

Do Cases Make Bad Law?

Frederick Schauer†

“It is the merit of the common law,” Oliver Wendell Holmes observed, “that it decides the case first and determines the principle afterwards.”¹ That the decision of a particular case holds pride of place in common law methodology is largely uncontroversial. And indeed so too is the view that this feature of the common law is properly described as a “merit.” Treating the resolution of concrete disputes as the preferred context in which to make law—and making law is what Holmes meant in referring to “determin[ing] the principle”—is the hallmark of the common law approach.² It is true that the common law’s methods and theory were developed at a time when most common law judges understood themselves to be discovering the law rather than making it, but Holmes knew better. He fully appreciated that common law judges made law in the process of deciding cases, and nowadays few think otherwise. Common law method is not simply the discovery of immanent law, but rather an approach in which the decision of live disputes in concrete contexts guides the lawmaking function. Moreover, so it is said, making law in the context of deciding particular cases produces lawmaking superior to methods that ignore the importance of real litigants exemplifying the issues the law must resolve. Indeed, this belief in the virtue of a crystallized dispute be-

† Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University, and Daniel R. Fischel and Sylvia M. Neil Distinguished Visiting Professor of Law (Fall 2005), The University of Chicago Law School. Earlier versions of this Article were presented as a Faculty Enrichment Lecture at the Rogers College of Law of the University of Arizona, as a Faculty Colloquium at the Chicago-Kent College of Law, and at the Harvard Law School Seminar on Law and Economics. I am grateful for the comments of Yael Aridor Bar-Ilan, Elizabeth Chorvat, Richard Fallon, Louis Kaplow, Richard Posner, Steven Shavell, Matthew Stephenson, David Strauss, Peter Strauss, Mark Tushnet, Adrian Vermeule, Lloyd Weinreb, Michael Wells, Kenneth Winston, and Ernest Young; for valuable research suggestions from Iris Bohnet, Alan Ferrell, Jack Goldsmith, and Christine Jolls; and for the generous research support of The University of Chicago Law School and the Joan Shorestein Center on the Press, Politics and Public Policy.

¹ Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 Am L Rev 1 (1870), reprinted in Sheldon M. Novick, ed, 1 *The Collected Works of Justice Holmes* 212 (Chicago 1995). See also Louis Menand, *The Metaphysical Club* 338 (Farrar, Straus, and Giroux 2001).

² “In short, as Professor Eisenberg has reminded us in his book on the common law, courts are legitimately in two businesses: deciding individual disputes and enriching our body of legal norms.” Todd D. Rakoff, *The Implied Terms of Contracts: Of “Default Rule” and “Situation-Sense,”* in Jack Beatson and Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* 191, 195 (Clarendon 1995), citing Melvin Aron Eisenberg, *The Nature of the Common Law* 4–7 (Harvard 1988).

tween specific parties as the platform for creating legal rules is so strong that it is reflected not only in the faith still placed in the common law as a desirable method of lawmaking, but also in the Constitution's "case or controversy" requirement,³ which as currently understood embodies a preference that law be made in the context of a concrete dispute between genuine adversaries, rather than on the basis of "abstract" speculation.⁴

Yet although both the common law and the Constitution manifest a preference for having a genuine case before the lawmaker, this preference may rest on a fundamentally mistaken premise. If in fact concrete cases are more often distorting than illuminating, then the very presence of such cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass. Such distortion may rarely be seen or appreciated by the common law judge, who focuses, as she must, on the *this-ness* of this case. But the distortion of the immediate case may systematically condemn common law lawmaking not only to suboptimal results, but also to results predictably worse than those that would be reached by making law in a less dispute-driven fashion. If this is so, then the entire "merit" of lawmaking in common law fashion may need to be reconsidered, and my goal here is to prompt just such wholesale reconsideration of the virtues of the common law method as a desirable way to create the rules and principles that constitute so much of our law.

The tension I explore here becomes even more apparent when we consider another of Holmes's famous statements, the view that "[g]reat cases like hard cases make bad law."⁵ Holmes did not believe that identifying the problematics of great cases and hard cases was inconsistent with his view about the merits of case-based lawmaking, because for Holmes both great cases and hard cases presented vivid factual settings whose very vividness made proper resolution of the particular case especially salient even when that proper resolution would have negative effects on future and different cases. But such scenarios

³ See US Const Art III, § 2.

⁴ See *Allen v Wright*, 468 US 737, 752 (1984) (stating that an individual plaintiff lacks standing if his or her fact-specific harm is "too abstract, or otherwise not appropriate, to be considered judicially cognizable"). See also *Raines v Byrd*, 521 US 811, 839 (1997) (Breyer dissenting) ("[T]here would be no case or controversy here were the dispute before us . . . not concrete and focused."); *Babbitt v United Farm Workers National Union*, 442 US 289, 297 (1979) ("The difference between an abstract question and a 'case or controversy' is one of degree . . . and is not discernible by any precise test."); *Coleman v Miller*, 307 US 433, 460 (1939) (Frankfurter dissenting) (arguing that "traditional" English common law courts adjudicated "concrete, living contest[s] between adversaries," not "abstract, intellectual problems").

⁵ *Northern Securities Co v United States*, 193 US 197, 400 (1904) (Holmes dissenting).

were aberrational, Holmes believed, and he saw no reason why the distorting effects of great or hard cases would be present for the mine run of ordinary common law litigation.

Yet in supposing a dichotomy between the attention-grabbing and the more ordinary cases, Holmes may have ignored the extent to which even ordinary cases impress their facts on the judges who have to decide them, and scarcely less than great cases or hard cases appear to demand proper resolution purely by virtue of their very presence in the foreground of judicial phenomenology. To the extent that this is so, then it is not just great cases and hard cases that make bad law, but simply the deciding of cases that makes bad law. Or at least that is the disturbing possibility that I examine here.

I. THE COMMON LAW JUDGE AS LAWMAKER

At the time when Holmes wrote about the merits of the common law method, it was still often (albeit not universally⁶) believed that judges neither do nor should make law.⁷ Common law decisionmaking was widely understood prior to the twentieth century as the process of discovering the rules and principles immanent in the existing law, such discovery being assisted by logical deduction from earlier cases as well as the less deductive but no less constrained application of that mysterious array of skills then and now known as “legal reasoning.”⁸ To the paradigmatic nineteenth-century judge, and perhaps even at times to Holmes himself, the move from the decision of a particular case to the

⁶ See, for example, John Austin, *2 Lectures on Jurisprudence* 634 (Murray 5th ed 1885) (Robert Campbell, ed) (noting “the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges”). See also *Allen v Jackson*, 1 Ch D 399, 405 (C A 1875) (Mellish) (observing that “the whole of the rules of equity, and nine tenths of the rules of common law, have in fact been made by the Judges”); John Chipman Gray, *The Nature and Sources of the Law* 285 (Macmillan 2d ed 1921) (referring to law being “made by the judges”).

⁷ “The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law.” R.W.M. Dias, *Jurisprudence* 151 (Butterworths 5th ed 1985). See also *Willis v Baddeley*, 2 QB 324, 326 (C A 1892) (Esher) (“There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.”); *In re Hallett's Estate*, 13 Ch D 696, 710 (C A 1879) (Jessel) (announcing that “the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial”).

⁸ Anyone who thinks the statement in the text to be an inaccurate caricature would be well advised to examine Eugene Wambaugh, *The Study of Cases* §§ 74–79 at 74–80 (Little, Brown 2d ed 1894) (admitting competing views of the law as either discovered or judge-made but advocating a universal “legal reasoning [that] is the same everywhere”). To the same effect is John M. Zane, *German Legal Philosophy*, 16 Mich L Rev 287, 338 (1918) (“The man who claims that under [the United States’] system the courts make law is asserting that the courts habitually act unconstitutionally.”).

announcement of the principle that had determined the outcome of that case was substantially bounded and significantly backward looking. The common law judge was engaged, in the eyes of many, in locating and articulating a preexisting principle, no less preexisting for never before having been formally articulated. The approach was thus one of principle-finding rather than principle-making—of discovery rather than creation. Making law was rarely thought to be part of the process.⁹

Even the nineteenth century, however, saw numerous dissenters from this Blackstonian picture of what the common law judge was doing in announcing broad legal principles in the context of deciding concrete controversies. Jeremy Bentham was the earliest and shrillest of these dissenters,¹⁰ and Holmes himself, although later and less shrill than Bentham, presaged the Realists by pressing against a picture of the common law as discovery and quasi-logical legal reasoning.¹¹ Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as “formalists.”¹²

It is thus no longer especially controversial to insist that common law judges make law.¹³ Sometimes this occurs when judges create new

⁹ See Gerald J. Postema, *Classical Common Law Jurisprudence (Part 1)*, 2 Oxford U Commw L J 155, 166 (2002) (“Classical common law judges did not regard themselves as ‘making’ law . . . any more than rules of English grammar are [] made.”); J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* 3 (Oxford 2001) (noting that “a problem is presented by the fact that there is often a disparity between what courts do . . . and what they say they are doing”); Morton J. Horwitz, *The Transformation of American Law 1780–1960* 16–17 (Oxford 1992) (describing “[d]eduction from general principles” as a nineteenth-century tool to allow judges to “distinguish the legal from the political”).

¹⁰ See Jeremy Bentham, *Of Laws in General* 166–68, 184–95 (Athlone 1970) (H.L.A. Hart, ed); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 8 (Athlone 1970) (E.H. Burns and H.L.A. Hart, eds). See also Gerald J. Postema, *Bentham and the Common Law Tradition* 197 (Clarendon 1986) (noting Bentham’s belief that precedent ought not be viewed as binding); Nancy L. Rosenblum, *Bentham’s Theory of the Modern State* 94–98 (Harvard 1978); James Steintrager, *Bentham* 20, 20–43 (Cornell 1977) (“Bentham’s diagnosis of the sickness of the English body politic centred on his analysis of the English common law.”).

¹¹ This is the best understanding of Holmes’s claim that “[t]he life of the law has not been logic: it has been experience.” Oliver Wendell Holmes, *The Common Law* 5 (Belknap 1967) (Mark DeWolfe Howe, ed). See also William Twining, *Karl Llewellyn and the Realist Movement* 16 (Weidenfeld 1973) (“[Holmes] recognized that judges can and do make law.”).

¹² Thus, the word “formalism,” when not serving simply as a catchall term of jurisprudential abuse, may denote a belief, indeed a highly plausible one, in the possibility and/or desirability of rule-based constraint. Alternatively, “formalism” may be the vice of denying the extent of judicial choice or discretion when that choice or discretion actually exists. See Frederick Schauer, *Formalism*, 97 Yale L J 509, 509–11 (1988). It is this latter version of formalism, formalism as the denial of choice, that I discuss in the text.

¹³ Benjamin Cardozo wrote that:

The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that the judges did,

doctrines in traditional common law areas such as contract, tort, and choice of law. Few would dispute that the New York Court of Appeals made law in *McPherson v Buick Motor Co*¹⁴ when it held that a consumer of even a product that was not inherently dangerous could recover against a manufacturer for negligent manufacture despite the absence of privity between the consumer and the manufacturer, or that the House of Lords did much the same when it reached more or less the identical outcome in *Donoghue v Stevenson*.¹⁵ So too when the venue for lawmaking is not simply the creation or re-creation of common law rules, but rather the judicial construction of doctrine against the background of a largely indeterminate authorizing statute. The Sherman Act's prohibition of "[e]very contract, combination[,] . . . or conspiracy, in restraint of trade or commerce"¹⁶ is the canonical but hardly unique example, and when the Supreme Court interprets the open-ended language of that Act as prohibiting price-fixing¹⁷ and tying arrangements¹⁸ its lawmaking role is scarcely less than that of a common law court. So too when the context for judicial lawmaking is constitutional interpretation, where the judicial development of constitutional doctrine against the background of vague phrases such as "[c]ommerce . . . among the several [s]tates,"¹⁹ "freedom of speech,"²⁰ "establishment of religion,"²¹ "due process of law,"²² "equal protection of the laws,"²³ "unreasonable searches and seizures,"²⁴ and

was to throw off the wrappings, and expose the statute to our view. Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 124–25 (Yale 1921).

