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DETERMINING LIMITATION PERIODS FOR ACTIONS ARISING UNDER FEDERAL STATUTES

by Neil Sobol

TIME limitations for causes of action are an integral part of the American system of law.¹ These limitations define time periods following the accrual of the right of action in which a litigant must assert his claim.² If the litigant fails to commence his suit within the specified time period, the court will generally deny relief.³ Given that failure to commence a suit before the limitation period has expired may deny an injured party relief and allow a wrongdoer to escape without providing such relief, litigants must be able to determine the limitation periods that will apply to their particular causes of action.⁴

For state created rights of action litigants can generally predict the applicable limitation periods. The court, whether state or federal, simply applies the limitation period that the state legislature has specified for the particular cause of action.⁵ If no specific state statute of limitation exists for the cause of the action, the court applies the appropriate general statute of limitation.⁶

For federally created rights of action, the determination of the appropriate statute of limitation is not always as simple. While many congressional statutes provide specific statutes of limitation,⁷ many other federal statutes do not have such limitation periods.⁸ Unlike the states, the federal government

1. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (not providing a limitation period "would be utterly repugnant to the genius of our laws").

2. Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1015 (1980).

3. *Id.* Under certain circumstances, however, a court may suspend or toll the limitation period. See generally 5 F. POORE & E. KOEBER, CYCLOPEDIA OF FEDERAL PROCEDURE §§ 15.526-.529 (3d ed. 1968) (discusses circumstances in which a court may toll the limitation period).

4. The ability reasonably to predict the limitation is also important to the defendant, the judicial system, and society in general. See *infra* notes 19-30 and accompanying text.

5. *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-09 (1945).

6. See *Burleson v. Mead Johnson & Co.*, 331 F. Supp. 710, 711-12 (N.D. Tex. 1971); Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1127 (1979). General statutes of limitation constitute catch-all provisions that apply when no other statutes providing specific limitation periods apply. See, e.g., ARIZ. REV. STAT. ANN. § 12-550 (1982) (four years); HAW. REV. STAT. § 657-1 (1985) (six years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986) (four years).

7. See, e.g., 15 U.S.C. § 15b (1982) (Clayton Act) (four years); 17 U.S.C. § 507 (1982) (Copyright Act) (three years); 35 U.S.C. § 286 (1982) (Patent Act) (six years); 45 U.S.C. § 56 (1982) (Federal Employers' Liability Act) (three years).

8. See, e.g., 15 U.S.C. §§ 751-760h (1982) (Emergency Petroleum Allocation Act); 18

has not specified general statutes of limitation that apply to all situations in which the federal statute does not contain a limitation period.⁹ As a result, when a federal statute does not specify a limitation period the courts must decide whether to apply a time restriction, and if so, which limitation period to apply.

In the vast majority of cases in which no specified limitation periods exist the federal courts have simply borrowed such periods from the laws of the forum state.¹⁰ Under this borrowing approach litigants in different forum states may face different statutes of limitation for the same federal cause of action because of disparities in state statutes of limitation.¹¹ Such a borrowing scheme, therefore, merely encourages forum shopping and fosters nonuniformity and unpredictability for federal causes of action.¹² Furthermore, the forum rule may run counter to the reasonable expectations of the parties if the cause of action occurs in a state other than the forum.¹³ Even litigants in the same forum may face different statutes of limitation for the same federal cause of action, since the choice of the state statute of limitation depends on the court's characterization of the cause of action in a particular case. Inconsistent characterizations result in the application of different state statutes of limitation to the same federal right of action.¹⁴ In a small minority of cases the Supreme Court has decided not to adopt the forum state statutes, but instead has turned to other sources to define limitation periods.¹⁵ Such an approach merely decreases the litigant's ability to predict the limitation period that a federal court may apply in any given case.¹⁶ In summary, the present system's method of determining limitation periods for federal actions when the federal statute does not specify a statute of limitation has resulted in inconsistency and confusion in the federal courts.¹⁷

This Comment first discusses the purposes for providing statutes of limita-

U.S.C. § 1964 (1982) (civil enforcement action under the Racketeer Influenced and Corrupt Organizations Act); 29 U.S.C. §§ 141-187 (1982) (Labor Management Relations Act); 42 U.S.C. § 1983 (1982) (civil action for deprivation of rights).

9. Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 78 (1955); Note, *supra* note 6, at 1127. Congress, however, has established a general five-year limitation period for noncapital criminal offenses. 18 U.S.C. § 3282 (1982).

10. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 279 (1985) (apply New Mexico statute of limitation); *Board of Regents v. Tomanio*, 446 U.S. 478, 492 (1980) (apply New York statute of limitation); *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976) (apply Virginia statute of limitation); see Special Project, *supra* note 2, at 1055; Note, *supra* note 6, at 1134.

11. Note, *Disparities in Time Limitations on Federal Causes of Action*, 49 YALE L.J. 738, 739 (1940).

12. Special Project, *supra* note 2, at 1013; Note, *supra* note 6, at 1136.

13. Hill, *supra* note 9, at 102 n.164.

14. Special Project, *supra* note 2, at 1072-75. The problem of inconsistent characterization becomes especially evident in cases in which no state causes of action exist that are clearly analogous to the federal causes of action. *Id.* at 1077-78.

15. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987) (use limitation period from an analogous federal statute); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-44 (1985) (use no limitation period); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983) (use limitation period from an analogous federal statute); *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) (use equitable doctrine of laches).

16. Note, *supra* note 11, at 741.

17. *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few

tion and the general factors involved in selecting limitation periods for causes of action in federal courts. In light of the objectives of limitation periods, the Comment next analyzes the current approach of using the forum state's limitation period to provide time restrictions for federal statutes that do not specify such periods. This analysis concentrates on the development of the forum state borrowing approach, as well as the problems inherent in such a system. Next the Comment discusses the Supreme Court's and commentators' suggested alternatives to the general approach. The Comment presents the advantages and disadvantages of each of these alternatives. Finally, in light of the analysis of the present system and its alternatives, this Comment offers several proposals to help create uniformity and certainty for federal causes of action that do not specify limitation periods.

I. PURPOSES OF LIMITATION PERIODS

Limitation periods have always constituted an important part of the American legal system.¹⁸ In enacting statutes of limitation legislators generally seek to protect the interests of three groups: potential defendants, the courts, and society in general.¹⁹ The protection of the interests of any one of these groups often overlaps with the protection of the interests of one or both of the other groups.²⁰ The primary purpose of statutes of limitation is to provide fairness to potential defendants.²¹ By specifying a time period after which parties are no longer liable for specific causes of action, statutes of limitation prevent parties from being subject to indefinite threats of lawsuits. A party does not have to defend itself after long periods of time, when evidence or witnesses may no longer be available.²² Moreover, the specification

areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.")

18. W. FERGUSON, *THE STATUTES OF LIMITATION SAVING STATUTES* 46 (1978). Ferguson has suggested that limitation periods "may be traced to ancient Greece or beyond and through numerous societies that developed in the ancient world." *Id.* at 7. At first statutes of limitation applied solely to actions involving real property. Note, *supra* note 6, at 1129. The early English statutes originally defined limitation periods based on the occurrence of a historical event, such as the coronation of a king. W. FERGUSON, *supra*, at 7. In 1540, however, the English system adopted the modern approach to limitation periods by not only specifying a fixed time interval in which a litigant must bring his suit following the occurrence of the cause of action, but also by setting different time periods for different causes of action. In 1623 England extended its use of statutes of limitation from real property actions to personal actions. Special Project, *supra* note 2, at 1022 & n.62. The American colonies adopted the English system and generally retained statutes of limitation after the American Revolution. W. FERGUSON, *supra*, at 46.

19. W. FERGUSON, *supra* note 18, at 40. At least one commentator has suggested that another justification for limitation periods is that they encourage plaintiffs to bring suits quickly. See Special Project, *supra* note 2, at 1018. *But see* W. FERGUSON, *supra* note 18, at 42 ("If the only purpose of the statutes of limitation were to compel plaintiff to sue early or not at all, without regard to the effect upon the public or the defendant, it would be difficult, if not impossible, to rationally endorse such statutes.").

20. Special Project, *supra* note 2, at 1016.

21. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 473 (1975) (Marshall, J., concurring); W. FERGUSON, *supra* note 18, at 43; *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments in the Law*].

22. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

of the limitation period serves as notice to a party of how long it should preserve information that a court might consider as evidence if a plaintiff were to bring suit prior to the expiration of the period. Finally, the expiration of a limitation period provides a party with a period of repose. The party can conduct its daily business without the fear of having to defend against stale claims and unfair surprises.²³

Statutes of limitation also serve to protect and benefit the judicial system. Limitation periods help to preserve the integrity of the courts by ensuring that such courts need not deal with claims that the plaintiff has simply delayed until the parties have lost or destroyed evidence.²⁴ Stale claims hurt the adversarial system by preventing a full examination of all relevant evidence.²⁵ Limitation periods allow a court to concentrate its efforts on cases in which evidence is still fresh and witnesses have not forgotten their experiences.²⁶ Finally, as a matter of judicial convenience, limitation periods prevent already overloaded court dockets from becoming worse and allow the courts more effective allocation of their limited resources.²⁷

In addition to protecting the interests of the courts and defendants, statutes of limitation serve to protect the interests of society in general. Statutes of limitation help to preserve stability in commercial relations. After the expiration of a limitation period potential creditors can feel secure in making loans to and transacting with parties who, prior to the period's expiration, stood as potentially bad credit risks because of the threat of lawsuits.²⁸ Limitation periods appear especially important in claims involving property rights. Such periods serve to protect the rights of bona fide purchasers who, based on these limitation periods, can determine whether existing or potential claims on the property are still valid.²⁹ Limitation periods, therefore, help to preserve stability in the ownership of real property.³⁰

In summary, legislators design statutes of limitation to protect the interests of defendants, the courts, and society. Failure of a litigant to bring suit within the specified limitation period will generally result in dismissal of an otherwise valid claim.³¹ Such a result may appear harsh in any particular case since it may deny an injured party relief. The overall benefits, however,

23. Note, *supra* note 6, at 1128-29.

24. *Campbell v. Haverhill*, 155 U.S. 610, 616-17 (1895); Special Project, *supra* note 2, at 1017.

