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STATUTES OF LIMITATIONS: CLAIMS FORGOTTEN, FORGIVEN, OR FOREGONE?

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"Don't look back. Something might be gaining on you."

—Leroy "Satchel" Paige[1]

Recent allegations and revelations about the past conduct of high officials have raised questions that could have been addressed under the statute of limitations. How far back can we go in the search for misdeeds in an individual's past history? Does the likely deterioration of evidence limit the scope of the inquiry? Or conversely, does the magnitude of the alleged wrong extend it? What do we make of the verdict that if past wrongs were committed, they were committed too long ago to make a difference now?

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1. SATCHEL PAIGE QUOTES, http://www.satchelpaige.com/quote2.html (last visited Oct. 7, 2019).

These questions regularly arise in litigation and just as regularly are resolved under the statute of limitations or, if none applies, under the equitable doctrine of laches. Outside of litigation, time limits do not come into play in nearly the same way. There is no statute of limitations in politics. So, for instance, the highly publicized charge of sexual assault in the confirmation hearings of Justice Kavanaugh dates back over thirty years to when he was in high school.[2] Was that too long ago to make a difference? Likewise, a disturbing confluence of charges and admissions has also recently engulfed the highest officials in Virginia, starting with the Governor, who was charged with appearing in either blackface or in KKK robes in his medical school yearbook.[3] The Virginia Attorney General then admitted to appearing in blackface as a college student, and, following that admission, the Lieutenant Governor was charged with sexual assault in two incidents, one fifteen years ago and an earlier one when he was in college.[4] Additionally, the #MeToo movement has generated many charges of sexual assault and sexual harassment, only some of which would be actionable in litigation.[5]

The timeliness of these allegations and revelations remain unsettling. Did the incidents in question occur too long ago to be investigated, or are they too serious to be ignored? The theory and function of the statute of limitations could shed light on such questions, even if the statute itself does not apply. Yet a close examination of the legal doctrine interpreting and applying the statute of limitations yields only a deep-seated ambivalence. Late claims are barred, except when they are not by a dizzying array of technicalities that surrounds the simple time limit at the core of the statute. There are rules governing the accrual of claims, the tolling of the running of the statute, the difference between discrete and continuing violations, the distinction between statutes of limitations and statutes of repose, whether the statute is

2. Catie Edmondson, *4 Key Takeaways from the Blasey and Kavanaugh Hearing*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/takeaways-kavanaugh-hearing.html.

3. Jonathan Martin, Trip Gabriel & Alan Blinder, *Virginia Governor, Ralph Northam, Defies Calls to Resign Over Racist Photo*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/us/politics/ralph-northam-virginia-governor.html.

4. Jonathan Martin & Alan Blinder, *Second Virginia Democrat Says He Wore Blackface, Throwing Party into Turmoil*, N.Y. TIMES (Feb. 6, 2019), https://www.nytimes.com/2019/02/06/us/politics/virginia-blackface-mark-herring.html; Campbell Robertson & Stephanie Saul, *The Political Ascent of Justin Fairfax, and the Disturbing Allegations that Might End It*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/us/justin-fairfax-virginia.html.

5. Ginia Bellafante, *The #MeToo Movement Changed Everything. Can the Law Catch Up?*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/nyregion/metoo-movement-schneiderman-prosecution.html.

jurisdictional or subject to waiver, and the choice of the applicable statute of limitations from state or federal law.[6]

The entire subject has been relegated to the backwaters of legal theory probably because, as the Supreme Court has observed, statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay."[7] Instead of a compelling justification for barring late claims, legal doctrine can only offer the delphic implication of rules that, at one and the same time, generally bars late claims but allows a multitude of exceptions available to enterprising lawyers. The demands of time itself upon the presentation of legal claims collide with timeless conceptions of doing justice to generate a signal often drowned out by noise. Recent controversies over the past, sometimes long past, misdeeds of public officials just echo the cacophony of legal doctrine.

Despite their marginal presence in legal theory, statutes of limitations do not suffer from the same neglect in legal practice. Defendants regularly raise a defense on this ground in the expectation that, if successful, it will make the plaintiffs' claims simply go away.[8] Plaintiffs, by contrast, fight to keep their claims alive. Regardless of its general justification in policy and theory, a defense based on the statute of limitations raises the stakes in any individual plaintiff's case—into an all-or-nothing decision that might unfairly bar the plaintiff from presenting a meritorious claim.

These concerns lead to continued litigation and doctrinal elaboration over the precise contours of the statute of limitations.[9] They should not, however, obscure its fundamental objective. At some point, an alleged wrong is too minor, the evidence too unreliable, and the event too far in the past to warrant further inquiry into its alleged occurrence. Even if the tipping point emerges only gradually, when does the passage of time become decisive and why? In the abstract, it is easy enough to accept that the passage of time, all by itself, can bar otherwise valid claims. Otherwise, future initiatives will be held hostage to charges of past wrongdoing. The price of progress dictates preclusion of untimely claims in order to direct attention to the future.

6. *See generally* CALVIN W. CORMAN, LIMITATION OF ACTIONS (1991) (comprising a two-volume treatise analyzing the listed issues in greater detail).

7. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

8. *See* 1 CORMAN, *supra* note 6, at 135–36 (explaining the expiration of time under a statute of limitations or a statute of repose bars, respectively, the plaintiff's remedy or the plaintiff's right).

9. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975) ("In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.").

Standard justifications for the statute of limitations obscure this fundamental choice by assimilating late claims to those without merit.[10] Late claims require reliance upon stale evidence, which is inherently unreliable, or so the argument goes.[11] But why not let the plaintiff take a chance on meeting the burden of proof by relying on old evidence? The burden of proof, after all, largely rests with the plaintiff and, if it cannot be met, the plaintiff loses. The statute of limitations makes late claims meritless. It does not identify them as meritless on other grounds, but instead precludes any inquiry into their merits. This Article defines and defends the unique character of the statute of limitations in four parts.

Part I identifies several paradoxes of the statute of limitations. What difference is there really between a claim filed a day after the statute of limitations has expired and a claim filed a day earlier? Why does the statute of limitations operate to preclude future litigation, just like the doctrine of res judicata does after a hearing on the merits? And, if the statute of limitations is supposed to operate so simply, why is it hedged about with so many qualifications and exceptions? Part II takes up the justifications usually offered for statutes of limitations: avoiding litigation based on "stale evidence" and protecting the "repose" of the defendant. On analysis, these two justifications turn out to be dependent upon one another because the costs efficiently spent on litigation depend on the magnitude of the dispute between the parties. Even if stale evidence increases the cost of proving or defending a case, the added costs might well be justified if the stakes are high enough. Part III explores the cases in which statutes of limitations operate most effectively, when no claim is brought at all or the defense is summarily upheld. The implications of these cases necessarily remain speculative because they leave so little visible trace. Nevertheless, they do indicate that the statute of limitations has its greatest impact when it leads to the least litigation. Part IV proceeds from this conclusion to a catalogue of problems created by the statute of limitations, beginning with its consequences for claimants who might not even be aware of its existence. The discussion then turns to choice of law as applied to statutes of limitations, going on to the proliferation of collateral issues that surrounds calculation of the applicable time limit. The conclusion recounts the implications of having a statute of limitations and returns briefly to the acts of public officials with which we began. The past cannot be ignored, but its effects go

10. *See* 1 CORMAN, *supra* note 6, at 11–12 ("A defendant who is afforded repose after the expiration of a specified time is relieved of the obligation to defend against claims for which necessary evidence may no longer be available, memories may have faded, or important witnesses may have disappeared.").

11. *Id.* at 12–13.

forward and must be weighed—and often are outweighed—by competing demands upon the future.

I. PARADOXES OF THE STATUTE OF LIMITATIONS

Any sharply defined legal rule generates paradoxes at the margins of its application. Just a little more or a little less—time in the case of the statute of limitations—has drastic consequences. Either a claim is barred, or it is not. Other formal rules can have similar consequences. Territorial boundaries of states and nations have immediate consequences for choice of law and personal jurisdiction, depending on whether otherwise identical events fall on one side of the line or the other. Time, however, yields additional dimensions of apparent arbitrariness because the exact length of the limitation period is a matter of legislative choice,[12] rather than determinate reasoning, and because failing to file within the limitation period cannot be made up by going back in time to file earlier. Territorial boundaries usually have an historical justification in occupation, conquest, or treaty, and individuals can cross the boundary going in either direction. The legislative choice between a one-year or a two-year limitation period appears to be a matter simply of selecting one among any of several plausible time limits. Once the limitation period is set, waiting to bring a claim until after it expires suddenly and irreversibly extinguishes the claim.

The presumably arbitrary selection and operation of the limitation period has been tolerated as a policy judgment properly within the sphere of the legislature. Few decisions doubt the existence of legislative competence.[13] A typical statement from the Supreme Court dates back to the middle of the nineteenth century: "Reasons of sound policy have led to the adoption of limitations laws, both by Congress and the States, and, if not unreasonable in their terms, their validity cannot be questioned."[14] This standard view leaves open the possibility that statutes of limitations, although they are generally "arbitrary," are nevertheless valid so long as they are not "unreasonable." Legislation needed in the public interest does not usually trigger the characterization that it is arbitrary. Yet, the statute of limitations routinely does so.[15] Perhaps the

12. *Id.* at 73 (noting that "legislatures have the prerogative to establish the time in which a cause of action may be commenced" so long as they afford a reasonable time in which to sue).

13. *See id.* at 23 ("[C]hallenges to the validity of statutes of repose on constitutional grounds often fail.").

