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Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations

Mitchell A. Lowenthal

Brian E. Pastuszenski

Mark E. Greenwald

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SPECIAL PROJECT

TIME BARS IN SPECIALIZED FEDERAL COMMON LAW: FEDERAL RIGHTS OF ACTION AND STATE STATUTES OF LIMITATIONS[1]

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[1] Federal courts must apply state law to state-created rights; "[t]here is no federal general common law." Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); *see* Rules of Decision Act, 28 U.S.C. § 1652 (1976). When federal rights are at issue, however, federal courts often engage in what, "for want of a better term, . . . may [be] call[ed] specialized federal common law." Friendly, *In Praise of* Erie—*And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964). *See* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026 (1967); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-17 (1975).

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INTRODUCTION

For over 150 years[2] the federal courts have struggled with the question of how long a litigant's claim remains viable when the

[2] *See, e.g.,* M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830). For a discussion of *M'Cluny* see notes 73-91 and accompanying text *infra.*

underlying federal statute prescribes no limitations period.[3] Congress has not always chosen to limit the rights that it has created.[4] The federal judiciary has responded by absorbing the law of forum states, but courts disagree whether the Rules of Decision Act[5] compels this absorption.[6] The federal law of limitations thus varies from circuit to circuit, state to state, and litigant to litigant.[7] Commentators have often assailed the uncertainty and inconsistency that absorption has produced.[8] Nevertheless, Congress continues to legislate without enacting limitations periods,[9] and the confusion surrounding the borrowing of state law continues.[10]

This Project rejects the view that the Rules of Decision Act compels the application of state limitations law to federal rights of action. Rather, Congress has deferred to the judiciary the determination of appropriate periods. However, unlike other commentaries, this Project does not advocate abandoning the absorption of state limitations periods; although absorption is not legislatively

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[3] Of course, "[i]f Congress explicitly puts a limit upon the time for enforcing the right which it created, there is an end of the matter. The Congressional Statute of Limitation is definitive." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). *See* Kird v. Rockwell Int'l Corp., 578 F.2d 814, 819, 826 (9th Cir. 1978); Saffron v. Department of the Navy, 561 F.2d 938, 941 (D.C. Cir.), *cert. denied,* 434 U.S. 1033 (1977); Adams v. Jefferson Davis Parish School Bd., 450 F. Supp. 1141, 1144 (W.D. La. 1978).

This Project examines the absorption of state limitations law not only for federal statutory causes of action, but also for federal non-statutory rights. Such rights or actions include admiralty claims, *see* note 11 *infra,* and actions for damages implied under the Constitution. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); note 311 and accompanying text *infra.*

[4] *See, e.g.,* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1794 (1980) (absence of statute of limitations for § 1983 action is "a void which is commonplace in federal statutory law"); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 284 (3d ed. 1976) ("Quite commonly, ... federal statutes will create a right of action without stating the time within which such action must be brought.").

[5] 28 U.S.C. § 1652 (1976).

[6] *See* note 72 and accompanying text *infra.*

[7] *See, e.g.,* notes 195-231 & 247-96 and accompanying text *infra.*

[8] *See, e.g.,* Blume & George, *Limitations and the Federal Courts,* 49 MICH. L. REV. 937 (1951); Note, *Statutes of Limitations in Federal Civil Rights Litigation,* 1976 ARIZ. ST. L.J. 97; Note, *A Limitation on Actions for Deprivation of Federal Rights,* 68 COLUM. L. REV. 763 (1968); Note, *Federal Statutes Without Limitations Provisions,* 53 COLUM. L. REV. 68 (1953); Note, *Rules of Decision in Nondiversity Suits,* 69 YALE L.J. 1428 (1960); Note, *Disparities in Time Limitations on Federal Causes of Action,* 49 YALE L.J. 738 (1940); 31 ARK. L. REV. 692 (1978).

[9] *See, e.g.,* Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976). *See also* note 66 and accompanying text *infra.*

[10] *Compare* Wright v. Tennessee, 613 F.2d 647 (6th Cir. 1980) (justifying absorption of state law on RDA) *with* Roberts v. Magnetic Metals Co., 611 F.2d 450 (3d Cir. 1979) (application of state law a matter of judicial presumption).

compelled, the borrowing process has become a matter of judicial compulsion through *stare decisis.*

Nonetheless, courts remain free to fashion federal common law on ancillary issues. Such issues include choosing when a state period begins to run and which period applies. In light of the purposes behind limitations periods, especially predictability, and the federal interests in litigation of federal rights, federal courts should create uniform rules for some subsidiary issues, but continue to absorb state law for others.

I

NATURE AND PURPOSES OF TIME BARS

There are three sources of time limitations upon rights of action: the equitable doctrine of laches,[11] common law time

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[11] Laches is an equitable doctrine premised on the maxim that "equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." Russell v. Todd, 309 U.S. 280, 287 (1940); *see* Gardner v. Panama Ry., 342 U.S. 29, 31 (1951) (per curiam); Southern Pac. Co. v. Bogert, 250 U.S. 483, 490 (1919); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979). In *Russell*, the Court held that a laches defense is only available when the sole remedy for plaintiff's claim lies in equity. If the court can provide a remedy at law, jurisdiction is "concurrent," and a statute of limitations applies. 309 U.S. at 289. The federal courts have split over whether "concurrent jurisdiction" includes only cases where *adequate* legal relief is available, or extends to all cases where *any* legal relief is available. *Compare* Saffron v. Department of the Navy, 561 F.2d 938, 943 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1033 (1978) *and* Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323, 327 (D. Del. 1956), *aff'd,* 244 F.2d 902 (3d Cir. 1957) ("the decisive feature . . . is . . . whether the federal right in issue may be judicially enforced in any action by means both legal and equitable") *with* Gruca v. United States Steel Corp., 495 F.2d 1252, 1258 (3d Cir. 1974) (laches applied where legal relief inadequate). *See also* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977) (implying availability of laches defense to plaintiff's Title VII claim for backpay and injunctive relief); Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitations,* 56 B.U.L. REV. 970, 974-75 (1976).

In determining whether laches bars plaintiff's claim, courts consider whether plaintiff's tardiness has prejudiced the defendant. *See, e.g.,* Penn Mut. Life Ins. Co. v. Austin, 168 U.S. 685, 698 (1898) (court of equity will not grant relief if "the position of the parties has so changed that . . . injustice" would result); Hill v. W. Beans & Co., 498 F.2d 565, 568 (2d Cir. 1974) (claim stale if "impossible or difficult . . . to defend because evidence has been destroyed or lost"); Gruca v. United States Steel Corp., 495 F.2d 1252, 1260 (3d Cir. 1974) (claim barred by laches because relief would cause extensive disruption to defendant company); Powell v. Zuckert, 366 F.2d 634, 638 (D.C. Cir. 1966) ("loss of evidence and unavailability of witnesses" barred claim). On the other hand, courts also consider whether plaintiff's delay was justified. *See, e.g.,* Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (defendant's fraudulent conduct cause of delay); Mogavero v. McLucas, 543 F.2d 1081, 1083 (4th Cir. 1976) (period of settlement negotiations not counted in determining laches); Moore v. Schultz, 491 F.2d 294, 300-01 (10th Cir. 1974) (no bar where plaintiff ignorant of infringement of patent); Note, *supra,* at 971-73.

When considering a laches defense, federal courts generally look to the analogous state statute of limitations. *See, e.g.,* Cope v. Anderson, 331 U.S. 461, 463-64, 468 (1947);

bars,[12] and statutes of limitations.[13] In practical terms, each denies a plaintiff relief if sufficient time has elapsed between the accrual of the right of action and the commencement of the suit. This effect may occasionally offend notions of justice and fairness: while the wrongdoer escapes liability, the injured party is left without a remedy. From a broader perspective, however, time bars are "wise and beneficial," [14] "tend[ing] to the peace and welfare of society." [15]

Musicanese v. United States Steel Corp., 354 F. Supp. 1394, 1398 (E.D. Pa. 1973). *But see* McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (applying Jones Act limitations period to state admiralty claims). Thus, the problems in the analogizing process discussed in this Project apply when litigants invoke the doctrine of laches.

Courts give statutes of limitations varying degrees of weight; some shift the burden of persuasion to the plaintiff after the period has run, although others consider the running merely as one element in the defense. *Compare* Churma v. United States Steel Corp., 514 F.2d 589, 593 (3d Cir. 1975) ("prior to the running of the statute, the defendant has to prove laches, but thereafter the plaintiff has to disprove laches.") *with* Giddens v. Isbrandtsen Co., 355 F.2d 125, 128 (4th Cir. 1966) (burden remains on defendant, "[b]ut he may rest on the inference [of the statute's running] alone or introduce additional evidence."). *See* Note, *supra*, at 976-81. Shifting the burden of persuasion better serves the purposes of time bars by increasing the predictability of when the cause of action expires, while allowing a court of equity to exercise its discretion as to the merits of the defense.

[12] Common law time bars are judicially created limitations on rights of action. Examples of common law time bars include: the rule against perpetuitites, the common law year-and-a-day murder rule, the presumption of death after seven years absence, and the presumption of satisfaction on notes after the lapse of 20 years. *See* Bean v. Tonnele, 94 N.Y. 381, 384-85 (1884); D. CURRIE, FEDERAL COURTS 893-94 (2d ed. 1975). *Cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 713 (1966) (dissenting opinion, White, J.) ("Courts have not always been reluctant to 'create' statutes of limitations.").

[13] All states have general statutes of limitations that categorize rights of action and assign them specific time periods. Most states have adopted a "catch-all" provision for rights of action that do not fall into one of the categories. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter cited as *Limitations Developments*]. These statutes may also contain provisions for accrual, borrowing, "postponement, suspension, or extension of the period in specified circumstances." *Id. See* notes 341-44 & 376-85 and accompanying text *infra*.

Some statutory limitation periods apply only to specific laws. The federal government has adopted such a piecemeal approach. *See, e.g.*, 15 U.S.C. § 15b (1976) (four-year statute of limitations for antitrust action); 17 U.S.C. § 507(b) (1976) (three-year statute of limitations on copyright actions); 35 U.S.C. § 286 (1976) (six-year statute of limitations on patent actions). *See generally* Note, *supra* note 8, 53 COLUM. L. REV. at 68. Some statutes also provide for special suspension or extension periods. *See, e.g.*, 15 U.S.C. § 16(i) (1976). States also provide special limitation periods for particular actions. *See, e.g.*, N.J. REV. STAT. ANN. § 56:9-14 (West Supp. 1979-80) (antitrust); ME. REV. STAT. ANN. tit. 32, § 881 (West 1964) (blue sky); HAWAII REV. STAT. § 485-20 (1976) (blue sky); IDAHO CODE § 30-1446 (1967); ILL. REV. STAT. ch. 121 1/2, § 137.13 (1975) (securities).

[14] Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) (Story, J.).

[15] M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 278 (1830).

Time limitations rest on three broad, overlapping justifications: institutional, remedial, and promotional.[16]

A. *Institutional*

Three institutional reasons justify placing time bars on rights of action. First, the limitations protect litigants' reasonable expectations[17] and promote the stability of property ownership. In so doing, they also regulate modes of conduct. Justice Holmes observed:

> A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself.... The law can ask no better justification than the deepest instincts of man.[18]

While the statutory period is running, the possibility of litigation influences the activity of prospective parties.[19] Once the statute has run, there is "repose."[20]

Convenience is also a long-recognized institutional justification for limiting actions.[21] Today's overloaded dockets demand procedures that reduce burdensome litigation levels. By keeping

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[16] Institutional justifications benefit the courts and society; remedial justifications benefit the defendant, and promotional justificaitons benefit the plaintiff. *See* W. FERGUSON, THE STATUTE OF LIMITATIONS SAVINGS STATUTES 40 (1978).

[17] *Limitations Developments, supra* note 13, at 1185 ("There comes a time when [the defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.") (footnote omitted).

[18] Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 477 (1897).

[19] *See* Allen v. United States, 542 F.2d 176, 179 (3d Cir. 1976) (limitations "serve to strike a balance between the need for certainty and predictability in legal relationships and the role of the courts in resolving private disputes"); Gates Rubber Co. v. U.S.M. Corp., 508 F.2d 603, 611 (7th Cir. 1975) ("the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time"); Newman v. Freeman, 262 F. Supp. 106, 112 (E.D. Pa. 1966) ("It is rudimentary that the purpose of a Statute of Limitations is to ... give potential defendants a fixed point in time when they will no longer have to fear a lawsuit."); *Limitations Developments, supra* note 13, at 1185 ("the public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse").

[20] Doe v. Jones, 4 Term R. 300, 308, 100 Eng. Rep. 1031, 1035 (K.B. 1791) (Lord Kenyon, C.J.); *see* Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 334 (1978); City of El Paso v. Simmons, 379 U.S. 497, 516 (1965); Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Shephard v. Thompson, 122 U.S. 231, 235 (1887).

[21] King v. Walker, 1 Black W. 286, 287, 96 Eng. Rep. 159, 160 (K.B. 1761); R. SOHM, THE INSTITUTES OF ROMAN LAW 283 (3d ed., Ledlie trans. 1907) ("Emperors Honorious and Theodosios, ... moved by obvious considerations of convenience, enacted in 424 A.D. that all actions should be barred in a certain period.").

stale claims out of court, statutes of limitations relieve courts "of the burden of trying stale claims when a plaintiff has slept on his rights."[22]

Limitations periods also preserve the credibility of the judicial system by barring claims that "have been allowed to slumber until evidence has been lost, memories faded, and witnesses disappeared."[23] Decisionmaking based upon full and fair presentation of the facts from all litigants is a tenet of the adversary system. Barring stale claims promotes justice and fairness[24] and diminishes the risk of perjury and fraud.[25]

B. *Remedial*

Many institutional justifications for time bars also serve remedial interests.[26] But limitations periods also serve the unique remedial function of notifying the potential defendant of the duration of his exposure to liability.[27] When a cause of action accrues, he may know that he is susceptible to suit for the period of time specified in the applicable statute of limitations.[28] Once aware of the limitation period's length, he can preserve facts necessary to

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[22] Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) (footnote omitted); *see* United States v. Western Pac. R.R., 352 U.S. 59, 72 (1956) ("purpose of [statutes of limitations] is to keep stale litigation out of the courts"); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); Meyer v. Frank, 550 F.2d 726, 730 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 550 (2d Cir. 1963).

[23] Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944) (*quoted in* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974)). *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Meyer v. Frank, 550 F.2d 726, 730 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977).

[24] *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348 (1944); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 805 (8th Cir. 1979); *Limitations Developments, supra* note 13, at 1185.

[25] *See* Dedmon v. Falls Prods., Inc., 299 F.2d 173, 178 (5th Cir. 1962); United States v. Palm Beach Gardens, 466 F. Supp. 1155, 1164 (S.D. Fla. 1979); Canadian Ace Brewing Co. v. Anheuser-Busch, Inc., 448 F. Supp. 769, 772 (N.D. Ill.), *aff'd,* 601 F.2d 593 (7th Cir.), *cert. denied,* 444 U.S. 884 (1979); Adams v. Coon, 36 Okla. 644, 129 P. 851, 853 (1913); W. BLANSHARD, A TREATISE ON STATUTES OF LIMITATIONS 1 (London 1826), *reprinted in* 1 LAW LIBRARY 1 (T. Sergeant & J. Lowber eds. 1833).

[26] Fairness, justice, and stability serve both institutional and remedial functions. *See* notes 18-20 & 24 and accompanying text *supra.*

[27] Isthmian Lines, Inc. v. Rosling, 360 F.2d 926, 927 (2d Cir. 1966); Snoqualimes Tribe of Indians *ex rel.* Skykomish Tribe of Indians v. United States, 372 F.2d 951, 960 (Ct. Cl. 1967).

[28] Service of process, of course, notifies the defendant that a suit has actually been filed against him. Time bars, in contrast, notify defendants of their *potential* period of liability.

his defense until the statute has run[29] and avoid unfair surprise from a mistaken belief that his exposure has ended.[30]

C. *Promotional*

Time bars serve two counter-balanced promotional interests. On the one hand, they provide plaintiffs with an incentive to bring suit quickly; on the other, they allow plaintiffs enough time to vindicate their rights.[31] Lord Kenyon described the incentive created by time bars to bring suit diligently: "if parties neglect their interests for such a length of time, . . . they shall lose the benefits of suing to enforce their demands."[32] Similar policies support the equitable doctrine of laches,[33] which " 'aids the vigilant, not those who slumber on their rights.' "[34] Indeed, "[statutes] of limitations [are] designed to force suits to be brought without unreasonable delay."[35]

D. *Application*

Despite these compelling reasons for placing time limitations upon rights of action, courts often suspend these periods. Such suspensions illustrate the interplay among the various purposes of time bars. One such widely-used suspension doctrine is fraudulent concealment.[36]

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[29] D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904, 908 (1st Cir. 1958); DeMalheabe v. International Union of Elevator Constructors, 449 F. Supp. 1335, 1341 (N.D. Cal. 1978); Homcy v. United States, 536 F.2d 360, 364 (Ct. Cl.), *cert. denied,* 429 U.S. 984 (1976); Hodges v. United States, 111 F. Supp. 268, 270 (Ct. Cl. 1953).

[30] Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348 (1944); Meyer v. Frank, 550 F.2d 726, 730 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977); Macklin v. Spector Freight Syst., 478 F.2d 979, 994 n.30 (D.C. Cir. 1973); Eastridge v. Fruehauf Corp., 52 F.R.D. 129, 131 (W.D. Ky. 1971); United States v. Vibradamp Corp., 257 F. Supp. 931, 939-40 (S.D. Cal. 1966).

[31] Judicial and statutory tolling rules can mitigate the effects of overly restrictive time periods. *See* notes 341-48 and accompanying text *infra.*

[32] Perry v. Jackson, 4 Term R. 516, 519, 100 Eng. Rep. 1150, 1152 (K.B. 1792).

[33] *See* note 11 *supra.*

[34] Powell v. Zuckhart, 366 F.2d 634, 636 (D.C. Cir. 1966) (quoting 2 A. POMEROY, EQUITY JURISPRUDENCE § 418 (5th ed. 1941)).

[35] Vason v. Nickey, 438 F.2d 242, 244 (6th Cir. 1971). *See* NLRB v. California School of Professional Psychology, 583 F.2d 1099, 1101 (9th Cir. 1978); Dedmon v. Falls Prods., Inc., 299 F.2d 173, 178 (5th Cir. 1962); Armstrong v. Maple Leaf Apts., Ltd., 436 F. Supp. 1125, 1148 (N.D. Okla. 1977); Maricopa Co. v. American Pipe & Constr. Co., 303 F. Supp. 77, 85 (D. Ariz. 1969), *aff'd,* 431 F.2d 1145 (9th Cir. 1970), *cert. denied,* 401 U.S. 937 (1971); United States v. First Nat'l Bank, 54 F. Supp. 351, 352 (N.D. Ohio 1943); Cable v. Commercial & Sav. Bank, 31 F. Supp. 628, 631 (W.D. Va. 1940).

[36] For other examples of suspension doctrines, see notes 341-75 and accompanying text *infra.*

The fraudulent concealment doctrine applies when the defendant has prevented the plaintiff from discovering his injury. In the seminal case of *Bailey v. Glover*,[37] an assignee in bankruptcy brought suit to set aside certain fraudulent conveyances that the defendant allegedly made. Those conveyances made the defendant appear bankrupt despite his great wealth.[38] Defendant successfully concealed the transfers until long after the limitation period had run.[39] The statute barred the action,[40] but the Supreme Court suspended the time bar.[41] The Court reached this conclusion despite strong policies favoring "speedy disposition of the bankrupt's assets,"[42] and the statute's "imperative"[43] language that "admitted of no exceptions."[44]

> [W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.[45]

The equitable doctrine of *Bailey v. Glover* meshes with the purposes of time bars. No remedial policies justify barring an action when, as in *Bailey*, the defendant has prevented the plaintiff from bringing suit. Protection of defendant's right to repose cannot justify a time bar in these circumstances.

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[37] 88 U.S. (21 Wall.) 342 (1874).

[38] *Id.* at 342-43 (statement of the case).

[39] Congress provided a two-year limitation period for the bankruptcy act. Act of March 2, 1867, ch. 176, § 2, 14 Stat. 518. Plaintiff filed suit more than three years after the rigbt of action had accrued. 88 U.S. (21 Wall.) at 345 (argument for property holder).

[40] *Id.* at 346.

[41] *Id.* at 350.

[42] *Id.* at 346. The Court stated:

> The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay. Appeals in some instances must be taken within ten days; and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate.

Id. at 346-47.

[43] *Id.* at 346 (argument for property holder). For the statutory language, see *id.* at 344 (statement of the case) ("*no* suit . . . shall in any case be maintainable . . . unless . . . brought within two years") (emphasis added).

[44] *Id.* at 346.

[45] *Id.* at 349-50.

Similarly, barring an action involving fraudulent concealment serves no promotional interests because even the most diligent plaintiff cannot commence litigation if he is kept unaware of the existence of his claim.[46] Furthermore, the plaintiff's strong interest in redressing his wrong weighs heavily in favor of suspending the period.

Institutional factors tip both sides of the scale. Stability favors unwavering application of the time bar. Even when the defendant fraudulently conceals his wrongdoing, suits after the limitations period has run thwart his expectations of repose. These expectations, however, differ greatly from the reasonable expectations that time bars were designed to protect. The remaining policies, convenience and credibility of evidence, favor barring the action. After a lapse of many years, witnesses may be unavailable, and the parties may have lost evidence. In weighing these factors against the countervailing considerations, the *Bailey* Court struck the proper balance.

II

History of Limitations of Actions

A. *Roman Law*

Time limitations on rights of action existed in ancient legal systems.[47] Under the Roman civil law, the doctrine of *usucapio*[48] operated to quiet title after one had possessed property for a

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[46] In the language of Justice Miller:

> [Statutes of limitations] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence. . . . To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing tbe fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349.

[47] One commentator suggests that "[s]tatutes of limitation relating to real property may be traced to ancient Greece or beyond." W. Ferguson, *supra* note 16, at 7; *see* J. Angell, A Treatise on the Limitations of Actions at Law 5 (6th ed. 1876).

[48] Sohm defines *usucapio* as "the acquisition of ownership by continuous possession." R. Sohm, *supra* note 21, at 318. For example,

> [i]f a person, having come into possession of land on some lawful ground (justo titulo) and in good faith (bona fide), and having continued in the possession of such land for "a long time," were sued by the person claiming to be owner of the land, he (the defendant) had a good defence to tbe action, and was protected by . . . a reservation made in his favour. . . .

specified period of time.[49] However, most actions not involving real property[50] had no time limitations[51] until the enactment, in 424 A.D., of a statute of limitations that generally barred actions unless plaintiff commenced suit within thirty years[52] of the accrual of the right.[53]

B. *English Common Law*

Modern American limitations doctrines are rooted in the English common law.[54] Although the common law imposed no time limitations on contract remedies,[55] the maxim *"actio personalis moritur cum persona"* confined suits to the life of the parties in tort actions.[56] The doctrines of presumption[57] and wager of

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Id. at 319. *See also* J. ANGELL, *supra* note 47, at 1-2; W. BLANSHARD, *supra* note 25, at 3; Ailes, *Limitation of Actions and the Conflict of Laws,* 31 MICH. L. REV. 474, 474n.1 (1933); *Limitations Developments, supra* note 13, at 1177.

[49] The necessary period of possession depended upon the domiciles of the parties: 10 years if the parties were domiciled in the same province, 20 years if domiciled in different provinces. R. SOHM, *supra* note 21, at 319. *But see* M. ORTOLAN, THE HISTORY OF ROMAN LAW 668 (I. Prichard & D. Nasmith trans. 1871) (*"Usucapio,* acquisition by use, . . . by possession for a certain period: one year for movables, two years for immovables.").

[50] Sohm contends that "limitations of actions were on principle unknown to the civil law." R. SOHM, *supra* note 21, at 283.

[51] In "quite exceptional cases" civil law actions were barred after the passage of time. *Id.* "[A] number of actiones honorariae," however, had specific time limitations. *Id.* at 282. These rights of action were known as "actiones temporales." *Id.* at 283. The expiration of the specific time period extinguished the action and the right. *Id.*

[52] *Id.* at 283.

[53] "[C]onsiderations of convenience" moved Emperors Honorious and Theodosios to enact the limitation period. *Id.* at 283. Expiration of the period extinguished the remedy, not the right. *Id.* at 283-84.

[54] *See* J. ANGELL, *supra* note 47, at 9; W. FERGUSON, *supra* note 16, at 7.

[55] *See* H. BANNING, LIMITATION OF ACTIONS 1-2 (1877); W. BLANSHARD, *supra* note 25, at 3 (a single instance of "a right being barred after a certain lapse of time, without the intervention of a statute"); J. WILKINSON, A TREATISE ON THE LIMITATION OF ACTIONS 1 (London 1829), *reprinted in* 1 LAW LIBRARY (T. Sergeant & J. Lowber eds. 1833); 1 H. WOOD, A TREATISE ON THE LIMITATIONS OF ACTIONS 4 (4th ed. D.C. Moore 1916). Bracton disagreed: *"omnes actiones in mundo infra certa tempora habent limitationem."* 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 157 (S. Thorne trans. 1968) ("every action in the world is limited to a certain time"). Many commentators, however, have criticized this statement. The basic objection, apparently applicable to much of Bracton's work, is his wholesale application of Roman law to English law. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 261 (5th ed. 1956). Banning claims the truth of Bracton's statement "seems as doubtful as the Latinity." H. BANNING, *supra,* at 1 n.1. Blanshard, drawing support from Coke, also takes issue with the statement. *See* W. BLANSHARD, *supra* note 25, at 3.

[56] *See* J. WILKINSON, *supra* note 55, at 1; 1 H. WOOD, *supra* note 55, at 4-5.

[57] "It was a rule of the common law that tbe payment of a bond or other specialty, would be presumed after the lapse of twenty years from the time it became due, in the absence of evidence explaining the delay, although there was no statute bar." Bean v. Ton-

law,[58] both applied infrequently,[59] also served the purposes of time limitations on actions.[60]

Great Britain enacted its first statute of limitations applicable to personal actions in 1623.[61] It attached different periods of time to different actions, recognizing that some actions demanded longer periods than others.[62] The American colonies adopted

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nele, 94 N.Y. 381, 385 (1884) (action on note 21 years after maturity barred by presumption of satisfaction).

Although the doctrine of presumption developed in courts of equity, 1 H. WOOD, *supra* note 55, at 4, "from an early time it [was] recognized by courts of law." Bean v. Tonnele, 94 N.Y. at 385. The doctrine enabled courts to refuse to enforce stale demands. *See* 1 H. WOOD, *supra* note 55, at 4-5.

[58] Plucknett defined wager of law operationally:

> The party who was called upon to make his law had to find a number of people, twelve or some other number fixed by the court according to circumstances, and then take a solemn oath that he was innocent. His companions, or "compurgators" as they were called, then swore that the oath which he had taken was clean. In other words, the court calls upon the accused to produce a specified number of people (occasionally from a particular class or even from the names on a given list) who are prepared to swear that in their opinion his oath is trustworthy. They do not swear to the facts of the case, but merely to their judgment that the accused is a credible person.

T. PLUCKNETT, *supra* note 55, at 115. The wager of law was an absolute defense to an action, 1 H. WOOD, *supra* note 55, at 5 n.22, available to defendants and to plaintiffs denying affirmative pleas interposed by defendant's counterclaims. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH COMMON LAW 634 (2d ed. Reiss. 1968). With this remedy available, stale claims were of little moment to defendants. *See* W. FERGUSON, *supra* note 16, at 11 ("The right to wage his law . . . protected the defendant against loss of evidence and the death of witnesses obviating the need for a statute of limitations."). *See generally* J. WILKINSON, *supra* note 55, at 2-3.

[59] Wager of law was only available in actions of debt and detinue. R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 298 (1978); 2 F. POLLOCK & F. MAITLAND, *supra* note 58, at 634; 1 H. WOOD, *supra* note 55, at 5 n.22. It was not available in actions on assumpsit. T. PLUCKNETT, *supra* note 55, at 645. Banning suggests presumption had limited usefulness, characterizing it as a "doubtful doctrine." H. BANNING, *supra* note 55, at 1-2.

[60] *See* H. BANNING, *supra* note 55, at 1-2; 1 H. WOOD, *supra* note 55, at 5.

[61] 21 Jac. 1, c. 16 (1623).

Twenty-one years earlier, plaintiffs were given the option of electing to sue in assumpsit, rather than debt. *See* Slade's Case, 4 Coke 92b, 76 Eng. Rep. 1074 (K.B. 1602). Because wager of law was unavailable in actions for assumpsit, Edgecomb v. Dee, Vaugh. 89, 101 Eng. Rep. 984, 990 (D.B. 1682), a general statute of limitations became a logical necessity. *See* J. WILKINSON, *supra* note 55, at 4; W. FERGUSON, *supra* note 16, at 11.

Statutes of limitations on real property actions had existed for some time. These statutes cut off actions that had accrued before the occurrence of some "notable" event, such as a coronation or the end of a reign. H. BANNING, *supra* note 55, at 2; W. FERGUSON, *supra* note 16, at 7. *See, e.g.*, 3 Edw. 1, c. 39 (1329).

[62] The first modern statute of limitations for real property actions was 32 Hen. 8, c. 2 (1540). *See* W. FERGUSON, *supra* note 16, at 8. Although 4 Hen. 7, c. 24 (1487) was the first time limitation on real property rights, only the 1540 statute classified actions into categories and based the time period on the character of the right. 32 Hen. 8, c. 2, §§ 3-5

this concept of limitations[63] and continued to apply it after independence.[64]

The federal government, however, never adopted the English limitations statutes and remains without a general statute of limitations.[65] The number and importance of federally created rights with no specific limitations period[66] highlights the problems of this omission.

(1540). Such classification is the essence of modern statutes of limitations. Unlike the "notable event" periods of the past (*see generally* note 61 *supra*), both statutes limited actions to specific time periods that began running upon the accrual of the action. W. FERGUSON, *supra* note 16, at 7-9. *But see* Note, *Limitation Borrowing in Federal Courts,* 77 MICH. L. REV. 1127, 1129 (1979) (32 Hen. 8, c. 2 (1540)) (first statute fixing limitation period between "accrual of the right and the commencement of the action"). This note misinterprets Wood, who observed that 32 Hen. 8, c. 2 is one example of a modern statute; he never claimed that it was the first. 1 H. WOOD, *supra* note 55, at 6.

The 1540 statute placed a six-year limitation period on actions for trespass, detinue, debt, and replevin. Assault, battery, wounding, and imprisonment had periods of four years. A later statute placed a two-year limit on actions for slander. 21 Jac. 1, c. 16, § 3 (1623). For persons with disabilities, such as imprisonment, the limitation period did not commence running until after the cessation of the disability. *Id.* § 7.

[63] *See* J. ANGELL, *supra* note 47, at 10 (21 Jac. 1, c. 16 was "generally adopted by the original American states"); W. FERGUSON, *supra* note 16, at 46; 1 H. WOOD, *supra* note 55, at 6.

[64] *See, e.g.,* Walden v. Heirs of Gratz, 14 U.S. (1 Wheat.) 292 (1816) (construing state statute of limitations in light of 21 Jac. 1, c. 1).

[65] *See* Note, *supra* note 8, 53 COLUM. L. REV. at 68; Note, *supra* note 62, at 1127.

For a time, it appeared that 28 U.S.C. § 2462 (1976) would remedy the problem. It provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

Originally enacted in 1799, in a somewhat different form (Act of March 2, 1799, ch. 22, § 89, 1 Stat. 696), this statute has had little effect. The Supreme Court has construed its language narrowly, rendering the statute inapplicable to most civil actions. In Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), an antitrust action, the Court defined "penalty or forfeiture" in the criminal sense, severely limiting the statute's application in the civil area. *Id.* at 397. *See* Meeker v. Lehigh Valley R.R., 236 U.S. 412, 423 (1915) (limiting "penalty or forfeiture" to punitive recoveries for infractions of public laws, as opposed to liability imposed to redress private injuries); Brady v. Daly, 175 U.S. 148, 155-58 (1899) (limiting the statute to penal actions); Huntington v. Attrill, 146 U.S. 657, 667-68 (1892) (equating "penalty" with "penal").

Courts have held the statute inapplicable in antitrust actions (Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906)), civil rights actions (O'Sullivan v. Felix, 233 U.S. 318, 322-23 (1914)), actions for recovery of delinquent tax interest (United States v. Guest, 143 F. 456, 458 (4th Cir. 1906)), and actions under the Fair Labor Standards Act (Keen v. Mid-Continent Petroleum Corp., 58 F. Supp. 915, 919 (N.D. Iowa 1945)).

[66] These rights arise under the antifraud provision of the Securities Exchange Act of 1934 (15 U.S.C. § 78(b) (1976)), Labor Management Relations Act (29 U.S.C. §§ 141-188 (1976)), Fair Labor Standards Act (29 U.S.C. §§ 201-219 (1976)), civil rights acts (42 U.S.C.

