Limitation Borrowing in Federal Courts

Aggrieved citizens contemplating litigation usually face statutes requiring that they bring suit within a fixed number of years after the claim accrues. Litigants who prosecute state claims find that legislatures have enacted limitations for every action by using provisions that restrict specific causes of action and general statutes that limit claims not otherwise covered. Litigants suing on a federal right, however, face a different statutory scheme. Although federal statutes limit several specific federal causes of action, there are no general federal statutes of limitations. As a result, some litigants in federal court press their claims unrestrained by any statute of limitations.

Yet such causes of action do not go unlimited. Traditionally, federal courts have limited actions by borrowing a state statute of limitations. Thus, when an otherwise unlimited federal claim arises, the court treats it as if it had arisen under state law and applies the appropriate state statute of limitations. Federal courts have used borrowing successfully for more than eighty years. Recently, however, the Supreme Court acknowledged a second method of limiting federal actions: in Occidental Life Insurance Co. v. EEOC the Court held that when a state statute of limitations would “frustrate or interfere with the implementation of national policies,” the right of action is to be limited by standards like those of the equitable doctrine of laches. Occidental Life, undermining nearly a century of precedent, raises important questions about the appropriate method of limiting actions in federal courts.

This Note studies limitations on federal actions in light of Occidental Life. Part I discusses the reasons for limiting actions

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7. 432 U.S. at 367.
and presents a short history of the limitation of actions. Part II analyzes the alternatives for the federal courts when no statute of limitations applies directly. Finally, the Note suggests a solution that will achieve a result most nearly consistent with both the reasons for limiting actions and the proper role of the judiciary. It suggests, notwithstanding Occidental Life, that in some situations courts should borrow specific federal statutes of limitations and that in the remainder they should continue the traditional practice of borrowing state statutes of limitations.

I. PURPOSES OF LIMITING ACTIONS

To evaluate the alternative means of placing a time limitation on a cause of action, one must understand the purposes of limiting actions. This Part discusses the three most important reasons for governments to limit the lives of causes of action:

1. to promote the achievement of substantive justice by the courts;
2. to provide stability to potential defendants and to society in general; and
3. to promote the efficient use of judicial resources.

The first reason to limit the life of a claim is to promote the achievement of substantive justice by protecting the potential defendants against "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Limiting the time period in which actions may be prosecuted excludes stale claims and moldy evidence and preserves the integrity of the fact-finding process.

Second, limiting actions provides stability. Temporal limitations, especially those of certain duration, assure potential defendants that they will not be forced to live indefinitely with the threat of a lawsuit. One form of limitation, the statute of limitations, gives the potential defendant a precise day on which to heave a sigh of relief. This sigh is protected at the expense of a


possibly valid claim so that the signer may plan his daily affairs against a stable background. This stability also benefits society at large. Often, many different people have a stake in the economic status of a potential defendant. A legal action can drastically change that status and affect the well-being of the defendant's associates. Therefore, many people are reluctant to deal with others whose legal status is uncertain. Limitation of actions minimizes the disruptive effects of such uncertainty on commercial intercourse. 11

Finally, limiting actions conserves judicial resources by checking the caseload of the courts. 12 Restricting litigation eliminates claims from the trial docket, reduces crowded calendars, and allows courts to concentrate on relatively current disputes. 13

Despite these strong reasons for imposing time limits on the prosecution of claims, the common law courts did without them for many years. In fact, the early equity courts took the first steps in that direction when they began to conclusively presume payment of twenty-year old bonds and other specialties, effectively barring actions not prosecuted within that time. 14 Courts of law later followed equity's example and adopted this twenty-year conclusive presumption. 15

The first express statutes of limitations applied only to real property actions. They established temporal barriers by reference to certain notable events, such as royal coronations. 16 Not until the reign of Henry VIII was the limitation period reduced to a fixed interval between the accrual of the right and the commencement of the action. 17 The English colonies in America generally adopted the British statute, and most kept it even after independence. 18

Soon after the newly independent states ratified the Constitution in 1787, Congress began to enact legislation for the new government. It created a system of federal courts 19 and estab-

11. Developments, supra note 8, at 1185.
15. Id. See also Bean v. Tonnele, 94 N.Y. 381, 384 (1884).
16. 1 H. Wood, supra note 14, § 2.
lished private federal rights. But all too often it failed to place explicit time limits on those rights. Thus, the question of whether limitations were intended, and, if so, how they were to be determined, was left to the courts.

II. ALTERNATIVES FOR THE FEDERAL COURTS WHEN NO FEDERAL STATUTE OF LIMITATIONS APPLIES DIRECTLY

When no statute of limitations explicitly covers a claim in a federal court, the court may choose among five alternatives:

1) It may find that there is no limitation on the time during which that action may be brought.

2) It may create its own "statute of limitations" to be applied to that claim and to all similar claims.

3) It may "borrow" a statute of limitations from another federal claim and incorporate it as the relevant statute for the claim in question.

4) It may "borrow" a statute of limitations from a state and incorporate it as the relevant statute for the claim in question.

5) It may apply the equitable doctrine of laches.

This Part suggests that the first two alternatives — no limitation and judicial legislation — are totally unacceptable. It then suggests that each of the last three alternatives has some merit, but that each poses difficult problems in some situations. The final Part suggests a unified theory of borrowing to resolve these problems.