14. Christmas v. Russell, 72 U.S. 290, 300 (1866).

15. Johnson v. Ry. Express Agency, 421 U.S. 454, 463 (1975) (commenting that "any statute of limitations is necessarily arbitrary").

collective advantage in barring delayed litigation contrasts too dramatically with the individual loss suffered by a plaintiff whose claim is barred. The benefit of the statute is spread out over many people while the burden in any one case falls entirely on a single plaintiff. If the statute confers a reasonable benefit on people generally, then it is valid and can be applied arbitrarily to a single individual to deny rights that the individual otherwise possesses.[16] This approach inverts the usual analysis of individual rights as a constraint on overall policy, instead making collective benefit a reason for arbitrary treatment of individuals.[17]

Perhaps these different approaches simply are incommensurable. The sharp divide between the collective perspective and individual treatment cuts through all levels of the analysis of statutes of limitations. The tension between these approaches runs so deep that it defeats any attempt to give a simple account of what should be a simple rule, barring claims based solely on the passage of time.[18] The benefit of enacting a time limit might be clear in the abstract and yet, in any concrete case, it imposes apparently exorbitant costs on the plaintiff whose claim is barred.

Such a plaintiff faces the same preclusive effect as from a final judgment but without the benefit of any decision on the merits or, indeed, any extended court proceedings at all. Res judicata in all its forms requires a final judgment on a claim related in some fashion to the claim to be precluded. It also requires that the precluded party have had an opportunity to be heard.[19] Under the modern test, claim preclusion extends to all claims arising out of the same transaction or occurrence as the adjudicated claim, so long as the plaintiff could have brought those

16. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . [S]eparately considered, it is merely an unfortunate event in history which has no present legal consequences."); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 248 (2004) ("But in any particular case in which the statute runs before the claim is filed, the result is that the claim is lost, even if it is meritorious and even if the evidentiary record is sufficiently preserved to ensure a high likelihood of accurate adjudication.").

17. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191–92 (1978) (asserting rights cannot be overridden simply by an argument for an increased collective benefit).

18. Richard Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1183 (1986) (recognizing that, although statutes of limitations are categorical, "a statute of limitation[s] rarely is totally determinative").

19. "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction." Richards v. Jefferson Cty., 517 U.S. 793, 797 n.4 (1996) (quoting Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918) (citations omitted)).

claims along with the original claim.[20] Issue preclusion applies only to issues actually decided,[21] but again, only after the precluded party has had an opportunity to be heard.[22] No similar limiting principle applies in so many words to the statute of limitations.

The Supreme Court's decisions on preclusion by the statute of limitations have been equivocal, stopping short of holding that a short limitation period, or one unknown to the plaintiff, by itself denies due process. Whether such qualifications are required by due process remains uncertain. In *Logan v. Zimmerman Brush Co.*, the Supreme Court held that a 120-day time limit for convening a factfinding conference denied due process because it could be satisfied only by the discretionary decision of an administrative official, not the plaintiff, to convene the conference.[23] The short time limit, by itself, did not violate the Due Process Clause. In another line of decisions, the Court has invalidated one- and two-year statutes of limitations to file claims for paternity and child support on the ground that these statutes discriminated against illegitimate children.[24] However, legitimate children did not face the same burdens because they did not have to establish paternity in order to obtain support.[25] In these decisions, the Court found a violation of both the Due Process Clause—in denying the right to support—and the Equal Protection Clause—in discriminating against illegitimate children.[26] The Court reasoned that the limitation periods were not "sufficiently long to provide a reasonable opportunity to those with an interest in illegitimate children to bring suit on their behalf" and that the limitation periods were not "substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."[27]

It remains possible that a limitation period could be so short, or that the plaintiff had so little notice of the need to meet its requirements, that it denied due process. Just as with preclusion by judgment, preclusion by the statute of limitations requires notice and opportunity to be heard.[28] If the limitation period is so short or administered in such a way that the plaintiff had no opportunity to bring a timely claim, then the plaintiff's

20. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982).

21. *Id.* § 27.

22. *Id.* § 42(1)(d)–(e).

23. 455 U.S. 422, 433–37 (1982).

24. Pickett v. Brown, 462 U.S. 1, 12–13 (1983); Mills v. Habluetzel, 456 U.S. 91, 101–02 (1982).

25. *Pickett*, 462 U.S. at 12.

26. *Id.* at 18; *Mills*, 456 U.S. at 99–100.

27. *Pickett*, 462 U.S. at 12–13.

28. *Id.* at 12 ("[T]he first question is whether the two-year limitations period is sufficiently long to provide a reasonable opportunity to those with an interest in illegitimate children to bring suit on their behalf.").

claim should not be barred. This principle does not strictly follow as a matter of constitutional law, but it has profound implications for nonconstitutional interpretation of the statute of limitations. For instance, the "discovery rule" causes the limitation period to begin to run only when the plaintiff has sufficient knowledge of the facts giving rise to her claim, typically knowledge of the injury or property damage for which she seeks relief.[29] Before she knows of her loss, she is hardly in a position to make a claim.

The discovery rule is only one of several constraints that determines how and when the limitation period begins to run. Tolling the running of the limitation, fraudulent concealment by the defendant, disability of the plaintiff, and waiver by failure to plead the defense of the limitation all qualify its stringent requirement to file within the specified time limit.[30] These constraints ameliorate problems with the plaintiff's opportunity to be heard, but they raise problems of their own. They deflect application of the statute away from the mechanical operation of the passage of time towards questions of when the limitation period begins to run, when it is tolled, and how it is satisfied. These questions have generated a web of legal doctrine surrounding and complicating the simple passage of time as the measure of the limitation period. As these complications diminish the arbitrariness of the statute of limitations as applied to any particular plaintiff, they also compromise the apparent clarity and simplicity of its operation.[31] The paradox that the statute establishes a rule that bars a claim without a hearing gives way to the paradox that the statute does not create such a clear rule after all.

The incentives of the parties in litigating over the statute of limitations only aggravate this tendency. The plaintiff seeks to preserve the ability to litigate a claim on the merits, while the defendant seeks to extinguish it summarily and inexpensively.[32] Both parties have enough at stake to litigate the issue as thoroughly as possible. The cost in terms of expense and uncertainty presumably does not exceed the cost of litigating the merits. Otherwise, the statute of limitations would be self-defeating, substituting only the cost of litigation over its own application for the corresponding cost of litigation on the merits. As it is, even if the cost is less than litigating the merits, it might approach the cost of

29. 2 CORMAN, *supra* note 6, at 134–35.

30. *Id.* at 74–77, 99–103, 348–51.

31. Epstein, *supra* note 18 ("The insistence upon a statute of limitation recognizes that sometimes better overall results are reached by *not* making individualized inquiries into the facts of each case.").

32. *See* SAMUEL ISSACHAROFF, CIVIL PROCEDURE 43 (3d ed. 2012) (observing that affirmative defenses like the statute of limitations cut off the plaintiff's access to discovery by relying on facts equally accessible to both parties).

litigating the defense of laches, which serves as the equitable counterpart and contrast to the statute of limitations.[33] Laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[34] As an equitable doctrine, it relies upon an open-ended standard of fairness rather than an ostensibly bright-line time limit.[35] This contrast diminishes with doctrines, like the discovery rule or tolling, that take the sharp edge off the statute of limitations. The more the decision depends upon the specific facts of each case, the more it invites assessment of the overall fairness of barring the plaintiff's claim.

The paradox that the statute of limitations comes to resemble the equitable doctrine of laches, even if only to a degree, points towards the fundamentally identical goal that both doctrines serve: as gatekeepers that exclude claims at some point in order to express a preference for the future over the past, dispensing with litigation over old claims so that individuals and institutions can face the future free of the resulting legal entanglements. The bar comes down on untimely claims, whether more sharply with the statute of limitations or less sharply with laches.[36] The legal system has to have the courage of its convictions: if time limits are justified generally in a class of cases, then they have to be applied in concrete cases. Qualms about barring individual claims generate litigation over whether the bar applies, paradoxically giving rise to some of the same costs that these defenses were designed to prevent. The next part looks into when the statute of limitations operates with the least of these self-defeating tendencies.

II. THE EVIDENCE OF CLAIMS UNSEEN

If litigation over the statute of limitations defeats the very purpose of the statute, then the statute should be drafted and implemented to deter litigation over even this narrow issue. At a first approximation, the most direct deterrent would be limitation periods that were both short

33. 1 CORMAN, *supra* note 6, at 181 ("The defense of laches depends on the equitable circumstances in each case.").

34. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121–22 (2002) (quoting Kansas v. Colorado, 514 U.S. 673, 687 (1995)).

35. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977) (finding that, in the absence of a statute of limitations, courts have "discretionary power 'to locate "a just result" in light of the circumstances peculiar to the case'" (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975))).

36. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217 (2005) ("The principle that the passage of time can preclude relief has deep roots in our law . . . .").

and clear.[37] The limitation period should be just long enough to give the plaintiff a genuine opportunity to present his claim. It should be clear enough so that the plaintiff knows enough not to delay, the defendant knows enough not to invoke the defense when it is likely to fail, and the court can easily decide whether or not to allow the defense. In this idealized scenario, the costs of litigation over the defense, directly in court and indirectly in generating uncertainty and inhibiting future activity, remain minimal.

At a second approximation, countervailing considerations come into play. The limitation period can be either too short or too long, regardless of whether the concern is retrospective or prospective—whether it looks to remedying past wrongs or to freeing future conduct from the risks of litigation. The limitation period is too short if it makes it practically impossible for most claimants to make an informed decision whether to sue, even if it is long enough to give them a formal opportunity to be heard.[38] This risk is most acute for uncounseled and uninformed claimants who might lack any knowledge of the limitation period.[39] The statute of limitations, after all, has no close counterpart in ordinary moral reasoning that simply cuts off complaints about wrongful conduct at a certain point in time. Sophisticated claimants also suffer from similar concerns if they need time to determine how litigation might affect ongoing relationships, for instance, in business. The same considerations also come into play prospectively. Potential defendants might welcome the prospect of a defense triggered by a short limitation period but, if they are also likely to be future plaintiffs, they face the risk that good claims available to them will be compromised by a short limitation period.

