2012

The Evolving Temporality of Lawmaking

Andrew J. Wistrich

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation
Conventional wisdom suggests that law is past-oriented. That view always has been incomplete and is no longer as accurate as it once was. In fact, law always has been more future-oriented than is widely recognized. Additionally, during the last century, fundamental changes took place in attitudes about the nature and sources of law, as well as in the ways in which law is made. Predominately future-oriented methods of lawmaking—such as statutes, treaties, and administrative regulations—have expanded, while predominately past-oriented modes of lawmaking—such as the common law—have contracted. As a result, lawmaking has become even more future-oriented, and law's memory of past law now plays a smaller role than it used to in determining the content of legal rules. Although this evolving temporality of lawmaking offers advantages, humans are not adept at predicting the future. Therefore, we should be cautious about projecting far into the future when making law, and we should minimize entrenchment of the law we make.
ARTICLE CONTENTS

I. INTRODUCTION ........................................................................................................... 739
   A. THE PAST IN LIFE AND LAW ................................................................. 739
   B. THE FUTURE IN LIFE AND LAW ............................................................. 744
   C. THE MULTI-FACETED TEMPORALITY OF LAWMAKING ..................... 750

II. THE INCREASING FUTURE-ORIENTEDNESS OF LAWMAKING ....................... 752
   A. THE SHIFT FROM NATURAL LAW TO PRAGMATISM ......................... 752
   B. THE DISPLACEMENT OF CONSTITUTIONAL TEXT
      BY COMMON LAW INTERPRETATION ................................................ 756
   C. THE EROSION OF STARE DECISIS ...................................................... 763
   D. THE MULTIPLICATION OF STATUTES ............................................... 777
   E. THE EXPANSION OF ADMINISTRATIVE REGULATION ...................... 783
   F. THE PROLIFERATION OF TREATIES ................................................. 791

III. IS LAW'S INCREASING FUTURE-ORIENTEDNESS GOOD OR BAD? .......... 796
   A. FRAMING THE ISSUE ......................................................................... 796
   B. TEMPORAL CONSIDERATIONS ......................................................... 796
   C. INSTITUTIONAL CONSIDERATIONS .................................................. 806
   D. SOME IMPLICATIONS ......................................................................... 815

IV. CONCLUSION ........................................................................................................... 825
The Evolving Temporality of Lawmaking

ANDREW J. WISTRICH*

"Law changes not only from place to place but also from
time to time."

"Law is the projection of an imagined future upon
reality.""2

I. INTRODUCTION

A. The Past in Life and Law

The past plays an important role in life.3 Our memories make us who we are.4 What we remember limits our cognitive horizons, coloring our understanding of the present and shaping our expectations of the future.5 Even when we break free from the grasp of the past and recognize the desirability or necessity of change, our previous choices restrict our future options.6 Our past is so "omnipresent"7 that we can never really put it

---

* Magistrate Judge, United States District Court, Central District of California. The insightful comments of J. T. Fraser and Tyler T. Ochoa are gratefully acknowledged.


3 WILLIAM SHAKESPEARE, HAMLET, act 2, sc. 2 (Cyrus Hoy ed., W. W. Norton & Co. 1963) (1604) ("Purpose is but the slave to memory... ").

4 LARRY R. SQUIRE & ERIC R. KANDEL, MEMORY: FROM MIND TO MOLECULES, at ix (2000) ("We are who we are because we can remember what we have thought about... Memory is the glue that binds our mental life, the scaffolding that holds our personal history... "); see also A. A. MENDELOW, TIME AND THE NOVEL 223 (1972) ("[W]e are at any moment the sum of all our moments, the product of all our experiences.").

5 Oliver Wendell Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 444 (1899) ("[C]ontinuity with the past is only a necessity and not a duty... That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think."); see also ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 24 (1975) ("The visions of good and evil, the [moral] denominations to be computed—these a society draws from its past and without them it dies."); J. T. FRASER, TIME, CONFLICT, AND HUMAN VALUES 66 (1999) ("In animals and in humans, as far as their biological functions go, the past is the source of the inherited or learned traits that direct teleonomic behavior.").

6 FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY 5 (Cosimo, Inc. 2010) (1873) ("[M]an... cannot learn to forget, but hangs on the past: however far or fast he runs, that chain runs with him."); OSCAR WILDE, AN IDEAL HUSBAND, act I, at 54 (London, Leonard Smithers & Co. 1899) ("One’s past is what one is.").
behind us.

The past also plays a significant role in law.\textsuperscript{8} Law is subject to all of the influences that the past exerts on the rest of life. Those influences, which overlap to some degree, include: (1) respect for tradition;\textsuperscript{9} (2) status quo bias;\textsuperscript{10} (3) path dependence;\textsuperscript{11} (4) escalation of commitment;\textsuperscript{12} (5) a desire to avoid the responsibility of making tough decisions;\textsuperscript{13} (6) a reluctance to invest in improving upon past solutions to similar problems;\textsuperscript{14}

\textsuperscript{8}DAVID LOWENTHAL, THE PAST IS A FOREIGN COUNTRY, at xv (1985); see also WILLIAM FAULKNER, REQUIEM FOR A NUN, act 1, sc. 3 (1950) ("The past is never dead. It's not even past.").

\textsuperscript{9}RICHARD A. POSNER, Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship, 67 U. CHI. L. REV. 573, 585 (2000) ("The modern law is full of vestiges of early law. If we were starting from scratch, we could design and (even with due regard for political pressures) would adopt a more efficient system, and this implies that there must be formidable obstacles to changing the existing one."�).

\textsuperscript{10}RONALD DWORKIN, LAW'S EMPIRE 167 (1986) ("[T]he past must be allowed some special power of its own . . . ."); Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029, 1031-32 (1990) (asserting that the past deserves to be respected merely because it is the past); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1977) ("A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future."�).

\textsuperscript{11}JONATHAN BARON, THINKING AND DECIDING 468 (3d ed. 2000) ("People tend to stick to the old, even when they would choose the new if they were starting afresh."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 223 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) ("People are not so easily got out of their old forms, as some are apt to suggest. They are hardly to be prevailed with to amend the acknowledged faults in the frame they have been accustomed to. And if there be any original defects, or adventitious ones introduced by time, or corruption; it is not an easy thing to get them changed, even when all the world sees there is an opportunity for it.").

\textsuperscript{12}Clayton P. Gillette, Lock-In Effects in Law and Norms, 78 B.U. L. REV. 813, 813 (1998) ("Where lock-in occurs, history matters. The selection of a prior path, for whatever reason, determines current behavior—notwithstanding that the initial path was selected for reasons unrelated to current conditions . . . ."); see id. at 817 (offering typewriter keyboards and computer operating systems as examples); Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 IOWA L. REV. 601, 605 (2001) (noting that judicial decisions are "path dependent") in the sense that "courts' early resolutions of legal issues can become locked-in and resistant to change" due to a variety of factors, including stare decisis, even when change in legal rules is needed to "respond to changing underlying conditions."); But see MICHAEL J. GERHARDT, THE LIMITED PATH DEPENDENCY OF PRECEDENT, 7 U. PA. J. CONST. L. 903, 909 (2005) (contending that the common law is only weakly path dependent).

\textsuperscript{13}ELLIOT ARONSON, T. WILSON & R. AKERT, SOCIAL PSYCHOLOGY 114 (2004) ("Escalation is self-perpetuating. Once a small commitment is made, it sets the stage for ever-increasing commitments. The behavior needs to be justified, so attitudes are changed; this change in attitudes influences future decisions and behavior."); Rafael Gely, Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis, 60 U. PITT L. REV. 89, 110 (1998) ([T]he use of precedent . . . presents a sunk costs problem. The manner in which case law develops under our judicial system fits the escalation of commitment prototype.").

\textsuperscript{14}REBECCA L. BROWN, Tradition and Insight, 103 YALE L.J. 177, 179 (1993) ("To the extent that traditions represent judgments that others in other times have made, they can provide an attractive resource to those uncomfortable with making judgments of their own."); see also ROGER ORMROD, Judges and the Process of Judging, in JUBILEE LECTURES CELEBRATING THE FOUNDATION OF THE FACULTY OF LAW UNIVERSITY OF BIRMINGHAM 192 (1981) ("The stronger the adherence to precedent, the narrower the scope for choice, which reduces the risk and makes the anxieties more supportable."); TERRANCE SANDALOW, CONSTITUTIONAL INTERPRETATION, 79 MICH. L. REV. 1033, 1038 (1981) ("The uneasiness, often the agony, and always the responsibility that accompany a difficult choice are softened by the belief that real choice does not exist.")); BURNET v. CORONADO OIL & GAS CO., 285 U.S. 393, 406 (1932) (BRANDEIS, J., dissenting) ("[I]n
(7) a preference for intertemporal consistency;\(^\text{15}\) (8) an inclination to follow the example of others;\(^\text{16}\) and (10) a penchant for precommitment.\(^\text{17}\) In addition, law contains features that systematically weigh the past more heavily than the present\(^\text{18}\) and the future. Those features include: (1) a grounding in ancient religion and moral philosophy;\(^\text{19}\) (2) a written constitution that is difficult to amend;\(^\text{20}\) (3) entrenched statutes that sometimes outlive their transitory purposes;\(^\text{21}\) (4) the doctrine of stare

most matters it is more important that the applicable rule of law be settled than that it be settled right.); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ."); Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 MINN. L. REV. 1173, 1177 (2006) ("[I]t saves time and trouble to rely on earlier decisions.").\(^\text{22}\)

\(^{15}\) ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 95 (4th ed. 2001) ("Psychologists have long recognized a desire in most people to be and look consistent within their words, beliefs, attitudes, and deeds."); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 4 (3d ed. 1977) ("It is a basic principle of the administration of justice that like cases should be decided alike."); John E. Coons, Consistency, 75 CALIF. L. REV. 59, 60 (1987) ("C[onsistency prescribes like treatment for successive cases governed by the same rule of law or morality."); Karl N. Llewellyn, CASE LAW, IN 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249, 249 (Edwin R. A. Seligman & Alvin Johnson eds., 1930) (noting "that curious, almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances" regardless of differences in time).

\(^{16}\) See CIALDINI, supra note 15, at 100 ("We view a behavior as correct in a given situation to the degree that we see others performing it.") (emphasis omitted); THE FEDERALIST NO. 61 (Alexander Hamilton) ("There is a contagion in example which few men have sufficient force of mind to resist."); Robert H. Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1, 26 (1945) ("While . . . the power of the precedent is only ‘the power of the beaten track,’ still the mere fact that a path is a beaten one is a persuasive reason for following it.") (footnote omitted).\(^\text{23}\)

\(^{17}\) See JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 1 (2000) (explaining that precommitment strategies include “removing certain options from the feasible set, by making them more costly or available only with a delay, and by insulating themselves from knowledge about their existence”); Jon Elster, Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment, 81 TEX. L. REV. 1751, 1754 (2003) (“When precommitting himself, a person acts at one point in time in order to ensure that at some later time he will perform an act that he could but would not have performed without that prior act.”).

\(^{18}\) If I seem to neglect the present, that is because I view it as an artificial construct possessing a very brief duration. See BARBARA ADAM & CHRIS GROVES, FUTURE MATTERS: ACTION, KNOWLEDGE, ETHICS 123 (2007) ("T[he present as such is more a construct than a basic reality."); PAUL J. NAHIN, TIME MACHINES: TIME TRAVEL IN PHYSICS, METAPHYSICS, AND SCIENCE FICTION 287 (1993) ("The present is the knife edge on which the past and future balance."); BLAISE PASCAL, PENSÉES NO. 172 (1670) ("If anyone examine his thoughts, he will find them entirely taken up with the past or the future. We hardly think of the present at all, and we do think of it with a thought, it is only to borrow a light from it to direct the future.").


\(^{20}\) See U.S. CONST. art. V (requiring multiple supermajorities for the adoption of amendments); John Ferejohn & Lawrence Sager, Commitment and Constitutionalism, 81 TEX. L. REV. 1929, 1954 (2003) (“Article V is the Constitution’s constitution. Its resistance to change is what cements the external, institutional commitments of the Constitution in place.”).

\(^{21}\) See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (describing “the problem of legal obsolescence” caused by laws which no longer fit but still govern); GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (“One of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions.”).
decisis;22 (5) the Ex Post Facto Clause;23 (6) the presumption against statutory retroactivity;24 (7) statutes of limitation;25 (8) originalist and textualist approaches to constitutional interpretation;26 and (9) the finality of court judgments.27 Each of these features restrains the nature and pace of legal change, and represents a way in which law remembers and honors its past.

The ways in which the past affects life must be combined with the ways in which the past affects law to correctly assess the role of the past in law. Their interaction, however, is not merely additive. Some past-oriented features of law are specific to law, but others are derived from more general considerations—such as respect for tradition, path

22 See Fleming James, Jr. et al., Civil Procedure 679–80 (5th ed. 2001) ("The doctrine of stare decisis is a mandate that courts should give due weight to precedent. It holds that an already established point of law should be followed without reconsideration, provided that the earlier decision was authoritative."); W. Barton Leach, Revisionism in the House of Lords: The Bastion of Rigid Stare Decisis Falls, 80 HARV. L. REV. 797, 803 (1967) ("Stare decisis is a habit of mind in all walks of life—
the professions, business, family life. One does what one has done before in similar circumstances."); Alexander M. Sanders, Jr., Speech, Everything You Always Wanted to Know About Judges but Were Afraid to Ask, 49 S.C. L. REV. 343, 347 (1998) ("It is barely possible for lawyers to persuade most judges of the validity of anything they have to say unless they can first persuade those judges that some other judge has already said it. We embrace, therefore, a sort of institutionalized nostalgia. We call it, quaintly enough, stare decisis."); cf. Algernon Charles Swinburne, A Word From the Psalmist, in A MIDSUMMER HOLIDAY AND OTHER POEMS 176, 179 (3d ed. 1889) ("Is not Precedent indeed a king of men?").

23 U.S. CONST. art. I, § 9, cl. 3 (prohibiting the passage of federal ex post facto statutes); U.S. CONST. art. I, § 10, cl. 6 (prohibiting the same with state statutes); see also Fletcher v. Peck, 10 U.S. (1 Cranch) 87, 138 (1810) ("An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.").

24 See Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."); Robert G. Natelson, Statutory Retroactivity: The Founders’ View, 39 IDAHO L. REV. 489, 527 (2003) ("[T]he policy against statutory retroactivity was a major force behind the adoption of the U.S. Constitution.").

25 See Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 PAC. L.J. 453, 457 (1997) (cataloging and analyzing the purposes of statutes of limitation); Andrew J. Wistrich, Procrastination, Deadlines, and Statutes of Limitations, 50 WM. & MARY L. REV. 607, 617 (2008) (identifying promoting repose and avoiding the retrospective application of contemporary standards as two of the four principal purposes of statutes of limitation).

26 See Brown, supra note 13, at 178 ("Originalists look to the way things have been done to see what the Framers intended. Textualists look to the way things were done to determine what the all-important words meant to the community for which they were written."); see also Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. REV. 1, 15 (2009) (proposing that an interpreter should look differently at the originalist object on structural questions than rights questions, and differently at the provisions of the 1787 Constitution than later amendments); John F. Manning, Textualism and Legislative Intent, 91 VA. L. REV. 419, 420 (2005) (describing textualism as the "basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be)").

27 See James et al., supra note 22, at 673 (explaining that once a court enters a final judgment in a particular case, "the judgment establishes legal barriers against relitigating the matters involved in the action" in subsequent cases); see also John V. Orth, Due Process of Law: A Brief History 1 n.1 (2003) ("[T]he dispute-resolution effect of a judicial decision is labeled res judicata: once finally resolved, an individual dispute becomes a ‘thing adjudged’ and may not be relitigated. The rule-making effect is called stare decisis: the judges ‘stand by the decision’ in prior cases and apply the same rule in the future.").
dependence, and consistency—that affect both life and law, so simply adding the two sets of influences would be a sort of double-counting that would overestimate the importance of the past in law.

Not surprisingly, law's memory of past law while crafting legal rules has seemed central to many. In 1790, for example, Edmond Burke noted that English lawyers and legislators exhibited a "powerful prepossession toward antiquity."28 Sixty years later, Alexis de Tocqueville wrote that "[t]he first thing an English or American lawyer looks for is what has been done . . . ."29 Roughly one century ago, Oliver Wendell Holmes, Jr. observed that "if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition."30 Even today, conventional wisdom holds that the role of the past in law is very significant, and certainly more important than the role of the future.31 As Richard Posner recently said:

Law is the most historically oriented, or if you like the most backward-looking, the most "past-dependent," of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. It is suspicious of innovation, discontinuities, "paradigm shifts," and the energy and brashness of youth.32

Indeed, law has been ridiculed for precisely this reason.33

29 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 267–68 (1850) (J.P. Mayer ed., George Lawrence trans., 1969); see also id. at 268 ("[T]he English lawyer values laws not because they are good but because they are old . . . .").
30 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
31 See, e.g., Kronman, supra note 9, at 1044 ("[T]he authority of the past continues, perhaps, to exert a greater influence in the law than in other spheres of life . . . ."); Gerald J. Postema, On the Moral Presence of Our Past, 36 MCGILL L.J. 1153, 1156–57 (1991) ("Law is essentially historical, not just in the sense that the life stories of legal systems can be chronicled, but more importantly in the sense that it is characteristic of law to anchor justification to the past."); see also Larry D. Kramer, The Pace and Cause of Change, 37 J. MARSHALL L. REV. 357, 357 (2004) ("[L]egal training nurtures a predisposition to preserve the familiar, while providing assorted tools with which to do so.").
32 Posner, supra note 8, at 573. Posner's statement is probably true in the sense that law likely is more past-oriented than some other professions, such as medicine or engineering.
33 See JONATHAN SWIFT, GULLIVER'S TRAVELS AND OTHER WRITINGS 203 (Ricardo Quintana ed., 1958) ("It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the Name of Precedents, they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of directing accordingly.").
Although the past's role in law is, and will continue to be, significant, its importance has been exaggerated. The temporality of legal rules is not that simple. Among its other shortcomings, the simplistic view of the law as highly past-oriented ignores the importance of the future in life and law.

B. The Future in Life and Law

For humans, "the fundamental phenomenon of time is the future." According to Immanuel Kant:

Men are more interested in having foresight than any other power, because it is the necessary condition of all practical activity and of the ends to which we direct the use of our powers. Any desire includes a (doubtful or certain) foresight of what we can do by our powers. We look back on the past (remember) only so that we can foresee the future by it; and as a rule we look around us, in the standpoint of the present, in order to decide on something or prepare ourselves for it.

Elaborating on Kant's insight, Charles Sherover provided a detailed description of how the future-orientedness that is inherent in the nature of human beings shapes our lives. In his view,

human reasoning is prudential: it is teleologically organized; human rational activity, whether individual or communal, is to be understood as goal-oriented behavior. This is to say that all rational activity is temporally

---

34 Martin Heidegger, The Concept of Time 14E (William McNeill trans., 1992) (emphasis omitted); see also Charles M. Sherover, Are We in Time? And Other Essays on Time and Temporality 89 (Gregory R. Johnson ed., 2003) ("Our basic concerns on every level, trivial or profound, are concerns about the future."); José Ortega y Gasset, What Is Philosophy?, in Complete Works 420 (Espasa-Calpe 1946) ("It is not primarily in the present nor in the past that we live. Our life is an activity directed towards what is to come. The significance of the present or the past only becomes clear afterwards, in relation to the future. Human life is 'futurian,' largely determined by what is not as yet realized.").

35 Immanuel Kant, Anthropology from a Pragmatic Point of View 59 (Martinus Niijhoff ed., Mary J. Gregor trans., 1974) (1798); see also 1 Jeremy Bentham, Principles of the Civil Code, in The Works of Jeremy Bentham 297, 308 (Russell & Russell 1962) (1843) ("[M]an is not like the brutes, limited to the present time, either in enjoyment or suffering, but... he is susceptible of pleasure and pain by anticipation... This disposition to look forward, which has so marked an influence upon the condition of man, may be called expectation—expectation of the future."); David A. Armor & Shelley E. Taylor, When Predictions Fail: The Dilemma of Unrealistic Optimism, in Heuristics and Biases 334, 334 (Thomas Gilovich et al. eds., 2002) ("[M]any of the decisions people make, most of their choices, and virtually all plans are based on expectations about the future... "); A.R. Ammons, Boon, New Republic, Aug. 1, 1988, at 48 (stating that human life consists largely of "being about... to be").
structured: it is animated by the present perception of possibilities of the future which are not yet actualized but are nevertheless presently seen as obtainable by appropriate human effort.

... [W]hatever may be the rhythm of my lived time, whether it is punctuated by a mechanical clock which ticks off its seconds, or follows the more leisurely flow of a chess game or a picnic, my temporality is marked by a priority of future considerations. ... [W]hether my task is winning a chess game, writing a paper, finishing a book, embarking on a journey, or just loafing around, my lived present is future-oriented in its structure. My comprehension of my present situation is interpreted by me in terms of what seems possible to do henceforth; by the light of the alternatives I interpret the situation as presenting to me, I will retrieve from past experience whatever guidance I deem germane to my present prospect.

Of course, Kant and Sherover are right. However much we respect and are influenced by the past, we understand that focusing our attention on it would be futile. The past has happened and cannot be changed. We can only affect the future. "It is the future with which we have to deal." Even popular sayings that exhort people to stop worrying about the future consequences of their actions, and to enjoy the present instead, merely

---

36 Sherover, supra note 34, at 164, 167; see also Gary Eberle, Sacred Time and the Search for Meaning 171 (2003) ("We are too busy thinking about the future to worry about the past."); Fraser, supra note 5, at 77 ("Man’s awareness of time renders him incapable of complete immersion in present experience; it causes him ever to be looking ahead beyond the immediate moment."); Eugene M. Caruso et al., A Wrinkle in Time: Asymmetric Valuation of Past and Future Events, 19 Psychol. Sci. 796, 797 (2008) (concluding that "people value events in the future more than equivalent events in the equi-distant past"). Even non-human forms of life exhibit this characteristic. Adam & Groves, supra note 18, at 129 ("Organisms (including human beings) maintain themselves by sustaining conditions that are favorable to them through their powers of adaptation and anticipation.").

37 Adam & Groves, supra note 18, at 31 ("The past is closed to influence, thus open to factual knowledge while the future is open to choice and efforts to colonize and control, and thus closed to factual inquiry."); Sherover, supra note 34, at 81 ("Moral decisions are not about the past, which cannot be changed, or about the present moment which is fleetingly actual, but only about the future.").

38 Bertrand de Jouvenel, The Art of Conjecture 5 (Nikita Lary trans., 1967) ("We can act only on the future.").

confirm humans’ future-orientatedness.40 If people were not so focused on the future, there would be no need to urge them to redirect their attention elsewhere.

Because of the accelerating rate of change, people are more focused on the future now than at any previous time. The quickening pace of events today carries the future upon us like a tidal wave, flowing faster than ever before,41 and threatening to overwhelm us.42 Understandably, we find ourselves spending even more time contemplating the future, and looking farther ahead than we used to.43

Americans seem especially future-oriented. James Madison evidently thought so. As he asked rhetorically:

Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to

40 See Winston S. Churchill, Triumph and Tragedy 401 (1953) (“It is a mistake to look too far ahead. Only one link in the chain of destiny can be handled at a time.”); Matthew 6:34 (“Therefore do not be anxious about tomorrow, for tomorrow will be anxious for itself. Let the day’s own trouble be sufficient for itself.”) (internal quotation marks omitted).

41 James Gleick, Faster: The Acceleration of Just About Everything 9 (1999) (“We are in a rush. We are making haste. A compression of time characterizes the life of the century now closing.”); Mary Settegast, Mona Lisa’s Moustache: Making Sense of a Dissolving World 9 (2001) (“Our everyday perception is that time itself has accelerated while space has shrunk. The pace of life seems to be racing, and the entire geographical world is suddenly ‘here’ as the barriers of conventional space are overcome by the communications technology.”); Ellen Dunham-Jones, Temporary Contracts: On the Economy of the Post-Industrial Landscape, Harv. Design Mag., Fall 1997, at 2 (“The social contracts that supported [our] grandparents have been ruptured. Marriage vows, the homestead, corporate stability, and job security—all have suffered in the ever-evolving, non-stop world of GATT and NAFTA, of cyberspace, freeways, twenty-four-hour convenience marts and other manifestations of post-industrialism.”).

42 John Dewey, Liberalism and Social Action 57 (1935) (“The fact of change has been so continual and so intense that it overwhelms our minds. We are bewildered by the spectacle of its rapidity, scope, and intensity.”); Lester R. Brown, The Acceleration of History, in State of the World, 1996: A Worldwatch Institute Report on Progress Toward a Sustainable Society, 3, 3 (Linda Starke ed., 1996) (“The pace of change in our world is speeding up, accelerating to the point where it threatens to overwhelm the management capacity of political leaders.”).

43 Nicholas Rescher, Predicting the Future: An Introduction to the Theory of Forecasting 5 (1998) (“[W]ith the passage of centuries the future has come to loom ever larger in our lives. The ration of time and resources a person spends on average in attending to the immediacies of the day as against making provisions for the more distant future has continually decreased over the ages . . . ”); see also Alvin Toffler, Future Shock 23 (1970) (quoting the novelist and scientist C. P. Snow as saying that “[u]ntil this century . . . social change was so slow, that it would pass unnoticed in one person’s lifetime. That is no longer so. The rate of change has increased so much that our imagination can’t keep up.”); Daniel Bell, Twelve Modes of Prediction—A Preliminary Sorting of Approaches in the Social Sciences, 93 Daedalus 845, 869 (1964) (“This is an era in which society has become ‘future-oriented’ in all dimensions: a government has to anticipate future problems; an enterprise has to plan for future needs; an individual is forced to think of long range career choices. And all of those are regarded as possible of doing.”).
overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?44

David Brooks agrees. He recently argued that there is a distinctly American cast of mind, which he called the “Paradise Spell.” He defined it as

the capacity to see the present from the vantage point of the future. It starts with imagination—the ability to see a vision with detail and vividness, as if it already existed. Then the future-minded person is able to think backward from that vision; to ask, “What must I do to take the future that is in my head and make it exist in the world?” That person is more emotionally attached to the glorious future than to the temporary and unsatisfactory present. Time isn’t pushed from the remembered past to the felt present to the mysterious future. It is pulled by the vivid future from the unsatisfactory present and away from the dim past.45

According to Brooks, the Paradise Spell is what makes Americans “heedless of the past, disrespectful toward traditions, short on contemplation, wasteful in our use of the things around us, impious toward restraints, but consumed by hope, driven ineluctably to improve, fervently optimistic, relentlessly aspiring, [and] spiritually alert . . . .”46 If Brooks is right about the American character, then we should expect American lawmaking to be future-oriented, and given the demands of today’s environment, rapidly becoming even more so.