III

SPECIALIZED FEDERAL COMMON LAW

Modern American law is more complex than the unitary common law systems because of the interplay of the state and federal systems. On any particular question, federal and state laws may provide different answers. Of course, if a valid federal statute provides the answer, the supremacy clause commands that federal law controls.[67] But in the absence of such a statute, the choice is often unclear. Congress restricted the choice somewhat through the Rules of Decision Act (RDA), which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[68]

Although the Supreme Court has interpreted the RDA to require application of state statutory or common law rules unless the Constitution, or a federal statute or treaty "otherwise requires or provides,"[69] the scope of the exception has generated considerable debate. After construing it narrowly for 100 years, the Supreme Court now interprets the exception expansively.[70] Consequently, federal courts should not be subject to the RDA's mandate when adjudicating federally-created rights.[71] Yet the Court's early interpretation of the RDA continues to confuse the lower courts.[72]

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§§ 1981-1988 (1976)), Outer Continental Oil Shelf Lands Act (43 U.S.C. §§ 1331-1343 (1976)), Communications Act of 1934 (47 U.S.C. §§ 151-609 (1976)), and Military Selective Service Act (50 U.S.C. §§ 459-473 (1976)).

Some federally created rights have statutory limitations periods. *See, e.g.,* 15 U.S.C. § 15b (1976) (antitrust, four years); 17 U.S.C. § 507 (1976) (copyright, three years); 35 U.S.C. § 286 (1976) (patent, six years).

[67] U.S. CONST. art. VI, para. 2. *See also* note 3 *supra.*

[68] 28 U.S.C. § 1652 (1976). For a discussion of the origins of this provision, see note 78 *infra.*

[69] 28 U.S.C. § 1652 (1976). *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

[70] *See, e.g.,* Holmberg v. Armbrecht, 327 U.S. 392 (1946); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Board of County Comm'rs v. United States, 308 U.S. 343 (1939). *See also* note 139 *infra.*

[71] Hereinafter, the phrase "the RDA is inapplicable," or words to that effect, will be used as a shorthand to express the idea that the RDA does not compel a federal court to apply state law.

[72] *See* Wright v. Tennessee, 613 F.2d 647, 648 (6th Cir. 1980); Warner v. Perrino, 585 F.2d 171, 174 (6th Cir. 1978); International Union of Operating Eng'rs v. Fishback &

A. *Early Interpretations of the RDA*

In *M'Cluny v. Silliman* [73] a frustrated purchaser sued a federal land office registrar thirteen years after the officer allegedly refused to enter a tendered land purchase application[74] in violation of federal law.[75] The circuit court held that Ohio's six-year statute of limitations for actions on the case barred the plaintiff's action.[76] The plaintiff appealed to the Supreme Court, claiming "no statute of limitations of the state ... is pleadable ... in the circuit court of the United States ... where the plaintiff's rights accrued to him under a law of congress."[77] The Court held summarily that the RDA[78] required "the acts of limitations of the

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Moore, Inc., 350 F.2d 936, 938-39 (9th Cir. 1965); Nickels v. Koehler Management Corp., 392 F. Supp. 804, 805 (N.D. Ohio 1975); *cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966) (citing cases decided under RDA).

[73] 28 U.S. (3 Pet.) 270 (1830).

[74] *Id.* at 275-76. Plaintiff allegedly produced two receipts from the receiver of public moneys "for the purchase of public lands." *Id.* With the receipt, plaintiff attempted to purchase the land from defendant, who erroneously claimed that the lands either had been sold, or were not for sale, and who refused to enter plaintiff's purcbase application. *Id.* at 276.

[75] *See generally* Act of May 18, 1796, ch. 29, 58, 1 Stat. 468. The Act provided for the "Sale of the Lands of the United States, in the territory northwest of the river Ohio, and above the mouth of Kentucky river." M'Cluny apparently sued under § 8, although the argument of counsel and the Court placed M'Cluny's reliance on § 10. 28 U.S. (3 Pet.) at 270-71, 276. Section 8 required land registrars to enter all purchase applications; § 10 provided for compensation for surveyors. Act of May 18, 1796, ch. 29, §§ 8, 10, 1 Stat. 468.

The source of the right, as well as the basis of jurisdiction in *M'Cluny*, is the subject of considerable dispute. For discussions concluding that the basis of the claim was federal law, see Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 79 (1955); Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 102 n.37. Plaintiff tendered the receipts on August 2, 1810 (28 U.S. (3 Pet.) at 275), yet did not file suit until December 15, 1823. *Id.* at 270. Neither the parties nor the Court advanced any reason for the delay.

[76] *Id.* at 276. *See generally* An Act for the Limitations of Actions, § 1, OHIO ACTS ch. 18 (Collins 1810) ("all actions of trespass upon real property, trespass, detinue, trover and conversion, and replevin; all actions upon the case, and of debt for rent, shall be sued or brought witbin six years next after the cause of such actions [arose]").

[77] 28 U.S. (3 Pet.) at 276.

[78] The early version of the RDA provided:

> That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92. The modern counterpart of this statute is substantially similar to the original enactment. *See* text accompanying note 68 *supra.* For a discussion of the legislative history behind the RDA, see Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923).

The role of the RDA in non-diversity cases was rarely examined because most cases (other than appeals from state court) which reacbed federal courts before 1875 were based

several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts."[79] The Court concluded that because the state statute en-

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upon diversity jurisdiction. *See* Frankfurter, *Judicial Power of the Federal and State Courts,* 13 CORNELL L.Q. 499, 507-08 (1928). *See also* Friendly, *supra* note 1, at 406 n.111 (federal statutory provisions in the twentieth century greatly outnumber those in the nineteenth century). Not until 1875 did Congress enact a statute granting federal courts jurisdiction over matters arising under the Constitution, laws, or treaties of the United States. *See generally* Act of March 3, 1875, ch. 137, 18 Stat. 470 (pt. 3). For a history of federal question jurisdiction before the Federal Rules of Civil Procedure, see Frankfurter, *supra,* at 507-11.

[79] 28 U.S. (3 Pet.) at 277. It is not clear why the court felt compelled to apply state law, nor why the RDA was chosen as the source of the directive. The RDA was intended to insure that federal courts would administer state law in diversity jurisdiction cases "to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that within a State there should be no discrimination against non-citizens in the application of justice." Warren, *supra* note 78, at 83. Apparently, Congress' sole concern was to ensure the equal treatment of state-created rights in the federal and state courts. There is no indication that Congress intended the RDA to apply to federally-created rights of action. *Id.* at 81-88 *passim.*

The RDA has three elements: (1) only the "laws of the several states" are the rules of decision in (2) "cases where they apply," but (3) the mandate to apply state law is inapplicable where the "Constitution, treaties or statutes of the United States otherwise [shall] require or provide." The Supreme Court has adopted varying interpretations of these three elements.

In Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the Court held that decisions of state courts, except those construing state statutes or constitutions, were not "laws of the several states" for purposes of the RDA. *Id.* at 18. Justice Story's interpretation of the language conflicted with the legislative history of the RDA and with the spirit as well as the holding of *M'Cluny.* Erie R.R. v. Tompkins, 304 U.S. 64, 72-73 (1938). *See* Warren, *supra* note 78, at 83-88. Nevertheless, *Swift* remained the law until 1938 when the Court expressly overruled it in *Erie.*

The "in cases where they apply" language does not limit the scope of the RDA. *See* Note, *supra* note 8, 69 YALE L.J. at 1432. The Court has long recognized that "[t]he statute, however, is merely declarative of the rule which would exist in the absence of the statute." Mason v. United States, 260 U.S. 545, 559 (1923). *See* Hill, *supra* note 1, at 1069-70 (clause requires the application of the appropriate or relevant state law). *See also* Erie R.R. v. Tompkins, 304 U.S. 64, 72 n.2 (1938). Indeed, the only case that misconstrued the phrase to limit the scope of the RDA is Campbell v. Haverhill, 155 U.S. 610 (1895). The *Campbell* Court stated that this exception would relieve federal courts from the necessity of following state laws which discriminate against "causes of action . . . enforceable only in the Federal courts." *Id.* at 614-15.

> [I]t might be plausibly argued that it could never have been intended by Congress that [the RDA] should apply to statutes passed in manifest hostility to Federal rights or jurisdiction, but only to such as were uniform in their operation upon state and Federal rights and upon state and Federal courts.

Id. at 615. Other courts, however, did not share this view. For a more complete discussion of *Campbell,* see notes 96-108 and accompanying text *infra.*

Early federal cases adopted a narrow construction of the "otherwise require or provide" exception. *See* Note, *supra* note 8, 69 YALE L.J. at 1433. "If the state law in question was not inconsistent with the federal statute," the exception was irrelevant and the state law applied. *Id.* Later, the Court greatly expanded this exception. After *Erie* state law applied only where state rights were involved, a federal interest looming in the background of a

compassed all actions on the case, it applied to actions for malfeasance against federal officers[80] and thus barred the action.

The *M'Cluny* Court faced several choices in deciding which limitations period applied to plaintiff's federally-created rights. It might have fashioned its own limitations period,[81] extended laches to suits at common law,[82] applied the statutory limitation of a

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case sufficed to trigger the exception. *See* Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946); Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455-56 (1942); Royal Indem. Co. v. United States, 313 U.S. 289, 294-95 (1941); Diethnick v. Greaney, 309 U.S. 190, 200-01 (1940); Board of County Comm'rs v. United States, 308 U.S. 343, 349-50 (1939).

Although the Court's expansive interpretation of the RDA appears to limit the statute to diversity cases, the RDA also applies to nondiversity cases involving state-created rights:

> The Erie doctrine is sometimes spoken of as applying only in cases in which jurisdiction is based on diversity of citizenship. It is plain, is it not, that this is erroneous, and that Erie applies, whatever the basis of the jurisdiction, to any issue in the case which is governed by state law operating of its own force?
>
> It is equally clear, is it not, that Erie is inapplicable with respect to issues governed by federal law, even if jurisdiction does rest on diversity of citizenship?

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 766 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. For example, the Second Circuit asserted that "it is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded which determines the governing law." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) (emphasis in original) (citing HART & WECHSLER, *supra*, at 690-700). *See* Burks v. Lasker, 441 U.S. 471, 475 (1979) ("first step" in determining whether state or federal law applies is ascertaining which law creates the cause of action).

Professor Hill offers a preemption analysis to determine whether a question is one of state or federal law. He suggests:

> [e]ven when there is undoubted competence in the federal judiciary, state law may be applied for . . . judicial economy, or to avoid the introduction of unwarranted uncertainties into the conduct of public or private affairs. But it is also possible that sometimes state law is or should be applied *ex proprio vigore* because the particular issue is one that should not be taken to be federalized by force of the Constitution itself in view of the strength of the state interests involved and the relative inconsequentiality of the federal interests (from which it does not necessarily follow that the issue is outside the scope of congressional competence).

Hill, *supra* note 1, at 1042. *See id.* at 1033-34; Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033-34 (1953).

[80] 28 U.S. (3 Pet.) at 277-78.

[81] If historical precedent is a proper benchmark, the court has inherent power to establish time bars. *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 713 (1966) (dissenting opinion, White, J.) ("Courts have not always been reluctant to 'create' statutes of limitations . . . ."). It exercises such power whenever it rules on a laches issue. *See* note 11 *supra*. Further, courts have formulated limitations periods in other contexts. *See* note 12 *supra*.

[82] Laches is an equitable doctrine, Russell v. Todd, 309 U.S. 280, 287 (1939), and, despite the merger of law and equity, is still recognized as such. Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979). *Cf.* 28 U.S.C. §§ 1291-1292 (1976) (generally limiting federal appellate jurisdiction to final decisions, but permitting review of interlocutory orders having equitable origins).

similar federal right,[83] absorbed a state statute of limitations by choice, or held there was no limitation period at all.[84] Instead, the Court failed to recognize the choices available, assuming that the RDA mandated absorption of the state limitations period.

The position that appellant urged upon the *M'Cluny* Court was equally narrow. Without specifying which federal solution was preferable, the appellant contended that state legislatures inherently lacked jurisdictional power to affect federally created rights.[85] He argued that strong interests in uniformity of federal rights disfavored adoption of state limitation periods.[86]

A recent commentator claims, however, that in Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977), the Supreme Court extended the doctrine of laches to "federal actions at law lacking congressional limitations." Note, *supra* note 11, 77 MICH. L. REV. at 1142. If this commentator is correct, then *Occidental Life* marks a departure from the *Russell* rule that a court cannot apply laches if jurisdiction is concurrent. 309 U.S. at 280. *See* note 11 *supra.* This conclusion is only correct if a backpay award is a legal remedy. The weight of authority, however, suggests that it is not. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 443 (1975); Johnson v. Georgia High. Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969). *But see* EEOC v. Griffin Wheel Co., 511 F.2d 456, 459 (5th Cir. 1975) (applied state statute of limitations to Title VII backpay claims).

[83] *See, e.g.,* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 228-30 (1958) (concurring opinion, Brennan, J.); Gatlin v. Missouri-Pac. R.R., 475 F. Supp. 1083, 1089 (E.D. Ark. 1979). For a discussion of this opinion, see notes 323-29 and accompanying text *infra.*

[84] Chief Justice Marshall warned that having no limitation on rights of action would be "utterly repugnant to the genius of our laws." Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1804) (dicta). In *Adams,* Marshall discussed only a federal statutory limitation, implying that the choice was between the federal statutory limitation or none at all. *Id.* at 340-41. Marshall's warning should carry equal weight when the arguably applicable limitations period is a *state* statute. *See* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961) (Friendly, J.) (although Congress may create a federal right without a limitation period, it does not intend that courts apply an unlimited period). A court should focus upon the purposes underlying time bars, not on which sovereign promulgated the limitations period.

[85] Apparently, the argument rested on the division of power between state and federal governments. The appellant contended that:

> it rests with the sovereign power of the state to say how far the interests of the society it represents require that its own Courts shall be kept open to give redress in each particular case, or whether there shall be any limitation of personal actions. It particularly belongs to each government to say how long its ministerial officers shall be exposed to the claims of those who consider themselves aggrieved by their acts of misfeasance or nonfeasance; consequentially, in such cases, the statutes of limitation of one state cannot be pleaded in bar in the Courts of another state.

28 U.S. (3 Pet.) at 271-72 (citations omitted). In essence, the appellant argued that state legislative enactments may never limit the duration of federally created rights of action. The source of this jurisdictional limitation probably was the supremacy clause. *See generally* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489 (1954).

[86] The appellant claimed that the Ohio legislature could not have contemplated that federal officers would be subject to the statute. 28 U.S. (3 Pet.) at 274-75, 277. He alleged that applying state statutes would "produce the absurdity and injustice of different laws,

By assuming that a state period may not operate, *ex proprio vigore,* to limit a federal right, the appellant's argument misconstrued the operation of federal common law. Once a federal court fills a gap in federal law, the gap-filler, whether judicially-created or absorbed from the state, *becomes* federal law.[87] Whether a state time bar may operate of its own force is irrelevant unless absorption of a state statute of limitations conflicts with the underlying federal rights—and the plaintiff in *M'Cluny* failed to show any such conflict. Federalism does not preclude a federal court from applying the state statute.

Neither does the interest in uniformity preclude absorption of state statutes of limitations. Although the time period for the same federal claim will inevitably vary among the states,[88] mere disharmony does not justify mandatory judicial creation of uniform federal limitations periods.[89] Nor does this interstate varia-

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and different limitations" throughout the nation. *Id.* at 278. Although a lack of uniformity would exist even if the state intended courts to apply state periods to federal rights, the appellant argued that to apply them where they were "unintended" aggravated the disharmony to an "absurd" and "unjust" degree. *Id.* This argument is hardly convincing; absorption of state time bars, whether "intended" or "unintended," would produce disuniformity.

[87] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957) ("state law applied [through federal law], however, will be absorbed as federal law"),; Hill, *supra* note 1, at 1074 (well settled in practice that federal judge-made law is binding upon the states); Monaghan, *supra* note 1, at 10 (federal common law created by the Supreme Court is binding on the states).

[88] Federal rights are characteristically subject to varying time periods. Courts have applied at least five different periods to claims arising under 42 U.S.C. § 1983 (1976) (*see* note 281 *infra*), and three different periods to § 1985 claims (*see* note 282 *infra*). *See* note 272 *infra* (10b-5 claims).

[89] *See* Friendly, *supra* note 1, at 410-11; Monaghan, *supra* note 1, at 12-13. Professor Monaghan argues that lack of uniformity seems an insufficient justification for judicial creation of federal common law. Monaghan argues for a narrow role for federal law. He believes that the RDA compels the application of state law unless there is preemption—a material conflict between state law and the policies underlying the federal law. Monaghan, *supra* note 1, at 12 n.69. Further, Professor Monaghan asserts that only an overriding justification, perhaps disharmony in the area of primary conduct, would justify judicial legislation when the "principal reason for creating federal law is a postulated need for national uniformity." *Id.* at 13 & n.70. Clearly, simply deciding when to commence a lawsuit is not such conduct.

Courts presently agree with Professor Monaghan's position on uniformity. In Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977), the Supreme Court adopted a preemption analysis and refused to apply a state statute of limitations to a Title VII action, partly because "[s]tate legislatures do not devise their limitations periods with national interests in mind." *Id.* at 367. However, the Court did not base its decision on a lack of uniformity; instead, it rejected the state statute because applying the state limitations provision would so limit the duration of the remedy as to "be inconsistent with the underlying policies of the federal statute." *Id.* The result thus rested on preemption principles; the Court felt that "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Id.*

tion alone conflict with federal interests; only a conflict of state law with basic federal policies would justify such mandatory judicial invention.[90] Finally, as long as parties contemplating litigation are able to predict the duration of their claims by ascertaining which state period the court will absorb, lack of uniformity among state periods is not a significant problem. The *M'Cluny* court reached the proper result. However, its construction of the RDA[91] left a legacy of confusion[92] that continues to this day.[93]

The Court has rejected the uniformity argument when it has not been supported by strong policies. In UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), the Court confronted the problem of setting a time limitation for claims under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1976). The appellant urged the Court to "devise a uniform time limitation to close the statutory gap left by Congress" (383 U.S. at 701), rather than apply the state limitations period adopted by the district court (*id.* at 699). Despite the disharmony that would result from absorbing the various state limitations periods for § 301 claims, the Court refused to create a uniform rule. *Id.* at 702-05. The Court noted that "there are problems so vital to the implementation of federal . . . policy that they will command a high degree of inventiveness from the courts (*id.* at 701), and that "the subject matter of § 301 is 'peculiarly one that calls for uniform law' " (*id.* (citation omitted)). Nonetheless, the Court asserted that "[t]he need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly desigued to promote." *Id.* at 702. The Court recognized that under § 301 there was a "need for uniformity in the 'substantive principles' that govern these suits." *Id.* at 703 n.4. Although it gave the issue short shrift, the Court noted that "lack of uniformity in limitations provisions is unlikely to have a substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights" in the type of litigation at hand. *Id.* *Cf.* United States v. Kimball Foods, Inc., 440 U.S. 715, 729 (1979) (need for uniform federal rule of priority of liens insufficient to "override intricate state laws of general applicability on which private creditors base their daily commercial transactions").

The case law thus supports Professor Monaghan's conclusion. Simple disharmony in limitations periods does not justify the judicial creation of a uniform rule. *But see* UAW v. Hoosier Cardinal Corp., 383 U.S. at 711-13 (dissenting opinion, White, J.) (need for uniformity to prevent unequal treatment of litigants in substantive law of labor agreements constitutes sufficient reason to create uniform rule); Note, *supra* note 8, 68 COLUM. L. REV. at 772-73 (urging creation of uniform limitations period for civil rights actions).

[90] Varying time limitations upon federal rights alone would probably not justify the creation of a uniform federal rule. Uniformity becomes compelling only when the primary decisions respecting human conduct become subject to conflicting requirements. *Cf.* Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (concurring opinion, Harlan, J.) (uniform application of state law required in federal diversity cases where primary conduct would otherwise be subject to conflicting demands). The Court in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), recognized the need for uniformity where primary conduct would be affected. *Id.* at 702. *See* note 89 *supra*. The *UAW* Court held that statutes of limitations merely regulate secondary activity; they come "into play only when [the primary] processes have already broken down." 383 U.S. at 702.

[91] Erie R.R. v. Tompkins, 304 U.S. 64 (1938) highlights the potential danger of the *M'Cluny* holding. In *Erie*, the Court held that the word "laws" in the RDA includes both the enactments of the state legislature and the decisions of the state judiciary. *Id.* at 78. Read together, *M'Cluny* and *Erie* would mean that the RDA compels a federal court to apply not only state limitations periods, but also state common law rules on subsidiary issues such as tolling, accrual, and commencement.

In *Campbell v. Haverhill,*[94] the Supreme Court again adopted a narrow interpretation of the RDA exception. Assignees of a patent brought an infringement action in federal court,[95] which exercised exclusive jurisdiction over such claims. The trial court applied the state statute of limitations and barred the action.[96] The Supreme Court affirmed,[97] construing the RDA to require the application of the state time bar.[98]

The *Campbell* Court added a new wrinkle to the mandatory interpretation of the RDA first advanced in *M'Cluny.* The Court

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> Where state law is determined to govern of its own force, that determination generally means that all issues in the subject-matter area will be similarly governed by local law. This follows almost inevitably from the idea that local law governs of its own authority; in our federal system, the authority of states runs over whole areas of law, and determinations of jurisdiction will thus generally cover such areas.

Mishkin, *The Variousness of "Federal Law:" Competence and Diseretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797, 805 (1957). *See* C. WRIGHT, *supra* note 4, at 284. Mandatory application of state law on these subsidiary issues could seriously undermine federal interests involved in suits on federal claims. For an extensive discussion of these problems, see notes 187-431 and accompanying text *infra.*

[92] After *M'Cluny,* the circuit courts split over the applicability of state statutes of limitations in patent infringement actions, over which federal courts have exclusive jurisdiction. U.S. CONST. art. I, § 8. *See* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (actions at law); Act of Feb. 19, 1819, ch. 19, 3 Stat. 481 (actions in equity); 28 U.S.C. § 1338 (1976) (current codification). For example, in Hayden v. The Oriental Mills, 15 F. 605 (C.C.D.R.I. 1883), the court followed the rationale of *M'Cluny* and held that the RDA required it to adopt the Rhode Island statute of limitations. *Accord,* Sayles v. Richmond, F. & P.R.R., 21 F. Cas. 613, 613 (C.C.E.D. Va. 1879) (No. 12,424); Sayles v. Oregon Cent. Ry., 21 F. Cas. 611, 612 (C.C.D. Or. 1879) (No. 12,423); Rich v. Ricketts, 20 F. Cas. 681, 682 (C.C.N.D.N.Y. 1870) (No. 11,762); Parker v. Hawk, 18 F. Cas. 1135, 1135-36 (C.C.S.D. Ohio 1857) (No. 10,737) (citing *M'Cluny*).

The court in *Brickell v. City of Hartford,* 49 F. 372 (C.C.D. Conn. 1892), reached the opposite conclusion. Expressly holding the RDA inapplicable in patent infringement actions, the court noted that a congressional mandate to absorb state limitations periods, based upon the RDA, would require courts to absorb time periods that might discriminate against federal rights. *Id.* at 374-75. A mandate to absorb discriminatory periods would permit state legislatures to accomplish indirectly what they had no power to legislate directly. The court held that the RDA's mandate applied to those cases "which involve matters or rights within the legislative jurisdiction of the state;" and that because suits for patent infringements fell outside of that category, the RDA did not require absorption of the state statute. *Id.* at 375. Most lower courts followed *Brickell* until the Supreme Court decided Campbell v. Haverhill, 155 U.S. 106 (1895). *See, e.g.* Sayles v. Richmond, F & P. R.R., 21 F. Cas. 613, 613 (C.C.E.D. Va. 1879) (No. 12,424); Rich v. Ricketts, 20 F. Cas. 681, 682 (C.C.N.D.N.Y. 1870) (No. 11,762).

[93] *See* note 72 and accompanying text *supra.*

[94] 155 U.S. 610 (1895).

[95] *Id.*

[96] *Id.* at 611.

[97] *Id.* at 621.

[98] *Id.* at 614.

hesitantly concluded that although the RDA required federal courts to absorb state periods, this requirement could be waived if that period unduly burdened or discriminated against a federal right. Thus, the *Campbell* court chipped away at the *M'Cluny* Court's narrow reading of the "in cases where they apply" exception by allowing courts "discretion" in the application of burdensome or discriminatory state periods.[99] Even if this reading of the RDA is construed as an accommodation of the supremacy clause, it left the court in an awkward posture because it pierced the "mandatory" nature of the RDA with a considerable discretionary loophole.

The *Campbell* Court apparently read the RDA to require application of state law in all cases except those in which Congress had attached a limitations period to the federal right involved. Rejecting the plaintiff's contention that the exclusive federal jurisdiction over his claim was sufficient to bring it outside the RDA's mandate, the Court thought it lacked the power to fashion its own limitations period;[100] it held that the RDA required absorption of the state period. The Court reached this result by examining the RDA in cases of concurrent and exclusive jurisdiction; this examination rested on the erroneous assumption that the RDA applied where jurisdiction over federal rights was concurrent.

The Court assumed unquestioningly that Congress intended the RDA to apply in cases of "concurrent jurisdiction." Although the Court did not define "concurrent jurisdiction," the term clearly referred to federally-created rights litigable both in federal and state courts.[101] From this false assumption—that the RDA ex-

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[99] *Id.* at 614-16. The Court stated:

> In such case it might be plausibly argued that it could never have been intended by Congress that [the RDA] should apply to statutes passed in manifest hostility to Federal rights or jurisdiction, but only to such as were uniform in their operation upon state and Federal rights and upon state and Federal courts.

Id. at 615.

[100] *Id.* at 616. *See* Note, *supra* note 8, 68 COLUM. L. REV. at 771 (The *Campbell* Court "apparently felt powerless to fashion its own rule.").

[101] 155 U.S. at 616. From the Court's initial premise that the RDA applied in cases of concurrent jurisdiction came the query whether the RDA should require application of state law where federal jurisdiction is exclusive. The Court concluded that it should. Why, it asked, would Congress discriminate in favor of plaintiffs with exclusive federal claims by rejecting state limitations law, and against defendants by eliminating their use of that law as a defense? *Id.* Neither argument is persuasive. Even accepting the fallacious contention that the RDA applies to federal rights with concurrent jurisdiction, discrimination would not result unless remedies for rights with exclusive federal jurisdiction were of unlimited or

tended to federal rights of concurrent jurisdiction—followed logically the Court's conclusion that the RDA should apply to cases of federal rights of exclusive jurisdiction.[102] Because of its initial

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significantly longer duration. But the Court could have set its own period—even if it denied it had such power. *See* note 103 *infra*.

The Court's concern with the plight of defendants in actions of exclusive federal jurisdiction is equally misplaced. It asked: "[w]hy . . . should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled?" 155 U.S. at 616. But Congress unquestionably *could* favor federal rights of exclusive jurisdiction by specifically providing longer statutes of limitations for them than similar concurrent federal rights, thus creating discrimination between defendants.

The real question is how to interpret the congressional silence. The Court claimed that it was "more reasonable to presume that Congress . . . intended to subject such action[s] to the general laws of the State applicable to actions of a similar nature." *Id.* This argues for the absorption of state law, but not necessarily by an RDA mandate. State law can be absorbed by federal courts without relying on a congressional mandate. *See* text accompanying note 124 *infra*.

Even if extending the RDA to cases of exclusive federal jurisdiction would eliminate this form of discrimination between litigants, other forms would necessarily result. For example, an RDA mandate would require the application of all state laws which discriminate against nonresident plaintiffs, such as state borrowing statutes. These statutes protect the claims of resident plaintiffs in situations where the limitation period of a foreign jurisdiction would bar a nonresident plaintiff's claim. *See* notes 418-19 and accompanying text *infra*. In diversity cases, federal courts typically enforce these provisions. *See, e.g.*, Schiess-Froriep Corp. v. Steamship Finnsailor, 574 F.2d 123, 125 n.5 (2d Cir. 1978); Ramsay v. Boeing Co., 432 F.2d 592, 594 n.4 (5th Cir. 1970); Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 428 (2d Cir.) (under New York's borrowing statute, non-resident plaintiffs bringing causes accruing in another state are barred from instituting suit if they are barred by the statute of limitations of either jurisdiction, but New York residents are affected only by the New York limitations period), *cert. denied*, 400 U.S. 829 (1970); Bartholomeo v. Parent, 71 F.R.D. 86, 87 (E.D.N.Y. 1976); Sangdahl v. Litton, 69 F.R.D. 641, 643 (S.D.N.Y. 1976). Under this Project's analysis of the RDA this inequity would not result in cases concerning federal rights because, when under a federal common law presumptive application of state law, a federal court would apply only the local time limit, and not the discriminatory provision. *See* note 431 and accompanying text *infra*.

[102] 155 U.S. at 616. By assuming that the RDA applies to cases of concurrent jurisdiction, the Court ignored the fundamental distinction between state-created rights and federal rights. *See* note 79 *supra*. Some commentators argue that, through its "concurrent-exclusive" analysis, the Court distinguished *state* claims over which both state and federal courts could exercise jurisdiction from federal rights, which could be litigated only in federal courts. *See, e.g.*, Note, *supra* note 8, 68 COLUM. L. REV. at 768; Note, *supra* note 8, 53 COLUM. L. REV. at 74. This interpretation has some logical appeal. Certainly the RDA applies to suits based on state rights in federal courts—it was enacted for that very purpose. *See* note 79 *supra*. The *Campbell* Court's error, then, lies in the extension of the RDA to federal rights that can only be litigated in federal courts.

But a closer reading of the case reveals that the previous commentators incorrectly interpreted *Campbell*. The Court characterized the appellant's argument as follows:

> It is insisted, however, that, by the express terms of [the RDA], the laws of the several States should be enforced only "in cases where they apply," and that they have no application to causes of action created by Congressional legislation and enforceable *only* in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state *courts*.

false assumption, the Court failed to focus on the source of plaintiff's right in *Campbell.* Whether this right was state or federally-created should have determined the RDA's applicability.

The Court's perception of its limited power to fashion its own period is flawed for another reason. By 1895, the Court's power to devise rules through federal common law was well-established.[103] Nothing prevented the Court from creating its own time bar.

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155 U.S. at 614 (emphasis added). This language strongly suggests that the Court was distinguishing "causes of action created by Congressional legislation and enforceable only in the Federal courts" from state created *and congressionally created* rights enforceable in both state *and* federal courts. The Court further read the appellant's argument to say "that the States, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter." *Id.* at 615. This emphasis on state *legislatures* makes it unlikely that "concurrent" jurisdiction referred to diversity matters; rather the Court was focusing on federally-created rights. The historical development of patent infringement actions, in particular, lends support to this interpretation. Initially, state as well as federal courts could hear patent infringement actions. Later, they became the exclusive domain of the federal courts. *See* note 89 *supra.* Because *Campbell* involved a patent claim, the conclusion that "concurrent" includes federal, and not just state claims, seems unmistakable.

Thus, this Project comes to a different view of *Campbell* than did the two *Columbia* Notes. The *Columbia* Notes assumed that *M'Cluny* involved a state, and not a federal claim. *See* Note, *supra,* 68 COLUM. L. REV. at 767-68; Note, *supra,* 53 COLUM. L. REV. at 74 (*Campbell* (not *M'Cluny*) was the first Supreme Court case dealing with a federal statutory right without a limitations period). Because of this assumption and because the *Campbell* Court referred to the RDA's application in *M'Cluny* when analyzing the statute's application in patent actions, the two *Columbia* Notes could conclude that the Court was comparing the effect of state-created rights with those of federally-created rights. This Project, however, concludes that *M'Cluny* involved a federal right, *see* note 75 *supra,* and that the *Campbell* Court compared federal rights of concurrent and exclusive jurisdiction.

This Project's analysis faults the *Campbell* Court only for its poor reading of the RDA. The RDA does not apply to federal claims, concurrent or exclusive. But the other commentators are overly critical of the *Campbell* Court's analysis. Those writers apparently believed that the court could perceive no difference between state-created and federally-created rights, and that this lack of perception led to the Court's holding that the RDA also controls federally created rights. For example, when one commentator stated that the *Campbell* Court held "the distinction between a state right enforceable in state courts and a federal right enforceable in federal courts irrelevant" (Note, *supra* note 8, 68 COLUM. L. REV. at 768), he implied that the Court ignored an obvious distinction. This Project, on the other hand, only questions the Court's reading of the RDA, which was undoubtedly influenced by previous cases such as *M'Cluny.* Prior case law mechanically applied the RDA. Given this background, the *Campbell* Court's extension of the RDA to claims of exclusive federal jurisdiction is understandable.

This Project agrees with other commentators, however, that the *Campbell* Court's reliance on the RDA was inappropriate. *See id.* at 769; Note, *supra* note 8, 53 COLUM. L. REV. at 74-76; notes 109-10 and accompanying text *infra.*

[103] *See, e.g.,* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842); Schofield, *Swift v. Tyson. Uniformity of Judge-Made State Law in State and Federal Courts,* 4 ILL. L. REV. 533, 536 (1910) ("[n]o judge in England or in the United States ever did need to be told . . . that he has the power to *make* law") (emphasis added).

The confusion in the Court's analysis of the RDA's compulsion in cases involving federal rights pales in comparison to the intellectual chaos of its notion of discretionary application of the RDA.[104] Congress did not intend the RDA's "cases where they apply" language to be a vehicle for judicial discretion, and no precedent supported such a view.[105] In addition, the supremacy clause[106] provided protection against state laws that discriminated against or burdened federal rights.[107] Thus, the Court strained

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[104] The plaintiff in *Campbell* claimed that mechanical application of state law through the RDA would require federal courts to apply unreasonably short state time periods. The Court held, however, that it could choose not to absorb statutes, according litigants too short a period in which to bring suit. 155 U.S. at 615. No authority other than the Court's own reading of the RDA supported this finding of discretionary power to ignore state statutes.

The Court also responded to plaintiff's argument by stating that it could declare unreasonably short state limitations periods unconstitutional. *Id.* The authorities on which the Court relied, however, were inapposite to the *Campbell* facts. They also highlight the Court's failure to understand the preemption doctrine.

