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Limitation Periods for Federal Causes of Action After the Judicial Improvements Act of 1990

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I. INTRODUCTION

Congress often enacts statutes that create specific causes of action for aggrieved individuals.[1] Many federal statutes, however, create duties with no corresponding action for breach,[2] leaving courts to create causes

1. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1988) (civil enforcement action for violations of antitrust laws); Copyright Act, 17 U.S.C. § 501(b) (1988) (action for infringement); Trademark Act, 15 U.S.C. § 1125 (1988) (action for misrepresentation regarding goods, services, or commercial activities).

2. *See, e.g.*, Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1988) (granting authority to the Securities Exchange Commission to regulate securities fraud but providing no recourse for those injured by securities fraud).

of action for individuals owed those duties.[3] When the courts, rather than Congress, create a cause of action, no specific statute of limitations governs the suit. Surprisingly, many statutory causes of action also lack limitation periods.[4] Courts frequently face actions not governed by any statute of limitations because traditionally there has been no general statute of limitations governing all federal actions.[5]

Courts usually are not content to find that a party may bring suit at any time after the cause of action accrues.[6] Throughout history, courts have found time limitations necessary to protect possible defendants, the judicial system, and society in general.[7] Because many federally derived causes of action do not have statutory limitation periods, courts must look elsewhere for appropriate time restrictions.[8]

In 1990 Congress sought to relieve the courts of the arduous task of borrowing limitation periods. The Judicial Improvements Act of 1990[9] (the Act) contains a general statute of limitations governing actions arising under federal statutes that contain no specific limitation periods.[10] Part II of this Note discusses the Act in more detail. Part III evaluates options courts have when confronting a federal cause of action with no limitation period, including borrowing from state law, borrowing from federal law, applying no limitation period, limiting the

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3. The general assumption is that such actions are within Congress's intent. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); *cf.* Cort v. Ash, 422 U.S. 66 (1975).

4. *See, e.g.*, Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, 1985 (1988) (specifying no limitation period for civil actions for deprivation of civil rights); Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1988) (specifying no limitation period for civil actions for violations of collective bargaining agreements); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1988) (specifying no limitation period for civil enforcement actions for violation of § 1962 of the Act).

5. 28 U.S.C. § 2462 (1988) places a general five-year limit on actions brought "for the enforcement of any civil fine, penalty, or forfeiture" except as otherwise provided by Congress. Courts, however, have interpreted this statute narrowly to apply only to actions brought by or on behalf of the United States. *See* Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785, 788-89 (2d Cir. 1959), *cert. denied*, 361 U.S. 960 (1960). *See also* Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133, 166-67 (1989) (suggesting that courts expand their interpretation of § 2462).

6. "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' . . . Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten." Wilson v. Garcia, 471 U.S. 261, 271 (1985) (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805)).

7. For an in-depth discussion of the purposes of time limitations, see Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1014-20 (1980).

8. *See infra* Part III.

9. Pub. L. No. 101-650, 104 Stat. 5114 (codified as amended in scattered titles of 28 U.S.C.).

10. The Act provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." Pub. L. No. 101-650, § 313(a).

action with laches, or simply creating an appropriate period. Part IV examines steps Congress could take to ensure that every action arising under a federal statute has an appropriate limitation period and examines constitutional concerns regarding congressional delegation of the power to fix statutes of limitations. Finally, this Note concludes that the general fallback statute of limitations in the Act is insufficient as a remedy for the uncertainty caused by Congress's failure to provide limitation periods in statutes that create causes of action. Because courts are unable to provide uniform solutions to this problem, Congress must enact additional legislation.

II. THE JUDICIAL IMPROVEMENTS ACT OF 1990

On December 1, 1990 President George Bush signed into law the Judicial Improvements Act of 1990.[11] The Act covers many aspects of the federal judiciary, including jurisdiction, removal, venue, the role of magistrates, litigation management, and limitation periods for actions arising under federal statutes.[12] The statute of limitations provision was prompted by conclusions reached by the Federal Courts Study Committee.

A. Report of the Federal Courts Study Committee[13]

On April 2, 1990 the Federal Courts Study Committee issued its final report containing many recommendations for improving the fed-

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11. *See Legislation: Mixed Bag of Changes Designed to Improve Federal Practice*, 59 U.S.L.W. 2419 (Jan. 15, 1991); *The Judicial Improvements Act of 1990*, N.Y. L.J., Dec. 26, 1990, at 1.

12. Title I of the Act, the Civil Justice Reform Act, requires every federal district court to implement a "civil justice expense and delay reduction plan," the purpose of which is to streamline the process of adjudicating civil cases. Pub. L. No. 101-650, § 103 (codified as amended at 28 U.S.C. §§ 471-482 (Supp. 1991)). Title II, the Federal Judgeship Act, creates 85 new federal judgeships. Pub. L. No. 101-650, §§ 202-203 (codified as amended at 28 U.S.C. §§ 44(1), 133 (Supp. 1991)). Title III, the Federal Courts Study Implementation Act, implements some of the recommendations made by the Federal Courts Study Committee, including the statute of limitations provision of 28 U.S.C. § 1658, which is discussed in this Note. Pub. L. No. 101-650, §§ 301-325 (codified as amended in scattered sections of 28 U.S.C.); *see infra* subpart II(B). Title IV, the Judicial Discipline and Removal Reform Act, designed to augment the Judicial Discipline Act of 1980, Pub. L. No. 96-458 (codified as amended at 28 U.S.C. § 372 (1988)), creates the National Commission on Judicial Impeachment to make recommendations to Congress for improving the process for discipline and impeachment of federal judges. Pub. L. No. 101-650, §§ 408-418 (codified as amended in scattered sections of 28 U.S.C.).

13. Congress created this Committee with the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4643 (codified as amended in scattered sections of 28 U.S.C.), to study the federal courts' growing caseload and to create a comprehensive plan for improvement. The Committee, which lasted 15 months, was comprised of 15 members appointed by Chief Justice Rehnquist. Members included five federal judges, including Judge Joseph Weis, Jr., chairman of the Committee, Judge Jose Cabranes, Judge Levin Campbell, Judge Judith Keep, and Judge Richard Posner; Washington Supreme Court Justice Keith Callow; Assistant U.S. Attorney

eral judiciary.[14] The Committee recommended that every federal statute creating a cause of action should include a statute of limitations and that Congress should adopt limitation periods for those statutory actions which lacked them.[15] The Committee's report also suggested that Congress should enact a general fallback statute of limitations for federal claims that were not created explicitly by Congress.[16] This fallback statute of limitations also would cover any express action for which Congress neglected to create a specific limitation.[17]

B. Congress's Response: Section 1658

In response to these recommendations, Congress enacted Section 313 of the Act, amending Title 28 of the United States Code with Section 1658. That section imposed a four-year limitation on civil actions arising under federal statutes which themselves contain no specific limitation periods.[18] With Section 1658, Congress enacted a general fallback statute of limitations. Section 1658, however, applies only to actions arising under statutes enacted *after* December 1, 1990.[19] Therefore, Section 1658 does not apply to the many federal causes of action created before that date.[20]

It is unclear why Congress limited the scope of Section 1658. The current version of Section 1658, however, is incapable of effecting its primary purpose. Section 1658 was designed to provide a standard limitation period for all the federal causes of action, regardless of whether Congress or the courts created those causes of action that had no fixed limitation.[21] Because the Section expressly provides that it only applies

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General Edward Dennis; former Solicitor General Rex Lee; Diana Gribbon Motz and Morris Harell, private practitioners; Vince Aprile, general counsel of the Department of Public Advocacy, State of Kentucky; Senators Howell Heflin and Charles Grassley; and Representatives Carlos Moorhead and Robert Kastenmeier. 136 CONG. REC. E2501 (daily ed. July 26, 1990) (statement of Rep. Kastenmeier).

14. Report of the Federal Courts Study Committee (Apr. 2, 1990) [hereinafter Study Committee Report].

15. *Id.* at 93.

16. *Id.*

17. *Id.*

18. 28 U.S.C. § 1658 (Supp. 1991). Other recommendations Congress enacted were those regarding supplemental jurisdiction, venue, removal, witness and juror fees, and hankruptcy appeals. Congress did not enact proposals to limit diversity jurisdiction, shift most drug prosecutions from federal to state courts, create an appellate tax court, and estahlish a new Article I court to review social security disability claims. *See The Judicial Improvements Act of 1990*, *supra* note 11; *Sweeping Changes in Federal Judiciary Urged by Federal Courts Study Committee*, 58 U.S.L.W. 2599, 2601 (Apr. 17, 1990).

19. The section limits its application to actions arising *after* its enactment on December 1, 1990. *See supra* note 10.

20. For examples, see *supra* notes 1-5 and accompanying text.

21. "[Section 1658] provides a fall-back statute of limitations . . . for federal civil actions by

to causes of action arising under statutes enacted after its passage,[22] it cannot reach those older causes of action. Yet these were the same causes of action that served as the impetus for Section 1658's enactment.[23]

Congress probably intended for the fallback statute of limitations to govern all causes of action accruing after December 1, 1990, regardless of when the particular cause of action was created. This interpretation is strengthened by other language in the Act.[24] The language of Section 1658 itself, however, can mean only that the fallback period is to apply to statutory causes of action created after the Act.[25] Thus, if Congress wants the fallback period to apply to all statutory causes of action lacking limitation periods, it must amend Section 1658. It is unfortunate that all of the efforts of Congress and the Federal Courts Study Committee have failed to solve the limitations problem.

