1988


Paul Rathburn

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2061

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
INTRODUCTION

Section 1983 of title 42 of the United States Code gives individuals a civil cause of action against any person who, under color of state law, deprives them of rights guaranteed by federal law or the Constitution. It is the most popular and most

   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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

To state a cause of action under this section, two elements must be present. First, a party must allege that some person has deprived him of a federal right. Second, the party must allege that the person who has deprived him of that right acted under color of state or territorial law. Gomez v. Toledo, 446 U.S. 635, 640 (1979).

The 42d Congress enacted a portion of § 1983 as section 1 of the Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871). This Act, also known as the Civil Rights Act of 1871, attempted to remedy the dual problems of Ku Klux Klan violence against former slaves and the unwillingness of southern state courts to prosecute such claims.

2. For the annual reporting period ending June 30, 1987, the Administrative Office of United States Courts classified 8.3% of the 238,982 cases filed in federal district court as “civil rights cases.” ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 122 (1987). Another 15.6% of this docket consisted of prisoner petitions. Id. It is likely that a substantial portion of these cases were § 1983 claims. See Bauman, Civil Rights Litigation: Section 1983, 1985 ANN. SURV. AM. L. 203, 204 n.8.

Because precise statistical information on the number of § 1983 claims is unavailable, any estimate of the percentage of § 1983 claims within the federal docket is inexact. See Eisenberg, Section 1983: Doctrinal Foundations and Empirical Study, 67 CORNELL L. REV. 482, 533-36 (1982). One commentator es-
potent method of redress open to those seeking to prosecute constitutional claims. Section 1983, despite its importance, contains no limitations period.

Before 1985, federal courts used diverse and conflicting...

estimated that § 1983 claims have accounted for approximately 12% of federal district court civil cases annually since 1977. Bauman, supra, at 205 n.11.

In the last 25 years § 1983 has been put to myriad uses. As one prominent jurist has noted:

In the context of racial equality, many of the major school desegregation cases were filed as § 1983 actions. In the First Amendment area, § 1983 was relied on for a challenge to state laws that required loyalty oaths, or prevented the wearing of armbands in protest of our policy in Vietnam. It was also used to restrain prosecutions under Louisiana's ... Communist Control Law . . . . to establish [the NAACP's] authority to advise Negroes of their legal rights . . . . [to establish] that a welfare recipient has a right to notice and a hearing before his benefits are terminated . . . . [and to confirm] due process rights of recipients of utility service, of public employees, of employees entitled under state law to seek redress for unlawful discharge, and of debtors whose property is about to be seized . . . .


3. Judge Aldisert, writing for the Third Circuit, commented on the importance of § 1983:

If, with Dean Eugene V. Rostow, we agree that the purpose of the Constitution is to assure the people a free and democratic society and that the final aim of that society is to provide as much freedom and equality as possible for individuals, we can also agree that there has been no procedural device in the modern era that has guaranteed those assurances more than the remedies available through § 1983. This statute furnishes bone and sinew to what Dean Rostow described as the root idea of the Constitution: "man can be free because the state is not."


5. Many of the older civil rights acts of the 19th century were passed without accompanying statutes of limitations. See generally Comment, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97, 97 [hereinafter Arizona Comment] (noting absence of limitations statutes for Civil Rights Acts).

See supra note 1 for the text of § 1983.
analyses to select appropriate statutes of limitations for section 1983 claims. In that year, however, the United States Supreme Court decided *Wilson v. Garcia* and partially clarified the confusion by ruling that federal courts should borrow limitations periods from state personal injury statutes. This formula has helped promote the Court's goals of "uniformity, certainty, and the minimization of unnecessary litigation" within state boundaries. Nonetheless, ambiguous language in *Wilson* and unanticipated complications in state law have made the decision difficult to apply, have undercut predictability, and have imposed unduly shortened limitations periods. Together these conditions inhibit both the sweep of section 1983 and the vindication of civil rights claims.