¹⁴ 217 NY 382, 111 NE 1050, 1054–55 (1916) (Cardozo). For discussion and elaboration, see Eisenberg, *The Nature of the Common Law* at 58–61, 132–35 (cited in note 2).

¹⁵ 1932 App Cas 562, 566, 622–23 (HL 1932). For an analysis of *Donoghue v Stevenson* and other cases as decisions choosing among alternative legally justifiable outcomes, and thus making law, see Neil MacCormick, *Legal Reasoning and Legal Theory* 69–70, 234–35, 246–58 (Clarendon 1978) ("[T]here may be more than one set of normative generalizations which can be advanced in rationalization of the rules which 'belong' to the [legal] system."). As is well known, the most prominent contemporary defender of the view that judges find law and do not make it is Ronald Dworkin, especially in Ronald Dworkin, *Law's Empire* 410–12 (Belknap 1986), and Ronald Dworkin, *Taking Rights Seriously* xi (Harvard 1977). But although Dworkin wishes to understand as "finding" or "interpreting" what others would call "making," those differences have little pertinence to the themes of this Article. Even if we understand Dworkin to be correct and his opponents mistaken, my central point about the distorting dominance of the particular case before the judge would be no less applicable.

¹⁶ 15 USC § 1 (2000).

¹⁷ See, for example, *United States v Socony-Vacuum Oil Co*, 310 US 150, 228 (1940).

¹⁸ See, for example, *United Shoe Machinery Corp v United States*, 258 US 451, 457 (1922).

¹⁹ US Const Art I, § 8.

²⁰ US Const Amend I.

²¹ *Id.*

²² US Const Amend V; US Const Amend XIV, § 1.

²³ US Const Amend XIV, § 1.

²⁴ US Const Amend IV.

“cruel and unusual punishments”²⁵ is largely untethered by the text.²⁶ But whether in the context of pure common law decisionmaking or instead in the context of the supposed “interpretation” of capacious language in statutes or the Constitution, it is far too late in the day to deny that judges are often (some would say “always”²⁷) engaged in the process of making law. Moreover, as Holmes stressed, judges make law in conjunction with their decision of actual controversies before the lawmaking court.²⁸ Aside from whether that procedure is a merit or a demerit, there is no longer much doubt that using the decision of a single case as the platform for making law is one of the characteristic features of common law method.

II. LAW AS RULE AND PRINCIPLE

Although Holmes referred to “determin[ing] the principle,” nothing here turns on any alleged difference between determining a principle and making law. It is certainly true that at times a court will announce a crisp and precisely defined rule—as in the Supreme Court’s decision in *Miranda v Arizona*²⁹ or the Court’s creation of various per se antitrust rules³⁰—and that at other times it will announce a broad and less determinate principle.³¹ In language more familiar these days, sometimes a court makes law by setting forth a rule and at other times by

²⁵ US Const Amend VIII.

²⁶ See David A. Strauss, *Common Law Freedom of Speech and the Common Law Constitution*, in Lee C. Bollinger and Geoffrey R. Stone, eds, *Eternally Vigilant: Free Speech in the Modern Era* 32, 59 (Chicago 2002) (“The content of [First Amendment] law has not emerged from the text [but instead] by a [common law] process.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 877 (1996) (“[I]n the day-to-day practice of constitutional interpretation, . . . the specific words of the text play at most a small role.”). See also Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* 23 (Chicago Public Law and Legal Theory Working Paper No 73, 2004), online at <http://www.law.uchicago.edu/academics/publiclaw/resources/73-av-amendments.pdf> (visited June 11, 2006) (discussing “judge-made constitutional law”).

²⁷ See Duncan Kennedy, *Legal Formality*, 2 J Legal Stud 351, 378 (1973) (arguing that judges necessarily exercise choice in every decision, even when it appears they are simply following the law).

²⁸ Even earlier, Theophilus Parsons observed that judges in nineteenth-century America “appear[ed] to take the opportunity which each case afforded, not only of deciding that case, but of establishing rules of very general application.” Theophilus Parsons, *Memoir of Theophilus Parsons* 239 (Ticknor and Fields 1859).

²⁹ 384 US 436, 467–74 (1966) (providing virtually the exact language that police were to use in alerting suspects of their Fifth Amendment rights).

³⁰ See, for example, *United States v Socony-Vacuum Oil Co*, 310 US 150, 222 (1940) (holding that price-fixing per se violates antitrust laws); *Times-Picayune Publishing Co v United States*, 345 US 594, 605 (1953) (holding that tying arrangements per se violate antitrust laws).

³¹ See Michael C. Dorf, *Courts, Reasons, and Rules*, in Linda Meyer, ed, *Rules and Reasoning: Essays in Honour of Fred Schauer* 129, 130–31 (Hart 1999).

announcing a standard.³² But whether what a court offers is a rule or a standard, the court's announcement still serves as the presumptively governing norm for future cases. Consequently, for all but the most vacuous of norms—"do the right thing," for example³³—a norm set forth by the deciding court will operate as constraining law for future cases. The argument offered here is stronger insofar as the announced norm is precise—a rule and not a standard—and highly stringent—having great precedential force and significant weight against countervailing interests³⁴—but the core of the argument is dependent on neither precision nor great stringency. As long as the announced norm exerts at least some constraint in and for future cases, the argument presented here still holds.

To go even further, the argument holds even if the decisionmaking court is understood to be doing no more than giving a reason for its decision. Because a reason is necessarily more general than the

³² On the rule-standard distinction, see Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *Or L Rev* 23, 24 (2000); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *Duke L J* 557, 559–60 (1992); Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 *Harv L Rev* 22, 26–27 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv L Rev* 1685, 1776 (1976). Ronald Dworkin has fostered a not inconsiderable amount of confusion by distinguishing rules from principles, and then defining rules as precise and absolute and principles as vague and overridable. Ronald Dworkin, *Taking Rights Seriously* at 22–28 (1978) (explaining that rules are "all-or-nothing," while principles may not apply in a particular case and yet remain valid). Dworkin's error lies in part in assuming that the dimensions of precision and weight operate in tandem, when in fact they appear to be largely independent of each other. There are precise but overridable rules, and there are vague but highly stringent standards (or even absolute standards, as with Kant's vague but nonoverridable categorical imperative), and even if we assume equivalence between what Dworkin means by "principles" and others mean by "standards," it is still not the case either that the precision of rules is a marker of their stringency or that the vagueness of standards is a marker of their overridability. Joseph Raz has observed, against Dworkin, that "we do not normally use the rule/principle distinction to mark the difference between *prima facie* and conclusive reasons or between the standards which establish them," Joseph Raz, *Legal Principles and the Limits of Law*, in Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* 73, 82 (Rowman & Allanheld 1983), and Raz seems plainly correct. See also Frederick Schauer, *The Convergence of Rules and Standards*, 2003 *NZ L Rev* 303, 306 (noting that Dworkin "mistakenly . . . conflates the dimension of specificity with the dimension of stringency"); Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 13–14 (Clarendon 1991) (preferring a distinction between "conclusive and overridable rules" to the one drawn by Dworkin).

³³ The slightly more common version is "all things considered" decisionmaking, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *Colum L Rev* 1667, 1680 (1988) (referring to "all-things-considered intuitive weighing" as lying at the heart of pragmatism), and some would put open-ended "balancing" into the same category. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 *Hastings L J* 825, 826 (1994); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *Yale L J* 943, 944 (1987).

³⁴ On these questions of strength as opposed to scope, see Frederick Schauer, *A Comment on the Structure of Rights*, 27 *Ga L Rev* 415, 433 (1993).

decision that the reason is a reason for,³⁵ any reason (or any statement of a reason) that has precedential force in future cases operates in largely rule-like fashion. Once a court announces a reason for its decision, and once that stated reason is something that future or lower courts are expected to take seriously *as a reason*,³⁶ then the troubling question still arises as to whether the general statement that is the reason is better or worse by virtue of it having been initially announced in the context of a concrete dispute that a court is expected to resolve.

III. THE PROBLEM IN A STATIC MODEL

The basic argument is best approached by initially considering a static and thus highly artificial model of common law decisionmaking.³⁷ We start with the premise, as explained above, that lawmaking is rulemaking. And we proceed then to the fact that rules are, of necessity, general and not particular. What makes a rule a rule, and what distinguishes a rule from a particularized command, is precisely the way in which a rule builds on a generalization and prescribes for all of the acts or events encompassed by the generalization.³⁸ When a lawmaker makes law, she thus sets forth a rule that controls, even if only presumptively, and even if not precisely, a multiplicity of future instances.³⁹ The lawmaker, whether judge or legislature or agency, is de-

³⁵ See Frederick Schauer, *Giving Reasons*, 47 Stan L Rev 633, 635 (1995).

³⁶ The alternative view—that announced reasons have virtually no normative weight in subsequent litigation, see Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 NYU L Rev 123, 126 (1999)—is stunningly at odds with the realities of actual legal practice. For the three-month period from October 1, 2004, through December 31, 2004, for example, 222 briefs were filed in the Supreme Court of the United States, and every one of those briefs *quoted* from a previous Supreme Court decision (Lexis Supreme Court Briefs database, search conducted on Feb 9, 2005). This would be an odd practice indeed unless the writers of those briefs had reason to believe that what the Court had *said* in previous cases might make a decisional difference in subsequent ones. Consequently, one traditional understanding of common law decisionmaking, in which opinions are seen as highly transient and highly defeasible, appears these days to be in substantial decline. The less that particular decisions exert force on the future, the less my argument tells against common law method. But the more that particular decisions genuinely constrain the future—and that is the whole point of precedent—the more the phenomenon I address here is genuinely problematic.

³⁷ The static model is artificial if we are considering the essentially continuous nature of the common law itself. But the static model begins to resemble reality whenever we consider the numerous contexts—rulemaking in families, private associations, and often in administrative agencies, for example—in which, realistically, a single discrete event or decision prompts the process of rule creation.

³⁸ This account of rule-based decisionmaking is developed at length in Schauer, *Playing By the Rules* at 17–37 (cited in note 32).

³⁹ I ignore the interesting phenomenon of person-specific “special” legislation. Special laws, typically granting some privilege or exemption to (or prohibition on) an identified individual or entity, and commonly prohibited by state constitutions although not by the Constitution of

deciding presumptively how not one but a *class* of future events or controversies ought to be determined or regulated.

Our question is then one of comparing the lawmaker who sets forth a rule for a multiplicity of future particulars in the context of deciding one concrete dispute right now with the lawmaker who also makes a rule for a multiplicity of future particulars, but who does so in the abstract, divorced from the obligation to resolve a dispute between real parties. Plainly the case-based rulemaker, paradigmatically the common law judge, will perceive her task in terms of determining both how this case and also other cases *of this kind* ought to be decided, while the non-case-based rulemaker will also have to decide how cases of some kind—some set of future cases—ought to be decided, but unencumbered (or unguided) by the necessity of deciding one of those cases right now. Put differently, the common law judge has before her a concrete token of the type of case for which she is making a rule, while other rulemakers make their rules without having before them in the same immediate way a particular token of the case-type that the rule will encompass. Our task, therefore, is to compare these two different approaches to and methods of lawmaking.

The contrast between the two types of lawmaking is often presented as a contrast between common law and statute law,⁴⁰ between common law and civil law,⁴¹ or between common law and codification.⁴² But however we characterize the difference, I mean to pose a

the United States, are not general and are not rules. See Norman J. Singer, *2 Statutes and Statutory Construction* § 40.01 (Clark Boardman Callaghan 5th ed 1993) (noting that the Alabama Constitution is representative in prohibiting legislation “[e]xempting any individual, private corporation, or association from the operation of any general law”).

