g.*, 28 U.S.C. § 2072 (authorizing the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for federal cases); Fed. R. Evid. 501 (providing that in federal question cases, "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience"). On the substantive side, the best example is Section 301(a) of the Labor Management Relations Act, which provides for federal court jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . in an industry affecting commerce." 29 U.S.C. § 185(a). On its face, that provision is simply a grant of jurisdiction and not a delegation of lawmaking power at all. Nevertheless, the Court interpreted has § 301(a) as an authorization to the federal courts to "fashion a body of federal law for the enforcement of these collective bargaining agreements." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957); *cf.* Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Power to the Courts*, 29 Vt. L. Rev. 611, 614 & n.9 (2005) (citing "liberal construction" clauses as a species of explicit delegation).

[33] U.S. v. Mead Corp., 533 U.S. 218, 229 (2001) ("'[S]ometimes the legislative delegation to an agency on a particular question is implicit." (quoting *Chevron*, 467 U.S. at 844)).

[34] *Chevron*, 467 U.S. at 843-44.

[35] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, at 521.

[36] *Mead*, 533 U.S. at 226-27 (limiting *Chevron* deference to instances where Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency exercised that authority when adopting the interpretation at issue).

[37] Scalia, *supra* note 35, at 516.

[38] *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 Duke L.J. 549, 559 (2008) ("Although the dominant theories of statutory interpretation differ in many ways, they share an important feature; they invite courts to construe statutory text as if Congress intended that text to have a relatively specific meaning.").

[39] *See* Neal v. United States, 516 U.S. 284, 295 (1996) (explaining that while an agency "[e]ntrusted within its sphere to make policy judgments" may change its interpretations, courts "do not have the same latitude to forsake prior interpretations of a statute").

"agency liberating" line is different from the court-liberating line. And where, exactly, *is* the court-liberating line? As noted above, two possibilities emerge from the relevant case law and commentary. One is that common-law statutes are defined by the nature of their texts: Although mere ambiguity is not enough to signal a delegation to the judiciary, truly open-textured language is. The second possibility is that common-law statutes are defined by the fact that they were enacted against a backdrop of common law. In the remainder of this Chapter, I seek to show that neither of the proposed definitions supports a sharp distinction between common-law statutes and other judicially administered acts. If statutory ambiguity is a poor proxy for identifying delegations to courts, we have yet to find a better one.

III. "SWEEPING, GENERAL TERMS"

Perhaps the most conventional way of describing common-law statutes is by reference to how they are written. Common-law statutes, we are told, are "phrased in sweeping, general terms."[40] Congress did not define the precise content of common-law statutes, but instead "expect[ed] the federal courts to interpret them by developing legal rules on a case-by-case basis in the common law tradition."[41]

As a description of statutes like the Sherman Act, that characterization is uncontroversial. It does not work, however, to define a self-contained category of statutes. So-called common-law statutes represent a subset of the larger class of statutes for which courts have primary interpretive authority. It is no secret that many statutes in that larger class contain gaps and ambiguities.[42] In the hands of agencies, such statutes would be taken as implicit delegations of policymaking authority. But with no agency to fill in the blanks, the job is entrusted to judges. How and why are such judicially administered statutes different from common-law statutes?

Consider a statute like Title VII—a "normal" statute that most would agree lies outside the privileged common-law category. Title VII bars employment discrimination on the basis of race, sex, religion, and national origin, but leaves many key issues to be resolved by courts in the course of case-by-case adjudication. For example, the statute does not define the term "discrimination" and it says nothing about whether or to what extent "employer[s]" are liable for the actions of supervisors or other employees. In short, it is "silent or ambiguous"[43] in significant respects. And, because the relevant agency does not have the authority to create binding substantive regulations interpreting and implementing Title VII, as a practical matter courts are responsible for elaborating the meaning of the statute.[44] Thus, even if it is not a common-law statute, Title VII constitutes a delegation to courts.[45]

To be sure, the delegation is more limited than the Sherman Act's, and the commands of Title VII are specified in more detail than those of federal antitrust law. But the differences are not *categorical* differences; they are differences in degree. It should come as no surprise, then, that proponents of purposive, dynamic statutory interpretation advocate a purposive, dynamic approach to interpreting Title VII.[46] Yet, while such arguments are widely accepted in the narrow

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[40] Guardians Assoc. v. Civil Serv. Comm'n, 463 U.S. 582, 641 & n.12 (1982) (Stevens, J., dissenting).