It is only natural that law should share this future-oriented perspective. Law is a practical discipline. It affects and is affected by the world.47 If

---

44 The Federalist No. 14 (James Madison).
45 David Brooks, On Paradise Drive: How We Live Now (and Always Have) in the Future Tense 263 (2004); see also id. at 123, 255 (“An American is thus imbued with a distinctive orientation: future-mindedness. . . . From the start, Americans were accustomed to thinking in the future tense. They were used to living in a world of dreams, plans, innovations, improvements, and visions of things to come.”); Jay Griffiths, A Sideways Look at Time 82 (1999) (“In America, news is preferred to history, the present to the past. Novelty is rated; the old is discarded. The new is privileged over the old.”).
46 Brooks, supra note 45, at 269.
people constantly look ahead in their daily living, law unavoidably will do so as well.\textsuperscript{48}

Consider, for example, criminal law. Because a defendant's past misconduct is an important determinant of his or her future status, and because a defendant's conduct is measured exclusively against pre-existing rules, criminal law superficially seems very past-oriented. Looking at criminal law from another perspective, however, reveals a different aspect. Most agree that there are five key objectives of criminal prosecution and punishment: retribution, general deterrence of all potential offenders, specific deterrence of the particular offender, incapacitation, and rehabilitation.\textsuperscript{49} Of those five, only retribution focuses on remembering the past.\textsuperscript{50} The others are concerned with the likely future conduct of the wrongdoer or others, and the effect of that future conduct on society. This imbalance reflects our belief that remembering the past by punishing wrongdoers is usually a poor second best to maximizing social welfare by preventing future wrongdoing.\textsuperscript{51} The same philosophy is reflected in other aspects of criminal law, such as sentencing, parole, pretrial detention,\textsuperscript{52} the criminalization of attempts,\textsuperscript{53} and the recent emphasis on prevention.\textsuperscript{54}

\textsuperscript{48} See Scott J. Shapiro, Legality 119 (2011) ("[T]he fundamental rules of legal systems are plans."); Andrew E. Taslitz, Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future, 58 Rutgers L. Rev. 195, 197 (2005) ("Most legal rules, constitutional or otherwise, are justified by preventing future harms or obtaining future benefits.").

\textsuperscript{49} See, e.g., Principled Sentencing: Readings on Theory and Policy 1, 53-54, 101, 181 (Andrew von Hirsch & Andrew Ashworth eds., 1992); see also Cassia C. Spohn, How Do Judges Decide?: The Search for Fairness and Justice in Punishment 6-7 (2002) (suggesting another purpose for criminal punishment, namely, "restoration," "a utilitarian justification for punishment that emphasizes repairing harm and rebuilding relations among victims, offenders, and communities").

\textsuperscript{50} Spohn, supra note 49, at 6-16 (explaining that while retribution "look[s] backward to the crime and the criminal," the other rationales for criminal punishment are utilitarian and "look forward to future consequences or results").

\textsuperscript{51} See 4 William Blackstone, Commentaries 248-49 ("And indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past . . . ."); Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 Calif. L. Rev. 323, 326 (2004) ("[O]ne of the main purposes of the criminal law remains the instrumental one of reducing harmful wrongdoing."); Herbert Wechsler, The Challenge of a Modern Penal Code, 65 Harv. L. Rev. 1097, 1105 (1952) ("While invocation of a penal sanction necessarily depends on past behavior, the object is control of harmful conduct in the future.").

\textsuperscript{52} See Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 188 (2007) ("Today, the criminal sentence is related, primarily, to prior criminal history as a proxy to future offending . . . . The prediction of future dangerousness has begun to colonize our theories of punishment."); id. at 187 ("In the parole context, we observe a deliberate shift from using the new science of crime to find the right rehabilitative treatment to using probabilities to predict success and failure on parole."); see also 18 U.S.C. § 3142(g) (2006) (authorizing pretrial detention based on the risk of future flight from prosecution or future danger to the community).

\textsuperscript{53} See Barbara Baum Levenbook, Prohibiting Attempts and Preparations, 49 UMKC L. Rev. 41, 63 (1980) (advocating criminalizing preparations as well as attempts).

\textsuperscript{54} See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1429 (2001) ("During the past several decades, the justice system's focus has shifted from punishing past crimes to preventing future violations through the incarceration
Other areas of law, such as tort law and contract law, display equally fundamental orientations toward the future.

We also tend to overlook the future-orientedness of the tasks most lawyers perform much of the time. Although we usually imagine lawyers making closing arguments or cross-examining witnesses at trial, those activities are actually rather rare, except on television. Many lawyers spend the bulk of their time providing advice about non-litigation matters. Their clients are Holmesian "bad men" who want to know if they can do something that they would like to do without getting themselves into trouble. As Max Radin put it, lawyers' "business is prophecy . . . ." This is true not just of business and regulatory lawyers, but also of litigators, both civil and criminal. While litigators spend some time consulting precedents and attempting to reconstruct past facts, their predictions about what courts will do drive their choices about how to present a case and whether to recommend a compromise. Thus, in many aspects of the law, and in many of the tasks that lawyers perform, the future has always played a larger role than is widely assumed.

Therefore, although its influence is frequently underestimated, the future has always played a powerful role in law. Moreover, the prominence of that role has grown dramatically during the past century, especially with respect to lawmaking.

55 See John C. P. Goldberg, Twentieth-Century Tort Theory, 91 GEO. L.J. 513, 544 (2003) (surveying various theories of tort law and noting that economists believe that "the purpose of tort law is to promote overall social welfare by deterring accidents in the future"); Jeffrey J. Rachlinski, Misunderstanding Ability, Misallocating Responsibility, 68 BROOK. L. REV. 1055, 1056 (2003) (noting that one of the two purposes of tort law is to deter "socially undesirable conduct by forcing people to pay for the harm caused by actions with excessive social costs").


57 See Marc Galanter, The Vanishing Trial, DISP. RESOL. MAG., Summer 2004, at 3, 3 ("[T]he portion of dispositions . . . by trial today (1.8 percent) is less than one sixth of what it was in 1962.").

The relationship between past and future in the development of legal doctrine is complicated. Law is made by several different methods. Those methods include written constitutions, judicial decisions, statutes, treaties, administrative rulemaking, and administrative adjudication. Each of those methods possesses its own distinctive temporality.

The product of a particular method of lawmaking can vary along at least five temporal dimensions, each of which can be conceived of as a continuum. The first dimension concerns a law’s direction, that is, whether it applies retrospectively (such as the common law) or prospectively (such as constitutions). The second dimension concerns a law’s duration, that is, whether it is enduring or transient. While there is some variation within each type of law, some types of law (such as constitutions) generally endure longer than other types of law (such as administrative adjudications) because the products of some lawmaking processes are either better adapted to long-term needs or more resistant to change. Relatively more enduring law might be said to possess a characteristically longer half-life. The third dimension concerns the speed with which a law is made, that is, whether it is made quickly, or whether it is the product of a gradual or drawn out process. Some types of law (such as the common law) are made by evolutionary processes and others (such as constitutions) are made by avulsive revolutionary processes. The fourth dimension concerns the basis, or raw material, on which a law is made, that is, whether it principally rests on information gleaned from the past (such as the common law) or on predictions about the future (such as statutes). Finally, the fifth dimension concerns a law’s purpose, that is, whether it is intended to preserve the past by remedying something that has occurred (such as the common law), or to influence the future (such as administrative regulations). Arguably, the fifth dimension is the most important dimension of the temporality of lawmaking because it influences the lawmakers’ choices about each of the other four

---

59 See Liaquat Ali Kahn, Temporality of Law, 40 McGeorge L. Rev. 55, 65 (2009) (“Laws are enacted either for definite or indefinite durations . . . . Most laws prescribe no date for their expiration; they continue to exist and function for an indefinite duration . . . until specifically repealed. Some laws exist but are no longer used. Laws not used for a long duration may lose their validity, a circumstance known as desuetude.”).

60 As an example, some precedents may be viewed as more binding and resistant to change than others. Abraham Lincoln, The Dred Scott Decision, in The Language of Liberty: The Political Speeches and Writings of Abraham Lincoln 211, 214 (Joseph R. Fornieri ed., 2009) (“Judicial decisions are of greater or less authority as precedents, according to circumstances.”); see also Michael J. Gerhardt, Essay, Super Precedent, 90 Minn. L. Rev. 1204, 1205 (2006) (contrasting the legal status of “super precedent” with that of “super statutes”).

61 The term “half-life” refers to “[t]he time in which the quantity of a substance (or the number of similar objects) in a sample decreases by half . . . .” 6 Oxford English Dictionary 1037 (2d ed. 1991).
dimensions.

Some aspects of each method of lawmaking are backward-looking and others are forward-looking. For example, statutes that are intended to regulate future conduct, and that operate only prospectively, may have been enacted because of a problem that occurred in the past, or may have been modeled on a measure previously adopted by a different polity. As a further example, court decisions that are focused on resolving a particular dispute that arose in the past rely on earlier court decisions, or other pre-existing sources of law, and formally operate only retrospectively. Nevertheless, they may guide later courts in resolving disputes that will arise in the future. Similarly, a statute may be future-oriented in the sense that it is based on a prediction about what will be most conducive to future societal welfare but, paradoxically, may lock in that future-oriented rule for a long period of time so that the rule stays in effect even when the prediction about the future on which it is based becomes obsolete.

Moreover, law is made by a system. No method of lawmaking is exclusive; instead, we utilize a blend. For example, legislatures enact general rules by statutes ex ante, then agencies elaborate on them and reshape them by promulgating regulations ex ante, and finally courts make these forward-looking types of rules more specific by performing case-by-case adjudication ex post. Similarly, the avulsiveness of legislative transformation may be softened by post-enactment common law interpretation, elaboration, and application. The adoption of a forward-looking legal rule often is only the first step in the lawmaking process. That rule then must be applied to specific past situations by courts or agencies. As a part of that process, ambiguities or gaps in the rule may be exploited by courts or administrative law judges to subtly change the content of the rule in order to make it more suitable for solving past problems, thus tempering the rule’s future-orientedness with a small dose of past-orientedness. If the result is undesirable, then the legislature may step in again. To some extent, then, the strengths and weaknesses of one method of lawmaking may be offset by the strengths and weaknesses of the others. In addition, it is possible to rebalance the blend of lawmaking methods from time-to-time as circumstances warrant.

---

63 See Linda Hamilton Krieger, Afterword, Socio-Legal Backlash, 21 BERKELEY J. EMP. & LAB. L. 476, 485 (2000) (arguing that courts can undermine a transformative statute’s effectiveness by interpreting ambiguities in a manner consistent with the familiar pre-transformation attitudes which the statute was intended to replace).
64 Matthew C. Stephenson, Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts, 119 HARV. L. REV. 1035, 1070 (2006) (“Legislators who delegate interpretative power must pick the agent to whom they will delegate . . . . One of the most basic decisions a legislator must make in this regard is whether to delegate to an administrative agency or to the courts.”).
On balance, though, each method of lawmaking can appropriately be characterized as either predominantly past-oriented or predominantly future-oriented. As it happens, the predominantly future-oriented methods of lawmaking have become increasingly numerous and important. We now make law with a very different attitude, and in very different ways, than we used to. Specifically, the roles of statutes, treaties, and administrative regulations have expanded, while the roles of constitutional text and the common law have shrunk. In addition, the common law—arguably the most past-oriented method of lawmaking—has been recast and deployed in new ways calculated to emphasize its future-oriented aspects. The overall trend is clear: in lawmaking of every sort, and in the relative proportions in which the methods of lawmaking are employed, the role of the past is waning, and the role of the future is waxing. The common law has been dethroned, and statutes, treaties, and regulations have been enthroned in its place. As a consequence, law today is surprisingly future-oriented, and it is rapidly becoming more so. Law’s memory of past law still matters, of course, but the influence of the past in the lawmaking process is declining.

II. THE INCREASING FUTURE-ORIENTEDNESS OF LAWMAKING

A. The Shift from Natural Law to Pragmatism

Perhaps the best definition of natural law is the one offered by Cicero:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting . . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature . . . .

---

65 CICERO, DE RE PUBLICA DE LEGIBUS 211 (Clinton Walker Keyes trans., Harvard Univ. Press 1961) (1928); see also Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.) 392; 7 Co. Rep. 1a, 12b (“The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex oeterna, the moral law, called also the law of nature.”);
Natural law has been an enduring and influential legal theory. It can be traced back as far as Heraclitus, who spoke of “a divine law” by which “all the laws of men are nourished.” It was the nurse maid of the common law, Blackstone endorsed it, and it still has adherents today.

By the beginning of the twentieth century, if not before, however, this theory of law had been largely cast aside. What had been a system of rules based upon natural law—a system in which nature, as reflected in religion and ancient moral philosophy, provided the controlling legal principles—was replaced by a system of law based upon pragmatism. This new approach resulted from enthusiasm for science and acceptance of the notion that law could be used to promote and to regulate economic activity. It looked less to what had been done in the past and more to

---

H.L.A. Hart, The Concept of Law 182 (1961) (defining natural law as the theory “that there are certain principles of human conduct, awaiting discovery by human reason, with which man made law must conform if it is to be valid”).


67 See Surocco v. Geary, 3 Cal. 69, 73 (1853) (“The common law adopts the principles of natural law . . .”).

68 1 Blackstone, supra note 51, at ’41 (“This law of nature, being . . . dictated by God himself, is of course superior in obligation to any other.”).

69 E.g., John Finnis, Natural Law and Natural Rights 59, 85–90 (1980) (describing seven basic forms of “human good,” and noting that there are “countless objectives and forms of good” whose pursuit is made possible by the “inclinations and urges of one’s nature”).

70 See Karl N. Llewellyn, The Bramble Bush 34, 36 (1930) (observing that for centuries “law was felt as something ordained of God, or even as something inherently right in the order of nature,” but describing that view as “superstition”); Benjamin Fletcher Wright, Jr., American Interpretation of Natural Law 276 (1931) (explaining that “the concept of natural law was generally discarded, and frequently explicitly repudiated, by American political theorists after the Civil War,” but nevertheless continued to influence judicial decision-making for the rest of the nineteenth century).


72 Brian Z. Tamanaha, Law As A Means To An End 1 (2006) (“Today, law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilized in the furtherance of ends. A few centuries ago, in contrast, law was widely understood to possess a necessary content and integrity that was, in some sense, given or predetermined.”); see also Robert Samuel Summers, Instrumentalism and American Legal Theory 23–26 (1982) (arguing that “pragmatic instrumentalism” was the dominant force in American legal thought during the twentieth century); Cornell West, The American Evasion of Philosophy: A Genealogy of Pragmatism 5 (1989) (describing pragmatism as “a future oriented instrumentalism”).

73 Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy 112 (1992) (“As law became increasingly implicated in the process of promoting economic growth, the earlier natural rights justifications for the judicial function began to be overwhelmed by the overtly instrumental use of private law to advance utilitarian objectives.”); see
what it would make sense to do for the future.\textsuperscript{74} Gradually, law came to be seen as possessing only a loose connection to religion or morality, and as having less to do with “ought,” than with “is” (or, perhaps, with “will be”).\textsuperscript{75} As Oliver Wendell Holmes, Jr. observed nearly a century ago, “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”\textsuperscript{76} As a result of this shift in attitudes about the nature and sources of law, a great deal of early law—and early theory about law and lawmaking—was rendered obsolete.

With the passage of years, the Blackstonian notion that judges merely “declare” or “find” pre-existing law rather than create new law—once a mainstay of jurisprudence that would make perfect sense to a natural law theorist for whom legal rules are immutable and eternal—began to seem quaint, or even a bit ridiculous. As one English judge joked:

![Image](https://via.placeholder.com/150)

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him knowledge of the magic words Open Sesame. . . . But we do not believe in fairy tales any more.\textsuperscript{78}

\textit{also} Holmes, \textit{supra} note 56, at 40 (“[T]he law does undoubtedly treat the individual as a means to an end, and uses him as a tool to increase the general welfare at his own expense.”).

\textsuperscript{74} Richard A. Posner, \textit{Book Exchange, Legal Pragmatism Defended}, 71 U. CHI. L. REV. 683, 684 (2004) (“Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty.”); see also Richard G. Singer, \textit{Just Deserts: Sentencing Based on Equality and Desert} 16 (1979) (“The crux of this philosophy is the offender’s future actions, and the future actions of others, not their past actions . . . . [T]he orientation of the utilitarians is the future . . . .”).

\textsuperscript{75} See Hans Kelsen, \textit{General Theory of Law and State} 5 (1945) (arguing that the science of law has nothing to do with justice or morality). This is illustrated by, among other things, the wild proliferation of regulatory offenses and other malum per se crimes.


\textsuperscript{77} See 1 Blackstone, \textit{supra} note 51, at ‘69 (stating that courts are “not delegated to pronounce a new law, but to maintain and expound the old one”).

\textsuperscript{78} Lord Reid, \textit{The Judge as Law Maker}, 12 J. SOC’Y PUB. TCHRS. L. (n.s.) 22, 22 (1972); see also 2 John Austin, \textit{Jurisprudence} 655 (Robert Campbell ed., London, John Murray, Albemarle Street, 4th ed. 1873) (referring to the Blackstonian “childish fiction . . . . that judiciary or common law is not made by [judges], but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges”); Kermit Roosevelt Ill, \textit{A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity}, 31 Conn. L. Rev. 1075, 1076 (1999) (“Once it was believed that the common law had a positive source independent of judicial decisions, but this view has no modern adherents.”).
In an era dominated by the common law and by a relatively small number of loosely worded statutes, how judges interpreted and applied precedents and legislation in particular cases involving novel issues presented by a rapidly evolving society was what mattered. History and formalism were downplayed. Eventually, Oliver Wendell Holmes, Jr. defined law simply as predictions about what judges are likely to do. In his words:

[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right . . . . The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Others followed his lead, and broadened his notion to include all officials, not merely judges, since some non-judges had in the meantime become important lawmakers.

This development represented a momentous shift in attitudes about law: from eternal to transitory, from God-given to man-made, and from

79 A related change in the attitude about law was the abandonment of historical jurisprudence. "Historical jurisprudence" is the theory that law "is first developed by custom and popular faith, next by jurisprudence—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver." FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 30 (Abraham Hayward trans., photo. reprint 1975) (1831). An important strain of legal thought in the nineteenth century, I ROSCOE POUND, JURISPRUDENCE 63 (1959), and an intermediate step between natural law and pragmatism, historical jurisprudence had been consigned to the dustbin by the beginning of the twentieth century. Harold J. Berman, Toward an Integrative Jurisprudence: Politics, Morality, History, 76 CALIF. L. REV. 779, 794–96 (1988).

80 Holmes, supra note 30, at 457, 458, 461; see also Oliver Wendell Holmes, Jr., Book Notice, 6 AM. L. REV. 723, 724 (1872) ("The only question for the lawyer is, how will the judges act?"); Max Radin, Case Law and Stare Decisis: Concerning Prűjudizienrecht in Amerika, 33 COLUM. L. REV. 199, 211 (1933) ("[L]aw essentially is an expectation."); Wesley G. Skogan, Judicial Myth and Judicial Reality, 1971 WASH. U. L.Q. 309, 310 ("In reality, law is then merely a set of expectations about judicial behavior.") (citing HEINZ EULAU & JOHN SPRAGUE, LAWYERS IN POLITICS 81 (1964)).

81 E.g., RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 225 (1990) ("The law is not a thing [judges] discover; it is the name of their activity. They do not act in accordance with something called 'law'—they just act as best they can. . . . The important thing is that law is something that licensed persons, mainly judges, lawyers, and legislators, do . . . .") (footnote omitted); Jerome Frank, ARE JUDGES HUMAN? Part II: AS THROUGH A CLASS DARKLY, 80 U. PA. L. REV. 233, 236 (1931) ("For the rights and duties of his client under any legal document a lawyer drafts or on which he gives advice are nothing more and nothing less than what may in the future be decided by some court in a lawsuit involving those rights.").

82 See Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431, 456 (1930) ("[T]he center of law, is not merely what the judge does . . . but what any state official does, officially.").
inherently knowable to something that can only be guessed at (or, more optimistically, predicted). The past remained relevant to some extent, but only as a means to an end, and conformity to the past was no longer viewed as an end in itself.\(^8\) That shift in attitude helped to free the legal system to make law in new ways that were more future-oriented than past-oriented.\(^4\)

B. The Displacement of Constitutional Text by Common Law Interpretation

Because the creation of a constitution generally precedes all other forms of lawmaking within a polity, and because constitutions are intended to be permanent,\(^8\) and may endure for lengthy periods,\(^8\) constitutions are generally thought of as backward-looking.\(^8\) By their nature, however, constitutions are inherently forward-looking. A constitution typically is not written unless there is a desire to begin afresh, to break from the past, and to establish new principles or a new set of institutional arrangements deemed better suited to the demands of the future. “Its goal is to set in motion a new nation with a spirit of its own, a tool for progressing toward some goal—‘a more perfect Union,’ perhaps. It looks forward. It contemplates progress from the less perfect toward the more perfect.”\(^8\)

\(^1\) See CARDOZO, supra note 14, at 102 (“Not the origin, but the goal, is the main thing.”); Holmes, supra note 30, at 474 (“[O]ur only interest in the past is for the light it throws upon the present.”).

\(^4\) See, e.g., HORWITZ, supra note 73, at 2 (“As judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.”); Henry P Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 388 (1981) (characterizing the “general decay of stare decisis” as “the manifestation in legal thought of the marked, accelerating, and apparently irreversible decline in the belief of permanent ordering”); see also ADAM & GROVES, supra note 18, at 202 (“When human beings begin to assume ownership of the future and start to shape it to their design, the belief in providence tends to be deposed from its dominant cultural position and displaced by the pursuit of progress.”).

\(^8\) See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821) (“[A] constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it.”); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (explaining that because the creation of a constitution is “a very great exertion” that cannot be “frequently repeated,” constitutions “are designed to be permanent”).

\(^8\) Although the U.S. Constitution has endured for over two hundred years, the half-life of constitutions throughout the world is shorter than one might expect—about seventeen years. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 129 (2009).

\(^8\) Daniel B. Rodriguez, State Constitutional Failure, 2011 U. ILL. L. REV. 1243, 1280 (“Constitutions do not emerge fully formed as from the head of Zeus. Nor are they properly analogized to a chain novel. They are [an] accretion of devices, structures, and policies. Many of these structures are path dependent; they reflect circumstances and conditions which time has often made anachronistic or, in any event, unsuitable to modern needs.”).

\(^8\) Brown, supra note 13, at 207; see also Kim Lane Scheppel, A Constitution Between Past and Future, 49 WM. & MARY L. REV. 1377, 1379 (2008) (“Because the explicit aim of constitutions
The U.S. Constitution, which was designed to supplant the flawed Articles of Confederation, exemplifies this future-oriented aspect of constitutions. Of course, constitutions are also intended to restrict the options of future generations. In fact, "[t]he very existence of written constitutions ... is evidence of skepticism, if not outright pessimism, about the moral fiber of future citizens ... ." As Henry Hazlitt has remarked, this is an American obsession:

We are constantly trying to protect ourselves in advance against what we may think of and do about a future situation when it arrives and we actually know what it is. In a whole network of constitutional restrictions, traditions, and laws, the American people or their representatives assume their own prescience at the time that they impose the restrictions and their own future incompetence. In brief, we impose our self-restrictions in the mood of an inordinately self-confident father drawing up the conditions of a will for what he assumes is to be a certainly irresponsible and possibly idiotic son.

Theoretically, then, the text of a constitution binds future generations to an enduring set of broad principles and institutional arrangements. But generally is to improve upon an existing condition, the faces of constitution drafters are almost invariably imagined to be turned toward the future, bright with hope.

---

89 See U.S. CONST. pmbl. (stating that its goal is to "secure the Blessings of Liberty to ourselves and our Posterity"); WILLIAM J. BRENNAN JR., The Constitution of the United States: Contemporary Ratification, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 200, 204 (David M. O'Brien ed., 1997) ("Our Constitution was not intended to preserve a preexisting society but to make a new one . . . .").

90 Senator John Potter Stockton, addressing Congress during debate over the Ku Klux Klan Act of 1871, said: "Constitutions are chains with which men bind themselves in their sane moments that they may not die by suicidal hand in the day of their frenzy." JOHN E. FINN, CONSTITUTIONS IN CRISIS 5 (1991); see also ANTONIN SCALIA, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40 (1997) ("It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."); Michael C. Dorf, The Aspirational Constitution, 77 GEO. WASH. L. REV. 1631, 1631 (2009) ("[A] constitution burdens rather than benefits future generations by limiting their political freedom to choose policies that, in their judgment, best serve their interests."). For additional discussion, see Richard Albert, Constitutional Handcuffs, 42 ARIZ. ST. L.J., 663, 665-66 (2010) (defining entrenched constitutional provisions as those that "are intended to last forever and to serve as an eternal constraint on the state and its citizens"), and Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 HARV. L. REV. 657, 697 (2011) (arguing that constitutionalizing legal rules entrenches them against legal change).

91 Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373, 376 (1982).

92 HENRY HAZLITT, A NEW CONSTITUTION NOW 79 (2d ed. 1974).

93 JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 15 (2005) ("The point of constitutional law is to hold the nation to its self-
practically speaking, its ability to accomplish that objective is limited. Even if a constitution is written and difficult to amend, later generations will find ways to change it if they must. Moreover, after twenty or fifty years have passed, some updating almost invariably will be needed.\textsuperscript{94} If a constitution was well-designed, the restraints it imposes on change will be loose enough to allow the polity to shift position slightly as time passes and circumstances evolve.\textsuperscript{95} Otherwise, a constitution that is difficult to amend might either subjugate later generations to their ancestors, or eventually be discarded as obsolete.\textsuperscript{96}

Obviously, the more difficult it is to amend a constitution, the greater the degree of restraint it imposes on succeeding generations’ would-be framers. The text of the U.S. Constitution is highly resistant to change.\textsuperscript{97} Faced with evolving conditions and a founding document that was supposed to be respected, but that could not be readily altered to adapt to changing needs, courts assumed the responsibility for updating the Constitution while interpreting and applying it by utilizing a species of common law decision-making.\textsuperscript{98} Although courts still mention the
given, fundamental commitments over time . . . .\textsuperscript{99} See Richard S. Kay, Constitutional Chrononomy, 13 Ratio Juris 31, 41 (2000) ("Human history tells us that sooner or later every constitution will begin to chafe.").

\textsuperscript{94} See Richard S. Kay, Constitutional Chrononomy, 13 Ratio Juris 31, 41 (2000) ("Human history tells us that sooner or later every constitution will begin to chafe.").

\textsuperscript{95} CARDOZO, supra note 14, at 83–84 ("A constitution states or ought to state not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play."); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the proximity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."); Brown, supra note 13, at 218–19 (suggesting that the Framers (or the Founding Generation) were like good parents who convey sound general principles that their children can apply on their own to guide their future conduct in particular situations).

\textsuperscript{96} The risk of the latter is significant, especially in rapidly evolving times. See ELKINS ET AL., supra note 86, at 131, 137 ("[T]here is a decline in constitutional life spans after World War II.").

\textsuperscript{97} See J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT 46 (Harv. Univ. Press 1965) (1907) ("As a matter of fact it is impossible to secure amendments to the constitution, unless the sentiment in favor of change amounts almost to a revolution."); Speeches of Patrick Henry in the Virginia State Ratifying Convention, in THE ANTI-FEDERALIST 293, 301 (Herbert J. Storing ed., 1985) (1788) ("The way to amendment, is, in my conception, shut.").

\textsuperscript{98} See Ferejohn & Sager, supra note 20, at 1961 ("Article V and a judiciary that has acquired the authority of constitutional oversight . . . encourage a constitutional practice in which judges play a major role . . . ."); Sandalow, supra note 13, at 1046 ("Reference to the ‘important objects’ of the framers rather than their specific intentions is, no doubt, a necessity if the evolving needs of the nation
Constitution in their opinions, today's decisions are driven less by the words of the Constitution than by what courts have said those words mean. As one scholar explained:

The tests brought to bear in determining the validity or invalidity of challenged governmental action are ... formulated in terms that paraphrase or refine the simpler and usually more general words of the Constitution itself.

... The constitutional text is down there somewhere under this massive overlay of case law development and refinement, but the usual contest between advocates in the Supreme Court, and more often than not between or among the Justices, is the kind of contest that has characterized the common law judicial process at least since the days of Sir Edward Coke, a battle over cases and what they should be taken to stand for.