This Note argues that Congress should set a federal statute of limitations for section 1983. The Note offers a model amendment with the view that such an addition would preserve scarce judicial resources, decrease the frequency and complexity of section 1983 litigation, and better achieve the interests identified by the Supreme Court in *Wilson*. Part I explains the methods courts have traditionally used to choose statutes of limitations for section 1983 claims. Part II discusses *Wilson*, its holding, and its reasoning. Part III analyzes the decision's limitations and the problems it has created for the federal courts. Part IV concludes that the best means of addressing these problems is enactment of a federal limitations period and offers a model amendment for section 1983.

I. SELECTING LIMITATIONS PERIODS FOR SECTION 1983 BEFORE *WILSON*

Statutes of limitations define the exact time period in which a cause of action may be filed successfully. Federal law

---

6. Courts developed different methods of analogy to aid them in choosing statutes of limitations from state laws. These included drawing factual analogies to state actions, see infra notes 37-46 and accompanying text, statutory liability analogies, see infra notes 47-54 and accompanying text, analogies to catch-all limitations periods, see infra notes 55-60 and accompanying text, and general tort analogies, see infra notes 61-64 and accompanying text.


8. The Court, in a 7-1 decision (Justice O'Connor dissenting, Justice Powell taking no part), held that § 1983 claims "are best characterized as personal injury actions" for purposes of borrowing local limitations periods. *Id.*, 471 U.S. at 280.

9. *Id.* at 275.

embraces the idea that a claim must not be brought at an undefined future time, because just determinations of fact cannot be made when memories have faded, witnesses have disappeared, or evidence has been lost. Clearly defined limitations periods protect defendants from stale claims and relieve courts of the difficult task of coping with incomplete or blurred facts. Finally, defined limitations periods serve “policies of repose” by allowing potential defendants to calculate when they are free from the threat of legal attack.

Section 1983 of the Civil Rights Act of 1871, enacted to

13. “Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber . . . .’” Id.
14. “[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.” Id. (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)).
16. The theory justifying such statutes is that even an injured party with a just claim must put an adversary on notice to defend within the period of limitations. A different result would be unjust because the right to be free of stale claims prevails over the right to prosecute them. See Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1964). “In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.” See Wilson v. Garcia, 471 U.S. 261, 271 (1985).
17. Ch. 22, 17 Stat. 13 (1871). The Act represented an attempt by the 42d Congress to remedy the problem of Ku Klux Klan violence against blacks and the unwillingness of southern state courts to prosecute their claims.

Representative Lowe of Kansas, a strong supporter of the legislation, characterized the situation in this way:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . and the records of the public tribunals are searched in vain for any evidence of effective redress.

CIVIL RIGHTS

enforce the fourteenth amendment,\textsuperscript{18} contained no limitations period. Because plaintiffs rarely used section 1983 in the years following its enactment,\textsuperscript{19} this omission raised no great controversy.\textsuperscript{20} In 1961, however, the Court invigorated section 1983.\textsuperscript{21} As section 1983 became an increasingly popular vehicle for redress of "constitutional torts,"\textsuperscript{22} the federal courts frequently had to assign limitations periods to section 1983 claims.\textsuperscript{23}

Shella\textsuperscript{br}arger); 606 (Sen. Pool); 654 (Sen. Osborn); 691 (Sen. Edmunds), noted in Wilson, 471 U.S. at 276 n.36.

At least in theory, the Act could have provided a federal forum for the former slaves. In reality, courts narrowly construed the Act and discriminatory state statutes circumvented it. See T. Eisenberg, Civil Rights Litigation 58 (2d ed. 1987).


The fourteenth amendment to the United States Constitution reads:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.


21. See Monroe v. Pape, 365 U.S. 167 (1961), overruled in part in Monell v. Department of Social Servs., 436 U.S. 658 (1978). In Monroe the Court recognized a plaintiff's cause of action under § 1983 for constitutional violations suffered during an illegal police search. Id. at 192. In a 1981 opinion, then Associate Justice Rehnquist noted the significance of Monroe: "It was not until our decision in Monroe . . . that § 1983 was held to authorize immediate resort to federal court whenever state actions allegedly infringed constitutional rights . . . ." Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 104 (1981); see also Blackmun, supra note 2, at 19 (noting significance of Monroe).