25. Special Project, *supra* note 2, at 1017.

26. *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

27. Note, *Fair Representation by a Union: A Federal Right in Need of a Federal Statute of Limitations*, 51 *FORDHAM L. REV.* 896, 903-04 (1983).

28. Note, *supra* note 6, at 1129.

29. *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831); *Developments in the Law*, *supra* note 21, at 1186.

30. W. FERGUSON, *supra* note 18, at 41. Ferguson suggests that while protection of public interest is a reasonable purpose for statutes of limitation in real property actions, this purpose does not necessarily apply to personal actions. *Id.* He contends that in personal actions the only public interest justification of statutes of limitation is the vague goal of having a final resolution of controversies. *Id.*

31. See Special Project, *supra* note 2, at 1015. A court may toll or suspend a limitation period. See *supra* note 3.

of statutes of limitation generally outweigh their disadvantages.³²

II. FACTORS RELEVANT TO THE SELECTION OF LIMITATION PERIODS

The federal courts generally consider three factors in determining the appropriate limitation period for a particular cause of action. These considerations are: (1) whether the legislators have specified a federal statute of limitation to apply to the cause of action; (2) whether the cause of action arises from a federal or state created right; and (3) whether the courts, prior to the merging of equity and law,³³ considered the action legal or equitable. Through an analysis of these factors courts are able to determine whether a limitation period should apply to a cause of action, and if so, whether federal or state law should be the source for the period.³⁴

Generally, the most important consideration is whether the statute that creates the cause of action explicitly provides a federal statute of limitation.³⁵ If Congress has declared that a certain limitation period should apply to a particular cause of action, then a federal court must apply that period.³⁶ Furthermore, under the supremacy clause³⁷ the congressionally provided statute of limitation for a particular cause of action controls over any conflicting state limitation period.³⁸ When the federal statute contains a limitation period, therefore, the federal courts simply adopt that period. Such an approach helps to ensure uniformity in federal law and thereby discourages forum shopping by litigants seeking the forum with the most advantageous limitation period for a particular cause of action.³⁹

If Congress has not specified an applicable limitation period, the court must examine the nature of the cause of action to determine the time restric-

32. See *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831) ("The best interests of society require that causes of action should not be deferred an unreasonable time."); *M'Cluney v. Siliman*, 28 U.S. (3 Pet.) 270, 278 (1830) (Statutes of limitation "rest upon sound policy, and tend to the peace and welfare of society."); *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828) (Story, J.) ("The statute of limitation is a wise and beneficial law . . . [that] afford[s] security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses."). For capital offenses, however, Congress has determined that limitation periods are not appropriate. 18 U.S.C. § 3281 (1982).

33. See FED. R. CIV. P. 2.

34. 2 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 3.07[2] (2d ed. 1987).

35. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Developments in the Law*, *supra* note 21, at 1266; Special Project, *supra* note 2, at 1024.

36. *Holmberg*, 327 U.S. at 395; Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 939 (1951).

37. U.S. CONST. art. VI, cl.2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land . . .").

38. See *Herget v. Central Nat'l Bank & Trust Co.*, 324 U.S. 4, 9 (1945) (apply federal limitation period instead of state period for action arising under the federal Bankruptcy Act); *Engel v. Davenport*, 271 U.S. 33, 38-39 (1926) (federal limitation period controls over shorter state period); *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 201 (1915) (federal limitation period controls over longer state period); Special Project, *supra* note 2, at 1024.

39. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 229-30 (1958) (Brennan, J., concurring). If the plaintiff raises the cause of action under the federal statute in a state rather than a federal court, the express federal limitation period will bind the state court. 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2].

tion.⁴⁰ The sources from which a federal court will derive the limitation period depend on whether the cause of action is a state or federally created right and whether the court regards the action as legal or equitable.⁴¹ In actions involving state created rights, the federal court must follow the state statute of limitation for the particular action or a state general statute of limitation if no specific limitation period applies.⁴² Such a rule applies to diversity cases regardless of whether the court classifies the action as legal or equitable.⁴³ The rationale suggesting the use of state statutes of limitation in diversity cases is that the federal court merely acts as a state court enforcing a state created right.⁴⁴ State legislators have provided limitation periods based on state interests in the state right; accordingly, federal courts are bound to give deference to these state limitation periods.⁴⁵ Moreover, the rule of *Erie Railroad Co. v. Tompkins*⁴⁶ dictates that in cases in which a federal court has jurisdiction based solely on diversity, the court must adopt the forum state's choice of limitation periods.⁴⁷

In an action involving federally created rights when no specified limitation period exists, the requirements and policy considerations of *Erie* do not bind a federal court.⁴⁸ Instead of sitting merely as a court of the state, as it does in diversity cases,⁴⁹ the federal court in nondiversity cases acts as part of the national system and, therefore, possesses the ability to formulate federal common law.⁵⁰ Moreover, the rationale of using state statutes of limitation

40. *Holmberg v. Armbrrecht*, 327 U.S. 392, 394-96 (1946).

41. *Id.*; 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2].

42. *Holmberg v. Armbrrecht*, 327 U.S. at 394; 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2]. The courts may suspend or toll the limitation period. *See supra* note 3.

43. *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-09 (1945); 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2]. As the Supreme Court explained in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), federal courts should provide litigants in diversity suits the same limitation periods that they would receive in state court:

There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

Id. at 753.

44. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945).

45. *Id.* In a conflict-of-laws case, however, this rationale breaks down since a court must follow the forum statute of limitation period, subject to any forum borrowing provision, even if the cause of action and all other relevant factors, except for the filing of suit, took place in another state. A federal court sitting in diversity, therefore, will look to forum laws for statutes of limitation rather than to the state where the cause of action arose. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516-17 (1953).

46. 304 U.S. 64 (1938).

47. *Id.* at 78; *see Wells*, 345 U.S. at 517; 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2].

48. *See Erie*, 304 U.S. at 78. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 666 (1959). In addition, the Rules of Decision Act, 28 U.S.C. § 1652 (1982), does not require the federal courts in nondiversity cases to select state statutes of limitation. *See infra* notes 79-81 and accompanying text.

49. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945).

50. *Holmberg v. Armbrrecht*, 327 U.S. 392, 394-95 (1946). The Court stated that:

We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate with-

does not apply to federally created rights.⁵¹ State legislators design statutes of limitation based on state, rather than federal, interests.⁵² Neither legal mandate nor policy considerations, therefore, require that federal courts apply state limitation periods in actions involving federally created rights.⁵³

The final consideration that a court looks to in determining the applicable limitation period is whether the court considers the action legal or equitable.⁵⁴ Although separate courts of equity and law no longer exist, the distinction between legal and equitable actions may still become important to a court trying to determine limitation periods for federal statutes.⁵⁵ The determination of whether an action is equitable or legal may affect whether the court will allow the equitable defense of laches to govern a particular case.⁵⁶

In summary, courts facing the problem of determining limitation periods for a given cause of action apply various standards. If Congress specifies a limitation period, that period controls. If Congress does not provide a period, the federal courts must examine the nature of the underlying cause of action. If the cause of action results from a state created right, state law binds the courts. If, on the other hand, the cause of action arises from a federal statute that does not specify a limitation period, the courts are not legally bound to follow state law.

III. THE GENERAL APPROACH: BORROWING A STATE LIMITATION PERIOD

Although federal courts are not legally bound to adopt state limitation periods for federal causes of action that do not specify limitation periods, historically they have borrowed such periods from states.⁵⁷ Moreover, modern federal courts generally continue to follow this traditional approach.⁵⁸

out discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress.

Id. at 395.

51. *Id.* at 394.

52. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977).

53. *Id.*; *Holmberg v. Armbrecht*, 327 U.S. at 394-95. While not bound to select the forum state's limitation periods, the general practice is to adopt the state period as long as that period appears consistent with federal policy. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

54. *Holmberg*, 327 U.S. at 395-96; 2 J. MOORE & J. LUCAS, *supra* note 34, ¶ 3.07[2].

55. *Holmberg*, 327 U.S. at 395-96; 5 F. POORE & E. KOEBER, *supra* note 3, § 15.522. The distinction between equity and actions at law does not matter for diversity cases. *See supra* note 43 and accompanying text.

56. *Holmberg*, 327 U.S. at 395-97 (apply doctrine of laches in a traditional equity case). The Supreme Court has not resolved the question of whether it will apply the doctrine of laches in actions traditionally known as actions at law. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 & n.16 (1985). For a discussion of the use of the laches defense in cases arising under federal statutes, see *infra* notes 178-194 and accompanying text.

57. *See, e.g.*, *Cope v. Anderson*, 331 U.S. 461, 468 (1947) (apply Kentucky statute of limitation); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905) (apply Washington statute of limitation); *Campbell v. Haverhill*, 155 U.S. 610, 621 (1895) (apply Massachusetts statute of limitation); *M'Cluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277-78 (1830) (apply Ohio statute of limitation).

58. *See, e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985) (apply New Mexico statute of limitation); *Board of Regents v. Tomanio*, 446 U.S. 478, 492 (1980) (apply New York statute

In only a small minority of cases have the federal courts refused to apply the state limitation period in actions when no federal statute of limitation existed.⁵⁹ This section presents the development of the state borrowing approach and an evaluation of its advantages and disadvantages in light of the purposes of limitation periods.

A. *Development of the General Approach*

The state borrowing rule stems from an early misunderstanding of the Rules of Decision Act.⁶⁰ In *M'Cluny v. Silliman*⁶¹ the Supreme Court first dealt with the issue of determining an applicable limitation period for a federally created right that did not specify a limitation period. The Court held that section 34 of the Judiciary Act of 1789⁶² required that the federal court adopt state limitation periods for federal statutes in which Congress failed to specify limitation periods.⁶³ Fifty-five years later, the Court in *Campbell v. Haverhill*⁶⁴ held that while section 34 now commonly known as the Rules of Decision Act, generally required application of the state statute of limitation for actions in which Congress failed to specify a limitation period, under certain circumstances courts need not adopt state law.⁶⁵ Specifically the Court declared that if the state statute of limitation appeared discriminatory with respect to the federal cause of action or if it imposed an unreasonable burden on the parties involved, then the state limitation period would not apply.⁶⁶ If a court found the state limitation neither discriminatory nor burdensome, then, according to *Campbell*, the Rules of Decision Act mandated application of the state period.⁶⁷

*Johnson v. Davis*⁶⁸ illustrates a discriminatory state statute of limitation. In *Davis* the Fourth Circuit refused to apply a one-year statute of limitation that the state had specified should apply to a cause of action arising under section 1983 of title 42 of the United States Code.⁶⁹ The court found that the one-year period discriminated against the federal cause of action because

of limitation); *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976) (apply Virginia statute of limitation).

