Notre Dame Law Review

Volume 99 | Issue 2 Article 5

12-2023

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COMMON LAW STATUTES

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The defining feature of a "common law statute" is that it resists standard methods of statutory interpretation. The category includes such important federal statutes as the Sherman Act, § 1983, and the Labor Management Relations Act, among others. Despite the manifest significance of common law statutes, existing caselaw and legal scholarship lack a minimally defensible account of how courts should decide cases arising under them. This Article supplies such an account. It argues that judges should decide cases arising under common law statutes by applying rules representing a consensus among American courts today—i.e., rules that jurisdictions generally have in common. To determine, for example, whether a state officer is entitled to immunity under § 1983, a court should ask whether American courts generally extend immunity to officials accused of tortious conduct in similar circumstances.

Existing caselaw and legal scholarship provide two rivals to this proposal. According to one rival, common law statutes constitute delegations of substantially unrestrained lawmaking power to courts. They thus empower judges to create new legal rules in a policy-driven manner. According to the other rival, common law statutes incorporate the common law rules that prevailed at the time of their enactment. Judges should therefore decide cases by applying historical common law rules.

This Article's proposal is superior to its rivals for several reasons. It represents a more conventional and more sensible understanding of the relationship between courts and unwritten law and thus more likely reflects Congress's intent in enacting each common law statute. It strikes a better balance between the law's needs for stability and

* Associate Professor of Law, George Washington University Law School. For valuable exchanges on earlier drafts, I thank Will Baude, Jeremy Bearer-Friend, Sam Bray, Aaron-Andrew Bruhl, Jonathan Choi, Tom Colby, Katherine Mims Crocker, Dan Epps, Tara Leigh Grove, Maggie Lemos, Heidi Liu, Nina Mendelson, Alan Morrison, Aaron Nielson, Dick Pierce, Jeff Pojanowski, Joshua Schwartz, Fred Smith, Peter Smith, Tania Valdez, Nina Varsava, Chris Walker, Daniel Walters, Kate Weisburd, Ilan Wurman, Katie Young, and participants at the Loyola Chicago Constitutional Law Colloquium, the Junior Federal Courts Workshop at the University of Florida, and the Statutory Interpretation Roundtable at Georgetown University Law Center. Spencer Banwart, Stephon Howie, Geunyoung Kim, Ema Klugman, Ian Lam, Addie Lynch, Gabrielle Lysko, Ben Martin, Jeremy Martinez, Sydney McDermott, Esteban Muñoz Calle, Augusta Nau, and Victor Xu provided excellent research assistance. Finally, I am grateful for the help of my late colleague, Dmitry Karshtedt. I hope this Article would have made him as proud as I was of him.

flexibility. And it's more responsive to democratic preferences. After anticipating several objections, the Article concludes by illustrating some of the model's implications for two important common law statutes—§ 1983 and the Sherman Act.

INTRODUCTION

"Common law statutes" are a special kind of federal statute. Their defining feature is that they are written in such "sweeping" and "general"[1] terms that they are often resistant to standard methods of statutory interpretation.[2] Their texts are impenetrably vague, the canons of construction are often unhelpful, they embody purposes that either conflict or are too abstract for deriving rules of decision, and federal administrative agencies have not been given rulemaking authority in the domains they address. Common law statutes thus present an acute problem for statutory interpretation. How should a judge interpret a statute when the standard interpretive toolbox is unavailing?

Existing caselaw and legal scholarship evince two models for answering this question. One model—the "delegation model"—treats common law statutes as delegations of substantially unrestrained lawmaking power to courts. It therefore posits that courts should create rules of decision in a "free-wheeling and policy-driven manner."[3] The second model—the "incorporation model"—treats common law statutes as if they incorporate the common law rules that prevailed when each statute was enacted. It therefore posits that a court should decide cases arising under those statutes by applying historical common law rules. Neither model, however, is particularly appealing. Both imply exotic conceptions of the relationship between courts and unwritten law. And both raise numerous concerns about the legitimacy, stability, and quality of rules used to decide cases arising under common law statutes.[4]

One can hardly overstate the practical and theoretical significance of this problem. Common law statutes include some of the most significant and frequently litigated statutes on the books, such as the Sherman Act,[5] the Civil Rights Act of 1871 (§ 1983),[6] the Labor

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1 Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting).

2 *See* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 89 (Shyamkrishna Balganesh ed., 2013).

3 Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 46 (2018).

4 *See infra* Sections II.A–D.

5 *See, e.g.*, Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2063 (2020); Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1251 (2021).

6 *See, e.g.*, Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 268 (1992); Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 265; Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1546 (2017); Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 993 (2019).

Management Relations Act,[7] the Federal Employers' Liability Act,[8] the Copyright Act,[9] the Lanham Act,[10] and federal statutes defining various species of fraud.[11] Thousands of cases arise under those statutes each year.[12] To say that we lack a defensible model for deciding cases arising under common law statutes is therefore to acknowledge a vast lacuna in statutory-interpretation theory.

This Article proposes a third model. The consensus model, as I call it, posits that courts should decide cases arising under common law statutes by applying rules that "reflect principles or practices common to many different jurisdictions."[13] Many "blackletter" rules found in the Restatements, for instance, are rules of this sort because they represent the predominant approach to specific legal issues in the United States.[14] Unlike the delegation model, the consensus model begins with an empirical question, rather than a normative one. To

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7 *See, e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 35 (1957); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 789 (1989).

8 *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1063 (1989).

9 *See, e.g.*, Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1167–68 (2009); Shyamkrishna Balganesh, *Causing Copyright*, 117 COLUM. L. REV. 1, 10 n.51 (2017); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 100–01 (2004); Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285, 289 (2021).

10 *See, e.g.*, Graeme B. Dinwoodie, *The Common Law and Trade Marks in an Age of Statutes*, *in* THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROFESSOR DAVID VAVER 331, 331–52 (Catherine W. Ng, Lionel Bently & Giuseppina D'Agostino eds., 2010); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 197–98 (2004).

11 *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 45 n.198 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 373–78.

12 A search of cases filed in the last twelve months under the statutes listed in the main text produced over 35,000 cases. Dockets Search, BLOOMBERG L., https://www.bloomberglaw.com/ (select "Dockets"; then search keywords "Sherman Act" and select date range "Last 12 months"; repeat the search for the keywords "Civil Rights Act of 1871," "Labor Management Relations Act," "Federal Employers' Liability Act," "Copyright Act," and "Lanham Act.").

13 Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) [hereinafter Nelson, *Persistence*]; *see* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 44–45 (2015) [hereinafter Nelson, *Legitimacy*].

14 The main text mentions the Restatements merely for purposes of illustration. One must exercise some caution in relying on the Restatements to identify consensus rules because, as Shyamkrishna Balganesh has shown, the committees that draft the Restatements don't always aim merely to report general principles of jurisprudence. They sometimes also endeavor to "synthesize, clarify, and simplify the law." Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2136 (2022).

determine, for example, whether a particular business practice is an unlawful "restraint of trade" within the meaning of the Sherman Act,[15] it suggests courts ask whether American courts generally consider the practice anticompetitive, rather than asking what the law should be as a matter of public policy. And unlike the incorporation model, the consensus model focuses on the present, rather than the past. To determine, for example, the scope of officer immunities under § 1983, it directs judges to ask whether American courts generally extend immunity to officials accused of tortious conduct in circumstances like the facts of the cases before them, rather than trying to identify historical common law rules.

The consensus model has made a few cameo appearances in articles addressing specific common law statutes.[16] But until now, no one has provided a full-fledged, transsubstantive defense of it.[17] The argument proceeds in three Parts.

Part I explains the delegation, incorporation, and consensus models in greater detail.

Part II argues that the consensus model is superior to its rivals for several reasons. First, it represents a more conventional understanding of the relationship between courts and unwritten law and thus more likely reflects Congress's intent in enacting a common law statute. Second, the consensus model does a better job than its rivals of balancing the law's needs for stability and flexibility. It avoids freezing the law in a bygone era, while also preventing the interpretive inquiry

15 15 U.S.C. § 1 (2018).

16 *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, 632–33 (2005) (discussing the Sherman Act); Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 609 (1985) (discussing 42 U.S.C. § 1983); David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 524–28 (1992) (same); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 52 (1989) (same).

17 The consensus model is also similar in some respects to the work of scholars who have recently advanced general-law theories of various constitutional provisions. *See* Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 910 (2023) (defending a general-law approach to the Fourth Amendment); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1249 (2017) (defending a general-law approach to jurisdiction under the Due Process Clause); Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1433 (offering a general-law theory of fundamental rights); Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 611 (2023) (defending a general-law theory of citizenship); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 6), https://ssrn.com/abstract=4604902 [https://perma.cc/94WR-L892] (offering a general-law theory of the Fourteenth Amendment).

from devolving into "a discretionary free-for-all."[18] Third, the consensus model is more likely to produce high-quality legal rules than its rivals. That's because it does not require judges to make policy judgments in myriad technical domains, where they are prone to serious blunders. Nor does it invoke historical common law rules that may have no connection to current problems. Finally, the consensus model is more responsive to democratic preferences than its rivals because it invokes rules of decision that bubble up from courts and legislatures across the country. Those rules thus better approximate what a majority of Americans prefer than do rules derived either from the policy judgments of a few unelected judges or from legal epochs that have long since passed.

Part II concludes by anticipating several objections. In particular, it responds to concerns that the consensus model's dynamism is inconsistent with the nature of written law, that the model gives too much discretion to judges, that it increases decision and error costs, and that it insufficiently respects precedent.

Part III explores the consensus model's implications for two important common law statutes—§ 1983 and the Sherman Act. The model justifies and provides a sturdier conceptual foundation for many aspects of existing law than either of its rivals. But it also suggests reforms to several areas of existing doctrine, including the Supreme Court's qualified immunity jurisprudence and several recent developments in antitrust law.

I. THREE MODELS OF COMMON LAW STATUTES

No significant statute addresses every circumstance to which it arguably applies. Interpreters will always be required to resolve borderline cases, like whether a pair of roller skates qualifies as a vehicle in the park,[19] or whether a tomato qualifies as a vegetable or a fruit.[20] While this is a nearly universal feature of written law, common law statutes are particularly vexing examples of open-ended statutory language. That's because they characteristically combine large "domains"[21] with extremely cryptic texts. In other words, they apply to a broad set of circumstances but fail to specify what they require within those circumstances. The Sherman Act, for example, proscribes

18 D'Onfro & Epps, *supra* note 17, at 918.

19 *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

20 *See* Nix v. Hedden, 149 U.S. 304, 306 (1893).

21 By "domain," I mean the set of circumstances to which a statute applies. *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

"[e]very contract, combination . . . , or conspiracy, in restraint of trade,"[22] but it doesn't specify what it means by a "restraint of trade."[23]

When deciding cases arising under common law statutes, courts are therefore in desperate need of closure rules—i.e., rules that "determine outcomes in cases of uncertainty."[24] The problem, however, is that common law statutes are resistant to the typical ways that statutory interpreters obtain closure. Their texts are impenetrably vague, the canons of construction are often unhelpful, they often embody purposes that either conflict or are too abstract for deriving rules of decision, and federal administrative agencies have not been given rulemaking authority in the domains they address. As a result, courts often must decide cases arising under common law statutes by creating "federal common law"—that is, rules that "cannot be traced directly by traditional methods of interpretation to" the statutes themselves.[25] The central question, then, is *how* courts should go about identifying those federal common law rules.

This Part canvasses three distinct models for answering that question. The first two—the delegation and incorporation models—are commonly found in the Supreme Court's caselaw. The third—the consensus model—is this Article's proposal.

A. The Delegation Model

According to the delegation model, common law statutes are "implicit delegations of [lawmaking] authority to the courts."[26] Nearly every statute, of course, delegates lawmaking power to courts in the narrow sense that it requires courts to apply its text to circumstances not expressly contemplated. But the delegation model makes a stronger claim about common law statutes. It posits that common law statutes delegate substantially unrestrained lawmaking power to

22 15 U.S.C. § 1 (2018).

23 *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) ("One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade."); William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 659 ("[T]he Sherman Act is so open textured and the legislative history so vague, that any standard the Court adopts is ultimately a judicial creation.").

24 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1108 (2017).

25 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 635 (7th ed. 2015); *see* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248 (1996); Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026 (1967).

26 McNally v. United States, 483 U.S. 350, 373, 372–73 (1987) (Stevens, J., dissenting).

courts. A judge should therefore decide cases arising under common law statutes by creating legal rules in a "free-wheeling and policy-driven manner."[27] The model thus likens common law statutes to statutes that delegate lawmaking power to administrative agencies. Just as agencies promulgate regulations that they believe will serve the national interest, courts should decide cases arising under common law statutes by creating rules they believe reflect sound public policy.

One initial problem: While many statutes clearly state that they delegate lawmaking power to administrative agencies,[28] no common law statute expressly delegates lawmaking power to courts.[29] Indeed, apart from the Rules Enabling Act,[30] no federal statute expressly states that courts should self-consciously formulate rules based on considerations of public policy. The delegation model must therefore proceed from the idea that the substantial gaps in common law statutes constitute *implied* delegations of lawmaking authority.[31] And numerous commentators have understood the gaps in common law statutes in precisely that way.[32]

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27 Levin & Wells, *supra* note 3, at 46.

