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Jim Greiner

University of Michigan Law School

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NOTE

Federal Common Law and Gaps in Federal Statutes: The Case of ERISA Plan Limitation Periods for Section 502(a)(1)(B) Actions

Jim Greiner

[W]here power of choice [between state and federal law] exists, what are the criteria for its exercise; under what circumstances should a federal substantive rule be prescribed, and when should state law be incorporated?¹

Over thirty-five years ago Professor Paul Mishkin posed his question in what has become a canonical work² in the area of federal common law; the answer to Mishkin's question is not clear today. The lack of set criteria in this area is no doubt due in part to the stunning variety of factual and legal situations in which Mishkin's question can arise. This Note seeks to contribute to the understanding in this field by examining a particular federal common law issue: the validity of clauses within employee benefits plans purporting to set an enforceable limitation period for a cause of action filed under section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA).³ The aim of this Note is thus twofold. Its narrow purpose is to argue that federal courts should enforce ERISA plan limitation periods providing a reasonable length of time for a lawsuit,⁴ and that they should do so regardless of the law of any particular state. The more general project is to develop a framework for deciding when federal courts exercising their federal common lawmaking powers to provide a rule of decision for a particular case should borrow state law or construct a uniform national rule. The framework developed in this Note consists of a series of factors that the Supreme Court has looked to in

1. Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 810 (1957).

2. Supreme Court opinions have cited Mishkin's article numerous times. See, e.g., *Wilson v. Garcia*, 471 U.S. 261, 287 (1985) (O'Connor, J., dissenting); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 160 n.13 (1983); *Ridgway v. Ridgway*, 454 U.S. 46, 70 n.9 (1981); *Burks v. Lasker*, 441 U.S. 471, 476 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 n.19 (1979); *Miree v. DeKalb County*, 433 U.S. 25, 35 (1977) (Burger, C.J., concurring); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 n.9 (1966); *Wheeldin v. Wheeler*, 373 U.S. 647, 666 (1963).

3. 29 U.S.C. § 1132(a)(1)(B) (1988).

4. The caveat requiring a plan limitation period to provide a reasonable time for a lawsuit comes from both the common law and the purposes of ERISA § 502(a)(1)(B). See *infra* notes 202-07, 215-20 and accompanying text.

past cases when answering the question Mishkin posed. These factors should provide partial guidance to federal courts confronting federal common law questions in statutory contexts other than ERISA section 502(a)(1)(B) lawsuits.

INTRODUCTION

ERISA regulates pension and welfare plans adopted for the benefit of employees and their dependents.⁵ Congress sought to protect the interests of participants in employee benefits plans⁶ by regulating the administration of such plans and by providing employee-beneficiaries a variety of remedies to assure compliance with the statutory framework.⁷ As part of this system of remedies, ERISA section 502(a)(1)(B) grants plan participants a federal cause of action against the plan to recover wrongfully denied benefits.⁸ Because benefits plans often provide a wide variety of services such as medical insurance, vacation pay, and retirement payments,⁹ the scope of section 502(a)(1)(B) extends to wrongful denial of a large array of benefits.

ERISA provides no statute of limitations applicable to a section 502(a)(1)(B) lawsuit.¹⁰ The Supreme Court has held that "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so."¹¹ That is, federal courts confronting a federal statutory cause of action without a limitation period "close [the] interstices in federal law"¹² or "fill the gap left by Congress,"¹³ and they do so typi-

5. EMPLOYEE BENEFITS COMM., ABA, *EMPLOYEE BENEFITS LAW* 19 (1991).

6. 29 U.S.C. § 1001b(c)(3) (1988).

7. EMPLOYEE BENEFITS COMM., ABA, *supra* note 5, at 17 (citing 29 U.S.C. § 1001b (1988)).

8. Section 502(a)(1)(B) provides, "A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan . . ." 29 U.S.C. § 1132(a)(1)(B) (1988).

9. See 29 U.S.C. § 1002(1)(A) (1988) (defining ERISA-covered welfare plans as plans that provide health and vacation benefits); 29 U.S.C. § 1002(2)(A) (1988) (defining ERISA-covered pension plans as plans that provide retirement benefits).

10. Congress closed similar gaps in federal statutes passed after 1990 with the Judiciary Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5114 (codified as amended at scattered sections of 28 U.S.C. (Supp. III 1991)). The limitation provision of the Judiciary Improvements Act provides, "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658 (Supp. III 1991). This statute does not apply to ERISA § 502(a)(1)(B), which was passed in 1974.

11. *Wilson v. Garcia*, 471 U.S. 260, 266-67 (1985); see also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1974) (citing cases in which the Supreme Court borrowed state limitation periods to apply to federal statutory causes of action). "Local time limitation" in this context means a state statute of limitations.

12. *West v. Conrail*, 481 U.S. 35, 39 (1987).

13. 481 U.S. at 40 n.6.

cally by borrowing a state statute of limitations. In so doing, federal courts construct federal common law¹⁴ by adopting state statutes of limitations as the rule of decision for federal causes of action.¹⁵ Almost all federal circuit courts of appeals have followed this practice for ERISA section 502(a) actions, including lawsuits under section 502(a)(1)(B).¹⁶ The majority of courts considering this limitation issue in the context of a section 502(a)(1)(B) suit have applied the state statute of limitations for actions on a written contract.¹⁷

Almost all federal courts have also borrowed state law¹⁸ to decide the related issue that is the subject of this Note: whether to enforce plan provisions that *modify* the applicable limitation period for a section 502(a)(1)(B) lawsuit.¹⁹ These courts have enforced

14. See *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) (characterizing the borrowing process as an exercise of federal common law construction).

15. 327 U.S. at 395. When a federal court chooses to borrow a state statute of limitations, it first characterizes the essence of the federal cause of action involved; it then decides which state limitation period governs the state cause of action most analogous or similar to the federal action at issue. *Wilson*, 471 U.S. at 268. In performing this analysis, federal courts incorporate the relevant state legislature's judgment as to the proper balance among the competing social interests of repose, increased accuracy in a truth-finding process based on fresh evidence, and preservation of a plaintiff's right to recover for wrongful acts. 471 U.S. at 271.

16. See, e.g., *Johnson v. State Mut. Life Assurance Co.*, 942 F.2d 1260, 1261-62 (8th Cir. 1991); see also James S. Ray, *Overview of ERISA Title I Enforcement: Procedural Aspects*, in 1994 EMPLOYEE BENEFITS LITIGATION: ALI-ABA COURSE OF STUDY MATERIALS NO. C887, at 385, 424-25 (collecting cases). But see *Meagher v. IAM Pension Plan*, 856 F.2d 1418, 1422-23 (9th Cir. 1988) (applying a limitation period contained within ERISA § 413(a)(2), 29 U.S.C. § 1113(a)(2) (1988), without considering the state statute of limitations alternative), *cert. denied*, 490 U.S. 1039 (1989); *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52, 54-55 (3d Cir.) (borrowing the limitation period found in ERISA § 413(a)(2)), *cert. denied*, 474 U.S. 843 (1985). The latter two cases, however, appear to represent aberrations from the law of their circuits. For the more common approach in the Ninth Circuit, see *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512, 516-18 (9th Cir. 1987) (borrowing a state statute of limitations in a suit for unpaid contributions); *Mann v. New England Mut. Life Ins. Co.*, No. C-89-0814 MHP, 1991 WL 631954, at *5 (N.D. Cal. Jan. 25, 1991) (explicitly recognizing the aberrational nature of *Meagher*). For the more common approach in the Third Circuit, see *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179-82 (3d Cir. 1992) (borrowing the most analogous state period for a § 502(a)(1)(B) action in a case decided after *Edwards*).

17. See, e.g., *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194-95 (6th Cir. 1992); *Johnson*, 942 F.2d at 1261-63; *Dameron v. Sinai Hosp.*, 815 F.2d 975, 981 (4th Cir. 1987); *Jenkins v. Local 705 Intl. Bhd. of Teamsters Pension Fund*, 713 F.2d 247, 251-52 (7th Cir. 1983).

18. All references to state law in this Introduction are to the law of the state in which the district court sits. Interstate choice of law problems lurk in the background in this area. See *infra* text accompanying notes 157-58.

19. See, e.g., *Payne v. Blue Cross & Blue Shield*, No. 91-2583, 1992 WL 235537 (4th Cir. Sept. 24, 1992); *Koonan v. Blue Cross & Blue Shield*, 802 F. Supp. 1424 (E.D. Va. 1992); *Davis v. National Maritime Union Pension & Welfare Plan*, 810 F. Supp. 532 (S.D.N.Y. 1992); *Bologna v. National Maritime Union Pension Trust Fund of the Natl. Maritime Union Pension & Welfare Plan*, 654 F. Supp. 637 (S.D.N.Y. 1987); *Moro v. Welfare Plan of the Natl. Maritime Union Pension & Welfare Plan*, No. 84 Civ. 9275, 1985 WL 1896 (S.D.N.Y. July 11, 1985); *Scheirer v. National Maritime Union Pension & Welfare Plan*, 585 F. Supp. 76 (S.D.N.Y. 1984); see also *Chilcote v. Blue Cross & Blue Shield United*, 841 F. Supp. 877 (E.D. Wis. 1993) (upholding a plan limitation period without clearly specifying whether the rule of decision came from state or federal law).

shorter limitation periods contained within plans if state law allowed contractual modification of limitation periods. Those courts looking to state contract law have followed the general sense among federal courts that an ERISA plan is in some ways analogous to a contract,²⁰ and that section 502(a)(1)(B) actions are analogous to actions for breach of contract.²¹ Only one federal district court has disagreed, stating that “[t]hose state courts which have addressed the issue of whether parties may modify a state statute of limitations by a mutually agreed upon contract provision did not reach their conclusions with national interests in mind.”²²

The validity of plan provisions modifying the relevant state limitation period is a matter of great importance to parties litigating a section 502(a)(1)(B) lawsuit. If courts invalidate such provisions, the state statute of limitations for suits on a written contract probably will govern.²³ Such limitation periods typically are long, some

Plan limitation periods typically appear in regulations promulgated by a trustee pursuant to an ERISA trust document. At least one court has held that a trustee to an ERISA benefits plan who inserts a provision in the plan shortening the time limit for a § 502(a)(1)(B) suit exceeds the authority delegated to her by the trust agreement, unless the agreement specifically grants her the power to promulgate rules concerning the time or procedures governing the filing of suits in court. *Bologna*, 654 F. Supp. at 640-41. Another court has held plan limitation periods invalid because plan beneficiaries do not actually “agree” to such regulations when they are issued subsequent to a trust agreement or a collective bargaining agreement that does not explicitly authorize their promulgation. *Davis*, 810 F. Supp. at 534. This Note does not address the delegation or agreement issues.

The following is an example of a typical plan provision providing a shortened limitation period:

“LIMITATION OF ACTION: No action at law or suit in equity may be brought against the plan more than twelve (12) months after the date on which the cause of action accrued with respect to any matter relating to: this Contract; the Plan’s performance under this Contract; or any statement made by employees, officers or directors of the Plan concerning the contract or the benefits available to a Member.”

Payne, 1992 WL 235537, at *1 (quoting the plan at issue in the case).

20. See, e.g., *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (referring to ERISA plan benefits as “contractually authorized benefits”); *Trustees of the Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613, 620 (10th Cir. 1988) (analogizing § 502(a)(1)(B) actions to breach of contract actions).

21. See, e.g., cases cited in *supra* note 19 (borrowing state statutes of limitations for suits on a written contract for § 502(a)(1)(B) actions because such actions are most analogous to suits for breach of a written contract).

22. *Plazzo v. Nationwide Mut. Ins. Co.*, 697 F. Supp. 1437, 1441 (N.D. Ohio 1988), *revd. on other grounds*, No. 88-4016, 1989 WL 154816 (6th Cir. Dec. 22, 1989) (describing grounds for reversal of the case reported without opinion at 892 F.2d 79 (6th Cir. 1989)), *cert. denied*, 498 U.S. 950 (1990). Portions of the *Plazzo* opinion are curious. The language quoted in the text notwithstanding, the *Plazzo* court hinted that it would have enforced the plan provision if a state statute had expressly permitted the parties to a contract to shorten the otherwise applicable limitation period. 697 F. Supp. at 1441. The difficulty with this reasoning is that state legislatures have no greater duty to consider federal interests in making state limitation law than do state courts. Nevertheless, the holding of the case is clear: the court refused to borrow state law that would have upheld the plan limitation period because state decision-making bodies did not decide limitation issues with federal interests in mind.

23. See *supra* note 19 and accompanying text.

of them ten years or more,²⁴ and exposure to potential lawsuits for such lengthy time periods could adversely affect plan management. If courts enforce plan modifications, however, employees will have a shortened opportunity to recover benefits otherwise due under ERISA.²⁵

The question of whether to borrow state law to determine the validity of plan limitation periods is similar to questions facing courts that confront other contractual modifications in suits arising under the Commodity Exchange Act,²⁶ the Federal Emergency Petroleum Allocation Act of 1973,²⁷ and 42 U.S.C. § 1981.²⁸ All of these courts, like most courts considering the question in the context of ERISA section 502(a)(1)(B), have borrowed state law to decide the validity of the contractual limitation periods.

Judges determining the validity of ERISA plan limitation periods must first address the preliminary question of whether to borrow state law or to construct a uniform national rule to decide the issue. If federal courts borrow state law, then the enforceability of plan modifications will vary from state to state, depending on state common and statutory law.²⁹ If courts refuse to borrow state law, they must construct a uniform national rule to decide the validity of plan limitation periods, raising the question of whether this national rule should uphold or invalidate such plan provisions. At least since 1868, federal courts have applied a common law rule that the parties to a contract may shorten the applicable limitation period so

24. See, e.g., ILL. ANN. STAT. ch. 110, para. 13-206 (Smith-Hurd 1984) (providing a statute of limitations of 10 years); IND. CODE ANN. § 34-1-2-2(6) (West 1983) (allowing 10 years for suits on written contracts other than those to pay money); IOWA CODE § 614.1(5) (West Supp. 1994) (providing a statute of limitations of 10 years); KY. REV. STAT. ANN. § 413.090(2) (Michie/Bobbs-Merrill 1992) (providing a statute of limitations of 15 years).

25. See cases cited in *supra* note 19 (illustrating that employees have already lost § 502(a)(1)(B) lawsuits because of their failure to file within the time specified by plan limitation periods).

26. 7 U.S.C. §§ 1-26 (1988); see *Cange v. Stotler & Co.*, 826 F.2d 581 (7th Cir. 1987).

27. Pub. L. No. 93-159, 87 Stat. 627 (expired Sept. 30, 1981); see *Reynolds Indus. v. Mobil Oil Corp.*, 618 F. Supp. 419 (D. Mass. 1985).

28. 42 U.S.C. § 1981 (1988); see *Taylor v. Western & S. Life Ins. Co.*, 966 F.2d 1188 (7th Cir. 1992).