59. See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987) (use limitation period from an analogous federal statute); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239-44 (1985) (use no limitation period); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983) (use limitation period from an analogous federal statute); *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946) (use equitable doctrine of laches).

60. 28 U.S.C. § 1652 (1982). The Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

61. 28 U.S. (3 Pet.) 270 (1830).

62. Judiciary Act, ch. 20, § 34, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1652 (1982)).

63. *M'Cluny*, 28 U.S. (3 Pet.) at 276-77.

64. 155 U.S. 610 (1895).

65. *Id.* at 614-15.

66. *Id.* at 615.

67. *Id.* at 615-16.

68. 582 F.2d 1316 (4th Cir. 1978).

69. *Id.* at 1318-19; see 42 U.S.C. § 1983 (1982).

comparable state claims had two-year limitation periods.⁷⁰ The relevant test for determining whether a limitation period is discriminatory, therefore, considers whether the state provides a shorter limitation period for a federal cause of action than it does for an analogous state cause of action.⁷¹

Subsequent cases have also developed the unreasonable burden exception specified in *Campbell*.⁷² In *Johnson v. Railway Express Agency*⁷³ the Supreme Court declared that federal courts may adopt state law only if the state law stands consistent with the underlying policies of the federal cause of action.⁷⁴ While *Railway Express* dealt with what law should govern the tolling of a statute of limitation, the Supreme Court has expressly extended this doctrine to apply to the choice of limitation periods.⁷⁵ In *Occidental Life Insurance Co. v. EEOC*⁷⁶ the Court explained that the rationale behind this exception is that state legislatures base their limitation periods on state rather than national interests; therefore, a federal court may deny application of a state limitation period if it appears contrary to a federal policy or interest.⁷⁷ The courts, therefore, have interpreted the unreasonably burdensome exception to include state statutes of limitation that conflict or stand inconsistent with the policies surrounding the federally created right.⁷⁸

While *Campbell* 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.⁷⁹ Instead, the federal courts had discretion to determine whether to apply state law to fill gaps left in federal law.⁸⁰ Subsequent cases indicated that in adopting state statutes of limitation, the federal courts were doing so as a matter of federal rather than state law.⁸¹

70. *Id.* The analogous state claims constituted personal injury actions. *Id.*

71. Special Project, *supra* note 2, at 1049.

72. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).

73. 421 U.S. 454 (1975).

74. *Id.* at 465.

75. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). For a discussion of whether federal or state law governs the tolling of limitation periods, see *infra* note 92.

76. 432 U.S. 355 (1977).

77. *Id.* at 367.

78. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985).

79. *Holmberg v. Armbrecht*, 327 U.S. 392, 394-95 (1946); see *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983).

80. *Holmberg*, 327 U.S. at 395; see *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.").

81. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). In a recent Supreme Court case, however, one Justice argued that the courts should adopt state limitation periods as a matter of state law. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2771, 97 L. Ed. 2d 121, 138-39 (1987) (Scalia, J., concurring). Justice Scalia indicated, however, that precedent has prevented the application of such a rule. *Id.*

Although neither *Erie* nor the Rules of Decision Act require that federal courts adopt state limitation periods, the federal courts continue to borrow state statutes of limitation.⁸² The general rule, which remains in effect, creates a presumption in favor of the use of forum state law for actions in which Congress has not specified time restrictions.⁸³ Given the exceptions described in *Campbell*, however, such a presumption does not appear absolute.⁸⁴

B. Evaluation of the General Approach

The state borrowing approach, which has existed since at least 1830,⁸⁵ possesses some apparent advantages. This approach ensures that a court will use limitation periods for actions arising under federal statutes that do not contain any time restrictions.⁸⁶ Moreover, litigants, society, and the judicial system also benefit from the approach, because they can reasonably predict that the courts will generally continue to use state law as the major source of limitation periods.⁸⁷ In addition, given that the courts have used the approach for over 150 years, the assumption that the failure of Congress to specify a limitation period suggests the congressional intent that courts adopt a state statute of limitation seems reasonable.⁸⁸ Finally, a comparison of the comprehensive coverage of state statutes of limitation, both specific and general, relative to the sparsely scattered federal statutes of limitation indicates that state rather than federal law may provide a better source for determining the appropriate statute of limitation for a given cause of action.⁸⁹

Despite these apparent advantages, the present system of borrowing state limitation periods also contains some important disadvantages. The major problems associated with the state borrowing approach consist of nonuniformity and inconsistency in the federal court system.⁹⁰ Any ap-

82. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985) (apply New Mexico statute of limitation); *Board of Regents v. Tomanio*, 446 U.S. 478, 492 (1980) (apply New York statute of limitation); *Runyon v. McCrary*, 427 U.S. 160, 180-82 (1976) (apply Virginia statute of limitation).

83. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966).

84. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985); Special Project, *supra* note 2, at 1043.

85. *M'Cluney v. Silliman*, 28 U.S. (3 Pet.) 270, 276-77 (1830).

86. *Campbell v. Haverhill*, 155 U.S. 610, 616-18 (1895).

87. *Wilson v. Garcia*, 471 U.S. 261, 266-76 (1985). Given the problems of inconsistent characterization and use of borrowing provisions, however, knowledge of the source of the limitation periods does not necessarily guarantee easy prediction of a court's choice of a specific limitation period. See *infra* notes 92-153 and accompanying text.

88. Special Project, *supra* note 2, at 1044-45; Note, *supra* note 6, at 1147.

89. See Special Project, *supra* note 2, at 1081. In certain cases, however, federal law may provide a clearer analogy than available state law. See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2764, 97 L. Ed. 2d 121, 130 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983). For a discussion regarding the use of limitation periods from analogous federal statutes, see *infra* notes 195-218 and accompanying text.

90. Special Project, *supra* note 2, at 1013.

proach that relies exclusively on state law as guidance subjects such approach to the inevitable differences among the various states. Each state generally possesses a unique set of statutes of limitation.⁹¹ Moreover, the failure of federal district and appellate courts to characterize federal causes of action and to use borrowing provisions for causes of action arising outside the forum state in a consistent fashion compounds the problem by creating differences within the states, as well as conflicts between the states.⁹²

Inconsistent characterizations are the primary source of uncertainty under the state borrowing approach.⁹³ The way a court chooses to characterize a particular federal cause of action controls the court's selection of an analogous state claim, and thus determines which state limitation period a federal court will decide to borrow.⁹⁴ For example, if a court characterizes a particular federal claim as a breach of contract action, then most likely the action will have a different limitation period than if the court had characterized the claim as a tort action.⁹⁵

A problem with characterization arises in that several federal causes of action do not have any readily apparent analogous state causes of action.⁹⁶

91. Note, *Federal Borrowing of Arkansas Statutes of Limitations in Enforcement of the Reconstruction Civil Rights Statutes*, 31 ARK. L. REV. 692, 697 (1978); see, e.g., CAL. CIV. PROC. CODE § 337 (West 1982) (four-year limitation period for action on contract); MO. ANN. STAT. § 516.120(1) (Vernon 1952) (five-year limitation period for action on contract); WIS. STAT. ANN. § 893.43 (West 1983) (six-year limitation period for action on contract).

92. Special Project, *supra* note 2, at 1065, 1099-1101. An additional problem that the courts have faced in borrowing state limitation periods is whether the adoption of a state's limitation period requires the court to adopt the state's guidelines related to the adoption of such a period. Traditionally, the problem has arisen in determining whether a court that adopts a state's limitation period must also adopt the state's rules for tolling that period. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975); Special Project, *supra* note 2, at 1084.

Relying on the general principle that the length of the limitation period clearly relates to the issue of tolling and the direction in 42 U.S.C. § 1988 (1982) to look to state law for guidance, the Supreme Court has held that state law governs the tolling of limitation periods in actions arising under 42 U.S.C. §§ 1981, 1983 (1982). *Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985); *Chardon v. Fumero Soto*, 462 U.S. 650, 662 (1983); *Board of Regents v. Tomano*, 446 U.S. 478, 484-85 (1980); *Johnson*, 421 U.S. at 463-64. The state tolling provisions will not apply, however, if such provisions appear contrary to the underlying policies of the federal cause of action. *Chardon*, 462 U.S. at 657; *Johnson*, 421 U.S. at 464-66.

The Seventh Circuit, however, has indicated that the rule that state tolling provisions govern when a court adopts a state's limitation period may not apply in cases arising under federal acts other than 42 U.S.C. §§ 1981, 1983 (1982). *Sentry Corp. v. Harris*, 802 F.2d 229, 235-40 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1624, 95 L. Ed. 2d 199 (1987). In *Sentry Corp.* the court distinguished civil rights cases due to the direction in 42 U.S.C. § 1988 (1982) to use state law and the absence of an applicable federal tolling provision. 802 F.2d at 235-40. The court held that in an action under a federal security law, in which no express federal limitation period exists, state law provides the limitation period, but federal law determines whether the plaintiffs commenced the suit for purposes of tolling the limitation period. *Id.* at 233.

93. *Wilson v. Garcia*, 471 U.S. 261, 271-75 (1985); Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97, 98-102.

94. See *Wilson v. Garcia*, 471 U.S. 261, 271-75 (1985). Characterization would also control the court's selection of an analogous federal claim. See *infra* note 217 and accompanying text.

95. Compare CONN. GEN. STAT. § 52-576 (1987) (six-year limitation period for contract action) with *id.* § 52-577 (three-year limitation period for tort action).