... The literal text of the Constitution ... figures in contemporary constitutional adjudication only at one remove, that is, as the words of the original text have been construed, expounded, and developed by successive generations of Supreme Court Justices.

In the two centuries of our life as a constitutional republic, a vast and intricate exegesis has been imposed on the lean text of the original constitutional document. ... [T]he student or practitioner of constitutional law, or the constitutional judge, is working not just from the text but with an authoritative literature, authoritative because the doctrine of precedent makes it so.99

---

99 Harry W. Jones, Lecture, Precedent and Policy in Constitutional Law, 4 Pace L. Rev. 11, 12–14 (1983); see also Harry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 770–72 (1988) (explaining that in constitutional adjudication "the absolute primacy of text over gloss" cannot be maintained; observing that "the case law overwhelms the text and historical understanding"); and stating that "the Supreme Court is concerned not with the Constitution, but with constitutional law, which consists largely (albeit not entirely) of case law"); Charles Evan Hughes,
For example, the text of the First Amendment to the U.S. Constitution consists of forty-five words. It takes up one-tenth of a page in the latest edition of the annotated United States Code. The one sentence summaries of the cases applying it, by contrast, consume more than 2000 pages of fine print in that same publication, and the collection of cases summarized there is far from comprehensive. Based upon quantity alone, the constitutional text is dwarfed by the court decisions interpreting and applying it. In the realm of constitutional law, common law precedents are more dog than tail.100

Ironically, a written constitution actually leaves courts more freedom to innovate than do other sources of law, such as statutes and common law precedents.

Under the United States experience, contrary to what has sometimes been believed when a written constitution of a nation is involved, the court has greater freedom than it has with the application of a statute or case law. In case law, when a judge determines what the controlling similarity between the present and a prior case is, the case is decided. . . . And in interpreting legislation, when the prior interpretation, even though erroneous, is determined after a comparison of facts to cover the case, the case is decided. But this is not true with a constitution. The constitution sets up the conflicting ideals of the community in certain ambiguous categories. These categories bring along with them satellite concepts covering the areas of ambiguity. . . . But no satellite

---

Speech of May 3, 1907, in THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 144 (David J. Danelski & Joseph S. Tulchin eds., 1973) ("We are under a constitution, but the constitution is what judges say it is . . . .")).

100 This discussion focuses on the U.S. Constitution, but some state constitutions are very different. State constitutions tend to be more easily amended, see John Dinan, “The Earth Belongs Always to the Living Generation”: The Development of State Constitutional Amendment and Revision Procedures, 62 REV. OF POL. 645, 645 (2000) (noting that “the relatively flexible state procedures (which have produced nearly 150 constitutions, as well as some 6000 amendments to the current documents) have had a variety of harmful effects”), and more detailed, than their federal counterpart. See Rodriguez, supra note 87, at 1262 n.103 ("State constitutions are famously verbose when considered in comparison to the national Constitution."). When a constitution is both detailed and easily amended, the pressure on the judiciary to update it by means of interpretation is diminished.
concept, no matter how well developed, can prevent the court from shifting its course, not only by realigning cases, which impose certain restrictions, but by going beyond realignment back to the over-all ambiguous category written into the document. The constitution, in other words, permits the court to be inconsistent. The freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both.  

Courts use the ambiguities inherent in the Constitution to overcome the greater specificity of precedents interpreting the constitution. This allows the meaning of the Constitution to change without first clearing the nearly insuperable obstacles to amendment. Because one sort of change (amendment of text) was allowed only a narrow scope, another sort of change (reinterpretation of text) filled the gaps. This notion of a “living constitution,” though not without its drawbacks, is justifiable for a variety of reasons. For one thing, if a constitution is too impervious to modification, the result may be widespread social unrest or even revolution. More fundamentally, as the Founders themselves

---

101 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7–8 (1949).
102 See id. at 61 (“The consequence of this is that a constitution cannot prevent change; indeed by permitting an appeal to the constitution, the discretion of the court is increased and change made possible.”); Lawrence Lessig, Fidelity and Constraint, 65 FORDHAM L. REV. 1365, 1366 (1997) (“Readings of the Constitution change. This is the brute fact of our constitutional past. The Constitution is read at one time to mean one thing; at another to mean something quite different.”).
103 That the Constitution has been amended twenty-seven times would seem to weigh against the characterization of the obstacles to its amendment as “nearly insuperable.” It is noteworthy, however, that the first ten amendments (which are known as the “Bill of Rights”) were adopted in 1791, essentially contemporaneously with the ratification of Constitution itself, that several of the remaining seventeen amendments have been technical or uncontroversial in nature, and that only a tiny fraction of the approximately 10,900 amendments proposed in Congress have been adopted. During the past two hundred years, the Constitution has been amended just once in every thirteen years on average, and during that time there have been eleven decades in which it was not amended at all. Interestingly, however, the number of amendments proposed and adopted increased significantly during the 1900s as compared to the 1800s (1676 and four for the 1800s, as compared to 8416 and twelve for the 1900s (through the early 1990s only)). See JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 41, apps. B & C (2d ed. 2003). Even though spectacularly unsuccessful, the recent explosion in the number of constitutional amendments proposed in Congress is itself an indication of just how future-oriented our attitude toward even the Constitution has become. See Kathleen M. Sullivan, Address, Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever, 17 CARDOZO L. REV. 691, 691 (1996) (noting that Congress is considering more constitutional amendments than in recent memory).
recognized, "[t]here ought to be a capacity to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity." 106 The Founders did not say, and it is unlikely that they intended, that we should allow ourselves to choke to death on their words. 107 After all, "[t]he Constitution . . . is not a suicide pact." 108

Originalists and textualists deplore this approach to constitutional adjudication, 109 but they have difficulty applying their own approaches consistently. 110 Their own interpretive techniques, although influential, have been criticized, 111 and appear not to have carried the day. 112 Some of

altering the institutions of their State, unless the necessity for such change be demonstrated; and since this necessity cannot arise without danger, the State may easily be overthrown before the new order of things is established.").

106 THE FEDERALIST NO. 34 (Alexander Hamilton); see also Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."); Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."); Julliard v. Greenman (The Legal Tender Case), 110 U.S. 421, 439 (1884) ("A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages, and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract.").

107 Some have argued that it is the intent of the ratifiers rather than the intent of the Founders that is relevant. See, e.g., Charles A. Lofgren, The Original Understanding of Original Intent?, 5 CONST. COMMENT. 77, 79 (1988) (arguing that the authors of the Constitution rejected framer intent but were hospitable to ratifier intent). They have a point, but the distinction is immaterial in the context of this Article.

108 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); see also Jean-Jacques Rousseau, On the Social Contract or Essay About the Form of the Republic, in ON THE SOCIAL CONTRACT 157, 168 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762) ("[T]he general will that should direct the State is not that of a past time but of the present moment . . .").

109 See Champion v. Ames (The Lottery Case), 188 U.S. 321, 371 (1903) ("In countries whose fundamental law is flexible it may be that the homely maxim, 'to ease the shoe where it pinches,' may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts.").


111 See, e.g., Baade, supra note 1, at 337 ("[N]either the 'Founding Fathers' nor the 'Founding Generation' viewed their 'original intent' or the 'original understanding' of the Constitution prevailing between 1787 and 1791 as binding on future generations faced with the task of constitutional interpretation.") (footnote omitted); Terrance Sandalow, Judicial Protection of Minorities, 75 MICH. L. REV. 1162, 1193 (1977) ("[T]he evolving content of constitutional law is not controlled, nor even significantly guided, by the Constitution, understood as an historical document."); Theodore P. Seto, Originalism v. Precedent: An Evolutionary Perspective, 38 LOY. L.A. L. REV. 2001, 2003 (2005) ("The more a culture learns after the text becomes fixed, however, the more problematic originalism becomes.").
them essentially have conceded as much.\textsuperscript{113}

Therefore, even if it is concealed because courts (whether wisely or not) are hesitant to admit it, and regardless of whether it is a good idea or a bad idea, common law interpretation of the Constitution has largely supplanted constitutional text as the de facto basis of constitutional law.\textsuperscript{114} This development makes constitutional doctrine more future-oriented than it otherwise would be.

C. The Erosion of Stare Decisis

Adjudication is inherently backward-looking. It addresses past events, and it does so primarily in light of previously existing law. As Aristotle observed, “a juryman [is] an example of one judging the past . . . .”\textsuperscript{115} Jeremy Bentham said that judges make law after the fact “just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it.”\textsuperscript{116} More recent scholars agree that in “the judicial context . . . the emphasis is upon doing justice based upon events in the past.”\textsuperscript{117} In particular, they have observed

\textsuperscript{112} See Norman Marsh, Law Reform in the United Kingdom: A New Institutional Approach, 13 WM. & MARY L. REV. 263, 266 (1971) (“[T]he law cannot stand still.”); SCALIA, supra note 90, at 107 (“[W]hen a student asked about the role of text in constitutional analysis, an American professor’s response was: ‘Forget about the text!’”); see also LOWENTHAL, supra note 7, at 70 (“[T]he most faithful followers of tradition cannot avoid innovating, for time’s erosions alter all original structures and outdate all previous meanings.”).

\textsuperscript{113} See, e.g., James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forbears were) as to be unaware that judges in a real sense ‘make’ law. But they make it as judges make it, which is to say as though they were ‘finding’ it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.”), superseded on other grounds, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236 (codified in scattered sections of 12 U.S.C.); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CHI. L. REV. 849, 864 (1989) (“I hasten to confess that in a crunch I may prove a faint-hearted originalist.”); see also DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 38-44 (2002) (suggesting that Scalia’s jurisprudence is designed to perpetuate noble myths which he does not believe, but which are, in Duncan Kennedy’s words, “a beneficial illusion,” and that all will be better off if judges pretend to believe in them).

\textsuperscript{114} See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (Scalia, J.) (explaining that it is the Supreme Court’s prior decisions describing the meaning of the Eleventh Amendment, rather than the literal meaning of words of the amendment, that are controlling).

\textsuperscript{115} LANE COOPER, THE RHETORIC OF ARISTOTLE 17 (1932); see also Walter V. Schaefer, Prospective Rulings: Two Perspectives, 1982 SUP. CT. REV. 1, 2 (“Courts normally look back. They apply rules to conduct that has already occurred.”).

\textsuperscript{116} ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 306-07 (1941) (quoting Jeremy Bentham) (internal quotation marks omitted).

\textsuperscript{117} Brett G. Scharffs, The Character of Legal Reasoning, 61 WASH. & LEE L. REV. 733, 758 (2004); see also Jeffrey Abramson, Ronald Dworkin and the Consequence of Law and Political Philosophy, 65 TEX. L. REV. 1201, 1221 (1987) (reviewing RONALD DWORKIN, LAW’S EMPIRE (1986)) (“Judicial decisions, therefore, must be backward-looking” because pre-existing provisions of the constitution or statutes are the primary sources of law).
that "[t]he very notion of planning is alien to adjudication."\textsuperscript{118}

In actuality, however, the question whether adjudication is forward-looking or backward-looking is a matter of degree. "[T]he adjudicative context is not entirely backward-looking; concern for the future and the present may be relevant to judicial choice."\textsuperscript{119} In addition, future litigants are affected by the outcomes of past cases, whether they participated in them or not.\textsuperscript{120} Finally, adjudication is retroactive in the sense that the law announced in a case is usually applied to that case, and to any other case that is not final because it is still pending in a trial court or on direct appeal.\textsuperscript{121} Such adjudicative retroactivity is thought to be legitimate because of the historically-based view that courts find existing law rather than create new law.\textsuperscript{122}

Common law adjudication is decision-making by courts based not on the constitution or on a statute, but instead on reasoning by analogy from precedents.\textsuperscript{123} A precedent is "a decision of a court that furnishes an example or authority for a similar case or a similar question of law arising later in time."\textsuperscript{124} In performing common law adjudication, courts are

\textsuperscript{119} Scharffs, supra note 117, at 758; see also MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 7 (1988) ("The function of resolving disputes faces toward the parties and the past. The function of enriching the supply of legal rules faces toward the general society and the future."); Beryl Harold Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1, 7 (1960) ("One function is to decide the instant case; another is to lay down a rule which may afford some guidance in the future.").
\textsuperscript{120} Anthony D'Amato, Legal Uncertainty, 71 Calif. L. Rev. 1, 51–52 (1983) ("Legislators look forward; courts look backward. Yet the impact of judicial dispute resolution looks forward; future potential litigants are affected by a case they did not participate in.").
\textsuperscript{121} See Jeremy Bentham, A Comment on Commentaries, in A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 3, 50 (J.H. Burns & H.L.A. Hart eds., 1977) ("c. 1774–76") ("[T]he common law . . . is but a series of ex-post facto laws."); Robert Raultou, Oration at Scituate, in AMERICAN LEGAL HISTORY 317, 317 (Kermitt L. Hall et al. eds., 1991) ("Judge-made law is ex post facto law . . . .") But see Meir Katz, Note, Plainly Not "Error": Adjudicative Retroactivity on Direct Review, 25 Cardozo L. Rev. 779, 81 (2004) ("Although courts act as if retroactivity anachronistically reconfigures past decisions as trial error, the doctrine does not address the past at all, but is a statement about the present: Current law must be equally applied to currently open cases. ‘Retroactivity’ in adjudication is thus a misnomer, and, contrary to its literal definition, is not actually a backwards-reaching process.") (footnotes omitted).
\textsuperscript{122} See MICHAEL ZANDER, THE LAW-MAKING PROCESS 393 (6th ed. 2004) ("When a court delivers a ruling which is perceived to change the law the effect is not only for the future. It also affects the past. This is because of the fiction that when it states the law a court is stating the law as it always has been.").
\textsuperscript{123} EISENBERG, supra note 119, at 1 ("Much of our law derives from rules laid down in constitutions, statutes, or other authoritative texts that courts must interpret but may not reformulate. The common law, in contrast, is that part of the law that is within the province of the courts themselves to establish. In some areas of law . . . common law rules predominate. . . . In all areas, even those that are basically constitutional or statutory, they figure at least interstitially."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247 (1990) (defining common law as "any body of law created primarily by judges through their decisions rather than by the framers of statutes or constitutions").
constrained by the doctrine of stare decisis. The doctrine of stare decisis is “a policy of the courts to stand by precedent and not to disturb settled points.”\textsuperscript{125} Stare decisis tethers law’s future to its past. In its strictest form it means that a later court \textit{must} follow the decision of an earlier court.\textsuperscript{126}

Strict forms of stare decisis are highly past-oriented.\textsuperscript{127} As one scholar has observed, “the effect of the rigid English doctrine of precedent is that our judges frequently do have to try to see the law through the eyes of their predecessors.”\textsuperscript{128} The court is supposed to be bound by precedent, and it is supposed to look backward, focusing on the case before it and that case’s predecessor cases. It is not supposed to look ahead, or to purport to create rules to govern future cases.\textsuperscript{129} Future-oriented adjudication is typically regarded as illegitimate. “For a court to decide in advance a case or question not before it would be an exercise of legislative power, binding other courts before which such cases or questions might properly arise later.”\textsuperscript{130} Under classical common law doctrine, then, determination of future rules is reserved to future courts, and present courts are supposed to stay out of their way. The attitude traditionally required of judges has been described as, “[t]he grace to drudge away on today’s problem and the refusal to foreclose tomorrow’s issues.”\textsuperscript{131}

The doctrine of stare decisis, however, is inherently less past-oriented than it seems. To start with, even though judges arguably should be focusing only on the particular case before them, they often do think about what rule would be best for the future when they decide cases. They understand that their decision will be relied upon by other judges in the future, and they do not want to cement an unsound brick of legal doctrine

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{See JAMES ET AL., supra note 22, at 585 (“The doctrine of \textit{stare decisis} is a mandate that courts should give due weight to precedent. It holds that an already established point of law should be followed without reconsideration, provided that the earlier decision was authoritative.”)}.
\item \textsuperscript{127} \textit{See A. L. Goodhart, \textit{Precedent in English and Continental Law}, 50 LAW Q. REV. 40, 41 (1934)} (explaining that in English law, when a prior case is directly on point, “[i]t is more than a model; it has become a fixed and binding rule”). Some question whether stare decisis was ever as strict in America as it has been in England. John Chipman Gray, \textit{Judicial Precedents—A Short Study in Comparative Jurisprudence}, 9 HARV. L. REV. 27, 40 (1895) (“Naturally, considering the character of the people and of institutions, the weight attached to judicial precedent [in America] is somewhat less than in England . . . .”). However, stare decisis historically has exerted powerful force on American courts and has frequently been relied upon to justify decisions. \textit{See Earl Malz, \textit{The Nature of Precedent}, 66 N.C. L. REV. 367, 367 (1988)} (“[R]eliance on precedent is one of the distinctive features of the American judicial system.”).
\item \textsuperscript{128} SIR RUPERT CROSS, \textit{PRECEDENT IN ENGLISH LAW} 207 (1961).
\item \textsuperscript{129} EUGENE WAMBAUGH, \textit{THE STUDY OF CASES} 8 (2d ed. 1894) (“[T]he court making the decision is under a duty to decide the very case presented and has no authority to decide any other.”).
\item \textsuperscript{131} Herman Oliphant, \textit{A Return to Stare Decisis}, 14 A.B.A. J. 71, 75 (1928).
\end{itemize}
\end{footnotesize}
into the masonry wall of the law.\textsuperscript{132}

In addition, because judges must decide what prior decisions are sufficiently similar to the present case to qualify as precedents, the responsibility for determining what a prior decision means always rests with the precedent-following court rather than with the precedent-setting court.\textsuperscript{133} The earlier court can no longer speak; only the voice of the later court is heard.\textsuperscript{134} “It is not what the prior judge intended that is of any importance; rather, it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification.”\textsuperscript{135} In common law adjudication, then, the “most recent exposition by a court of last resort is always the controlling one.”\textsuperscript{136} Rather than being rigidly bound by past decisions, “[a] judge blends old and new to reach her decisions—the current controversy sheds light on past cases and vice versa.”\textsuperscript{137}

Finally, past decisions are not really as old as they seem because while in one sense they remain unchanged, in another sense they evolve over time. “People other than the initial decisionmakers use and talk about, and in the process recharacterize, the decisions of yesterday . . . . Past decisions

\textsuperscript{132} See Llewellyn, supra note 70, at 159 (“Every opinion must be directed forward, it must make sense and give guidance for tomorrow for the type of situation in hand.”); Joseph P. Nadeau, What It Means to a Judge, in HANDBOOK FOR JUDGES 21, 23 (Kathleen M. Sampson ed., 2004) (“Judges must see the present through the lens of the past, but view it with an eye to the future.”); Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 572 n.4 (1987) (“Considering the future implications of today’s decisions is central to the notion of adjudication according to principle.”); Roger J. Traynor, No Magic Words Could Do It Justice, 49 CALIF. L. REV. 615, 625 (1961) (citing Professor Clarence Morris, who notes that “a judge should have at least the day after tomorrow in mind”).

\textsuperscript{133} Richard B. Cappalli, The Common Law’s Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755, 773 (2003); see also Gillette, supra note 11, at 824-25 (“Judicial decisions have characteristics . . . that allow subsequent judges substantial discretion in deciding whether to apply potential precedents. There may be multiple relevant precedents, the selection of one of which leads to different results than if another selection is made from the same plausible set.”).

\textsuperscript{134} Gillette, supra note 11, at 825 (“Linguistic imprecision can prevent the judge in an initial case from characterizing the grounds of her decision in a way that clearly includes or excludes subsequent cases, thus giving judges in those subsequent cases significant latitude to apply or ignore that initial decision.”) (footnote omitted).

\textsuperscript{135} Levi, supra note 101, at 2–3; see also Adrian Vermeule, Judicial History, 108 YALE L.J. 1311, 1313 (1999) (“Federal courts do not consider the judiciary’s internal records as interpretative sources bearing on the meaning of published opinions or judicially-promulgated rules.”) (footnote omitted).

\textsuperscript{136} Baade, supra note 1, at 339; see also Llewellyn, supra note 70, at 47 (“[T]he true rule of the case, to wit, [is] what it will be made to stand for by another later court.”); Bradley Scott Shannon, The Retroactive and Prospective Application of Judicial Decisions, 26 HARV. J.L. & PUB. POL’Y 811, 850 n.193 (2003) (“[W]hat a precedent-setting court might say is never fully ‘binding’ on a later court, at least in the sense that the later, interpreting court always gets the last word.”).

\textsuperscript{137} Linda Meyer, “Nothing We Say Matters”: Teague and New Rules, 61 U. CHI. L. REV. 423, 476 (1994); see also Richard A. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM 374 (1996) (“Realistically, a precedent is the joint creation of the court that decides the case later recognized as a precedent and the courts that interpret that case in later cases.”).
thus come to the present encrusted with society’s subsequent characterizations of and commentary on those decisions.\textsuperscript{138} Accordingly, prior decisions often already have been “updated” even before a later court attempts to apply them, and that “updating” colors the later court’s understanding of their meaning.

The doctrine of precedent has also suffered a significant erosion in power. Formerly, precedents were followed by courts and extremely difficult to change.\textsuperscript{139} Subsequently, precedents came to be viewed as flexible guidelines, which courts of equal rank could alter when necessary to fix past mistakes,\textsuperscript{140} or abandon to help law to grow and to adapt.\textsuperscript{141} Eventually precedents came to be seen by some merely as objects of strategic manipulation employed by skilled judicial craftpersons—a workbench of tools used to conceal the true mechanism for reaching his or her desired result beneath a veneer of legitimacy.\textsuperscript{142} Now, precedents are

\begin{itemize}
\item Schauer, supra note 132, at 574.
\item See 1 BLACKSTONE, supra note 51, at 69–70 (“For it is an established rule to abide by former precedents, where the same points come again in litigation[,] . . . because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments. . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law.”); LORD DENNING, THE DISCIPLINE OF LAW 285 (1979) (“In the latter part of the 19th century, the law held firmly to the doctrine of \textit{stare decisis} . . . .”).
\item See Posner, supra note 8, at 585 (“By rejecting strict \textit{stare decisis} American judges have empowered themselves to alter doctrine to keep abreast of changing circumstances.”); see also Cleveland v. United States, 329 U.S. 14, 28 (1946) (Murphy, J., dissenting) (arguing that the age of the rule announced in a previous case “does not justify its continued existence. \textit{Stare decisis} certainly does not require a court to perpetuate a wrong for which it was responsible . . . .”); Lord Wright of Durley, \textit{Precedents}, 4 U. TORONTO L.J. 247, 276 (1942) (“No Court will be anxious to repudiate a precedent. It will do so only if it is completely satisfied that the precedent is erroneous. If the Court is so satisfied, it is a humiliation which ought not to be put upon it to reproduce and to perpetuate the error.”).
\item Indyka v. Indyka, [1966] 3 All E.R. 583, 591 (“It is the function of courts to mould the common law and to adapt it to the changing society for which it provides the rules of each man’s duty to his neighbour.”); United Australia, Ltd. v. Barclays Bank, Ltd., [1941] A.C. 1, 29 (Lord Atkin) (“When these ghosts of the past stand in the path of justice cranking their mediaeval chains the proper course for the judge is to pass through them undeterred.”).
\item See ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 11 (1985) (“Courts resort to a legal fiction or grasp at a mere hint of an analogy—anything to avoid open confession that they are pouring new wine into old bottles.”); KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES, at x (1929) (“Every lawyer knows that a prior case may, at the will of the court, ‘stand’ either for the narrowest point to which its holding may be reduced, or for the widest formulation that its \textit{ratio decidendi} will allow.”); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 75–91 (1960) (presenting a taxonomy of the tools for analyzing precedent); JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW 193 (1950) (describing precedents as “pegs on which to hang [a] judgment,” rather than as the actual basis for a decision). The profusion of case law may have made this easier. 1 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, at ix (1904) (“A judge may decide almost any question any way, and still be supported by an array of cases.”).
\end{itemize}
overturned more frequently than before. In fact, stare decisis has been so weakened that some have proclaimed it dead. While that may be a bit of an exaggeration—precedent still determines the outcome of many cases, especially below the Supreme Court level—most observers agree that “the doctrine of stare decisis has appreciably eroded.”

One development that has contributed to undermining stare decisis is courts’ increasing reliance on dicta, rather than holding, in applying previous decisions. Strictly speaking, the holding of a case is limited to the facts plus the outcome. Dicta, on the other hand, is anything in a judicial opinion that is not part of the holding. Dicta can help future courts by clarifying a complicated subject or signaling the future direction of the law. Unfortunately, however, courts have lapsed into regularly elevating dicta into holding. The potential diminution in quality this causes is a concern, but the practice also makes the common law process more future-oriented in two ways. First, establishing prospective rules in dicta frees courts from limits imposed by the facts and questions presented by a particular case, thus enabling them to set their own agenda and quasi-legislate. Second, by relying on dicta rather than holding, a later court permits the earlier court to determine the effect of the earlier court’s decision. That function, however, is supposed to be the responsibility of the later court.

Another factor sapping the strength of stare decisis is an uptick in overruling. The United States Supreme Court furnishes a striking example of how much more willing courts are to overrule past decisions than they used to be. Of 219 Supreme Court cases overruled from 1789 to 1999, a

---

143 See Eisenberg, supra note 119, at 135 (“It is widely perceived that the pace of overruling has dramatically increased in the last forty years.”); Jim Chen, Judicial Epochs in Supreme Court History: Sifting Through the Fossil Record for Stitches in Time and Switches in Nine, 47 St. Louis U. L.J. 677, 730 (2003) (“[O]verruling is primarily a phenomenon of the twentieth century.”) (footnote omitted); Fred W. Catlett, The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied, 21 Wash. L. Rev. & St. B. J. 158, 168 (1946) (“Nor can it be denied that there is apparent in the courts of last resort, at the present time, less regard for precedent and prior decision and a greater inclination to examine a question anew in the light of present day conditions . . .”).

144 See Earl M. Maltz, Commentary, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 494–96 (listing forty-seven pairs of overruled and overruling decisions from 1960 through 1979).

145 James et al., supra note 22, at 680; Scalia, supra note 90, at 12.

146 Morris L. Cohen et al., How to Find the Law 16 (9th ed. 1989); Judith M. Stinson, Why Dicta Becomes Holding and Why It Matters, 76 Brook. L. Rev. 219, 223 (2010).


148 Stinson, supra note 146, at 221; Leval, supra note 147, at 1269.

149 Stinson, supra note 146, at 221; Leval, supra note 147, at 1255.

150 Stinson, supra note 146, at 228.

151 See United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J.) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”).
period of 210 years, just twenty-eight overrulings occurred during the first 105 years (1789–1894). During the second 105 years (1895–1999), by contrast, there were 191 overrulings, nearly seven times (6.82) as many. Similarly, while the overall average was 1.04 overrulings per year, the average number of overrulings per year during the first fifty years of the period (1789–1838) was just 0.06, while the average number of overrulings per year during the most recent fifty years of the period (1950–1999) was 2.46. Other courts have displayed a similar pattern.

When a court overrules a precedent, it adopts a more future-oriented perspective. It looks to the needs of the future, rather than to the decisions of the past, to determine what the law “is.” Because overruling has become more frequent, the common law has become more future-oriented.

Some recent forms of judicial decision-making, however, are even more future-oriented than overruling. In the last fifty years or so, courts have occasionally engaged in a practice called “prospective overruling.” At least three variations of this practice have been identified. “Pure prospective overruling” occurs when a court announces a new rule, but does not apply it in the case before it. “Prospective overruling” occurs when a court announces a new rule, but makes it applicable only to incidents which occur after a specified future date. “Explicit signaling” occurs when a court applies the old rule in the case before it, but describes the new rule and states its intention to apply the new rule in future cases.