29. Some states have statutes explicitly allowing the parties to a contract to modify the limitation period for a lawsuit. See, e.g., N.Y. CIV. PRAC. L. & R. 201 (McKinney 1990). In other states, state common law provides that courts should enforce a modification provision so long as no statute says otherwise and so long as the contract's limitation period provides a reasonable length of time for suit. See, e.g., *Ferguson v. Order of United Commercial Travelers of Am.*, 821 S.W.2d 30 (Ark. 1991) (holding that Arkansas state common law allows the parties to shorten the limitation period by contract). A third group of states have statutes prohibiting courts from enforcing any contractual provision shortening a limitation period. See, e.g., ALA. CODE § 6-2-15 (1975); FLA. STAT. ch. 95.03 (1993); MISS. CODE ANN. § 15-1-5 (1972); MONT. CODE ANN. § 28-2-708 (1985); OKLA. STAT. ANN. tit. 15, § 216 (West 1993); S.D. CODIFIED LAWS ANN. § 53-9-6 (1990); see also U.C.C. § 2-725(1) (1989) (prohibiting the parties, in a contract for the sale of goods, from providing for a contractual limitation period shorter than a year).

long as no statute provides otherwise and so long as the contract's modified period provides a reasonable length of time for suit.³⁰ If federal courts apply this common law rule to ERISA actions, then courts must enforce reasonable plan limitation periods; if the rule does not apply, such modifications may be held invalid.

This Note argues that federal courts should adopt a uniform national rule that upholds plan provisions modifying the limitation period for a section 502(a)(1)(B) action. Part I examines the reasoning of those courts that have borrowed state law to determine the validity of modifications of the limitation period applicable to actions arising under ERISA section 502(a)(1)(B) and under other federal statutes. Part I argues that those courts may have incorrectly characterized the validity of plan limitation periods as an issue of limitation law. As a consequence of this characterization, those courts have followed the Supreme Court's rule that, when borrowing a state's statute of limitations, federal courts should also borrow the state's law regarding the "overtones and details" of the limitation period.³¹ Part I argues, however, that the validity of contractual limitation periods is *not* an overtone or detail of a statute of limitations, and thus that federal courts have erroneously applied the overtones or details principle as a justification for borrowing state law on the modification issue.

The next two Parts then examine other sources to determine whether — and how — courts should enforce plan modifications of applicable state limitation periods. Part II argues that the purpose behind the preemption of state law effectuated by ERISA section 514(a)³² suggests that federal courts should formulate a uniform national rule without reference to the law of any particular state. Because — as Part II also shows — there is reason to think that section 514(a) does not fully dispose of the issue, Part III looks to principles of federal common law for further support. Specifically, Part III identifies a list of factors that courts should consider when deciding whether to borrow state law in a suit arising under a federal statute, then applies these factors to the question of the validity of plan limitation periods. These principles lead to the simultaneous conclusions that (i) federal courts should adopt a uniform national rule governing the validity of plan limitation periods, and (ii) that this rule should declare reasonable plan limitation periods valid and enforceable.

30. See *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947); *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386 (1868); cf. *Thompson v. Phenix Ins. Co.*, 136 U.S. 287, 297-98 (1890) (stating that clauses limiting the time to bring an action are valid contractual stipulations).

31. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975); see *infra* notes 48-50 and accompanying text.

32. 29 U.S.C. § 1144(a) (1988).

Finally, Part IV rejects concerns that the rule recommended in Part III conflicts with the purposes or policies of ERISA. In particular, Part IV argues that the federal court habit of relying on pre-existing common law to fill in gaps in federal statutes suggests that a similar practice in this instance is unlikely to conflict with Congress's intent. Furthermore, Part IV concludes that upholding plan limitation periods is consistent with congressional intent even if enforcing such periods causes some meritorious section 502(a)(1)(B) claims to fail.

I. CHARACTERIZATION OF THE MODIFICATION ISSUE

This Part argues that those federal courts borrowing state law to decide the validity of plan limitation periods have erroneously characterized the issue as one of limitation law. The argument proceeds in three steps. Section I.A outlines the basic history and modern structure of the borrowing doctrine as articulated by the Supreme Court. This doctrine dictates that courts should borrow state law regarding the "overtones and details" of a limitation period. Section I.B concludes that federal courts borrowing state law to decide the validity of contractual limitation periods in the context of federal statutory causes of action may have followed the borrowing practice because they consider modification to be an overtone or detail of a state statute of limitations. Section I.C, however, relies on analogous Supreme Court precedent to argue that the validity of contractual limitation periods is *not* an overtone or detail of a state statute of limitations.

A. *The History and Basic Structure of the Borrowing Doctrine*

This section briefly reviews the history and structure of the federal court practice of borrowing state limitation law. It demonstrates that federal courts borrow state statutes of limitations because of their desire to incorporate some legislative judgment on the proper balance of the values of repose, accuracy in the fact-finding process, and the plaintiff's right to recover. Federal courts also borrow related state principles of tolling, application, and revival because state doctrines in these areas are inseparably related to the state statute of limitations itself. The impetus to borrow state law on these related principles stems from the same source as the desire to borrow state statutes of limitations, namely, a desire to incorporate a legislative judgment balancing certain values in a context closely analogous to the case before the federal court.

1. *The Borrowing Doctrine: State Statutes of Limitations*

Federal courts in the 1800s and early 1900s applied state limitation periods to federal lawsuits not because they followed a federal

common law doctrine of borrowing, but rather because they felt bound to do so. The reason courts felt so bound is a matter of dispute. Some courts explicitly relied on the Rules of Decision Act, which requires federal courts to enforce state laws "in cases where they apply."³³ Statutes of limitations were one type of a large variety of state rules that federal courts believed the Rules of Decision Act required them to follow.³⁴

The Supreme Court's holding in *Erie R.R. v. Tompkins*³⁵ effectively ended the force of this rationale. In *Erie*, the Court held that the Rules of Decision Act was merely declaratory on the issue of whether federal courts should apply federal common law or state law in diversity cases; the Constitution, and not the Act, makes state laws binding in the federal courts.³⁶

In *Holmberg v. Armbrrecht*,³⁷ the Supreme Court announced the Court's modern borrowing principle: "[T]he silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."³⁸ *Holmberg* marks a fundamental shift in thinking about when and why federal courts should borrow state limitation law to apply to federal causes of action. If the force of state limitation periods depends only on a federal policy of applying such periods as part of the federal courts' prudential duty to "fashion[] remedial details where Congress has not spoken,"³⁹ then other federal policies might preclude federal courts from applying state limitation law. After *Holmberg*, federal court decisions spoke

33. 28 U.S.C. § 1652 (1988); see, e.g., *Campbell v. Haverhill*, 155 U.S. 610, 614-17 (1895); *McCluney v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830).

34. See 155 U.S. at 617-19 (listing state rules considered binding on federal courts).

35. 304 U.S. 64 (1938).

36. 304 U.S. at 71-80. Responding to *Erie*'s construction of the Rules of Decision Act, Justice Scalia has interpreted the early cases stating that federal courts were bound to apply state limitation periods as holding that state law applied of its own force: "[S]tate statutes of limitations whose terms appear to cover federal statutory causes of action appl[ie]d as a matter of state law to such claims . . ." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 161 (1987) (Scalia, J., concurring) (emphasis added). Thus before *Erie*, either because of the Rules of Decision Act or because of an inherent power of state legislatures to bind federal courts, state limitation periods applied directly to federal statutory causes of action.

Justice Scalia's view that state statutes of limitations apply with binding force upon federal courts is curious, given the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and traditional attitudes about the ability of state law to affect the federal courts in suits arising under federal statutes. Interestingly, while Scalia's concurrence in *Agency Holding* contains a great deal of historical analysis, a theoretical justification for the principle that state legislatures can bind federal courts in this manner is conspicuously absent. Justice Scalia has, however, provided two additional justifications for continuing the borrowing practice. See *infra* note 47.

37. 327 U.S. 392 (1946).

38. 327 U.S. at 395. The *Holmberg* Court did not examine the Rules of Decision Act. Rather, the Court stated simply that congressional silence signifies that federal courts should borrow state limitation law.

39. 327 U.S. at 395.

of "borrowing"⁴⁰ — as opposed to "applying" — state limitation periods, signifying the shift in thinking stimulated by the case.

In spite of this shift, courts continued to look almost exclusively to state law to provide limitation periods for congressionally created causes of action.⁴¹ The Supreme Court has hinted broadly that it borrows state law primarily to avoid what it views as judicial legislation. As the Court's discussion in *Johnson v. Railway Express Agency*⁴² suggests, a limitation period is the result of a balance of the plaintiff's right to recover, the social policy of repose, and the greater accuracy of litigation occurring shortly after the relevant events.⁴³ The Court apparently believes, despite its considerable use of balancing in other contexts and the prevalence of judicial tests requiring the assessment of intangibles,⁴⁴ that balancing these values in order to produce a limitation period is fundamentally a legislative function, a function that the judiciary should not perform. For example, the Court in one case refused to construct its own limitation period, calling such an exercise a "drastic sort of judicial legislation."⁴⁵ In a similar vein, Judge Friendly remarked that "selection of a period of years [is] not . . . the kind of thing judges do."⁴⁶ In short, then, modern federal courts borrow state statutes

40. See, e.g., *Agency Holding*, 483 U.S. at 147; *Wilson v. Garcia*, 471 U.S. 260, 266, 269 (1985).

41. See Ellen E. Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133, 137 n.32 (1989) (observing that prior to 1983 "the virtually uniform practice was to look to applicable state statutes of limitations") (citing *Agency Holding*, 483 U.S. at 157 (Scalia, J., concurring)); see also *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171 (1983) ("[R]esort to state law remains the norm for borrowing of limitations periods.").

42. 421 U.S. 454 (1975).

43. 421 U.S. at 463-64, 467 n.14, 473.

44. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (charting the rise of the balancing method in constitutional law).

45. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

46. *MovieColor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 83 (2d Cir. 1961).

In hindsight, one can construct a theoretical, although probably ahistorical, justification for the evolution of the practice of relying on state limitation periods, namely, that early federal courts were filling in a conspicuous gap in federal statutes using the only source available. This justification works even if the early interpretation of the Rules of Decision Act was incorrect, and it might have been in the minds of judges deciding to borrow state law.

The theoretical explanation relies on two fundamental principles. First, strict time limits on how long a plaintiff had to file suit were unknown at common law, which is why causes of action require statutes of limitations. "[R]ights in contract and tort recognized in the early days of both the Roman and the common law were in theory perpetual." *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-78 (1950). Instead, the common law used elaborate procedural requirements and the equitable doctrine of laches to limit law and equity actions respectively. *Id.* at 1178, 1183-85. The reasons for this refusal to construct limitation periods are unclear, but they probably involve the same considerations of institutional competence discussed in the text.

Second, judges in the United States, from the nation's founding to the present, have felt a strong sense that a cause of action without a limitation period would be "utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). Only on the rarest of occasions has the Court held that no limitation period applied to a federal statutory

of limitations in order to avoid legislating their own limitation periods.⁴⁷

2. "Overtones and Details": Borrowing State Law on Issues Related to the State Statute of Limitations

In *Johnson v. Railway Express Agency*,⁴⁸ the Supreme Court stated that federal courts borrowing a state statute of limitations should also borrow state law regarding "the overtones and details of application of the state limitation period to federal causes of action."⁴⁹ The Court explained,

In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limi-

cause of action. See, e.g., *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977) (holding that no limitation period applied to an EEOC action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) (1988)).

When construing a cause of action without a limitation period, courts faced a problem they could not solve on their own. A limitation period must come from somewhere, and no precedent existed for a court to impose its own time limit. Courts thus sought some legislative judgment as to the proper balance of repose, accuracy inherent in trials based on fresh evidence, and the plaintiff's right to recover. At the time this problem first arose, federal statutory law was relatively undeveloped and thus provided few statutory causes of action with limitation periods. Courts thus adopted the only remaining option, state statutes of limitations.

Justice Brennan interpreted the early cases borrowing state limitation periods in this way in his concurring opinion in *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 229 (1958) (Brennan, J., concurring). Justice Brennan believed that the early decisions adopting state statutes of limitations

represented intensely practical solutions to a practical problem in the administration of justice. In the absence of any comparable federal statute of limitations which might be applied, the Court had four choices: (1) No period of limitations at all; (2) an arbitrary period applicable in all like cases; (3) the flexible but uncertain doctrine of laches; and (4) state statutes of limitations. The state statutes were chosen by default.

357 U.S. at 229.

For further discussion of the role of the legislative nature of the limitation question, see *infra* notes 149-51 and accompanying text.

47. Justice Scalia has suggested two alternative reasons for continuing the practice. First, because federal courts have applied state limitation law to federal statutes since at least 1830, *M'Cluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830), "it is reasonable to say that such a result is what Congress must expect, and hence intend," by not explicitly providing a limitation period. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 165 (1987) (Scalia, J., concurring). Second, according to Justice Scalia, borrowing state limitation periods is more appropriate than the only alternative available to federal courts, borrowing limitation periods from other federal statutes. The reason is that state statutes of limitations generally "apply to a whole category of causes of action," while federal periods "are almost invariably tied to specific causes of action." 483 U.S. at 168 (Scalia, J., concurring). The broader range of the state periods means that the state legislature presumably considered a wide variety of fact situations in its balance of the social values of repose, fresh evidence, and the plaintiff's right to recover. Congress, on the other hand, balanced these values with only a narrow range of fact situations in mind. 483 U.S. at 168-69. For an argument in favor of abandoning the automatic practice of borrowing state limitation laws, see Kaulbach, *supra* note 41, at 162-70.

48. 421 U.S. 454 (1975).

49. 421 U.S. at 464.

tation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.⁵⁰

According to *Johnson*, then, federal courts should view certain principles as inseparable from the limitation period. Tolling, application, and revival, like the limitation period itself, all depend on a state's balancing of the social values of repose and accuracy inherent in speedy trials against preservation of the plaintiff's right to recover. A state legislature considering how long to allow a plaintiff to sue in a certain cause of action might change the length of the contemplated period in response to the applicable principles of tolling, application, and revival. These principles are an integral part of the state's balance of values. Therefore, when courts borrow state limitation periods to apply to federal causes of action, they must also borrow these related principles.

B. *The Reasoning of the Lower Federal Courts*

Although courts borrowing state law to determine the validity of plan limitation periods have offered little or no explanation for this practice, this section argues that the practice is best described as a result of an implicit characterization of modification as a limitation issue akin to other limitation issues, such as tolling, revival, and application, that federal courts adopt state law to decide.

A close examination of those cases holding that federal courts should borrow state law to determine the validity of ERISA plan limitation periods reveals a dearth of justification for the practice.⁵¹ But reference to closely analogous cases — that is, opinions in law-

50. 421 U.S. at 464. The definition of *tolling* is simple enough, but what the Court meant by *application* and *revival* is not clear. Some courts have ruled that questions of relation back are application issues to be governed by state law when a federal statute lacks a limitation period. See, e.g., *Diaz v. Shallbetter*, 984 F.2d 850, 854 (7th Cir. 1993); *Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989). Alternatively, the Supreme Court might have meant that courts deciding which of several possible state statutes of limitations to borrow should consult state law in order to discover which state limitation period applies to the state cause of action most analogous to the federal claim. See, e.g., *Central States, S.E. & S.W. Areas Pension Fund v. King Dodge, Inc.*, 835 F.2d 1238 (8th Cir. 1987) (relying on state court decisions in deciding which of two possible state statutes of limitations was most analogous to an ERISA § 502(a) action); *Carpenters Dist. Council Pension Fund v. Bowlus Sch. Supply*, 716 F. Supp. 1232 (W.D. Mo. 1989) (same).

The word *revival* probably refers to the circumstances under which an action barred by a statute of limitations can be rejuvenated. For instance, a debt that has become unenforceable because of the expiration of the limitation period may be renewed by the debtor's new promise to pay, even if the new promise lacks consideration. JOHN P. DAWSON ET AL., *CONTRACTS* 230-32 (5th ed. 1987).

