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A Study in the Choice of Form:
Statutes of Limitation and the Doctrine of Laches

Gail L. Heriot*

I. INTRODUCTION

Pity the poor statute of limitations. Throughout its long history, its invocation has often been regarded by the public and sometimes even by courts as somehow hypertechnical or downright unfair. A defendant who invokes its protection has sometimes been perceived as pulling a fast one on the hapless plaintiff. This does not mean that these courts believe that no limitation whatsoever should be placed upon the time period allowed for a plaintiff to bring a lawsuit. Hardly anyone is foolish enough to suggest such a thing.¹ Rather, these judicial critics of the statute of limitations regard it as an overly rigid and mechanical method for determining which cases, in good conscience, ought to be time barred and which ought not.²

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1. Indeed, Chief Justice John Marshall once remarked that a cause of action without any kind of time limitation would be "utterly repugnant to the genius of our laws." Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805).

2. It is not unusual to come across a court apologizing for what it perceives to be a bad result forced upon it by a formal reading of the statute. See, e.g., T.J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838, 842 (C.D. Cal. 1972) (dismissing admiralty action subject to a two year statute of limitations, despite fact that plaintiff had originally mistakenly believed its remedy to be within the Federal Tort Claims Act instead of the Suits in Admiralty Act, but stating that "[i]t is unfortunate that the suit is so barred"), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975); Martin v. Grace Line, Inc., 322 F. Supp. 395, 396-97 (E.D. Cal. 1970) (holding that statute of limitations barred action against United States, despite fact that plaintiff did not know that United States was the
Contrast the statute of limitations with the doctrine of laches, that golden girl of equity jurisdiction. Little dissatisfaction is expressed by courts applying it. Instead, they wax poetic about its virtues. According to one, "[L]aches is not a hidebound rule like a statute of limitations... but is a creature of courts of equity, founded upon common sense and natural justice." Such a description carries with it the peculiar suggestion that, in contrast, the statute of limitations is founded upon something other than common sense and natural justice. Laches, such courts have commented, "cannot be used to... defeat justice" and "cannot be used as an instrument of oppression." Again, the reader is left to wonder whether the statute of limitations can be used to defeat justice or to work oppression.

Of course, the popularity of the laches doctrine among courts is hardly proof of its superiority over the statute of limitations. Instead, it may simply suggest that our legal literature, dominated as it is by a seemingly inexhaustible supply of judicial opinions, has a bias in favor of doctrines that vest power in the hands of the judiciary. Courts like them; hence, the legal system likes them. Insofar as the two approaches can be seen as alternative positions in a struggle for power and influence between lawmakers (such as legislatures and appellate courts) and law administrators (such as trial courts), the laches approach represents a victory for the administrators—but not necessarily for the community. Courts would be the last to express reservations about laches because

appropriate party to sue, even though the result was "unfortunate"); Boutin v. Cumbo, 278 F. Supp. 223, 226 (S.D.N.Y. 1967) (applying the statute of limitations to dismiss action despite fact that defendant had been out of jurisdiction though decrying result as "unfortunate"); Skinner v. United States, 202 F. Supp. 598, 599 (S.D. Tex. 1962) (dismissing case of taxpayers who had erroneously paid excessive taxes as time barred but noting that "[t]he Court is most sympathetic with the unfortunate position in which the Plaintiffs find themselves, and is deeply disturbed over the fact that, but for the statute of limitations, it is undisputed they would be entitled to the refund"); Stephens v. Snyder Clinic Ass'n, 631 P.2d 222, 236 (Kan. 1981) (holding that the effect of a four-year statute of repose for medical malpractice was "unfortunate" but nevertheless mandatory upon the court). Whether these courts perceived the statute of limitations to be generally wrongheaded or whether they considered the result in the particular case to be an unfortunate but unavoidable result of a generally good and wise law is unclear.

it vests them with nearly full discretion to dismiss a claim they believe ought to be time barred. If laches is wrongheaded, it is wrongheaded precisely because it vests too much power and discretion in the hands of the courts.

Cries of foul are thus more likely to come from (1) dissatisfied litigants who object to a particular court's judgment pursuant to the laches doctrine and (2) potential litigants who object to the difficulty they have in planning their future behavior given the uncertainties of laches. These litigants have fewer opportunities to register their objections publicly; thus, it is not surprising that we see so little criticism of the laches approach in the legal literature. It would be serious error, however, to interpret this silence as approval of courts' sentimental and self-serving view of laches.

The laches doctrine tends to take its licks only indirectly, in the form of occasional general warnings about the dangers of vesting too much discretion in the hands of judges. One of the most dramatic warnings was voiced by Lord Camden:6

"The discretion of a judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper and passion.—In the best it is often times caprice: In the worst it is every vice, folly, and passion, to which human nature can be liable."7

The criticisms of both approaches seem eminently sensible, at least to anyone not fully jaded by the view that it is impossible to constrain the discretion of judges by imposing rules upon them.8 Indeed, the statute of limitations does sometimes produce results that seem hypertechnical in view of its underlying policy concerns. Like all rules, it is both overinclusive and underinclusive.9 Formal application of a

6. More recently, Justice Scalia has become known as one of the leading critics of such discretion in judges' hands. See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989) (generally calling for an increase in the influence of rules in American law); see also Gail L. Heriot, Way Beyond Candor, 89 MICH. L. REV. 1945 (1991) (discussing problems created when too much discretion is given to moral decision makers).

7. Hindson & Kersey, quoted in 8 HOWELL'S STATE TRIALS 57 n.† (1816).

8. See Frederick Schauer, Formalism, 97 YALE L.J. 509 (1988) (arguing that the language of rules can constrain judges' discretion).

rigid statute of limitations occasionally results in the dismissal of a suit that was not, in anyone's view, unreasonably delayed and whose delayed filing caused no undue prejudice to the defendant. Similarly, formal application occasionally allows a lawsuit to be maintained that has clearly been unreasonably and harmfully delayed. On the other hand, however, a doctrine like laches, which vests the court with the authority to determine whether the plaintiff has unreasonably delayed bringing a lawsuit to the detriment of the defendant, also produces less than optimal results because, among other things, it relies so heavily upon the wisdom and good faith of the trial judge. When judicial wisdom and good faith fail us, as they sometimes do, highly discretionary doctrines like laches fail us too.10

A. The Lawmaker's Choice of Formulation

In promulgating any kind of law, one of the tasks a lawmaker must perform is to select the best formulation of that law—the one that delegates to the law administrator the level of discretion and authority that is just right. This is a complex task,11 as I hope to illustrate in this article, using the statute of limitations and the doctrine of laches as my example.

The doctrine of laches and the statute of limitations are an interesting and familiar example of a rule-standard pair.12

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Utilitarianism and Social Contract Theory, 26 UCLA L. Rev. 1263, 1280-81 (1979); Schauer, supra note 8, at 534-35.
10. See Scalia, supra note 6.
11. See, e.g., Ehrlich & Posner, supra note 9. It is also a thankless task, since one could hardly expect the law administrator to be happy about those occasions when the lawmaker, for whatever reason, prefers formulations that purport to limit the law administrator's discretion and authority. The tension this scenario will create between lawmakers and law administrators is likely to be significant.
12. These doctrinal pairs come in two kinds, those that apply in combination to the same areas of human endeavor and those that have separate bailiwicks. Examples of the first category include the laws concerning acquisition of a driver's license. In general, one must be at least sixteen years old to get a driver's license. This rule is designed to weed out those who are likely to be bad drivers. Passing one's sixteenth birthday, however, is not enough. In addition, one must take a driving test administered by an employee of the division of motor vehicles. That employee is charged with determining whether the applicant possesses the skills and temperament necessary to function safely on the highways. Because of the judgment involved, this law is more standardlike than the age test. Like the age test, however, it is designed to weed out those who are likely to be bad drivers. Such pairs of laws, applied in tandem, are common. Another example is the combination of a strict rulelike speed limit with a standardlike prohibition against driving too fast for prevailing conditions. By combining a rule and a standard, the
They are two differing legal formulations designed to deal with the same underlying legal concern—that at some point a plaintiff's cause of action ought to perish for lack of timeliness. They do so, however, in very different ways. The statute of limitations represents a rulelike approach and governs cases at law; the laches doctrine is a standardlike approach and applies to cases in equity. Much of this article is devoted to a discussion of how and why this rule-standard pair came about. This article will address why legislatures might have chosen a rulelike formulation for cases at law while equity chancellors and courts chose to apply the standardlike laches doctrine to equity. It will conclude that there are several factors, any of which would provide justification for the development of these starkly different approaches to limitations law. My hope is, of course, to shed light on the factors that law has cast two nets with which to catch the evil it is seeking to prevent. If one fails, the other may still be successful.

The other kind of doctrinal pair is comprised of doctrines that have application to separate areas of the law. Included in this category is the statute of limitations and laches dichotomy, which is the subject of this article.

13. See infra text accompanying notes 41-44.

14. Although I have been discussing the statute of limitations in the singular, there are, of course, many statutes of limitation both within single political jurisdictions and across political jurisdictions. Statutes of limitation tend to have rulelike formulations, but they do so in varying degrees. Some statutes of limitation are cast in very rulelike terms. For example, a statute of limitations that does not provide tolling for infancy, insanity, or imprisonment is quite rulelike. See, e.g., ME. REV. STAT. ANN. tit. 14, § 752 (West 1991). This type of statute provides a fixed time period in which to bring a lawsuit regardless of the hardship this might place on the potential plaintiff or lack of detriment it might place on the potential defendant. In contrast, a statute that does provide for tolling is less rulelike. See, e.g., 21 Jam. 1, ch. 16, § 2 (1623) (Eng.) (providing tolling for "feme covert, non composit mentes, imprisonment, and for being beyond the seas."). Questions of fact and law regarding whether the plaintiff is an infant, insane, or imprisoned within the meaning of the law make the law somewhat more difficult to administer properly. On the other side of the coin, it vests the adjudicator with somewhat more authority to tailor the result to the facts of the case. Statutes of limitation that provide for tolling if for any reason the plaintiff did not know, and in the exercise of reasonable care could not have known, are still less rulelike. See, e.g., IDAHO CODE § 5219(4) (1992) (limitation period for cause of action arising out of foreign objects inadvertently left in plaintiff's body).

15. See infra text accompanying note 45.

16. Just as statutes of limitation can vary, so too can the doctrine of laches. Although all formulations tend toward the standard end of the rule-standard spectrum, some jurisdictions vest more discretion in the hands of the adjudicator than others. Compare Gruca v. United States Steel Corp., 495 F.2d 1252, 1259 & n.8 (3d Cir. 1974) with Tandy Corp. v. Malone & Hyde, Inc., 769 F.2d 362, 366 (6th Cir. 1985), cert. denied, 476 U.S. 1158 (1986).

17. See infra part II.D.
generally influence a lawmaker's choice of formulation along the rule-standard continuum.

B. Convergence

Much of the remainder of this article is devoted to the interesting phenomenon of convergence. Over time, the application of both the statute of limitations and the doctrine of laches has changed. The statute of limitations has, in practice, become more standardlike and, to a lesser extent, the doctrine of laches more rulelike. The formulation selected by the original lawmakers has thus—for better or worse—been slowly altered by subsequent law administrators. This phenomenon is important because it casts doubt on the lawmakers' ability to determine the optimal formulation for a given law along the rule-standard continuum and to see that it is administered in that form—at least over long periods of time. Law administrators enter the picture and alter the formulation.

The courts responsible for applying statutes of limitation justify their decision to make them more standardlike by arguing that times have changed and outdated laws need to be modified. They reason that the enacting legislatures would have wholeheartedly approved the adoption of an expansive discovery rule and considered such a rule a valid interpretation, under the circumstances.

Maybe these courts are right; the argument certainly has its sympathetic side. Regardless of the proffered justifications, this transformation has effected a fundamental change in the theoretical underpinnings of limitations law. Unfortunately, once that change is acknowledged, the assumption that the original promulgators of the statutes of limitation would approve of the transformation begins to seem dubious. Indeed, as I will discuss, there are a number of reasons the enacting legislatures might be ill-disposed towards the transformation that has occurred.

This article includes a discussion of what might be causing this curious convergence trend, whether convergence is a positive or negative influence in the law, and insofar as it is perceived as negative, the difficulty legislators face trying to

18. See infra part III.
19. See infra pp. 953-60.
control it. This article concludes that there are reasons to distrust judges who transform rulelike statutes of limitation into standards. Sadly, despite their best intentions, judges interpreting and applying statutes of limitation have an incentive systematically to undervalue the need for rules. As I will explain below, judges tend to favor more standardlike formulations on the ground that they yield "fairer" outcomes and thereby reject rulelike formulations that provide superior guidance to potential litigants. Rather than attempt to reconcile these two competing functions of law—the guidance of adjudication and the guidance of conduct—in a manner that reflects community consensus, judges tend, for reasons of self-interest, systematically to favor adjudication. Even more sadly, this is a tendency that legislatures acting as lawmakers may be unable to control, given the demands of the separation of powers doctrine.