28 *See, e.g.*, 47 U.S.C. § 303 (2018) (delegating rulemaking power to the Federal Communications Commission); 7 U.S.C. § 1038 (2018) (same for the Secretary of Agriculture); 25 U.S.C. § 389d (2018) (same for the Secretary of the Interior); 15 U.S.C. § 74 (2018) (same for the Secretary of the Treasury); 42 U.S.C. § 1962d-1 (2018) (same for the Water Resources Council).

29 A few commentators have claimed that certain common law statutes expressly delegate lawmaking power to courts. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1811 (1998) ("[T]he Sherman Act . . . *expressly* delegate[s] lawmaking power to the courts." (emphasis added)); Levin & Wells, *supra* note 3, at 49 (claiming that section 33(a) of the Lanham Act, 15 U.S.C. § 1115(a), contains "an *explicit* provision delegating the power to develop the law to courts" (emphasis added)). But the reader who consults those provisions for herself will see that they don't.

30 The Rules Enabling Act confers power on the Supreme Court to "prescribe general rules" of evidence and procedure. 28 U.S.C. §§ 2072, 2075 (2018); *see* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (stating that the Rules Enabling Act is "a delegation by Congress to the Court of the power to promulgate procedural rules").

31 More generally, the delegation model is a common way of conceptualizing what courts do any time they apply a rule of federal common law. *See* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 888–89 (2005) (noting that a "common premise of many theories of federal common law" is that a court creating federal common law may "will[] into existence whatever law it believes would best serve its sense of the national interest").

32 *See* Eskridge, *supra* note 8, at 1063 (arguing that the "open texture" of common law statutes "makes judicial policymaking inevitable"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421 (1989) (maintaining that courts have "inevitably" understood the Sherman Act as "a delegation of policymaking power pursuant to quite open-ended criteria"); Peter Westen & Jeffrey S. Lehman, *Is There Life For* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 333 (1980) (making a similar argument); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of*

The clearest examples of the delegation model in action are the Court's decisions interpreting section 1 of the Sherman Act. As noted, that section makes unlawful every "contract, combination . . . , or conspiracy, in restraint of trade."[33] The Court has understood that phrase as empowering federal judges "to invent" the statute's "core normative content."[34] In *Ohio v. American Express Co.*, for example, the Court's opinion invoked a dizzying array of economic concepts—from "market definition" and "restricting output" to "two-sided transaction platforms" and "indirect network effects"—to reach its conclusion that an "antisteering" provision in American Express's standard contract with merchants did not constitute an unlawful "restraint of trade."[35] Similarly, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court's opinion relied heavily on the conclusions of "[r]espected economic analysts" and "recent studies documenting the competitive effects of resale price maintenance" to hold that an agreement between a manufacturer and its distributors setting the minimum price the distributors may charge for the manufacturer's products ("resale price maintenance") isn't unlawful per se.[36] These examples are typical of the Court's decisions applying the Sherman Act, which read more like "short treatises on microeconomic analysis" than workaday statutory-interpretation decisions.[37]

B. The Incorporation Model

The derogation canon instructs courts to strictly construe statutes in derogation of common law rules so as to produce "minimal

Antitrust Law, 60 TEX. L. REV. 661, 664 (1982) (same); Levin & Wells, *supra* note 3, at 47 (arguing that "judicial policymaking" under common law statutes is necessary because "there is simply no other option than for courts to fill in the gaps"); Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1283 (2015) (observing that the Court has "delegated authority to make law by filling gaps" in common law statutes).

33 15 U.S.C. § 1 (2018).

34 Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 233 (2021).

35 Ohio v. Am. Express Co., 138 S. Ct. 2274, 2280, 2283, 2286, 2288, 2295 (2018) (emphasis omitted).

36 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882, 890, 906–07 (2007), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). Likewise, Justice Breyer's dissent devoted considerable space to what he saw as the anticompetitive potential of resale price maintenance. *Id.* at 911–18 (Breyer, J., dissenting).

37 Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 59 (1984).

disruption of existing arrangements."[38] In a variation on that canon, some of the Supreme Court's decisions have treated certain common law statutes as if they incorporate the common law rules in force when the relevant statute was enacted.[39] Historical common law rules are thus treated like the soil in a potted plant: when the plant is transferred to a new pot, "it brings the old soil with it."[40] Here again, no common law statute expressly adopts this model. Instead, a statute's invocation of historical common law rules is premised on the following inference: since Congress presumptively knows the common law when it enacts a statute, a court should presume that Congress intended to retain the substance of the common law going forward.[41]

Some recent cases interpreting § 1983 illustrate this approach. Section 1983 provides a cause of action for damages against "[e]very person" acting under color of state law who violates another's "rights, privileges, or immunities secured by the Constitution and laws."[42] That text is silent on many issues that frequently arise in litigation. It doesn't specify, for example, what "elements and prerequisites" a plaintiff must prove to establish her entitlement to damages,[43] nor does it state whether anyone is immune from the liability the statute creates.[44] The Court's recent cases have assumed that "Congress intended [§ 1983] to be construed in the light of common-law principles" that prevailed

38 David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992); *see* Shaw v. R.R. Co., 101 U.S. 557, 565 (1880) ("No statute is to be construed as altering the common law, farther than its words import.").

39 Some non-common-law statutes have also been understood in this way. *See, e.g.*, Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (interpreting ERISA's reference to "equitable relief"); Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) (interpreting the Judiciary Act's grant of jurisdiction over "all suits . . . in equity" (omission in original)).

40 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

41 *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON STATUTORY INTERPRETATION 444 (2012) ("[F]or issues entirely unaddressed by the statute, the interpreter might presume that the legislature intended to adopt the established common law rule.").

42 42 U.S.C. § 1983 (2018).

43 Carey v. Piphus, 435 U.S. 247, 248 (1978); *see also* Eskridge, *supra* note 8, at 1052 (noting that § 1983 "tells us almost nothing about the exact contours of liability").

44 *See* Beermann, *supra* note 15, at 68. Alex Reinert has recently argued that the original text of § 1983 and its surrounding legislative history show that Congress didn't intend to extend immunity to law-enforcement officers. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 234–41 (2023). If Reinert's thesis is correct, then this aspect of § 1983 jurisprudence would not be amenable to the consensus model because the text itself would be clear. Because Reinert's argument is beyond the scope of this Article, the main text proceeds on the assumption that the text of § 1983 is unclear on the issue of officer immunities.

when the statute was enacted in 1871.[45] In *Thompson v. Clark*, for example, the Court clarified the elements of a Fourth Amendment claim for malicious prosecution under § 1983 by "look[ing] to the elements of the most analogous tort as of 1871."[46] Similarly, in *Filarsky v. Delia*, the Court's conclusion that a private contractor hired to perform government work may claim the same immunities as full-time government employees was guided by "the common law as it existed when Congress passed § 1983."[47] The Court's recent § 1983 cases thus exhibit what one influential casebook calls a "relentless historicity."[48]

C. The Consensus Model

This Article proposes a third possibility: When American courts have converged on an answer to a legal question, a judge should treat that answer as authoritative when applying a common law statute that raises, but doesn't resolve, the same question. Put another way, courts should decide cases arising under common law statutes by applying consensus rules—legal rules that American courts generally have in common. These rules will have a "cross-jurisdictional character"[49] in the sense that they will not be "under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions."[50]

The existence of a consensus on a particular issue doesn't require unanimity, but it does require coalescence around a rule, standard, or framework. To determine whether American courts have coalesced, a

45 Rehberg v. Paulk, 566 U.S. 356, 362 (2012) (alteration in original) (quoting Kalina v. Fletcher, 522 U.S. 118, 123 (1997)). To be clear, the Court hasn't always followed this approach. Earlier cases relied to some extent on the modern common law of torts or policy justifications for extending immunities to various government actors. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 34 (1983); Imbler v. Pachtman, 424 U.S. 409, 421–22 (1976). But recent jurisprudence evinces a decided turn toward historical common law rules.

46 142 S. Ct. 1332, 1337 (2022); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1726 (2019) (holding that a retaliatory arrest claim under § 1983 requires a plaintiff to show that the officer didn't have probable cause to arrest for any crime); Manuel v. City of Joliet, 580 U.S. 357, 370 (2017) (holding that an individual's Fourth Amendment right to be free from unreasonable search and seizure continues throughout the legal process of a criminal case).

47 566 U.S. 377, 380, 384 (2012). For other cases using this methodology to determine the scope of immunities under § 1983, see *Rehberg*, 566 U.S. at 362; *Kalina*, 522 U.S. at 123; and Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

48 JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 160 (3d ed. 2013); *see also* Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 698 (1997) ("[T]he common law has been an important source of norms for filling gaps in the statute and for shaping the contours of the § 1983 cause of action.").

49 Baude et al., *supra* note 17 (manuscript at 9) (characterizing general law).

50 Nelson, *Persistence*, *supra* note 13, at 505 (characterizing a modern form of general law).

judge may consult legal treatises; the Restatements; state and local statutes, regulations, and court decisions; or even state and local customs and practices[51]—all with the goal of determining what is the law's general approach to an issue. And when this inquiry reveals a consensus rule, the judge should apply the rule to the case before her. In some cases, of course, state law will support conflicting approaches to an issue. If so, then no consensus rule exists, and a judge will have more discretion. In such cases, the judge still should choose the rule of decision that best coheres with the general fabric of the law.[52] In situations where numerous jurisdictions have developed competing approaches to an issue, the judge should usually adopt one of those approaches, rather than charting an entirely new course. The consensus model therefore doesn't eliminate the need for policy-based reasoning.[53] Instead, it restricts the domain of such reasoning to situations where the statute itself is unclear and where no consensus emerges from the laws of the states. While not completely banished, policy arguments are thus "marginaliz[ed]" to the final step of a lexically ordered decision process.[54] To paraphrase Fred Schauer, "Policy and principle appear before us" but only when "the law runs out."[55]

The Court's recent cases applying the Labor Management Relations Act (LMRA) illustrate the consensus model. Section 301(a) of that statute permits "[s]uits for violation of contracts between an employer and a labor organization representing employees" to be

51 *Cf.* D'Onfro & Epps, *supra* note 17, at 935 ("Federal, state, and local statutes, ordinances, and common-law court decisions could all constitute evidence of the general law; so, too, could societal norms and practices not codified as positive law.").

52 In this respect, the consensus model is similar to a proposal by Judge Guido Calabresi. In his Oliver Wendell Holmes Lectures, Judge Calabresi argued that courts should modify (or ignore) statutes that are "sufficiently out of phase with the whole legal framework." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164, 164–65 (1982). Calabresi's proposal shares the consensus model's commitment to ensuring that federal statutory law coheres with broader jurisprudential patterns. Unlike Calabresi's proposal, however, the consensus model stops short of permitting a judge to contravene the plain meaning of a statute's text. That's because it's a theory of common law statutes, which by definition do not provide clear answers to many questions.

53 Nor should that be surprising. Arguments that characterize "states of affairs as conducive or adverse to the general welfare" figure "pervasively" in common law reasoning. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 26, 32, 26–32 (1988); *see* Kent Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1010 (1977) (explaining that common law courts frequently "rely on arguments that a particular decision will serve the collective welfare in some respect").

54 *Cf.* David E. Pozen & Adam M. Samaha, *Anti-modalities*, 119 MICH. L. REV. 729, 777 (2021) (using the term "marginalization" to refer to the limited role for antimodal forms of reasoning in constitutional law); *see also* Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1708–10 (2010) (analyzing the ways that interpretive methods lexically order decision-making processes).

55 Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1942 (2004).

"brought in any district court of the United States."[56] On its face, that provision appears to grant subject-matter jurisdiction to federal district courts but not to alter substantive federal law.[57] In its 1957 decision in *Textile Workers Union v. Lincoln Mills of Alabama*, however, the Court held that section 301(a) created substantive federal law but that courts would have to "fashion" the content of that law from our national labor "policy."[58] Largely due to that opinion's use of the words "fashion" and "policy," commentators have often described the LMRA as a statute that delegates robust policymaking authority to the courts.[59]

In reality, the Supreme Court has typically refused to engage in a "freewheeling inquiry" into "the most desirable rule."[60] Instead, the Court has tended to derive rules of decision from "ordinary principles of contract law."[61] In *Granite Rock Co. v. International Brotherhood of Teamsters*, for example, the Court rejected an employer's request that it permit a federal tort claim under section 301(a) pursuant to its authority to create "a federal common law of labor contracts."[62] Instead, the court confined its discretion to what could be supported by the "common law of contracts."[63] Similarly, in *M&G Polymers USA, LLC v. Tackett*, the Court observed that it wouldn't draw inferences from the context of labor negotiations when interpreting a collective-bargaining

56 29 U.S.C. § 185(a) (2018).

57 Indeed, that's how Justice Felix Frankfurter read the statute. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 460–84 (1957) (Frankfurter, J., dissenting); *see also* Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp., 348 U.S. 437, 441–49 (1955).