Lengthening the limitation period responds to these concerns but can raise problems of its own. Claimants who insist, retrospectively, that they would like as much time as possible to decide whether to sue must reckon with the crowding that would result in court dockets from a longer limitation period. Consideration of their own claim might be delayed because so many older claims also are added to the docket. On the widely shared assumption that older claims are harder to bring and harder to

37. Epstein, *supra* note 18, at 1182 ("[O]ther things being equal, a legal system that compresses the scope of the temporal dimension will operate at a higher degree of effectiveness than one that fails to respond to temporal demands.").

38. 1 CORMAN, *supra* note 6, at 46–47 (summarizing decisions on whether a statute of repose denies due process when it "does not provide a reasonable time extension in which to seek a remedy").

39. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 649–51 (2007) (Ginsburg, J., dissenting) (recounting difficulties faced by employees deciding without counsel whether to file a charge of discrimination in compensation).

resolve because of the erosion of relevant evidence—the "stale evidence" rationale for statutes of limitations—even a small increase in the number of such claims would disproportionately displace resources that could otherwise be devoted to more recent claims.[40] Of course, many claimants might decide not to bring such claims because they could not meet the burden of proof, which generally rests on them.[41] Yet if that effect predominates, then the point of lengthening becomes lost in the reluctance of plaintiffs to sue. A shorter, clearer rule would be better.[42]

A different, but potentially severe, effect is on the resolution of more recent claims, which might be systematically skewed in favor of defendants for fear of expanding liability on older claims. This effect has been widely noted in the refusal to grant retroactive application to newly recognized constitutional rights.[43] Immunity, for example, protects government officials from civil rights claims based on constitutional law that was not "clearly established" at the time of the alleged violation.[44] Without constraints on the retroactive application of new rights, courts may be reluctant to recognize those rights in the first place.[45] Both through the direct costs of litigation and through indirect effects on decisions, allowing older claims might detract from resolution of more recent claims.

From the prospective point of view, long limitation periods raise the specter of a long tail of exposure to liability, like that generated by the prolonged litigation of asbestos claims.[46] Because of the long latency period in diseases caused by asbestos, the effective extension of the

40. Epstein, *supra* note 18, at 1182 ("The passage of time is positively correlated with . . . the expense of litigation and the error rate."); Jonathan R. Macey, *The Pervasive Influence of Economic Analysis on Legal Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 107, 115 (1994) ("Statutes of limitation are useful where the parties to legal disputes do not internalize all of the costs of bringing litigation. Because litigation may not be fully priced, statutes of limitation serve as a crude but effective mechanism for rationing inefficient disputes.").

41. ISSACHAROFF, *supra* note 32, at 51.

42. Epstein, *supra* note 18 ("In the end no manipulation of the burdens of proof, the rules of admissibility, or the discretion of the jury works as well or efficiently as a simple rule that forces a plaintiff to sue early in the process or forever hold his peace.").

43. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law*, *Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738–58 (1991) (surveying areas in which refusal of retroactive application facilitates the creation of previously unrecognized constitutional rights).

44. Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

45. John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120–22 (arguing that courts should be free to reach the merits of constitutional claims despite defense of qualified immunity).

46. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 597–98 (1997) (summarizing the features of the "asbestos litigation crisis").

limitation period in that litigation has much to be said for it.[47] Something has to be said, however, to justify the extended exposure to litigation. All other things being equal, sooner would have been better in compensating victims of such diseases. Exactly how much sooner to require claims to be filed in general remains a policy judgment for the legislature in framing statutes of limitations and, in particular, "statutes of repose" that seek to cut off the exceptions to the statute of limitations.[48] Just as the prospective approach does not justify shrinking the limitation period as closely as possible to zero, neither does the retrospective approach justify extending it towards infinity.

Inferring the effect of the statute of limitations on claims that are not brought, or on defenses that are not raised or that do not result in published opinions, inevitably involves a degree of speculation. But it is in these instances that the statute of limitations has its greatest impact.[49] Looking at decided cases tends to minimize this impact through qualifications and exceptions that come into play only in cases at the margin: where either party can reasonably argue that the claim is or is not barred by the statute of limitations.[50] The all-or-nothing bar of the limitation has far greater deterrent effect in cases in which its application is not contested, either because the plaintiff does not sue at all or voluntarily dismisses the claim, or simply does not contest summary judgment based on the defense.[51]

The frictionless operation of the statute of limitations hardly commends it as a fair method of screening out claims by potential plaintiffs lacking legal advice or knowledge. They are the parties most likely to let the limitation period expire without taking steps to file an action because they do not know what the limitation period is.[52] When they belatedly approach an attorney, if they ever do, they will learn that

47. KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 155–56 (2008) (noting increased liability "[w]hen the applicable period of limitations for bringing suit against the maker of a disease-causing product does not begin to run until manifestation of the disease").

48. *Id.* at 165.

49. Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 677 (1986) ("[T]he well-crafted statute of limitations shapes the primary conduct of private parties, thus preventing certain kinds of cases from being litigated at all.").

50. *See* FED. R. CIV. P. 11(b) (requiring a reasonable basis in law or fact for claims and defenses).

51. *See* FED. R. CIV. P. 41(a)(1) (regarding voluntary dismissal); *id.* 56 (regarding summary judgment).

52. *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988) (simplifying the time limits for filing a claim under "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process").

it is too late to act to protect their rights. The statute of limitations just adds to the burdens faced by unsophisticated parties in obtaining a hearing on their claims. Filing fees, jurisdictional limits, pleading requirements, discovery rules, and the general cost of litigation all put such parties at an often insuperable disadvantage.[53] The statute of limitations, one might suppose, does not differ in kind from these obstacles to effective representation without counsel. Apart from the drastic sanction for failing to make a timely claim, what makes the statute of limitations so burdensome?

It need not be a distinctive burden, unique to the statute of limitations, to be unjustifiable. Why add this particular hurdle to all the others faced by unsophisticated parties? The answer to this question, although posed in categorical terms, actually is a matter of degree. The strength of the required justification depends upon the extent of the burden imposed.[54] The nature of this inquiry yields a surprisingly simple implication for policy: limitation periods long enough to give the plaintiff an opportunity to recognize an injury and to take steps to bring a claim are easier to justify than short limitation periods that compress the time for the plaintiff to make a decision. The more time a potential plaintiff has to recognize that she has a claim, the easier it is for her to comply with the statute of limitations and the stronger the justification for barring her claim if she fails to act in a timely fashion. This implication for policy in enacting a statute of limitations does not automatically extend to interpretation of an existing statute,[55] which depends on the text of the actual statute and the details of its administration.

Starting off with a relatively long limitation period, however, addresses both issues of principle and issues of practice. It gives potential plaintiffs greater assurance of an opportunity to be heard without relying as heavily on the myriad exceptions and qualifications to the statute of limitations. In our litigious society, anyone who suffers personal injury or damage to property should be aware that it might support a claim for recovery. At a first approximation, the plaintiff will rationally decide to sue if the amount of damages, discounted by the probability of success,

53. Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1837 (2018) ("One of the most important aspects of pro se litigation in federal district courts is that pro se litigants fare extremely poorly.").

54. By analogy to the test for procedural due process based on the significance of the private interest of the claimant and the likelihood that it will be erroneously denied, triggering the need for a stronger government interest served by the procedure in question. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

55. 1 CORMAN, *supra* note 6, at 17–23 (noting courts do not have the power to override legislative determination of public policy, but they can utilize "tools of construction").

exceeds the costs of suing.[56] A limitation period of several years, like the default federal limitation of four years for new causes of action,[57] gives potential plaintiffs adequate time to investigate the cause of their loss, the probability of recovery, and the cost of consulting a lawyer. As a matter purely of logic, even such a relatively long limitation period runs only according to the supplementary rules that define when a claim accrues, when the limitation period is tolled, or whether other exceptions apply. As a practical matter, however, a longer limitation period reduces the occasions when it is necessary to resort to those rules. A potential plaintiff who does not sue after such a long period probably will never sue, and even if the plaintiff does sue, a court faces less pressure to interpret the limitation period leniently if the defendant invokes the statute of limitations. The plaintiff is more likely to have had a reasonable time to bring suit. Barring a claim as untimely becomes easier as the time for bringing the claim increases.

The diminished significance of supplementary rules also puts less pressure on a lay person's knowledge of the law.[58] The need to sue within a few years after a claim arises has a stronger basis in common sense than many of the intricacies surrounding the statute of limitations, for instance, whether wrongful conduct is a discrete or continuing violation of the law or whether the limitation period is tolled by the pendency of a class action.[59] The esoteric nature of these doctrinal rules does not argue for their abandonment. Any developed body of law accumulates rules familiar only to lawyers rather than lay people.[60] It does argue for reducing the frequency with which these technicalities need to be invoked. Simplifying the statute of limitations where possible would serve one of the main reasons put forward for allowing the plaintiff a reasonable time in which to decide to sue.

Simplicity obviously is not the only reason for statutes of limitations. For instance, some of the supplementary rules surrounding these statutes favor plaintiffs, like those that toll the limitation period when the plaintiff lacks the capacity to sue or while the defendant remains

56. ISSACHAROFF, *supra* note 32, at 201.

57. 28 U.S.C. § 1658(a) (2012).

58. *See* STEPHEN C. YEAZELL, LAWSUITS IN A MARKET ECONOMY: THE EVOLUTION OF CIVIL LITIGATION 19 (2018) ("A civil litigant can represent herself, but that's often asking for trouble and a bad outcome.").

59. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) (distinguishing discrete and continuing violations); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–56 (1974) (tolling because of pendency of class action).