II. THE FORMULATION OF LIMITATIONS LAW ALONG THE RULE-STANDARD CONTINUUM

A. An Early History of the Statute of Limitations and the Doctrine of Laches

Although English law has long evidenced a desire to keep stale cases out of the courts, in practice this policy has been applied in an uneven and erratic manner in both real property and personal actions.

Limitations on actions to recover real property were established early in Roman law. England's experience, however, was spottier. A good example is the writ of novel disseisin. From its name, one would think that no action could be maintained under a writ of novel disseisin unless the disseisin had been recent or "novel." One would expect to find some device—rulelike or standardlike—that effectively cut off a would-be plaintiff attempting to bring a tardy action. In

21. See infra part IV.
23. Indeed, Pollock and Maitland tell us that in Normandy—where the writ of novel disseisin originated—such a law existed. Only disseisins occurring since the last harvest were cognizable. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW, ch. iv, § 2, at 51 (2d ed. 1909).
England, however, this was not the case.\textsuperscript{24} Common law courts put no time limitation upon litigants. They apparently viewed such limitations as the responsibility or prerogative of the king or the Parliament, which acted infrequently and on an ad hoc basis. No rule or standard was formulated that could be applied indefinitely into the future. Rather than set a specific length of time between the date the cause of action arose and the latest date the case could be brought, the king and Parliament based limitations on a fixed date in legal memory. No actions arising prior to that fixed date would be entertained.\textsuperscript{25}

For example, at the time of Glanville, a writ of novel disseisin would be entertained only if the act of disseisin occurred after the king's most recent trip to Normandy.\textsuperscript{26} Glanville quotes from the writ of novel disseisin as it stood in his time:

"The King to the Sheriff, Health. N. complains to me, that R. has, unjustly and without a Judgment, disseised him of his free Tenement, in such a Vill, since my last voyage into Normandy . . . ."\textsuperscript{27} Unfortunately, such a method of time barring causes of action is only effective if English monarchs continue to make regular trips to Normandy. When that stopped, other arrangements had to be made.\textsuperscript{28}

Limitations on personal actions were even less developed. At both early Roman and early common law, rights in contract and in tort were, in theory, perpetual. Under the common law, however, certain procedural requirements stood in the way of the assertion of truly hoary claims. Tort actions, for example, were extinguished upon the death of either the plaintiff or the defendant.\textsuperscript{29}

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} By their very nature such measures had to be revised from time to time. \textit{Id.}

\textsuperscript{26} \textsc{Ranulf de Glanville, A Treatise on the Laws and Customs of the Realm of England} 167 (G.D.G. Hall ed., 1983).

\textsuperscript{27} \textit{Id.} (footnote omitted).

\textsuperscript{28} By 1194, the year in which the available plea rolls began, the limiting date was Richard I's first coronation in 1189. Later, the date was changed to Henry III’s coronation. In 1236 or 1237, the date changed by statute to the time of Henry III’s voyage to Brittany in 1230. No later date was fixed until 1275, when a date in 1242, said to be the date of Henry III's first voyage to Gascony, was fixed. Statute of Westminster I, 1275, 3 Edw. 1, ch. 39 (Eng.). This date was the only time limitation upon a novel disseisin case until the reign of Henry VIII, three centuries later, when Parliament first saw the folly of the ad hoc approach to limitations. 2 Pollock & Maitland, supra note 23, at 51. Most writs had a similar history. See \textit{id.} at 51, 81 (tracing the history of time limitation upon the writ of right and the writ of mort d'ancestor).

\textsuperscript{29} See Thomas E. Atkinson, \textit{Some Procedural Aspects of the Statute of Limita-}
Not until the reign of Henry VIII did Parliament enact legislation that moved in the direction of creating a self-perpetuating limitations system for real property actions. The preamble to that statute articulates the legislature's reasons for implementing such a mechanism to time bar state actions:

Forasmuch as the time of Limitation appointed for suing [various writs of action] . . . extend, and be of so far and long time past, that it is above the remembrance of any living man, truly to try and know the perfect certainty of such things . . . to the great danger of mens consciences . . . and it is also a great occasion of much trouble, vexacion and suits to the King's loving subjects at the common laws of this realm; so that no man, although he . . . [has] been in peaceable possession of a long season . . . is or can be in any surety, quietness or rest . . . be it therefore enacted . . .

The policies behind the statute are thus clear. Parliament wanted to guard against the dangers of trying a case for which the relevant evidence had been lost or destroyed and to protect against the uncertainty that arises when potential defendants are left in limbo, not knowing whether or not they will be sued.

Nothing in the statute suggests the members of Parliament intended to promote a plaintiff-focused limitations principle that would not extinguish a cause of action until the plaintiff had a reasonable opportunity to bring a lawsuit. Indeed, the statute may suggest, if anything, an emphasis on the defendant-focused principle that no cause of action should be maintainable if the defendant, through no fault of his own, has lost valuable evidence in his defense or has otherwise innocently changed position to his detriment.

The Statute of Henry VIII did not provide a system of limitation rules applicable to all common law actions. Curiously, it applied to some writs of action but not to overlapping writs.
that gave different remedies for similar wrongs. For example, the Statute of Henry VIII operated to bar the traditional real action if not brought within the period it specified. It did not, however, bar a claimant's right of entry.\textsuperscript{33}

This rather sizable gap in the law was not closed until eighty-three years later when Parliament passed the Statute of James I in 1623,\textsuperscript{34} marking the advent of reasonably effective and systematic rules to govern time limitation. The Statute of James I provided specific lengths of time for numerous real property and personal actions. It explicitly tolled these limitation periods for infancy, insanity, imprisonment, coverture, and absence from the realm, but was silent concerning ignorance. This statute is the model for statutes of limitation adopted by American legislatures.

Nowhere in either of these English statutes did the legislature acknowledge the existence of equity courts. Indeed, the statutes are so explicit in referring to common law writs that it seems doubtful that the members of Parliament believed the statutes would cover matters brought before equity courts. Perhaps it was merely oversight that no provision was made for limitations in equity. After all, during the reign of Henry VIII, the typical, well-informed individual might not have considered equity courts to be courts, just as many persons during our time do not consider administrative agencies to be courts. Parliament may simply have forgotten them. On the other hand, perhaps it was deliberate. In any event, equity courts did not perceive themselves at the time to be bound by these statutes.\textsuperscript{35}

Nevertheless, the legal norm underlying the statutes of limitation—that there must be some time limitation on potential plaintiffs—was not entirely lost upon equity judges. Numerous cases from the era of the statutes of Henry VIII and James I, in which the court dismissed the action for untimeliness, demonstrate the concern with which equity courts handled the issue.\textsuperscript{36} Not one of these cases actually uses the

\begin{itemize}
  \item Bevil's Case, 76 Eng. Rep. 862, 876 (C.P. 1575).
  \item 21 Jam. 1, ch. 16, § 1 (1623) (Eng.).
\end{itemize}
term "laches." Yet it is clear that, in some form or another, the courts deciding them had subscribed to the substance of that doctrine. The Latin maxim "interest republicæ ut sit finis litium" is repeated in many of the cases.

In the nineteenth century, equity courts decided the laches question according to the special circumstances of each case. Power was vested in the equity judge to do what was best. This is in sharp contrast to the rulelike way in which law courts administered the statutes of limitation. In the early nineteenth century, most American courts applied statutes of limitation quite formalistically, thus magnifying the existing rulelike qualities of the statutes. When asked to provide an exception for the plaintiff's ignorance of the cause of action, one court stated:

[The statute of limitations] contains no such exception. To allow it would make the statute virtually inoperative. Those in possession of real property, instead of being secure, would be constantly subject to actions commenced twenty, thirty, or even double that number of years, by some one who shows that he or she was ignorant of their [sic] claim or right.

The two approaches to limitations policy—standardlike laches and rulelike statutes of limitation—were miles apart.

B. The Nature of Rules and Standards and the Environments that Give Rise to Them

In order to understand why a statute of limitations is rulelike and the doctrine of laches is standardlike, one must first examine the nature of rules and standards.

Rules are characterized by simplicity of administration. A rule will turn on a very limited number of easily ascertainable facts. If those facts are found to exist, the legal outcome


37. Black's Law Dictionary defines the phrase as follows: "It concerns the state that there be an end of lawsuits. It is for the general welfare that a period be put to litigation." BLACK'S LAW DICTIONARY 814 (6th ed. 1979).


39. See, e.g., Goodridge v. Union Pac. Ry., 35 F. 35 (C.C.D. Colo. 1888); Crawford v. Gauden, 33 Ga. 173 (1862); Washington County v. Mahaska County, 47 Iowa 57 (1877); Mast v. Easton, 22 N.W. 253 (Minn. 1885).

prescribed by the law will be a certainty.\textsuperscript{41} The typical rule will be formulated in this way: "If $A$ is true, then $X$ shall be the result," where $A$ is an easily ascertainable fact and $X$ is a specific legal outcome.

The degree to which a given law will be considered rulelike will thus depend upon the number of difficult-to-resolve facts that the law puts directly in issue and the amount of discretion afforded the administrator in deciding the legal outcome given the facts.\textsuperscript{42} Consequently, the formulation "If $A$ is true, then $X$ shall be the result" is an extremely rulelike law, especially if $A$ is an easily ascertainable fact. "If $A$ and $B$ are true, then $X$ shall be the result" is slightly less rulelike if $B$ is a fact that is not easily ascertainable, such as state of mind. Still less rulelike would be this formulation: "If $A$ and $B$ are true, then $X$ shall be the result unless the administrator is convinced that $X$ would cause the end of civilization as we know it." Because the discretionary leash given to the administrator under this latter formulation is extremely short, however, it is still proper to classify the formulation as very rulelike relative to other possible formulations.

A rule purports to be simple to administer because it purports to shield the administrator from having to consider the full range of factual circumstances that might be relevant to the underlying legal norm.\textsuperscript{43} Whether it is in fact simple to administer will depend upon the administrator’s approach to rules in general or to the rule at issue.\textsuperscript{44} For example, a statute of limitations that states, "A cause of action against a decedent’s estate will, without exception, be barred if the complaint embodying that cause of action is not filed within one year from the date on which a death certificate is filed," is in the tradition of a rule. This rule purports to direct the court not to consider whether the plaintiff was notified of the decedent’s demise, whether the plaintiff knew or should have known of his cause of action, whether the injury was significant, or whether any evidence favorable to the defendant has been lost. These questions presumably have already been weighed wholesale by

\textsuperscript{41} For an excellent discussion of the language of rules and whether it can or should restrain decision makers, see Schauer, \textit{supra} note 8.

\textsuperscript{42} See Kennedy, \textit{supra} note 9, at 1687.

\textsuperscript{43} See Ehrlich & Posner, \textit{supra} note 9, at 266-67; Powers, \textit{supra} note 9, at 1277-78; Schauer, \textit{supra} note 8, at 520-23.

the legislature and thus taken into consideration in formulating the rule. The rule attempts to shroud all other issues from the administrator's consideration so that the only factual issues will be: (1) whether this is a cause of action against the estate of a person for whom a death certificate has been filed, (2) the date the death certificate was filed, (3) the date the complaint was filed, and (4) whether more than a year has passed from the time the death certificate was filed to the time the complaint was filed. In nearly every case, once these factual questions are answered, application will be simple for all but the most incurably argumentative.

Standards, on the other hand, allow a broad range of facts to be considered. Moreover, once every possible fact question has been answered, the legal outcome of the case may still be in doubt, subject to the administrator's discretion. Thus, a typical formulation of a standard will be: "If, upon consideration of A, B, C, D, and any other relevant factor, the court finds that the application of outcome X is the most desirable one, then X shall be the outcome." Nothing is shrouded from consideration under such a formulation; everything can potentially affect the outcome.45

As I have suggested earlier in discussing the statute of limitations in particular, rules often receive only grumbling acceptance in court opinions.46 On the other hand, courts seldom grumble about standards.47 None of this is surprising given that courts derive power from the discretion vested in them by standards; it should be expected.

What is curious is the fact that standards tend to receive favorable play not only in judicial opinions48 but also in the conceptions of justice popularized by history and literature. The explanation may be simple: Standards lend themselves to a sense of dramatic immediacy that rules cannot generate. When it comes to drama, therefore, people prefer their doers of justice to be actual adjudicators of individual controversies rather than aloof promulgators of general law and to be wise and all powerful rather than mechanical and hemmed-in.