[41] *Id.*

[42] *See* Lemos, *supra* note 12, at 429-34.

[43] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

[44] *See* Lemos, *supra* note 30, at 384-87 (describing Title VII's institutional arrangements).

[45] *See id.*

[46] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1488-96 (1986) (pressing a dynamic approach to interpreting Title VII); *id.* at 1517-18 (arguing that the reasons for interpreting statutes dynamically

context of common-law statutes, they are met with stiff resistance when applied to most other judicially administered statutes, including Title VII.[47]

If statutes like Title VII and the Sherman Act represent different degrees of delegation rather than distinct conceptual categories, it becomes harder to explain why the appropriate interpretive methodology changes as courts move from one to the other. That is not to say that an explanation is unavailable, but merely that one is needed. Perhaps a textualist, for example, would answer that the more comprehensive text of Title VII enables a textual approach that is not possible in Sherman Act cases. On that view, the textualist concession for common-law statutes is akin to an impossibility defense, and the difference between statutory ambiguity and "sweeping . . . general[ity]" matters because it marks the line where textualism becomes infeasible.

My own view is that the proposed textualist distinction is unpersuasive. First, it is not obviously true that a textualist approach is not feasible in the context of the Sherman Act.[48] Not only does the Sherman Act itself contain clues that textualism ordinarily would attend to, but Congress has enacted several other statutes in the antitrust field that speak in far more specific terms.[49] Moreover, the Sherman Act incorporates the common-law concept of "restraint of trade." Although that concept may be "dynamic,"[50] a textualist approach would focus on the evolving content of the common law, whereas the Court has treated the common law as a jumping-off point for independent policy analysis.[51] Indeed, what is striking about the prevailing judicial approach to antitrust law is that courts do not even *try* to find guidance in the relevant statutory texts and other textualism-approved sources of meaning.

Second, it is not clear that textualism is capable of achieving its normative goals in the context of statutes that delegate less broadly than the Sherman Act. I will not rehearse here the many arguments that have been levied against textualism, but it is worth mentioning at least one problem with a textualist approach to Title VII and like statutes: deliberate ambiguity. Even within a relatively comprehensive statute, legislators may use ambiguity to secure majority support for provisions that could not be enacted if they were explicit.[52] Title VII itself contains

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rather than "with strict regard to original legislative intent" "apply not only to common law statutes such as Section 1983 and the Sherman Act, but also to more detailed statutes as Title VII").

[47] *See, e.g.*, Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (bemoaning the majority's infidelity to "what the law as enacted meant"); *cf. id.* at 644 (Stevens, J., concurring) (accepting a construction of Title VII "that is at odds with my understanding of the actual intent of the authors of the legislation" on the basis of stare decisis).

[48] *Cf.* Bilski v. Kappos, 130 S.Ct. 3218 (2010) (taking a textualist approach to interpreting the Patent Act). Although *Bilski*'s "textualist turn" is certainly open to criticism, *see generally* Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land:* Bilski*'s Superficial Textualism and the Missed Opportunity to Ground Patent Law Interpretation and Return Patent Law to its Technology Mooring*, 63 Stan. L. Rev. 1289 (2011), the majority's opinion illustrates that a textualist approach is *possible* even for broadly worded statutes. Indeed, the *Bilski* majority drew a textualist inference from the very breadth of the statute's text, emphasizing the "ordinary meaning" of the "broad terms" governing patentable subject matter, and reasoning that Congress's choice of "expansive terms . . . modified by the comprehensive 'any'" weighs against recognizing judicially crafted exceptions. 130 S.Ct. at 3225-26.