60. Epstein, *supra* note 49, at 680 (referring to "the massive common law gloss upon the basic statute [of limitations]").

beyond the jurisdiction of the court.[61] These rules enhance the plaintiff's opportunity to be heard. More generally, legal rules are needed for the computation and application of the limitation period. No legal system can dispense with such rules without making the limitation period wholly indeterminate. Yet neither should it give these rules overriding significance. Ordinary people are not likely to know of them and lawyers are too likely to exploit them to make litigation over the statute of limitations as complicated as litigation on the merits.[62]

Statutes of repose, to the extent that they differ from statutes of limitations, attempt to cut out as many of these supplementary rules as possible.[63] By enacting a long limitation period, such statutes give plaintiffs ample time to bring their claims.[64] They also simplify litigation, typically by starting the limitation period with the event giving rise to the plaintiff's injury, rather than the plaintiff's notice of the injury.[65] Such statutes might be dismissed as a compromise that favors the interests of defendants in avoiding liability for long-tail injuries that take years to become manifest. They undeniably reduce liability for injuries from exposure to asbestos and other carcinogens.[66] On the other hand, the statute of limitations inevitably represents a compromise, whether or not it takes the more limited form of a statute of repose. For any particular type of claim, the crucial question revolves around the balance in the run of cases between the plaintiff's opportunity to be heard and the defendant's interest in repose.[67] In any concrete case, the limitation might bar the plaintiff's claim and the law then has to have the courage of its convictions and apply the limitation period in as simple a manner as possible. Statutes of repose do no more than acknowledge the inevitability of this choice.

61. 2 CORMAN, *supra* note 6, at 46–50.

62. Indeed, lawyers have an ethical obligation to take all steps "reasonably necessary for the representation," requiring defense lawyers to raise the defense of the statute of limitations if reasonably available and plaintiffs' lawyers to attempt to defeat it if they reasonably can. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017).

63. Epstein, *supra* note 18, at 1206 (noting statutes of repose differ from statutes of limitations "in that they do not run from the date of injury").

64. 1 CORMAN, *supra* note 6, at 8–9.

65. *See* Epstein, *supra* note 18, at 1206.

66. *Cf.* 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS 885 (2d ed. 2011).

67. 1 CORMAN, *supra* note 6, at 23–24.

III. REPOSE REVISITED

The justification for statutes of limitations usually appeals interchangeably to avoiding litigation over stale claims and preserving the defendants' repose:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[68]

The stale evidence rationale usually is categorized as procedural and the repose rationale as substantive.[69] Litigating stale claims raises the cost and inaccuracy of litigation, which are values directly related to litigation, while exposure to liability from stale claims inhibits the parties from planning for the future.[70] Here, as elsewhere, the attempt to disentangle procedure from substance raises problems of its own.[71] With respect to statutes of limitations, the problems arise from the interdependence and trade-offs between the two rationales for the statute.[72]

The expense and uncertainty of litigation have to be evaluated relative to the consequences of the litigation itself.[73] A claim that may be costly and difficult to adjudicate and result in a large judgment might

68. Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

69. John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 726 (1974) ("[S]tatutes of limitation are passed not simply for the substantive purpose of relieving people's minds after the passage of the designated period, but also for the procedural purposes, to keep down the size of the docket and to ensure that cases will not be tried on evidence so stale as to cast doubt on its trustworthiness.").

70. 1 DOBBS ET AL., *supra* note 66, at 874 (noting one purpose of statutes of limitations is that otherwise "[t]he defendant's ability to manage business or personal affairs is clouded by a potential law suit").

71. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 107–12 (1945) (proposing effect-on-outcome as the test for substantive state law under the *Erie* doctrine).

72. Epstein, *supra* note 18 ("In and of itself, the passage of time does not constitute a waiver of a cause of action, which in all cases requires a deliberate release of a known right; nor is evidence in old cases necessarily stale.").

73. *Id.* at 1182 ("Uncertain outcomes also increase the stakes in litigation, so that more will have to be expended before judgment or settlement is reached.").

nevertheless raise issues of sufficient importance to extend the applicable limitation period. Apparently for that reason, states generally do not impose a statute of limitations for charges of capital murder.[74] Conversely, the disruptive effect of litigation over stale claims on future plans depends upon how costly and uncertain that litigation is and how large the stakes are.[75] The smaller these procedural deficiencies, the less likely they are to have a substantive effect on future planning.[76] A prospective defendant has less need to set aside reserves for litigation or for satisfying any resulting judgment.[77] The procedural justification of avoiding reliance upon stale evidence dovetails with the substantive justification of protecting repose.

"Repose," in fact, has misleading implications. In one technical usage "statutes of repose" overlap with, but tend to be interpreted more strictly than, statutes of limitations.[78] To the extent that such statutes really are stricter, they limit the effect of the discovery rule and similar doctrines that can effectively extend the limitation period long after the events giving rise to the plaintiff's claim.[79] A statute of repose, in this strict sense, bars the plaintiff's claim regardless of when the claim accrued and the plaintiff could sue.[80] It takes the same basic substantive policy as ordinary statutes of limitations and simply applies it without qualification.

74. *See* 1 CORMAN, *supra* note 6, at 116–17; Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 106 (2002) ("'Low level' felonies, such as burglaries, tend to have much shorter statutes of limitations than crimes such as murder or rape.").

75. *See* ISSACHAROFF, *supra* note 32, at 201–02 (containing a formula modeling the defendant's expected total cost of litigation).

76. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 807–08 (8th ed. 2011) (identifying cost of litigating stale claims as a procedural purpose and facilitating future planning as a substantive purpose of statutes of limitations).

77. *See* Epstein, *supra* note 49, at 678 (regarding litigation over title to land, the statute of limitations "spares the rightful owner the costs of litigation that might otherwise be needed to establish title," thus increasing the certainty of title).

78. *See* Francis E. McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416, 417–19 (1981) ("[S]tatutes of limitation bar suits after a cause of action accrues; statutes of repose potentially bar suits *before* a cause of action accrues.").

79. *See id.* at 428 (noting that statutes of repose enacted for construction claims "have almost inevitably resulted in more restrictive limitation periods" and those for medical malpractice claims "were made on behalf of medical care providers to limit their personal injury liability exposure").

80. *See* 1 CORMAN, *supra* note 6, at 30–31 (offering one definition of a statute of repose as "distinct from a statute of limitations because it begins to run at a time unrelated to the traditional cause of action, that is, from the date of the act of injury regardless when discovered").

A further complication of the term "repose," as used also as a justification for statutes of limitations, lies in the misleading suggestion that a potential defendant will simply do nothing and rest easy if the statute of limitations has expired.[81] On the contrary, it is the inhibiting effect of exposure to litigation that is debilitating. It deters future commitments that might make potential defendants, and others as well, better off. Like certainty over property rights, which encourages economic activity and investment, certainty that a past claim is barred frees the parties to look to the future. This benefit accrues mainly to potential defendants, but it also can benefit potential plaintiffs.[82] Charles Dickens spends most of his famous novel, *Bleak House*, condemning the pernicious effects that prolonged litigation in the Court of Chancery has on claimants and potential beneficiaries of the case, *Jarndyce and Jarndyce*.[83] In less literary terms, potential plaintiffs might succumb to the risk of investing too much in pursuing past claims if they are not barred by the statute of limitations.[84] In doing so, they force potential defendants and the judicial system to make corresponding investments.[85]

Freeing parties from exposure to future litigation represents a substantive choice in the predominant modern view, usually framed as a tradeoff between "the competing substantive values of repose and vindication of the underlying right."[86] These values are substantive insofar as they go beyond purely procedural concerns, such as the cost and inaccuracy of litigation based on stale evidence. Freeing parties from exposure to litigation is not only "outcome determinative."[87] It also frees them from the need to hold assets in reserve to cover uncertain exposure to liability.[88] Without trying to articulate a general distinction between substance and procedure, statutes of limitations can be placed on the same side of the line as the law creating the plaintiff's claim itself.

To say the least, this result did not always correspond to the rules on choice of law. The procedural dimension of statutes of limitations

81. *See* Ely, *supra* note 69, at 731 (characterizing statutes of limitations as permitting "potential defendants to breathe easy after the passage of the designated period").

82. *See* Epstein, *supra* note 49, at 679 ("The reduction in error, administrative and transaction costs brings about a gain that can be shared by all parties to the system.").

83. *See generally* CHARLES DICKENS, BLEAK HOUSE (1853).

84. *See* Epstein, *supra* note 49, at 676 ("The passage of time tends to help the party with the weaker case by giving greater prominence to the random elements of the case.").

85. *Id.* at 678.

86. Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) (characterizing the argument of petitioners).

87. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

88. *See* Young v. United States, 535 U.S. 43, 47 (2002) (noting that one purpose of the statute of limitations is to generate "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities" (quoting Rotella v. Wood, 528 U.S. 549, 555 (2000))).

previously received more attention, usually under the heading of "remedies" made available by the forum in which the plaintiff chose to sue.[89] This rule dates from an era in which choice of law sought to be more determinate than it does today, when states now have considerable freedom to adopt one choice of law rule or another.[90] Whatever might be said for the traditional rule, it had one significant drawback: it invited plaintiffs to shop for the forum that had a limitation period that still permitted them to sue.[91] The traditional rule invited strategic behavior. It also introduced a divergence between the statute of limitations and the law that otherwise governed the substance of the plaintiff's claim.

The strategic behavior fostered by the traditional rule does not stop with forum shopping. It extends to litigation over a variety of supplementary issues. The resulting lack of predictability undermines any purpose served by the statute of limitations, whether characterized as substantive or procedural.[92] If parties do not know which state's law applies, they do not know whether or where they might be subject to suit or whether any resulting suit will be summarily dismissed as untimely. Instead of serving any systematic purpose that can be discerned ex ante, before a suit is filed, intricate issues of choice of law just invite maneuvering ex post, once litigation has commenced.[93] It accomplishes little more than filling out the portfolio of arguments available to attorneys on both sides.