45. See Ehrlich & Posner, supra note 9, at 258; Kennedy, supra note 9, at 1688; Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1973); see also Pierre J. Schlag, Rules and Standards, 33 UCLA L. REV. 379, 382-83 (1985).
46. See cases cited supra note 2.
47. See cases cited supra notes 3-5.
48. See supra notes 3-4.
Nevertheless, popular stories concerning both approaches lend insight into the nature of rules and standards and their relative strengths and weaknesses as instruments of the law. Moreover, they illustrate well the differing legal environments that tend to give rise to each.

Perhaps the most well known of these stories is that of Solomon. He was among the great practitioners of the discretionary, standardlike approach to justice. Fearful that he would not govern wisely, Solomon asked God to grant him “an understanding mind to govern” the people of Israel. God complied, granting his request with these words, “Behold I give you a wise and discerning mind, so that none like you has been before you and none like you shall arise after you.” From that point, Solomon sat in judgment of the people of Israel and became known among the surrounding nations as an extraordinarily wise ruler. His rule was a personal one. No administrative body intervened between Solomon and the litigants before him. He did not promulgate rules prior to deciding an individual case in order to facilitate adjudication. Rather, when called upon to adjudicate a case, he reacted to the totality of the circumstances before him and tailored his “rule” of decision appropriately.

The Bible records only one case as an illustration of Solomon’s wisdom—the well-known maternity dispute between two harlots. In that story, Solomon does not apply any preconceived rule; his general standard was “do the right thing.” He reacts to the full range of the circumstances before him. Shrewdly summing up the situation, he orders the child cut in half. One of the women consents to this barbarous suggestion. When the other objects and protests that she would rather lose custody of the child than see him killed, Solomon awards custody to her.

The people of Israel “heard of the judgment which the king had rendered; and they stood in awe of the king, because they

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49. 1 Kings 3:9 (Revised Standard); see 2 Chronicles 1:10.
50. 1 Kings 3:12 (Revised Standard); see 2 Chronicles 1:12.
51. 1 Kings 3:28 (Revised Standard); see 2 Chronicles 1:13, 9:1-4.
52. 1 Kings 3:16-28 (Revised Standard).
53. Id. at 3:25.
54. Id. at 3:26.
55. Id.
56. Id. at 3:26-27.
perceived that the wisdom of God was in him, to render justice.  

Solomon ruled for forty years, during which Israel prospered under his just reign. Rehoboam, Solomon’s son and successor, showed none of his father’s leadership talent. To the contrary, he is described in Ecclesiasticus as “the folly of the nation” and one “that had little wisdom.” The result of his conduct was rebellion. The kingdom divided, never to reunite. His is one of the great tragedies of the Old Testament.

Historical and literary figures illustrating the contrary tradition—a rulelike approach to law and adjudication—tend not to assume such heroic proportions in the public consciousness,

57. Id. at 3:28. Did Solomon believe that no biological mother could ever consent to having her child cut in half and thus that he was awarding custody to the biological mother? Or did he believe that regardless of the identity of the biological mother, it was in the child’s best interests to be placed with a woman who cared more for his safety than for her right of custody? We will never know. We can be sure, however, that Solomon could not have successfully used this trick twice. The next child custody case could not be resolved by threatening to cut the child in half since both contenders would have been forewarned and reacted accordingly. Solomon’s was not a legal system built on rule or precedent.

58. Id. at 11:42.
59. See id. chs. 6-10.
60. Id. at 11:43.
61. Ecclesiasticus 47:27 (Douay).
62. Id. at 47:28.
63. 1 Kings 12:19 (Revised Standard).
64. Although the people had grudgingly tolerated high taxes and mandatory labor under Solomon, they were not inclined to do so for Rehoboam. The Bible reports that a delegation of Israelites came to Rehoboam and asked that the “heavy yoke” upon them be lightened. Id. at 12:3-4. The Bible reports that Rehoboam reacted as follows:

Then King Rehoboam took counsel with the old men, who had stood before Solomon his father while he was yet alive, saying, “How do you advise me to answer this people?” And they said to him, “If you will be a servant to this people today and serve them, and speak good words to them when you answer them, then they will be your servants for ever.” But he forsook the counsel which the old men gave him, and took counsel with the young men who had grown up with him and stood before him. And he said to them, “What do you advise that we answer this people who have said to me ‘Lighten the yoke that your father put upon us’? ” And the young men who had grown up with him said to him, “Thus shall you speak to this people who said to you, ‘Your father made our yoke heavy, but do you lighten it for us’; thus shall you say to them, ‘My little finger is thicker than my father’s loins. And now, whereas my father laid upon you a heavy yoke, I will add to your yoke. My father chastised you with whips but I will chastise you with scorpions.’”

Id. at 12:6-14.
but they are certainly not unknown. Solon, the great lawgiver of sixth century B.C. Athens, is an excellent example of that tradition. Solon's story is quite different from Solomon's. Solomon was born a prince; Solon was forced into public life because, at a time of considerable strife in Athens, he was perhaps the only man in all of Athens who was acceptable to each of its factions.65

Once in office, Solon set himself about the task of legal reform. He established an elaborate code governing such things as citizenship, inheritances, and commerce.66 When these reform measures were in place, Solon sought out the members of the Athenian Council and requested them to swear that they would allow these changes in the law to remain in place for a period of ten years. Once he had secured those promises, Solon left. Sailing away on a ship, Solon was not seen in Athens for ten years.67

The legacy of his legal reforms, however, continued. Firmly in place, they no longer required his presence. Athens prospered and indeed became one of the well-springs of western culture.

The contrast between Solomon and Solon reveals something about the nature of rules and standards. Both were great and wise men of the law. Portraits of both grace the courtroom of the U.S. Supreme Court along with the likes of Moses, Hammurabi, Charlemagne, and Louis IX. Solon's code of rules, however, was the product of a legal community that was at war with itself. Lawmakers (Athenian Council members and persons seeking to influence that body) had conflicting ideas concerning the public good. Such a setting can only produce rules. Warring factions would never be able to agree upon standard-like formulations, whose underlying principles tend to be all too transparent. Rules were a practical way out of this dilemma.

This lack of consensus must have extended not only to Athenian lawmakers but also to Athenian law administrators. Thus, even if the lawmakers had been able to agree upon principles, they might have had to resort to rules rather than standards to implement those principles because they could not rely

66. See id. at 108-12; MICHAEL GAGARIN, EARLY GREEK LAW 51-80 (1986).
upon the law administrators to exercise discretion uniformly, in an appropriate manner. Rules were thus necessary. The use of standards could only result in an avalanche of unpredictable or wrongly-decided cases from the point of view of Athenian lawmakers.

Solomon had no problem with heterogeneous values among his lawmakers and law adjudicators. Scripture does not record any lack of consensus among the lawmakers of ancient Israel. Solomon was himself the lawmaker; he was king. There is no evidence of warring factions attempting to influence him on matters of family law principles. Similarly, Solomon personally conducted adjudications and thus he relied upon his “law administrator” to adjudicate uniformly and appropriately.

Solomon's rule drafting cannot compete with Solomon's adjudication of the single maternity dispute on a literary level. Solomon's ability to react wisely to a discrete human predicament makes for fascinating story telling. That does not mean, however, that Solon's methods cannot compete on a jurisprudential level. Solomon's method has many disadvantages. It requires a lawmaker who is single-minded concerning principles of the law. It also requires a steady supply of wise administrators. When Solomon passed from the scene, no one could take his place. Rehoboam proved to be ill-suited to the task, and the Davidic dynasty's empire was doomed. Solon's rule-governed legal system, on the other hand, though less dramatic, depends only upon the existence of one wise lawmaker. Once the rule is promulgated, its wise promulgator is not immediately required to ensure the day-to-day functioning of

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68. The fact that many of the areas of the law Solon touched, commerce for example, require predictability so that citizens can act in reliance could only serve to reinforce this tendency towards rules.

69. Indeed, it is impossible to conceive of Solomon's fame as a man of justice with his emphasis on standards in any other way. He would never have been considered a wise man had he simply told his ministers, “I command you to look at all the circumstances and arrive at the best solution.” Arriving at standardlike formulations of legal norms is often simple; applying them to actual controversies requires a wisdom that too few of us possess. Under those circumstances, the fame would rightly belong to the ministers, not to Solomon, a mere source of broad, imprecise standards. Solon's brand of justice had precisely the opposite characteristic. His fame was the result of promulgating rules to guide adjudication, not from any actual adjudication. As Solon himself perceived, once a well-considered code of rules was promulgated, the most difficult task was complete. The only difficult task remaining is to avoid the temptation to modify the rules inappropriately.
the legal system. Solon could, as he in fact did, take an extended vacation.

C. Selecting a Formulation
Along a Rule-Standard Continuum

How does the lawmaker decide which formulation along the rule-standard continuum to adopt? One can only guess at the motivations of the British Parliaments during the reigns of Henry VIII and James I or of the multitude of Anglo-American legislatures that followed them in adopting the relatively rule-like statutes of limitation. The same is true of the motivations of the British chancellors and the British and American equity courts that developed the more standardlike laches doctrine. It seems likely, however, that the same reasons that made standards appropriate for Solomon and rules for Solon would apply here.

Any individual lawmaker will have to consider the following in selecting a point along the rule-standard continuum to cast the law: (1) the ability of the formulation to guide law administrators to achieve appropriate case outcomes, (2) the ability of the formulation to guide actors towards appropriate conduct, (3) the relative importance of guiding law administrators to achieve appropriate case outcomes and guiding actors to appropriate conduct, and (4) the practical ability of the formulation to attract the consensus of fellow members of the law-making body.

1. Guiding adjudication

A lawmaker's choice along the rule-standard continuum can be judged, in part, according to its ability to function as a guide for adjudication. An optimum guide for adjudication is, of course, one that over time will yield appropriate outcomes in

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70. The distinction between law as a conduct guide and law as an adjudicative guide has been discussed at length in Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984). Professor Dan-Cohen has suggested that different laws can fulfill these separate functions. For such a system to work, of course, the actors whose conduct is being regulated must be at least partially ignorant of the dual system—some degree of "acoustic separation" must exist. Under my system of formulation selection, a lawmaker could consider the practicability and desirability of separate laws for guiding adjudications and for guiding conduct when reconciling the competing goals of appropriate adjudications and appropriate conduct guidance.

71. See Ehrlich & Posner, supra note 9, at 260.
the cases that are likely to come before the law administrators for adjudication. By appropriate outcome, I mean an outcome that would have been preferred by the lawmaker if the lawmaker had been adjudicating on a case-by-case basis without reference to rules or their possible benefits, omniscient as to facts, and possessed of the quality of discretion that it deems most perfect.\textsuperscript{72}

Obviously, no formulation will yield one hundred percent appropriate results. Given that fact finding is imperfect and costly and that discretion is not always exercised in a perfect manner, the optimum formulation for adjudication is one that will minimize the costs related to: (1) incorrect judgments resulting from mistakes in the application of discretion; (2) incorrect judgments resulting from errors in the fact-finding process; (3) incorrect judgments resulting from incongruity between the formulation of the law and its underlying social and legal norms; and (4) administration.

a. \textit{Mistakes in the application of discretion.} When a lawmaker chooses a formulation for a given social or legal norm that accords the law administrator discretion in its application, it is not always because the lawmaker is indifferent about how the individual cases should be resolved. To the contrary, the lawmaker may be very interested in the ultimate resolution of each and every case that is decided under the law. The lawmaker may have a definite sense of the right way and the wrong way to resolve each case. The only reason such a lawmaker may fail to make the proper resolution of each case clear to the law administrator is that it is difficult to articulate a full set of rules that applies to every set of circumstances. The lawmaker understands that it is impossible to anticipate every possible factual circumstance and therefore is forced to cede, however reluctantly, certain discretion to the law administrator and hope for the best.

Herein lies one of the major considerations for the lawmaker. The further the lawmaker moves in the direction of a standard, the greater the level of discretion accorded to the law administrator. The greater the level of discretion accorded to

\textsuperscript{72} Lawmakers may wish that their own sense of the appropriate exercise of discretion be reflected in the law administrator's decision or they may prefer that some other entity's, such as the community's, sense of the appropriate exercise of discretion be the yardstick against which the administrator's performance is measured.
the law administrator, the greater the likelihood the law administrator will make an error.\footnote{73}

It is not difficult to see how discretionary errors might happen in the application of the laches standard. If the law requires the judge sitting in equity to determine whether a plaintiff's delay in bringing a lawsuit was unreasonable under all the circumstances, certainly there will be disagreements over what constitutes unreasonable delay. Should a person with a debilitating, chronic illness but a clear mind be excused for the failure to bring a lawsuit? Reasonable minds will disagree. Should a person who has been misled by a well-meaning but meddling third party into believing that he has no cause of action be allowed to proceed when he finally brings a lawsuit that would otherwise be considered unreasonably delayed? The possibility of exactly such issues arising and being incorrectly decided (from the point of view of the lawmaker) is exactly what must be considered when determining whether to use standards in the formulation of a particular law. At least with honest errors,\footnote{74} the further one proceeds towards the standard

\footnote{73. There are a number of varieties of error (from the point of view of the lawmaker) that can occur when a law administrator exercises discretion to decide an issue governed by standards. Only some of them can be categorized as honest disagreements between lawmaker and law administrator. These good-faith errors, however, are the ones expected to increase the more standardlike a law formulation becomes. Others kinds of errors, however, are the result of cheating by the administrator. Such an administrator purports to apply the discretionary standard when in fact the administrator is going outside the standard. The cheating phenomenon can arise in four situations. In the first, the administrator attempts to reach the result preferred by the lawmaker if the lawmaker were personally adjudicating the matter and actually achieves that result. In the second, the administrator attempts to reach the result preferred by the lawmaker if the lawmaker were personally adjudicating the matter but misperceives that result. In the third, the administrator attempts to reach a result contrary to that yielded by an honest application of discretion and actually reaches an unintended result. Finally, in the fourth situation, the administrator attempts to reach a result contrary to that yielded by an honest application of discretion but actually achieves an intended result.