⁴⁰ See, for example, Richard A. Posner, *The Problems of Jurisprudence* 247–61 (Harvard 1990) (devoting a chapter to contrasting common law versus statute law). But see Paul H. Rubin, *Common Law and Statute Law*, 11 *J Legal Stud* 205, 222 (1982) (arguing that the “sharp distinction[] between statute and common law . . . is often overdrawn”).

⁴¹ See, for example, Thomas Lundmark, Book Review, 46 *Am J Comp L* 211, 214–15 (1998) (“One of the classic differences between civil-law and common-law jurisdictions is that the former . . . do not recognize judicial precedent as an independent source of law.”), reviewing D. Neil MacCormick and Robert S. Summers, eds, *Interpretive Precedents: A Comparative Study* (Dartmouth 1997). But see Katharina Pistor and Chenggang Xu, *Incomplete Law*, 35 *NYU J Intl L & Polit* 931, 946–47 (2003) (noting that although many believe civil law judges interpret law and common law judges make law, “[t]he line between lawmaking and law interpretation [] is often difficult to draw”).

⁴² See, for example, Robert W. Gordon, Book Review, 36 *Vand L Rev* 431, 431 (1983) (“[M]odern historians have turned the debates over codification into a ‘movement’ . . . resisted by a countermovement to preserve the common law.”), reviewing Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Greenwood 1981); Samuel Stoljar, *Codification and the Common Law* in S.J. Stoljar, ed, *Problems of Codification* 1, 1 (Australian Natl U 1977) (describing a longstanding split between “common law traditionalists and aficionados of [codification]”). See also Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* ix–x (Greenwood 1981) (arguing that nineteenth-century

skeptical challenge to one pervasive argument for the common law and against its alternatives.⁴³ And that argument is that one reason (and not necessarily the only reason, and not necessarily the best reason) to prefer the common law is that rulemaking and lawmaking are better done when the rulemaker has before her a live controversy, a controversy that enables her to see all of the real world implications of making one rule rather than another. When there is no actual dispute, so the argument goes, everything is speculation, and speculation that is not rooted in real world events is especially likely to be misguided.⁴⁴ But when there is a real case, the rulemaker can see in a concrete context how the rule will play out in the actual controversies of real life.⁴⁵ It is precisely this perception of at least one actual controversy, the conventional common law wisdom supposes, that systematically produces better rules. That is the claim that supports the statement from Holmes with which I opened this Article,⁴⁶ and it is the claim that pervades the classic explanations and celebrations of common law method.⁴⁷

This argument for the virtues of dispute-guided rulemaking is not only part of the standard defense of the common law in general, but is

debates over common law and codification resulted in compromises that shaped a distinctive, hybridized American legal system).

⁴³ It is worth emphasizing that I am concerned here largely with the soundness (or lack thereof) of a particular argument for case-based rulemaking. There are other arguments for it, and there are arguments against it other than the one I offer here. Thus, my claim, even if sound, cannot be considered a conclusive or all-things-considered argument against case-based rulemaking. Still, if I am right, one of the most prominent arguments for the case-based approach will be significantly weakened, and the overall argument for that approach will be weakened pro tanto.

⁴⁴ “[L]itigants, after all, are the ones who actually experience the effects of legal rules.” Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J Legal Stud 379, 417 (1995) (noting that “appeals courts sometimes can learn about opportunities for lawmaking only from disappointed litigants”).

⁴⁵ The claim is frequently part of a larger appeal for context and on the importance of seeing particular litigants as a way to understand the context. See, for example, Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 Ariz L Rev 11, 107 n 577 (1994) (arguing that courts that focus on “the concrete context of the litigants” do not “launch forth on a sea of indeterminacy and lawlessness”); Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 Harv L Rev 10, 89 (1987) (arguing that courts should avoid “insulating themselves in abstractions”).

⁴⁶ See note 1 and accompanying text.

⁴⁷ See Eisenberg, *The Nature of the Common Law* at 12 (cited in note 2) (arguing that “the particular case” is one of “two basic arenas” in “which the courts are obliged to be responsive”); Guido Calabresi, *A Common Law for the Age of Statutes* 165 (Harvard 1982) (“[Courts’] main job would still be to give us continuity and change by applying the great vague principle of treating like cases alike.”); Edward H. Levi, *An Introduction to Legal Reasoning* 3 (Chicago 1948) (noting that “it cannot be said that the legal process is the application of known rules to diverse facts. . . . [R]ules are discovered in the process of determining similarity”). See also Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* ix (Harvard 1999) (advocating “[j]udicial minimalism,” in which a “court settles the case before it, but it leaves many things undecided”).

also embodied in the “case or controversy” requirement of Article III of the Constitution. By requiring that constitutional rules be made only in the context of actual cases and controversies, and not on the basis of abstract speculation, judges are presumed to be able to make better rules than they would in the absence of that case-generated context.⁴⁸ So although there might be strong arguments for the “case or controversy” requirement that emerge out of any number of other values—separation of powers, democratic theory, the role of the courts, and the presumption against judicial review, for example—those arguments are not my focus here. Rather, my concern is with lawmaking quality and not with lawmaking authority, and thus only with the argument that one virtue of the “case or controversy” requirement is that its strict observance fosters better (rather than more legitimate) rules precisely because the court as rulemaker will have the opportunity to perceive a genuine dispute before it.⁴⁹

A. (Mis-)Surveying the Field

Once we understand rulemaking as the process of setting forth a prescription couched in general terms and covering a multiplicity of future instances, we can see that rulemaking also necessarily involves assessing what those future instances are likely to be and then determining (at least presumptively, but not necessarily conclusively) how those future instances ought to be resolved. Any rulemaker, be it court or legislature or agency or parent or dean, is explicitly or implicitly engaged in a process of surveying the future and imagining the field of decisions to be governed by the putative rule. This can be done well or poorly, but a necessary component of any rulemaking is the process of

⁴⁸ See, for example, *Flast v Cohen*, 392 US 83, 100 (1968) (reviewing precedent standing for the idea that federal courts do not have to review cases that fail to present a concrete controversy). As the Supreme Court put it in *Baker v Carr*, 369 US 186 (1962), concreteness “sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Id.* at 204. And in *Valley Forge Christian Coll v Americans United for Separation of Church and State, Inc.*, 454 US 464 (1982), the Court observed that “a concrete factual context” is likely to produce “a realistic appreciation of the consequences of judicial action.” *Id.* at 472. See also William A. Fletcher, *The Structure of Standing*, 98 Yale L J 221, 222 (1988) (noting that one common rationale for standing is that it “ensur[es] that a concrete case informs the court of the consequences of its decisions”). Compare Susan Bandes, *The Idea of a Case*, 42 Stan L Rev 227, 318–19 (1990) (arguing that the Supreme Court’s standing jurisprudence “uses contorted logic and tortured language to fit a public rights problem into the private rights mold”).

⁴⁹ I want to make clear that my challenge is to the very requirement of a concrete controversy, and not to the interesting question of whether the standing requirement fosters concreteness. As to the latter, see the important argument in David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 Cornell L Rev 808, 811 (2004) (noting that courts do not have to adjudicate based on a case’s specific facts, though standing requires those facts to exist).

trying to get a sense—and it is rarely much more than this—of what the array of future acts, events, disputes, and decisionmaking occasions will look like.

The problem, however, is that in attempting to gauge the distribution of future events that will be encompassed by a rule, there is a substantial risk that the common law rulemaker will be unduly influenced by the particular case before her. More specifically, the rulemaker, seeing a concrete case before her, is likely to believe that this case is representative of the larger array. If that is so then there is no problem. But if the immediate case is not representative, it may still be mistakenly thought to be representative, a mistake generated precisely by the fact that this case is before the decisionmaker while other cases within the class are not.

Thinking rationally, we understand that the case that happens to be before a court or other case-based rulemaker is not exactly the same in all respects, and not even in all relevant respects, as others that might be members of the same larger and generally described class. And rationally we can understand as well that some of the relevant differences between this case and other members of its class are such that the right decision for this case might not be the right decision for some, many, or even almost all of the other members of the class. A judge acting rationally, therefore, would assess as systematically and as objectively as she could the extent to which the case before her was representative of the larger class of which it is a member. The rational judge creating a rule would create a rule based on an assessment of the nature and preferred resolution of the full set of actual acts and events encompassed by that rule, and would consequently create the rule producing the best aggregate outcomes for the entire class. The process would thus necessarily involve determining the extent to which the larger class did or did not resemble the particular class member whose immediate presence before the decisionmaker prompted making the rule.

Unfortunately, however, decisionmakers often act with less than perfect rationality in making just this kind of assessment. They are mesmerized by the case before them, and consequently often believe that the most proximate member of a class is representative of the class. The problem, however, is that decisionmakers make this (mis-)assessment not on the basis of a rational survey of the class, and not on the basis of systematic empirical examination, but instead largely on the basis of the usually irrelevant factors of proximity or ease of recall. This phenomenon of being overinfluenced by proximate examples is commonly called, in

the heuristics and biases literature, the “availability heuristic.”⁵⁰ Less often it goes by the names “salience heuristic” or “vividness heuristic,”⁵¹ but the basic idea is the same: when decisionmakers are in the thrall of a highly salient event, that event will so dominate their thinking that they will make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events.⁵² So if when buying insurance I am making a probabilistic decision about the likelihood of, say, a hurricane over the next ten years, I will make a different decision had there been a hurricane last week than I would otherwise have made. Although the presence of a hurricane last week ought not rationally to make a difference in predicting the probability of a hurricane over the next ten years,⁵³ in practice the

⁵⁰ The original insight is in Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 *Science* 1124, 1127 (1974) (“[P]eople assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.”), and there is now a voluminous literature, some of the key items being contained in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under Uncertainty: Heuristics and Biases* 11–14 (Cambridge 1982) (noting that “the reliance on availability leads to predictable biases,” such as those stemming from “retrievability,” “the effectiveness of a search set,” “imaginability,” and “illusory correlation”), and Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* 19–119 (Cambridge 2002) (presenting five articles discussing the representativeness and availability heuristics).

⁵¹ See Scott Plous, *The Psychology of Judgment and Decision Making* 125–26, 178–80 (McGraw-Hill 1993) (noting the similarities between availability, salience, and vividness). See also Robert M. Reyes, William C. Thompson, and Gordon H. Bower, *Judgmental Biases Resulting from Differing Availabilities of Arguments*, 39 *J Personality & Soc Psych* 2, 5–12 (1980) (finding that concrete and vivid information has greater effect on decisionmaking than abstract information).

⁵² There is a dispute in the literature between those who take availability as an often reliable indicator of class characteristics, see Gary Klein, *The Fiction of Optimization*, in Gerd Gigerenzer and Reinhard Selten, eds, *Bounded Rationality: The Adaptive Toolbox* 103, 114 (MIT 2001) (positing that instead of being seen as biases, heuristics are better viewed “as strengths that permit skillful decision making in field settings”), and those opposed to the view that availability is often a biased indicator of an actual frequency distribution, see Amos Tversky and Daniel Kahneman, *Extensional versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, in Gilovich, Griffin, and Kahneman, eds, *Heuristics and Biases* 19, 20–21 (cited in note 50) (noting extensive data that show heuristics to be “errors of judgment”). Some of the dispute can be disaggregated by understanding availability solely in terms of ease of recall, independent of the extent to which people may recall on the basis of reliability and not ease. And there is evidence that when we control for the content of the recall, ease of recall itself is often a determinant of judgment. Norbert Schwarz and Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, in Gilovich, Griffin, and Kahneman, eds, *Heuristics and Biases* 103, 118–19 (cited in note 50) (“[I]ndividuals are likely to rely on ease of recall when the judgment task is of low personal relevance.”). Understood as ease of recall itself, availability is especially likely to be biased. As shall become clear, there is reason to believe not only that the availability of the immediate case is an unreliable indicator of the array of disputes of that type, but also that, when litigation incentives are taken into account, it may be an especially unreliable indicator.

