Denver Law Review

Volume 72
Issue 3 *Tenth Circuit Surveys*

Article 7

January 1995

# Civil Rights Survey

Brent D. Warkentine

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Brent D. Warkentine, Civil Rights Survey, 72 Denv. U. L. Rev. 593 (1995).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

# Civil Rights Survey

This article is available in Denver Law Review: https://digitalcommons.du.edu/dlr/vol72/iss3/7

# CIVIL RIGHTS SURVEY

## INTRODUCTION

Statutes of limitations are a balance between the interests in protecting valid claims and the interest in prohibiting the prosecution of stale claims.[1] Congress, however, has frequently failed to provide a statute of limitations for federal causes of action. Allowing such actions to be brought after any length of time was not Congress's intent.[2] Therefore, the federal courts must find a statute of limitations to apply to such actions. Unwilling to fashion a period of limitations on their own,[3] the federal courts have resorted to borrowing one from a state or federal statute.[4] In order to achieve a proper balance for federal causes of action that do not have a statute of limitations, courts borrow a period of limitations from an analogous state cause of action.[5] This task often is very difficult.

From September 1993 through December 1994, the Tenth Circuit confronted the issue of borrowing a statute of limitations for two different federal civil rights causes of action. In *Arnold v. Duchesne County*,[6] the Tenth Circuit determined the appropriate statute of limitations to borrow for a civil rights action under 42 U.S.C. § 1983.[7] Although the Utah state legislature had passed a statute of limitations specifically for § 1983 actions, the court applied Utah's residual statute of limitations instead.[8] In *Jones v. Runyon*,[9] the Tenth Circuit decided which statute of limitations applied to a civil rights action

---

1. Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454, 462-63 (1993).

2. *See* Wilson v. Garcia, 471 U.S. 261, 271 (1985) (quoting Adams v. Woods, 6 U.S. 336, 342 (1805)).

3. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703 (1966) (fashioning a period of limitations would be a "drastic sort of judicial legislation" by federal courts).

4. *See* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146-48 (1987).

5. *Wilson*, 471 U.S. at 271.

6. 26 F.3d 982 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

7. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

Three main objectives of § 1983 were: (1) to override certain state legislation infringing upon the rights or privileges of United States citizens; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy was theoretically but not practically available. Monroe v. Pape, 365 U.S. 167, 173-74 (1961). The primary purpose of § 1983 is to enable an individual whose federal constitutional or statutory rights are abridged by a person acting under color of law to recover damages or secure injunctive relief. *See* Burnett v. Grattan, 468 U.S. 42, 55 (1984).

8. *Arnold*, 26 F.3d at 985-89.

9. 32 F.3d 1454 (10th Cir. 1994).

brought by a federal employee under the Age Discrimination in Employment Act after a final administrative decision denied his promotion.[10] The court borrowed the limitations period from a similar action brought by a federal employee under Title VII.[11]

## I. THE STATUTE OF LIMITATIONS FOR 42 U.S.C. § 1983 ACTIONS

### A. *Background*

Civil rights actions brought under 42 U.S.C. § 1983 do not have express statutes of limitations.[12] Moreover, Congress has not enacted a general limitations period for all civil rights actions, and until recently, no fallback statute of limitations existed.[13] Traditionally, federal courts have borrowed a period of limitations from state law in order to fill the gap left by Congress.[14] The Supreme Court, in *Burnett v. Grattan*,[15] interpreted 42 U.S.C. § 1988[16] to require the federal courts to apply a three step procedure for selecting a state limitations period:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statute] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."[17]

The Court clarified the second step by reference to its previous decisions that required the federal courts to apply the "most appropriate" or most "anal-

---

10. *Id.* at 1455.

11. *Id.* at 1458; *see* 42 U.S.C. § 2000e-16(a)-(c) (1988) (providing a 30-day limitations period for a federal employee after receipt of notice of final action taken by the EEOC on a complaint of discrimination based on race, color, religion, sex, or national origin); *see also* 42 U.S.C. § 2000e-16(c) (Supp. V 1993) (increasing the limitations period to 90 days as required by the Civil Rights Act of 1991).

12. *See* Wilson v. Garcia, 471 U.S. 261, 262 (1985).

13. Congress recently passed a residual statute of limitations for federal statutory claims. 28 U.S.C. § 1658 (Supp. V 1993). This will not affect the statute of limitations for § 1983 actions, however, because § 1658 applies only to statutes passed after December 1, 1990. *Id.*

14. *See, e.g., Wilson*, 471 U.S. at 266-67, 267 n.12 (citations omitted).

15. 468 U.S. 42 (1984).

16. Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of [this title] . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1988 & Supp. V 1993).

17. *Burnett*, 468 U.S. at 47-48 (citations omitted) (quoting 42 U.S.C. § 1988).

ogous" state limitations period.[18] This attempted clarification, however, did not end the confusion because "appropriate" and "analogous" are not synonymous, and the terms were supplied without much explanation or elaboration.[19] The federal courts developed a number of different analytical methods in trying to choose the most appropriate or analogous statute of limitations for § 1983 actions.[20]

At least seven circuits used a factual analogy,[21] in which they would select a statute of limitations for a state law claim that was factually similar to the § 1983 claim alleged.[22] The factual analogy led to time-consuming litigation, different limitation periods for allegations within the same § 1983 complaint, and unpredictability.[23]

Four circuits adopted the statutory liability analogy method.[24] Under this method, the courts applied limitation periods created by the state statute governing similar actions, on the theory that such statutes were most appropriate because § 1983 actions stemmed from a federal statute.[25] Some courts using this analogy applied state statutes of limitations the state legislature had made applicable expressly to § 1983 actions.[26] Although the statutory liability analogy achieved state-wide uniformity, commentators criticized the method for adopting limitation periods motivated by state interests[27] and for the analyti-

---

18. *Id.* at 49.

19. Paul Rathburn, Note, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More Than 'A Half Measure of Uniformity'*, 73 MINN. L. REV. 85, 91 (1988).

20. *Id.* at 92; *see also* Gregory L. Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1, 16-27 (1983-84); Mark D. Jarmie, *Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit's Resolution*, 15 N.M. L. REV. 11, 18-36 (1985); Brian Kibble-Smith, *Statutes of Limitation and Section 1983: Implications for Illinois Civil Rights Law*, 20 J. MARSHALL L. REV. 415, 418-21 (1987); Michael J. Brophy, Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97, 98-101; Lee L. Cameron, Jr., Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440, 442-43 (1986); Dirk J. Holkeboer, Note, *A Call for Uniformity: Statutes of Limitation in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61, 65-67 (1979).

21. *See* Rathburn, *supra* note 19, at 92 n.38 (citing various circuits' decisions that utilized a factual analogy).

22. *See, e.g.*, McClam v. Barry, 697 F.2d 366, 374-75 (D.C. Cir. 1983) (applying the one-year limitations period for an analogous common law assault cause of action to a § 1983 claim alleging deprivation of constitutional rights after police officer allegedly beat and threatened the claimant).