Relegating the statute of limitations to the status of remedy or procedure also introduces an equivocal and seemingly optional element in its application. Depending on the desire of the forum state and the capacity of its courts, a longer or shorter limitation period could be applied. That result accurately reflects the range of choice open to a state subject to the wide constitutional power of the states over choice of law.[94] It does not reflect the serious values at stake, which are subsumed and subside into the arbitrary nature of the statute of limitations. One time limit, from one state or another, seems to be as good as any other. Once selected by the legislature, however, the limitation period should express

89. *See* McElmoyle v. Cohen, 38 U.S. 312, 327–28 (1839).

90. *See Sun Oil*, 486 U.S. at 726–28 (refusing to force a state court to follow the "modern understanding" as the correct approach to choice of law).

91. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773–74 (1984) (finding personal jurisdiction in New Hampshire even though it enabled plaintiff to take account of that state's unusually long six-year limitation period for libel actions).

92. *See* Ely, *supra* note 69.

93. *See* 1 CORMAN, *supra* note 6, at 75–76 (summarizing complexities of choice of law in selecting a statute of limitations).

94. *See Sun Oil*, 486 U.S. at 722.

a degree of finality that prevents manipulation to get around the limits on revival of untimely claims.

The decisions under the *Erie*[95] doctrine, although not as clear as they might be, almost invariably require federal courts to follow state statutes of limitations as applied to claims under state law. *Guaranty Trust Co. v. York*[96] takes the clearest stand against applying federal law. In that case, the Supreme Court held that the federal equitable doctrine of laches had to give way to a state statute of limitations.[97] Decisions under the Federal Rules of Civil Procedure take the same approach, notably with requiring service of process within the limitation period if state law does so,[98] but Rule 15 purports to alter the statute of limitations for new claims and new parties.[99] It would be best to leave all of these issues to state law insofar as federal courts entertain state claims. Simplicity would otherwise tend to erode, as such complications multiply under the pressure of litigation.

The preference for state law describes the traditional approach to adopting state statutes of limitations to apply to federal claims for which Congress has set no limitation period. The federal courts face no compulsion to apply state law but adopt it to fill the gap in federal statutory law.[100] Courts understandably feel reluctant to devise their own limitation period out of whole cloth, which falls much more comfortably within the province of the legislature.[101] Yet once adopted, state law governing the computation and application of the limitation period can be overridden if "inconsistent with the federal policy underlying the cause of action under consideration."[102] Necessity might dictate this added complexity, just as it dictated resort to limitation periods enacted by the state legislature when Congress failed to act. Nevertheless, it hardly reaches the optimal result. The new default federal statute of limitations does much better, but it applies only to claims enacted after its effective date. A wholesale revision and clarification of this segment of the law would put it on a much sounder footing.

Much the same conclusion follows from an examination of choice of law generally as applied to statutes of limitations. As noted earlier, states

95. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
96. 326 U.S. 99 (1945).
97. *Id.* at 100–01, 110, 112.
98. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 749–53 (1980).
99. FED. R. CIV. P. 15(c).
100. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–65 (1975).
101. *See* 1 CORMAN, *supra* note 6, at 73.
102. Bd. of Regents of Univ. of N.Y. v. Tomanio, 446 U.S. 478, 485, 492 (1980) (finding no inconsistency); *Johnson*, 421 U.S. at 465–67 (same).

have wide leeway in selecting their own limitation period or another state's, typically the one whose law governs the plaintiff's claim.[103] States also have wide leeway in characterizing claims, for instance, in tort or contract, to determine which limitation period applies to them.[104] This choice of law within a legal system might also affect which choice of law rules, again like those for tort or contract, determine whether to apply the statute of limitations from another legal system.[105] Despite this range of choice, modern choice of law reasoning has focused on the choice between the law of the forum and the law that created the cause of action.[106]

In particular, the modern trend preserves the traditional approach if the forum's limitation period is shorter than the competing alternative. This qualification appeals to the forum's procedural interest in avoiding litigation of stale claims.[107] This interest lacks the substantive dimension of protecting the defendant's repose, as revealed by the limited preclusive effect of a judgment of dismissal under the forum's statute of limitations. It does not prevent the plaintiff from suing elsewhere, in a state with a longer limitation period.[108] This result preserves the forum's control over its own courts without sacrificing either party's interests: the plaintiff's in suing under a longer limitation period elsewhere, and the defendant's in not being any worse off than under the competing limitation period. The forum exercises its own interest in control over access to its own courts.

All of this is fine as far as it goes, but it raises the question of whether it goes far enough. Enforcing the forum's shorter limitation period, and protecting the defendant's repose to that extent, comes at the cost of sacrificing the preclusive effect of a dismissal based on the limitation period. One form of repose comes at the expense of the other. The standard rule leaves open the possibility of a series of lawsuits as the plaintiff seeks out different forums with progressively longer limitation periods.[109] The optimal result would offer greater finality with less litigation.

103. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988).

104. 1 CORMAN, *supra* note 6, at 288, 332–39.

105. *See id.* at 81–84.

106. *See id.* at 79–84.

107. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 77–78 (5th ed. 2006).

108. *See id.* at 69 (describing "the standard rule that dismissal of a suit because the period of limitations has run is not on the 'merits' in the sense of barring suit in another state").

109. This happened in Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 499–500 (2001).

The standard rule instead preserves the power of each state to set its own limitation period, with minimal compromise of the reasons for having a limitation in the first place. Perhaps a federal system cannot do any better, short of adoption of uniform limitation periods by all the states concerned. Federal legislation conceivably could be enacted under the Full Faith and Credit Clause[110] to enhance the preclusive effect of state dismissals of untimely claims. But Congress has never tried to give greater preclusive effect to a state judgment than the state itself would.[111] Under existing law, states have great leeway in setting the time limits for suing on judgments from another state in order to enforce it in their own courts.[112] That leeway takes for granted that the judgment would be given the same effect in the enforcing state as in the rendering state if it were the subject of a timely suit.[113] If the rendering state regarded the judgment as precluding all further litigation over the same claim, it would support a strong argument that it was entitled to the same full faith and credit in another state as it was in the rendering state.

Neglecting this avenue for simplifying the law can have dire consequences, as illustrated by the Supreme Court's decision in *Semtek International, Inc. v. Lockheed Martin Corp.*[114] That case involved layers upon layers of choice of law analysis, moving from the effect of a federal judgment on a state law claim, to the federal common law of preclusion, to the state law of preclusion on dismissal under the statute of limitations.[115] The opinion wound its way through all these levels of analysis, not always persuasively; at one point it held that a dismissal "on the merits" did not preclude further litigation.[116] It eventually reached the conclusion that litigation on the same claim in another state could go forward.[117] This odyssey through choice of law in state and federal courts in two different states eventually yielded the

110. U.S. CONST. art. IV, § 1.

111. The general Full Faith and Credit Statute requires that judgments "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738. This statute has not been significantly altered since its enactment in 1790 and "[i]t is generally assumed that the command of § 1738 is to give to the state judgment the same effect—no more and no less—that the state courts would give it." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 660, 662 (8th ed. 2017) (internal quotation marks and footnote omitted).

112. *See* McElmoyle *ex.rel.* Bailey v. Cohen, 38 U.S. 312, 327–28 (1839).

113. *See id.* at 326 ("The judgment of a state Court should have the same credit, validity, and effect, in every other Court of the United States, which it had in the state Court where it was pronounced . . . .").

114. 531 U.S. 497 (2001).

115. *Id.* at 500–09.

116. *Id.* at 500–06.

117. *Id.* at 506–09.

counterintuitive conclusion that a judgment "on the merits" precludes litigation only in the forum where the judgment was rendered.[118] Even if each step on the journey could be justified, it appears to have led to a suboptimal destination.

Borrowing statutes, which direct the forum state to apply the statute of limitations of another state, supports the modern trend away from applying only the law of the forum.[119] Courts have become sidetracked over the means of identifying the other state, usually as the state where the plaintiff's claim "accrued" or "arose."[120] Those terms incorporate a territorial approach more common in traditional choice of law rather than modern approaches, for instance, by relying upon the place of the wrong, or the *lex loci delicti*, in selecting the applicable law.[121] Modern approaches look instead to the state with "a substantial interest" in applying its law or the most "significant relationship to the parties and the occurrence."[122] A borrowing statute that takes the traditional approach does not fit at all well with state law that takes a modern approach. It fits even more poorly with an approach specifically aimed at the statute of limitations that seeks to depart from the traditional rule favoring the law of the forum. The fit becomes poorer still in those states that allow the forum to apply its own law in favor of a resident plaintiff.[123] Instead of simplifying the analysis, borrowing statutes seem to pile up one complication after another.[124]

Borrowing statutes recognize that the forum state need not apply its statute of limitations whenever it has the power to do so.[125] Nevertheless, that power in the absence of a borrowing statute remains quite broad, as the Supreme Court held in *Sun Oil Co. v. Wortman*.[126] The state law at issue provided a longer limitation period than the law of the state that created the cause of action, concerned with recovery on gas leases from wells in other states.[127] Those claims, but not the limitation period, were

118. *Id.* at 506–07. For an extended critique of *Semtek*, see Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 718–27 (2006).

119. *See* 1 CORMAN, *supra* note 6, at 106–07.

120. WEINTRAUB, *supra* note 107, at 73–76.

121. *See id.* at 71–72 ("More seriously, a borrowing statute may freeze the forum's choice-of-law analysis into an undesirable territorial mold.").

122. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 cmt. e, f (AM. LAW INST. 1988).