96. See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2764-65, 97 L. Ed. 2d 121, 130-32 (1987) (no clear state analogy for civil enforcement action under the

As a result, federal courts often possess considerable discretion in characterizing a particular cause of action for purposes of determining the most appropriate limitation period.⁹⁷ The traditional state borrowing approach, which generally limits a court's selection to limitation periods of the forum state, prevents a court from borrowing a potentially more appropriate limitation period from another state.⁹⁸ Moreover, the federal courts complicate these problems by inconsistently relying on state law,⁹⁹ federal law,¹⁰⁰ or both in the characterization process.¹⁰¹ Finally, even if all courts utilized federal law to characterize the cause of action, inconsistencies would still exist since the courts emphasize different factors in determining limitation periods. While some courts base their characterization solely on the specific facts alleged or remedy sought in a particular case,¹⁰² other courts look to the statutory language of the federal act or the effect that the characterization will have on the federal policies underlying the federal act.¹⁰³ Conflicting responses to the question of which law should govern the characterization process and which factors are important to that process contribute to the problems of inconsistent characterizations. Such inconsistent characterizations between, and especially within, the circuits create needless uncertainty and unpredictability in the federal court system.¹⁰⁴

In *Wilson v. Garcia*¹⁰⁵ the Supreme Court sought a solution to the problems of inconsistent characterization of federal civil rights claims arising under section 1983 of title 42 of the United States Code.¹⁰⁶ Prior to this case the federal courts had inconsistently adopted limitation periods for civil rights claims under section 1983 by analogizing to at least eight different

Racketeer Influenced and Corrupt Organizations Act); Special Project, *supra* note 2, at 1077-78 (states may possess no clear analogies for civil rights acts, national labor laws, and claims for damages implied under the Constitution).

97. See, e.g., *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 774 (4th Cir. 1978) (characterize action under Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411 (1982), as a personal injury action); *Dantagnan v. I.L.A. Local 1418*, 496 F.2d 400, 401-03 (5th Cir. 1974) (characterize similar action as a quasi-contract action); *Sewell v. Grand Lodge*, 445 F.2d 545, 549-50 (5th Cir. 1971) (characterize similar action as a tort action), *cert. denied*, 404 U.S. 1024 (1972).

98. Note, *supra* note 11, at 738-40. Under a borrowing statute a court may borrow the limitation period of the state where the cause of action arose. *Cope v. Anderson*, 331 U.S. 461, 464-68 (1947); Note, *supra* note 6, at 1139-40. Such borrowing provisions, however, appear inconsistent and may not apply if the plaintiff is a resident of the forum or the foreign limitation period is longer than the forum's period. See *infra* notes 147-162 and accompanying text.

99. *Dantagnan v. I.L.A. Local 1418*, 496 F.2d 400, 402-03 (5th Cir. 1974).

100. *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 773-74 (4th Cir. 1978).

101. Compare *Butler v. Local Union 823, Int'l Bhd. of Teamsters*, 514 F.2d 442, 446 (8th Cir. 1975) (use federal law for characterization) with *Sandobal v. Armour & Co.*, 429 F.2d 249, 252-54 (8th Cir. 1970) (use state law for characterization), *cert. denied*, 423 U.S. 924 (1975). See Special Project, *supra* note 2, at 1057-66.

102. See *Dantagnan v. I.L.A. Local 1418*, 496 F.2d 400, 401-02 (5th Cir. 1974); *Sandobal*, 429 F.2d at 256-57.

103. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2763-64, 97 L. Ed. 2d 121, 129 (1987); *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Beard v. Robinson*, 563 F.2d 331, 338 (7th Cir. 1977).

104. Special Project, *supra* note 2, at 1065-67, 1072-75.

105. 471 U.S. 261 (1985).

106. 42 U.S.C. § 1983 (1982).

sources of limitation periods.¹⁰⁷ Specifically these sources included state limitation periods for liability created by statute,¹⁰⁸ personal injury actions,¹⁰⁹ intentional torts,¹¹⁰ contract actions,¹¹¹ violation of state civil rights provisions,¹¹² actions against public officials,¹¹³ general state limitation periods that are applicable to causes of action that do not specify such periods,¹¹⁴ and specific state statutes governing federal civil rights actions.¹¹⁵ In addition, the federal courts inconsistently decided cases regarding whether federal or state law should control the characterization¹¹⁶ and what factors a court should use in determining whether to borrow a given statute of limitation.¹¹⁷ Commentators had long criticized the federal courts for the inconsistencies in the area of civil rights,¹¹⁸ but not until *Garcia* did the Supreme Court develop a uniform characterization rule for actions arising under section 1983.¹¹⁹

The Supreme Court in *Garcia* began by answering the question whether federal or state law should govern the characterization of section 1983 claims. The Court concluded that under section 1988¹²⁰ the federal courts

107. See generally *Garcia v. Wilson*, 731 F.2d 640, 643-48 (10th Cir. 1984) (discusses the disparate ways that the circuits have characterized § 1983 claims), *aff'd*, 471 U.S. 261 (1985); Annotation, *What Statute of Limitations is Applicable to Civil Rights Action Brought Under 42 USCS § 1983*, 45 A.L.R. FED. 548 (1979) (lists the many ways that the courts have characterized claims under § 1983 for purposes of determining limitation periods).

108. *Keating v. Carey*, 706 F.2d 377, 381-82 (2d Cir. 1983); *Wagh v. Dennis*, 677 F.2d 666, 667 (8th Cir. 1982); *Major v. Arizona State Prison*, 642 F.2d 311, 312 (9th Cir. 1981).

109. *Garcia*, 731 F.2d at 651; *McCausland v. Mason County Bd. of Educ.*, 649 F.2d 278, 279 (4th Cir. 1981); *Rubin v. O'Koren*, 644 F.2d 1023, 1025 (5th Cir. Unit B May 1981).

110. *Suthoff v. Yazoo County Indus. Dev. Corp.*, 722 F.2d 133, 136 (5th Cir. 1983); *Gashgai v. Leibowitz*, 703 F.2d 10, 12-13 (1st Cir. 1983); *Hess v. Eddy*, 689 F.2d 977, 980 (11th Cir. 1982).

111. *White v. United Parcel Serv.*, 692 F.2d 1, 2-3 (5th Cir. 1982); *Hansbury v. Regents of the Univ.*, 596 F.2d 944, 949 n.15 (10th Cir. 1979); *Skehan v. Board of Trustees*, 590 F.2d 470, 476-77 (3d Cir. 1978).

112. *Burns v. Sullivan*, 619 F.2d 99, 106-07 (1st Cir. 1980).

113. *Buford v. Tremayne*, 747 F.2d 445, 447-48 (8th Cir. 1984).

114. *McKay v. Hammock*, 730 F.2d 1367, 1370 (10th Cir. 1984); *Perri v. Aytch*, 724 F.2d 362, 368 (3d Cir. 1983); *Morrell v. City of Picayune*, 690 F.2d 469, 469-70 (5th Cir. 1982); *Branchcomb v. Brewer*, 683 F.2d 251, 255 (8th Cir. 1982).

115. *Loiseau v. Department of Human Resources*, 558 F. Supp. 521, 526-27 (D. Or. 1983); *Kompara v. Board of Regents*, 548 F. Supp. 537, 539 (M.D. Tenn. 1982).

116. Compare *Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977) (uses federal law for characterization of § 1983 claim) with *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1260-63 (5th Cir. 1977) (uses state law for characterization of § 1983 claim); see Special Project, *supra* note 2, at 1059-62.

117. Compare *Garmon v. Foust*, 668 F.2d 400, 406 (8th Cir. 1982) (look to the source of the cause of action) with *Burns v. Sullivan*, 619 F.2d 99, 105-07 (1st Cir. 1980) (look to the specific facts pleaded).

118. See Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1, 34 (1983); Special Project, *supra* note 2, at 1067-70; Note, *supra* note 93, at 97-98; Note, *supra* note 91, at 704-05; Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763, 773 (1968) [hereinafter Note, *A Limitation on Actions*]; Note, *A Call For Uniformity: Statutes of Limitation in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61, 67-69 (1979) [hereinafter Note, *A Call for Uniformity*].

119. *Wilson v. Garcia*, 471 U.S. 261, 275-76 (1985).

120. 42 U.S.C. § 1988 (1982). Section 1988 provides:

The jurisdiction in civil and criminal matters . . . for the protection of all persons in the United States in their civil rights, . . . shall be exercised and enforced in

must use federal law to characterize the cause of action for purposes of determining limitation periods.¹²¹ Having determined that federal law should control characterization, the Court moved to the issue of what factors should determine the applicable limitation period. The Court held that instead of analyzing the particular facts of each section 1983 case in order to select the appropriate limitation period, the better method characterizes all section 1983 claims in the same manner.¹²² Specifically, the Court declared that all federal courts should characterize section 1983 claims as personal injury actions.¹²³ While such an approach does not create a uniform federal limitation period, it does establish a much needed uniform characterization process for section 1983 claims. Such an approach possesses the potential to create uniformity and certainty within the circuits.¹²⁴

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*¹²⁵ the Court, relying on its analysis developed in *Garcia*, recently adopted a uniform federal characterization process for civil enforcement actions arising under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹²⁶ Prior to *Malley-Duff* the courts had inconsistently characterized RICO actions.¹²⁷ In *Malley-Duff* the Court held that given the "'garden variety'"¹²⁸ of potential acts that could establish a RICO cause of action and that RICO actions stood unknown at common law, a uniform statute of limitation was necessary to alleviate "intolerable 'uncertainty and time-consuming litigation.'"¹²⁹

While *Garcia* and *Malley-Duff* should help reduce the problems of inconsistency and confusion in civil rights cases under section 1983 and in civil

conformity with the laws of the United States . . . but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . 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

Id.

121. *Garcia*, 471 U.S. at 268-71 & n.22.

122. *Id.* at 272-76.

123. *Id.*

124. *Id.* at 275. In her dissent Justice O'Connor argued that the Court should not characterize all § 1983 claims in the same manner. *Id.* at 280.

125. 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987).

126. *Id.* at 2763-64, 97 L. Ed. 2d at 129-30. Congress has codified the provision for RICO civil enforcement actions at 18 U.S.C. § 1964 (1982).

127. Compare *Tellis v. United States Fidelity & Guar. Co.*, 805 F.2d 741, 744 (7th Cir. 1986) (uniform characterization of all civil RICO actions) with *Silverberg v. Thomson McKinnon Sec., Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986) (characterize civil RICO actions on a case-by-case method based on the particular facts alleged and the legal theories presented).