23. Rathburn, *supra* note 19, at 92-93; *see also* Wilson v. Garcia, 471 U.S. 261, 272 (1985) (stating that the factual analogy approach "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983"); Biehler, *supra* note 20, at 34 (concluding that confusion and prejudice result from the inconsistent application of factual analogies); Brophy, *supra* note 20, at 99 (characterizing factual analogies as mechanical, fragmented, and producing uncertainty); Cameron, *supra* note 20, at 443 (criticizing factual analogies for often forcing courts to rely upon misleading allegations in the pleadings).

24. *See* Plummer v. Western Int'l Hotels Co., 656 F.2d 502, 505-06 (9th Cir. 1981); Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir. 1980); Beard v. Robinson, 563 F.2d 331, 335-36 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978).

25. Rathburn, *supra* note 19, at 93.

26. *See, e.g.*, Nored v. Blehm, 743 F.2d 1386, 1386-87 (9th Cir. 1984) (per curiam) (applying OR. REV. STAT. § 30.265(1) (1975) which specifically referred to § 1983 actions at that time). *But see* Johnson v. Davis, 582 F.2d 1316, 1318-19 (4th Cir. 1978) (rejecting VA. CODE ANN. § 8-24 (Michie 1950) one-year limitation on all § 1983 claims).

27. *See* Rathburn, *supra* note 19, at 94 n.51 ("This criticism goes beyond the statutory liabil-

cal flaws in the analogy.[28]

At least four other circuits adopted a catch-all analogy and applied the limitations period for all state actions not otherwise limited.[29] This method was used mainly when courts applying the statutory liability analogy failed to locate a statutory liability provision.[30] Commentators criticized this approach for being arbitrary[31] and adopting limitation periods motivated by state interests.[32]

In 1985, the Supreme Court adopted a general tort analogy approach in *Wilson v. Garcia*.[33] The Supreme Court held that: (1) federal law governs the characterization of § 1983 for limitations purposes;[34] (2) a single characterization of all § 1983 claims best fits the statute's remedial purposes;[35] (3) the most appropriate characterization was as a personal injury claim;[36] and (4) the state's personal injury statute of limitations should apply.[37] The Court found that the personal injury tort actions were most analogous because they were similar to the nature of § 1983 actions.[38] Although *Wilson* clarified which analogy the federal courts should use, practical problems remained.

Justice O'Connor, in her dissent, claimed that the majority's rule provided no guidance for courts using state law that "defie[s] the newly minted rule by supplying not one but two periods that govern various injuries to personal rights."[39] Because state law possibly will not "obligingly supply a limitations period to match an abstract analogy that may have little relevance to the forum State's limitations scheme,"[40] Justice O'Connor advocated the continued use of the factual analogy method.[41] Thus, even after *Wilson*, federal courts remained confused about which personal injury statute of limitations should be applied when the state had more than one.[42] When faced with this problem, several federal courts applied the intentional personal injury statute of limita-

---

ity analogy to the heart of the 'borrowing' process. Some critics contend that only a federal limitations period should govern § 1983 actions. They argue that state limitations periods, although sufficient for state actions, cannot properly govern federal constitutional claims.").

28. *See id.* at 94 n.52 ("The gist of this 'analytical' criticism rests with the nature of § 1983. Because § 1983 does not *create* substantive rights, but rather enforces other rights existing in the Constitution and federal law, it makes little sense to analogize § 1983 to a statute that creates both a substantive right and remedy.") (emphasis added).

29. *See* McKay v. Hammock, 730 F.2d 1367, 1370 (10th Cir. 1984) (applying Colorado's "residuary" statute of limitations); Garmon v. Foust, 668 F.2d 400, 406 & n.11 (8th Cir.) (applying Iowa's general catch-all statute of limitations), *cert. denied*, 456 U.S. 998 (1982); Baker v. F & F Inv., 420 F.2d 1191, 1198 (7th Cir.) (applying Illinois catch-all statute), *cert. denied*, 400 U.S. 821 (1970); Greenfield v. District of Columbia, 623 F. Supp. 47, 50 (D.C. 1985) (applying District of Columbia's catch-all statute).

30. Rathburn, *supra* note 19, at 95.

31. *Id.*

32. *Id.* at 96.

33. 471 U.S. 261, 276 (1985).

34. *Id.* at 270.

35. *Id.* at 271-75.

36. *Id.* at 276.

37. *Id.* at 275.

38. *Id.* at 276.

39. *Id.* at 286 (O'Connor, J., dissenting).

40. *Id.* at 287.

41. *Id.*

42. Owens v. Okure, 488 U.S. 235, 241 (1989).

tions, theorizing that intentional torts are most closely analogous to the claims Congress envisioned being brought under § 1983.[43] Other federal courts considered the analogy to the intentional tort action too narrow because § 1983 embraces a broad array of actions for personal injuries, and thus applied the residuary personal injury statute of limitations.[44]

In 1989, the Supreme Court again considered which statute of limitations should apply to § 1983 claims in order to settle the disagreement between the federal courts.[45] In *Owens v. Okure*, the Supreme Court held that when a state had multiple limitation periods for personal injury actions, the state's general or residual personal injury statute of limitations should be applied for § 1983 actions.[46] Finally, the issue appeared settled.

In 1987, however, the Utah state legislature muddied the waters again by enacting section 78-12-28(3) of the Utah Code, which provided for a two-year statute of limitations in actions "for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983."[47] This is the only effective statute in the country that provides an explicit limitations period for § 1983 actions.[48] Thus, in Utah, the federal courts were forced to decide whether to apply Utah's four-year residual statute of limitations[49] or to apply the two-

43. *See, e.g.*, Mulligan v. Hazard, 777 F.2d 340, 344 (6th Cir. 1985) (selecting Ohio statute of limitations for libel, slander, assault, battery, malicious prosecution, false imprisonment, and malpractice, and rejecting statute of limitations for bodily injury or for injury to the rights of the plaintiff not enumerated elsewhere), *cert. denied*, 476 U.S. 1174 (1986); Gates v. Spinks, 771 F.2d 916, 920 (5th Cir. 1985) (selecting Mississippi statute of limitations for most intentional torts, and rejecting statute for causes of action not otherwise provided for), *cert. denied*, 475 U.S. 1065 (1986); Jones v. Preuit & Mauldin, 763 F.2d 1250, 1254-56 (11th Cir. 1985) (selecting Alabama statute of limitations governing actions for "any trespass to person or liberty, such as false imprisonment or assault and battery" and rejecting statute for "any injury to the person or rights of another not arising from contract and not specifically enumerated in this section") (citations omitted), *cert. denied*, 474 U.S. 1105 (1986).