⁵³ This may or may not be true, but I assume that for certain weather events, like for many disasters, the occurrence of such an event at Time 1 is causally unrelated to the probability of a similar event at Time 2.

very “availability” of the hurricane by virtue of its occurrence last week will lead people to overestimate the probability of a hurricane in the future. For the same reason, people overestimate the probability of their contracting illnesses that their friends happen to have, and overestimate the unreliability of automobiles whose failings have been personally described to them.⁵⁴ In these and countless other examples, we repeatedly observe “the human tendency to make judgments based on attention to only a subset of available information, to overweigh that information, and to underweigh unattended information.”⁵⁵

Further examples of the availability phenomenon are legion, all involving decisionmakers required to make decisions that require either a probabilistic assessment or an assessment that encompasses a multiplicity of future instances.⁵⁶ And in all of the examples the decisionmakers turn out to be highly prone to exaggerate the representativeness of a particular instance that happens to be easily recallable because of its temporal, physical, or mental proximity⁵⁷—the word “vividness” captures the idea. And because judges (and other rule-makers) in their lawmaking and rulemaking capacity are necessarily engaged in a process of mapping a large array of future events that will be governed by the rules they make, the risk is that judges who have a particular case before them to decide will systematically overestimate the extent to which those future events will resemble the one they are now most immediately confronting.

This misunderstanding of the nature of the field can be exacerbated by “anchoring,” in which the properties of the first event considered (or even an irrelevant event) influence the estimation of the

⁵⁴ See Richard E. Nisbett, et al, *Popular Induction: Information Is Not Necessarily Informative*, in John S. Carroll and John W. Payne, eds, *Cognition and Social Behavior* 113, 128–29 (Lawrence Erlbaum 1976) (noting that “subjects seized on particular concrete details of the experimental situation and related them to similar situations in their own histories”).

⁵⁵ Dolly Chugh and Max H. Bazerman, *Bounded Awareness: What You Fail to See Can Hurt You* 9 (Harvard Business School Working Paper No 05-037, 2005), online at <http://www.people.hbs.edu/mbazerman/Papers/Bounded%20Awareness.pdf> (visited June 11, 2006) (classifying this “common tendency to focus too much on a particular event” as “[f]ocalism”). See also Max H. Bazerman and Dolly Chugh, *Bounded Awareness: Focusing Failures in Negotiation*, in Leigh L. Thompson, ed, *Negotiation Theory and Research* 7, 9–10 (Psychology 2006). The phenomenon is referred to as “focalism” or the “focusing illusion” in David A. Schkade and Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 *Psych Sci* 340, 345 (1998).

⁵⁶ See John S. Carroll, *The Effect of Imagining an Event on Expectations for the Event: An Interpretation in Terms of the Availability Heuristic*, 14 *J Exp Soc Psych* 88, 90–91, 92, 94 (1978).

⁵⁷ See Abigail J. Chiodo, et al, *Subjective Probabilities: Psychological Theories and Economic Applications*, 86 *Fed Res Bk of St Louis Rev* 33, 35 (2004) (“[P]eople often give too much weight to memorable evidence, even when better sources of information are available.”).

properties of subsequent events.⁵⁸ This phenomenon is well known to sellers of carpets and automobiles, all of whom (or at least the successful ones) understand the anchoring importance of setting the initial price. And the phenomenon of anchoring suggests that even the judge who is aware of the pitfalls of availability may be hindered in her ability to overcome them,⁵⁹ especially because there is evidence that anchoring is particularly resistant to a range of awareness-based debiasing techniques.⁶⁰ So even if the lawmaking common law judge or some other case-based rulemaker recognizes that future events may differ from this case, the instant case may still anchor and thus influence the way in which the future field of disputes is assessed. Even if the instant case is unrepresentative, therefore, its anchoring effect can cause judges and other rulemakers, including careful ones who are cognizant of the possibility of bias by availability and even cognizant of the nature of anchoring effects, to imagine a field that is more similar to the anchor case than the underlying reality would justify.

Related to the availability and anchoring effects produced by the case looming in front of the judge is the phenomenon of “issue framing.” Unlike “equivalency framing,” in which alternative characterizations of identical acts or events influence how those acts or events are assessed,⁶¹ “[i]ssue framing effects refer to situations where, by empha-

⁵⁸ See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L Rev 777, 787–94 (2001) (describing how the damage determinations of parties, jurors, and judges are anchored by initial information); Fritz Strack and Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J Personality & Soc Psych 437, 438 (1997) (noting that anchoring occurs regardless of whether the given anchor falls inside or outside a range of neutrally acceptable values); Plous, *The Psychology of Judgment and Decision Making* at 144–52 (cited in note 51) (noting that “unusually high or low” values are “most likely to produce biases in judgment”); Tversky and Kahneman, 185 Science at 1128–30 (cited in note 50) (finding that cognitive “adjustments” from the anchor value “are typically insufficient”).

⁵⁹ See Francisca Fariña, Ramón Arce, and Mercedes Novo, *Anchoring in Judicial Decision-Making*, 7 Psych in Spain 56, 61–62 (2003) (finding anchoring effects in judicial determinations of guilt and judicial imposition of sentences in criminal cases).

⁶⁰ See Gretchen B. Chapman and Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in Gilovich, Griffin, and Kahneman, eds, *Heuristics and Biases* 120, 138 (cited in note 50) (describing anchoring as “both prevalent and robust” and observable “in numerous real-world contexts”); Timothy D. Wilson, et al, *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J Exp Psych: Gen 387, 400 (1996) (finding “anchoring effects even when people were blatantly provided with anchor values and explicitly told not to use these values when answering subsequent questions”).

⁶¹ See Plous, *The Psychology of Judgment* at 97–98 (cited in note 51) (describing how framing an outcome as a “gain” rather than a “loss” shapes decisionmakers’ risk-aversion); Amos Tversky and Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J Bus S251, S260–61 (1986) (giving the example of how framing the difference between two prices as either a surcharge or a discount impacts preferences); Daniel Kahneman and Amos Tversky, *Choice, Values, and Frames*, 39 Am Psych 341, 343 (1984) (noting that “two versions of a choice problem that are recognized to be equivalent when shown together should elicit the same preference even when

sizing a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions.”⁶² If in the previous quotation we substitute “case” for “speaker” and “judges” for “individuals,” we can understand the relevance of the large literature⁶³ suggesting that, as with anchoring, the case awaiting decision will provide the frame by which the features of subsequent disputes or events will be imagined, potentially in a highly misleading way. If the case that has prompted the rulemaking exercise has some number of particularly salient features, even the judge consciously surveying a larger field of real and predicted cases in order to make a rule will likely focus disproportionately on those cases containing the salient features of the first case, even when those salient features are present to a lesser extent in the larger field.

Availability, anchoring, and issue framing are characteristics of actual and not ideally rational human decisionmaking, and all reinforce each other to produce the same problem—the capacity of vivid and nearby events to distort rather than to enrich decisions that have the same “multiplicity of instances” character. We take that which is first or looms largest as being representative of some greater class of which it might be a member, and we tend to do so even when the looming event is highly unrepresentative. In the context of common law decisionmaking, it is the case at hand that is the looming event, and much that we might learn from the modern social science literature suggests that the presence of a concrete dispute before the judge is likely to distort any lawmaking that occurs in that case. That this distortion occurs, of course, is not inconsistent with the concrete dispute also providing genuine information and thus also enriching the ability to assess the larger field of future cases and events. But such potentially informationally advantageous features of the particular case also exist in the numerous experiments that have produced what we now know about availability, anchoring, and issue framing. Last week’s hurricane does provide some information about hurricanes and the possibility of their existence. That my neighbor has had problems with her particular Volvo does provide some information about the reliability of Volvos. Nevertheless, the possibly countervailing informational advantages of specific cases and events are already incorporated in the existing research, and so, if that research is to be be-

shown separately” but that “the requirement of invariance . . . cannot generally be satisfied”); Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *Science* 453, 457 (1981) (noting that “seemingly inconsequential changes in the formulation of choice problems caused significant shifts of preference”).

⁶² James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 *Am Pol Sci Rev* 671, 672 (2004).

⁶³ Much of this literature is cited in Druckman, 98 *Am Pol Sci Rev* at 685–86 (cited in note 62).

lieved, the effects under consideration are properly understood as net effects. It is therefore fair to conclude that the effects of a particular case are likely, on balance and not just as one potentially outweighed flaw, to distort the case-based rulemaker's ability accurately to assess the field of future events that any prospective rule would encompass.

B. The Burdens of Decision

The foregoing is simply about the salience of a proximate event, and the effect of that salience on the capacity of decisionmakers to perceive the properties of a larger class of which that proximate event is but one member. Thus, the biases of availability, anchoring, and issue framing suggest that a rulemaker making rules in the context of a particular dispute may take that dispute as more representative of the array of future events than is actually the case. But there is more to the matter, for there is also reason to suspect that the risk of taking the unrepresentative as representative is increased to the extent that a decisionmaker is compelled not just to observe but to resolve the proximate event. An additional source of concern, therefore, is one inspired less by Kahneman and Tversky than by Frank and Llewellyn. As is well known, Jerome Frank, especially in *Law and the Modern Mind*,⁶⁴ maintained that judges were incapable of ignoring the immediate equities of the case before them,⁶⁵ and insisted further that it was perfectly acceptable, precisely because of its inevitability, for them to behave in this way.⁶⁶ For present purposes I am less concerned with the latter than the former—the possibility that it is extremely difficult (but more plausible than a claim of impossibility) for judges to avoid making what to them appears to be the correct decision with respect to the particular facts at issue and the particular parties before them. Karl Llewellyn, in talking about the “fireside equities” or the power of the “particular,” echoed a similar theme, believing that the psychological force of a particular series of events had a strong hold on the judicial mind.⁶⁷ What Frank and Lle-

⁶⁴ Jerome Frank, *Law and the Modern Mind* 102–04 (Brentano's 1930).

⁶⁵ To the same effect, see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L Q 274, 278 (1929) (“[T]he judge, being merely on his way with a roving commission to find the just solution, will follow his hunch wherever it leads him.”); Herman Oliphant, *A Return to Stare Decisis*, 14 ABA J 71, 75 (1928).

⁶⁶ See Brian Leiter, *American Legal Realism*, in Martin P. Golding and William A. Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* 50, 58–59 (Blackwell 2005).

⁶⁷ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 121 (Little, Brown 1960) (arguing that judges draw “on more than ‘common knowledge’” to decide cases; they draw on “‘horse sense,’ the balanced shrewdness of the expert in the art”). See also William Twining, *Karl Llewellyn and the Realist Movement* at 209 (cited in note 11).

wellyn celebrated,⁶⁸ however, is from a lawmaking perspective more problematic. If judges have a hard time avoiding what they see as the right result for the particular case in all of its contextual richness, and if they are at the same time making law for future cases, then the combination of the salience of the particular case and the pull to decide it correctly may produce a rule that is unrepresentative of the full range of future cases that can be expected to be decided under it. Obviously under a strong Realist view this is not a problem, for subsequent judges will simply disregard the rule. But more plausible views will recognize the constraints of judge-made rules while still being concerned that *that* rule will be distorted by the case-specific circumstances under which it is made. In theory this need not be so. A court could, after all, reach the wrong result in the case before it in order to announce the right rule for future controversies.⁶⁹ Or courts could recognize the nonrepresentativeness of the case before them and then either make less law than they would otherwise be inclined to do,⁷⁰ or announce a rule narrower than or different from what would appear to flow out of the outcome in the particular case.⁷¹ More commonly, however, the power of the particular is a power with distorting emanations, with courts often announcing the decision rule that will most directly produce the correct result in the

⁶⁸ Llewellyn's celebration was far less frequent and far more qualified than Frank's, for Llewellyn was most concerned with urging judges to base their decisions on situation *types* rather than case-specific litigant characteristics. See Leiter, *American Legal Realism* at 55 (cited in note 66) ("[W]hat more typically determines the course of the decision is the 'situation-type,' that is, the general pattern of behavior."). In this context, it is important to note that the thorough-going particularist—Jerome Frank, perhaps—would not be troubled by the issue I raise here, for the particularist would not suppose that the "law" that is made in one case would have much, if any, effect on the decision of subsequent cases. I use the Realist observations about particularism, therefore, not totally to enlist the Realists in my case, but simply to draw on their highly plausible observations about the way in which the necessity of decision might focus judicial attention more on a particular case than would occur in a less distorted lawmaking process.