58 *Lincoln Mills*, 353 U.S. at 456. For a detailed argument in support of the Court's reading of the legislative record in *Lincoln Mills*, see James E. Pfander, *Judicial Purpose and the Scholarly Process: The* Lincoln Mills *Case*, 69 WASH. U. L.Q. 243 (1991).

59 *See* Jeffrey L. Rensberger, Erie *and Preemption: Killing One Bird with Two Stones*, 90 IND. L.J. 1591, 1613 (2015); Harper, *supra* note 32, at 1316; Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 371 (2010); Alexander Volokh, *Judicial Non-delegation, the Inherent Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1432–33 (2017); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 891 (1986); Bickel & Wellington, *supra* note 7, at 35; Redish, *supra* note 7, at 789; Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573, 604.

60 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 311 (2010) (quoting Howard Johnson Co. v. Det. Loc. Joint Exec. Bd., Hotel & Rest. Emps. Int'l Union, 417 U.S. 249, 255 (1974)).

61 CNH Indus. N.V. v. Reese, 138 S. Ct. 761, 762 (2018) (quoting M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 430 (2015)); *see also* Nelson, *Persistence*, *supra* note 13, at 521 (making the same point).

62 *Granite Rock Co.*, 561 U.S. at 310.

63 *Id.* at 311.

agreement that arguably granted retirees healthcare benefits for life.[64] Such inferences, the Court concluded, are inconsistent with "ordinary principles of contract law."[65] Thus, while the LMRA has been billed as "the best-recognized instance of common law-making power derived ostensibly from congressional delegation,"[66] the consensus model provides a better way of understanding the Court's recent caselaw.

The notion that federal courts should apply rules that are not under the control of any jurisdiction may sound odd to modern ears. After all, the transjurisdictional character of consensus rules makes them a lot like rules of general law.[67] And the conventional wisdom is that *Erie Railroad Co. v. Tompkins*[68] "banished general law from federal court."[69] Properly understood, however, *Erie* did no such thing.[70] At the time of *Swift v. Tyson*,[71] which *Erie* overruled, many states' laws incorporated general legal principles derived from the shared "customs and practices among nations."[72] For that reason, federal courts sitting in diversity often decided diversity cases according to principles of general jurisprudence.[73] Moreover, because general law wasn't the law of a particular state, but a freestanding body of law common to many jurisdictions, federal courts often didn't defer to state-court opinions interpreting general law.[74] *Erie*, of course, radically changed the state of the law by holding that federal courts sitting in diversity must defer to the decisions of a state's highest court about the content of state law,

64 *M&G Polymers*, 574 U.S. at 430; *see also* Turner v. Am. Fed'n of Teachers Loc. 1565, 138 F.3d 878, 882 (11th Cir. 1998) (looking to "general contract principles" to decide a case arising under section 301(a) of the Labor Management Relations Act).

65 *M&G Polymers*, 574 U.S. at 435.

66 Smith, *supra* note 59, at 604.

67 *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997) (discussing historical notions of general law); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984) (same); Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 681–82 (2013); Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1280–81, 1283 (2000).

68 304 U.S. 64, 78 (1938).

69 Bellia & Clark, *supra* note 67, at 657; *see* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 929 (2013).

70 *See* Nelson, *Persistence*, *supra* note 13, at 505–25; Nelson, *Legitimacy*, *supra* note 13, at 44–45.

71 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. 64.

72 Bellia & Clark, *supra* note 67, at 658; *see* Bellia, *supra* note 31, at 889–90 (explaining that "[g]eneral law, or the law of nations, governed matters that courts today categorize as commercial law, admiralty and maritime law, conflict of laws, and private international law").

73 *See* Fletcher, *supra* note 67, at 1514–15; Nelson, *supra* note 69, at 929–49.

74 *See* Sachs, *supra* note 17, at 1262–63.

even when the state's law incorporates general law. But *Erie* didn't prohibit federal courts from using a transjurisdictional form of law to decide cases not arising under state law.[75] Indeed, on the same day that *Erie* was decided, the Court decided a dispute between two states according to rules of general law.[76]

Moreover, federal courts continue to rely on a transjurisdictional form of jurisprudence to decide cases in numerous areas today. The clearest examples arise in the so-called "enclaves"[77] of federal common law, where the Constitution prevents state law from applying of its own force but where written federal law fails to supply rules of decision.[78] While commentators sometimes speak as if judges have broad discretion to select whatever rules they think best in these enclaves,[79] Caleb Nelson has shown that they typically don't do so. Instead, courts more frequently derive the relevant rules of decision from "patterns in the jurisprudence of the fifty states."[80] Moreover, courts frequently invoke consensus rules to supply definitions for undefined terms in federal statutes. Numerous statutes that refer to "employers" or "employees," for example, are understood as incorporating general principles of agency.[81] Similarly, the Bankruptcy Code's references to "fraud" have been understood to incorporate "the general common law of torts," which reflects "the dominant consensus of common-law jurisdictions."[82] The Court has also read certain statutes, such as the Employee Retirement Income Security Act (ERISA), so as to cohere with the evolving common law.[83]

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75 *See* Bellia & Clark, *supra* note 67, at 707.

76 *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

77 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

78 These "enclaves" include cases concerning the "rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes omitted).

79 *See, e.g.*, PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 127 (9th ed. 2018) ("The Court is acting in this instance as an ordinary common-law court. Its job is to formulate the best solution to the problem before it, consistent with any controlling legislative policy."); *see also* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) (observing that the content of federal common law "is a matter of judicial policy").

80 Nelson, *Persistence*, *supra* note 13, at 507–08; *see id.* at 508–18 (collecting examples).

81 *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 & n.3 (1992); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 542 (1999); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–55 (1998); Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 444–45, 444 n.3 (2003).

82 *See* Field v. Mans, 516 U.S. 59, 70 n.9 (1995).

83 *See* Hughes v. Nw. Univ., 142 S. Ct. 737, 741 (2022) (noting that ERISA's duty of prudence is interpreted "in light of the common law of trusts"); Tibble v. Edison Int'l, 575 U.S. 523, 528–29 (2015) (citing the RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. b (AM. L.

Having thus introduced the consensus model's approach to common law statutes, the next Part presents the normative case for adopting that approach.

II. THE CASE FOR THE CONSENSUS MODEL

This Part presents the case for the consensus model. Sections A–D argue that the model has the following advantages over its rivals: it's more faithful to Congress's likely intent, it strikes a better balance between the law's needs for stability and flexibility, it's more likely to generate high-quality legal rules, and it's more responsive to democratic preferences. Section E then anticipates several objections.

A. Congressional Intent

The standard view is that courts are supposed to function as Congress's faithful agents when interpreting and applying federal statutes.[84] No common law statute, however, expressly addresses how Congress prefers a court to proceed within the gaps that they characteristically leave open.[85] We might therefore wish to ask which model offers the best account of Congress's likely intent when enacting a common law statute. As this Section argues, the consensus model implies a more conventional understanding of the relationship between courts and unwritten law and thus offers the best account of Congress's likely intent.

Begin with the delegation model. Implicit in that model is a particular understanding of the nature of unwritten law that applies in the gaps left open by common law statutes. According to that understanding, the unwritten law is a body of rules that judges create "*ex nihilo*."[86] In other words, the delegation model views unwritten law as a form of

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INST. 2007) and several treatises); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 113 (2008) (citing treatises).

84 *See* Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1567–69 (2010) (articulating the functions and cultural primacy of the faithful agent theory); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (discussing the conventional view that federal courts function as faithful agents of Congress).

85 I reviewed the entire legislative histories of the three most commonly cited common law statutes—the Sherman Act, § 1983, and the Labor Management Relations Act. Based on that review, I concluded that none of those histories sheds light on Congress's preferred interpretive model for applying those statutes. Substantiating that conclusion would far exceed the space constraints of this Article. The main text assumes, without establishing, that those legislative histories are not instructive.

86 John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 508 n.17 (2000).

"judicial legislation"[87] that's "continually being made by current judges."[88] To quote Justice Scalia, deciding cases under this form of law is like "playing king" and thus "devising, out of the brilliance of one's own mind, those laws that ought to govern mankind."[89]

This understanding of the relationship between courts and the content of unwritten law is exotic, to say the least. Indeed, not a single federal statute other than the Rules Enabling Act expressly delegates to courts the authority to create legal rules from scratch. And the Rules Enabling Act itself is easily distinguishable from most other statutes on the ground that it merely purports to grant power to courts that they almost certainly already had as an inherent part of the judicial function—namely, to create rules for managing their own proceedings.[90]

Moreover, the delegation model's understanding of unwritten law is difficult to square with the Constitution's allocation of institutional responsibilities. If common law statutes require courts to apply rules that judges create *ex nihilo*, then those statutes appear to assign courts a task bearing a troubling resemblance to the "legislative [p]owers"[91] reserved to the political branches. And that is a reason to think that Congress did not intend that institutional arrangement.[92]

A similar argument can be made against the incorporation model's understanding of the unwritten law that governs in the interstices of common law statutes. According to that understanding, the rules to be applied in a case arising under a common law statute are the common law rules that prevailed when the relevant statute was enacted. But that understanding of the common law is "deeply ahistorical."[93] The common law has always been understood as an evolving, rather than a static, body of rules and principles. An interpretive theory that "seeks to arrest the development of the common law and

87 Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549 (1949).

88 Nelson, *Legitimacy*, *supra* note 13, at 15 (emphasis omitted).

89 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7 (new ed. 2018).

90 *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 661 & n.25 (2019).

91 U.S. CONST. art. I, § 1.

92 To be clear, the claim in the main text isn't that Congress may not delegate lawmaking power to courts. The Court has squarely rejected a nondelegation challenge to the Rules Enabling Act, which contemplates a policymaking role for the Supreme Court. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941). *But see* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1335 (2006) (arguing the Rules Enabling Act violates separation-of-powers principles). It's possible, of course, that most delegations of lawmaking power to courts would be unconstitutional, even if the Rules Enabling Act is not. But the point made in the main text does not rely on that claim.

93 D'Onfro & Epps, *supra* note 17, at 940 (emphasis omitted) (making this point in the context of interpreting the Fourth Amendment).

freeze it at a single point in time" therefore clashes with the common law's "fluid and evolutionary nature."[94] Moreover, treating common law statutes as if they incorporate a static set of rules conflicts with the most likely reason that Congress left a statute vague and open-ended in the first place: a more specific text couldn't have survived the onerous legislative process. Under the incorporation model, the open-ended provisions of common law statutes would dictate outcomes on topics as varied as the common law itself, rather than dictating outcomes only on the matters over which Congress reached agreement.

The consensus model, by contrast, reflects a more conventional understanding of the unwritten law that operates in the interstices of common law statutes. Traditionally, judges were expected to "find" common law rules by identifying shared customs and social practices.[95] Likewise, the consensus model assigns courts the traditional task of identifying rules generally followed by other jurisdictions and applying those rules in similar circumstances. These rules, to be sure, will be "judge-made" in the sense that they will emerge from the diffuse patterns of courts across the country.[96] And they will be "judge-made" in the sense that they will often be first articulated by courts, rather than some other institution.[97] But, contra the delegation model, they won't be "judge-made" in the sense that a single court may create whatever rules it pleases or alter the existing rules at will.[98] And this conception of unwritten law is easy to square with the Constitution's allocation of the "legislative [p]owers"[99] to the political branches because it doesn't charge courts with the task of creating rules of decision. Instead, it tasks them with adjudicating the rights and obligations of the parties according to preexisting rules.

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94 M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 914 (2010).

95 *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 3–4 (1986); Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1360 (2015); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 51–52 (2008); A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359, 373 (1987).

96 *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 531 (2019) (likening common law rules to "norms of fashion, etiquette, or natural language," which are "generally perceived as binding, without anyone in authority having formally enacted them or laid them down").

97 And when a court identifies a consensus rule for the first time, it can be said to "make" law in the sense that its decision will bind future courts. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1556–71 (2020) (explaining different ways of thinking about the holding of a case).

98 *See* Nelson, *Legitimacy*, *supra* note 13, at 14 ("[E]ven someone who thinks that courts made the common law out of whole cloth might not think that any current common-law court enjoys quasi-legislative authority.").

99 U.S. CONST. art. I, § 1.

Moreover, common law judges were traditionally responsible for perceiving changes in shared customs and social practices and updating their decisions accordingly.[100] Likewise—and contra the incorporation model—the consensus model conceives of the unwritten law to be applied in the interstices of common law statutes as an evolving body of jurisprudence, rather than a static set of rules fixed at some moment in the past.

The consensus model thus reflects a more conventional understanding of unwritten law than its two main rivals. And for that reason, it provides a more plausible account of Congress's likely intent when enacting each common law statute.

B. Quality of Legal Rules

The consensus model is also more likely to produce high-quality legal rules than its rivals. The problem with the incorporation model is that we have little reason to think yesterday's legal rules will be well adapted to today's problems. As Danielle D'Onfro and Daniel Epps put it, historical common law rules "were made to govern a world much different than the one we live in today."[101] For that reason, those rules will often fail to provide sound answers to present-day legal issues.[102] The incorporation model is therefore particularly unlikely to produce rules that are well adapted to contemporary problems.