1. No Limit

The first choice, to impose no temporal limits on actions, is unworkable. When actions go unlimited, the legal system forgoes the benefits of accuracy, stability, and efficiency that limitation is designed to foster. The gains — greater equity for those whose claims are valid even though old — have failed to impress American judges. Chief Justice Marshall, for example, said that to allow someone to bring an action regardless of the lapse of time "would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted, after a lapse of

20. E.g., Act of April 10, 1790, ch. 7, 1 Stat. 109 (patents); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyright).

21. In addition to these limitations, a court could still invoke the twenty-year common law presumption. See text at notes 14-15 supra. See also Note, *Disparities in Time Limitation on Federal Causes of Action*, 49 Yale L.J. 738, 744 (1940). While this would establish a temporal barrier, few of the purposes of limiting actions would be adequately served by such an extended period.
three years, it could scarcely be supposed, that an individual
would remain forever liable to pecuniary forfeiture." Moreover,
even though many federal actions are unlimited, Congress has
long acquiesced in the practice of borrowing state limitations,
suggesting a legislative preference for limited actions.23

2. Judicially Legislated Limitations

The second option, to allow the courts to formulate temporal
limitations for broad classes of federal rights, would fulfill most
purposes of limiting actions. Indeed, because courts are in a posi-
tion to see many important effects24 of any given limitation pe-
riod, they are well-placed to set specific time limits.

The only difficulty with this approach is its concentration of
quasi-legislative authority in the hands of the federal judiciary.
At the heart of the problem is the distinction between legislative
and judicial powers. Generally speaking, a court investigates,
declares, and enforces liabilities as they stand on facts before it
and under laws already existing.25 A legislature, on the other
hand, provides for the future by creating, sometimes arbitrarily,
a rule to be applied thereafter. The creation of a fixed-period
limitation on actions, necessarily an arbitrary task, is properly
characterized as legislative action.

Alone, this does not preclude action by a federal court, whose
occasional authority to act legislatively has long been recog-
nized.26 Some of the legislative power of the federal courts is con-
stitutionally rooted;27 the remainder has been conferred on the
courts, explicitly or implicitly, by Congress.28 The Constitution

22. Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805). See also Campbell v. Havet-
hill, 155 U.S. 610, 616 (1895), where the Court rejected the notion of a class of plaintiffs
whose causes of action are subject to no temporal limitations.
23. See note 124 infra; Einhorn & Feldman, Choosing a Statute of Limitations in
24. Docket control, however, is not the only aim of statutes of limitations. See text
at notes 8-13 supra.
26. See L. Tribe, American Constitutional Law § 2-2, at 16 (1978); P. Bator, P.
Mishkin, H. Wechsler, Hart and Wechsler's The Federal Courts and the
27. E.g., the power to create rules of decision for admiralty cases derived from U.S.
Const. art. III, § 2. See L. Tribe, supra note 26, § 3-31 at 116; Hart & Wechsler, supra
note 26, at 786.
28. See L. Tribe, supra note 26, § 3-31 at 115-16. See also Van Alstyne, The Role of
Congress in Determining Incidental Powers of the President and of the Federal Courts: A
Comment on the Horizontal Effect of "The Sweeping Clause", 56 Ohio St. L.J. 788-94
(1975). An example of such legislative power is the ability of the Supreme Court to devise
contains no explicit grant of power to establish limitations on the prosecution of actions. Thus, if the federal courts have any such power, it has been conferred on them by Congress.

But Congress has never delegated this power to the courts. The Supreme Court implicitly recognized this in *UAW v. Hoosier Cardinal Corp.*29 The plaintiff labor union, arguing that incompatible doctrines of local law must give way to principles of federal labor law30 contended that a borrowed state statute of limitations should not bar its claim. Instead, the union asked the Court to create a uniform limitation period to close the gap left by Congress. Although the Court recognized that section 301 of the Labor Management Relations Act31 represented a broad grant to the courts of power to fashion labor law,32 it held that it could infer no congressional intent that the judiciary set a limitation period.33 Viewing the proposal as one for “drastic . . . judicial legislation,”34 the Court concluded that “the teaching of our cases does not require so bald a form of judicial innovation.”35

This is the proper view. While Congress arguably could confer upon the courts a power to create fixed periods of limitation, there has never been any indication that it has intended to do so. In the absence of explicit congressional authorization, the courts ought not to assume that they possess such legislative power.36

32. 383 U.S. at 701.
33. 383 U.S. at 701-04.
34. 383 U.S. at 702.
35. 383 U.S. at 701. But see Justice White’s dissent, where he argues that the § 301 delegation was meant to include the power to fashion limitations, 383 U.S. at 710, and that the Court should be free to draw on any source, including state and federal statutes, in devising such limitations, 383 U.S. at 714. In at least one case, the Supreme Court has suggested that in extraordinary circumstances, federal courts could create “statutes” of limitations. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court applied admiralty laches to a personal injury suit arising from an accident on a coastal oil rig. If declining to create a specific limitation period, the Court stated that “[a] special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations.” 404 U.S. at 104. See also *De Malherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335 (N.D. Cal. 1978).
36. See also *Fischbach & Moore, Inc. v. International Union of Operating Engrs.*, 198 F. Supp. 911, 915 (S.D. Cal. 1961), *reud. on other grounds*, 369 F.2d 308 (9th Cir. 1966),
3. **Federal Borrowing**

A third option is to borrow an express federal statute of limitations that governs a cause of action similar to that at issue. Although such an approach has never been used in a civil action at law, it has supplied the limitation in at least one maritime action, *McAllister v. Magnolia Petroleum Co.* In that case a seaman combined an action for unseaworthiness with a Jones Act claim for negligence. The Jones Act claim was limited by a three-year federal statute, while the unseaworthiness action was not limited by any federal provision. Principles of res judicata prohibited the prosecution of the Jones Act claim and the unseaworthiness claim in separate actions. Because of this, the Court noted that for those wishing to press both claims, giving effect to the state’s two-year statute for the unseaworthiness claim would effectively preempt the three-year Jones Act provision and the congressional policy expressed therein. Consequently, it held that the unseaworthiness claim would be limited by the three-year statute governing the Jones Act claim.