III. Options Available to the Courts

Since Congress did not address actions arising under older statutes, courts hearing such claims will have to decide what time limitations, if any, to place on them.[26] This Part discusses the methods the Supreme Court has used to select limitation periods and other proposals courts and commentators have suggested.

A. Borrow a State Limitation Period

A court facing a federal action lacking a limitation period most often borrows from the forum state's statute of limitations governing analogous state law claims.[27] The court first characterizes the federal action and then examines the state's statute of limitations controlling similar claims.[28] If more than one limitation period is available, the court chooses the period that seems most appropriate by weighing the

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providing that, except as otherwise provided by law, a civil action arising under an Act of Congress may not be commenced later than four years after the cause of action accrues." 136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley).

22. *See supra* note 10.

23. One can assume that the Federal Courts Study Committee and Congress were concerned more with present difficulties with existing causes of action than with the possibility of future difficulties with future causes of action. Indeed, the Committee's report recommended that Congress adopt limitation periods for existing causes of action that lacked them. Study Committee Report, *supra* note 14, at 93.

24. Section 313(c) of the Act provides that § 1658 "shall apply with respect to causes of action accruing on or after the date of the enactment of this Act." Judicial Improvements Act of 1990, Pub. L. No. 101-650 § 313(c).

25. *See supra* note 10.

26. *See supra* notes 6-8 and accompanying text.

27. *See* Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980).

28. Wilson v. Garcia, 471 U.S. 261, 269-75 (1985).

factors considered by the state legislature in selecting its limitation periods.[29] State legislatures may have considered factors such as the plaintiff's interest in bringing suit, the defendant's interest in repose, the judiciary's interest in evidence that has not become stale, and the practical problems associated with litigation of a particular claim.[30] Generally, a court assumes that the limitation period for analogous state claims addresses all of these concerns.[31]

The Supreme Court applied a state statute of limitations to a claim arising under federal law for the first time in 1830, in *M'Cluny v. Silliman*.[32] The plaintiff claimed that a federal land office registrar had breached a duty created by a federal statute.[33] The Supreme Court affirmed the lower court's decision that Ohio's statute of limitations barred the claim.[34] The plaintiff argued that the state's statute of limitations could not bar a claim asserting a right created by federal law because the state legislature could not have considered such an action when it enacted the statute.[35] The plaintiff also contended that affirming the lower court would result in different limitations in different states for the same federal action.[36] The Supreme Court was not persuaded, however, and held that the Rules of Decision Act[37] required that state statutes of limitations govern federal statutory actions when Congress had created no specific limitation.[38]

Although most commentators[39] and most of the present Supreme

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29. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

30. *See* Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1134-41 (1979).

31. "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit . . . on the prosecution of a closely analogous claim." *Railway Express*, 421 U.S. at 464.

32. 28 U.S. (3 Pet.) 270 (1830).

33. Act of May 19, 1796, ch. 29, 58, 1 Stat. 468. The Act provided for the sale of lands belonging to the United States northwest of the Ohio River and above the mouth of the Kentucky River. M'Cluny sued under § 10, which required land registers to enter all purchase applications. M'Cluny v. Silliman, 28 U.S. (3 Pet.) at 270-71.

34. The circuit court held that Ohio's six-year statute of limitations for actions on the case barred the claim. *M'Cluny*, 28 U.S. (3 Pet.) at 276. The failure to enter his purchase application occurred on August 2, 1810, but the plaintiff did not bring suit until December 15, 1823. *Id.* at 270.

35. *Id.* at 273-74.

36. *Id.* at 274.

37. The Rules of Decision Act 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." 28 U.S.C. § 1652 (1988). The Act was substantially the same at the time of the *M'Cluny* decision, with the words "in trials at common law" in place of "in civil actions." Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92. For a discussion of the legislative history behind the original act, see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

38. *M'Cluny*, 28 U.S. (3 Pet.) at 276-79.

39. *See, e.g.*, Comment, *supra* note 5, at 152-55; Note, *supra* note 30, at 1135-37. For a pro-

Court Justices[40] question the correctness of the reasoning of *M'Cluny*, the case established a preference for state borrowing that continues today.[41]

Fifty-five years after *M'Cluny*, the Court modified its stance on the Rules of Decision Act in *Campbell v. Haverhill*.[42] The Court noted that the Rules of Decision Act generally required application of the state's statute of limitations when Congress provided none, but explained that the state's statute would not apply if it appeared unduly burdensome or discriminatory to the federal action.[43] The Court then found that in the case before it the state's statute did not burden the federal action and applied the state limitation period.[44] *Campbell* is significant, however, because it gave courts discretion in applying state limitation periods when federal rights might be prejudiced.[45]

Not until 1946, in *Holmberg v. Armbrecht*,[46] did the Court decide that the Rules of Decision Act did not mandate application of state limitation periods.[47] The Court began by noting that congressional silence traditionally had been interpreted to mean that Congress intended federal courts to adopt the local statutes of limitations in actions at law.[48] Despite this interpretation, the Court held that it would not necessarily borrow limitation periods for actions in equity.[49] Thus, *Holmberg* gave courts even greater discretion in cases in which a federal action had no explicit limitation period.[50]

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bative analysis of *M'Cluny*'s application of the Rules of Decision Act, see Special Project, *supra* note 7, at 1025-30.

40. *See, e.g.*, DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983) (finding that the Rules of Decision Act requires application of a state's limitation period only when federal law does not provide one and that the choice of a limitation period for a federal cause of action was itself a question of federal law, rendering the Act inapplicable). But see Justice Stevens's dissenting opinion in *DelCostello*, stating that the Act required application of state statutes of limitations. *Id.* at 172-74 (Stevens, J., dissenting).

41. *See, e.g., DelCostello*, 462 U.S. at 158-59.

42. 155 U.S. 610 (1895).

43. *Id.* at 614-15.

44. *Id.* at 615-21. The Court rejected the plaintiff's contention that his action for patent infringement was outside the Rules of Decision Act because the federal courts had exclusive jurisdiction. *Id.* at 614-15. The Court apparently assumed the only alternative was that no limitation applied. *Id.* at 616-17.

45. For a thorough discussion of the *Campbell* Court's reasoning, see Special Project, *supra* note 7, at 1031-37.

46. 327 U.S. 392 (1946).

47. *Id.* at 395.

48. *Id.*

49. *Id.* at 396-97.

50. The *Holmberg* Court announced a new rationale for state borrowing: "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." *Id.* at 395.

Since the *Holmberg* decision, the Supreme Court generally has followed the presumption in favor of borrowing state statutes of limitations.[51] As state law has created different statutes of limitations governing more specific causes of action, the Court has focused its attention on exactly which statutes of limitations are most analogous under state law.[52] The Court in these cases attempts to find the most appropriate time restriction by focusing on the state law action most analogous to the federal cause of action.[53] The Justices, however, often have disagreed over which state period is most appropriate.[54]

Many commentators have questioned both the necessity and the wisdom of borrowing state statutes of limitations.[55] These commentators have proposed alternatives to state borrowing that would create uniformity among the states and reduce the uncertainty as to which statute of limitations will apply.[56]

B. Borrow a Federal Limitation Period

Some commentators have suggested[57] that the Supreme Court first borrowed a statute of limitations from an analogous federal cause of

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51. *See supra* note 31 and accompanying text.

52. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 272-75, 280 (1985) (rejecting the prior practice of determining the most analogous statute of limitations for civil rights actions under 42 U.S.C. § 1983 on a case-by-case basis, and ruling that henceforth all such claims would be governed by the states' personal injury statutes of limitations); Owens v. Okure, 488 U.S. 235, 239-50 (1989) (holding that each state's residual personal injury statute of limitations would apply rather than the statute of limitations for enumerated intentional torts). For a discussion of the problems courts face when searching state law for the most analogous statute of limitations, see New York State Bar Association, *Report on the Application of Statutes of Limitations in Federal Litigation*, 53 ALB. L. REV. 3 (1988) [hereinafter *New York Report*] (focusing on federal securities regulation, civil rights actions, and labor law).

53. It is thought that the same values that compelled the state legislature to select the limitation period will serve the federal interests reflected in a similar federal statute. *See supra* note 31.

54. *See, e.g.*, United Parcel Serv. v. Mitchell, 451 U.S. 56 (1981) (Justices disagreeing as to whether to apply the state's statute of limitations governing actions to vacate arbitration awards or the state's statute governing contract actions to a claim brought under § 301 of the Labor Management Relations Act).

55. *See* sources cited *infra* note 56.

56. Disuniformity results because borrowing state law can result in many different statutory time bars governing the same federally created action. Uncertainty results because plaintiffs in different states do not know what limitation governs their action until the courts determine which state statute will apply. The list of the borrowing approach's detractors is long, but for a survey of their complaints, see Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); *New York Report*, *supra* note 52; Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937 (1951); Comment, *supra* note 5; Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 SW. L.J. 895 (1987) [hereinafter Comment, *Determining Limitation Periods*]; Note, *Disparities in Time Limitations on Federal Causes of Action*, 49 YALE L.J. 738 (1940).