128. 107 S. Ct. at 2763, 97 L. Ed. 2d at 129. The Court indicated that it could analogize the potential acts creating RICO claims to a number of state actions including but not limited to breach of contract, unfair competition, and tortious interference with business relations. *Id.*

129. *Id.* at 2764, 97 L. Ed. 2d at 129 (citing *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). Unlike in *Garcia*, the Court in *Malley-Duff* found that a federal statute, the Clayton Act, 15 U.S.C. § 15 (1982), provided a better analogy than any state statute. *Malley-Duff*, 107 S. Ct. at 2764, 97 L. Ed. 2d at 130. For a discussion of the federal borrowing approach, see *infra* notes 195-218 and accompanying text.

RICO claims, such problems still exist for the numerous other federal statutes for which the Supreme Court has not declared a uniform characterization process.¹³⁰ The characterization problem appears especially evident in cases arising under the national labor acts.¹³¹ In *UAW v. Hoosier Cardinal Corp.*¹³² the Supreme Court specifically refused to adopt a uniform federal characterization for actions arising under section 301 of the Labor Management Relations Act.¹³³ The Court argued that although characterization ultimately became a matter of federal law, federal courts could adopt state characterizations as long as such characterizations did not conflict with federal labor policy.¹³⁴ Since *Hoosier* the courts have inconsistently applied state and federal law characterizations in labor cases.¹³⁵ Moreover, different courts have examined different factors in determining what limitation periods should apply in these cases.¹³⁶ The problems of inconsistency and uncertainty in the present system of characterization will not disappear unless the Supreme Court or Congress specifies uniform rules for characterization.¹³⁷ Inconsistent characterizations make appeals more likely as litigants will appeal in the hope of obtaining a characterization of the cause of action that has a more favorable limitation period.¹³⁸ Inconsistent characterizations and differences in state law also create nonuniformity in the federal system. Litigants in different as well as the same forum state may face different limitation periods for the same federal cause of action.¹³⁹ Such an approach only encourages forum shopping and fosters a feeling of unfairness in the federal system. Plaintiffs who meet the jurisdictional and venue requirements of a forum state with a relatively favorable limitation period for a particular cause of action¹⁴⁰ 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.¹⁴¹ This nonuniform system runs counter to the express objectives of the federal

130. See Special Project, *supra* note 2, at 1071.

131. *Id.* at 1062-63; Note, *supra* note 27, at 897-99; see 29 U.S.C. §§ 141-188 (1982) (Labor Management Relations (Taft-Hartley) Act); *Id.* §§ 401-531 (Labor Management Reporting and Disclosure Act).

132. 383 U.S. 696 (1966).

133. Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1982).

134. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-04 (1966).

135. Compare *Butler v. Local Union 823, Int'l Bhd. of Teamsters*, 514 F.2d 442, 446-47 (8th Cir. 1975) (use federal characterization) with *Sandobal v. Armour & Co.*, 429 F.2d 249, 252-54 (8th Cir. 1970) (use state characterization), *cert. denied*, 423 U.S. 924 (1975).

136. Compare *Butler*, 514 F.2d at 447-48 (8th Cir. 1975) (look at federal interests) with *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 285-87 (1st Cir. 1970) (look at nature of statutory right).

137. Special Project, *supra* note 2, at 1078-82.

138. *Id.* at 1075-76.

139. *Id.* at 1015; see also Note, *supra* note 27, at 907 & n.81 (potential number of limitation periods is "fifty times the number of possible characterizations" for a federal claim, although not all states have the same number of characterizations).

140. Given the inconsistency in the present system litigants may find it difficult to predict whether they will have a favorable limitation period. See *supra* text accompanying notes 90-137.

141. Note, *supra* note 6, at 1139; Note, *supra* note 11, at 738-40.

court system and the federal rules of procedure.¹⁴²

In an effort to reduce forum shopping, many states have enacted borrowing statutes that generally provide for the barring of an action if it would have been time-barred in the state where the cause of action arose.¹⁴³ If the forum state has created a borrowing statute, then, under the traditional approach, the court will generally apply it.¹⁴⁴ To the extent that great disparities exist in the borrowing provisions of many states and that other states do not possess such provisions, such a practice merely produces additional inconsistency and unpredictability.¹⁴⁵ Moreover, if a court decides to borrow a limitation period of a foreign state, the borrowing court must also determine whether to adopt that state's rules for tolling and other subsidiary issues related to limitation periods.¹⁴⁶

The resident plaintiff exception, which some states incorporate in their borrowing provisions,¹⁴⁷ only adds more confusion to the system.¹⁴⁸ Under this exception the court will not apply a borrowing statute to an action brought by the resident of the forum.¹⁴⁹ The rationale behind such a provision states that a forum has an interest in protecting its citizens and allowing them to bring suits.¹⁵⁰ This rationale, however, does not appear to apply to actions brought under federally created rather than state created rights, at least when the federal courts exercise exclusive jurisdiction.¹⁵¹ Such an exception merely creates more inconsistency and nonuniformity in the federal courts.¹⁵²

Even if all states possessed borrowing statutes, the traditional approach would still tend to discourage plaintiffs from filing in a state other than the

142. Note, *supra* note 11, at 738-40. Lack of uniformity by itself provides an insufficient justification for judicial creation of a uniform law. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702-03 (1966).

143. See, e.g., FLA. STAT. ANN. § 95.10 (West 1982); ILL. ANN. STAT. ch. 110, para. 13-210 (Smith-Hurd 1984); NEB. REV. STAT. § 25-215 (1985). See generally A. CERVERA, *THE STATUTE OF LIMITATIONS IN AMERICAN CONFLICTS OF LAW* 169-76 (1966) (lists the various borrowing statutes). Determining where the cause of action arose may be difficult in cases in which elements of the cause of action occur in different states. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2766, 97 L. Ed. 2d 121, 132 (1987).

144. *Cope v. Anderson*, 331 U.S. 461, 466-68 (1947).

145. A. CERVERA, *supra* note 143, at 81; Blume & George, *supra* note 36, at 994-95; Special Project, *supra* note 2, at 1104. See generally Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MTN. L. REV. 287, 294-96 (1960) (classifies the borrowing statutes of the various states and indicates which states do not have such provisions).

146. *Devine v. Rook*, 314 S.W.2d 932, 935 (Mo. Ct. App. 1958); Special Project, *supra* note 2, at 1099. For a discussion of the problems inherent in determining the sources for tolling rules and other subsidiary rules, see *supra* note 92.

147. See, e.g., CAL. CIV. PROC. CODE § 361 (West 1982); DEL. CODE ANN. tit. 10, § 8121 (1974); IDAHO CODE § 5-239 (1979); UTAH CODE ANN. § 78-12-45 (1977).

148. Vernon, *supra* note 145, at 311.

149. *Figueroa v. Esso Standard Oil Co.*, 231 F. Supp. 168, 169-70 (S.D.N.Y. 1964); Blume & George, *supra* note 36, at 982-83; Special Project, *supra* note 2, at 1101-03.

150. Special Project, *supra* note 2, at 1101.

151. Hill, *supra* note 9, at 102 n.164; Special Project, *supra* note 2, at 1102-05. Moreover, one commentary argues, "[I]f the purpose of the statute of limitations is to bar stale claims, it is difficult to justify degrees of staleness depending upon the domicile of the claimant." Blume & George, *supra* note 36, at 995.

152. Special Project, *supra* note 2, at 1101-05.

one in which the cause of action arose, due to the reliance of borrowing statutes on the forum state limitation periods. Generally, borrowing statutes only provide for borrowing if the foreign state's limitation period runs shorter than the forum's period.¹⁵³ Under such a system, if a cause of action occurs in a state that has a long limitation period, the plaintiff cannot take advantage of that period unless he files in that state or in a state that has a longer limitation period. Given the federal nature of the claims, plaintiffs suing under federal statutes should face the same limitation periods regardless of where they file suit.¹⁵⁴

In summary, no legal mandate requires that federal courts use the state borrowing approach. Instead, the use of such a rule basically arises from a tradition that rests on a misinterpretation of the Rules of Decision Act.¹⁵⁵ Given the inconsistency problems inherent in the state borrowing approach and that at times the courts have refused to follow state law, it is important to analyze the alternatives that a federal court has if it decides not to borrow forum state law.

IV. ALTERNATIVES TO THE GENERAL APPROACH

The Supreme Court and commentators have suggested at least six alternatives to the traditional state borrowing approach:¹⁵⁶ (1) use no limitation period;¹⁵⁷ (2) apply the equitable doctrine of laches;¹⁵⁸ (3) borrow a limitation period from an analogous federal cause of action;¹⁵⁹ (4) use a general federal statute of limitation;¹⁶⁰ (5) judicially create a statute of limitation;¹⁶¹ or (6) use conflict-of-law principles.¹⁶² Each of these alternatives contain certain advantages and disadvantages. This section examines and evaluates each of the options in light of the objectives behind limitation periods and the problems inherent in the traditional state borrowing approach. Such an analysis serves as a background for formulating general solutions to the problem of determining limitation periods for federal statutes that do not specify such periods.

153. Blume & George, *supra* note 36, at 995.

154. Hill, *supra* note 9, at 102; Blume & George, *supra* note 36, at 995.

155. *Ingram v. Steven Robert Corp.*, 547 F.2d 1260, 1264 (5th Cir. 1977). The Fifth Circuit declared that the state borrowing rule is "neither rational nor historical, but purely precedential." *Id.*

156. Another alternative that the courts could adopt is the twenty-year common-law presumption. See Note, *supra* note 11, at 744-45.

157. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239-44 (1985); Note, *supra* note 27, at 903-04; Note, *supra* note 6, at 1130-31.

158. *Holmberg v. Armbrrecht*, 327 U.S. 392, 396-97 (1946); Note, *supra* note 27, at 904; Note, *supra* note 6, at 1141-46; Note, *supra* note 11, at 744.

159. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983); Note, *supra* note 27, at 914-18; Note, *supra* note 6, at 1133-34.