When courts engage in any form of prospective overruling, they announce that a precedent is overruled, but they decline to apply the new rule of law to the case before them. Prospective overruling allows a court to quickly promulgate general, forward-looking rules like a legislature, rules that a court might be reluctant to announce if it had to apply them retrospectively to the parties before it (even though the change might represent a badly needed reform) because doing so might punish


See, e.g., Charles N.W. Keckler, The Hazards of Precedent: A Parameterization of Legal Change, 80 MISS. L.J. 1, 123 & tbl.1 (2010) (reporting that the Illinois Supreme Court overruled 504 of its prior decisions from 1819 to 2005, a period of 186 years, and that 360 (or 71.4%) of these overrulings occurred during the period 1951 through 2005, the last 54 years of that span).

See Eisenberg, supra note 119, at 127–28 (explaining prospective overruling and explicit signaling).

See, e.g., Linkletter v. Walker, 381 U.S. 618, 622, 628 (1965) (prospectively overruling a previous decision, and acknowledging that “[a]t common law there was no authority for the proposition that judicial decisions made law only for the future,” but stating that “in appropriate cases the Court may in the interest of justice make the rule prospective”).
those who relied in good faith on the stability of the pre-existing law. This practice has been criticized on the ground that it "crosses the Rubicon that divides the judicial and the legislative powers." Putting aside questions about its legitimacy, by freeing the common law from the prohibition on making rules for the future, prospective overruling represents another way in which common law adjudication has become quasi-legislative, and thus more future-oriented in character.

Courts also increasingly engage in "anticipatory overruling." A lower court utilizing this technique declines to follow an apparently binding precedent of a higher court because the lower court believes that the higher court will overrule the precedent as soon as it has the opportunity to do so. In employing this arguably illegitimate technique, the lower court is essentially predicting what the higher court eventually will do, and conforming its decision to that prediction rather than to precedent.

156 See Kenneth Diplock, The Courts as Legislators, in THE LAWYER AND JUSTICE 281, 281 (1978) (noting that the retrospective application of judicial decisions was one reason why courts were reluctant to correct past errors or adapt to changing circumstances).

157 Lord Devlin, Judges and Lawmakers, 39 MOD. L. REV. 1, 11 (1976); see also EISENBERG, supra note 119, at 131 ("[If] the court adopts the technique of pure prospective overruling and refuses to apply the new rule even to the immediate transaction, it breaks the intimate tie between the dispute-settlement and rule-enrichment functions."); Shannon, supra note 136, at 841 ("[P]rospectivity-based approaches are quite inconsistent with [a] basic understanding of the nature of the adjudicative function."). But see Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1080 (1997) ("[N]o independent constitutional authority [exists] for the proposition that retroactivity is a definitive component of the judicial power.").

158 Compare Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 105 (1993) (Scalia, J., concurring) ("Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis."); with Albert Kocourek & Harold Koven, Renovation of the Common Law Through Stare Decisis, 29 ILL. L. REV. 971, 996 (1935) ("If overruling a prior decision has not been condemned as amounting to judicial legislation, it is difficult to see how giving an overruling decision prospective effect only, would be any more a matter of legislation.").


160 See Margaret N. Kniffin, Overruling Supreme Court Precedents: Anticipatory Action by the United States Courts of Appeals, 51 FORDHAM L. REV. 53, 57 (1982) ("Anticipatory overruling . . . occurs when a lower court departs from a higher court's decision embodying a rule of law that the higher court has not repudiated either explicitly or by implication.").

161 See State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its own precedents."). But see United States v. Girouard, 149 F.2d 760, 765 (1st Cir. 1945) (Woodbury, J., dissenting) (claiming that judges sometimes have the duty of prophesy thrust upon us because "[n]othing is to be gained by our deciding a question contrary to the way we think the Supreme Court would decide it"), rev'd 328 U.S. 61 (1946); Maurice Kelman, The Force of Precedent in the Lower Courts, 14 WAYNE L. REV. 3, 28 (1967) ("Judges must be alert to the fact that a rule can lose its force without formal repudiation. . . . [T]he lower courts should not shrink from declaring that an implied overruling has taken place and should in that event give full effect to the change.").

162 See DWORKIN, supra note 9, at 36 (explaining that according to the prediction model, lawyers try to predict what judges will do and judges try to predict what the "path" of the law is); Evan H.
Accordingly, this practice tends to diminish the force of stare decisis and makes the lawmaking process more predictive in nature. Of course, calling this “overruling” is a misnomer because a lower court cannot actually “overrule” a decision of a higher court, but the practice does eviscerate the precedential effect of the higher court decision unless and until the higher court revives it.

Common law updating usually proceeds slowly and haphazardly, partly because courts cannot initiate litigation, but instead must wait for a suitable case to happen along. Therefore, if a court makes a bad decision, it may be decades before the unsound legal principle it established can be erased. Prospective overruling and anticipatory overruling help to mitigate this shortcoming. These tools allow courts to change course more quickly when altered circumstances require it, or to correct mistakes as soon as they are recognized as such. They partly free courts from dependence on happenstance and the initiative of private litigants.

A related development was the Judges’ Bill of 1925, which gave the Supreme Court the discretionary power to choose which cases it would decide. Prior to that time, the Supreme Court had to decide whatever cases came to it within the bounds set by Congress. The Judges’ Bill of 1925 made the Supreme Court a bit more like a legislature than a traditional court because it empowered the Supreme Court to set its own agenda. As one commentator has observed:

How different the judicial function has become since the Judges’ Bill created a power to choose which matters

Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 TEx. L. REV. 1, 78 (1994) (“The understandable desire to avoid such psychological and professional costs of reversal might well influence inferior court judges to decide cases in accord with their expectations about appellate court behavior.”).

Compare Caminker, supra note 162, at 82 (endorsing this technique and arguing that “[t]he orthodox view that prediction is inherently incompatible with the judicial function must be revisited”), with Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 715 (1995) (criticizing this technique because “the prediction model undermines the rule of law by over-emphasizing the role of individual judges”).

See Horowitz, supra note 118, at 39 (“[A]djudication proceeds by fits and starts, now too early, now too late, only occasionally well timed.”); M. D. A. Freeman, Standards of Adjudication, Judicial Law-Making and Prospective Overruling, 26 CURRENT LEGAL PROBS. 166, 179 (1973) (“[J]udges develop the law incrementally.”).

Lon L. Fuller, The Forms and Limits of Adjudication, 92 HARV. L. REV. 353, 385 (1978) (quoting an unnamed German socialist critic as stating that “courts are like defective clocks; they have to be shaken to set them going”).


our highest court would hear! Decision is no longer a necessity, nor new law merely its by-product. A court with certiorari authority is not merely able, but is expected, to choose its targets with reference to what law seems most important to enunciate. Having thousands of petitions from which to select, say, one hundred controversies for decision enables judges to have agendas. It encourages them to speak more broadly than the particular facts before them require, counsel against that as we may. It permits them to defend themselves against the inconvenience of facts that might appear to compel movement opposite to the direction they prefer. And, thus, it inevitably heightens our sense that in appointing judges we are appointing lawmakers and should be concerned with the kind of law they are likely to make. Freed from the discipline of the unavoidable call of justice, lured by the opportunity, perhaps even felt as responsibility, to speak broadly, the judge can shape her agenda as she chooses.\footnote{Peter L. Strauss, Lecture, \textit{Courts or Tribunals? Federal Courts and the Common Law}, 53 ALA. L. REV. 891, 896-97 (2002) (footnotes omitted).}

The Judges’ Bill of 1925, then, was a significant step toward liberating Supreme Court justices from some of the traditional restraints on common law adjudication. It also encouraged them to see themselves more as legislators than as judges. And lower courts have tended to emulate their example.

Taken together, these developments have caused confusion about what precedents mean and how long they last. As Roscoe Pound explained:

> The layman seems to think a certain number of cases were decided back in the time of the Plantagenets and were laid down in a fossilized state in the Middle Ages and from time to time are dug up and are used as the measure of decision in controversies of Twentieth Century America.

Now, the fact is, as far as rules are concerned, the life of a rule of law in the strict sense is relatively short. I had occasion in 1924, at the request of a committee of the American Bar Association, to investigate the reports beginning in 1774, at intervals of fifty years, down to 1924, and the thing that struck me as I went on with that, and could be shown conclusively as I had finished it, was
that the general run of rules of law . . . had a life of simply one generation. Fifty years is a long life for a rule . . . .\[169\]

Thus, the law’s memory of precedents is actually rather brief—typically no more than twenty to thirty years.

Even this, however, may exaggerate the durability of precedents. The precedential value of a decision erodes rapidly as time passes. One measure of the transience of precedent is the length of the period of time during which particular precedents are cited.\[170\] As it turns out, most cases cited by courts are less than ten years old. According to one study, the probability that the California Supreme Court will cite one of its prior decisions as a precedent is reduced by fifty percent every seven years. The half-life of precedent, then, is short.\[171\] “[A]s with people, the life expectancy of a statute, and of a judicial decision too, is relatively low right after birth, becomes very high after the rule has survived for a few years, and then diminishes as it ages.”\[172\] Because the pace of legal change and the degradation of the value of precedents have continued to accelerate since those studies were performed, it is reasonable to assume that the common law’s long-term memory of itself has gotten even worse. What is most telling on that score, of course, is not just whether courts prefer to cite more recent cases, but whether their preference for more recent cases became stronger from, say, 1900 to 2000. Empirical studies indicate that it


\[170\] Simply because recent cases are cited does not mean that the old ones are no longer good authority. Some old cases may live on because whether they are cited in more recently decided cases or not, the rule that they established is followed in the most recently decided cases. Thus, the overruling of an old case may be a better measure of obsolescence of a legal rule than is a diminishing rate of citation. Nevertheless, a diminishing rate of citation is one indication of depreciation in the value of a precedent.

\[171\] See John Henry Merryman, Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970, 50 S. CAL. L. REV. 381, 395 & n.11 (1977) (concluding that “there is a predictable property that might be called the ‘citation half-life’ of earlier California Supreme Court decisions, i.e., that the statistical probability of citation of a case by the court is reduced by 50% (at least from 1880 forward) every $x$ years.” And noting that “$x$ has, on the average, an approximate value of 7 years. That is to say, the probability that any decision of the California Supreme Court will be cited by that court as an authority is reduced by one-half every 7 years or so.”). More recent studies of courts in other states have demonstrated that the phenomenon is widespread. See, e.g., William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & ECON. 249, 255 (1976) (“In the 1974–1975 court of appeals sample, half of the citations to Supreme Court and other-court decisions were less than 9.8 and 4.3 years old, respectively . . . . In the 1974 Supreme Court sample, the half lives of Supreme Court and other-court decisions were 13 and 5.4 years respectively . . . .”); Richard A. Mann, The North Carolina Supreme Court 1977: A Statistical Analysis, 15 WAKE FOREST L. REV. 39, 44 (1979) (explaining that a study of North Carolina case citation practices revealed that “47.2% of the cases cited . . . were no more than seven years old and 69.6% were seventeen years old or less”).

\[172\] CALABRESI, supra note 21, at 132 (footnote omitted).
Often, the law's memory of its history is determinative of common law legal doctrine, but sometimes it is merely window-dressing, a style of discourse adopted to justify and legitimize a decision that it is actually based on something else, such as forward-looking notions of public policy. As an example, scholars have concluded that the Supreme Court justices in both the majority and in the dissent often contend that history supports their opposing conclusions, which miraculously usually happen to be consistent with their preexisting policy preferences. Sometimes history really is the true basis of decision, but sometimes it simply provides a convenient rationalization.

As an example, when the Supreme Court overrules a previous interpretation of the Constitution, it usually is predicting rather than remembering, even if it justifies the outcome by providing historical reasons in its opinion. There may have been advances in the discipline of history during the past two hundred years, but they have not been dramatic. With every passing day we become further removed from the circumstances and the world view of the Founders. There is no reason to believe that we are any better at divining their intent today than we were ten years ago, much less 150 years ago. When the Supreme Court changes its interpretation of the Constitution, it is almost always updating its

---

173 See A. Michael Beaird, Citations to Authority by the Arkansas Appellate Courts, 1950–2000, 25 U. ARK. LITTLE ROCK L. REV. 301, 319, 338 (2003) (stating that from 1950 to 2000, “the total percentage of Arkansas Supreme Court citations less than twenty years old increased from 50% to 85%” and from 1980 to 2000 “Arkansas Court of Appeals citations show the same pattern—recent case citations increased from 66% to 82%”); William H. Manz, The Citation Practices of the New York Court of Appeals, 1850–1993, 43 BUFF. L. REV. 121, 136 (1995) (“The court’s preference for its own most recent opinions has existed since its inception. In every sample year since 1850, cases from the immediately preceding decade outnumbered those from any other period. This practice has become more pronounced in the 1980 and 1990 sample years, in which over 50% of all cases cited in the court’s opinions dated from the past ten years.”).

174 See ZANDER, supra note 122, at 215 (“It is difficult to conceive of a legal system in which precedent plays no part at all.”); Paul J. Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 HARY. L. REV. 56, 60 (1965) (“It is certainly true that courts in general handle the vast bulk of cases by application of preexisting law.”).

175 See CARDOZO, supra note 14, at 66 (“Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.”); LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 9 (1993) (noting “the pressures that operate on judges to write decisively and to limit what they say to certain acceptable argumentation”).


177 See Richard A. Posner, Bork and Beethoven, 42 STAN. L. REV. 1365, 1373 (1990) (“The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession’s orthodox mode of justification.”).
understanding of the meaning of the text based upon its perception of what will be best for the nation in the future in light of the changes in circumstances since the founding or since its previous decision containing the interpretation which it is modifying or repudiating. Very rarely can it honestly be said that something new has been discovered—such as additional notes taken during the debates on the Constitution—that shed fresh light on what the Founders (or the citizens who ratified the Constitution) had in mind.178

As the needs of society have evolved, the role of courts has shifted. Among other things, courts have become increasingly involved in institutional reform litigation, an arena that thrusts the judge into a role that differs from the traditional model of adjudication. For example, a lawsuit that arises out of a persistent failure to meet constitutional standards in schools or prisons, and aims to reshape those institutions by means of a permanent injunction or consent decree designed to ensure that such standards will be met in the future. In such a lawsuit the judge acts not only as a judge, but also (in some respects) as the administrator of a government entity. While traditional litigation is retrospective in the sense that it is tied to the parties before the court and to facts that happened in the past, institutional reform litigation is more future-oriented. Although it springs from dissatisfaction with past conduct, and may focus on preventing its re-occurrence, its explicit goal is to establish rules to govern the future conduct of an institution. As a result, in institutional reform litigation "the trial judge has passed beyond even the role of the legislator and has become a policy planner and manager."179 Because the litigation focuses more on an ongoing process of institutional change than upon the contours of a biparty dispute about past events, institutional reform litigation is more forward-looking than is traditional litigation.180 Although

178 See Emil A. Kleinhaus, Note, History as Precedent: The Post-Originalist Problem in Constitutional Law, 110 YALE L.J. 121, 141 (2000) ("Justices who lived closer in time to the Framers were surely in a better position to interpret the Framers' language and grasp the Framers' worldview than their successors.") (footnote omitted). But see Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 633 n.17 (1997) (Thomas, J., dissenting) (arguing that the Supreme Court's 1868 interpretation of the dormant Commerce Clause should be abandoned because the author of the earlier opinion "seems not to have had in his arsenal many of the historical materials cited above" and because "our appreciation of[ ] such documents has increased over time").

179 Abraham Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1302 (1976); see also Horowitz, supra note 118, at 7 ("Litigation is now more explicitly problem-solving than grievance-answering. The individual litigant, though still necessary, has tended to fade a bit into the background.").

180 David Zaring, National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA L. REV. 1015, 1019 (2004) (stating that institutional reform litigation "create[s] a forward-looking relationship involving both the court and the litigants, rather than a backward-looking resolution by a court regarding a dispute between litigants"); see also id. at 1077–78 ("Institutional reform litigation can create trends and links across cases that may result in the widespread adoption of
institutional reform litigation comprises only a small percentage of all litigation, its scale makes its consequences highly significant, and its increasing frequency in recent years has contributed to making law more future-oriented.

Another consequence of changing societal needs is that judges have been spending larger amounts of time on so-called "untraditional activities." The ascendency of so-called collaborative, therapeutic, or problem-solving courts provides an example of this expansion of the judicial role. These include such quasi-judicial fora as drug courts, juvenile delinquency courts, and the like. In these settings, trial court judges work closely with social services agencies in an ongoing attempt to fashion long-term changes in a party's future behavior. The creation of these courts represents a revolution in the way in which the judiciary conducts its business.

Finally, the increasing globalization of the legal community has increased the pace of legal change. Courts all over the world are creating new legal doctrine, and their work is rapidly available to courts in other countries. The result is a cascade of cross-fertilization, which—whatever its other advantages or disadvantages—tends to accelerate the

---

1. Judicial Counsel of Cal., Justice in Focus: The Strategic Plan for California Judicial Branch 2006–2012 14 (2007), available at http://www.courts.ca.gov/documents/strategic_plan_2006-2012-full.pdf ("Court users increasingly look to the courts to do more than resolve legal issues or dispose of cases. Instead, they expect court decisions to promote effective outcomes that help them resolve underlying problems. These expectations demand innovations in programs and services, including problem-solving and treatment-oriented courts.").


4. See Frank V. Williams, III, Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts, 29 Campbell L. Rev. 591, 594 (2007) ("Judges and a variety of activists working with them are effectively redefining the judicial power in response, they argue, to the changing social context by adding an expanded repertoire of therapeutic techniques to solve a broad range of social, economic and political problems among individuals and entire communities. Judges are transitioning from decision makers to life changers, employing new techniques to manipulate individuals and entire communities for the purpose of modifying individual and collective life.").


6. See Richard Posner, No Thanks, We Already Have Our Own Law, Legal Affairs, July–Aug. 2004, at 40–41 (detailing the problems that arise when a foreign legal decision is relied on as precedent).
Therefore, common law adjudication always has been less past-oriented than is widely thought, and it has become even less so in recent decades.  But as future-oriented as common law adjudication turns out to be, it is inherently less future-oriented than a form of lawmaking that has been rapidly crowding it out: namely, legislating.

D. The Multiplication of Statutes

Statutory law lies at the opposite end of the lawmaking spectrum from common law. It is inherently future-oriented. Aristotle said that “[a] member of a democratic assembly is an example of one judging about future happenings.”  Plato added that “[w]hen we legislate, we make our laws with the idea that they will be advantageous in time to come.”  More recently, Oliver Wendell Holmes, Jr. jokingly described statutes as “scattered prophecies of the past upon the cases in which the axe will fall.”

Consistent with their future-orientedness, statutes are almost never retroactive. Statutes also are not “precedents” for future statutes. No one would argue that a legislature is forbidden from modifying or repealing a statute simply because the statute had previously been enacted. A later legislature is free to make whatever changes it wishes, regardless of attempts by an earlier legislature to tie its hands, subject only to relatively

---

187 See Thomas L. Friedman, It’s a Flat World, After All, N.Y. TIMES MAG., Apr. 3, 2005, at 33 (“[W]e are now in the process of connecting all the knowledge pools in the world together... [T]he upside is that by connecting all of these knowledge pools we are on the cusp of an incredible new era of innovation...”).


189 See J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 327-28 (4th ed. 1991) (“Judges are concerned to preserve and to protect the existing order. This does not mean that no judges are capable of moving with the times, of adjusting to changed circumstances. But their function in our society is to do so belatedly.”).

190 ARISTOTLE, RHETORIC 1.3.1358a36-b5; see also Scharffs, supra note 117, at 758 (stating that in “the legislative context, the emphasis is upon deliberating about the future”).

191 Plato, Theaetetus 178a.

192 Holmes, supra note 30, at 461.


194 DAVID LUBAN, LEGAL MODERNISM 109 (1994) (“Statutes exert no precedential force on legislators whatsoever, and the attitude of respect for past decisions... is wholly absent.”); Holmes, supra note 5, at 444 (“As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it... without the slightest regard to continuity with the past.”).
loose constitutional restrictions concerning retroactivity.¹⁹⁵

Unlike courts, which are designed primarily to apply or interpret existing law, legislatures are designed to create entirely new law or to modify existing law. This distinction in theory leads to a difference in performance.

The institutional framework within which a legislature operates may facilitate transitions more easily than is the case with judicial efforts, simply because the act of making change is less likely to be perceived as antithetical to the enterprise in which the rule-maker is engaged. The very fact that our common law system is defined as one predicated on precedent and horizontal equity suggests that deviation from established rules requires substantial justification. Judges who engage in too much distinction of precedent face the risk that they will be considered as operating contrary to the objectives for which the system is created.

Legislatures, on the other hand, are expected to reform and revise law, and the fact that their rules apply prospectively means that their changes do not easily offend the principle of treating similar cases similarly. The signal implicit in this arrangement is that legislatures are supposed to adapt to new circumstances and adjust legal doctrine when alternatives superior to the status quo arise. Thus, we can expect that those institutional features of a precedential system that might promote lock-in in the common law will be reversed in the legislative arena.¹⁹⁶

Even with respect to legislation, however, past or future-orientedness is a matter of degree. "Legislative deliberation is not limited to deliberating about the future; past experience and present perspectives will be relevant."¹⁹⁷ Moreover, statutes usually are not written on a perfectly clean slate. Instead, they are written by people who have learned something about previous problems and previous attempts at solving those problems, and their experience inevitably affects what they write.

¹⁹⁵ See Fletcher v. Peck, 10 U.S. 87, 135 (1810) ("[O]ne legislature cannot abridge the powers of a succeeding legislature."); 1 BLACKSTONE, supra note 51, at *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not.").
¹⁹⁶ Gillette, supra note 11, at 827.
¹⁹⁷ Scharffs, supra note 117, at 758.
Nevertheless, it is fair to say that legislation is primarily future-oriented. During the past century, American lawmaking spurned the common law and embraced statutory law. As Guido Calabresi explained: “The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.”

His view is widely shared. As a consequence of this tectonic shift, now, “we live in a world of statutes.”

As an example, consider the unannotated version of the United States Code. It grew from two volumes (six inches wide) to twenty-nine volumes (six feet wide) between 1928 and 1988. This means that as of 1988,

---

198 See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513 (1989) (Stevens, J., concurring in part and concurring in the judgment) (“Legislatures are primarily policy making bodies that promulgate rules to govern future conduct.”); Eisenberg, infra note 119, at 9 (“[T]he primary function of the legislature is to make rules to govern the future.”); Luban, infra note 194, at 109 (“[T]he attitude of legislatures is properly forward-looking and consequentialist, not traditionalist.”); Scharffs, infra note 117, at 758 (“[T]he focus of legislation is on the future.”).

199 Calabresi, supra note 21, at 1; John V. Orth, How Many Judges Does It Take to Make a Supreme Court? And Other Essays on Law and the Constitution, at x-xi (2006) (“Although statutes have been known almost (but not quite) since the beginning of the common law 800 years ago, they became a predominant part of the common-law system only in the last century or two.”).

200 Strauss, infra note 62, at 239.


202 Robert C. Ellickson, Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?, 74 S. CAL. L. REV. 101, 105 (2000). Of course, the volume of court decisions has been increasing as well. James W. Torke, Lecture, What is This Thing Called the Rule of Law?, 34 IND. L. REV. 1445, 1452 n.38 (2001) (“In 1926, six volumes of approximately 1000 pages per volume of the Federal Reporter were published. In 1997, twenty-seven volumes at 1600 pages per volume were issued.”). These data arguably understate the growth in case law, because a growing percentage of appellate court decisions are not published. Cappalli, supra note 133, at 757-58 (“[T]he number of non-precedential opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole.”). The growth in the number of published court decisions does not undercut this Article’s thesis for at least three reasons. First, court decisions themselves are becoming more future-oriented. See discussion supra Section II.C. Second, legislation is a more efficient way of creating legal rules. See Frank I. Michelman, 9 J. LEGAL STUD. 431, 442-43 (1980) (using the Uniform Commercial Code as an example of statutory efficiency and arguing that “[w]herever there is no reasonably clear competing interpretation of a statute, self-interested judges can hardly do better than support that the community of legislative traders has acted on its shared interest in the efficiency of the legal background”). Third, most cases decided by courts
Congress had created about twelve times as much statutory law during the last fifty years as it had created during the preceding 150 years. The same trend is apparent in individual states, and the United Kingdom. As a result of this "orgy of statute making," the relationship between statutes and common law cases has taken a turn of nearly 180 degrees from the point at which we appear to have started at the beginning of the century. Statutes are now central to the law in the courts, and judicial lawmaking must take statutes into account virtually all of the time.

In short, law has become "statutorified." This is a drastic departure from the past. Originally, legislatures were designed not as devices to enact good laws, but rather to prevent the enactment of bad laws. In more recent eras, legislatures were thought to be doing too little, and to be leaving excessive latitude to the courts. When statutes became more common, they were initially viewed (at least by judges) as clumsy intrusions into the lawmaking prerogatives of the courts. Today, the relative positions of the courts and the legislature are based upon statutes rather than common law. Peters, supra note 200, at 996 (estimating that only ten percent of the cases filed in the Connecticut Supreme Court are "purely common law" and that statutes are "relevant [to] if not determinative of" the remaining ninety percent).

See Torke, supra note 203, at 1452 n.38 ("In 1947, Indiana Acts amounted to 1800 pages; in 1997, 4500 pages.").

See DENNING, supra note 139, at 9 ("In almost every case on which you have to advise you will have to interpret a statute. There are stacks and stacks of them. Far worse for you than for me. When I was called [to the Bar] in 1923 there was one volume of 500 pages. Now in 1978 there are three volumes of more than 3,000 pages.").

GILMORE, supra note 21, at 95.

Peters, supra note 200, at 998.

CALABRESI, supra note 21, at 7 (terming this trend "statutorification").


2 John Austin, Lecture XXXVI: Jus Praetorium and English Equity Compared, in Lectures on Jurisprudence 625, 632 (Robert Campbell ed., 3d. ed. 1869) ("In almost every community, such has been the incapacity, or such the negligence, of the sovereign legislature, that unless the work of legislation had been performed mainly by subordinate judges, it would not have been performed at all, or would have been performed most inefficiently: with regard to a multitude of most important subjects, the society would have lived without law; and with regard to a multitude of others, the law would have remained in pristine barbarity.").

Lawrence M. Friedman, A History of American Law 316 (1973) ("Legislation, whatever its subject, was a threat to . . . [judge's] primordial functions, molding and declaring law. Statutes were brute intrusions, local in scope, often short-sighted in principle or effect. They interfered in a legal world that belonged, by right, to the judges. Particularly after 1870, judges may have seen themselves more and more as guardians of a precious and threatened tradition.").
have been reversed.

While common law decision-making proceeds incrementally and typically is retroactive—at least to the extent that the rule announced in a case is usually applied in that case, as well as in any other cases still open on direct appellate review—statutory change, though more difficult to achieve, can be avulsive, and usually operates entirely prospectively. A statute can erase in a day legal doctrine that required centuries to evolve. The difference between lawmaking by common law adjudication, on the one hand, and lawmaking by legislation, on the other hand, is reminiscent of changes that might occur in the contours of a sandy peninsula like Cape Cod. Usually the shape of a beach changes slowly and imperceptibly, a few grains of sand at a time. No change may be detected for years, or even for decades. Eventually someone asks: "Doesn't the beach seem a little wider here than it used to be?" It is still recognizable as the same beach, but its shape has been subtly altered. This is the sort of change that typically results from common law adjudication. Occasionally, however, there is a dramatic change in the beach, such as the collapse of gigantic cliff of sand onto the shore during a storm. The transformation is immediate and unmistakable, and the new beach may seem like a different place, entirely disconnected from the old beach. This is the sort of change that typically results from legislation.