57. *See, e.g.*, Comment, *Determing Limitation Periods supra* note 56, at 914-15.

action in 1958 in *McAllister v. Magnolia Petroleum Co.*,[58] but that suggestion is misleading. In *McAllister* the Court held only that when a judicially created federal action for unseaworthiness[59] was combined with an action under the Jones Act,[60] a court could not apply a state statute of limitations that was shorter than the limitation that Congress provided for the statutory action.[61] Thus, the *McAllister* case did not concern a statutory right for which Congress had provided no statute of limitations.[62] The majority opinion stated only that the practicalities of litigation dictated that both actions be brought together.[63] Thus, the application of a state limitation period shorter than the period prescribed for the statutory right would have shortened the period for the latter, denying the full benefit of the federal law.[64]

Justice Brennan's concurring opinion suggested that the Jones Act limitation should apply to the analogous action for unseaworthiness because it was the logical source from which to draw.[65] The dissenters argued that the two actions were independent and that when federal rights were silent on the matter of limitation, the state statute of limitations applied.[66] The dissenters believed that uniformity was desirable, but that such a change in the law was for Congress, and not the Court, to effect.[67]

The first time the Supreme Court actually borrowed a statute of limitations from an analogous federal statute was in 1983. *DelCostello v. International Brotherhood of Teamsters*[68] involved "hybrid" suits brought under Section 301 of the Labor Management Relations Act.[69] The Court previously had held that after a plaintiff's union has brought

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58. 357 U.S. 221 (1958).

59. An unseaworthiness claim is a cause of action under general maritime law alleging that the shipowner or operator breached a duty to furnish a vessel reasonably fit for its intended use. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960). *See generally* T. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 4-5, 5-3 (1987).

60. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law." 46 U.S.C. § 688(a) (1988).

61. *McAllister*, 357 U.S. at 224. While the state court had applied the state's two-year personal injury statute of limitations to the unseaworthiness action, McAllister v. Magnolia Petroleum Co., 290 S.W.2d 313, 316 (Texas Civ. App. 1956), the Jones Act had a three-year statute of limitations. *McAllister*, 357 U.S. at 225 n.6.

62. Instead, the Court had to determine what statute of limitations to apply to the unseaworthiness action, which was grounded in general maritime law. *See supra* note 59.

63. *McAllister*, 357 U.S. at 225-26.

64. *Id.*

65. *Id.* at 227-30 (Brennan, J., concurring).

66. *Id.* at 232 (Whittaker, J., joined by Frankfurter & Harlan, JJ., dissenting).

67. *Id.* at 234.

68. 462 U.S. 151 (1983).

69. Section 301 of the Labor Management Relations Act (LMRA) authorizes suit in federal court for breach of a collective bargaining agreement. 29 U.S.C. § 185 (1988).

a formal grievance against his employer unsuccessfully, the plaintiff may bring a hybrid action against both the employer, for breach of contract, and the union, for breach of its duty of fair representation.[70] Since neither claim is governed by an express limitation period, the Court was forced to select one.[71] Again, the Court stated the presumption that Congress intended for the courts to borrow from state law,[72] but intimated that the preference for state limitation periods was a fallback rule rather than an attempt to ascertain legislative intent.[73]

Citing *McAllister*, the Court noted that it previously had borrowed from federal rather than state law.[74] Although the Court acknowledged that it had applied state statutes of limitations to actions under Section 301, it distinguished those cases because they involved only actions against the employer.[75] An action solely against the employer was analogous either to a state law contract action or an action to vacate an arbitration award.[76] Because the hybrid suits in *DelCostello* also contained claims against unions, these analogies no longer controlled.[77] Instead, because the Court had created a cause of action against the unions based on the scheme of the National Labor Relations Act,[78] no

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70. Vaca v. Snipes, 386 U.S. 171 (1967). To recover damages against either the union or the employer, the plaintiff employee must prove both that the employer breached the collective bargaining agreement and that the union breached its duty of fair representation. *See DelCostello*, 462 U.S. at 164-65.

71. While the claim against the employer is based on § 301, the claim against the union actually is implied under the scheme of the National Labor Relations Act (NLRA), 29 U.S.C. § 160 (1988). The claim under the NLRA does not have a statute of limitations because it was judicially created. *See DelCostello*, 462 U.S. at 164 n.14. The LMRA simply does not provide a statute of limitations for actions brought under § 301. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 697-98 (1966).

72. *DelCostello*, 462 U.S. at 158.

73. *Id.* at 158 n.12.

74. *Id.* at 162. The Court apparently reinterpreted its holding in *McAllister* as applying the Jones Act statute of limitations to all unseaworthiness actions. The *McAllister* opinion, however, stressed that it found merely that the Jones Act preempted state limitation periods of less than three years. 357 U.S. at 225 n.6. This new interpretation traced Justice Brennan's concurring opinion in *McAllister*. *See supra* text accompanying note 65. This may be explained by the fact that Justice Brennan wrote the majority opinion in *DelCostello*. *See* 462 U.S. at 154.

75. *DelCostello*, 462 U.S. at 162-65.

76. *Id.* In UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), the Court held that a straightforward suit under § 301 for breach of a collective bargaining agreement by an employer was most akin to actions on unwritten contracts. *Id.* at 705-08. Thus, the state statute of limitations governing those actions would apply. *Id.* at 707. In United Parcel Serv. v. Mitchell, 451 U.S. 56 (1981), the Court held that an action brought by an employee against his employer under § 301 following a grievance and arbitration procedure was most like an action to vacate an arbitration award. *Id.* at 62. Thus, the Court held that the state statute governing those claims would be applied. *Id.* at 64.

77. *DelCostello*, 462 U.S. at 165-69.

78. *See supra* note 71.

state law analogy existed.[79]

The Court then noted that state law was not the only source available for borrowing.[80] A federal statute of limitations, which was designed to address a balance of interests very similar to those at stake in the suit, existed under Section 10(b) of the National Labor Relations Act.[81] The Court borrowed Section 10(b)'s six-month period for filing unfair labor practice charges with the National Labor Relations Board.[82] The Court stressed that resort to state law remained the norm for borrowing, indicating that it would turn away from state law only when a federal rule clearly provided a closer analogy and the federal rule was significantly more appropriate in light of federal policy concerns and the practicalities of litigation.[83]

Justice Stevens, in his dissent, argued that the Rules of Decision Act required courts to borrow state limitation periods.[84] Therefore, the Court should have borrowed the states' statutes of limitations governing attorney malpractice suits because these were the most analogous to the claim of breach of duty of fair representation.[85] Although Justice O'Connor agreed with the majority that the Rules of Decision Act did not control, she asserted in her dissent that Congress had not indicated that it intended the courts to depart from the usual practice of borrowing state law.[86] Justice O'Connor agreed with Justice Stevens that the limitation periods for malpractice actions should apply.[87]

The Court borrowed from federal law again in *Agency Holding Corp. v. Malley-Duff & Associates*.[88] The *Agency Holding* Court had to determine the appropriate limitation period for civil claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).[89] Interestingly, Justice O'Connor wrote the majority opinion.[90] The Court stated that its first task is to determine whether all claims arising out of a federal statute should be characterized the same way,

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79. *DelCostello*, 462 U.S. at 168.

80. *Id.* at 169.

81. *Id.* (citing 29 U.S.C. § 160(b) (1988)).

82. *DelCostello*, 462 U.S. at 155.

83. *Id.* at 171-72.

84. *Id.* at 172-74 (Stevens, J., concurring in part and dissenting in part).

85. *Id.* at 174 (citing his separate opinion in United Parcel Serv. v. Mitchell, 451 U.S. 56, 71 (1981)).

86. *DelCostello*, 462 U.S. at 174-75 (O'Connor, J., dissenting).

87. *Id.* at 175.

88. 483 U.S. 143 (1987).

89. 18 U.S.C. § 1964 (1988). RICO provides no express limitation period. *Agency Holding*, 483 U.S. at 146.

90. *Agency Holding*, 483 U.S. at 144. Justice O'Connor dissented in *DelCostello*. *See supra* text accompanying notes 86-87.

noting that this characterization is a matter of federal, not state, law.[91] The Court noted that once the characterization is made, a court should inquire whether a federal or state statute of limitations should be used. The Rules of Decision Act requires application of state limitation periods unless a federal rule should be applied.[92] Again, Justice O'Connor stated that congressional intent governs, and if a state limitation period is at odds with the underlying federal right, then a court can assume that Congress did not intend for it to borrow state periods.[93] Noting the confusion among the lower courts as to what state limitation period should apply to RICO claims, the Court found that a uniform statute of limitations should be applied to avoid uncertainty and time-consuming litigation.[94]

The Court borrowed from the Clayton Act,[95] finding the cause of action under the Clayton Act to be most analogous to civil RICO claims because both statutes provided for treble damages, costs, and attorney's fees.[96] Additionally, both statutes were designed to deter criminal behavior by creating private causes of action.[97] The Court concluded that the federal policies at stake and the practicalities of litigation made the limitation period of the Clayton Act more appropriate than any state limitation period.[98]

Justice Scalia's concurring opinion traced the history of borrowing state statutes of limitations.[99] He concluded that the tradition of borrowing rests on the theory that the states have the power to create statutes of limitations and to determine which statute governs federal claims.[100] This determination under state law will control unless the federal statute that creates the right preempts the state limitation pe-

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91. *Agency Holding*, 483 U.S. at 147.