The Court cited Koshkonong v. Burton, 104 U.S. 668 (1881), and Wheeler v. Jackson, 137 U.S. 245 (1890). These cases involved accrued state rights of action and subsequent legislative pronouncements shortening the time period. Both cases turned on the deprivation of a property right without due process. In neither case did the Court question whether a particular time limitation was sufficiently long for a particular type of claim. Further, the Court actually upheld the statutes in both cases, because the newly enacted time periods were not unreasonably short. 137 U.S. at 255; 104 U.S. at 675. Finally, and equally inappropriately, *Campbell* also cited a treatise that deals with prejudice to existing causes of action by the shortening of an existing statute of limitations. *See* T. COOLEY, CONSTITUTIONAL LIMITATIONS 366-67 (Boston 8th ed. 1868). In short, the Court failed to recognize that the preemption doctrine was the proper vehicle for invalidating unreasonably short limitations on federal rights. *See* notes 163-79 and accompanying text *infra*. This analysis is consistent with both an RDA mandate and a federal common law presumption to absorb.

[105] *See* note 79 *supra*.

[106] U.S. CONST. art. VI, cl. 2. Ordinary *Erie* rules do not then force an application of state law. For example, in Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942) the Court stated: "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad v. Tompkins, 304 U.S. 64." *Id.* at 176. The state rule must give way to the conflicting federal rule, because of the supremacy clause. Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948). *Cf.* Testa v. Katt, 330 U.S. 386 (1947) (state courts having jurisdiction over certain state actions cannot refuse to hear actions involving similar federal rights).

[107] *See* notes 163-79 and accompanying text *infra*. In a preemption case, "the primary task of the Court is to ascertain whether a challenged State law is compatible with the policy *expressed* in the Federal statute." W. CHASE & C. DUCAT, CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 272 (14th ed. 1978) (emphasis added); *see* D. CURRIE, FEDERAL COURTS 684-87 (2d ed. 1968). The policies expressed in the federal statute are "divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law." Monaghan, *supra* note 1, at 12. Recent developments have limited the doctrine's application to cases in

the statutory language to create a safeguard against discriminatory state time bars instead of relying on well-established preemption principles.[108] By importing these notions of discretion into the RDA, the Court broadened a well-defined provision beyond sensible bounds and treated the clear congressional mandate as if it were a mere rebuttable presumption. This reading conflicts with both the language of the statute and the doctrine of separation of powers.[109]

In short, the reasons given by the *Campbell* Court fail to withstand even cursory analysis.[110] *Campbell*, however, like many of the

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which "state law is seen to be in *material* conflict with the policies of federal law." *Id.* at 12 n.69. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 653 (1975).

[108] *See, e.g.*, M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[109] The doctrine of separation of powers requires that the governmental body that makes law must not also execute and interpret that law; rather, governmental power must reside in a separate legislature, executive, and judiciary. *See* THE FEDERALIST No. 47 (J. Madison), at 323 (J. Cooke ed. 1961). *See generally* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935). Two concerns underlie the doctrine: (1) a fear of power concentrated into a single group or class; and (2) a "[s]olicitude for liberty." Sharp, *supra*, at 434; THE FEDERALIST No. 47 (J. Madison), at 325 (J. Cooke ed. 1961). Allocation of powers and responsibilities to separate branches is also rooted in the goal of efficient government. W. GWYN, *supra*, at 127.

Although the doctrine requires separate governmental branches, it does not preclude the overlapping of governmental functions. Justice Jackson, concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952), noted that separation of powers "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity." The Court in Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) agreed, stating that the *Youngstown* case "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches." It repudiated the "archaic view" of "airtight departments of government." *Id.* As Madison recognized in 1788, the doctrine seeks only to prevent the situation "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department." THE FEDERALIST, No. 47 (J. Madison), at 325-26 (J. Cooke ed. 1961). It does not preclude the exercise of *"partial agency"* over the functions of another branch. *Id.*

Under this view of the doctrine, the judiciary's role is to review the actions of other governmental bodies to determine if they are constitutionally valid. Moreover, the judiciary must interpret and effectuate those laws that it does find constitutional. *See* W. GWYN, *supra*, at 125. Interpretation of legislation and effectuation of congressional policy are consistent with the separation doctrine's prohibition of exercising the *whole* power of another branch.

However, were a court to read the clearly absolute mandate of the RDA as merely a presumptive absorption of state law, the judicial branch would effectively be usurping the *whole* function of the legislature. Ignoring a law's patent command is to make law, not to interpret and effectuate legislative intent. Labelling the RDA a rebuttable presumption would thus violate the doctrine of separation of powers.

[110] In addition to its other flawed arguments for absorbing state law, the *Campbell* Court stated that federal courts should apply state limitations periods because Congress had compelled absorption of state procedural law by enacting the Conformity Act, ch. 255, 17 Stat.

early cases in this area, reached the right result for the wrong reasons. Clearly it would have been proper to absorb the state time bar as a matter of *choice.*[111] Despite its correct result, *Campbell's* theoretical difficulties plagued later courts.[112] The Court's mistaken reliance on the RDA and its dilution of the RDA's mandate with "discretion" generated confusion from which courts did not escape for nearly fifty years.

For example, a decade after *Campbell,* in *Chattanooga Foundry & Pipe Works v. City of Atlanta,*[113] the Court adopted *Campbell*'s flawed rationale without lengthy discussion and applied a state statute of limitations to a federal antitrust action.[114] The Court held the state period applicable because the "matter [had been]

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196 (1872). 155 U.S. at 617-18. The Court suggested that statutes of limitations were closely related to procedure and should be treated as such.

But an opposite result can easily be argued in light of modern practice. Statutes of limitations are more than procedural rules. *See Limitations Developments, supra* note 13, at 1186-88. In diversity suits, for example, state statutes of limitations are treated as substantive rules of law, subject to compulsory absorption under *Erie. See* Guaranty Trust Co. v. York, 326 U.S. 99, 108-11 (1945). Arguably, then, limitations periods for federal rights deserve different treatment than simple rules of procedure. *York* held that in diversity suits logic as well as congressional compulsion required the application of the state period. *Id.* at 112. When the origin of the right is federal, the logical, as well as congressional, compulsion to apply the state statute vanishes. In this situation, a mechanical application of state periods under RDA compulsion would severely limit the federal courts' ability to protect and enhance federal policies. A presumptive application of state law, however, preserves this ability.

Finally, the Court stated that the state period applied because statutes of limitations "affect the remedy," and because it was "settled" congressional policy "to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States." 155 U.S. at 618. The Court relied upon M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839), which held that statutes of limitations were pleas "to the remedy" to whicb the "lex fori must prevail." *Id.* at 327. The Court, however, misapplied this authority. The *M'Elmoyle* Court was confronted not with a choice between the application of federal or state law, but a choice between two state laws. *Id.* at 327-28. A court may properly invoke the *lex fori* rule only *after* it has decided to apply state law.

[111] *See* text accompanying note 123 *infra.* Even without RDA compulsion, however, federal courts may be unable to reexamine whether state periods should be adopted, because consistent judicial application of state statutes may have foreclosed such an inquiry through the operation of *stare decisis.* Thus, what on a clean slate should have been only a presumption would now be a result compelled by judicial practice. This "judicial compulsion," however, only requires federal courts to apply existing state periods rather than formulate uniform federal periods. The courts enjoy greater freedom regarding the less settled questions of ancillary, yet related, doctrines such as tolling, accrual, and survival. *See* notes 187-431 and accompanying text *infra.*

[112] *See* note 72 *supra.*

[113] 203 U.S. 390 (1906).

[114] The action was based on § 7 of the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209 (1890) (currently codified at 15 U.S.C. §15 (1976)). Congress obviated the need to absorb state limitations statutes in 1955 by passing a uniform statute of limitations for federal

left to the Local law by the silence of the Statutes of the United States."[115]

B. *Specialized Federal Common Law and the RDA*

In 1939, the Court adopted new reasoning that was to prove more harmonious with the nature of a federally created right. The case, *Board of County Commissioners v. United States,*[116] involved an 1861 treaty exempting Indian lands from taxation.[117] The United States, on behalf of the Indians, sued the county to recover taxes allegedly collected in violation of the treaty.[118] The County admitted liability for the principal, but challenged the claim for interest on the wrongly collected funds; it argued that under state law, it was "settled . . . that a taxpayer may not recover from a county interest upon taxes wrongfully collected."[119] The government urged the Court to be "indifferent"[120] to the state law; the locality argued that state law controlled *ex proprio vigore.* The Court disagreed with both positions. Implicitly interpreting the "otherwise require or provide" exception of the RDA and rejecting the notion that the statute requires courts to apply state law in cases involving federal rights, Justice Frankfurter stated:

> The starting point for relief in this case is the Treaty of 1861, exempting [Indian] property from taxation. Effectuation of the exemption is, of course, entirely within Congressional control. But Congress has not specifically provided for the present contingency, that is, the nature and extent of relief in case loss is

antitrust actions. Act of July 7, 1955, ch. 283, § 4B, 69 Stat. 282 (currently codified at 15 U.S.C. § 15b (1976)). For a discussion of the justifications for enacting the uniform period, see S. REP. No. 619, 84th Cong., 1st Sess. 3-6, *reprinted in* [1955] U.S. CODE CONG. & AD. NEWS 2328, 2330-33. For discussions of the problems courts previously had with placing time limitations on federal antitrust actions, see Fulda & Klemme, *The Statute of Limitations in Antitrust Litigation,* 16 OHIO ST. L.J. 233 (1955); Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit,* 61 YALE L.J. 1010, 1030-31 (1952); Note, *Treble Damage Time Limitations: Federalism Rampant,* 60 YALE L.J. 553 (1951); note 195 *infra.*

[115] 203 U.S. at 397. For similar applications of state limitations periods through the RDA, see O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (Civil Rights Act); McClaine v. Rankin, 197 U.S. 154, 158 (1905) (National Bank Act); Brady v. Daly, 175 U.S. 148, 158 (1899) (copyright).

[116] 308 U.S. 343 (1939) (Frankfurter, J.).

[117] *Id.* at 348.

[118] *Id.* at 348-49.

[119] *Id.* at 349 (citation omitted).

[120] *Id.*

> suffered through denial of exemption. It has left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the *Constitution, treaties or statutes of the United States,* and does not owe its authority to the law-making agencies of [the state].[121]

Because fashioning remedial details to protect rights deriving from the Constitution, treaties or statutes of the United States is a function of the federal judiciary, federal courts are free to fashion uniform federal rules, or to absorb state law to fill the interstices of statutes creating federal rights.[122] In *Board of County Commissioners,* the Court absorbed the state law:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. . . .
>
> . . . .
>
> Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature . . . Congress has left us free to take into account appropriate considerations of "public convenience.". . . Nothing seems to us more appropriate than due regard for local institutions and local interests.[123]

The Court emphasized that application of state law was a judicial choice:

> The state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate.[124]

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[121] *Id.* at 349-50 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (emphasis added)).
[122] *But see* note 111 *supra.*
[123] 308 U.S. at 350-51 (citations omitted).
[124] *Id.* at 351-52 (citations omitted).

This conclusion had yet to be applied in the statute of limitations context. In less than a decade, the opportunity arose.

In *Holmberg v. Armbrecht*,[125] creditors sued the shareholders of a bank under section 16 of the Federal Farm Loan Act.[126] A decade after the cause of action arose, the plaintiffs learned that a shareholder had concealed his stock ownership and they commenced suit in district court eleven years after the cause of action accrued.[127] The district court rejected the defendant's assertion that either the ten year statute of limitations of the forum state or laches barred the action.[128] The Court of Appeals reversed,[129] holding state statutes of limitations subject to the outcome-determinative test of *Guaranty Trust Co. v. York*.[130] The Supreme Court reversed. Justice Frankfurter again explained:

> The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of . . . [rights] created not by a State legislature, but by Congress.[131]

Having dismissed the circuit court's conclusion that *York* required the application of state law, the Court then focused on what law it should choose. The Court noted that a federal statute of limitations, if Congress had enacted one, would put "an end [to] the matter,"[132] but that "[a]part from penal enactments, Congress ha[d] usually left the limitation of time for commencing actions under national legislation to judicial implications."[133] In actions at law, congressional silence has been "interpreted to mean that it is federal policy to adopt the local law of limitation."[134] For this proposition, the Court cited three cases[135] that had all applied state law because of a mistaken belief that the RDA com-

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[125] 327 U.S. 392 (1946) (Frankfurter, J.).

[126] 39 Stat. 374 (1916) (repealed by Pub. L. No. 92-181, Title V, § 5.26(a), 85 Stat. 624 (1971), 12 U.S.C. § 812 (1976)).

[127] 327 U.S. at 393.

[128] Holmberg v. Anchell, 24 F. Supp. 594, 600-03 (S.D.N.Y. 1938), *rev'd sub nom.* Holmberg v. Armbrecht, 150 F.2d 829 (2d Cir. 1945), *rev'd*, 327 U.S. 392 (1946).

[129] Holmberg v. Armbrecht, 150 F.2d 829, 832 (2d Cir. 1945), *rev'd*, 327 U.S. 392 (1946).

[130] 326 U.S. 99 (1945). *York* is a progeny of *Erie*. The cases "can be viewed as an interpretation of the Rules of Decision Act." Mishkin, *supra* note 91, at 800 n.16.

[131] 327 U.S. at 394.

[132] *Id.* at 395.

[133] *Id.*

[134] *Id.* (citations omitted).

[135] *Id.*

pelled them to do so: *Campbell, Chattanooga,* and *Rawlings v. Ray.*[136] But the Court abandoned the justifications for absorption set forth by these precedents:

> The implied absorption of State statutes of limitation within the interstices of federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.[137]

Holmberg should have dispelled the notion that the RDA mandated application of state statutes of limitations in litigation involving federal rights. Thus under this view, if Congress prescribes no time bar,[138] federal courts may choose—but are not required—to

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[136] 312 U.S. 96 (1941).

[137] 327 U.S. at 395 (citing Board of County Comm'rs v. United States, 308 U.S. 343, 340-50, 351-52 (1939)).

[138] *See* note 4 *supra.* Congress's failure to attach a specific statute of limitations to a federal right does not necessarily mean that Congress has been silent. In civil rights actions, for example, 42 U.S.C. § 1988 (1976) may require federal courts to apply state law. That section provides:

> The jurisdiction in civil ... matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," ... for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies..., the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil ... cause is beld, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ....

Id.

Section 1988's effect on the application of state law recently received judicial attention. In Board of Regents v. Tomanio, 100 S. Ct. 1790 (1980), the Court applied New York statute of limitations and tolling laws to bar a § 1983 claim. The opinion lends itself to two interpretations of the role of § 1988. On the one hand, tbe Court proferred a view of § 1988 similar to the *Campbell* Court's view of the RDA when it stated that "federal courts [are] *obligated* to apply ... the analogous New York statute of limitations to respondent's federal constitutional claims ...." *Id.* at 1794 (emphasis added). Federal courts should reject state law only if it is "inconsistent" with federal law. *Id.* at 1796. The factors that the Court considered when determining whether state law was inconsistent, however, suggest a second view of § 1988. The Court analyzed the effect of absorbing state law on: (1) the underlying policies of § 1983 actions and (2) general federalism concerns. *Id.* at 1797-99. The Court's concern with these factors offers a second view of § 1988: it is simply a congressional codification of the presumption to apply state law to fill interstices in federal rights of action. This latter interpretation appears correct because it closely comports with the view offered in Robertson v. Wegmann, 436 U.S. 584 (1978) and Johnson v. REA, 421 U.S. 454 (1975), upon which *Tomanio* heavily relies.

apply state law.[139] This judicial freedom is not, however, unlimited, and there are a number of circumstances in which federal courts properly refuse to apply state time bars.

Courts have applied state law in several other areas by relying on § 1988. *See, e.g.*, Robertson v. Wegmann, 436 U.S. 584, 593 (1978) (state survivorship statute); Johnson v. REA, 421 U.S. 454, 464 (1975) (state tolling law) (dictum); Warner v. Perrino, 585 F.2d 171, 174-75 (6th Cir. 1978) (state statute of limitations); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 488 (7th Cir.), *cert. denied*, 400 U.S. 911 (1970) (state statute of limitations); Hughes v. Smith, 264 F. Supp. 767, 769 (D.N.J. 1967), *aff'd*, 389 F.2d 42 (3d Cir. 1968) (state statute of limitations).

For a discussion of § 1988 and its relationship to state statutes of limitations, see 1976 ARIZ. ST. L.J., *supra* note 8, at 107-08. *See generally* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

[139] *See* Burks v. Lasker, 441 U.S. 471, 476 (1979) ("Since we proceed on the premise of the existence of a federal cause of action, it is clear that 'our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U.S. 64,' and state law does not operate of its own force.") (citation omitted); Runyon v. McCrary, 427 U.S. 160, 180 (1976) (citing *Holmberg*); Johnson v. REA, 421 U.S. 454, 469 (1975) (concurring opinion, Marshall, J.) ("As a general practice, where Congress has created a federal right without prescribing a period for enforcement, the federal courts uniformly borrow the most analogous state statute of limitations."); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 709 (1966) (dissenting opinion, White, J.) (courts apply state law when it supplements and fulfills federal policy with the ultimate question being what comprises federal policy); United States v. Standard Oil Co., 332 U.S. 301, 305-10 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (in absence of applicable act of Congress federal courts fashion governing rule of law according to own standards); Roberts v. Magnetic Metals Co., 611 F.2d 450, 457 (3d Cir. 1979) (concurring opinion, Sloviter, J.) (suggesting state statutes apply "because they are there"); Donaldson v. O'Connor, 493 F.2d 507, 529 (5th Cir. 1974) (state statute applied not because of legal compulsion, but merely as a matter of convenience when no other limitation period available); Gatlin v. Missouri-Pacific R.R., 475 F. Supp. 1083, 1087 (E.D. Ark. 1979) (citing *Donaldson*). Professor Mishkin explained:

> Since the *Erie* doctrine basically represents a determination of a lack of competence in the federal courts to do other than apply the state law, this is an accurate statement of the issue only if the term "federal law" is taken to refer to federal judicial competence to choose which law shall govern. However, ["federal law"] may seem to imply more: not only the power to choose, but also the exercise of that power by a choice in favor of a single, federally-created substantive rule. The latter is not a necessary corollary of the former. The power to choose may also be exercised by adopting state law as the governing rule—by incorporating the local rules for decision as the "federal law" for this purpose . . . .
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> What makes the distinction important is that if the issue is seen only as a choice between a federal rule of substance and *Erie*, the problem appears much more difficult than need be. For the implication of this breakdown is that any application of state law—whether of its own force or by way of federal incorporation—is subject to the entire body of rules and doctrine which developed in the aftermath of *Erie*. In fact, however, these two modes of using local law may involve substantially different approaches, particularly as to the methods and scope of applying state law. Much of the doctrine as to such methods and scope which was developed under *Erie* is premised upon that case's basic concept of lack of federal judicial competence in the pertinent area. Therefore, it is not necessarily applicable where local law is adopted as the discretionary federal choice in an area of undoubted competence.

IV

ABSORPTION OF STATE PERIODS

Even after Justice Frankfurter freed the federal courts to fashion specialized federal common law, the courts generally continued to absorb state time bars. Only for good reason will courts depart from the state period. Although the present practice was born out of the Court's misinterpretation of the RDA, strong reasons support the continued existence of this framework.

A. *Presumption to Absorb State Periods*

Three pragmatic justifications support the presumption to absorb state limitations periods. The practice (1) promotes local experimentation; (2) avoids undermining the substantive policies of the states; and (3) eliminates the difficult task of analyzing the implications of each new rule in all fifty states.[140] Factors espe-

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Mishkin, *supra* note 91, at 802-03 (footnotes omitted). Professor Hart agreed:

> In an accurate analysis, it seems, state law cannot be said to operate of its own force in such situations. The case is rather one in which "the state law has been absorbed, as it were, as the governing federal rule"—a rule which "does not owe its authority to the law-making agencies of" any state, but is "ultimately attributable to the Constitution, treaties or statutes of the United States." But there is illumination, again, in the fact that Congress should choose to make the reference, by absorption or otherwise.
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> For every instance in which Congress has made the choice expressly there are dozens in which it has left it uncertain. In such cases the Court has come to recognize, with increasing candor in recent years, its duty to make the choice in Congress' behalf. "In absence of an applicable Act of Congress," in the blunt language of Justice Douglas, "it is for the federal courts to fashion the governing rule of law according to their own standards." Again and again the Court has found "reasons which . . . make state law . . . the appropriate federal rule" in matters which beyond doubt are basically federal. Thus state law has been applied in determining whether a judgment for the United States in an action to recover taxes illegally exacted from an Indian should include interest. And when Congress creates a new statutory right of action for the recovery of damages but fails to specify any period of limitations, the inference has seemed irresistible that some limitation must have been intended and, in default of any federal measure, the Court has turned to state law.

Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 529-30 (1954) (footnotes omitted). *See* Hill, *supra* note 1, at 1042.

[140] Note, *The Federal Common Law,* 82 HARV. L. REV. 1512, 1517-19 (1969). *See* HART & WECHSLER, *supra* note 79, at 470-71 ("Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose."); Hart, *supra* note 139, at 490 ("the existence of varied facilities, providing alternative means of working out by common action, through various groupings of interest, solutions of problems which cannot be settled unilaterally, appears as an enrichment of equipment for successful social life."); Mishkin, *supra* note 91, at 803-04 (1957)

cially relevant to time bars also favor the presumptive absorption of state statutes of limitations. For example, the very arbitrariness of statutes of limitations argues against judicial rulemaking.[141] It is better left to the legislatures; whenever judges engage in this type of line-drawing, a chorus of criticism generally follows.[142] Finally, there is arguably a congressional preference, albeit implied, to absorb state time periods. Legislative omission of a limitations period does not imply that Congress intended the right to endure indefinitely,[143] and absorption of state law is a reasonable means of filling gaps left by Congress.[144] Although it is plausible that

("there may be situations where state law is chosen only because of special difficulty in the judicial framing of a definite federal rule in a specific issue in an area otherwise totally national").

Similarly, three situations stand as general exceptions to the presumption: (1) where the controversy is between two states, or affecting foreign ambassadors; (2) where there is explicit or implicit congressional authorization to create uniform rules, rather than absorb state law; and (3) where the courts must formulate remedies for federal duties. Note, *supra*, at 1519-26. For a discussion of the first exception, see Note, *supra* note 8, 69 YALE L.J. 1428, at 1431-32. For an example of the second exception, see 28 U.S.C. §§ 2071-2175 (1976) (empowering Supreme Court to promulgate procedural rules).

One commentator argues that fixing time bars when Congress has been silent falls under the third exception of judicial formulation of federal remedies. Note, *supra*, 82 HARV. L. REV., at 1524. The better approach, however, favors a presumption to absorb state law. Statutes of limitations should not fall under any of the three exceptions to the general rule of absorption. Time bars do not pit equal sovereignties against each other, nor is there evidence that "Congress considered whether [courts should create a uniform rule], and reached a meaningful conclusion that [they] should." *Id.* at 1523. The only remaining exception is also inapplicable. Although statutes of limitations *are* remedial (Campbell v. Haverhill, 155 U.S. 610, 618 (1895)), precedent and practicality prevent them from falling under the "formulation of remedies" exception. *See* notes 141-46 and accompanying text *infra*.

[141] *See, e.g.*, Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961) (Friendly, J.) ("selection of a period of years [is] not . . . the kind of thing judges do"); Note, *supra* note 8, 53 COLUM. L. REV. 68, at 75 (limitation period is arbitrary measure traditionally and justifiably left to legislature).

[142] The reactions to the Rule Against Perpetuities is an example. *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 591-93, 364 P.2d 685, 690, 16 Cal. Rptr. 821, 826 (1961) (attorney not liable in malpractice for drafting instrument which violated rule because of overtechnicality of rule); C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY 691 (1974) (calling the rule a "technical morass"); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 722 (1952).

[143] *See* note 84 *supra*.

[144] In Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966), the Court absorbed state law for regulating the dealings between private parties in an oil and gas lease under the Mineral Leasing Act of 1920. Justice Harlan pointed out that "[e]ven where there is related federal legislation in an area, . . . it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states. . . .' " *Id.* at 68 (quoting H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)). *See* Burks v. Lasker, 411 U.S. 471, 478 (1979). *See also* Mishkin, *supra* note 91, at 810-11, 814; Hill, *supra* note 1, at 1024 n.1.

congressional silence may *require* courts to fashion rules, absorption is more reasonable and pragmatic.[145] Moreover, recent case law strongly supports presumptive absorption.[146]

B. *Preemptive Limits on Absorption of State Periods*

Despite these policies supporting absorption of state periods, the presumption is defeasible. Federal courts have refused to adopt state periods if (1) the state statute would provide an unduly short limitations period that would impermissibly undermine a federal right, or (2) the state statute would discriminate against a federal right by providing a longer limitations period for an analogous state right.[147] These two preemption concepts derive from the supremacy clause.[148] The federal courts will not permit

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[145] On the surface, it is more reasonable to suppose that Congress intended a missing element to be filled by a known rather than an unknown. Congress cannot anticipate what time period a court will find reasonable, but can easily examine, and approve, existing state provisions. *See* Note, *The Federal Common Law, supra* note 140, at 1519 (relative order and clarity of law in state courts compared to uncertain and unpredictable common law rule applied in federal court). Further, through time, this interpretation's persuasiveness gradually increases: once courts begin to apply state statutes of limitations, continued congressional silence indicates at least tacit approval of the absorption process.

From another perspective, legislative decisions are more directly produced by the democratic process than are judicial decisions. The elected state legislator is inherently in closer contact with the population than the appointed federal judiciary. *See* Roberts v. Magnetic Metals Co., 611 F.2d 450, 458 (3d Cir. 1979) (concurring opinion, Sloviter, J.) ("It is a task uniquely suited to a legislative body which, although it may sometimes make an arbitrary decision, is ultimately answerable to its constituency."). *But see* Note, *supra* note 8, 68 COLUM. L. REV. 763, at 771. Furthermore, the factfinding capabilities of a legislative body are far superior to those of the courts. As a result, legislatures are better qualified to discern and account for local practices and procedures, which are necessary factors in choosing reasonable time periods within which suit must be brought. *See* S. REP. No. 619, 84th Cong., 1st Sess. 3-6, *reprinted in* [1955] U.S. CODE CONG. & AD. NEWS 2328, 2331-32 (discussing method of selecting limitations period for antitrust actions). Case law has not justified absorption on this ground, however.

[146] *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (presumption to absorb state limitation period in Title VII action); Runyon v. McCrary, 427 U.S. 160, 179-82 (1976) (Civil Rights Act of 1866); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701-05 (1966) (§ 301 of the Labor Management Relations Act); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871). This is not to suggest that absorption will, in fact, occur. *See, e.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute"). *But see* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906) (civil suit under Sherman Antitrust Act); Campbell v. Haverhill, 155 U.S. 610, 614-18 (1895) (Patent Act). For a discussion on the proper interpretation of *Campbell, Chattanooga,* and *O'Sullivan,* see notes 94-115 and accompanying text *supra.*

[147] Van Horn v. Lukhard, 392 F. Supp. 384, 389-91 (E.D. Va. 1975).

[148] U.S. CONST. art. VI, para. 2. Technically, the supremacy clause only preempts state laws which, *ex proprio vigore,* interfere with federal interests. Of course, absorbed state time

state laws to conflict with federal interests; if such a conflict arises, the offending state law must yield.

1. *Burdensome Limitations Periods*

In *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission, (EEOC),*[149] the EEOC[150] brought an action in federal court[151] charging Occidental with discriminatory employment practices that allegedly violated Title VII of the Civil Rights Act of 1964.[152] The EEOC's investigation of the claim and its efforts

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periods do not operate of their own force. *See* notes 66-139 and accompanying text *supra.* However, the analysis is essentially the same; a federal court will only absorb state periods that do not conflict with federal rights. Thus, it is helpful to use preemption language in analyzing the absorption process; courts will only absorb state time bars up to a point of preemption.

This Project uses the term "burdensome state period" to describe a statute that prescribes a period so short that applying it would emasculate the federal claim, thus violating the supremacy clause. For example, a statute providing a period of two hours would burden the federal right because almost no litigants would be able to file actions within this time limit. This Project also employs the term "discriminatory state period" to describe a period that treats similar state and federal claims differently, but that is not always so short that it destroys the federal claim. For example, a statute allowing six years for a federal civil rights cause of action, but eight years for the state counterpart, would be discriminatory; although this statute treats the federal and state claims differently, it accords ample time to both. However, courts should presume that such discriminatory statutes, absent sufficient justifications, are also burdensome, and hence preempted under the supremacy clause.

For a discussion of preemption, see D. CURRIE, FEDERAL COURTS 887 (2d ed. 1975); Monaghan, *supra* note 1, at 12. For cases holding that discriminatory state statutes violate the supremacy clause, *see* Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83, 86 (5th Cir. 1947); Republic Pictures Corp. v. Kappler, 151 F.2d 543, 546-47 (8th Cir. 1945), *aff'd per curiam,* 327 U.S. 757 (1946); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 508 (D. Colo. 1952).

Some courts have invoked the equal protection clause of the fourteenth amendment to justify their refusal to absorb discriminatory state periods, reasoning that litigants making claims under federal law should not be treated differently than litigants making claims under state law. *See* Republic Pictures v. Kappler, 151 F.2d 543, 547 (8th Cir. 1945), *aff'd per curiam,* 327 U.S. 757 (1946) (relying on both the supremacy clause and the equal protection clause); Van Horn v. Lukhard, 392 F. Supp. 384, 391 (E.D. Va. 1975). For a criticism of the use of the equal protection clause to analyze state statutes of limitations which allegedly "discriminate" against federal claims, see Note, *supra* note 75, at 135-36.

[149] 432 U.S. 355 (1977).

[150] The EEOC is responsible for the administration of Title VII. 42 U.S.C. § 2000e-4 (1976).

[151] The 1972 amendments to Title VII granted the EEOC power to commence an enforcement action in federal court if, after 30 days following the filing of a charge with the EEOC, the EEOC has been unable to obtain a conciliation agreement. 42 U.S.C. § 2000e-5(f)(1) (1976).

[152] 42 U.S.C. §§ 2000 to 2000e-17 (1976). In *Occidental Life,* a female employee alleged that her employer denied her benefits provided to male employees, and that her employment had been terminated because of her pregnancy, in violation of 42 U.S.C. § 2000e-2(a)

to obtain voluntary compliance before filing suit consumed three years.[153] The district court applied a one-year statute of limitations[154] and barred the action. The Supreme Court reversed:[155]

> [T]he one-year statute of limitations applied by the District Court in this case could under some circumstances directly conflict with the timetable for administrative action expressly established in the 1972 Act.
>
> But even in cases involving no inevitable and direct conflict with the express time periods provided in the Act, absorption of state limitations would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments.[156]

The Court noted that "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."[157] Congress required Title VII plaintiffs to exhaust administrative remedies to encourage voluntary compliance and conciliation. Particularly in light of the EEOC's large case load, subjecting these federal rights to the "vagaries of diverse state limitations statutes"[158] would constitute more interference with

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(1976). EEOC v. Occidental Life Ins. Co., 12 Fair Empl. Prac. Cas. 1298 (M.D. Cal. 1974), *rev'd*, 535 F.2d 533 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977).

[153] 432 U.S. at 358.

[154] The district court applied CAL. CIV. PROC. CODE ANN. § 340(3) (West Supp. 1980), a general statute of limitations covering, among other things, an action to recover for libel, slander, assault, battery, false imprisonment, seduction and wrongful death.

[155] The Supreme Court rejected § 706f(1), 42 U.S.C. § 2000e-5(f)(1) (1976), as an appropriate limitations period. This section provides:

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Id. If the Court interpreted this section as a limitations period for Title VII, the EEOC's action would have been barred because it failed to commence the action within 180 days of the complainant's filing of the charge. The Court, however, stated that § 706f(1) provides only that a private right of action does not arise until 180 days after a charge has been filed, and imposes no time constraint upon EEOC enforcement powers. 432 U.S. at 366.

[156] 432 U.S. at 368-69 (footnote omitted).

[157] *Id.* at 367.

[158] *Id.* at 368-71.

this congressional policy than the Court would allow. The Court refused to absorb the state statute of limitations and stated that *any* state time bar would impermissibly burden the federal right. Consequently, it fashioned a federal common law rule seemingly establishing an unlimited period for Title VII suits.

Occidental Life is an extreme example of preemption analysis; ordinarily, courts do not reject every possible analogous state period.[159] Instead, they scrutinize state statutes for impermissible burdens upon the assertion of federal rights. If a court finds one statute burdensome, it will usually search for an analogous state statutory period.[160] Indeed, the courts have rarely found that state statutes impose impermissible burdens, probably out of deference to state legislatures.[161] Additionally, although *Erie* and the RDA no longer have compelling force in this area, they exert a gravitational pull. Unless absorption would clearly burden fed-

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[159] *See* Ashland Oil Co. v. Union Oil Co., 567 F.2d 984 (Temp. Emer. Ct. App. 1977). Considering whether to apply a state statute of limitation to an action brought under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 754(a)(1) (1976), the court inquired whether borrowing a state time period would conflict with the strong national policy embodied in the EPAA. The conclusion it reached, however, differed from the conclusion the Court reached in *Occidental Life.* The Court stated: "There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitation provisions to apply or that state statutes of limitations should not be looked to in accordance with the general rule in the absence of express federal provision." *Id.* at 989.