Courts do continue to play an important role in the interpretation and application of statutes, especially since the constitutionality of nearly every statute of any importance is now challenged in the courts. The legislature, however, reigns supreme over statutory law, and usually can quickly overturn what it views as a judicial misinterpretation of a statute. Obviously, then, "courts are less free in applying a statute than in dealing

---

212 See Norman Marsh, Law Reform in the United Kingdom: A New Institutional Approach, 13 WM. & MARY L. REV. 263, 269 (1971) ("Clearly there is less scope, at least for rapid change, where that principle [i.e., stare decisis] prevails than by clean-sweeping enunciation by the legislature of some new general principle.") (footnote omitted).

213 CARDOZO, supra note 14, at 25 ("The common law] goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.").

214 See RICHARD A.L. GAMBITTA, MARILYN L. MAX & JAMES FOSTER, GOVERNING THROUGH COURTS 141 (1981) ("Courts make law more directly and boldly than simply through interpretation. American courts make law by exercising the power of judicial review, scrutinizing the constitutionality of legislative and executive actions.").

215 Congressional overrides of statutory judicial decisions are relatively infrequent. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 337, 338 tbl.1 (1991) (listing the number of congressional overrides of federal statutory decisions between 1967 and 1990). One recent empirical study, however, suggests that at least in the modern era, each Congress typically overrides several of the Supreme Court's statutory decisions. See id. at 338 tbl.1 (reporting that 124 of the Supreme Court's statutory decisions were overridden during the twelve Congresses assembled between 1967 and 1990; see also id (estimating that the same Congresses overrode or modified 220 statutory decisions by lower courts).
The degree of freedom, however, depends upon the specificity of the statute. The more specific the statute, the less latitude is left for courts. One scholar has explained the difference between common law adjudication and adjudication involving statutory interpretation and application as follows: “Where case law is considered, there is a conscious realignment of cases; the problem is not the intention of the prior judge. But with a statute the reference is to the kind of things intended by the legislature.” It is as if the court is respectfully restoring an ancient vase, rather than creating a vase of its own from scratch. Moreover, because the legislature can update a statute itself, if necessary, courts feel less responsibility to update statutes than to update common law precedents.

Ironically, although statutory law is more future-oriented than is common law adjudication, the predominance of statutory law over common law may entrench the past more firmly than was true when common law adjudication predominated. Even though statutes are more future-oriented, and can effect change avulsively, they also are resistant to change. Thus, some statutes possess greater durability than some common law precedents, especially if courts previously have provided the statute with a definitive interpretation, in which case its meaning is fixed unless altered by new legislation. As a consequence, some statutes outlive the evils they were enacted to address. While this is true, this difference between adjudication and legislation should not be exaggerated.

216 LEVI, supra note 101, at 7.
217 ZANDER, supra note 122, at 191-92 (“If the statute is a Bill of Rights with broad, open-textured provisions, the scope for judicial legislation will be vast compared with the opportunities offered by the tight provisions of, say, an income tax Act.”).
218 LEVI, supra note 101, at 30.
220 ZANDER, supra note 122, at 441 (“[C]ourts do not see it as their functions to mould statute-law or to adapt it to our changing society.”).
221 See CALABRESI, supra note 21, at 2 (describing statutory obsolescence); Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 YALE L.J. 1665, 1705 (2002) (describing a variety of ways in which legislators attempt to secure statutes against future modification).
222 See Douglass v. Cnty. of Pike, 101 U.S. 677, 687 (1879) (“After a statute has been settled by judicial construction, the construction becomes . . . as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect . . . as an amendment of the law by means of a legislative enactment.”); LEVI, supra note 101, at 32 (“Therefore it seems better to say that once a decisive interpretation of legislative intent has been made, and in that sense a direction has been fixed within the gap of ambiguity, the court should take that direction as given. In this sense, a court’s interpretation of legislation is not dictum. The words it uses do more than decide the case. They give broad direction to the statute.”); William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L.J. 1361, 1362 (1988) (describing the stare decisis effect of statutory precedents as “super-strong”).
223 See CALABRESI, supra note 21, at 6.
Precedents also are somewhat resistant to change. In addition, the extent to which it is true depends upon whether one views the meaning of statutes as static or dynamic. If the former, then a statute always means what it meant on the day of its enactment; but if the latter, then a statute might mean what it means on the day of its interpretation in light of what has happened since its enactment.

E. The Expansion of Administrative Regulation

As the complexity of life and the rate of change increased, particularly during the industrial revolution and the New Deal, the President and Congress found their resources and institutional structures unequal to the demands placed upon them. Beginning earlier, but accelerating in the late nineteenth century, administrative agencies were created to fill the gap. In part, they "sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems." Initially, courts resisted, insisting that Congress lacked the power to...

---

224 Holmes, supra note 56, at 31 ("[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten.").

225 See Neal v. United States, 516 U.S. 284, 290 (1996) ("While acknowledging that the Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts . . . principles of stare decisis require that we adhere to our earlier decision.").


228 See Peters, supra note 220, at 996 ("[T]he New Deal . . . accelerated the rate of change in the law . . . "); Stewart, supra note 227, at 440 ("The New Deal Congress created a raft of new federal regulatory agencies and endowed them with very broad powers through open-ended statutes.").

229 Jerry L. Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787–1801, 115 YALE L.J. 1256, 1266 (2006) (arguing that "as it was written . . . there was a hole in the U.S. Constitution. The Constitution provided a legislature, a Supreme Court, and two executive officers. Administration was missing.").

230 See id. at 1268 ("Early Congresses delegated broad policymaking powers to the President and to others, combined policymaking, enforcement, and adjudication in the same administrative hands, created administrative bodies outside of executive departments, provided for the direct responsibility of some administrators to Congress itself, and assigned ‘nonjudicial’ business to the courts."); id. at 1260 ("From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action."); id. (arguing that "the first independent agency at the national level was not the ICC, but the Patent Office, created ninety-seven years earlier").

231 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 30 (1938); see also Elihu Root, Address of the President: Public Service by the Bar, 39 ANN. REP. A.B.A. 355, 369 (1916) ("[A]gencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.").
delegate its responsibilities to the Executive Branch.\footnote{See Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").} The need for administrative agencies, however, eventually forced the abandonment of the judiciary’s non-delegation doctrine,\footnote{See Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); Root, supra note 231, at 368 ("Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."); Stewart, supra note 227, at 438 (stating that administrative agencies were created in response to the "demonstrated inadequacies of private and criminal law" to prevent the ills resulting from increased economic activity). Some contend that the non-delegation doctrine is not dead, but that instead a broad non-delegation doctrine has been replaced by a set of more specific non-delegation rules with a narrower aggregate scope. E.g., Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 315 (2000) (stating that contrary to some overexaggerated reports, the nondelegation doctrine is "alive and well"). In either case, any residual ban on delegation is narrower than it was previously.} and fundamentally altered American law. "This change was the advent of the administrative state itself, the transition from a system of rules elaborated and implemented by the judiciary to a system of comprehensive regulation elaborated and implemented by administrative agencies."\footnote{Edward Rubin, It’s Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 96 (2003).} As a result, administrative agencies have become a de facto “fourth branch” of government.\footnote{President’s Comm. on Admin. Mgmt., Report of the Committee With Studies of Administrative Management in the Federal Government 39–40 (1937) ("They are in reality miniature independent governments . . . . They constitute a headless ‘fourth branch’ of the Government . . . ."); see also FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (describing administrative agencies as "a veritable fourth branch of the Government, which has deranged our three-branch legal theories").}

Some have argued that this explosion of bureaucracy was an “epochal transformation” of American government.\footnote{Rubin, supra note 234, at 96.} The Supreme Court itself has said that “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century . . . .”\footnote{Ruberoid, 343 U.S. at 487 (Jackson, J., dissenting).} That may be right. In fact, it has made an enormous difference in the way much of American law is created. Among other things, it partly replaced common law adjudication by courts with a combination of agency rulemaking and administrative adjudication.\footnote{See Roscoe Pound, Report of the Special Committee on Administrative Law, 63 ANN. REP. A.B.A. 331, 339 (1938) (warning of “the tendency of administrative bureaus to extend the scope of their operations indefinitely even to the extent of supplanting our traditional judicial régime by an administrative régime”).}

The degree to which agencies have replaced courts is striking. For example, courts have traditionally exercised great power in the area of criminal law, especially with respect to sentencing. For many years, legislatures merely set a broad sentence range for each crime, leaving the

\footnote{See Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").}
courts considerable leeway to fix the actual sentence within the range that a particular defendant would receive. In more recent decades, by contrast, sentencing commissions have been created to limit judicial sentencing discretion by confining it to a much narrower scope. The guidelines promulgated by these sentencing commissions are quasi-legislative in character. This approach possesses advantages—for example, it may reduce the magnitude of distortions caused by certain types of cognitive error—but it also shifts decision-making from courts to agencies, especially sentencing commissions (and, indirectly, to another administrative agency, namely, prosecutors) in an important area in which courts traditionally had exercised enormous power.

Administrative agencies perform two basic functions. First, they promulgate regulations, a process known as rule-making. Second, they adjudicate disputes between private parties, or between a private party and the government.

When promulgating regulations, administrative agencies act like narrowly specialized legislatures, conducting investigations and soliciting input from those to be regulated and the public before creating rules to govern future conduct. Like statutes, regulations seldom operate

239 See Rachel B. Barkow, Administering Crime, 52 UCLA L. REV. 715, 715, 722 (2005) (stating that administrative agencies—including state and federal sentencing commissions—are the "dominant force in criminal law today").


241 James B. Burns et al., We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution), 91 NW. U. L. REV. 1317, 1317–18 (1997) (arguing that the federal sentencing guidelines shifted power from judges to the Congress and the U.S. Sentencing Commission); Bennett L. Gershman, The New Prosecutors, 53 U. PIT. L. REV. 393, 418 (1992) (arguing that the federal sentencing guidelines shift discretion from judges to prosecutors).

242 Obviously, this is an oversimplification. Agencies also make policy in many other ways. See, e.g., M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. CHI. L. REV. 1383, 1386 (2004) (referring to agency-initiated judicial enforcement actions).


244 Id. §§ 551(7), 554.


246 5 U.S.C. § 551(4) (defining a "rule" as "an agency statement of general or particular applicability and future effect") (emphasis added); Charles H. Koch, Jr., Policymaking by the Administrative Judiciary, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49, 52 (2005) ("Rulemaking is a quasi-legislative process, and its goal is to make general pronouncements with future effect.").
Their emphasis is on guiding or controlling future conduct. When making rules, administrative agencies are frequently filling gaps or implementing legislation at a more detailed level than the legislature was able to do or felt it had the time or expertise to do. In essence, administrative agencies are assuming part of the legislative function when they promulgate regulations. It is not surprising that administrative regulations promulgated on the basis of explicit legislative authorization following compliance with notice and comment requirements are termed "legislative regulations."  

Replacing common law adjudication with administrative regulation changes the character of lawmaking. Because judges are merely "discovering" law, in the medieval and common law conception, they must proceed on a case-by-case basis as the specifics of each case reveal a new aspect of the pre-existing legal rules. The administrative state displaces this approach. Its defining feature is conscious policy intervention in the economic and social system by various means, among them the promulgation of explicitly new laws. While incremental decision making is not necessarily precluded, the hallmarks of the administrative state—the rationale behind the creation of administrative agencies—are its comprehensive programs and long-term planning in pursuit of these policy objectives.

Thus, when administrative regulations crowd out common law adjudication, a fundamentally backward-looking process is replaced by a

\[\text{247 See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority [to an administrative agency] will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").}\]

\[\text{248 CALABRESI, supra note 21, at 45 n.5 ("Agencies were thought to have greater institutional capacity than legislatures to examine technical, specialized problems and to frame an appropriate response."); see also HENRY FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR A BETTER DEFINITION OF STANDARDS 166–67 (1962) (explaining that Congress cannot carry the full weight of its legislative responsibilities); Louis L. Jaffe, Administrative Procedure Re-Examined: The Benjamin Report, 56 Harv. L. Rev. 704, 725 (1943) (stating that Congress has "other fish to fry").}\]

\[\text{249 Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 476–77 (2002) ("Agency rules come in several types. A basic distinction is between 'legislative' rules and 'nonlegislative' rules. Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute. Nonlegislative rules do not have the force and effect of law; rather, they are simply statements about what an agency intends to do in the future.") (footnotes omitted).}\]

\[\text{250 Rubin, supra note 234, at 105 (footnotes omitted).}\]
fundamentally forward-looking one.\textsuperscript{251}

The increase in administrative rulemaking has been stunning. As one commentator noted:

In the decades immediately following the passage of the APA in 1946, most agencies relied on adjudicatory, case-by-case methods to make policy. This began to change in the 1960s . . . . [T]here is little doubt that a shift occurred such that, by the mid-1970s, rulemaking was the primary and preferred mode of making policy for many agencies.\textsuperscript{252}

The trend was so dramatic that by 1974, Circuit Judge Skelly Wright proclaimed that the country had entered the “age of rulemaking.”\textsuperscript{253}

One measure of the magnitude of this change is the enormous quantity of regulations that agencies promulgate. The Code of Federal Regulations contains the formal rules adopted by all federal agencies, organized by subject matter. By one estimate, the number of pages in the Code of Federal Regulations increased from less than 60,000 to 140,000 between 1970 and 1995.\textsuperscript{254} This means that it took agencies about 180 years to adopt 60,000 pages of regulations, but just twenty-five years to adopt 80,000 more. By this measure then, the quantity of administrative regulations more than doubled in just twenty-five years.

Another measure of agency activity is the Federal Register, a daily

\textsuperscript{251} Bowen, 488 U.S. at 221 (“Adjudication deals with what the law was; rulemaking deals with what the law will be.”).

\textsuperscript{252} Magill, supra note 242, at 1398. Some have argued that agencies may be shifting back toward case-by-case policy-making by a new emphasis on litigation, negotiated settlements, and ad hoc waivers of rules. Id. at 1398–99. That may or may not be true, but it does suggest an important advantage of administrative agencies as lawmakers, namely, the ability to shift policy-making from one method to another method over time as evolving conditions dictate so that the lawmaking method and the conditions that law needs to address remain optimally matched.


\textsuperscript{254} J.B. Ruhl & James Salzman, Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State, 91 GEO. L. J. 757, 775 fig.5 (2003); see also 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.3 (4th ed. 2002) (“The size and scope of federal administrative activity has increased during every period in the nation’s history.”); JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 40–41 (1977) (“Our chart will show no great contribution to the body of law from executive offices or administrative agencies until the 1890’s . . . . We can plot major executive-administrative contributions from the decade of 1905–1915, which first saw the grant of substantial rule-making, rule-enforcement, and adjudicative powers to executive offices and independent administrative agencies . . . . [B]y the 1950’s lawyers with business clients and individuals with demands on the increasing service functions of government had to turn more to administrative rule books than to statute books to locate the legal frame of reference for their affairs.”); Torke, supra note 203, at 1452 n.38 (“The original Code of Federal Regulations (CFR) published in 1930 totaled 3450 pages. In 1999, the CFR occupied seven shelves.”).
record not just of adopted rules, but also of proposed rules and other agency actions. During 1936 just 2620 pages were added to the Federal Register; by 2010, the number of pages added had risen to 82,590.\textsuperscript{255} While there have been occasional fluctuations, the overall trend is plain.\textsuperscript{256} Truly, as Felix Frankfurter observed, “our Administrative Law has largely ‘growed’ like Topsy.”\textsuperscript{257}

Although major agency policy shifts are typically subject to the somewhat cumbersome formal procedures applicable to notice and comment rulemaking,\textsuperscript{258} as well as deferential judicial supervision, agencies can sometimes change course more quickly and easily than legislatures can.\textsuperscript{259} This nimbleness may be a desirable characteristic of government in an era of rapid change, but it contributes to the diminishing role of the past in law. Operating within the broad scope of discretion conveyed by the legislature, and unconstrained by the non-delegation doctrine, the Executive Branch can alter policy by modifying regulations (and to some extent, the interpretation of the statute underlying them pursuant to the \textit{Chevron} doctrine)\textsuperscript{260} rapidly. Under the \textit{Chevron} doctrine, courts must defer to an agency’s interpretation of an ambiguous statute if it is based on a reasonable interpretation of a statute administered by the agency.\textsuperscript{261} Since judicial interpretation of agency regulations is common,\textsuperscript{262} the result is a narrowing of the already limited judicial power to interpret statutes.

The volume of formal legislative rules promulgated by administrative agencies is dwarfed by the even larger amount of informal regulations, guidelines, policy statements, letter rulings, and the like. Most agencies

\begin{footnotes}
\footnote{\textsc{Law Librarians’ Society of Washington, D.C., Federal Register Pages Published Annually, available at http://www.llsdc.org/attachments/wysiwyg/544/fed-reg-pages.pdf} (charting the number of Federal Register pages published each year from 1936–2010 based on information supplied by the Office of the Federal Register and the year end Federal Register).}
\footnote{See Stewart, supra note 227, at 437 (“The century just concluded witnessed a dramatic rise in the scope and intensity of administrative regulation.”).}
\footnote{Felix Frankfurter, \textit{Foreword: Final Report of the Attorney General’s Committee on Administrative Law}, 41 \textsc{Colum. L. Rev.} 585, 586 (1941).}
\footnote{See Magill, supra note 242, at 1390 (“[T]oday, promulgating an important legislative rule is a labor-intensive enterprise.”); Thomas O. McGarity, \textit{Some Thoughts on “Deossifying” the Rulemaking Process}, 41 \textsc{Duke L.J.} 1385, 1385 (1992) (“During the last fifteen years the rulemaking process has become increasingly rigid and burdensome.”).}
\footnote{Joel Brinkley, \textit{Out of Spotlight, Bush Overhauls U.S. Regulations}, \textsc{N.Y. Times}, Aug. 14, 2004, at A1 (“The administration can write or revise regulations largely on its own, while Congress must pass laws. For that reason, most modern-day presidents have pursued much of their agendas through regulation.”).}
\footnote{\textit{Id.} at 861–66 (stating that the agency’s interpretation need only be “reasonable” or “permissible” to be upheld by the courts).}
\footnote{Scalia, supra note 90, at 13–14 (“By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations.”) (emphasis added).}
\end{footnotes}
issue such materials, and their quantity is staggering. These devices allow agencies to develop policy more quickly and inexpensively than promulgating formal regulations because the notice and comment procedural requirements do not apply. Although not binding in the same way that formal legislative rules are, informal regulations nonetheless indicate how agencies intend to exercise their discretionary power in implementing their enabling statutes and their formal regulations. As a practical matter, they shape future agency outcomes, and they may receive some judicial deference. Because of their volume and pervasiveness, along with less formal policy statements, agency regulations now occupy an important place in our jurisprudence.

The other major function that agencies perform is adjudication. In fact, the number of adjudications conducted by administrative agencies is vast, much larger than the number of adjudications conducted by courts. In the Social Security Administration alone, administrative law judges

---

263 Michael Asimow, Guidance Documents in the States: Toward a Safe Harbor, 54 ADMIN. L. REV. 631, 632 (2002) ("Virtually every administrative agency produces guidance documents expressing its view about the meaning of language in statutes or regulations.").

264 Peter L. Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463, 1468-69 (1992) (stating that agency staff produce informal rules "in a profusion that overwhelms the more formal output"). For example, the ratio of the volume of informal regulations (such as policy statements, technical guidelines, and staff manuals) to formal regulations is about 20 to 1 for the Internal Revenue Service, and about 240 to 1 for the Federal Aviation Administration. Id. at 1469.

265 See Magill, supra note 242, at 1391-92 (stating that guidance documents allow agencies to develop policy cheaply and easily); see also 5 U.S.C. § 553(b) (2006) (providing that notice and comment procedures do not apply to guidance documents).

266 Thomas W. Merrill & Kristin E. Hickman, Chevron's Domain, 89 GEO. L.J. 833, 903-05 (2001) (discussing the different legal effects of legislative and interpretative rules); see also United States v. Mead Corp., 533 U.S. 218, 234 (2001) (limiting Chevron deference to agency interpretations of statutes to formal regulations promulgated based on notice and comment procedures).

267 Mead Corp., 533 U.S. at 232 ("[I]nterpretive rules may sometimes function as precedents . . . ."). When interpretive rules informally adopted by agencies serve as "precedents," as Mead suggests they can, they are really operating more like forward-looking rules than precedents in the common law sense because they are future-oriented rules of general application, not a decision confined to a particular set of historical facts. See 8 C.F.R. § 103.3(c) (2010) (identifying some INS adjudications as precedential); see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 102-03 (1969) (discussing the role of policy statements and informal administrative agency rules); Asimow, supra note 245, at 385-88 (describing the role of non-legislative rules in the administrative process).

268 FRIEDMAN, supra note 211, at 686 ("The rules of the countless administrative agencies [are] themselves an important, even crucial, source of law.").

269 See 1 PIERCE, supra note 254, § 8.1 ("Agencies dwarf courts in terms of the proportion of adjudications resolved by the two types of institutions."); Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMPIRICAL LEGAL STUD. 783, 799-800 figs.1 & 2 (2004) (estimating that during 2001, four federal administrative agencies—the Social Security Administration, INS, the Board of Veterans' Appeals, and the Equal Employment Opportunity Commission—conducted approximately 722,000 adjudicatory proceedings, while federal courts (including proceedings before district judges, magistrate judges, and bankruptcy judges) conducted just 80,000).
decide more cases each year than all federal and state courts combined.\textsuperscript{270} As the Supreme Court concluded half a century ago, "perhaps more values today are affected by their decisions than by those of all the courts . . ."\textsuperscript{271}

When adjudicating, administrative agencies act like courts.\textsuperscript{272} Agency adjudication, however, differs from court adjudication in some respects. Among other things, it usually is quicker and less formal.\textsuperscript{273} Sometimes administrative trials are not really adversary proceedings.\textsuperscript{274} In addition, agencies feel less constrained by their own previous decisions than do courts; that is, the doctrine of stare decisis carries less weight in administrative adjudication than it does in common law adjudication.\textsuperscript{275} Administrative adjudication is also more goal-directed, and therefore more future-oriented\textsuperscript{276} Finally, agency adjudicators sometimes lack the clear-cut independence that judges possess,\textsuperscript{277} and frequently have their agency's policy preferences and rulemaking agenda very much in mind.\textsuperscript{278} For

\textsuperscript{270} Bernard Schwartz, Administrative Law 29–30 (2d ed. 1984).
\textsuperscript{271} FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952).
\textsuperscript{272} See Butz v. Economou, 438 U.S. 478, 513 (1978) ("[T]he role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge."); Thomas C. Muns, Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges (Part I), 63 Judicature 60, 62 (1979) (describing the corps of federal administrative law judges as the "hidden judiciary").
\textsuperscript{273} See Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990) (reasoning that agency adjudication is informal and has only minimal requirements).
\textsuperscript{275} Texas v. United States, 866 F.2d 1546, 1556 (5th Cir. 1989) ("An agency . . . is not bound by the shackles of stare decisis . . ."). But see Pierce v. LTV Corp., 496 U.S. 633, 655–56 (1990) (reasoning that agency adjudication is informal and has only minimal requirements).
\textsuperscript{276} Michael Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1124–25 (1992) ("The process of administrative adjudication superficially resembles litigation in court, but the differences between the systems are fundamental. Trial and appellate judges are independent and isolated and perform no tasks other than judging. In contrast, administrative adjudication is only one facet of the regulatory process by which an agency carries out a legislative mandate. In many situations, the same people who function as adjudicative decision-makers or their advisors also have responsibilities inconsistent with judging and which may result in strong policy opinions."); John L. Gedid, ALJ Ethics: Conundrums, Dilemmas, and Paradoxes, 11 Widener J. Pub. L. 33, 38 (2002) (asserting that "ALJs are not impartial and neutral in the same sense as Article III judges, but frequently have a role in developing and applying agency policy" and citing the example of the NLRB, which made all of its policies by adjudication rather than by rulemaking during the first fifty years of its existence).
\textsuperscript{277} Charles H. Koch, Jr., Policymaking by the Administrative Judiciary, 29 Admin. & Reg. L. News 2, 3 (2004) ("[A]dministrative judges have crucial roles in the development of policy in
example, some federal agencies have adopted a practice called "non-acquiescence," refusing to follow court decisions with which they disagree in their administrative adjudications outside of the jurisdiction in which the disfavored decision is controlling.\(^{279}\) Others have policy guidelines, manuals, or rules of thumb that govern many of the adjudicative decisions they make.\(^{280}\) Such guidelines, and the decisions shaped by them, are forward-looking in ways that common law adjudication by courts is not.

\[\text{F. The Proliferation of Treaties}\]

There are at least three basic types of international agreements: treaties, congressional-executive agreements, and sole executive agreements. They have been defined as follows:

A "treaty" is an international agreement approved by a two-thirds vote in the Senate. A "congressional-executive agreement" is an international agreement approved by majority vote in both Houses of Congress. A "sole executive agreement" is an agreement concluded by the President on the basis of his Article II powers, without explicit authorization or approval by any legislative body.\(^{281}\)

A further distinction may be drawn between treaties that are self-executing and treaties that are not. Self-executing treaties become law as soon as they are adopted. Non-self-executing treaties become law only after they are both adopted and implemented by legislation.\(^{282}\) The former...
make new rules more quickly and decisively because their effectiveness cannot be postponed by delay in enacting implementing legislation.

Treaties are notoriously difficult to characterize. They may be viewed either as contracts between sovereign states, or as laws analogous to domestic statutes but possessing transnational application. With the passage of time, the latter characterization has gained wider acceptance.

Treaties possess many of the features statutes possess. They have been described as "a sort of international legislation where states explicitly agree to make rules to govern their own conduct, as well as the activities of their individual and corporate [counterparts]." The analogy is apt. Once a

---


See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1026, 1034 (1994) (stating that treaties are "sui generis species of law"); Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1245 (2005) (arguing that treaties are "a unique species of document. They are law but not legislation; they rest on promised exchanges but are not contracts.") (footnote omitted).

Compare *Medellin*, 552 U.S. at 491 ("While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be 'self-executing' . . . ."). and *The Federalist* No. 75 (Alexander Hamilton) ("The power of making treaties . . . relates neither to the execution of the subsisting laws nor to the enaction of new ones; . . . its objects are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."), with U.S. CONST. art. VI, cl. 2 ("[A]nd all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . . ."), and *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . ."); and *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158 (Jonathan Elliot ed., 2d ed. 1888) ("It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made.").

285 Foster v. Neilson, 27 U.S. 253, 314 (1829) ("A treaty is in its nature a contract between two nations, not a legislative act . . . . In the United States a different principle is established. Our constitution declares a treaty to be the law of the land [by the Supremacy Clause, U.S. CONST. art. VI, cl. 2]. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.")., overthrown on other grounds United States v. Percheman, 32 U.S. (7 Pet.) 51, 52 (1833); see also Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1274 (2002) ("Contrary to the sovereign contract paradigm . . . self-executing treaties are properly viewed as the formal and functional equivalent of Article I legislation."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1958 (1999) ("International agreements are becoming more like the permanent statutes and regulations that characterize the domestic legal system, and less like mutually convenient, and temporary, compacts to undertake state action.").