51. One federal district court borrowed state law upholding contractual limitation periods and applied a plan limitation period to dismiss a § 502(a)(1)(B) lawsuit with the curt observation, "This Court is aware of no public policy of the United States or Virginia which would prevent enforcement of a . . . contractual limitation period." *Koonan v. Blue Cross & Blue Shield*, 802 F. Supp. 1424, 1425 (E.D. Va. 1992). A second district court upheld an ERISA plan limitation period defense after citing and quoting very briefly from the case discussed in

suits arising under other federal statutes in which courts have confronted contractual limitation periods — may help elucidate federal court decisions in the ERISA context. The most complete explanation for the practice of borrowing state law appears in the 1992 Seventh Circuit decision in *Taylor v. Western & Southern Life Insurance Co.*⁵² In *Taylor*, the Seventh Circuit relied on state law to uphold the validity of a contractual limitation period. The case arose when dismissed employees sued their employer under 42 U.S.C. § 1981⁵³ and other federal statutes, alleging racially motivated discharges.⁵⁴ The employees' contracts included a clause specifying a six-month limitation period for any suit relating to their employment.⁵⁵ The district court, relying on the contractual limitation period, dismissed the section 1981 claim.⁵⁶ The Seventh Circuit agreed with the district court that the clause was valid.⁵⁷

The *Taylor* court began its analysis of whether to consult state or federal law to decide the validity of the contractual limitation period by noting that the Supreme Court had recently applied to section 1981 cases the general practice of borrowing state statutes of limitations for federal causes of action.⁵⁸ The court then quoted the Supreme Court's language in *Johnson v. Railway Express Agency, Inc.*,⁵⁹ establishing the principle that federal courts should borrow state law regarding "the overtones and details" of the statute of limitations.⁶⁰ On the basis of this authority, the Seventh Circuit panel concluded that it should borrow state law to decide the validity of the contractual limitation period.⁶¹

The court went on to note that federal common law already existed regarding the validity of contractual limitation periods⁶² but stated that the federal principles were "not so well established, especially in the context of employment contracts, as to constitute a federal rule that must override the application of state law."⁶³ The

the text immediately following this footnote. *Chilcote v. Blue Cross & Blue Shield United*, 841 F. Supp. 877, 879-80 (E.D. Wis. 1993).

52. 966 F.2d 1188 (7th Cir. 1992).

53. 42 U.S.C. § 1981 (1988).

54. 966 F.2d at 1190.

55. 966 F.2d at 1190.

56. 966 F.2d at 1193-94.

57. 966 F.2d at 1206.

58. 966 F.2d at 1203 & n.8 (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987)).

59. 421 U.S. 454 (1975).

60. 966 F.2d at 1203 (quoting 421 U.S. at 464); see *supra* notes 48-50 and accompanying text (discussing the overtones and details principle).

61. 966 F.2d at 1203.

62. 966 F.2d at 1204 (citing *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947), in which the Supreme Court upheld a contractual limitation period); see also cases cited in *supra* note 30.

63. 966 F.2d at 1205.

court was unconcerned that borrowing state rules upholding or invalidating contractual limitation periods would result in interstate variation as to the validity of such periods, arguing that "by enacting section 1981 without a statute of limitations, Congress implied that it is willing to live with a wide range of state statutes and rules governing limitations of actions under section 1981."⁶⁴

The *Taylor* court's approach boils down to three analytic steps. First, when a federal statutory cause of action lacks a limitation period, federal courts borrow state statutes of limitations.⁶⁵ Second, federal courts also borrow state law on issues closely related to the applicable state limitation period.⁶⁶ Third, no congressional policy or statute prohibits variation in limitation matters; Congress could have prevented interstate variation by providing a limitation period, but it chose not to do so. Therefore, courts should borrow state law to determine whether to enforce contractual limitation periods limiting the time available to a plaintiff to sue under a federal statutory cause of action when the statute provides no limitation period.

This reasoning includes a conspicuous gap: the practice of borrowing state law governing the tolling, application, and revival of a state limitation period provides support for a practice of borrowing state law governing the validity of contractual limitation periods only if the last issue is fundamentally similar to the other three. That is, courts should borrow state law to decide whether to uphold or invalidate plan limitation periods only if state law regarding modification is also an "overtone" or "detail" of the state statute of limitations. The *Taylor* court did not explain why the state law it borrowed was an overtone or detail of the state statute of limitations.

Nevertheless, it is evident that the reasoning of the *Taylor* court is dependent on a process of characterization similar to the method that courts use in interstate choice of law cases.⁶⁷ In the interstate choice of law context, courts employ a process of characterization in order to decide what principles apply to their choice among two or more states' laws. For instance, characterizing an issue as one of tort law often leads to a presumption in favor of the rule of *lex loci*

64. 966 F.2d at 1205 (citing *Cange v. Stotler & Co.*, 826 F.2d 581, 584 (7th Cir. 1987)). *Cange* had applied similar reasoning to an action based on the Commodity Exchange Act, 7 U.S.C. §§ 1-26 (1988). See also *Reynolds Indus. v. Mobil Oil Corp.*, 618 F. Supp. 419 (D. Mass. 1985) (applying similar reasoning in a suit based on the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (expired Sept. 30, 1981)).

65. See *supra* notes 37-47 and accompanying text.

66. See *supra* notes 48-50 and accompanying text.

67. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (1971) (stating that the characterization of a choice of law problem must take place prior to the application of the proper Restatement section, and that courts should use forum law to engage in this process).

delicti.⁶⁸ Those courts following the line of reasoning found in *Taylor* in determining whether to borrow state law regarding the validity of contractual limitation periods are likely to have engaged in a similar process. By grouping the question of whether the parties may modify an otherwise applicable limitation period together with issues of tolling, revival, and application, these courts in effect characterized modification as a limitation issue subject to the normal limitation practice of borrowing state law.

C. Understanding Modification as a Separate Issue

This section argues that the validity of plan- or contract-based limitation periods is distinct from limitation law generally, and that federal courts therefore should not borrow state modification law as an overtone and detail of state limitation law. This section demonstrates that analogous Supreme Court precedent from the interstate conflict of law context indicates that a state's judgment on the validity of contractual modification should be viewed as quite different from its judgment on the length of the limitation period.

A state's rules of tolling, revival, and application reflect fundamentally different judgments with respect to the values underlying statutes of limitations than does a state's rule on contractual modification of the statutory limitation period. The overtones and details of a state's statute of limitations, as embodied in principles of tolling, revival, and application, *supplement* the legislature's judgment as to the proper balance of values of the competing social interests of repose, fresh evidence, and a plaintiff's right to recover. Contractual limitation periods *discard* that legislative judgment altogether, in favor of a bargain struck by the contracting parties. The parties' bargain may depend on their perception of how long they can afford to remain exposed to a lawsuit without significant interference in financial planning, or simply on their relative bargaining strengths. These values are quite separate from generalized values of repose, fresh evidence, and right to compensation. The question of whether contracting parties should be allowed to disregard a legislative balance of values represented by a statute of limitations thus resembles laws governing the type of rights that persons may bargain away in a contract, or how far the parties may change by contract the legal relationship that would have existed between them had the contract been silent on a particular issue.

The Supreme Court has implicitly confirmed the distinction between modification law and limitation law in *Home Insurance Co. v. Dick*,⁶⁹ in which the Court engaged in a process of characterization

68. *Id.* § 146.

69. 281 U.S. 397 (1930).

similar to that which courts use in the interstate choice of law context.⁷⁰ *Dick* essentially characterized the ability of the parties to shorten a limitation period by contract as an issue of contract law, not one of limitation law.⁷¹ The Court held that a state court's application of a state statute that would have voided the contractual limitation period at issue in the case would also have "increase[d the] obligation and impose[d] a burden not contracted for" upon the defendant.⁷² Although in the *Dick* Court's view a state could "prescribe the kind of remedies to be available in its courts and dictate the practice and procedure to be followed in pursuing those remedies,"⁷³ the state statute invalidating contractual limitation periods dealt "neither with the kind of remedy available nor with the mode in which it [was] to be pursued."⁷⁴ Instead, the statute "purport[ed] to create rights and obligations"⁷⁵ upon which the contracting parties had not agreed. Thus, the language of *Dick* suggests strongly that the Supreme Court has characterized the issue of the validity of contractual limitation periods as one of contract law, not limitation law.

A comparison of *Dick* and another choice of law case from the 1930s with more recent conflict of law decisions further supports the argument that a state's decision regarding the validity of contractual limitation periods is a separate judgment from its decision as to the length of the statute of limitations. In the two early cases — *Dick* and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*⁷⁶ — the Supreme Court held that state courts could not apply forum law invalidating contractual limitation periods when the contract at issue was executed and to be performed in other states. In *Delta & Pine* the Supreme Court held that a fifteen-month limitation period contained in an insurance contract placed a condition upon the liability of the insurance company.⁷⁷ Because this provision was valid in the state in which the parties executed the contract and in which the contract was to be performed, the

70. See *supra* notes 67-68 and accompanying text.

71. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(1) (1971) (defining characterization as "[t]he classification and interpretation of legal concepts and terms").

Contract law is the body of principles governing whether the terms of "a promise [are] enforceable at law directly or indirectly." 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 3 (1952). Limitation law is the body of principles deciding at what point the law will "foreclose judicial action by virtue of expiration of allotted time." 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1 (1991). Notice that on its face, the issue of the validity of contractual limitation periods could fit comfortably within either category.

72. 281 U.S. at 409.

73. 281 U.S. at 409.

74. 281 U.S. at 410.

75. 281 U.S. at 410.

76. 292 U.S. 143 (1934).

77. 292 U.S. at 149.

forum state of the insured's lawsuit could not apply its own statute invalidating the contractual modification without enlarging the insured's contractual rights, a result the Court held to be prohibited by the Due Process Clause.⁷⁸ Similarly, in *Dick*, the Court reversed a forum state's attempt to apply its own law prohibiting contractual modification of the state's statute of limitations when the contract at issue was made and was to be performed in Mexico.⁷⁹

The Supreme Court integrated both *Delta & Pine* and *Dick* into its modern choice of law jurisprudence in the 1964 case *Clay v. Sun Insurance Office*.⁸⁰ The Court interpreted the two early cases as resting on a requirement that a forum state have minimum contacts to the parties, the transaction, and the litigation before a state court could apply forum law invalidating a contractual limitation period. Thus, in *Clay*, the Court held that a forum state could apply its own statute nullifying contractual limitation periods because the forum had "ample contacts with the present transaction and the parties."⁸¹ The Court distinguished *Delta & Pine* and *Dick* on the ground that in those cases "the activities in the State of the forum were thought to be too slight and too casual [or even wholly lacking] to make the application of local law consistent with due process."⁸² Taken together, then, *Clay*, *Delta & Pine*, and *Dick* stand for the principle that a court may apply a forum law invalidating a contractual limitation period only when the forum has at least minimum contacts with the parties, the transaction, and the litigation.

The significance of this principle for the analysis of borrowing state limitation law becomes clear when one compares *Clay*, *Delta & Pine*, and *Dick* to the more recent decision in *Sun Oil Co. v. Wortman*.⁸³ In *Wortman*, the Supreme Court held that a forum state could constitutionally characterize its statute of limitations as procedural for choice of law purposes.⁸⁴ The *Wortman* holding means that a forum court can apply its own statute of limitations to a lawsuit even in the absence of the minimum contacts necessary to allow the court constitutionally to apply forum law to other issues in the same lawsuit.⁸⁵

78. 292 U.S. at 150 (construing U.S. CONST. amend. XIV, § 1).

79. 281 U.S. at 410.

80. 377 U.S. 179 (1964).

81. 377 U.S. at 183.

82. 377 U.S. at 181-82 (citation omitted).

83. 486 U.S. 717 (1988).

84. The eight Justices participating in the case were unanimous on this point. See 486 U.S. at 722-29, 737, 743.

85. Justice Scalia, writing for a five-person majority, adhered to the view that "a statute of limitations may be treated as procedural and thus may be governed by forum law even when the substance of the claim must be governed by another State's law." 486 U.S. at 723.

Reading *Wortman* together with *Clay*, *Delta & Pine*, and *Dick* leads to the conclusion that a state court may apply the forum state's statute of limitations to a lawsuit in the absence of minimum contacts, but the state must have minimum contacts to apply forum law regarding the ability of contracting parties to modify a statute of limitations. This conclusion suggests that under the Supreme Court's current jurisprudence a state's judgment regarding the ability of contracting parties to specify their own limitation periods is a fundamentally different decision from the state's judgment as to the length of the limitation period. If the two state judgments were essentially the same decision, then the Supreme Court should have applied the same minimum contacts requirement to a forum court's application of forum law with respect to both the statute of limitations and the validity of contractual modifications of the statute.

Thus, reason and precedent both suggest that state laws prohibiting or upholding contractual limitation periods are not like state rules on tolling, application, and revival. *Johnson v. Railway Express Agency*⁸⁶ teaches that the latter principles are part and parcel of the state's statute of limitations itself; a state's judgment on the length of the limitation period is inseparably related to its judgments on tolling, revival, and application.⁸⁷ But *Wortman*, *Clay*, *Delta & Pine*, and *Dick* suggest exactly the opposite for the validity of contractual limitation periods; state law on this issue is *not* part and parcel of the state's statute of limitations.⁸⁸ Thus, federal courts should not borrow state law regarding the validity of contractual modifications of limitation periods as part of the general practice of borrowing state statutes of limitations to apply to federal causes of action lacking limitation periods.

86. 421 U.S. 454 (1975).

87. 421 U.S. at 462-63.

88. It is true of course that these cases are choice of law cases decided under the Due Process Clause, U.S. CONST. amend. XIV, § 1, and the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, and that they do not mention the federal court practice of borrowing state law on limitation issues. But the inquiry is nevertheless the same: whether the state's judgment on one issue is inseparably related to the state's decision on the other.

One might also argue that *Delta & Pine* and *Dick* are no longer good law after *Wortman*. Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-09 & n.11 (1981) (criticizing *Delta & Pine*'s reliance on the traditional rule that the law of the place of contracting governs the interpretation of contracts). But the *Wortman* Court did not cite *Dick* at all, and it referred to *Delta & Pine* only in passing. 486 U.S. at 728 n.2, 740. The Supreme Court rarely overrules a case without mentioning it explicitly. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (discussing the force of the doctrine of stare decisis). Furthermore, just three years before *Wortman*, the Court cited and relied on *Dick* in another choice of law decision. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985). In addition, lower federal courts and judges continue to treat *Dick* as good law. See, e.g., *Soo Line R.R. v. Overton*, 992 F.2d 640, 649 n.7 (7th Cir. 1993) (Ripple, J., dissenting); *Thorton v. Cessna Aircraft Co.*, 886 F.2d 85, 89 (4th Cir. 1989); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 206 (1st Cir. 1988); *Republic of Philippines v. Westinghouse Elec. Co.*, 821 F. Supp. 292, 294 (D.N.J. 1993); *Superfos Invs., Ltd. v. First Miss. Fertilizer, Inc.*, 809 F. Supp. 450, 454 (S.D. Miss. 1992).

II. CONGRESSIONAL INTENT AND ERISA PREEMPTION

Although Part I argued that courts cannot justify borrowing state law regarding modification as part and parcel of state limitation law, this argument alone is not enough to lead to the conclusion that federal courts should not borrow state law to govern the enforceability of ERISA plan limitation periods; the federal court practice of adopting state law is not limited to statutes of limitations. Federal courts borrow state law in a wide variety of legal contexts, and state statutes of limitations are only one of a number of categories of state law that federal courts incorporate in enormously different legal contexts for many different reasons. Yet in other situations, federal courts have deliberately chosen to ignore state law in favor of a uniform national rule. Deciding whether federal courts should borrow state law to answer the section 502(a)(1)(B) modification question, then, requires a more general look at the federal court use of state law in cases arising under federal causes of action. This Part and Part III analyze the federal court use of state law and apply the resulting principles to the ERISA section 502(a)(1)(B) modification question.