Only the results of the second and third scenarios are errors, at least when one looks at the short-term picture. When computing short-term costs, only these short-term results count. Unlike honest errors, however, one can expect certain cheating errors (the first and possibly the second scenarios) to increase in incidence the more rulelike the formulation becomes. This is because the number of occasions on which the administrator perceives that the all-things-considered result will differ from the result indicated by the law will increase as the law becomes more rulelike.

\footnote{74. See supra note 73.}}
end of the rule-standard continuum, the greater the likelihood of error in the application of discretion.

b. Mistakes in fact finding. The possibility of mistakes in fact finding is another cost of standards. The further one proceeds towards standards on the rule-standard continuum, the more facts are put into issue and the more difficult it becomes to resolve the factual issues. Errors in factual resolution thus become more likely. Sometimes this will cause entire cases to be incorrectly decided. Under those circumstances, the subtlety of analysis made possible by the use of standards backfires just as effectively as if the judge had erred in the application of discretion.

Rules are parsimonious in their consideration of facts. The more rulelike a formulation of a given concern is, the fewer the facts that will be relevant in applying that law and the easier they will be to resolve. Consequently, fewer factual errors will occur.

Statutes of limitation, at least when applied formalistically, tend to involve the adjudication of only a handful of easily-resolved facts. Although errors will occasionally occur (and when they do they are very likely to affect the outcome of the case) they will be relatively rare. Laches, on the other hand, requires a very broad investigation of facts—including such difficult-to-resolve facts as what the plaintiff knew and when she knew it. Errors in fact finding that affect the outcome of the case are bound to be numerous.

c. Inconsistency between the formulation of a law and its underlying legal norm. This is the other side of the coin: the cost of rules. As one reduces underlying legal norms to simpler, more rigid rulelike formulations, there is an increasing potential for incorrect judgments—judgments that would not reflect the lawmaker's preferences had the lawmaker adjudicated the case personally on an all-things-considered basis without regard to rules or their benefits over time. The rigidity of rules creates errors.

For example, a rulelike statute of limitations will always be both underinclusive and overinclusive. It will never be a perfect reflection of its underlying policies. Suppose, for example, legislators take the position that every plaintiff should have a reasonable period within which to bring a

75. See sources cited supra note 9.
lawsuit. The legislature promulgates that legal norm in the form of a rigid three-year statute of limitations. Sometimes, a potential plaintiff may purposely wait until the last opportunity to bring a lawsuit before the limitations period has expired because he knows that evidence valuable to the potential defendant will disappear. A rigid rule for time barring actions would work an injustice here. It would be underinclusive in that it bars fewer actions than justice would require. On other occasions, a plaintiff may have a perfectly reasonable explanation for being unable to bring a lawsuit within the time specified by the statute, and the delay may have worked no harm upon the defendant. To bar such an action would not promote the stated underlying policies of the legislators who adopted it. The rule is thus overinclusive, barring more actions than necessary.

The doctrine of laches does not present the same problem. Its flexibility allows the judge sitting in equity the discretion necessary to avoid such errors.

d. Administrative costs. Finally, the gathering and presentation of evidence is not an inexpensive enterprise, as every litigant knows. Neiter is it cheap to maintain a judicial system that must analyze and make a decision on that evidence. Courthouses must be built, furnished, and maintained; judges and staff paid; and jurors taken away from their routines. These are costs that must be taken into account in determining where along the rule-standard continuum to formulate a given law. If a change in the law does not yield any, or only a few, appropriate results while greatly increasing the costs of adjudication, then such a change is no bargain and should be rejected.

Ordinarily, the further one moves towards standards on the rule-standard continuum, the greater the associated administrative cost. The doctrine of laches, which shrouds little or nothing from the judge's consideration, is more likely to involve significant administrative costs than the statute of limitations. Legal issues presented by statutes of limitation are more likely to be disposed of summarily.

Any individual lawmaker must weigh these costs with the various possibilities of error outlined above to arrive at the

76. I discuss administrative costs only in the context of the ability of a formulation to guide law administrators to achieve appropriate case outcomes in adjudications. Of course, administrative costs must also be taken into consideration in evaluating the formulation's ability to guide actors towards appropriate conduct.
formulation most appropriate to guide adjudication. With this, however, the lawmaker's job has just begun. In addition, the lawmaker must consider whether a given formulation can function as an appropriate guide for conduct.

2. Guiding conduct

In addition to considering the formulation's ability to achieve appropriate adjudicative results, a lawmaker must consider the effect that formulation will have on the future behavior of the regulated actors. After all, law is not simply a tool for resolving disputes that exist autonomously from the law. Law affects behavior; people change their activities in response to it.77

One of the virtues of standards in this regard is that they discourage brinkmanship. Because it is never clear exactly how a particular case will be resolved, those attempting to avoid trouble with the law will not "push it to the limit." People cannot rely upon the technical overinclusiveness or underinclusiveness of a rule to protect them when they are engaged in an all-things-considered undesirable activity.78 In contrast, the equal and opposite virtue of rules is that they permit brinkmanship. Because rules are easier to predict, actors are in a better position to plan their behavior with confidence.

The key, of course, is knowing when to encourage brinkmanship and when to discourage it. For certain situations, providing predictable rules will serve no beneficial purpose. The kinds of activities that will be fostered, if any, will not be valuable. For other, perhaps most, situations providing a safe harbor for actors may encourage them both to avoid prohibited activities and to engage in associated beneficial activities. Society benefits from the creation of such a safe harbor.79 An obvious example is commercial activity. Rulelike formulations often provide the kind of certainty that will ultimately encourage beneficial commercial activity. Before an entrepreneur will sink resources into a new enterprise, she will want to know whether her contemplated activities are permitted by law. If the penalty for violating the law is severe enough, any significant doubt

77. See Joseph Raz, The Concept of a Legal System 147-56 (2d ed. 1980) (making similar distinction between laws governing adjudication and laws governing conduct); Dan-Cohen, supra note 70.
78. Kennedy, supra note 9, at 1695-96; Schlag, supra note 45, at 384-85.
79. See Ehrlich & Posner, supra note 9, at 262; Schlag, supra note 45, at 384.
may lead the entrepreneur to cancel the new enterprise completely—hardly a beneficial result. For example, laws with severe penalties for selling drugs that are “injurious to the public health” may discourage commerce in pharmaceuticals altogether. Merchants may refrain from selling pharmaceuticals that most believe to be highly beneficial (such as antibiotics) if a minority believes otherwise. Such a standard would function as a distinctly poor guide for conduct. In contrast, a more rule-like formulation, such as a prohibition against the sale of heroin and cocaine, might work quite well.80

On the other hand, standardlike formulations may be appropriate in other areas of the law. For example, a law protecting domestic pets from cruelty could spell out in excruciating detail precisely what kind of activity is prohibited or it could simply prohibit cruelty to domestic pets. At least from the standpoint of affecting primary behavior, it seems unlikely that the rulelike formulation would have any substantial benefit. Ordinarily, responsible pet owners don’t engage in any activity that is even remotely close to the line, so the need for rulelike certainty is minimal. Only miscreants would be interested in having a bright-line rule to skate close to.

How does all this apply to limitations policy? The primary argument for the use of rules is that it encourages potential defendants to feel secure enough to engage in worthwhile activities once the limitations period has passed. A bright-line rule allows a person who has been tying up resources in anticipation of being sued to release those resources into productive use. For example, in cases that involve disputes over the ownership of real estate, it is hardly surprising that the potential defendant in possession would be reluctant to invest heavily in improving the property if he or she feels it may soon be lost. Even in cases that do not involve disputes over specific items of property, it is not surprising that a potential defendant would be inclined to refrain from the most productive use of assets in favor of a less vulnerable position. Why should anyone invest a lifetime of savings and effort into a new Italian restaurant if there is a significant risk that it will be taken in execution of a judgment? It is better to spend the money on a vacation to Italy and eat Italian food prepared by someone else.

80. See Ehrlich & Posner, supra note 9, at 262; Schlag, supra note 45, at 384.
The effect on plaintiffs may be less significant. From the standpoint of the plaintiff, the benefit of having a rigid rule, such as it is, lies primarily in allowing for amicable settlements when otherwise the anxious potential plaintiff might be forced to file a lawsuit for fear of being time barred. The harm lies primarily in the risk that plaintiffs will wait until the last minute to file an action in hopes that the defendant's evidence will disappear or that the defendant will be inconvenienced by the uncertainty entailed by the extra wait. The possibility of such behavior being a double-edged sword serves to lessen the likelihood of such abuse.

Consequently, bringing the ability of a limitations formulation to serve as a guide for conduct into the lawmaker’s calculus will mainly influence the lawmaker in the direction of rules.

3. The relative importance of directing adjudication and guiding conduct

Once a lawmaker has decided which formulations will achieve the most appropriate case outcomes and which will be most effective in encouraging appropriate conduct, the lawmaker must decide how to reconcile the goals.

The balance the lawmaker strikes will no doubt vary according to the subject matter of the laws. The key is simply that the person who strikes the balance must attempt to do so from an unbiased vantage point. The lawmaker must not favor one goal over the other for reasons of self interest. Instead, the lawmaker’s views should reflect a mature judgment about the degree to which a given formulation will yield appropriate adjudicative results, the degree to which that formulation will guide appropriate conduct, and the relative importance of each.  

4. Attracting consensus

To the extent that the lawmaker is not one unfettered individual with a single mind about the policies he or she is attempting to pursue, the choice along the rule-standard continuum will also be influenced by the need to obtain the level of consensus necessary to promulgate a law.

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81. See infra part II.D.1-2.
82. See James Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962); Richard A. Posner,
The more standardlike a law becomes, the more transparent it is with regard to the underlying legal principle or principles that it is designed to implement. If the members of a legislature or other body authorized to promulgate laws cannot agree on the underlying principles that should animate the law they promulgate, they should not look to standards. Standards cannot build consensus. Rules, on the other hand, by virtue of the fact that they can often be accounted for by any number of underlying legal principles, will often receive the support of otherwise warring factions within the lawmaking body. Consequently, they may be the only choices available.

Limitations law makes for an excellent example. An individual can take several approaches to the subject: one favoring plaintiffs, one favoring defendants, or a balance of the two. One can take the position that no lawsuit should be barred until the plaintiff has had a reasonable opportunity to bring it. Only then should courts begin to contemplate whether to bar an action as untimely (and perhaps only then if the defendant has actually been harmed). One can focus on the defendant's predicament by maintaining that no lawsuit should be allowed after the defendant, through no fault of her own, has suffered a loss of evidence or other loss to a particular defense regardless of whether the plaintiff has had a reasonable opportunity to bring the case. In the alternative, one can attempt to balance the competing interests of plaintiffs and defendants through the use of some formula. These are policy choices that logically precede the lawmaker's choice of the point along the rule-standard continuum.

The doctrine of laches cannot hide its sympathy with the plaintiff-focused position described above. In order for a defendant to prevail on a laches defense, he must show both that the plaintiff delayed unreasonably in bringing the lawsuit and that he has been harmed by this delay. Hence, only cases in which the plaintiff has had a reasonable opportunity to bring the action can be time barred. A supporter of the defendant-focused position would have a difficult time casting a vote in favor of the laches doctrine. Such a supporter could, on the other hand, cast a vote in favor of a statute of limitations. A statute of limitations does not identify its supporters so readily as proponents of the plaintiff-focused, the defendant-focused, or the

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mixed position. All such persons might be willing to support it as a "compromise" position. Most of the time it will produce results consistent with all three approaches. Occasionally, though, it will produce results inconsistent with one, two, or even all three approaches. It will not, however, systematically favor one approach to the exclusion of the others. In that sense, it is a compromise.

D. The Divergent Paths of the Statute of Limitations and Laches

Assuming that actual lawmakers have considered the foregoing, one is led to question what accounts for the divergence in limitations policy between law and equity. Several possible explanations come to mind.