⁶⁹ Reaching the wrong result in order to announce the right rule is the best understanding of Herbert Wechsler's call for decision according to "neutral principles." Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 Harv L Rev 1, 34–35 (1959). The word "neutral" is unnecessary and distracting, see Frederick Schauer, *Neutrality and Judicial Review*, 22 L & Phil 217, 217 (2003), but the basic idea is that a rule announced in the first case should be one a court is willing to follow in subsequent ones. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 Colum L Rev 982, 983 (1978); M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 Colum L Rev 35, 35 (1963). The implication is that if a court is not willing to follow in future cases the rule necessary to decide the first case properly, then deciding the first case improperly would be preferable to having a bad rule, a rule that precisely because it is a bad rule will decide some number of subsequent cases improperly.

⁷⁰ As with a court that goes out of its way to emphasize the uniqueness of a unique case, as in *Bush v Gore*, 531 US 98, 109 (2000) ("Our consideration is limited to the present circumstances.").

⁷¹ See Sunstein, *One Case at a Time* at 5 (cited in note 47) ("[A] minimalist path usually . . . makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided.").

particular case even though that rule will produce erroneous outcomes in future cases.

The way in which the obligation to decide the immediate case can distort a rulemaker's perception of the class of cases to be covered by a putative rule is again compatible with recent work in the social sciences. As with airline pilots who fail to see other airplanes because they are focusing on operating the controls,⁷² people often ignore that which is plainly "visible and available" to them because their ability to perceive the readily available is "competing with a task requiring other attentional resources."⁷³ So when people have a particular task that requires doing, the focus on the task may increase even further any tendency to fail to perceive or to misperceive even that which is in theory available.⁷⁴ For the typical judge, deciding *this* case may be just that kind of task, and thus the obligation to decide may well increase even further the proclivity to be unduly influenced by the facts of the immediate case.

C. Some Examples

Consider, for example, *New York Times Co v Sullivan*.⁷⁵ Other than to say that libel was not covered by the First Amendment,⁷⁶ the Supreme Court had never before even considered a defamation case. Yet despite the Court's lack of experience with the topic, in *Sullivan* it was compelled to make a decision in the context of a case in which protection of the civil rights movement against crippling civil judgments was seen to be important, in which the plaintiff was a powerful public official using civil litigation as a way of wielding official power, and in which the verdicts embodied little other than the jury's (and Alabama's) desire to punish what were perceived to be so-called Northern Agitators. These dimensions of the actual litigation were at the forefront of the Court's thinking,⁷⁷ and thus it is useful to ask whether, if

⁷² Ariën Mack, *Inattentional Blindness: Looking without Seeing*, 12 *Curr Dir in Psych Sci* 180, 180 (2003) (noting the same phenomenon "even may account for many car accidents"). See also Ariën Mack and Irvin Rock, *Inattentional Blindness* 250 (MIT 1998) ("[T]hat the absence of attention causes apparent blindness, deafness, and numbness and perhaps even insensitivity to extreme pain [indicates] that attention is necessary for conscious perception.").

⁷³ Chugh and Bazerman, *Bounded Awareness* at 5 (cited in note 55) (noting that "significant laughter and disbelief" result when inattentive subjects are alerted to a novel stimulus that passed through their visual fields).

⁷⁴ See Daniel J. Simons and Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 *Perception* 1059, 1072 (1999) (finding that "'directed ignoring' could inhibit perception of not just the ignored event but of *all* unattended events").

⁷⁵ 376 US 254 (1964).

⁷⁶ See *Beauharnais v Illinois*, 343 US 250, 266 (1952).

⁷⁷ See Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 147 (Random House 1991) (noting that the Court applied its new test to the instant facts, a rare event, in order to prevent the same outcome on remand); Harry Kalven, Jr., *The Negro and the*

none of these idiosyncratic features had existed, the extraordinarily press-protective and plaintiff-restrictive “actual malice” rule, a rule endorsed by no country in the world in the ensuing forty years,⁷⁸ would have been adopted.⁷⁹

This characterization of *Sullivan* bears a close affinity with the concern expressed by Justice White in his dissenting opinion in *INS v Chadha*.⁸⁰ In chastising the Court for invalidating “an entire class of statutes based on . . . a somewhat atypical and more readily indictable exemplar of the class,”⁸¹ Justice White made clear that he thought that the unrepresentative nature of the particular facts before the Court had produced the wrong result for the larger class almost accidentally encompassing these facts. So too, perhaps, with *Katzenbach v McClung*⁸² and *Brown v Louisiana*,⁸³ both cases in which, like in *Sullivan*, the pressing nature of the desegregation concerns presented in the particular case may well have helped produce doctrinal extensions with respect to the reach of the Commerce Clause and free speech rights in government buildings, respectively, that very likely would not otherwise have come to pass.

First Amendment 53 (Ohio State 1965) (“On its facts, the *Times* case seems to have been put together by the Devil himself in order to embarrass the legal system.”).

⁷⁸ See Frederick Schauer, *The Exceptional First Amendment*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 29, 30 (Princeton 2005) (“[T]he American First Amendment . . . remains a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.”); Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* 101 (Ashgate 2000) (“[In Australia,] the defendant [in an action for libel] must normally prove that . . . reasonable grounds warranting belief in the truth of the defamatory imputation existed at the time of publication.”); Ian Loveland, *Political Libels: A Comparative Study* 4 (Hart 2000) (noting that in England, the plaintiff in a libel case must only “prove that the publication complained of was libellous”); Leonard Leigh, *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia*, in Ian Loveland, ed., *Importing the First Amendment: Freedom of Expression in American, English, and European Law* 51, 66 (Hart 1998) (“In neither [Australia nor Canada] do courts welcome the American extension [of libel] from matters of a political nature . . . to matters of public interest.”).

⁷⁹ I do not claim that *Sullivan* was wrongly decided, nor that the *Sullivan* actual malice rule was the wrong rule. Both of those might be true, see Richard Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U Chi L Rev 782, 784–85 (1986) (noting that the post-*Sullivan* period has brought increased numbers of libel suits and increasing unease about libel law), but my point is only that the particular facts of the case produced a rule almost certainly different from what the same justices of the same Court would otherwise have done were they asked simply to make a public figure libel rule, and different from what every other open liberal democracy in the world has subsequently decided to do. *Sullivan* may be a fortuitously distorted decision, but the distortion seems nevertheless plain.

⁸⁰ 462 US 919, 967 (1983) (White dissenting).

⁸¹ *Id.* at 974.

⁸² 379 US 294 (1964) (upholding the Civil Rights Act of 1964 as a valid congressional exercise of the Commerce Power even as applied to primarily local entities).

⁸³ 383 US 131 (1966) (upholding the First Amendment right to protest, even in a public library).

Similarly, and outside of the constitutional context, consider the Supreme Court's 1999 decision in *Kumho Tire Co v Carmichael*.⁸⁴ The Court in *Kumho Tire* was faced with the task of elaborating what kind of scientific and other expert testimony should be allowed into evidence under Rule 703 of the Federal Rules of Evidence, a line of inquiry that had commenced six years earlier in *Daubert v Merrill Dow Pharmaceuticals, Inc.*⁸⁵ Yet although the question of what counts as expertise is a broad and important one, the Court in *Kumho Tire* faced it in the context of an expert who, testifying in a products liability case against the manufacturer of a tire that had been driven until bald and poorly repaired on multiple occasions, offered as his expert opinion that it was neither the tire's baldness nor its serial poor repair that had caused the tire failure, but rather a defect in the tire's design and manufacture. And it is not surprising that in announcing a rule in the context of a case involving such a flimsy case of expertise, the Supreme Court fashioned a rule plainly tailored to the case of the bogus expert, without having any serious data on the extent to which bogus experts dominated the array of future cases that would be governed by the new rule.

The foregoing cases all come from the Supreme Court of the United States, and that is partly because one might expect Supreme Court cases to be the ones in which the distortion of the immediate case would be *least* present. The Court decides by full opinion after oral argument slightly over 1 percent of the cases presented to it,⁸⁶ and the process by which it screens⁸⁷ and selects the cases it wishes to hear may generate special resistance to the distorting tendencies of particular parties and particular issues in the particular case. So if the problem exists even in the Supreme Court, it is reasonable to suppose that it exists, a fortiori, to an even greater extent when the special dynamics of Supreme Court case selection are not present.

Thus there are, as would be expected, numerous examples of the case-driven distortion in judicial rulemaking outside of the Supreme Court. The particularly botched use of statistical evidence in *People v*

⁸⁴ 526 US 137 (1999) (increasing the degree of judicial scrutiny over the qualifications of expert witnesses).

⁸⁵ 509 US 579, 597 (1993) (holding that "the Rules of Evidence . . . assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant").

⁸⁶ To be exact, 83 out of 7781 in the Supreme Court's October 2003 Term. *The Supreme Court 2003 Term: The Statistics*, 118 Harv L Rev 497, 504-05 (2004) (excluding fifty cases summarily decided from the eighty-three decided by full opinion).

⁸⁷ See Shavell, 24 J Legal Stud at 416-17 (cited in note 44) (noting that appellate courts that screen their own caseload may be able to engage in lawmaking with less attention to the error correction process).

*Collins*⁸⁸ may have led the California Supreme Court, and other courts dealing with the issue after *Collins*,⁸⁹ to express a principle of skepticism about statistical evidence that would be justified were *Collins* representative of all statistical evidence cases, but much less so if the case were an aberration. Similarly, the purest and ultimately diluted⁹⁰ versions of so-called interest analysis in conflicts of law⁹¹ may have been based on the belief that the seeming irrationality of the traditional rules when applied to a small number of unusual guest statute scenarios was typical of choice of law issues.⁹² And to the same effect is the indication that larger principles of criminal intent were distorted by a series of nineteenth century decisions in which the judges' views about the issues of sexual morality involved in statutory rape cases led them to say things about mens rea that they would not have said in other types of cases.⁹³

I emphasize again that all of these cases may be unrepresentative of the full array of case-based rulemaking decisions, and thus provide

⁸⁸ 68 Cal 2d 319, 438 P2d 33 (1968) (disallowing the testimony of a statistician in a criminal case where there had been no foundational evidence of the probabilities and no evidence that the several probabilities were statistically independent). That the use of statistics in *Collins* was particularly inept is accepted both by those sympathetic and hostile to the use of statistical evidence generally. Compare Michael O. Finkelstein and William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 Harv L Rev 489, 489–90 (1970) (criticizing *Collins* but expressing sympathy to statistical evidence), with Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329, 1393 (1971) (criticizing use of statistical evidence as evidence at civil or criminal trials).

⁸⁹ See Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence* § 7.18 at 667 (Aspen 3d ed 2003) (noting that, in both criminal and civil cases, “the objections to statistical inference have prevailed”); Neil B. Cohen, Comment, *The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion to Statistical Evidence*, 66 BU L Rev 563, 569–70 (1986) (contending that the use of statistical evidence, although rarely accepted by courts, enhances the distributive aspects of tort law).