44. *See, e.g.*, Meade v. Grubbs, 841 F.2d 1512, 1523-24 & n.11 (10th Cir. 1988) (selecting Oklahoma statute of limitations for "injury to the rights of another, not arising on contract and not hereinafter enumerated", and rejecting statute for assault or battery) (citations omitted); Banks v. Chesapeake & Potomac Tel. Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986) (stating in dicta that it "might well" apply District of Columbia statue of limitations for claims not otherwise provided for and rejecting statute for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest, or false imprisonment); Small v. Belfast, 796 F.2d 544, 546-49 (1st Cir. 1986) (selecting Maine's statute of limitations governing all tort actions except as otherwise provided and rejecting statute for assault and battery, false imprisonment, slander, libel, and medical malpractice); McKay v. Hammock, 730 F.2d 1367, 1370 (10th Cir. 1984) (selecting Colorado statute of limitations for "all other actions of every kind for which no other period of limitation is provided by law," and rejecting statutes for trespass and trespass on the case) (quoting COLO. REV. STAT. § 13-80-108(1)(b) (1973)).

45. *Owens*, 488 U.S. at 243-48.

46. *Id.* at 249-50.

47. UTAH CODE ANN. § 78-12-28(3) (1992).

48. Arnold v. Duchesne County, 26 F.3d 982, 985 & n.5 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995). Virginia had a statute that specifically provided a one-year limitation for § 1983 actions, but it was held inapplicable in Johnson v. Davis, 582 F.2d 1316, 1317 (4th Cir. 1978), and repealed after four years. *Id.* Oregon also had such a statute which the Ninth Circuit applied to § 1983 actions, but the specific reference to § 1983 has since been removed from the statute. *Id.* (citing Nored v. Blehm, 743 F.2d 1386 (9th Cir. 1984) (per curiam)).

49. *See* UTAH CODE ANN. § 78-12-25(3) (1992). Section 78-12-25(3) provides a four-year statute of limitations for "an action for relief not otherwise provided for by law." *Id.*

year statute of limitations applicable specifically to § 1983 actions.[50] The federal district court judges in Utah were divided on the question.[51] The Tenth Circuit addressed this issue in *Arnold v. Duchesne County*.[52]

B. Arnold v. Duchesne County[53]

1. Facts

On April 21, 1988, officers of the Duchesne County Sheriff's Department arrested Louis F. Arnold and charged him with selling a stolen firearm.[54] The Duchesne County Attorney dismissed the charges against Mr. Arnold on June 27, 1988.[55] Mr. Arnold brought an action on April 17, 1992, against Duchesne County, Sheriff Clair Poulson, and officers Merv Taylor and Jerry Foote, asserting claims under state law and 42 U.S.C. §§ 1983, 1985, 1986 and 1988.[56] Mr. Arnold alleged that his arrest had been politically motivated and "the police had actual knowledge at the time of his arrest that the firearm in question was not stolen."[57]

Defendants filed a motion to dismiss arguing that section 78-12-28(3) of the Utah Code, which imposed a two-year statute of limitations on § 1983 actions, barred Mr. Arnold's § 1983 claim.[58] The district court held that section 78-12-28(3) was the most appropriate and analogous statute of limitations for § 1983 actions and granted the defendants' motion to dismiss.[59] In so holding, the court noted that the Supreme Court, in *Wilson v. Garcia*,[60] had directed the federal courts to use the most appropriate or analogous state statute of limitations.[61] The district court dismissed the Supreme Court's decision in *Owens v. Okure*[62] to apply the residual personal injury statute of limitations because Utah had provided an express statute of limitations for § 1983 actions. The court instead concluded that the Supreme Court's directive was to follow the *Wilson* mandate of choosing the most analogous or appropriate

50. *Arnold*, 26 F.3d at 983.

51. *Compare* Adamson v. City of Provo, 819 F. Supp. 934, 948 (D. Utah 1993) (applying Utah's residual four-year statute of limitations rather than § 78-12-28(3) to § 1983 actions) *and* Sheets v. Lindsey, 783 F. Supp. 577, 581 (D. Utah 1991), *aff'd sub nom.* Sheets v. Salt Lake County, Nos. 93-4128, 93-4134, 1995 WL 8224 (10th Cir. Jan. 10, 1995) (same) *with* Arnold v. Duchesne County, 810 F. Supp. 1239, 1242 (D. Utah 1993) (applying § 78-12-28(3) to bar § 1983 action), *rev'd*, 26 F.3d 982 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995) *and* Tarlip v. Van Austin, No. 92-C-621-W, 1993 WL 723501, at *4-5 (D. Utah May 18, 1993) (adopting report and recommendation following *Arnold* and applying § 78-12-28(3)), *aff'd sub nom.* Tarlip v. Buckner, 17 F.3d 1437 (10th Cir. 1994) *and* Thompson v. Rasmussen, No. 91-C-1039-S, 1993 WL 723845, at *2 (D. Utah May 5, 1993) (same).

52. 26 F.3d 982 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

53. *Id.*

54. *Id.* at 983.

55. Arnold v. Duchesne County, 810 F. Supp. 1239, 1240 (D. Utah 1993), *rev'd*, 26 F.3d 982 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

56. *Arnold*, 26 F.3d at 983.

57. *Arnold*, 810 F. Supp. at 1240.

58. *Arnold*, 26 F.3d at 983.

59. *Arnold*, 810 F. Supp. at 1247.

60. 471 U.S. 261 (1985).

61. *Arnold*, 810 F. Supp. at 1242.

62. 488 U.S. 235, 247-48 (1989).

statute of limitations.[63] Because section 78-12-28(3) was the most analogous and appropriate, the district court concluded it should be applied unless it was "inconsistent with federal laws and policy."[64] In order to determine that section 78-12-28(3) passed this test, the court examined both procedural due process and equal protection attacks.

The district court found that the statute of limitations was procedural in nature, because the limitations period was not part of the same act as the cause of action.[65] Under procedural due process, a statute passes constitutional muster if it provides a reasonable time to bring suit.[66] The district court held that two years was a reasonable time in light of a number of federal circuit court decisions applying as little as one year to § 1983 actions.[67]

In holding that section 78-12-28(3) did not violate equal protection, the district court found no evidence to support the contention that the Utah state legislature improperly discriminated against a federal cause of action.[68] First, the district court noted that section 78-12-28(3) could be interpreted as applying to 42 U.S.C. § 1985 claims in addition to § 1983 claims.[69] Second, even if the limitations period did not apply to § 1985 claims, §§ 1983 and 1985 are distinguishable and any difference in limitations periods would be rationally based.[70] Third, the court noted that the two-year period of limitations was the same as that applied to state actions against state officers, which indicated that the "legislature reasonably assessed the length of time required to bring a cause of action against any individual acting under color of state law."[71] Fourth, the court dismissed the claim that the Utah state legislature acted with improper motives. The court felt the legislature was only trying to set up a limitations period within the parameters set by the Tenth Circuit in *Mismash v. Murray City*[72] because of the similarity in the language between *Mismash* and the statute.[73] Fifth, the court found that Utah had a legitimate interest in setting the statute of limitations, because Utah courts had concurrent jurisdiction over § 1983 actions.[74] Sixth, the court refused to assume that the state

63. *Arnold*, 810 F. Supp. at 1242 ("[I]t is logical to assume that the Supreme Court used the terminology of most appropriate or analogous because there was no express statute of limitations at issue in either *Wilson* or *Owens*.") (citations omitted).