[49] *See* Farber & McDonnell, *supra* note 19, at 644-54 (discussing the Clayton and FTC Acts); *cf*. Peter L. Strauss, *The Common Law and Statutes*, 70 U. Colo. L. Rev. 225, 244 (1999) ("What the Court has made of the Sherman Act competes with what the text of the Act seems to say and what more recent enactments have been generally understood to accomplish.").

[50] Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731 (1988).

[51] *See* Farber & McDonnell, *supra* note 19, at 632-39 (discussing several ways the common law could guide and constrain antitrust jurisprudence).

[52] Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 595-97 (2002) (discussing statutory drafters' use of deliberate ambiguity).

provisions that reflect a legislative agreement to disagree,[53] as do other more detailed statutes.[54] Although it would be possible for a textualist interpreter to construct a meaning for such provisions, it is hard to see such behavior as an exercise of judicial restraint.[55] Nor can such construction be defended on "democracy-forcing" grounds,[56] as it does nothing to deter future legislative coalitions from dodging contentious questions while "both side[s] . . . hope that the Supreme Court w[ill] eventually rule in their favor."[57]

Finally, the proposed distinction entails an extremely stingy view of delegations to courts, suggesting that courts should decline congressional invitations to policymaking if they possibly can. As I suggest below, there is a respectable argument that Congress is less likely to delegate to courts than to agencies, given concerns about courts' comparative institutional competence and their political insulation. Yet it is one thing to say that delegations to courts should not be lightly presumed, and quite another to suggest that that they must be rebuffed. Absent a claim that delegations to courts are invalid (rather than merely a bad idea), a refusal to recognize statutes like Title VII as at least partial delegations would seem to reflect precisely the sort of contested policy judgment that textualism insists be left to Congress.

The important point for present purposes, however, is not that textualist distinctions between Title VII and the Sherman Act are wrongheaded, but that they that ought to be brought out into the open. As others have observed, the reasons textualists have offered for exempting antitrust law from the methodological strictures of textualism "are remarkably cursory."[58] The fiction that the Sherman Act is different in kind from other judicially administered statutes perpetuates this state of affairs, allowing textualists to finesse some of the hardest cases for their preferred approach without articulating why textualism gives way in contexts like antitrust, and where exactly it kicks back in.[59]

IV. COMMON-LAW HISTORY

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[53] *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51, 52 ("[I]n enacting the Civil Rights Act of 1991, which amends Title VII . . . in many important respects, Congress was often purposefully ambiguous, essentially choosing not to decide polarizing issues in order to pass a bill the President would sign."); Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992) (limiting courts' consideration of legislative history regarding the term "business necessity" to an interpretive memorandum stating that the term is "intended to reflect the concepts enunciated by the Supreme Court" in cases "prior to" *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

[54] *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stan. L. Rev. 627, 665-66 (2002) (discussing Congress's agreement to disagree on the pleading standard set out in the Private Securities Litigation Reform Act of 1995).

[55] *Cf.* Nourse & Schacter, *supra* note 52, at 618 ("If the expectation in a particular circumstance among those responsible for drafting a bill is that a court will resolve the meaning of a particular provision, is it activist or restrained for a court to insist that Congress answered that question and to attribute responsibility for its reading of the language to Congress?").

[56] Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 103 (2000) ("A central argument for textualism is that it has a democracy-forcing effect: Judicial refusal to remake enacted text forces Congress to legislate more responsibly *ex ante*.").

[57] Grundfest & Pritchard, *supra* note 54, at 658.

[58] Farber & McDonnell, *supra* note 19, at 622.

[59] The argument in the text has focused on textualism for the sake of brevity, but the same points hold for the other methodological exceptions allowed for so-called common-law statutes. That is, it may be possible for intentionalist interpreters, or proponents of strict statutory stare decisis, to explain why Title VII and the Sherman Act should be treated differently. But the convenient "common-law" label masks both the need for such explanations and the thorny problems of line-drawing they inevitably would confront.