[160] For example, in Van Horn v. Lukhard, 392 F. Supp. 384, 389-90 (E.D. Va. 1975), the court rejected Virginia's one-year statute of limitations, although explicitly applicable to § 1983 actions, because it impermissibly burdened the assertion of federal rights. But the court absorbed the state's two-year limitations period for personal injury actions, implicitly finding that it comported with federal policies.

[161] *See* Note, *supra* note 140, 82 HARV. L. REV. at 1512, at 1524 ("[A]nalogous state statutes of limitations may be followed since the choice of an arbitrary cutoff line is a discretionary act more appropriate for legislatures than for courts"); note 145 *supra.*

In Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83 (5th Cir. 1947) (applying state period to action under Fair Labor Standards Act), the court said:

> The lawmaking body is the primary judge as to what is a reasonable time limitation for the bringing of actions, and courts will not inquire into the wisdom of a legislative decision establishing a period of limitation unless the time allowed is so manifestly insufficient as to amount to a denial of justice.

Id. at 85 (citations omitted). The court in Smith v. Cudahy Packing Co., 73 F. Supp. 141 (D. Minn. 1947), displayed a similar attitude:

> The Minnesota legislature is primarily the judge of what constitutes a reasonable period of limitation for the commencement of actions under circumstances here existing, and the wisdom of that law-making body in so doing will not be questioned by the Court unless the time allowed is so inadequate as to deny justice.

Id. at 143 (citations omitted).

eral interests, courts should absorb state periods that provide a reasonable time within which plaintiffs can assert federal claims.[162]

2. *Discriminatory Limitations Periods*

Even if a state limitations period is not unreasonably short, federal courts will refuse to absorb it if it discriminates against federal rights.[163] In ascertaining whether a state period is discriminatory, courts focus on whether the state statute provides a shorter limitations period for a federal right than for a similar state right.[164] Exclusive application to federal claims is one indication of discrimination, but standing alone, it generally does not constitute a fatal defect; the crucial inquiry is whether the statute that applies only to federal claims provides a shorter period for federal claims than for analogous state claims.[165]

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[162] *See* Chambers v. Omaha Pub. School Dist., 536 F.2d 222, 230 (8th Cir. 1976); Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83, 85 (5th Cir. 1947); Peterson v. Parsons, 73 F. Supp. 840, 846 (D. Minn. 1947); Smith v. Cudahy, 73 F. Supp. 141, 143 (D. Minn. 1947); Warnick v. Bethlelem-Fairfield Shipyard, Inc., 68 F. Supp. 857, 867 (D. Md. 1946).

[163] One of the harbingers of this discrimination doctrine is Campbell v. Haverhill, 155 U.S. 610 (1895) (dicta). *Campbell* suggested that non-adoption based on a discrimination rule would be appropriate for "statutes . . . discriminating against causes of action enforceable only in the Federal courts." *Id.* at 615. Courts have cited it as precedent for the discrimination principle. Rockton & Rion Ry. v. Davis, 159 F.2d 291, 293 (4th Cir. 1946); Van Horn v. Lukhard, 392 F. Supp. 385, 389 (E.D. Va. 1975); Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506, 508 (D. Col. 1952). *Campbell*, however, is not convincing authority on this point. The Court relied upon the mandate of the Rules of Decision Act, 28 U.S.C. § 725 (1976), yet imported a discretionary element into the statute. For a critique of *Campbell*, see notes 106-26 and accompanying text *supra*.

[164] A discriminatory state period may also impermissibly burden the federal right. In Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975), for example, the court found the Virginia limitations period applicable to § 1983 actions "unconstitutional because it both burdens the assertion of a federally created right of substantial importance and because it effects an invidious and unwarranted discrimination against assertion of the 'constitutional tort.' " *Id.* at 389. *See id.* at 389-91.

[165] *See, e.g.*, Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975). *See also* Warnick v. Bethlehem-Fairfield Shipyard, Inc., 68 F. Supp. 857 (D. Md. 1946). Some language in Rockton & Rion Ry. v. Davis, 159 F.2d 291 (4th Cir. 1946), intimates that exclusive application to federal claims might, without more, constitute unlawful discrimination. The *Davis* court said "a statute of limitations of a State is unconstitutional when the statute is directed exclusively at claims arising under a federal law. And particularly is this true when the State statute of limitations is discriminatory in its effect in favor of State claims and against federal claims." *Id.* at 293. *Cf.* J. ELY, DEMOCRACY AND DISTRUST 84 (1980) (arguing courts should protect the interests of minorities by "tying their interests to those of groups that [do] possess political power.") Most courts, however, have insisted on discriminatory periods before refusing to absorb state periods. *See* text accompanying notes 166-74 *infra*.

Several illustrative cases[166] involve a 1973 amendment to a Virginia statute of limitations barring civil rights actions under 42 U.S.C. § 1983 brought more than one year after they had accrued.[167] In *Van Horn v. Lukhard,*[168] the district court clearly noted the federal policy of presumptive—not compulsory—absorption of state statutes of limitations.[169] However, the court observed that prior to the enactment of the amendment, the Fourth Circuit had held Virginia's two-year period for personal injury actions applied to a section 1983 claim.[170] Thus, a clear case of discrimination confronted the *Van Horn* court: the Virginia amendment afforded plaintiffs with claims under section 1983 only one year, while the state provided a two-year period for plaintiffs with analogous claims under state law. Consequently, the *Van Horn* court refused to absorb the discriminatory one-year period established by the Virginia amendment.[171]

In contrast, federal courts have absorbed a Tennessee statute of limitations[172] explicitly applicable to federal civil rights ac-

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[166] Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Brady v. Sowers, 453 F. Supp. 52 (W.D. Va. 1978); Brown v. Blake & Bane, Inc., 409 F. Supp. 1246 (E.D. Va. 1976); Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975); Edgerton v. Puckett, 391 F. Supp. 463 (W.D. Va. 1975).

[167] VA. CODE ANN. § 8-24 (1976).

[168] 392 F. Supp. 384 (E.D. Va. 1975).

[169] The court, quoting Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946), noted that applying state limitations periods to federal rights was a "remedial detail where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." 392 F. Supp. at 389. The *Van Horn* court also observed that when filling the interstices of federal rights of actions "federal courts for reasons of economy and federalism will often refer to the great corpus of state law." *Id.* at 388-89. *See* text accompanying notes 125-39 *supra.*

[170] Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).

[171] Other courts faced with such discriminatory schemes have reached similar results. In Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d 83 (5th Cir. 1947), the Fifth Circuit considered a one-year state statute of limitations intended to govern actions brought under the Fair Labor Standards Act. Because Congress failed to enact a statute of limitations for the Fair Labor Standards Act of 1938, wage and hour claims brought under the federal act in the absence of such a specifically applicable state period would have been governed by an analogous three-year state period for claims on an implied employment contract and a six-year limitation for claims under an express employment contract. Because the specifically applicable state statute provided a much shorter period for FLSA claims, the Fifth Circuit found it discriminatory and refused to allow its application to bar plaintiff's claims. For additional cases, see Rockton & Rion Ry. v. Davis, 159 F.2d 291 (4th Cir. 1946); Republic Pictures v. Kappler, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam,* 327 U.S. 757 (1946). *Cf.* Chambers v. Omaha Pub. School Dist., 536 F.2d 222, 229 (8th Cir. 1976) (Nebraska statute applicable to "[a]ll actions upon a liability created by a federal statute" not discriminatory; plaintiff's claims had no state law counterpart to afford a basis for comparison.).

[172] TENN. CODE ANN. § 28-304 (Bobbs-Merrill Supp. 1979).

tions.[173] The statute provides a one-year period for federal civil rights claims, as did the Virginia statute, but the courts have absorbed it because it also applies to a wide variety of similar state-created tort actions.[174]

Although the courts have never fully explained the rationale underlying the discrimination principle, its origins lie in *M'Culloch v. Maryland*.[175] There, the Court invalidated a state tax on the operations of all banks not chartered by the state when the only such bank was the Bank of the United States.[176] Although Chief Justice Marshall's opinion relied on notions of sovereignty and intergovernmental immunity, dictum at the end of the opinion suggests that the Constitution would permit the state to impose a nondiscriminatory tax:

> This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.[177]

Although dictum, it rests on sound political theory. Because the federal government cannot protect its interests by participating in a state's political process, only the supremacy clause prevents states from treating federal interests more harshly than state interests.[178] However, the political process is an effective safeguard

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[173] Johnson v. REA, 489 F.2d 525, 529 (6th Cir. 1973), *aff'd*, 421 U.S. 454 (1975) (Tennessee one-year period for civil rights claims applied to bar § 1981 action); Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972) (actions under 42 U.S.C. §§ 1983, 1985(3) barred by Tennessee one-year period); Williams v. Hollins, 428 F.2d 1221 (6th Cir. 1970) (Tennessee one-year period barred action under 42 U.S.C. § 1983); Beckum v. Tennessee Hotel, 341 F. Supp. 991 (W.D. Tenn. 1971).

[174] In fact, prior to 1969, the statute applied only to general tort actions. *See* TENN. CODE ANN. § 28-304 (Bobbs-Merrill 1955). In 1969, the Tennessee legislature amended the statute to cover claims arising under the federal civil rights statutes. *See* 1969 TENN. PUB. ACTS 43-44; Gentry v. Evans, 310 F. Supp. 840, 841 (E.D. Tenn. 1969) (mem.).

[175] 17 U.S. (4 Wheat.) 316 (1819).

[176] The petitioner's brief stated, "this tax is leveled exclusively at the branch of tbe United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other." 17 U.S. (4 Wheat.) at 392.

[177] *Id.* at 424.

[178] The dictum still applies today. In United States v. County of Fresno, 429 U.S. 452 (1977), for example, the Court relied heavily on the *M'Culloch* language. The issue was whether California could tax the possessory interests of federal employees in housing owned and supplied to them by the federal government. The United States argued that the federal employees occupied these houses solely to discharge their duties, and maintained that *M'Culloch* forbade the tax because it was levied on federal property. *Id.* at 457.

against burdens imposed by nondiscriminatory state laws: a state is not likely to emasculate rights of its creation.[179] Professor Ely employed this rationale to explain why Justice Marshall suggested that a nondiscriminatory tax on the real property of the Bank might be valid:

> The unity of interest with all Maryland property owners assured by this insistence on equal treatment would protect the Bank from serious disablement by taxes of this sort. The power to tax real or personal property *is* potentially the power to destroy. But people aren't lemmings and while they may agree to disadvantage themselves somewhat in the service of some overriding social good, they aren't in the habit of destroying themselves en masse.[180]

The Court, however, disagreed: "the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." *Id.* at 462. Because the Court found the federal employees were "no worse off under California tax laws than those who work for private employers and rent houses in the private sector," it held the tax nondiscriminatory and therefore valid. *Id.* at 465. *See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (sustaining nondiscriminatory tax on income of federal employees). *But see* United States v. Allegheny County, 322 U.S. 174, 177 (1944) (indicating that properties, functions and instrumentalities of the federal government are immune from state taxation in any form). The *Fresno* Court referred to *Allegheny County* as the "single arguable departure" from the principle that nondiscriminatory taxes, the legal incidence of which did not fall on the federal government, were constitutional. 429 U.S. at 462. However, in one case the Supreme Court harmonized *Allegheny County* with the general rule by finding that the tax involved fell on the federal "property itself, not on the privilege of using or possessing it." United States v. Detroit, 355 U.S. 466, 471 (1958).

The *M'Culloch* dictum, however, has not survived intact. Cases have found an absolute immunity, regardless of nondiscrimination, where states "impose taxes directly on the Federal Government, . . . [or where] the legal incidence of [the tax] falls on the Federal Government." United States v. County of Fresno, 429 U.S. at 459 (footnote omitted). *See* United States v. Tax Comm'n of Mississippi, 421 U.S. 599, 610 (1975); First Agricultural Nat'l Bank v. State Tax Comm'r, 392 U.S. 339, 347 (1968); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).

The distinction between legal incidence, which invokes absolute immunity, and mere economic incidence is not clear. Courts continue to confront this issue "on a case by case basis." United States v. New Mexico, 581 F.2d. 803, 806 (10th Cir. 1978). *See* United States v. Maryland, 471 F. Supp. 1030, 1036 (D. Md. 1979); Note, *Federal Immunity From State Taxation: A Reassessment,* 45 U. CHI. L. REV. 695 (1978).

[179] Some would differ with this logic. In *M'Culloch,* the petitioner urged the Court not to adopt a discrimination analysis to test the validity of the tax: "A criterion which has been proposed, is to see whether the tax has been laid, impartially, upon the State banks, as well as the Bank of the United States. Even this is an unsafe test; for the state governments may wish, and intend, to destroy their own banks." 17 U.S. (4 Wheat.) at 392.

[180] J. ELY, DEMOCRACY AND DISTRUST 85 (1980) (emphasis in original). *See also* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 205-06 (1980).

The discrimination branch of preemption thus serves a prophylactic function, affording the beneficiary of a federal right protection against burdensome state laws.

Other Supreme Court decisions illustrate this prophylactic function. In *McKnett v. St. Louis & San Francisco Ry.*,[181] the Court struck down a state law that denied state courts jurisdiction over federally-created claims arising in another state, but permitted state courts to hear similar state-created actions. The Court simply stated: "The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights under federal laws."[182] In *Testa v. Katt*[183] the Court was faced with a similar problem. The Rhode Island Supreme Court had held that the state courts lacked jurisdiction over an action seeking treble damages under the Emergency Price Control Act of 1942 because Rhode Island refused to enforce the "penal" statutes of another jurisdiction. The Supreme Court, citing *McKnett,* reversed because "this same type of claim arising under Rhode Island law would be enforced by that State's courts."[184]

There is a strong relationship between these discrimination cases and the problem of absorbing state statutes of limitations. As a general rule, federal courts should refuse to absorb state statutes which provide longer periods for analogous state claims. Even if the period for federal claims appears "reasonable," a court should not apply it unless the benefited party can clearly demonstrate that the period for the federal right is reasonable and the state action merits the extra time. The danger of burdening the assertion of federal rights posed by discriminatory limitations periods justifies such a stiff rule.

Courts might adopt a per se rule against absorbing discriminatory state time bars without allowing the state to show a justification for the discrimination. The opportunity has not arisen, apparently because most state time periods that discriminate against federal rights do so arbitrarily. A situation could be imagined, however, where the state action legitimately required a longer period. For example, a state might impose a one-year stat-

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[181] 292 U.S. 230 (1934).

[182] *Id.* at 234. In Republic Pictures v. Kappler, 327 U.S. 757 (1946) (per curiam), the Court, citing *McKnett*, struck down a state statute of limitations providing a six-month limitations period for actions arising under federal statutes, and a five-year period for similar actions arising under state law.

[183] 330 U.S. 386 (1947).

[184] *Id.* at 394.

ute of limitations on certain federal claims, and grant a two-year period for analogous state claims, because plaintiffs with state law claims must first pursue their grievances through administrative channels, a requirement not imposed on plaintiffs with federal claims. Arguably, courts should absorb the one-year period imposed by this hypothetical statute; there is really no "discrimination" against federal claimants because the administrative exhaustion requirement imposed on state law claimants accounts for the one-year difference in limitations periods.

Thus, where there is a substantial justification for an apparently discriminatory scheme, the federal courts should absorb the state period. The Fourth Circuit recently hinted that it would adopt such an approach. In *Johnson v. Davis,*[185] the court refused to absorb a state statute providing a one-year period for section 1983 actions because the state afforded a two-year period for analogous state claims. The court stated, "*absent some . . . reasonable basis* for applying a shorter period for remedying a 'constitutional tort' than for remedying the underlying state tort, we will disregard this special limitation on section 1983 actions."[186]

The two-part preemption analysis is relatively easy for courts to apply. Courts must first inquire whether a state limitations period is so short that it burdens the assertion of federal rights. If it does, that is the end of the matter—the period cannot be absorbed. If it does not, the court must consider whether the statute discriminates against federal rights, and if so, whether the rationale for the discrimination is sufficiently compelling.

The judicial compulsion to absorb non-burdensome and non-discriminatory state time periods does not extend to the full panoply of state limitations law. The treatment of the ancillary doctrines associated with statutes of limitations, to which this Project now turns, is not so fixed by *stare decisis* as to be calcified. Hence, the presumptive—as opposed to compulsory—application

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[185] 582 F.2d 1316 (4th Cir. 1978).

[186] *Id.* at 1319 (emphasis added). The court did consider whether a possible reasonable basis could be found for distinguishing between § 1983 actions and personal injury actions in light of the general purposes of statutes of limitations. The court inquired whether a § 1983 claim was likely to become stale earlier than a personal injury action, and whether the facts to be proved or the evidence to be considered differed for the two types of actions. Finding no differences, the court refused to absorb the discriminatory one year period.

Arguably, the *Johnson* court was too lenient with the standard it set for the state period. Courts should require a strong justification for state time periods that discriminate against federal rights. An explanation—even if reasonable—for a discriminatory scheme may not be sufficient to protect federal interests.

of state limitations law frees courts to choose among the ancillary doctrines and absorb only those that best effectuate federal policies.

V

PRESENT STATE OF THE LAW: SUBSIDIARY ISSUES

With few exceptions,[187] federal courts have steadfastly refused to deviate from the well-established practice of presumptively absorbing state limitations periods.[188] However, they are less hesitant to create uniform federal rules governing subsidiary issues related to the process of applying state statutes of limitations, such as tolling, characterization of the cause of action and definition of the time of accrual.[189] Although courts engage in a

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[187] *See, e.g.,* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (refusing to apply any state statute of limitations, holding federal policy requiring plaintiff to exhaust administrative remedies before bringing suit inconsistent with imposition of an absolute state period of limitations); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (refusing to apply two-year state limitations period in action for unseaworthiness because it would vitiate plaintiff's right to sue under the three-year federal limitations period applicable to Jones Act claims). In Public Adm'r v. Angela Compania Naviesa, S.A., 592 F.2d 58, 64 n.4 (2d Cir.), *cert. denied,* 443 U.S. 928 (1979), the court explicitly refused to follow *McAllister* because of intervening Supreme Court decisions.

[188] *See, e.g.,* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1965) (refusing to create federal limitations period for claims arising under § 301 of the Labor Management Relations Act). Despite inconsistency among the federal courts in choosing an appropriate limitations period for claims arising under the National Labor Relations Act, the Court refused to engage in "so bald a form of judicial innovation" as devising a uniform federal period of limitations. *Id.* at 701. The Court acknowledged the importance of uniform administration of the federal labor laws, but dismissed the argument for uniformity on the ground that the need for uniformity is compelling only when its "absence [threatens] the smooth functioning of [the] consensual processes" that Congress intended federal labor law to promote. *Id.* at 702. Because these processes have broken down by the time a case comes to trial, the Court implied that the need for uniformity was academic at best. *Id.*

However, Justice White, joined by Justices Douglas and Brennan, dissented, asserting that congressional "silence on the limitations matter" did not mean that Congress intended the federal courts to adopt diverse state laws. *Id.* at 710. Rather, Justice White argued that formulation of a uniform time period for Labor Management Relations Act claims "represents only another task in [the] process" of developing the law of labor contracts with which the Court was entrusted. *Id.* He noted that "there is no sense or justice in referring to 50 or more different statutes of limitations," thus treating employees and employers bound by the same labor contract differently, depending on the state in which suit was brought. *Id.* at 712. Second, he noted the complex administrative problems plaguing lower court determinations of what state period to apply. *Id.* at 712-13. These complexities, which the "fertile imagination of counsel" would exacerbate, would prolong litigation. *Id.* at 713. Finally, drawing an analogy to judicial creation of the common law doctrine of prescription, which presumes that judgments are paid after 20 years, he rejected the Court's reluctance to fashion a uniform federal limitations period. *Id.*

[189] *See, e.g.,* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961). Unlike the Court in UAW v. Hoosier Cardinal Corp., 383 U.S. 696

similar preëmption analysis with respect to these subsidiary issues,[190] the practical threshold level of federal interests necessary

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(1965), the Second Circuit in *Moviecolor* found uniformity a persuasive reason for adopting a uniform federal tolling doctrine in cases at law arising under the Clayton Act. The court acknowledged that the federal interest in uniformity did not suffice to override the presumptive absorption of state statutes of limitation, because Congress presumably would have written a uniform federal limitations period for antitrust actions (as it did in 1955) were the interest strong. 288 F.2d at 84. However, it did find the inconsistencies among federal courts as to the applicable law on the subsidiary issue of tolling compelling:

> Plainly Congress did not deem complete nation-wide uniformity of limitation essential in such cases, else it would have provided its own period, as for the subject with which we are here concerned, it now has done, 15 U.S.C.A. § 15b. But we still must endeavor to determine whether, on the *narrower issue* of the effect of the wrongdoer's concealment, Congress would have preferred uniformity among the federal courts with respect to the right it had created, a uniformity favorable to recoveries by plaintiffs, or uniformity as between the treatment of this right in federal courts and of rights of a related conceptual character in the courts of the state where the federal court sits.

Id. (emphasis added). The court reasoned that federal interests in uniform administration of rights, over which federal courts had exclusive jurisdiction, and in prolonging the period of suit during the concealment of the wrongful act by the defendant "transcend those of the states." *Id.* Thus, the Second Circuit in *Moviecolor* refused to absorb the forum state's tolling law and applied the fraudulent concealment doctrine which Holmberg v. Armrecht, 327 U.S. 392 (1946), had introduced into federal suits at equity.

See also Miller v. Smith, 615 F.2d 1037, 1042 (5th Cir. 1980) (holding that in civil rights suit, court may ignore state rule tolling limitations period during imprisonment unless prisoner first proves lack or access to federal courts while imprisoned); Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975) (federal law determines time of accrual in action under § 10b of Securities & Exchange Act of 1934); Mizell v. North Broward Hosp. Dist., 427 F.2d 468, 475 (5th Cir. 1970) (lower court's dismissal of civil rights claims on ground complaint time barred remanded for consideration of whether federal policies required tolling during pendency of related state claims in state court); Banana Distribs., Inc. v. United Fruit Co., 269 F.2d 790, 794 (2d Cir. 1959) (in antitrust claim that accrued before effective date of federal statute of limitations, court refused to absorb state law tolling statute where defendant absent from state, because federal service of process rules made defendant amenable to process while outside state); Pesola v. Inland Tool & Mfg., Inc., 423 F. Supp. 30 (E.D. Mich. 1976) (strong federal interest in private resolution of labor disputes under § 301 of Labor Management Relations Act required federal tolling rule during pendency of internal union procedures; despite tolling, claim time-barred); Layne v. International Bhd. of Elec. Workers, 418 F. Supp. 964, 965-66 (D.S.C. 1976) (federal law determines whether action under §§ 411 and 412 of LMRDA survives death of litigants). *Cf.* Mishkin, *supra* note 91, at 804-05:

> the question of how much [state law will be absorbed is] ... a matter to be determined by the exercise of federal discretion. The main point here is that a decision to apply state law as a matter of federal incorporation does not necessarily carry with it the obligation to adhere to the range and techniques which have been held to govern under *Erie;* there remains a freedom, after decision to incorporate local law, to control the extent and methods of that adoption which is not present when a determination has been made that state law will apply because the court has no competence to do otherwise....
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> Most pervasive, perhaps, is the principle that a decision to apply state law as a matter of federal judicial incorporation may frequently be made as to a single issue at a time.

[190] *See* Monaghan, *supra* note 1, at 12; notes 73-139 and accompanying text *supra.*

to justify fashioning federal common law is lower than for the initial decision to absorb a state period.[191]

Several subsidiary issues demand attention: (1) what body of law controls the characterization of federal rights; (2) what factors courts evaluate when characterizing that right; (3) what state law analogues courts ultimately choose; (4) when applicable state periods toll; (5) when federal rights accrue, survive, and revive; and (6) which state's statute controls when the cause of action does not arise in the forum state. In many of these areas, differing treatment of litigants, uncertainty, and judicial inefficiency compel judicial creation of uniform federal rules. In others, the problems associated with absorption of state law are not sufficiently pressing to justify deviation from state law. The objective of this selective absorption of state law and creation of federal law is to promote predictable time periods.

A. *Characterization of the Federal Cause of Action*

1. *What Law Controls*

Before a federal court can apply a state limitations period, it must choose the most analogous state cause of action. This process of analogy requires the court to determine the essential character of the federal claim. The federal right may resemble a tort, breach of contract, or some other state-created cause of action.

Circuit courts have split over whether state or federal law governs the characterization process.[192] In *UAW v. Hoosier Cardinal Corp.*,[193] the Court ruled that the characterization question, at least in cases arising under the National Labor Relations Act, "is

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[191] *See* Note, *supra* note 8, 53 COLUM. L. REV. 68, at 71-72:

> These related issues, such as when a cause of action accrues, need not be decided in accordance with state law despite the fact that it is a state statute which has fixed the period of limitation. The failure of a federal statute to provide a limitation period is difficult to remedy by judicial action, but the courts are well situated to write federal law on the subsidiary issues involved in the limitation of actions.

Cf. C. WRIGHT, *supra* note 4, at 288 (court has "greater flexibility . . . when state law is absorbed, as compared to the Erie-type situations where it is controlling of its own force").

[192] Although courts disagree whether state or federal law determines the essential nature of a cause of action, all agree that once a court chooses an analogy, state law governs interpretation of the state statute of limitations. *See, e.g.*, Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962); Ware v. Colonial Provision Co., 458 F. Supp. 1193, 1194 (D. Mass. 1978)

[193] 383 U.S. 696 (1975).

ultimately a question of federal law," but that "there is no reason to reject" a state characterization that is not unreasonable or inconsistent with federal policy.[194] Although it upheld the district court's characterization of the plaintiff's federal claims according to state law, the Court did not require courts to adopt state characterizations of federal rights; the words "there is no reason to reject" do not mean that "a court must apply" state law. Thus *UAW* left the lower courts free to apply federal law if federal interests so require. By refusing to establish a uniform federal characterization[195] and deferring to the lower courts' case-by-case evaluations of national interest, *UAW* contributed little consistency or predictability.[196] The circuit courts continue to look both to federal and state law in characterizing the essential nature of the claim.

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[194] *Id.* at 706.

[195] Cases arising under § 15 of the Sherman Antitrust Act before Congress attached a limitations period to it in 1955 (Act of July 7, 1955, Ch. 283, § 1, 69 Stat. 283, currently codified at 15 U.S.C. § 15b (1976)), exemplify the inconsistency that use of the state and federal approaches of characterization produces. The issue in the antitrust cases was whether an antitrust claim for treble damages was compensatory or punitive. Both the state and federal approach cases cited Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), to support their method of characterization. *Compare* Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912, 914 (7th Cir. 1951), *cert. denied,* 342 U.S. 947 (1952) (adopting state approach on the ground that *Chattanooga* meant only that the general federal statute of limitations for penalties and forfeitures did not apply to antitrust treble damage claims, not that *state* penalty periods were also inapplicable), *with* Fulton v. Loew's, Inc., 114 F. Supp. 676, 682 (D. Kan. 1953) (adopting federal approach on ground that *Chattanooga* meant that an antitrust suit for treble damages was necessarily compensatory because the Chattanooga Court did not analogize to the federal penalty period).

The rationale of the federal approach cases was that state law should not exert a "formative influence on federal substantive law" in a "field divorced from state regulation." Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F. Supp. 937, 941 (W.D. Mo. 1953). The antitrust claim was a "purely federal cause of action" over which the federal courts had exclusive jurisdiction. *Id.* The court in *Electric* also cited the benefits of uniformity of characterization to support its adoption of the federal approach. *Id.* at 942. The Second Circuit echoed this reasoning in adopting, as a matter of federal common law, the fraudulent concealment tolling doctrine in antitrust suits. *See* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961).

[196] *UAW* involved claims against an employer arising under § 301 of the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1976) [hereinafter cited as LMRA]. Cases dealing with other sections of the labor act or other federal statutes without limitations periods can thus distinguish *UAW;* courts can argue that federal interests surrounding other national rights, unlike those underlying § 301, *do* require reference to federal precedent when a court determines the essential nature of a cause of action. Thus, *UAW* is not controlling outside § 301. Further, courts can circumvent *UAW* by finding that the state characterization is unreasonable or inconsistent with federal policy. *See* text accompanying note 194 *supra.* Finally, the federal courts do not consistently follow *UAW* even in § 301 cases. *See, e.g.,* DeArroya v. Sindicato de Trabajadores Packing, 425 F.2d 281, 283 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970) (stating *UAW* required absorption of *a* state statute of limitation but left open question of *which* statute); notes 230-31 *infra.*

Cases arising under the Civil Rights Acts exhibit the most significant disparity in the characterization process. Several circuits, often citing *UAW*, have decided that characterization is a matter of federal law; the Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits characterize claims arising under the Reconstruction Era civil rights statutes[197] according to federal law.[198] These "federal approach"[199] circuits usually attempt to choose the analogy that best effectuates the federal policies underlying the federal statutory right.[200] Exemplary of the "federal approach" is *Shouse v. Pierce County,*[201] a Ninth Circuit case brought under section 1983.

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[197] *See* 42 U.S.C. §§ 1981, 1982, 1983, 1985(3) (1976).

[198] Second Circuit: *See, e.g.,* Rosenberg v. Martin, 478 F.2d 520, 526-27 (2d Cir.), *cert. denied,* 414 U.S. 872 (1973) (citing only to federal precedent in determining that analogous period for § 1983 claim is that for a "liability created by statute"); Swan v. Board of Higber Educ., 319 F.2d 56, 60 (2d Cir. 1963).

Fourth Circuit: *See, e.g.,* Johnson v. Davis, 582 F.2d 1316, 1318-19 (4th Cir. 1978) (citing a federal precedent in deciding that two-year period for "personal injuries" most analogous for § 1983 claim); Almond v. Kent, 459 F.2d 200, 203-04 (4tb Cir. 1972) (citing federal precedent in applying state personal injuries period to § 1983 claim).

Sixth Circuit: *See, e.g.,* Mason v. Owens-Illinois, Inc., 517 F.2d 520, 521-22 (6th Cir. 1975) (no reference to state law in characterizing § 1981 claim as having no common law analogue; applied period for "liability created by statute").

Seventh Circuit: Beard v. Robinson, 563 F.2d 331, 334-38 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (court looked exclusively to federal precedent in characterizing § 1981 claim as "fundamentally different" from a common law tort and applying statutory liability period).

Ninth Circuit: Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970) ("Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983"; statutory liability period most analogous); Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962) (federal court "determines for itself the nature of the right conferred by the federal statute"; statutory liability period applied to § 1983 claim).

Tenth Circuit: Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978) ("the characterization of this [§ 1981] action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law"; contract period most analogous) (quoting *UAW,* 383 U.S. at 705).

[199] The phrase "federal approach" does *not* connote a consistent methodology; rather, it connotes a failure to use state law. A federal court may conduct a de novo inquiry into the nature of the federal right, or it may simply rely on federal precedent for the appropriate characterization without discussing the rationale or origin of the precedent. This precedent itself may or may not use a "state approach." In such cases, it may be difficult to determine why the court felt compelled to use a certain characterization; i.e., which law required it to do so. If a court looks solely to federal precedent, for all practical purposes its *approach* is federal, because it is actually determining what a federal, not state, court would do. *See, e.g.,* Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975); Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), *cert. denied,* 414 U.S. 872 (1973).

[200] *See, e.g.,* Beard v. Robinson, 563 F.2d 331, 334-38 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (§ 1981 claim); Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970) (§ 1983 claim). Effectuation of federal policy is a notion implicit in the policy of absorbing state law; absorption could not occur if a state period seriously impaired the policy underlying a statutory right. *See* notes 165-79 and accompanying text *supra.*

[201] 559 F.2d 1142 (9th Cir. 1977).

The *Shouse* court stated that a federal court "determines for itself the nature of the right conferred by the federal statute."[202] It noted that the effectuation of federal interests guides the process of characterization and that a federal court must choose the state period that is "sufficiently generous . . . to preserve the remedial spirit of the federal civil rights actions."[203]

Some circuits exhibit great inconsistency in their approaches to characterization. These courts look both to federal and state law when they characterize, or use language that suggests a state approach, yet apply federal characterizations. For example,[204] the Third Circuit applies both state and federal law in the characterization process. In *Wilson v. Sharon Steel Corp.*,[205] a racial discrimination suit under section 1981, the court held that the "limitation to be applied is that which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law."[206] The court remanded the case to the district court for a determination of the applicable period, directing it to examine authority in Pennsyl-

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[202] *Id.* at 1146 n.5 (quoting Smith v. Cremins, 308 F.2d 187, 189 (9th Cir. 1962)).

[203] *Id.* at 1146. Examining federal precedent and the federal interests at stake, the court found that the most analogous state limitations period would be one for "liability created by statute." Because the forum had no such period, the court applied the "catch-all" period. *Id.* at 1146-47. Those cases that apply the "statutory liability" or "catch-all" periods do not appear to characterize the federal right at all; finding no analogue in the state's common or statutory law, these courts adopt the statutory liability periods almost by default. However, these "federal approach" courts must still analyze the essential nature of the federal cause of action—as a matter of federal law—to determine that no state law equivalent exists and that a "catch-all" or "statutory liability" period is appropriate.

Circuits choosing to apply these periods to Civil Rights Act claims, thus circumventing a case-by-case process of analyzing the particular facts underlying a claim, include: the Second Circuit, *see, e.g.*, Keyse v. California Texas Oil Corp., 590 F.2d 45 (2d Cir. 1978) (three-year statutory liability period for § 1981 claim); Rosenberg v. Martin, 478 F.2d 520 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973) (six-year "statutory liability" period applied to § 1983 claim), the Seventh Circuit, *see, e.g.*, Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (five-year "statutory liability" period applied to § 1981 claim); Baker v. F & F Inv. Co., 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (five year "catch-all" period applied to § 1982 action), and the Ninth Circuit, *see, e.g.*, Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (three-year "catch-all" period applied to § 1983 claim); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962) (three-year "statutory liability" period applied to § 1983 claim).