92. *Id.*

93. *Id.* at 147-48.

94. *Id.* at 148-50.

95. 15 U.S.C. § 15 (1988). The Clayton Act provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1988).

96. *Agency Holding*, 483 U.S. at 150-51. RICO's civil enforcement provision states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of his suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).

97. *Agency Holding*, 483 U.S. at 151.

98. *Id.* at 156.

99. *Id.* at 158-64 (Scalia, J., concurring).

100. *Id.*

riod.[101] If it does, then no limitation on the federal cause of action exists.[102] Justice Scalia was troubled by the Court's practice of basing its decisions on congressional intent, opining that if Congress had intended a limitation period for a statutory action, then it would have included one in the statute.[103]

Although borrowing from federal law could create uniformity among the states, not all the lower federal courts choose to borrow federal limitation periods.[104] Uniformity results when a federal cause of action is governed by a single federal limitation period, regardless of the limitation laws of the forum state. Inconsistency still occurs because some courts may decide to apply a federal limitation period, while others may continue to apply state periods. Until the Supreme Court makes a clear pronouncement, the practice of borrowing from federal law will not guarantee uniformity, but instead will provide merely another option for the courts, creating an opportunity for more confusion.[105]

C. *Apply No Limitation Period*

The majority in *Agency Holding* rejected Justice Scalia's contention that federal causes of action which lack a limitation period, and for which no state statute is appropriate, should have no time limitation.[106] Clearly, limitation periods reflect important concerns, including potential defendants' interest in repose, the integrity of the judicial system, and the interests of society in general.[107] Thus, the Court generally as-

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101. *Id.* at 161-62.

102. *Id.* at 163-64.

103. *Id.* at 165-67. For a thorough analysis of both the majority's and Justice Scalia's opinions, see Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1474-92 (1988).

104. In Davenport v. A.C. Davenport & Son Co., 903 F.2d 1139 (7th Cir. 1990), the Seventh Circuit declined to follow the Third Circuit's approach, taken in *In re* Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988) (en banc), *cert. denied*, 488 U.S. 849 (1989), of borrowing a federal limitation period for securities fraud claims brought under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.106-5. Instead, the Seventh Circuit borrowed from a state blue sky statute. *See Davenport*, 903 F.2d at 1140-41.

105. *See* Wilson v. Garcia, 471 U.S. 261, 270 (1985) (asserting the federal interest in having " 'firmly defined, easily applied rules' " for limitations) (quoting Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). For a criticism of the federal borrowing approach, see Comment, *Determining Limitation Periods, supra* note 56, at 916.

106. The majority stated the oft-quoted maxim that "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws'." *Agency Holding*, 483 U.S. at 156 (quoting Wilson v. Garcia, 471 U.S. 261, 271 (1985) (quoting Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805))).

107. Statutes of limitations protect parties from being subject to indefinite threats of lawsuits, they protect the judicial system from having to consider cases where relevant evidence has been lost or forgotten, and they protect society in general by helping to preserve stability in com-

sumes that some limitation period must apply to any claim.[108] The Court, however, has held in a few rare instances that no limitation period applied.

In *Occidental Life Insurance Co. v. EEOC*[109] the Court held that no limitation period applies to an action brought by the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964.[110] Although state limitation periods might apply to a private plaintiff, applying such periods to EEOC actions would be inconsistent with federal policy.[111] Under federal law, the EEOC has significant administrative duties that have to be discharged before it can bring suit, so the EEOC would be prejudiced by state limitation periods.[112] The Court determined that Congress could not have intended this result.[113] According to the Court, Congress addressed the need for timeliness by providing short time periods within which charges were to be filed with the EEOC and notice given to the employer.[114] Because of the nature of the EEOC proceedings and the notice afforded the potential defendants, no state period should be borrowed.[115]

It may be significant that the Court showed concern for uniformity.[116] Had the case been decided after *DelCostello*, the Court might have looked for an analogous federal law. Still, it seems that the core rationale for the decision was that limitation periods were not necessary or appropriate given the particular nature of the suit.[117] Justice Rehnquist's dissenting opinion, joined by Chief Justice Burger, criticized the decision[118] and argued that the state statute of limitations should apply.[119]

Eight years later, the Court again found no limitation period appropriate in *County of Oneida v. Oneida Indian Nation.*[120] The plain-

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mercial relations. *See* Comment, *Determining Limitation Periods, supra* note 56, at 897-99.

108. *See supra* note 6 and accompanying text.

109. 432 U.S. 355 (1977).

110. *Id.* at 366. 42 U.S.C. § 2000e-5(f)(3) (1988) allows the EEOC to bring a civil action in federal district court against a private employer alleged to have violated the Civil Rights Act.

111. *Occidental Life*, 432 U.S. at 368-72.

112. *Id.* at 368-79. The EEOC is required to investigate claims of employment discrimination and settle disputes, if possible, in an informal, noncoercive fashion. 42 U.S.C. § 2000e-5(b) (1988).

113. *Occidental Life*, 432 U.S. at 368-69.

114. *Id.* at 371-72.

115. *See id.* at 371-73.

116. "It would hardly be reasonable to suppose that . . . Congress . . . would . . . consign [the EEOC's] federal lawsuits to the vagaries of diverse state limitations statutes. . . ." *Id.* at 370-71.

117. *See supra* notes 112-16 and accompanying text.

118. *Occidental Life*, 432 U.S. at 373-74 (Rehnquist, J., dissenting) (calling the majority decision a "process of unwarranted judicial legislation").

119. *Id.* at 384.

120. 470 U.S. 226 (1985).

tiffs in the case claimed that a 1795 conveyance from their ancestors to New York State violated the Trade and Intercourse Act of 1793.[121] The complaint requested fair rental value of the lands conveyed illegally for the two years prior to commencement of the suit.[122] The Court held that borrowing a state limitation period in this case would be inconsistent with the federal policy of not limiting Native American claims.[123] Thus, borrowing a limitation period would violate Congress's will.[124] This reasoning is confusing because the Court did not hold that the action was maintainable under the 1793 Act, but instead under federal common law.[125] One must assume that the Court was concerned not with Congress's intent, but with some general federal policy toward Native American claims.[126]

The Court rarely will decide to apply no limitation period at all, based on the importance of time limitations in the history of American jurisprudence. Still, this option does offer some advantages over borrowing.[127] First, the no-limitation option allows a court to avoid barring an otherwise valid claim. Second, the lack of consistency and uniformity inherent in the borrowing method could be obviated if all courts declined to find limitation periods for federal claims that lack them. Finally, some have argued that any borrowing is simply a guise for judicial legislation.[128] Finding that no existing limitation periods were applicable would force Congress to make the limitation decision.[129]

D. Apply the Doctrine of Laches

In *Holmberg v. Armbrecht* the Supreme Court held that no strict statutory limitation period will apply to a federal cause of action when

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121. *Id.* at 229. The Act provided that no person or entity should purchase any lands owned by Native Americans without the acquiescence of the federal government. Indian Trade and Intercourse Act, ch. 19, § 8, 1 Stat. 329 (1793). The State of New York, without the necessary approval, entered into an agreement with the Oneidas whereby it bought all of their land. *Oneida*, 470 U.S. at 232.

122. The plaintiffs commenced the suit in 1970, seeking damages representing the fair rental value of the lands for the period January 1, 1968, through December 31, 1969. *Oneida*, 470 U.S. at 229.

123. *Id.* at 240-41.

124. *Id.* at 244.

125. *Id.* at 233-36.

126. The Court focused on limitation treatment of other statutes giving rise to Native American land claims. *Id.* at 241-44.

127. For an evaluation of this approach, see Comment, *Determining Limitation Periods*, *supra* note 56, at 912-13.

128. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 170 (1987) (Scalia, J., concurring); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1394-95 (7th Cir. 1990) (Posner, J., concurring).

129. *Agency Holding*, 483 U.S. at 170 (Scalia, J., concurring); *Belleville Shoe*, 908 F.2d at 1394 (Posner, J., concurring).

the sole remedy is in equity.[130] The Court then remanded the case to the lower court to determine if laches would bar the plaintiff's suit.[131] Laches ordinarily is comprised of two elements: inexcusable delay by the plaintiff in bringing suit, and prejudice to the defendant due to that delay.[132]

In *Occidental Life Insurance Co. v. EEOC* the Court refused to apply a state statute of limitations, but intimated that in the case of undue delay courts could restrict or even deny backpay relief.[133] Also, in *County of Oneida v. Oneida Indian Nation* Justices Stevens, White, Rehnquist, and Chief Justice Burger argued in dissent that laches should bar the Native Americans' claims.[134] This is significant because the claim in *Oneida* was an action at law, not in equity.[135] The Justices acknowledged that laches would be novel in an action for damages, but found that real property disputes, such as the present one, often were resolved by resorting to equity.[136] In addition, the case involved a judicially created cause of action, so the Court did not need to be concerned with frustrating congressional intent.[137]

Like the application of no limitation periods, the use of laches ameliorates some of the harshness associated with statutes of limitations. Laches could create even more inconsistency than borrowing, however, because laches is applied on a case-by-case basis.[138] Therefore, the basic rationales for statutes of limitations would be undermined completely. The defendant's interests ultimately may be served when a court determines that a claim against him is barred, but not before he has been haled into court. Likewise, courts would expend scarce judicial resources to determine whether laches applied in a given case. Finally, it is difficult for a prospective claimant to predict when an otherwise valid claim becomes extinguished by time. Thus, laches does not offer a sig-

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130. 327 U.S. 392, 396-98 (1946). *See supra* text accompanying notes 46-50.