Borrowing an analogous federal limitations period is appropriate for some causes of action created by judicial implication. In such claims, one cannot infer that congressional creation of an unlimited right of action reveals an intent to conform to the historical practice of borrowing limitations from state laws; in these cases Congress has had no opportunity to consider enacting its own explicit limitation period. Therefore, courts should not rush to apply the general rule of state limitation borrowing to implied causes of action.


40. 357 U.S. at 225. The Court, however, did not consider whether a state period longer than the Jones Act period could be applied. See UAAP v. Hoosier Cardinal Corp. 383 U.S. 696, 704 n.6 (1966). The Court’s reasoning in *McAllister* indicates that such a period could be applied since it would not frustrate the policy of the Jones Act.
This is particularly true when a court infers a cause of action from a federal statutory system that has its own specific statute of limitations. In such circumstances, the court creates a judicially enforceable right because it believes that such a right is necessary to effectuate federal policy. Because the statute limiting the entire scheme suggests boundaries to that policy, it is sensible to apply that statute to all implied offspring of that policy.

4. State Borrowing

The fourth possibility is to borrow state statutes of limitation. Unlike federal borrowing, state borrowing is well-defined by usage and today provides the general rule for limiting otherwise unlimited federal actions. The federal courts have borrowed state statutes since early in the nineteenth century. In *M'Cluny v. Silliman*, a case grounded in diversity jurisdiction, a registrar of a United States land office was sued for malfeasance. Referring to the Rules of Decision Act, the Court held the action barred by a six-year Ohio statute of limitations: "Under this statute, the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the Courts of the United States, and the same effect is given to them as is given in the state Courts." A borrowed state statute of limitations was first used to limit a suit to enforce a federal right in 1895. In *Campbell v. Haverhill* the Court applied a six-year Massachusetts statute to bar a patent infringement claim. Noting that the Rules of Decision Act consistently had been held to require application of state statutes to limit state law rights as-
serted in federal court, the Court held that the Act also authorized state law limitation of federal causes of action.\textsuperscript{49} Thus, when Congress has not spoken directly, a court is not without guidance. The Rules of Decision Act directs it to rely “on the State’s wisdom in setting a limit . . . on the prosecution of a closely analogous claim.”\textsuperscript{50}

But the literal terms of the Rules of Decision Act do not provide a completely satisfactory justification for limitation borrowing for all federal claims. Historically, statutes of limitations have not applied to suits in equity,\textsuperscript{51} and therefore the Court has refused to apply such state statutes to federal rights whose sole remedy is equitable.\textsuperscript{52} Moreover, whether the Rules of Decision Act itself has any relevance to equitable claims is still a topic of debate. By its own terms the Act applied to “trials at common law”;\textsuperscript{53} it said nothing about suits in equity.\textsuperscript{54} Even after congressional modification of the Act in 1948 to include “civil actions” generally, the view that the Act should apply to equitable and maritime actions has received little, if any, acceptance.\textsuperscript{55}

Recently, courts have failed to state the basis of their use of limitation borrowing. Although they have not rejected the Rules of Decision Act as a justification, they have tended to ignore it

\begin{footnotes}
\item[49] 155 U.S. at 620. Two important provisos to the general rule of limitation borrowing should be noted. First, federal courts need not borrow statutes that discriminate against or are hostile to federal rights. For example, in Rockton & Rion Ry. v. Davis, 159 F.2d 291 (4th Cir. 1946), the court considered a South Carolina statute of limitations providing six years in which to bring an action of a contract, obligation, or liability unless such contract, obligation, or liability was created by federal statute, in which case, the period was one year. The court held that the one-year statute should not be applied. See Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), affd.,327 U.S. 610, 615 (1946).
\item[53] See note 46 supra.
\item[54] See Russell v. Todd, 309 U.S. 280 (1940).
\item[55] See note 46 supra. While the change would seem to require limitation borrowing in equitable and maritime actions, such a view has never received much support. Furthermore, by looking to congressional intent and the historic procedural autonomy of equity and admiralty courts, a persuasive argument can be made for maintaining the distinction between legal and other actions. See Hill, supra note 36, at 113-15.
\end{footnotes}
and to treat the doctrine as an aspect of judge-made law. The Supreme Court has been indifferent toward the statute in recent limitation borrowing cases and has limited its discussion to underlying policy values.

The practice of borrowing state statutes to limit federal causes of action poses two significant problems. The first is to determine which state statute of limitations ought to be borrowed to limit a particular federal cause of action. The second is to maintain uniformity among courts in different states enforcing the same federal right.

The courts agree that the objective in choosing a state statute of limitations is to borrow the one that best effectuates the federal policy at issue. In seeking an appropriate state limitation period, courts follow two courses: the passive and active approaches.

When using the passive approach, the court first examines the nature of the federal cause of action. It then examines the state's catalogue of limitations, determines which statute would apply to a similar state claim, and applies that statute to the federal claim. This approach comports with the interpretation that has been given the Rules of Decision Act.