286 *Mark W. Janis, An Introduction to International Law* 13 (4th ed. 2003); see also Ernest A. Young, *Treaties As "Part of Our Law,"* 88 TEX. L. REV. 91, 124 (2009) ("[T]he nature of international law has changed, so that treaties increasingly regulate traditional domestic concerns and thus overlap with the legislative prerogatives of both Congress and state legislatures."); id. at 139 ("A congressional executive agreement, of course, simply is a statute . . . .").
treaty goes into effect, it is regarded by courts as equivalent to an act of the legislature. Like statutes, treaties are forward-looking. They are usually designed to create rules to regulate the future or to promote future cooperation among nations, rather than to resolve particular past disputes. Typically, they are not retroactive. Finally, especially when self-executing, treaties can cause avulsive changes in law. Their effect on even domestic substantive law can be dramatic. They can alter or sweep aside statutes and administrative regulations. For example, treaties entered into by the United States during the past two decades have radically transformed many aspects of U.S. copyright law. Their scope can even exceed the bounds of Congress’s Article I legislative power.

On the other hand, like statutes, treaties can become entrenched. Since amending them or withdrawing from them is difficult or awkward,

---

287 Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 HARV. L. REV. 1867, 1885 (2005) ("The treaty power is somewhat analogous, textually and structurally, to the legislative power vested in ... Congress by Article I, Section 1 [of the U.S. Constitution].").

288 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States ... and all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land . . ."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation."); JANIS, supra note 286, at 92 ("[B]etween treaty law and federal statutory law there is thought to be a virtual equivalence.").

289 See Glashauser, supra note 283, at 1296 ("With treaties, there is usually no 'mischief' to eradicate; the aim is cooperation."); see also Jeremy Waldron, The Half-Life of Treaties, Waitangi, Rebus Sic Stantibus, 11 OTAGO L. REV. 161, 169 (2006) ("Presumably it is the point of treaties to protect expectations against change."). In this respect, treaties may be even more future-oriented than statutes. This does not mean, however, that treaties are entirely uninfluenced by the past. See Glashauser, supra note 283, at 1325 (noting that countries "have a history with everyone—a history that includes previous treaties. That past cannot help but color the meaning of a treaty.").

290 See JANIS, supra note 286, at 29 ("Treaties may, by their terms, apply retroactively, but the presumptive rule is that treaty provisions are not retroactive.") (footnote omitted).

291 See Stewart, supra note 227, at 456 (predicting that "the regulatory policies and rules applied at the domestic level in the United States and other countries will increasingly have been established through extranational processes not directly subject to domestic administrative law").

292 See CRAIG JOYCE ET AL., COPYRIGHT LAW 25 (7th ed. 2006) ("The pressure[,] of operating in an increasingly interconnected world . . . has forced upon U.S. lawmakers the necessity of making rapid, and quite fundamental, changes in this ancient body of [copyright] law.").


294 See Glashauser, supra note 283, at 1292 ("Overall, treaties are considered harder to amend than contracts or statutes. In fact, treaty amendment has been called even harder than constitutional amendment.") (footnote omitted); see also Elk v. United Arab Airlines, 360 F.2d 804, 812 n.18 (2d Cir. 1966) (stating that statutes are easier to amend than treaties because legislators regularly schedule meetings).

295 See JANIS, supra note 286, at 36 ("A treaty may be terminated or a party [may] withdraw from it either 'in conformity with the provisions of the treaty; or at any time by consent of all of the parties after consultation with the other contracting [parties].'"") (quoting Vienna Convention, supra note 281, at art. 54); Edward T. Swaine, The Constitutionality of International Delegations, 104 COLUM. L. REV. 1492, 1561 (2004) ("['L]egislators may have less freedom to alter or repudiate [an international] proposal than they do with respect to domestic measures.") (alterations in original) (quoting Paul Stephan). Unilateral termination of or withdrawal from treaties, though not uncommon, is theoretically regulated by the concept of rebus sic stantibus. JANIS, supra note 286, at 37–38; Laurence R. Helfer,
they are resistant to change. Even assuming that they can be modified or abrogated if relevant circumstances change, treaties may be subject to forms of entrenchment stronger than those applicable to legislation because complex relations with other nations may be adversely affected by even a technically legal repudiation of treaty obligations.297

"We live in a world of treaties."298 As time has passed, treaties have become both more numerous and more influential.299 Moreover, the focus of treaties has shifted and broadened to include not merely the conduct of nations but also the conduct of individuals and private organizations.300

Expiring Treaties, 91 VA. L. REV. 1579, 1583, 1616–19 (2005) (discussing some of the consequences of treaty withdrawal, including sanctions, a reputation for unreliability that may lead to fewer future opportunities to enter into treaties or to do so on advantageous terms, and diminished influence in future international rulemaking); id. at 1606–07 (explaining that “older multilateral agreements are denounced more frequently than recently adopted treaties” and suggesting that there may be a discernible “shelf life” for treaties).

See JOHN STUART MILL, Treaty Obligations, in ESSAYS ON EQUALITY, LAW, AND EDUCATION 341, 346 (John Robson ed., 1984) (“Nations cannot rightfully bind themselves . . . beyond the period to which human foresight can be pressed to extend [because of] the danger which, to some extent, always exists, that the fulfillment of the obligation may, by change of circumstances, become either wrong or unwise.”); Waldron, supra note 289, at 162 (“[T]reaties are not required to survive all the changes that time has wrought . . . parties may be freed from their treaty obligations when things change in some fundamental relevant respect.”).

Posner & Vermeule, supra note 221, at 1701 (“Treaties raise significant entrenchment issues . . . . In the United States, because a treaty requires a two-thirds vote of the Senate, the Senate cannot abrogate an earlier treaty by consenting to an inconsistent treaty with a simple majority; nor can a majority in both houses—through ordinary legislation—abrogate the international effect of treaty obligations. As a consequence, the Senate (with the President) can reach beyond its ‘temporal mandate’ and entrench policies against the interest of future majorities.”) (footnote omitted). This may be inaccurate because the President could simply withdraw from the previous treaty, thereby leaving the field clear for the new one. See JANIS, supra note 286, at 40 (“In the United States, the power to suspend or terminate a treaty or to decide not to suspend or terminate a treaty is vested in the President.”); see also Beard v. Greene, 523 U.S. 371, 376 (1998) (“An Act of Congress . . . is on full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”) (internal quotations omitted). Since, as a practical matter, a country can terminate or withdraw from a treaty at will, and since in the United States the President can do it alone, it actually may be easier to abrogate a treaty than it is to abrogate a statute.

Yoo, supra note 285, at 1956.

See JANIS, supra note 286, at 8 (“[T]he fact is that there is more international law today than ever before. [In addition,] the role it plays in world affairs—political economic, social, and humanitarian—has never been greater.”); see also id. at 13 (“Virtually every human activity is to some degree the object of some treaty.”); Scott M. Sullivan, Rethinking Treaty Interpretation, 86 TEX. L. REV. 777, 781 (2008) (“The latter half of the twentieth century and the beginning of the twenty-first have demonstrated remarkable growth in international connectedness . . . . The result has been a dramatic proliferation of international treaties, both bilateral and multilateral, purporting to [cover] . . . diverse subject matters . . . .”).

See Rosenkranz, supra note 287, at 1869–70 (referencing “the explosion of the United States’s commitments under international law [on matters of distinctly local concern]”); Yoo, supra note 285, at 1958 (“[T]he real object [of such a] treaty . . . is not to affect state behavior but to regulate the activities of individuals and private entities.”) (quoting ABRAM CHAYES & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 14 (1995)).
This trend has been apparent for some time, but it has accelerated during the past fifty years.\textsuperscript{301} For example, the treaties concluded between 1648 and 1919 fill 226 weighty books, those concluded between 1920 and 1946 fill 205 more volumes, and those concluded between 1946 and 1999, fill 204 more volumes.\textsuperscript{302} In addition, between 1920 and 1946, 4834 treaties were registered with the League of Nations; while between 1946 and 1999, 35,426 treaties were registered with the United Nations.\textsuperscript{303} Similarly, while just eighty-six multilateral treaties were concluded between 1751 and 1850, more than 2000 were concluded between 1951 and 1975.\textsuperscript{304} Further, from 1960 to 2000, the United States alone entered into 12,446 treaties,\textsuperscript{305} an increase aptly described as an "explosion."\textsuperscript{306} Finally, the number of self-executing treaties entered into by the United States is also increasing.\textsuperscript{307} In short, "[r]ecent decades have witnessed a striking proliferation in treaties."\textsuperscript{308} Non-treaty international agreements have proliferated as well.\textsuperscript{309}

\textsuperscript{301} See JANIS, supra note 286, at 11 n.4 (showing the increase in treaties from 1944 to 1999); David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 MICH. L. REV. 1075, 1304 (2000) ("[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further . . . as globalization proceeds.").

\textsuperscript{302} JANIS, supra note 286, at 11.

\textsuperscript{303} Id. at 11 n.4.


\textsuperscript{305} CONG. RESEARCH SERV., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 39 tbls.II-1 & II-2 (Comm. Print 2001); see also Richard B. Graves III, Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause, 50 J. COPYRIGHT Soc'Y USA 199, 249 (2003) ("Both the number of treaties to which the United States is a party, and particularly the scope of those treaties, have sharply increased in recent decades . . .").

\textsuperscript{306} Rosenkranz, supra note 287, at 1869–70 (describing "the explosion of the United States’s commitments under international law [on matters of distinctly local concern]" as one of "the two most dramatic trends in American law").

\textsuperscript{307} See Michael P. Van Alstine, Federal Common Law in an Age of Treaties, 89 CORNELL L. REV. 892, 921–22 (2004) ("Perhaps the most striking observation that emerges from a comprehensive examination is the sheer number of existing self-executing treaties. The number of treaties that contain self-executing provisions is now over four hundred (even excluding treaties with Native American tribes) . . . Equally remarkable is their substantive law coverage.").


\textsuperscript{309} Sloss, supra note 281, at 1968 ("Between 1789 and 1989, the United States concluded more than 12,000 non-treaty international agreements.") (citing CONG. RESEARCH SERV. 103RD CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 14 (Comm. Print 1993)).
As a result of these developments, the expanding role of treaties may soon rival that of statutes. "Now, . . . with the continuing transition from interstate to international integration, the law is increasingly entering a new phase in its maturation."

Because of the proliferation of treaties and other consequences of globalization, this era of lawmaking is likely to be even more future-oriented than its predecessor.

### III. Is Law's Increasing Future-Orientedness Good or Bad?

#### A. Framing the Issue

Whether the changes in lawmaking described above are good or bad depends upon two sets of considerations. The first set—the temporal one—asks whether it is better to employ more future-oriented methods of lawmaking than in the past. The second set—the institutional one—asks whether, apart from their greater future-orientedness, the newly dominant methods of lawmaking are better or worse than the old ones. On both dimensions, better or worse must be determined in relation to the demands of the environment, namely, an increasingly complex, interrelated, and rapidly evolving world. Just as it makes little sense to ask whether reptiles or fish are better than mammals in the abstract, because the answer depends in part on the nature of the environment in which they are situated, it also makes little sense to ask whether judges are better lawmakers than legislators, administrators, or diplomats in the abstract. If, in the long run, we migrate from one method of lawmaking to another it may be because the one we consistently prefer meets our actual needs better than the one we consistently reject.

#### B. Temporal Considerations

1. **Why Increasingly Future-Oriented Lawmaking Might Be Good**

   From a temporal standpoint, several considerations weigh in favor of

---

310 Van Alstine, supra note 307, at 900; see also MANFRED B. STEGER, GLOBALIZATION: A VERY SHORT INTRODUCTION 64 (2003) ("At the outset of the 21st Century, the world finds itself in a transitional phase between the modern nation-state system and postmodern forms of global governance."); Young, supra note 286, at 124 ("[M]odern treaty making often delegates legal authority to supranational institutions . . . .").

311 See THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 7–8 (1999) (describing globalization as involving "the inexorable integration of markets, nation-states and technologies to a degree never witnessed before . . . ."); STEGER, supra note 310, at 11 (stating that "globalization involves the intensification and acceleration of social exchanges and activities."); Golove, supra note 301, at 1304 ("[I]nternational treaty practice has greatly expanded in the past half century and promises to expand further in the decades ahead as globalization proceeds.").

312 See JANIS, supra note 286, at 8 ("As trade, transport, culture, and communications link the people of the globe ever closer together, so are we likely to rely more upon international law in the future.").
THE EVOLVING TEMPORALITY OF LAWMAKING

the increasing future-orientatedness of lawmaking. First, we generally encourage people to try to anticipate the future, plan ahead, and invest in an attempt to transform their present goals into future realities. We do this because of an optimistic belief that "[disciplined and valid prospective thinking can help people shape their environments and their futures effectively and responsibly."\(^{313}\) Proverbs such as "planning your future saves you from regretting your past,"\(^{314}\) express a widely-shared view that attempting to anticipate the future is essential to achieving good results.\(^{315}\)

Second, our knowledge of the past is imperfect. Although we know more about the past than we know about the future, that does not mean that our view of the past is accurate. The difficulty of discerning the past is widely recognized: time has been described by Alfred Tennyson as "a maniac scattering dust,"\(^{316}\) and by William Shakespeare as a dark, bottomless pit.\(^{317}\) Sophocles said that "Great Time makes all things dim,"\(^{318}\) and Robert Grudin observed that "[n]o darkness obscures things as effectively as time."\(^{319}\) There are several reasons why people speak of time in this way.

To start with, although there are traces of portions of the past, the available recording devices—memory, documents, photographs, tape recordings, etc.—are not entirely reliable,\(^{320}\) and are employed selectively.\(^{321}\) Even worse, some of the devices used to record the past do not just passively decay, but actively reconstruct.\(^{322}\) As a result,
information about the past tends to deteriorate with the passage of time. Many have confirmed the existence of this phenomenon, and it has not escaped the notice of the courts.

In addition, interpretations of the past unavoidably occur in the present and look toward the future. For that reason, they over-emphasize the things about the past that seem to possess significance for the present or the future, and under-emphasize those things that do not. Of course, as time passes our notion about what parts of the past are significant changes. The hindsight bias—a cognitive illusion that causes people to overstate their ability to have predicted the past, and to believe that others should have been able to predict events better than actually was possible—exacerbates this distortion. Learning an outcome causes people to update their beliefs about the world, but in doing so, people overlook the change in their beliefs that learning the outcome inspired. When courts evaluate conduct after the fact, retroactively assessing the predictability of what has occurred since the litigants acted, they are vulnerable to the hindsight bias.

We want.

Arnold, supra note 320, at 12 ("[H]istorians always get things 'wrong.' We do this first because we cannot ever get it totally 'right.' Every historical account has gaps, problems, contradictions, areas of uncertainty.").

See, e.g., Bd. of Regents of Univ. of State of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980) ("The process of discovery and trial which result in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the evidence or testimony in question is relatively fresh"); see also Richard A. Epstein, The Temporal Dimension in Tort Law, 53 U. Chi. L. Rev. 1175, 1182 (1986) ("The longer the period between operative fact and legal judgment, the more likely it is that error will creep in: memories will fade, evidence will disappear or become unreliable.").

See Michel Foucault, The Archaeology of Knowledge (A. M. Sheridan Smith trans., Pantheon 1972) (1969) (explaining that history is written about the past from a particular present, and therefore history tends to emphasize the events that appear to have caused the present or to have mattered in the present); Baruch Fischhoff, For Those Condemned to Study the Past: Heuristics and Biases in Hindsight, in Judgment Under Uncertainty: Heuristics and Biases 335, 341 (Daniel Kahneman et al. eds., 1982).

See Jeffrey J. Rachlinski, A Positive Psychological Theory of Judging in Hindsight, 65 U. Chi. L. Rev. 571, 571–72 (1998) (quoting Baruch Fischhoff's description of the "hindsight bias"); see also Bernard Bailyn, On the Teaching and Writing of History 53 (Edward Connelly Latham ed., 1994) ("This is one of the great impediments to a truly contextual history. Somehow one has to recapture, and build into the story, contemporaries' ignorance of the future."); Arthur M. Schlesinger, Jr., The Historian as Participant, 100 Daedalus 339, 350 (1971) ("The present, as historians well know, re-creates the past. This is partly because, once we know how things have come out, we tend to rewrite the past in terms of historical inevitability.").

Scott A. Hawkins & Reid Hastie, Hindsight: Biased Judgments of Past Events After the Outcomes Are Known, 107 Psychol. Bull. 311, 312–13 (1990) (describing the process of "creeping determinism" where "outcome information is immediately and automatically integrated into a person's knowledge about the events preceding the outcome").

Finally, human beings are susceptible to what might be called "temporalcentrism." We find it difficult to understand why people did the things they did in the past. We unavoidably measure the past against contemporary standards, and, when we do, the past frequently suffers by comparison. Of course, this is unfair. We know that, but we cannot help doing it all the same. This means that, like the future, the past also provides an unstable foundation on which to base laws and other choices.

A third reason future-oriented lawmaking might be good is that excessive preoccupation with the past can be a burden that hinders our ability to deal with new challenges in the innovative manner necessary to achieve optimal results. This is especially problematic when technology and culture are rapidly evolving. In that circumstance, simply relying on our knowledge of the past is no longer enough. Accordingly, such sentiments as "the earth belongs to the living, and not to the dead," and ", our relation with the past should be that of a student, not a mortician," are even more apt today than when they were uttered. At least to some

329 L.P. Hartley, The Go Between 9 (1952) ("The past is a foreign country; they do things differently there."); Henry David Thoreau, A Week on the Concord and Merrimack Rivers, in 1 THE WRITINGS OF HENRY DAVID THOREAU 162 (Houghton Mifflin 1906) (1867) ("Critical acumen is exerted in vain to uncover the past; the past cannot be presented, we cannot know what we are not.").

330 See Charles A. Beard, Written History as an Act of Faith, 39 AM. HIST. REV. 219, 221 (1934) ("[A]ny written history inevitably reflects the thought of the author in his time and cultural setting.").

331 J.T. Fraser, The Problems of Exporting Faust, in TIME, SCIENCE AND SOCIETY IN CHINA AND THE WEST: THE STUDY OF TIME V 1, 14 (J.T. Fraser et al. eds., 1986) ("[T]o every epoch its own understanding of the world appears to be obvious and just about complete."); Posner, supra note 8, at 575 ("The concept of moral progress, which is definitionally historicist, invariably makes us look good in comparison to our predecessors because it is assessed from the standpoint of the present; it is our values that determine what is to count as progress.").

332 See MARK TWAIN, PERSONAL RECOLLECTIONS OF JOAN OF ARC, at vii (Harper & Bros. 1896) ("To arrive at a just estimate of a renowned man's character one must judge it by the standards of his time, not ours.").

333 See NATHANIEL HAWTHORNE, THE ENGLISH NOTEBOOKS 294 (Randall Stewart ed., Russell & Russell, Inc. 1969) (1941) ("The present is burthened too much with the past . . . I do not see how future ages are to stagger onward under all this dead weight, with the additions that will continually be made to it."); LOWENTHAL, supra note 7, at 69 ("[T]radition is a brake on progress."); KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE 9 (Daniel De Leon trans., 3rd ed. 1913) (1852) ("The tradition of all past generations weighs like an alp upon the brain of the living.").

334 See DE JOUVENEL, supra note 38, at 10 ("[T]he fewer changes we anticipate, the more we can continue to rely on our knowledge for the future. If society tends on the whole to conserve the present state of affairs, our present knowledge has a high chance of being valid in the future. On the other hand, the future validity of our knowledge becomes increasingly doubtful as the mood of society inclines toward change and the changes promise to be more rapid.").

335 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958); see also LUBAN, supra note 194, at 118 ("The framers of past laws enacted them to put out their own fires, and their time horizons were not necessarily long enough to envision the fires that we now confront."); Holmes, supra note 30, at 469 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

336 Meyer, supra note 137, at 471.

337 See ADAM & GROVES, supra note 18, at 1 ("Change rather than stability is the order of the day. In this dynamic world of universal mobility, standing still means falling behind.").
extent, law and lawmaking must evolve. Adapt or die is a maxim that applies as well to legal rules as to species.

Fourth, as the human population of the earth has grown, and as technology has advanced, our ability to influence the future has increased. Unlike just a few generations ago, we now possess the capability to drastically affect the lives of people who may exist hundreds or even thousands of years from now, and even to destroy humans as a species or to render the earth uninhabitable. The future we are shaping—or, in some instances, taking—is the present of unborn generations. Unless we are careful, we may find that we are unfairly “exploiting the future in the narrow interests of the present.” Accordingly, we have a responsibility to care about the future we are creating. Otherwise, we may emulate the Greek titan Kronos, who ate his children.

2. Why Increasingly Future-Oriented Lawmaking Might Be Bad

On the other hand, several temporal considerations weigh against the increasing future-orientedness of lawmaking. First, we would be foolish to

338 See Gallimore v. Children's Hosp. Med. Ctr., 617 N.E.2d 1052, 1056 (Ohio 1993) (“Times have changed and so should the law.”); Lord Reid, supra note 78, at 25 (“Common sense is not static. What passed for common sense three hundred or even one hundred years ago sometimes seems nonsense today.”). As one scholar has said, “consistency with past institutional decisions has only limited value for its own sake; it has substantial value only if it serves some fairness or policy goal. We may sometimes accept, but we never treasure, consistency with bad past decisions.” EISENBERG, supra note 119, at 144.

339 See Seto, supra note 111, at 2013 (“Humans dominate Earth because our behaviors evolve more quickly than those of any other species.”); 2 BLAISE PASCAL, PENSEES 271 (Ernest Havet ed., 1881) (1651) (“The whole succession of human beings throughout the course of the ages must be regarded as a single man, continually living and learning; and this shows how unwarranted is the deference we yield to the philosophers of antiquity.”).

340 ADAM & GROVES, supra note 18, at 33 (“Our actions in contemporary society reach into ever more distant futures and cast ever longer shadows.”); AURELIO PECCEI, ONE HUNDRED PAGES FOR THE FUTURE: REFLECTIONS OF THE PRESIDENT OF THE CLUB OF ROME 10 (1981) (“The future will no longer be a mere continuation of the present, but a direct consequence of it.”).

341 See ADAM & GROVES, supra note 18, at 110 (“What differentiates these new genetic techniques from established traditions of selective breeding is the capacity to effect change in the present where conventional breeders had to await results over many generations of reproductive subjects.”); id. at 167 (stating that “the future is approached as a realm where poisons can be deposited for thousands of years, where resources evolved over millennia can be used up or depleted in a single life time, and where our atmosphere and stratosphere can be altered”).

342 Id. at 13 (“Our future is the present of others.”).

343 Id. at 143.

344 See Oren Lyons, An Iroquois Perspective, in AMERICAN INDIAN ENVIRONMENTS: ECOCLOGICAL ISSUES IN NATIVE AMERICAN HISTORY 171, 173 (Christopher Vecsey & Robert W. Venables eds., 1980) (“We are looking ahead, as is one of the first mandates given to us as chiefs, to make sure and to make every decision that we make relate to the welfare and well-being of the seventh generation to come.”); id. at 174 (“What about the seventh generation? Where are you taking them? What will they have?”).

345 See Hesiod, Theogony, in THEOLOGY WORKS AND DAYS TESTIMONIA 1, 39, 41 (Glenn Most trans., 2006).
ignore the past, even if we could. By ignoring the past, we would forfeit potentially useful information. William Shakespeare was right when he wrote “[w]hat’s past is prologue,”\textsuperscript{346} at least to some degree. Presumably there is a sort of natural selection at work that retains the best of human knowledge (or at least the most suitable for present and short-term future conditions) and discards the worst as time passes.\textsuperscript{347} Thus, focusing too much on the future could unduly discount what we have already devised. As Nobel Prize-winning physicist Richard Feynman put it, “[t]o listen to the ideas of the past and the experience of people for a long time might be a good idea. It’s only a good idea not to pay attention to the past when you have another independent source of information that you’ve decided to follow.”\textsuperscript{348}

Second, law can be viewed as a sort of collective social memory, “a cultural endeavor . . . requiring the collaboration of many generations . . . ”\textsuperscript{349} On this account, the present generation has a moral obligation to respect the past because if it does not, the work of past generations will have been wasted, and its own work will be more likely to be ignored in the future.\textsuperscript{350} Forgetting the past may be immoral as well as

\textsuperscript{346} WILLIAM SHAKESPEARE, THE TEMPEST, act 2, sc. 1; see also MARTIN LUTHER KING, JR., THE WORDS OF MARTIN LUTHER KING, JR. 83 (Coretta Scott King ed., 1983) (“The past is prophetic . . . ”).

\textsuperscript{347} See ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 459 (Thomas G. West ed., Liberty Fund Inc. 1996) (1751) (“Men are subject to errors, and 'tis the work of the best and wisest to discover and amend such as their ancestors may have committed, or to add perfection to those things which by them have been well invented.”); Kronman, supra note 9, at 1057 (noting that the achievements of culture are cumulative and the product of generations of collaboration). But see Ronald A. Heiner, Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules, 15 J. LEGAL STUD. 227, 256–57 (1986) (questioning whether the analogy to natural selection processes is appropriate because, in human society, less harsh natural selection processes and much shorter time scales are at work, and concluding that, as a consequence, “the law may not comprise a set of uniformly functional doctrines and procedures. Rather, at any point in time it may embody a mixture of practices, some highly functional and others not.”).


\textsuperscript{349} Kronman, supra note 9, at 1057; Gregory A. Caldeira, The Transmission of Legal Precedent: A Study of State Supreme Courts, 79 AM. POL. SCI. REV. 178, 183 (1985) (describing the common law as “the collective and collected wisdom amassed over decades, of an appellate bench”); see also Mashaw, supra note 229, at 1343 (“We look to the past to understand who we are, to justify our normative commitments, and to give meaning to the present. The past is the repository of our cultural and intellectual resources.”).

\textsuperscript{350} WILLIAM HAZLITT, On Reading New Books, in 12 COLLECTED WORKS OF WILLIAM HAZLITT: FUGITIVE WRITINGS 161, 171 (A.R. Waller & Arnold Glover eds., 1904) (“By despising all that has preceded us, we teach others to despise ourselves.”). A similar argument has been made for the proposition that judges should respect precedents; otherwise, the doctrine of stare decisis will be weakened and their own decisions will have no staying power. Richard A. Posner, What Do Judges and Justices Maximize? (The Same Things Everybody Else Does), 3 SUP. CT. ECON. REV. 1, 14–15 (1993) (stating that judges do not like to be “reversed” but noting that this aversion to reversal does not figure largely in the judicial utility function as such reversals have become rare at the appellate level and are nonexistent at the Supreme Court level).
shortsighted. Third, adherence to precedent promotes inter-temporal equity. Since the past cannot be undone, the only way to treat later cases like (identical) earlier ones is to conform the later cases to them; this is a consequence of the rather obvious fact that time flows in one direction only. Maintaining fairness among litigants, then, may compel us to respect, and to repeat, what we have previously done, even if we now believe that what we did was suboptimal. For this reason as well, forgetting or ignoring past decisions and rules seems wrong.

Fourth, humans are not particularly adept at predicting the future. "The future," it has been said, "is a sealed book," the contents of which are "hidden from us." Since ancient times, humans have recognized the limits of foresight. More recently, it has been observed that "[e]very prediction contains an element of irreducible uncertainty," and even that

351 See Simone Weil, The Need for Roots: Prelude to a Declaration of Duties Toward Mankind 51—52 (Arthur Wills trans., 1952) ("The past once destroyed never returns. The destruction of the past is perhaps the greatest of all crimes.").

352 See Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817, 850—55 (1994) (arguing that judicial adherence to precedent promotes uniformity, "facilitates the administration of public law, ensures that similarly situated people are treated equally, bolsters respect for judicial authority, and provides the authority of a single voice").