What about the delegation model's suggestion that judges should devise policy in the interstices of federal statutory law? It has been suggested that this approach would enhance the quality of legal rules by allowing Congress to enact a broad policy framework and then delegate the task of working out the details of that framework to a better equipped institution.[103] That argument has also been made—correctly, in my view—in the context of delegations of lawmaking power to administrative agencies.[104] But one shouldn't assume that one set of

100 *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186.

101 D'Onfro & Epps, *supra* note 17, at 951.

102 *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 1000 (2016) (arguing that basing an approach to the Fourth Amendment on common law concepts that existed in 1791 would "lead to bizarre historical and definitional line drawing"); Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 658 ("[U]sing common law doctrines that originated in a bygone era to determine the meaning of modern statutes could 'hobble[] Congress's efforts to respond to modern problems that may have sparse or strained common law analogues.'" (second alteration in original) (quoting Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 GEO. MASON L. REV. 729, 773 n.353 (2022)).

103 *See* Kahan, *supra* note 11, at 351–52.

104 *See, e.g.*, Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002); *see also* Jerry L.

delegates (the courts) is equipped to address a problem just because another delegate (an agency) is.

Courts, in particular, labor under several limitations that don't apply to the same extent to agencies. First, there's a problem of personnel. One of Congress's principal justifications for delegating lawmaking power to administrative agencies is the superior competence and expertise of their staffs. The Environmental Protection Agency, for instance, employs scientists, engineers, economists, and others who bring substantial expertise to bear on the regulations that Congress has authorized the agency to promulgate.[105] Judges, by contrast, tend to be lawyers, who lack substantial expertise in most of the policy domains that common law statutes touch upon.[106]

Second, courts' policymaking capacity is limited by the structure of adjudication. Courts typically decide one case at a time, creating a myopic view of the domains their decisions address. A judge's choice of rules may therefore be biased by aspects of a case that are unrepresentative of how a problem typically manifests.[107] A judge, for instance, may select a broad rule where an expert would have known that a narrow one is warranted, or vice versa.

Third, courts tend to have scarcer resources and leaner staffs than Congress and administrative agencies.[108] These limitations inhibit their ability to acquire relevant background knowledge about a legal

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Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (arguing delegations promote public preferences and welfare).

105 *See generally* Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57 (1991).

106 A large body of scholarship argues that courts lack the requisite level of expertise to formulate sound competition policy. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 47 (2008); Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359 (2020); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1440 (2009); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674 (2009); Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 2 (2011).

107 *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006).

108 *See* William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 420–23; Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 950 (2003); Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2299–301 (2015).

problem and make them overly dependent on one-sided, self-interested submissions from the parties.[109]

In contrast, the consensus model discourages judges from weighing policy considerations outside their domains of expertise. Instead, it directs them to seek guidance in general jurisprudential patterns. To do that, a judge doesn't need a deep understanding of microeconomics, or power dynamics in labor relations, or the incentives of innovators, or the responsibilities and training of police officers, or any of the other subjects that common law statutes address. She simply needs to study the laws of various jurisdictions and determine which rules predominate. To be sure, performing that task requires a certain intellect, professional training, and good judgment. And in many cases it will be difficult. But it's the sort of task that judges are well equipped to perform—certainly more equipped than crafting rules based on sound public policy.

The fact that a rule is maintained by many jurisdictions may also provide better evidence that the rule is sensible than the theorizing of a single individual or small group of individuals. That evidence is defeasible, of course. Like all legal rules, rules of general law can be poorly conceived, counterproductive, or downright evil. But there's reason to think that the collective judgment of numerous jurisdictions is more likely to be sound than the judgment of a single court. The voice of the consensus model, to paraphrase Michael McConnell, is thus "the voice of humility."[110] It asks judges to subordinate their own views about a topic to the views expressed by most courts across the country.

C. Stability and Flexibility

A third reason to prefer the consensus model over its rivals is that it strikes a better balance between the law's needs for stability and

109 *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1858 (1998); Charles W. Tyler, Constitutional Genealogy (Nov. 1, 2023) (unpublished manuscript) (on file with author).

110 Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 684; *see also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 37–38 (2010) (arguing that the authority of constitutional law stems from its "evolutionary origins and its general acceptability to successive generations," *id.* at 38); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688, 691–92 (1994) (endorsing a theory of constitutional interpretation that relies heavily on precedent); Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 519–21 (1996) (arguing conservatives are properly "skeptical about the power of human reason to reorder society in accordance with some overarching rational plan," *id.* at 519). *But see* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009) (expressing skepticism about the soundness of many-minds arguments).

flexibility. On one hand, the delegation model is too flimsy. When courts follow it, the correct answer to some questions of statutory interpretation will change whenever judges' views about the relevant policy considerations change. If a court changes its view on minimum resale price maintenance, for example, then the law on that subject will change as well.[111] On the other hand, the incorporation model is too wooden. It increases the risk that the law will become poorly adapted to changes in society or to the wishes of the electorate because it treats statutes as if they freeze common law rules from the distant past in statutory amber.[112]

The consensus model avoids the drawbacks of these extremes. Contra the incorporation model, it allows statutory law to evolve as jurisdictions across the country change their approach to a particular legal issue.[113] Some state legislatures, for example, have recently rescinded or substantially curtailed immunities for law-enforcement officers.[114] If similar reform efforts become more widespread, then the consensus model would say that cases arising under § 1983 should be decided differently as well.

Contra the delegation model, the interpretation of a common law statute won't change merely because judges' views about public policy have changed. That's because the rules of decision aren't "under the control of any federal decisionmaker, nor are they dictated by the policymakers of any single state."[115] The model thus "capture[s] big, durable changes without being captured by fleeting trends."[116]

D. Democratic Responsiveness

Finally, the consensus model arguably reflects the will of the people more than its competitors. In the classical tradition, the common law was thought to derive from the customs and habits of the people.[117]

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111 *See supra* note 36 and accompanying text.

112 *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 n.66 (1997) ("Because of inertia . . . the failure to repeal existing legislation might indicate that a majority still supports it or that a *minority* sufficiently large to block repeal supports it.").

113 One might argue that the dynamism of the consensus model is a bug, rather than a feature. That objection is addressed *infra* subsection II.E.1.

114 *See* COLO. REV. STAT. § 13-21-131(2)(b) (2023) ("Qualified immunity is not a defense to liability pursuant to this section."); CONN. GEN. STAT. § 52-571(k) (2023) ("In any civil action brought under this section, governmental immunity shall only be a defense to a claim for damages when, at the time of the conduct complained of, the police officer had an objectively good faith belief that such officer's conduct did not violate the law.").

115 Nelson, *Persistence*, *supra* note 13, at 505.

116 D'Onfro & Epps, *supra* note 17, at 951 (making a similar point in the Fourth Amendment context).

117 *See supra* note 95 and accompanying text.

For that reason, it was thought to enjoy a "species of democratic legitimacy."[118] The consensus model maintains the same connection to the people. Like customary rules, consensus rules bubble up from below. They emerge from the diffuse decisions of decentralized, politically accountable institutions—state legislatures and courts.[119] Moreover, "[n]o single vote, no single electoral victory, [and] no single jurisdiction" can change those rules.[120] To effect changes in how the relevant statute is applied, policy entrepreneurs must either convince the people's representatives in Congress to amend the relevant common law statute or alter the consensus rule by convincing a sufficiently large number of jurisdictions to change their local policies.[121] Consensus rules thus approximate, in some sense, what a majority of Americans desire.[122]

To be sure, even consensus rules are a species of law first articulated by judges. That means they are law first articulated by a small group of people who "tend to belong to the more powerful groups in society and to reflect those groups' sensibilities."[123] Those rules may therefore "ignore the views of minorities and disfavored segments of the population."[124] Moreover, in some circumstances, a state's

118 Nelson, *Legitimacy*, *supra* note 13, at 10; *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *74 ("[I]t is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people."); David J. Bederman, *Public Law and Custom*, 61 EMORY L.J. 949, 949–50 (2012) ("Custom . . . is a bottom-up dynamic, where legal rules are being made by the actual participants in the relevant legal community.").

119 *See* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1751 n.20 (2015) (observing that "[c]ommon law courts are politically accountable because most of them are popularly elected and, more importantly, because their constructions of the common law are subject to revision by the legislative branch").

120 McConnell, *supra* note 110, at 682 (making this point in the context of describing constitutional traditions).

121 For an exploration of the influence of policy entrepreneurs on state law, see Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187 (2022).

122 In a related context, Professor Corinna Barrett Lain has argued that counting states to answer constitutional questions can ameliorate the countermajoritarian difficulty. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 415 (2009).

123 Krishnakumar, *supra* note 102, at 658; *see also* NEIL M. GORSUCH WITH JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 139 (2019) ("[J]udges are, by and large, drawn from the majority or more powerful groups in society," so "bias will often harm minorities and disfavored groups.").

124 Krishnakumar, *supra* note 102, at 658. *But see* Kramer, *supra* note 6, at 270 (suggesting ways that adjudication "increas[es] citizen access to the lawmaking apparatus"); Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1587–89 (2013) (same).

adherence to a particular rule may reflect legislative inertia more than it does the rule's current popular support, which diminishes the consensus model's link to the people.[125] But the claim here isn't that the consensus model is perfectly attuned to democratic preferences; it's that the model is *more* responsive than the alternatives. And that claim is easier to establish.

In the case of the delegation model, the key difference is institutional. Rather than looking for guidance in the collective views of state institutions, the delegation model derives rules from the policy judgments of the few unelected, life-tenured judges who happen to be assigned cases raising issues that common law statutes leave open. Moreover, because procedural rules typically don't permit nonparty participation, courts have few, if any, mechanisms by which to hear from the general population. Thus, as Rohit Chopra and Lina Khan explain, judicial lawmaking of the form contemplated by the delegation model deprives the public "of any real opportunity to participate in the creation of substantive . . . rules."[126]

In the case of the incorporation model, the key difference is temporal. Like the consensus model, the incorporation model derives rules from the decisions of many decentralized, democratically accountable institutions. But unlike the consensus model, it derives those rules from decisions made long ago, which in many cases won't reflect the wishes of the current populace. Many rules suggested by the incorporation model will therefore be the artifacts of the dead hand of the past.

E. Replies to Objections

This section responds to several potential objections to the consensus model: namely, that it is too dynamic, that it insufficiently restrains judges, that it raises decision and error costs, and that it fails to respect precedent.

1. Dynamism

Some might criticize the consensus model's dynamism for fundamentally misunderstanding the nature and purpose of written law. Whereas unwritten law can mutate and evolve as the customs, practices, and traditions of a society change, the whole point of writing the

125 *See* Klarman, *supra* note 112, at 505 n.66.

126 Chopra & Khan, *supra* note 106, at 362 (making this observation in the antitrust context).

law down is to render it fixed.[127] If a court determines that a statute meant *X* when it was enacted, it shouldn't mean *not-X* at a later point in time. The objection, however, is based on a misunderstanding of the consensus model. The model doesn't posit that the *meaning* of a statute changes as the laws of the various states change; rather, the claim is that the decisions of courts should change. The latter claim does not entail the former. To see this, consider an analogy.

Suppose a statute caps the interest rates that banks may charge for student loans at the London Interbank Offered Rate (LIBOR). The meaning of that statute is fixed—banks may not charge more than the LIBOR. But the rate that banks may charge to individual borrowers under the statute will change. It will fluctuate for the same reasons that the LIBOR fluctuates. Much the same is true for the relationship between common law statutes and consensus rules. If, for example, an undefined statutory term is understood to refer to the consensus meaning of that term, then that reference will be fixed, even though the underlying practices of American jurisdictions may change. Of course, if Congress wants to prevent this kind of evolution, it could easily do so by making the statute clearer. But in the absence of clearer language, the consensus model posits that the rules for deciding cases arising under common law statutes should be allowed to evolve.

Of course, adopting the consensus model will raise some tricky questions of judicial administration, such as how to tell when a change in the consensus rule has occurred and which courts (Only the Supreme Court? All federal appellate courts? All federal courts? All state and federal courts?) are permitted to announce such a change. But there is no reason to think these issues will be any more difficult to figure out than other intersystemic issues of stare decisis, such as when a lower court is permitted to recognize that a Supreme Court precedent has been abrogated or when a lower court is permitted to recognize that a particular holding constitutes "clearly established" law.

2. Judicial Discretion

A second objection is that the consensus model gives judges too much discretion. Identifying consensus rules will not be a mechanical exercise. And, for several reasons, judges can be expected to disagree about the content of those rules.[128] First, they may disagree about

127 This is also a common objection to Professor William Eskridge's theory of dynamic statutory interpretation. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125 (1994) (arguing that courts should update statutes to deal with modern problems).