When a federal court engages in common lawmaking to fill a gap in a federal statute, it should first look to any relevant source to see if Congress has expressed a discernible intent in the area.⁸⁹ This rule stems from the respective roles of Congress and the judiciary in our federal system. As the Supreme Court stated in 1979, “[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.”⁹⁰ This rule applies with full force to any context in which a court is deciding whether to borrow state law or to construct a uniform national rule. Congress can, for instance, create its own uniform national rule in any particular area simply by specifying the content of that rule in a statute. Congress can also direct federal courts to formulate federal common law in a particular area instead of borrowing state law.⁹¹ Congress can also require courts to incorporate as rules of decision an entire area of state law, even if that area is in constant evolu-

89. See Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 320 (1992) (describing federal common lawmaking in the context of federal statutes as “judicial lawmaking — or filling in of enacted law — in *pursuance* of congressional intent”).

90. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979).

91. Federal Rule of Evidence 501 arguably contains such an instruction. See FED. R. EVID. 501. Rule 501 directs federal courts to create a common law of privilege; although state law may be instructive, few courts if any have understood Rule 501 to permit them simply to borrow the local state’s rule of privilege. See 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 201 (1978); see also 28 U.S.C. § 1651 (1988) (granting federal courts the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”).

tion.⁹² Finally, Congress can leave the decision of whether to borrow state law entirely to the federal courts' discretion.⁹³ Accordingly, federal courts should follow any discernible congressional intent when deciding whether to borrow state law regarding the ERISA modification question.

This Part argues that ERISA section 514(a)'s⁹⁴ broad preemption of state law provides substantial evidence that Congress intended for federal courts to ignore state law when filling in gaps in ERISA. Nevertheless, this Part argues that preemption alone does not warrant a definitive conclusion that federal courts should construct a uniform national rule regarding plan limitation periods. Such caution is necessary for two reasons. First, the section 514(a) argument developed here may not apply to procedural questions. Second, federal courts do borrow state law to fill in some gaps in some federal statutes containing preemption clauses, most notably in section 301 of the Labor Management Relations Act.⁹⁵

92. See, e.g., Assimilative Crimes Act, 18 U.S.C. § 13 (1988) (borrowing the entirety of state criminal law to apply to federal bases and enclaves in the absence of applicable federal law). The Supreme Court upheld the Assimilative Crimes Act against a nondelegation doctrine challenge in *United States v. Sharpnack*, 355 U.S. 286, 294 (1958).

Read literally, 42 U.S.C. § 1988 (1988) might constitute an example of a congressional command to borrow state law. Section 1988 provides that when existing federal law is "not adapted" to the protection of civil rights,

the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.

42 U.S.C. § 1988 (1988). Nevertheless, the Supreme Court has not construed or applied § 1988 consistently. In *Robertson v. Wegmann*, 436 U.S. 584 (1978), for example, the Court held that § 1988 "instructs us to turn to state law" to decide whether an action under 42 U.S.C. § 1983 (1988) survived the death of the plaintiff, "unless an 'inconsistency' with federal law is found" to exist; indeed, the Court posed the question in terms of whether a federal court was "required [by § 1988] to adopt [state law]." 436 U.S. at 585, 593 & n.11 (emphasis added). In several other cases, however, the Court has seemed oblivious to § 1988 in § 1983 cases. See, e.g., *Carey v. Piphus*, 435 U.S. 247 (1978) (ignoring both state law and § 1988 while constructing a rule of damages in § 1983 cases involving denials of procedural due process in schools). Note that the Court decided *Robertson* and *Carey* in the same term.

Robertson may suggest a way to justify the result in *Taylor v. Western & Southern Life Insurance Co.*, 966 F.2d 1188 (7th Cir. 1992), discussed *supra* in notes 52-68 and accompanying text. Recall that the earlier discussion criticized *Taylor* for assuming that modification law was an overtone or detail of limitation law as a justification for borrowing state law to uphold a contractual modification of the limitation period applicable to a suit under 42 U.S.C. § 1981 (1988). One might argue instead that § 1988 expressed Congress's intent that federal courts borrow state law to fill gaps in § 1981. If so, the mistake was in borrowing state law to decide the modification question outside the § 1988 context, as the Seventh Circuit appeared to do in *Cange v. Stotler & Co.*, 826 F.2d 581 (7th Cir. 1987).

93. See, e.g., *Board of County Commrs. v. United States*, 308 U.S. 343, 349-52 (1939) (holding that Congress by "not specifically provid[ing] for the present contingency," had left the judiciary "free to take into account appropriate considerations of 'public convenience'" in deciding what law to apply).

94. 29 U.S.C. § 1144(a) (1988).

95. 29 U.S.C. § 185 (1988).

The text, legislative history, and statutory structure of ERISA are of little help in deciding whether to borrow state law to uphold or invalidate plan limitation periods.⁹⁶ ERISA section 514(a), however, does provide some basis for concluding that Congress intended, or would have intended had it thought about the matter, for federal courts to ignore state law when deciding the validity of ERISA plan modifications. Section 514(a) preempts all state law that "relates to"⁹⁷ an ERISA plan. Congress employs preemption clauses like section 514(a) to remove the possibility that state law will govern the relevant area. It would be quite odd for federal courts, perceiving that Congress used the device of preemption to make state law inapplicable to ERISA issues, nevertheless to adopt state law as the rule of decision regarding plan modifications. Borrowing state law in this context would appear to flaunt congressional intent that state law not govern ERISA plan issues. Thus, the purpose behind section 514(a) seems to require federal courts to construct a uniform national rule to decide the validity of plan limitation periods.⁹⁸

This argument has considerable force, but it is not conclusive for two reasons. First, the argument depends entirely upon characterizing the issue of the validity of plan limitation periods as substantive rather than procedural. Preemption clauses do not affect state procedural law, at least not when the lawsuit is filed in state court. Plaintiffs may file an ERISA section 502(a)(1)(B) lawsuit in state or federal court,⁹⁹ yet no one would argue that section 514(a) requires state courts adjudicating a section 502(a)(1)(B) action to follow the Federal Rules of Civil Procedure. Plans are subject to variations in state procedural law even if federal courts refuse to borrow state

96. Justice White briefly noted the modification question in a footnote in a dissent to an opinion deciding a different issue regarding a different federal statute. See *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 711 n.2 (1966) (White, J., dissenting) (stating that the Supreme Court presumably would support establishing a uniform federal rule regarding the enforceability of contractual modifications of limitation periods applicable to suits under Labor Management Relations Act § 301, 29 U.S.C. § 185 (1988)). The legislative history of ERISA increases the relevance of White's footnote to the § 502(a)(1)(B) modification question because Congress apparently used § 301 as a model for § 502(a)(1)(B). See H.R. CONF. REP. NO. 1280, 93d Cong., 2d Sess. 327 (1974), reprinted in 1974 U.S.C.A.N. 4639, 5107 (stating that courts should treat ERISA § 502(a) actions like § 301 actions). Nevertheless, because Justice White's statement represents the views of a dissenting justice commenting on a different statute, it probably carries little weight in the context of § 502(a)(1)(B) suits.

97. 29 U.S.C. § 1144(a) (1988).

98. The Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), provides some support for this interpretation of § 514(a). In *Firestone*, the Court relied heavily on the general common law of trusts to choose a standard of review for § 502(a)(1)(B) actions challenging benefit eligibility decisions. 489 U.S. at 110-15. The Court did not refer to the law of any particular state, nor did it mention the option of borrowing state law. This omission perhaps reflects some recognition of the oddness of borrowing state rules in the presence of a preemption clause as broad as § 514(a).

99. 29 U.S.C. § 1132(e)(1) (1988).

law on any ERISA problem, because a section 502(a)(1)(B) plaintiff can always file in state court. Thus, section 514(a) prohibits federal courts from borrowing state law to decide the validity of plan limitation periods only if the issue is substantive.¹⁰⁰

The division between substance and procedure is a treacherous area, and the Supreme Court has struggled with the distinction repeatedly.¹⁰¹ This Note has already argued that the validity of plan limitation periods presents a *substantive* issue of contract law; contractual modifications clearly present a substantive issue in the interstate choice of law context.¹⁰² But the Supreme Court has warned that what is substantive in one context may not be substantive in another.¹⁰³ Thus, to the extent that courts consider modi-

100. The Supreme Court's discussion of § 514(a) in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), states this point almost exactly:

Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. . . . *Particularly disruptive is the potential for conflict in substantive law.* It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

498 U.S. at 142 (emphasis added).

Courts have disagreed on the proper characterization of the issue of the validity of contractual limitation periods. *Compare, e.g.,* *General Elec. Credit Corp. v. Home Indem. Co.*, 309 S.E.2d 152, 158 (Ga. Ct. App. 1983) (characterizing contractual modifications as raising substantive issues) *with* *Jordan v. Texaco, Inc.*, 297 F. Supp. 1140, 1142 (W.D. Okla. 1969) (characterizing contractual modifications as raising procedural issues).

The *Ingersoll-Rand* Court's reference to administrative and financial burdens suggests the possibility of a response to the argument that § 514(a) expresses a congressional desire of uniformity only on substantive as opposed to procedural issues. The response runs as follows: Congress passed § 514(a) to minimize administrative and financial burdens that varying state laws would impose upon ERISA plans. Administrative and financial burdens can result from variations in state procedural as well as substantive law. Accordingly, courts should concentrate not on an abstract line between substance and procedure, but rather on whether variations in state law on a particular issue would place undue administrative and financial burdens on plans. Section III.C.2 of this Note briefly examines the administrative and financial burdens that variation in state law on the validity of plan limitation periods would place on plan administrators.

This response has some force, but Congress apparently intended to subject plans to the burdens of variations in state procedural law by allowing state courts concurrent jurisdiction over § 502(a)(1)(B) lawsuits, apparently believing that the benefits of allowing plan beneficiaries a choice of forum justified the resulting cost to plans.

101. *See, e.g.,* *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding that states may treat statutes of limitations as procedural when facing an interstate conflict of laws); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 n.4 (1966) (refusing to decide whether statutes of limitations are substantive or procedural in the context of § 301 of the Labor Management Relations Act and recognizing the limited utility of the term "substantive"); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945) (refusing to decide whether statutes of limitations are substantive or procedural).

102. *See supra* notes 69-88 and accompanying text.

103. *See, e.g.,* *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

fication law procedural, section 514(a)'s expression of a congressional desire for uniformity may not apply to the ERISA modification issue.

Moreover, preemption has never stopped federal courts from borrowing some categories of state law, most notably state statutes of limitations. For instance, section 301 of the Labor Management Relations Act¹⁰⁴ preempts state law affecting collective-bargaining agreements.¹⁰⁵ Yet the Supreme Court held in *UAW v. Hoosier Cardinal Corp.*¹⁰⁶ that federal courts should borrow state statutes of limitations in certain types of section 301 lawsuits.¹⁰⁷ Congressional desire for uniformity has not been dispositive on this issue.¹⁰⁸ This argument in turn suggests the need for a more general analysis of the various reasons that federal courts borrow state law, to determine if any of these reasons support a similar practice regarding the ERISA modification question. The next Part proceeds with this more general analysis.

III. INTERSTITIAL LAWMAKING, STATUTORY INTERPRETATION, AND FEDERAL COMMON LAW

This Part examines the plan limitation period question as an exercise in federal common lawmaking.¹⁰⁹ As several commentators

104. 29 U.S.C. § 185 (1988).

105. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

106. 383 U.S. 696, 704-05 (1966).

107. The *Hoosier* court believed that the congressional desire for uniformity in labor law did not extend to limitation periods:

The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote For the most part, statutes of limitations come into play only when those processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

383 U.S. at 702.

In addition, lower federal courts continue to borrow state limitation periods in § 502(a)(1)(B) lawsuits without considering § 514(a). See cases cited *supra* note 19.

108. For a discussion of why federal courts follow the borrowing practice in the case of limitation periods, see *supra* notes 41-47 and accompanying text.

It might be more accurate to say that federal courts will find some reasons sufficient to strain to find a congressional desire for uniformity, as expressed in a preemption statute, inapplicable to the precise issue presented in a particular case. Courts may in essence be arguing that Congress would not have intended for uniformity to exist on *this* issue had it thought about the matter. The language of *Hoosier* quoted *supra* in note 107 supports this more charitable characterization of the Court's holding in that case.

Alternatively, perhaps *Hoosier's* holding, when placed alongside § 301's preemption of state substantive law, illustrates that the Court believes that statutes of limitations are in fact procedural, despite the Court's repeated attempts to avoid the issue. See *supra* note 101 and accompanying text. If so, then *Hoosier* represents nothing more than a specific example of the substantive versus procedural division discussed *supra* in notes 99-103 and accompanying text.

109. Some commentators argue that federal common lawmaking is an illegitimate usurpation of legislative power by the judiciary. See, e.g., Thomas W. Merrill, *The Common Law*

have noted, federal common lawmaking in the context of a federal statute can represent a hybrid between statutory interpretation and judicial construction of a rule of decision.¹¹⁰ Accordingly, this Part

Powers of the Federal Courts, 52 U. CHI. L. REV. 1 (1985); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327 (1992) [hereinafter Merrill, *The Judicial Prerogative*]; Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980); Martin H. Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U. L. REV. 853 (1989); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761 (1989) [hereinafter Redish, *"Institutionalist" Perspective*]. But see, e.g., Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989) (arguing for a broad federal common lawmaking power).

Those scholars labeling federal common lawmaking illegitimate, however, do not dispute the practice of filling gaps in federal statutes via a process they label "statutory interpretation," and under their definitions, federal courts legitimately could fill the gap in ERISA regarding the validity of plan limitation periods by either borrowing state law or constructing a uniform national rule. Professor Merrill, arguing against the legitimacy of federal common lawmaking, defines statutory interpretation to include a federal court's duty to resolve an "implicit delegation," a term which in turn subsumes "cases where Congress leaves an internal gap in a statute creating a federal cause of action, i.e., a gap that must be resolved in order to decide a case which Congress has directed the courts to hear." Merrill, *The Judicial Prerogative*, *supra*, at 354-55. Merrill does not elaborate, but this definition on its face would seem to cover the issue of the validity of plan limitation periods.

Similarly, Professor Redish, the scholar arguing perhaps most vehemently against a federal common lawmaking power, distinguishes between federal common law and statutory interpretation. See Redish, *"Institutionalist" Perspective*, *supra*, at 767 n.23. Redish continues,

In certain instances, although a statute clearly applies, the statute's text is silent on a collateral issue which must be resolved one way or the other. In such cases, it is incumbent upon an interpreting court to resolve the issue in the manner most consistent with attainment of the policies sought to be achieved by the statute. Here, the court properly performs its "gap-filling" function.

Id. at 785 (footnote omitted). Redish defines legitimate gap-filling as deciding issues "that must be resolved before the statute may be applied — in other words, where not to decide the issue is effectively to decide it." *Id.* at 795. This definition is distinctly unhelpful because it fits issues that Redish later uses as examples of illegitimate federal common lawmaking, including the existence of implied causes of action. See *id.* at 795-96. Nevertheless, the tone of Redish's discussion on gap-filling suggests that in his view, courts may legitimately construct law to solve unforeseeable issues in the context of lawsuits based on federal statutory causes of action, see *id.* at 785, 794-95, and this description fits the § 502(a)(1)(B) modification question.