131. *Id.* at 397-98.

132. Gardner v. Panama R.R., 342 U.S. 29, 30-31 (1951); Note, *supra* note 30, at 1141 & n.91.

133. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 373 (1977).

134. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 261-62 (1985) (Stevens, J., dissenting). *See supra* text accompanying notes 120-26.

135. The plaintiffs in *Oneida* sought monetary damages. *See supra* note 122.

136. *Oneida*, 470 U.S. at 261-65. The dissenting Justices apparently did not consider the suit in *Occidental Life*, in which the court hinted at laches, to be an action at law, because they did not mention that case in their discussion. Some commentators, however, consider *Occidental Life*, decided before *Oneida*, to be the first case in which the Supreme Court allowed for laches in a legal action. *E.g.*, Note, *supra* note 30, at 1141-43; Comment, *Determing Limitation Periods*, *supra* note 56, at 913-14. The *Occidental Life* Court did not address the anomaly of applying laches to a legal action. Therefore, one can assume that the Court found the enforcement action for backpay to be an equitable action.

137. *See Oneida*, 470 U.S. at 270-73.

138. Note, *Fair Representation by a Union: A Federal Right in Need of a Federal Statute of Limitations*, 51 FORDHAM L. REV. 896, 904 (1983).

nificant improvement over borrowing.[139]

E. Create a Limitation Period

Some commentators have suggested that courts simply should create limitation periods for actions under consideration that lack them.[140] Such an approach could obviate the inconsistency associated with borrowing.[141] Uniformity would result, however, only when the Supreme Court set the time limitation for each action definitively. Until then, the creation by lower courts of different time periods probably would be less uniform than borrowing. Thus, allowing courts to create limitation periods does not seem to be the answer.

Regardless of the temptation to create limitation periods, the Supreme Court is very reluctant to engage in judicial legislation.[142] In the majority of cases, the Court does not even consider the option of creating a limitation period, but assumes that it should borrow from some other legislative source.[143] In *United Auto Workers v. Hoosier Cardinal Corp.*[144] a union requested that the Supreme Court create a uniform limitation period for actions brought under Section 301 of the Labor Management Relations Act.[145] The Court refused, finding that to do so would violate congressional intent.[146] The Court concluded that although uniformity was needed in labor law, prior case law did not require "so bald a form of judicial innovation."[147] Most commentators agree with the Court that the creation of limitation periods is performed more appropriately by Congress.[148]

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139. For an analysis reaching the same conclusion, see Note, *supra* note 30, at 1141-46.

140. *See, e.g., id.* at 1131 (stating that courts are "well-placed" to create limitation periods because they are positioned to appreciate their effects).

141. Comment, *Determining Limitation Periods, supra* note 56, at 917.

142. *See, e.g.,* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703 (1966).

143. *See, e.g., Hoosier,* 383 U.S. at 703-04; Chevron Oil Co. v. Huson, 404 U.S. 97, 104-05 (1971); Note, *Disparities in Time Limitations on Federal Causes of Action,* 49 YALE L.J. 738, 745 (1940).

144. 383 U.S. 696 (1966).

145. *Id.* at 701; *see supra* notes 69, 71.

146. Although the Court recognized that § 301 granted broad authority to the courts to fashion labor law, the Court could not infer that Congress intended the courts to invent a limitation period. *Hoosier,* 383 U.S. at 701-04. Justice White, joined by Justices Douglas and Brennan, argned in dissent that Congress did intend for the courts to create limitation periods for § 301, *id.* at 710 (White, J., dissenting), and that courts should be free to draw upon any source, including state and federal statutes of limitations, to arrive at the proper period. *Id.* at 714.

147. *Id.* at 701. In at least one case, however, the Court has suggested that it would create a limitation period in extraordinary circumstances. Although finding those circumstances not to exist in the instant case, the Court, in *Chevron Oil,* stated that "[a] special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations." *Chevron Oil,* 404 U.S. at 104.

148. *See, e.g., New York Report, supra* note 52, at 16; Comment, *Determining Limitation*

IV. JUDGE POSNER'S PROPOSALS

In *Short v. Belleville Shoe Manufacturing Co.*[149] the Seventh Circuit announced that it would join the Third Circuit in borrowing the limitation period from Section 13 of the Securities Act of 1933 to govern securities fraud claims under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.[150] Judge Easterbrook's majority opinion detailed the history of borrowing and determined that it was time to borrow a federal limitation period for the judicially created cause of action.[151]

Judge Posner agreed with the decision in his concurring opinion, but expressed dissatisfaction with the borrowing practice altogether.[152] Judge Posner argued that statutes of limitations should not be extended to actions they did not originally cover because Congress's true motivations for enacting a particular limitation period are difficult to glean and may not apply to other actions.[153] He criticized the practice of borrowing as being without standards and completely at the discretion of the judge, and cautioned that different courts could not be expected to arrive at the same limitation period for a given cause of action before repeated litigation had settled the issue.[154]

Judge Posner noted that judges feel they must borrow limitation periods rather than create them because they fear accusations of arbitrariness and judicial legislation.[155] Judge Posner pointed out, however, that selecting which period to borrow is inevitably as arbitrary as creat-

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Periods, *supra* note 56, at 917-18; Special Project, *supra* note 7, at 1104-05; Note, *supra* note 30, at 1131-32.

149. 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991).

150. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1989), promulgated thereunder, prohibit fraud in connection with the purchase and sale of securities. Section 13 of the 1933 Act, 15 U.S.C. § 77m (1988), provides a three-year statute of limitations for actions brought under the Act for materially incorrect or misleading information in securities sales.

In *In re* Data Access Systems Securities Litigation, 843 F.2d 1537 (3rd Cir. 1988) (en banc), *cert. denied*, 488 U.S. 849 (1989), the Third Circuit held that § 13 would govern § 10(b) and Rule 10b-5 claims.

151. *Belleville Shoe*, 908 F.2d at 1387-89. The implied right of action under § 10(b) has existed for approximately 45 years. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946).

152. *Belleville Shoe*, 908 F.2d at 1393-95 (Posner, J., concurring). Interestingly, Judge Posner served on the Federal Courts Study Committee. *See supra* note 13. The decision in *Belleville Shoe* was issued four months after the Committee's final report and four months before the enactment of the Judicial Improvements Act of 1990.

153. Judge Posner called the process "a matter of which round peg te stuff in a square hole," and argued that statutes of limitations are "unprincipled legislative deals." *Belleville Shoe*, 908 F.2d at 1393-94 (Posner, J., concurring).

154. *Id.* at 1394.

155. *Id.* According to Judge Posner, legislators may be arbitrary but judges may not. *Id.*

ing a limitation period.[156] Judge Posner discussed the possibility of judges simply creating statutes of limitations openly and without apology, but concluded that this would effect only modest improvements.[157]

Judge Posner found that an institutional solution was necessary and proposed two options.[158] His first proposal was the enactment of a congressional rule that every statute must contain a statute of limitations.[159] Judge Posner opined that this rule would be superior to the then proposed, and now enacted,[160] general catch-all statute of limitations because no single limitation period is suitable for the entire range of causes of action in statutes that do not specify a period.[161] He admitted that such a rule might be ineffectual unless Congress created a "nagging agency" to enforce it.[162] In the alternative, Judge Posner suggested that the Supreme Court could adopt Justice Scalia's proposal that a statute lacking a limitation period should have no time limitation, modified somewhat by allowing for the use of laches.[163]

Judge Posner's other proposal was that Congress should delegate the power to adopt limitation periods to either the Judicial Conference of the United States or an agency modeled on the United States Sentencing Commission.[164] He argued that this delegation would relieve Congress of the burden of having to amend numerous statutes to include limitation periods and also would provide an expert body that could create limitation periods without resort to litigation.[165]

A. A New Rule for Congress

Judge Posner's proposal, that Congress should enact a rule requiring it to create a statute of limitations for every statutory action, is similar to one of the suggestions of the Federal Courts Study Committee.[166] It is not clear whether Judge Posner intended his proposed rule

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156. "You cannot . . . reason to the right statute of limitations to borrow. The imponderables are so numerous that in the end the borrowing judgment . . . is inescapahly arhitrary, as the present case illustrates." *Id.*

157. Judge Posner cited the doctrine of laches as precedent, but concluded, for many of the reasons identified in this Note, that judge-made limitation periods were not the solution. *Id. See supra* subpart III(E).

158. *Belleville Shoe*, 908 F.2d at 1394-95 (Posner, J., concurring).

159. *Id. See infra* text accompanying notes 166-67.

160. *See supra* text accompanying note 18.

161. *Belleville Shoe*, 908 F.2d at 1395 (Posner, J., concurring).