128 *See* Krishnakumar, *supra* note 102, at 613 (finding that Justices on the Roberts Court have "disagreed about the substance of the relevant common law rule" in nearly one-fourth

which states' laws are sufficiently analogous to federal law.[129] Second, judges may disagree about the threshold required to declare a "consensus." Some judges may believe a majority rule represents a consensus, while others may believe a consensus requires a supermajority.[130] Third, they may disagree about how to aggregate state law. When determining the general approach to some constitutional questions, the Supreme Court has typically counted each state as an indivisible unit of measurement.[131] But a judge could conceivably determine a rule's level of support in state law in other ways.[132] There's thus significant discretion involved in using consensus rules to decide cases. For that reason, a critic may worry that the consensus model won't sufficiently restrain judicial discretion. More pointedly, she may worry that the consensus model allows judges to rationalize whatever outcomes they prefer. If so, then perhaps the model is just a means of "impos[ing] judicial preferences under the facade of judicial modesty."[133]

The consensus model, it must be acknowledged, doesn't determine answers to every interpretive question raised by common law statutes. Nor does it eliminate the need for policy-based reasoning in

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of the cases where the Court has invoked the common law to aid its interpretation of a federal statute).

129 This issue has gained more prominence in recent years. That's because, as the Court has begun to rely increasingly on "tradition" in constitutional cases, one needs to know which events constitute the relevant tradition. For a criticism of the Court's review of state abortion practices at the time of the Fourteenth Amendment, see, for example, Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1130 (2023).

130 Relatedly, some commentators have criticized the Court's occasional practice of declaring the laws and practices of some states unconstitutional based on the fact that a bare majority of other states have different laws and practices. *See* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 21 (2009); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1112 (2006).

131 *See* Hills, *supra* note 130, at 17 (noting that the Supreme Court has treated the states "as one large decision-making body whose members reach a single consensus"). The Court has taken this approach in various constitutional contexts. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682 (2019) (addressing the incorporation of the Bill of Rights); Atkins v. Virginia, 536 U.S. 304 (2002) (Eighth Amendment proportionality). And there are reasons to think this reflects the constitutional structure. After all, the states are separate sovereigns in the theory of American federalism, *see* Arizona v. United States, 567 U.S. 387, 398 (2012), the ratification of the Constitution occurred through the assent of the states, U.S. CONST. art. VII, and the amendment process requires the assent of three-fourths of the states, *id.* art. V.

132 She could, for example, weigh each state based on its population. *See* Jacobi, *supra* note 130, at 1113–14 ("The variation in the population of the states means that a simple count of the number of states supporting or opposing a particular application of the death penalty will often not give an accurate picture of what 'national' consensus exists.").

133 *Id.* at 1091 (making this point in the context of a critique of the Supreme Court's Eighth Amendment jurisprudence).

every case.[134] But it doesn't follow that the model allows judges to do whatever they please, or that they will have the same range of discretion under the consensus model as they would under the delegation model. In some cases, there will be a clear consensus in state law favoring a particular rule of decision. And in others, state law will narrow the universe of defensible outcomes, even as it doesn't dictate a single correct answer. As A.J. Bellia writes, "there are wrong answers to legal questions even in cases in which there may not be one right answer."[135]

To illustrate this point, consider the Supreme Court's decision in *Consolidated Rail Corporation v. Gottshall*.[136] The plaintiff's coworker in that case had died from heat exhaustion.[137] The plaintiff sued the railroad company for negligent infliction of emotional distress because it had discouraged his crew from taking scheduled breaks.[138] The Court took the case to determine the proper standard for evaluating claims of negligent infliction of emotional distress under the Federal Employers' Liability Act.[139] Writing for the Court, Justice Thomas surveyed various states' tests for evaluating claims of negligent infliction of emotional distress. In particular, he noted that the states had developed three distinct tests—a "physical impact" test,[140] a "zone of danger" test,[141] and a "relative bystander" test.[142] Further, both the relative-bystander test and the zone-of-danger test enjoyed substantial support in state law. He then treated that information as a limitation on the Court's discretion, ultimately adopting the test that he thought best cohered with the law's general fabric.[143] Consensus rules can thus constrain even as they may not always dictate uniquely correct answers.

Nothing but force can constrain the willful judge, who seeks to impose her personal or ideological preferences notwithstanding the clear law against her. But for the judge who seeks restraint[144]—who

134 *See supra* notes 53–55 and accompanying text.

135 Bellia, *supra* note 31, at 912; *see also* Nelson, *Persistence*, *supra* note 13, at 519 ("On some issues . . . [state] practices and precedents are too varied for a determinate rule of general law to emerge. . . . Even then, however, the practices that other jurisdictions follow tend to constrain the options that the Court considers.").

136 Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994).

137 *Id.* at 536.

138 *Id.* at 535. *Gottshall* involved two consolidated cases. For simplicity, the main text sets forth the facts of only one of those cases.

139 *Id.* Recall that the Federal Employers' Liability Act has been characterized as a common law statute. *See supra* note 8.

140 *Consol. Rail Corp.*, 512 U.S. at 547 & n.7.

141 *Id.* at 547–48, 548 n.9.

142 *Id.* at 548–49.

143 *Id.* at 551, 554 ("[T]he zone of danger test best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence." *Id.* at 554.).

144 *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017) (distinguishing between "external constraints, which help others to judge the

wants her decisions to be based on something other than her own preferences—the consensus model will supply sufficient guardrails to cabin her discretion in the mine run of cases.

3. Decision and Error Costs

A third objection concerns the costs associated with identifying consensus rules. In cases of first impression, courts may have to review the laws, policies, or customs of many states to determine which rule predominates. That will be a time-consuming endeavor that will either sap resources from other matters or force policymakers to devote a greater portion of the federal budget to the courts. Moreover, the difficulty of identifying the law will not just affect pending cases. It will also affect people trying to organize their lives and affairs in the shadow of the law. If one needs to perform a fifty-state survey to determine what the law is, then the law will be opaque to anyone who lacks the wherewithal or the will to perform that task.[145] Finally, identifying consensus rules will also be an endeavor that will sometimes lead courts to err, as they will sometimes fail to discern the laws of the various states correctly.

These are important concerns. But they are not dispositive objections to the consensus model. As an initial matter, it bears noting that not everyone who wishes to determine the law on a particular issue arising in the interstices of a common law statute will have to perform a fifty-state survey. In many cases, another court or a third party will already have compiled that research.[146] More importantly, the relevant question isn't whether the law will sometimes be unclear under the consensus model; it is whether the law will be *less* clear under the consensus model than under its rivals. In general, the answer is "no" because judges and litigants can more easily identify and evaluate the universe of materials relevant for identifying consensus rules than the

interpreter, and internal constraints, which focus on allowing the interpreter to constrain himself or herself").

145 Unwritten law has long been criticized for its inaccessibility. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 8 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789) (lamenting that the English common law had "no known assemblage of words for its substance").

146 For a source that compiles this type of research related to the Sherman Act, see AM. BAR ASS'N, STATE ANTITRUST PRACTICE AND STATUTES (5th ed. 2014). For a similar source related to some issues arising under § 1983, see MATTHIESEN, WICKERT & LEHRER, S.C., MUNICIPAL/COUNTY/LOCAL GOVERNMENTAL IMMUNITY AND TORT LIABILITY IN ALL 50 STATES 1 (2022).

universe of materials relevant for identifying the law under the other models. To see this, consider a hypothetical example.[147]

Suppose a collective bargaining agreement provides that an employer will pay for its retirees' healthcare benefits. A retired union member believes that under the agreement her healthcare benefits are vested for life. Nonetheless, when the agreement expires, the employer terminates those benefits. Further, suppose the relevant jurisdiction has not yet determined whether retirement healthcare benefits presumptively vest for life. A retired union member asks her lawyer to assess her chances of success in a suit brought under section 301(a) of the Labor Management Relations Act, which provides a cause of action for breach of collective bargaining agreements.[148]

If the courts in the relevant jurisdiction follow the consensus model, the lawyer will know which sources to consult and roughly how a judge will evaluate those sources. In particular, she will know to review various legal treatises and scour the decisions of state courts to determine whether "ordinary principles of contract law" support her client's position.[149] Of course, that question may be difficult, and there may be legitimate differences of opinion about how ordinary principles of contract interpretation apply to her client's case. But the answer will be based on a universe of materials that can be reliably identified ex ante and that the lawyer's professional training has prepared her to analyze.

Now, what if courts follow the delegation model? The lawyer will first have to anticipate the policy considerations a judge may deem relevant to the issue. She will then have to determine what universe of materials would help her predict how the judge might weigh those considerations. In many cases, those resources won't be limited to the treatises and cases she's accustomed to reading. Instead, they'll be found in expert reports, white papers, industry surveys, and the like. Her research would therefore be more cumbersome and more open-ended than a routine search for the relevant state statutes and caselaw. And for that reason, a court's ruling in her client's case will be far more difficult to predict.

And what if courts follow the incorporation model? In that case, the lawyer will have a better sense of which sources to consult. She will know to review historical statutes, cases, and treatises to determine what the common law provided with respect to her client's situation. But the rules of decision will often be less clear than they are under

147 The example is based on *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018), and *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427 (2015).

148 *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957).

149 *M&G Polymers*, 574 U.S. at 435.

the consensus model. That's in part because historical common law rules are often difficult to apply to contemporary problems.[150] But it's also because lawyers are more adept at determining the law today than they are at determining the law as of some date in the distant past. Moreover, since each common law statute was enacted at a unique moment in time, each statute will incorporate a unique set of common law rules. And that will be true even for statutes that address the same subject matter. Federal statutory law would thus contain many bodies of common law rules, corresponding to the era in which each federal statute was enacted. If it were consistently applied, the incorporation model would therefore greatly complicate the law.[151]

To be clear, the point is not that consensus rules will always be easier and less costly to identify than the best public policy or the relevant historical common law rules. On some issues, the policy merits may be easy, and the consensus rules difficult, to determine. And on some issues, it might be easier to determine historical common law rules than to determine a contemporary consensus. Rather, the point is that there's no reason to think one category of rules is generally and substantially easier to identify than the others.

4. Precedent

In common law legal systems, judges treat past judicial decisions as authorities—as content-independent reasons for doing the same things in the future.[152] This practice promotes several important goals. Among other things, it promotes fairness by ensuring that parties with similar claims are treated similarly, and it promotes stability by ensuring that the law doesn't change too rapidly.[153] On many issues, however, common law statutes have been applied in a manner that is inconsistent with contemporary consensus rules. The rule that indirect purchasers do not have a cause of action for damages under the Sherman Act, for example, is contrary to the majority rule in the states.[154] Perhaps, then, respect for precedent is a reason not to adopt the consensus model. Perhaps it's simply too late to turn back the clock.

In considering this objection, it's important to distinguish between the consensus model itself and the substantive rules of decision

150 *See supra* notes 101–02 and accompanying text.

151 *Cf.* Eric A. Johnson, *Dynamic Incorporation of the General Part: Criminal Law's Missing (Hyper)Link*, 48 U.C. DAVIS L. REV. 1831, 1871 (2015) (making a similar point about static incorporation of the General Part in defining criminal offenses).

152 *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987).

153 *See* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 47–49, 116–18 (2017); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176–80 (2006).

154 *See infra* subsection III.B.3 and accompanying text.

it may lead courts to adopt. That's because the reasons for respecting an earlier court's interpretive methodology aren't as forceful as the reasons for respecting substantive rules of decision. Interpretive methodologies don't implicate individual reliance interests to nearly the same extent.[155] Unlike rules of property or contract,[156] people generally don't organize their affairs around principles for interpreting statutes. Further, one can easily understand why it's unfair to decide one case under rule *A* but an indistinguishable case under rule *B*, at least where the rules lead to different outcomes. But it doesn't seem unfair for a court to apply a different interpretive methodology in two cases, unless doing so would *also* produce dissimilar treatment of similarly situated individuals. In other words, refusing to follow an earlier court's methodology isn't independently unfair, apart from how it may affect substantive rules of decision (and thus outcomes). For these reasons, methodological stare decisis is "generally absent from the jurisprudence of mainstream federal statutory interpretation."[157] Courts should therefore not be required to eschew the consensus model merely because they have followed other models in the past.[158]

But what about substantive rules of decision that courts have articulated by following other models in the past? Unlike the consensus model itself, altering these rules would implicate the sorts of interests that stare decisis is meant to protect. One of the consensus model's potential implications, for example, is reform of federal qualified immunity doctrine under § 1983.[159] Aaron Nielson and Chris Walker have argued that qualified immunity has engendered "significant

155 *See* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1147 (2019).

156 *See* Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .").

157 Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 218 (2015). In a related context, Professor Nina Varsava has noted that state and federal courts often don't follow one another's methodologies for determining the holding of a case. *See* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207, 1227–35 (2022).

158 To be clear, the claim isn't that courts need not follow a consistent approach to deciding statutory cases. Abbe Gluck is right that "a consistent approach would increase predictability and systemic coordination for the many parties involved in statutory interpretation" and that this would also have "symbolic, legitimacy-enhancing benefits." Gluck, *supra* note 157, at 1851, 1854. Instead, the claim is that courts may justifiably adopt the consensus model, even when doing so would alter their existing interpretive practices.