⁹⁰ See *Cooney v Osgood Machinery, Inc.*, 595 NYS2d 919, 612 NE2d 277, 280, 282 (1993) (noting that of “the schools of thought on choice of law, the one that emerged as most satisfactory was ‘interest analysis’” and applying it to the case at hand).

⁹¹ See *Babcock v Jackson*, 240 NYS2d 743, 191 NE2d 279, 285 (1963) (applying the law based on which jurisdiction “has the strongest interest in the resolution of [each] particular issue presented”), which applies an approach largely attributable to Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U Chi L Rev 227, 249 (1958).

⁹² See *Tooker v Lopez*, 301 NYS2d 519, 249 NE2d 394, 409 (1969) (Breitel dissenting) (criticizing the New York Court of Appeals for adopting an unworkable rule because of the influence of a “wholly adventitious” set of facts in the case in which the rule was created). See also David P. Currie, Herma Hill Kay, and Larry Kramer, *Conflict of Laws* 155–62 (West 6th ed 2001) (commenting on the “New York Mess” spawned by *Babcock v Jackson*); Joseph William Singer, *Facing Real Conflicts*, 24 Cornell Intl L J 197, 198 (1991) (arguing that interest analysis does not describe courts' actual practice, which is closer to “a rebuttable presumption that forum law applies”); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich L Rev 392, 393 (1980) (arguing that “[i]nterest analysis is simply too unpredictable and parochial to be a plausible theory of constructive intent”).

⁹³ See Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* 58–62 (Princeton 2002).

only skewed support for what I suspect is a pervasive pathology. I cannot of course deny that the very same biases I argue may exist for judges and other case-based rulemakers exist for me as I attempt to identify the very phenomenon I am discussing. Thus, these cases are presented as an existence theorem and not with any claim that they are necessarily representative.⁹⁴ Still, this collection of cases supports the proposition that the phenomenon of rulemaking distortion caused by the salience and decisional pressures of the immediate case is both possible and frequent. Thus these cases serve to illustrate the nature and possibility of the claim—that making law in the context of a particular concrete controversy may well produce law that, although aimed at resolving a range of future controversies, does so with a distorted view of the nature of those controversies and the proper resolution of them.⁹⁵

Now of course a legislature or agency might at times be subject to the same phenomenon,⁹⁶ and there can be little doubt that legislation made in the wake of a highly salient disaster, or made in the wake of legislative hearings featuring sympathetic victims, is subject to the same distortion. Megan's Law,⁹⁷ after all, was largely the consequence of Megan.⁹⁸ But even if we concede this possibility of parallel legislative distortion, we can still ask the question whether, without the impetus to distortion that is common but not necessary in legislative action or administrative rulemaking but which is a virtually necessary component of common law rulemaking, law that is made with the goal of imagining an array of future cases without a particular case in the foreground is systematically likely to be less distorted than law that is made with a focus on one particular situation under circumstances in which that situation needs to be successfully resolved. And at least in the static model, there seems to be some reason to believe that this is exactly what is often likely to transpire.

⁹⁴ Insofar as the cases arriving in an appellate court are systematically heterogeneous with respect to the classes of which they are members, see Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 *Georgetown L J* 583, 592 (1992), the phenomenon identified here would be amplified. But even if outliers arrive in appellate courts in their proper proportion, the tendency of decisionmakers to see the outliers as nonoutlying exemplars would itself create a substantial problem.

⁹⁵ As should be apparent, all of this also applies to the original perception of a court that an existing rule needs to be changed. A rule that gets it right 99 percent of the time is, usually, a pretty good rule, but if only the 1 percent gets litigated then courts are likely to believe that the existing rule is far worse than it in fact is. I discuss this issue at greater length in Part IV.A.

⁹⁶ I return to these comparative issues in Part V.

⁹⁷ Pub L No 104-145, 110 Stat 1345 (1996).

⁹⁸ See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 *Ind L J* 315, 315 (2001) (explaining how seven-year-old Megan's rape and murder spurred New Jersey "to adopt a sex-offender community-notification law in her memory"). See generally *Symposium on Megan's Law*, 6 *BU Pub Int L J* 29, 29-73 (1996).

IV. FROM A STATIC TO A DYNAMIC CONCEPTION OF THE COMMON LAW

A. Changing the Rules at All the Wrong Times

The common law is of course not the static model embodied in the previous discussion, but is rather a much more dynamic process. More concretely, one of the arguments for case-based lawmaking has always been the allegedly self-correcting character of the common law, a phenomenon that often rides under the banner, in the words of Lord Mansfield made famous by Lon Fuller, of the common law “work[ing] itself pure.”⁹⁹ In more modern times, many of those who have most strongly touted evolutionary models of common law change¹⁰⁰ have also relied heavily on the way in which common law changes are systematically even if not universally for the better. The question then is whether, when we move from an unrealistic static model of case-based decisionmaking to a more realistic dynamic model, the flaws that were featured in the previous section can systematically be expected to evaporate.

Although a dynamic case-based rulemaking system possesses the capacity for change, it is not clear that those changes take place at the right time or that those changes are necessarily or even systematically for the better. Initially, a significant issue is the extent to which rules may be changed with excess frequency just because the cases that

⁹⁹ *Omychund v Barker*, 26 Eng Rep 15, 23 (Ch 1744) (Mansfield) (“[T]he common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.”). See Lon L. Fuller, *The Law in Quest of Itself* 140 (Foundation 1940) (adopting Mansfield’s phrase in saying that “[t]he common law works itself pure and adapts itself to the needs of a new day”).

¹⁰⁰ The literature, sometimes more or sometimes less supportive of evolutionary explanations, includes Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 Nw U L Rev 1551, 1553 (2003) (proposing that changes in the institutional legal framework “have made the common law more susceptible to rent-seeking pressures, which have undermined the common law’s pro-efficiency orientation”); Douglas Glen Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J Legal Stud 753, 755 (2000) (using a model of legal process to derive conditions under which the common law will produce convergence on a single rule rather than oscillation between rules); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 Texas L Rev 645, 646 (1985) (“Today every theory of jurisprudence worth contemplating incorporates a theory of change.”); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J Legal Stud 397, 398 (1981) (importing “tools of evolutionary analysis from biology” to test the efficiency of law); William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J Legal Stud 235, 284 (1979) (arguing that the common law trends towards economic efficiency in some areas but that its overall efficiency is generally “overstated”); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J Legal Stud 393, 394 (1978) (proposing that the litigants drive the evolution of the common law towards economic efficiency); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J Legal Stud 51, 51 (1977) (arguing that inefficient legal rules will lead to more litigation, and thus greater potential change, than efficient legal rules).

prompt change are thought, for the very reasons we are considering here, to be more representative than they in fact are. Because rules are necessarily actually or potentially both under- and overinclusive,¹⁰¹ even the best rules will in their normal operation on occasion produce the wrong results. Precise speed limits will sometimes overconstrain good drivers under perfect conditions, just as they may unduly empower poor drivers in bad conditions. The rule prohibiting vehicles in the park may keep out benign ceremonial vehicles and also fail to exclude noisy or dangerous instrumentalities that are not vehicles.¹⁰² And precise rules such as § 16(b) of the Securities Exchange Act of 1934¹⁰³ may fail to reach inside-trading owners of 9.99 percent of the stock of a registered company while at the same time the rule constrains the owner of 10.01 percent of the stock who seeks to sell within six months of buying even though she possesses no inside information whatsoever.

Yet although this under- and overinclusion is a necessary feature of rules, a process that focuses disproportionately on the instances of under- or (especially) overinclusion may be inclined to take every such instance as an occasion for changing a rule. A rule that gets it right 99 percent of the time may well be a very good rule, but a process that focuses only on the remaining 1 percent may be a process influenced to believe that some of these very good rules are in need of modification. In a variation on the common phenomenon of hindsight bias,¹⁰⁴ and also as a manifestation of the common tendency to overes-

¹⁰¹ See Schauer, *Playing by the Rules* at 34–35 (cited in note 32).

¹⁰² This well-known example comes from H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv L Rev 593, 607 (1958) (positing that rules create “a penumbra of debatable cases” surrounding “a core of settled meaning”), and H.L.A. Hart, *The Concept of Law* 123 (Clarendon 2d ed 1994) (arguing that “[a]ll rules involve recognizing or classifying particular cases,” some of which are easily classified and some of which are ambiguous). The supposed counterexample comes from Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv L Rev 630, 663 (1958) (arguing that the distinction between the core and the penumbra cannot be determined without reference to purpose).

¹⁰³ 15 USC § 78p(a) (2000) (establishing that “[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security” is required to file statements in accordance with the statute).

¹⁰⁴ See Baruch Fischhoff, *Learning from Experience: Coping with Hindsight Bias and Ambiguity*, in J. Scott Armstrong, ed, *Principles of Forecasting: A Handbook for Researchers and Practitioners* 543, 544 (Kluwer 2001) (defining hindsight bias as “the tendency to exaggerate in hindsight what one [would have been] able to predict in foresight”); Paul Slovic and Baruch Fischhoff, *On the Psychology of Experimental Surprises*, 3 J Exp Psych: Hum Perception & Performance 544, 561 (1977) (finding “people to be wrong too often when they are certain that they are right”); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty*, 1 J Exp Psych: Hum Perception & Performance 288, 298 (1975) (finding that subjects with outcome knowledge believed the probability of the known occurrence was higher than subjects without outcome knowledge). For the view that hindsight bias is adaptive and not irrational, see Ulrich Hoffrage, Ralph Hertwig, and Gerd Gigerenzer, *Hindsight Bias: A*

estimate the frequency of low-probability events,¹⁰⁵ an ex post examination of a rule may lead decisionmakers to believe, erroneously, that the instances in which the rule produced the wrong result are more frequent than they are. And rulemakers who thus exaggerate the phenomenon of the rule-generated wrong result—who mistake the edges of a rule for its center—will have cause to believe, erroneously, that a better rule would, ex ante, have taken account of such instances. By focusing on the imperfect applications of even the best rules, therefore, a common law process, rather than being designed to make rules better, is in fact inadvertently designed to encourage continuous tinkering with rules, even under circumstances in which the tinkering, from the perspective of just why we have rules in the first place, is likely to make things worse.

B. The Entrenchment of Mistakes

Although a dynamic understanding of case-based lawmaking processes recognizes the theoretical capacity of the common law for self-correction, the question still needs to be framed in comparative terms. Case-based lawmakers can and do counteract mistakes, but the issue is determining whether the common law process is more inclined towards improvement—the common law “work[ing] itself pure”—than the alternative. So the question is again a process one, and can be framed in terms of whether a method systematically making its decisions in the context of live disputes has a greater capacity for self-correction than its more abstract alternatives. And once we frame the question in this way the answer is not quite so clear. Indeed, the literature even includes those who have argued that the alleged efficiency of the common law, assuming that it in fact exists, is a function of historical coincidence and various other method-independent factors more than anything intrinsic to the common law method of making decisions.¹⁰⁶

In addition to the problem of being systematically unwilling to leave well enough alone—an alternative way of characterizing the

By-Product of Knowledge Updating?, 26 J Exp Psych: Learning, Memory & Cognition 566, 579 (2000) (“[W]e do not view hindsight bias as a bias in the first place but as a consequence of learning by feedback.”).

¹⁰⁵ See Bernt P. Stigum, *Econometrics and the Philosophy of Economics: Theory-Data Confrontations in Economics* 431–33 (Princeton 2003) (noting, however, that “[b]y how much perceived and objective probabilities differ and how this difference varies with . . . individuals are less well documented”).