162. *Id.*

163. *Id. See supra* text accompanying notes 99-103.

164. *Belleville Shoe*, 908 F.2d at 1395 (Posner, J., concurring). *See infra* notes 171-90 and accompanying text.

165. *Belleville Shoe*, 908 F.2d at 1395 (Posner, J., concurring).

166. The Committee suggested that Congress consider a "checklist" for legislative staff to use in reviewing proposed legislation, with one of the items on the list being the inclusion of an appro-

to apply prospectively or retroactively. Clearly, a retroactive rule would be preferable to address the current lack of limitation periods for existing federal causes of action. That the Committee suggested such a retroactive rule and that Congress neglected to follow the suggestion,[167] however, does not bode well for the rule's enactment in the near future.

B. Delegation to an Administrative Agency

Judge Posner's second proposal, delegation to the Judicial Conference or to a commission created especially to adopt limitation periods, would relieve Congress of a burden that it seems unable or unwilling to shoulder: that of creating statutes of limitations to govern actions arising under existing statutes. Before considering the constitutionality of such a delegation, this Note briefly describes the current duties of the Judicial Conference and the Sentencing Commission on which a "Statutes of Limitations Commission" would be modeled under Judge Posner's scheme.

1. The Judicial Conference

Created in 1922,[168] the Judicial Conference of the United States includes the Chief Justice of the United States Supreme Court as chairman, the chief judges of the twelve circuits, the chief judge of the Court of International Trade, and one district judge elected from each circuit for a three-year term.[169] The Chief Justice is to submit an annual report to Congress detailing the Conference's proceedings and its recommendations for legislation.[170]

The Conference is authorized: (1) to survey the condition of business in the federal courts and to recommend to Congress reassignment of judges according to need; (2) to submit suggestions to the federal courts to promote uniformity of procedures and the expeditious conduct of court business; (3) to investigate, discipline, and recommend to the House of Representatives impeachment of federal judges; and (4) to study the operation and effect of rules prescribed for the federal courts by the Supreme Court, and to recommend to the Court changes in and additions to those rules to simplify procedure, make administration

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priate statute of limitations for statutes creating causes of action. Study Committee Report, *supra* note 14, at 93.

167. *See supra* text accompanying notes 18-20 and *supra* note 166. Section 1658 was the only legislation Congress enacted in response to the Committee's suggested reforms.

168. The Judicial Conference was established by the Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 838 (codified as amended at 28 U.S.C. § 331 (1988)). For a synopsis of the history of the creation of the Conference, see Myers, *Origin of the Judicial Conference*, 57 A.B.A. J. 597 (1971).

169. 28 U.S.C. § 331 (1988).

170. *Id.*

more fair, arrive at the just determination of litigation, and eliminate unjustifiable expense and delay.[171] In addition, the Conference is to modify or abrogate any rules prescribed by courts, other than the Supreme Court or the district courts, which the Conference finds inconsistent with federal law.[172]

The delegation to the Judicial Conference suggested by Judge Posner would be a departure from the Conference's current role of monitoring and administering the internal affairs of the federal judiciary. Statutes of limitations affect those persons outside the Judicial Branch markedly more than they affect those persons inside.

2. A Statute of Limitations Commission

Under Judge Posner's second delegation proposal, Congress would create a "Statute of Limitations Commission" authorized to adopt by regulation a limitation period for any statute without one. Since the agency would be modeled on the United States Sentencing Commission (Sentencing Commission),[173] this subpart outlines the Sentencing Commission's duties and powers.

With the Sentencing Reform Act of 1984 (the Act),[174] Congress created the Sentencing Commission and empowered it to promulgate guidelines for sentencing persons convicted of federal law violations. The Act was designed to reduce the disparity among sentences for persons convicted of the same offense.[175] Also, the Act sought to alleviate the uncertainty as to the time a sentenced offender would spend in prison before parole under the existing system.[176]

The Act established the Sentencing Commission as an independent body in the judicial branch,[177] with seven voting members appointed by the President and confirmed by the Senate.[178] At least three of the

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171. *Id.*

172. *Id.*

173. *See supra* text accompanying note 164.

174. 18 U.S.C. § 3551 (1988), 28 U.S.C. §§ 991-998 (1988).

175. Mistretta v. United States, 488 U.S. 361, 366 (1989). The reason for the disuniformity was that, although congressional statutes specified the penalties for federal crimes, they often gave the sentencing judge wide discretion over whether a sentence would include imprisonment, rather than a fine or probation, and the duration of the offender's incarceration.

176. Once the judge determined the length of incarceration, parole officials had the authority to release a prisoner at their discretion before the expiration of the sentence imposed by the judge. *Id.* at 363. Congress sought to rectify the sentence and parole disparities by vesting the Commission with the powers previously exercised by the sentencing judge and the Parole Commission. *Id.* at 367 (citing 28 U.S.C. §§ 991, 994, 995(a)(1)).

177. 28 U.S.C. § 991(a).

178. *Id.* The Attorney General or his designee is to serve as the eighth, ex officio nonvoting member. *Id.* When considering the appointment of voting members, the President is to consult with "judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens,

seven members must be federal judges selected from a list of six recommended by the Judicial Conference.[179] Each member is limited to two six-year terms,[180] and is subject to removal by the President only for neglect of duty, malfeasance in office, or for other good cause.[181]

The Sentencing Commission is authorized to devise sentencing guidelines that are binding on the federal courts.[182] The sentences suggested by the guidelines must be within the limits of existing law,[183] but the sentence ranges must be narrower.[184] While the sentencing judge retains some discretion to depart from the guidelines, the reasons for such a departure must be included in the trial record.[185]

In addition to its duty to promulgate the guidelines, the Sentencing Commission is to review and revise them periodically after consulting with authorities on the criminal justice system.[186] The Sentencing Commission must report to Congress any amendments it makes to the guidelines,[187] along with recommendations as to whether Congress should modify the limits and grades it has established,[188] and an annual analysis of the operation of the guidelines.[189] Finally, the Sentencing Commission is empowered to monitor the compliance of probation officers with the guidelines,[190] and to perform any other functions that assist the federal courts in meeting their sentencing responsibilities.[191]

Like the Sentencing Reform Act, a Statute of Limitations Reform Act would create a commission in an effort to remove disparities and uncertainty from the federal judicial system. A Statute of Limitations Commission, following the Sentencing Commission's model, would be an independent agency within the judicial branch. The Limitations

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victims of crime, and others interested in the criminal justice process." *Id.* The President, with the advice and consent of the Senate, is to appoint one of the voting members as the Chairman. *Id.*

179. *Id.*

180. *Id.* § 992(a)-(b).

181. *Id.* § 991(a).

182. *Id.* § 994(a).

183. *Id.* § 994(b)(1).

184. The maximum sentence under the guidelines may not exceed the minimum by more than 25% or six months, except that if the minimum is 30 years or more, the maximum may be life imprisonment. *Id.* § 994(b)(2).

185. The judge enjoys this discretion only if there is an aggravating or mitigating factor that the Commission did not adequately consider when formulating the guidelines. 18 U.S.C. § 3553(b).

186. 28 U.S.C. § 994(o).

187. Such amendments take effect 180 days after they are submitted to Congress unless Congress modifies or disapproves of them by statute. *Id.* § 994(p).

188. *Id.* § 994(r).

189. The analysis is to include for each sentence imposed under the guidelines: A written report of the sentence; the offense for which it is imposed; the age, race, and sex of the offender; information regarding factors made relevant by the guidelines; and other information deemed appropriate by the Commission. *Id.* § 994(w).

190. *Id.* § 995(a)(9).

191. *Id.* § 995(a)(22).

Commission would consist at least partially of federal judges, with all members appointed by the President and removable only for cause.

A Statute of Limitations Commission would have the authority to create limitation periods for all federal statutes creating causes of action but lacking corresponding statutes of limitations. The Limitations Commission periodically would review and revise limitation periods previously promulgated under its authority, and would recommend to Congress modifications of limitation periods already established by statute. Conceivably, the Limitations Commission also would have jurisdiction over matters ancillary to limitation periods, such as tolling, accrual, commencement, relation-back, survival, and revival.[192] While such a Limitations Commission conceivably could solve the statute of limitations problems that have plagued the federal judiciary since *M'Cluny*, the Limitations Commission might not pass constitutional muster.

C. Constitutional Concerns Regarding Delegation

A court considering the validity of a congressionally created limitations agency[193] probably would focus first on whether the agency enjoyed an impermissible delegation of legislative power to the judicial branch. Second, a court probably would consider whether such a delegation, if allowable, violated the separation of powers scheme of the Constitution. *Mistretta v. United States*[194] concerned a challenge to the Sentencing Commission's authority and serves as the touchstone for the following analysis of the delegation proposed by Judge Posner.

1. The Nondelegation Doctrine

The nondelegation doctrine is based on the separation of powers scheme found in the Constitution.[195] Delegation of legislative powers to another governmental branch is improper because the Constitution requires that the legislative powers of the federal government be vested in Congress.[196] The Court has struck down only two statutes under the nondelegation doctrine, both in 1935. Since *A.L.A. Schechter Poultry*

192. For a discussion of how these issues have troubled federal courts when applying state statutes of limitations, see Special Project, *supra* note 7, at 1084-95.