159 *See infra* Section III.A.

reliance" and therefore shouldn't be reformed (if at all) by judicial action.[160]

But that isn't necessarily a problem for this Article's proposal. For one thing, the Court has long noted that the force of stare decisis is weaker in cases involving common law statutes.[161] Parties' legitimate reliance interests are therefore weaker than in the ordinary case because they have been put on notice that the law is subject to judicial modification. Moreover, the consensus model is consistent with a wide range of views about the weight that courts should give to their earlier interpretations of the same statute. Most relevant here, the consensus model is consistent with the view that a judge should give great weight to previously articulated doctrinal rules, even if those rules can't be derived from her preferred interpretive methodology. It's thus consistent with the view that courts should use it to decide future cases but not to overrule earlier interpretations, particularly where reliance interests are significant.

III. DOCTRINAL IMPLICATIONS

To illustrate what adopting the consensus model would mean in practice, this Part applies the model to two important common law statutes—§ 1983 and the Sherman Act. In light of the differences between the consensus model and its rivals, one might suspect that adopting the consensus model would entail sweeping changes to the jurisprudence of those statutes. This Part concludes, however, that the model justifies many aspects of existing law and thereby places them on a firmer conceptual foundation. At the same time, the model suggests reforms to several areas of existing doctrine.

Of course, not everyone will agree with each of these implications. I, for one, would not select all the model's implications were I asked to design my own legal system from scratch.[162] But this Part's aim isn't to defend each of the model's implications to the hilt. Nor would it be realistic to expect an interpretive model to produce the optimal rule of decision for every issue to which it may be applied. If the consensus model is superior to its rivals, it's because it performs better than its rivals overall, even if it doesn't deliver what one believes is the optimal rule in every case. Moreover, to the extent that one hopes that some aspect of the law will remain unchanged, stare decisis provides some measure of comfort against the changes that the model suggests.

160 *See* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 237, 237–38 (2020).

161 *See* Lemos, *supra* note 2, at 91–93; Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 53 (2010).

162 Oddly, no one has asked.

That's because, as noted, a judge may adopt the consensus model as her interpretive approach going forward without committing herself to overruling every decision reached in earlier cases under a different model.[163] Even without the comfort of stare decisis, however, the consensus model's implications for particular common law statutes are not so counterintuitive that they should lead one to abandon the model altogether.

A. Section 1983

Section 1983 "create[s] a species of federal tort liability for individuals to sue state and local officers for deprivations of" their rights.[164] In particular, it provides a cause of action against "[e]very person" acting under color of state law who violates another's federal constitutional or statutory rights.[165] But, as noted, that text does not address the circumstances, if any, under which a state officer is entitled to immunity from the liability the statute creates.[166]

1. Absolute Immunity

At first blush, § 1983 may seem to "admit[] of no immunities."[167] "Every person," after all, is most naturally read to mean *every* person. The Court, however, regards the statute as silent on the topic of immunities and has concluded that the statute didn't abrogate "common law protections 'well grounded in history and reason.'"[168] To determine the nature and scope of official immunities, the Court's recent cases have thus sought guidance from common law rules in force when § 1983 was enacted.[169] Based on its understanding of the common law as of 1871, for example, the Court has held that state legislators[170] and judges[171] are absolutely immune from liability for actions taken in their

163 *See supra* subsection II.E.4.

164 Thompson v. Clark, 142 S. Ct. 1332, 1336–37 (2022).

165 42 U.S.C. § 1983 (2018).

166 *See supra* note 44 and accompanying text.

167 Imbler v. Pachtman, 424 U.S. 409, 417 (1976); *see* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2096 (2018) ("The plain text of Section 1983 begins with two words that place governmental immunities in a precarious position from the outset: 'Every person.'" (quoting 42 U.S.C. § 1983)).

168 Filarsky v. Delia, 566 U.S. 377, 380, 383–84 (2012) (quoting *Imbler*, 424 U.S. at 418).

169 As noted, the Court hasn't always followed this approach. *See supra* note 45.

170 *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.").

171 *See* Pierson v. Ray, 386 U.S. 547, 554–55 (1967) ("The immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have

legislative and judicial capacities, respectively. Further, while the common law didn't extend immunity to prosecutors in 1871,[172] the Court has concluded that "the same considerations that underlie the common-law immunities of judges" justify extending absolute immunity to prosecutors as well.[173]

While the consensus model takes a very different approach to the interpretation of § 1983, it supports each of these doctrinal rules. That's because nearly every state today continues to immunize officials for actions taken in their judicial, legislative, or prosecutorial capacities.[174] The consensus model thus leads to outcomes that are consistent with this aspect of existing law. Moreover, because the consensus model provides a more satisfying set of reasons for extending absolute immunity to these kinds of officials, it grounds the doctrine in a sounder theoretical foundation than the incorporation model.

2. Qualified Immunity

At the same time, the consensus model suggests reforming the most controversial aspect of contemporary immunity doctrine—namely, the qualified form of immunity given to state and local law-enforcement officers. Under current law, a law-enforcement officer is entitled to qualified immunity unless "the unlawfulness of [her]

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specifically so provided had it wished to abolish the doctrine."). The history of immunity for judges is less straightforward than for legislators. *Compare* Douglas K. Barth, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RSRV. L. REV. 727, 732 n.29 (1977), *with* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 887–91.

172 *See* Rehberg v. Paulk, 566 U.S. 356, 364 (2012). Indeed, there are even some early cases permitting civil liability for prosecutors. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 111–14.

173 *See Imbler*, 424 U.S. at 422–23.

174 For cases providing absolute judicial immunity, see, for example, Frost v. Geernaert, 246 Cal. Rptr. 440, 441 (Ct. App. 1988); Johnson v. Harris, 645 So. 2d 96, 98 (Fla. Dist. Ct. App. 1994); Tarter v. State, 503 N.E.2d 84, 86–87 (N.Y. 1986); Post v. Mendel, 507 A.2d 351, 353–54 (Pa. 1986); and Turner v. Pruitt, 342 S.W.2d 422, 423 (Tex. 1961). For cases providing absolute legislative immunity, see, for example, Mahler v. Jud. Council, 282 Cal. Rptr. 3d 34, 44–48 (Ct. App. 2021); Fla. House of Representatives v. Expedia, Inc., 85 So. 3d 517, 523–24 (Fla. Dist. Ct. App. 2012); Larabee v. Governor of N.Y., 880 N.Y.S.2d 256, 267–68 (App. Div. 2009); League of Women Voters of Pa. v. Commonwealth, 177 A.3d 1000, 1002–04 (Pa. Commw. Ct. 2017); and *In re* Perry, 60 S.W.3d 857, 859 (Tex. 2001). For cases providing absolute prosecutorial immunity, see, for example, Ingram v. Flippo, 89 Cal. Rptr. 2d 60, 68 (Ct. App. 1999); Qadri v. Rivera-Mercado, 303 So. 3d 250, 254 (Fla. Dist. Ct. App. 2020); Cunningham v. State, 422 N.Y.S.2d 497, 498–99 (App. Div. 1979); Miller v. Nelson, 768 A.2d 858, 861 (Pa. Super. Ct. 2001); and Font v. Carr, 867 S.W.2d 873, 876–77 (Tex. Ct. App. 1993).

conduct was 'clearly established at the time'" of her conduct.[175] "Clearly established" law, the Court has explained, must have a "clear foundation in then-existing precedent."[176] Federal law thus hinges an officer's entitlement to immunity on the clarity of the law she's alleged to have violated.[177]

The consensus model does not support this aspect of current law. To identify the consensus rule, a judge would begin by determining which states' laws are sufficiently analogous to federal law. There are two defensible options. But, as explained below, a judge who chooses either option will likely conclude that the consensus model doesn't support the federal qualified immunity standard.

First, the judge could base her determination of the consensus rule on the tort laws of every state because § 1983 "create[s] a species of federal tort liability,"[178] and nearly every state allows victims to pursue ordinary tort claims, such as assault and battery, against state officials.[179] Table 1 visually represents the results of such an analysis.

175 District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

176 *Id.*

177 For a fascinating discussion of qualified immunity and other doctrines that turn on the law's clarity, see generally Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497 (2019).

178 Thompson v. Clark, 142 S. Ct. 1332, 1336–37 (2022).

179 *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 759 (2021).

TABLE 1: OFFICER IMMUNITY IN STATES THAT ALLOW TORT SUITS AGAINST GOVERNMENT OFFICIALS

	Clarity of Law	Level of Fault	Type of Action
AL		✓	
AK	✓		
AZ	✓		
AR	✓		
CA			✓
CO		✓	
CT		✓	
DE		✓	
FL		✓	
GA		✓	
HI		✓	
ID		✓	
IL		✓	
IN			✓
IA		✓	
KS			✓
KY		✓	
LA	✓		
ME	✓		
MD		✓	
MA	✓		
MI		✓	
MN		✓	
MS			✓
MO		✓	
MT	✓		
NE		✓	
NV			✓
NH		✓	
NJ	✓		
NM		✓	

	Clarity of Law	Level of Fault	Type of Action
NY			✓
NC		✓	
ND		✓	
OH		✓	
OK		✓	
OR			✓
PA		✓	
RI		✓	
SC		✓	
SD		✓	
TN		✓	
TX		✓	
UT			✓
VT	✓		
VA		✓	
WA	✓		
WV	✓		
WI			✓
WY			✓

As Table 1 shows, the laws of only eleven states follow the federal rule that bases an officer's entitlement to immunity on the clarity of the legal rule she's alleged to have violated.[180] Meanwhile, twenty-nine states hinge an officer's immunity on a more generic notion of fault—one not tied to the clarity of existing caselaw. In these states, an officer is entitled to immunity unless she acted with the requisite level of culpability.[181] States formulate that level of culpability differently, but all

180 *See* Sheldon v. City of Ambler, 178 P.3d 459, 464 (Alaska 2008); Chamberlain v. Mathis, 729 P.2d 905, 912 (Ariz. 1986); Baldridge v. Cordes, 85 S.W.3d 511, 514 (Ark. 2002); Moresi v. Dep't of Wildlife & Fisheries, 567 So. 2d 1081, 1093–94 (La. 1990); Clifford v. MaineGeneral Med. Ctr., 91 A.3d 567, 583 (Me. 2014); Rodriques v. Furtado, 575 N.E.2d 1124, 1127 (Mass. 1991); Rosenthal v. County of Madison, 170 P.3d 493, 500 (Mont. 2007); Morillo v. Torres, 117 A.3d 1206, 1208–09 (N.J. 2015); Stevens v. Stearns, 833 A.2d 835, 842 (Vt. 2003); Est. of Lee *ex rel.* Lee v. City of Spokane, 2 P.3d 979, 991 (Wash. Ct. App. 2000); Clark v. Dunn, 465 S.E.2d 374, 379–80 (W. Va. 1995).

181 *See Ex parte* Dixon, 55 So. 3d 1171, 1178 (Ala. 2010); Martinez v. Est. of Bleck, 379 P.3d 315, 317 (Colo. 2016); Fleming v. City of Bridgeport, 935 A.2d 126, 147–48 (Conn. 2007); McCaffrey v. City of Wilmington, 133 A.3d 536, 547 (Del. 2016); Medina v. Pollack,

require something beyond mere negligence—for example, that an officer acted willfully, wantonly, recklessly, with malice, or in bad faith. And a third group of ten states hinges immunity on the nature of the officer's action—usually whether it was "discretionary."[182] The overwhelming majority of states therefore reject the federal rule in favor of a rule that turns on an officer's level of culpability.

Second, the judge could confine her review to the twenty-four states that recognize a specific cause of action for damages against officers who violate a plaintiff's constitutional rights.[183] Table 2 illustrates the results of that analysis.

300 So. 3d 173, 175–76 (Fla. Dist. Ct. App. 2020); Cameron v. Lang, 549 S.E.2d 341, 344 (Ga. 2001); Gordon v. Maesaka-Hirata, 431 P.3d 708, 730–31 (Haw. 2018); Ransom v. City of Garden City, 743 P.2d 70, 72 (Idaho 1987); Calloway v. Kinkelaar, 659 N.E.2d 1322, 1327 (Ill. 1995); Baldwin v. City of Estherville, 915 N.W.2d 259, 268 (Iowa 2018); Rowan County v. Sloas, 201 S.W.3d 469, 475 (Ky. 2006); Lee v. Cline, 863 A.2d 297, 309–11 (Md. 2004); Odom v. Wayne County, 760 N.W.2d 217, 228 (Mich. 2008); Mumm v. Mornson, 708 N.W.2d 475, 490 (Minn. 2006); State *ex rel.* Alsup v. Kanatzar, 588 S.W.3d 187, 190 (Mo. 2019) (en banc); Davis v. State, 902 N.W.2d 165, 193 (Neb. 2017); Everitt v. Gen. Elec. Co., 932 A.2d 831, 838–39 (N.H. 2007); Schear v. Bd. of Cnty. Comm'rs, 687 P.2d 728, 730 (N.M. 1984); Wilcox v. City of Asheville, 730 S.E.2d 226, 230 (N.C. Ct. App. 2012); Kouba v. State, 687 N.W.2d 466, 469–70 (N.D. 2004); Hoffman v. Gallia Cnty. Sheriff's Off., 103 N.E.3d 1, 14 (Ohio Ct. App. 2017); Burgin v. Leach, 2014 OK CIV APP 18, ¶ 10, 320 P.3d 33, 37–38; Dorsey v. Redman, 96 A.3d 332, 338–39 (Pa. 2014); State *ex rel.* Kilmartin v. R.I. Troopers Ass'n, 187 A.3d 1090, 1099–1100 (R.I. 2018); Shelley v. S.C. Highway Patrol, 852 S.E.2d 220, 225 (S.C. Ct. App. 2020); Bego v. Gordon, 407 N.W.2d 801, 810 (S.D. 1987); McCloud v. Bradley, 724 S.W.2d 362, 364 (Tenn. Ct. App. 1986); Tex. Dep't of Pub. Safety v. Bonilla, 481 S.W.3d 640, 643–44 (Tex. 2015); Cromartie v. Billings, 837 S.E.2d 247, 254 (Va. 2020).