[204] The inconsistency within individual circuits is the product both of confusion as to what the federal interests underlying a particular right require and lack of congeniality among circuit panels. Panels sitting in different states frequently disagree on the state cause of action most analogous to the same federal claim. *See* notes 287-94 and accompanying text *infra*. *See generally* Note, *supra* note 148, at 126-31.

[205] 549 F.2d 276 (3d Cir. 1977).

[206] *Id.* at 280.

vania state law on the question of the essential nature of the section 1981 claim.[207] Other Third Circuit decisions have also adopted the state approach in adjudicating Civil Rights Act claims.[208] By contrast, the Third Circuit has in other cases referred primarily to federal law to characterize a federal right.[209] For example, the court in *Meyers v. Pennypack Woods Home Ownership Ass'n.*[210] looked predominantly to federal precedent and relied on its own de novo—and, by definition, federal—findings as to the nature of the plaintiff's section 1982 claim.[211] The court justified its analogy to a state tort cause of action on federal policy grounds,[212] a common practice in "pure" federal approach cases. On the other hand, the court also used language indicative of a "state" approach and cited state precedents.[213]

Like the Third Circuit, the First Circuit is also erratic in litigation arising under the Civil Rights Act. For example, in *Walden III, Inc. v. Rhode Island,*[214] the court applied a three-year tort period to a section 1983 action. It signalled its adoption of the state approach by stating that plaintiff's "alleged injuries are properly construed as personal injuries under Rhode Island law."[215] Yet, in *Ware v. Colonial Provision Co.*[216] a federal district

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[207] *Id.*

[208] *See, e.g.,* Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977). In characterizing the nature of §§ 1983 and 1985 claims alleging a conspiracy to bring false criminal charges against the plaintiff under color of state law, the court in *Jennings* held that "federal courts must ascertain the underlying cause of action under state law and apply the limitation period which the state would apply if the action had been brought in state court." *Id.* at 1216. The court then considered Pennsylvania state cases to determine whether plaintiff's federal claim sounded in the tort of malicious abuse of process, or the tort of malicious use of process. *Id.* at 1216-19. *See also* Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974) (fragmenting civil rights claim into three analogies and looking to state law to determine what claim did not sound in).

[209] *See, e.g.,* Roberts v. Magnetic Metals Co., 611 F.2d 450, 458-59 (3d Cir. 1979) (concurring opinion, Sloviter, J.) (emphasis in original):

> [o]nce the federal court determines that there is more than one state statute of limitations which it can borrow, the selection of the one most appropriate to use must be made by considerations which comport with federal policy. The state policy of repose is relevant only if, and to the extent to wbich, it is consistent with the underlying federal claim. . . . It is important to recognize, therefore, that it is *federal* law and *federal* policy which is paramount, and if the federal policy leads to the state law, it is done as an application of a federal choice of law.

[210] 559 F.2d 894 (3d Cir. 1977).

[211] *Id.* at 901-02.

[212] *Id.* at 903 n.26. However, the court did not base its holding on policy grounds.

[213] *Id.* at 902-03.

[214] 576 F.2d 945 (1st Cir. 1978).

[215] *Id.* at 947.

[216] 458 F. Supp. 1193 (D. Mass. 1978).

court sitting in Massachusetts applied a two-year tort period to a section 1981 claim, but held that federal law "governs the question" of "what is the nature of a § 1981 action."[217] In *Partin v. St. Johnsbury Co.*,[218] the district court acknowledged the uncertainty in the First Circuit about what law governs the process of characterization: "[i]t is unclear whether, in adopting the analogous state statute of limitations, a federal court must also look to whether state law would characterize the federal action as *ex contractu* or *ex delicto* . . . ."[219]

Only the Fifth Circuit looks exclusively to state law to characterize federal civil rights claims. In two recent cases, *Shaw v. McCorkle*[220] and *Ingram v. Steven Robert Corp.*,[221] the Fifth Circuit dispelled all doubts that it regarded state law as controlling, despite previous Fifth Circuit opinions holding the contrary.[222] The Fifth Circuit noted that its earlier cases required "determination based on *federal law* of the 'essential nature' of the federal claim,"[223] but emphasized that this line of cases had nonetheless gone on to apply state law characterizations. The court stated that "references to federal law . . . in this line tend to be of little import. Federal interests are thus generally subordinated to a mechanical application of state law."[224] Finding that even the ostensibly federal approach cases in the Fifth Circuit "depend substantially on state law in categorizing the essential nature of the claim,"[225] the court unequivocally adopted a state approach: "how would a [state] court categorize this action or an action seeking similar relief?"[226]

The circuits have also inconsistently characterized claims arising under the Labor Management Relations Act[227] and the Labor

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[217] *Id.* at 1194. *See also* Holden v. Boston Hous. Auth., 400 F. Supp. 399 (D. Mass. 1975) (two-year tort period applied to § 1983 claim).

[218] 447 F. Supp. 1297 (D.R.I. 1978) (§ 1981 claim).

[219] *Id.* at 1301 n.3. The court failed to resolve the uncertainty because the state and federal characterizations were identical on the facts before the court. *Id.*

[220] 537 F.2d 1289 (5th Cir. 1976) (§§ 1983 and 1985 claims).

[221] 547 F.2d 1260 (5th Cir. 1977) (§§ 1981 and 1983 claims).

[222] Ingram v. Steven Robert Corp., 547 F.2d 1260, 1261 (5th Cir. 1977); Shaw v. McCorkle, 537 F.2d 1289, 1292-93 (5th Cir. 1976).

[223] 537 F.2d at 1292 (emphasis in original); 547 F.2d at 126. *See, e.g.*, McGuire v. Baker, 421 F.2d 895, 898 (5th Cir.), *cert. denied*, 400 U.S. 820 (1970); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967). It is virtually impossible to tell what, if any, *approach* these cases took. Their importance lies in *Shaw's* and *Ingram's* rejection of any suggestion of a federal approach.

[224] 547 F.2d at 1261.

[225] 537 F.2d at 1293.

[226] *Id.*

[227] 29 U.S.C. §§ 141-87 (1976).

Management Reporting and Disclosure Act.[228] For example, the Fifth Circuit has clearly adopted the state approach,[229] while the Seventh and Eighth Circuits have adopted a hybrid approach in labor cases.[230] The other circuits employ a federal approach in cases arising under the national labor acts.[231] Circuits have taken more consistent approaches when characterizing claims arising

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[228] 29 U.S.C. §§ 401-531 (1976) [hereinafter cited as LMRDA].

[229] As with other Fifth Circuit cases, *see* note 223 *supra*, it is difficult to tell what approach the Fifth Circuit *thought* it took. It *actually* applied state law. *See, e.g.*, Sewell v. Grand Lodge of the Int'l Ass'n of Mach. & Aero. Workers, 445 F.2d 545, 549 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972) (applying Alabama law to determine nature of claim of wrongful discharge from employment under 29 U.S.C. §§ 411(a)(1), (2) (1976)); Dantagnan v. I.L.A. Local 1418, 496 F.2d 400, 403 (5th Cir. 1974) (referring to Louisiana law to determine if claim under 29 U.S.C. § 411(a)(3) (1976) to recover illegally collected union dues was *ex contracto* or *ex delicto*).

[230] Two cases in the Eighth Circuit dealing with LMRA § 301, Butler v. Local Union 823, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975), and Sandobal v. Armour & Co., 429 F.2d 249 (8th Cir. 1970), indicate a split in the circuit over characterization. Undertaking a de novo classification of the plaintiff's federal claim, the *Butler* court held that it had to choose a period that best promotes federal interests. 514 F.2d at 446. Giving superficial recognition to *UAW*, the court stated that "[w]hen a plaintiff sues on a federal cause of action, the character of the action—*e.g.*, whether it is one in 'tort' or in 'contract'—is a federal question." *Id.* In contrast, the court in *Sandobal* characterized plaintiff's § 301 claim according to Nebraska law. 429 F.2d at 252-54. The *Sandobal* court was uncertain whether jurisdiction was based on diversity of citizenship or on § 301 of the LMRDA. *Id.* at 251. Nonetheless, the court decided that, on either basis, it had to choose the analogy that a state court would choose.

The Seventh Circuit has also applied both state and federal approaches in labor cases. In Grant v. Mulvihill Bros. Motor Serv., Inc., 428 F. Supp. 45 (N.D. Ill. 1976), the court held that it could best effectuate federal labor policy by characterizing, as a matter of federal law, a suit seeking relief under § 301 against plaintiff's employer and union as sounding in contract. *Id.* at 47. In contrast, the court in Mikelson v. Wisconsin Bridge & Iron Co., 359 F. Supp. 444 (W.D. Wis. 1973), adopted a state characterization of a similar suit; the court held the state's characterization was not binding, but adopted it nonetheless "in the interest of uniformity." *Id.* at 447. The court did not explain whether it sought to promote uniformity among federal courts or between the state and federal system.

[231] First Circuit: *See, e.g.*, DeArroyo v. Sindicato de Trabajadores Packing, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (looking exclusively to federal precedent for LMRA § 301 claim); Second Circuit: *See, e.g.*, Abrams v. Carrier Corp., 434 F.2d 1234, 1251-52 (2d Cir. 1970), *cert denied*, 401 U.S. 1009 (1971) (action under LMRA § 301 and LMRDA § 102; "it is for the federal court to consider the character of the claim involved, and give effect to the nature and purpose of the federal act from which the claim derives and to the federal objectives pursued"); Fourth Circuit: *See, e.g.*, Howard v. Aluminum Workers' Int'l Union, 589 F.2d 771 (4th Cir. 1978) (LMRA § 9 and LMRDA § 101; exclusive reference to federal precedent); Coleman v. Kroger Co., 399 F. Supp. 724, 729 (W.D. Va. 1975) (looking exclusively to federal precedent; "characterization [of LMRA § 301 claim] . . . is a matter of federal law"); Sixth Circuit: *See, e.g.*, Pesola v. Inland Tool & Mfg., Inc., 423 F. Supp. 30, 33 (E.D. Mich. 1976) (looking exclusively to federal precedent; "[f]ederal law determines which state statute is the most appropriate [for LMRA § 301 claim]); Ninth Circuit: *See, e.g.*, Price v. Southern Pac. Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978) (looking exclusively to federal precedent; "[c]haracterization [of 45 U.S.C. § 152 (Railway Labor Act)] is a federal question").

under other federal statutes. With the exception of the Ninth Circuit,[232] courts considering claims brought under section 10(b) of the Securities Exchange Act of 1934,[233] and SEC Rule 10b-5[234] promulgated thereunder, uniformly follow a federal approach.[235] Courts that have heard claims for damages implied under the Constitution have unanimously adopted the federal approach.[236] Finally, courts adhere to the federal approach[237] in cases arising under section 9(b) of the Military Selective Service Act[238] of 1967.[239]

Courts generally fail to provide adequate justification for their adoption of either the federal or the state approach. Several circuits following the federal approach mechanically cite *UAW*, stating merely that characterization is "ultimately a federal question," without analyzing the federal interests that justify the departure from the presumptive absorption of state law classifica-

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In cases arising under the national labor acts courts following the "federal approach" generally do not explain why they choose to characterize according to federal law and deviate from *UAW*'s presumptive application of state law characterizations. Courts refer to federal precedent or perform *de novo* categorization of the federal right without citing the federal interests that have overridden the presumptive absorption of state characterizations. Most "federal approach" courts simply focus on the court's statement in *UAW* that "characterization . . . is ultimately a question of federal law." *UAW*, 383 U.S. at 706. *See, e.g.*, Price v. Southern Pac. Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978); Coleman v. Kroger Co., 399 F. Supp. 724, 729 (W.D. Va. 1975).

[232] *Compare* Fratt v. Robinson, 203 F.2d 627, 635 (9th Cir. 1953) (analyzing Washington state law to decide that liability for fraud under the Securities Exchange Act of 1934 does not arise "upon a statute"), *with* Douglass v. Glenn E. Hinton Inv., Inc., 440 F.2d 912, 915-16 (9th Cir. 1971) (relying exclusively upon federal objectives underlying the statute and federal interests in uniformity).

[233] 15 U.S.C. § 78j (1976) [hereinafter cited as 1934 Act].

[234] 17 C.F.R. § 240.10b-5 (1979).

[235] *See* note 272 *infra*.

[236] *See* note 271 *infra*.

[237] Although the circuits seem largely consistent in their method of characterizing these federal causes of action, individual circuits lack internal consistency in characterizing different federal rights. For example, the Fifth Circuit has employed the state approach in adjudicating claims arising under the Civil Rights Acts, *see* notes 220-26 and accompanying text *supra*, but uses a federal approach in analogizing 1934 Act claims and claims under the Military Selective Service Act, 45 U.S.C. § 459 (b) (1972) [hereinafter cited as MSSA] (repealed 1974 and substantially recodified under 38 U.S.C.A. § 2021(a) (1979)). *See* notes 272 & 273 *infra*. The Third Circuit has often used a state approach in civil rights litigation, *see* notes 205-208 and accompanying text *supra*, but uses an exclusively federal approach in 1934 Act cases. *See* note 272 *infra*. Finally, the First Circuit has adopted a hybrid approach in civil rights cases, *see* notes 214-19 and accompanying text *supra*, but has chosen not to do so for labor cases. *See* note 272 *infra*.

[238] 45 U.S.C. § 459(b) (1972) (repealed by Pub. L. No. 93-508 and substantially recodified under 38 U.S.C.A. § 2021(a) (1979)).

[239] *See* note 273 *infra*.

tions of federal rights.[240] Most courts fail to offer any rationale for their choices.[241]

To an idealist envisioning uniform federal law, the inconsistency in, and often complete lack of, methods and rationales for the question of what law governs characterization is distressing. But even though inconsistency alone may provide insufficient impetus for change,[242] the uncertainty produced by inconsistency should concern both the idealist and the pragmatist. Not only do the circuits take different approaches in characterizing federal rights, but courts within the same circuit alternate unpredictably between state and federal approaches both in analyzing different federal rights and in examining the same federal claim in different cases. The unpredictability that pervades the characterization process impairs the ability of federal litigants to know before trial what state time period the court will apply. Because it deprives both plaintiff[243] and defendant of adequate notice of how long claims remain viable, this uncertainty contravenes both the policy of giving plaintiff every reasonable opportunity to bring an action and the remedial, notice-giving function of time bars. Uniform reliance on federal law[244] to characterize federal claims would

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[240] *See* Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978) (§ 1981 claim); Cox v. Stanton, 381 F. Supp. 349, 352 (E.D.N.C. 1974), *rev'd on other grounds,* 529 F.2d 47 (4th Cir. 1975) (§ 1983 claim). In Ingram v. Steven Robert Corp., 547 F.2d 1260 (5th Cir. 1977), the Fifth Circuit did offer reasons for its presumptive application of state law. It asserted that a state statute of limitations does not impair federal interests because it does not abrogate a federal plaintiff's right to sue, but only regulates the time in which he may exercise the right. Thus, "[i]f federal interests are affected, they are not so severely restricted when the state limitations provision applies that we need fear the definition of those interests in state terms . . . ." *Id.* at 1262. The court's conclusion that federal interests do not demand a uniform federal rule of characterization seems flawed. A uniform judicial policy to look exclusively to federal law when characterizing would afford litigants greater certainty concerning the type of analogy and length of period that the court would ultimately chose. *See* notes 12-46 and accompanying text *supra.*

[241] *See, e.g.,* Brogan v. Wiggins School Dist., 588 F.2d 409 (10th Cir. 1978) (§ 1983); Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974) (§ 1983); Bell v. Aerodex, 473 F.2d 869 (5th Cir. 1973) (MSSA § 459); Gray v. International Ass'n of Heat & Frost Insulators & Asbestos Workers, 416 F.2d 313 (6th Cir. 1969) (LMRA); Ware v. Colonial Provisions Co., 458 F. Supp. 1193 (D. Mass. 1978) (§ 1981).

[242] *See Limitations Developments, supra* note 12, at 1266-67 (inconsistency not a strong argument for national uniformity; variation in types and lengths of state limitations periods does not siguificantly increase entropy within federal system).

[243] *See* Ingram v. Steven Robert Corp., 547 F.2d 1260, 1263 (5th Cir. 1977) ("the uncertainty about which limitations provision applies affords inadequate notice to potential plaintiffs").

[244] Because characterization of a federal statutory right defines and limits the right, it often requires evaluation of federal policy and congressional intent. *See* notes 246-73 and accompanying text *infra.* Because federal courts are better able to discern and weigh na-

promote certainty and would better comport with the proper function of the federal courts.[245]

2. *Factors Considered Once a Federal or State Approach is Chosen*

After deciding whether to characterize the federal right according to state or federal law, a court must determine what factors it will consider in choosing an analogous statute of limitations. For example, the court might base its choice on the similarity of the facts of the underlying transactions or the type of relief that plaintiff requests. Alternatively, it might rely exclusively upon the statutory or constitutional language and the abstract nature of the rights and duties it creates. Finally, the court might consider how each possible choice would effectuate federal interests. Not sur-

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tional policy and are more likely to give full consideration to statutory purposes than are state courts, characterization seems a proper federal function. *See* Note, *supra* note 191, at 71 (choice of analogous state statute "might well be said to contain a federal question—characterization of the cause of action"); Note, *supra* note 140, 82 HARV. L. REV. at 1528; *cf.* Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970) ("Congress has not evinced any intention to defer to the states the definition of the federal right created in section 1983"). Moreover, "[a]mple authority in analogous situations would support the application of federal law to classify the nature of [a] federal right." Note, 65 HARV. L. REV. 1457, 1458 (1952). For example, federal courts have chosen not to absorb state law in deciding whether a claim survives a litigant's death and when a cause of action accrues because, like characterization, such questions require interpretation of the nature of the federal statutory right. *See, e.g.*, Rawlings v. Ray, 312 U.S. 96, 98 (1941) (accrual "is a federal question and turns upon the construction of . . . the applicable federal legislation"); Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (survival "depends . . . on the nature of the cause of action"). *But see* Hill, *supra* note 75, at 99 (silence of Congress in not establishing limitations period indicates that federal court should also absorb state law on subsidiary issues).

[245] Uncertainty about the length and type of limitations periods applicable to federal claims clearly provides sufficient reason for courts to look uniformly to federal law in characterizing. Thus the rule set forth in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1965), requiring presumptive application of state law characterizations, demands reexamination. Under *UAW*, a court may abandon this presumption when the state "characterization is unreasonable or otherwise inconsistent with [the] policy [behind the statute involved]." *Id.* at 706. The Court obviously was referring to state characterizations that burden or discriminate against federal rights. *See* notes 149-86 and accompanying text *supra*. However, these traditional branches of preemption do not sufficiently protect federal interests in this context.

If the RDA compels a federal court to absorb state law, only a direct conflict between state law and federal statutory policies would justify a court's refusal to apply the former. Justice White's dissent in *UAW* indicates that the court mistakenly assumed that the RDA controlled on the issue of absorbing state law characterizations. *See* 383 U.S. at 709. This error explains the majority's restrictive description of when a federal court can deviate from the absorption of state law to fill the interstices of federal law.

Because the RDA is inapplicable to federally-created rights, a federal court absorbs state law only as a matter of choice. Moreover, federal courts can exercise discretion to account for *any* factors that they consider relevant to the determination of whether to absorb or abandon state law; creation of federal common law is a free-form balancing

prisingly, circuits employ all of these approaches, applying different approaches to different federal causes of action and often applying inconsistent approaches to the same federal right.[246] In choosing factors, as in deciding what law governs characterization, courts do not satisfactorily explain the reasons—if any—that guide their choices.

Cases arising under the Civil Rights Acts exemplify the absence of uniform treatment. For example, the Tenth and Third Circuits principally look to the factual allegations and relief requested in plaintiff's complaint when analogizing the federal right to a state cause of action. In *Meyers v. Pennypack Woods Home Ownership Association*,[247] the Third Circuit examined defendant's conduct, plaintiff's alleged injuries and the relief requested in analogizing a civil rights claim to a common law tort.[248] The court acknowledged that federal policy underlying the right justified its choice, but emphasized that the policy was "not a basis of [its] decision."[249] Similarly, the Tenth Circuit in *Zuniga v. Amfac*

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process in which only stare decisis defines the boundaries of a court's discretion. Courts have implicitly recognized the wide range of relevant factors. *See, e.g.*, Johnson v. REA, 421 U.S. 454, 463-64 (1975) (considering interrelationship of state limitations rules in refusing to create new federal tolling law); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 712-13 (1966) (dissenting opinion, White, J.) (considering judicial efficiency and avoidance of "litigation-creating complexities" sufficient justification for establishing uniform federal characterization of suits under LMRA § 301); Williams v. Walsh, 558 F.2d 667, 674-76 (2d Cir. 1977) (considering the "principles of federalism" and "the policy of repose which underlies statutes of limitations" in determining whether to ignore state tolling law); Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970) (considering concepts of federalism in determining whether lower court should have tolled period applicable to claims under §§ 1981, 1983, 1985). *See also* Mishkin, *supra* note 91, at 812 (determination of whether to reject state law requires not only analysis of statutory policy, but "introduc[es] an additional range of considerations having to do with the federal nature of the Union. . . . Moreover, the choice of law issue involves examination of . . . special factors not generally important in the resolution of a direct substantive question"); Monaghan, *supra* note 1, at 12 ("the cases are somewhat ad hoc—reflecting a crazy-quilt pattern of statutory, constitutional, and pragmatic considerations"); Note, *supra* note 8, 69 YALE L.J. at 1438 ("federal courts have come to rely upon increasingly less explicit legislative policies against using state law, [and] the specific reasons for rejecting state law have tended to become both obscure and unrelated to the issue in dispute. An example of this lack of clarity is the frequent appeal to uniformity as a reason for rejecting state decisional rules.").

[246] *See generally* Annot., 45 A.L.R. FED. 548 (1979). A court's choice to apply state or federal law when characterizing does not resolve which factors the court will consider in the characterization process. For example, a court may decide to follow the characterization that state law would impose, yet look only to the state's characterization of various factors chosen as a matter of federal law.

[247] 559 F.2d 894 (3d Cir. 1977). Other cases in the Third Circuit looking to the factual averments in the complaint include Jennings v. Shuman, 567 F.2d 1213, 1216-19 (3d Cir. 1977) and Ammlung v. City of Chester, 494 F.2d 811, 813-14 (3d Cir. 1974).

[248] 559 F.2d at 900-03.

[249] *Id.* at 903 n.26.

Foods, Inc.[250] scrutinized the allegations in the complaint in determining that plaintiff's section 1981 claim of employment discrimination seeking re-employment and backpay resembled a "tortious discriminatory [act] infringing contractual rights."[251]

Several circuits have avoided application of inconsistent periods—an inevitable product of case-by-case categorization of facts and allegations—by looking solely to the nature of the federal right and the policies that support it.[252] By analyzing the bare statutory or constitutional language, the Second, Seventh and Ninth Circuits have found state "catch-all" periods or periods for "statutorily created liability" most analogous to federal civil rights

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[250] 580 F.2d 380 (10th Cir. 1978).

[251] *Id.* at 387.

[252] A serious problem that occurs in circuits that look to the particular factual circumstances of each case is the fragmentation of a single federal right into several time periods. For example, Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977) and Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974), involved actions under § 1983 of the Civil Rights Act. Focusing on the particular factual allegations in the complaints, the court divided the claim in each case into different common law analogues and applied different time periods to different counts of the complaints. In *Ammlung* the court found that plaintiff's allegations sounded both in trespass and false arrest. Although plaintiff brought both counts under § 1983, the court assigned a two-year period to the trespass count and a one-year period to the false arrest claim. 494 F.2d at 813-14. Similarly, in *Jennings* the court held that the facts underlying the action stated claims of both malicious use of process and malicious abuse of process; the court barred the former claim, but not the latter. 467 F.2d at 1219. *See also* Williams v. Walsh, 558 F.2d 667, 670 (2d Cir. 1977) (dicta suggesting that fragmentation of single § 1983 claim is appropriate); Chambers v. Omaha Pub. School Dist., 536 F.2d 222, 227 (8th Cir. 1976) (fragmentation acceptable in "appropriate circumstances").

Even more common than the fragmentation of a single statutory cause of action is the application of different state law analogues to claims arising under different sections of the same statutory scheme—both when joined in the same suit and when litigated separately. Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967) is typical. The court applied a six-year trespass period to plaintiff's § 1983 claim, but a one-year period for conspiracy to commit a tortious act to plaintiff's § 1985 claim. *Id.* at 689-90. *See also* Green v. Ten Eyck, 572 F.2d 1233, 1237-39 (8th Cir. 1978) (three-year period for offense by public officer applied to § 1983 claim, but 180-day period for state discriminatory housing practices applied to §§ 1981 and 1982 claims).

Surely Congress did not intend courts to multiply a single statutory cause of action or different rights of action under one statutory scheme into several common law analogues, thus establishing diverse limitations periods for actions under one federal statute. Fragmentation destroys the integrity of a unified body of law that Congress ostensibly intended to be applied uniformly to different factual settings. For example, even if 42 U.S.C. § 1988 mandates the absorption of state law in civil rights actions (*see* note 138 and accompanying text *supra*), it surely does not compel the splintering of the Civil Rights Act, the "overall tenor [of which] ... is unitary even though the individual sections are aimed at particular constitutional harms.... Suits under any one of these sections are founded upon deprivation of the rights guaranteed by the thirteenth and fourteenth amendments." Note, *supra* note 204, at 132. Moreover, congressional intent disfavoring fragmentation of federal legis-

claims.[253] Because these circuits consider federal civil rights claims fundamentally different from any preexisting common law action, the lack of an analogy in state law for the federal rights and duties created thus requires adoption of catch-all periods almost by default.[254] These courts also emphasize the strong federal interests in uniformity and administrative efficiency. The Seventh Circuit in *Beard v. Robinson*[255] asserted:

> By following the . . . approach of applying a uniform statute of limitations, we avoid the often strained process of characterizing civil rights claims as common law torts, and the "[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action."[256]

The Fourth Circuit has also adopted a uniform approach—but not by choosing a catch-all or statutory liability period. Instead, it restricts its examination to the nature of the federal right and remedy established by the statutory languge. After focusing on the language and history of section 1983, the court in *Almond v. Kent*[257] concluded that "every cause of action under 1983 which is well-founded results from 'personal injuries.' "[258] The Court consequently applied the state's two-year statute of limitations for personal injury actions. The court also noted, however, that the nature of the 1983 right "depend[ed] on federal considerations,"[259] and the two-year statute of limitation would apply

lation is manifest in federal statutes which do have limitations periods; in such cases, one period generally applies to all causes of action arising under an entire statutory scheme. *See, e.g.,* 15 U.S.C. § 15(b) (1976) (single period for all antitrust claims); 35 U.S.C. § 286 (1976) (single period for all patent infringement claims). Several courts have implicitly recognized the significance of this problem, choosing to effectuate congressional intent by refusing to use the fact approach in characterizing federal claims. *See, e.g.,* Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 902 (1978) (uniform application of statutory liability periods to all civil rights claims); Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962) (dictum suggesting application of statutory liability period to all civil rights claims). *But see* Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978) (although possibly leading to fragmentation, fact approach preferable to single, uniform period because "more in keeping" with teaching of *UAW*).

[253] *See* note 198 *supra.*

[254] *See, e.g.,* Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (§ 1981 claim); Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970) (§ 1983 claim).

[255] 563 F.2d 331 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978).

[256] *Id.* at 337 (quoting Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962)).

[257] 459 F.2d 200 (4th Cir. 1972).

[258] *Id.* at 204.

[259] *Id.*

"[e]ven if we [were to] conclude that a § 1983 action is not a suit for 'personal injuries' within the Virginia concept of that type of litigation."[260]

The Fifth and Eighth Circuits have taken different approaches. Recent cases in both circuits apply the fact approach and the uniform statutory-liability or catch-all approach to civil rights claims.[261] For example, in *Glasscoe v. Howell*[262] the Eighth Circuit held that either the catch-all or statutory liability period applied to plaintiff's section 1983 claim.[263] Examining the statutory language, the court concluded that the right created by the statute could not be "narrowly characterized as merely an action for assault and battery,"[264] and held that "section 1983 . . . clearly creates rights and imposes obligations different from any which would exist at common law."[265] However, in *Savage v. United States*,[266] the same circuit looked solely at the factual allegations in the complaint in deciding that a civil rights claim was most analogous to a state cause of action for malicious prosecution.[267] The Eighth Circuit[268] has repeatedly refused to resolve these conflicts in its approach.[269]

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[260] *Id.*

[261] *See* Beard v. Robinson, 563 F.2d 331, 337 n.7 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (listing cases from Fifth and Eighth Circuits).

[262] 431 F.2d 863 (8th Cir. 1970) (claim alleging unnecessary use of violence in arrest by police).

[263] *Id.* at 865.

[264] *Id.*

[265] *Id.* (quoting Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962)).

[266] 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

[267] *Id.* at 451-52. *See also* Johnson v. Dailey, 479 F.2d 86, 88 (8th Cir. 1973) (following *Savage*).

[268] The Fifth Circuit is similarly split. In Ingram v. Steven Robert Corp., 547 F.2d 1260 (5th Cir. 1977), the court focused on the relief plaintiff sought and "the circumstances of [the] case," concluding that his rights under §§ 1981 and 1983 were analogous to a tort cause of action under the forum state's law. *Id.* at 1263. Yet in Nevels v. Wilson, 423 F.2d 691 (5th Cir. 1970), the court applied a statutory liability period to a similar claim. *See also* White v. Padgett, 475 F.2d 79, 85 (5th Cir.), *cert. denied*, 414 U.S. 861 (1973).

[269] The Eighth Circuit has missed several opportunities to resolve the conflict. In Reed v. Hutto, 486 F.2d 534 (8th Cir. 1973), the court declined because the applicable limitations period would have been three years whether the court chose a statutory liability period or one for negligence claims. In Chambers v. Omaha Pub. School Dist., 536 F.2d 222 (8th Cir. 1976), the court failed to resolve the inconsistency because the forum state had enacted a statute expressly limiting federal statutory causes of action to three years, obviating the need to analogize plaintiff's §§ 1981 and 1983 claims to common law equivalents. In Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977), the court again refused to resolve the split. It held that the limitations period was three years, regardless of whether it followed *Glasscoe* or *Savage*.

The circuits have also taken inconsistent approaches in other contexts. Cases arising under the national labor acts[270] and *Bivens* suits for damages implied under the Constitution[271] reflect an absence of uniformity similar to that of the civil rights cases. In SEC

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[270] The following cases have taken a factual approach in analogizing labor claims: Dantagnan v. L.L.A. Local 1418, 496 F.2d 400, 401-02 (5th Cir. 1974) (considered factual averments in complaint and character of relief requested and absorbed 10-year quasi-contract period for LMRDA § 101(a) (3) claim); Jones v. TWA, 495 F.2d 790, 799 (2d Cir. 1974) (considered remedy requested in determining six-year contract period applicable to claim under § 6 of National Railway Labor Act); Sandobal v. Armour & Co., 429 F.2d 249, 252-56 (8th Cir. 1970) (considered facts and relief requested in holding written contract period most analogous to claim under LMRA § 310).

The following cases have examined the rights created by the statutory language: Howard v. Aluminum Workers Int'l Union & Local 400, 589 F.2d 771, 773-74 (4th Cir. 1978) (analyzed nature of statutory rights and duties and adopted tort analogy for LMRA § 9, personal injury analogy for LMRA § 101); Price v. Southern Pac. Transp. Co., 586 F.2d 750, 753 (9th Cir. 1978) (National Railway Labor Act § 2 imposing duties upon defendant requiring application of three-year statutory liability period); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir. 1970) (considering nature of plaintiff's statutory right to relief and union's duty in suit under LMRA § 301 and applying one-year tort period); Pesola v. Inland Tool & Mfg., Inc., 423 F. Supp. 30, 33-34 (E.D. Mich. 1976) (examining nature of statutory right and drawing tort analogy to LMRA § 301).

The following cases have analogized according to federal policy interests: Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 447-48 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975) (federal labor policy dictating contract analogy for claims under LMRA § 301); Abrams v. Carrier Corp., 434 F.2d 1234, 1251-53 (2d Cir. 1970) (weighing federal interest in efficiency and uniformity and the policies underlying the national labor laws and applying six-year contract period to LMRA § 301 and LMRDA § 412); Grant v. Mulvihill Bros. Motor Serv., Inc., 428 F. Supp. 45, 47-48 (N.D. Ill. 1976) (despite logical similarity of claim to tort action, federal labor policy dispositive of period chosen for claim under LMRA § 301 and adopted contract analogy applied).

[271] The following cases analogize claims for damages implied under the Constitution according to a factual approach: Shifrin v. Wilson, 412 F. Supp. 1282, 1301-02 (D.C. Cir. 1976) (negligence period applied after a "close reading of plaintiff's complaint"); Felder v. Daly, 403 F. Supp. 1324, 1326 (S.D.N.Y. 1975) (intentional tort analogy drawn from examination of complaint).