In addition, a federal court's decision to borrow or to ignore state law in deciding the validity of plan limitation periods would probably fit within the definition of "judicial lawmaking under the authority of enacted law" espoused by Professor Kramer. See Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 268 (1992).

110. See, e.g., PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 863 (3d ed. 1988) [hereinafter HART & WECHSLER] ("The demarcation between 'statutory interpretation' or 'constitutional interpretation,' on the one hand, and judge-made law on the other, is not a sharp line. Statutory interpretation shades into judicial lawmaking on a spectrum, as specific evidence of legislative purpose with respect to the basic issue at hand attenuates."); Weinberg, *supra* note 109, at 835 ("[T]here is no fundamental difference between statutory interpretation . . . and judicial lawmaking . . ."); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind.").

uses the tools of both methods to argue that federal courts should adopt a uniform national rule upholding plan limitation periods.¹¹¹

This Part proceeds in three steps. Section III.A argues that no useful background presumption exists in the case law either favoring or opposing recourse to state law to fill gaps in federal statutes. Section III.B introduces a more narrow focus, identifying a list of factors that federal courts use when deciding whether to borrow state law. Section III.C then applies these factors to the ERISA plan limitation period question. In applying these factors, section III.C also makes clear that the decision whether to adopt a uniform national rule necessarily implicates the question whether the rule should uphold or invalidate plan periods. This Part answers both questions, concluding that federal courts should adopt a uniform national rule upholding the application of plan limitation periods to section 502(a)(1)(B) lawsuits, so long as the plan period provides a reasonable length of time for a lawsuit.

A. Inconclusive Background Presumptions

In some types of cases involving relations between state and federal law, the Supreme Court employs background presumptions designed to help decide specific cases while simultaneously protecting values important to the U.S. legal system generally. For instance, the Court construes federal statutes with a presumption against the preemption of state law,¹¹² and the Court employs a strong presumption that when Congress creates a statutory cause of action it intends to give state courts concurrent jurisdiction to hear cases arising under that statute.¹¹³ Both presumptions are designed to protect the role of state law and state courts in the federal system. With respect to the question of whether to borrow state law to fill gaps in federal statutes, however, the Supreme Court has made conflicting statements about the existence of a general presumption for or against borrowing state law.

Two cases decided approximately twenty-five months apart reveal the conflict. In 1989, the Supreme Court handed down *Mississippi Band of Choctaw Indians v. Holyfield*,¹¹⁴ a case requiring the Court to formulate a definition of the word *domicile* under the In-

111. Professor Martha Field perhaps best captures the spirit of the methodology in this Part with her phrase "judicial lawmaking — or filling in of enacted law — in *pursuance* of congressional intent." See Field, *supra* note 89, at 320.

112. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

113. *Clafin v. Houseman*, 93 U.S. 130, 136-37 (1876). For another example of such a presumption, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985) (requiring an explicit statement from Congress of its intention to abrogate state sovereign immunity under the Eleventh Amendment).

114. 490 U.S. 30 (1989).

dian Child Welfare Act of 1978 (ICWA).¹¹⁵ In responding to one party's argument that the Court should borrow state definitions of domicile, the Court stated, "We start . . . with the general assumption that 'in the absence of a plain indication to the contrary . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" ¹¹⁶ The Court continued, "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application. . . . A second reason for the presumption against the application of state law is the danger that 'the federal program would be impaired if state law were to control.'" ¹¹⁷

Just two years later, however, the Court flatly contradicted the *Choctaw Indians* presumption. In *Kamen v. Kemper Financial Services, Inc.*,¹¹⁸ the Court faced the question of "whether we should fashion a federal common law rule obliging the representative shareholder in a derivative action founded on the Investment Company Act of 1940 . . . to make a demand on the board of directors even when such a demand would be excused as futile under state law."¹¹⁹ The Court recognized that the question it faced was federal in nature,¹²⁰ but nevertheless decided to borrow state law to decide it.¹²¹ In reaching this conclusion, the Court began with a

115. 25 U.S.C. § 1911(a) (1988).

116. 490 U.S. at 43 (second omission in original) (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

117. 490 U.S. at 43-44 (quoting *Jerome*, 318 U.S. at 104).

The Court also articulated two additional reasons against borrowing state law, but appeared to rely rather heavily on its background presumption against borrowing state law to decide the case. The Court's first alternative argument was that Congress could not have intended to allow the states to define a term crucial to the ICWA's implementation because states had themselves caused many of the problems that Congress passed the ICWA to correct. 490 U.S. 44-45; see *infra* notes 155-56 and accompanying text. The Court's second reason for refusing to borrow state law was that variations in state law would invariably lead to different results for cases in which the crucial events happened in different states, and that parties might choose states in order to obtain the benefit of a certain state's rules. 490 U.S. at 45-46; see *infra* notes 159-60.

The Court might have done better to rely on the traditional supremacy of the federal government in relations with Native Americans. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-27 (1964) (relying on the federal government's traditional supremacy on international matters to ignore state law in creating a federal common law act of state doctrine). Alternatively, the Court might have held that the area of child custody jurisdiction required uniform law. See, e.g., *The Parental Kidnaping Prevention Act of 1980*, 28 U.S.C. § 1738A (1988); *UNIF. CHILD CUSTODY JURISDICTION ACT*, 9 U.L.A. 123 (1988). But cf. *De Sylva v. Ballentine*, 351 U.S. 570, 580-82 (1956) (indicating that the area of domestic law is one traditionally reserved for the states). See generally *infra* notes 125-31 and accompanying text (explaining the importance of spheres of traditional state or federal influence in deciding whether to borrow state law).

118. 500 U.S. 90 (1991).

119. 500 U.S. at 92 (construing 15 U.S.C. § 80a-1(a)-65 (1988)) (citation omitted).

120. 500 U.S. at 97.

121. 500 U.S. at 98-107.

clear statement of a background presumption *in favor* of borrowing state law to fill gaps in federal statutes:

Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. Otherwise, we have indicated that federal courts should “incorporat[e] [state law] as the federal rule of decision,” unless “application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.”¹²²

A clearer articulation of a background presumption in favor of borrowing state law, and against the principle of *Choctaw Indians*, is difficult to imagine. In the absence of a consistent presumption in favor of or against borrowing state law, courts must proceed with a closer analysis of the factors which affect the relationship between state and federal law.

B. Factors Governing Whether a Federal Court Should Borrow State Law

The choice between borrowing state law and constructing a uniform national rule is present in a vast variety of factual and legal contexts. Because of the situational variety of the cases, any attempt to construct a definitive set of rules governing when federal courts should borrow state law will likely be futile. Instead, this section follows the methodology of Professor Martha Field by seeking to identify a list of factors that the Supreme Court has relied on in deciding whether to borrow state law.¹²³ Section III.C will ex-

122. 500 U.S. at 98 (citations omitted) (alterations in original) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)). The Court also made clear that the presumption it articulated was generally applicable to all federal statutes by stating that “[t]he presumption that state law should be incorporated into federal common law is *particularly strong*” in certain areas of the law. 500 U.S. at 98 (emphasis added). Note that *Kamen* did not even cite *Choctaw Indians*, much less explicitly overrule it.

In describing the conflicting holdings and doctrines characteristic of the federal common law, Professor Kramer has stated, “In truth, there is something for everyone in the decided cases, and it doesn’t take a whole lot of ingenuity to deconstruct any position and show that the exceptions are really the rule and vice versa.” Kramer, *supra* note 109, at 277. This observation seems particularly applicable here.

123. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 953-62 (1986). Professor Field focused her article elsewhere, so her list of factors is incomplete. Nevertheless, this methodology is superior to attempts to construct a simple test to cover all cases involving the possibility of borrowing state law. See, e.g., Theresa C. O’Loughlin, Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823, 830 (1976) (advocating a three-part test looking to “the need for uniformity in operating the federal program, the presence of an area of traditionally local concern, and the existence of conflict between the state law and the federal program”). The enormous variety of the factual and legal situations to which the borrowing practice might apply likely dooms to failure any attempt to mold the cases into a single test.

amine whether those factors counsel for or against absorbing state law to decide the validity of plan limitation periods.¹²⁴

1. *Traditional State Governance*

One factor the Supreme Court has looked to in deciding whether to borrow state law is whether the case involves a legal arena traditionally dominated by state law. An example of the importance of tradition is *De Sylva v. Ballentine*,¹²⁵ a case requiring the Court to construe the word *children* in a federal copyright statute.¹²⁶ The Court stated that borrowing state law was especially appropriate "where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a

124. All of the factors listed below are in varying degrees reversible. That is, if the presence of a specific factor suggests that courts should ignore state law, then its absence also suggests that courts should borrow state law. For instance, a tradition of state governance over a particular area suggests that courts should borrow state law, and a tradition of federal governance suggests that courts should ignore state law. See *infra* notes 125-31 and accompanying text.

Nevertheless, the strength of each factor as compared to its opposite will vary from factor to factor and from case to case. For instance, the fact that Congress has given federal district courts exclusive jurisdiction over a certain type of suit is a relatively strong indication that courts should ignore state law, see *infra* notes 152-54 and accompanying text, but the absence of exclusive district court jurisdiction — that is, concurrent jurisdiction — might not be such a strong indicator in favor of state law because most suits under federal statutes may be brought in either state or federal court. Cf. *Claffin v. Houseman*, 93 U.S. 130, 136 (1876) (explaining that courts should presume that Congress intends for state courts to exercise concurrent jurisdiction over suits arising under federal statutes absent some indication to the contrary). As the above example illustrates, the strength of a factor's "opposite" may well depend on what the normal or default doctrine is in the particular area. That is, the fact that a statutory cause of action is subject to the concurrent jurisdiction of the state courts may be a weak indicator because concurrent jurisdiction is so common. Similarly, the strength of the factor consisting of the presence or absence of forum shopping difficulties, see *infra* notes 159-60 and accompanying text, depends on how prevalent forum shopping problems are in lawsuits in general.

Two other explanations are necessary. First, each factor will vary in strength and importance from case to case, and courts deciding whether to borrow state law should carefully examine the real-world consequences of their choice. See Mishkin, *supra* note 1, at 814-32 (illustrating principles in this area by analyzing the costs and benefits of borrowing state law in five specific case studies). Section III.C.2 of this Note provides an analysis of the consequences of a decision to borrow or ignore state law governing whether plan limitation periods are valid.

Second, the factors listed below are not hermetically sealed packets; in some cases, they may blend together and as such could be difficult to distinguish. For instance, "traditional state governance," "expectation interests of private parties," and "interference in state regulation and regulatory judgments" are identified separately, although in some cases private parties might reasonably rely on a highly developed body of state regulations and regulatory judgments because state law traditionally has dominated the area of law. See *infra* notes 125-31, 138-40, 141-44, and accompanying text. Likewise, "complexity of federal common law" and "lack of information" are listed separately, even though courts are probably more likely to find that they lack the information necessary to do a good job on their own when ignoring state law would require courts to construct a complex body of federal common law. See *infra* notes 132-34, 135-37, and accompanying text.

125. 351 U.S. 570 (1956).

126. 351 U.S. at 571-72 (construing Act of July 30, 1947, ch. 1, § 24, 61 Stat. 652, 659 (repealed 1978)).

matter of state concern.”¹²⁷ Similarly, in *Reconstruction Finance Corp. v. Beaver County*,¹²⁸ the Court borrowed state law to define the term *real property* as used in a federal statute, in part because “[c]oncepts of real property are deeply rooted in state traditions, customs, habits, and laws.”¹²⁹ Language in other cases further indicates that the Court considers tradition an important factor in deciding whether to borrow state law.¹³⁰

The flipside of this factor is that courts should be reluctant to borrow state law in areas traditionally reserved by the federal government. The tradition of federal preeminence in international and military affairs has led the Court to construct federal common law in diversity cases involving those areas of law,¹³¹ and there is no

127. 351 U.S. at 580; see also Mishkin, *supra* note 1, at 822 (arguing that the Court was correct to borrow state law in *De Sylva*, in part because of the traditional dominance of state law in the area of domestic relations).

128. 328 U.S. 204 (1946).

129. 328 U.S. at 210 (construing the Reconstruction Finance Corporation Act, ch. 8, § 10, 47 Stat. 5, 9-10 (1932), amended by Act of June 10, 1941, ch. 190, § 3, 55 Stat. 248, 248). In a later case, the Court characterized the holding in *Beaver County* as an example of congressional consent “to application of state law . . . through failure to make other provisions concerning matters *ordinarily so governed*.” *United States v. Standard Oil Co.*, 332 U.S. 301, 309 (1947) (emphasis added).

130. See, e.g., *United States v. Brosnan*, 363 U.S. 237, 241-42 (1960) (adopting state law to govern the extinguishing of federal tax liens in part because “when Congress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law”); see also *Butner v. United States*, 440 U.S. 48, 55 (1979) (borrowing state law to determine the right of a mortgagee to rents and profits from the land of a bankrupt mortgagor in part because “[p]roperty interests are created and defined by state law”). But see *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (refusing to borrow state law in a case involving child custody, an area of law traditionally dominated by state law).

131. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964) (relying in a diversity case on the constitutional underpinnings of the act of state doctrine to decide a case posing questions under that doctrine according to federal, not state, law); *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947) (constructing federal common law because “the government-soldier relation [is] distinctively and exclusively a creation of federal law”). Note that both of these examples involved an application of federal common law in diversity cases, not in cases in which the area of law was dominated by a federal statute. The subtle difference between state law that governs of its own force and state law that federal courts borrow is often significant in other contexts. When state law governs of its own force, as it does when federal courts sit in diversity, a federal court must normally follow the whole of state law regardless of that law’s content. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Mishkin, *supra* note 1, at 803-04. Federal courts may depart from state law only if the case involves an important federal interest requiring uniformity of treatment. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (holding that a uniform federal common law governs the rights and duties of the United States when the federal government deals in commercial paper, and omitting any reference to the possibility of borrowing state law as the rule of decision). This Note refers to the construction of federal common law in cases not arising under federal statutes as applications of the “*Clearfield* doctrine.” Federal courts, however, may be reluctant to apply the *Clearfield* doctrine when the United States is not a party to the lawsuit. See, e.g., *Bank of America Natl. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29 (1956) (refusing, in a case in which the United States was not a party to the lawsuit, to apply the *Clearfield* doctrine to a transaction nearly identical to the one involved in *Clearfield*). See generally Henry J. Friendly, *In Praise of Erie — And of the New Federal*

reason why this factor should not operate in a similar fashion when a court fills a gap in a federal statute.

2. *Magnitude and Complexity of the Interstitial Lawmaking Project*

The Supreme Court has expressed greater willingness to borrow state law when doing otherwise would require it to formulate a large and intricate body of common law. In *Kamen v. Kemper Financial Services, Inc.*,¹³² for example, the respondent suggested that the Court disregard state corporation law in favor of a federal universal demand rule in suits under the Investment Company Act of 1940.¹³³ The Court refused, responding that detaching "the demand standard from the standard for reviewing board action would require a quantum of federal common lawmaking that exceeds the federal courts' interstitial mandate. . . . [The respondent's] suggestion would impose upon federal courts [a] duty 'to fashion an entire body of federal corporate law'"¹³⁴

Common Law, 39 N.Y.U. L. REV. 383, 410 & n.130 (1964) (describing the dissonance created by the combination of *Clearfield* and *Parnell*).