A court using an active approach assumes a more legislative posture in determining which state limitation period should apply. The court begins, as do courts using the passive approach, by identifying those state statutes that govern claims similar to the federal claim at issue. Instead of selecting the most analogous statute, however, an active court establishes a group comprising all statutes governing state claims that bear a minimum degree of similarity to the federal claim.

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56. E.g., Holmberg v. Armbricht, 327 U.S. 392, 395 (1946): “The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.” See also Einhorn & Feldman, supra note 23, at 497.


59. See also text at notes 68-71 infra.

60. The court determines the characteristics of, and the elements which give rise to, the completed cause of action. Federal law governs the characterization question. See Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785, 788 (2d Cir. 1959).


62. See text at notes 5 & 48-50 supra.

63. See also text at notes 72-74 infra.
of similarity to the federal claim at issue. To choose a statute from the group, the court weighs other factors it feels deserve consideration — most notably the social, economic, and political policies underlying the federal right, and the lengths of the periods prescribed by the various statutes — and selects the statute that best reflects these considerations.\textsuperscript{64}

A good illustration of the difficulties that can come up under either the passive or the active approach to borrowing state statutes of limitations is the problem of limitations for SEC rule 10b-5 securities actions,\textsuperscript{65} presently one of the more confused areas of federal law.

A court using a passive approach often must choose among a large number of limitation statutes.\textsuperscript{66} In cases arising under rule 10b-5, alternatives\textsuperscript{67} include state statutes of limitations governing actions for fraud, blue sky claims,\textsuperscript{68} liability created by statute,\textsuperscript{69} general civil causes of action (e.g., contract, personal injury, etc.), and claims not covered by other provisions. The court must select the statute that a state court would apply if the right in question were the creation of the state, rather than the federal legislature. In a 10b-5 case, it considers factors such as the presence of provisions similar to rule 10b-5 in the state blue sky law, parallels between 10b-5 actions and securities actions, and parallels between 10b-5 actions and fraud actions.\textsuperscript{70} Courts strive to be


\textsuperscript{65} "Rule 10b-5 prohibits fraud by any person who makes a material misrepresentation or omission in connection with the purchase or sale of securities; rule 10b-5 thus extends its protection to both buyers and sellers of securities wherever the trading occurs." Comment, Statutes of Limitations in 10b-5 Actions: A Proposal for Congressional Legislation, 24 Syracuse L. Rev. 1154, 1156-57 (1973) (emphasis original).


\textsuperscript{67} See Einhorn & Feldman, supra note 23, at 499.

\textsuperscript{68} Blue sky laws are state statutes regulating securities. See J. Mofsky, Blue Sky Restrictions on New Business Promotions 1, 3 n.1 (1971).

\textsuperscript{69} E.g., CAL. CIV. PRO. CODE § 338 (West Supp. 1978): "An action upon a liability created by statute, other than a penalty or forfeiture."

\textsuperscript{70} Einhorn & Feldman, supra note 23, at 603. The task may now be somewhat easier. For a while the circuits differed as to whether scienter was an element of the 10b-5 cause of action. In Ernst & Ernst v. Hochfelder, 425 U.S. 186 (1976), the Supreme Court held
objective in such determinations, but because there are not, and never can be, clear guidelines to explain when two things are "similar," there is room for reasonable differences of opinion.71

The latitude is even greater for a court that uses the active approach. The court begins with the same list of "similar" statutes as a passive court, but the process of weighing is far more complicated. Similarity is only one of many criteria for selection. Some courts, favoring longer limitation periods, have borrowed general fraud statutes and applied them to 10b-5 actions.72 Others have relied on congressional indications that short limitation periods are most appropriate for securities actions73 to justify borrowing different statutes. This discrepancy illustrates the greater freedom of "active" courts to pick and choose among alternatives, and perhaps to justify their choice by reference to their own notions of what legislative intent ought to have been, as well as to evidence of what legislative intent actually was. It is not surprising that there is little agreement concerning the appropriate period for 10b-5 actions.74

As the 10b-5 cases show, the general standard of limitation borrowing — choosing the statute that best effectuates the federal policy at issue75 — has been too malleable to provide guidance. The Supreme Court could improve the situation by specifying

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that scienter is an element of the cause of action in suits by private litigants. As a result, it may be more likely that courts will characterize 10b-5 actions as actions for fraud. In the case of rule 10b-5, the state law ultimately selected is commonly either a statute of limitations covering actions for fraud or one covering actions under blue sky statutes. See Einhorn & Feldman, supra note 23, at 500-04. See also Bateman & Keith, supra note 66, at 174.

71. An additional problem exists when a state changes its statutory scheme after a court has determined which limitation period to borrow. Some courts have shown a reluctance to change the federal limitation to bring it into line with the new state law. E.g., United Cal. Bank v. Salik, 481 F.2d 1012, 1014 (9th Cir.), cert denied, 414 U.S. 1004 (1973); Douglass v. Glenn E. Hinton Univs., Inc., 440 F.2d 912, 916 (9th Cir. 1971); Smith v. Guaranty Serv. Corp., 51 F.R.D. 289, 296 (N.D. Cal. 1970).


74. For a case in which the court faced several of these variables, see Bailey v. Piper, Jaffray & Hopwood, Inc., 414 F. Supp. 475 (D. Minn. 1976).

75. See text at note 58 supra.
whether courts should take an active or a passive role. The pas-

tive approach best promotes the values of stability and effi-

ciency, as long as state legislatures set sensible periods for the

prosecution of state claims. This approach also keeps legisla-

tively minded judges from using limitation borrowing as a mask

for the creation of limitation periods by judicial fiat.