182 *See* Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158, 173 (Ct. App. 2007); Cantrell v. Morris, 849 N.E.2d 488, 495 (Ind. 2006); Dougan v. Rossville Drainage Dist., 757 P.2d 272, 276 (Kan. 1988); Barrett v. Miller, 599 So. 2d 559, 567 (Miss. 1992); Martinez v. Maruszczak, 168 P.3d 720, 728–29 (Nev. 2007); Tango v. Tulevech, 459 N.E.2d 182, 185–86 (N.Y. 1983); Westfall v. State *ex rel.* Or. Dep't of Corr., 324 P.3d 440, 449–50 (Or. 2014); Ross v. Schackel, 920 P.2d 1159, 1163–64 (Utah 1996); Pries v. McMillon, 784 N.W.2d 648, 656–57 (Wis. 2010); Darrar v. Bourke, 910 P.2d 572, 575–76 (Wyo. 1996).

183 Eight states have statutes that provide a cause of action for damages against officers who violate a person's state constitutional rights. *See* Reinert et al., *supra* note 176, at 760 & n.93 (listing the states of Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, New Jersey, and New Mexico). And another sixteen states recognized an implied right of action under their state constitution. *See id.* at 759 & n.91 (listing the states of Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, New York, North Carolina, Oklahoma, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin).

TABLE 2: OFFICER IMMUNITY IN STATES RECOGNIZING PRIVATE ACTIONS FOR CONSTITUTIONAL VIOLATIONS

	Clarity of Law	Level of Fault	Type of Action
AZ	✓		
CA			✓
CO		✓	
CT		✓	
IA		✓	
LA	✓		
ME	✓		
MD		✓	
MA	✓		
MI		✓	
MS			✓
MT	✓		
NJ	✓		
NM		✓	
NY			✓
NC		✓	
OK		✓	
RI		✓	
TX		✓	
UT			✓
VT	✓		
VA		✓	
WV	✓		
WI		✓	

As Table 2 shows, eight of the twenty-four states that recognize a private cause of action for state constitutional violations follow the federal rule, twelve hinge immunity on the officer's level of culpability, and four states hinge an officer's immunity on the nature of her actions. A judge who confines her analysis to these states would therefore likely reach the same conclusion as a judge who bases her analysis on

the law of every state.[184] Whichever set of states the judge chooses, it thus appears that the consensus model supports *some* form of qualified immunity, but not the form that current doctrine takes.[185] In particular, it suggests an officer should be given immunity that hinges on her level of culpability—e.g., whether she acted willfully, recklessly, with malice, in bad faith, and the like.[186]

Reforming qualified immunity in this way would address several criticisms that have been leveled against current doctrine. First, scholars have argued the current doctrine has no basis in the common law in force when § 1983 was enacted. That's because in 1871 government officials generally couldn't assert a good-faith defense to liability.[187] By the Court's own terms, the doctrine is therefore unlawful.[188] The consensus model, however, suggests an alternative basis for the legality of some form of qualified immunity. In particular, the model supports extending immunity to officers who act with a sufficient level of care with respect to the injuries they may cause. While this form of immunity can't be found in the "common-law backdrop against which

184 To be sure, a judge could conceivably confine her review to the eight states that have a statute similar to § 1983. And if so, then she may conclude that the federal rule is the consensus rule, since four of those states follow the federal rule. But that approach seems far too blinkered. After all, the states that recognize an implied private right of action are still grappling with the same basic question: namely, how to balance society's "need to hold public officials accountable" against its "need to shield officials from harassment, distraction, and liability." Pearson v. Callahan, 555 U.S. 223, 231 (2009).

185 *Cf.* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 241–42 (2013) ("[I]t is essential to distinguish the case for retaining *some version* of qualified immunity from the details of existing doctrine.").

186 In this respect, the consensus model suggests moving toward an earlier era in qualified immunity jurisprudence, in which an officer's bad faith could deprive her of immunity to which she might otherwise be entitled. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974). The Court jettisoned this approach to qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 814–819 (1982). For a summary of doctrinal developments between *Pierson* and *Harlow*, see David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 37–44 (1989).

187 Scholars tend to agree that the common law in 1871 did not extend immunity to police officers. *See* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 16–17 (2017); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 414–22 (1987); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972). *But see* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1368–75 (2021) (surveying Supreme Court doctrine, treatises, and state law supposedly demonstrating common law support for qualified immunity).

188 For this reason, Justice Thomas has recently expressed his desire to overhaul the Court's qualified immunity jurisprudence. *See* Ziglar v. Abbasi, 582 U.S. 120, 158–60 (2017) (Thomas, J., concurring).

Congress enacted the 1871 Act," that doesn't mean that it's an untethered "policy choice."[189] Rather, it is grounded in the general approach to the issue that courts take today.

Second, commentators have criticized the policy rationale for the clearly-established-law standard. They have argued that standard unjustifiably immunizes officers who act outrageously or with malevolent intent,[190] that it's a poor proxy for the objective reasonableness of a defendant's conduct,[191] that it tends to be exceedingly difficult for plaintiffs to meet in certain categories of cases (most notably cases alleging that an officer used excessive force during an arrest),[192] and that it stunts the development of constitutional law.[193] While this Article doesn't advance the thesis that the rule followed by the majority of states is the ideal liability rule for constitutional rights, it appears that rule would perform better as a policy matter than existing federal law along several of these dimensions. In particular, the consensus rule wouldn't immunize officers who behave outrageously or who intentionally violate a plaintiff's rights. Moreover, because the consensus rule doesn't hinge on the similarity between the instant case and existing caselaw, it would eliminate courts' incentive to avoid answering constitutional questions on the merits. While stopping short of abolishing qualified immunity, the consensus rule should therefore be a welcome revision to many who have criticized the existing federal standard.

189 *Id.* at 159 (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

190 *See* Jeffries, *supra* note 185, at 263–64.

191 *See id.* at 255; John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 863 (2010).

192 *See* Jeffries, *supra* note 185, at 255; Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018).

193 *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37–38 (2015) (finding that courts have reached the merits of constitutional questions less frequently after *Pearson v. Callahan*, 555 U.S. 223 (2009)). Several commentators have argued that qualified immunity's right-remedy gap has the opposite effect—encouraging innovation in constitutional law. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999). That may well be true of remedial discretion as a general matter. But, as Professor Schwartz has noted, neither the Supreme Court nor the federal circuit courts are in the habit of recognizing the existence of a new constitutional right only to then grant immunity on the ground that the right wasn't clearly established. *See* Schwartz, *supra* note 192, at 1826–27.

B. The Sherman Act

Section 1 of the Sherman Act provides that every "contract, combination . . . , or conspiracy, in restraint of trade" is unlawful.[194] That vague text doesn't address numerous issues arising under the statute, including what it means by the phrase "restraint of trade."[195] As this Section explains, the consensus model can be used to address some of those issues. As in the case of § 1983, the legal rules generally applied by the states are consistent with, and justify, many aspects of the Court's current jurisprudence interpreting section 1, while at the same time suggesting several lines of critique.

1. Per Se Violations

The Court has distinguished business arrangements that are analyzed under the "rule of reason" from those deemed unlawful per se. Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[196] The per se rule, by contrast, "treat[s] categories of restraints as necessarily illegal" because they're so clearly harmful to competition that they can be held unlawful without any inquiry into their purpose or effects in particular circumstances.[197] The consensus model also supports this framework. The laws of nearly every state contain a prohibition similar to section 1 of the Sherman Act—either in a functionally similar state statute (a "little Sherman Act") or under state common

194 15 U.S.C. § 1 (2018).

195 The legislative history is also notoriously cryptic on that point. A huge literature has tried to interpret the legislative history, but scholars have identified numerous, conflicting purposes in the legislative record. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10 (1966) (maintaining the Act seeks exclusively to promote consumer welfare by lowering prices); Paul, *supra* note 33, at 220 (attributing to the common law a purpose of "dispers[ing] economic coordination rights"); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 363, 367 (1993) (arguing the Act was designed to prohibit unfair business practices); Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 289–91 (1986); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 105–06 (1982) (arguing that the Act was partly about protecting small producers); John C. Peppin, *Price-Fixing Agreements Under the Sherman Anti-trust Law*, 28 CALIF. L. REV. 297, 306 & n.29 (1940) (arguing section 1 was meant to make unlawful under federal law "what had been previously held unlawful restraint of trade at common law").

196 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (quoting Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977)).

197 *Id.* at 886.

law.[198] And in interpreting those statutes (or state common law), nearly every state draws the same distinction between per se violations and those subject to a rule-of-reason analysis.[199]

Under current federal law, a few categories of business arrangements are unlawful per se. One example is the general prohibition on horizontal price-fixing agreements—that is, agreements among competitors to restrict output and charge supracompetitive prices. Federal law has long treated such agreements as unlawful per se.[200] Another example is the general prohibition on horizontal market-allocation agreements—that is, agreements among competitors to divide, and not to compete with one another within, particular geographic regions. Federal law has long prohibited this practice as well.[201] The consensus model has no difficulty justifying these aspects of current law because nearly every state with reported cases on these issues proscribes both horizontal price fixing[202] and horizontal market allocation.[203]

198 The exceptions are Arkansas and Georgia. *See* AM. BAR ASS'N, *supra* note 146, §§ 5-1, 12-1.

199 *See id.* §§ 1–51. The exceptions are New York and Kansas, which don't recognize per se offenses. *See* Atkin v. Union Processing Corp., 457 N.Y.S.2d 152, 155–56 (App. Div. 1982); KAN. STAT. ANN. § 50-163(c) (Supp. 2023).

200 *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 135 (1969).

201 *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).

202 *See* AM. BAR ASS'N, *supra* note 146, §§ 1–54.

203 *See* Flowers & Peagler v. W.T. Smith Lumber Co., 47 So. 1022, 1023 (Ala. 1908); Betz v. Chena Hot Springs Grp., 742 P.2d 1346, 1349 (Alaska 1987); Ariz. Downs v. Ariz. Horsemen's Found., 637 P.2d 1053, 1062 (Ariz. 1981); *In re* Cipro Cases I & II, 348 P.3d 845, 863 (Cal. 2015); CONN. GEN. STAT. § 35-28(c) (2023); Océ Printing Sys. USA, Inc. v. Mailers Data Servs., Inc., 760 So. 2d 1037, 1043 (Fla. Dist. Ct. App. 2000); Health Pros., Ltd. v. Johnson, 791 N.E.2d 1179, 1187 (Ill. App. Ct. 2003); Nat. Design, Inc. v. Rouse Co., 485 A.2d 663, 667 (Md. 1984); MINN. STAT. § 325D.53, subdiv. 1(1)(c) (2022); Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co., 43 So. 435, 437 (Miss. 1907); MONT. CODE ANN. § 30-14-205(2)(c) (2023); State v. Adams Lumber Co., 116 N.W. 302, 312–13 (Neb. 1908); NEV. REV. STAT. § 598A.060(1)(b) (2021); N.H. REV. STAT. ANN. § 356:2(II)(c) (2022); State v. Scioscia, 490 A.2d 327, 334, 336 (N.J. Super. Ct. App. Div. 1985); Culp v. Love, 37 S.E. 476, 477 (N.C. 1900); Medina Cnty. Farmers' Tel. Co. v. Medina Tel. Co., 12 Ohio N.P. (n.s.) 289 (Ohio Ct. Com. Pl. 1911); UTAH CODE ANN. § 76-10-3112(1)(a) (LexisNexis 2017); VT. STAT. ANN. tit. 9, §§ 2451a(8), 2453a(a) (2020 & Supp. 2022); Norfolk Motor Exch., Inc. v. Grubb, 147 S.E. 214, 217 (Va. 1929); Murray Publ'g Co. v. Malmquist, 832 P.2d 493, 497 n.4 (Wash. Ct. App. 1992); W. VA. CODE ANN. § 47-18-3(b)(1)(C) (LexisNexis 2015). *But see Atkin*, 457 N.Y.S.2d at 155–56 (analyzing horizontal market-allocation agreement under the rule of reason).