353 Kronman, supra note 9, at 1041; see also Douglas, supra note 99, at 736 ("And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."). But see Jerome Frank, Courts on Trial: Myth and Reality in American Justice 268 (1949) ("Equality before the law" is a properly cherished principle. Yet it ought not to be pushed to ridiculous limits. Merely because a court was outrageously unfair to Mr. Simple in 1900 is a poor reason for being equally unfair to Mr. Timid in 1947. Thus to perpetuate a markedly unjust rule seems a queer way of doing justice.").

354 See Stewart Brand, How Buildings Learn: What Happens After They're Built 178 (1994) ("All predictions are wrong."); see also Laura Lee, Bad Predictions (2000) (collecting over 1000 examples of failed predictions); Roger Buehler et al., Inside the Planning Fallacy: The Causes and Consequences of Optimistic Time Predictions, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 250 (Thomas Gilovich et al. eds., 2002) (stating that "predicted completion times for specific future tasks tend to be more optimistic than can be justified by the actual completion times or by the predictors' general beliefs about the amount of time such tasks usually take"). Even the Supreme Court has made embarrassingly poor predictions. See, e.g., Clinton v. Jones, 520 U.S. 681, 702 (1997) (predicting that respondent Jones's lawsuit against President Clinton was "highly unlikely to occupy any substantial amount of [the President's] time").

355 A DICTIONARY OF AMERICAN PROVERBS, supra note 314, at 244.


357 De Jouvenel, supra note 38, at 5 ("[T]he expression 'knowledge of the future' is a contradiction in terms."); Sophocles, Ajax, in SOPHOCLES II 1, 62 (David Grene & Richmond Lattimore eds., John Moore trans., 1957) ("What men have seen they know/But what shall come hereafter/No man before the event can see/Nor what end waits for him.").

358 Thomas R. Stewart, Uncertainty, Judgment, and Error in Prediction, in PREDICTION: SCIENCE, DECISION MAKING, AND THE FUTURE OF NATURE 41 (Daniel Sarewitz et al. eds., 2000) (stating that although it is undisputed that every prediction necessarily has at least some degree of uncertainty, the implications of this uncertainty are generally not appreciated).
predicting the future is simply "impossible."\textsuperscript{359} "Foresight," as one French poet commented, "is a dream from which the event awakes."\textsuperscript{360}

Predicting what other people, whether singly or in groups, will do is especially challenging because the connection between future human behavior and the past is tenuous. As Barbara Adam has explained:

[M]uch of human futurity is not of the kind that can be extrapolated from a known past. Rather, it is open-ended, rooted in being unto death and irreducibly tied to human freedom. Our futurity, in other words, is marked by anticipation, fear, hope and desire; by the capacity to use our imagination, calculate and speculate, plan and make choices; by entering contracts, honoring obligations, taking responsibility and acting on trust; by being guided by ideals, passions and ambitions as well as ethics, morals, faith and visions of how the world ought to be. In everyday life, it seems people (including scientists) bracket past-based causality, casting aside its restrictions by living futurity and practicing protention.\textsuperscript{361}

The quality of legal rules cannot help but be adversely affected by our inability to predict other people’s behavior.\textsuperscript{362}

Our inability to reliably predict the future even extends to our forecasts of our own future preferences.\textsuperscript{363} For example, people who buy food for two weeks at a time, rather than one day at a time, usually are less satisfied with their choices because they fail to accurately predict what they will feel like eating even a few days later.\textsuperscript{364} Similarly, “human beings are
remarkably bad at predicting how various experiences will make them feel. They were remarkably bad at predicting how various experiences will make them feel. Young college professors asked to anticipate how they would feel if they were awarded or denied tenure, correctly predicted the valence of their feelings, but overestimated how good a positive decision would make them feel and how bad a negative decision would make them feel. If we cannot predict even relatively simple matters like this about ourselves, it is difficult to imagine how we can expect to accurately predict the preferences of others.

Fifth, an obsession with looking to the future means that we cannot dwell comfortably in the present. Our hopefulness and drive to improve and adapt our law make it difficult for us to accept our law as it is and to adjust to it. Excessive future-orientedness makes our law seem contingent and provisional, rather than like a treasured heirloom handed down to us by our ancestors. Increasingly, precedents seem like “a restricted railroad ticket, good for this day and train only.” This appearance may breed cynicism about law and lead to an underinvestment in making law work.

Sixth, pre-commitments are frequently useful and value-maximizing. Binding contractual promises facilitate planning and optimal deployment experience is occurring”); see also Daniel Read & George Loewenstein, Diversification Bias: Explaining the Discrepancy in Variety-Seeking Between Combined and Separate Choices, 1 J. EXP. PSYCHOL.: APPLIED 34, 34–35 (1995) (arguing that human consumers engage in “diversification bias,” a process by which they select many goods of the same kind, thus creating “much more diversity for themselves than they will subsequently want”); Itamar Simonson, The Effect of Purchase Quantity and Timing on Variety-Seeking Behavior, 27 J. MARKETING RES. 150, 150 (1990) (“[C]onsumers’ preferences when making purchases may be poor predictors of their preferences in a future consumption period because of possible changes in state of mind and tastes.”) (internal citation omitted).

SCHWARTZ, supra note 364, at 173.  
366 See Daniel T. Gilbert et al., Immune Neglect: A Source of Durability Bias in Affective Forecasting, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 617–24 (1998) (stating that recent positive experiencers were “not as happy as forecasters believed they would be after becoming recent positive experiencers themselves” and that recent negative experiencers were “happier than forecasters estimated they would be after becoming recent negative experiencers themselves”).

FRASER, supra note 5, at 186 (“Contemporary legal scholars tend to view laws as forms of community discourse subject to continuous revision.”); see also BROOKS, supra note 45, at 273 (“The hopeful person is always chasing the grapes of Tantalus, which remain always out of reach. The hopeful person has trouble living in the present and savoring the moment, for she is imprudently distracted by the mirages of the future. She doesn’t appreciate what she has, because she is consumed by the thought of what she might have.”); cf. S. G. F. BRANDON, MAN AND HIS DESTINY IN THE GREAT RELIGIONS 385 (1962) (“Man’s awareness of time renders him incapable of complete immersion in present experience; it causes him ever to be looking ahead beyond the immediate moment . . . .”).

BROOKS, supra note 45, at 275–76 (“In the land of the future, one’s relationship to a place, to a job, to a lifestyle is provisional, because at any juncture, you might move on in pursuit of the horizon.”).

Smith v. Allwright, 321 U.S. 649, 666, 669 (1944) (Roberts, J., dissenting) (arguing that the Supreme Court’s tendency to overrule previous decisions “indicates an intolerance for what those who have composed [the] court in the past have consciously and deliberately concluded”).
of resources. Tying our hands also can prevent us from taking action that is contrary to our long-term best interest in the heat of a crisis.

Seventh, “future-orientedness” might give a single generation or a small number of generations too much lawmaking power in the long run. Broadly speaking, generations collaborate in making law, with each generation contributing new doctrine to the pile of law heaped up by its predecessors. But once law is created it acquires inertia that makes it difficult to change. A burst of lawmaking, such as America underwent during the twentieth century, may be problematic. Society may be better off if law develops at a more even rate so that law can keep pace with societal change rather than sporadically lagging behind it and leaping ahead of it. More gradual lawmaking also helps prevent one era—which may be an unfortunate one in terms of the quality of the law made, or which may possess idiosyncrasies unrepresentative of conditions and needs generally prevailing in the long run—from dominating the legal landscape for a long period of time.

For these reasons, some have argued that it is a mistake to try to make law for the future, especially the distant future. Thomas Jefferson thought that all constitutions and laws should expire after a generation, which he calculated to be nineteen years. John Maynard Keynes believed even that was too long:

We cannot expect to legislate for a generation or more. The secular changes in man’s economic condition and the liability of human forecast to error are as likely to lead to mistake in one direction as in another. We cannot as reasonable men do better than base our policy on the evidence we have and adapt it to the five or ten years over...
which we may suppose ourselves to have some measure of prevision . . .

Because statutory and regulatory law are essentially predictive in character and can be difficult to change,\footnote{John Maynard Keynes, The Economic Consequences of the Peace 204 (1920).} by relying more heavily upon them we may be “colonizing the future.”\footnote{Calabresi, supra note 21, at 6 (observing that statutes which are “inconsistent with a new social or legal topography,” and which “could not have been reenacted and thus could be said to lack current majoritarian support,” sometimes remain in effect because the “interests served by these outdated laws could successfully block their amendment or repeal”) (footnote omitted); see also Stewart, supra note 227, at 447 (describing a similar problem of obsolescence and obstacles to change in the administrative rulemaking context).} Worse yet, such colonizing may amount to carving in stone legal rules based upon predictions which will turn out to be not only erroneous, but also a far cry from what we had projected we would want just a few years earlier.

Therefore, we should not make predictions, or base our choices on predictions, unless absolutely necessary.\footnote{Adam, supra note 361, at 298.} To the extent that law is based upon predictions, its foundation is likely an unstable one.

C. \textit{Institutional Considerations}

The quality of legal rules depends in part on the characteristics of the mechanism used to create them.\footnote{See Oscar Wilde, A New Book on Dickens, in \textit{The Artist as Critic: Critical Writings of Oscar Wilde} 46, 47 (Richard Ellmann ed., 1969) (“[O]f all forms of error, prophecy is the most gratuitous . . .”).} The nature of the legal rules made by courts, legislatures, agencies, and diplomats\footnote{See Horowitz, supra note 118, at 24 (noting that “every process, every institution has its characteristic ways of operating; each is biased toward certain kinds of outcomes; each leaves its distinctive imprint on the matters it touches”).} differs.\footnote{I use the term “diplomat” as a proxy for all of those involved in lawmaking by treaty, including not just diplomats, but also the president and the legislature, when applicable.} Sometimes a judicially-created rule works best, so shifting lawmaking away from courts and toward legislatures, agencies, or diplomats may result in the creation of sub-optimal legal rules.\footnote{Because of the infeasibility of repeatedly creating a new constitution or frequently amending an existing one, constitutional framers are not a realistic alternative to courts, legislatures, agencies, and diplomats, as day-to-day lawmakers, so I do not discuss their strengths and weaknesses.} Other times, however, a non-judicially-
created rule works better, so shifting lawmaking away from courts and toward one or more of the other lawmaking institutions makes sense. Non-judicial lawmaking is sometimes attractive because legislatures, agencies, and diplomats possess some structural advantages as lawmakers relative to courts. However, there are tradeoffs because those institutions also possess some structural disadvantages.

Some methods of lawmaking are quicker than others. Speed, however, is a double-edged sword in lawmaking. It can be advantageous, especially when conditions are rapidly evolving. Legislatures, agencies, and diplomats can act more quickly than courts, even if they do not always do so, and that may be one reason why the types of law they make have become so prevalent. Not only does litigation have a slow gestation period, but one case usually is not sufficient to establish a rule, especially if it is not a Supreme Court case. At common law, it typically takes not one case, but several cases presented over a span of years, to accomplish what a statute, treaty, or regulation can accomplish in a few months. And that protracted process must be repeated jurisdiction-by-jurisdiction. Even a Supreme Court decision may not establish a rule because its holding may be so general that lower courts must first apply the broad principle in numerous cases before a definitive rule emerges. Although

have certain capacities for dealing with matters of principle that legislatures and executives do not possess. . . . This is crucial in sorting out the enduring values of a society . . . . ”); Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 HARV. L. REV. 153, 156 (1997) (“[A] rigorous judicial examination of effects on commerce would entail making economic judgments of a kind ill-suited to courts.”).

CARLETON KEMP ALLEN, LAW IN THE MAKING 300–01 (7th ed. 1964) (“Ancient doctrines of the common law are constantly undergoing adaptation. . . . But the process is slow and uneven, and it would be an exaggeration to suppose that the Common Law always keeps abreast of changing conditions. Sometimes, out of excessive deference to precedent, it singularly fails to do so.”).

Stephenson, supra note 64, at 1070 (explaining that “court decisions exhibit more stability over time but more ideological heterogeneity across issues, whereas agency decisions are more ideologically consistent within a given time period but more likely to vary across time”); Giacomo A.M. Ponzetto & Patricio A. Fernandez, Case Law Versus Statute Law: An Evolutionary Comparison, 37 J. LEGAL STUD. 379, 411 (2008) (“The evolution of case law is beneficial because it generates a sequential interaction between a series of judges with different preferences whose idiosyncrasies then balance one another. . . . [T]he evolution of case law provides better outcomes [than statutes] in the long run, unless the efficient rule is changing over time. When the optimum is highly mutable, common law should include a role for statutes to correct the rigidity of binding precedent.”).

legislatures can act more quickly, broad language in a statute or treaty may sometimes require similar elaboration before a clear rule is born. \(^{387}\) Regulations are usually more detailed, so that they may not need elaboration to acquire the requisite specificity, but when they do, agencies can readily supply guidelines and policy statements to fill the gaps. On the other hand, the administrative rulemaking process can be slow.

Fast lawmaking comes at a cost, however. Avulsive changes in law resulting from the adoption of treaties, the enactment of statutes, and the promulgation of administrative regulations undercut the important interests promoted by stare decisis (such as stability, predictability, legitimacy, and efficiency). \(^{387}\) As an example, if law changes quickly, it may fail to achieve one of its central purposes, namely, providing effective incentives for future behavior. People who attempt to follow the law may have the rug pulled out from under them often enough that eventually they may simply stop trying to comply—thereby rendering incentives ineffectual. At first glance, abrupt changes in law made by legislators, administrators, or diplomats (who are directly or indirectly subject to legislative or popular control) seem less troubling than similar changes by undemocratic courts. \(^{389}\) But, in reality, all abrupt legal change undercuts the notion that justice system outcomes should be based on “rules of law and not merely the opinions of a small group of men who temporarily occupy high office.” Only if law evolves slowly over time does it seem to have direction of its own, independent of the particular people who happen to make it. Changes that are too rapid or too frequent undercuts the perceived legitimacy of law.

\(^{387}\) See SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (“Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations.”); Jerome Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 COLUM. L. REV. 1259, 1264 (1947) (“The legislature is like a composer. It cannot help itself: It must leave interpretation to others, principally to the courts.”).

\(^{388}\) See Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970); HART & SACKS, supra note 226, at 568–69 (summarizing the policies promoted by stare decisis); Seto, supra note 111, at 2025–26 (“The requirement that courts adhere to precedent serves to preserve the cultural learning embodied in that precedent . . . . Legislatures have no comparable mechanism. As a result, it is easier for legislatures to discard cultural learning in the heat of the moment.”).

\(^{389}\) See Jones v. Sec’y of State for Soc. Servs., [1972] A.C. 944 (H.L.) 1026 (appeal taken from Eng.) (“Nevertheless, the theory [that judges were not makers of law but merely its discoverers and expounders], however unreal, had its value—in limiting the sphere of lawmaking by the judiciary (inevitably at some disadvantage in assessing the potential repercussion of any decision, and increasingly so in a complex modern industrial society), and thus also in emphasizing that central feature of our constitution, the sovereignty of Parliament.”). Of course, many judges are elected and thus, theoretically subject to popular control. See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES (2004), available at http://www.judicialselection.us (providing state-specific information on judicial selection).

\(^{390}\) Malitz, supra note 127, at 371 (footnote omitted).
The slower pace of courts, and the characteristic lag between the events precipitating a lawsuit and adjudication, gives courts an edge over legislatures, agencies, and diplomats in this respect. As Alexander Bickel put it, "the marvelous mystery of time give[s] courts capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."391 In a sense, law made by courts is like the hundred-day moving average of a stock price392 because courts make law by blending the past, present, and future. This measured pace dilutes or dampens fluctuations in common law relative to more volatile legislative law,393 but it also makes judicial lawmaking more ponderous. On the other hand, courts can implement change more quickly than legislators, administrators, or diplomats in one limited sense: courts can apply their decisions retroactively, at least to cases remaining open on direct review.394

Different lawmaking institutions make law at different times relative to events. Courts make law reactively ex post, after harm has been done, and only after an alleged victim has initiated legal proceedings. By contrast, legislators, administrators, and diplomats make law proactively ex ante, before harm has been done, and without having to wait for a complainant to rouse them to action. Because it is difficult to predict the future, a court, with the benefit of hindsight, may more easily determine the optimal rule than a legislator, administrator, or diplomat acting in foresight.395 On the other hand, judgments made in hindsight may be distorted and unfair to litigants, providing an unsound basis on which to rest future law.396

Some lawmakers have better access to information than others. As compared to the information-gathering resources of courts, "the information-gathering resources of administrators are vastly superior; those of legislators, modestly superior."397 In particular, "courts suffer from an unusual poverty of resources to minimize the incidence of unintended consequences in advance and especially to detect and correct them once they occur."398 This drawback is a serious failing where future-oriented

391 BICKEL, supra note 382, at 26.
392 See Magliocca, supra note 372, at 498 (observing that in common law adjudication "judges pull their values from a consensus built up over time").
393 See Schauer, supra note 132, at 604–05 (describing precedents as "stabilizers and brakes, rather than engines and accelerators").
394 See, e.g., Shannon, supra note 136, at 812 ("Today, the retroactive application of judicial decisions remains the norm." (citing Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 114 (1993)).
395 See ELINOR RICE HAYS, MORNING STAR: A BIOGRAPHY OF LUCY STONE 1818–1893 312 (1961) ("Those most dedicated to the future are not always the best prophets.").
396 Rachlinski, supra note 326, at 571, 596 ("The hindsight bias is a systematic error with the capacity to distort the legal system in undesirable ways.").
397 HOROWITZ, supra note 118, at 55 (footnote omitted).
398 HOROWITZ, supra note 118, at 52.
lawmaking is concerned. However, the legislature’s information advantage should not be exaggerated. “For every judge who acts on imperfect information, students can produce three legislators.”

Diplomats also possess an advantage in this respect. Treaties benefit from an unusually rich information base because they emanate from multiple cultures and legal traditions and may require the endorsement of two branches of government. In addition, because treaties transcend national boundaries, the solutions they offer can be more comprehensive than those offered by domestic legislation or regulations. On the other hand, treaties also possess weaknesses.

Sometimes the way in which an institution makes law fails to take advantage of its institutional strengths and leaves it vulnerable to its institutional weaknesses, especially with respect to the information at its disposal. Courts engaging in prospective overruling and other forms of “judicial legislating” are not basing their decisions on the narrow circumstances before them. Therefore, their inability to engage in the sort of wide-ranging fact-finding that legislatures are capable of performing may generate legal rules that are based upon insufficient information. Similarly, the size and complexity of many statutes, and

---

399 Richard A. Posner, Law, Pragmatism, and Democracy 80 (2003) (“What the judge has before him is the facts of the particular case, not the facts of future cases. He can try to imagine what those cases will be like, but the likelihood of error in such an imaginative projection is great.”).
400 Horowitz, supra note 118, at 293.
401 Janis, supra note 286, at 95 (stating that of all international agreements entered into by the United States between 1946 and 1972, 6% were sent to the Senate for advice and consent pursuant to Article II, § 2, 86.7% were agreements made by the President pursuant to authorizing legislation passed by both houses of Congress, and just 7.4% were agreements made by the President without any congressional participation) (citing L. K. Johnson, The Making of International Agreements 13 (1984)). Since either the full Congress (86.7%) or the Senate (6%) is involved in authorizing or approving a treaty about 92.7% of the time, the information on which treaties are based is usually no worse than that on which statutes are based, and it may in fact be better because the knowledge of other nations informs the drafting process.
402 For example, transplanted law may not properly take root in foreign soil to which it is ill-suited, and generalized law designed to be acceptable to many nations may not fit any nation optimally. See Montesquieu, The Spirit of Laws 8 (Anne M. Cohler et al. eds., 1989) (arguing that “[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another”); David Berkowitz et al., The Transplant Effect, 51 Am. J. Comp. L. 163, 189 (2003) (“Where law develops internally through a process of trial and error, innovation and correction, . . . legal institutions tend to be highly effective. By contrast, where foreign law is imposed and legal evolution is external rather than internal, legal institutions tend to be much weaker.”).
403 Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. Rev. 847, 858–69, 895–904 (2005) (describing a variety of doctrinal changes—e.g., the weakening of the political question doctrine, the erosion of the mootness doctrine, and the ban on providing advisory opinions—which have resulted in the Supreme Court deciding constitutional questions that formerly would have been avoided as unnecessary).
404 Horowitz, supra note 118, at 44 (“Because courts respond only to the cases that come their way, they make general law from what may be very special situations.”); see also Freeman, supra note
the haste with which they are enacted by busy legislatures (sometimes without hearings or meaningful debate), means that legislatures often do not fully utilize the fact-finding procedures available to them (or even have the opportunity to read the entire text of the bills they are enacting). Some have suggested that legislatures too often act precipitously, lurching from crisis to crisis, and acting hastily because of intense short-term political pressure rather than on the basis of careful long-term study. That may be partly true. Attempts to streamline the legislative process to enable it to respond to social change even more rapidly may exacerbate this problem.

One reason common law rules may work better than legislative rules in some situations is that they are created in small increments and can be fine-tuned if they prove unsuitable. Courts usually make law piecemeal,
generalizing only after a lengthy period of trial and error, while legislators, administrators, and diplomats typically attempt to create a comprehensive scheme.

Common-law courts face many institutional limitations, but one constraint they do not face is time. There is no pressure for ordinary judges to rush in and develop a comprehensive doctrinal synthesis or establish clear standards for society’s difficult problems. Instead, courts are expected to resolve cases based on intuitions of equity for years, sometimes decades, before the bar might expect them to pull the cases together and announce THE PRINCIPLE . . .

This feature of the common law may be especially valuable when, as is the case with the future, information is scarce. For example, a court may make a tiny exception to an established rule and then expand or narrow that exception depending upon how well the exception worked, assuming that it is not confronting a deadline. Although legislatures might approximate this technique by means of temporary legislation, or by

---

The Failure of the Common Law, 36 ARIZ. ST. L.J. 765, 777 (2004) (“To believe that the common law works itself pure is to believe that subsequent cases correct the errors of earlier ones far more than they add errors to previously sound doctrines, and that new cases present opportunities for refinement rather than occasions for mistake.”), and Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551, 1552 (2003) (arguing that the common law is neither inevitably nor systematically self-correcting).

Magliocca, supra note 372, at 502–03.

HOROWITZ, supra note 118, at 35; Colin S. Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65, 98 (1983) (arguing that incremental changes in legal rules are most conducive to optimal content and precision); see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 57 (1999) (stating that minimalism in common law adjudication may be best where “factual or moral uncertainty and rapidly changing circumstances” undermine confidence in identifying the best rule for the future).

See Magliocca, supra note 372, at 502–03 (“A strategy of avoiding decisions or rendering exquisitely narrow rulings, which is integral to both the passive virtues and minimalism, works only if there is no immediate need to answer the issues under considerations. If a court had a deadline by which a particular set of issues had to be resolved, then a broader decision—perhaps made in a single burst—would be required to beat that deadline.”).

Jacob E. Gersen, Temporary Legislation, 74 U. CHI. L. REV. 247, 273–75 (2007) (identifying three types of temporary legislation: (1) legislation “used to fill gaps in existing law or as placeholder legislation enacted to cover interim time periods while the legislature considers permanent legislation”; (2) legislation “enacted to respond to policy problems that are themselves believed to be temporary”; and (3) legislation to “implement policy as a short-term basis as a means of generating information that can be subsequently incorporated into the policymaking process”). Temporary legislation allows us to learn from our experience—i.e., if a seemingly sound approach is not working—something that is discouraged by permanent legislation. It also allows us to act immediately, secure in the knowledge that if we make a mistake or learn from experience we can easily undo what we have done and refine our approach. Id. at 268 (“When uncertainty in a policy domain is high, temporary legislation produces informational benefits that aid in the selection of optimal policy.”) (footnote omitted).
amending a statute to fix a mistake, time constraints limit their ability to do so. This might give courts an advantage.\textsuperscript{413} As Learned Hand once said, "[n]obody is so gifted with foresight that he can divine all possible human events in advance and prescribe the proper rule for each."\textsuperscript{414}

This case-by-case model of rulemaking has drawbacks, however. One prominent downside is that courts may not be looking at the big picture, as other lawmakers ordinarily do, so that their view of the forest may be obscured by the sight of a few trees. Specifically, courts may fall prey to the availability heuristic—a tendency to assume that a highly salient event is more common or typical than it actually is.\textsuperscript{415} That cognitive error might cause courts to believe that the situation presented by a particular case is typical of many other cases when in fact it is an infrequent and aberrant circumstance. Moreover, the equities of a particular case might push a court in the direction of creating a rule of law that is either more plaintiff-oriented or more defendant-oriented than the rule it would have crafted based upon a sample of fifty cases in which the equities would be more balanced in the aggregate.\textsuperscript{416} This nearsightedness might also lead to the adoption of a rule poorly suited for the vast majority of cases. Of course, legislatures may act on the basis of a highly salient situation rather than a

\textsuperscript{413} ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 45 (1938) ("Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle. Legislation, when more than declaratory, when it does more than restate authoritatively what judicial experience has indicated involves the difficulties and the perils of prophecy."). Some think that rules are usually better. E.g., Antonin Scalia, Essay, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1187 (1989) (arguing that "the Rule of Law, the law of rules, be extended as far as the nature of the question allows"). Others disagree. E.g., Kathleen Sullivan, Foreword: The Justices of Rules and Standards, 106 HARV. L. REV. 22, 57–62 (1992) (exploring the relative advantages and disadvantages of rules and standards).

\textsuperscript{414} LEARNED HAND, Is a Judge Free in Rendering a Decision?, in THE SPIRIT OF LIBERTY 105 (3d ed. 1977).

\textsuperscript{415} See, e.g., SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 125–26, 178–80 (1993) (discussing the availability heuristic); cf. LLEWELLYN, supra note 142, at 121 (alluding to the "power of the particular").

\textsuperscript{416} See JEROME FRANK, LAW AND THE MODERN MIND 103–04 (1930) ("The judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appearing only in the opinion. The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics. Accordingly, he passes in review all of the rules, principles, legal categories, and concepts 'which he may find useful, directly or by an analogy, so as to select from them those which in his opinion will justify his desired result.'") (quoting Judge Hutcheson); Schauer, supra note 408, at 779 ("Judges are human, and the facts of the particular case will occupy the foreground of their phenomenology. This may at times provide useful contextualization, but it may at times provide distortion, and it is hardly inconceivable that a contemporary reluctance to rely too heavily on case-focused rulemaking reflects a recognition that case-based rulemaking brings as many disadvantages as advantages.").
broader sample as well, so this problem is not confined to courts. But a legislature is more likely to have a wider range of situations before it than a court, which is usually faced with one simple, bilateral dispute at a time. Although this problem is not limited to situations in which courts are making future-oriented rules, it is exacerbated in that situation because so little reliable information about circumstances outside the particular case is available. The Supreme Court’s growing inclination to grant certiorari in groups or clusters of cases is one way of mitigating the truncated perspective caused by the availability heuristic. Lower courts can accomplish a similar result by consolidating related cases or transferring them to a single judge. Specialization by judges might also help.

The common law also may not be as effective a process for refinement and error correction as it seems for another reason. Courts are dependent on litigants for ignition. This has at least two implications. First, the selection of cases that find their way to court may be unrepresentative of the bulk of those to which a legal rule applies. Second, the process for developing new rules and fixing old rules is slow and haphazard. Slowly, through a line of cases—always interspersed in a large pool of cases of many other kinds—the realization that there are problems stemming from earlier decisions may strike the judges. If so, they may turn to corrective action, doubtless long after the initial decisions were made.