1. The relative ability of the two approaches to guide adjudication

It would make sense for individual legislators to favor a relatively rulelike limitations device to adjudicate cases at law. At the same time, however, it would make sense for those same individuals, if given a seat upon an appellate court, to favor a more standardlike limitations device in adjudicating equity cases. There are at least three interrelated reasons for this. First, the case load has traditionally been regarded as more homogeneous at law than at equity and hence better governed by rules. Second, the adjudicators of cases at law (judges and jurors) tend to be regarded as heterogeneous and not as inclined as equity adjudicators (judges sitting in equity) to reflect the same values as the lawmakers who issue directives to them. Third, the mechanisms available to a legislator to correct courts that have, in the legislator's view, incorrectly decided a case are very limited. Unlike the appellate court judge, the legislator cannot simply reverse a bad decision. Hence, legislators may be more inclined to put adjudicators on a short leash than would if they were appellate court judges deciding how much discretion to vest in trial judges deciding equity cases.

a. The degree of homogeneity in case loads. The first possible explanation for the existence of the two very different approaches to limitations lies in the degree of homogeneity in the groups of cases to which they are applied. Relatively homogeneous cases can be governed efficiently by a rulelike
formulation of a legal principle. The variations in the fact patterns presented are such that a relatively rigid rule can be fashioned that will produce unfortunate case outcomes only rarely. The more heterogeneous the case load becomes, the greater the need for standards.

Is it in fact true that traditional actions at law were relatively homogeneous and traditional equity cases were relatively heterogeneous? Certainly, the conventional answer to that question would be yes. The history of the common law is rooted in the notion that cases at law can be categorized in one of only a handful of forms of action. Within each category, the facts and circumstances surrounding the cases were thought to be sufficiently similar to justify the application of the same procedure.

On the other hand, equity cases were, in theory at least, the oddball cases. They were the square pegs that did not fit the round holes available in the law courts. If traditional equity courts were not truly dealing with exceptional cases, there would be little justification for having such courts. Given this traditional view, it hardly seems surprising that a lawmaker would choose to apply a rulelike statute of limitations to actions at law and a standardlike laches doctrine to actions in equity. If actions at law are generally homogeneous and equity cases generally heterogeneous, they are probably less so with regard to the application of limitations law.

The degree of contrast between law and equity is probably accentuated when viewed through the eyes of the relevant lawmakers. For example, legislators drafting statutes for common law courts are often aloof from the day-to-day business of

83. This is necessarily true because when I designate a given group of cases relatively homogeneous, I mean nothing other than homogeneous with respect to those characteristics that are relevant to a decision maker engaging in particularistic decision making. There are relatively few cases that do not fit the usual pattern. Consequently, there are relatively few cases that would be decided incorrectly if a rigid rule were applied to them.

84. It is questionable whether the underlying facts of traditional law cases were bland and homogeneous and the facts of equity cases exceptional. Perhaps law cases only seemed unexceptional because the procedure traditionally used to adjudicate these cases, the jury trial, was so cumbersome that law courts tended towards regimenting procedures that obscured the true range of facts that came before them. This can be contrasted with equity procedures, where jury trials were unavailable. A good example is the stylized pleading rules used at common law. If the underlying facts of the cases brought under those pleading rules appeared to be bland and homogeneous, it is only because the pleading rules forced them into such a mold.
adjudication and thus may be unfamiliar with the courts' case load. They may be tempted to oversimplify or to presume incorrectly that any set of cases with which they are unfamiliar must be less complex and diverse than it really is. This aspect of human nature intensifies the tendency towards rulelike formulations for application to actions at law. No similar lack of familiarity exists for equity cases. Originally, the lawmaker was the chancellor, who would have been intimately familiar with equity cases. When appellate courts inherited the function of lawmaker, the intimate familiarity with equity cases was inherited as well. The likelihood of overestimating the homogeneity of the cases is small. Instead, the danger is the opposite: losing sight of the forest on account of all the trees.

This parallels the contrast between Solomon and Solon. Solomon was dealing with a single case. It is not clear how many custody battles he had to decide during his reign, but it seems unlikely that the case recounted in the Bible was a routine one. In any event, given the size of his empire, he probably did not take the time to decide ordinary cases. These could be decided by ministers applying his rules. As king, he probably concentrated his efforts on the extraordinary cases, much the same way equity courts were thought to do. Solon's codes, on the other hand, were intended to govern all the cases that arose in Athens, the vast majority of which were likely to be quite commonplace. Consequently, like the legislators passing statutes to govern actions at law, Solon tended to formulate his laws as rules.

b. The law administrator's trustworthiness. A closely related difference between law and equity is the identity of the adjudicator. The importance of this factor should be clear. Adjudicators who are perceived by the lawmaker to be relatively homogeneous, to share the lawmaker's basic values, and to be capable fact finders need not be reined in by rules. On the other hand, control must be exerted over untrustworthy adjudicators. We have already seen this at work in the contrast between Solomon and Solon. Solomon was his own adjudicator and thus felt perfectly comfortable in ceding complete authority to himself. Solon, whose adjudicators were presumably members of the warring factions that made up Athenian society at the time, had to rely on rules.

How does this help explain why a rulelike limitations law developed for actions at law and a standardlike one for equity cases? A fundamental distinction between traditional courts of
equity and courts of law was the jury. Equity courts, of course, had no juries.\textsuperscript{85} All decisions, whether on facts, law, or mixed issues of fact and law, had to be made by the chancellor himself or, later, by professional judges. Courts of law, in contrast, used juries as fact finders and as arbiters of certain discretionary matters such as the existence of negligence.\textsuperscript{86}

How would the legislatures that enacted statutes of limitation have perceived adjudicators in law courts? How would the equity chancellors and appellate courts who instituted and refined the laches doctrine have perceived those who adjudicate equity cases? The chancellor likely felt a great deal more comfortable vesting power and discretion in the equity adjudicators than Parliament did vesting power and discretion in the law adjudicators. Originally, the chancellor was his own adjudicator. Like Solomon, he could be completely assured of an adjudicator who would share his values. When equity expanded to include equity judges, the chancellor had every reason to believe these judges shared his outlook on life. If nothing else, they tended to share with him a legal education of one sort or another and a background in the practice of law.

Legislatures enacting laws for common-law courts had no similar assurance that their adjudicators would be kindred spirits. Little evidence exists to show that the typical eighteenth-century juror had a lot in common with the typical eighteenth-century legislator.\textsuperscript{87}

\textsuperscript{85} Although litigants had no right to trial by jury in equity courts, such courts have traditionally had the authority to convene advisory juries. See 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 39.10 (2d ed. 1992). See also FED. R. CIV. P. 39(c) (preserving this authority for federal courts acting in equity); Note, Practice and Potential of the Advisory Jury, 100 HARV. L. REV. 1363 (1987).

\textsuperscript{86} The distinction is crucial because it made equity courts possible. Without it, the English dual system of justice could never have evolved. The extensive powers of the equity courts, which go far beyond the mere award of legal damages, would never have been permitted to develop had the power been lodged primarily in the hands of nonprofessional juries.

\textsuperscript{87} In the eighteenth century, English jurors were adult males subject to a statutory property qualification. In 1693, this was set at ten pounds a year for English juries and six pounds a year for juries in Wales. GILES DUNCOMB, TRIALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES BY NISI PRIUS 91-92 (photo. reprint 1980) (1725). These requirements remained in effect at least until midcentury, with only a few regional variations. For the city of London, in 1730, a hundred-pound qualification was imposed. 3 Geo. 2, ch. 25, § 19 (1730) (Eng.). In Middlesex, where leaseholding was apparently common, men possessing leaseholds worth fifty pounds per year were qualified to serve on juries. 4 Geo. 2, ch. 7, § 3 (1731) (Eng.).
One thing is for certain: The jurors of the eighteenth century were certainly not the elite of English society. Indeed, an eighteenth century commentator described the petty jurors at assizes as "low and ignorant country people." 88

88. MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE, WITH RESPECT TO THE CRIMINAL LAWS, PARTICULARLY ON ITS CIRCUITS (2d ed. 1785).

Opinions varied tremendously, just as they do today, concerning the desirability of the jury system. In 1956, Lord Devlin, speaking in the Eighth Hamlyn Lecture Series, offered this defense of juries:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

In contrast, one year earlier, at the Seventh Series of Hamlyn Lectures, Glanville Williams stated:

If one proceeds by the light of reason, there seems to be a formidable weight of argument against the jury system. To begin with, the twelve men and women are chosen haphazard. There is a slight property qualification—too slight to be used as an index of ability, if indeed the mere possession of property can ever be so used; on the other hand, exemption is given to some professional people who would seem to be among the best qualified to serve—clergymen, ministers of religion, lawyers, doctors, dentists, chemists, justices of the peace (as well as all ranks of the armed forces). The subtraction of relatively intelligent classes means that it is an understatement to describe a jury, with Herbert Spencer, as a group of twelve people of average ignorance. There is no guarantee that members of a particular jury may not be quite unusually ignorant, credulous, slow-witted, narrowminded, biased or temperamental. The danger of this happening is not one that can be removed by some minor procedural adjustment; it is inherent in the English notion of a jury as a body chosen from the general population at random.


One need look no further than our own founding fathers for a similar divergence of opinion. In the heady days of the American Revolution up to the ratification of the Constitution, one would expect antijury sentiment to be relatively rare. Yet that is exactly the sentiment expressed by Alexander Hamilton in The Federalist No. 83. In it, Hamilton expresses reservations about the wisdom of vesting juries (as opposed to judges) with the authority to decide questions of fact in equity cases. According to Hamilton, such a change in procedure "will tend gradually to change the nature of the courts . . . by introducing questions too complicated for a decision in that mode." THE FEDERALIST NO. 83, at 570 (Alexander Hamilton) (Jacob E. Cook ed., 1961).

Jefferson took the contrary position. Apparently convinced that the use of juries yielded a superior method of adjudicating cases, Jefferson advocated their use as fact finders in all kinds of cases. In a proposed Constitution for the Commonwealth of Virginia authored by Jefferson, he urged that "[a]ll facts in causes, whether of Chancery, Common, Ecclesiastic, or Marine law, shall be tried by jury." THOMAS
The point here is simply that any lawmaker would have been able to recognize the heterogeneity of juries, the risk that they might not share the lawmaker's values, and the risk that they might be incompetent fact finders. Consequently, any legislature promulgating a statute of limitations had plenty of reason to prefer a rulelike formulation if it was seeking to maximize appropriate adjudications.

c. **Ability to correct the law administrator's errors.** The lawmaker's ability to correct errors of the law administrator is another important factor to consider when deciding between the two approaches to limitations law. Unlike equity lawmakers, the legislature loses control once the law is enacted and a case presents itself for adjudication. If the legislature is dissatisfied with the law court's resolution of the case, it can change the statute but it can do little or nothing to change the outcome of a case. The same was never true in equity. Certainly, no loss of control occurred when the chancellor was both lawmaker and adjudicator. Later, of course, equity became more institutionalized. Eventually appellate courts became the equity lawmakers and lower courts the adjudicators. Even so, the lawmakers remain in position to reassert control over an individual case through the appeals process. When and if an appeal is made, the appellate court may correct any errors the lower court has committed in interpreting the standard. Thus, it can better afford the luxury of vesting discretion in law administrators through standards.

Hence all three reasons discussed—the homogeneity of cases, the identity and perceived trustworthiness of jurors, and the lack of mechanisms to correct erroneous decisions—tend to move legislators enacting statutes that will govern law cases in the direction of rules.

2. **Ability to guide conduct**

The lawmaker's desire to guide conduct can also account, at least in part, for the divergence between the two approaches to limitations. Even if the guidance of conduct, rather than the guidance of adjudication, is at issue, a legislator would have reason to prefer a rulelike device for cases at law. If the same

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legislator were given a seat on an appellate court, however, he or she would have reason to prefer a more standardlike device to govern equity.

Some areas of law demand rulelike treatment or standardlike treatment not because such formulations produce better adjudication, but because they produce better behavior. For example, Solomon dealt with a question of family law—an area particularly well-suited to standards. In theory at least, family law governs situations in which actors are not likely to conform their conduct to the intricacies of a rule of law. Solon’s rules, on the other hand, applied to, among other things, commercial law, an area in which more rulelike formulations are thought to be necessary.

How does this explain the difference in limitations policy between law and equity? As discussed earlier, laws have two very distinct functions. First, they provide rules of conduct to which members of the public conform their behavior. A good law, from this standpoint, is one that best influences such persons to act appropriately. Second, laws provide rules for courts to follow in deciding cases. A good law from this standpoint is one that best enables the court applying it to dispose of cases in a just and fair manner.