2. Minimum Resale Price Maintenance

As noted, *Leegin* overruled the Court's 1911 decision in *Dr. Miles*, which had held that resale price maintenance (RPM) is a per se violation of the Sherman Act.[204] Under *Leegin*, RPM is instead analyzed under the rule of reason.[205] The Court's decision in *Leegin* was largely based on its assessment that there are "procompetitive justifications for a manufacturer's use of resale price maintenance."[206] In short, the Court concluded that *Dr. Miles*'s per se rule was bad public policy.

The consensus model, however, doesn't support the Court's change of heart. Table 3 illustrates the laws of the various states regarding the standard of review for resale price maintenance.

TABLE 3: STATE POLICIES ON RESALE PRICE MAINTENANCE

	Per Se Violation	Rule of Reason		Per Se Violation	Rule of Reason
AL	✓		NE	✓	
AZ	✓		NV	✓	
AR		✓	NH	✓	
CA	✓		NJ	✓	
CT	✓		NC	✓	
FL		✓	OH	✓	
HI	✓		OK		✓
IL		✓	PA	✓	
IA		✓	SC	✓	
KS		✓	TN	✓	
MD	✓		TX		✓
MI	✓		VT	✓	
MN		✓	WA		✓
MS	✓		WV	✓	
MT	✓				

As Table 3 shows, twenty-nine states have addressed the legality of RPM—either in a statutory provision or a reported judicial decision

204 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007), *overruling* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

205 *Id.* at 882.

206 *Id.* at 889.

interpreting state law.[207] But only nine of those states analyze RPM under the rule of reason.[208] By contrast, twenty states regard RPM as a per se violation of their antitrust laws.[209] A per se prohibition is therefore the clear majority rule. The consensus model would thus call into question the Court's decision to analyze RPM under the rule of reason.

3. Indirect-Purchaser Standing

The general thrust of state antitrust laws also sheds critical light on the Court's decision in *Illinois Brick Co. v. Illinois*.[210] In that case, the Court held that purchasers more than one step down the distribution chain ("indirect purchasers") may not bring suits for damages against the original manufacturer or service provider under the federal antitrust laws.[211] Like the decision in *Leegin*, the Court's opinion in *Illinois Brick* is an exemplar of the delegation model. The Court reasoned that permitting both indirect and direct purchasers to bring suit would potentially expose defendants to duplicative liability and lead plaintiffs to fight over defendants' limited funds.[212] In the Court's view, determining the amount that direct purchasers had been overcharged would

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207 In addition to the states discussed in notes 208–09, New York courts have held that resale price maintenance agreements are unenforceable, but not illegal, under New York law. *See* People v. Tempur-Pedic Int'l, Inc., 944 N.Y.S.2d 518 (Sup. Ct. App. Div. 2012).

208 *See* Fort Smith Light & Traction Co. v. Kelley, 127 S.W. 975, 981–82 (Ark. 1910); MYD Marine Distrib., Inc. v. Int'l Paint Ltd., 76 So. 3d 42, 49 (Fla. Dist. Ct. App. 2011); 740 ILL. COMP. STAT. ANN. 10/3, Bar Comm. Cmts. § 3(1)–(2) (West 2022); W.T. Rawleigh Med. Co. v. Osborne, 158 N.W. 566, 568 (Iowa 1916); KAN. STAT. ANN. § 50-163(c) (Supp. 2023); State v. Alpine Air Prods., 490 N.W.2d 888, 894–95 (Minn. Ct. App. 1992); Furst v. Lucas, 61 P.2d 214, 218 (Okla. 1936); Lubbock Beverage Co. v. Miller Brewing Co., No. CIV.A.5:01-CV-124-C, 2002 WL 31011266, at *10 (N.D. Tex. June 4, 2002); State *ex rel.* Hamilton v. Standard Oil Co. of Cal., 68 P.2d 1031, 1032 (Wash. 1937).

209 *See* ALA. CODE § 8-10-1 (2017); State *ex rel.* La Sota v. Ariz. Licensed Beverage Ass'n, 627 P.2d 666, 670 (Ariz. 1981); Kunert v. Mission Fin. Servs. Corp., 1 Cal. Rptr. 3d 589, 604 (Ct. App. 2003); CONN. GEN. STAT. § 35-28(a) (2023); HAW. REV. STAT. § 480-4(b)(1) (2008); MD. CODE ANN., COM. LAW § 11-204(b) (West 2013); Goldman v. Loubella Extendables, 283 N.W.2d 695, 699 (Mich. Ct. App. 1979); MISS. CODE ANN. § 75-21-1(b) (2016); MONT. CODE ANN. § 30-14-205 (2023); NEB. REV. STAT. § 59-805 (2021); NEV. REV. STAT. § 598A.060(1)(a)(2)–(3) (2021); N.H. REV. STAT. ANN. § 356:2(II)(a) (2022); State v. Lawn King, Inc., 417 A.2d 1025, 1035 (N.J. 1980); Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, 206 S.E.2d 141, 150 (N.C. 1974); State *ex rel.* Brown v. Palzes, Inc., 317 N.E.2d 262, 266 (Ohio Ct. Com. Pl. 1974); Shuman v. Bernie's Drug Concessions, Inc., 187 A.2d 660, 663 (Pa. 1963); S.C. CODE ANN. § 39-3-10 (2022); TENN. CODE. ANN. § 47-25-101 (2013); VT. STAT. ANN. tit. 9, §§ 2451a(8), 2453a (2020); W. VA. CODE ANN. § 47-18-3(b)(1)(A) (LexisNexis 2015).

210 431 U.S. 720 (1977).

211 *See id.* at 726, 728–30. *Illinois Brick* was a case brought under the Clayton Act, but the Court has extended the holding to cases brought under the Sherman Act. *See, e.g.*, Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

212 *Ill. Brick*, 431 U.S. at 737–38.

therefore be far simpler.[213] In short, permitting suits by indirect purchasers would be bad public policy.[214]

Table 4 illustrates current state law on the subject of indirect-purchaser standing.

TABLE 4: STATE POLICIES ON INDIRECT-PURCHASER STANDING

	Standing	No Standing		Standing	No Standing
AL	✓		MO		✓
AK		✓	NE	✓	
AZ	✓		NV	✓	
CA	✓		NH	✓	
CO		✓	NJ		✓
CT		✓	NM	✓	
FL	✓		NY	✓	
HI	✓		NC	✓	
ID		✓	ND	✓	
IL	✓		OH		✓
IN		✓	OK		✓
IA	✓		OR	✓	
KS	✓		RI		✓
KY		✓	SC		✓
LA		✓	SD	✓	
ME	✓		TN	✓	
MD		✓	TX		✓
MA	✓		VT	✓	
MI	✓		WA		✓
MN	✓		WV	✓	
MS	✓		WI	✓	

213 *See id.* at 737.

214 The indirect-purchaser rule has been the subject of substantial criticism. Scholars have argued that it denies compensation to victims, inhibits deterrence of antitrust violations, and exacerbates the complexity of litigation. *See* Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 89–100 (2007) (summarizing these criticisms).

As Table 4 shows, forty-two states have either a statutory provision or a reported case addressing whether indirect purchasers may bring suit for violations of state antitrust laws.[215] Twenty-five of those states permit indirect purchasers to sue,[216] while seventeen states do not.[217] The majority rule thus rejects the holding of *Illinois Brick*. Moreover, of the sixteen states that follow the federal rule, eight have directed their state courts to interpret state statutes so as to conform with judicial interpretations of the Sherman Act.[218] Thus, if the Supreme Court were to adopt the consensus model in this area, one would expect it to

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215 The Court held in *California v. ARC America Corp.*, 490 U.S. 93, 105–06 (1989), that federal antitrust laws, which the Court has interpreted to preclude suit by "indirect purchasers," don't preempt state antitrust laws that permit suit by indirect purchasers.

216 *See In re* Chicken Antitrust Litig., 669 F.2d 228, 239 n.18 (5th Cir. 1982) (applying Alabama law); Bunker's Glass Co. v. Pilkington, PLC, 75 P.3d 99, 102 (Ariz. 2003); Union Carbide Corp. v. Superior Court, 679 P.2d 14, 16–17 (Cal. 1984); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 108–09 (Fla. Dist. Ct. App. 1996); Hindman v. Microsoft Corp., 88 P.3d 1209 (Haw. 2004); 740 ILL. COMP. STAT. 10/7(2) (2022); Comes v. Microsoft Corp., 646 N.W.2d 440, 445 (Iowa 2002); KAN. STAT. ANN. § 50-161(b) (2005); ME. STAT. tit. 10, § 1104(1) (2023); Ciardi v. F. Hoffmann–La Roche, Ltd., 762 N.E.2d 303, 313 (Mass. 2002); A&M Supply Co. v. Microsoft Corp., 654 N.W.2d 572, 574 (Mich. Ct. App. 2002); Lorix v. Crompton Corp., 736 N.W.2d 619, 626–27 (Minn. 2007); MISS. CODE ANN. § 75-21-9 (2016); Arthur v. Microsoft Corp., 676 N.W.2d 29, 35 (Neb. 2004); NEV. REV. STAT. § 598A.210(2) (2021); N.M. STAT. ANN. § 57-1-3(A) (2022); Lennon v. Philip Morris Cos., 734 N.Y.S.2d 374, 378 (Sup. Ct. 2001); Hyde v. Abbott Lab'ys, Inc., 473 S.E.2d 680, 683 (N.C. Ct. App. 1996); N.D. CENT. CODE § 51-08.1-08(3) (2021); OR. REV. STAT. § 646.780 (2021); *In re* S.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 671 (S.D. 2003); Freeman Indus. v. Eastman Chem. Co., 172 S.W.3d 512, 517 (Tenn. 2005); VT. STAT. ANN. tit. 9, § 2465(b) (2020); W. VA. CODE R. § 142-9-1.4 (1990); Obstetrical & Gynecological Assocs. of Neenah v. Landig, 384 N.W.2d 719, 723–24 (Wis. Ct. App. 1986).

217 *See* 1 AM. BAR ASS'N, STATE ANTITRUST PRACTICE AND STATUTES § 3-14.b.9 (Harvey I. Saferstein et al. eds., 4th ed. 2009) (Alaska); *id.* § 15-14.b.9 (Idaho); Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471, 476 (Colo. App. 1996); Vacco v. Microsoft Corp., 793 A.2d 1048, 1064 (Conn. 2002); Berghausen v. Microsoft Corp., 765 N.E.2d 592, 595–96 (Ind. Ct. App. 2002); Skilcraft Sheetmetal, Inc. v. Ky. Mach., Inc., 836 S.W.2d 907, 909 (Ky. Ct. App. 1992); Free v. Abbott Lab'ys, Inc., 176 F.3d 298, 301 (5th Cir. 1999) (applying Louisiana law); Davidson v. Microsoft Corp., 792 A.2d 336, 344 (Md. Ct. Spec. App. 2002); Ireland v. Microsoft Corp., No. 00CV-201515, 2001 WL 1868946, at *1 (Mo. Cir. Ct. Jan. 24, 2001); LaChance v. U.S. Smokeless Tobacco Co., 931 A.2d 571, 575–77 (N.H. 2007); Sickles v. Cabot Corp., 877 A.2d 267, 276 (N.J. Super. Ct. App. Div. 2005); Johnson v. Microsoft Corp., 834 N.E.2d 791, 798 (Ohio 2005); Major v. Microsoft Corp., 60 P.3d 511, 514 (Okla. Civ. App. 2002); Siena v. Microsoft Corp., 796 A.2d 461, 465 (R.I. 2002); *In re* Wiring Device Antitrust Litig., 498 F. Supp. 79, 85–86 (E.D.N.Y. 1980) (applying South Carolina law); Abbott Lab'ys, Inc. v. Segura, 907 S.W.2d 503, 506 (Tex. 1995); Blewett v. Abbott Lab'ys, 938 P.2d 842, 844 (Wash. Ct. App. 1997).

218 *See* Elida, Inc. v. Harmor Realty Corp., 413 A.2d 1226, 1230 (Conn. 1979); S. Tool & Supply, Inc. v. Beerman Precision, Inc., 862 So.2d 271, 278 (La. Ct. App. 2003); Fischer, Spuhl, Herzwurm & Assocs., Inc. v. Forrest T. Jones & Co., 586 S.W.2d 310, 313 (Mo. 1979) (en banc); *Sickles*, 877 A.2d at 275; *Johnson*, 834 N.E.2d at 794–95; *In re Wiring Device*, 498 F. Supp. at 87; *Abbott Lab'ys*, 907 S.W.2d at 505–06; *Blewett*, 938 P.2d at 844.

lead to even greater convergence between state and federal law than existing state law may initially suggest, as those states would likely conform to the new interpretation of federal law.

CONCLUSION

The delegation and incorporation models are inadequate. They misunderstand the nature of the common law, ignore the preferences of people living today, produce legal rules that aren't well adapted to the statutes they implement, and either make the law too wooden or too flimsy. The consensus model—with its focus on the evolving common law—offers much more. It's consistent with the judicial role within the traditional common law process, it responds to the people's preferences, it leverages the wisdom of the crowd, and it balances the law's needs for stability and flexibility.