64. *Id.* at 1243.

65. *Id.* at 1244 ("If not part of the same act, however, the 'limitations period is said to be only a procedural limit on the remedy, and not a substantive limit on the right'.") (quoting Sarfati v. Wood Holly Assocs., 874 F.2d 1523, 1526 (11th Cir. 1989)).

66. *Id.* (citing Owens v. Okure, 488 U.S. 235, 251 n.13 (1989)).

67. *Id.* at 1244-45.

68. *Id.* at 1245.

69. *Id.* at 1245 n.7 (stating that the language "for injury to the personal rights of another as a civil rights suit under 42 U.S.C. 1983" does not rule out application of the limitations period to § 1985) (quoting UTAH CODE ANN. § 78-12-28(3) (1992)).

70. *Id.*

71. *Id.* at 1245.

72. 730 F.2d 1366 (10th Cir. 1984), *cert. denied*, 471 U.S. 1052 (1985).

73. *Arnold*, 810 F. Supp. at 1246. The Tenth Circuit, in *Mismash*, applied the four-year residual statute in Utah, because Utah had no statute of limitations "expressly applicable to actions for injury to the rights of another." *Mismash*, 730 F.2d at 1367.

74. *Arnold*, 810 F. Supp. at 1246-47 (stating that Utah's interests are legitimate and do not amount to an invasion of the federal domain, because "as long as Congress chooses to defer to the states in questions of time limitations, the court cannot see that a state is violating the principles

legislature's motive in shortening the limitations period was to truncate the cause of action, because attempting to guess the motives of the legislature was too imprecise and difficult to be of value.[75] Because the district court found section 78-12-28(3) was the most analogous and appropriate statute of limitations and both the due process and equal protection standards were met, it applied the two-year statute of limitations to § 1983 actions.[76]

2. Tenth Circuit Opinion

The Tenth Circuit reversed the district court, holding that the four-year residual statute of limitations under section 78-12-25(3) should apply instead of the two-year statute of limitations under section 78-12-28(3).[77] The court initially went through the analyses set forth in *Burnett v. Grattan*,[78] *Wilson v. Garcia*,[79] and *Owens v. Okure*[80] and found that, prior to the enactment of section 78-12-28(3), § 1983 actions were governed by the four-year residual statute of limitations set forth in section 78-12-25(3) of the Utah Code.[81] The court then discussed whether to apply the new statute of limitations enacted specifically for § 1983 actions.

The Tenth Circuit went through the three step procedure, as mandated by § 1988,[82] for determining which state statute of limitations to apply to decide if section 78-12-28(3) should apply to § 1983 actions. First, the court noted that § 1983 did not have a statute of limitations and therefore, no suitable federal rule existed.[83] In the absence of a federal rule, the court moved to the second step, which required the selection of the most analogous or appropriate statute of limitations. The Tenth Circuit assumed that section 78-12-28(3) was the most analogous statute because the Utah state legislature enacted the statute specifically to provide a limitations period for § 1983 actions.[84] The court combined the remainder of the second step with the third step of the § 1988 analysis, and discussed whether section 78-12-28(3) was the most appropriate limitations period and consistent with federal law and policy.[85] The Tenth Circuit court held that section 78-12-28(3) was not consistent with the purpose and nature of § 1983.[86] First, the court stressed that the characterization of the essential nature of a § 1983 action was a question of federal law.[87] Even

---

of federalism by setting an express statute of limitations for civil rights actions, particularly when the state has concurrent jurisdiction.").

75. *Id.* at 1247.

76. *Id.* at 1243, 1247.

77. Arnold v. Duchesne County, 26 F.3d 982, 983 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

78. 468 U.S. 42 (1984).

79. 471 U.S. 261 (1985).

80. 488 U.S. 235 (1989).

81. *Arnold*, 26 F.3d at 984-85.

82. *See supra* note 16 and accompanying text.

83. *Arnold*, 26 F.3d at 984.

84. *Id.* at 985 n.6.

85. *Id.* at 985-86.

86. *Id.* at 986 (stating that the primary objectives of the Civil Rights Acts are to ensure that individuals may recover damages or secure injunctive relief when their federal constitutional or statutory rights have been abridged).

87. *Id.*

though federal courts borrow the statute of limitations from state law, the federal court decides how to characterize the 1983 action in order to borrow the appropriate limitations period applicable to an analogous state cause of action.[88] This determination is crucial because it allows the federal court to ensure an acceptable fit between the borrowed limitations period and the policies behind § 1983.[89] The court held that section 78-12-28(3) merely reflects the Utah legislature's judgment as to the appropriate statute of limitations for § 1983 actions and usurps the role of the federal courts in characterizing the essence of those actions.[90] Therefore, section 78-12-28(3) was inconsistent with federal law and should not be applied to § 1983 actions.[91]

Second, the court found section 78-12-28(3) eliminated the assurances that neutral rules of decision will apply to § 1983 actions.[92] Section 78-12-28(3) applies exclusively to § 1983 actions.[93] Its legislative history revealed that while the initial proposal applied to the broader category of "personal injury, or injury to the personal rights of another," it was changed before enactment to apply specifically and exclusively to § 1983 actions and thus, was no longer a neutral rule of decision applicable to all personal injury cases.[94] The court concluded that this change was intended to reduce the number of § 1983 actions and was therefore inconsistent with the broad remedial objectives of such actions.[95] Thus, the court held that the two-year statute of limitations was not the appropriate period of limitations.[96] Instead, the four-year statute of limitations for personal injury actions should be applied to § 1983 actions.[97]

### C. *Analysis*

With one exception, Congress failed to establish express statutes of limitations for civil rights actions.[98] Obviously, Congress did not intend for civil rights actions to have no statute of limitations.[99] Therefore, either the federal courts have to fashion a statute of limitations themselves or they have to borrow one from the forum state. The federal courts could not fashion a period of limitations because it would be a "drastic sort of judicial legislation."[100] This

---

88. *Id.* at 987.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 987-88.
93. *Id.* at 986 (rejecting any arguments that § 78-12-28(3) was intended to apply to any action other than § 1983 actions).
94. *Id.* at 988 (stating that had the original proposal been enacted, it would have supplied a neutral rule of decision).
95. *Id.* at 988-89, 988 n.9 (noting that the *Burnett* court made it clear that such a purpose was impermissible).
96. *Id.* at 989.
97. *See id.*
98. 42 U.S.C. § 1986 (1988) (providing a one-year-within-accrual limitation period for claims against persons who negligently refuse to prevent the commission of wrongs conspired to be done by others as prohibited in 42 U.S.C. § 1985).
99. Wilson v. Garcia, 471 U.S. 261, 271 (1985) ("A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws'.") (quoting Adams v. Woods, 6 U.S. 336, 342 (1805)).
100. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703 (1966).

left the option of borrowing a state statute of limitations, which is what Congress mandated federal courts to do under § 1988.[101] The question then arises: which state statute of limitations should the federal court borrow for each federal cause of action?