Although we ordinarily think that the same law must fulfill both functions, the principle of acoustic separation suggests that this is neither necessary nor optimal. The two functions will often conflict. For example, a very rigid statute of limitations may be the best law for inducing potential plaintiffs to file their lawsuits promptly. Frightened into believing they will lose their cause of action if they do not file immediately and knowing that no amount of bellyaching over so-called special circumstances will do them any good, many potential plaintiffs will file promptly, believing they must. Moreover, such a rule will almost certainly be best for persuading potential defendants to undertake socially beneficial activities that they would not otherwise undertake without assurances that their potential liability has been extinguished. Nevertheless, a rigid rule may be much less effective as a rule of decision than it is as a rule of conduct. A more lenient law allowing for special circum-

89. See Dan-Cohen, supra note 70.
90. See id.
stances may yield an increased number of appropriate outcomes\textsuperscript{91} in adjudication.

If a wall of silence could be erected between a rigid statute of limitations as a rule of conduct and a more lenient laches-like rule of decision, one could enjoy the best of both worlds, or so the argument runs.\textsuperscript{92} The problem is that the separation between a rule of conduct and a rule of decision can never be complete. Members of the public are sure to find out that, when it comes to decisions, the rigid statute of limitations is in fact quite lenient. That, of course, will affect the degree to which they can rely on the law and conform their behavior to it. So long as the public's knowledge of the truth is imperfect, however, some benefit can be derived from a dual system.

The division between law and equity can in part be explained by the concept of acoustic separation.\textsuperscript{93} In general, the common law is considerably more familiar to both lay persons and their attorneys than is equity. It should not come as a surprise, therefore, that laws applying to actions at law tend to be somewhat more rulelike than laws applying to cases in equity.

This tendency includes limitations law. Members of the public are more likely to be acquainted with the statute of limitations than the doctrine of laches. Hence, the public is more likely to use the statute of limitations as a guide for conduct than they are to use laches. Of course, the statute of limitations is not solely a rule of conduct; however, the public's reliance on it as a guide for conduct will have some incremental effect on its formulation.

The doctrine of laches, on the other hand, is primarily an adjudication guide. Since members of the public are less likely to be aware of it and thus to attempt to conform their behavior to it, the doctrine can afford to be somewhat more standardlike than the statute of limitations. A court adopting the laches doctrine need not be as fearful of the effect the doctrine will have on the primary behavior of potential litigants as the legislature adopting a statute of limitations for law cases. It can be secure

\begin{itemize}
\item \textsuperscript{91} See supra text accompanying note 72.
\item \textsuperscript{92} See Emily L. Sherwin, Law and Equity in Contract Enforcement, 50 MD. L. REV. 253 (1991) (discussing the principle of acoustic separation in the context of law and equity).
\item \textsuperscript{93} See id.
\end{itemize}
in the knowledge that, at least to some degree, courts sitting in equity operate outside the public consciousness.

3. Ability to develop consensus among lawmakers

So far I have been seeking explanations for why a rational individual might choose to apply a rulelike formulation of a limitations principle to actions at law but a standardlike formulation to equity cases. Practical politics may be one explanation for the existence of this rule-standard pair governing limitations. The statute of limitations is first and foremost a statute, the product of a legislative body. The laches doctrine, on the other hand, is the product of equity chancellors and courts.

Because legislatures are ordinarily made up of large numbers of individuals, they may be more prone than courts—certainly more prone than a single chancellor—to promulgate rules. In order to forge a coalition necessary to enact a law, conflicts among legislators regarding the appropriate underlying legal norm must be subordinated to the task at hand: enacting some sort of limitations law. Resorting to rules, which by their nature do not put the legislature on record as advocating one approach or another, is the obvious strategy to take. In equity, where consensus is easier to achieve, no similar tendency towards rules will exist.

None of this has any bearing on whether the statute ultimately enacted by a legislature will be a good law if judged by its ability to function as an appropriate guide for adjudication or for conduct. Nevertheless, it is important because without the consensus of legislators no law can be promulgated. Additionally, without some level of confidence on the part of legislators that their compromises will be upheld by courts, no future compromises can occur.

4. Systematic differences in the perspectives of legislators and judges

Finally, the possibility exists that two different lawmakers might adopt strikingly different limitations formulations because they have strikingly different views of what constitutes appropriate limitations policy specifically or of the value of rules and standards generally.

Self-interest may drive judges to favor standards. Unlike legislators, judges resolve individual disputes for a living. The importance of law as a guide for adjudication as contrasted
with its importance as a guide for conduct is thus bound to
loom large for them.

Each judge knows that his or her decisions will be evalu-
ated both for their quality as instruments of adjudication and for
their effectiveness in guiding conduct. The effect any particular
decision might have on an adjudication, however, is direct and
obvious: the decision is the adjudication. It will often be dispos-
itive in resolving a lawsuit. The public will perceive the judge
as having correctly decided the case or they will perceive the
judge as having decided it incorrectly. Whatever costs or
benefits to reputation that accrue as a result of the
adjudication will accrue almost fully to the judge or judges who
have decided the case. It is easy for the public to connect the
judge or judges to a particular case. On the other hand, the
connection between any particular decision and its effect on
future conduct is much more indirect and tenuous. Conduct will
ordinarily be guided not by one judge’s opinion, but by a cluster
of opinions in the same area of the law. Consequently, no one
judge (or panel of judges) can be identified as the source of the
problem.

The best strategy for the ambitious judge is thus to concen-
trate on developing adjudication guides, not conduct guides.
That way the judge can fully reap the benefits of being some-
one who correctly decides cases while free-riding on the efforts
of other judges to create laws that are easily interpretable and
thus helpful to the public as guides for conduct.

In essence, what we have here is a prisoner’s dilemma for
the judge. The problem is, of course, that if all judges pursue
this strategy, eventually the law will suffer. The systematic
overemphasis of law as an adjudicative device will result in bad
law.

III. THE MODERN TREND TOWARDS CONVERGENCE OF
THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF LACHES

Given the many explanations for the contrasting formulat-
ion of limitations law, it is both interesting and a bit troubling
that the two approaches are experiencing a noticeable degree of
convergence.

With regard to laches, this process has been going on for
quite some time. By the nineteenth century, American courts
had lined up behind attempts to limit the discretion of equity
judges in applying the laches doctrine. These courts held that
equity judges at the trial level should accept the length of time
stated in the analogous statute of limitations as reasonable and not deviate from it except in unusual circumstances. The laches doctrine thus became more rulelike than before—not a surprising result given the increased institutionalization of equity courts during that period. Indeed, one would expect that as the equity courts became increasingly removed from the single chancellor model and more complex and hierarchical as an institution, they would turn to more rulelike formulations.

This trend has continued into the twentieth century. In situations that require courts to apply the laches doctrine, they simply apply the period specified in the most analogous statute of limitations unless unusual or extraordinary circumstances dictate otherwise. In *Tandy Corp. v. Malone & Hyde, Inc.*, the court stated:

Several reasons underlie the use of the statutory period as the laches period. It enhances the stability and clarity of the law by applying neutral principles in an evenhanded fashion rather than making the question purely discretionary. It also requires courts to make clear distinctions between threshold or special defenses or pleas in bar and the merits of the case. It enhances the rationality and objectivity of the process by preventing courts from short circuiting difficult issues on the merits by confusing and conflating the merits of an action with other defenses.

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94. See, e.g., Godden *v.* Kimmell, 99 U.S. 201 (1878); Wagner *v.* Baird, 48 U.S. (7 How.) 234 (1849); Kelley *v.* Boettcher, 85 F. 55, 62 (8th Cir. 1898).


97. The strength of the presumption in favor of the statutory period varies from jurisdiction to jurisdiction. Consequently, the degree to which the laches doctrine is made more rulelike by that presumption varies. But it is clear that in each such jurisdiction the level of discretion wielded by a judge sitting in equity is limited. See *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 366 (6th Cir. 1985) ("If the analogous statute of limitation has not elapsed, there is a strong presumption that plaintiff's delay in bringing the suit for monetary relief is reasonable . . . ."); *cert. denied*, 476 U.S. 1158 (1986); *Gruca v.* United States Steel Corp., 495 F.2d 1252, 1259 & n.8 (3d Cir. 1974) (stating that the effect of analogous statute of limitations on the application of laches in an equity case is simply to determine on which party the burden to demonstrate unreasonableness should lie); *Layton Pure Food Co. v.* Church & Dwight Co., 182 F. 35, 40 (8th Cir. 1910) (finding that the analogous statute of limitations will be applied to trademark case except under "unusual conditions or extraordinary circumstances").

98. 769 F.2d at 365.
There is, of course, a price to pay for stability and clarity in the law. In some cases, limitations on a judge’s discretion will force unwanted results. Now and then, one will find a case that cannot in good faith be classified as extraordinary and yet, all things considered, justice would be better served by an outcome contrary to that dictated by the analogous statute of limitations.

More interesting is the tendency of American courts to move the statute of limitations in the direction of the standard-like laches doctrine. Traditionally, most statutes of limitations have provided that a cause of action would be barred a certain number of years after the cause of action accrued.99 Such statutes did not explicitly allow for a tolling of the limitations period based on plaintiff’s ignorance of facts suggesting a claim. When they explicitly allowed for tolling at all, they did so for infancy, imprisonment, or insanity, but not ignorance.100 Over time, this has been changed by court decisions engrafting everexpanding discovery rules into statutes of limitation. These discovery rules toll the commencement of the limitations period when plaintiff is excusably unaware of his or her cause of action.

Through these seemingly minor modifications, the courts have achieved a near convergence of the statute of limitations and the doctrine of laches. Indeed, some courts have rendered them barely distinguishable in practice.101

Prior to the advent of discovery rules, statutes of limitation essentially operated like this: A specific length of time was selected by the legislature to cover all cases that fell into a particular category of substantive law. For example, certain tort cases might be barred after three years102 and cases founded

99. See, e.g., 21 Jam. 1, ch. 16 (1623) (Eng.).
100. See id.
101. During the nineteenth century, plaintiff’s ignorance of his or her cause of action was ordinarily insufficient to toll the commencement of a limitations period, unless the defendant fraudulently concealed information regarding the cause of action from plaintiff. See, e.g., District Township of Crawford v. Gaulden, 33 Ga. 173 (1862); Boomer v. French, 40 Iowa 601 (1875); Mast v. Easton, 22 N.W. 253 (Minn. 1885). The practice of equitably tolling the commencement of a limitations period during any period the defendant had fraudulently concealed facts relating to plaintiff’s cause of action was well-established even in the nineteenth century. See, e.g., Campbell v. Long, 20 Iowa 382 (1866); Garrett v. Conklin, 52 Mo. App. 654, 659 (1892).
upon debt arising out of a written contract might be barred after six years.\textsuperscript{103} The length of time would be such that most (but not all) plaintiffs whose cause of action fell within that category of cases would have sufficient time to discover their cause of action and file in court. Significantly, however, the calculation of the appropriate length of time was done at the wholesale level. The issue was whether the number of years provided by the statute was an adequate length of time for the great number of cases, not whether it was adequate in any particular case. Because a bright-line limitations rule allowed potential defendants to feel secure enough to carry on ordinary, productive lives, individualized consideration was thought unwise.

Once an expansive discovery rule was added onto the statute of limitations, everything changed. No longer was the calculation of the appropriate length of time done wholesale; it was individualized. As a consequence, a court must now determine, for each cause of action, whether a particular plaintiff has had adequate notice of the need to take action.

This important change in limitations law deserves special scrutiny. Equitable doctrines, like laches, were created by courts and thus are for the courts to modify. Judicial modification of statutes is something different. When courts modify statutes passed by legislatures, it raises a complex set of issues.

The kinds of cases for which courts were originally most likely to fashion a discovery rule were those in which the cause of action could not be known by the plaintiff. The prototypical example is the medical malpractice cases in which the surgeon leaves some undesirable material in the patient after surgery.\textsuperscript{104} This was often referred to as the foreign object rule.\textsuperscript{105}

Later, some jurisdictions expanded the foreign object rule to include ordinary medical malpractice, legal malpractice, and

\textsuperscript{103} See, e.g., HAW. REV. STAT. § 657-1 (1985).


\textsuperscript{105} See, e.g., Burns v. Bell, 409 A.2d 614 (D.C. 1979).
products liability cases in which the plaintiff was neither aware of his or her injury nor in the exercise of due diligence should the plaintiff have been aware. This rule became known as the discovery rule.\textsuperscript{106}

This expansion quickly led to the obvious question: Just what is it that has to be discovered in order to trigger the rule? Suppose a tort victim is aware of the fact of his or her injury, but not that it was caused by the defendant. Suppose the victim is not aware of facts indicating that the defendant’s conduct was wrongful (for example, negligent in the case of a negligence cause of action). How much information is enough? Should the limitations period’s commencement be delayed until plaintiff is in possession of sufficient facts to give notice of each element of the cause of action?