160. Note, *supra* note 6, at 1146.

161. Note, *supra* note 27, at 905; Note, *supra* note 6, at 1131-32.

162. Hill, *supra* note 9, at 102 n.164.

A. No Limitation Period

Instead of adopting a state statute of limitation, a federal court could refuse to apply any limitation period for statutes when Congress has not specified a period.¹⁶³ Except for actions brought by the federal government,¹⁶⁴ or where Congress has specifically declared that no limitation period is applicable,¹⁶⁵ the Court appears reluctant to refuse the application of a limitation period for a cause of action.¹⁶⁶ In at least one case, however, the Supreme Court has held that no limitation period should apply to a particular cause of action.¹⁶⁷ In *County of Oneida v. Oneida Indian Nation*¹⁶⁸ Indian tribes sued two New York counties. Their complaint alleged that a conveyance of land by the ancestors of the Indians in 1795 was void since it violated the Indian Trade and Intercourse Act of 1793.¹⁶⁹ The tribes sought damages based on the fair rental value of the land for the years 1968 and 1969. The Court found that although in the usual practice courts adopted state limitation periods when confronted with a federal action that did not specify a limitation period, in this case the state limitation was inconsistent with the general federal policy against limitation for Indian land claims.¹⁷⁰ Instead of applying a limitation period from another source, the Court held that no limitation period should apply to the action.¹⁷¹

The no-limitation alternative offers several advantages. Such an approach avoids the often harsh result arising from the denial of an otherwise valid claim simply because the plaintiff did not bring suit before the expiration of the limitation period.¹⁷² Moreover, this alternative prevents arbitrary judicial creation of limitation periods and could act as a catalyst for Congress to establish limitation periods.¹⁷³ Finally, if all federal courts refused use of limitation periods for federal statutes that do not contain such periods, the courts could solve the problems of inconsistency and nonuniformity that plague the state borrowing approach.

While the no-limitation period alternative does have these advantages, it generally runs counter to the American system of law and is not likely to

163. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239-44 (1985).

164. *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960).

165. See 18 U.S.C. § 3281 (1982) (no time limitation on prosecution for capital criminal offenses).

166. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 256-58 (1985) (Stevens, J., dissenting).

167. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239-44 (1985). Justice Scalia has also contended that if no appropriate state limitation period exists, a court should not apply any period. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2774, 97 L. Ed. 2d 121, 142 (1987) (Scalia, J., concurring).

168. 470 U.S. 226 (1985).

169. Indian Trade & Intercourse Act, ch. 19, § 8, 1 Stat. 329 (1793).

170. *Oneida*, 470 U.S. at 239-44.

171. *Id.* The Court did not consider whether the equitable doctrine of laches could apply to the case since the petitioners did not assert the defense on appeal. *Id.* at 244.

172. See Special Project, *supra* note 2, at 1015.

173. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2774, 97 L. Ed. 2d 121, 143 (1987) (Scalia, J., concurring).

become a widely used alternative.¹⁷⁴ American courts have long recognized the important purposes behind limitation periods.¹⁷⁵ Such periods, although they may appear harsh in any particular case, benefit society, the defendant, and the judicial system.¹⁷⁶ Moreover, given the long history of judicial reliance on limitation periods, Congress likely did not intend by its failure to include a limitation period for a given federal statute that a limitation period should not exist under the federal act.¹⁷⁷

B. Doctrine of Laches

Given the judicial reluctance to omit any use of a limitation period, one must analyze the alternatives to the state borrowing approach that do provide time limitations for federal causes of action. One such approach consists of the use of laches.¹⁷⁸ Similar to statutes of limitation, laches may deny relief to a litigant who has delayed bringing his cause of action.¹⁷⁹ Unlike statutory limitations, however, laches do not define specific time periods in which a plaintiff must commence his suit. Instead, a court looks to equitable considerations to determine whether the plaintiff has unreasonably delayed bringing his action and, if so, if such delay prejudiced the defendant.¹⁸⁰

Traditionally the Supreme Court has restricted the use of laches to suits in equity.¹⁸¹ In *Holmberg v. Armbrecht*¹⁸² the Supreme Court declared that the laches doctrine applied to actions arising under federal statutes when Congress had not specified limitation periods and the only remedies were traditionally in equity.¹⁸³ In 1977 the Court seemed to indicate that the laches doctrine could apply to legal as well as equitable actions.¹⁸⁴ The Court in *Occidental Life Insurance Co. v. EEOC*¹⁸⁵ refused to apply a statutory limitation period to an action that the Equal Employment Opportunity Commission brought under title VII of the Civil Rights Act of 1964.¹⁸⁶ The Court indicated however, that federal courts may bar such an action if delays by the Equal Employment Opportunity Commission significantly prejudice a defendant's ability to defend himself.¹⁸⁷ Such a standard appears

174. See *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985); *Campbell v. Haverhill*, 155 U.S. 610, 616-17 (1895).

175. *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

176. See *supra* notes 19-32 and accompanying text.

177. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); Special Project, *supra* note 2, at 1044-45.

178. *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946).

179. *Id.* at 396; Note, *supra* note 27, at 904.

180. *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951); Note, *supra* note 6, at 1141.

181. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 & n.16 (1985).

182. 327 U.S. 392 (1946).

183. *Id.* at 395-97.

184. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977); Note, *supra* note 6, at 1140-46.

185. 432 U.S. 355 (1977).

186. *Id.* at 372.

187. *Id.* at 373.

similar to the traditional laches defense.¹⁸⁸ A recent Supreme Court case suggests, however, that the Court has not resolved the issue of whether a defendant may assert such a defense in an action at law.¹⁸⁹

The important remaining question asks not whether courts may allow the laches defense in legal as well as equitable actions, but whether the use of laches provides an effective alternative to the state borrowing approach. Such a determination must be made in light of the purposes of limitation periods. While the use of the laches defense prevents some of the harsh results that occasionally arise in statute of limitation cases, such a discretionary approach also undermines the principal objectives of limitation periods.¹⁹⁰ The use of a case-by-case analysis for situations involving the laches defense has the potential to create even greater inconsistency and nonuniformity in the federal courts than exists now.¹⁹¹ By failing to provide a specific time period after which a claimant may no longer bring suit, the laches defense deprives the defendant of his period of repose.¹⁹² Similarly, under laches, society is unable to predict with certainty when the claim against an individual or property becomes invalid.¹⁹³ Finally, when compared to statutes of limitation, the use of laches creates a burden on the court system since the case-by-case approach requires added expenditure of a court's limited resources. Under laches a court must determine not only whether the plaintiff has unreasonably delayed, but also whether the delay prejudiced the defendant's defense.¹⁹⁴

C. Borrow a Federal Limitation Period

In cases in which the federal statute does not specify a limitation period, federal courts could borrow a time restriction from a related federal, rather than a state, cause of action.¹⁹⁵ The Supreme Court has resorted to this federal borrowing approach in at least three cases.¹⁹⁶ In *McAllister v. Magnolia Petroleum Co.*¹⁹⁷ the Court applied a federal limitation period to an unseaworthiness claim under general admiralty law that did not specify a limitation period.¹⁹⁸ In this case the plaintiff, a crew member of a ship, sought damages for injuries suffered when he fell down a stairway on the ship. He

188. Note, *supra* note 6, at 1141-46.

189. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 & n.16 (1985) ("application of the equitable defense of laches in an action at law would be novel indeed.").

190. Note, *supra* note 6, at 1143-44.

191. Note, *supra* note 27, at 904.

192. Note, *supra* note 6, at 1143-44.

193. *Id.*

194. *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951); Note, *supra* note 6, at 1143-44.

195. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983); Note, *supra* note 27, at 914-18; Note, *supra* note 6, at 1133-34.

196. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958). One commentator has suggested that in implied federal causes of action, the justification for the federal borrowing approach appears stronger since Congress has not had the chance to consider setting limitation periods. Note, *supra* note 6, at 1133-34.

197. 357 U.S. 221 (1958).

198. *Id.* at 225.

filed suit under the Jones Act¹⁹⁹ for negligence and under general maritime law for unseaworthiness. The Court chose to apply the federal limitation period specified in the Jones Act to the unseaworthiness claim rather than using a limitation period from an analogous state cause of action.²⁰⁰ The Court reasoned that since the law required the plaintiff to file both actions in the same suit,²⁰¹ application of a two-year state statute of limitation for the unseaworthiness claim stood contrary to the congressional intent specified in the three-year limitation period under the Jones Act.²⁰²

Similarly in *DelCostello v. International Brotherhood of Teamsters*²⁰³ the Court borrowed a federal rather than a state limitation period.²⁰⁴ The Court held that the federal limitation period for making charges of unfair labor practices to the National Labor Relations Board²⁰⁵ applies when employees bring actions alleging a breach of a collective-bargaining agreement by an employer and a breach of a duty of fair representation by a union.²⁰⁶ The Court declared that when federal law provides a better analogy than state law, and the federal policies underlying the federal cause of action support the use of this federal analogy, then the court may borrow an analogous federal rather than state limitation period.²⁰⁷

In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*²⁰⁸ the Court recently applied the analysis developed in *DelCostello* to the area of civil enforcement actions for RICO violations.²⁰⁹ The Court held that a federal act, the Clayton Act,²¹⁰ which contains a limitation period, represents a better analogy than any available state cause of action.²¹¹ The Court reasoned that the many similarities between RICO and the Clayton Act, as well as the need for a uniform federal limitation period due to the often multistate nature of RICO claims, which create uncertainty, expensive litigation, and the danger of forum shopping, supported the uniform application of the limitation period in the Clayton Act to all civil RICO causes of action.²¹²

The use of a federal borrowing approach potentially may eliminate many of the disadvantages of the state borrowing approach. One major criticism of the state borrowing method for federal causes of action argues that states do not develop their limitation periods based on national interests.²¹³ Congress,

199. 46 U.S.C. § 688 (1982). The Jones Act contains a three-year limitation period. *Id.*

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

201. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321-22 (1927).

202. *McAllister*, 357 U.S. at 224-26.

203. 462 U.S. 151 (1983).

204. *Id.* at 169-72.

205. 29 U.S.C. § 160(b) (1982).

206. *DelCostello*, 462 U.S. at 169-72.

207. *Id.* at 171-72.

208. 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987).

209. *Id.* at 2762-64; 97 L. Ed. 2d at 128-30.

210. 15 U.S.C. § 15 (1982).

211. *Malley-Duff*, 107 S. Ct. at 2764, 97 L. Ed. 2d at 130.