When federal courts decide to borrow state law as the rule of decision, the analysis is somewhat different. State law still provides the rule of decision, but it does so only if the substance of the rule is not inconsistent with federal policy in the area. See, e.g., *Wissner v. Wissner*, 338 U.S. 655 (1950) (holding that a state community property law granting an estranged widow half of the proceeds to her husband's army life insurance policy conflicted with Congress's policy, as expressed in the statute creating life insurance for army employees, of allowing the decedent to designate the beneficiary); *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173 (1942) (refusing to borrow a state estoppel law because its application would be inconsistent with a federal statute).

Thus, in any setting, state law cannot apply in any sense if its application would frustrate a federal policy. The difference is that when state law would otherwise apply of its own force, courts are extraordinarily reluctant to find that an overriding federal interest requires invocation of the *Clearfield* doctrine to create a uniform federal law. When federal courts borrow state law, they feel more freedom to discard that law as against a federal interest. See generally *Mishkin*, *supra* note 1 (arguing that federal courts are free to pick and choose among state laws when borrowing state law but not when applying state law that governs of its own force). But see *Field*, *supra* note 123, at 950-53 (questioning the relevance of this distinction). Section III.B of this Note cites diversity cases involving federal common law questions to provide additional examples of the principles involved. The reader should always bear in mind, however, the differences between applying the *Clearfield* doctrine and filling gaps in federal statutes.

132. 500 U.S. 90 (1991).

133. 500 U.S. at 103-04 (construing 15 U.S.C. § 80a-1(a)-65 (1988)).

134. 500 U.S. at 104-05 (quoting *Burks v. Lasker*, 441 U.S. 471, 480 (1979)); see also *Burks*, 441 U.S. at 480 (noting that borrowing state law in the case at bar "relieve[d] federal courts of the necessity to fashion an entire body of federal corporate law out of whole cloth"); *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956) (drawing upon a "ready-made body of state law" to define the word *children* instead of constructing a uniform common law definition); *Mishkin*, *supra* note 1, at 826-28 (relying in part on the magnitude and complexity of common lawmaking necessary to create a uniform law governing United States commercial paper to argue in favor of the result in *Parnell*). But see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (holding that federal courts should construct a necessarily complicated body of federal common law to govern collective bargaining agreements).

3. Limited Information

Courts also consider the limited capacity to gather information characteristic of the judicial branch in deciding whether to borrow state law. In *United States v. Brosnan*,¹³⁵ for example, the Court borrowed state law to determine the relative priority of federal tax liens on a mortgagor's land, stating that it was "ill-equipped to assess" the policy considerations in favor of or against granting federal tax liens a higher priority than private creditors.¹³⁶ The Court concluded that a "wise resolution of such a far-reaching problem [could not] be achieved within the confines of a lawsuit."¹³⁷

4. Expectation Interests of Private Parties

Courts facing a borrowing decision tend to resort to state law if disregarding state law would interfere with the reasonable expectations of private parties that state law would govern their transactions. In *Brosnan*, a case involving the extinguishment of tax liens, the Court held that because "[f]ederal tax liens are wholly creations of federal statute,"¹³⁸ any rule regarding their extinguishment could come only from federal law.¹³⁹ The Court nevertheless borrowed state law, fearing that a uniform national rule prioritizing federal tax liens above the claims of private creditors would result in "severe dislocation to local property relationships" and in disruption of "many titles . . . secured" by "[l]ong accepted nonjudicial means of enforcing private liens."¹⁴⁰

5. Interference in State Regulation and Regulatory Judgments

The Supreme Court has indicated that if constructing a uniform common law rule would disrupt state regulation of a certain field, or would disregard a careful balancing of interests already completed by state authorities, federal courts should borrow state law.

135. 363 U.S. 237 (1960).

136. 363 U.S. at 252.

137. 363 U.S. at 252.

138. 363 U.S. at 240.

139. 363 U.S. at 240.

140. 363 U.S. at 242; see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (stating that federal courts should normally incorporate state law "in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards"); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979) (applying the *Clearfield* doctrine to hold that priority of United States contractual liens resulting from federal loan programs was a matter governed by federal common law, but nevertheless borrowing state law in the area because "[c]reditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence"); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (applying the reasoning of *Kimbell Foods* to a case involving the rights of Native Americans to land abutting a river).

*Kamen v. Kemper Financial Services, Inc.*¹⁴¹ involved the question of whether shareholders must make a demand upon a corporation's board of directors before suing under the Investment Company Act of 1940.¹⁴² The Court borrowed state law,¹⁴³ reasoning that the demand requirement was a crucial component of a state's judgment regarding the respective roles of corporate directors and shareholders, and thus that "[s]uperimposing a rule of universal-demand over the corporate doctrine of [the] States would clearly upset the balance that they have struck between the power of the individual shareholder and the power of the directors to control corporate litigation."¹⁴⁴

6. Better Match from Federal Law

The Supreme Court has indicated that federal courts may borrow a rule from a federal statute if that statute resulted from a congressional balance of the same values at issue in the instant case. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,¹⁴⁵ for example, the Court confronted a lawsuit based on an implied right of action for violation of section 10(b) of the Securities Exchange Act of 1934.¹⁴⁶ The Court held that "where . . . the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations periods."¹⁴⁷ Presumably, the limitation periods already specified in the statute of origin provided a congressional judgment concerning the balance of repose, trial accuracy, and a plaintiff's right to recover under circumstances similar to those at issue in *Lampf*.¹⁴⁸

141. 500 U.S. 90 (1991).

142. 500 U.S. at 92 (construing 15 U.S.C. § 80a-1(a)-65 (1988)).

143. The Court followed the rationale of its holding in *Burks v. Lasker*, 441 U.S. 471 (1979).

144. 500 U.S. at 103; see also *United States v. Brosnan*, 363 U.S. 237, 252 (1960) (adopting state law to prevent "dislocation of long-standing state procedures" governing liens); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1946) (borrowing state law to define a term in a statute making federal land subject to state taxes in part because permitting "the States to tax, and yet [requiring] them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend"); *Board of Commrs. v. United States*, 308 U.S. 343, 351 (1939) (choosing to follow state law governing interest on a judgment against a state stemming from the state's improper collection of property taxes, in part out of deference to the "local institutions and local interests" represented by the state law of real property).

145. 501 U.S. 350 (1991).

146. 501 U.S. at 352 (construing 15 U.S.C. § 78j(b) (1988)).

147. 501 U.S. at 359.

148. 501 U.S. at 359 (discussing "the policy considerations implicated in any limitations provision"); see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (stating that federal courts should refuse to borrow state law when "express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand");

7. Judicial Legislation

The Supreme Court has stated that courts should borrow state law if construction of federal common law would require courts to engage in tasks traditionally considered legislative. The strongest indication of this factor's force is the long line of cases borrowing state statutes of limitations to apply to federal causes of action lacking limitation periods.¹⁴⁹ In general, courts consider making up a limitation period a "drastic sort of judicial legislation,"¹⁵⁰ and federal courts without exception refuse to engage in "so bald a form of judicial innovation."¹⁵¹

8. Exclusive Federal Jurisdiction

When a statute grants exclusive jurisdiction to the federal judiciary, federal courts should consider this grant a factor in favor of ignoring state law.¹⁵² Exclusive jurisdiction is strong evidence of a congressional intent to make the actors regulated by the statute subject to a uniform body of federal law. The uniformity provided by exclusive jurisdiction applies to both substantive and procedural legal rules; state courts cannot apply their own procedures to cases they cannot hear.¹⁵³ Furthermore, as Professor Mishkin has suggested, if federal courts borrow state law in exclusive jurisdiction cases, state law "must of necessity be applied without any possibility of state court consideration of the precise type of case. The use of local rules under these circumstances is thus necessarily attended by speculation as to the weight which state courts might attribute to various factors in the federal situation."¹⁵⁴ For both of these rea-

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) (applying a limitation period contained in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1988), to an employee's suit against a union for breach of the duty of fair representation under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988)).

For an example of an argument that state law can provide a better analogy in certain instances, see *supra* note 47 (discussing Justice Scalia's view that a state statute of limitations' more general coverage makes borrowing state law more appropriate in the statute of limitations context).

149. See *supra* notes 37-47 and accompanying text.

150. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966).

151. 383 U.S. at 701; see also *Field*, *supra* note 123, at 960-61 (describing the judiciary's sense that making up limitation periods is not something judges do); *Mishkin*, *supra* note 1, at 803-04 & n.27 (noting that federal courts sometimes choose state law "because of special difficulty in the judicial framing of a definite federal rule on a special issue in an area otherwise totally national").

152. Cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (construing a statutory grant of exclusive federal jurisdiction to imply a congressional intent that federal courts construct federal common law).

153. See *supra* notes 99-103 and accompanying text (discussing the role of the substantive versus procedural division in causes of action over which state courts exercise concurrent jurisdiction).

154. *Mishkin*, *supra* note 1, at 819. *Mishkin* discusses the importance of exclusive jurisdiction using the example of *Dyke v. Dyke*, 227 F.2d 461 (6th Cir. 1955). *Mishkin*, *supra* note

sons, a grant of exclusive jurisdiction to the federal courts suggests that courts should ignore state law.

9. *Distrust of the States*

In some areas, Congress passes statutes specifically to restrict the zone of state influence or to deter state behavior. When filling gaps in such statutes, the Supreme Court has in some cases cited this congressional purpose as a reason not to borrow state law, and in other cases omitted consideration of the borrowing option altogether. For example, in *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁵⁵ the Court refused to borrow state law to define a term used in a federal statute in part because "Congress perceived the States and their courts as partly responsible for the problem it intended to correct."¹⁵⁶

10. *Choice of State Difficulties*

The nature of some controversies makes it virtually impossible to choose a particular state's law as the proper source for borrowing, suggesting a need for uniform federal rules. Justice Brennan's concurring opinion in *McAllister v. Magnolia Petroleum Co.*,¹⁵⁷ for example, articulates this rationale in an admiralty case in which the Court refused to borrow state statutes of limitations: "In actions arising at sea, frequently beyond the territorial bounds of any state,

1, at 816-20. *Dyke* involved the question of competence to change the beneficiary of a life insurance policy granted under the National Service Life Insurance Act of 1940. 227 F.2d at 464 (construing 38 U.S.C. §§ 1901-1929). According to Mishkin, a uniform national rule of competency was appropriate because "litigation of [the competency] question is exclusively within the jurisdiction of the federal courts." Mishkin, *supra* note 1, at 819. Mishkin thus concluded that exclusive jurisdiction "tends to suggest a congressional determination for implementation of [the statutory scheme] without regard to local patterns." *Id.* at 819.

155. 490 U.S. 30 (1989).

156. 490 U.S. at 45. The Court rarely articulates explicitly its distrust of the states as a reason to refuse altogether to consider borrowing state law. Nevertheless, distrust could be at work in cases like *Pierson v. Ray*, 386 U.S. 547 (1967), *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Carey v. Piphus*, 435 U.S. 247 (1978). In these cases, all three arising under 42 U.S.C. § 1983 (1988), the Court did not even mention the possibility of borrowing state law. These holdings are striking in light of *Robertson v. Wegmann*, 436 U.S. 584 (1978), a § 1983 case in which the Court considered itself bound to apply state law by 42 U.S.C. § 1988 (1988). See 436 U.S. at 588-90; see also *supra* note 92.

One way to reconcile these cases is to point out that *Pierson*, *Imbler*, and *Carey* all involved rules affecting the liability of states or state officers that the state might manipulate to minimize its § 1983 liability. *Pierson* and *Imbler* both involved the scope of immunity of state officials from § 1983 liability. 386 U.S. at 548-52; 424 U.S. at 410-17. *Carey* involved whether students suspended from school without procedural due process may recover presumed damages. 435 U.S. at 248. *Robertson*, in contrast, involved a question of the survival of an action after a plaintiff's death, 436 U.S. at 585, a rule that states are less likely to be able to manipulate to avoid § 1983. But see *Board of Commrs. v. United States*, 308 U.S. 343, 351-53 (1939) (borrowing a state law providing that private litigants could not collect interest on recovery of taxes wrongfully collected by a state body).

157. 357 U.S. 221, 227 (1958) (Brennan, J., concurring).

normal choice-of-law doctrines are likely to prove inadequate to the task of supplying certainty and predictability.”¹⁵⁸

11. *Forum Shopping*

The Supreme Court has expressed greater willingness to construct a uniform national rule if borrowing state law will present a danger of forum shopping.¹⁵⁹ The force of this factor is somewhat limited in suits involving local transactions, where the plaintiff may have few forum choices. But in cases involving large, interstate transactions, where the defendant may be amenable to suit in several jurisdictions, forum shopping can be a substantial danger.¹⁶⁰

12. *The Possibility of Uniformity*

If a statute uses terms or structures regulatory rules in a way that prevents uniformity regardless of the rule adopted in a particular case, courts perceive a message from Congress that uniform national rules in the area are unnecessary. In *Reconstruction Finance Corp. v. Beaver County*,¹⁶¹ the Court considered the meaning of the term *real property* as used in a statute making certain federal land subject to state taxes.¹⁶² The Court, recognizing that tax laws governing realty differ from state to state, refused to exercise its power to provide a uniform definition “as a matter of federal law” in part because “Congress, in permitting local taxation of the real property,

158. 357 U.S. at 230; see also *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 148-54 (1987) (discussing the difficulty of choosing a particular state's law in civil RICO actions); cf. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (omitting consideration of the option of absorbing state law to provide rules of contribution for joint antitrust tortfeasors, perhaps in part because of the difficulty of pinpointing what state's law to borrow in antitrust cases). Courts could solve this problem simply by borrowing at all times the law of the state in which the suit was filed, but such a policy would create forum-shopping problems, itself another factor. See *infra* notes 159-60 and accompanying text.

This Note uses the term “choice of state” instead of the more traditional “choice of law” because commentators often use the latter term to refer to choices both between federal and state law and between the law of two different states.

159. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991) (applying this rationale to private claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988)); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45-46 (1989) (articulating the danger of forum shopping in the field of interstate child custody law); *Agency Holding*, 483 U.S. at 153-54 (applying this rationale to claims under the civil enforcement provision of the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1964 (1988)); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 230 (1958) (Brennan, J., concurring) (supporting the Court's decision to ignore state statutes of limitations in an admiralty case, in part because “[t]he mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations”).

160. See, e.g., *Lampf*, 501 U.S. at 537 (applying this rationale); *Agency Holding*, 483 U.S. at 153-54 (same).

161. 328 U.S. 204 (1946).

162. 328 U.S. at 208-09 (construing the Reconstruction Finance Corporation Act, ch. 8, § 10, 47 Stat. 5, 9-10 (1932), amended by Act of June 10, 1941, ch. 190, § 3, 55 Stat. 248, 248).

made it impossible to apply the law with uniform tax consequences in each State and locality."¹⁶³

C. Application of Factors

This section applies the factors identified in section III.B to the question of the validity of plan limitation periods. It concludes that courts should adopt a uniform national rule upholding plan limitation periods.

The application of the factors identified above to the issue discussed in this Note depends heavily on the content of a federal common law rule. One cannot decide whether to adopt a uniform federal rule to determine the validity of plan limitation periods without also deciding what the content of that rule would be. To apply these factors, this section analyzes the plan limitation periods question in terms of three possibilities available to federal courts. First, courts could borrow state law to decide the validity of plan limitation periods. Second, courts could formulate a uniform national rule *invalidating* such periods. Third, courts could formulate a uniform national rule *upholding* such periods. Although the desirability of a federal common law rule is in theory a distinct question from the content of that rule, examination of these three possibilities shows why the two inquiries cannot be separated. Each possible rule requires a different analysis in terms of the factors identified in section III.B.