Statutes of limitations are a balance between the interest of having claims prosecuted and the interest of not wasting time and resources litigating old claims.[102] When a state legislature enacts a statute of limitations, it strikes that balance for a particular type of *state* claim, not federal. The federal courts try to find a statute of limitations for a state action that is analogous to the federal action so the federal law will incorporate the state's judgment on the proper balance for the statute of limitations.[103] When the federal claim differs from the state cause of action, however, "the State's choice of a specific period of limitation is, at best, only a rough approximation of 'the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones'."[104]

In passing section 78-12-28(3), the Utah state legislature directly balanced the interests of the federal cause of action under § 1983.[105] However, in enacting the four-year residual statute of limitations the Utah state legislature balanced the interests, if any balancing occurred at all, for all state actions without a statute of limitations.[106] Thus, in *Arnold*, the court could pick either (1) a statute of limitations where the state legislature had directly balanced the interests in the federal cause of action or (2) a statute of limitations where the state legislature may have balanced the interests inherent in all state causes of action that did not have a statute of limitations. The purposes of borrowing a state statute of limitations would have been better served had the court chosen the former statute of limitations. The major purpose of choosing an analogous state cause of action from which to borrow a statute of limitation is to make sure that the interests of the federal cause of action are appropriately balanced.[107] Having the state legislature directly balance the interests of the federal cause of action serves this purpose better than having the federal court balance the interests and then choose an approximate state cause of action in which the state may or may not have made the appropriate balancing considerations.

Allowing the state to balance directly the interests in a federal cause of action would also aid predictability and reduce litigation. First, borrowing state

---

101. 42 U.S.C. § 1988(a) (1988 & Supp. V 1993).

102. Nelson, *supra* note 1, at 462-63.

103. *Wilson*, 471 U.S. at 271 ("By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action.").

104. *Id.* (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975)).

105. *See* Arnold v. Duchesne County, 810 F. Supp. 1239, 1245-46 (1993), *rev'd*, 26 F.3d 982 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

106. *See* UTAH CODE ANN. § 78-12-25(3) (1992).

107. *See Wilson*, 471 U.S. at 271; *Arnold*, 26 F.3d at 987 (picking the appropriate limitations period applicable to an analogous state cause of action is crucial because it better ensures an acceptable fit between the borrowed limitations period and the policies behind § 1983).

statutes of limitations leads to uncertainty because litigants do not know which statute the federal court will borrow. Although the Supreme Court's decision in *Owens v. Okure*[108] greatly reduced this problem, greater certainty would result if the state statute expressed both the federal cause of action it applied to and the statute of limitations for that action. A state statute expressly directed to § 1983 actions would best accomplish the goal set forth by the Supreme Court, in *Wilson v. Garcia*,[109] of eliminating uncertainty by providing one simple broad characterization of all § 1983 actions.

Second, allowing the state legislature to enact specific statutes of limitations for federal causes of action would reduce the amount of litigation on the subject of borrowing the state statute of limitations. Instead of going through the three step procedure mandated by § 1988, the federal court would only need to look at the state statute that applied specifically to the federal cause of action.

In *Arnold v. Duchesne County*, the court noted two arguments against allowing the state legislature to enact a statute of limitations aimed directly at a federal cause of action.[110] The first is that a state legislature which enacts such a limitations period usurps the role of federal law in characterizing the essence of such actions.[111] "'Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.'"[112] Although Congress may not have intended to assign the state legislatures such a role, it has allowed it by not passing a federal statute of limitations and thereby endorsing the borrowing of state limitation periods. If a state legislature enacts a statute of limitations for general personal injury actions, the federal courts are directed by *Owens* to apply it to § 1983 actions. Thus, a state legislature is allowed to set a specific statute of limitations for § 1983 actions so long as it disguises it under a general personal injury limitations period and does not mention § 1983 in the statute.

The *Wilson* Court directed federal courts to apply the personal injury statute of limitations partly to ensure the borrowed period of limitations would

---

108. 488 U.S. 235, 248 (1989) (holding that a state's general or residual statute of limitations should be applied to § 1983 actions).

109. 471 U.S. 261, 275 (1985).

110. *See Arnold*, 26 F.3d at 986-88.

111. *Id.* at 987; *see also* Sheets v. Lindsey, 783 F. Supp. 577, 581 (D. Utah 1991):

> A state is within its sphere of power in our federal system of government, as a matter of state policy, when it limits the time within which a state cause of action may be vindicated in state court. In contrast, a federally recognized or federally created cause of action cannot be foreshortened by specific state legislation.
>
> The concept is simple. The issue before the court concerns the fundamental principle of federalism; namely the geographic division of power. A state lacks the power to truncate federally created or federally recognized rights. The principles of federalism is [sic] the perennial message of both the Constitution and the Civil Rights Act. Whether to diminish a federally created right is simply not a choice for a state to make. . . . Determining the statute of limitations for a federally created cause of action, the court emphasizes, is exclusively a federal choice.

*Id.*

112. *Arnold*, 26 F.3d at 986 (quoting *Wilson*, 471 U.S. at 269).

not discriminate against federal civil rights remedies.[113]

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.[114]

Although this would be true if the state legislature did not know which personal injury statute of limitations would apply, it is not true when the state legislature knows that the residual personal injury statute of limitations will apply. A state legislature could provide a statute of limitations for every state personal injury cause of action and then the residual statute of limitations would only apply to § 1983 actions. This seems to be what the Utah state legislature was trying to do. Unfortunately, it made the mistake of mentioning that the statute of limitations should apply to § 1983 actions.[115]

The federal courts are not willing to give state legislatures such power explicitly because they are worried that the state legislature would provide a period of limitations that was too short.[116] This protection, however, could be accomplished by making sure that the statute of limitations did not violate procedural due process and equal protection.[117] Under procedural due process the statute of limitations must provide the claimant a reasonable time within which to bring a claim.[118] A number of cases have found that limitation periods as short as one year should be applied to § 1983 actions.[119] Thus, Utah's two-year statute of limitations is hardly unreasonable.[120]

Under an equal protection claim, the federal court would not use the limitation period if it was shown that the state legislature improperly discriminated against the federal cause of action.[121] Thus, the state legislature must have a rational reason for choosing the limitations period.[122] Arguably, the Utah state legislature's rational reason was to make the § 1983 period of limitations consistent with the period of limitations for state actions against state officers acting in their official capacity.[123] Thus, the Utah two-year statute of limitations passed constitutional muster,[124] but was rejected because it expressly applied to § 1983 actions.[125]

The second argument against allowing a state legislature to enact a statute of limitations aimed directly at a federal cause of action is that it would elimi-