The following cases analogize according to federal interests, the nature of the right, or both: Beard v. Robinson, 563 F.2d 331, 338 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (unique nature of the federal constitutional right considered and federal interest in treating members of same conspiracy alike required statutory liability analogy); Regan v. Sullivan, 557 F.2d 300, 303-07 (2d Cir. 1977) (focusing on unique nature of the constitutional right, which precludes analogy based on facts of case to common law claims, and applying catch-all period to claim for damages under fourth, fifth, sixth, ninth, and fourteenth amendments); De Malherbe v. International Union of Elevator Constructors, 449 F. Supp. 1335, 1351 (N.D. Cal. 1978) (statutory liability period applicable to claim under fifth amendment because of unique nature of constitutional right and federal interests in uniformity and judicial efficiency); Ervin v. Lanier, 404 F. Supp. 15, 20 (E.D.N.Y. 1975) (three-year period for actions based on statutory liability held applicable, even though *Bivens* suit is not such an action, because of federal interest in uniformly treating *Bivens* and Civil Rights Act claims).

10b-5 actions[272] and actions under the Military Selective Service Act[273] however, courts exhibit consistent approaches. Just as for characterization, inconsistency among and within circuits in factors considered when analogizing undermines the ability of parties to determine with certainty the period applicable to the claims they are litigating.

3. *Analogies Adopted*

The lack of uniformity in the characterization process—both as to choice of law and method of analogizing—predictably produces divergence in the types[274] of analogies courts draw. Cases involving civil rights claims exemplify both inter- and intra-circuit confusion. For example, the First Circuit analogizes section 1981 claims[275] to state tort causes of action.[276] The Second Circuit uniformly applies statutory liability periods to section 1981 claims.[277] The Tenth Circuit has analogized a section 1981 claim to a state contract cause of action.[278] Finally, in *Green v. Ten Eyck,*[279] the Eighth Circuit found that plaintiff's section 1981 action was most

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[272] Courts considering 10b-5 actions analogize to best effectuate federal interests. *See, e.g.,* Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977) (analogy to local blue sky law "best effectuates federal policy"); LaRosa Bldg. v. Equitable Life Assurance Soc'y, 542 F.2d 990, 992 (7th Cir. 1976) (local blue sky period adopted because of federal policies of protecting the "uninformed, the ignorant, the gullible" and of increasing uniformity in federal courts' approach to limitations issues); Douglass v. Glenn E. Hinton Invs., Inc., 440 F.2d 912, 914-15 (9th Cir. 1971) (policy of protecting federal plaintiff's right to sue and interest in federal uniformity mandating three-year fraud period); Vanderboom v. Sexton, 422 F.2d 1233, 1240 (8th Cir.), *cert. denied,* 400 U.S. 852 (1970) (commonality of purpose and effectuation of federal securities policy controlling in adoption of local two-year securities period);, Charney v. Thomas, 372 F.2d 97, 100 (6th Cir. 1967) (federal policy compelling fraud analogy because local blue sky law dissimilar to federal securities law).

[273] Courts analogizing under the MSSA use the fact approach. *See, e.g.,* Bell v. Aerodex, Inc., 473 F.2d 869, 872 (5th Cir. 1973) (looked exclusively to relief requested in MSSA § 9 suit in choosing period for restoration of wages); Marshall v. Chrysler Corp., 378 F. Supp. 94, 97-98 (E.D. Mich. 1974) (in MSSA § 9 suit looked to facts of underlying transaction and to relief requested and chose personal injury analogy).

[274] The courts also choose periods of different *lengths,* but this is an inevitable product of the absorption process. However, federal courts can achieve uniformity as to the *types* of analogies drawn.

[275] *See generally* Note, *Filing of an Employment Discrimination Charge under Title VII as Tolling the Statute of Limitations Applicable to a 1981 Action: The Unanswered Questions of Johnson v. REA,* 26 CASE W. RES. L. REV. 889, 916-31 (1976).

[276] Partin v. St. Johnsbury's Co., 447 F. Supp. 1297, 1301 (D.R.I. 1978); Ware v. Colonial Provision Co., 458 F. Supp. 1193, 1196 (D. Mass. 1978).

[277] *See, e.g.,* Keyse v. California Tex. Oil Corp., 590 F.2d 45, 47 (2d Cir. 1978).

[278] Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 386 (10th Cir. 1978).

[279] 572 F.2d 1233 (8th Cir. 1978).

analogous to a state claim for discriminatory housing practices; it remained viable for only 180 days.[280] Circuits adjudicating actions under sections 1983,[281] 1985(3),[282] 1982,[283] SEC rule 10b-5,[284] the national labor acts[285] and the Military Selective Service Act[286] have also drawn differing analogies.

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[280] *Id.* at 1237 (looking to facts alleged).

[281] *See, e.g.,* Brogan v. Wiggins School Dist., 588 F.2d 409, 412 (10th Cir. 1978) (six-year contract analogy); Walden III, Inc. v. Rhode Island, 576 F.2d 945, 946 (1st Cir. 1978) (three-year tort analogy); Green v. Ten Eyck, 572 F.2d 1233, 1239 (8th Cir. 1978) (§ 1983 analogized to three-year period for derelict by one acting "in his official capacity"); Jennings v. Shuman, 567 F.2d 1213, 1216-17 (3d Cir. 1977) (§ 1983 claim divided into one-year malicious use of process and two-year malicious abuse of process analogies); Howell v. Cataldi, 464 F.2d 272, 277 (3d Cir. 1972) (two-year personal injury analogy); Garner v. Stephens, 460 F.2d 1144, 1145-48 (6th Cir. 1972) (five-year statutory liability period); Beard v. Stephens, 372 F.2d 685, 688-90 (5th Cir. 1967) (six-year trespass period for § 1983); Wakat v. Harlib, 253 F.2d 59, 63-64 (7th Cir. 1958) (five-year catch-all period). *See also* Note, *Federal Borrowing of Arkansas Statutes of Limitations in Enforcement of the Reconstruction Civil Rights Statutes,* 31 ARK. L. REV. 692, 697-700 (1978); note 198 *supra. See generally* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 116-31.

[282] *See, e.g.,* Peterson v. Fink, 515 F.2d 815, 816 (8th Cir. 1975) (§ 1985(3) analogous to unlawful conduct of public officers; three-year period applied); Cresswhite v. Brown, 424 F.2d 495, 496 n.2 (10th Cir. 1970) (two-year period for "injury to the rights of another, not arising on contract" applied to § 1985(3) claims); McGuire v. Baker, 421 F.2d 895, 898-99 (5th Cir.), *cert. denied,* 400 U.S. 820 (1970) (two-year period for action on a debt applied to § 1985(3) claim); Jones v. Bombeck, 375 F.2d 737, 738 (3d Cir. 1967) (two-year tort analogy applied to § 1985(3) claim) (alternate holding); Wakat v. Harlib, 253 F.2d 59, 63-64 (7th Cir. 1958) (five-year catch-all period applied to § 1983(5) claim). *See generally* Note, *supra* note 281, 31 ARK. L. REV. at 697-700.

[283] *See, e.g.,* Green v. Ten Eyck, 572 F.2d 1233, 1237-38 (8th Cir. 1978) (180-day period in Missouri Discriminatory Housing Practices Act most analogous to § 1982 claim); Meyers v. Pennypack Woods Home Own. Ass'n, 559 F.2d 894, 900-01 (3d Cir. 1977) (six-year period applicable to actions on a debt, contract or personal injury applied to § 1982 claim); Baker v. F&F Inv., 420 F.2d 1191, 1198 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970) (five-year catch-all period applied to § 1982 claim).

[284] *See* note 275 *supra. See generally* Martin, *Statutes of Limitations in 10b-5 Actions: Which State Statute is Applicable?,* 29 BUS. LAW. 443, 447-50 (1974); Raskin & Enyart, *Which Statute of Limitations in a 10b-5 Action?,* 51 DENVER L.J. 301, 303-14 (1974); Note, *Statutes of Limitations in 10b-5 Actions,* 39 U. MO. K.C. L. REV. 283, 287-89 (1970-71).

[285] For claims under LMRDA § 101, see, e.g., Howard v. Aluminum Workers Local 400, 589 F.2d 771, 774 (4th Cir. 1978) (two-year personal injury period applied to LMRDA § 101 claim); Dantagnan v. I.L.A. Local 1418, 496 F.2d 400, 401-03 (5tb Cir. 1974) (ten-year quasi-contract period); Sewell v. Grand Lodge of Int'l Ass'n of Macbinists, 445 F.2d 545, 549-50 (5th Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972) (one-year tort period).

For claims under LMRA § 301, see, e.g., Butler v. Local 823, 514 F.2d 442, 446-48 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975) (five-year contract period applied to LMRA § 301 claim); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 286-87 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970) (one-year tort period); Pesola v. Inland Tool & Mfg. Co., 423 F. Supp. 30, 33-34 (E.D. Mich. 1976) (three-year tort period); Carpenters & Millwrights Health Benefit Trust Fund v. Domestic Insulation Co., 387 F. Supp. 144, 148 (D. Colo. 1975) (six-year contract period); Mikelson v. Wisconsin Bridge & Iron Co., 359 F. Supp. 444, 447 (W.D. Wis. 1973) (six-year contract period).

[286] *See* Greathouse v. Babcock & Wilcox Co., 381 F. Supp. 156, 163 (N.D. Ohio 1974) (either oral contract or statutory liability period applicable to claim under MSSA § 9); *see also* note 273 *supra.*

These intercircuit disparities reflect the confusion in this area of the law. However, the widespread differences *within* circuits are even more distressing. These conflicts undermine predictability much more than do differences between circuits. For example, the Sixth Circuit's analogies for section 1981 claims are notoriously erratic. In *Johnson v. REA,*[287] a Sixth Circuit panel applied a Tennessee statute that provided a one-year period for federal civil rights suits.[288] However, in *Marlowe v. Fisher Body*[289] another Sixth Circuit panel absorbed Michigan's three-year statute of limitations for personal injury.[290] The Sixth Circuit chose still another analogy in *Mason v. Owens-Illinois, Inc.,*[291] applying a six-year statutory liability period.[292] Similar disparity exists within the Third, Fifth and Sixth Circuits with respect to claims under sections 1985(3)[293] and 1983.[294]

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[287] 489 F.2d 525 (6th Cir. 1973), *aff'd,* 421 U.S. 454 (1975).

[288] *Id.* at 529.

[289] 489 F.2d 1057 (6th Cir. 1973).

[290] *Id.* at 1063. *See generally* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 121-23 (use of personal injury analogy in civil rights actions).

[291] 517 F.2d 520 (6th Cir. 1975).

[292] *Id.* at 521-22.

[293] Fifth Circuit: *See, e.g.,* Shaw v. McCorkle, 547 F.2d 1289, 1291-95 (5th Cir. 1976) (six-year contract period); McGuire v. Baker, 421 F.2d 895, 898-99 (5th Cir.), *cert. denied,* 400 U.S. 820 (1970) (two-year period for action on a debt); Beard v. Stephens, 372 F.2d 685, 689 (5th Cir. 1967) (one-year period for conspiracy to commit a tortious act applied to § 1985(3) claim).

Sixth Circuit: *See, e.g.,* Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977) (one-year malicious prosecution and false arrest period); Garner v. Stephens, 460 F.2d 1144, 1146-48 (6th Cir. 1972) (five-year statutory liability period).

[294] Third Circuit: *See, e.g.,* Jennings v. Shuman, 567 F.2d 1213, 1217-19 (3d Cir. 1977) (§ 1983 claim fragmented into one-year malicious use of process and two-year malicious abuse of process analogies); Ammlung v. City of Chester, 494 F.2d 811, 814-15 (3d Cir. 1974) (§ 1983 claim fragmented on basis of facts into one-year false arrest/false imprisonment and two-year trespass analogies); Howell v. Cataldi, 464 F.2d 272, 276 (3d Cir. 1972) (two-year period for personal injuries).

Fifth Circuit: *See, e.g.,* Ingram v. Steven Robert Corp., 547 F.2d 1260, 1262-63 (5th Cir. 1977) (one-year tort period); White v. Padgett, 475 F.2d 79, 85 (5th Cir.), *cert. denied,* 414 U.S. 861 (1973) (three-year statutory liability period).

Sixth Circuit: *See, e.g.,* Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977) (one-year malicious prosecution period); Garner v. Stephens, 460 F.2d 1144, 1146-48 (6th Cir. 1972) (six-year statutory liability period).

The First Circuit demonstrates a similar conflict. *See* Ware v. Colonial Provision Co., 458 F. Supp. 1193, 1196 (D. Mass. 1978) (applying two-year period); Currington v. Polaroid Corp., 457 F. Supp. 922, 923 (D. Mass. 1978) (applying two-year period for private right of action for racial discrimination in employment) (mem.); Sims v. United Com. Travelers, 343 F. Supp. 112, 115 (D. Mass. 1972) (applying six-year provision for contract enforcement) (mem.). *See also* Daughtry v. King's Dep't Stores, Inc., 608 F.2d 906, 910 (1st Cir. 1979) (failing to resolve conflict).

It is especially difficult to predict the applicable period in circuits adhering to the fact approach. Opinions from those circuits have little precedential value. Unless the fact pattern of the litigant's case is identical to those in the reported cases, he cannot be certain how the court will characterize his complaint.[295] Minor variations in the type of relief requested for the same wrong may result in a different analogy. Even if a circuit consistently analogizes to a tort or contract period, uncertainty may still prevail because there are innumerable types of tortious wrongs (*e.g.*, trespass, negligence, battery and slander) and contractual breaches (*e.g.*, of written contracts, oral contracts and contracts implied in fact), each with a different time period.[296] As long as a court looks to the facts pleaded and the relief requested, little certainty will be possible.

The purposes of time bars demand that litigants be able to predict with certainty how long a claim remains timely. Unpredictability undermines the institutional purposes of limitations periods.[297] The possibility that any one of several analogies with different time limits may apply eliminates the stability and order that a period of limitations should accord to property interests.[298] The absence of a certain, predictable period also negates the convenience[299] that statutes of limitations are designed to produce. Ideally, limitations periods reduce the burden on court dockets by barring stale claims. However, in circuits which analyze the facts and remedies requested in each case, or which are inconsistent in the approaches they adopt, plaintiffs may bring suits after one possibly analogous period has run in the hope of persuading the court to analogize their suits to other causes of action. Moreover, judicial inconsistency encourages litigants to appeal cases in the hope that the appellate court will analogize the claims differently.[300]

The absence of predictable periods also undermines the remedial,[301] notice-giving aspect of time bars. When his potential

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[295] *See* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 119-20; Note, *supra* note 275, at 930.

[296] *See* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 119-20.

[297] *See* notes 17-25 and accompanying text *supra.*

[298] *See* notes 18-20 and accompanying text *supra.*

[299] *See* notes 21-22 and accompanying text *supra.*

[300] *See* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 120. Because the analogizing process encourages appeals—which circuit courts often grant with instructions to the district court to proceed to the merits—analogizing often results in inefficient use of judicial resources.

[301] *See* notes 26-29 and accompanying text *supra.*

liability rests on a federal statute without a limitations provision, the defendant cannot know how long he must preserve evidence for his defense.[302]

Finally, allowing a plaintiff to bring his action under any of several possible analogies undermines the promotional function of time bars.[303] Uncertainty as to the applicable period may be a two-edged sword: the analogy chosen by the court may benefit a dilatory plaintiff, or it may deprive a plaintiff of a remedy when he honestly believed his suit to be timely. Limitations periods should encourage claimants to bring suit promptly, thus avoiding stale claims, yet preserve every reasonable opportunity for remedying their grievances. Inconsistencies in the analogizing process upset this balance and undermine predictability.

Analogizing federal rights of action not only fails to serve the fundamental purposes of time bars,[304] but also may invite abuse.

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[302] Uncertainty in many circuits about the length and type of period applicable to a federal statute may render an attorney's error in determining the most analogous statute of limitations "reasonable," and thus would not subject him to liability for malpractice. *Cf.* Lucas v. Hamm, 56 Cal. 2d 583, 592-93, 364 P.2d 685, 689-90, 15 Cal. Rptr. 821, 825-27 (1961) (although attorney's estate plan invalidated due to rule against perpetuities, attorney not negligent due to complexity of law of perpetuities).

[303] *See* notes 31-35 and accompanying text *supra.*

[304] At least two commentators have alluded to the problem of forum shopping inherent in the analogizing process. *See* Note, *Laches in Federal Substantive Law: Relation to Statutes of Limitations,* 56 B.U. L. Rev. 970, 984 (1976); Note, *supra* note 8, 53 Colum. L. Rev. 68, at 77. These critics suggest that tardy plaintiffs can search for the forum with the most liberal time limitations. *See* Note, 56 B.U. L. Rev., *supra,* at 894.

It is necessary to define precisely what "forum shopping" means in this context. It is clearly not the forum shopping between the federal and state systems that the Court in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), sought to curtail; plaintiffs can bring most federal question cases in state courts, and federal courts absorb the same limitations law that would apply in state courts (including borrowing statutes per Cope v. Anderson, 331 U.S. 461 (1947)).

Where jurisdiction is concurrent, a plaintiff may, of course, forum shop hy choosing federal court to take advantage of the court's likely bias toward federal causes of action. *See generally* Note, *The Federal Common Law, supra* note 140, at 1528 (inherent attractiveness of federal judiciary). However, this situation is not unique to the statutes of limitations area, because a favorably disposed federal court is always available where jurisdiction is concurrent. This is hardly troubling, because Congress established the federal system to provide plaintiffs with an alternative to a possibly parochial and prejudiced state court system.

Thus, the only forum shopping that the absorption process is likely to promote is in the choice of federal forums. This problem seems insignificant. First, the plaintiff will always have a choice of federal forums in a federal question case; he can always choose the forum with the most favorable law. *See* H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962) *cert. denied,* 372 U.S. 928 (1963) ("[a] certain amount of forum shopping inevitably results from our federal system"). Forum shopping for limitations law is not a unique problem. Second, the restrictive venue provisions in 28 U.S.C. § 1391 (1976) for federal question cases and personal jurisdiction requirements limit the choice of forums; § 1391(b) restricts federal question cases to districts where all defendants reside or where

Uncertainty may provide a court flexibility to analogize capriciously to a short period in order to dismiss the case and avoid deciding a particular issue.[305] More significantly, because some federal claims have no state common law analogues, the analogizing process may be inherently inappropriate. For example, several courts have held that claims arising under the Civil Rights Acts are unique.[306] Indeed, they do not sound in common law tort or contract, but "creat[e] rights and impos[e] obligations different from any which would exist at common law in the absence of [a] statute."[307] "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[308] Similarly, it may be inappropriate to analogize actions under section 10(b) of the Securities and Exchange Act of 1934,[309] the national labor laws,[310] and claims for

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the cause of action arose. *Cf.* 28 U.S.C. § 1391(c) (1976) ("corporation may be sued in any ... district in which ... incorporated or licensed to do business or is doing business"). Third, because almost all jurisdictions have borrowing statutes, although the forum state may have an unusually long period, the court will not apply that period unless the plaintiff is also a resident of the forum state and can take advantage of the "resident plaintiff exception." *See* notes 418-28 and accompanying text *infra.*

However, the federal plaintiff has some choices. First, he may have a choice between states that follow the "single place of arising" theory and those that adhere to the "multiple place of arising" theory—a choice which may produce different periods. *See* notes 412-14 and accompanying text *infra.* Second, when using a borrowing statute a federal court first analogizes the action under the forum's laws and then borrows the analogous period of the borrowee state. *See, e.g.,* Arneil v. Ramsey, 550 F.2d 774, 779-80 (2d Cir. 1977). A plaintiff may have a choice of different periods if forum "A" consistently analogizes to a tort period, thus always taking the short tort period of a borrowee state, and forum "B" consistently analogizes to a contract period, thus taking the longer contract period of a borrowee state.

[305] *See* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 118.

[306] *See, e.g.,* Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978); Glasscoe v. Howell, 431 F.2d 863, 865 (8th Cir. 1970) (holding that § 1983 right cannot "be narrowly characterized as merely an action for assault and battery"); Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962). *But see* Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 386 (10th Cir. 1978) ("no doubt that there are some differences between a civil rights claim ... and [state] ... claims, but we cannot say that a comparable claim is not found in the contract and tort causes of action").

[307] Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962) (*quoted in* Glasscoe v. Howell, 431 F.2d 863, 865 (8th Cir. 1970)).

[308] Monroe v. Pape, 365 U.S. 167, 196 (1961) (concurring opinion, Harlan, J.) (quoted in Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978)).

[309] Legislative history clearly indicates that Congress intended securities actions to have short limitations periods—partly to prevent plaintiffs from taking advantage of fluctuating securities values. *See* Newman v. Prior, 518 F.2d 97, 100 n.4 (9th Cir. 1975); Martin, *supra* note 284, at 454-56; Raskin & Enyart, *supra* note 284, at 302. Thus, analogizing a rule 10b-5 claim to common law fraud periods, which average four years in length, ignores the

damages implied under the Constitution.[311] In short, by analogizing courts may create fiction—they may arbitrarily grasp a state period for a federal claim without an appropriate state analogue.[312] Such searching is tantamount to the judicial creation of periods of limitation for federal rights—the same "bald . . . form of judicial innovation"[313] that the Supreme Court has discouraged.

4. *Judicial Streamlining of the Analogy Process*

a. *Uniform Selection of State Periods.* The disparity within circuits in the types and lengths of periods found most analogous to claims arising under federal statutes demands reform. The current lack of predictability is more than a mere inconvenience. It

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fundamental federal policy underlying the statute. *See* Martin, *supra* note 284, at 457; Raskin & Enyart, *supra* note 284, at 316. Moreover, "it is universally true that in order to establish . . . civil liability . . . under section 10(b) and rule 10b-5, it is not necessary to allege and prove the classic elements of common law fraud." Martin, *supra* note 284, at 457. *See* Raskin & Enyart, *supra* note 284, at 315. *But cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (requiring scienter for civil liability claim under rule 10b-5). The incongruity between the elements of and policy behind a securities action and the often-invoked fraud analogy, *see* note 272 *supra,* counsels against use of the analogizing process. However, both Martin, *supra* note 284, at 459, and Raskin & Enyart, *supra* note 284, at 316, recommend uniform adoption of local blue-sky analogies because of their short periods and great resemblance to the rule 10b-5 cause of action.

[310] *See* Gatlin v. Missouri-Pac. R.R., 475 F. Supp. 1083, 1087 (E.D. Ark. 1979) ("duty of fair representation [judicially derived from the national labor laws] does not have a truly satisfactory counterpart in most state laws; rather, it is a *sui generis* right and duty").

[311] Most courts have analogized claims for damages implied under the Constitution to statutory liability periods. These courts uniformly recognize that the analogy is not wholly satisfactory because no statute defines the federal right. However, they assert that it is the best analogy possible due to the fundamental differences between common law causes of action and constitutional rights. *See, e.g.,* Beard v. Robinson, 563 F.2d 331, 338 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (adopting statutory liability period because interests behind state causes of action possibly "inconsistent [with] or even hostile" to those underlying constitutional actions) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 (1971)); Regan v. Sullivan, 557 F.2d 300, 304 (2d Cir. 1977) (absorbing statutory liability period because "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right") (quoting *Cremins)*; De Malherbe v. International Union of Elevator Const., 449 F. Supp. 1335, 1345-50 (N.D. Cal. 1978) (absorbing statutory liability period because constitutional right fundamentally different from one sounding in tort or contract).

[312] Such arbitrary searching obviously diminishes judicial efficiency. Instead of ruling expeditiously on limitations defenses by referring to a certain body of limitations law, courts expend valuable time and effort in determining the least incongruous analogy to unique federal rights. *Cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 712-13 (1966) (dissenting opinion,White, J.) (criticizing majority's refusal to establish uniform period for claims under LMRA § 301 because decision would spawn "unnecessary complexities and opportunities for vexatious litigation").

[313] *Id.* at 701.

arguably burdens the assertion of federal rights sufficiently to justify creation of uniform federal rules. Reform is possible either through legislation, which Congress is unlikely to enact, or through judicial streamlining of the present system.

Perhaps the simplest judicial remedy is uniformly to apply state "catch-all" or "statutory liability" periods to all federal causes of action without limitations periods.[314] The Second, Seventh, and Ninth Circuits have adopted this approach for all claims arising under the Civil Rights Acts.[315] Because determination of whether state or federal law governs characterization is necessary only if the court analogizes on a case-by-case basis, this approach avoids one source of intra-circuit disparity. Moreover, absorption of the statutory liability period is more appropriate than adoption of common law analogues because, by definition, the former applies to claims not found in the general catalogue of common law actions. Thus, statutory liability periods are well suited to those federal claims, such as implied damages actions under the Constitution,[316] that lack common law analogues.[317]

A second solution is the application of a single state law analogy to all claims arising under a particular federal statute. The Fourth Circuit applies a personal injury analogy to all section 1983 claims,[318] and the First Circuit has acknowledged that "it is obviously preferable that one statute of limitations, such as that provided for torts, apply generally to most if not all §1983 actions arising in a particular jurisdiction." [319] At least two commentators have recommended that all eleven circuits uniformly absorb state blue sky periods for claims arising under section 10(b) of the Securities and Exchange Act of 1934.[320] The Seventh Circuit has done so on the ground that the approach tends to produce a more "orderly" development of the law.[321] On the other hand,

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[314] Of course, this remedy would be unavailable in those few states lacking "catch-all" or "statutory liability" periods.

[315] *See* Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 97, 124 ("The Seventh Circuit's consistent use of catch-all limitations in federal civil rights litigation fosters predictability. Parties can assess in advance whether their actions are barred.").

[316] *See* note 311 and accompanying text *supra*.

[317] Catch-all periods are less appropriate. Although not expressly limiting any particular common law right, and thus ostensibly tailored to statutory claims, they apply to any statutory *or* common law cause of action not specified in a state's remaining limitations provisions.

[318] *See, e.g.*, Johnson v. Davis, 582 F.2d 1316, 1319 (4th Cir. 1978); Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972).

[319] Walden, III, Inc. v. Rhode Island, 576 F.2d 945, 947 (1st Cir. 1978).

[320] *See* Martin, *supra* note 284, at 459; Raskin & Enyart, *supra* note 284, at 316.

[321] LaRosa Bldg. Corp. v. Equitable Life Assurance Soc'y, 542 F.2d 990, 992 (7th Cir. 1976).

the Ninth Circuit has chosen to apply a fraud analogy to all rule 10b-5 suits for reasons of predictability.[322]

A third possibility is to analogize to federal statutes of limitations.[323] This approach might promote uniform administration of federal rights and reduce forum-shopping among circuits.[324] But analogizing to federal periods entails several problems. Most significant, stare decisis has probably foreclosed deviation from state law. Unlike the resolution of the subsidiary issues, the absorption of state law has become a matter of judicial compulsion,[325] and federal courts deviate from the practice only when absorption would vitiate a federal statutory right.[326]

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[322] *See, e.g.,* Douglass v. Glenn E. Hinton Indus., 440 F.2d 912, 916 (9th Cir. 1971).

[323] *Cf.* Note, *supra* note 304, 56 B.U. L. REV. at 984-87 (advocating reference to federal rather than state limitations periods as guides for applying laches).

[324] *See* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 229-30 (1958) (concurring opinion, Brennan, J.) (applying federal statute of limitations to admiralty claim); Note, *supra* note 304, 56 B.U. L. REV. at 985.

[325] *See* notes 139-46 and accompanying text *supra.*

[326] *See, e.g.,* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1966) (refusing to establish a uniform federal period for LMRA § 301 claims because not "*vital* to the implementation of federal labor policy") (emphasis added); Roberts v. Magnetic Metals Co., 611 F.2d 450, 456 (3d Cir. 1979) (concurring opinion, Sloviter, J.) ("the instructions we have received from the Supreme Court are unambignous: in the absence of a federal limitations period, resort must be had to the applicable state statute of limitations."). Those few courts which have analogized to federal periods have justified their choices on classic preemption grounds. *See* notes 163-79 and accompanying text *supra.* For example, in McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), the Court refused to apply a two-year period for state-created personal injury actions, although the personal injury cause of action resembled plaintiff's claim for damages due to the unseaworthiness of his employer's vessel. Instead, the Court applied the three-year federal period applicable to suits for maritime negligence under the Jones Act, 46 U.S.C. § 688 (1976). The majority reasoned that application of the shorter two-year period to the unseaworthiness claim would deprive a plaintiff of his right to sue for a full three years under the Jones Act. It noted that a claimant must, for all practical purposes, bring these claims in the same suit because res judicata as to one claim would bar a subsequent suit on the other. 357 U.S. at 224-25. Although it also cited other reasons for adopting a federal period, the Court's opinion primarily reflected concern for the destruction of a specific federal right. Indeed, the Court held that a state court "may not qualify [a] seaman's Jones Act right." *Id.* at 225.

The court also adopted a federal period in Gatlin v. Missouri-Pac. R.R., 475 F. Supp. 1083 (E.D. Ark. 1979), on the ground that absorption of state law would undermine the effective implementation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151-63 (1976). The court interpreted the complaint as alleging a breach of plaintiff's union's duty of fair representation during arbitration of his claims against his employer. *Id.* at 1084. The court stated that all employment contract claims under RLA § 153 are subject to mandatory arbitration. In the interest of finality of arbitrated decisions, Congress enacted a two-year limitations period in which an employee could seek limited judicial review of a decision. *Id.* at 1088. *See* 45 U.S.C. § 153 (first) (r) (1976). Because claims against a union for breach of its duty to represent an employee fairly during arbitration would destroy the finality of arbitration, the court held that employees must bring fair representation claims within the federal statutory two-year period. The court thus refused to adopt a longer state tort or contract analogy, which would "undermine the overall federal legislative policy." *Id.* at 1089.

Even if courts traditionally required a lower threshold of interference with federal interests to deviate from adopting a state limitations period, use of federal limitations analogies would be less desirable than either of the other reform proposals. The likelihood of inconsistent analogies would be great because there is no federal catch-all period as in most states. Without a generally applicable period, courts would be forced to choose an analogy from the wide range of federal rights with limitations provisions, many with common law roots, making the analogizing process as difficult and as arbitrary as the present system.[327] Further, analogizing to federal statutes of limitation would afford litigants no greater certainty than the two proposals for judicial reform that this Project suggests. Choice of a single analogy for a particular right in each circuit would ensure that litigants could predict the applicable period, regardless of whether federal or state law supplied the limitations period. Finally, the propriety of analogizing *statutory* rights to *statutory*, as opposed to *common law*, time periods[328] is not a compelling reason to adopt federal periods. By uniformly absorbing state statutory liability periods, circuits can achieve this conceptually appropriate result within the present analogizing process.[329]

Neither remaining proposal—adoption of statutory liability or catch-all periods, or adoption of a single state analogy for each federal statute—will eliminate intercircuit conflicts. Consistency among circuits will come only if the Supreme Court establishes uniform analogies. One might argue that this Project's proposals

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[327] Use of federal periods *would* enhance intracircuit consistency, because tbe length of a period would not vary from state to state within a circuit. However, unpredictability would still be possible because a circuit could find different federal periods applicable in different cases involving the same rights.

[328] *See* notes 306-07 and accompanying text *supra.*

[329] Of course, analogizing to federal periods may be warranted when adoption of state law would undermine the particular federal statutory scheme in question, or perhaps when the federal statute is so complex that even a crude state analogy would be impossible and borrowing of an incompatible state law would impede effective judicial administration of the right. The Racketeer Influenced and Corrupt Organizations Law (RICO), 18 U.S.C. §§ 1961-68 (1976) might well be an example of such a statute. The courts have not yet confronted RICO in the context of an applicable limitations period. A RICO charge requires proof that defendant engaged in at least two of over 25 underlying offenses; in addition to providing for criminal liability, RICO allows recovery of treble damages, court costs and attorneys' fees in civil actions. *See generally* Smith, Flanagan and Pastuszenski, *The Statute of Limitations in a Civil RICO Suit for Treble Damages,* 2 TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MATERIALS ON RICO 974, 1053 (G.R. Blakey ed. 1980) (Publication of Cornell Institute on Organized Crime) (advocating analogizing RICO to federal statutes of limitations).

will encourage forum-shopping among circuits. However, because of restrictions on venue[330] and personal jurisdiction,[331] plaintiffs will rarely be able to choose among circuits when filing suit.[332] In addition, the proposal to adopt a single common law analogy may be attacked as theoretically unsound because it analogizes a federal statutory right, which may have no common law analogue, to a state-created nonstatutory cause of action.[333] However, these minor problems pale in comparison with the benefits of enhanced predictability for litigants that the reform proposals would produce.

b. *Factors in the Selection Process.* In determining the most analogous period, courts should first examine the language of the statute and the rights and duties it creates. Because they seek one controlling period,[334] courts should not consider the individual fact patterns of cases. They should look to federal precedent for guidance to promote uniformity and certainty because defining and limiting a federal right is a function of the federal courts.[335]

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[330] *See* 28 U.S.C. § 1391(b) (1976).

[331] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980).

[332] *See* note 304 *supra.*

[333] *See* notes 306-13, 317 and accompanying text *supra.* Although a federal right arising under the civil rights statutes or one for damages implied under the Constitution may not have a precise common law counterpart, some analogues may be preferable to others. For example, a personal injury analogy may be preferable to a contract or tort analogy for civil rights claims. Although the court in Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1974) emphasized that a § 1983 claim had no common law analogue, it nevertheless applied a state personal injury period to the action. Refusing to acknowledge that it had analogized, the court asserted that it had defined a unique federal right in purely federal terms (which happened to coincide with terms applicable to state created rights), and held that "every cause of action under § 1983 which is well-founded results from 'personal injuries.' " *Id.* Some courts may disagree with the proposition that a state statute applicable to common law claims can approximate the true nature of a federal civil rights action. *See, e.g.*, Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (the Civil Rights Acts "creat[e] rights and impos[e] obligations different from *any* which would exist at common law in the absence of statute") (quoting Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962)) (emphasis added).