Constructing federal common law often requires a holistic look at an area of law and a willingness to decide theoretically distinct questions together. Courts essentially act as policymakers to achieve a congressionally desired or an otherwise best result. This exercise may require experimenting with different combinations of rules on theoretically distinct questions to see if the overall result is desirable.¹⁶⁴ Such is the case regarding plan limitation periods.

163. 328 U.S. at 208-09; *see also* *De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (adopting state law to define the word *children* because the statute at issue used words like "widow," "widower," "next of kin," "executor," and "adopted," which the Court held had to be defined by state law, thus making uniformity impossible); Mishkin, *supra* note 1, at 820-22 & n.98 (citing *De Sylva* as an example of a case in which uniformity of application was impossible).

Recall that the factors discussed in this section are all to some extent reversible. *See supra* note 124. The opposite of the factor focusing on the impossibility of uniformity is, of course, the principle that courts should be more willing to construct a uniform national rule if real uniformity can be achieved in the specific area of law at issue. This latter principle is important in the ERISA plan limitation period context. *See infra* section III.C.2.

164. Mishkin uses a similar type of analysis in one of his case studies in his article on federal common law. Mishkin, *supra* note 1, at 828-33. He examines the holding of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), that a lawsuit based upon United States commercial paper and including the United States as a party is governed by uniform federal common law rules. Mishkin argues that the desirability of a uniform federal common law rule for cases involving U.S. checks in which the United States is a party depends largely upon the desirability of uniform rules for similar suits in which the United States is *not* a

Section III.C.1 distinguishes those factors that are helpful in the plan limitation period context from those that are inapplicable to this question. Section III.C.2 illustrates how these factors operate in the three different situations identified above: if courts borrow state law, if courts formulate a uniform national rule invalidating plan limitation periods, and if courts formulate a uniform rule upholding such periods. This section concludes that the latter is the superior choice.

1. *Distinguishing Applicable and Inapplicable Factors*

Not all of the factors identified in section III.B are instructive for each federal common law case. This section argues that the three instructive factors in the area of plan limitation periods are the danger of forum shopping, choice of state difficulties, and the possibility of uniformity.

In general, the application of these factors focuses on whether the “scheme in question evidences a distinct need for nationwide legal standards”¹⁶⁵ or whether a state’s rules “serve[] legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law.”¹⁶⁶ As Professor Mishkin has noted, courts deciding whether to borrow state law must often balance the gain of uniformity against “the potential losses from non-integration of the national program with normal state activities.”¹⁶⁷ This formulation captures much of what is at stake in the choice between state and federal law, and courts are generally aware of it when making the choice.¹⁶⁸

The factor of traditional state governance in an area of law does not cut for or against borrowing state law in the plan limitation period context. Before 1974, pension plans were indeed regulated by state contract and insurance laws. But Congress passed ERISA in large part because regulation by state law was producing unsatisfactory results — primarily the cancellation or underfunding of pension plans which employees were relying upon for post-retirement income.¹⁶⁹ Thus, although state law traditionally dominated the

party. Mishkin, *supra* note 1, at 828-33. Because the Court decided — correctly, in Mishkin’s view — in *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U.S. 29 (1956), that suits between private parties would be governed by state law, a different rule based merely on the presence of the United States as a party made little sense. Mishkin, *supra* note 1, at 828-33; *see also* Friendly, *supra* note 131, at 409-11 & 410 n.130.

165. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

166. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 599 (1973).

167. Mishkin, *supra* note 1, at 812.

168. *See, e.g., United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947) (noting the absence of a strong state interest in a case applying the *Clearfield* doctrine to preempt state law).

169. *See* 29 U.S.C. § 1001(a) (1988).

employee benefits area before 1974, Congress passed ERISA to end this tradition. Accordingly, there is no continuing tradition of state dominance to support borrowing state law in the context of plan limitation periods.

The next two factors, the magnitude and complexity of the interstitial lawmaking project and the limited information capacities of the judiciary, also weigh neither for nor against borrowing state law. Deciding the validity of plan limitation periods without reference to state law would not require that courts construct a large, complex body of federal common law. At most, courts would have to decide whether to uphold plan limitation periods and, if so, whether a particular plan period is reasonable. Furthermore, such an inquiry does not require judges to gain command over a complex body of information. The effects of a uniform national rule either upholding or invalidating plan limitation periods are easily articulated¹⁷⁰ based on information within the grasp of the judiciary. Because the difficulties of complexity and information gathering are not present, courts need not consider these factors in the plan limitation period context.

The next two factors, the expectation interests of private parties and interference with state regulatory judgments, are inapplicable to the plan limitation period question because of the broad preemption of ERISA section 514(a). Plan beneficiaries, administrators, and contributors cannot reasonably rely upon state law to provide the rule of decision in a dispute concerning pension and welfare benefits in the face of section 514(a)'s preemption of all state laws that "relate to"¹⁷¹ benefits plans. Similarly, Congress preempted almost all state regulatory judgments regarding pension and welfare plans when passing ERISA. To the extent that the concerns underlying these factors have motivated courts to borrow state law, these factors should not affect the plan limitation period question.

The next factor, the presence of a better match from federal law, is also unhelpful in the plan limitation period context. No analogous federal statute provides useful guidance, and the purpose behind section 514(a) may not be specific enough to direct courts to apply federal law.¹⁷² While previously existing common law in the federal courts did allow the parties to a contract to include a provision shortening a limitation period,¹⁷³ none of these cases examined the question in a setting more closely analogous to the ERISA section 502(a)(1)(B) area than did similar state cases. Accordingly,

170. See *infra* notes 177-97 and accompanying text.

171. 29 U.S.C. § 1144(a) (1988).

172. See *supra* notes 96-108 and accompanying text.

173. See *infra* note 202 and accompanying text.

these cases do not provide a match superior to state law regarding contractual limitation periods.

The same federal cases articulating a federal common law rule upholding contractual limitation periods also suggest that judges would not be engaging in illegitimate judicial legislation if they were to formulate a uniform national rule upholding or denying plan limitation periods. If federal courts are competent to articulate a rule upholding or invalidating contractual limitation periods, there is little reason to think that federal courts would be less competent to construct a similar rule in the section 502(a)(1)(B) context.

The next two factors, exclusive federal jurisdiction and distrust of states, are also unhelpful in deciding whether to borrow state law to decide the validity of plan limitation periods. Plaintiffs may bring section 502(a)(1)(B) lawsuits in either state or federal court,¹⁷⁴ and states are highly unlikely to manipulate their general laws regarding contractual modification in order to achieve a certain result in the section 502(a)(1)(B) context.

The remaining factors, however, do provide significant guidance regarding the choice between state and federal law in the plan limitation period context. These factors are forum shopping, choice of state difficulties, and the possibility of uniformity. Although the danger of forum shopping exists whenever a court chooses to borrow state law, the danger is less acute when potential defendants are susceptible to in personam jurisdiction in a limited number of states.¹⁷⁵ ERISA plans, however, may be large, interstate entities involved in a variety of transactions,¹⁷⁶ thus making the danger of forum shopping more acute. If plaintiffs do forum shop, courts will face difficult choice of state questions; the forum district court will have to decide whether to borrow the law of the state in which it sits or to absorb the law of some other state. Finally, the third remaining factor, uniformity, also affects the choice of whether to borrow state law. Courts might be able to avoid forum-shopping and choice of state difficulties by adopting a uniform federal rule; the effect of this factor, however, depends largely on whether the rule upholds or invalidates plan limitation periods.

In conclusion, then, while ten of the factors identified in section III.B provide little guidance as to whether a federal court should borrow state law to decide the validity of plan limitation periods,

174. 29 U.S.C. § 1132(e)(1) (1988).

175. The Supreme Court has liberalized the rules of in personam jurisdiction in the last half century. See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 n.1 (1975) (Powell, J., concurring) (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

176. Cf. *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (finding preemption under ERISA § 514(a) in part because of the problems inherent in administering "nationwide" plans); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987).

three factors are applicable. The next section examines which way these factors cut.

2. *Whether to Ignore State Law, and the Content of a Uniform Common Law Rule*

Federal courts facing a plan limitation period have three choices: borrowing state law to decide the validity of plan limitation periods, formulating a uniform national rule invalidating plan periods, or formulating a uniform rule upholding such plan provisions. This section concludes that the last choice, a federal common law rule upholding plan limitation periods, constitutes the best possible world in terms of the three factors identified above.

a. *Borrowing State Law.* Application of the three relevant factors indicates that federal courts should not borrow state law to decide the validity of plan limitation periods. As noted above, some ERISA plans are amenable to in personam jurisdiction in a variety of states.¹⁷⁷ If courts borrow state law to decide the validity of plan limitation periods, section 502(a)(1)(B) plaintiffs may forum shop by filing their lawsuits in states like Florida¹⁷⁸ and Texas,¹⁷⁹ states whose statutes prohibit or limit contractual modifications of the statute of limitations.¹⁸⁰

Such forum shopping will cause difficult choice of state problems. When a section 502(a)(1)(B) plaintiff files in an odd forum to take advantage of laws invalidating plan limitation periods, federal district courts choosing to borrow state law face three unhappy options. First, district courts can apply the law of the states in which they sit, thus rewarding the plaintiff's forum shopping. Second, they can engage in a choice of law analysis to decide what state's rules to follow, an option requiring examination of a question the Supreme Court has striven to avoid: does the holding of *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹⁸¹ require recourse to state choice of law rules in "arising under" jurisdiction, or should courts use federal choice of law rules?¹⁸² Third, courts can

177. See *supra* note 176 and accompanying text.

178. See FLA. STAT. ch. 95.03 (1993) (voiding any provision that shortens the time period to less than the applicable statute of limitations).

179. See TEX. BUS. & COM. CODE ANN. § 2.725(a) (West 1994) (limiting modifications to not less than one year and not more than four years).

180. For a list of some of the states with statutes invalidating contractual limitation periods, see *supra* note 29. Note that § 502(a)(1)(B) plaintiffs will make this choice even if the relevant employment contract was executed in another state.

181. 313 U.S. 487 (1941) (holding that in diversity cases district courts should use the choice of law principles of the state in which the court sits).

182. See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966) (avoiding this issue); *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956) (avoiding the issue because the choice in the case was "not difficult"); *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 371 n.2 (1945) (avoiding this issue); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456 (1942) (same).

transfer the case to a district court having greater contacts to the parties and the litigation under 28 U.S.C. § 1404(a),¹⁸³ thus raising the even more complicated issue of whether *Van Dusen v. Barrack*¹⁸⁴ and *Ferens v. John Deere Co.*¹⁸⁵ affect the transferee court's choice of state law. ERISA plan administrators have anticipated some of these problems and attempted to solve them by inserting choice of law clauses into their plans, but the circuits are split on whether these choice of law clauses are themselves enforceable.¹⁸⁶

Justice White has described the kind of problems already facing courts in ERISA cases:

The increasing significance of ERISA litigation is apparent from the growing number of such cases that appear on our docket Moreover, because the coverage of particular ERISA plans frequently extends to beneficiaries in more than one State — and, no doubt, in more than one judicial circuit — differences in the rules governing access to federal court for the purpose of pressing a claim under ERISA may have the troubling effect of encouraging forum shopping by plaintiffs.¹⁸⁷

Borrowing state law regarding plan limitation periods will only compound these problems.

In addition to forum-shopping and choice of state problems, the factor of uniformity also does not favor borrowing state law. Uniformity is obviously not achieved if courts borrow state law to decide the validity of plan limitation periods. Barring some effort to produce a uniform code of state law governing contractual limitation periods, these problems are inherent in the choice to borrow state law in this field. Borrowing state law is thus an unsatisfactory choice.

183. 28 U.S.C. § 1404(a) (1988).

184. 376 U.S. 612 (1964) (holding that after a transfer of a diversity case under 28 U.S.C. § 1404(a) (1988), when the transfer was the result of a motion by the defendant, federal district courts should use the choice of law rules of the state in which the transferor court sits).

185. 494 U.S. 516 (1990) (holding that the rule of *Van Dusen* applies even when the plaintiff requests the § 1404(a) transfer).

186. *Compare* *Wang Labs., Inc. v. Kagan*, 990 F.2d 1126, 1129 (9th Cir. 1993) (borrowing the statute of limitations of the state chosen in the plan's choice of law clause, as opposed to the statute of limitations of the state in which district court sat) *with* *Central States, S.E. & S.W. Areas Pension Fund v. Kraftco*, 799 F.2d 1098, 1105 & n.5 (6th Cir. 1986) (ignoring a plan's choice of law clause and borrowing the statute of limitations from the state in which the district court sat).

Note that these arguments are applicable whenever a court confronts gaps in a federal statute governing large, multistate transactions. In fact, the Supreme Court has stated explicitly that such transactions often require uniform federal rules to prevent many of the problems discussed in the text. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991) (applying this principle to support borrowing a federal limitation period in order to avoid "complex and expensive litigation over what should be a straightforward matter" (internal quotation marks omitted)).

187. *Mason v. Continental Group, Inc.*, 474 U.S. 1087 (1986) (White, J., dissenting from denial of certiorari).

b. Constructing a Uniform National Rule Invalidating Plan Periods. The relevant factors also indicate that courts should not construct a federal common law rule *invalidating* plan limitation periods. A uniform rule would initially appear to eliminate forum-shopping and choice of state difficulties, but courts must then decide what limitation period governs the section 502(a)(1)(B) cause of action. Courts would in all probability answer this question by borrowing the state statute of limitations for suits on written contracts.¹⁸⁸ But this practice does not solve the forum-shopping problem, because state limitation periods for suits on a written contract vary widely.¹⁸⁹ Plaintiffs would likely forum shop for a lengthy statute of limitations, again to avoid a limitation bar to their lawsuits. Such forum shopping leads to the same choice of state problems as would exist if courts were to borrow state law to decide the validity of plan limitation periods in the first place. Thus, applying a uniform rule invalidating plan limitation periods represents no improvement over borrowing state law to decide the validity of plan limitation periods. Neither approach provides any significant gain in uniformity, or in solving forum-shopping and choice of state difficulties.¹⁹⁰

c. Constructing a Uniform National Rule Upholding Plan Limitation Periods. A uniform national rule upholding plan limitation periods results in a significant gain in uniformity and a corresponding decrease in the possibility of litigation collateral to the merits of a section 502(a)(1)(B) lawsuit. If federal courts enforce limitation periods, they would have no need to look to state law to find either a statute of limitations¹⁹¹ or a rule governing the validity of contractual limitation periods. The plan itself would clearly state the limitation period regardless of the law of any state.

Examining these issues from the point of view of a plan administrator also indicates that uniformity is best served by a rule upholding reasonable limitation periods. In passing ERISA, Congress sought to ensure smooth and rapid administration of benefits plans. Thus, for example, various ERISA provisions require fiduciaries administering plans to consider administrative integrity in making

188. See *supra* note 17 and accompanying text.

189. See *supra* note 24 and accompanying text.

190. There is one reason why a uniform national rule invalidating plan limitation periods might still be slightly superior to resorting to state law. State statutes of limitations for suits on written contracts will normally be longer than plan limitation periods. If courts invalidate plan limitation periods and consult only the state statutes, the limitation issue is less likely to arise, because longer limitation periods mean that a plaintiff is more likely to have filed before the period expired.

191. See, e.g., *Central States, S.E. & S.W. Pension Fund v. King Dodge, Inc.*, 835 F.2d 1238 (8th Cir. 1987) (following a state court's pronouncements on the applicability of the state's two limitation periods governing suits on written contracts).

decisions.¹⁹² ERISA section 503¹⁹³ requires each plan to have an internal appeals process to help avoid unnecessary litigation over denial of benefits. Smooth administration helps minimize the percentage of plan income directed to purposes other than providing employee benefits.