193. Because delegation to either the Judicial Conference or an independent commission modeled on the Sentencing Commission involves delegation to a body within the judicial branch comprised partially of Article III judges, these agencies are treated alike for the constitutional analysis in this Note. Accordingly, they are referred to collectively as "a limitations agency."

194. 488 U.S. 361 (1989).

195. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 421-30 (1935).

196. U.S. CONST. art I, § 1.

Corp. v. United States[197] and *Panama Refining Co. v. Ryan*,[198] the Court has not invoked the doctrine except to interpret statutes narrowly to avoid excessive delegation that otherwise would be unconstitutional.[199] Still, the doctrine has not been overruled and must be considered.

The nondelegation doctrine, as explained in *Mistretta*, requires that Congress specify a general policy, the agency which is to apply the policy, and the boundaries of the delegated authority.[200] The *Mistretta* Court upheld the authority of the Sentencing Commission because the delegation was sufficiently specific and detailed: Congress charged the Sentencing Commission with three goals[201] and specified four purposes of sentencing that the Sentencing Commission was to pursue in carrying out its mandate.[202] In addition, Congress provided a detailed set of guidelines for the Sentencing Commission to employ in regulating sentencing,[203] and directed the Sentencing Commission to develop a system of ranges to apply to various categories of offenses and defendants.[204] Congress also provided seven factors that the Sentencing Commission was to consider in its formulation of offense categories and eleven factors relating to defendant categorization.[205] The Sentencing Commis-

197. 295 U.S. 495 (1935).

198. 293 U.S. 388 (1935).

199. *Mistretta*, 488 U.S. at 373 n.7. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

200. *Mistretta*, 488 U.S. at 372-73 (citing American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

201. *Mistretta*, 488 U.S. at 374. The goals were: (1) to "assure the meeting of the purposes of sentencing as set forth" in the Act; (2) to "provide certainty and fairness" in meeting these purposes; and (3) to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." *Id.* at 374 (citing 28 U.S.C. § 991(b)(1)).

202. *Mistretta*, 488 U.S. at 374. The purposes were: (1) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; (2) "to afford adequate deterrence to criminal conduct"; (3) "to protect the public from further crimes of the defendant"; and (4) "to provide the defendant with needed . . . correctional treatment." *Id.* (citing 18 U.S.C. § 3553(a)(2)).

203. *Mistretta*, 488 U.S. at 374. *See supra* notes 182-85 and accompanying text.

204. *Mistretta*, 488 U.S. at 374 (citing 28 U.S.C. § 994(b)). These guidelines were to include determinations of (1) whether to impose probation, a fine, or a term of imprisonment; (2) the appropriate amount of the fine or the appropriate term of probation or imprisonment; (3) whether the imprisonment, if imposed, should include a requirement of supervised release, and if so, for how long; and (4) whether multiple terms of imprisonment should run concurrently or consecutively. 28 U.S.C. § 994(a)(1).

205. *Mistretta*, 488 U.S. at 375-76. The offense categorization factors include (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. *Id.* at 375 (citing 28 U.S.C. § 994(c)(1)-(7)).

The offender characterization factors include the offender's age, education, vocational skills,

sion was forbidden from considering the race, sex, national origin, creed, or socioeconomic status of offenders, and the guidelines were not to reflect any other factors that might serve as proxies for those specifically forbidden.[206]

Congress also directed that the guidelines must require higher sentences for crimes involving violence or drugs[207] or crimes committed by certain offenders.[208] Congress instructed that the guidelines generally should provide for imprisonment for crimes of violence resulting in serious bodily injury, but should not require imprisonment for first offenders not convicted of serious offenses.[209] Finally, Congress listed various aggravating and mitigating circumstances that the guidelines should take into account.[210] Thus, Congress specified a detailed hierarchy of punishment[211] and stipulated the most important offense and offender characteristics for the Sentencing Commission to consider when promulgating its sentencing guidelines.

The *Mistretta* Court acknowledged that the Sentencing Commission had significant discretion to determine the relative severity of federal crimes, to assess the relative weight of the offender characteristics, to determine which crimes had been punished too leniently or too severely in the past, and to decide which types of crimes and criminals were similar for the purpose of sentencing.[212] The Court found, however, that Congress was not prohibited from delegating authority that required policy judgments.[213] Only if there were an absence of standards for the agency's guidance, rendering it impossible for a court to ascertain whether the agency had obeyed congressional will, would the Court strike down Congress's decision to delegate.[214] The Court found that Congress provided sufficient standards for the Sentencing Commission and that the criteria supplied by Congress were adequate for carrying out the general policy and purpose of the Act.[215]

Mindful of *Mistretta*, Congress could provide detailed guidelines for a limitations agency in order to avoid violating the nondelegation

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mental and emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. *Id.* at 376 (citing 28 U.S.C. § 994(d)(1)-(11)).

206. *Id.* at 376 (citing 28 U.S.C. § 994(d)-(e)).
207. *Id.* at 376 (citing 28 U.S.C. § 994(h)).
208. *Id.* at 376-77 (citing 28 U.S.C. § 994(i)).
209. *Id.* at 377 (citing 28 U.S.C. § 994(j)).
210. *Id.* (citing 28 U.S.C. § 994(*l*), (n)).
211. *Id.*
212. *Id.* at 377-78 (citing 28 U.S.C. § 994(c), (d), (m)).
213. *Id.* at 378.
214. *Id.* at 378-79 (citing Yakus v. United States, 321 U. S. 414, 425-26 (1944)).
215. *Id.* at 379.

doctrine. Congress could instruct the agency to consider certain factors relevant to statutes of limitations: the interests of defendants in repose; the interests of the judicial system in considering evidence before it becomes stale; the interests of plaintiffs in having adequate time to prepare claims; and the interest of society in having a fair, reliable judicial system.[216] Congress could set a hierarchy of claims, specifying which types of claims should receive longer limitation periods than others. Congress even could instruct the agency to draw from federal or state statutes of limitations. All of these standards would be in accord with *Mistretta*'s application of the nondelegation doctrine to the Sentencing Commission, and would support a finding that a limitations agency would not enjoy constitutionally excessive delegation.

A limitations agency would differ from the Sentencing Commission, however, in one important respect: The Sentencing Commission was created to narrow sentence ranges already enacted by Congress, while the limitations agency would exist because of Congress's failure to enact statutes of limitations for many claims. Thus, while the Sentencing Commission serves to narrowly tailor existing law, the limitations agency would promulgate new law in the form of specific limitation periods. In this respect, the creation of a limitations agency would seem to fly in the face of the nondelegation doctrine: Congress cannot delegate legislative power to another branch. In the past, the Court has upheld delegations of power to agencies to regulate areas not previously covered by legislation.[217] It may be significant, however, that statutes of limitations traditionally have been the exclusive domain of legislatures. State legislatures have not shied away from regulating limitation periods.[218]

2. Separation of Powers

After determining that Congress had not delegated excessive authority, the *Mistretta* Court focused on whether the Sentencing Commission's structure violated the separation of powers principle of the Constitution.[219] While recognizing the importance of the principle, the Court noted that the Constitution does not require that the three branches be entirely separate and distinct.[220] The Court stated that it will allow statutory schemes that commingle the functions of the

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216. *See supra* note 107 and accompanying text.

217. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

218. State legislatures, more so than Congress, have been active in implementing limitation periods. *See* Developments in the Law, *Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950).

219. *Mistretta*, 988 U.S. at 380.

220. *Id.*

branches as long as one branch does not enjoy increased power at the expense of another.[221]

The Court expressed two concerns raised by the delegation to the Sentencing Commission: First, that the judicial branch should not perform duties more appropriately performed by the other branches, and second, that the institutional integrity of the judicial branch should not be threatened.[222] Because a limitations agency would raise these same concerns, this subpart examines *Mistretta*'s separation of powers analysis in detail.

The Court first considered the placement of the Sentencing Commission within the judicial branch.[223] While recognizing that nonjudicial executive or administrative duties normally may not be assigned to judges,[224] the Court found that judicial rulemaking falls within a constitutional "twilight area" in which some commingling of the activities of the three branches is allowable.[225] The Court then discussed the power of Congress to delegate to the judiciary the power to promulgate the federal rules of civil procedure, and Congress's power to create the Judicial Conference, the Rules Advisory Committee, and the Administrative Office of the United States Courts.[226] The Court concluded that the Constitution allows these delegations because the duties involved are so closely related to the judiciary's power to pronounce judgments.[227] Accordingly, these activities are not more appropriate for another branch.[228] Likewise, the placement of the Sentencing Commission in the judicial branch simply acknowledges the role that courts always have played in sentencing, and thus poses no danger to the separation of powers.[229]

The Court also found that the location of the Sentencing Commission within the judicial branch does not undermine the integrity of that branch or unduly expand the powers of the judiciary.[230] While the Sen-

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221. *Id.* at 382 (citing Morrison v. Olson, 487 U.S. 654 (1988), and Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)).

222. *Id.* at 383 (citing *Morrison*, 487 U.S. at 680-81, and *Commodity Futures*, 478 U.S. at 851).

223. *Mistretta*, 488 U.S. at 384-97.

224. *Id.* at 385 (citing *Morrison*, 487 U.S. at 677).