212. *Id.* at 2764-67, 97 L. Ed. 2d at 130-34. The Court recognized that "the federal policies that lie behind RICO and the practicalities of RICO litigation" support the adoption of a uniform federal limitation period. *Id.* at 2767, 97 L. Ed. 2d at 134.

213. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977).

on the other hand, considers national concerns when formulating federal statutes. The use of a limitation period from a related federal cause of action, therefore, might tend to reflect federal policy concerns more accurately.²¹⁴ Moreover, the Supreme Court could solve the problems of inconsistency and nonuniformity for any particular federal cause of action by declaring that a limitation period from an analogous federal statute should apply.²¹⁵ While the federal borrowing approach contains these potential advantages, it also possesses several limitations. Borrowing from analogous federal statutes will solve the nonuniformity and inconsistency problems only if the Supreme Court makes the selection of the particular analogous federal statute.²¹⁶ If the choice is left solely to the lower courts then, as under the state borrowing approach, different characterizations of the same cause of action could result in the borrowing of different federal limitation periods.²¹⁷ The major problem with the federal borrowing approach arises when an analogous federal cause of action does not exist. Even if such a cause of action does exist, given the many federal statutes that do not specify limitation periods, courts may be unable to find federal limitation periods to borrow.²¹⁸

D. General Federal Statute of Limitation

Under the state borrowing approach, a court solves the problem of not finding an analogous state claim from which to borrow a limitation period by adopting the state's general statute of limitation period. Such a catch-all provision enables the court to apply a limitation period to any cause of action.²¹⁹ Given the utility of general limitation periods, the next alternative to consider is whether the federal courts could adopt a general federal statute of limitation to apply in actions when no close federal analogies exist. A

214. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983).

215. Note, *A Limitation on Actions*, *supra* note 118, at 773.

216. *Cf.* Note, *supra* note 27, at 905 (only have consistency if Supreme Court chooses uniform limitation period).

217. The federal, as opposed to the state, borrowing approach may reduce inconsistencies because courts may select from fewer federal limitation periods. Moreover, under the federal approach the federal courts would be looking under the same federal law for any given cause of action, whereas in the state approach each forum state would look at its own source law. On the other hand, the federal approach may increase inconsistencies because, unlike in many of the states, there remains no general federal statute of limitation to which the court may refer if no close state analogy exists. *See* Special Project, *supra* note 2, at 1081. Justice Scalia has also argued that selecting appropriate federal limitation periods may be more difficult than selecting state limitation periods, as federal limitation periods apply to particular federal statutes while many state limitation periods apply to general categories of actions such as contract actions. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2773-74, 97 L. Ed. 2d 121, 141-42 (1987) (Scalia, J., concurring).

218. Special Project, *supra* note 2, at 1081. In selecting a limitation period from a particular federal statute, a court must also determine whether to adopt any subsidiary rules that the statute contains. *West v. Conrail*, 107 S. Ct. 1538, 1541-42, 95 L. Ed. 2d 32, 37-38 (1987). In *West* the Court selected the limitation period from an analogous federal statute, but declined to follow the statute's related service provisions by stating that the Federal Rules of Civil Procedure provided service rules and that in borrowing limitation periods the courts may "borrow no more than necessary" to "close interstices in federal law." *Id.* at 1542, 95 L. Ed. 2d at 38.

219. Special Project, *supra* note 2, at 1081.

general statute of limitation defines limitation periods for "all actions and proceedings within broad classes established by the statute."²²⁰ Several commentators have suggested the use of such limitation periods for federal actions that do not specify limitation periods.²²¹ While such an approach would create uniformity in the federal system, at least one scholar has argued that different federal causes of actions should have different limitation periods.²²²

Presently, beyond a few limited exceptions,²²³ no such general federal statutes of limitation exist for civil actions.²²⁴ Section 2462 of title 28²²⁵ had potential as a general statute of limitation, but the Supreme Court has construed the statute narrowly.²²⁶ Given the fact that Congress has not enacted any general limitation provisions since section 2462, and that it continues to enact federal statutes without limitation periods, Congress appears unlikely to adopt a general statute of limitation.²²⁷ The next question is whether the courts could adopt such a general limitation period.²²⁸ This question is part of a much larger issue dealing with whether the courts may judicially create a limitation period when Congress has not provided for such a period in the statute.

E. A Judicially Created Limitation Period

The fifth alternative available to a court when confronted with a federal statute that does not specify a limitation period is simply to invent an applicable period judicially.²²⁹ Judicial creation of uniform limitation periods has the potential to solve the problems of nonuniformity and inconsistency inherent in the state borrowing approach.²³⁰ Such a solution will not occur, however, unless the Supreme Court selects the limitation periods.²³¹ If lower courts are free to create limitation periods, inconsistency and

220. 5 F. POORE & E. KOEBER, *supra* note 3, § 15.519.

221. Note, *A Limitation on Actions*, *supra* note 118, at 771; Note, *supra* note 6, at 1146-47; Note, *A Call for Uniformity*, *supra* note 118, at 73-74.

222. *Developments in the Law*, *supra* note 21, at 1267-68; *cf.* *Wilson v. Garcia*, 471 U.S. 261, 280-87 (1985) (O'Connor, J., dissenting) (Court should not adopt a uniform characterization for all § 1983 actions).

223. *See, e.g.*, 28 U.S.C. § 2401 (1982) (actions against the United States); *id.* §§ 2415-2416 (1982 & Supp. III 1985) (certain actions by the United States); *id.* § 2462 (1982) (actions for penalties, fines, or forfeitures).

224. 5 F. POORE & E. KOEBER, *supra* note 3, § 15.519. For noncapital criminal offenses, Congress has provided a general limitation period of five years. 18 U.S.C. § 3282 (1982).

225. 28 U.S.C. § 2462 (1982) provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." *Id.*

226. *See, e.g.*, *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (limit to recoveries for violations of public laws); *O'Sullivan v. Felix*, 233 U.S. 318, 322-25 (1914) (not apply to remedial actions); *Brady v. Daly*, 175 U.S. 148, 155-58 (1899) (limit to penal actions).

227. Note, *supra* note 6, at 1146-47.

228. Note, *A Limitation on Actions*, *supra* note 118, at 773; Note, *supra* note 6, at 1146-47.

229. Note, *supra* note 27, at 905; Note, *supra* note 6, at 1131-32.

230. Note, *A Limitation on Actions*, *supra* note 118, at 773; Note, *A Call for Uniformity*, *supra* note 118, at 73-74.

231. Note, *supra* note 27, at 905.

nonuniformity will still exist in the system. Moreover, such an approach could aggravate the problems of the present approach. Currently, litigants can predict that the courts will most likely use the state borrowing approach. Although litigants have to guess what particular state law will apply, they at least know the probable sources of the limitation period. The lower courts' choices or creations of any limitation periods for given federal causes of action will restrict the ability of litigants to predict such periods.²³²

Despite the potential for uniformity inherent in the Supreme Court creation of limitation periods, the Court has appeared reluctant to invent limitation periods for federal statutes that do not specify such periods.²³³ In the vast majority of cases the Court does not even discuss this option. Instead, the Court's usual approach considers congressional silence in not providing a limitation period as a reflection of congressional intent that the courts should follow their traditional practice of borrowing limitation periods from the forum state.²³⁴ In *UAW v. Hoosier Cardinal Corp.*²³⁵ a union requested that the Court adopt a uniform limitation period for suits arising under section 301 of the Labor Management Relations Act.²³⁶ The Court refused to create such a period on the basis that judicial invention stood contrary to congressional intent.²³⁷ Moreover, the Court added that while the use of the state borrowing approach would preclude uniformity, the need for such uniformity in this case did not justify judicial legislation.²³⁸

F. Conflict-of-Law Principles

A final alternative to the state borrowing approach advocates the use of uniform conflict-of-law principles to determine which state law should apply when the relevant facts occur outside the forum state.²³⁹ Under the traditional state borrowing approach a federal court looks to the forum's choice

232. *Id.*

233. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); Note, *supra* note 11, at 745.

234. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966). The Court held that if Congress disagrees with the selection of limitation periods then it can enact a uniform federal period, as Congress did in the Patent Act, 35 U.S.C. § 286 (1982). *Hoosier*, 383 U.S. at 704.

235. 383 U.S. 696 (1966).

236. Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185 (1982).

237. *Hoosier*, 383 U.S. at 703-04.

238. *Id.* at 701-05. The Court did indicate that certain cases might require judicial creation of a limitation period. *Id.* at 701; see *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971) ("A special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations."). Dissenting in *Hoosier*, Justice White argued that courts in the past created limitation periods, and that the real issue in the case was whether to create one uniform period or fifty separate periods. *Hoosier*, 383 U.S. at 713 (White, J., dissenting). White suggested that the Court adopt a single limitation period based on relevant federal and state statutes. *Id.* at 713-14. Others have suggested that the creation of limitation periods is essentially a legislative function allocated to Congress. Under such a theory the courts may not create limitation periods because neither Congress nor the Constitution has delegated this power to the courts. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 234 (1958) (Whittaker, J., dissenting); Note, *supra* note 6, at 1132.

239. Hill, *supra* note 9, at 102 n.164.

of limitation periods.²⁴⁰ If the forum has enacted a borrowing statute, the court may be able to adopt a limitation period of a foreign state.²⁴¹ In many cases, however, the borrowing statute will not allow adoption of the foreign state provision if the foreign provision runs longer than the forum's period, or if the plaintiff resides in the forum state.²⁴² The fact that different states have different borrowing provisions while some states do not have such provisions merely adds inconsistency to the traditional approach.²⁴³

A more fundamental question than whether the courts should adopt forum state borrowing statutes is whether the federal courts may bypass the forum state's law and look directly to the limitation periods of the state or states where the cause of action arose. The Supreme Court has never declared that the courts must adopt the forum's choice of limitation periods in federal actions arising outside the forum state.²⁴⁴ In fact, in *UAW v. Hoosier Cardinal Corp.*²⁴⁵ the Court appeared to reserve this question for future review.²⁴⁶

In *Kellermeyer v. Blue Flame Gas Corp.*²⁴⁷ the Supreme Court had an opportunity to resolve this question, but denied the petition for certiorari. In *Kellermeyer* the plaintiff brought suit in Texas for a federal cause of action under the Emergency Petroleum Allocation Act.²⁴⁸ The act does not contain a limitation period, and all of the relevant events, except for the filing of the complaint, occurred in Indiana and Ohio. The district court and the Temporary Emergency Court of Appeals applied the limitation period of the forum state.²⁴⁹ Given that the choice of a federal statute of limitation ultimately becomes a federal question,²⁵⁰ federal law principles should govern the selection of either the law of the forum state or the law of the state where all the relevant events occurred.²⁵¹ Adoption of a rule applying the limitation period of the state where the cause of action arose appears in accord

240. See *Campbell v. Haverhill*, 155 U.S. 610, 616-19 (1895).

241. See *supra* notes 143-144 and accompanying text.

242. See *supra* notes 147-153 and accompanying text.

243. See *supra* note 145 and accompanying text.

244. See H. HART & H. WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 829 n.7 (2d ed. 1973); Hill, *supra* note 9, at 80.