In addition to the difficulties of selecting the correct state

statute of limitations, some courts and commentators see a

second problem: limitation borrowing establishes a different limitation period for each state. This lack of uniformity can increase

the profitability of forum shopping. Because defendants are

often amenable to suit in more than one state, a plaintiff whose

delay has precluded suit in one jurisdiction may sometimes prose-

cute his action in another.

For example, in a civil action under rule 10b-5, suit may be

brought where any act or transaction involved in the violation

occurred, or where the defendants reside or transact business. A

plaintiff suing a national corporation could conceivably bring suit in any of a dozen jurisdictions and might select one to obtain a

longer limitation period. A plaintiff possessing a right of action

to against two defendants may be allowed to proceed against one

but be barred against the other solely because their home states

provide different limitation periods.

The problem of forum shopping, however, should not be over-

stated. Borrowing statutes, enacted by most states, limit the

national uniformity, by which the same limitation period would govern a cause of action throughout the country. Limitation borrowing, however, affects at least two other types of “uniformity”: first, consistency within the federal scheme of limitations between similar causes of action, see, e.g., text at note 73 supra; and, second, consistency within a state between the limitation periods of the federal right and of similar state rights, see De Malherbe v. International Union of Elevator Constructors, 449 F. Supp. 1335, 1342 (N.D. Cal. 1978); Regan v. Sullivan, 417 F. Supp. 389, 402 (E.D.N.Y. 1976), revd. on other
grounds, 557 F.2d 300 (2d Cir. 1977).


83. A plaintiff aware of a potential cause of action may wish to wait as long as possible to see whether the securities gain or lose, speculating at the expense of the defendant. See Bateman & Keith, supra note 66, at 151.
benefits plaintiffs can derive from forum shopping. A borrowing statute permits a state's courts to bar an action if another state, often the state where the right accrued, has a statute barring that action. Thus, a plaintiff who is barred in one state may find himself barred in all. Moreover, federal courts that borrow a state statute of limitations also borrow the state's borrowing statute. Admittedly, since not all states have borrowing statutes, and since those that exist may differ in terms, some loopholes remain. Nevertheless, these statutes close many gaps and limit the advantages of forum shopping. Moreover, had forum shopping alarmed Congress, the legislators could have prevented the problem by passing an explicit, uniform statute of limitations. This is undoubtedly why most authorities do not consider limitation periods characteristics of a substantive right, but rather procedural details governing the remedy that vindicates the right.

Because these two shortcomings of limitation borrowing from state statutes are minimal, and because the procedure fulfills almost all of the objectives of temporal limitation of actions, the courts have made it their standard rule of limitation and Congress has acquiesced in that decision. Occidental Life, however, creates an important exception to this well-established practice by holding that the general rule is not to be applied when the application of state limitations periods would "frustrate or interfere with the implementation of national policies." The Court announced a new standard that is not given a formal name by the

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85. Restatement (Second) of Conflict of Laws § 142, Comment f (1971).
87. Statutes of limitations may be characterized as either substantive or procedural. Generally they have been viewed as procedural, governing the remedy, not the right, and thus justify a forum in imposing its statute of limitations on foreign causes of action. Some statutes of limitations, however, have been viewed as limiting the substantive right, not merely the remedy. These are either contained within the statute creating the right sued upon or in a separate statute explicitly limiting that right. See Michigan Ins. Bank v. Eldred, 130 U.S. 693, 696 (1889); The Harrisburg, 119 U.S. 199, 214 (1886); J. Angell, A Treatise on the Limitations of Actions at Law § 22 (6th ed. 1876); H. Wood, supra note 14, § 9. Cf. Restatement (Second) of Conflict of Laws §§ 142, 143 (1971) (conflict of laws rules for statutes of limitations). Borrowed statutes of limitations should not be considered as substantive limitations of federal rights because they are not directed at federal rights.
88. 432 U.S. 355 (1977). See also text at notes 6-7 supra.
89. 432 U.S. at 357.
Court but that strikingly resembles the venerable equitable doctrine of laches.

5. Laches

Use of the doctrine of laches forms the last approach to limiting federal actions at law; in light of Occidental Life, it deserves particular attention. In its traditional equitable form, laches comprises two elements: inexcusable delay by the plaintiff in bringing suit and prejudice to the defendant resulting from that delay.91


For most courts, however, mere lapse of time is insufficient to demonstrate laches. They require in addition that the defendant prove some change in condition during the period of delay. Northern Pac. Ry. v. Boyd, 226 U.S. 482, 509 (1912); Penn Mut. Life Ins. Co. v. Austin, 168 U.S. 685, 698 (1899); McGrann v. Allen, 291 Pa. 574, 578, 140 A. 552, 553 (1928); H. McClintock, Handbook of the Principles of Equity § 28 (2d ed. 1948); 2 J. Pomeroy, Equity Jurisprudence § 419(d) (5th ed. 1941). By refusing to find laches absent legally cognizable prejudice, a court may grant relief even though an extended period of time has lapsed between the accrual and the enforcement of the right of action. E.g., Southern Pac. Co. v. Bogert, 250 U.S. 483 (1919) (twenty-two years between the accrual of the right and the affixing of a trust status on shares of stock held by a corporation); Shaffer v. Rector Well Equip. Co., 155 F.2d 344 (5th Cir. 1946) (eight years on patent infringement action); Stephenson v. Stephenson, 52 So. 2d 684 (Fla. 1951) (seven years in suit for overdue support payments).