---

113. *Wilson*, 471 U.S. at 276.
114. *Id.* at 279.
115. *See* UTAH CODE ANN. § 78-12-28(3) (1992).
116. *See* Sheets v. Lindsey, 783 F. Supp. 577, 581 & n.9 (D. Utah 1991).
117. *See Arnold*, 810 F. Supp. at 1247.
118. *Id.* at 1244 (citing Owens v. Okure, 488 U.S. 235, 251 n.13 (1989)).
119. *See id.* at 1245 (listing citations).
120. *Id.* at 1244-45.
121. *Id.* at 1245.
122. *See id.* at 1245 n.7.
123. *Id.* at 1245-46.
124. *Id.* at 1247.
125. *See Arnold*, 26 F.3d at 986.

nate the assurance that neutral rules of decision would apply to § 1983 actions in Utah.[126] This would only be the case, however, if the state passed a different statute of limitations for each federal civil rights cause of action. In *Arnold*, the court interpreted section 78-12-28(3) to apply exclusively to § 1983 actions; therefore, civil rights actions brought under other sections of the Civil Rights Acts had a different limitations period.[127] Section 78-12-28(3), however, could have been interpreted just as easily to apply to other sections of the Civil Rights Acts, because the statute of limitations was for any action "for injury to the personal rights of another *as a* civil rights suit under 42 U.S.C. § 1983."[128] In addition, an equal protection analysis could ensure that the state legislature did not discriminate against a particular federal cause of action.

Allowing the state legislature to enact a statute of limitations that expressly applied to federal civil rights actions, instead of choosing the residual personal injury statute of limitations, would better serve the main purpose of statutes of limitations. The state legislatures could directly balance the interests of having claims prosecuted and the interest of not wasting time and resources litigating old claims. This also would provide more certainty and reduce litigation. Furthermore, the federal courts could use the doctrines of due process and equal protection to make sure that the limitations period was reasonable and that neutral rules of decision would apply within the state.

## II. THE STATUTE OF LIMITATIONS FOR 29 U.S.C. § 633A ACTIONS

### A. *Background*

The Age Discrimination in Employment Act (ADEA), enacted in 1967, prohibits employers from discriminating against employees over the age of 40 on the basis of their age.[129] Section 633a of Title 29, which was added to the ADEA in 1974, prohibits age discrimination by federal government agencies.[130] A federal employee has two alternative routes for pursuing a claim of age discrimination.[131] A federal employee may invoke the Equal Employment Opportunity Commission's (EEOC) administrative process and then file a civil action in federal court if not satisfied with the administrative remedies.[132] In the alternative, the federal employee may choose to bring suit in federal court in the first instance.[133] Although the ADEA provides time periods for notification of the EEOC for the latter route,[134] it does not set forth

126. *Id.* at 987.

127. *Id.* at 987-88 (stating it is arguable that other sections of the Civil Rights Acts would still be covered by the residual four-year statute of limitations).

128. *Arnold*, 810 F. Supp. at 1245 n.7 (quoting UTAH CODE ANN. § 78-12-28(3)) (emphasis added).

129. *See* 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

130. 29 U.S.C. § 633a (1988 & Supp. V 1993). Section 633a provides in pertinent part: "All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in [5 U.S.C. § 105] . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

131. Stevens v. Department of Treasury, 500 U.S. 1, 5 (1991).

132. 29 U.S.C. § 633a(b), (c).

133. 29 U.S.C. § 633a(d).

134. *Id.* (providing that a claimant must give notice of intent to sue to the EEOC within 180

limitation periods for either route to federal court.[135]

When Congress amended the ADEA in 1974 to make it applicable to the federal government, it did not merely add the government to the definition of employers subject to the Act. Instead, it added § 633a, which applied to the federal government and expressly forbade incorporation of any other ADEA provision into § 633a.[136] The original proposal of § 633a contained a thirty-day statute of limitations for federal employees after a final administrative decision.[137] This provision was virtually identical to the thirty-day statute of limitations for federal employees under Title VII.[138] When the proposed bill emerged from committee, however, it appeared without a limitations period and with no explanation for its removal.[139] Because the ADEA is silent as to how long after a final administrative decision an action may be filed in district court, the Supreme Court has indicated that the proper analysis is to assume "Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one."[140]

There are four possible sources of a statute of limitations for § 633a. First, a court could adopt a state statute of limitations that covers an analogous state action.[141] Second, a court could adopt the two-year (three years if willful violation) statute of limitations applicable to private ADEA actions.[142] One district court so held, despite the command in § 633a(f) that the private sector provisions of the statute do not apply to federal employees.[143] Third, a

---

days after the alleged unlawful practice occurred and then wait 30 days before filing the action, but not providing a limitations period for filing a claim in the federal court).

135. *See* 29 U.S.C. § 633a. Because the Tenth Circuit, in Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994), determined only the appropriate statute of limitations for federal employees filing a claim in federal court after an administrative decision, this survey will not address the statute of limitations issue arising from claims filed first in federal court. See Stevens v. Department of Treasury, 500 U.S. 1 (1991) and Edwards v. Shalala, 846 F. Supp. 997 (N.D. Ga. 1994) for decisions on the statute of limitations for filing a claim in federal court in the first instance.

136. 29 U.S.C. § 633a(f) provides: "Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631 (b) of this title and the provisions of this section."

137. *See* S. 1861, 92d Cong., 2d Sess. (1972), *reprinted in* 118 CONG. REC. 15895 (1972).

138. *See* 42 U.S.C. § 2000e-16(c) (1988); *see also* 42 U.S.C. § 2000e-16(c) (Supp. V 1993) (codifying the increased limitations period from 30 to 90 days mandated by the Civil Rights Act of 1991).

139. Bornholdt v. Brady, 869 F.2d 57, 66 (2d Cir. 1989).

140. Stevens v. Department of Treasury, 500 U.S. 1, 7-8 (1991) (citing Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146-48 (1987)). The Supreme Court did not decide which limitations period to apply because the defendants acknowledged that filing one year and six days after the allegedly discriminatory event took place was well within whatever statute of limitations that might apply. *Id.* at 8. The Court also noted that the plaintiff had received a notification from the EEOC that indicated that he may have up to six years to file the action. *Id.* at 8 n.2.

141. Jones v. Runyon, 32 F.3d 1454, 1455-56 (10th Cir. 1994) (ruling out the applicability of state statutes).

142. 29 U.S.C. § 626(e) (1988). The statute of limitations for private ADEA actions was reduced to 90 days after the date of notice of termination or dismissal from the EEOC by the Civil Rights Act of 1991. *See* 29 U.S.C. § 626(e)(1) (Supp. V 1993).