225. *Id.* at 386 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, (1952) (Jackson, J., concurring); Myers v. United States, 272 U.S. 52, 291 (1926) (Brandeis, J., dissenting)).

226. *Mistretta*, 488 U.S. at 387.

227. *Id.* at 386-90.

228. *Id.* at 390.

229. *Id.* at 390-91. "In other words, the Commission's functions, like this Court's function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch." *Id.* at 391.

230. *Id.* at 393.

tencing Commission does perform quasi-legislative functions, it is not a court, but is an independent agency. Thus, there is no combination of legislative and judicial power within a single body in the judicial branch.[231] The judicial branch does not enjoy increased authority because the Sentencing Commission is bound by Congress's sentencing ranges just as the courts were prior to the creation of the Sentencing Commission.[232] Finally, the degree of political authority involved with the promulgation of the guidelines is not inappropriate for a nonpolitical branch because, although the guidelines have substantive effects on public behavior, they do not regulate the primary conduct of the public.[233]

The Court next considered the composition of the Sentencing Commission, focusing on whether the requirement of judicial service undermines the integrity of the judicial branch.[234] The Court found that neither the text of nor the historical gloss on the Constitution precludes extrajudicial service by judges in their individual capacities.[235] Accordingly, while Congress may not assign extrajudicial duties to a court or judges acting as members of a court, it may assigu such duties to judges acting in their individual capacities as members of a commission.[236] Also, the Sentencing Reform Act does not threaten the independence of the judiciary because the Act does not give the President the power to force a judge to serve on the Sentencing Commission against his will.[237] Participation by judges on the Sentencing Commission would not affect their ability to adjudicate impartially sentencing issues.[238] Finally, the participation of judges on the Sentencing Commission does not threaten the appearance of impartiality because the creation of sentencing guidelines is a neutral function particularly appropriate to the judicial branch.[239]

Finally, the Court considered the President's power under the Act to appoint and remove judges as members of the Sentencing Commis-

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231. Unlike a court, the Commission does not exercise judicial power and is not controlled by, or accountable to, the members of the judicial branch. The Commission is fully accountable to Congress. *See supra* note 187 and accompanying text. Its members are subject to the President's limited powers of removal, and its rulemaking power is subject to the notice and comment requirements of the Administrative Procedure Act, 28 U.S.C. § 994(x) (1988). *Mistretta*, 488 U.S. at 391-94.

232. *Id.* at 395.

233. *Id.* at 396.

234. *Id.* at 397-408.

235. *Id.* at 397-404.

236. *Id.* at 404.

237. *Id.* at 405-06.

238. *Id.* at 406-07.

239. The Court did admit, however, that it was "somewhat more troubled" by this concern. *Id.* at 407.

sion.[240] The Court found it unimaginable that judges would alter their judicial actions to receive appointments to the Sentencing Commission.[241] While the President may remove judges from the Sentencing Commission, the Act in no way authorizes him to remove them as judges. In addition, the President's removal power is limited to removal for good cause.[242] Thus, the Act does not threaten the ability of the judges serving on the Sentencing Commission to perform their Article III duties.[243] The Court thus concluded that the Sentencing Reform Act neither delegates excessive legislative power nor upsets the separation of powers mandated by the Constitution.[244]

The preceding analysis would support finding a limitations agency within the judicial branch constitutionally permissible. A court probably would find that selecting an appropriate limitation period is as essential to the determination of cases or controversies as the rules of civil procedure or the selection of an appropriate sentence. Thus, the location of an agency within the judicial branch would be no more incongruous than the powers already delegated to the branch.

Location of the agency within the branch conceivably could expand the power of the judiciary, however, because the limitation periods selected by the agency would have more of an effect on the general public than the sentencing guidelines considered in *Mistretta.* Unlike the sentencing guidelines, which affect an individual only after conviction of a crime, the limitation periods determine when an individual may have access to the judicial system. Still, the limitation periods arguably would affect parties to a suit no more than the federal rules of civil procedure. Congress delegated the authority to promulgate these rules to the judiciary over fifty-five years ago.[245]

The *Mistretta* Court, however, seemed to rely on the fact that the guidelines promulgated by the Sentencing Commission were required by law to be within the sentence ranges previously established by Congress. Thus, a chief problem could be that Congress has provided no limitation periods in the first place. The duties performed by the limitations agency would be not so much quasi-legislative as outright legislative. The limitations agency would be acting in an area that Congress had declined to enter. This difficulty could be tempered somewhat by a

240. *Id.* at 408-11.

241. *Id.* at 408-10.

242. *Id.* at 410-11.

243. *Id.* at 411.

244. *Id.* at 412.

245. This delegation was upheld in Sibbach v. Wilson & Co., 312 U.S. 1 (1941). Congress delegated this authority with the Rules Enabling Act of 1934, codified at 28 U.S.C. § 2072 (1988). *See Mistretta,* 488 U.S. at 387.

provision that, like the guidelines in *Mistretta*, the limitation periods would not take effect until Congress had an opportunity to revise them.[246] In addition, a court considering the validity of a limitations agency might rely on the fact that it would be an independent agency, rather than a court, and thus might find that there was no combination of legislative and judicial functions within the judicial branch.

A court considering the composition of the agency and the power of the President to appoint and remove members probably would find them constitutionally permissible, following *Mistretta*. The analysis would be no different for a limitations agency than it was for the Sentencing Commission.

D. Creation of a Study Committee

If Congress wants the expertise provided by a limitations agency, but is concerned with the constitutional validity of such a delegation, it could create a committee, similar to the Federal Courts Study Committee, charged with the duty of recommending appropriate limitation periods to Congress.[247] Under this system, a body of experts would have the resources and authority to determine what limitation periods should govern federal causes of action, but there would be no constitutional concern, because the committee would not promulgate the limitation periods itself. Rather, the committee simply would recommend the periods to Congress, who would have the final decision and authority to legislate the periods as it saw fit. Naturally, the committee would be a viable alternative to a permanent agency only if Congress followed the committee's recommendations. Ideally, Congress simply would rubberstamp the recommendations into law.

V. CONCLUSION

Congress added Section 1658 to Title 28 of the United States Code with the Judicial Improvements Act of 1990 because it was dissatisfied with borrowing.[248] Section 1658 was intended to provide a limitation

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246. *See supra* note 187.

247. *See supra* note 13.

248. At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appeals [sic] to lack persuasive support as a matter of policy.

It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley).

period for statutory causes of action lacking one.[249] Section 1658 falls short of the mark, however, because it applies only to causes of action arising under statutes enacted after December 1, 1990.[250] As this Note makes clear, there has been, and will continue to be, much disagreement over appropriate limitation periods for the many causes of action arising under statutes enacted before 1990. Congress perceived the problems associated with borrowing, but has not done enough to remedy a situation brought about by its own failure to provide limitation periods. Clearly, Congress must do more.

The simplest solution would be for Congress to amend Section 1658 to apply to all causes of action arising under federal statutes, regardless of the date of those statutes' enactment. The problem with a fallback statute of limitations, however, is that it does not reflect intelligently the concerns prompting limitation periods in the first place. Legislatures create different limitation periods for different causes of action based on the particular features of those causes of action.[251] A fallback period ignores the peculiarities of various causes of action and lumps them all under the same time period. Even a fallback period, however, would create certainty among litigants and uniformity among the federal courts—something that is impossible under the present version of Section 1658.

If Congress wants to provide a thoughtful assignment of limitation periods to individual causes of action, it could enact Judge Posner's suggested delegation and repeal Section 1658. While it is not certain that such a scheme would be constitutionally valid, *Mistretta* would strongly support its validity. Delegation would alleviate Congress's burden of determining a limitation period governing every cause of action, but would assure that a competent body would make the necessary deliberations to determine an appropriate period for every cause of action. This would be preferable to amending Section 1658 and would certainly be an improvement over Section 1658 as it now reads.

Another alternative would be for Congress to create a study committee charged with the duty of recommending appropriate limitation periods to Congress. The committee could be created in conjunction with, or in lieu of, the present Section 1658. If Congress is content with the fallback period applicable to future statutory causes of action, then a temporary committee[252] could be responsible for selecting periods for statutory causes of action created before the enactment of Section 1658.

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249. *See supra* note 21 and accompanying text.

250. *See supra* notes 19-23 and accompanying text.

251. *See* Developments in the Law, *supra* note 218, at 1192-97.

252. The Federal Courts Study Committee is an example of a temporary committee—it was commissioned to study the federal courts system for 15 months. *See supra* note 13.

Then, causes of action created before 1990 would have narrowly tailored limitation periods, and Congress either could let the fallback period govern future statutory causes of action as a default provision or could enact specific periods governing new causes of action as they are created.[253]

In any event, it is clear that the burden falls on Congress to remedy the current state of federal limitations law. While Section 1658 was created to do this, it will not be successful unless courts ignore its clear language. It is somewhat ironic that Congress perceived a problem and acted on it, but actually did nothing to ameliorate it. Congress should attempt again to solve this problem that has vexed the federal courts since 1830.[254]

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253. The Judiciary Committees of the House and Senate presumably would have an interest in having appropriate statutes of limitations. They should play a role in ensuring that future congressionally created actions contain limitation periods.

254. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting).