28 U.S.C. § 1658: A Limitation Period with Real Limitations

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> Several centuries from now, when the archaeologists have unearthed a copy of the Federal Reporter and turned it over to the legal historians for study and analysis, our descendants will indeed be puzzled to discover that a society in which judicial resources were such a scarce "commodity" expended so much of that "commodity" searching its state codes for "analogous" limitation periods. I doubt very much that, at least in this regard, our priorities will command mueh admiration.
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> Fixing the statute of limitation for a particular cause of action is a legislative function. Indeed, it is not a particularly difficult or complex legislative function. In most circumstances, it can be handled in a sentence. Yet, in a significant number of statutory schemes of nationwide application, Congress has failed to fulfill this basic responsibility and has left the courts to spend hundreds of hours—and thousands of dollars in government money—searching for a substitute solution. Meanwhile, justice is delayed, not only in the cases in which limitation issues arise but also in the many cases, often raising far more serious questions, which must wait while this tedious process takes place.[1]

INTRODUCTION

Most readers who have practiced in federal court or who have studied the federal court system have confronted the dilemma of locating limitation periods to apply to federal civil actions that lack express limitation periods.[2] Federal statutory law is replete with civil rights of action that do not contain express limitation periods.[3] This Article analyzes the adequacy of a recent congressional enactment designed to rectify this problem—28 U.S.C. § 1658.[4]

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1. Tellis v. USF&G, 805 F.2d 741, 747 (7th Cir. 1986) (footnote omitted) (Ripple, J., dissenting), *vacated*, 483 U.S. 1015 (1987).

2. *Id.*; *see also* Garcia v. Wilson, 731 F.2d 640, 643 (10th Cir. 1984) ("In the face of Congressional refusal to enact a uniform statute . . . it is imperative that we establish a consistent and uniform framework by which suitable statutes of limitations can be determined . . . ."), *aff'd*, 471 U.S. 261 (1985); Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1105 (1980) ("Congress should enact a general catch-all period for groups of federal rights. But, because Congress is unlikely to enact such legislation the federal judiciary must reform this confused area of the law.").

3. Examples include: Securities Exchange Act of 1934 § 10, 15 U.S.C. § 78j (1988); Investment Advisors Act of 1940 § 216, 15 U.S.C. § 80b-15 (1988); Emergency Petroleum Allocation Act of 1973 § 5, 15 U.S.C. § 754 (1982) (expired on Sept. 30, 1981, pursuant to 15 U.S.C. § 760g); Trademark Act of 1946 § 4, 15 U.S.C. § 1125 (1988 & Supp. 1992); Racketeer Influenced and Corrupt Organizations Act § 901(a), 18 U.S.C. § 1964(c) (1988); Alien Tort Statute § 41(17), 28 U.S.C. § 1350 (1988); Labor-Management Relations Act of 1947 § 301, 29 U.S.C. § 185 (1988); Labor-Management Reporting and Disclosure Act of 1959 § 102, 29 U.S.C. § 412 (1988); Rehabilitation Act of 1973 § 501, 29 U.S.C. § 791 (1988 & Supp. IV 1992); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132 (1988 & Supp. III 1991); Workers Adjustment and Retraining Notification Act of 1988 § 5, 29 U.S.C. § 2104 (Supp. III 1991); Clean Water Act § 505, 33 U.S.C. § 1365(a) (1988); the Reconstruction-era Civil Rights Acts §§ 1977-1980, 42 U.S.C. §§ 1981-1983, 1985 (1988 & Supp. III 1991); Civil Rights Act of 1964 tit. 7 § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1988 & Supp. III 1991); Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. III 1991); Railway Labor Act § 202, 45 U.S.C. § 182 (1988); Airline Deregulation Act of 1978 § 43, 49 U.S.C. § 1552(d)(1) (1988).

4. The Implementation Act, Pub. L. No. 101-650, Title III, § 313(a), 104 Stat. 5114 (1990 & Supp. III 1991) (The Implementation Act is part of the Judicial Improvements Act of 1990, Pub. L. No. 101-

This new statute mandates a fall-back limitation period of four years for any civil right of action arising under a congressional statute enacted after December 1, 1990, that does not contain an express limitation period. Specifically, § 1658 provides:

> 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 four years after the cause of action accrues.[5]

This statute makes no attempt to solve the limitation problems for the very federal statutory claims that gave rise to its birth. It completely ignores civil rights of action that arise under preexisting statutes, for example, federal statutory claims that lack express limitation periods and that are contained in acts of Congress enacted prior to December 1, 1990, the effective date of § 1658.[6]

Part I of this Article analyzes how federal courts confronting federal statutory claims lacking express limitation periods have traditionally solved this dilemma by borrowing from state law. The inequity inherent in this traditional resolution surfaces in a brief survey of the limitation periods currently applied to six civil rights of action that arise under preexisting statutes. In Part II, this Article explores the purpose of, and the circumstances giving rise to, § 1658. This Part further demonstrates the failure of Congress' purported mission to solve the federal limitation problem by its refusal to apply § 1658 prospectively to all federal statutory causes of action lacking express limitation periods.

Part III appraises two routes for resolving this problem. The first route, continuation of the borrowing practice, is undesirable because it fosters non-uniformity in the lengths of time applied to such actions. This Article ultimately advocates the second route, congressional action, and suggests exactly what Congress must do to resolve this issue properly. A new statute is then proposed that would remedy the pitfalls of § 1658, most notably its current failure to apply to claims contained in federal statutes enacted prior to December 1, 1990. Congress must amend § 1658 to provide a fall-back limitation period for all federal statutory claims lacking express limitation periods. Failure to act will mean continued uncertainty, a lack of uniformity, and the waste of time, money, and judicial resources.

650, 104 Stat. 5089-5137).

5. *Id.*

6. As used throughout this article, the term "civil rights of action that arise under pre-existing statutes" refers only to *federal statutes enacted prior to December 1, 1990*, that contain civil rights of action lacking express limitation periods. The term then *specifically includes* federal statutory claims arising after December 1, 1990, where the statutes from which those claims derive were enacted prior to December 1, 1990.

I. FEDERAL CIVIL ACTIONS LACKING EXPRESS LIMITATION PERIODS AND THE BORROWING DOCTRINE

A. A Historical Backdrop

Federal subject-matter jurisdiction is generally based upon one of two grounds: 1) diversity of citizenship[7] or 2) questions "arising under" federal law.[8] In cases where jurisdiction is based upon diversity of citizenship, federal courts refer to the conflicts of law principles of the forum state to identify the state whose law will govern the action.[9] Once the federal courts identify that particular state, the courts then locate the relevant cause of action under that state's law. This state law claim, as well as its statute of limitation, then applies to the federal court action.[10]

When jurisdiction rests on matters arising under federal law—federal question jurisdiction—the path taken to state law is not as simple. If the federal law at issue supplies the parameters of the substantive claim, federal law controls.[11] However, when the federal law at issue provides the substantive claim but is silent on other matters—for example, which statute of limitation governs the substantive claim—the federal courts typically refer to state law to determine which limitation period to borrow.[12]

In cases arising under federal question jurisdiction, the federal courts' next task is to identify the state whose law should provide a limitation period. Although the answer is clear when subject-matter jurisdiction is based upon diversity,[13] the Supreme Court has yet to rule on this issue when subject-matter jurisdiction is based upon a federal question.[14] As a result, the federal courts have generally taken one of three different paths.

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7. 28 U.S.C. § 1332 (1988).

8. *Id.* § 1331 (1988).

9. *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941).

10. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 110-12 (1945); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

11. *See, e.g., Erie R.R. Co.*, 304 U.S. at 78, where the Court stated, "*[e]xcept in matters governed by the Federal Constitution or by Acts of Congress*, the law to be applied in any case is the law of the State." (emphasis added).

12. *See, e.g.*, Reed v. United Transp. Union, 488 U.S. 319, 323 (1989). The word "typically" is used because there are rare instances when federal courts have not borrowed any limitation period to fill the deficiency in a particular federal statutory claim. These exceptions tend to be limited, however, to cases involving the Federal Government. *See, e.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (no limitation period imposed against government in EEOC enforcement actions); Mullikin v. United States, 952 F.2d 920, 929 (6th Cir. 1991) ("[T]he government is not subject to a statute of limitations on a cause of action in its favor unless the government expressly so provides."), *cert. denied*, 113 S. Ct. 85 (1992).

13. *Klaxon*, 313 U.S. 487.

14. *See, e.g.*, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 705 n.8 (1966) (Where the forum state as well as the state where all operative events occurred were identical, the Court had no occasion to decide "whether such a choice of law should be made in accord with the principle of *Klaxon* . . . or by operation of a different federal conflict of laws rule.") (citation omitted).

Under one approach, the courts automatically choose the forum state as the state whose laws are to be consulted.[15] The federal courts then proceed to "characterize"[16] the federal claim. Characterization involves finding the state law claim most analogous to the federal claim before the court.[17] After finding the most analogous forum law claim, the courts borrow the limitation period applied to that claim.[18]

Under the second approach, the substantive law of the forum does not automatically apply. Rather, following *Klaxon Co. v. Stentor Electric Manufacturing*,[19] the federal courts consult the conflicts of law principles of the forum state in order to identify the state whose law would have governed the federal action if federal subject-matter jurisdiction had been based on diversity of citizenship.[20] Once this state is identified, the courts then characterize the federal claim, locate that state's claim that is most analogous to the federal law claim, and borrow the limitation period applied to that claim.[21]

The third approach neither automatically refers to the substantive law of the forum nor refers to the forum's conflicts of law principles. Rather, "[w]hen jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law."[22] Some of the federal courts following this approach consult the conflicts of law principles contained in the *Restatement (Second) of Conflicts of Law* for "federal common law" guidance in identifying the state whose law should apply.[23] Some other federal courts following this approach have found that under "federal choice of law [principles], . . . the forum state's statute of limitations . . . controls, unless a party can demonstrate that the adoption of the forum state's limitation period will substantially undermine federal . . . policy . . . ."[24] In either case, once the appropriate state is identified, courts then characterize the federal claim, locate the most analogous claim in that particular state, and borrow the state limitation period applied to that claim.[25]

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15. *See, e.g.*, Shaw v. McCorkle, 537 F.2d 1289, 1292 n.5 (5th Cir. 1976); Barbarino v. Anchor Motor Freight, Inc., 421 F. Supp. 1003, 1006 (W.D.N.Y. 1976).

16. "In borrowing statutes of limitations for other federal claims, this Court has generally recognized that the problem of characterization 'is ultimately a question of federal law.'" Wilson v. Garcia, 471 U.S. 261, 269-70 (1985) (citation omitted).

17. *Id.*; *see also* Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

18. *See supra* note 16.

19. *Klaxon*, 313 U.S. 487 (1941).

20. *See, e.g.*, Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982).

21. *Id.*

22. Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291, 1294 n.14 (1st Cir. 1988).

23. *Id.* at 1296; *see also* Union Flight Attendants, Local No. 1 v. Air Micronesia, Inc., 684 F. Supp. 1520, 1528 (D. Haw. 1988) (applying federal common law choice of law rules based upon reliance on RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1969)), *aff'd without op.*, 902 F.2d 1579 (9th Cir. 1990).

24. Champion Int'l Corp. v. United Paperworkers Int'l Union, 779 F.2d 328, 334 (6th Cir. 1985).

25. *See supra* notes 21-23.

Under any of the three approaches, when federal jurisdiction is based upon questions arising under federal law, courts generally borrow a period of limitation from state law.[26]

This concept of borrowing a limitation period from an analogous state law claim dates to 1830. In that year, the Supreme Court relied upon the Rules of Decision Act[27] for the proposition that a limitation period from state law should supplement the deficiency in the federal law at issue. Specifically, in *M'Cluny v. Silliman*,[28] the Court found that, under the language of the Rules of Decision Act, "the acts of limitations of the several states, where no special provision has been made by [C]ongress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts."[29] The next seventy years saw steadfast and consistent reliance upon the Rules of Decision Act as the basis of state law borrowing.[30]

Later decisions began to cite *M'Cluny* for the proposition that the Rules of Decision Act *required* state law borrowing.[31] This proposition was subsequently rejected.[32] State law borrowing did continue, but it continued "as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act . . . require[d] it."[33]

In addition to rejecting the idea that the Rules of Decision Act mandated state law borrowing, later decisions also began to reject state law as the sole

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26. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2778 (1991) [hereinafter *Lampf*], *partially superseded by statute*, FDIC Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387 (codified at 15 U.S.C. § 78aa-1 (Supp. III 1991)) (reviving all § 10(b)(5) claims pending on or before the *Lampf* decision). Although *Lampf* borrowed a limitation period from federal law for use in actions brought under § 10(b) of the Securities Exchange Act of 1934, the Court stated that "we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'" *Id.* (citation omitted).

27. Ch. 20, § 34, 1 Stat. 73, 92 (1789) (now codified with minor changes at 28 U.S.C. § 1652). The Rules of Decision Act then provided: "[T]he laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Id.*

28. *M'Cluny*, 28 U.S. (3 Pet.) 270 (1830).

29. *Id.* at 277.

30. Campbell v. Haverhill, 155 U.S. 610, 614 (1895) ("[T]o no class of state legislation has the [Rules of Decision Act] been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction."); *see also* Bauserman v. Blunt, 147 U.S. 647, 652-53 (1893) (citing cases involving statute of limitations actions).

31. *See, e.g.*, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703-04 (1966) ("As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise.").

32. DelCostello v. Interuational Bhd. of Teamsters, 462 U.S. 151, 160 n.13 (1983) (rejecting reliance "on a few turn-of-the-century cases suggesting that the Rules of Decision Act *compels* application of state limitations periods") (emphasis added).

33. *Id.* The *DelCostello* court stated:

> Since *Erie*, no decision of this Court has held or suggested that the [Rules of Decision] Act requires borrowing state law to fill gaps in federal substantive statutes. Of course, we have continued since *Erie* to apply state limitations periods to many federal causes of action; but we made clear in *Holmberg v. Armbrecht*, 327 U.S. 392, 394-95 (1946), that we do so as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the *Erie* doctrine requires it.

Id.

source from which to borrow. Although borrowing from state law remained the general rule,[34] federal laws were borrowed[35] in cases where they "clearly provide[d] a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation [made federal law] a significantly more appropriate vehicle for interstitial lawmaking . . . ."[36]

The general rule of borrowing limitation periods from state law filled the gap in the otherwise deficient federal statutory claims at issue. Unfortunately, when state limitation periods are borrowed, the limitation periods then vary from state to state.[37] However, this is not the case when limitation periods are borrowed from federal law. In the federal law borrowing context, the resulting limitation period applied to each federal statutory claim that lacks an express limitation period is uniform in length nationwide.[38]

B. A Dated Example: Civil RICO Claims

Prior to the Supreme Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,[39] federal courts had to decide the applicable limitation period for civil claims brought under § 1964(c) of the Racketeer

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34. *See, e.g., Lampf*, 111 S. Ct. 2773, 2778 (1991) ("It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand."), *partially superseded by statute*, 15 U.S.C. § 78aa-1 (Supp. III 1991); Reed v. United Transp. Union, 488 U.S. 319, 323 (1989) ("Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, '[w]e have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'") (citation omitted); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 147 (1987) ("Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."); *DelCostello*, 462 U.S. at 158 ("We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.") (footuote omitted); *Hoosier Cardinal*, 383 U.S. at 703-04 ("As early as 1830, this Court held that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise.") (citation omitted); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) ("As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation.").

35. Examples of federal law borrowing include: *Lampf*, 111 S. Ct. at 2778 (limitation periods applicable to certain claims brought under the Securities Act of 1933 and under the Securities Exchange Act of 1934 applied to claims brought under § 10(b) of the Securities Exchange Act of 1934); *Malley-Duff*, 483 U.S. at 150 (limitation period applicable to certain claims brought under the Clayton Act, 38 Stat. 731, codified as amended at 15 U.S.C. § 15 (1988), applied to civil RICO actions); *DelCostello*, 462 U.S. at 169 (limitation period applicable to unfair labor practices under § 10(b) of the National Labor Relations Act applied to employee's action under the Labor-Management Relations Act against employer for wrongful termination and against union for breach of duty of fair representation); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 366 (1977) (federal limitation period applied to enforcement actions brought by the EEOC under § 706(f)(*l*), 42 U.S.C. § 2000e-5(f)(*l*)); McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958) (federal limitation period under the Jones Act applied to unseaworthiness action under general admiralty law).

36. *Malley-Duff*, 483 U.S. at 148 (quoting *DelCostello*, 462 U.S. at 171-72).

37. *See generally infra* notes 78-196, 204-15 and accompanying text.

38. *See infra* notes 58-68, 198-202 and accompanying text.

39. In *Malley-Duff*, 483 U.S. at 156, the Court held that all claims brought under 18 U.S.C. § 1964(c) (civil RICO claims) would henceforth be governed by the four-year limitation period applicable to Clayton Act civil enforcement actions, 15 U.S.C. § 15(b).

Influenced and Corrupt Organizations Act ("RICO").[40] Resolution of this issue depended upon how the civil RICO claim was characterized. Because civil RICO claims are "truly *sui generis* and . . . cannot be readily analogized to causes of action known at common law," the Third Circuit found that characterization was impossible.[41] Thus, the limitation period applicable under the state's residual statute applied.[42] Under this characterization, all civil RICO claims arising in Pennsylvania were subject to the six-year limitation period provided under Pennsylvania's residual statute.[43] Civil RICO claims decided under Seventh Circuit law were characterized differently. The Seventh Circuit concluded that civil RICO claims were best characterized as actions for treble damages, so the state's statute of limitation for actions based on a statutory penalty applied.[44] Under this characterization, a civil RICO action based in Illinois was subject to the two-year limitation period applied under that Illinois statute.[45]

The approaches adopted in these two circuits came to be known as the "uniform characterization" approach.[46] Uniformity meant that the federal circuits following this approach did not engage in the time-consuming characterization process. Rather, all federal courts confronting civil RICO claims and applying the law of any state within the Third Circuit would borrow the relevant state's residual statute,[47] and all federal courts facing civil RICO claims and applying the law of any state within the Seventh Circuit would borrow the limitation period applied under the particular state's action based on a statutory penalty claim.[48]

Not all federal circuits followed the uniform characterization approach. For these circuits, federal courts faced with civil RICO claims were directed to consider each claim individually, identify the relevant "factual circumstances

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40. 18 U.S.C. § 1964(c) provides that "[a]ny 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 the suit, including a reasonable attorney's fee." Section 1962, to which § 1964(c) refers, provides that it is a violation of the statute to: a) use income derived from a pattern of racketeering activity or through the collection of an unlawful debt to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; b) acquire or maintain any interest in an enterprise through a pattern of racketeering activity or collection of unlawful debt; c) conduct or participate in the conduct of an enterprise through a pattern of racketeering activity or collection of an unlawful debt; or d) conspire to violate such provisions.

41. Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 353 (3d Cir. 1986) (emphasis in original), *aff'd sub. nom.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987).

42. *Id.*

43. *Id.*

44. Tellis v. USF&G, 805 F.2d 741, 746 (7th Cir. 1986) (holding that Illinois' two-year limitation period for actions based on statutory penalty applied to all civil RICO claims arising under Illinois law).

45. *Id.*

46. The "uniform characterization" approach was not always uniformly adhered to. For example, while in one case the Seventh Circuit characterized all civil RICO claims as most analogous to state actions based upon statutory penalty, *see Tellis*, 805 F.2d at 746, a subsequent Seventh Circuit decision, without explicit departure from the uniform characterization approach, applied the state's "baby RICO" statute to a federal civil RICO claim. *See* Hemmings v. Barian, 822 F.2d 688, 690 (7th Cir. 1987).

47. *See supra* notes 41-43 and accompanying text.

48. *See supra* notes 44-45 and accompanying text.

and legal theories presented," locate the relevant state's most analogous claim, and borrow the limitation period applicable to that state claim.[49]

Both approaches produced unfortunate results. The civil RICO claims of two plaintiffs, suing in different states, were both characterized differently and subject to limitation periods of varying length. With respect to characterization, for example, one circuit was unable to characterize civil RICO claims,[50] another characterized them on a case by case basis,[51] another characterized the civil RICO claims as actions based on a statute,[52] and yet another characterized actions based on a statutory penalty.[53]

Additionally, even when the various circuits characterized civil RICO claims in the same manner, the limitation periods which were applied varied in length. Thus, in the Ninth Circuit, which deemed civil RICO actions to be analogous to actions based on a statute, claims arising under California law were subject to a three-year limitation period,[54] while civil RICO claims arising under Montana law were subject to a two-year limitation period.[55] Civil RICO claims characterized as most analogous to common law fraud under the law of Ohio were subject to a four-year limitation period.[56] Under the law of Alabama, the one-year limitation period applicable to Alabama's common law fraud claim was applied to RICO claims.[57]

Fortunately, the Supreme Court resolved both the characterization issue and the limitation period issue for civil RICO claims.[58] Concluding that civil RICO claims were most analogous to civil enforcement actions under the Clayton Act, the Court held that the four-year limitation period applicable thereunder applied to civil RICO claims.[59] Today, civil RICO claims, no matter where they are filed in this country, are characterized uniformly and are subject to the same limitation period.

The nationwide uniformity of limitation periods ultimately achieved for civil RICO claims is, unfortunately, not typical of federal statutory claims that lack express limitation periods.[60] Of all federal statutory claims that lack express

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49. *See, e.g.*, Silverberg v. Thomson McKinnon Secs., Inc., 787 F.2d 1079, 1083 (6th Cir. 1986) (holding that based on the allegations of the plaintiffs' complaint, the four-year limitation period applicable to common law fraud under Ohio law would control).

50. Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 353 (3d Cir. 1986), *aff'd sub. nom.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987).

51. *Silverberg*, 787 F.2d at 1083.

52. Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984).

53. Tellis v. USF&G, 805 F.2d 741, 746 (1986).

54. *See, e.g., Compton*, 732 F.2d at 1433.

55. *See* Volk v. Davidson & Co., 816 F.2d 1406, 1415 (9th Cir. 1987).

56. Silverberg v. Thomson McKinnon Secs., Inc., 787 F.2d 1079, 1083 (6th Cir. 1986).

57. Bowling v. Founders Title Co., 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).

58. *See* Agency Holding Corp. v. Malley-Duff & Assos., 483 U.S. 143, 147 (1987).

59. *Id.* at 156.

60. *See, e.g.*, Emergency Petroleum Allocation Act of 1973 § 5, 15 U.S.C. § 754 (1982) (expired on Sept. 30, 1981, pursuant to 15 U.S.C. § 760g); Trademark Act of 1946 § 3, 15 U.S.C. § 1125 (Supp. III 1993); Alien Tort Statute § 41(17), 28 U.S.C. § 1350 (1988); Labor-Management Reporting and Disclosure Act of 1959 § 102, 29 U.S.C. § 412 (1988); Rehabilitation Act of 1973 § 501, 29 U.S.C. § 791 (1988 & Supp. IV 1992); Employee Retirement Income Security Act of 1974 § 502, 29 U.S.C. § 1132 (1988 & Supp. III 1991); Workers Adjustment and Retraining Notification Act of 1988 § 5, 29

limitations periods,[61] only three enjoy uniformity both in how they are characterized and in the actual time limitation applied to them: 1) civil RICO claims,[62] 2) securities fraud claims implied under § 10(b) of the Securities Exchange Act of 1934,[63] and 3) "hybrid" actions, for example, actions brought by an employee against both an employer for violation of a collective bargaining agreement and a union for breach of its duty of fair representation,[64] brought under § 301 of the Labor-Management Relations Act of 1947 ("LMRA").[65]

Each of these three claims enjoys one characterization and one uniform limitation period because the Court characterized each claim as most analogous to other federal laws. It then borrowed limitation periods from those more analogous federal laws. Thus, all civil RICO claims, uniformly analogized to civil enforcement actions under the Clayton Act, enjoy a uniform four-year limitation period.[66] All claims implied under § 10(b) of the Securities Exchange Act of 1934, uniformly characterized as most analogous to certain express causes of action contained in the Securities Act of 1933 and the Securities Exchange Act of 1934, enjoy a one-year-within-discovery, three-year-within-sale limitation period.[67] All claims brought under § 301 of the LMRA, uniformly characterized as hybrid actions under the National Labor Relations Act ("NLRA"), enjoy a six-month limitation period.[68]

C. Contemporary Examples of a Continuing Problem

For all other civil rights of action that arise under pre-existing federal statutes, the borrowing practice continues.[69] Some such claims are characterized uniformly. For example, the civil rights claims brought under the Reconstruction-era Civil Rights Acts that lack express limitation periods are uniformly characterized as most analogous to personal injury claims.[70] Despite this uniform characterization, however, the time periods applied to these claims vary in length because the limitation periods are borrowed from

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U.S.C. § 2104 (Supp. III 1991); Clean Water Act § 505, 33 U.S.C. § 1356(a) (1988); Reconstruction-era Civil Rights Acts §§ 1977-1980, 42 U.S.C. §§ 1981-1983, 1985 (1988 & Supp. III 1991); Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. III 1991); Airline Deregulation Act of 1978 § 43, 49 U.S.C. § 1552(d)(1) (1988).

61. *See supra* note 3.

62. *Malley-Duff*, 483 U.S. at 143-44.

63. *Lampf*, 111 S. Ct. 2773, 2775 (1991), *partially superseded by statute*, 15 U.S.C. § 78aa-1.

64. *See, e.g.*, DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 154 (1983).

65. *Id.* at 165.

66. *Malley-Duff*, 483 U.S. at 156.

67. *See Lampf*, 111 S. Ct. at 2782. Note, however, that the Court specifically excluded from consideration § 16(b), 15 U.S.C. § 78p(b), of the Securities Exchange Act of 1934. That section sets an outside period of two rather than three years. *Id.* at 2780 n.5.

68. *DelCostello*, 462 U.S. at 169.

69. For examples of federal statutory claims currently subject to state law borrowing, see *supra* note 60.

70. *See, e.g.*, Wilson v. Garcia, 471 U.S. 260, 279 (1985).

various state laws.[71] Other federal statutory claims lacking express limitation periods are not characterized uniformly.[72] For these claims, not only do the characterizations vary from state to state, but the limitation periods applied to them also vary in length.[73]

Two separate forces are at work: 1) multiple charaeterization of federal statutory claims that are not uniformly characterized, and 2) multiple limitation periods due to reference to state laws. Multiple characterization has proven to be an extremely time-consuming and generally wasteful practice, resulting in confusion and uncertainty.[74] Multiple limitation periods are more disturbing and are thus principally attacked. Indeed, whether a particular federal statutory claim is characterized uniformly or not, borrowing state limitation periods creates undesirable variances among the courts. Specifically, two or more plaintiffs who are suing under the identical federal statutory claim can end up with different lengths of time within which to pursue their actions.[75] This time differential directly impacts perceptions of fairness in the federal judicial system and invites forum-shopping.[76] While this type of difference is both allowed and common in state court practice,[77] it rings of unfairness in a federal law context.

A few contemporary examples of both forces at work are detailed below. In some such examples, although federal statutory claims are characterized uniformly, different state laws determine the length of time afforded to file the action. In other examples, federal statutory claims are characterized differently from court to court, and various state limitation periods are applied. The unfairness, uncertainty, and potential for forum-shopping are clear.

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71. *See, e.g., infra* notes 133-69 and accompanying text.

72. *See infra* notes 78-132, 183-96, 204-15 and accompanying text.

73. *See infra* notes 78-132, 183-96, 204-15 and accompanying text.

74. *See, e.g., supra* notes 1, 39-57; *infra* notes 204-16, 218, 227-30, 250, 286, 325-26 and accompanying text; *see also* Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987) ("This is one tottering parapet of a ramshackle edifice. Deciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours.") (citation omitted), *cert. denied*, 484 U.S. 943 (1987).

75. *See, e.g., infra* notes 78-196, 204-15 and accompanying text.

76. "Forum shopping occurs when a litigant attempts to have his claim heard by a court in a jurisdiction where he would receive a favorable decision. Logically, most plaintiffs will try to use procedural rules to move their case to a jurisdiction with a longer statute of limitations." Stephen W. Bialkowski, Note, *Civil Rights—Statute of Limitations—State Limitation Period for Personal Injury Actions Applies to All Section 1983 Claims*—Wilson v. Garcia, *105 S. Ct. 1938 (1985)*, 16 SETON HALL L. REV. 831, 848 (1986) (footuote omitted); *see also* Neil Sobol, Comment, *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 SW. L.J. 895, 909 (1987) ("Plaintiffs who meet the jurisdictional and venue requirements of a forum state with a relatively favorable limitation period . . . possess an advantage over plaintiffs who sue under the same federal statute but lack either the resources or venue and jurisdictional contacts to bring suit in the more favorable forum.") (citations omitted).

77. Each state, as an individual sovereign, has the right to make its own laws. U.S. CONST. amend. X; *see also* Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941) ("[O]ur federal system . . . leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.").

1. The Employee Retirement Income Security Act of 1974[78]

After years of careful study, Congress enacted the Employment Retirement Income Security Act of 1974 ("ERISA").[79] Its purpose was to:

> [P]rotect . . . participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.[80]

With ERISA, "Congress wanted to guarantee that if a worker ha[d] been promised a defined pension benefit upon retirement—and if he ha[d] fulfilled whatever conditions are required to obtain a vested benefit—he [would] actually receive it."[81]

ERISA is a complex, "comprehensive and reticulated statute."[82] Although detailed treatment of this Act is beyond the scope of this Article,[83] the Act provides a perfect example of how the federal courts have inconsistently resolved the applicable limitation periods issue for civil rights of action that lack express limitation periods.

ERISA contains a variety of civil actions that can be maintained by private individuals.[84] Only one such action, that allowed to redress breach of fiduciary duties,[85] has an express limitation period.[86] The remaining private rights of actions borrow limitation periods from state law.[87]

The most common private civil action brought under ERISA is the civil action contained in 29 U.S.C. § 1132(a)(1)(B) to "recover benefits due to [a

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78. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of Titles 5, 15, 18, 21, 26, 31, 42, and 45 U.S.C.).

79. *Id.*

80. 29 U.S.C. § 1001(b) (1988).

81. Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2271-72 (1993) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 214 (1986)); *see also* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984) (quoting Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 375 (1979)).

82. *Nachman*, 446 U.S. at 361.

83. For a recent study of ERISA as it relates to the appropriate limitation period to apply to the claims arising thereunder, see Todd M. Worscheck, Comment, *Eighth Circuit Struggles to Select Appropriate Statute of Limitations for ERISA Claims: Difficulties with a Straightforward Matter*, 18 WM. MITCHELL L. REV. 861 (1992).

84. The ERISA civil enforcement section, 29 U.S.C. § 1132, allows: actions to enforce requests by participants or beneficiaries for information under 29 U.S.C. § 1132(a)(1)(A); actions to recover benefits, enforce rights, or clarify future benefits under the terms of the employee benefit plan under 29 U.S.C. § 1132(a)(1)(B); actions to enforce breaches of fiduciary obligations under 29 U.S.C. § 1132(a)(2); injunctive relief under 29 U.S.C. § 1132(a)(3); actions to compel disclosure of information under 29 U.S.C. § 1132(a)(4). A private civil action may be obtained against an employer for failure to make any obligatory contributions to multiemployer plans, 29 U.S.C. § 1145. Private civil actions may also be maintained against persons who discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any of the rights provided under ERISA. 29 U.S.C. § 1140. Both of these latter provisions are enforceable under 29 U.S.C. § 1132(a).

85. 29 U.S.C. § 1132(a)(2).

86. *Id.* § 1113 (1985), *amended by* 29 U.S.C. § 1113 (1989 & Supp. 1993).

87. *See, e.g., infra* notes 89-95 and accompanying text.

participant or beneficiary] under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[88] According to most courts, the § 1132(a)(1)(B) claim is most analogous to the applicable state's breach of written contract action.[89] One court, however, has characterized this claim as most analogous to personal injury actions;[90] another as *either* most analogous to an action for damages for withholding personal property *or* an action for detaining personal property;[91] and another as most analogous to the state law action for "recovery of wages . . . or damages . . . accruing under any federal or state law."[92] Just like the various characterizations applied to civil RICO claims prior to *Malley-Duff*,[93] the § 1132(a)(1)(B) claim is now subjected to multiple characterizations.

Lack of uniformity in the characterization of § 1132(a)(1)(B) claims is only part of the problem. More importantly, the limitation periods applied to this claim vary in length from two years in some cases to fifteen years in others.[94] This time differential has nothing to do with the claim's characterization, but rather, it results from resorting to state law borrowing. Indeed, even if one were to focus solely on those jurisdictions that characterize the claim as most analogous to breach of written contract, the limitation periods applied still vary from five years under the law of some states to fifteen years under the law of other states.[95]

This time variance is troubling. A national cause of action should not affect litigants differently depending upon where the lawsuit is filed.[96] Moreover, Congress clearly intended federal law, not state law, to control ERISA actions. For example, all state laws relating to employee benefits plans are pre-empted by ERISA.[97] The legislative history also indicates that in enacting ERISA, it was "essential to provide for a uniform source of law . . . ."[98] Because Congress wanted "fiduciaries[, beneficiaries,] and partici-

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88. 29 U.S.C. § 1132(a)(1)(B).

89. *See, e.g.*, Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992); Meade v. Pension Appeals and Review Comm., 966 F.2d 190, 194-95 (6th Cir. 1992); Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge B.P.O.E. No. 1450, 827 F.2d 1324, 1328 (9th Cir. 1987) [hereinafter *Pierce County*]; Jenkins v. Local 705 Int'l Bd. of Teamsters Pension Plan, 713 F.2d 247, 251 (7th Cir. 1983).

90. Keunedy v. Electricians Pension Plan, IBEW #995, 954 F.2d 1116, 1120 (5th Cir. 1992).

91. Salyers v. Allied Corp., 642 F. Supp. 442, 445 (E.D. Ky. 1986).

92. Wendland v. Erickson Oil Prods., Inc., 1992 U.S. Dist. LEXIS 20569, *15 (D. Minn. Oct. 2, 1992); Arkin v. MedCenters Health Care, Inc., 1990 U.S. Dist. LEXIS 20100, *15 (D. Minn. Apr. 17, 1990).

93. *See supra* notes 39-57 and accompanying text.

94. Meade v. Pension Appeals and Review Comm., 966 F.2d 190, 195 (6th Cir. 1992) (Ohio's fifteen-year period); *Kennedy*, 954 F.2d at 1120-21 (Louisiana's ten-year period); *Pierce County*, 827 F.2d 1324, 1328 (9th Cir. 1987) (Washington's six-year period); *Wendland*, 1992 U.S. Dist. LEXIS 20569 at *15 (Minnesota's two-year period); *Salyers*, 642 F. Supp. at 445 (Kentucky's five-year period).

95. *E.g.*, *compare* Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992) (five years) *with Meade*, 966 F.2d at 195 (fifteen years).

96. *See, e.g., supra* note 76; *infra* note 116.

97. *See, e.g.*, 29 U.S.C. § 1144(a) (1985); *see also* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-45 (1987).

98. S. REP. NO. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871.

pants to predict the legality of proposed [ERISA] actions without the necessity of reference to varying state laws[,]"[99] state law should not be allowed to determine how long the federal claim should exist.

Furthermore, the wily ERISA plaintiff is invited to forum-shop. The venue provision governing all ERISA claims provides that venue is proper "in the district [court] where the plan is administered, where the breach took place, or where a defendant resides or may be found."[100] Suppose that a corporate ERISA defendant "may be found" in a plaintiff's home state of Nebraska and also in Ohio. Ohio applies a fifteen-year limitation period to a § 1132(a)(1)(B) claim,[101] while Nebraska applies a five-year limitation period to that same claim.[102] Six years after the plaintiff's ERISA action accrues, can the plaintiff file the action in a federal court located in Ohio in order to obtain Ohio's longer limitation period and then transfer the action to Nebraska? In a case based on diversity of citizenship, the Supreme Court held that the law of the transferor court (Ohio in our case), including the transferor state's limitation period, applies in the action before the transferee court (in our case, Nebraska).[103] The answer, then, appears to be yes.

Specifically, in *Ferens v. John Deere Co.*,[104] the plaintiff lost a hand when it became caught in combine harvester equipment manufactured by the defendant.[105] The injury occurred in Pennsylvania, the state of the plaintiff's residence.[106] After the two-year tort limitation period expired under the law of Pennsylvania, the plaintiff brought his diversity action against the defendant in a federal court located in Mississippi, where the defendant did business.[107] The federal court in Mississippi, following *Klaxon*,[108] determined that Pennsylvania law governed the substantive claim but Mississippi's six-year statute of limitation applied.[109] After obtaining this ruling, the plaintiff transferred the action, under 28 U.S.C. § 1404(a), to Pennsylvania.[110] Both the district court in Pennsylvania and the Third Circuit rejected the longer Mississippi limitation period.[111] The Supreme Court, however, reversed and held that the "transferee forum [of Pennsylvania was] to apply the law of the transferor court [of Mississippi] . . . ."[112] This

99. H.R. REP. NO. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650; S. REP. NO. 127, *supra* note 98, at 29, *reprinted in* 1974 U.S.C.C.A.N. at 4865.
100. 29 U.S.C. § 1132(e)(2).
101. Meade v. Pension Appeals and Review Comm., 966 F.2d 190, 195 (6th Cir. 1992).
102. Schroeder v. Phillips Petroleum Co., 970 F.2d 419, 420 (8th Cir. 1992).
103. Ferens v. John Deere Co., 494 U.S. 516, 532 (1990).
104. *Ferens*, 494 U.S. 516.
105. *Id.* at 519.
106. *Id.*
107. *Id.*
108. Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941).
109. *Ferens*, 494 U.S. at 519.
110. *Id.* at 520.
111. *Id.* at 520-21.
112. *Id.* at 523.

was so notwithstanding the Court's explicit recognition that "Mississippi's long limitation period no doubt drew plaintiffs to [that] State."[113]

Would the Court hold differently if subject matter jurisdiction were based on a federal question? It is unlikely. Nothing in the Supreme Court decision hinted at any different treatment.[114] Nor does there appear to be any reason to treat federal question cases differently in this context.

This obvious form of forum-shopping should not be permitted. But it has been permitted, at least with respect to claims based on diversity of citizenship.[115] Could Congress have intended this result for ERISA claims or, indeed, for any federal statutory claim lacking an express limitation period?[116] Not according to the dissenting opinion in *Ferens*:

> [It is] unlikely that Congress meant to provide the *plaintiff* with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case . . . . [A]pplication of the transferor court's law in this context [does nothing but] encourage forum-shopping . . . .[117]

2. The Airline Deregulation Act of 1978[118]

In connection with the deregulation of the commercial airline industry, Congress enacted the Airline Deregulation Act of 1978.[119] In response to the concerns of organized labor that deregulation would result in massive job loss, Congress added the Employee Protection Program ("EPP").[120] The EPP, in its relevant part, imposes a duty to hire protected employees, furloughed or terminated other than for cause, on airlines covered under the Airline Deregulation Act, when those airlines hire additional employees.[121] Although

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113. *Id.* at 528.

114. *Id.* at 516.

115. *Id.*

116. Note also that the general venue provision, applicable to all federal claims for which no specific venue provision applies, provides that venue is proper in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
> (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b) (1976), *amended by* 28 U.S.C. § 1391(b) (1990 & Supp. 1993).

117. *Ferens*, 494 U.S. at 535 (Scalia, J., dissenting).

118. Pub. L. No. 95-504, 92 Stat. 1705 (1978); Pub. L. No. 96-192, 94 Stat. 35, 48 (1980).

119. *Id.*

120. 49 U.S.C. app. § 1552 (1993); *see also* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 691-92 (1987); Haggerty v. USAir, Inc., 952 F.2d 781, 785 (3d Cir. 1992); S. REP. NO. 631, 95th Cong., 2d Sess. 114 (1978); 124 CONG. REC. 10,650 (1978) (Apr. 19, 1978) (statement of Sen. Pearson).

121. 49 U.S.C. app. § 1552(d)(1) provides:

> (D) DUTY TO HIRE PROTECTED EMPLOYEES
>
> (1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978 shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371

the EPP does not contain an express private cause of action,[122] courts have found an implied private right of action thereunder for its violation.[123]

As an implied claim, the private action under the EPP obviously does not contain a limitation period.[124] Several circuits have addressed the question of what limitation period should be applied, and each court has come up with a different answer.[125] While one federal court has borrowed a limitation period from federal law;[126] other federal courts have borrowed limitation periods from state law.[127] Among those courts choosing state law, some characterize EPP claims as most analogous to tort actions and have thus borrowed the limitation periods applied under state tort law claims,[128] while others have characterized EPP claims as most analogous to state claims for actions created under a federal statute (or to enforce federal rights) and have thus borrowed the limitation period applied under those state claims.[129]

Moreover, regardless of its characterization, EPP claims have limitation periods ranging from six months in some cases to three years in others.[130]

> of this title prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

49 U.S.C. app. § 1552(h)(1) defines a "protected employee," exclusive of members of the board of directors or officers of a corporation, as "a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this title."

122. 49 U.S.C. app. § 1552.

123. *See, e.g.*, Bowdry v. United Air Lines, Inc., 956 F.2d 999 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 97 (1992); *Haggerty*, 952 F.2d 781; Gonzalez v. Aloha Airline, Inc., 940 F.2d 1312, 1314 (9th Cir. 1991); McDonald v. Piedmont Aviation, Inc., 930 F.2d 220, 224 n.4 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 441 (1991); Long v. Trans World Airlines, Inc., 913 F.2d 1262, 1265 (7th Cir. 1990); Crocker v. Piedmont Aviation, Inc., 696 F. Supp. 685, 689 (D.D.C. 1988). See also *Alaska Airlines*, 480 U.S. at 687 n.9, where the Court implicitly recognized the implied private right of action under the EPP.

124. *See, e.g., In re* Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988):

> Congress cannot be faulted for not providing a statute of limitations, because the section 10(b) private cause of action was not enacted by it; it is a genie sired solely by the judiciary, and the genie having escaped from the bottle is not easily cabined. So the courts resort to the political science fiction of formulating judicially-declared "statutes" of limitations, suggesting that this would have been the intention of Congress had it created an express cause of action. It is a sort of hermaphroditic process: the courts invent the remedy and then seek to determine what would have been the intention of Congress as to a statute of limitations had it expressly created the private damage action. Because Congress takes no action to legislate to the contrary after an implied cause of action has been judicially formulated, we conclude that by *post hoc* inaction, Congress must have intended *ante hoc* that this is what it desired.

Id. at 1547.

125. *See Bowdry*, 956 F.2d 999; *Haggerty*, 952 F.2d 781; *Gonzalez*, 940 F.2d 1312; *McDonald*, 930 F.2d 220; *Crocker*, 696 F. Supp. 685.

126. *Haggerty*, 952 F.2d at 788.

127. *Bowdry*, 956 F.2d at 1004-05; *Gonzalez*, 940 F.2d at 1315; *McDonald*, 930 F.2d at 224.

128. *MeDonald*, 930 F.2d 225.

129. *Bowdry*, 956 F.2d 999; *Gonzalez*, 940 F.2d 1312; *Crocker*, 696 F. Supp. 685.

130. *Bowdry*, 956 F.2d at 1006 (two years); *Haggerty*, 952 F.2d at 788 (six months); *Gonzalez*, 940 F.2d at 1316 (two years); *McDonald*, 930 F.2d at 225 (three years); *Crocker*, 696 F. Supp. at 691-92 (three years).

The length of time provided depends upon where the lawsuit is filed. As the Third Circuit has noted:

> Because the first right of hire that a protected employee enjoys is for employment in any other carrier that is hiring employees, a number of state statutes of limitations may be implicated. *It happens that [the plaintiff] is claiming that right in his home city of Pittsburgh, but he could just as easily be claiming it as to an airline in Dallas or San Francisco.*[131]

Consequently, because the length of time that a plaintiff is granted to pursue such claims depends solely upon which state the plaintiff chooses to file the action in, the Third Circuit held that only a federal limitation period should be applied to EPP actions.[132]

3. The Reconstruction-era Civil Rights Acts[133]

The Reconstruction-era Civil Rights Acts create several private causes of action designed to protect certain civil rights. Like many federal statutory claims,[134] the private rights of action under the Reconstruction-era Civil Rights Acts do not, with one exception,[135] contain express statutes of limitation.[136] Because the limitation period used for all such claims is identical,[137] only the claim under § 1983 is discussed here. "The specific historical catalyst for . . . [§ 1983] was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."[138] "By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement."[139] Section 1983, then, permits a private individual to bring a civil claim for relief, in either state[140] or federal court, against persons who deprived him or her of a federal constitutional or statutory right while acting under color of state law.[141]

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131. *Haggerty*, 952 F.2d at 786 (emphasis added).

132. *Id.*

133. 42 U.S.C. §§ 1981-1983, 1985 (1988 & Supp. III 1991).

134. *See supra* note 3.

135. 42 U.S.C. § 1986 (1988 & Supp. III 1991) (providing a one-year-within-accrual limitation period for claims against persons who negligently refuse to prevent the commission of wrongs conspired to be done by others as prohibited in 42 U.S.C. § 1985).

136. *See, e.g.*, Id. §§ 1981-1983, 1985; *see also* Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987) (§ 1981 claims); Wilson v. Garcia, 471 U.S. 261, 266 (1985) (§ 1983 claims); Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1528 (7th Cir. 1990) (§ 1982 claims); Bougher v. University of Pittsburgh, 882 F.2d 74, 79 (3d Cir. 1989) (§ 1985 claims).

137. *See, e.g., Goodman*, 482 U.S. at 662 (§ 1981 claims); *Wilson*, 471 U.S. at 266 (§ 1983 claims); *Village of Bellwood*, 895 F.2d at 1528 (§ 1982 claims); *Bougher*, 882 F.2d at 79 (§ 1985 claims).

138. *Wilson*, 471 U.S. at 276; Briscoe v. Lahue, 460 U.S. 325, 336-40 (1983).

139. *Id.* at 277.

140. State courts have concurrent jurisdiction over claims under 42 U.S.C. § 1983. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980); Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980).

141. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

The practice of borrowing a limitation period from state law for use in § 1983 claims originally derived from the Rules of Decision Act.[142] State law borrowing later continued under another provision contained in the Reconstruction-era Civil Rights Acts: 42 U.S.C. § 1988.[143] This provision specifically authorizes courts to borrow state law when federal law is inadequate or deficient.[144]

Before *Wilson v. Garcia*,[145] the federal courts relied on Supreme Court directives to borrow the most analogous or the most appropriate limitation period for § 1983 claims.[146] As a result, the federal courts developed a two-step process for deciding which state limitation period to borrow.[147] First, the federal courts characterized the "essential nature" of the § 1983 claim; second, the federal courts surveyed the various state law causes of action to determine which met the parameters of that characterization.[148]

These two steps, while simple in theory, were not so simple in practice. Federal courts varied considerably in their perceptions of which of the particular state's various common law or statutory causes of action was *most*

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988) (amended 1991).

142. The first known case to find that the Rules of Decision Act applied to actions brought under 42 U.S.C. § 1985 was O'Sullivan v. Felix, 233 U.S. 318 (1914). This holding was extended to civil rights actions generally. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 474, 484 (1980) ("Limitation borrowing was adopted for civil rights actions filed in federal court as early as 1914, in O'Sullivan v. Felix.").

143. *See, e.g., Wilson*, 471 U.S. at 267-69; *Tomanio*, 446 U.S. at 484-85; Moor v. County of Alameda, 411 U.S. 693, 710 (1973).

144. Section 1988 provides in part:

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

42 U.S.C. § 1988 (1988 & Supp. III 1991).

145. *Wilson*, 471 U.S. 261.

146. *See, e.g., Tomanio*, 446 U.S. at 483-84 (borrowing "the state law of limitation governing an analogous cause of action"); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) (borrowing "the most appropriate . . . [limitation period] provided by state law").

147. *See, e.g.*, Garcia v. Wilson, 731 F.2d 640, 642-50 (10th Cir. 1984) (detailed circuit by circuit review), *aff'd*, 471 U.S. 261 (1985).

148. *Id.*

appropriate or *most analogous*[149] to the § 1983 claim before them. Four principal methods were employed.

First, some federal courts applied a factual analysis approach.[150] This required reviewing the facts comprising the alleged violation, locating the state law tort claim closest to those facts, and applying that tort's limitation period.[151] The second approach was predicated upon the state's limitation period for liabilities created by statute.[152] Under this approach, because the § 1983 remedy was created in a federal statute, the state limitation period most analogous to it had to be the state period governing actions based upon the liabilities created by statute.[153] The third approach borrowed the particular state's general limitation period for actions not otherwise provided for.[154] The fourth approach borrowed the limitation period applicable to the state's general tort[155] or injuries to the person[156] cause of action.

These divergent characterizations were problematic. First, the characterization process created at least four different categories within which to place §

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149. The *most appropriate* limitation period was not always the *most analogous*:

> In one case, for example, *Burnett v. Gralton*, the Court indicated that there may be a distinction. In *Burnett*, employees of a Maryland state college brought suit under sections 1981, 1983, 1985 and 1986, claiming racial discrimination in employment. The federal district court dismissed the claims as barred by the six-month limitations period applicable to a Maryland statute prohibiting racial discrimination in employment. Without disputing that the state employment discrimination statute was the cause of action most analogous to the actual suit being brought by the plaintiffs, the Supreme Court refused to apply the six-month limitations period for filing an administrative complaint under the state statute to the section 1983 claim. The Court held that the state statute was not "appropriate" because it failed "to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts."

Stephen J. Shapiro, *Choosing the Appropriate State Statute of Limitations for Section 1983 Claims After* Wilson v. Garcia: *A Theory Applied to Maryland Law*, 16 U. BALT. L. REV. 242, 258 (1987) (footnotes omitted).

150. *See, e.g.*, Aitchison v. Raffiani, 708 F.2d 96, 103 (3d Cir. 1983); McGhee v. Ogburn, 707 F.2d 1312, 1315 (11th Cir. 1983); McClam v. Barry, 697 F.2d 366, 371-73 (D.C. Cir. 1983), *overruled by* Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984); Kilgore v. City of Mansfield, 679 F.2d 632, 634 (6th Cir. 1982) (per curiam); Shaw v. McCorkle, 537 F.2d 1289, 1292-93 (5th Cir. 1976).

151. *See supra* note 150; *see also* Polite v. Dichl, 507 F.2d 119, 122 (3d Cir. 1974) (en banc) (holding that the state's one-year statute of limitation for false arrest claims applied to those § 1983 allegations considered most analogous to false arrest, while the state's two-year limitation period for assault, battery, and coercion of guilty pleas applied to other § 1983 allegations).

152. Michael J. Brophy, Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97, 125-26; Paul Rathburn, Note, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More than "A Half Measure of Uniformity"*, 73 MINN. L. REV. 85, 93-95 (1988).

153. *See, e.g.*, Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 506 (9th Cir. 1981); Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); Beard v. Robinson, 563 F.2d 331, 336-37 (7th Cir. 1977), *cert. denied*, Mitchell v. Beard, 438 U.S. 907 (1978).

154. Rathburn, *supra* note 152, at 95-96; *see also*, Garmon v. Foust, 668 F.2d 400, 406 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

155. *See, e.g.*, Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 318-19 (1st Cir. 1978). *But see* Holden v. Commission Against Discrimination, 671 F.2d 30, 33 n.3 (1st Cir. 1982) (adopting factual analysis approach), *cert. denied*, 459 U.S. 843 (1982).

156. Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985); *see also* McCausland v. Mason County Bd. of Educ., 649 F.2d 278, 279 (4th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). *But see* Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir. 1980) (applying limitation period for actions based upon liabilities created by statute).

1983 claims.[157] Second, some federal courts, adopting a particular approach in some cases, did not always follow the same approach in subsequent decisions.[158] Third, the limitation periods applied to § 1983 claims varied from one to six years.[159] Finally, each approach had its own problems. The factual analysis approach not only "forced courts to undertake time-consuming dissections of individual claims and to assign different limitations periods to allegations within the same § 1983 complaint,"[160] but also it encouraged the parties to engage in artful pleading in order to have the limitation period most favorable to their positions applied.[161] The approach predicated on liabilities created by statute was criticized because the remedy provided in § 1983 enforced rights deriving from the United States Constitution, not from a statute. Thus, the liability created by statute analogy was inaccurate.[162] The general tort or injuries to the person approach was criticized because it provided one general characterization for all § 1983 claims even though § 1983 claims could involve police brutality on the one hand to school desegregation on the other.[163]

In *Wilson*, the Supreme Court put an end to the characterization part of the problem for § 1983 claims.[164] After characterizing all such claims as most analogous to personal injury actions, lower federal courts were directed to borrow the state limitation period governing such actions.[165] Unfortunately, most states had more than one personal injury action and, thus, more than one possible limitation period from which to borrow.[166] It was another four years before the Supremc Court then directed federal courts confronting more than

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157. *See supra* notes 149-56 and accompanying text.

158. *Compare* Kilgore v. City of Mansfield, 679 F.2d 632 (6th Cir. 1982) (using the factual analysis approach) *with* Mason v. Owens-Illinois, Inc., 517 F.2d 520, 521 (6th Cir. 1975) (using the liability created by statute approach) *and* Madison v. Wood, 410 F.2d 564, 567 (6th Cir. 1969) (using an injury to the person approach). *Compare* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 506 (9th Cir. 1981) (employing the liabilities created by statute approach) *with* Kosikowski v. Bourne, 659 F.2d 105, 106-07 (9th Cir. 1981) (employing limitation period expressly applicable to § 1983 claims under Oregon law).

159. *See infra* note 169.

160. Rathburn, *supra* note 152, at 92.

161. *See* Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 261 (1985).

162. *See, e.g., id.*; *see also* Lee L. Cameron, Jr., Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440, 443 (1986).

163. *See, e.g.*, Peter M. Zante, Comment, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 504 (1970) [hereinafter *Choice of Law*].

164. Wilson v. Garcia, 471 U.S. 261, 272 (1985).

165. *Id.* at 276.

166. At the time *Wilson* was decided, over half of the states had more than one limitations period governing personal injury claims. *See, e.g.*, Julie A. Davies, *In Search of the "Paradigmatic Wrong"?: Selecting a Limitations Period for Section 1983*, 36 KAN. L. REV. 133, 134-35 n.6 (1987); Shapiro, *supra* note 149, at 245-46 n.18. The Supreme Court could have easily resolved this issue by granting certiorari in either of two other cases presented to it, along with *Wilson*. *See, e.g.*, Hamilton v. City of Overland Park, 730 F.2d 613, 614 (10th Cir. 1984), *cert. denied*, 471 U.S. 1052 (1985); Misinash v. Murray City, 730 F.2d 1366 (10th Cir. 1984), *cert. denied*, 471 U.S. 1052 (1985).

one state personal injury action to use the limitation period governing the state's residual personal injury claims.[167]

Today, all § 1983 claims are characterized uniformly. However, the limitation periods applied to such claims continue to be nonuniform.[168] Depending upon which state law applies, the time periods can range from one to six years.[169]

4. The Labor-Management Reporting and Disclosure Act of 1959[170]

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") protects the free speech and assembly rights of union members.[171] "[V]ital to the independence of the membership and the effective and fair operation of the union as the representative,"[172] the claim under § 101(a)(2) was enacted by Congress to promote union democracy and to end abuses by union leadership.[173] The claim lacks an express limitation period.[174]

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167. Owens v. Okure, 488 U.S. 235, 250 (1989) ("Whenever a state has more than one limitation period for personal injury claims, the one governing general or residual personal injury actions should be borrowed.").

168. *See* Rathburn, *supra* note 152, at 100 n.100 ("Although after *Wilson*, § 1983 claims brought within the *same* state were treated identically, the decision did not create uniformity among or even within the federal circuits. Thus, plaintiffs and defendants involved in interstate § 1983 litigation remained uncertain as to what statutes of limitations would apply in their cases.").

169. Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 182 (6th Cir. 1990) (Kentucky's one-year period); Free v. Granger, 887 F.2d 1552, 1555 (11th Cir. 1989) (Alabama's one-year period); Callwood v. Questel, 883 F.2d 272, 274 (3d Cir. 1989) (Virgin Island's two-year period); Lundblad v. Celeste, 874 F.2d 1097, 1103 (6th Cir. 1989) (Ohio's two-year period), *vacated*, 882 F.2d 207 (6th Cir. 1989), *aff'd*, 924 F.2d 627 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2889 (1991); Gray v. Lacke, 885 F.2d 399, 408-09 (7th Cir. 1989) (Wisconsin's six-year period), *cert. denied*, 494 U.S. 1029 (1990); Lillios v. Justices of the New Hampshire Dist. Ct., 735 F. Supp. 43, 48 (D.N.H. 1990) (New Hampshire's six-year period); Berg v. Groschen, 437 N.W.2d 75, 77 (Minn. App. 1989) (Minnesota's six-year period).

170. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.).

171. Section 101(a)(2) provides as follows:

> FREEDOM OF SPEECH AND ASSEMBLY
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> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at mectings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (1988). This section is enforceable by a private right of action. *Id.* § 412.

172. Hall v. Cole, 412 U.S. 1, 8 (1973) (citation omitted).

173. United Steelworkers v. Sadlowski, 457 U.S. 102, 112 (1982); *see also* Finnegan v. Leu, 456 U.S. 431, 436 (1982).

174. Reed v. United Transp. Union, 488 U.S. 319, 323 (1989).

Before the Supreme Court decision in *Reed v. United Transportation Union*,[175] the federal circuits were not only divided on the proper characterization of the § 101(a)(2) action, but they were also divided on the appropriate limitation period to apply to these claims. With respect to the applicable limitation period, for example, some borrowed the applicable state's limitation period for personal injury claims,[176] while others borrowed the federal limitation period applicable to claims brought under § 10(b) of the NLRA.[177]

Although the Supreme Court could have resolved this issue in 1985,[178] it did not do so until *Reed* in 1989. In *Reed*, the Court first characterized all § 101(a)(2) claims uniformly as most analogous to personal injury actions under state law.[179] It then directed lower courts to borrow the limitation period applied under individual "state general or residual personal injury statutes."[180]

While characterization of § 101(a)(2) claims is now uniform, the limitation periods applied to these claims continue to be borrowed from state law.[181] Those time periods can range from one to five years.[182]

5. The Trademark Act of 1946[183]

The Trademark Act of 1946 provides a private right of action against anyone who uses in commerce any word, term, name, symbol, or device; any false designations of origin; or any descriptions or representations of fact that are likely to result in confusion as to the sponsorship, ownership, or origin of

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175. In *Reed*, the Court held that from henceforth the limitation periods applied under state residual personal injury claims would apply to actions brought under § 101(a)(2) of the LMRDA. *Id.* at 323.

176. *See, e.g.*, Rodonich v. Honse Wreckers Union Local 95, 817 F.2d 967, 976-77 (2d Cir. 1987) (New York's three-year limitation period); Doty v. Sewall, 784 F.2d 1, 11 (1st Cir. 1986) (Massachusetts' three-year limitation period).

177. *See, e.g.*, Clift v. International Union, United Auto., Aerospace & Agric. Implement Workers, 818 F.2d 623, 629 (7th Cir. 1987), *vacated*, 488 U.S. 1025 (1989); Davis v. United Auto. Aerospace & Agric. Implement Workers, 765 F.2d 1510, 1512 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986); Local Union 1397 v. United Steelworkers, 748 F.2d 180, 183 (2d Cir. 1984).

178. *See Davis*, 765 F.2d 1510.

179. *Reed*, 488 U.S. at 333-34.

180. *Id.* at 334.

181. *Id.*

182. *See, e.g.*, Holmes v. Donovan, 984 F.2d 732, 738 (6th Cir. 1993) (Tennessee's one-year period); Marshall v. Local Union No. 6, Brewers, 960 F.2d 1360, 1367 (8th Cir. 1992) (Missouri's five-year period); Guidry v. International Union of Operating Eng'rs, Local 406, 882 F.2d 929, 942 (5th Cir. 1989) (Louisiana's one-year period), *vacated*, 494 U.S. 1022 (1990); *see also* Gvozdenovic v. United Air Lines, 933 F.2d 1100, 1107 (2d Cir. 1991) (New York's three-year period), *cert. denied*, 112 S. Ct. 305 (1991); Allgood v. Elyria United Methodist Home, 904 F.2d 373, 378 (6th Cir. 1990) (Ohio's two-year period).

183. 15 U.S.C.A. §§ 1051-1128 (West Supp. 1993).

any goods or services.[184] The Trademark Act does not contain an express limitation period.[185]

Violations of this statute can take varied forms. While the typical action involves trademark infringements,[186] other claims include deception and fraud,[187] false advertising,[188] and unfair competition in commerce.[189] The few decisions under this statute dealing with the limitation period issue[190] have borrowed time periods from state law.[191] The majority of jurisdictions have characterized these claims as most analogous to fraud and have thus borrowed the limitation period applicable to the particular state's common law fraud claim.[192] A few other courts have characterized the claim as most analogous to the state's injury to property cause of action and have thus borrowed the limitation period applied to that claim.[193] While a fraud characterization could lead to a six-year limitation period,[194] an injury to property characterization could lead to a three-year limitation period.[195]

But multiple characterization is again not the most disturbing problem. Even for the jurisdictions characterizing such claims uniformly as fraud, for

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184. *Id.* § 1125(a)(1) (West Supp. 1993) provides:

FALSE DESIGNATIONS OF ORIGIN AND FALSE DESCRIPTIONS FORBIDDEN

(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

185. *See, e.g.*, Fox Chem. Co. v. Amsoil, Inc., 445 F. Supp. 1355, 1357 (D. Minn. 1978).

186. *See, e.g.*, Coca-Cola Co. v. Howard Johnson, Co., 386 F. Supp. 330 (N.D. Ga. 1974).

187. *See, e.g.*, LaCoste Alligator, S.A. v. Bluestein's Men's Wear, Inc., 569 F. Supp. 491 (D.S.C. 1983).

188. *See, e.g.*, Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990).

189. *See, e.g.*, Unital, Ltd. v. Sleepco Mfg., 627 F. Supp. 285 (W.D. Wash. 1985).

190. *See, e.g.*, Construction Tech., Inc. v. Lockformer Co., 704 F. Supp. 1212, 1218 (S.D.N.Y. 1989). "In most ... [Trademark] Act claims, the alleged violations are ongoing, involving either false advertising or the copying of trade press, such that the statute of limitations is never an issue."

191. *See, e.g.*, Mylan Labs., Inc. v. Pharmaceutical Basics, Inc., 808 F. Supp. 446, 453 (D. Md. 1992); Johannsen v. Brown, 797 F. Supp. 835, 839 (D. Or. 1992); Unlimited Screw Prods., Inc. v. Malm, 781 F. Supp. 1121, 1125 (E.D. Va. 1991); *Construction Tech.*, 704 F. Supp. at 1219; Monkelis v. Scientific Sys. Servs., 653 F. Supp. 680, 684 (W.D. Pa. 1987); Fox Chem. Co. v. Amsoil, Inc., 445 F. Supp. 1355, 1359 (D. Minn. 1978).

192. *Mylan Labs.*, 808 F. Supp. 446; *Johannsen*, 797 F. Supp. 835; *Unlimited Screw Prods.*, 781 F. Supp. 1121; *Monkelis*, 653 F. Supp. 680; *Fox Chem.*, 445 F. Supp. 1355.

193. *Construction Tech.*, 704 F. Supp. at 1221.

194. *See, e.g., Monkelis*, 653 F. Supp. at 684.

195. *Construction Tech.*, 704 F. Supp. at 1221.

example, individual state law borrowing results in varying limitation periods from two to six years.[196]

6. While Some Claims Enjoy Uniformity, Claims Under The Workers Adjustment and Retraining Notification Act of 1988 Are a Warning

There are two federal statutory claims without express limitation periods, that currently enjoy uniformity both in characterization and in the time periods applied. Specifically, following the Supreme Court's direction to borrow a limitation period from federal law whenever federal law "clearly provides a closer analogy than available state statutes and when the federal policies at stake and the practicalities of litigation make [federal law] a significantly more appropriate vehicle for interstitial lawmaking,"[197] several federal courts have borrowed limitation periods from other federal laws to supply the deficiency for these two federal statutory claims.

Thus, under the implied right of action found in § 215 of the Investment Advisors Act of 1940,[198] the few federal courts confronting the applicable limitation period issue for this claim have consistently borrowed the one-year-within-discovery, three-year-within-sale limitation period applied under certain express causes of action contained in the Securities Act of 1933 and the Securities Exchange Act of 1934.[199]

Second, the private right of action contained in the Railway Labor Act[200] has consistently been analogized to hybrid actions[201] under the LMRA and have thus been subjected to the limitation period governing LMRA claims, that is, the six-month period contained in § 10(b) of the NLRA.[202]

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196. *See, e.g., Johannsen*, 797 F. Supp. at 839 (two years); *Unlimited Screw Prods.*, 781 F. Supp. at 1125 (two years); *Monkelis*, 653 F. Supp. at 684 (six years); *Fox Chem.*, 445 F. Supp. at 1359 (six years).

197. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983); *see also Lampf*, 111 S. Ct. 2773, 2778 (1991), *partially superseded by statute*, 15 U.S.C. § 78aa-1; Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 147 (1987).

198. 15 U.S.C. § 80b-15 (1988).

199. *See, e.g.*, Kahn v. Kohlberg, Karvis, Roberts & Co., 970 F.2d 1030, 1039 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 494 (1992). Note also that, although the Supreme Court rejected an implied claim for § 206 of the Investment Advisors Act, Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 24 (1979), an implied claim has been found to exist under § 203 (unlawful use of mail by an unregistered investment adviser) of that Act. *See also, e.g., In re* Taxable Mun. Bond Secs. Litig., 1992 WL 124783, at *7 (E.D. La. June 4, 1992); Derby v. Perschke, 1990 WL 179868, at *4-5 (N.D. Ill. Nov. 8, 1990). Both of these latter decisions found implied claims under § 203 subject to the same limitation period (one-year-within-discovery, three-year-within-sale) governing most express claims under the Securities Act of 1933 and the Securities Exchange Act of 1934. *In re* Taxable Mun. Bond Secs. Litig., 1992 WL 124783, at *7; *Derby*, 1990 WL 179868, at *4-5.

200. 45 U.S.C. § 151 (1988).

201. See *supra* notes 64-65 and accompanying text for the definition of a hybrid action.

202. Trial v. Atchison, Topeka & Santa Fe Ry., 896 F.2d 120, 124 (5th Cir. 1990); Bailey v. Chesapeake & Ohio Ry., 852 F.2d 185, 186 (6th Cir. 1988); Smallakoff v. Airline Pilots Ass'n, Int'l, 825 F.2d 1544, 1546 (11th Cir. 1987); Barnett v. United Air Lines, Inc., 738 F.2d 358, 364 (10th Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984); Engberg v. Atchison, Topeka & Santa Fe Ry., 820 F. Supp. 558, 561 (D. Kan. 1993).

The apparent trend toward uniformity for these two federal statutory claims is refreshing. However, the Supreme Court has not decided the applicable statutes of limitation for these two statutory claims.[203] Most courts have yet to confront the issue. It may merely be a matter of time before some federal court disagrees with the cases cited above and chooses some other limitation period.

A perfect example of this real possibility rests in the developing history of the Workers Adjustment and Retraining Notification Act of 1988 ("WARN").[204] Under this statute, employers having one hundred employees or more can be subject to civil liability for failure to give their employees at least sixty days written notice in the event of a plant closing or a mass layoff.[205] This civil right of action does not contain an express limitation period. At one time, the few federal district courts addressing the limitation issue consistently characterized these claims as most analogous to hybrid actions under the NLRA.[206] Thus, the limitation period applied to such hybrid actions, for example, the six-month period contained in § 10(b) of the NLRA, was applied by these courts to WARN claims.[207] Another trend has now developed. Several federal district courts have rejected both the hybrid characterization and its corresponding six-month limitation period in favor of what these courts perceive to be more analogous state law claims.[208] One such court has characterized WARN claims as most analogous to the state's breach of contract action claim and thus borrowed the six-year limitation period applied thereunder.[209] Also adopting the state breach of contract approach, another district court has found WARN claims as most analogous to the three-year limitation period applied under that particular state's breach of contract action.[210] Taking a totally different approach, another district court has characterized WARN claims as most analogous to the state's "liability created by statute, other than a penalty or forfeiture" cause of action;

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203. In West v. Conrail, 481 U.S. 35 (1987), the Court implicitly sanctioned the hybrid analogy, and thus the six-month limitation period applied under § 10(b) under the NLRA for use in hybrid actions under the Railway Labor Act. *Id.* at 38 n.2. However, the decision fell short of actually holding that the six-month period henceforth applied. *Id.* at 40.

204. 29 U.S.C. §§ 2101-2109 (1988 & Supp. III 1991).

205. *Id.*

206. *See, e.g.*, Halkias v. General Dynamics Corp., 825 F. Supp. 123, 125 (N.D. Tex. 1993); Staudt v. Glastron, 1993 WL 85356, at *2 (W.D. Tex. Feb. 23, 1993); Newspaper & Mail Deliverers Union v. United Magazine Co., 809 F. Supp. 185, 190 (E.D.N.Y. 1992), *reconsidered by* 1993 WL 308138 (E.D.N.Y. Apr. 10, 1993).

207. *See supra* note 206.

208. *See, e.g.*, Wholesale and Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326 (C.D. Cal. 1993); Frymire v. Ampex Corp., 821 F. Supp. 651, 654-55 (D. Colo. 1993); Wallace v. Detroit Coke Corp., 818 F. Supp. 192, 195-96 (E.D. Mich. 1993); *see also* Automobile Mechanics Local No. 701 v. Santa Fe Terminal Servs., 1993 WL 319649, at *5 (N.D. Ill. May 3, 1993) (rejecting the argument that the hybrid analogy and its six-month limitation period provided a close fit with WARN claims). Since only application of the six-month period would have barred the plaintiff's claim, the court found it "unnecessary at this time to determine the particular statute from which to borrow." *Id.* at *5.

209. *Wallace*, 818 F. Supp. at 196.

210. *Frymire*, 821 F. Supp. at 654-55.

thus borrowing the three-year limitation period applied thereunder.[211] Yet another court found it unnecessary to characterize the WARN claim, since only the application of the six-month limitation period contained in § 10(b) of the NLRA would have barred the action.[212]

To date, only one circuit court of appeals has addressed this issue.[213] In this case, the Second Circuit held that the state's breach of contract action, a six-year limitation arising under Vermont law, applied.[214] Currently, then, the limitation period applied to WARN claims varies from six months in some cases to six years in others.[215]

How to characterize WARN claims and the most appropriate limitation period to apply to such claims is now being fought out in the federal courts. This recent development provides proof that in the absence of congressional or Supreme Court resolution, both the characterization of and the limitation period applicable to *any* federal statutory claim not containing an express limitation period is uncertain.

II. THE DESIRE TO FILL THE GAP: § 1658

A. Introduction

In those cases in which federal statutory claims are not characterized uniformly, it is a very time-consuming and uncertain process to resort to state law to determine the best characterization of the federal claim.[216] Even more disturbing than the multiple characterizations, however, are the time periods that vary from state to state in all cases where state law is borrowed. Having recognized these pitfalls, Congress enacted § 1658 of the U.S.C.[217]

The legislative history of § 1658 reflects congressional concern about the practice of borrowing limitation periods from state laws to rectify deficiencies in federal statutes. As the Senate noted:

> Section [1658] provides a fall-baek statute of limitations . . . for federal civil actions by 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 eause of action accrues.

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211. *Automotive Mechanics Local No. 701*, 1993 WL 249120, at *2.

212. *See, e.g., Automobile Mechanics*, 1993 WL 319649, at *5.

213. United Paperworkers Int'l Union v. Specialty Paperboard, Inc., 999 F.2d 51 (2d Cir. 1993).

214. *Id.* at 56-57.

215. *See supra* notes 206-14 and accompanying text.

216. *See, e.g., supra* note 74; *see also* Wilson v. Garcia, 471 U.S. 261, 266 (1985) ("[T]he conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to [claims brought under 42 U.S.C. § 1983] provided compelling reasons for granting certiorari."); *see also* London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981), where Judge Anderson observed:

> The background to this appeal illustrates once again the burden which the failure of Congress to provide clear guidelines on the question of limitations periods for private enforcement of federal civil rights statutes places upon litigants, administrative agencies, and the courts. The delay and uncertainty engendered by the confusion arising from overlapping remedies and procedures benefits neither of the parties before us.

Id. at 813.

217. *See supra* note 4; *infra* notes 218-19 and accompanying text.

> Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. 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 varianee among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.[218]

The House Report on § 1658 contains similar language.[219] Clearly, then, Congress desired to cure the problems of nonuniformity and uncertainty created under the state law borrowing practice.

Unfortunately, § 1658 does not go far enough. Though § 1658 is a step toward solving the limitation dilemma regularly faced by federal judges, litigants, and the federal court system as a whole, it suffers from two key drawbacks: 1) it does not address what limitation period should apply to civil rights of action that arise under pre-existing statutes; and 2) when applied to the very federal statutory claims it was designed to reach—those arising under Acts of Congress enacted after December 1, 1990—the Section's incomplete language points to future litigation.

B. § 1658's Failure to Cover Civil Rights of Action That Arise Under Preexisting Statutes

The Federal Courts Study Committee ("Committee"), appointed by Chief Justice Rehnquist in 1988 to study the "problems and issues currently facing the courts of the United States [and] develop a long-range plan for the future of the Federal Judiciary"[220] issued a comprehensive report in April of

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218. *See* 136 CONG. REC. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden).

219. *See* H.R. REP. NO. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. As pointed out by the Study Committee:
>
> > 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.
>
> Section [1658] addresses this problem by creating a four-year fallback statute of limitations, applicable to legislation enacted after the effective date of this Act, which creates a cause of action but is silent as to the applicable limitations period.

Id. (footnote omitted).

220. The appointment was made pursuant to Title I of the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 1988 U.S.C.C.A.N. (102 Stat.) 4642, 4644. The Committee was asked to study the "problems of the Federal courts and develop a long-range plan for the future of the Federal Judiciary . . . ." *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Comm. on the Judiciary House of Representatives*, 101st Cong., 2d Sess. 82 (1990) [hereinafter *FCSCIA*] (statement of Hon. Robert W. Kastenmeier,

1990.[221] The Committee recommended, among other things, that Congress "adopt limitations periods for major congressionally created federal claims *that presently lack such periods* . . . ."[222]

As enacted, § 1658 clearly did not adopt this recommendation.[223] The sole piece of legislative history that sheds light on the rejection of the Committee recommendation is contained in a House Report:

> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section he made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no cxplicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.[224]

If this House Report reveals the reasons behind the rejection of the Committee's recommendation, § 1658 was not applied retroactively because Congress believed that statutory change would disrupt "settled expectations" given prior "judicial decision."

This conclusion overlooks the fact that, in most instances, "judicial decision" simply refers to the practice of statc law borrowing. Ignoring this reality overlooks the very foundations upon which § 1658 was built: a) the unhappiness with the borrowing practice; b) the uncertainty inherent in judicial characterization of the most analogous state law claim from which to borrow; and c) the undesirable variance created when a plaintiff in one federal court is allowed a longer or a shorter time within which to bring a claim than another who is suing under the identical federal statute and who, by happenstance, is subjected to the law of a different state.[225]

Chairman).

221. *See* FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter REPORT].

222. *Id.* at pt. 2 at 93 (emphasis added). The Committee recommendation conflicts with H.R. REP. NO. 734, *supra* note 219, at 24, *reprinted in* 1990 U.S.C.C.A.N. at 6870, which states: "[a]s recommended by the Study Committee at page 93 of its Report, this section simply *provides a prospective* fall-back statute of limitations . . . ." (emphasis added).

223. *See supra* notes 4-5 and accompanying text.

224. H.R. REP. NO. 734, *supra* note 219 at 24, *reprinted in* 1990 U.S.C.C.A.N. at 6870.

225. *See supra* notes 218-19 and accompanying text; *see generally supra* notes 78-196; 204-15 and accompanying text.

Indeed, with but one exception,[226] all of the witnesses—most of whom were litigants and federal judges—who testified during floor debate before the House of Representatives urged that § 1658 not be limited to federal claims that arise under statntes enacted after December 1, 1990.[227] A statement made by the Chair of the Judicial Conference Committee on the Judicial Branch is representative:

> [A]s written the langugage [sic] only applies prospectively to future legislation that the Congress will enact. It would appear more appropriate to make the law apply to those causes of action arising under laws in existence at the time of enactment of this legislation rather than only to make it applicable prospectively. *A two-tiered system, as envisioned by the bill, would leave laws presently on the books open to lengthy determinations of applicable state law statutes of limitations and the laudable purpose of the amendment would largely fail.*[228]

The consensus of the testimony revealed concerns about the burdens that would continue to be imposed on the federal court system by failing to provide for claims arising under pre-existing statutes: 1) the burden caused by the continuation of the generally wasteful and time-consuming practice of finding the applicable law from which to borrow;[229] and 2) the burden caused by a two-tiered system under which civil rights of action that arise under pre-existing statutes would remain subject to borrowing, while statutes enacted after December 1, 1990, that contain civil rights of action lacking express limitation periods would be addressed.[230]

The sole testimony against retroactivity[231] was based on the premise that society needs to know the law in advance so that society can conform its conduct accordingly. It was argued that making the legislation retroactive would have the ironic effect of making the ability to conform impossible. This in turn would fly in the face of the key purposes behind the new law: certainty and predictability.[232]

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226. *See, e.g., FCSCIA, supra* note 220, at 245-47 (statement of George C. Freeman, Jr., Chair, American Bar Association Business Law Section).

227. *Id.* at 198 (prepared statement of Stuart Gerson, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice) ("The proposed residual statute of limitations should be applied to *all* congressional enactments that do not contain such a provision . . . . This simple change would save the federal courts a substantial amount of time and provide certainty in a wide range of cases where the appropriate statute of limitations is now litigated.") (emphasis in original); *id.* at 224 (testimony of Alan B. Morrison) ("In our view, the general statute of limitations ought to apply to all cases, and not be limited to laws passed by Congress after the effective date of H.R. 5381.").

228. *Id.* at 154-55 (prepared statement of Deanell R. Tacha, Chairman, Judicial Conference Comm. on the Judicial Branch, and Judge, U.S. Court of Appeals for the Tenth Circuit) (emphasis added).

229. *Id.* at 92 (prepared statement of Joseph F. Weis, Jr., Chairman, Federal Courts Study Comm., and Senior Judge, U.S. Court of Appeals for the Third Circuit) ("I hope that passage of this section will not delay the highly desirable process of reviewing statutes presently on the books for the addition of specified limitations periods. Addition of statutes of limitations would end the practice of recourse to analogous state time periods, a generally wasteful exercise.").

230. *See supra* note 228 and accompanying text.

231. *See supra* note 226.

232. Specifically, the witness testified:

> The very reason for having a uniform Federal statute of limitations where none is presently specified is to provide certainty and predictability. But making it retroactive is counter to those

The House agreed.[233] The unquestioned acceptance[234] of this testimony is problematic for a number of reasons.

First, the objection was against retroactive application of § 1658.[235] If § 1658 applied retroactively in the pure sense of the term, the concerns of the witness *might* have had more validity. However, Congress easily could have made § 1658 applicable to any federal statutory claim that *arises and/or accrues after* December 1, 1990, or some other prospective date. If this had been done, there would have been no retroactivity problem.

Second, the argument that one needs to know the law in advance of conduct is not valid for statutes of limitation. While plaintiffs might delay filing actions after taking into account the governing statute of limitation, they do not, in the first instance, choose to have their rights violated after considering what statute of limitation applies. It is also hard to believe that any potential defendant would consciously choose to engage in conduct that would subject him or her to litigation after first reviewing the limitation period governing the potential cause of action.

Third, statutes of limitation simply provide lengths of time within which actions must be filed. Their key purpose is "to assure fairness to defendants . . . [and thus] 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'"[236] In no way could these purposes, or the purposes of certainty and predictability, have been adversely affected by applying § 1658 to federal statutory causes that arise

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very principles.

> Our section of the association has been deeply disturbed by the growing trend in recent years to make legislation and regulation retroactive. Prior to 20 years ago no statute in the United States nor any regulation was retroactive. That was because we have a great common law tradition in this country that goes back even before our Constitution of not having retroactive legislation. It was anathema to the common law, and the reason it was anathema was because the law was normally based on the theory that a person ought to know what the law is and conform his conduct to it accordiugly.
>
> So we would strongly urge you not to make it retroactive.

See FCSCIA supra note 220, at 245-46 (statement of George C. Freeman, Jr., Chair, American Bar Association Business Law Section).

233. *See supra* note 224 and accompanying text.

234. It may be that this unquestioned acceptance relates to Congress' concern with protecting American corporations. The legislative history of Title I (the Civil Justice Reform Act of 1990) of the Judicial Improvements Act of 1990, is replete with the following types of comments:

> The legislation also advances the substantive goal of improving the efficiency and competitiveness of American business. High and increasing litigation costs inpose a heavy burden on our businesses—large and small—since they are compelled to spend increasingly more money on legal expenses and to divert valuable resources from the essential functions of making better products and delivering quality services at the lowest possible cost. These increased legal expenses come at a time when American businesses are confronted with intense international competition.

S. REP. NO. 416, 101st Cong., 2d Sess., at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6814-15.

235. *See supra* note 232 and accompanying text.

236. Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965) (citation omitted); *see also* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983); Order of R.R. Tels. v. Railway Express Agency, 321 U.S. 342, 348-49 (1944); Shipp v. Miller's Heirs, 15 U.S. (2 Wheat.) 316, 324 (1817); Adams v. Woods, 6 U.S. (2 Cranch) 336, 341-422 (1805); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

and/or accrue after some prospective date. It is thus startling that Congress so quickly rejected the clear consensus of the Committee that was asked to recommend solutions. All of that Committee's supporting evidence and the united testimony of those in the trenches (actual trial practitioners and judges)[237] was in favor of one business attorney's retroactivity concern—a concern that was then and is now easily addressed.

Fourth, Congress has admitted that variance among the federal courts in the treatment of identical federal statutory claims is undesirable.[238] Uniformity in the limitation periods applied to these claims, then, should displace concerns with the temporary disruption of settled expectations. Indeed, how can settled expectations even exist when some civil rights of action that arise under pre-existing statutes are not characterized uniformly,[239] and others, whether uniformly characterized or not, have different state limitation periods applied to them?[240]

The importance of settled expectations in this context is overrated. Our legal system knows how to and is capable of adjusting to changes in the law. Indeed, the Supreme Court recently forced the entire securities industry to abandon "settled expectations" concerning the applicable limitation period for actions implied under § 10(b) of the Securities Exchange Act of 1934 in favor of one uniform limitation period.[241] Specifically, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson ("Lampf")*,[242] the Court held that the one-year-within-discovery, three-year-within-sale limitation period applicable to certain express claims contained in the Securities Act of 1933 and the Securities Exchange Act of 1934 would henceforth apply to all causes of action implied under § 10(b) of the Securities Exchange Act of 1934.[243] Prior to *Lampf*, the "settled practice," for more than forty years, involved borrowing a limitation period from the particular state's most analogous state law claim.[244] This practice resulted in variations in the prescriptive period from two to six years.[245] In *Lampf*, settled expectations were abandoned in favor of one uniform characterization and one uniform limitation period.[246]

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237. *See, e.g., supra* notes 222, 227-30; *see also* REPORT, *supra* note 221, pt. 2, at 93 and pt. 3 (part 3 is published separately as FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS JULY 1, 1990 app.)

238. *See, e.g., supra* notes 218-19 and accompanying text.

239. *See supra* notes 78-132, 183-96, 204-15 and accompanying text.

240. *See supra* notes 133-82 and accompanying text.

241. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), *partially superseded by statute*, 15 U.S.C. § 78aa-1.

242. *Id.*

243. *Id.* at 2781.

244. *See, e.g.*, Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 248 (1989); Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 646 (1986).

245. *See, e.g.*, Smith v. Duff & Phelps, Inc., 891 F.2d 1567, 1571 (11th Cir. 1990) (two years); Semegen v. Weidner, 780 F.2d 727, 733 (9th Cir. 1985) (three years); Nakamoto v. Hartley, 758 F. Supp. 1357, 1363 (D. Haw. 1991) (six years).

246. *See Lampf*, 111 S. Ct. at 2781-82.

Fifth, it is senseless to ignore civil rights of action that arise under pre-existing statutes. Nothing validly explains a decision to recognize and admit a problem within the existing federal law and to then enact legislation that continues to ignore the lion's share of the problem. This is exactly what § 1658 does. The enactment of § 1658 without including civil rights of action that arise under pre-existing statutes fails to act upon the desires of the users of the federal court system.[247] The laudable purpose of the section simply fails.[248]

C. The Gap Filler Leaves Gaps

The federal judicial system will hopefully never be faced with civil rights of action that lack express limitation periods as contained in Acts of Congress *enacted after* December 1, 1990. Now that Congress has recognized the federal limitation problem, the hope remains that Congress will enact express limitation periods for all federal statutory claims created in the future. In the administrative law context, for example, "each agency formulating proposed legislation and regulations . . . is [to] make . . . reasonable effort[s] to ensure: 1) that the legislation — A) [s]pecifies whether all causes of action arising under the law are subject to statutes of limitations . . . ."[249] If Congress does enact express limitation periods for all future federal statutory claims, § 1658 would become superfluous.

Possibly, however, Congress will give even less attention to fixing the statutes of limitation for such future claims. After all, if no limitation period is provided, the fall-back feature of § 1658 can easily be cited as the cure for the deficiency.[250] In this unfortunate event, at least two ambiguities and one obvious gap in § 1658 might come back to haunt Congress indirectly, and the federal court system directly. The first potential ambiguity relates to § 1658's "arising under"[251] language. Specifically, recall that § 1658 refers to any "civil action arising under an Act of Congress enacted after the date of the enactment of this section . . . ."[252] The question may become whether this language includes federal statutory claims *implied* by the judiciary. As noted earlier, implied federal claims do not contain express statutes of limitation.[253] Although § 1658 clearly encompasses express claims,[254] the coverage of implied claims is not so clear.

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247. Fulfilling the desires of the users of the federal court system was one of the purposes behind the Judicial Improvements Act of 1990. *See, e.g.*, S. REP. NO. 416, *supra* note 234, at 12, *reprinted in* 1990 U.S.C.C.A.N. at 6815. For other user desires, see *supra* notes 222, 227-30 and accompanying text.

248. *See supra* note 228 and accompanying text.

249. Exec. Order No. 12778, 56 Fed. Reg. 55195, 55198 (1991).

250. As the Third Circuit noted in *Haggerty*, "[f]ortunately, inquiries such as we are obliged to make in this case will not recur with new legislation because in 1990, Congress, at the urging of the Federal Courts Study Committee, filled the interstices in federal law by the enactment of a residual four-year statute of limitations." Haggerty v. USAir, Inc., 952 F.2d 781, 782 n.2 (3d Cir. 1992) (citation omitted).

251. 28 U.S.C. § 1658.

252. *Id.*

253. *See supra* note 124 and accompanying text.

254. *See, e.g., supra* note 219.

Implied claims arguably "arise under" Acts of Congress. However, applying this conclusion to § 1658 may be attacked on two grounds. First, the Committee specifically recommended that Congress adopt a fall-back limitation period for *both* express federal statutory claims and those "implicd by the courts."[255] Nothing in the legislative history indicates whether § 1658 includes this recommendation.[256] Indeed, the section itself does not adopt the specific wording suggested by the Committee.[257] More importantly, the legislative history specifically provides that § 1658 is applicable to legislation *that creates* a cause of action.[258] This language supports the conclusion that only express claims are covered.

Federal courts are likely to imply federal statutory rights of action only in rare circumstances,[259] but their power to do so clearly exists. Consequently, Congress should have specified whether § 1658 applies to such claims. Because the legislative history does not specifically address the coverage of implied claims,[260] only time will tell how the courts will handle this issue.

A second potential ambiguity contained within § 1658 involves its effect on post-1990 amendments to pre-1990 federal statutes. Would § 1658 apply to a federal statute that was enacted in 1980 and amended in 1994 either to create a new cause of action without an express limitation period or to restore a cause of action previously overlooked by the courts?

On the one hand, § 1658 expressly includes all "Acts of Congress,"[261] and a post-1990 amendment would clearly be such an Act. On the other hand, the 1994 "Act of Congress" creating the new cause of action or restoring a previously overlooked cause of action is, in fact, an amendment to a pre-1990 statute—a statute that, because of the date of its enactment, would not itself be subject to § 1658.[262]

Third, § 1658's silence on the circumstances under which the four-year fall-back period may be tolled is a significant gap.[263] Clearly filing the lawsuit officially "commences" the action, thus tolling the statute of limitation.[264] However, what about events that occur before the lawsuit is filed? Are there some pre-filing events that will stop § 1658's four-year limitation period from running? If so, are these events borrowed from state law or federal law?

When federal subject matter jurisdiction is based upon diversity, the answers are clear. When the federal courts borrow the states' substantive claims and corresponding limitation periods, they also borrow the states'

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255. REPORT, *supra* note 221, pt. 2 at 93.

256. *See, e.g., supra* notes 218-19 and accompanying text; *see also FCSCIA, supra* note 220.

257. 28 U.S.C. § 1658.

258. H.R. REP. NO. 734, *supra* note 219, at 24, *reprinted in* 1990 U.S.C.C.A.N. at 6870.

259. *See* Cort v. Ash, 422 U.S. 66, 78 (1975). *But see supra* notes 123, 198-202 and accompanying text, where implied claims have recently been found to exist under certain federal statutes.

260. *See, e.g., supra* notes 218-22 and accompanying text.

261. 28 U.S.C. § 1658.

262. *See supra* notes 4-6 and accompanying text.

263. The tolling doctrine temporarily stops or suspends a statute of limitation from running in certain situations. *See, e.g.,* BLACK'S LAW DICTIONARY 1488 (6th ed. 1990); *see also* Cada v. Baxter Healthcare, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied,* 111 S. Ct. 2916 (1991).

264. West v. Conrail, 481 U.S. 35, 38-39 (1987).

tolling doctrines.[265] When subject matter jurisdiction is based upon federal questions, the federal courts have borrowed state tolling doctrines in some cases and federal tolling doctrines in others. Specifically, although the Supreme Court has held that state tolling doctrines generally should be borrowed whenever state limitation periods are borrowed,[266] the rule is not without exception. Thus, if application of state tolling doctrines "would be inconsistent with the federal policy underlying the cause of action under consideration[,]"[267] state tolling doctrines may be ignored.[268]

While many federal courts follow the general rule and borrow state tolling doctrines automatically when state limitation periods are borrowed,[269] some do not. These latter courts either first consult federal equitable tolling doctrines[270] or utilize a combination of both state and federal tolling doctrines.[271]

Litigants do not know in advance what tolling doctrines the federal court will borrow.[272] Moreover, tolling doctrines vary from state to state.[273]

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265. *See, e.g., id.* at 39 n.4 ("When the underlying cause of action is based on diversity of citizenship, state law not only provided the appropriate period of limitations but also determines whether service must be effected within that period.") (citing Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980)). See also Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), stating that when jurisdiction is based upon diversity,

> we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. It accrues and comes to an end when local law so declares. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of Erie R.R. Co. v. Tompkins is transgressed.

Id. at 533 (citations omitted).

266. Wilson v. Garcia, 471 U.S. 261, 269 (1985); Johnson v. Railway Express Agency, 421 U.S. 454, 463-65 (1975); *see also* Cohen v. McAllister, 673 F. Supp. 733, 737 (W.D. Pa. 1987) (holding that the general rule espoused in *Wilson* that state tolling doctrines are borrowed whenever state limitation periods are borrowed is not limited to § 1983 claims, but is rather "a general approach to all statute of limitations borrowing problems") (quoting Malley-Duff & Assocs. v. Crown Life Ins. Co., 797 F.2d 341, 345 n.9 (3d Cir. 1986), *aff'd sub nom.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987)).

267. *Johnson*, 421 U.S. at 465.

268. *Id.*

269. *See, e.g., Wilson*, 471 U.S. at 269; Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980, 984 (5th Cir. 1992).

270. *See, e.g.*, Farmers & Merchants Nat'l Bank v. Bryan, 902 F.2d 1520, 1522 (10th Cir. 1990); Gurley v. Documation, Inc., 674 F.2d 253, 259 (4th Cir. 1982); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987).

The doctrine of equitable tolling under federal law includes two categories: "(1) where defendant's wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside of plaintiffs' control make it impossible for plaintiff to timely assert his claim." *Id.*; *see also* Lampf v. Gilbertson, 111 S. Ct. at 2773, 2782 (1991), *partially superseded by statute*, 15 U.S.C. § 78aa-1; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991); Morley v. Cohen, 610 F. Supp. 798, 816-17 (D. Md. 1985), *vacated*, Tellis v. USF&G, 483 U.S. 1015 (1987).

271. *See, e.g.*, Smith v. City of Chicago Heights, 951 F.2d 834, 840 (7th Cir. 1992).

272. *See, e.g., Morley*, 610 F. Supp. at 819 n.20.

273. For example, while some federal courts have held that mental incompetency will toll a statute of limitation, others have held the exact opposite. See Char v. Matson Terminals, Inc., 817 F. Supp. 850, 854-55 (D. Haw. 1992) for a detailed circuit-by-circuit review.

Thus, until a federal court first identifies the state whose law will apply for limitation period purposes, the litigant simply does not know in advance which states' tolling doctrines will apply.[274] Again, then, aspects of nonuniformity, confusion, and uncertainty surface.

III. SOLVING THE FEDERAL LIMITATION ISSUE

A. Overview

There are only two ways to handle the problem of what limitation periods to apply to civil rights of action arising under pre-existing statutes. First, the federal courts can continue the current practice of borrowing limitation periods from what they deem to be the most analogous state laws. Under this unsatisfactory option, judges and litigants can only hope for Supreme Court resolution. Second, Congress can act either a) by amending § 1658 to encompass all federal statutory claims lacking express limitation periods, whether expressed or implied, that arise or accrue after some prospective date, or b) by enacting limitation periods for each civil right of action that arises under a pre-existing statute.

B. Maintaining the Status Quo

Maintaining the status quo is unsatisfactory for several reasons. First, the entire state law borrowing practice is of questionable value. It was born out the fiction that the Rules of Decision Act[275] (or, in the case of § 1983 claims, that § 1988)[276] *required* federal courts to borrow state law.[277] Nowhere in the text of either the Rules of Decision Act or § 1988, does Congress *require* state law borrowing. Both statutes simply *allow* or *permit* federal courts to borrow state law "in cases where they apply"[278] or if the federal law at issue is "deficient . . . [then, state law may be borrowed if] not inconsistent with the Constitution and laws of the United States to do so."[279] Scholars[280] and the Supreme Court have recognized that holding that the

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274. *Id.*

275. Ch. 20 § 34, 1 Stat. 73, 92 (1789); *see also supra* text accompanying note 27.

276. 42 U.S.C. § 1988; *see also supra* text accompanying note 144.

277. *See, e.g., supra* notes 27-31 and accompanying text; *see also* Robertson v. Wegmann, 436 U.S. 584, 593 n.11 (1978) ("§ 1988 instructs us to turn to state laws.").

278. Ch. 20 § 34, 1 Stat. 73.

279. 42 U.S.C. § 1988.

280. Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 499-500 (1980) ("Superficially, section 1988 appears to be a choice-of-law provision instructing federal courts hearing civil rights cases to fill the inevitable gaps in federal statutes with compatible state law. [However] . . . section 1988 is not a command by Congress to fill those gaps by reference to state law."); Joseph L. Calamari, Note, *The Limited Reach of* DelCostello v. International Brotherhood of Teamsters: *A Statute of Limitations Analysis in LMRDA Title I Actions*, 56 FORDHAM L. REV. 227, 230 n.19 (1987) ("Both the majority approach, *see* DelCostello v. Int'l Bhd of Teamsters, 462 U.S. 151, 159 n.13 (1983), and Justice Scalia's view, *see Malley-Duff*, 107 S. Ct. at 2770 (Scalia, J., concurring), agree that the Rules of Decision Act does not mandate application of state limitations periods because the Act merely begs the question, authorizing federal courts to use state laws

Rules of Decision Act "mandates application of state statutes of limitations whenever Congress has provided none . . . begs the question, since the Act authorizes application of state law only when federal law does not 'otherwise require or provide.'"[281] In fact, the Court has even stated that state law borrowing simply no longer derives from the Rules of Decision Act.[282]

Second, when state limitation periods are enacted, state legislatures have *state* interests in mind.[283] Because state limitation periods are not devised to reflect *federal* interests, it becomes "the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."[284]

The Supreme Court has found that application of state law would frustrate or interfere with the implementation of national policies, thus referring to other federal laws for the purpose of borrowing statutes of limitation, in only three cases.[285] This is insufficient.[286] Rather, whenever a state enjoys the right to decide the longevity of a federal statutory claim, federal interests are automatically frustrated.[287] All such claims deserve national and not state

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'in cases where they apply.'") (citation omitted); Sobol, *supra* note 76, at 903 ("While *Campbell* [*v. Haverhill*, 155 U.S. 610 (1895)] described exceptions to the state borrowing approach, the Supreme Court did not recognize until 1946 that neither the Rules of Decision Act nor *Erie* required federal courts to apply state limitation periods for actions arising under federal statutes that did not contain such periods.") (footnote omitted); Note, *Disparities in Time Limitations on Federal Causes of Action*, 49 YALE L.J. 738, 744 (1940) [hereinafter *Disparities in Time Limitations*] ("For too long the courts have paid lip service to the proposition that it is the Rules of Decision Act which supports the [state law borrowing] doctrine.").

281. *DelCostello*, 462 U.S. at 159 n.13.

282. *Id. But see* Lampf v. Gilbertson, 111 S. Ct. 2773, 2778 (1991) (The state law borrowing "practice, *derived from the Rules of Decision Act* . . . has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily intends by its silence that we borrow state law.") (quoting Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 147 (1987)), *partially superseded by statute*, 15 U.S.C. § 78aa-1 (Supp. III 1991).

283. *See, e.g.*, Davies, *supra* note 166, at 164-65. Davies states that:

> [State] [l]egislatures consistently assign some types of actions short limitations periods while other periods are far more generous. To some extent, these differences probably reflect a wide array of policy decisions. For example, since the rise of industrialism, personal injury statutes of limitation have tended to be shorter than contract limitations, indicating that some jurisdictions sought to protect industry from crushing numbers of tort suits.

Id. (footnotes omitted).

284. Reed v. United Transp. Union, 488 U.S. 319, 324 (1989) (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)); *see also DelCostello*, 462 U.S. at 161; Davies, *supra* note 166, at 164-66.

285. *See supra* notes 58-68 and accompanying text.

286. In *Malley-Duff*, the Court found that "[w]ith the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually gnarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'" *Malley-Duff*, 483 U.S. at 154 (citation omitted) (quoting ABA Report 392). Certainly these same dangers are real for any federal claim that does not contain its own limitations period. *See, e.g.*, Michael H. Coons, Sr., Note, *Expanding on Borrowed Time:* Agency Holding Corp. v. Malley-Duff & Associates, 1988 B.Y.U. L. REV. 429, 435-39.

287. *See, e.g.*, Robertson v. Wegmann, 436 U.S. 584, 598 (1983) (Blackmun, J., dissenting).

> Just as the Rules of Decision Act cases disregard state law where there is conflict with federal *policy*, even though no explicit conflict with the terms of a federal statute, so, too, state remedial and procedural law must be disregarded under Section 1988 where that [state] law fails to give adequate expression to important federal concerns.

Id. (emphasis in original) (citation omitted).

attention. And given the abundance of federal law in existence today,[288] finding suitable federal laws from which to borrow should not be too difficult a task.[289]

Third, it is simply neither sensible nor fair that a national cause of action should affect litigants differently depending upon the state in which the plaintiff is able to meet jurisdictional and venue requirements.[290] This is particularly true for § 1983 actions.[291] Because state law simply could not be relied upon to enforce and/or provide state remedies adequate to address the victim's needs,[292] § 1983 was designed to provide victims with a federal remedy, notwithstanding whatever remedies might exist under state law.[293] The Supreme Court and scholars have acknowledged this.[294] If then, the

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288. *See, e.g.*, Eisenberg, *supra* note 280, at 513 ("Today, the existing body of federal decisional law could be supplemented with the growing number of areas in which courts create federal common law.") (citation omitted); Ellen E. Kaulbach, Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CALIF. L. REV. 133, 147-48 (1989). Kaulbach states that:

> [While the] presumption favoring state law as a source of borrowed limitations periods . . . may have served a practical purpose when the body of federal statutory law was small and, hence, unlikely to provide a viable alternative source of limitations[,] . . . the growth of federal statutory law and the increased availability of potential federal law analogs, however, [demonstrate that] such a presumption is no longer necessary.

Id.

289. *See, e.g.*, Davies, *supra* note 166, at 137-38 ("[B]ecause courts are construing rights that find their source solely in federal statutory and constitutional provisions, . . . [f]ederal courts can make federal common law to fill in the interstices of incomplete federal statutory law.") (footnotes omitted).

290. *See, e.g., supra* notes 76 and 116.

291. As was observed more than a decade ago:

> [I]t seems inconceivable that Congress intended one rule of immunity to govern civil rights actions in Pennsylvania and another to govern in New Jersey. Strict uniformity may not be absolutely necessary to an effective civil rights program, *but surely a Congress that feared the inadequacies of state law intended the federal program to be free of the nonuniformity that mandatory resort to such law produces.* So strong is the sentiment that a federal rule should govern in civil rights cases that courts have done elaborate doctrinal dances to evade the apparent thrust of section 1988.

Eisenberg, *supra* note 280, at 517 (emphasis added) (footnote omitted).

292. Wilson v. Garcia, 471 U.S. 261, 279 (1985) ("It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place.") (footnote omitted); Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("[The] legislative history [of § 1983] makes evident that Congress . . . was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."). As the Court stated in Monroe v. Pape, 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Social Servs., 436 U.S. 658 (1978):

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180.

293. *Wilson*, 471 U.S. at 272.

> [T]he § 1983 remedy is one that can "override certain kinds of state laws," and is, in all events, "supplementary to any remedy any state might have," . . . [and has] no precise counterpart in state law. . . . [I]t is "the purest coincidence," when state statutes or the common law provide adequate remedies; [thus,] any analogies to those causes of action are bound to be imperfect.

Id. (citations omitted) (footnote omitted).

294. *Id*; *see also* Davies, *supra* note 166, at 158-59 (arguing § 1983 "was intended to redress inaction and abdication of responsibility by state and local officials"); Cameron, *supra* note 162, at 448-49 ("Section 1983 claims are designed to protect particularly important federal interests; mainly, effective

ineffectiveness of state law was the reason for § 1983's enactment, there is little logic in allowing state law to govern how long the federal claim should survive.

Finally, the argument that state law borrowing should remain the norm because of congressional silence (and thus acquiescence) in the longstanding state law borrowing practice is equally unpersuasive.[295] Congressional silence should rarely be determinative. Silence could be attributed to any number of factors,[296] most of them political, and none of which necessarily relate to satisfaction with state law borrowing.[297] Moreover, the silence of a previous Congress hardly limits the action of a future Congress.

If the status quo is maintained, the only hope for both uniform characterization and uniform limitation periods for civil rights of action that arise under pre-existing statutes lies with the Supreme Court. This hope is anything but reassuring.

It is unrealistic to expect the Court to hear argument in the near future on the proper characterization and limitation issues for all federal statutory claims that do not contain express limitation periods.[298] Civil RICO actions existed for seventeen years before the Court applied a nationally uniform limitation period to those claims.[299] More than forty years elapsed between the first judicial recognition of claims implied under § 10(b) of the Securities Exchange Act of 1934 and the 1991 Court decision adopting both a uniform

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enforcement of fourteenth amendment guarantees. But section 1983 claims are subject to state statutes of limitations. This allows state law to control the application of constitutional guarantees."); Nancy Black Sagfi-nejad, *Proposed Amendments to Section 1983 Introduced in the Senate*, 27 ST. LOUIS U. L.J. 373, 404 (1983); Dirk J. Holkeboer, Note, *A Call for Uniformity: Statutes of Limitation in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61, 61-62 (1979).

295. *See, e.g., Wilson*, 471 U.S. at 284 (O'Connor, J., dissenting) (arguing that Congress' failure to enact a bill to standardize limitations is a "persuasive indication" that Congress felt no need for uniformity).

296. For example, while several bills including limitations periods for claims brought under 42 U.S.C. § 1983 failed to pass, *see* S. 436, 99th Cong., 1st Sess. (1985); S. 1983, 96th Cong., 1st Sess. (1979); H.R. 12874, 94th Cong., 2d Sess. (1976), many of these bills were not limited solely to limitation issues. *See, e.g.*, Bialkowski, *supra* note 76, at 850. Thus, failure to pass *could have* related to disagreement over issues not relevant to the appropriate limitation period, as opposed to satisfaction with state law borrowing.

297. *See* Kaulbach, *supra* note 288, at 155-56, setting forth a variety of possibilities that might explain congressional inaction and further concluding that, in any event, "the silent acquiescence of a subsequent Congress in the interpretation of a statute is not probative of the original, enacting Congress' intent." *Id.* (footnotes omitted).

298. As the Federal Courts Study Committee noted, "the Court has long since given up granting certiorari in every case involving an intercircuit conflict." *See* REPORT, *supra* note 221, at 124-25. Indeed, "[i]t appears from academic analyses that the Supreme Court in 1988 refused review to roughly sixty to eighty 'direct' intercircuit conflicts presented to it by petitions for certiorari. This number does not include cases involving less direct conflicts (*e.g.*, fundamentally inconsistent approaches to the same issue)." *Id.* at 125; *see also* 136 CONG. REC. S17,578 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley).

299. The civil RICO action was enacted in 1970 as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (the civil action now codified in 19 U.S.C. § 1964(c)). The civil RICO claim existed long before the Court's 1987 decision in Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987), which adopted a national limitation period to govern civil RICO claims.

characterization and limitation period for such claims.[300] This snail's pace has the added burden of continued clogging of federal court dockets—a result fundamentally inconsistent with the spirit of the Judicial Improvements Act of 1990, which includes § 1658.[301]

Waiting for Supreme Court action remains undesirable for yet another reason. Recent decisions reveal that the Court continues to believe that state law borrowing "has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'"[302] Thus, even when presented with opportunities to supply civil rights of action lacking express limitation periods with nationally uniform limitation periods, the Court has not always done so. The Court's resolution of claims brought under the Reconstruction-era Civil Rights Acts[303] and under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 exemplify this.[304] Although the Court has characterized these claims uniformly, the limitation periods applied thereunder vary from state to state.[305] While the Court has seen fit both to uniformly characterize and to apply uniform limitation periods for some federal statutory claims,[306] the Court clearly cannot be relied upon to always produce such uniform results.[307]

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300. The implied claim under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, promulgated thereunder, was first recognized in 1946. *See* Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946). Twenty-five years later the Supreme Court acknowledged the implied claim's existence. *See* Casualty, Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971). While the Court could have resolved the applicable limitation period issue as early as 1976, *see, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n.29 (1976), it did not do so until 1991. *See* Lampf v. Gilbertson, 111 S. Ct. 2773 (1991), *partially superseded by statute*, 15 U.S.C. § 78aa-1.

301. The primary goals of that Act are to decrease delays in the federal court system as a result of overloaded case dockets, to increase overall efficiency, and to reduce costs and litigation expenses. *See The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and on S. 2648 Before the Comm. on the Judiciary United States Senate*, 101st Cong., 2d Sess. 307-12 (statements of Sen. Biden, Chairman, and Sen. Thurmond, ranking Republican member).

302. *Lampf*, 111 S. Ct. at 2778 (quoting *Malley-Duff*, 483 U.S. at 147).

303. *See supra* part I.C.3.

304. *See supra* part I.C.4.

305. For § 1983 claims, see *supra* part I.C.3. For § 101(a)(2) claims, see *supra* I.C.4.

306. *See, e.g., supra* notes 58-68 and accompanying text.

307. Indeed, insofar as § 1983 claims are concerned, the Court has stated:

> [W]hatever the value of nationwide uniformity in areas of civil rights enforeement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

Robertson v. Wegmann, 436 U.S. 584, 594 n.11 (1983); *see also* Burnett v. Grattan, 468 U.S. 42, 52 n.14 (1984), *partially superseded by statute*, COLO. REV. STAT. § 13-80-102(1)(g) (1987) (changing the three year statue of limitations under Wilson v. Garcia for § 1983 actions to two years for any federal claim without its own statute of limitations); *Tomanio*, 446 U.S. at 489. Nor, according to the Court, has the need for national uniformity "'been held to warrant the displacement of state statutes of limitations for civil rights actions.'" Wilson v. Garcia, 471 U.S. 261, 275 (1985) (citation omitted); *see also id.* at 280 (O'Connor, J., dissenting) ("I see no justification, given our longstanding interpretation of 42 U.S.C. § 1988 and Congress' awareness of it, for abandoning the rule that courts must identify and apply the statute of limitations of the state claim most closely analogous to the particular § 1983 claim.").

C. Congressional Action

The Constitution of the United States charges Congress with the responsibility of making the laws of this country, while the judicial branch is given the power to interpret those laws.[308] The "[f]ixing [of a] statute of limitation for a particular [federal statutory] cause of action is a legislative function."[309] And courts are hesitant to perform legislative functions,[310] lest they be accused of "unconstitutional act[s] of lawmaking."[311] The best solution then to the federal limitation problem is simple: congressional action.

Congress can choose one of two ways to fix the applicable limitation periods for all civil rights of action arising under Acts of Congress that lack express statutes of limitation: a) Congress can enact specific statutes of limitation for all federal statutory causes of action, both express and implied, that are not governed by express limitation periods, or b) Congress can amend § 1658 to apply to all federal statutory claims, whether express or implied, that are not governed by express limitation periods and that *arise or accrue* after some prospective date.

Several commentators have supported the former approach, particularly for § 1983 claims. These commentators criticize *Wilson*'s uniform characterization of all § 1983 claims on the ground that a limitation period different from that applied to the § 1983 claim may end up applying to the plaintiff's most analogous state law claim.[312] For example, a plaintiff's § 1983 claim may be most analogous factually to the state's battery claim. If this plaintiff were to file a § 1983 action based upon the conduct giving rise to the battery and

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308. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring); *see also* U.S. CONST. arts. I, III.

309. *See* Tellis v. USF&G, 805 F.2d 741, 747 (7th Cir. 1986) (Ripple, J., dissenting). *Cf.* Lampf v. Gilbertson, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) ("[A]bsent a congressionally created limitations period, state periods govern."), *partially superseded by statute*, 15 U.S.C. § 78aa-1.

310. Northwest Airlines, Inc., v. Transport Workers Union, 451 U.S. 77, 95 (1981) ("[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government . . . ."); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) ("[C]aution must temper judicial creativity in the face of legislative . . . silence.").

311. *See, e.g.*, Sobol, *supra* note 76, at 921 ("In light of congressional reluctance to mandate specific or general limitation period for federal acts, judicial invention of limitation periods would probably violate legislative intent, and others may construe such invention as an unconstitutional act of lawmaking.") (footnote omitted).

312. For instance, it has been said that:

> If a guard beat up a prisoner, for example, the same limitation period applied to the victim's section 1983 claim as applied to his pendent state battery claim. . . . Pre-*Wilson* doctrine therefore ensured that no section 1983 litigant would become time-barred sooner than a similarly situated person who decided to forego his federal claim and rely exclusively on his analogous state-created right of action. *Wilson* destroyed that guarantee of equality. Under the new approach, a uniform section 1983 limitation controlled even though the facts underlying the civil rights claim would have triggered a longer limitation period had the plaintiff elected to litigate under state law.

John R. Pagan, *Virginia's Statute of Limitations For Section 1983 Claims After* Wilson v. Garcia, 19 U. RICH. L. REV. 257, 262-63 (1985) (footnotes omitted); *see also Choice of Law*, *supra* note 163, at 504 ("Were there to be a unique federal limitations period, a claim against arresting officers might be barred by a state statute on batteries, but the same claim framed as a deprivation of due process might be permitted under federal law.") (footnote omitted).

also bring a pendant state law battery claim, two different limitation periods could apply in the same action: a one-year limitation period could apply to the state law battery claim, while the state's two-year limitation period, under its residual statute for personal injury claims, could apply to the § 1983 claim.[313] Because of this, the commentators advocating the case-by-case approach urge Congress to analyze § 1983 in depth, envision all of the possible claims that could arise under it, and enact different limitation periods accordingly.[314]

The reasons against the approach advocated by these commentators are threefold. First, the Congress that enacted § 1983 did not foresee the different types of claims that § 1983 encompasses more than one hundred years later.[315] Similarly, today's Congress is probably not blessed with the ability to foresee the types of claims that might give rise to a § 1983 claim one hundred years from today.[316] Thus, Congress should not waste time formulating a detailed statute that supplies an individual limitation period for each presently known § 1983 claim because if a new type of § 1983 claim were to arise that had not been specifically provided for, courts would again be confronted with surveying state law in search of the most analogous claim from which to borrow.

Second, it is precisely because of the diverse nature of the § 1983 action that a general limitation period best encompasses its broad scope.[317]

Third, there are simply too many federal statutory claims that lack express limitation periods.[318] Thus, there certainly does not appear to be any valid reason why Congress should supply detailed limitation periods for § 1983 claims, but not for other federal statutory claims lacking express periods of limitation. And with so many federal statutory claims lacking express limitation periods, it may be quite unrealistic to ask Congress to tackle each such claim. Nor would taxpayers sanction this massive spending of their tax dollars when countless other problems call for legislative action.

Rather, much can be said for the approach exemplified by § 1658, which, as it currently stands, provides a single fallback limitation period for *any and all* federal statutory claims contained in statutes enacted after December 1, 1990, that lack express limitation periods. Its applicability to such claims in no way depends upon the subject matter of the claim. The individualized balancing of policies behind each federal claim—allegedly a prerequisite to

313. *See, e.g., supra* note 312.

314. *See, e.g., supra* note 312.

315. "When § 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." Wilson v. Garcia, 471 U.S. 261, 275 (1985).

316. *E.g.*, Eisenberg, *supra* note 280, at 512.

317. *E.g.*, Linda C. Odom, Comment, *A Definitive Answer*, 17 MEM. ST. U. L. REV. 127, 141 (1986) ("Furthermore, section 1983 claims are varied, covering actions involving such diverse topics as unlawful arrest, illegal zoning, wrongful attachment, wrongful discharge, and wrongful canceling of a rock concert. Therefore, no one statute of limitations could consider all of the evidentiary factors that may be involved in these kinds of actions.") (footnote omitted).

318. *See supra* note 3.

choosing a particular limitation period[319]—is not a goal Congress hoped to achieve with § 1658.

Amending § 1658 does not have to be a massive undertaking. The groundwork has already been laid.[320] Ideally, the "new" § 1658 should include within its reach all federal statutory claims that arise or accrue after some prospective date; resolve its applicability to claims implied by the judiciary; and include any necessary tolling provisions. The following is an example, in its simplest form:

> Time Limitation on the Commencement
> of Civil Actions Arising Under Acts of Congress
>
> All civil rights of action, whether express or implied, arising under Acts of Congress and lacking express periods of limitation shall be subject to a four year statute of limitation. This four-year period is applicable only to those actions that arise or accrue after January 1, 1995. Subject to federal common law and federal tolling doctrines, all such actions must be commenced within four years of the date of accrual.

This proposal is modest. It merely expands the existing version of § 1658 to include all federal statutory claims, whether express or implied, that arise after a prospective date. It then goes a few steps further, by establishing some lead time and including tolling guidelines. However, this exact language need not be adopted. But whatever language Congress chooses, it is vital that the "new" § 1658 explicitly cover *all* federal statutory claims that lack express limitation periods; that it specifically address whether implied claims are covered thereunder; that it provide some lead time so as to minimize the alleged disruption of "settled expectations;"[321] and that it provide tolling guidelines.

CONCLUSION

Legislative history indicates a willingness to revisit § 1658 if "the benefits of retroactive application would indeed outweigh the costs."[322] The reasons set forth above should convince Congress that further action is warranted. The spirit and intent of the Judicial Improvements Act of 1990,[323] combined with the goals of uniformity, certainty, fairness, and the elimination of forum-shopping,[324] mandate that § 1658 be amended to apply to all civil rights of

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319. *See, e.g., Choice of Law*, *supra* note 163, at 504.

320. *See supra* notes 218-32 and accompanying text.

321. With respect to "settled expectations," see *supra* notes 224, 239-46 and accompanying text.

322. *See supra* note 224 and accompanying text.

323. *See supra* note 301.

324. *See, e.g., supra* notes 218-22 and accompanying text; *see also* Bialkowski, *supra* note 76, at 848 ("[The *Wilson*] decision permits plaintiffs to forum shop. This not only wastes time, but creates difficulties when witnesses are forced to travel to other jurisdictions.") (footnote omitted); Brophy, *supra* note 152, at 112 ("Limitations have been described as statutes of repose which promote order and foster security and stability in human affairs. If this description is accurate, statutes of limitations should promote order in litigation as well as judicial economy.") (footnotes omitted); Kaulbach, *supra* note 288, at 162 ("Absent a showing that certain types of claims implicate vastly different timeliness concerns,

action that arise under pre-existing statutes. Maintaining the status quo necessarily excludes the achievement of these goals.[325] Without further and proper action, the "costs" to society in the battle concerning proper characterization and applicable limitation periods for such claims will continue to include overloaded court dockets, and the waste of money, time, and judicial resources.

For decades, judges and commentators alike have urged congressional resolution of the matter entailing what limitation period to apply to federal statutory claims that lack express limitation periods.[326] Recently, the Committee appointed by Chief Justice Rehnquist to research this issue urged complete and proper resolution of this problem.[327] The virtually unanimous testimony of judges, practitioners, and others during the floor debates on § 1658 urged complete and proper resolution of this issue.[328] We should praise Congress for attempting to rectify the burdens it places on the federal court system whenever it fails to enact express limitation periods for federal statutory claims, but Congress simply has not gone far enough. Section 1658 *again* "needs legislative attention, and the dose that the 1990 session gave it

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uniform characterization is appropriate for . . . [§ 1983 actions] to further the goal of predictability in limitations matters."); Cameron, *supra* note 162, at 450 ("[S]tatutes of limitations assist in conserving scarce judicial resources by relieving the courts of the burden of hearing stale claims, thereby allowing courts to concentrate their resources on current conflicts.") (footnotes omitted); Holkeboer, *supra* note 294, at 69 ("Statutes of limitations are intended not only to promote fairness to defendants by preventing surprise, but also to foster order in litigation and judicial economy.") (footnote omitted); *Disparities in Time Limitations*, *supra* note 280, at 739 ("[O]ne area in which uniformity would seem the most essential is in the operation of federal statutes giving substantive rights to private parties. Instead, there are as many different time limits npon such causes of action as there are distinct state statutes of limitations.").

325. As Professor David Siegel observed:

> [U]nder the enormous caseloads that burden federal judges today, should there be so frequent a need for them to spend hours in state law—more hours than anyone suspects—seeking out a period of limitation to attach to a federal right? Even a superficial thumbing of the Federal Supplement would excite a statistician. We hear on the one side the frequent and legitimate lament about the burgeoning federal caseloads; and yet we see, on the other side, innumerable federal judicial hours spent on the pursuit of guidance in state law on an issue—the time period in which to sue on a federal cause of action—more appropriately governed by federal sources and suppliable there readily. A few thoughtful Acts of Congress on this subject could work wonders; they would save judicial hours probably beyond counting, and, incidentally, spare the federal bar the disappointment they often feel after a prolonged and frustrating search in state law on a matter that doesn't belong there in the first place.

David D. Siegel, *Service Under Amended Rule 4*, 96 F.R.D. 81, 99-100 (1983).

326. *See, e.g.*, Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."); Sentry Corp. v. Harris, 802 F.2d 229 (1986). In *Sentry*, the court stated that:

> We join the growing number of commentators and courts who have called upon Congress to eliminate these complex eases, that do much to consume the time and energies of judges but that do little to advance the cause of jnstice, by enacting federal limitations periods for all federal causes of action.

Id. at 266; *see also* Gregory L. Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1, 34 (1983-84); Lowenthal et al., *supra* note 2, at 1105; Shapiro, *supra* note 149, at 251 n.59; Bialkowski, *supra* note 76, at 848; Cameron, *supra* note 162, at 452-53; Rathburn, *supra* note 152, at 120.

327. *See supra* notes 221-22 and accompanying text.

328. *See supra* notes 227-30 and accompanying text.

falls far short of the mark."[329]

329. David D. Siegel, *Practice Commentary, in* 28 U.S.C.A. § 1658, at 26 (West Supp. 1991).