A few courts have balked at extending the discovery rule quite so far. Prominent among these is United States v. Kubrick,\textsuperscript{107} in which the Supreme Court decided the question for cases brought under the Federal Tort Claims Act.\textsuperscript{108} In Kubrick, plaintiff was given an antibiotic at a veterans’ hospital that caused him to become partially deaf. The court of appeals ruled that

\begin{quote}
\textit{even though a plaintiff is aware of his injury and of the defendant’s responsibility for it, the statute of limitations does not run where the plaintiff shows that “in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper.”}\textsuperscript{109}
\end{quote}

The Supreme Court disagreed, stating that such a rule would unduly and unfairly delay the commencement of the limitations period. It therefore reversed, holding that a cause of action accrues when the plaintiff knows of the injury and its cause.\textsuperscript{110} The Court stated: \textit{“A} plaintiff such as Kubrick,

\begin{footnotes}
\item[106] Id.
\item[107] 444 U.S. 111 (1979), rev’g 581 F.2d 1092 (3d Cir. 1978).
\item[109] Kubrick, 444 U.S. at 116 (citation omitted).
\item[110] Cases decided by federal courts applying state law generally support Kubrick. In Timberlake v. A.H. Robins Co., 727 F.2d 1363 (5th Cir. 1984), for example, the plaintiff had contracted a pelvic infection and had been told by her doctor that her problem was probably caused by her intrauterine contraceptive device. She did nothing, however, until three years later, when she saw a television show that indicated her injury may have been the result of the manufacturer’s negligence. She then filed suit. The court held that despite her lack of knowledge
\end{footnotes}
armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute ...."111

Kubrick and its progeny112 stand for the proposition that once a plaintiff is aware of the existence of his or her injury and its cause, the limitations period begins to run regardless of whether plaintiff has or should have evidence of negligence or other wrongdoing. These cases take the position that the limitations period prescribed in the statute is the time for a potential plaintiff who realizes that he or she has been injured by the defendant to seek whatever evidence he or she needs and make a decision whether to bring a lawsuit. The time period is rigid and fixed and hence will occasionally work an injustice to a plaintiff. Sometimes it will be too short for the plaintiff to discover sufficient facts upon which to predicate a cognizable claim. But it will provide desirable results more often than an approach that vests the trier of fact with the authority to carry out the hopeless task of determining whether the plaintiff was of the defendant's negligence, her cause of action accrued at the time she learned of her infection and its likely cause. At that point, she was on notice to investigate the situation within the two-year period allotted by the Texas statute of limitations. Since she had not done so, the court rendered summary judgment for the defendant.

Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 883 (9th Cir. 1983), is nearly identical to Timberlake. The court held that, under California law, the injured party must bring suit within one year of discovering the physical cause of her injury. The Court refused to toll the limitations period until the injured party learned facts suggesting that the defendant's conduct was tortious. Accord Fidler v. Eastman Kodak Co., 714 F.2d 192 (1st Cir. 1983) (holding that the Massachusetts statute of limitations began to run on plaintiff, injured as a result of droplets of a chemical substance being left in her body after an X-ray, as soon as she was told her pain might be caused by these droplets and not later when she learned of manufacturer's negligence); Davis v. United States, 642 F.2d 328 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (refusing to extend limitations period on suit against manufacturer of allegedly defective vaccine when injured party had known all along he had been injured by the vaccine but had only recently learned of early test results indicating the vaccine had been unsafe); Pauley v. Combustion Eng'g, Inc., 528 F. Supp. 759 (S.D. W. Va. 1981) (holding that cause of action of asbestosis victim accrued when he learned of his injury and its actual cause, not when he learned of its legal cause); Bosworth v. Plummer, 510 F. Supp. 1027 (W.D. Pa. 1981) (holding that the cause of action against doctor for medical malpractice accrued when parents were told that infant suffered cerebral palsy as a result of lack of oxygen at birth, not later when they learned facts suggesting negligence). 111. Kubrick, 444 U.S. at 123.

112. See cases cited supra note 110.
actually aware of facts suggesting defendant's negligence and, if not, whether plaintiff should have been aware of these facts.

*Kubrick* and the cases that follow it attempt to halt the progress of the discovery rule. They draw an arbitrary line and refuse to go further. The particular line they draw may be difficult to defend. If it makes sense to deviate from the express language of the statute to toll the statute when plaintiff is blamelessly ignorant of the identity of the individual, it is difficult to see why it should not also make sense to toll the statute when the plaintiff is blamelessly ignorant of facts suggesting negligence. Nevertheless, the line preserves some of the rulelike qualities of the statute of limitations.

Although at least one court has referred to *Kubrick* as the majority rule, recent cases suggest otherwise. A review of cases from state courts suggests *Kubrick* is losing ground as a new generation of expansive discovery rules is being adopted.

*Bussineau v. President & Directors of Georgetown College* is a good example. The plaintiff in that case brought an action for dental malpractice. As a result of "an externally caused traumatic injury to her face and mouth," she became a patient at Georgetown Dental School. During the course of her treatment there, she complained on numerous occasions about the results of the work being done. She experienced considerable pain and difficulty, including a problem with tooth movement. She was assured, however, that the treatment she had received was appropriately rendered and that the results were simply unfortunate. Not until many years later did plaintiff learn from another dentist that the work had been shoddily done. Rejecting *Kubrick*, the District of Columbia Court of Appeals adopted a rule under which the limitations period does not commence until the plaintiff has real or constructive knowledge of her injury, its cause in fact, and some evidence of wrongdoing. The plaintiff's case, as articulated by her complaint, was thus allowed to proceed.

*North Coast Air Services, Ltd. v. Grumman Corp.* is another example of an expansion

115. Id. at 425.
116. Id. at 435.
117. 759 P.2d 405 (Wash. 1988).
beyond Kubrick. In North Coast, plaintiffs' decedent was a pilot who was killed when his small plane crashed. Investigating authorities originally attributed the crash to pilot error. Many years later, however, plaintiffs learned that the airplane might have been defective. The two-year limitations period had expired if the discovery rule tolled the commencement of the limitations period only until the plaintiffs had knowledge or should have had knowledge of (1) the plaintiffs' decedent's injury and (2) the causal connection between the airplane and the injury. It had not expired, however, if the plaintiffs must have, in addition, actual or constructive knowledge of the wrongfulness of defendant's behavior (for example, in a strict liability action, knowledge that the product was defective and hence that the defendant placed a defective product into commerce). The court held that such additional knowledge was necessary.118

118. North Coast was decided nine years after Ohler v. Tacoma Gen. Hosp., 598 P.2d 1358, 1360 (Wash. 1979), in which the Washington Supreme Court declared in no uncertain terms that a medical malpractice claim “did not accrue until [plaintiff] discovered or reasonably should have discovered all of the essential elements of her possible cause of action, i.e. duty, breach, causation and damages.” Plaintiff had been born prematurely and placed in an incubator where she was administered excessive amounts of oxygen. This exposure resulted in her blindness. For many years, she believed that the oxygen had been administered properly and that her blindness was an unfortunate by-product of necessary medical treatment that had saved her life. When she learned facts suggesting that the hospital's treatment had in fact been contrary to proper medical practice, she brought suit. The court held that the limitations period had not expired. In the wake of that decision, the Washington State Legislature enacted a statute providing that “no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.” WASH. REV. CODE ANN. § 7.72.060(3) (West Supp. 1992).

The legislative history of the statute made it reasonably clear that it was passed in response to the Ohler decision. The committee report stated that it intended “to modify the discovery rule announced in Ohler” and that the Ohler rule unjustifiably extends the period during which an action may be brought. Wash. St. Sen. J., 47th Leg., 626 (1981).

A colloquy on the floor of the State Senate proceeded as follows:

Senator Newhouse: “[I]s the statute of limitations provision in section 7(3) intended to overrule our Supreme Court's decision in Ohler vs. Tacoma General Hospital, in which it was held that the statute of limitations does not begin to run until the plaintiff has discovered each and every element of his or her cause of action?”

Senator Bottiger: “Yes, the discovery rule would apply only to the discovery of the harm and its cause. In this context, 'discovery of the cause' merely means the discovery that the product was casually [sic] connected with the harm. It does not mean the discovery of the nature of the defect of the product.”
Bussineau and North Coast are excellent examples of expansive discovery rules. They call upon the trier of fact to determine at what point the plaintiff knew or should have known of (1) facts suggesting injury; (2) facts suggesting that defendant caused the injury; and (3) facts suggesting defendant's wrongfulness. When this rule is combined with the already existing tolling rule for infancy, insanity and imprisonment, the issue becomes remarkably similar to that presented in a laches case: reasonableness. Essentially, the trier of fact is asked to determine whether the plaintiff has had a reasonable opportunity to bring a lawsuit. The statute of limitations is thus stripped of much of its rulelike character.

Is it a good thing or a bad thing for courts to have such control over law formulation? One optimistic way to look at it is this: Legislatures formulate statutes along the rule-standard continuum in the manner that they consider to be optimal. The statute is then passed to the courts' custody for administration. In most cases, the courts will apply the statute in a manner consistent with the legislature's original formulation for two reasons. First, judges share many values and perceptions about the world with members of the legislature and hence do not have fundamental disagreements with the legislature about the formulation of a law. Second, judges accord the legislature a certain amount of deference in any event. Thus, they have no desire to deviate from the legislature's vision except in truly unusual cases—cases in which circumstances have so changed that the legislature's original formulation needs reexamination. In those exceptional cases, every reason exists to believe that the legislature would approve of the modification the court has adopted—or so the argument runs.

This approach paints a pretty picture. When applied to the statute of limitations specifically, it suggests that the movement towards expansive discovery rules can be explained solely in terms of changing times (in other words, the adoption of such rules is the result of the need to accommodate the growing number of modern tort victims who are innocently ignorant of the circumstances surrounding their causes of action). The argument would run thusly: Courts that have

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Remarkably, the Washington Supreme Court nevertheless held in North Coast that the limitations period does not commence until after the plaintiff has actual or constructive knowledge of the wrongfulness of the defendant's conduct.

119. Courts adopting expansive discovery rules justify their decisions by arguing
adopted expansive discovery rules have done so with the implicit consent of legislatures. These legislatures would prefer that courts modify original formulations rather than passively administer outdated statutes to respond to changing circumstances.

This suggestion paints too pretty a picture. The notion that legislatures can and should depend upon courts to fine tune law formulation along the rule-standard continuum as circumstances change is a bit too optimistic. One of the problems, as I have discussed above, is that the incentive structure for judges tends to lead them to value appropriate adjudicative results more heavily than they should relative to the conduct guidance function of the law. Legislatures may thus be better advised to look askance at judicial modification of statutes.

In cases like Bussineau and North Coast, courts have adopted discovery rules that make it extremely difficult for defendants ever to feel secure. Even in those cases in which plaintiff is aware of an injury and the fact the defendant caused it, the limitations period will not begin to run until the plaintiff knows or should have known of facts suggesting the defendant's wrongfulness. Consequently, one can expect defendants to refrain from using their resources most productively. A potential defendant is likely to refrain from using resources to start up a new enterprise only to have it foreclosed upon if a lawsuit is brought. Instead, such a potential defendant will prefer to engage in current consumption. As a guide for conduct, such a law is lacking.

Legislatures would not likely embrace such a profound shift in the focus of the statute of limitations. As originally drafted, the statute of limitations was neither plaintiff-focused nor defendant-focused in the sense that it did not openly embrace either the principle that every plaintiff should have a reasonable opportunity to bring a claim or the counter-principle that times have changed. Under this rationale, for example, the typical tort case at law can no longer be governed by as rigid a time limitation. Indeed, the argument continues, there is no longer any such thing as the typical tort case. Changing technologies have made cases involving unknown or unknowable injuries and causes of action more numerous than the legislatures that enacted the original statutes of limitation could have dreamed. Examples would be the mass tort litigation surrounding asbestos use or the use of the miscarriage preventative diethylstilbestrol. See, e.g., Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), cert. denied, 493 U.S. 944 (1989). 120. See supra part II.D.4.
that no defendant should have to defend a claim if, on account of delay, the defendant has lost evidence. Indeed, in a legislature filled with different views about limitations policy, this may have been the statute of limitation's chief appeal. The rulelike statute of limitations essentially worked as a black box compromise. It forced the competing principles embodied in limitations policy into a somewhat arbitrary but workable balance. Most, though not all, of the adjudicative results would be consistent with both principles. When an expansive discovery rule was added, however, the balance struck by the legislature between the plaintiff-focused principle and the defendant-focused principle was jarred massively out of kilter. It hardly seems likely that this would appeal to legislatures.

Perhaps most telling is the fact that when faced with the opportunity to adopt expansive discovery rules, legislatures have not acted. Some have declined to adopt any kind of discovery rule. Others have combined a short statute of limitations, softened by a discovery rule, with a longer but more rigid statute of repose. The latter solution is a particularly interesting one in that it accommodates to some extent the changing times argument without wholly sacrificing protection for the potential defendant. Legislatures have thus demonstrated no enthusiasm for the courts' heavily plaintiff-focused, standardlike solution.