¹⁰⁶ See, for example, Paul H. Rubin, *Common Law and Statute Law*, 11 J Legal Stud 205, 207 (1982) (arguing that the increased efficiency of the common law may be more historical correlation than methodological causation); Richard A. Epstein, *The Static Conception of the Common Law*, 9 J Legal Stud 253, 275 (1980) (“The simple dichotomy between statutory and common law rules explains nothing.”).

common law's tendency to fix rules that are in no need of repair—another reason for supposing that shifting from a static to a dynamic model of the common law will not cure the availability, anchoring, and issue framing problems discussed above is that precedential constraint is as much a part of the common law as is the capacity for change.¹⁰⁷ As long as precedent matters—as long as the rule made in the previous case actually has an influence on the resolution of a subsequent case independent of the wisdom of the rule made in the previous case¹⁰⁸—there is the omnipresent possibility that any mistake will be systematically more powerful than any later attempts to correct it. Part of this power derives from the basic idea of precedent itself. And part of the power of a precedent is the related but quite different phenomenon of path dependence, such that cases are likely to have doctrinal emanations independent of their precedential effect in the strict sense.¹⁰⁹ So even if there were no barrier of precedent to the correction of previous mistakes, earlier mistakes might still not be fully correctable precisely because some of their harm may already have leaked beyond the power of correction.

C. The (Wrong) Occasions for Correction

Even apart from questions of precedent and path dependence, however, some of the inability of the common law to correct itself is a function of the operation of the selection effect.¹¹⁰ As a result of the

¹⁰⁷ See generally Larry Alexander, *Constrained by Precedent*, 63 S Cal L Rev 1, 3 (1989) (naming precedent “one of the core structural features of adjudication in common-law legal systems”); Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 572 (1987) (“Reliance on precedent is part of life in general.”). For an economic analysis of why the common law might have incorporated a strong system of precedent, see Ronald A. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J Legal Stud 227, 227 (1986) (arguing that “uncertainty due to imperfectly using information” drove “certain major procedures that have evolved in the law”).

¹⁰⁸ The requirement that the constraint be independent of the wisdom of the constraining case is a necessary feature of any nontrivial account of precedent. See Alexander, 63 S Cal L Rev at 4 (cited in note 107) (examining “constraint by incorrectly decided precedents”); Schauer, 39 Stan L Rev at 571 (cited in note 107) (“The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs.”). Precedents that exert decisional force only when they are perceived to be correct have no weight *qua* precedents. Only if the essence of precedential constraint is understood to be content independent, and thus only if precedents constrain (even if only presumptively) even when they are perceived as mistaken by the subsequently deciding court, does the force of precedent have genuine bite.

¹⁰⁹ See Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv L Rev 641, 643–44 (1996) (noting that cultural practices may remain static even after the historical forces that provoked those practices have changed).

¹¹⁰ The literature is vast and growing. Seminal work on the basic phenomenon includes Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Georgetown L J 1567, 1569 (1989) (noting a selection effect when “cases tried are [] a skewed

selection effect, the likelihood that any dispute will wind up in an appellate court is significantly a function of the existence of two parties holding mutually exclusive positions each believing that they have a realistic possibility of prevailing. In such cases—we call them *hard*, or indeterminate—the likelihood of litigation and appeal is higher than the likelihood of litigation and appeal when only one side has a plausible possibility of prevailing. On the strong view of the selection effect it is only the cases balanced on the knife edge of existing doctrine—the fifty-fifty cases, if you will—that go to trial and appeal, but, even on a weaker view, the cases that a previous decision renders moderately clear, even if wrongly clear, are systematically less likely to go to trial and appeal. And as long as this is so, then most cases presenting an opportunity to modify an erroneous rule will simply not arise, or if they arise will settle before judgment at trial, or if they do not settle before judgment will settle after judgment but before the appeal that might modify the erroneous rule. Correcting an erroneous rule made at Time 1 requires a case at Time 2, but if the cases at Time 2 are unlikely even to reach judgment precisely because of the rule made at Time 1, then the common law’s ability to correct its own mistakes will be systematically less than its ability to make them in the first instance.

From this vantage point, then, we can see that the possibility of correcting in a subsequent case the lawmaking error in a previous case

sample of cases filed”); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman’s Mistakes*, 14 J Legal Stud 215, 216–17 (1985) (showing how an all-or-nothing legal rule affects parties’ willingness to settle); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1, 2 (1984) (noting that the very low proportion of cases that go to trial makes it “very difficult to infer specific characteristics” about all litigants); George L. Priest, *Selective Characteristics of Litigation*, 9 J Legal Stud 399, 400 (1980) (examining “the effect on the common law process of . . . the decision of parties to litigate or settle their dispute”); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J Legal Stud 65, 65 (1977) (noting that if “transaction costs in the real world are positive,” “inefficient legal rules will impose greater costs” and be more likely to be litigated). Subsequent discussion, analysis, and empirical work includes Daniel Kessler, Thomas Meites, and Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J Legal Stud 233, 235 (1996) (suggesting a multimodal approach to reconcile observed data with the predictions of selection effect); Robert E. Thomas, *The Trial Selection Hypothesis without the 50 Percent Rule: Some Experimental Evidence*, 24 J Legal Stud 209, 211–12 (1995) (noting that “the relative difference between the two sides’ estimates” of fault, as well as how close the dispute is to the legal rule, determines whether the parties will litigate); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J Legal Stud 187, 188 (1993) (arguing that “win-rate patterns can be explained by the informational requirements of the relevant legal standard”); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J Legal Stud 337, 338–39 (1990) (proposing the “50 percent hypothesis,” which is an assumption that plaintiffs and defendants will each win half the time). For an excellent analysis of the issues and a more comprehensive survey of the literature, see Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 Case W Res L Rev 315, 318 (1999).

will be in part a function of the willingness of a party on the wrong side of a case made easy by the previous ruling to litigate and appeal notwithstanding the existence of the unfavorable rule. The rule made in the first case will of course have unclear applications, and we can expect those unclear applications to be litigated—and appealed. And we can even expect courts in those cases to use their ability to resolve cases at the edges of the previous rule to move the rule away from the mistake generated at the outset. But the rule made in the first case can also be expected to produce at least some moderately clearly erroneous results, not erroneous from the perspective of that rule, but erroneous from the perspective of what the rule would have been had it not been formulated mistakenly in the first place. Repeat players will have an incentive to litigate against clear applications of a rule that disadvantages them, but again it can be expected that the opportunities for correction will systematically be weaker than the force of the rule that is in need of correction.

As a result of this phenomenon, therefore, there is reason to believe that even in a dynamic setting the selection effect will cause correction to lag behind an original mistake, and so on for every subsequent iteration. Indeed, the lag in self-correction will be produced not only by the selection effect, but also because each iteration of the correction process will be one in which the correcting case will have the ability to correct, but will also potentially introduce a new mistake. It should not be forgotten that any occasion for correction will be a single case that may distort the need for correction in much the same way that the original case had the potential for distorting the original rule. When we see case-based lawmaking from a dynamic perspective, therefore, we see that mistakes in the first case are not necessarily permanent, but we see as well that the same availability, anchoring, representativeness, and issue framing problems that plague any original decision will also plague the common law's attempts to correct it.¹¹¹

¹¹¹ Relatedly, consider Judge Calabresi's famous argument advocating that common law courts either already have or, if not, be given the authority to update clear but obsolete statutes. Calabresi, *A Common Law for the Age of Statutes* at 170 (cited in note 47) (contending that courts have "authority to interpret statutes honestly, but in ambiguous cases also functionally"). Without coming to a final conclusion on the matter, we would at least want to inquire into the possibility that common law courts considering updating statutes would update statutes (and not just find particular exceptions for particular cases) somewhat more than necessary because of a proclivity to take aberrational but litigated cases as more indicative of a deeper statutory problem than was in fact the case.

V. IMPLICATIONS

I want to avoid the common problem of comparing on the one hand a realistic model with an idealized one on the other. So I want to avoid comparing a model of case-based lawmaking that recognizes its flaws and limitations with an idealized model of codification, statute making, or rulemaking that refuses to recognize the limitations of that process. Thus, the implications of what I argue here may well be smallest if we think solely in terms of a contrast between case-based lawmaking and actual legislation. And the major reason for this is that the legislative process is itself hardly devoid of its own pathologies. Some of these pathologies are similar to the ones we have just been discussing, for legislation is often prompted by highly salient and potentially unrepresentative events. That we increasingly label legislation in terms of a particular event—Megan’s Law¹¹² or the Brady Law,¹¹³ for example—provides highly visible evidence of this phenomenon, and in addition there can be little doubt that lobbyists are usually engaged in a process of offering to legislators vivid examples that the lobbyist believes will prompt (or, occasionally, forestall) legislative action. Moreover, we cannot ignore the entire category of somewhat different pathologies infecting the legislative process just because legislation is a product of a multimember, elected, and often-captured legislature.¹¹⁴ So without going into all of these pathologies, it is still safe to say that we could not compare the net advantages and disadvantages of common law rulemaking with the net advantages and disadvantages of legislation without going much further into the full range of pathologies that infect each, and the full array of benefits they allegedly bring.

Moreover, even outside of formal legislation there can be cognitive deficiencies arising out of any attempt to imagine an array of future acts

¹¹² See notes 97–98.

¹¹³ Brady Handgun Violence Protection Act, Pub L No 103-159, 107 Stat 1536 (1993) (restricting the sale, manufacture, import, and export of firearms).

¹¹⁴ See Jeffrey S. Banks and John Duggan, *A Bargaining Model of Collective Choice*, 94 Am Pol Sci Rev 73, 84–85 (2000) (demonstrating “the existence of stationary equilibria” in a “noncooperative model of multiperson bargaining”); Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 4–6, 19 (Chicago 1998) (positing “gridlock” and “large, bipartisan coalitions” as defining features of 1990s politics); Gary W. Cox and Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House* 14–15 (California 1993) (analyzing party behavior in the House of Representatives); R. Douglas Arnold, *The Logic of Congressional Action* 3 (Yale 1990) (noting that “organized interests . . . often triumph” in effectuating their legislative agendas); Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 83–84 (Yale 2d ed 1989) (describing changes to the congressional landscape since the 1970s); David P. Baron and John A. Ferejohn, *Bargaining in Legislatures*, 83 Am Pol Sci Rev 1181, 1199 (1989) (providing “a theory of a majority rule legislature in a context in which the standard institution-free model of social choice theory yields no equilibrium”); James Q. Wilson, ed, *The Politics of Regulation* vii (Basic 1980) (presenting a set of essays on “the relationship between private power and public purpose”).

and events, but without the (mis)guidance of a single salient controversy. And here we can include not only the obvious pathology of ignorance, but also the pathology of the imagined example. When there is no real example, as there is in the case-based lawmaking scenario, the attempt by the lawmaker to imagine an array of cases is likely to be distorted by the excess availability in the lawmaker's mind of examples that come from prior experience or other similar sources. In other words, the same pathologies of excess preoccupation with a single distorting example that can plague case-based lawmaking can also plague non-case-based lawmaking whenever there is an example in the lawmaker's mind that has the same features of availability and unrepresentativeness.

Yet although it is undoubtedly true that nondeciding rulemakers can fall victim to the availability heuristic and related irrationalities, the fact that such a salient example need not be actually resolved, as is the case when a court must reach a decision with respect to the actual parties before it, gives some reason to believe that the negative effects of the imagined bad example in non-case-based rulemaking will be systematically less than the negative effects of the nonimagined and real but nevertheless bad example in case-based rulemaking. And even without the necessity of actually resolving the question whether real examples are more salient and more distorting than imagined ones, there may—and I offer this only as a testable hypothesis¹¹⁵—be some reason to believe that all of the trappings of actual parties and actual litigation and actual facts will make the real single case, *ceteris paribus*, more salient than the imagined single case. Holding unrepresentativeness constant, therefore, there may be reason to believe that the real unrepresentative case will be more distorting than the imagined or recalled unrepresentative case. Insofar as this is true, there may then be reason to believe that the distortions of case-based lawmaking are, *ceteris paribus*, sufficiently problematic that we can conceive of actual implications even putting aside the possibility of substituting formal legislation for common law lawmaking.