If the "sweeping . . . terms" of common-law statutes do not differentiate them categorically from other judicially administered statutes, perhaps their common-law heritage does. Most of the statutes that appear regularly on the "common-law" list codify legal principles that had been developed by the courts as common law.[60] Arguably, that feature might signal an implicit delegation to courts, taking the place of ambiguity as the relevant proxy.[61]

The argument that a common-law history serves as a trigger for ongoing judicial lawmaking finds oblique support in the literature on why Congress delegates to agencies. Although that literature is agency-focused, even a brief review reveals that delegations to courts are hard to explain in the conventional terms. For example, one of the principal justifications for agency delegations, particularly in complex policy areas, is that agencies have expertise that Congress lacks.[62] Delegations to courts are a mystery on this view, because generalist judges are unlikely to possess any special expertise.[63] Moreover, Congress has political and procedural tools for steering agency policymaking before it becomes final, thereby minimizing the principal-agent problem inherent in any delegation of power.[64] But Congress lacks equivalent mechanisms for influencing judicial decisionmaking. The only way to correct "bad" judicial decisions is via override legislation, a significantly less attractive option for legislators.[65]

These considerations suggest that Congress may have fewer reasons to delegate to courts than to agencies. Perhaps it follows that treating statutory ambiguity as evidence of a "legislative intent to confer discretion"[66]—as courts do in the administrative context—would overestimate Congress's desire to authorize judicial policymaking. And, perhaps, a history of common-law authority offers a more accurate proxy for an intent to delegate. Notions of judicial expertise may have more traction in areas that have traditionally been the province of the common law, where courts have substantial experience. Similarly, the incrementalism of common-law decisionmaking, and the related idea that the common law will "work[] itself pure" over time,[67]

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[60] *See, e.g.*, Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731-32 (1988) (explaining that the Sherman Act "invokes the common law itself"); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005) (explaining that the private right of action under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5 "resembles, but is not identical to, common-law tort actions for deceit and misrepresentation"); Balganesh, *supra* note 7, at 1167-68 (explaining that the fair use doctrine and the idea/expression dichotomy in the Copyright Act "merely codify rules developed independently by courts in the past"); Menell, *supra* note 48, at 1292-97 (detailing the common-law background of the Patent Act).

[61] *See* Leval, *supra* note 7, at 197 ("Regardless . . . of whether the text is detailed or consists of only a vague generalized reference to the body of doctrine, if the intention of the statute was not to make law but to give recognition in statutory form to a previously developed body of court-made law, proper interpretation of the statute demands that it be so understood."); Merrill, *supra* note 14, at 44 ("[A]n inference of delegation arises when . . . Congress adopts a legal standard that is borrowed from (or 'codifies') the common law."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 818 (1983) ("If the legislature enacts into statute law a common law concept, . . . that is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle—in which event the values of the framers may not be controlling after all."); *cf.* Farber & McDonnell, *supra* note 19, at 658 ("One of the main arguments for the delegation theory is that the Sherman Act uses common law terms, and must therefore contemplate a common-law process of law development."); Menell, *supra* note 48, at 1311 (arguing that the common-law history of the Patent Act demands that courts "perpetuate the common law-type jurisprudential tradition").

[62] *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 Cardozo L. Rev. 947, 967 (1998).

[63] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) ("Judges are not experts in the field . . . .").

[64] For a useful overview, see Bressman, *supra* note 38, at 569-71.

[65] *See* Lemos, *supra* note 30, at 420-23.

[66] Scalia, *supra* note 35, at 516.

[67] Lon L. Fuller, *The Law in Quest of Itself* 140 (1940) ("The common law works itself pure and adapts itself to the

may reduce the risk that judge-made law will veer sharply away from congressional expectations. In short, courts may seem like better delegates when the job consists of building on a body of law that courts themselves constructed.

Again, this view may work as a description of many statutes that enjoy the "common-law" label. But it does not work as a means of demarcating a separate category of such statutes. Many, perhaps most, judicially administered statutes build on common-law concepts, yet do not trigger the methodological concessions courts have made for the Sherman Act and its peers.[68] Here, too, any difference between common-law statutes and "normal" statutes is one of degree rather than kind.

Common-law concepts enjoy pride of place in many statutes that no one has ever categorized as common-law statutes.[69] For example, the Employee Retirement Income Security Act (ERISA)—a statute the Court has described as "comprehensive and reticulated"[70]—incorporates the general jurisprudence of trusts.[71] Title VII and other statutes that forbid discrimination against "employees" incorporate the common law of agency in defining that term.[72] Federal courts draw from common-law principles developed at the state level when interpreting such statutes,[73] but they do not feel free to elaborate the law in the policy-driven manner associated with antitrust law.

With respect to statutes that come closer to the "sweeping . . . general[ity]" of the Sherman Act, the Court's approach has been at best inconsistent.[74] Consider the Federal Employers' Liability Act (FELA), which created a federal tort remedy for railroad workers injured by their employers' negligence. The statute "does not define negligence, leaving that question to be determined . . . 'by the common law principles as established and applied in the federal courts.'"[75] As Peter Strauss has detailed, early courts "accepted [FELA] as a remedy to 'be developed and enlarged to meet changing conditions and changing concepts of the industry's duty toward its

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needs of a new day.").

[68] *See, e.g.*, Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. . . . [T]he task of the federal courts is to interpret and apply statutory law, not to create common law.").

[69] Although my focus here is on civil statutes, common-law concepts are legion in federal criminal law. For an illuminating discussion of the role federal courts play in elaborating federal criminal law, notwithstanding the rule of lenity and the longstanding rule barring federal "common law" crimes, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32 (1812), see Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 Buff. Crim. L. Rev. 5, 6-9 (1997).

[70] Mertens v. Hewett & Assocs., 508 U.S. 248, 251 (1993).

[71] *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 496-97 (1996) (noting that fiduciary duties under ERISA "draw much of their content form the common law of trusts"); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989) (invoking the Restatement (Second) of Trusts to identify the standards that courts should use in reviewing benefit determinations made by ERISA plan administrators).

[72] Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503, 521-22 (2006) (discussing courts' treatment of Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII).

[73] *Id.*

[74] *Compare* Eskridge, *supra* note 46, at 1485-88 (critiquing cases in which the Court took a static approach to § 1983 rather than drawing guidance from "[t]he modern common law of tort remedies and immunities" and "the Court's ongoing policy-balancing"), *with id.* at 1540 & n.247 (citing cases in which the Court "relied mainly on current policy and common law doctrine" in interpreting § 1983); *compare* Menell, *supra* note 48, at __ (ms. at 11-16) (criticizing *Bilski* majority for focusing on the ordinary meaning of the words in § 101 of the Patent Act rather than their common-law meaning), *with* J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 135 (2001) (explaining that § 101 is a "dynamic provision designed to encompass new and unforeseen inventions").

[75] Urie v. Thompson, 337 U.S. 163, 174 (1949) (quoting Urie v. Thompson, 175 S.W.2d 471, 474 (Mo. 1943)).

workers.'"[76] But the Supreme Court has shifted course in more recent years, grounding its interpretations of FELA in the common law as it existed when the statute was enacted in 1908 and disclaiming any authority to adjust the statutory remedy in light of modern demands.[77] Although the Court does not deny that the statute's meaning may evolve over time as the common law of negligence evolves, it sees state—not federal—courts as the appropriate drivers of such change.[78]

The Court's treatment of the Sherman Act provides a sharp contrast. The Court has rejected a static view of the Sherman Act under which the statute's meaning would be determined by "the contours of the common law of 1890."[79] Writing for the Court in *Business Electronics Corp. v. Sharp Electronics Corp*., Justice Scalia explained that the Sherman Act "adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."[80] Yet the Court has not linked its decisions to contemporary common law either. Instead it has treated the Sherman Act as "an exercise in applied economics," pursuing the statute's presumed goal of preserving competition "without regard to the strictures of the common law."[81]

This contrast undermines any claim that the freewheeling policymaking associated with common-law statutes (or at least some of them, some of the time) can be explained and justified by a tradition of common-lawmaking. Something is amiss here. If a common-law tradition is persuasive evidence of a congressional intent to delegate broad authority to the judiciary, courts are ignoring many delegations by focusing on the short list of common-law statutes. If, on the other hand, a common-law tradition signals at most that courts may continue to rely on common-law developments in interpreting the statute over time, then the Court has overstepped its bounds in the Sherman Act and perhaps elsewhere.[82] I suspect the answer lies somewhere in the middle, and that the appropriate approach to common-law concepts turns on contextual factors including the purpose of the statute, the importance of stability and predictability in the relevant area, courts' relative institutional competence to craft policy on the subject, and other evidence of a congressional desire to leave the resolution of the issue to the judiciary. But rather than engaging with those or other explanatory factors, the Court proceeds as if certain methodological consequences follow inevitably from Congress's incorporation of common-law concepts—ignoring the fact that in one case the common law is constraining and, in another, liberating.

V. DELEGATIONS TO COURTS TODAY

In sum, the label of "common-law statute" obscures more than in illuminates. It is difficult, if not impossible, to define a category of common-law statutes in a way that differentiates statutes

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[76] Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 Sup. Ct. Rev. 429, 431 (quoting Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958)).

[77] *Id.* at 421-34 (discussing *Gottshall v. Conrail*, 512 U.S. 532 (1994)); *cf.* Monessen Southwestern R. Co. v. Morgan, 486 U.S. 330 (1998) (holding that FELA does not permit the recovery of prejudgment interest, in part because such interest was generally barred in common law actions in 1908).

[78] Strauss, *supra* note 76, at 436 ("It is as if Congress's delegation to the federal courts to develop common law remedies for railroad worker injuries conveyed or recognized far less judicial authority than a state common law court would have—an authority necessarily dependent on what state courts were doing.").

[79] Farber & McDonnell, *supra* note 19, at 636 (outlining the "substantial argument" for such a static view).

[80] 485 U.S. 717, 731 (1988).

[81] Farber & McDonnell, *supra* note 19, at 639.

[82] *See id.* at 659 ("When Congress contemplates common-law decisions by the courts, there is no reason to suppose that it had this kind of blatantly result-oriented decisionmaking in mind. There is particularly little reason to ascribe this view to Congresses that acted in the era of *Swift v. Tyson*, when it was thought that judges 'found' rather than 'made' common law.").

like the Sherman Act from the many other statutes that judges must interpret and implement. If there are salient differences between the Sherman Act and Title VII, for example, they are differences in emphasis. The difficult questions are when, whether, and why those more subtle differences justify a shift in methodology—i.e., why textualism, intentionalism, and super-strong statutory stare decisis are appropriate for some statutes but not others. The fiction that there is a naturally occurring category of common-law statutes deflects much-needed attention from those questions.

But the problem with the "common-law" label goes beyond the interpretive questions on which I have focused so far. The label also serves to mask an important set of institutional questions about when, whether, and why delegations to courts make sense today. By tethering such delegations to venerated tradition of the common law, the label makes judicial policymaking seem familiar, uncontroversial, inevitable. In so doing, it assumes away the many differences between common-lawmaking of yesteryear and common-lawmaking today.