All of this is troubling. If courts systematically overvalue adjudication relative to conduct guidance, then courts cannot be trusted with the task of formulating laws along the rule-standard continuum. Because they are too close to individual controversies (and too removed from the effects of the laws they promulgate on future conduct), they are inclined to overemphasize the need for appropriate adjudications at the expense of appropriate guidance for conduct. Because judges' reputations depend on adjudication and not on formulating predictable guidance for conduct, they have every reason to favor the goal of appropriate adjudication to the detriment of appropriate conduct guidance.

122. See, e.g., Fla. Stat. Ann. § 95.11 (West 1992). The Florida statute of limitations for medical malpractice set a two-year limitations period that commences at the time of the incident giving rise to the action or at the time the incident is discovered or should have been discovered. In no event, however, can an action be brought more than four years after the incident.
IV. SPECIAL PROBLEMS FOR LEGISLATURES ATTEMPTING TO CONTROL COURTS

This article assumes that legislators would prefer to retain control over the formulation of the law, and that moreover, if my suspicion that judges tend to undervalue the conduct guidance function of the law is correct, that legislative preference is a good thing. It therefore asks, "How do legislators retain control?" Sadly, the answer appears to be that in the absence of a tradition of judicial deference to legislative prerogative in formulation choice, there is very little that legislators can do except hope that courts will agree with their choice of formulation. If judges systematically undervalue the conduct-guidance function of the law and therefore consistently discount rulelike formulations, the options available to legislators to correct the problem are limited.

No lawmaker (legislature or otherwise) can successfully control the fate of its laws unless it takes into consideration and attempts to control the tendency of the law administrator to make adjustments. This is true for all kinds of lawmaker-administrator pairs—parents and children, employers and employees, school principals and teachers, appellate courts and trial courts, and legislatures and courts. Administrators are not automatons; they are human beings. Forcing them to conform to the lawmaker's plan is no easy task. It cannot be avoided, however, unless the lawmaker is willing to cede to the administrator the power and responsibility to determine where along the rule-standard continuum the law will be formulated.

The first step the lawmaker must take to retain control of the laws that it enacts is to gain a thorough understanding of the decision making processes of the law administrator. The lawmaker must, as it were, know the administrator.

Decision-making styles have been catalogueed at length. In theory at least, these styles can run the gamut from the pure particularist—who refuses to consider rules promulgated

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123. If a lawmaker is convinced that a very rulelike formulation is the best possible one for a particular law, it will do the lawmaker no good at all to promulgate such a rule if the lawmaker knows the administrator will not accept and treat himself or herself as bound by the law's formal terms. The lawmaker must somehow adjust the law so that the lawmaker's goals are achieved despite any contrary proclivities the administrator may have. Unfortunately, this task may prove difficult.

124. See Schauer, supra note 44.
by lawmakers or the various benefits rules bring and instead considers only the particular circumstances of the case—to the pure rule-bound decision maker, who applies rules mechanically regardless of the consequences. In fact, however, both of these decision making types may populate the legal literature more often than they do the real world. Only an extraordinary person could be a true rule-based decision maker, willing to go with the rule regardless of the consequences. It is hard to imagine a judge, for example, who would apply literally a three-year statute of limitations to an ordinary tort case even when to do so would result in the certain destruction of the universe. When the stakes are high enough, even a rule-based decision maker will override a rule, assuming that person is at all rational. 125

The same is true for particularists. The true particularist does not recognize or approve of rules, and therefore would not allow any of the particulars of the immediate fact situation to be shrouded from consideration. 126 Finding such a creature in nature would be a challenge. No rational reason exists for a decision maker to adopt a system that includes everything except the value of rules. It makes no more sense than if a decision maker were to consider everything except those things that begin with the letter “p.” 127

The real world is populated by rule-sensitive particularists. In making a decision, a rule-sensitive particularist takes everything into consideration, including the existence and benefits of any rule. 128 Rule-sensitive concerns include the following: (1) the superior ability of the lawmaker to determine the best course of action, even though the decision is made at the

126. Calling particularistic decision making the “all things considered” approach is not precisely correct, however. All things are not considered using the particularistic approach to decision making. The value of rules is not considered. A particularistic decision maker, as I use the term, does not consider the value of having a rigid or semirigid rule that can be applied to future cases. Each case is decided in an historical and institutional vacuum. No thought is given to the need for a rule that will control the discretion of adjudicators in the future and provide predictable results that can guide either primary activity or decision making in the future. For the particularistic decision maker, everything is focused on the here and now: the particular before it. Particularistic decision making, as I use the term, can thus be contrasted with rule-sensitive particularism which is closer to a true “all things considered” approach, because it does indeed consider the value of rules in its calculus.
127. See Alexander, supra note 125.
128. Schauer, supra note 44.
wholesale level; (2) the superior right of the lawmaker to determine the course of action, even if incorrect decisions (in the immediate sense) are made; (3) the need to preserve decision making resources, even at the expense of some incorrect decisions; (4) the need to have an agreed upon rule, even if it is second best, so that people can rely upon it; (5) the need to have an agreed upon rule, even if it is second best, so that people that will perceive the adjudication process as fair; (6) the need to follow the authority of the lawmaker in order to influence others with an inferior ability to discern the best course of action; (7) the need to follow the authority of the lawmaker in order to discourage the lawmaker from promulgating a worse rule; (8) the need to follow the authority of the lawmaker in order to discourage others from replacing the lawmaker with an authority that is even less beneficial; and (9) any penalty the lawmaker may impose for failure to follow the rule. Many of these factors should apply with full force even when following the rule produces the second best result in a particular case.

All of these considerations and probably others are weighed in making a decision about whether to follow an available rule. The real differences among decision makers is not whether they are purely particularistic or purely rule-bound, but how heavily they weigh various rule values in their calculus. Some will clearly weigh these considerations more highly than others.

The closest one could expect to come to a true rule-based decision maker among rational persons is likely to be a rulesensitive particularist who, based on his empirical observations and his norms regarding rule values, esteems rules quite highly. Conversely, the closest one can expect to come to a true particularist in the real world is a rule-sensitive particularist who happens to value rules very lightly.

A lawmaker must approach the administrator from this standpoint and determine how highly the administrator values rules. Once the lawmaker has sized up the administrator's

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129. It is doubtful that every decision maker consciously and systematically considers each of these matters prior to deciding whether to follow a particular rule. Moreover, it is doubtful whether a systematic weighing of rule values occurs very often. This is because rule-sensitive particularism is telescoping. When a true rule-sensitive particularist takes into account the value of a rule that constrains discretion, other self-imposed rules about the use of rules may be employed to simplify the decision making process.
decision-making style, the lawmaker can use that information to retain control of the ultimate formulation of the enacted law. If the administrator puts a higher value upon rules than the lawmaker would have preferred, the lawmaker must fine tune the statutory formulation of the law to make it more standardlike. Thus, it will be absolutely clear to the administrator that some exercise of discretion is appropriate.

That is the simple case to solve. If the administrator puts a lesser value upon rules than what the lawmaker would prefer the solution is more difficult. The lawmaker must alter the administrator's calculus by imposing a penalty upon the administrator for failing to follow the rule. Such a penalty functions as a thumb upon the scale, inducing the law administrators to increase their regard for rules just enough to put them in harmony with the lawmaker's plans. The lawmaker can thus stay in control, and the application of the law reflects the lawmaker's original choice.

There is, however, a problem. This approach works well if the lawmaker is not a legislature and the law administrator is not a judge. A parent can affect a child's rule calculus when the child starts interpreting a very rulelike directive such as, "Always be home by ten o'clock," more loosely than the parent intended by grounding the child. An employer can respond to an employee whose own view of the importance of rules conflicts with the employer's by penalizing the employee for failure to follow the rules with a proper degree of formalism. Salaries can be set, in part, according to the employee's track record. Administrative hoops can be set up for the employee to jump through to prevent disobedience. Many options are available to these lawmakers.130

130. See Schauer, supra note 44.

131. If the particularistic decision maker could exist, however, and could promulgate his own laws, he would look at the continuum of possible formulations of the time-bar norm and choose the most flexible formulation possible. Such a formulation might go something like this: An action should be time barred if, considering all the circumstances, it appears appropriate to do so in view of the length of time that has elapsed between the time the cause of action arose and the time the action was filed.

Such a formulation would be defective to the true particularistic decision maker because it suggests that the only remedy is to bar the action. The decision maker will not have the right to impose other remedies for unreasonably tardy filing, such as reducing plaintiff's recovery by 50%. A better formulation from the particularistic decision maker's point of view would be: An adjudicator should do the appropriate thing in view of the length of time that has elapsed between the time the cause of action arose and the time the action was filed. Unfortunately
The options are not quite as rosy for legislatures attempting to control courts. Separation of powers prevents legislatures from manipulating judges in quite the same way parents manipulate their children or employers manipulate their employees. Congress cannot fire an Article III judge for an incorrect decision; Article III judges have life tenure during good behavior. Congress cannot diminish the salary of a judge during that judge’s continuance in office.

Few tools of judicial control are available to legislatures. That is the way separation of powers is supposed to work and correctly so. There is, however, a price to be paid for separation of powers. If I am correct in asserting that judges systematically undervalue the role of law as a guide for conduct, courts that do not have a very strong ethic in favor of formalistic interpretations of statutes will be inclined to reformulate many statutes along the rule-standard continuum in a way that systematically undervalues rules, and legislatures can do little to control this tendency. Their only option is to continually enact more and more specific statutes.

V. CONCLUSION

There are perfectly plausible reasons for applying a more rulelike formulation of limitations law to actions at law and a more standardlike rule to equity cases. Nevertheless, recent history has witnessed a near convergence between statutes of limitation and the doctrine of laches. In particular, through the use of discovery rules, many courts have transformed the statute of limitations into a near twin of the doctrine of laches. Courts have attempted to justify their departure from a formal
reading and application of the statute of limitations (with some logic) by pointing out that legislatures could not have anticipated the increase in the number of cases that involve unknown and unknowable injuries. Such courts are, however, perhaps a bit too optimistic in their belief that the enacting legislatures would have approved of the convergence. I have outlined several reasons why a legislature might nevertheless prefer a very rulelike statute of limitations. My purpose in so doing was to suggest that courts that change rules into standards should be viewed with suspicion, in part because they are increasing their own power.

More important, courts may systematically tend to undervalue the importance of rulelike formulations for reasons of self-interest, quite apart from the direct pursuit of power. Statutes of limitation, like all laws, have at least two functions. They are adjudicative guides and they are conduct guides. The optimal formulation for guiding adjudication is not the same as the optimal formulation for guiding conduct. Indeed, most lawmakers would probably find that, in the case of statutes of limitation, the optimal formulation for the purpose of guiding conduct would be considerably more rulelike than the optimal formulation for the purpose of guiding adjudication. The need to ensure that potential defendants will at some point be able to consider themselves immune from suit and go about their business is great. Only rules can give such an assurance.

Any lawmaker must strike a balance between adjudication and conduct according to what it perceives to be the community's more pressing need. Unfortunately, judges are likely systematically to favor the use of laws as guides for adjudication over their use as guides for conduct. When judges decide cases, they are responsible for the outcome. If a judge's decision does not comport with the community's comprehensive view of the case, his or her prestige directly suffers.

On the other hand, the effect of any particular decision on conduct is indirect and tenuous. The public generally will be reacting not just to one decision but to groups of decisions. Judges will therefore be tempted to free-ride on other judges. Each judge will attempt to depend upon other judges to maintain the intensity of the rule as a conduct guide while she cheats a bit for the sake of achieving better adjudicative results. The problem is, of course, that all judges have an incentive to follow this strategy. If all do, no one is left to
maintain the integrity of the rule. Guiding adjudication ends up taking undue precedence over guiding conduct.

The result with respect to the statute of limitations has been predictable. Discovery rules shift considerable discretion to judges and juries to determine whether plaintiff knew or should have known sufficient facts to bring a cause of action. In doing so, they appear to yield fairer outcomes in the specific case decided. At the same time, they are likely to yield a far inferior result for the conduct guidance function of the law. As a result, potential defendants do not and cannot know when it is safe to move their resources, which are otherwise put on hold pending litigation, into productive use. If the judge strikes the balance between using law as a guide for adjudication and using it as a guide for conduct based purely on the judge’s self-interest, the community loses.

Unfortunately, there may be little legislatures can do to regulate judges’ behavior in this regard. Unlike other lawmaker-law administrator relationships, such as parent-child or employer-employee relationships, the relationship between legislature and judiciary is characterized by separation and independence. Legislatures have no power, aside from persuasion, to impose penalties on judges for reformulating a given statute along the rule-standard continuum.