In determining whether or not laches applies, the trial judge must rely on his own discretion, looking to the facts and equities peculiar to the case. Gardner v. Panama R.R., 342 U.S. 28 (1951); Potash Co. of America v. International Minerals & Chem. Corp., 213 F.2d 153 (10th Cir. 1954). Cf. Gillops v. Shell Co. of Cal., 86 F.2d 600, 607 (9th Cir. 1936) (comparing the application of laches to the doctrine of equitable tolling).

Laches often provides the only limitation on an equitable remedy. In many cases,
Before *Occidental Life*, the Supreme Court had not applied laches, an equitable doctrine, to federal actions at law lacking congressional limitations. In *Fischbach & Moore, Inc. v. International Union of Operating Engineers*, the trial court applied a laches test to an action for damages under section 303(b) of the Labor Management Relations Act of 1947. Relying on the "often expressed policy favoring a single uniform, national labor law," it refused to borrow the state limitation period. The Ninth Circuit, however, rejected that view, and the Supreme Court denied certiorari. The laches approach appeared dead.

Only twelve years later, however, the Supreme Court brought the doctrine back to *Occidental Life*. It held that laches would supply the limitation period when borrowing a state statute would frustrate federal policy. In *Occidental Life*, the EEOC, acting pursuant to Title VII of the Civil Rights Act of 1964, prosecuted an individual's claim of employment discrimination, but the district court held the action barred by a borrowed one-year California statute of limitations. More than three years of EEOC investigation and conciliation had passed between the employee's complaint and the EEOC suit.

However, statutes establish temporal limits on equitable remedies. E.g., 43 U.S.C. § 1166 (1976) (placing a six-year limit on suits by the United States to annul land patents); 17 U.S.C. § 507 (1976) (placing a three-year limit on all "civil actions" for copyright infringement). In such cases, the statute of limitations, supplementing — rather than supplanting — the doctrine of laches, creates a period beyond which suit will not lie, but within which laches may yet deny relief. See *Patterson v. Hewitt*, 195 U.S. 309, 318 (1904); *Alsop v. Riker*, 155 U.S. 488, 461 (1894); 2 J. POMEROY, supra, § 419(b); *Hill*, supra note 36, at 113; 9 Texas L. Rev. 93 (1930).


The majority of the courts which have considered the question, have refused to enjoin an action at law on the ground of the laches of the plaintiff at law. The small number of cases in which an injunction was sought indicates the general opinion that such relief would not be granted.

95. 198 F. Supp. at 913.
96. 198 F. Supp. at 915.
The Supreme Court affirmed a circuit court reversal of that decision. The Court recognized that one goal of Title VII was to obtain the cooperation and voluntary compliance of employers, and that Congress had established an administrative procedure to effectuate that goal. Moreover, "[u]nlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." The Court noted that applying the borrowed one-year statute of limitations would frustrate the federal policy of informally resolving employment discrimination claims. Accordingly, it specified that such suits would be limited by the doctrine of laches.

It is understandable that the Court was attracted to the flexibility of laches. After all, the Court itself has described the doctrine as the power "to locate a 'just result' in light of the circumstances peculiar to the case." But examination of the doctrine in light of the purposes of limiting actions reveals that laches is not the most desirable alternative. It is therefore regrettable that the Court endorsed it.

One drawback of laches is that it fails to provide stability to the defendant and the society with which he interacts. A statute of limitations, in contrast, simplifies the question of diligent prosecution, which has been determined in actions at law solely by reference to the objective statutory time period. "If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated." But under the doctrine of laches, the parties must wait until after the trial judge determines whether it would be "just" to allow the action to proceed. Thus laches cannot provide the predictability that is a

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101. 432 U.S. at 368. The Court also concluded that EEOC notice provisions adequately protect defendants against undue hardship and surprise. 434 U.S. at 372.
102. 432 U.S. at 368-69.
103. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1976), quoted in 432 U.S. at 373. This relates to the first purpose of limiting actions, providing substantive justice on the facts giving rise to the cause of action. See text at note 9 supra.
104. See text at notes 10-11 supra.
105. In one sense, statutes of limitations can be seen as liquidated laches. See West v. Theis, 15 Idaho 167, 177, 96 P. 932, 935 (1908).
106. One can argue that the doctrine of equitable tolling, discussed in note 111 infra, tempers a statute of limitations. Nevertheless, the statute itself still provides the means for objectively determining when a right of action expires.
107. Prior to Occidental Life, one could always find a statute of limitations, either congressionally enacted or, in the case of certain federal actions, borrowed from the states, to cover any legal action.
fundamental purpose of limitation of actions. Moreover, laches fails to conserve judicial resources. Plaintiffs who are uncertain as to whether their claims will be barred may be more likely to file suit. Furthermore, in order to decide whether laches should bar a claim, a court must spend additional time hearing evidence concerning justifiability of the delay and the existence of prejudice — time that would seldom be spent if an objective limitation were used.


110. See text at notes 12-13 supra.

111. This has been true in the cases following Occidental Life. One court has gone so far as to hold that “whether the commission’s delays caused prejudice that will justify a limitation of relief . . . can best be considered after the facts have been fully developed, if the commission prevails.” EEOC v. American Natl. Bank, 574 F.2d 1173, 1176 (4th Cir. 1978). This holding requires a full hearing on the merits before any question of laches is reached. See also EEOC v. Chesapeake & O. Ry., 577 F.2d 229, 333-34 (4th Cir. 1978). But see Callahan, supra note 8, at 126.