Consider, first, the divergence between *how* courts make law today and how they made law when many of the so-called common-law statutes were enacted. For example, the traditional conception of common-lawmaking was passive, "a corollary of the [courts'] obligation to decide . . . any matters that parties put before them."[83] That ceased to be true, at least for the Supreme Court, with the advent of discretionary jurisdiction. The modern Court's certiorari power enables the Justices to pick and choose opportunities for lawmaking, "encourages them to speak more broadly than the particular facts before them require," and "permits them to defend themselves against the inconvenience of facts that might appear to compel movement opposite to the direction they prefer."[84] Moreover, given the Court's shrinking docket, a great deal of time may elapse before the Court considers an issue, allowing a consensus to develop in the lower courts. Historically, "[t]hat trend would itself operate as a signal to a common law court—a reason if not precedent for reaching a similar conclusion."[85] But the Court seems to grant little deference to the legal conclusions of the lower courts.[86] As a result, its interventions into statutory law may be far more disruptive than the common-law tradition would suggest. The ever-growing ratio of cases to courts places additional strain on the analogy to traditional common-law practices, and on the notion that a common-law background can function as a substitute for specialized expertise. Courts cannot develop familiarity with statutes when they confront them so rarely. Although the problem is most stark at the Supreme Court level, it extends all the way down the federal judicial hierarchy.[87]

A backward-looking conception of common-law statutes ignores these and other changes in the procedures for judicial lawmaking. Perhaps more importantly, a focus on common-law history conceals how much the relevant subject areas have changed since the statutes were enacted. The Patent Act illustrates the problem. The first Patent Act was enacted in 1790.[88] At that time, technology was mostly uniform: "if you put technology in a bag and shook it, it would

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[83] Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 Ala. L. Rev. 891, 895 (2001).

[84] *Id.*

[85] Strauss, *supra* note 49, at 246.

[86] *See* Lemos, *supra* note 30, at 429 (discussing the relationship between Supreme Court and lower court decisionmaking in the context of Title VII).

[87] For example, the average district judge sees only a few patent cases a year and handles a patent trial once every seven years. *See* Peter Lee, *Patent Law and the Two Cultures*, 120 Yale L.J. 2, 16 (2010).

[88] Act of April 10, 1790, 1 Stat. 109.

make some noise."[89] Patent law was understood as a subset of property law, and analogies to land were common.[90] Moreover, the administrative state was still in the gestational stage. The institutional choice for Congress at the time was between legislating with specificity or leaving matters largely to the courts; the option of delegating lawmaking authority to a regulatory agency had yet to become conventional.[91]

Fast-forward to today. Innovation is becoming increasingly technologically and economically diverse. Patent scholars now recognize that harnessing the innovation-promoting potential of patent requires distinguishing among industries and inventions—a task that demands a sophisticated understanding of both technology and economics.[92] Meanwhile, there is good reason to believe that clarity and predictability are particularly valuable in the patent field, since "setting ex ante expectations is critical to well performing property systems."[93] Yet courts' lack of expertise, and the sporadic nature of their encounters with patent law, limit their ability to craft bright-line rules that serve those goals without sacrificing accuracy in individual cases.[94] Commentators have urged courts to focus instead on elaborating the law case by case in the incremental common-law fashion.[95] The advantage of the common-law method, at least in theory, is that it enables judges to apply the law with sensitivity to the circumstances of each case. But to translate that advantage from theory to practice, judges must be able to understand the circumstances of each case. That may not be true in most patent cases.[96]

All of this has prompted claims that the "patent system is in crisis."[97] Nevertheless, most scholars have focused their attention on tweaking the current system of judicial administration, without seriously considering whether that system is up to the modern task.[98] Only a few have suggested moving primary authority for law-elaboration from the federal courts to an expert agency.[99]

Similar problems are evident in the antitrust field.[100] Antitrust law today implicates

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[89] Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 Berkeley Tech. L.J. 577, 585 (1999).

[90] *See* Michael J. Burstein, *Rules for Patents*, 52 Wm. & Mary L. Rev. 1747, 1764-66 (2011) (describing early understandings and applications of patent law).

[91] *See* Jonathan S. Masur, *Regulating Patents*, 2010 Sup. Ct. Rev. 275, 303.

[92] *See generally* DAN L. BURK & MARK A. LEMLEY, THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT (2009).

[93] Burstein, *supra* note 90, at 36.

[94] *See generally* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035 (2003).

