

*From Federal Common Law to Textualism:
The Evolving Interpretation of Patent Cases in the Supreme Court*

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This paper examines the jurisprudence of the Supreme Court (and to a lesser extent, lower courts) as the Court has evolved in its approach to interpreting patent statutes. The paper contends that the Supreme Court has moved from a more common law approach to the patent statutes, especially with regard to patent doctrines such as patentable subject matter and obviousness, to a more strictly textualist approach to patent statutes. The paper compares and contrasts the Supreme Court's patent law decisions with contemporaneous antitrust decisions to chart the similarities, and eventual dissimilarities of the Court's approach to these two areas of law. The paper posits that the Court eventually turned towards textualism in patent law but not antitrust for at least two reasons. First, the Court never explicitly claimed congressional delegation to shape the patent laws as it did antitrust laws. But the Court did very much act as if it considered itself free to make patent common law in certain areas in the first century of the Court's jurisprudence. Second, while hard cases remain in antitrust law, there the Court was able to adopt the framework of increasing consumer welfare to arrive at a fairly consistent approach to antitrust law. There has been no such consensus and overall unifying approach to patent law. This paper shows that, instead, various patent law doctrines remain in tension with each other as they—to greater or lesser extents—represent the conflicting underlying policy interests of patent law. The inability to resolve these underlying tensions in a comfortable way has lead the Court to give up on crafting certain areas of patent law and instead fall back to a textualism that leaves problems to Congress to solve. Notwithstanding the much-heralded America Invents Act, however, Congress unfortunately has shown itself unable or unwilling to take on the core conflicts and uncertainties of patent law. Thus, the evolution of the Court's patent law interpretation has left patent law unmoored and inconsistent.