123. WEINTRAUB, *supra* note 107, at 73 (referring to "the common, seemingly chauvinistic, provision excepting forum citizens from the operation of a borrowing statute").

124. *See id.* at 76–78 (criticizing proposed uniform borrowing statute).

125. *See id.* at 71–76.

126. 486 U.S. 717, 726–30 (1988).

127. *Id.* at 719–22.

governed by the law of the states where the wells were located.[128] The Supreme Court upheld the power of the forum state to allow claims to go forward under its longer limitation period over the argument that doing so violated the Full Faith and Credit Clause and the Due Process Clause.[129] The longer limitation period allowed all plaintiffs, residents, and nonresidents of the forum to bring claims that would otherwise be barred.[130] The forum state's interest in doing so usually focuses upon the rights of its residents to compensation,[131] even though the state could extend the same right to compensation to nonresidents.

There was no argument in the case that the alternative limitation periods were too short to give plaintiffs an opportunity to pursue their claim.[132] The judgment of the forum state just came down to a different balance between the interest of the plaintiffs in compensation and the interest of defendants in repose.[133] The added expense of the parties and the court in litigating late claims figured, if at all, in the balance that the forum state was free to strike in adopting and applying its statute of limitations.[134] This conclusion seemingly follows from the hardheaded position that courts should enforce the bargain between competing interest groups worked out in the legislature. If owners of gas leases prevail over gas producers and obtain a longer limitation period, then they have the right to take advantage of it on claims brought in the forum state. Such reasoning, however, does not even go so far as enforcing legislative bargains generally, since it prevents enforcement of the shorter limitation periods obtained by gas producers in the legislatures in other states where they predominate.[135] Little seems to be gained by introducing this added level of interpretation, favoring the law of the forum, to cases in which the plaintiff's claim rests on the substantive law of the producing state. That state's statute of limitations should also apply as a component of its substantive law.[136]

The seemingly realistic approach succeeds only in making statutes of limitations as unpredictable as possible. The precise limitation period

128. *Id.*

129. *Id.* at 722–30.

130. *See id.* at 719–22.

131. *See* WEINTRAUB, *supra* note 107, at 76.

132. *Sun Oil*, 486 U.S. at 729–30 (noting due process argument limited the forum state's traditional power to apply its own limitation period).

133. *Id.* at 736–38 (Brennan, J., concurring in part and concurring in the judgment).

134. *See id.* at 730 (majority opinion) (relying on a "[s]tate's interest in regulating the work load of its courts").

135. Such as Texas, Oklahoma, and Louisiana in *Sun Oil*, 486 U.S. at 720.

136. *See* WEINTRAUB, *supra* note 107, at 67 ("Statutes of limitations . . . should always be treated as substantive for conflicts purposes and subjected to complete functional choice-of-law analysis.").

selected by the legislature might be a matter of discretion, once it goes beyond the minimum of assuring the plaintiff an opportunity to be heard.[137] The need to have some limitation period and to make it ascertainable to the parties is not a matter of arbitrary choice. It is fundamental. Putting an end to the risk of litigation is part of the price of progress.[138] It gives potential parties to litigation the freedom to look forward without looking back. To view statutes of limitations as only a regrettable necessity attributes to the legal system and litigation a timeless perspective better suited to a religious than rather a secular outlook. The law does not usually treat claims *sub species aeternitatis*—under the aspect of eternity. Statutes of limitations do not exist to prevent the pursuit of past claims at undue expense to current claims and to future opportunities. Repose, in other words, has to be taken seriously as an independent, substantive value.[139] It should not lightly be compromised once the plaintiff has had a genuine opportunity to be heard.

That principle holds throughout the ordinary operation of the legal system. Claims for reparations stand out as an exception, but one that proves the rule. Reparations to Native Americans, or the descendants of slaves, or those of Japanese-Americans interred during World War II all have a strong basis in claims to remedy historic injustice.[140] These examples of transitional justice must respond to a wider range of concerns, although identifying what they are and how they operate has proved to be a daunting task. They do not, in any event, typically proceed by the ordinary processes of law but by special legislation, appropriations, and treaties and, even so, they invoke a variety of different factors, which do not always face backwards only.[141] They depend upon context, and in their own way, reveal arbitrary features just like statutes of limitations.[142] Priority of the present and future over the past cannot easily be evaded, especially by corrective justice afforded through ordinary litigation.

137. *See* 1 CORMAN, *supra* note 6, at 23.

138. Epstein, *supra* note 49, at 681 ("A single number stated in advance truncates the risk of making it clear that some actions cannot be brought.").

139. *See* Ely, *supra* note 69.

140. *See* Alfred L. Brophy, REPARATIONS PRO & CON 30–31 (2006) (listing programs and proposals for reparations).

141. *See* Jon Elster, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 212–13 (2004) (noting competition among incompatible aims, looking both backwards and forwards, in transitional situations with minimal resources).

142. *Id.* at 188–215 (discussing various constraints on transitional justice).

IV. ANOMALIES AND PATHOLOGIES OF THE STATUTE OF LIMITATIONS

A specific example of a statute of limitations and its problems gives needed texture and detail to the general arguments made in the previous Parts of this Article. Title VII of the Civil Rights Act of 1964[143] offers an unfortunate example of how almost everything that could go wrong with a statute of limitations did go wrong. To add to the complications, related claims under the civil rights acts passed during Reconstruction also illustrate how esoteric and unmanageable statutes of limitations can be. Only heroic attempts by the courts and the Equal Employment Opportunity Commission ("EEOC") have saved claims under these statutes from disappearing under the burden imposed by their own limitation periods.

A. Legislative Origins

Like most limitation periods, those enacted under Title VII came as a result of compromise, primarily to weaken the power of the EEOC and to assure business interests that the statutory prohibitions would not be unduly burdensome.[144] This compromise was reflected in the resolution of a series of enforcement issues: whether to have vigorous enforcement through a federal administrative agency, what role to give to enforcement by state and local agencies, and how both levels of administrative enforcement would affect claims filed in court.[145] In the version of Title VII that passed the House of Representatives, the EEOC had authority to issue administrative orders subject to judicial review, on the model of the National Labor Relations Board and its authority to regulate collective bargaining.[146] These provisions were jettisoned in the Senate as part of a series of compromises designed to obtain the two-thirds vote then required to invoke cloture and to end a filibuster.[147] The Senate compromise could not be worked out in committee for fear that senior southern senators would bottle up the legislation indefinitely in

143. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (2012)).

144. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1490–92 (2003) (detailing the crucial role of Sen. Dirksen, the Republican minority leader, in protecting business interests in proposing amendments to Title VII).

145. *Id.* at 1487–91.

146. *Id.* at 1490–91. For the history of the enforcement provisions in the original version of Title VII, see George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 691–94 (1980).

147. Rodriguez & Weingast, *supra* note 144, at 1486–87, 1487 n.247.

committee hearings.[148] Accordingly, the leaders of both the Republicans and the Democrats in the Senate forged a compromise while the legislation was under debate on the floor.[149] After the compromise was formally introduced, the vote on cloture succeeded and the bill passed the Senate.[150] It was then passed by the House without amendment, to avoid running the same gauntlet again in the Senate if any new provisions were added to the legislation.[151]

The Senate compromise introduced, with virtually no discussion, a ninety day time limit for filing charges with the EEOC.[152] For states or localities that enforced their own law against employment discrimination, the time limit extended to 120 days, to accommodate a sixty day period in which the state or local agency exercised exclusive jurisdiction.[153] If the EEOC decided not to refer the charge to the Attorney General, the charging party had thirty days from the Commission's issuance of "right to sue" letter to commence an action in court.[154] Few, if any, arguments of principle or policy support the terms of this statute of limitations, with its layers of separate time limits and their extraordinarily short duration, measured out in days rather than years.[155] It seems more appropriate to have a scheduling order issued by a court in a pending case for parties represented by counsel, rather than a preliminary requirement supposed to be satisfied by individuals acting without the assistance of counsel. The harsh and complicated terms of the statute of limitations served only to bar claims as untimely, or failing that, to invite disputes over its terms.[156] Both quickly came to pass.[157]

Be that as it may, few supporters of civil rights would have risked the failure of the legislation over this provision and the floor manager of Title VII readily acquiesced in this provision.[158] Necessity, not for the first

148. *Id.* at 1468–69.

149. *Id.* at 1467–71.

150. *Id.* at 1473.

151. *Id.* at 1473–74.

152. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(d), 78 Stat. 241, 260 (codified as amended at 42 U.S.C. § 2000e-5 (2012)); THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY 313 (1964) (comparing House and Senate versions of the bill).

153. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(b), 78 Stat. 241, 259–60 (codified as amended at 42 U.S.C. § 2000e-5 (2012)).

154. *Id.* § 706(e); *see also* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 695–96 (2013).

155. *See* Mohasco Corp. v. Silver, 447 U.S. 807, 820–21, 824–26 (1980).

156. *See* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 169–79 (4th ed. 2016) (summarizing decisions on time limits under Title VII).

157. *Id.* at 175–79.