Plan limitation periods aid in smooth administration. As already noted above, in the absence of plan periods, federal courts would likely borrow state limitation periods for suits on written contracts. These limitation periods can be quite long, some as many as ten or fifteen years.¹⁹⁴ State legislatures setting these lengthy periods probably did not contemplate their application to a quasi-contractual arrangement like an ERISA plan, an arrangement that by statute must include an internal appeals process to resolve some disputes and upon which large numbers of employees depend. After initially ruling on an employee's application for benefits, and after reviewing a denial through the appeals process required by section 503,¹⁹⁵ plan administrators will desire to close the books on a particular claim. Rapid and final disposition of a claim, with a shortened but reasonable time period for filing suit, will allow plans to order their future investments and arrangements free from the worry of lawsuits based on events that took place up to fifteen years ago. Smooth administration ultimately will benefit the rest of the employees covered by the plan by minimizing the quantity of plan funds devoted to functions other than paying benefits, a goal congruent with Congress's purpose in passing ERISA.

Indeed, in cases deciding the scope of the preemption under ERISA section 514, the Supreme Court has recognized that variations in state law may cause inefficiencies in plan administration, and has stated that this result should be avoided when possible.¹⁹⁶ Although borrowing state law to decide the validity of plan limitation periods might not create the "patchwork scheme of regulation" nor the "considerable inefficiencies in benefit program operation"¹⁹⁷ that concerned the Court in the preemption cases, the prac-

192. See, e.g., 29 U.S.C. § 1104(a)(1)(A) (1988) (requiring that plan fiduciaries administer the plan "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan").

193. 29 U.S.C. § 1133 (1988).

194. See *supra* note 24 and accompanying text.

195. Plan beneficiaries are required to exhaust this internal appeals process before filing suit. *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986); see also Jared A. Goldstein, Note, *Employment Discrimination Claims Under ERISA Section 510: Should Courts Require Exhaustion of Arbitral and Plan Remedies?*, 93 MICH. L. REV. 193, 196 n.23, 199-200 n.39 (1994) (collecting cases on ERISA exhaustion).

196. See *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987).

197. 482 U.S. at 11.

tice of borrowing the entire body of state limitation law might. The mere fact that plans have chosen to insert plan limitation periods in their regulations suggests that plans are attempting to avoid even the relatively minor administrative difficulties associated with variations in state statutes of limitations. A uniform rule upholding plan limitation periods would thereby improve plan administration.

In conclusion, the possibility of uniformity, forum shopping, and choice of state considerations support the adoption of a uniform national rule regarding the validity of plan limitation periods, but only if that rule upholds these periods.

IV. CONSISTENCY WITH ERISA POLICY OF A NATIONAL RULE UPHOLDING PLAN LIMITATION PERIODS

The Supreme Court has emphasized that "[i]f there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law."¹⁹⁸ This principle suggests that any rule governing the validity of plan limitation periods must be consistent with ERISA's general purpose and policies. Accordingly, this section takes a final look at the consistency between a rule enforcing plan limitation periods and general federal policy in the area of employee benefits. Section IV.A argues that a canon of statutory interpretation in favor of common law rules suggests that the importation into the ERISA section 502(a)(1)(B) context of the previously existing common law rule upholding contractual limitation periods would not be inconsistent with the purposes of ERISA. Section IV.B rebuts the argument that plan limitation periods should be declared invalid because they will invariably cause some meritorious claims to fail on limitation grounds. This section concludes that the rule suggested is not inconsistent with ERISA policy even if some meritorious claims will be time-barred.

A. *The Canon in Favor of Common Law Rules*

When a federal statute is silent on an issue addressed by an entrenched common law principle, courts presume that Congress intended for the common law rule to apply in the context of the statute, unless Congress has manifested a contrary intent.¹⁹⁹ As a unanimous Supreme Court stated recently in *Astoria Federal Sav-*

198. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966).

199. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). The issue of the validity of plan limitation periods occupies an uncertain place near the line dividing statutory interpretation from common lawmaking, assuming that such a line even exists. *See supra* note 110. Accordingly, applying a canon of statutory construction to this issue is proper.

ings & Loan Assn. v. Solimino,²⁰⁰ the ultimate question is always what the legislature intended, but

[t]he presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident."²⁰¹

United States common law includes an entrenched rule that contractual modifications of the limitation periods applicable to a suit on a written contract are valid so long as no statute prohibits such modifications and so long as the contractual period allows a reasonable time for a lawsuit. The Supreme Court²⁰² and the vast majority of states²⁰³ have followed this rule. The Supreme Court discussed the first part of this rule in *Riddlesbarger v. Hartford Insurance Co.*,²⁰⁴ an early case involving a lawsuit by an insured on his policy.²⁰⁵ The Court explained that the parties to a contract may specify the conditions upon which performance depends, and that a contractual limitation period is an example of such a condition.²⁰⁶ Later courts concluded that so long as a contractual limitation period is reasonable, courts should enforce the parties' voluntarily agreed-upon terms.²⁰⁷

This common law background suggests that a rule upholding plan limitation periods would not be inconsistent with how Congress believed that federal courts would fill gaps in ERISA. Fed-

200. 501 U.S. 104 (1991).

201. 501 U.S. at 108 (citations omitted) (quoting *Isbrandtsen*, 343 U.S. at 783); see also *Midlantic Natl. Bank v. New Jersey Dept. of Env'tl. Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

This rule is akin to the principle that when Congress uses a legal term of art in a statute without usefully defining that term, courts presume that Congress intends for the common law definition to apply. See *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344 (1992); *Taylor v. United States*, 495 U.S. 575 (1990); *Moskal v. United States*, 498 U.S. 103 (1990).

202. See, e.g., *Order of United Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947) (modification must be reasonable); see also *Thompson v. Phenix Ins. Co.*, 136 U.S. 287, 297-98 (1890) (parties may agree to a different time period); *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386 (1868) (same).

203. See, e.g., *C & H Foods, Co. v. Hartford Ins. Co.*, 211 Cal. Rptr. 765, 769 (Ct. App. 1984); *Pick v. Associated Indem. Corp.*, 547 N.E.2d 555, 559 (Ill. App. Ct. 1989); *Brunner v. Economy Preferred Ins. Co.*, 597 N.E.2d 1317, 1318 (Ind. Ct. App. 1992); *Thomas v. United Fire & Cas. Co.*, 426 N.W.2d 396, 397-98 (Iowa 1988); *O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d 221, 222 (Minn. Ct. App. 1991); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 779 (N.M. 1991); *Lane v. Grange Mut. Cos.*, 543 N.E.2d 488, 489 (Ohio 1989).

Federal courts may refer to the general body of state common law as developed across the nation for guidance in interpreting ERISA. *Darden*, 112 S. Ct. at 1348 & n.3.

204. 74 U.S. (7 Wall.) 386 (1868).

205. 74 U.S. (7 Wall.) at 386-88.

206. 74 U.S. (7 Wall.) at 390.

207. See *supra* notes 202-03.

eral courts recognize that an ERISA benefits plan in some ways resembles a contract.²⁰⁸ Lower court decisions characterizing the essence of an ERISA section 502(a)(1)(B) action as a breach of contract suit support this recognition.²⁰⁹ Accordingly, the rule of *Riddlesbarger* upholding contractual limitation periods, along with the principle of statutory interpretation favoring common law rules, establishes a presumption that a rule upholding plan limitation periods would not be inconsistent with Congress's expectations regarding federal court gap-filling in the ERISA context.²¹⁰

208. See, e.g., *Trustees of the Wyo. Laborers Health & Welfare Plan v. Morgen & Oswood Constr. Co.*, 850 F.2d 613, 620 (10th Cir. 1988).

209. See *supra* notes 16-21 and accompanying text.

210. A recent Supreme Court decision provides some additional support for the application of the presumption in *Astoria* to ERISA. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-15 (1989) (relying heavily on the common law of trusts to choose a standard of review for § 502(a)(1)(B) actions without referring to the law of any particular state).

One can state the *Astoria* argument articulated in the text in different but closely related terms, and in doing so draw additional support from another Supreme Court case. In *West v. Conrail*, 481 U.S. 35 (1987), the Court ruled that because the Federal Rules of Civil Procedure provided rules governing when an action is commenced for limitation purposes, federal courts should not borrow state commencement rules as part and parcel of a borrowed state statute of limitations. 481 U.S. at 38-40. The Court reasoned that "because of the availability of Rule 3, there is no lacuna" in federal law necessitating recourse to state law. 481 U.S. at 40. One can arguably state the entire presumption in favor of common law rules in similar terms: if a clearly established and entrenched common law rule provides an answer to the question at issue in a particular case, such as the common law rule validating contractual limitation periods, then there is no "lacuna" in federal law necessitating recourse to state law.

The Supreme Court discussed the strength of the presumption in favor of common law rules in *Astoria*. The Court held that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988) [hereinafter the ADEA], made the common law doctrine of administrative estoppel inapplicable to age discrimination plaintiffs in some circumstances. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 110-13 (1991). Justice Souter, writing for a unanimous court, stated,

This interpretative presumption is not, however, one that entails a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme. Rules of plain statement and strict construction prevail only to the protection of weighty and constant values 501 U.S. at 108.

The Court first found that administrative preclusion does not implicate weighty and constant values. 501 U.S. at 108. Justice Souter gave two examples of weighty and constant values that could be reversed only by a plain statement from Congress. The first was state immunity under the Eleventh Amendment. 501 U.S. at 108. The second was the presumption against avoiding giving congressional statutes extraterritorial effect. 501 U.S. at 108-09.

The Court then held that the structure and language of the ADEA illustrated that Congress had assumed, and thus intended, that the doctrine of administrative estoppel would not apply in the context of the statute. 501 U.S. at 110-11. *Astoria* thus illustrates that the existence of an established common law rule gives rise to a rebuttable presumption that Congress intended for the rule to apply in the context of a particular statute. Furthermore, Congress need not make a plain statement of its intent in order to overcome this presumption.

Astoria does not explain exactly what is required to overcome the presumption in favor of a common law rule. Justice Souter relied on statutory language and legislative history to find that Congress did not intend for administrative estoppel to apply to ADEA suits. 501 U.S. at 109-14. *Astoria* does not say, however, whether a court may find that Congress intended to reverse an established common law rule when the application of that rule would be inconsistent with a court's view of the purpose of a congressional statute, if the statute's language, legislative history, and structure are essentially silent on the issue. Fortunately, federal courts

B. Consistency with Federal Policy

As noted above, any federal common law rule must be consistent with federal policy in the area.²¹¹ In the present context, this principle requires that the uniform national rule upholding plan limitation periods be consistent with ERISA section 502(a)(1)(B)'s policy of assuring that employees receive the benefits to which they are entitled.²¹² In essence, the rule regarding plan periods must preserve the effectiveness of the section 502(a)(1)(B) cause of action. This principle in turn leads to two related concerns. First, a federal court could not uphold an extremely short plan limitation period — two days, for instance — without raising serious questions about the consistency of the period with ERISA policy. Second, enforcing any plan limitation period raises the strong possibility that some meritorious section 502(a)(1)(B) lawsuits will be time-barred.

The short answer to the second of these arguments is that a uniform federal common law rule, like a borrowed state statute, "cannot be considered 'inconsistent' with federal law merely because the [rule] causes the plaintiff to lose the litigation."²¹³ Enforcing any limitation period means that *some* meritorious claims will be time-barred. Plaintiffs may still enforce their claims by commencing their actions within the plan's specified time period.²¹⁴ Thus, plan limitation periods are not inconsistent with ERISA policy on this ground alone.

need not resolve this difficult question to rule on the validity of plan modifications of the limitation period applicable to an ERISA § 502(a)(1)(B) lawsuit. As section IV.B demonstrates, a rule upholding plan limitation periods is not inconsistent with the purposes of ERISA even if such a rule would cause some meritorious § 502(a)(1)(B) lawsuits to fail.

Although the canon of statutory interpretation in favor of common law rules appears to favor a federal common law rule upholding plan limitation periods, strong reliance on such canons would be unwarranted. The difficulty is that, as Professor Karl Llewellyn vividly demonstrated, most canons of statutory interpretation have equal but opposite canons of statutory interpretation. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). In this particular context, the canon in favor of common law rules is the opposite of the canon in favor of construing remedial statutes broadly. *Id.* at 401; see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 459 n.201 (1989). See generally Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) (criticizing the use of canons of interpretation with the observation that "the only 'canons' we [legislators] talked about were the ones the Pentagon bought that could not shoot straight"). Because this Note need not rely on the strength of the canon in favor of common law rules as an affirmative argument in favor of a certain rule, this section uses this canon only to show that a federal rule upholding plan limitation periods is not inconsistent with ERISA.

211. See *supra* note 198 and accompanying text.

212. See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980) (identifying this goal as one of the primary purposes of ERISA).

213. *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978).

214. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) ("[P]laintiffs can still readily enforce their claims . . . simply by commencing their actions within three years.").

Nevertheless, an unduly short plan period, one effectively nullifying or placing an undue burden on the section 502(a)(1)(B) remedy, would be inconsistent with the federal policy embodied in ERISA. But the common law rule discussed in section IV.A directs courts to honor contractual limitation periods only if such periods provide a potential plaintiff a *reasonable* length of time for a lawsuit.²¹⁵

In *Burnett v. Grattan*,²¹⁶ the Supreme Court closely examined the practicalities of filing a suit under 42 U.S.C. §§ 1981, 1983, 1985, or 1986²¹⁷ in holding that a six-month state statute of limitations was inappropriately short and thus inconsistent with the federal policy behind these statutes.²¹⁸ The Court held that "[a]n appropriate limitations period must be responsive to [the] characteristics of litigation under the federal statutes."²¹⁹ The principles and holding of *Burnett* suggest that federal courts should look to the practicalities of filing a section 502(a)(1)(B) lawsuit to decide whether a plan limitation period is unduly short, and that judges should not be shy about invalidating unreasonable plan periods that place an undue burden on the section 502(a)(1)(B) remedy.²²⁰ This vigilance should allay the fear that courts will adopt unduly short limitation periods.

CONCLUSION

Federal common law issues arise in an incredible variety of legal and factual contexts. Such variety makes articulation of overarching theories based on reasoning from first principles difficult. The framework developed in this Note is thus decidedly limited. The factors enumerated here are lenses designed to focus the thinking of courts and commentators deciding when to incorporate state law into federal law; the discussion of plan limitation periods provides a case study of how these factors may relate to one another. The factors as applied here indicate that courts should adopt a uniform national rule upholding reasonable plan limitation periods. But the factors may work differently in another context, and new factors will undoubtedly surface. The strength of each factor, as well as its

215. See *supra* notes 202-07 and accompanying text.

216. 468 U.S. 42 (1984).

217. 42 U.S.C. §§ 1981, 1983, 1985, 1986 (1988).

218. 468 U.S. at 49-55.

219. 468 U.S. at 50.

220. Courts could perform this function in two different ways. Courts could adjudicate the validity of different plan periods on a case by case basis, which would inevitably result in conflicting pronouncements about the reasonableness of different time periods. Alternatively, courts could seek to draw a bright line rule and allow plan administrators to alter their plans accordingly. The latter option would, of course, be more consistent with the goals of uniformity and of preventing forum-shopping. Some courts, however, may view a bright-line standard as "judicial legislation," and choose a case-by-case approach on that ground.

relationship to other factors, also varies according to the legal and factual context. In the final analysis, courts should realize that they are engaging in policymaking of the most basic sort, and accordingly seek to integrate the rules they fashion into the dual system of U.S. government.