[334] The effectiveness of this proposal hinges on a circuit's choice of a *narrow* state law analogy. Characterizing a particular federal right as sounding generally in tort or contract leaves too much room for inconsistency. For example, a broad mandate from a circuit court that all civil rights claims are analogous to tort causes of action would permit lower courts to analogize to a wide range of tortious conduct (*e.g.*, trespass, battery, negligence), depending on the particular facts of a case. Thus, precision in choosing an analogy is a prerequisite to intracircuit consistency and predictability. *Cf.* Note, *supra* note 281, 1976 ARIZ. ST. L.J. at 117-23 (examining variety of tort and contract analogies possible).

[335] *See Note, supra* note 140, 82 HARV. L. REV. at 1528 (asserting superiority of federal judiciary in ascertaining and effectuating federal policy); note 209 and accompanying text *supra.*

A court should also consider the type of evidence that litigants are likely to present in suits arising under a particular federal right.[336] Analogizing to a state right involving the presentation of similar evidence would support the policy of terminating claims when evidence will likely be lost and memories faded.[337] Finally, courts should examine the legislative intent[338] and policies underlying the federal right.[339] This inquiry would encourage courts to absorb a period that relates rationally to the right that it limits.[340]

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[336] *Cf.* Note, *supra* note 304, 56 B.U. L. REV. at 987 (recommending that courts applying laches "focus on the evidentiary . . . issues presented by the federal right").

[337] *See Limitations Developments*, *supra* note 13, at 1185 ("[t]he particular period selected [by the legislature for a cause of action] . . . often varies with the degree of permanence of the evidence required to prove either liability or extent of damage").

[338] Professor Monaghan suggests that "[c]ongressional purpose [may be] divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law." Monaghan, *supra* note 1, at 12.

[339] *See* notes 270-71 *supra*; *cf.* Raskin & Enyart, *supra* note 284, at 314-15 (arguing for consideration of the legislative policies behind § 10(b) of the Securities and Exchange Act of 1934 in choosing an analogous period); Note, *supra* note 8, 1976 ARIZ. ST. L.J. at 113-15 (analysis of the purposes behind the Civil Rights Acts important because "it bears upon the development of a principled means of selecting statutes of limitations").

Courts have investigated legislative purposes in searching for state causes of action analogous to claims arising under the national labor laws. *See, e.g.*, Abrams v. Carrier Corp., 434 F.2d 1234, 1251-52 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) ("[i]n determining which state limitation period is applicable [to a claim under LMRA § 301] the federal court [must] . . . give effect to the nature and purpose of the federal act . . . and to the federal objectives pursued"); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 285-87 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (federal policy not requiring use of contract analogy when claims under LMRA § 301 against employer and union joined in single suit); Grant v. Mulvihill Bros. Motor Serv., Inc., 428 F. Supp. 45, 47 (N.D. Ill. 1976) (federal policy embodied in LMRA § 301 best served by single contract period when claims against employer and union joined).

Courts have undertaken similar inquiries when drawing analogies to claims arising under the securities laws, and have often found that a short blue sky law period for claims under SEC Rule 10b-5 best effectuates federal policy. *See, e.g.*, LaRosa Bldg. v. Equitable Life Assurance Soc'y, 542 F.2d 990, 992 (7th Cir. 1976); Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975); *cf.* Charney v. Thomas, 372 F.2d 97, 100 (6th Cir. 1967) (adopting common law fraud analogy because the federal courts "must choose among the several state statutes of limitation and apply that one which best effectuates the federal policy at issue").

[340] Of course, such probing can help find a period that relates rationally to the federal right only if the legislative history is itself clear. When it is not, the court must depend on the rights and duties that the language of the statute establishes and on the type of evidence that the parties will likely present. When the legislative intent is clear, a court will have a principled means of choosing analogous periods, even if the federal right at stake has no precise common law referent.

Of course, without congressional enactment of limitations periods, complete uniformity in the length of periods applicable to any federal right is unattainable. Variation in lengths of limitations periods is an inevitable aspect of the absorption process. However, such variation should not entail lack of predictability; as long as litigants know what *type* of period a court will absorb, they will be able to predict how long a claim will endure. Both proposals advocated here will restore predictability; each circuit should therefore adopt either a statutory liability or catch-all approach, or a single common law analogy, for each type of federal claim. Under either proposal, litigants will no longer have to wait until trial to know whether plaintiff's claims are time-barred.

B. *Exceptions to and Qualifications on Time Bars*

Once a federal court has decided which state period of limitations applies to a federal right, it must resolve several ancillary issues. For example, it must determine whether any circumstances justify suspending the period, and whether the cause of action accrued when defendant's wrongful act occurred or when plaintiff began to incur injury. As with the process of analogizing, the subsidiary issues of tolling, accrual, commencement, relation-back, survival and revival exhibit a curious mix of absorbed state law and judge-made federal law.

1. *Tolling*

At least one Court has said, "[s]tatutes of limitations are primarily designed to assure fairness to defendants."[341] Time bars encourage plaintiffs to bring suit promptly by preventing suits on stale claims. However, circumstances beyond a plaintiff's control may prevent him from suing within the applicable limitations period. Such circumstances include incompetency, incarceration, and inability to secure personal jurisdiction over the defendant.[342] Legislatures and courts have concluded that when

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[341] Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).

[342] State statutes toll limitations periods under several circumstances. *See generally Limitations Developments*, *supra* note 13, at 1220-37. For example, almost all states suspend the running of a period when the defendant is absent from the forum state. *See* Barney v. Oelrichs, 138 U.S. 529, 536 (1891) (suit under federal statute without limitations period to recover money illegally collected); Jolivet v. Elkins, 386 F. Supp. 261, 272 (D. Md. 1974) (§ 1983 claim); Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co., 100 F. Supp. 15, 30 (S.D.N.Y. 1951) (antitrust claim); Vernon, *The Uniform Statute of Limitations on Foreign Claims Acts: Tolling Problems*, 12 VAND. L. REV. 971, 982-83 (1959). Most states require that the defendant he absent *and* be beyond service of process. *See* notes 424-25 and accompanying

"plaintiff has not slept on his rights but, rather, has been prevented from asserting them,"[343] the running of the otherwise absolute[344] statute of limitations is suspended or "tolled," commencing anew when the obstacle disappears.

Suspending the time period represents a reordering in importance of the underlying purposes of limitations periods. Tolling embodies an overriding policy choice that a plaintiff should have every reasonable opportunity to assert his claims.[345] It also serves the institutional concern for credibility;[346] for example, a judicial system could hardly engender public confidence if it barred plaintiff from suing when he became mentally incapacitated and unable to bring suit within the limitations period as a result of defendant's tort. In such cases these two factors outweigh remedial[347] and promotional[348] concerns. Thus, courts and legislatures created tolling rules to acknowledge that plaintiff's right to sue may outweigh the risk that a court may try a stale claim after the point at which defendant reasonably believed his liability has ceased.[349]

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text *infra*. This position is sound—if defendant is amenable to process his absence does not prevent plaintiff from bringing a timely suit. For a detailed discussion of tolling when the defendant is absent from the state, see notes 424-28 and accompanying text *infra*.

Other circumstances suspending statutes of limitations include incarceration, incompetence, estoppel and waiver, death of a party, and revival of the action either upon the making of a fresh promise to perform an agreement or upon part performance. *See, e.g.*, Duncan v. Nelson, 466 F.2d 939, 941-42 (7th Cir. 1972), *cert. denied*, 409 U.S. 894 (1972) (applying Illinois law tolling period during incarceration to § 1983 claim); *cf.* Garvy v. Wilder, 121 F.2d 714, 717-18 (7th Cir. 1941) (applying state law on revival to 12 U.S.C. § 64, National Bank Act claim); Briley v. Crouch, 115 F.2d 443, 444-45 (4th Cir. 1940) (applying state revival law in suit to recover balance due on stock assessment under federal statute without limitations period); McDonald v. Boslow, 363 F. Supp. 493, 498 (D. Md. 1973) (applying state law tolling period during party's incompetence to § 1983 claim). *See generally Limitations Developments, supra* note 13, at 1220-37. The doctrine of revival rewinds the time-bar clock applicable to a contract action. Courts have stated that the making of a new promise, or partial fulfillment of the original promise, renews the obligation by implicitly recognizing its validity. The period applicable to the "original obligation" is tolled, but a new and complete period begins to run as to the "new," revived obligation. Garvy v. Wilder, 121 F.2d 714, 717-18 (7th Cir. 1941); Briley v. Crouch, 115 F.2d 443, 444-45 (4th Cir. 1940).

[343] Burnett v. New York Cent. R.R., 380 U.S. 424, 429 (1965). *See also Limitations Developments, supra* note 13, at 1220.

[344] *See* Note, *supra* note 62, at 1144 n.111.

[345] *See* Vernon, *supra* note 342, at 982.

[346] *See* notes 23-25 and accompanying text *supra*.

[347] *See* notes 26-30 and accompanying text *supra*.

[348] *See* notes 31-35 and accompanying text *supra*.

[349] *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) ("[the] policy of repose, designed to protect defendants, is frequently outweighed ... where the interests of justice require vindication of the plaintiff's rights").

The level of federal interests necessary to override the presumptive application of state law as to subsidiary issues[350] is lower than that necessary to justify a refusal to absorb a state period.[351] In *Johnson v. REA*[352] the Supreme Court held that "state law is [the federal courts'] . . . primary guide"[353] in tolling questions. A federal court must adopt state law regarding "the overtones and details of application of the state limitation period to the federal cause of action,"[354] but should displace state law with uniform federal tolling rules "where [its] application would be inconsistent with the federal policy underlying the cause of action."[355]

The *Johnson* Court did not find federal interests sufficient to override the presumptive application of state law,[356] but other

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[350] *See* HART & WECHSLER, *supra* note 140, at 762-70. *See generally,* Note, *supra* note 140, 82 HARV. L. REV. at 1517-19.

[351] *See id.* at 1524 ("the federal courts may decline to follow all the details of the state's construction of its statute"); notes 188-91 and accompanying text *supra.*

[352] 421 U.S. 454 (1975).

[353] *Id.* at 465. *See also* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966) ("there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy").

[354] *Id.* at 464.

[355] *Id.* at 465. In *Johnson,* the Court rejected plaintiff's invitation to fashion federal law tolling the period applicable to his § 1981 suit during the pendency of an EEOC investigation of his employment discrimination charges under Title VII. The Court held that the state's tolling law governed plaintiff's action because the policy behind § 1981 did not require a special federal tolling rule. Moreover, a uniform federal rule would destroy the integrity of the state period, which could be "understood fully only in the context of the various circumstances that suspend it." *Id.* at 463. The Court explained that "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Id.* at 464.

Like the Court in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), the *Johnson* Court did not fully describe the range of factors that a court may consider when deciding whether to reject state law.

In Board of Regents v. Tomanio, 100 S. Ct. 1790 (1980), the Supreme Court refused to restrict the range of factors that federal courts should consider. The *Tomanio* Court viewed § 1988 as a congressional codification of the judicial presumption to fill the interstices of the federal Civil Rights Act with state law. *See* note 138 *supra.* Therefore, even in the litigation of civil rights actions, federal courts should be concerned with a broad range of factors when deciding to absorb state tolling law. Moreover, § 1988 only applies to actions brought under the Civil Rights Acts, and *Tomanio* is arguably limited to § 1983 actions. *See* note 138 *supra.*

[356] Other cases involving the borrowing of state limitations periods have, like the *Johnson* Court, found federal interests insufficient to override the presumption to apply state tolling rules. *See, e.g.,* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1798-99 (1980) (because federal policies not violated by presumptive absorption of state tolling law under 42 U.S.C. § 1988, lower court erred in creating federal rule tolling period for § 1983 claim during pendency of related state court action); Kaiser v. Cahn, 510 F.2d 282, 287 (2d Cir. 1974) (federal policy embodied in § 1983 did not require tolling of period during plaintiff's successive periods of incarceration); Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815, 819-20 (5th Cir. 1972) (delay of government in filing suit under § 459 of Military Selective Service Act cannot toll periods absent state tolling provision); Falsetti v. Local 2026, UMW,

courts have. In *Pesola v. Inland Tool & Manufacturing, Inc.*,[357] the court held that the strong federal policy favoring private resolution of labor disputes required tolling the state statute during pendency of internal union procedures addressing plaintiff's grievances.[358] In *Mizell v. North Broward Hospital District,*[359] the Fifth Circuit reversed the lower court's holding that the statute of limitations barred plaintiff's claims under sections 1983 and 1985(3), and remanded for evaluation of whether federalism and the policies behind the civil rights statutes demanded federal tolling during pendency of litigation of related state claims in state court.[360]

Perhaps the most renowned case finding that federal policy interests demand the displacement of state tolling law by a federal rule is *Moviecolor Ltd. v. Eastman Kodak Co.*,[361] an antitrust case in which the Second Circuit adopted the equitable doctrine of fraudulent concealment. In *Moviecolor* the forum state's law did not toll the limitations period while the plaintiff was kept ignorant of his right to sue. However, in view of the federal interest in

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249 F. Supp. 970, 973 (W.D. Pa. 1965), *aff'd*, 355 F.2d 658 (1966) (refusing to toll state period applied to claim under LMRA § 301 during pendency of prior state suit, "there being no applicable Pennsylvania statute protecting plaintiffs against such exigencies").

[357] 423 F. Supp. 30, 34 (E.D. Mich. 1976).

[358] *Id.* at 34. The court stated tbat "[t]he basic inquiry in determining whether a limitation period should be tolled is 'whether congressional purpose is effectuated by tolling the [state] statute of limitations in given circumstances.' " *Id.* (quoting Burnett v. New York Cent. R.R., 380 U.S. 424, 427 (1965)).

[359] 427 F.2d 468 (5th Cir. 1970).

[360] *Id.* at 474. The court asserted that:

> [I]t is clearly within the underlying purpose of the Civil Rights Acts to encourage utilization of state administrative and court procedures to vindicate alleged wrongs under a state-created cause of action before requiring a plaintiff to bring his federal suit to prevent his being barred by a state statute of limitations .... [Courts] look to the federal purpose, policy and intent of Congress as to the objectives of the legislation in determining whether the pursuit of state remedies tolls this statute.

Id.

The court alluded to "the salutary rule that under our system of federalism aggrieved persons should be encouraged to utilize state procedures before appealing to the federal courts .... [A] federal rule on tolling ... should be observed, if such rule clearly carries out the intent of Congress or of the constitutional principle at stake." *Id.*

In Board of Regents v. Tomanio, 100 S. Ct. 1790 (1980), the Court implicitly overruled *Mizell's* disposition of plaintiff's § 1983 claim. The *Tomanio* Court held that federal policies do not require tolling of the period applicable to § 1983 claims during pendency of a related state court action. *Id.* at 1798-99.

[361] 288 F.2d 80 (2d Cir. 1961) (Friendly, J.).

uniformity, at least as to the "narrower issue" of tolling,[362] and the purpose of the Clayton Act to serve "not merely private but public ends,"[363] the court held that a borrowed state limitations period is tolled until the plaintiff discovers his cause of action if defendant's fraud causes plaintiff's ignorance.[364]

Since *Johnson v. REA*, the Second Circuit has further developed its analysis of tolling questions. The *Johnson* test for de-

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[362] *Id.* at 84.

[363] *Id.*

[364] *Id. Moviecolor* extended the holdings of Bailey v. Glover, 88 U.S. (11 Wall.) 342 (1874), and Holmberg v. Armbrecht, 327 U.S. 392 (1946). In *Bailey*, the Court applied the equitable doctrine of tolling during the fraudulent concealment of a cause of action to suspend a federal statute of limitations. The Court noted that prevention of fraud was an important function of statutes of limitations. 88 U.S. at 349. Permitting a limitation period to run despite concealment by the defendant of the cause of action would encourage fraud. *Id. See* notes 37-46 and accompanying text *supra.*

In *Holmberg*, the Court extended the application of the doctrine to equitable actions involving federally-created rights without limitations provisions. Asserting that Congress could "hardly expect [the courts] to break with historic principles of equity in the enforcement of federally created rights," 327 U.S. at 395, the Court held that "[i]t would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when . . . a federal statute . . . would be given [a] . . . mitigating construction [as in *Bailey*]." 327 U.S. at 397. Because *Holmberg* involved an equitable right, the Court absorbed the state statute of limitations only as a guide for the Court's discretionary application of laches. 327 U.S. at 396-97. *See generally* note 13 *supra.*

Other courts have followed *Moviecolor*, extending the fraudulent concealment tolling doctrine to actions at law based on federal rights without limitations periods. *See, e.g.*, Baker v. F & F Inv., 420 F.2d 1191, 1199 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) (§ 1982 claim); Morgan v. Koch, 419 F.2d 993, 997 (7th Cir. 1969) (10b-5 claim); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965) (10b-5 claim). Long v. Abbott Mtg. Corp., 424 F. Supp. 1095, 1098-99 (D. Conn. 1976) ("Federal policies underlying . . . [SEC Rule] 10b-5 suits seek to deter securities fraud [and] . . . will be better served by a uniform federal tolling policy that does not penalize plaintiffs for the time delays caused by the frauds they suffer."); *cf.* Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 87 (1969) (absorbing state's fraudulent concealment doctrine and following *Moviecolor's* rationale); Public Serv. Co. v. General Elec. Co., 315 F.2d 306, 311-12 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963) (expressly following *Holmberg* in antitrust action); Errion v. Connell, 236 F.2d 447, 455 (9th Cir. 1956) (applying state's fraudulent concealment tolling doctrine in Rule 10b-5 action and following *Moviecolor's* rationale).

The circuits generally agree on the elements of fraudulent concealment:

> At least two types of fraudulent behavior toll a statutory period. . . . In the first type, the most common, the fraud goes undiscovered even though the defendant after commission of the wrong does nothing to conceal it and the plaintiff has diligently inquired into its circumstances. The plaintiffs' due diligence is essential here. . . . In the second type, the fraud goes undiscovered because the defendant has taken positive steps after commission of the fraud to keep it concealed. . . . This type of fraudulent concealment tolls the limitations period until actual discovery by the plaintiff.

Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975).

termining whether a court could displace state tolling law focused mainly on evaluating federal policy, but the Court did consider whether tolling, on the particular facts of the case at bar, would disserve the policy of repose underlying statutes of limitations.[365] The Second Circuit has held that *Johnson* requires courts to "strike a balance" between protecting the federal legislative policy at stake and promoting the purposes behind limitations periods.[366] In both *Williams v. Walsh*[367] and *Meyer v. Frank,*[368] the Second Circuit assessed whether plaintiff had diligently brought suit and whether the defendant had achieved repose before commencement of the action.[369]

Although the Second Circuit intended this case-by-case factual analysis to promote the underlying purposes of limitations periods, such *ad hoc* determinations ironically tend to undermine these purposes. Predictability is the key to fulfillment of the policies embodied in statutes of limitations.[370] The practice of

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[365] 421 U.S. at 466-67, 467 n.14. In *Johnson,* the plaintiff argued that his prior filing of a Title VII employment discrimination charge with the EEOC tolled the period applicable to his § 1981 claim. Rejecting this argument, the Court noted plaintiff's dilatoriness: "Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued. . . ." *Id.* at 466. Moreover, the Court stated that it was "not at all certain" that plaintiff's prior filing with the EEOC had placed defendant on notice of subsequent suit under § 1981 in federal court, or instead that defendant had achieved repose, believing reasonably that his liability had terminated upon resolution of the EEOC charge. *Id.* at 467 n.14. The Court suggested that only where the claims in two suits are identical can the filing of one suit adequately place defendant on notice of his potential liability in the second suit. *Id.*

[366] Williams v. Walsh, 558 F.2d 667, 674-76 (2d Cir. 1977); Meyer v. Frank, 550 F.2d 726, 729-30 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977).

The discussion in *Johnson* of whether tolling the limitations period would serve the purposes of limitations periods was mere surplusage. The Court's refusal to toll focused on the insufficiency of federal interests, and the close interrelationship between state tolling rules and state limitations laws. *See* 421 U.S. at 465-67. Unfortunately, the Second Circuit has attached undue importance to the Court's gratuitous analysis of the purposes of time bars.

[367] 558 F.2d 667 (2d Cir. 1977).

[368] 550 F.2d 726 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977).

[369] 558 F.2d at 674-76; 550 F.2d at 729-30. In each case the court found the plaintiff dilatory and held that defendant had achieved a state of repose which tolling of the period would violate. Each plaintiff had brought related federal claims in state court prior to filing suit in federal court and argued that the previous actions should have tolled the period applicable to the federal actions. In *Meyer,* the court held that the prior state suit did not put defendant on notice of the later suit, and that defendant had achieved repose because the claims in state court rested on a different constitutional theory. 550 F.2d at 730. In *Williams,* the court assumed *arguendo* that some of plaintiff's claims in both suits were similar or identical; nonetheless, it held that defendants lacked notice of the later claims because the named defendants in each case were different. 558 F.2d at 675.

[370] *See* notes 297-303 and accompanying text *supra.*

examining plaintiff's dilatoriness and defendant's repose in each case further diminishes what little predictability exists in the present process of analogizing federal causes of action.[371] The Second Circuit's decisions transform the predictable law of tolling, which suspends a period for definite, predictable reasons, into a rule resembling laches, an equitable doctrine which eschews certainty in favor of assessing the timeliness of suits on a case-by-case evaluation of the equities.[372] In determining whether to create federal tolling rules courts should restrict themselves to analyzing the policy behind the relevant federal statutory right.[373] Once a circuit decides whether the federal interests behind a particular provision require a federal tolling rule, or whether state tolling rules suffice, litigants will have settled precedent permitting prediction of whether special circumstances have tolled an applicable limitations period.

Because most state tolling rules suspend periods in clearly defined circumstances,[374] a uniform federal law of tolling is not warranted. The disparity among state suspension laws is tolerable because litigants in each state can reasonably ascertain before trial whether the particular facts of the litigation will trigger the tolling of the applicable limitations period. Unlike the analogizing process, tolling does not entail the uncertainty produced by judicial characterization of the federal right; application of state tolling rules is largely mechanical[375] and predictable. Thus, only where the state law would vitiate a federal litigant's rights—either by exposing a defendant to perpetual liability that Congress never intended, or by erecting virtually insurmountable barriers to a timely suit—should a court create federal tolling rules.

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[371] *See* notes 274-313 and accompanying text *supra*.

[372] *See* note 13 *supra; cf.* Gillons v. Shell Oil Co., 86 F.2d 600, 607 (9th Cir. 1936), *cert. denied,* 302 U.S. 689 (1937) (doctrine of estoppel is "more clearly defined" than that of laches, which is "directed more intimately to the conscience of the [judge]"). A further difference between tolling and laches is that tolling *suspends* the running of a fixed period of limitations, whereas a court applying laches views the statutory period as a guide; the court remains free to adopt a period shorter or longer than that defined by the statute. *See generally* note 13 *supra*.

[373] For a discussion of how courts should divine federal interests, see note 338 *supra*.

[374] Such clearly defined circumstances include the death, incompetency, and incarceration of the litigant. *See* note 342 *supra*. However, some state tolling laws are not precisely defined and far from mechanical. For example, laws tolling during defendant's "fraudulent concealment" necessitate analysis of plaintiff's diligence in discovering his cause of action—a fact which may not be reasonably ascertainable until trial.

[375] *See* note 374 *supra*.

2. *Subsidiary Issues for Which Federal Courts Have Created Uniform Federal Rules: Commencement, Accrual, Relation-Back, Survival and Revival*

Federal courts have not consistently absorbed state laws that govern the subsidiary issues involved in applying a state statute of limitations. For example, rule 3 of the Federal Rules of Civil Procedure provides that actions in the federal courts commence upon the filing of a complaint with the court.[376] In *Bomar v. Keyes,*[377] the court held that rule 3 was valid under the Rules Enabling Act because it did not abridge, enlarge, or modify the substantive rights of any litigant.[378] Subsequent cases have reaffirmed the validity of rule 3,[379] although limiting the holding of *Bomar* to cases based on federal question jurisdiction.[380]

Federal law also governs whether amendments to a complaint or answer relate back to the time of the filing of the original

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[376] *See generally* Blume & George, *supra* note 8, at 955-57.

[377] 162 F.2d 136 (2d Cir.), *cert. denied,* 332 U.S. 825 (1947).

[378] *Id.* at 140-41 (L. Hand, J.). The court reasoned that rule 3 did not affect the substantive rights of the litigants because statutes of limitations qualify only remedies, not the substantive statutory right itself: "We have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. . . . [A]nd when a right is not so conditioned, the statute of limitations is treated as going to the remedy." *Id.*

[379] *See, e.g.,* Hoffman v. Halden, 268 F.2d 280, 302 (9th Cir. 1959) (§ 1983 claim); Jackson v. Duke, 259 F.2d 3, 6 (5th Cir. 1958) (§ 1983 claim); *cf.* Hanna v. Plumer, 380 U.S. 460, 470 (1965) (presumption that, when a situation is covered by one of the Federal Rules, the rule governs, displacing any state rule).

[380] In Walker v. Armco Steel Corp., 100 S. Ct. 1978 (1980), a unanimous Court held that state law, not rule 3, provides the rule of decision in diversity cases for commencement of an action for statute of limitations purposes. *See* Ragan v. Merchant's Transfer Warehouse Co., 337 U.S. 530, 533 (1949) (applying state commencement law in diversity case because of outcome-determinative effect of rule 3). *Walker* settles a dispute among the circuits, *see* 100 S. Ct. at 1982 n.6, but disrupts an area of law that had been settled since *Bomar.*

By holding that rule 3 does not commence actions for statutes of limitations purposes in diversity cases, the Court left open the question of what commencement rule applies in nondiversity cases. A simple solution would be for federal courts to devise a common law rule commencing actions upon filing of the complaint with the court—consistent with the prior view of rule 3. However, an equally plausible approach, which is consistent with the *ad hoc* absorption of state time periods, but departs from the historical view of commencement of actions in nondiversity cases, would be a presumptive absorption of *state* commencement rules. *Cf.* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1798-99 (1980) (principles of federalism favoring absorption of state law as to subsidiary issue of tolling in § 1983 action). A final alternative would be to allow rule 3 to regulate the commencement of suits for statutes of limitations purposes in nondiversity actions. If *Walker* is not simply an interpretation of rule 3, but an "*Erie* case," the application of state commencement law may be a product of limitations upon the scope of the federal rules imposed by the Rules Enabling Act, 28 U.S.C. § 2072 (1976). Under this view, the application of rule 3 might be broader in nondiversity cases than in diversity cases. *Cf.* Ragan v. Merchant's Transfer Warehouse Co., 337 U.S. at 533 (recognizing *Bomar* as good law).

pleading. Rule 15(c)[381] provides that an amendment is not time barred if it would have been timely when the litigant originally filed and if the claim or defense in the amended pleading arises from the same transaction or occurrence described in the original pleading.[382] No court has questioned the rule's validity under the Rules Enabling Act in federal question cases, and, indeed, rule 15(c) supports the institutional purposes behind limitations periods.[383] Because an amendment arising out of the same transaction or conduct underlying the original pleading will probably require presentation of similar evidence, allowing it to relate back will not lead to the trial of claims that have grown stale due to lost or forgotten evidence. Moreover, the rule is unassailable on grounds of fairness. The original pleading places defendant on notice that plaintiff may later raise closely related claims.

Federal law also governs two other subsidiary issues: accrual and survival of the cause of action. Federal courts do not even presumptively apply state law in deciding when a particular federal right arises,[384] or in determining if the representative of a plaintiff or defendant may sue or be sued in the place of a litigant who dies before vindicating his rights.[385] Courts have held, how-

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[381] FED. R. CIV. P. 15(c) provides in part: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

[382] *See generally* Blume & George, *supra* note 8, at 957-59. This Project's discussion of rule 15(c) is limited to the relation-back of claims, not parties. Furthermore, this Project assumes that rule 15(c) is more liberal than its state counterparts.

[383] *See* notes 17-25 and accompanying text *supra.*

[384] *See, e.g.,* Cope v. Anderson, 331 U.S. 461, 464 (1947); Fisher v. Whiton, 317 U.S. 217, 218 (1942); Rawlings v. Ray, 312 U.S. 96, 98 (1941); Newman v. Prior, 518 F.2d 97, 100 (4th Cir. 1975).

[385] *See, e.g.,* Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (action to recover for copyright infringement abated despite statute to contrary); Nelson v. Knox, 230 F.2d 483, 484 (6th Cir. 1956) (survival of § 1983 claim); Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 649 (4th Cir. 1942) (survival of antitrust claim); Layne v. International Bhd. of Elec. Workers, 418 F. Supp. 964, 965-66 (D.S.C. 1976) (question of survival of claims under LMRDA §§ 411, 412 "is not governed by state survival statutes or state decisions"); Sands v. Abelli, 290 F. Supp. 677, 681 (S.D.N.Y. 1968) (survival of LMRDA §§ 401-53 claim).

If the representative of a deceased litigant cannot sue (or be sued), the right of action does not "survive," but is said to "abate." The common law rule in tort actions was that all claims abated upon the death of the tortfeasor. *See* Derdiarian v. Futerman Corp., 223 F. Supp. 265, 267 (S.D.N.Y. 1963). The reason for this rule is probably that tort law was an outgrowth of criminal law, under which punishment and blame could not survive the death of the wrongdoer. *Id.* The "modern rule as to survivability is that action for torts in the nature of personal wrongs such as slander, libel [or] malicious prosecution . . . die with the person, whereas, if the tort is one affecting property rights, the action survives." Nelson v.

ever, that state law controls in survival questions arising under the Civil Rights Act due to congressional command to absorb state law presumptively.[386]

It is not entirely clear why federal courts choose to create uniform federal rules of survival and accrual, deviating from the presumptive absorption of state law that governs choosing and tolling a base time period and characterizing the federal right. Indeed, at least one commentator finds no reason why the courts do not treat all subsidiary issues alike.[387] Courts have distinguished accrual[388] and survival[389] from other subsidiary limitations issues

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Know, 230 F.2d 483, 484 (6th Cir. 1956). The rationale hehind this dichotomy is that an injured person cannot benefit from a recovery after death, whereas a cause of action to rectify property damage can achieve its purposes despite the owner's death because property passes to the deceased's representative after death. *See* Layne v. International Bhd. of Elec. Workers, 418 F. Supp. 964, 965-66 (D.S.C. 1976).

[386] 42 U.S.C. § 1988 (1976). In Robertson v. Wegmann, 436 U.S. 584 (1978) the Court held that § 1988 requires absorption of state survival statutes in actions arising under the Civil Rights Act. *Id.* at 593-95. Section 1988 provides in part that the Civil Rights Act provisions "shall be exercised and enforced in conformity with the laws of the United States . . . but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies. . . ., the common law, as modified and changed by the constitution and statutes of the [forum] state . . ., so far as [it] is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the . . . courts." 42 U.S.C. § 1988 (1976). The Court construed this to mean that the federal judiciary can disregard state law only where it is clearly inconsistent with federal law, such as where state law does not provide for the survival of any actions, or if it restricts significantly those that do survive. Since the forum state in *Robertson* did provide for survival when the representative of the deceased litigant was an immediate relative, the Court found that the policies behind § 1983, upon which plaintiff based his claim, did not require creation of a federal rule. 436 U.S. at 594. Section 1988 thus establishes at least a presumption to apply state law similar to that of Johnson v. REA, 421 U.S. 454, 463-65 (1975), and UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966). *See* discussion of § 1988 absorption of state tolling law in § 1983 as requiring presumptive actions, *supra* note 138.

[387] *See* Note, *supra* note 8, 53 COLUM. L. REV. 68, at 72; *cf.* Board of Regents v. Tomanio, 100 S.Ct. 1790, 1798-99 (1980) (federalism favoring absorption not only of state period, but also subsidiary issue of tolling); Johnson v. REA, 421 U.S. 454, 463-65 (1975) (state period incomprehensible without absorbing integrally related tolling rules).

[388] *See, e.g.*, Cope v. Anderson, 331 U.S. 461, 464 (1947) ("when the applicable state statute of limitations begins to run depends upon when, under federal law, the Comptroller of the Currency . . . , is empowered by federal law to bring suit"); Rawlings v. Ray, 312 U.S. 96, 98 (1941) (accrual "is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make [the assessment] under the applicable federal legislation").

[389] *See, e.g.*, Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) ("The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action. . . . Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it."); Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 648 (4th Cir. 1942) ("[T]he question of survival is not one of procedure but one which depends 'on the substance of the cause of action.' "); Layne v. International Bhd. of Elec. Workers, 418 F.

on the ground that they are substantive, not procedural questions, thus requiring a court to construe the substantive nature of the federal statutory right at stake. Although not explicit in the cases, the likely rationale for the treatment of survival and accrual is that federal courts better protect and effectuate the policies underlying federal rights than do state laws.[390]

Although judicial treatment of accrual and survival issues offers a persuasive justification for overriding the presumptive absorption of state law,[391] it is irreconcilable with the Supreme Court's holding in *UAW v. Hoosier Cardinal Corp.*[392] In *UAW,* the Court held that characterization of the nature of federal statutory rights for purposes of analogy calls for presumptive absorption of state law.[393] Characterization requires that a court construe the substance of a right; the court must analyze, for instance, whether the right sounds essentially in tort or contract, and what federal interests underlie the statute. Consequently, characterization is as much a "non-procedural" issue as courts have claimed survival and accrual are. Both issues require courts to interpret legislative intent and examine federal interests. Despite the traditional belief that federal courts are better equipped to ascertain and promote federal policy, the Court in *UAW* found that federal interests did not demand a federal rule of characterization. Thus, *UAW* arguably requires courts presumptively to absorb state law on accrual and survival issues.