245. 383 U.S. 696 (1966).

246. *Id.* at 705 n.8. In a footnote the Court found "no occasion to consider whether such a choice of law should be made in accord with the principle of *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, or by operation of a different federal conflict of laws rule." *Id.*

247. 797 F.2d 983 (Temp. Emer. Ct. App.), *cert. denied*, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986).

248. 15 U.S.C. §§ 751-760(h) (1982).

249. *Kellermeyer*, 797 F.2d at 985-86. The court found that application of a statute of limitation in an action at law occurs as a procedural matter, and thus the law of the forum should control. *Id.* at 985. The court also asserted that the longer Indiana limitation period would be more likely to interfere with the federal policies underlying the federal statute than the shorter Texas limitation period. *Id.* at 986.

250. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n.13 (1983).

251. *But see Kellermeyer*, 797 F.2d at 985 (if classify statutes of limitation as procedural then forum rule should apply). Commentators, however, have criticized the procedure/substantive distinction. A full discussion of this distinction falls beyond the scope of this Comment. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-10 (1945); A. CERVERA, *supra* note 143, at 4-8; Vernon, *supra* note 145, at 288-93.

with the reasonable expectations of the parties involved.²⁵² Such an approach, therefore, potentially supports the purposes underlying limitation periods.²⁵³ Moreover, the approach would create uniformity in the federal court system since litigants could expect equal limitation periods for their federal causes of action, irrespective of where plaintiffs file suit.²⁵⁴ The conflict-of-laws approach would help solve some of the inconsistencies that arise in cases in which the relevant facts occur outside the forum state. Such an approach, however, is simply another type of a state borrowing approach and thus is subject to the problems inherent in the general approach. Such problems include nonuniformity between states and inconsistency within states arising from federal courts' inconsistent characterizations.²⁵⁵ Moreover, such an approach could lead to an added expenditure of judicial resources to determine the applicable state law. Instead of having a rule that simply requires borrowing from the forum state, the conflict-of-laws approach would require the courts to choose the state whose law should apply to the cause of action and then select the applicable law from that state. Courts could find difficulty in administering the conflict-of-law approach in cases in which different elements of a cause of action occur in different states.²⁵⁶

V. PROPOSALS TO INCREASE UNIFORMITY AND CONSISTENCY

The traditional approach to defining limitation periods for federal statutes that do not specify such periods has merely created uncertainty and nonuniformity in the present system. Congress may alleviate these problems by enacting specific limitation periods for each federal statute. Such a system would bind federal courts to specific limitation periods and in doing so ensure uniformity and predictability within the system.²⁵⁷ These congressionally supplied limitation periods would control over any conflicting state periods.²⁵⁸ In light of over 150 years of the state borrowing approach, and the continuing reluctance of Congress to specify limitation periods for many federal statutes, however, Congress is not likely to enact specific federal limitation periods for all statutes.²⁵⁹

A more realistic alternative to the enactment of a specific limitation period for each federal statute that does not specify such a period is for Congress to enact a general limitation period for such statutes.²⁶⁰ Such an approach also

252. Hill, *supra* note 9, at 102 n.164.

253. See *supra* notes 19-32 and accompanying text.

254. Blume & George, *supra* note 36, at 995; Special Project, *supra* note 2, at 1104-05.

255. In addition, the problem of determining the source of law for subsidiary issues such as tolling would still exist under the conflicts of law approach. For a discussion of the determination of the choice of law for subsidiary issues, see *supra* note 92.

256. See *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2766, 97 L. Ed. 2d 121, 132 (1987).

257. See *supra* notes 36-39 and accompanying text.

258. See *supra* notes 37-38 and accompanying text.

259. Special Project, *supra* note 2, at 1105.

260. Blume & George, *supra* note 36, at 992-93; Special Project, *supra* note 2, at 1105; Note, *supra* note 6, at 1146-47; Note, *supra* note 11, at 745.

would foster uniformity and certainty in the federal court system. A disadvantage of such an approach arises in that different causes of action may deserve different limitation periods.²⁶¹ If Congress disagreed with the application of the general limitation period to a specific federal cause of action, however, it could always enact a specific limitation period for that particular action.²⁶² Nearly two hundred years ago Congress enacted a seemingly general limitation period,²⁶³ but the courts construed it narrowly.²⁶⁴ Given that Congress has not responded since these cases occurred over seventy years ago, Congress apparently will not adopt such an approach now.²⁶⁵

If Congress will not take steps to solve the problems of inconsistency and uniformity in the federal courts, then the courts should provide guidance in this area.²⁶⁶ In light of congressional reluctance to mandate specific or general limitation periods 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.²⁶⁷ The courts have reluctantly used such an approach in the past, and give no clear indications that they intend to change their course of action.²⁶⁸ The courts appear willing, however, to accept a uniform federal limitation period provided that a federal analogue and a need for uniformity exist.²⁶⁹ Such a rule depends on the availability of analogous federal statutes that contain limitation periods. Given that Congress appears unlikely to adopt uniform limitation periods, and that the courts may not find analogous federal statutes, alternatives do exist to bring more certainty to the present system. First of all, the Supreme Court should extend its analysis developed in *Wilson v. Garcia*²⁷⁰ and *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*²⁷¹ to other cases. In *Garcia* the Court adopted a uniform characterization system for federal causes of action.²⁷² While such an approach does not solve the problems of differences between states, the approach potentially creates predictability within the circuits and consistency within the states. Even if uniform characterization for federal causes of actions existed, however, the circuit courts might not adopt consistent characterizations in all cases. Inconsistency could still thrive in cases when relevant factors occur outside the forum states. The source of uncertainty in these cases is inconsistent borrowing

261. See *supra* note 222 and accompanying text.

262. See *supra* note 234.

263. Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 696 (1799) (current version at 28 U.S.C. § 2462 (1982)).

264. See *supra* note 226.

265. Note, *supra* note 6, at 1146-47.

266. Note, *A Limitation on Actions*, *supra* note 118, at 773.

267. See *supra* notes 233-238 and accompanying text.

268. See *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158-62 (1983) (alternatives to state borrowing approach consist of borrowing related federal limitation periods or applying equitable principles such as laches).

269. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121, 133-34 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983).

270. 471 U.S. 261 (1985).

271. 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987).

272. 471 U.S. at 271-76.

provisions in the various states. To solve these problems, the federal courts should adopt uniform conflict-of-law principles,²⁷³ or adopt a single federal limitation period for each cause of action as in *Malley-Duff*.²⁷⁴ Under these principles, the federal courts would not treat parties differently merely because they filed in a different forum state. Plaintiffs suing in federal court under the same federal statute should receive equal treatment.

By applying uniform characterization rules and conflict-of-law principles, courts could dramatically decrease the uncertainty and inconsistency in the present system.²⁷⁵ The reduction in litigation by the application of uniform characterization rules should outweigh the increase in litigation due to use of conflict-of-law principles. Under such a system of uniform characterization and conflict-of-law principles, while courts might not treat litigants in different states similarly, at least consistency would exist within the states. More importantly, parties as well as society and the judicial system could predict with more confidence than under the present system the applicable limitation period for a given federal cause of action. Such an approach appears essential to the objectives behind limitation periods.

VI. CONCLUSION

Given that Congress often enacts statutes without specifying limitation periods, courts frequently must decide whether to adopt limitation periods for these actions, and if so, what should be the source of such periods. Recognizing the importance of limitation periods to defendants, society, and the judicial system, the courts rarely fail to supply a limitation period for a cause of action. The traditional approach allows courts to adopt a limitation period from the forum state or a foreign state under a borrowing statute, unless such a period conflicts with the federal policy underlying the federal statute. Theoretically, such an approach establishes a straightforward procedure for courts to determine limitation periods for federal causes of action when statutes do not specify such periods. In practice, however, such an approach produces inconsistency and nonuniformity. Different states possess different limitation periods and, more importantly, courts inconsistently characterize federal causes of action. Moreover, when relevant facts occur outside the forum state the traditional approach's reliance on forum state rules and inconsistent borrowing provisions adds to the uncertainty in the present system. As a result, courts in different, as well as the same, states apply different limitation periods to the same federal cause of action.

This Comment has presented and evaluated several alternatives to the traditional approach. Each consists of several advantages and disadvantages that courts should consider when invoking these alternatives. In addition,

273. Cf. A. CERVERA, *supra* note 143, at 134-36 (suggests adoption of uniform borrowing statute); Blume & George, *supra* note 36, at 994-95 (same); Vernon, *supra* note 145, at 323-28 (same).

274. *Malley-Duff*, 107 S. Ct. at 2767, 97 L. Ed. 2d at 133-34.

275. Problems with respect to the adoption of subsidiary issues related to limitation periods would still remain unless the Supreme Court formulates a predictable approach to resolving such issues. See *supra* notes 92 & 218.

the Comment has suggested methods to increase uniformity and consistency within the federal courts. The optimal solution requires congressional limitation periods. If Congress fails to supply such periods, then the Supreme Court should adopt either specific or general limitation periods. Some commentators and legislators may deem judicial creation of such periods unconstitutional or violative of legislative intent. Beyond these drastic approaches, the Comment has suggested methods of improving consistency within the traditional borrowing approach. Adoption of uniform characterization rules and uniform conflict-of-law principles would help eliminate much of the unnecessary inconsistency and uncertainty under the present approach.