[95] *See, e.g.*, John F. Duffy, *Rules and Standards on the Forefront of Patentability*, 51 Wm. & Mary L. Rev. 609, 614 (2009) (arguing that standards for patentable subject matter perform better than rules in the long run); Rai, *supra* note 94, at 1101-02 (advocating standard- rather than rule-driven patent doctrine that is sensitive to facts and policy).

[96] Not only is the law of patent "rather arcane," Lee, *supra* note 87, at 12, but applying the law to the facts of each case requires a great deal of technological sophistication. *See* Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 Berkeley Tech. L.J. 877, 878 (2002) ("[D]ifficult questions of scientific fact are likely to arise more routinely in patent law than in virtually any other field of law.").

[97] Merges, *supra* note 89, at 591; *see also* BURK & LEMLEY.

[98] *See generally, e.g.*, Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444 (2010) (arguing that venue rules should be adjusted so as to concentrate patent cases by industry in select district courts); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. 1619 (2007) (arguing that, in addition to the Federal Circuit, at least one generalist circuit court should be authorized to hear patent appeals); Rai, *supra* note 96 (urging the creation of specialized trial courts).

[99] *See generally* Burstein, *supra* note 90, Masur, *supra* note 91.

[100] *See generally* Daniel Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 Wash. & Lee L. Rev. 49 (2007).

complicated and contested questions of economic theory. As such, it poses serious challenges for generalist judges and juries. If anything, those challenges have intensified in recent years, as the Court has moved away from *per se* rules and toward more flexible standards that allow judges to consider the challenged conduct in context to determine whether it appears to be an unreasonable restraint of trade. But the more nuanced and complex antitrust law becomes, the farther it drifts from the ken of the average federal judge. As in patent, while flexible standards hold the promise of improving the fit between the law and the facts of each case, courts' limited expertise sharply reduces the accuracy of case-by-case adjudication.

Considerations of institutional competence therefore call into question whether a robust judicial role in policymaking is in fact a good idea within the supposed category of common-law statutes. The point is not that courts should revert to a more formalist methodology in interpreting the Patent or Sherman Acts. Unless and until Congress adjusts the prevailing institutional arrangements, courts have little choice but to continue to muddle along; pretending that the statutes answer questions they clearly do not answer is not an attractive alternative. But neither does it make sense to pretend that the delegation can be justified by the common-law tradition that existed when the statutes were enacted.

The argument here works both ways. If, as I have suggested, the "common-law" label is unhelpful insofar as it connects modern delegations to historical common-lawmaking, the problem is one of exclusion as well as inclusion. That is, reliance on the label may suggest—perhaps improperly—that statutes outside the special category do not confer discretion on the courts. Yet courts may be much better suited to develop the law of employment discrimination, for example, than the law of antitrust. Not only do courts have experience enforcing the antidiscrimination provisions of the Constitution, but their remove from majoritarian politics makes them particularly valuable delegates on the statutory side of antidiscrimination law.[101] And, with no agency presently empowered to play a strong role in interpretation and implementation of Title VII, the practical need for judicial policymaking is at least as strong as in the fields of patent and antitrust.

This Chapter is not the place to make a comprehensive case for beefing up the judicial role in elaborating antidiscrimination law, or rolling back judicial involvement in patent and antitrust. My goal is more modest. I have sought to show that our existing practice with respect to delegations to courts is, at best, half correct. On the one hand, courts' treatment of the so-called common-law statutes reflects a healthy recognition that delegations matter, and that the appropriate approach to statutory interpretation depends on the role courts must play in developing the law. On the other hand, neither courts nor commentators have devoted much effort to identifying court-liberating statutes or assessing when and why such liberation is normatively attractive. The prevailing rhetoric on delegations obscures those important issues by perpetuating the fiction that delegations to courts occupy an easily identifiable, self-enclosed category of common-law statutes. The fiction is counterproductive, and we should abandon it.

[101] *See* Lemos, *supra* note 12, at 470.