However, the *UAW* Court failed to perceive that the lack of predictability surrounding the subsidiary issues justifies abandoning the presumptive absorption of state law in favor of uniform federal common law rules. Uncertainty can impose an intolerable burden on the assertion of federal rights, especially in the case of mere subsidiary issues which, unlike state tolling laws,[394] are not

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Supp. 964, 965 (D.S.C. 1976) (survival "is to be determined by an interpretation of the [federal] statute"). *See* Hill, *supra* note 75, at 99; *Limitations Developments, supra* note 13, at 1267.

[390] *Cf.* Note, *supra* note 140, 82 HARV. L. REV. at 1528 ("[T]he federal judiciary is particularly well-suited to develop decisional law that advances broad federal policies. Federal judges tend to have more familiarity and sympathy with federal policies and their goals than state judges. Judges selected and paid by the national government are more apt to give full scope to the means that government chooses to reach its objectives.").

[391] *See* Hill, *supra* note 75, at 99 ("subsidiary questions which go to the nature of the cause of the action and the time when it accrues should be decided in accordance with federal law").

[392] 383 U.S. 696 (1966).

[393] *Id.* at 706.

[394] *See* note 36 *supra.*

capable of simple, mechanical application. Thus, although the survival and accrual cases reflect a lack of respect for *stare decisis,* they correctly ascertain the need for uniform federal rules.

C. *Borrowing of Foreign States' Limitations Periods*

The presumptive absorption of state law requires courts to apply the forum state's choice of which period applies when the cause of action arises elsewhere. Most states have enacted borrowing statutes, which commonly bar an action in the forum state if it would be barred in the jurisdiction of accrual. Although some states without borrowing statutes still adopt a foreign period only if it is "substantive," several have recently rejected this archaic doctrine, and look instead to the interests of the forum state and the state of accrual to determine which period should control.

1. *Characterization as Procedural or Substantive*

The traditional practice in states without borrowing legislation is to characterize the limitations period of the state of accrual as either procedural or substantive.[395] The forum state will adopt the foreign period only if the court considers it substantive.[396] Moreover, the forum state will only borrow the foreign period if it is shorter than the forum's.[397] The theory underlying this "*lex fori*" rule is that, if a statute of limitations is procedural, affecting only the remedy, the running of a foreign jurisdiction's time period does not extinguish the right itself and the plaintiff may still sue upon the right if the forum's period has not expired.[398]

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[395] *See* Vernon, *Statutes of Limitations in the Conflict of Laws: Borrowing Statutes,* 32 ROCKY MTN. L. REV. 287, 289 (1960); Wurfel, *Statutes of Limitations in the Conflict of Laws,* 52 N.C. L. REV. 489, 514 (1974); Note, *Conflicts of Laws: Statutes of Limitation,* 29 OKLA. L. REV. 385, 385 (1976).

[396] Some courts hold that a statute of limitations can be substantive only if the right that it limits is statutory and did not exist at common law. *See, e.g.,* Kozan v. Comstock, 270 F.2d 839, 841 (5th Cir. 1959); Holford v. Leonard, 355 F. Supp. 261, 263 (W.D. Va. 1973); Morris Plan Indus. Bank v. Richards, 131 Conn. 671, 674, 42 A.2d 147, 148 (1945). Courts generally characterize foreign limitations periods as substantive if either the statute creating the right contains its own limitations period, or if the limitations period refers specifically to the legal right involved. *See* Note, *supra* note 395, at 386.

[397] *See* Vernon, *supra* note 395 at 290; Note, *supra* note 395, at 387.

[398] *See id.* at 385. In determining whether a foreign statute of limitations is procedural or substantive, the forum state will usually look to the opinions of the foreign jurisdiction's courts. *See* Ester, *Borrowing Statutes of Limitation and Conflict of Laws,* 15 U. FLA. L. REV. 33, 61 (1962); Wurfel, *supra* note 395, at 516 ("[T]his question is determined by the conflicts law of the forum . . . [which] normally requires the adoption of the classification made by the loci state.").

Critics have assailed this rule as irrational,[399] arguing that it leads to forum shopping.[400]

2. *Interest Analysis*

Courts in jurisdictions without borrowing provisions have recently begun to reject the *lex fori* rule, opting instead for a case-by-case analysis of the interests of the forum and foreign states in choosing an applicable period.[401] "Interest analysis" is nothing more than a modern conflict of laws approach to statutes of limitations questions; the court must assess whether the forum state's policies and its contacts with the cause of action are stronger than those of the state in which the claim accrued.[402] In *Heavner v.*

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[399] If the foreign state's period has run, thus extinguishing the remedy, little of the right remains. To contend that a time bar has not terminated the substance of the right is, for all practical purposes, absurd. *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 137, 305 A.2d 412, 416 (1973) ("[a] right for which the legal remedy is barred is not much of a right") (quoting R. LEFLAR, AMERICAN CONFLICTS LAW § 127, at 304 (1968)). Professor Vernon argues:

> Convenience appears to be the only justification for [this] rule calling for the application of local procedure without regard to the foreign fact elements in the case. . . . However, here the procedural designation is not justifiable on the basis of convenience. It is no more difficult for local courts . . . to ascertain the foreign statute of limitation than it is for them to discover the foreign 'substantive' law . . . Despite the absence of reason, the courts persist in the classification.

Vernon, *supra* note 395, at 288-89. *See also* Heavner v. Uniroyal, Inc., 63 N.J. 130, 139, 305 A.2d 412, 417 (1973) ("considerations of convenience and practicality dictating the forum's choice of its own procedure 'would appear to have little pertinency to the bar of limitations' ") (quoting Marshall v. George M. Brewster & Son, Inc., 37 N.J. 176, 180, 180 A.2d 129, 131 (1962)).

[400] *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 137, 305 A.2d 412, 416 (1973) ("plaintiffs whose claims are barred by the governing substantive law are allowed to shop around for a jurisdiction in which the statute is longer, in the hope of getting service there on the obligor") (quoting R. LEFLAR, AMERICAN CONFLICTS LAW § 127, at 304 (1968)). However, the problem of forum shopping in federal question cases involving state statutes of limitations seems insignificant. Shopping for the federal forum with the most favorable law is characteristic of the federal system. *See* H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962), *cert. denied,* 372 U.S. 928 (1963). *See generally* note 304 *supra.*

[401] *See, e.g.,* Dindo v. Whitney, 429 F.2d 25, 26 (1st Cir. 1970) (diversity case); Farrier v. May Dep't Stores Co., 357 F. Supp. 190, 191 (D.D.C. 1973) (diversity case); Heavner v. Uniroyal, Inc., 63 N.J. 130, 140, 305 A.2d 412, 418 (1973); Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 203, 206 N.W.2d 414, 419 (1973) (state-created cause of action). *See generally* Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation,* 27 HASTINGS L.J. 1 (1975); Wurfel, *supra* note 395, at 560-67; Note, *supra* note 395, at 388-94. However, the Second Circuit has refused to apply interests analysis in SEC rule 10b-5 cases involving New York's borrowing statute. *See* Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977); Sack v. Low, 478 F.2d 360, 367 (2d Cir. 1973).

[402] *See, e.g.,* Dindo v. Whitney, 429 F.2d 25, 26 (1st Cir. 1970). In *Dindo,* the action grew out of an automobile accident that had occurred in Quebec, Canada. Plaintiff, a Vermont resident, sued defendant, a New Hampshire resident, in New Hampshire federal district

Uniroyal, Inc.[403] the New Jersey Supreme Court formulated a five-part test to govern interest analysis, holding that it would borrow the period of a foreign jurisdiction if (1) the cause of action accrued in the foreign state; (2) all litigants are present and amenable to the process in the foreign state; (3) the forum has no substantial interests in the litigation which would necessitate application of its own time period; (4) the period of the state of accrual has expired; and (5) the substantive law of the foreign jurisdiction governs the suit.[404] Although this approach is more logical than the *lex fori* doctrine,[405] the latter rule may actually be preferable because of the greater certainty that it affords litigants in predicting how long a defendant's potential liability endures.[406]

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court. On appeal from the lower court's dismissal of the action, the First Circuit found that Quebec's contacts with the cause of action were minimal; neither litigant resided there, and New Hampshire supplied the controlling substantive law. Furthermore, borrowing Quebec's limitations period would not promote important policies of Quebec; its limitation period sought to protect its own citizens, none of whom were involved in the litigation. Thus, borrowing a foreign statute of limitations would disserve the forum state's policy of leaving "its courts open for a period long enough to permit this plaintiff's claim." *Id.*

[403] 63 N.J. 130, 305 A.2d 412 (1973).

[404] *Id.* at 141, 305 A.2d at 418.

[405] The rationale behind interests analysis is that the same jurisdiction should supply the substantive law and the statute of limitations of the same state. *See* Heavner v. Uniroyal, Inc., 63 N.J. 130, 138, 305 A.2d 412, 416 (1973) ("no court should enforce a foreign cause of action which is barred by the law governing the substantive rights of the parties") (citing Lorenzon, *The Statute of Limitations and the Conflict of Laws,* 28 YALE L.J. 492, 496-97 (1919) ("[w]henever considerations call for the application of the contract, tort or other 'substantive' law of a foreign jurisdiction, it would appear that its time bar should also be recognized") (quoting Vernon, *supra* note 395, at 291)). This reasoning is sound because the length of a limitations period and the substantive right itself are often closely related. To borrow a foreign state's substantive law, but not its applicable limitations period, thus permitting suit on the right long after the foreign legislature intended, would violate important policies of the foreign jurisdiction. However, this problem does not exist in federal question cases involving borrowing issues because the controlling substantive law is federal.

[406] The obvious flaw of interests analysis is its uncertainty. The interests of the forum and foreign states may differ from case to case depending on the number and citizenship of the litigants and the policies behind the statutes of limitations and substantive law involved. *See, e.g.,* Dindo v. Whitney, 429 F.2d 25, 26 (1st Cir. 1970) (analyzing residence of parties, policies behind the two jurisdictions' limitations periods and the significant contacts of each state with the cause of action). At least one court has weighed the disadvantage of predictability in the interests analysis approach against the benefit of promoting interstate order and advancing governmental interests, concluding that decreased predictability is tolerable. *See* Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 203, 206 N.W. 2d 414, 419 (1973). This decision is incorrect; without certainty, a limitations system cannot fulfill the institutional, remedial, and promotional functions of time bars. *See* notes 13-35, 46 and accompanying text *supra.* Indeed, one commentor concludes that "interest analysis leads to results too unpredictable to suffice as a workable method of choosing a statute of limitation." Note, *supra* note 395, at 394.

3. *Borrowing Statutes*

Most jurisdictions have statutes that borrow the limitations period of the state in which the cause of action "arose," "accrued," or "occurred."[407] As with the *lex fori* doctrine, borrowing legislation[408] usually provides for adoption of only those foreign periods shorter than the forum's.[409] Courts have split over whether bor-

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The problem of uncertainty, of course, is less pressing in federal question cases in which federal substantive law controls. States have few, if any, interests in litigation in federal court involving rights created by federal statutes. Consequently, fewer variables enter a federal court's application of a forum state's interests analysis. For example, the federal court will not have to evaluate the policies underlying either state's substantive law. It might, however, consider the residency of the parties and the policy behind each state's period of limitations. *Cf.* Dindo v. Whitney, 429 F.2d 25, 26 (1st Cir. 1970) (applying forum's period in diversity suit where defendant not a resident of the foreign state because foreign state's period designed to protect resident defendant).

[407] *See, e.g.,* CAL. CIV. PROC. CODE § 361 (West 1954); COLO. REV. STAT. § 13-80-118 (1974); IDAHO CODE § 5-239 (1979); ILL. REV. STAT. ch. 83, § 21 (1975); KY. REV. STAT. § 413.320 (1979); MO. REV. STAT. § 516.190 (1978); NEV. REV. STAT. § 11.020 (1979); UTAH CODE ANN. § 78-12-45 (1953).

[408] Legislatures intended borrowing statutes to fulfill several purposes: (1) spurring the growth of commerce in the forum by barring unsettled claims of long duration that ordinarily would be barred elsewhere; (2) discouraging nonresidents from litigating in the forum, thus relieving congestion in the forum's courts; (3) preventing forum shopping by denying a plaintiff the longer period available in the forum when the action was barred in the place of accrual; (4) encouraging immigration into the forum state; (5) preventing the unfairness of exposing the defendant to suit in the forum after he had acquired repose in his state of residence, or in the state of accrual; (6) diminishing the possibility of perpetual liability for the defendant in the forum. *See* Ester, *supra* note 398, at 40-43. *See also* Milhollin, *supra* note 401, at 28-29.

At least the last of these purposes is no longer compelling. The dangers of perpetual liability were far greater 20 years ago than they are today because most states have modified their tolling laws. The majority of jurisdictions formerly tolled their limitations periods with the mere absence of the defendant from the forum. Due to the advent of long-arm jurisdiction over out-of-state defendants (*see* International Shoe Co. v. Washington, 326 U.S. 310 (1945)) most states today require not only that the defendant be absent, but also that he be beyond the range of the forum's effective service of process. *Contra* Vaughn v. Dietz, 430 S.W.2d 487, 489 (Tex. 1968) (tolling when defendant simply absent from forum state). *See generally* Note, *Tolling the Statute of Limitations: Restricted by Enlarged Personal Jurisdiction,* 18 WASHBURN L.J. 565, 575-76 (1979). Therefore, except where the plaintiff is exempt from borrowing provisions under a resident plaintiff exception (*see* notes 418-19 and accompanying text *infra*), or where the defendant has never entered the forum or has had insufficient contacts with the forum state, perpetual liability is no longer a problem. *See* notes 425-30 and accompanying text *infra.*

[409] Wurfel, *supra* note 395, at 519-20 ("a borrowing [statute] is usually applied only to curtail, and not to enlarge, the applicable limitation of the forum"). Statutory provisions limiting borrowing to periods shorter than the forum's include DEL. CODE ANN. tit. 10, § 8121 (1975), N.C. GEN. STAT. § 1-21 (1969), 42 PA. CONS. STAT. ANN. § 5521 (Purdon Supp. 1979), and W. VA. CODE § 55-2A-2 (1966). Courts in several jurisdictions have restricted borrowing to the shorter of the two periods. *See* Sheets v. Burman, 322 F.2d 277, 278 (5th Cir. 1963) (applying Mississippi law); Krussow v. Stixrud, 33 Wash. 2d 287, 290 205 P.2d 637, 639 (1949); Duke v. Housen, 589 P.2d 334, 342 (Wyo.), *cert. denied,* 444 U.S. 865 (1979).

rowing the base time period of the state of accrual also requires adoption of its ancillary rules such as tolling, survival, and revival.[410]

The federal system absorbs a highly inconsistent and often irrational body of law[411] when it adopts state borrowing legislation.[412] Although most borrowing statutes make reference to

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[410] *See* Ester, *supra* note 398, at 57 ("[a] majority of the courts begin with the basic proposition that the borrowed prescriptive period is applied with all its accouterments regardless of whether they be in the form of additional statutory provisions or interpretive judicial decisions"); Wurfel, *supra* note 395, at 523-27. Devine v. Rook, 314 S.W.2d 932 (Mo. App. 1958) illustrates the majority view: "[The borrowee's period] is not wrenched bodily out of its own setting, but taken along with it are the court decisions of its own state which interpret and apply it, and the companion statutes which limit and restrict its operation. This we think is the general law." *Id.* at 935. The probable reason for the forum's horrowing of not only the period, but also of all the borrowee state's ancillary doctrines is the belief that the period and its accouterments are interdependent. For example, the borrowed period might be longer if the borrowee state had no tolling rule. *See* Vernon, *supra* note 395, at 325; 75 HARV. L. REV. 627, 629 (1962).

[411] *See* Vernon, *supra* note 395, at 323 ("A complete lack of consistency is found in existing statutory solutions. Uniform legislation would appear to present the only real hope of establishing a rational and consistent system.").

[412] Federal courts regularly confront and absorb state borrowing statutes. Several courts have applied the forum state's borrowing statute in cases involving claims under SEC rule 10b-5. *See, e.g.,* Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977); Sack v. Low, 478 F.2d 360 (2d Cir. 1973); Korn v. Merrill, 403 F. Supp. 377 (S.D.N.Y. 1975), *aff'd without opinion,* 538 F.2d 310 (2d Cir. 1976); Klapmeier v. Peat, Marwick, Mitchell & Co., 363 F. Supp. 1212 (D. Minn. 1973); *cf.* Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co., 100 F. Supp. 15 (S.D.N.Y. 1951) (applying New York borrowing statute in case arising under Clayton Act, now codified at 15 U.S.C. § 15 (1976)).

The Supreme Court first absorbed a state borrowing statute in a case arising under a federal right without a limitations period in Cope v. Anderson, 331 U.S. 461 (1947). In *Cope,* the Court disposed of two suits by the receiver of an insolvent national bank in Kentucky against Ohio and Pennsylvania stockholders to recover assessments that the Comptroller of the Currency had levied against them under the double liability provision of the National Bank Act, Rev. Stat. § 5151; Act of Dec. 23, 1913, ch. 6, § 23, 38 stat. 273 (formerly codified at 12 U.S.C. §§ 63, 64) (repealed 1959). In the first suit, Anderson v. Andrews, 156 F.2d 972 (3d Cir. 1946), *rev'd,* 331 U.S. 461 (1947), the receiver sued Pennsylvania stockholders in a federal district court sitting in Pennsylvania. The Third Circuit held Pennsylvania's borrowing statute inapplicable on the ground that a federal right did not arise in any particular jurisdiction because a national sovereign had created it. Thus, the court reasoned tbat there could be no "state in which the cause of action accrued" within the meaning of the Pennsylvania statute from which the court could borrow a period. *Id.* at 975. In the second suit, Helmers v. Anderson, 156 F.2d 47 (6th Cir. 1946), *aff'd,* 331 U.S. 461 (1947), the plaintiff-receiver sued Ohio shareholders in a federal district court sitting in Ohio. The Sixth Circuit rejected the argument that a federal cause of action had no situs of accrual within a particular state, reversing the lower court.

Noting that "limitations on federally created rights to sue have . . . been considered to be governed by the limitations law of the state where the crucial combination of events transpired," the Court refused to follow *Andrews*' "sterilizing interpretation" of the forum's borrowing statute. 331 U.S. at 466. The Court held that the plaintiff's federal causes of action under the National Bank Act arose, within the meaning of the forum's borrowing provision, in Kentucky, the place where "[p]ractically everything that preceded the final

where the "cause of action arose," state courts disagree on the definition of the "place of accrual."[413] Most jurisdictions follow the "single place of arising" theory, under which the period of only one state is relevant; the state of accrual is usually the state in which the last event necessary to establish liability occurred.[414] However, others have adopted a "multiple place of arising" theory under which the cause of action arises in every state in which the defendant is amenable to suit.[415] Still others have chosen the

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fixing of liability of shareholders" transpired. *Id.* at 467. Finding that federal causes of action without limitations periods do have a situs of accrual in a particular state, the Court held that the plaintiff-receiver's suits in both *Helmers* and *Anderson* were barred under the borrowee state's law.

Cases cite *Cope* as authority for applying the forum state's borrowing rules when absorbing a state limitations period. *See, e.g.*, Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977); Sack v. Low, 478 F.2d 360, 365 (2d Cir. 1973).

[413] *See* Vernon, *supra* note 395, at 300 ("[n]o consistent pattern appears . . . in the courts' efforts to locate the situs of the arising").

[414] Professor Vernon noted:

> Traditionally, it has been thought that a cause of action arises at . . . the place where the wrongful act or omission occurs. And, conceptually, it does seem that a "cause of action cannot have two places of origin." [footnote omitted] Thus, the place of performance in contracts and the place of impact in torts, as the situs of the action or inaction complained of, are normally designated as the place where the claim arose or accured [sic].

Id. at 302. For a collection of cases illustrating the majority approach, see *id.* at 302 n.64. *See generally* Milhollin, *supra* note 401, at 25-41 (criticizing "last act" doctrine as definition of single place of accrual and recommending adoption of interests analysis). *Cf.* TEX. REV. CIV. STAT. ANN. art. 5542 (Vernon 1958) (borrowing only the period of the state from which the defendant migrated into the forum state).

[415] Vernon, *supra* note 395, at 302-04. Professor Vernon labels the multiple place of arising theory a "legal realist approach," because it requires a geographic co-existence of right and remedy. Legal realists believe that a cause of action cannot realistically accrue unless the defendant is amenable to process. Thus, under this view, a cause of action may arise in several states if defendant is amenable to process in each. A multiple place of arising forum will bar plaintiff's suit if the time period of any of the states in which defendant remains amenable to process has run. *Id.* *See* Ester, *supra* note 398, at 49-53. States that have adopted the multiple place of arising theory include Massachusetts (MASS. ANN. LAWS ch. 260, § 9 (Michie/Law. Co-op 1980) (no action maintainable if barred by the law of "any state" in which defendant resided)), and Iowa (IOWA CODE § 614.7 (1977) (suit in forum barred if period of "any state" in which defendant resided has run)). The multiple place of arising approach appears harsh because it requires plaintiff to sue before any of several possible time bars have run. For example, if plaintiff sues in Massachusetts and the defendant has resided in three different states before plaintiff brings suit, plaintiff's suit is barred if any of the three periods have run. Under the majority position, unless the defendant was beyond the long-arm jurisdiction of the states in which he resided, their periods would not be tolled in his absence. *See* notes 425-27 and accompanying text *infra*. Like the tolling doctrine that suspends a period in the defendant's absence only if he was also beyond service of process, this approach places a premium on the plaintiff's diligence.

Evaluation of the merits of the multiple place of arising theory requires consideration of the policies embodied in limitations periods. Because it requires utmost diligence, this approach serves the promotional function of time bars. Where the litigants do not reside in

interests analysis approach to determine where the cause of action accrued.[416] Finally, several states have adopted a "resident plaintiff exception," and will not borrow a shorter foreign limitations period when the plaintiff is a resident of the forum state.[417]

a. *Discriminatory Effect of the Resident Plaintiff Exception.* The most distressing aspect of borrowing statutes is the frequent resident plaintiff exception, which raises the possibility of liability for a defendant extending far beyond the forum's statutory period. Parochial favoritism underlies this exemption;[418] the forum intends its own residents to have the advantage of the forum's period when it is longer than that of the state of accrual. Such exceptions give residents a substantial advantage over nonresidents, whose suits may be barred if either the forum's period or that of the borrowee state has run.[419] The resident litigant's suit remains timely in the forum as long as its period has not run, despite the expiration of several otherwise applicable foreign periods.

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the same state, the plaintiff is strongly encouraged to leave his state, locate the defendant and serve him with process. Moreover, by promoting docket-clearing and diminishing the trial of stale claims, the multiple place of arising theory serves the institutional purposes of time bars. Perhaps most important, permiting plaintiff to sue in the forum after the limitations of several foreign jurisdictions have run (because neither the courts of the single place of accrual nor of the forum state had jurisdiction over the defendant, thus tolling both states' periods) vitiates defendant's right to repose. The defendant develops a legitimate expectation that his liability has terminated once the time periods of the states in which he has resided have run. And, although this approach appears to contravene the policy of giving the plaintiff every reasonable opportunity to vindicate his claims, this argument falters upon closer inspection. The plaintiff has been given several reasonable periods in which to sue—those of each state in which defendant has resided. *See* Ester, *supra* note 398, at 50.

Finally, the apparent harshness of compelling the plaintiff to search out and serve an absent defendant decreases when compared to the majority rule that a limitations period tolls only when the absent defendant is beyond service. Vaughn v. Dietz, 430 S.W.2d 487, 489 (Tex. 1968); Note, *supra* note 408, at 575-76; *see* notes 425-27 and accompanying text *infra*. Even if a state followed the single place of accrual theory, this tolling doctrine would require absolute diligence on the part of the plaintiff in serving an out-of-state defendant, especially given the liberal long-arm jurisdiction with which most states have vested their courts.

[416] *See, e.g.* Thigpen v. Greyhound Lines, Inc., 11 Ohio App. 2d 179, 181 229 N.E.2d 107, 109 (1967).

[417] Several states do not borrow the period of the place of accrual when the plaintiff is a resident of the forum state. *See, e.g.*, CAL. CIV. PROC. CODE § 361 (West 1954); MICH. COMP. LAWS ANN. § 600-5861 (West Supp. 1979); N.Y. CIV. PRAC. LAW § 202 (McKinney 1972).

[418] *See* Ester, *supra* note 398, at 71; Vernon, *supra* note 398, at 311.

[419] *See* Vernon, *supra* note 395, at 311.

Although the Supreme Court has upheld the constitutionality of resident plaintiff exceptions,[420] such provisions are unfair and their absorption violates the federal interest in equal treatment of litigants;[421] "Any favoring of local plaintiffs . . . seems overly parochial in a federal system . . . and indefensible on rational grounds."[422] This federal interest goes beyond a mere desire to

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[420] In Canadian N. Ry. v. Eggen, 252 U.S. 553 (1920), the Court held that exempting a resident plaintiff from borrowing statutes did not violate a nonresident's rights under the "privileges and immunities" clause of the U.S. Constitution, Article 4, § 2:

> The principle on which this holding rests is that the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an oridinarily diligent man to institute proceedings for their protection.

Id. at 562.

[421] Federal courts absorb the resident plaintiff exception when they adopt state statutes of limitations and state borrowing rules. *See, e.g.*, Figueroa v. Esso Standard Oil Co., 231 F. Supp. 168, 169-70 (S.D.N.Y. 1964) (looking to state statute of limitations as guide in applying laches in federal admiralty suit; New York borrowing statute inapplicable because plaintiff was resident of forum state). Few cases have actually held the borrowee state's period inapplicable under this exception because the plaintiff has rarely been a resident of the forum state. The restrictive venue provisions for federal question suits in 28 U.S.C. § 1391 (1976), which permits suit only where defendant resides or where the cause of action arose, probably account for the paucity of cases in which plaintiff was a resident of the forum state. Innumerable cases in which the plaintiff was a nonresident have at least implicitly absorbed the exception by first stating that the forum's borrowing statute would not apply were plaintiff a resident of the forum, and then determining the plaintiff's resident to see if he qualified for the exception. *See, e.g.*, Posner v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 469 F. Supp. 972, 977 (S.D.N.Y. 1979) (because plaintiff's nonresidence "concededly present," resident plaintiff exception inapplicable); Haberman v. Tobin, 466 F. Supp. 447, 449 (S.D.N.Y. 1979) ("for purposes of New York's borrowing statute [the corporation] . . . is a non-resident of New York"); Gross v. Diversified Mortgage Investors, 438 F. Supp. 190, 198 (S.D.N.Y. 1977) (because plaintiff's residence not "at all times" clear, court dismissed without prejudice because it could not determine whether resident plaintiff exception applied); Arneil v. Ramsey, 414 F. Supp. 334, 337-38 (S.D.N.Y. 1976) (borrowing statute applies *only* where the action accrued outside New York *and* where plaintiff is a nonresident), *aff'd*, 550 F.2d 774 (2d Cir. 1977); Korn v. Merrill, 403 F. Supp. 377, 383-85 (S.D.N.Y. 1975), *aff'd without opinion*, 538 F.2d 310 (2d Cir. 1976) (although plaintiff resident of forum state, resident plaintiff exception inapplicable because claim accrued in favor of corporation, a nonresident).

[422] Vernon, *supra* note 395, at 311. In part borrowing statutes were enacted to prevent a litigant from unfairly prosecuting a claim in the forum state when the laws of the jurisdiction in which the cause of action arose barred the claim; legislators were motivated by a concern for fairness and a desire to prevent forum-shopping. *See* note 408 *supra*. Resident plaintiff exceptions create a limited kind of forum-shopping by encouraging plaintiffs to sue at home whenever the local time period is longer than that of the place of accrual.

achieve uniformity for its own sake. Rather, it is a concern that each plaintiff receive substantially the same opportunity to remedy the violation of his rights. The resident plaintiff exception ensures that the vagaries of the absorption process will prove more beneficial to in-state plaintiffs than to nonresident claimants. This discrimination is inconsistent with federal interests and with the purposes for which legislatures enacted borrowing provisions.[423]

b. *Potential for Extended Liability under the Resident Plaintiff Exception.* Not only is the resident plaintiff exception unfair, but it creates the possibility of extended liability for the defendant. Most jurisdictions do not toll their limitations periods unless an absent defendant is beyond the reach of their long-arm statutes,[424] a situation that arises infrequently.[425] However, if the defendant has never set foot in the forum state, if the cause of action accrued elsewhere, and if the state long-arm statute does not extend to the limits of the Constitution, his contacts with the forum state may not be sufficient to render personal jurisdiction reasonable. In such a situation, the forum's period would toll during the defendant's absence. The resident plaintiff exception renders irrelevant the running of any foreign time bars; only the time period of the forum, tolled in defendant's absence, would control. Under these circumstances, the defendant would still be liable in federal court even if he were to enter the forum state ten, fifteen, or twenty years after the accrual of the cause of action because the court's jurisdiction in federal question cases is not limited by state long-arm statutes.[426]

The possibility of extended liability strongly contravenes the policies underlying time bars. The knowledge that the forum's period has tolled encourages resident plaintiffs to wait until the

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[423] *See* note 408 *supra.*

[424] *See* Note, *supra* note 408, at 575-76; Vaughn v. Dietz, 430 S.W.2d 487, 489 (Tex. 1968).

[425] *See* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (dissenting opinion, Stewart J.); Leroy v. Great Western United Corp., 443 U.S. 173, 191-92 (1979) (dissenting opinion, White, J.); Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-90 (S.D. Ohio 1967); First Flight Co. v. National Car Loading Corp., 209 F. Supp. 730, 736-38 (E.D. Tenn. 1962); C. WRIGHT, *supra* note 4, at 304-05. However, in practice, "the federal district courts are subject to the limitations on service of process that apply to state courts." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.10, at 620 (2d ed. 1977).

[426] The assertion of personal jurisdiction over the defendant passes muster under the Constitution if the defendant has had sufficient "minimum contacts" with the forum state to make the exercise of jurisdiction over him reasonable. *See* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980); Rush v. Savchuk, 100 S. Ct. 571 (1980).

defendant becomes subject to suit in the forum, thereby reactivating the forum's time period. The possibility that important witnesses may die or disappear and that evidence may be lost or forgotten[427] frustrates the institutional and remedial interests in avoiding trials of stale claims.[428] Further, the combination of tolling and the resident plaintiff exception robs defendant of his right to repose.[429] Defendant has a right to feel secure in his possessions and free in his conduct after a reasonable time has expired; clearly, fifteen or twenty years is not reasonable in the absence of fraud or evasion by defendant. Finally, defendant is entitled to know with certainty how long his liability extends. Such certainty is unavailable where his liability depends on whether he happens to subject himself to the personal jurisdiction of the forum.

4. *Proposed Judicial Reform*

The inconsistencies of local laws in determining what limitations period controls when the cause of action accrues outside the forum state weigh against their absorption into the already inconsistent process of adopting state limitations periods. Federal litigants in states employing the interest analysis approach will often be subject to the limitations periods of borrowee forums, although those in states still adhering to the *lex fori* doctrine will rarely be. Litigants in "multiple place of arising" jurisdictions may find their claims barred long before litigants in "single place of arising" jurisdictions. This unequal treatment of federal litigants clearly mandates uniform federal legislation. Change through the federal judiciary is unlikely because the federal interests in uniformity and administrative efficiency are insufficient to override the presumptive absorption of state borrowing doctrines. Further, the application of borrowing rules is highly mechanical, and hardly presents the administrative problems that typify characterization.[430]

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[427] The Supreme Court has frequently emphasized the purposes of statutes of limitations in the federal system. In Order of Railroad Telegraphers v. REA, Inc., 321 U.S. 342, 348-49 (1944) the Court stated that:

> Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them.

[428] *See* notes 16-31 and accompanying text *supra.*

[429] *See* notes 16-20 and accompanying text *supra.*

[430] *See, e.g.,* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966).

However, federal interests may be strong enough to justify modification of a discrete aspect of the borrowing process—the resident plaintiff exception. This exception conflicts with the federal interests in equal treatment of litigants, avoiding stale claims and granting defendant repose within a reasonable period.[431] To remedy these problems, federal courts should uniformly refuse to absorb resident plaintiff exceptions when borrowing statutes of limitations. Under this approach courts would continue to absorb state laws that toll limitations periods when the defendant is not within the forum's personal jurisdiction; such tolling is consistent with the equitable purposes of time bars.

Conclusion

The Rules of Decision Act does not mandate the absorption of state law for federal rights without limitations periods. Congress deferred to the discretion of the federal courts in limiting such rights. Despite the judicial freedom to fashion uniform federal rules, federal limitations law is now an inconsistent and unpredictable patchwork of state law and judge-made rules. This Project has suggested a general framework to restore predictability, the most important function of limitations periods, to federal litigants.

However, absolute certainty and consistency are possible only if Congress enacts a uniform law of limitations. The optimum solution would be federal statutes not only prescribing periods for each federal right, but also regulating tolling, accrual, and the other subsidiary issues. Ideally, Congress should enact a general catch-all period for groups of federal rights. But, because Congress is unlikely to enact such legislation the federal judiciary must reform this confused area of the law. Thus, courts should presumptively absorb state limitations periods, tolling provisions and borrowing statutes—except for resident plaintiff exceptions. However, courts should fashion federal rules for the characterization process and the remaining ancillary issues.

Mitchell A. Lowenthal *Brian E. Pastuszenski*
*Mark E. Greenwald**

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[431] For a discussion of the lower threshold of federal interests necessary to override absorption of state law as to subsidiary issues, see notes 187-91 and accompanying text *supra*.

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