In addition to statutes of limitations and the doctrine of laches, the doctrine of equitable tolling also affects limitations of actions. Equitable tolling mitigates the arbitrary effects of statutes of limitations by preserving the right of action in appropriate cases. As announced in Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874), equitable tolling provides that in actions for fraud, both at law and in equity, statutes of limitations do not begin to run against the injured party until such time as he discovers, or in the exercise of due diligence ought to have discovered, the concealed fraud. See also Traer v. Clewa, 115 U.S. 528, 537 (1884); Rosenthal v. Walker, 111 U.S. 185, 190 (1884).

The doctrine, however, has not been limited to fraud situations. Circumstances that suspend or postpone the running of a statute of limitations include fraudulent concealment, estoppel, waiver, absence of the defendant from the jurisdiction, disability (e.g., infancy, insanity, imprisonment) of the plaintiff, and the death of either party. See Developments, supra note 8, at 1220-33. See also American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974) (the filing of a class action later dismissed as improper was held to toll the statute of limitations with respect to a plaintiff who later filed the suit individually); Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) (FELA action was begun in a state court having jurisdiction. The defendant was served with process but the case was dismissed for improper venue. The FELA time limitation was held tolled while the state suit pended and until the state court order dismissing the action became final).

The use of tolling, which is said to be grounded in a “sound and philosophical view of the principles of [statutes] of limitations,” Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874), prevents the statute from running when the plaintiff’s delay in properly instituting suit is justifiable. In addition, since the circumstances that justify tolling can be clearly explicated, the use of tolling maintains the certainty provided by statutes of limitations in determining when an action is barred. Consider this comparison of laches and tolling: “The rules governing [tolling] are more clearly defined and are less flexibly applied than those governing laches. . . . The defense of laches is directed more intimately to the conscience of the chancellor, and whether it shall prevail rests in his discretion.” Gillons v. Shell Co. of Cal., 86 F.2d 603, 607 (9th Cir. 1936).

It should also be noted that while state law determines the applicable limitation period in borrowing situations, federal law determines the circumstances that will toll the statute. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946); Esplin v. Hirschi, 402 F.2d 94,
Nevertheless, in *Occidental Life* the Supreme Court applied a laches standard to a situation where state statutes had formerly provided the time limitation. In so doing the Court discarded over eighty years of precedent requiring state borrowing and transplanted the equitable doctrine of laches into the alien realm of actions at law.\textsuperscript{112} Moreover, the change was not necessary. The Court could have held that a borrowed state statute of limitations was tolled while the charge was processed through the EEOC's administrative machinery (as long as that period of time was not unreasonable).\textsuperscript{113} Alternatively, the Court could have followed the reasoning of its earlier decision in *Johnson v. Railway Express Agency, Inc.*\textsuperscript{114} and advised the EEOC to file suit and "to request a stay until the administrative procedure is completed."\textsuperscript{115} Either approach would have protected not only the federal policy of informally resolving employment discrimination claims, but also the integrity of the limitation borrowing doctrine; and either approach would have been preferable to that adopted by the Court.\textsuperscript{116}

\textsuperscript{112} See text at notes 92-97 supra.
\textsuperscript{113} See note 111 supra.
\textsuperscript{114} 421 U.S. 454 (1975).
\textsuperscript{115} 421 U.S. at 465.
\textsuperscript{116} This is not to say that the *Johnson* approach of seeking a stay of the action pending administrative attempts to resolve the issue is as desirable as the tolling approach.

The issue in *Johnson* was whether equitable tolling, discussed in note 111 supra, applies to Title VII and § 1981 actions. See note 4 supra. Although separate causes of action, they require the same factual allegations and the right to relief in each depends on the same findings. See Note, *Employment Discrimination-Statute of Limitations Under Section 1981 Not Tolled by Filing of Charges with EEOC Under Title VIII*, 1976 Wis. L. Rev. 288, 303. Before being allowed to sue under Title VII, however, a person is required to proceed through an administrative procedure within the EEOC. 42 U.S.C. § 2000e-5 (f)(1) (1976).

Acknowledging a congressional policy of encouraging the use of this procedure before suit, several courts had held that the filing of a Title VII charge tolled the statute of limitations for § 1981. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 648 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 268 (5th Cir. 1974); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 994 n.30 (D.C. Cir. 1973); Ripp v. Dobbs Houses, Inc., 356 F. Supp. 205, 214 (N.D. Ala. 1973). This had been done with the understanding that "the broad purposes of statutes of limitations . . . are not frustrated by [tolling]." Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 994 n.30 (D.C. Cir. 1973).

In *Johnson*, however, the Supreme Court held tolling inappropriate in equal employment actions. It did so because the Title VII cause of action that was filed was not "exactly the same" as the § 1981 cause of action later asserted. 421 U.S. at 467.

On this issue, Justice Marshall's dissent provides a sounder analysis than that of the
In the future, *Occidental Life* should be limited to its facts. The Court's reasoning should apply only when federal pre-suit procedures, such as the EEOC's conciliation process, are used to vindicate federal rights. For the moment, however, one is left with the Court's suggestion that any potential frustration of federal policy may require the application of laches rather than limitation borrowing. It also remains to be seen whether any judicial belief that a state statute of limitations is too short will show "frustration of federal policy" sufficient to invoke the doctrine of *Occidental Life*.