158. The Senate compromise creating the very short time limits for filings with the EEOC (ninety days) and for filing in court (thirty days) was endorsed by the Democratic

time, became the mother of procedural invention, but not in a good sense.[159] Instead, it resulted in provisions that could not possibly be justified in their own terms.[160] The compromise in the original version of Title VII left the EEOC with no enforcement powers, making exhaustion of administrative remedies little more than an obstacle to litigation.[161] When exposed to the realities of litigation, it generated calls for amendment, which was attempted in the Equal Employment Opportunity Act of 1972.[162] Supporters of that legislation attempted again to grant administrative enforcement authority to the EEOC, but, when that failed, they fell back on giving authority to the EEOC to sue private employers and on lengthening the absurdly short limitation periods under Title VII.[163] The basic limitation period for filing with the EEOC was lengthened to 180 days and to 300 days in states and cities that had their own agencies like the EEOC.[164] Even the longest of these limitations still was less than a year.[165] An added complication, seemingly inconsistent with these short time limits, imposed a two-year limit on awards of back pay going back from the date of filing with the EEOC.[166] How could a plaintiff recover back pay for discrimination two years before filing if no charge could be filed alleging discrimination at that time? Litigation eventually supplied an answer to this question by invoking another complication: the existence of "continuing violations" that could extend over a long period of time, only some of which were recent enough to support a timely claim.[167] Judicial decisions and EEOC regulations had to be handed down before these issues could be clarified.[168]

manager of Title VII, Senator Humphrey, in his remarks on the floor of the Senate. 110 Cong. Rec. 12723 (1964).

159. *See* George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 1–5 (2019) (summarizing procedural compromises that put obstacles in the way of plaintiffs).

160. *See* Engstrom, *supra* note 154, at 695–99.

161. *See* Rodriguez & Weingast, *supra* note 144, at 1487–90.

162. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)); *see also* George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 824–25 (1972).

163. Sape & Hart, *supra* note 162, at 842, 850, 865.

164. BUREAU OF NAT'L AFFAIRS, INC., THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 315–16 (1973).

165. *Id.*

166. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 107 (1972) (codified as amended at 42 U.S.C. § 2000e-5(g) (2012)).

167. AMTRAK v. Morgan, 536 U.S. 101, 117–18 (2002).

168. *See i*d. at 110–13.

B. Regulatory and Judicial Simplification

The first step towards making the time limits under Title VII workable came from the EEOC.[169] It concerned the deferral period of sixty days in which state and local agencies could exercise exclusive jurisdiction over charges of discrimination.[170] The statute reads as if a charge cannot be filed with the EEOC during the deferral period.[171] Using its authority to issue procedural regulations, the EEOC provided that charges filed directly with it, instead of with the state or local agency could be sent to that agency and revived for its own consideration after sixty days.[172]

The deferral period also has implications for the limitation period for filing with the EEOC. Can a charge filed with the EEOC during the deferral period satisfy the 300-day limitation period for filing with the EEOC? Or does it subtract from the 300-day limitation making it effectively 240 days? The Supreme Court originally gave a complicated answer to this question, making it depend upon whether the state or local agency had terminated its proceedings.[173] If it had, then the deferral period was terminated also, and a charge could be timely filed with the EEOC within what remained of the 300-day limitation period.[174] Alternatively, the plaintiff had to file the charge with the EEOC within 240 days to make sure that it could be referred to the state or local agency and then revived for reconsideration by the EEOC within the 300-day limitation period.[175]

The Court reached this intricate result based on a literal reading of the statute, which was not contradicted by the legislative history.[176] The linchpin of the Court's argument relied on the very short time limits under Title VII:

> Perhaps the addition of another 60-day delay in the work of an already seriously overburdened agency is not a matter of critical importance. But in a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers

169. Sape & Hart, *supra* note 162, at 865–66.

170. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 106–07 (codified as amended at 42 U.S.C. § 2000e-5(c) (2012)).

171. *Id.* ("[N]o charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law . . . . ")

172. Love v. Pullman Co., 404 U.S. 522, 525–27 (1972).

173. Mohasco Corp. v. Silver, 447 U.S. 807, 815–17 (1980).

174. *Id.* at 817.

175. *Id.* at 817.

176. *Id.* at 818–24.

> of days—rather than months or years—we may not simply interject an additional 60-day period into the procedural scheme.[177]

As an exercise in enforcing the compromise worked out by Congress, this argument makes perfectly good sense. It is the compromise that does not make much sense. As the dissent pointed out, plaintiffs were left to fend for themselves in figuring out the "240-day maybe" rule, which nowhere appears in the statute and requires the aid of expert counsel to uncover.[178] By a series of small steps, each justifiable in and of itself, the Court reached a conclusion which made it nearly impossible for ordinary people to ascertain and comply with the limitation period. The problem all started with the very short time limits under Title VII, layered over with deferral to state and local agencies as a matter of federalism.[179] Even as a traditional repository of legislative deals, the statute of limitations could not bear the complexity imposed on it and still function effectively.

Fortunately, the EEOC tried again to redress this inequity in administration of the statute and succeeded in doing so. This time, it exercised its power to enter into "worksharing agreements" with state and local agencies, and to provide that its referral of charges automatically resulted in termination of state and local proceedings within the 300-day limitation period for filing with the EEOC.[180] Hence charges filed more than 240 days from the date of the alleged discrimination, but less than 300 days, would be formally terminated in the state or local agency and revived in the EEOC before the 300-day limitation period expired.[181]

The Supreme Court upheld this regulatory fix in a decision in which Justice O'Connor cast the decisive vote, relying upon the deference accorded to the EEOC in adopting a reasonable interpretation of the statute.[182] "Reasonable," in this context, constitutes something of an understatement.[183] As the plurality argued, the plaintiff would otherwise be left with a charge that was filed "too early until it is too late," despite the acceptance of its timeliness by all the agencies involved.[184] Avoiding

177. *Id.* at 825–26.
178. *Id.* at 833–35 (Blackmun, J., dissenting).
179. *See id.* at 822–24 (majority opinion).
180. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 110–13 (1988).
181. *Id.* at 112–13.
182. *Id.* at 115–16; *id.* at 125–26 (O'Connor, J., concurring in part and concurring in the judgment).
183. *Id.* at 108 (plurality opinion).
184. *Id.* at 120.

another interpretive morass, the Court also held that the timeliness of filing with the state or local agency under its own time limits was irrelevant.[185] Otherwise, those time limits would have had to be evaluated to determine whether they were too short or too long as compared to the time limits under Title VII, which do directly apply in state and local proceedings and which vary themselves in length. The Court, instead, opted for the general rule that those time limits only affected the right to recover under state or local law, leaving the procedures for recovery under each source of law to be assessed independently.[186] This task, as we have seen, is complicated enough already.

C. Added Exceptions

The time limits under Title VII have still proven to be recalcitrant enough to generate continued litigation and amending legislation. The most vexing issue involves the definition of "continuing violations"—violations of Title VII that extend beyond a discrete act to include continuing conduct.[187] In the first of a series of decisions, the Supreme Court held that a discharge, even if accompanied with the loss of accumulated seniority, is not continuing.[188] The plaintiff in that case sought to regain her accrued seniority on being rehired.[189] The Court, however, characterized her discharge, years before she was rehired, in these terms:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.[190]

Despite this categorical reasoning, the Court has had trouble distinguishing discrete from continuing violations in a convincing

185. *Id.* at 124.
186. *Id.* at 122–23.
187. AMTRAK. v. Morgan, 536 U.S. 101, 115 (2002) (distinguishing discrimination involving "discrete acts" from discrimination involving "repeated conduct").
188. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558–560 (1977).
189. *Id.* at 555–56.
190. *Id.* at 558.

fashion.[191] Hostile environment sexual harassment is continuing because the accumulation of instances needed to establish pervasive harassment may occur both before and after the cut-off for a timely claim.[192] All these events must be taken together to assess whether actionable harassment has occurred.[193] It is sufficient if only one in the series can be the subject of a timely claim.[194] A claim that a test has an unjustifiable disparate impact constitutes a continuing violation if, as inevitably will be the case, the plaintiff challenges the use of the test in hiring, promotions, pay, or other employment benefits.[195]

The Court initially held that discrimination in allocating seniority according to a system adopted by the employer could only be challenged within the limitation period of the adoption decision, not the later application of the system to the plaintiff.[196] Based on similar reasoning, the Court also held that a claim of sex discrimination in pay dated from the decision allegedly to pay women less than men, not from the later receipt by female employees of lower paychecks.[197] Both decisions were superseded by legislation that allows the plaintiff to sue from the latest of any of three events: the adoption of the discriminatory seniority or pay system; when the plaintiff becomes subject to the system; or when the plaintiff receives reduced seniority or pay under the system.[198] Following up on another wrinkle in Title VII, relief for a timely claim of discrimination in pay can extend as far back as two years before filing with the EEOC, so long as the latest instance of discrimination in pay occurred within the applicable limitation period.[199]

The overruled decisions provoked criticism on the ground that the plaintiff might not have had an opportunity to learn of the alleged discrimination if it dated back to the adoption of the seniority or pay system.[200] The plaintiff might not have been on notice of the discriminatory disparities created by the system if its application remained facially neutral for months or years afterwards.[201] The course

191. *See* RUTHERGLEN, *supra* note 156, at 175–77.
192. *See AMTRAK*, 536 U.S. at 109, 117.
193. *Id.* at 115–17.
194. *Id.*
195. Lewis v. City of Chicago, 560 U.S. 205, 212–13 (2010).
196. Lorance v. AT&T Tech., Inc., 490 U.S. 900, 906–13 (1989), *superseded by statute,* 42 U.S.C. § 2000e-5(e)(2) (2012), *as recognized in* Ledbetter v. Goodyear Tire & Rubber Co., Inc. 550 U.S. 618 (2007).
197. *Ledbetter*, 550 U.S. at 624–33, *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.
198. *See* 42 U.S.C. § 2000e-5(e)(2), (3)(A) (2012).
199. *Id.* § 2000e-5(e)(3)(B).
200. H.R. REP. NO. 102-40, pt. 2, at 23 (1991).
201. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

of decisions and legislation on these issues reveals a fault line in the analysis of limitations period. The acts that start the limitation running have to be distinguished from their consequences, which in any litigated case causes continuing harm to the plaintiff.[202] Otherwise, the plaintiff would have nothing to gain by suing. But in an ongoing relationship, like employment, the continuing effects of wrongful conduct can merge with the continuing conduct itself.[203] Legal doctrine has to distinguish between wrongful acts and their consequences, even if the plaintiff's ongoing employment by the defendant makes the distinction difficult to draw.