143. Wiersema v. Tennessee Valley Auth., 648 F. Supp. 66, 68 (E.D. Tenn. 1986); *see also* Coleman v. Nolan, 693 F. Supp. 1544, 1548 (S.D.N.Y. 1988) (limitations period is either two years under 42 U.S.C. § 1981 or two years (three if willful violation) under 29 U.S.C. § 626(e)).

court could follow the Ninth Circuit[144] and apply the general six-year statute of limitations that applies to all actions against the United States where no statute of limitations is otherwise provided.[145] Fourth, a court could follow the First and Second Circuits and apply the thirty-day limitations period for federal employees filing suit under Title VII.[146]

## B. Jones v. Runyon[147]

### 1. Facts

Julius J. Jones, an African-American male over the age of 40, alleged that the United States Postal Service denied him the position of ad hoc EEO counselor on November 7, 1986, due to his race, age, and past protests against alleged unlawful employment practices at the postal service.[148] Mr. Jones filed an administrative complaint on December 8, 1986, and the EEOC issued a final administrative decision on August 28, 1990, finding no discrimination.[149] Mr. Jones filed a pro se complaint in the District Court of Colorado on September 28, 1990, but the complaint was dismissed for failure to properly serve the Postmaster General and the United States.[150] On September 16, 1991, Mr. Jones refiled his discrimination claims in federal district court. The district court granted the Postmaster General's motion to dismiss on the ground the action was time barred, holding that the thirty-day limitation period then applicable to federal employees filing suit under Title VII applied to bar all of Mr. Jones's claims.[151] Mr. Jones appealed the district court's ruling only with respect to his age discrimination claims.[152]

### 2. Tenth Circuit Opinion

The Tenth Circuit affirmed the district court's ruling that Mr. Jones's age discrimination claim was time barred because the statute of limitations for federal employees alleging age discrimination after a final administrative decision was thirty days.[153] In so holding, the court noted that because Congress had not supplied a limitations period, the federal courts were to borrow an appropriate statute of limitations from a state or federal statute.[154] After set-

---

144. Lubniewski v. Lehman, 891 F.2d 216, 221 (9th Cir. 1989). *But see* Miller v. Department of Interior, Bureau of Reclamation, 827 F. Supp. 636, 638 (D. Nev. 1993) (applying the 90-day statute of limitations according to 1992 EEOC regulations).

145. 28 U.S.C. § 2401(a) (1988).

146. Long v. Frank, 22 F.3d 54, 55 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); Lavery v. Marsh, 918 F.2d 1022, 1024-27 (1st Cir. 1990); *see also* 42 U.S.C. § 2000e-16(c) (Supp. V 1993) (the Title VII statute of limitations was increased from 30 days to 90 days by the Civil Rights Act of 1991).

147. 32 F.3d 1454 (10th Cir. 1994).

148. Jones v. Frank, 819 F. Supp. 923, 924 (D. Colo. 1993), *aff'd sub nom.*, Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994).

149. *Jones*, 32 F.3d at 1454-55.

150. *Id.* at 1455.

151. *Id.* The refiling was "almost five years after the alleged discriminatory act and over one year after the final decision of the EEOC." *Id.*

152. *Id.*

153. *Id.* at 1458.

154. *Id.* at 1455-56 (quoting Stevens v. Department of Treasury, 500 U.S. 1, 7 (1991) (citing

ting forth the split of authority among the courts of appeals, the Tenth Circuit discussed which statute would be appropriate.[155]

The court ruled out using a state statute, because "[t]o adopt varying state rules would burden administrative efforts of the EEOC and prove an 'unsatisfactory vehicle[ ] for the enforcement of federal law'."[156] Instead, the court chose to borrow a federal statute. In determining that the statute of limitations under Title VII should apply, the court first noted that a reasonable source for borrowing a statute of limitations is an analogous statute where the balancing of interests Congress intended to protect was very similar.[157] The court found that the statute of limitations under Title VII was the most analogous statute to ADEA for three reasons.[158] First, the ADEA and Title VII share the common purpose of eliminating discrimination in the workplace.[159] Second, the language of § 633a(a) and (b) is "almost in haec verba" with § 2000e-16(a) and (b) of Title VII.[160] Third, the legislative history of § 633a indicates that Title VII was its source.[161]

The court then addressed whether the legislative history of § 633a indicated Congress did not intend for the statute of limitations under Title VII to apply because it left out the statute of limitations included in the proposal for § 633a that was almost identical to the one in Title VII.[162] Because Congress omitted the limitation without explanation or evidence of debate, the court determined it could not say Congress's purpose was to preclude the use of the Title VII statute of limitations.[163] Thus, the court did not believe the omission proved Congress intended to make the most appropriate statute of limitations inapplicable to § 633a.[164]

Lastly, the court found that the change in EEOC regulations, adopting the Title VII statute of limitations, was persuasive.[165] Prior to 1992, the EEOC took no position as to the statute of limitations for filing a suit after a final administrative decision.[166] The notice the EEOC sent out to Mr. Jones, however, was misleading because it stated that he "MAY have up to six years after the right of action first accrued."[167] In 1992, the EEOC changed its position to that of applying the Title VII limitations period to ADEA claims.[168] Although the Tenth Circuit noted that there should be less judicial deference to

---

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146-48 (1987))).

155. *Id.* at 1456-58.

156. *Id.* at 1456 (quoting DelCostello v. International Bd. of Teamsters, 462 U.S. 151, 161 (1983)).

157. *Id.*

158. *Id.* at 1456-57.

159. *Id.* at 1456 (citing Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) and Smith v. Oral Roberts Evangelistic Ass'n, 731 F.2d 684, 688 (10th Cir. 1984)).

160. *Id.*

161. *Id.*

162. *Id.* at 1457.

163. *Id.*

164. *Id.*

165. *Id.* at 1457-58.

166. 29 C.F.R. § 1613.514 (1991) (excluding age discrimination complaints expressly from a limitations period for filing civil actions after a final agency decision).

167. *Jones*, 32 F.3d at 1457 n.7 (emphasis in original).

168. 29 C.F.R. § 1614.408(c) (1994).

an agency's interpretation of an ambiguous provision in a statute inconsistent with a previously held position, the court still found the EEOC's position persuasive.[169] For these reasons the Tenth Circuit affirmed the district court and held that the statute of limitations found in Title VII, 42 U.S.C. § 2000e-16(c), applied to bar Mr. Jones's ADEA claim under 29 U.S.C. § 633a.[170]

### C. *Analysis*

The issue the Tenth Circuit faced in *Jones* is directly attributable to Congress's failure to explain why it omitted a statute of limitations when it enacted § 633a. That Congress chose to excise from § 633a a statute of limitations identical to the Title VII statute of limitations for federal employees creates a strong inference that Congress did not want that statute of limitations to apply.[171] The Tenth Circuit followed the First and Second Circuits in deciding the omission by Congress should not be determinative of legislative intent.[172] The Tenth Circuit, however, did find that the legislative history indicating the ADEA was patterned after, derived from, and similar to Title VII strongly suggested that the Title VII statute of limitations was an analogous statute of limitations.[173] Thus, the Tenth Circuit found that Congress's omission of a statute of limitations identical to the one in Title VII was a mistake and should be ignored.[174]

A few courts have refused to ignore the strong inference created by Congress's omission and have instead ignored the literal reading of § 633a(f).[175] It has been argued that Congress intended broader protection of federal employees against discriminatory employment practices than private sector employees.[176] Thus, § 626(e)'s longer statute of limitations would be more appropriate to achieve the broad remedial purposes of § 633a ac-

---

169. *Jones*, 32 F.3d at 1458.