417 See Frederick Schauer, Do Cases Make Bad Law?, 73 U. CHI. L. REV. 883, 905 (2006) (citing the example of Megan’s Law); see also Schauer, supra note 408, at 778 (“Prospective rules are necessarily generalizations, and the generalizations that best suit large classes of cases are generalizations that ignore features—even relevant ones—of particular cases.”) (footnote omitted).

418 Healy, supra note 403, at 861 n.60.

419 See 28 U.S.C. § 1407 (2006) (stating that “when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings”); FED. R. CIV. P. 42(a) (stating that “if an action before the court involves a common question of law or fact, the court may consolidate the action”).

420 See Jeffrey J. Rachlinski et al., Inside the Bankruptcy Judge’s Mind, 86 B.U. L. REV. 1227, 1229, 1257 (2006) (recognizing the advantages of specialization, and, while finding that it did not insulate judges from some cognitive errors, ultimately concluding that specialization “does not appear to decrease the quality of judicial decision making, even if it does not lead inexorably to improved decision making”).

421 HOROWITZ, supra note 118, at 294; see also Richard A. Epstein, The Social Consequences of Common Law Rules, 95 HARV. L. REV. 1717, 1719 (1982) (arguing that courts and litigants both maintain control over the judicial process but no one group has complete control). Some have argued that legislatures share this characteristic. Strauss, supra note 62, at 240–41 (arguing that statutory law also arises out of particular controversies and operates incrementally); id. (“[W]e have problems washing up against the legislature over time, much as (through the common law) they also wash up against the courts, and eventually acquiring an urgency that produces response.”).

422 Schauer, supra note 408, at 778 (“[T]he incentives to litigate (or not) and the incentives to appeal (or not) may distort the terrain of the underlying reality, such that cases that wind up in court, the cases that go to judgment, and the cases that wind up . . . on appeal turn out to be an unrepresentative sample of the issues or controversies that exist at the prelitigation stage.”).
and long after people have adjusted their behavior to them. And all of this is, needless to say, very much a matter of chance.  

This hopscotch aspect of common law decision-making by different judges means that it may be a long time before a clear, simple, comprehensive rule emerges.

Perhaps as the world becomes more complex and interdependent, and as it continues to evolve rapidly, the institutional advantages of legislatures, diplomats, and especially administrative agencies, over courts will become more pronounced. All, however, face a difficult challenge, and none is likely to perform very well. Courts use a microscope, legislatures and diplomats use a wide-angle lens, and agencies use both. The problem, however, may be that the device best suited to bringing the future into focus is a telescope.

D. Some Implications

One theme that emerges from a survey of changes in lawmaking during the past century is the gradual whittling down of the sphere of the common law. As Frederick Schauer pointed out:

---

423 Horowitz, supra note 118, at 54; see also Dworkin, supra note 9, at 179–86 (arguing that judicial lawmaking results in “checkerboard” legislation); Scalia, supra note 90, at 8–9 (“[T]he common law grew in a peculiar fashion—rather like a Scrabble board. No rule of decision previously announced could be erased, but qualifications could be added to it. The first case lays on the board: ‘No liability for breach of contractual duty without privity’; the next player adds ‘unless the injured party is a member of a household.’ And the game continues.”). Although the Supreme Court has some ability to shape its agenda, at least to the extent of choosing which cases it will decide from among those litigants happen to offer it, even it is hamstrung because it cannot initiate a case on its own. See Lee Epstein & Jack Knight, The Choices Justices Make 18 (1998) (observing that the Supreme Court can change public policy only in a “slow and incremental” way).

424 See Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 25 (1957) (stating that the courts “will necessarily come too late with a pound of ‘remedy’ where the smaller measure of prevention was needed. Their rules, tailored to the last bit of trouble, will never catch up with the next and different dispute.”); Schauer, supra note 408, at 781 (“As societies grow, so too does the importance of the guidance function of law, as opposed to its dispute resolution function. And thus so societies grow, the guidance function of the law, always the comparative advantage of the civil law, has increased in importance.”).

425 See Horowitz, supra at 118, at 290 (“Prediction in uncertain, often intractable surroundings remains for the courts, as for all decisionmakers, the most hazardous of enterprises.”); Manning, supra note 104, at 1749 (“Lawmaking bodies have imperfect foresight . . . .”).

426 See Horowitz, supra note 118, at 51–52 (“[A]ll decisionmaking processes are unduly based on what has happened in the past and insufficiently attuned to what might happen in the future . . . .”); see also Rachlinski, supra note 408, at 963 (“Courts and legislatures alike are capable of creating misguided laws.”).
There are important features of the common law that appear to be in rapid retreat. Insofar as it is often thought that a prominent characteristic of the common law is the central role of the judge in the lawmaking process, modern legal design appears to reject such an approach with remarkable frequency, instead substituting the kind of highly precise canonical statement of the law much more associated with civil law than the common law.\textsuperscript{427}

This seems counter-intuitive because law must be applied and because courts still decide large numbers of cases, even though most of those cases do not really “make law” in a meaningful sense, but it is true. Courts are in a competition with other lawmakers,\textsuperscript{428} and they are not faring well. As explained above, the erosion of stare decisis and other changes in judicial decision-making have contributed to courts acting more like legislatures by crafting broad, future-oriented rules. Nevertheless, statutes, regulations, and treaties remain more efficient ways of making law than judicial decisions. One page of statute, regulation, or treaty may affect as much conduct as a volume of case law.

Courts have adopted a variety of measures to attempt to preserve their role in lawmaking.\textsuperscript{429} Some of these measures have proven effective, especially at the level of the Supreme Court, while others have not been. But even when they work, almost all are vulnerable to legislative overturning, except, of course, those based on the Constitution. And the more effective these measures are, the more likely it is that the legislature will find them sufficiently irritating to attempt to limit or to override them. Overall, these measures have been at best temporarily or modestly successful. For example, the interpretive principle that statutes in derogation of the common law are strictly construed—a device employed by courts to limit legislative incursions into the judicial

\textsuperscript{427} Schauer, \textit{supra} note 408, at 765 (footnote omitted); \textit{see also id. at} 781 (“[U]sing the dispute resolution function to perform the law guiding function as well is increasingly unrealistic, with the decline of the common law model the not unexpected consequence.”).

\textsuperscript{428} See Arthur Corbin, \textit{The Law and the Judges}, 3 \textit{Yale Rev.} 234, 238 (1914) (“A judge’s declared rules must compete for their lives with the rules declared by other judges and by all other persons. In the judicial world, as in the animal and vegetable world, the ultimate law is the law of the survival of the fittest.”).

\textsuperscript{429} See Magill, \textit{supra} note 242, at 1426–37 (describing the measures courts have adopted to control agency rulemaking and adjudication, including shaping the scope or intensity of judicial review, and specifying the procedures agencies must follow); \textit{see also Eich v. Town of Gulf Shores}, 300 So. 2d 354, 357 (Ala. 1974) (“It is often necessary to breathe life into existing laws lest they become stale and shelf worn. This is not a confrontation with another branch of our government, but rather a unity of effort in order that existing law may become useful law to promote the ends of justice.”).

\textsuperscript{430} See Coral Gables, Inc. v. Christopher, 189 A. 147, 149 (1937); \textit{Llewellyn, supra} note 138, at 522 app. c.
lawmaking process and to integrate statutes smoothly into the overall scheme of the law—has atrophied. The result is that courts are less able to protect their lawmaking role and less able to discharge their traditional responsibility for making all sources of law blend seamlessly together.

Perhaps this result is inevitable: making law by adjudication may simply be too slow and disjointed to accomplish the rapid change we evidently desire, and perhaps need, today. Another reason for this shift may be that, in light of the erosion of stare decisis and the move from strict adherence to constitutional text to Supreme Court glosses on constitutional text as the principal source of constitutional doctrine, courts are viewed as possessing less lawmaking legitimacy than they used to. This trend may make law more democratic, because legislatures are, on balance, more democratic than courts (although diplomats and agencies arguably are not). It also might reduce the quality of law. Oddly, however, the conventional wisdom is that courts are appropriating power to themselves, and hence playing a larger role in the governance of America than ever before. If the account of the evolution of lawmaking presented in this Article is correct, however, then that view is wrong.

Within the common law and constitutional law, however, courts still enjoy considerable leeway. And, even in other areas of the law, they retain

---

431 See Reed Dickerson, The Interpretation and Application of Statutes 206 (1975) ("Except with respect to pure statutory codifications of existing common law, the rule makes little sense, because most statutes that affect the common law are enacted for the very purpose of changing it.").

432 See Magliocca, supra note 372, at 502 ("Since courts have limited information and must act incrementally, they are hardly the place for quick action. People looking for an immediate policy solution usually go to the legislature or to the executive branch."); see also Hogue, supra note 142, at 253 ("Problems of the government of complex industrial societies present serious threats to the continuance of the common-law system.").

433 See Schauer, supra note 408, at 777 ("Once we have recognized that common law decisionmaking involves empowering a group of people to make socially important and largely non-constrained decisions, we should not be surprised to discover that society may at times be more reluctant to do this than when the perceived constraints on judicial decision were much greater.").

434 See Gregg v. Georgia, 428 U.S. 153, 175–76 (1976) (plurality opinion) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

435 See Richard A. Posner, Economic Analysis of Law 560 (7th ed. 2007) ("Although the correlation is far from perfect, judge-made rules tend to be efficiency-promoting while those made by legislatures . . . tend to be efficiency-reducing."); Kysar, supra note 370, at 1059–60 (suggesting that statutory law is inefficient because legislators are not insulated from interest groups, and interest groups tend to advocate their own agendas rather than efficient outcomes).

436 See, e.g., Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism 1 (2004) ("Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries."); Mark R. Levin, Men in Black: How the Supreme Court is Destroying America, at x (2005) ("[S]ince the 1960s, the judicial branch, led by the United States Supreme Court, has accelerated its already well-honed pattern of usurping the authority of the elected branches of government.").
the role of interpreter and applier of what other lawmakers have written, which reserves to them a measure of authority.437 On the other hand, it should be remembered that others (such as agencies, lawyers, clients, etc.) must interpret the decisions made by courts, so it is not clear that courts really have the last word. In addition, agencies have partly taken over another function previously allocated to courts: the interpretation and elaboration of statutes. Here again, courts still retain some role, but much of the work is done by means of agency adjudication or agency rulemaking, and when courts do become involved, they often must defer to administrative determinations. Further, the slice of the common law has been reduced in size relative to the overall pie of law by the incursion of statutes, regulations, and treaties into areas previously governed only by common law—and by the creation of entirely new areas of law in which, while the courts still play a role, their role is merely an interpretive one that is not as large as their role as architects of the common law.438 Finally, even in the traditional arena of applying law to historical facts, the role of courts has been diminished by the ascendancy of alternative dispute resolution439 and the expansion of agency adjudication.440

A second implication is that agencies may be the best lawmakers for our era. Agencies do not have to wait for litigants; instead, they can initiate investigations, prosecute enforcement actions, and formulate policy on their own.441 They both adjudicate and make rules (or quasi-

437 See THEODORE M. BENDITT, LAW AS RULE AND PRINCIPLE: PROBLEMS OF LEGAL PHILOSOPHY 7 (1978) ("'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them.'") (quoting Bishop Benjamin Hoadly); see also HART & SACKS, supra note 226, at 164 ("The body of decisional law announced by the courts in the disposition of these [individual] problems tends always to be the initial and continues to be the underlying body of law governing the society.").

438 See Frederick Schauer, The Generality of Law, 107 W. VA. L. REV. 217, 224 (2004) (recognizing the influence of case law, but arguing that "more often transactions are arranged and legal advice given on the basis of statutes, rules, regulations, and regulatory practices than on the basis of what judges are likely to do on the remote chance that the transaction actually winds up in the hands of a judge").

439 See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 l. EMPIRICAL LEGAL STUD. 459, 460–61 (2004) (describing a steep decline in civil trials); Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1387 (1994) ("[M]ost litigation results in settlement and . . . the portion of cases settled is increasing.").

440 See discussion supra notes 268–70.

441 See, e.g., HOROWITZ, supra note 118, at 297 ("[A]dministrative enforcement is generally stronger and more effective than judicial enforcement, partly because it can be self-starting and self-perpetuating (it need not wait for litigants), and partly because, for some problems at least, administrative tools are sharper and more numerous."); Magill, supra note 242, at 1383 (noting that agencies have a flexibility in choosing among legislating, enforcing, and adjudicating that legislators, courts, and prosecutors lack).
and may develop facts in ways appropriate for each. They can also switch from one lawmaking mode to another as the circumstances and subject matter dictate, and they can apply what they learn during rulemaking to adjudication, and vice versa. Finally, agencies are not very adept at entrenching because legislatures and courts retain some control over what agencies do. However, agencies possess a flaw: they are susceptible to "capture" by those they regulate. Thus, some of what agencies gain in information gathering and in their flexible mix of lawmaking tools, they lose in their lack of independence. That may mean there is a need to remedy the process deficiencies of administrative agencies (such as their vulnerability to capture), while at the same time "getting out of their way" by avoiding judicial engrafting of more numerous and more exacting procedural hoops for them to jump through. Of course, legislatures also are vulnerable to "capture" by wealthy or powerful interests affected by their activities. In this respect the greater independence of courts gives them an advantage.

Other institutions might try to emulate agencies by attempting similar adaptations, but they are unlikely to be equally successful. Legislatures

---

442 Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935) (noting that the FTC was constituted to perform both "legislative and judicial powers"); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 327 (1998) ("The administrative agency itself represents a mixture, or indeed a merger, of all three functions."). In a sense, all lawmakers blend the adjudication perspective and the rulemaking perspective. See Jeffrey J. Rachlinski, Rulemaking Versus Adjudication: A Psychological Perspective, 32 FLA. ST. U. L. REV. 529, 532 (2005) ("No adjudication proceeds without some attention to the broader policy implications that the decision might have, and no rulemaking proceeds without some awareness of how individuals might be affected. Relative to a rulemaking, however, an adjudication will focus a decisionmaker's gaze upon the individual case, rather than the sociological, economic, or other structural aspects of the underlying issue."). Agencies, however, are unique because they actually make law in both adjudicative and rulemaking modes. Id. at 529.

443 See 1 PIERCE, supra note 254, § 6.9 ("Most agency-administered statutes confer on the agency power to issue rules and power to adjudicate cases, leaving the agency with discretion to choose any combination of rulemaking and adjudication it prefers."); Magill, supra note 242, at 1386 (explaining how agencies can "rely on an assortment of policymaking instruments" for different situations).

444 Magill, supra note 242, at 1445–47 (explaining how courts have adapted to agencies' procedural flexibility by developing "policymaking tools in order to respond to concerns about the fairness, utility, or strategic possibilities associated with particular agency choices of procedure").


446 See Dana & Koniak, supra note 445, at 497 ("[P]owerful groups sometimes can secure direct, specific giveaways in legislation itself.").
cannot adjudicate, partly because they are not supposed to, and partly because they lack the necessary time and resources. Courts are forbidden from issuing advisory opinions, as many agencies do. Courts can try to adapt by becoming more like legislatures, but they lack fact finding tools and breadth of vision so their efforts to combine adjudication and rulemaking may be unsuccessful. Moreover, when courts broaden their scope in this way, there may be some degradation in their ability to adjudicate. Instead of focusing on the individual case, they might subordinate it to policymaking. By becoming better suited to one sort of lawmaking (rulemaking), they could become worse suited to another sort of lawmaking (adjudication). Courts historically have been past-oriented decisionmakers, and they have adapted to that role by evolving rules and procedures that are better suited to making past-oriented decisions than future-oriented ones. Expecting them to adapt to future-oriented lawmaking without diminishing the quality of the law they make would be unrealistic.

Turning next to the question of what these changes mean for the future, one must wonder if, whether for good or for ill, this trend toward future-oriented lawmaking will continue. It is likely that it will, since the size and complexity of the global community appears to be growing and the pace of societal change seems to be increasing rather than slackening.
possible that, at some point, there will be an ebb. Perhaps "[l]ike its biological analogue, legal evolution occurs in violent spurts punctuated by long periods of relative inactivity." Maybe the twentieth century was a once-a-millennium volcanic eruption of future-oriented lawmaking, and the pace of legal change will eventually slow down. Frankly, however, that seems doubtful. The rapid proliferation of future-oriented law is likely to continue. Statutes, regulations, and treaties are faster ways of making law than common law adjudication. Every time humans have been forced to choose between faster and slower, they have always chosen faster. Why should lawmaking be different?

Assuming that this trend continues, what, if anything, should be done about it? Obviously, we cannot avoid basing law at least partly on predictions. Ironically, although we often encourage long-term thinking and discourage short-term thinking, we may need to reverse our preference, at least insofar as lawmaking is concerned. If we can see reliably for only a few feet ahead, then perhaps we should not be legislating for miles into the future. Instead, we might be better off crafting legal rules that apply only for as far ahead as we can see. That way, we might reduce the risk of driving our car too fast in the dark, and thereby out-running our headlights.

There may be no entirely satisfactory answer to the question of how future-oriented lawmaking should be. Minimalist or incrementalist decision-making may have desirable properties from a temporal perspective, but sidestepping important doctrinal questions or providing...

---

& Barbara E. Gauditz, *The Provisional Application of International Agreements*, 39 Me. L. Rev. 29, 30 (1987) ("The pace of concluding international agreements is accelerating and will mostly continue to accelerate at an increasing rate.").

454 Chen, supra note 143, at 728 (footnote omitted).

455 See JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 142 (1927) (noting society's "mania for motion and speed"); GLEICK, supra note 41, at 277 ("The historical record shows that humans have never, ever opted for slower.") (quoting STEPHEN KERN, THE CULTURE OF SPEED 277 (1996)).

456 See GRAHAM H. MAY, THE FUTURE IS OURS: FORESEEING, MANAGING AND CREATING THE FUTURE 32 (1996) ("[G]overnments are unavoidably dealing with the future because they are faced with three distinct time lags: the information lag, the decision lag, and the policy-effect lag.").

457 See, e.g., STEWART BRAND, THE CLOCK OF THE LONG NOW 2 (1999) ("Civilization is revving itself into a pathologically short attention span."); LESTER THURLOW, THE FUTURE OF CAPITALISM 16 (1996) ("The proper role of government in capitalistic societies . . . is to represent the interest of the future to the present . . . ").

458 See Adam, supra note 361, at 301 (stating that "we seem to lack the knowledge and conceptual capacity to know the future in a way that is appropriate to the temporal depth of our actions").

459 See PDK Labs. Inc. v. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part) (identifying "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more"); SUNSTEIN, supra note 410, at 9 (stating that "minimalist" judges "seek to avoid broad rules and abstract theories, and attempt to focus . . . only on what is necessary to resolve particular disputes") (footnote omitted); Rachlinski, supra note 408, at 934 (suggesting that adjudication inherently encourages the development of more limited rules than does legislation or agency rulemaking).
vague answers makes law less clear for those who are required to conform to it. In addition, minimalist, case-by-case incrementalism may not always produce optimal results. Among other things, the intelligent practice of minimalist common law decision-making allows courts to avoid making certain predictions, but also requires them to make other predictions for which they are no better suited. The sun-setting of constitutions, legislation, administrative regulations, and even judicial decisions holds promise. It leaves the future open for the next generation, and that may be a good thing. But even assuming that such measures are effective, they also reduce the stability and predictability of law, and

460 ALPHA C. CHIANG, ELEMENTS OF DYNAMIC OPTIMIZATION 5 (1992) (proposing that "[a] myopic, one-stage-at-a-time optimization procedure will not in general yield the optimal path").

461 See Sheldon Gelman, The Hedgehog, the Fox, and the Minimalist, 89 GEO. L.J. 2297, 2344-45 (2001) (reviewing SUNSTEIN, supra note 410) (noting that even though judges are called upon to make predictions and future assessments, there is no evidence to suggest that judges are better at doing so than anyone else).

462 See JEFFERSON, supra note 374, at 352 ("Every constitution then, and every law, naturally expires at the end of 19 years.").

463 See Gersen, supra note 412, at 247 (defining "temporary legislation" as "sett[ing] a date on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of bicameralism and presentment is taken by the legislature") (footnote omitted); see also CALABRESI, supra note 21, at 164 (advocating that courts overrule obsolete statutes by exercising "the judgmental function... of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it"); THE FEDERALIST No. 26 (Alexander Hamilton) (recommending a sunset provision of two years for military appropriations).

464 See Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed... to adapt their rules and practices to the Nation's needs...."); Lloyd N. Cutler & David R. Johnson, Regulation and the Political Process, 84 YALE L.J. 1395, 1408 n.43 (1975) (reporting that [a]ccording to Washington folklore, Justice [Hugo] Black suggested that every statute creating a new agency should limit its life to 14 years").

465 See HOROWITZ, supra note 118, at 291 (stating that "[t]he tentative or experimental decree and the decree that expires on a date certain unless renewed on a showing of continuing need are also useful ways of providing automatic, timed feedback and countering the propensity to let unsatisfactory arrangements harden into accepted habits and routines"); Neal Katyal, Sunsetting Judicial Opinions, 79 NOTRE DAME L. REV. 1237, 1244-45 (2004) (proposing that the "[S]upreme Court can hand down an opinion and announce that its holding is entitled to the full effect of the stare decisis doctrine for a set number of years.... After the elapse of that time period, both lower courts and the Supreme Court would not be bound by the decision, though they could of course follow its reasoning and logic"); see also Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("[W]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

466 See FEYNMAN, supra note 348, at 149 ("It is our responsibility to leave the men of the future a free hand. In the impetuous youth of humanity we can make grave errors that can stunt our growth for a long time."); Gersen, supra note 412, at 261 ("In contexts where initial policy judgments are likely to be inaccurate, temporary legislation has certain advantages over permanent litigation. In contrast, when initial decisions are likely to be correct, the opposite is true."); John A. Robertson, "Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions, 81 TEX. L. REV. 1729, 1736 (2003) ("[W]e have good reason to limit our use of commitments so as not to unduly restrict our future autonomy, capacity and opportunity to act on our revised values and life plan.").

467 See Kysar, supra note 370, at 1065 (arguing that, in view of the disadvantages of temporary
require the next generation to revisit a myriad of issues, some of which proved to be intractable the first time around.\textsuperscript{468} Additionally, since we cannot reliably foresee the future, we cannot determine ex ante whether sun-setting would be good or bad. For example, a beneficial statute might expire and not be reenacted, not because it has become obsolete, but simply because a few powerful constituents of the relevant congressional committee chair opposed it. Further, "[t]ime does not serve as a good indicator of age . . . in all statutes generally . . . . It does not distinguish sufficiently between those in need of reconsideration because they have become anachronistic and those which are in no sense anachronistic."\textsuperscript{469} Therefore, sun-setting all statutes ten years old or older might throw out some babies—not merely bathwater.

On balance, a combination of lawmaking minimalism coupled with avoidance of entrenchment may be optimal, at least for now. The opposite, a combination of aggressive prediction-based lawmaking and determined entrenchment, could be virulent. Not only are many of our predictions likely to be inaccurate, but we appear to lack a sense of moral obligation to future generations. Instead, our temporal horizon seems limited to just a few years into the future, and we blithely discount and externalize costs that will not be realized during that period.\textsuperscript{470} Entrenching our shortsighted perspective could thwart efforts by future generations to fix our inevitable mistakes. While the trends noted above may allow us to make course corrections more quickly than before, entrenchment may work in the opposite direction. Arguing, as some have,\textsuperscript{471} that the Constitution does not forbid most entrenchment and that we should not worry about entrenchment unless it runs afoul of constitutional limits, is unsatisfactory. The Constitution was not written with today’s fast-paced environment in mind. We may need to augment the Constitution’s protections against entrenchment, not merely rely on those protections crafted to deal with a much slower-paced era.

Perhaps the best that can be recommended is simply that we remain as flexible and open to legal change in light of new circumstances as we
This recommendation does not mean that we should not plan for the future: we should and we must. The consequences of failing to do so might be disastrous. But it does mean that we should recognize the need for flexibility in updating our forecasts and the desirability of avoiding long term commitments. As Jerome Frank said: "Present problems should be worked out with reference to present events. We cannot rule the future." Because our world is evolving so rapidly, that statement may be more insightful now than it was when Frank uttered it. Whatever we do in an effort to positively affect the future might end up backfiring for reasons we are unable to anticipate.

For similar reasons, it might make sense to diversify our legal portfolio. Perhaps we should reverse the present trend toward centralization and federalization in law, and instead allow many "laboratories for experimentation" to flourish. If we cannot reliably discern which potential solution to a challenging problem will suit us best in the future, perhaps we should experiment with several and see which works best, thereby avoiding putting all of our eggs in one basket prematurely. Allowing states to experiment with a variety of strategies, and only then settling on one or a few that seem to work best as time passes, may be a wiser course.

Adopting such an approach, however, may be difficult. Avoiding the artificial constriction of future options may be difficult because people are...
driven to do just that.\textsuperscript{477} In fact, law appears to be moving in the direction of less flexibility rather than more flexibility.\textsuperscript{478} The trend toward “precisification” of law may be pernicious. The more precise law is, the less room there is for its scope and content to be adjusted to unforeseen future conditions encountered in its application. Instead, law should be created in ways that allow for updating to occur easily as conditions change.

IV. CONCLUSION

No one would deny the importance of the past in law. Today’s law contains plenty of vestiges of past law, and it probably always will. As Paul Kahn said, “[w]e can imagine a policy science that is wholly unbounded by the past, but it is not law’s rule.”\textsuperscript{479} Nevertheless, when we look back on the last century, the trend is plain: the mix of lawmaking methods actually in use focuses on the future more than ever before. The temporality of lawmaking has been transformed. Our lawmakers have converted themselves from Epimetheus (“the one who reflects after the fact”) to Prometheus (“the one who foresees”).\textsuperscript{480} The common law arguably was the one predominantly past-oriented mode of lawmaking. Not only has it become more future-oriented, but other more future-oriented modes of lawmaking have emerged or swelled, greatly diminishing its importance. Because of the dramatic changes in the character of the lawmaking process and the erosion of traditional restraints on legal change, the role of the past in law is not as important as it used to be.

Oliver Wendell Holmes, Jr. probably would be pleased by what has occurred. After all, he once said: “I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.”\textsuperscript{481} That time appears to be at hand. For those of us who must live with the change

\textsuperscript{477} See Schauer, supra note 408, at 780 (“Just as the consumers quickly reduce the choice to a small number, even at the cost of eliminating some potentially desirable options, so too do we see judges and other legal decisionmakers more eager to reduce the range of their own choices than might have been suspected.”).

\textsuperscript{478} See id. at 768 (referring to “the progressive precisification of the law over time”); id. at 772 (noting that “open-ended lawmaking and rulemaking is now far more rare, with detailed statutes and detailed regulations far more the norm now than in the past”).


\textsuperscript{480} See 1 Robert Graves, The Greek Myths 143–45 (1960); see also Adam & Groves, supra note 18, at 79 (defining “promethean” as “an awesome power to set something in motion without an equivalent power to know and be mindful of potential consequences”).

\textsuperscript{481} Holmes, supra note 30, at 474.
Holmes eagerly anticipated, however, it may be more of a mixed blessing than he expected. On balance, we probably are better off with a mix of law that is more future-oriented than past-oriented at this stage of our societal evolution, but there are perils in this increasingly prophetic style of lawmaking we have embraced. In particular, we should be mindful of our limited ability to predict what will happen—or even what we will want to happen—in the future. As Robert Burns cautioned: "The best-laid schemes o' mice an men/Gang aft agley/An' lea'e us nought but grief and pain/For promised joy!"