A. Questions of Justiciability

As I noted at the outset of this Article, the alleged informational advantages of having a single concrete case before a court have often been thought to provide a reason for vigorous enforcement of the existing requirements for standing,¹¹⁶ and, by extension, for ripeness¹¹⁷ as

¹¹⁵ But not by me.

¹¹⁶ See notes 48–49 and accompanying text.

¹¹⁷ See *Lujan v National Wildlife Federation*, 497 US 871, 891 (1990) (defining ripeness as when “the scope of the controversy has been reduced to more manageable proportions, and its

well. With respect to such doctrines of justiciability, the prevailing wisdom has been that the concrete case provides information that assists a court deciding the issue surrounding that case and making law for future cases as well. But if those informational advantages are illusory, then at least one set of arguments for strengthening the standing and ripeness requirements has become weaker. There are other arguments, to be sure, most involving questions of decisional legitimacy and not decisional quality,¹¹⁸ but the collapse of one might suggest at the very least a marginal relaxation of the existing requirements.

A related issue is the question of the advisory opinion. As is well-known, the federal courts will not issue advisory opinions,¹¹⁹ although they are a common feature of many state court systems¹²⁰ and are commonly used by constitutional courts in other countries.¹²¹ Traditionally the aversion to advisory opinions is, again, based at least in part on the informational advantages of the concrete case. But once we see that those informational advantages are not all that they seem, then the argument for the aversion to advisory opinions is commensurately weakened. This might suggest, as with standing and ripeness, that there be some relaxation in the existing requirements, and might suggest as well that, as a matter of institutional design in those juris-

factual components fleshed out”); *Abbott Laboratories v Gardner*, 387 US 136, 148–49 (1967) (holding that the ripeness doctrine prevents courts from resolving abstract disagreements). See also Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U Chi L Rev 153, 155–56 (1987).

¹¹⁸ See *Raines v Byrd*, 521 US 811, 819–20 (1997) (making a separation of powers argument for a strict standing requirement); *United Public Workers of America v Mitchell*, 330 US 75, 89 (1947) (alluding to an Article III basis for the ripeness doctrine).

¹¹⁹ See *Rescue Army v Municipal Court of Los Angeles*, 331 US 549, 583–85 (1947) (refusing a preliminary judgment on the legal issue until a concrete case came before the Court); *United Public Workers*, 330 US at 89 (“For adjudication of constitutional issues, ‘concrete legal issues, presented in actual cases, not abstractions,’ are requisite.”); Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 Stan L Rev 1825, 1826 (1998) (arguing that nothing “in judges’ status or stature [] qualifies them to give such advice to elected officials”); Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv L Rev 1002, 1003 (1924) (“Every tendency to deal with [facts] abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions.”).

¹²⁰ See, for example, Mich Const Art III § 8 (2005) (“Either house of the legislature or the governor may request the opinion of the supreme court . . . as to the constitutionality of legislation.”); Mass Const Art LXXXV (2004) (“Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court.”).

¹²¹ See, for example, Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 Notre Dame L Rev 504, 505–06 (1987) (noting that constitutional challenges in Germany require neither standing nor ripeness).

ditions in which the issue is still open, the sympathy to advisory opinions might be somewhat greater.¹²²

The same considerations play out in legal doctrine as well, even after the hurdles of justiciability have been cleared. Courts determining whether to entertain facial (as opposed to as-applied) challenges are engaged in a process by which they must imagine the array of events that will be encompassed by the allegedly unconstitutional law.¹²³ If a court's assessment of that array is likely skewed by the particular case before it, however, the arguments for entertaining a facial challenge become weaker, and the arguments for dealing with unconstitutionality on a case-by-case as-applied basis become stronger. So too with overbreadth.¹²⁴ If the basis for determining that a statute is unconstitutionally overbroad is based, in large part, on a judicial prediction of its likely applications,¹²⁵ then, again, some reason to believe that such predictions will be systematically distorted would be one reason for encouraging reluctance to rely too heavily on overbreadth.

B. The Timing of Rulemaking

Once we look beyond these various particular doctrines, even larger implications emerge. One would be the possibility of delaying the very process of rulemaking until enough cases arose such that the rulemaking body could have the benefit of having seen multiple examples of some larger problem. When jurisdiction is discretionary, as with the Supreme Court's certiorari practice, this delay might come from taking very seriously a practice of delaying the decision on an issue until there is a fair amount of lower court experience. A conscientious reviewing court could then take a case based on a better sense of its representativeness, because the court would know from having seen an array of cases whether the case it was taking was or was not representative of the larger problem. And, having taken a case, the

¹²² See William M. Landes and Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J Legal Stud 683, 684–86 (1994) (examining the costs and benefits of anticipatory adjudication regimes).

¹²³ See Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv L Rev 1321, 1324 (2000) (concluding “that there is no single distinctive category of facial, as opposed to as-applied, litigation”).

¹²⁴ See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L J 853, 855 (1991) (“First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a ‘chilling effect.’”); Henry P. Monaghan, *Overbreadth*, 1981 Sup Ct Rev 1, 2 (noting that the “various limiting conceptions” of the overbreadth doctrine cause it to be perceived as “erratic and confusing”).

¹²⁵ See, for example, *New York v Ferber*, 458 US 747, 749, 774 (1982) (holding that a state anti-child-pornography statute was not overbroad because there was no indication that it would be applied to material that did not explicitly depict sexual conduct); *Broadrick v Oklahoma*, 413 US 601, 616–18 (1973) (upholding state laws restricting the public, but not the private, political speech of state employees).

court would then know about exemplars of the problem beyond the case at hand, thus likely reducing the distorting effect of that case.

This process of delaying can even take place when jurisdiction is not discretionary. A court deciding a case might decide the case without any opinion at all, as is the common practice in the federal courts of appeals, or if it decided a case with opinion it could make a choice to decide narrowly rather than broadly, and in adjudicative mode much more than rulemaking mode. Virtually any decision can be more or less narrowly justified, and in that sense genuine common law rulemaking is in some respects itself discretionary. To the extent that a court was inclined to make a rule, therefore, knowledge of the biases produced by concrete cases might militate in favor of deciding the first case narrowly and delaying rulemaking until the court's experiential base was considerably larger.¹²⁶ And this applies to the practice of giving reasons as well. As noted above,¹²⁷ the very practice of giving reasons has a rulemaking aspect, and thus a court deciding to delay its rulemaking can do this not only by not deciding, but also by giving no reasons for its decision, or giving narrower rather than broader reasons. The arguments here are all ones that, *ceteris paribus*, will counsel delay in judicial rulemaking, but the devices of delay turn out in fact to be quite numerous.

C. The Largest Questions

The largest implications of what I have argued here, however, are those that go to questions of institutional design. Although delay can often be useful, as can preferring narrower decisions to broader ones, the true implication of what I have offered here is that case-deciding bodies may not be well situated to engage in the large-number, systematic, and empirical inquiry that effective rulemaking requires. If we want to know the full reach and import of a particular speed limit, we do not want to rely solely on instances in which drivers caught speeding challenge their citations, and so too with almost any rulemaking process. So if the implications of case-based distortion are to be heeded, the larger implications relate to the comparative desirability of simply making rules in processes less liable to the distortion and

¹²⁶ There remains the risk, however, that subsequent cases will still be seen through the lens of the first case because of anchoring and framing effects, and to the extent that this is so then no amount of delay in rulemaking will totally eliminate the distortion of seeing all cases after the first through the lens of the first case. See Matthew Rabin and Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q J Econ 37, 38 (1999) (describing "confirmatory bias" as a tendency "to misinterpret ambiguous evidence as confirming [one's] current hypotheses about the world").

¹²⁷ See text accompanying note 35.

more suited to engage in the “large *n*” empirical assessment that effective rulemaking would require. This would then constitute an argument, for example, albeit not the only argument and not necessarily a conclusive argument, for administrative agencies making rules in the context of formal rulemaking rather than as an adjunct to adjudication.¹²⁸ For the same reasons it would constitute an argument for institutions such as the Federal Rules of Evidence and the Federal Rules of Civil Procedure (and the standing committees that take the lead in their revision) as opposed to letting the rules develop over time in common law fashion. And it might even counsel congressional hesitation when it considered, as it did in enacting the Sherman Act, for example, relying on a common law process to develop an entire area of law as opposed to charging an expert agency with the job, or perhaps, for all of its own pathologies, even doing it itself.

VI. CONCLUSION

My aims here are modest. They are not to claim that civil law legal regimes are better than common law ones, that statute law is better than common law, that codification is better than case-by-case decisionmaking, that the “case or controversy” requirement is fundamentally confused, or that it is generally better to make decisions under a “veil of ignorance.”¹²⁹ All of these may well be true, but a full comparison between common law method and its alternatives would require a thorough consideration of all of the virtues and pathologies of the common law as a process and all of the virtues and pathologies of all of its alternatives, and would need to do so in a multiplicity of institutional contexts. It may well be, after all, that these various virtues and pathologies would appear in different ways and with different consequences depending on various other institutional features. All of these considerations, therefore, and more, make the all-things-considered comparison between common law method and any of a number of alternatives far more than can possibly be tackled by one person, or in any one article.

¹²⁸ See the prescient (from my perspective) analysis in David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv L Rev 921, 972 (1965) (“[A]dministrative efforts to give content to general statutory provisions . . . should be encouraged rather than thwarted.”). See also Peter L. Strauss, *The Common Law and Statutes*, 70 U Colo L Rev 225, 225 (1999).

¹²⁹ John Rawls, *A Theory of Justice* 11 (Belknap rev ed 1999) (“[The veil of ignorance] ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.”). See also John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J Pol Econ 434, 434–35 (1953) (“[A] value judgment on the distribution of income would show the required impersonality . . . if the person [chose] in complete ignorance of what his own relative position . . . would be.”).

Nevertheless, we live in an era of glorification of the particular and celebration of the immediate factual context.¹³⁰ Part of that glorification comes from the common premise that we make better decisions when we see real events, real parties, real controversies, and real consequences. And this common premise provides a widely adopted argument for the virtues of case-by-case decisionmaking and the rulemaking that comes out of it. Indeed, even those otherwise less sympathetic to case-based rulemaking do not deny what they see as the informational benefits of the concrete case.¹³¹ Yet when we combine the lessons of at least one strand of Legal Realism with some of the lessons of modern social science, we see as well that real events, real parties, real controversies, and real consequences may have distorting effects as well as illuminating ones.¹³² And insofar as this is true, then at least one of the traditional arguments for common law lawmaking becomes less sound, and one of the arguments for the “case or controversy” requirement becomes less sound as well. Holmes was partially right. Great cases and hard cases often do make bad law. But if the distorting effects produced by greatness and hardness are present in nongreat and nonhard cases as well just because of the very immediacy of those cases, then Holmes’s insight about great cases and hard cases is not only broader than he thought, but also supports the proposition that cases *simpliciter* make bad law. And if that is so, then it may turn out to be more of a demerit than a merit that the common law decides the case first and determines the principle thereafter.

¹³⁰ There are, of course, dissenters. See, for example, Frederick Schauer, *Profiles, Probabilities, and Stereotypes* ix (Belknap 2003) (“My aim in this book is to challenge the primacy of the particular. . . . [T]hat *this* particular case, or *this* particular event, is what is most important.”).

¹³¹ See Landes and Posner, 23 *J Legal Stud* at 685 (cited in note 122) (favoring anticipatory adjudication but admitting that “[t]here is greater risk of deciding a case incorrectly when there is little or no factual record”).

¹³² One such distortion, and one I have not dealt with directly here, is the way in which the common law may simply see too narrow a range of policy options and policy problems, a failing neatly captured in the complaint that the common law “feeds too much upon itself.” James McCauley Landis, *Statutes and the Sources of Law*, in Roscoe Pound, ed, *Harvard Legal Essays* 213, 213 (Harvard 1934).