170. *Id.*

171. Lubniewski v. Lehman, 891 F.2d 216, 220 (9th Cir. 1989); Bornholdt v. Brady, 869 F.2d 57, 65-66 (2d Cir. 1989).

172. *Jones*, 32 F.3d at 1457 (following Long v. Frank, 22 F.3d 54, 57 (2d Cir. 1994) and Lavery v. Marsh, 918 F.2d 1022, 1026 (1st Cir. 1990)).

173. *Id.* at 1456-57. One court has argued that there are some differences between the structures of Title VII and the ADEA:

> Unlike Title VII, which requires an aggrieved federal employee to initiate administrative remedies, the ADEA allows a federal employee either to initiate administrative remedies or to file suit in federal court after filing a notice of intent to sue. Moreover, unlike [Title VII], which specifically provides that a plaintiff must exhaust administrative remedies unless certain exceptions are applicable, [the ADEA] does not require a plaintiff who initiates administrative remedies to exhaust those remedies before bringing suit in federal court.

Coleman v. Nolan, 693 F. Supp. 1544, 1547 (S.D.N.Y. 1988) (citations omitted). *But see* Lavery v. Marsh, 918 F.2d 1022, 1025 n.4 (1st Cir. 1990) (noting these differences but not finding them to be of overriding significance).

174. *See Jones*, 32 F.3d at 1457.

175. *See* Wiersema v. Tennessee Valley Auth., 648 F. Supp. 66, 67-68 (E.D. Tenn. 1986) (applying statute of limitations applicable to nongovernmental employees under the ADEA); *cf. Coleman*, 693 F. Supp. at 1548 (holding that either the two-year or three-year, in case of willful violation, statute of limitations under 29 U.S.C. § 626(e) or the three-year statute of limitation under 42 U.S.C. § 1981 should apply).

176. Valaris v. Army & Air Force Exch. Serv., 577 F. Supp. 282, 287-88 (N.D. Cal. 1983).

tions.[177] Every circuit court that has dealt with the issue has rejected this argument by reading § 633a(f) literally or ignoring the argument altogether.[178]

If the court does not borrow the limitations period for private employees alleging age discrimination or the Title VII limitations period, then only two possible sources for a statute of limitations remain. First, the court could apply a state statute of limitations. No circuit court has done so, because it would lead to varying statutes of limitations across the country and severely burden the administrative efforts of the EEOC.[179] Second, the court could follow the Ninth Circuit and apply the six-year statute of limitations for non-tort actions against the federal government.[180] Other circuit courts have not applied the six-year statute of limitations because they have noted the following anomaly: federal employees alleging discrimination on the basis of race, color, religion, sex, or national origin under Title VII would have thirty days to file a suit, while federal employees alleging age discrimination under the ADEA would have six years.[181]

Because all of the statute of limitations options that could be applied to § 633a have problems, the Tenth Circuit reached a pragmatic result by choosing the most analogous and best alternative of the thirty-day statute of limitations from Title VII, despite the countervailing legislative history.

The application of the thirty-day period of limitation to Mr. Jones, however, was unfair. Mr. Jones received a notice from the EEOC which stated, in pertinent part: "As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a), you MAY have up to six years after the right of action first accrued."[182] Although this notice does not unequivocally state that Mr. Jones had six years in which to file an action, it is not even close to thirty days. Thus, it is likely Mr. Jones was seriously misled by the EEOC with information that denied him his day in court. The EEOC has subsequently changed its position by approving the thirty-day period of limitations for federal employees after a final administrative decision.[183] The Tenth Circuit found the EEOC's change of position persuasive because it was consistent with the court's interpretation of the analogy between Title VII and the ADEA,[184] but the court also should have been persuaded by the misleading notice sent to Mr. Jones. Fairness would mandate the choice of a six-year statute of limitations for Mr. Jones, but the Tenth Circuit seemed more concerned with the precedent it was setting.

---

177. *See Coleman*, 693 F. Supp. at 1547; *Wiersema*, 648 F. Supp. at 68.

178. *Compare* Long v. Frank, 22 F.3d 54, 57 (2d Cir. 1994) (reading 633a(f) literally) *and* Lavery v. Marsh, 918 F.2d 1022, 1024 (1st Cir. 1990) (same) *and* Lubniewski v. Lehman, 891 F.2d 216 221 (9th Cir. 1989) (same) *and* Bornholdt v. Brady, 869 F.2d 57, 64 (2d Cir. 1989) (same) *with Jones*, 32 F.3d at 1455-58 (ignoring the argument altogether).

179. DelCostello v. International Bd. of Teamsters, 462 U.S. 151, 161-62 (1983).

180. *Lubniewski*, 891 F.2d at 221.

181. *Long*, 22 F.3d at 57-58; *Lavery*, 918 F.2d at 1027.

182. *Jones*, 32 F.3d at 1457 n.7 (emphasis in original).

183. *Id.* at 1457.

184. *Id.* at 1458.

## CONCLUSION

In *Arnold v. Duchesne County* and *Jones v. Runyon*, the Tenth Circuit had to determine which statute of limitations to borrow for a federal cause of action. Congress could have avoided the problems facing the Tenth Circuit by enacting statutes of limitations for the federal causes of action. In *Arnold*, the Tenth Circuit was instructed by § 1988 to borrow an analogous state statute of limitations for § 1983 actions.[185] Congress could just as easily have enacted § 1988 with the instruction that the federal courts should apply a certain limitations period for all civil rights actions and avoided the time-consuming and expensive litigation. In *Jones*, the Tenth Circuit had to determine which federal statute of limitations to apply to 29 U.S.C. § 633a, because Congress omitted, without explanation, the statute of limitations that was originally proposed.[186] Had Congress not omitted the limitations period, time-consuming and expensive litigation over the issue could have been avoided.

Recently, Congress had a chance to correct its mistakes and eliminate wasteful litigation on the issue of which statute of limitations to apply to federal causes without a limitations period. Congress enacted a general fallback statute of limitations for all federal causes of action without a period of limitations.[187] Instead of fixing the problems, however, Congress decided, in spite of recommendations by litigants and federal judges, that the fallback statute of limitations should not be applied to any cause of action created by a federal statute passed before December 1, 1990.[188] Thus, the federal courts must continue the long, expensive, and uncertain process of borrowing statutes of limitations that Congress failed to provide for federal claims.

*Brent D. Warkentine*

185. *Arnold*, 26 F.3d at 984.

186. *See Jones*, 32 F.3d at 1457.

187. 28 U.S.C. § 1658 (Supp. V 1993) (providing a four-year statute of limitations for any civil cause of action arising under a congressional statute enacted after December 1, 1990).

188. *See* Kimberly J. Norwood, *28 U.S.C. § 1658: A Limitation Period With Real Limitations*, 69 IND. L.J. 477, 502-05 (1994).