### III. Conclusion

The task of placing specific limitations on the prosecution of legal actions is a legislative function. Perhaps the best resolution of today's confusion would be for Congress to enact a statute of limitations to govern all federal causes of action not otherwise limited. Since such congressional action appears unlikely, the majority. He argued that prohibiting tolling thwarts the congressional policy of providing multiple remedies, and that the purposes of statutes of limitations would not be frustrated by allowing tolling in this situation. 421 U.S. at 472-73. In *Johnson*, the use of tolling would have been an appropriate, minor change in the federal limitations framework. Yet the Court relied on a mere technicality for its refusal to permit the practice. By contrast, in *Occidental Life*, the Court ignored technicalities, discarded precedent, and worked a much larger change with less justification than was present in *Johnson*.

The facts of *Occidental Life* also raise the question of whether the holding only applies when a governmental agency such as the EEOC is suing. The Court did not indicate that this was an essential fact. Moreover, the Court had previously stated that a private litigant suing to enforce Title VII "vindicates important congressional policy" and that the private right of action remains "essential." Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). It would therefore seem anomalous to hold that a private litigant using the Title VII procedure should be barred when suing on his own right whereas that same suit would be permitted if prosecuted by the EEOC. This has not, however, proved to be a problem, since lower courts appear to be applying the *Occidental Life* doctrine to suits by private litigants as well. See Kirk v. Rockwell Intl. Corp., 578 F.2d 814 (9th Cir. 1978); Wilson v. Continental Group, Inc., 451 F. Supp. 1 (M.D.N.C. 1978).

117. Presumably, the government is interested in vindicating all policies expressed in congressional enactments. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 382-83 (1977) (Rehnquist, J., dissenting). The question, however, is whether this justifies a court in adopting a limitation period longer than that specified by the analogous state law.

118. Along similar lines, one might argue that a simple lack of uniformity would sufficiently frustrate federal policy. This view was rejected, however, in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966).

119. *See text at notes 26-36 supra.*

120. Several commentators have taken this position. *E.g.*, Blume & George, *Limitations and the Federal Courts*, 49 Mich. L. Rev. 937, 992-93 (1951); *Note, supra note 36*, at 77-78; 32 Minn. L. Rev. 65, 68 (1947); 49 Yale L.J. 738, 745 (1940). On a smaller scale such a statute already exists. 28 U.S.C. § 2462 (1976) limits actions for penalty or
problem of limiting these actions will probably remain with the courts.

The options of recognizing causes of action without any limitation and of judicially creating “statutes” of limitations are inappropriate. And since the inherently subjective nature of the doctrine of laches makes it ill-suited either to clarify or to improve the federal limitations scheme, the Occidental Life approach of using laches should not be favored. Moreover, when one considers that the use of laches has been limited even in equitable actions, it seems curious to consider expanding its use into legal actions, a domain to which it historically has not applied. This leaves the alternatives of borrowing either state or federal statutes of limitations. Despite its drawbacks, there are several reasons for preserving the practice of borrowing state statutes of limitations. It has been the traditional manner of handling the problem. Moreover, no category of state laws has been more consistently held within the purview of the Rules of Decision Act than statutes of limitations. It is therefore reasonable to infer that, when Congress explicitly creates a right of action without also creating a limitation period, it intends to adopt the limitation periods of the states. That inference ought to be a presumption for all congressionally created causes of action.

121. See text at note 91 supra.

122. Campbell v. Haverhill, 155 U.S. 610, 614 (1895); Bausserman v. Blunt, 147 U.S. 647, 652 (1893). In cases concerning federal rights, the two principal areas historically covered by the Rules of Decision Act have been statutes of limitations and rules of evidence. See Hill, supra note 36, at 77. The adoption of the Federal Rules of Evidence has left only statutes of limitations.

123. Hill, supra note 36, at 91. But cf. EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1359-60 (6th Cir.), cert. denied, 423 U.S. 994 (1975), in which the court held that “in the absence of congressional intent to apply state statutes of limitations, such restrictions do not apply to the EEOC.” The court did not explain why the traditional formula should be reversed in this case.

124. As the Court has recognized, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966), if Congress disagrees with the specific application of the presumption, it can always act to overturn it. But see Bayles, supra note 36, at 652. Standing alone, the Hoosier Cardinal argument is weak since it can be easily applied to any judicial rule. But in this instance, against its historical background, it carries weight.

Moreover, Congress has acted to add federal statutes of limitations where state statutes had formerly been borrowed. For example, in response to the situation illustrated by Campbell v. Haverhill, 155 U.S. 610 (1895), see text at note 48 supra, Congress added a statute of limitations to limit patent claims, Act of March 3, 1897, ch. 391, § 6, 29 Stat. 694 (current version at 35 U.S.C. § 286 (1976)). And in 1955 Congress added a limitation provision to the Clayton Act, Act of July 7, 1955, ch. 283, § 1, 69 Stat. 283 (current version at 15 U.S.C. § 15b (1976)). It has been suggested that these changes occurred only because
This reasoning, however, does not apply when the right of action has been implied by the courts rather than created by Congress. When Congress did not create the cause of action, it is impossible to infer that it intended to use the standard practice of borrowing state rules. Under such circumstances, a court may well borrow a specific federal statute of limitations that already applies to a similar federal right. If, however, the court determines that there exists no clear congressional limitations policy toward similar actions, it should conform to traditional practice and borrow a state statute.125 If Congress intends something different, it, not the judiciary, should say so.

of the efforts of well organized patent and antitrust bars. Note, A Limitation on Actions for Deprivation of Federal Rights, 68 COLUM L. REV. 763, 773 (1968). If this is so, however, one wonders why rule 10b-5 still has no federal limitation. Surely the securities bar is no less organized than the antitrust bar.

125. See text at notes 37-44 supra.