This dilemma might not be susceptible to any general resolution, but it becomes more urgent as the limitation period grows shorter. The plaintiff faces a greater need to obtain more time to gain notice of any available claim and the defendant more easily can argue that the plaintiff has filed outside the limitation period.[204] The policy solution that would minimize the significance of the problem would be to lengthen the limitation period. It is available, however, only to the legislature.[205] The interpretive solution open to the courts would be to expand the discovery rule, which allows the plaintiff to delay the commencement of the limitation period at least until she was on notice that she was harmed.[206] Neither solution is perfect since each leaves open the possibility that a plaintiff might find her claim barred without knowledge that she had a claim in the first place. That risk unavoidably follows from any sharply defined time limit. It is nevertheless more tolerable than the existing situation in which short time limits breed scholastic disputes over the difference between a discrete act with continuing consequences and continuous acts with new consequences. Looking more or less directly at whether most plaintiffs have sufficient time to gain notice of their claims makes much more sense than refining ever more intricately the doctrine unique to the statute of limitations.

202. 2 CORMAN, *supra* note 6, at 525–26 ("[S]tatutes of limitations frequently provide that the period specified therein commences when the cause of accrues. In the absence of legislative definition, courts construe accrual to be effective when all the elements necessary to an action have occurred, thereby enabling a suit to be maintained.").

203. AMTRAK v. Morgan, 536 U.S. 101, 115–17 (2002) (discussing harassment as a continuing violation of Title VII); 1 DOBBS ET AL., *supra* note 66, at 890 (discussing continuing negligence).

204. *Ledbetter*, 550 U.S. at 645–51 (2007) (Ginsburg, J., dissenting) (summarizing obstacles to immediate filing of pay discrimination claims).

205. *See* 1 CORMAN, *supra* note 6, at 17–19.

206. 2 CORMAN, *supra* note 6, at 134–35.

D. Title VII and Other Civil Rights Claims

Doctrinal proliferation poses an especially severe problem when plaintiffs have several related claims, each one with its own limitation period and supplementary rules. Are they to be interpreted and applied in light of one another to yield a coherent balance between the plaintiff's opportunity to be heard and the defendant's right to repose? Or are they to be interpreted independently of one another? The Supreme Court has opted for the second alternative for employment discrimination claims, which can arise under Title VII and other modern civil rights statutes, like the Age Discrimination in Employment Act or under the Reconstruction civil rights acts, arbitration agreements, or state law.[207] As we have already seen, state time limits are to be applied independently with respect to state claims, with no effect on the time limits under Title VII. The Supreme Court has generalized this approach to all related claims, apparently out of fear that an attempt at integrated interpretation of different time limits would be too complicated to be feasible.[208]

This result serves the goal of simplicity, which is laudable in a field in which it is observed more often in the breach. It comes, however, at the cost of mixing up the other goals served by statutes of limitations. In a leading case, *Johnson v. Railway Express Agency, Inc.*,[209] the Supreme Court applied a one-year limitation period adopted from state law to a claim of racial discrimination in employment under § 1981,[210] first enacted in the Civil Rights Act of 1866, regardless of the time limits and requirements for exhausting administrative remedies under Title VII. On a comprehensive view of the procedures applicable to both claims, no consistent principle of protecting the interests of the parties emerges. If the very short time limits under Title VII gave the plaintiff adequate opportunity to bring a claim, then it was not necessary to resort to the longer time limit under state law to bring the same claim under a different statute.[211] Conversely, the defendant's interest in repose needed the protection of the shorter time limits under Title VII or the interests

207. For a decision on the effect of state law on a claim under the Age Discrimination in Employment Act, see Oscar Mayer & Co. v. Evans, 441 U.S. 750, 759–60 (1979) (holding that there is no need to file a timely claim under state law to preserve the federal claim). For a decision concerned with Title VII and the Civil Rights Act, see Delaware State College v. Ricks, 449 U.S. 250, 256–61 (1980) (holding that Title VII limitation begins to run before exhaustion of internal grievance procedures).

208. EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988).

209. 421 U.S. 454, 462–67 (1975).

210. 42 U.S.C. § 1981(a) (2012).

211. *Johnson*, 421 U.S. at 461–62 (finding that the limitation periods for different claims applied independently).

could be adequately served by the longer time limit under state law.[212] Which is it? Applying the time limits independently gives no answer to these questions.

But even if independently applied remedies serve simplicity, the whole apparatus of adopting the state limitation period defeats it. The most appropriate limitation period under state law must be identified and the consistency of state rule with federal rules on applying the limitation period must be determined.[213] In *Johnson*, the former issue was a tricky one of state law that the Supreme Court found to be outside the questions presented and the latter turned on the desirability of tolling the state limitation period while the plaintiff exhausted administrative remedies under Title VII.[214] Both questions no doubt can be answered, but the answers seem to be at a great distance from any purpose served by the statute of limitations. Why go to all this trouble if it does little more than resolve issues that the multiplicity of time limits themselves have raised?

Matters became even more complicated after passage of the default federal statute of limitations of four years. This statute avoided the need to refer to state law but only for new claims created after it was passed.[215] At the time of its enactment, claims for racial harassment were not covered by § 1981, but Congress later recognized such claims.[216] The Supreme Court accordingly held that the default limitation period applied to such newly recognized claims under § 1981 but not to claims existing earlier.[217] The new statute itself seemingly required this arcane distinction, but that just transforms a question of judicial interpretation into one of the wisdom of legislative policy.

As with the time limits under Title VII, compromise rather than wisdom seems to be the better explanation for the prospective-only operation of the default federal limitation period. Defendants had relied upon the possibly shorter limitations under state law and were unwilling to give them up, and possibly plaintiffs relied upon a longer limitation period, although this seems doubtful.[218] As elsewhere with the statute of

212. *Id.* at 463–64 (recounting policy judgments underlying the state's one-year limitation period).

213. *Id.* at 464–65.

214. *Id.* at 461–62, 462 n.7.

215. 28 U.S.C. § 1658(a) (2012).

216. Patterson v. McLean Credit Union, 491 U.S. 164, 176–82 (1989), *superseded by statute*, 42 U.S.C. § 1981(a) (2012).

217. Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382–83 (2004).

218. The House Report accompanying the legislation invoked this reliance argument:

> [R]etroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled

limitations, piecemeal reform just makes application and interpretation of the statute more complicated. Judicial interpretation encounters the same paradox in even more severe form because it is constrained by the legislative compromises entrenched in enacted statutes.[219]

Because of all the problems created by adoption of state limitations for federal claims, the Federal Courts Study Committee proposed retroactive operation of the new limitation period.[220] That recommendation made good sense, as would a thorough re-examination of all federal limitation periods, despite the herculean—or perhaps Sisyphean—aspirations of such an endeavor. Even the much more modest prospect of streamlining the overly complicated time limits under Title VII seems to fall under the weight of established expectations and interests. It still would make sense to enact and apply limitation periods to do as little harm as possible. Extremely short limitation periods should be expanded or interpreted liberally; those long enough to give the plaintiff time to gain notice of a claim should be enforced rigorously; and every effort should be made to avoid making the legal doctrine still more complex.

V. CONCLUSION

The proper policy recommendations for drafting a statute of limitations are disarmingly simple: make the limitation period long enough to assure that the plaintiff has an opportunity to be heard, and relatedly, to diminish the occasions and the incentives of courts to engage in intricate interpretation to avoid barring the plaintiff's claim; otherwise, make the supplementary rules for calculating and applying the limitation as clear and straightforward as possible. Even in the legislative process, however, statutes of limitations are rarely written on a clean slate, but instead have to contend with compromises based on the substantive claims of contending interest groups.[221] With respect to judicial interpretation, the slate becomes more cluttered still and courts have to seek sensible results under the constraint of compromises already reached by the legislature. All of these competing considerations usually

> expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.
>
> H.R. REP. NO. 101-734, at § 111 (1990).

219. *See* 1 CORMAN, *supra* note 6, at 17–23.

220. *Jones*, 541 U.S. at 379–80.

221. As evident, for instance, in the enactment of Title VII. *See supra* notes 144–68 and accompanying text.

get swept under the well-trodden rug of the necessarily arbitrary nature of statutes of limitations.[222] Even so, courts still have some room to prevent plaintiffs from losing their claims without an opportunity to be heard, as under the very short limitation periods under Title VII.[223] They should use their power to assure that the limitation period is long enough.

The proliferation of supplemental rules under statutes of limitations goes well beyond this needed flexibility. It apparently reflects an enduring uneasiness with invoking the bar of the limitation period at all. This tendency should be resisted because it can only obscure the clear signal that the statute of limitations should be sending, leaving parties and the courts to contend with the noise that surrounds this issue. Thorough reform to dispel this uncertainty has to contend with the accumulation of legal doctrine left by prior enactments and decisions. It might be utopian but, contrary to its neglect in recent legal scholarship, it should not be forgotten.

This conclusion casts new light on the allegations against public officials based on allegations of long past bad behavior. There is a genuine value in putting disputes over untimely allegations behind us. That value can be overcome, but it needs more than an imagined resolution of a timely dispute over the same allegations. That resolution never took place and, with the passage of time, never can take place. The uncertainty surrounding allegations of past wrongdoing cannot be dispelled, and it remains relevant only if it casts a shadow on present and future fitness for office. The signal that emerges from practice under statutes of limitations is decidedly mixed: that allegations of long past wrongdoing must often be foregone, even if the allegations, were they substantiated, could neither be forgiven nor forgotten. If the opportunity for a timely resolution was foregone, so also is the ability to rely upon what the resolution might have been.

222. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
223. *See supra* notes 176–79, 182–86 and accompanying text.