23. See, e.g., Hileman v. Knable, 391 F.2d 596, 597 (3d Cir. 1968) (applying one-year limitations period for false arrest and malicious prosecution to § 1983 claim); Gaito v. Strauss, 368 F.2d 787, 788 (3d Cir. 1966) (affirming lower
A. BORROWING LIMITATIONS PERIODS FROM STATE STATUTES

The process by which courts select a period of limitations for a federal law is well established. Federal law24 directs courts to borrow from state law to fill gaps in federal law as long as the borrowed state provisions do not conflict with federal law or policy.25 Courts borrow state law limitations periods to the extent that such periods are consistent with the polices underlying federal laws.26 When borrowing a local limitations period for a section 1983 action, each federal court must apply a three-step formula.27 First, the court establishes that no federal rule governs the claim.28 Second, the court considers

---


"In all cases where [federal civil rights laws] ... 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 ... 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 ...."

25. The Rules of Decision Act, 28 U.S.C. § 1652 (1982), also sanctions the practice of "borrowing" limitations periods from state law. In relevant part, the Act provides: "[t]he laws of the ... states, except where the Constitution ... treaties ... or Acts of Congress otherwise require ... shall be regarded as the rules of decision ... in cases where they apply." Id. (emphasis added).


27. In Burnett v. Grattan, 468 U.S. 42 (1984), the Supreme Court provided the following three-step procedure to aid courts in applying § 1988 to § 1983 actions. "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 statutes] into effect." Id. at 48. Thus, if an issue is covered by the federal law, the federal rule controls. "[Second,] [i]f no suitable federal rule exists, courts undertake the second step by considering the application of state law." Id. Finally, "[a] third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with' federal law. Id. See generally Schwartz, Statute of Limitations in Section 1983 Actions, 19 CLEARINGHOUSE REV. 638, 638 (1985) (explaining three-step procedure under § 1988 for determining applicable procedural rule in § 1983 actions).

applying an analogous state law.\textsuperscript{29} Finally, the court applies a state limitations period if it is consistent with federal law.\textsuperscript{30} In order to clarify the borrowing process, the Supreme Court has announced several additional directives to help courts select among various available state limitations periods.\textsuperscript{31} Before Wilson, for example, the Supreme Court counseled federal courts to apply the "most appropriate"\textsuperscript{32} or "most analogous"\textsuperscript{33} state statute of limitations. Because the Supreme Court supplied these terms without much explanation or elaboration, and because they are not synonymous, they failed to provide effective guidance to the lower courts.\textsuperscript{34}

B. THE USE OF ANALOGIES IN THE BORROWING PROCESS

Although the lower federal courts understood the need to employ general borrowing principles, they did not agree on specifics. Faced with an ever-increasing docket of section 1983 actions\textsuperscript{35} and a lack of concise direction from the Supreme Court, lower courts used several different analogies when assigning limitations periods to section 1983 claims.\textsuperscript{36}

29. \textit{Id}.
30. \textit{Id}.
31. A state procedural rule (or limitations period) is "consistent" with federal law if it does not frustrate the policies behind § 1983. Courts will not judge state rules inconsistent simply because their application defeats a claimant's cause of action. Rather, the key question is whether the state law is generally hospitable to § 1983 actions. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). \textit{See generally} Schwartz, \textit{supra} note 27, at 639 (discussing analysis of state law for consistency with federal law in § 1983 actions).
32. \textit{Railway Express}, 421 U.S. at 462.
33. \textit{Tomanio}, 446 U.S. at 488.
34. A state statute that is most closely "analogous" to a federal cause of action might not be "most appropriate" to federal policy. \textit{See} Schwartz, \textit{supra} note 27, at 639. For example, a court hearing a § 1983 claim for false arrest might find that a statute governing claims against state officials sets forth the state limitations period "most appropriate" to federal policy. \textit{See} Blake v. Kat-ter, 693 F.2d 677, 680 (7th Cir. 1982). For the same claim, a court could find that the most "analogous" statute is one governing state malicious prosecution claims.
35. \textit{See supra} note 2.
36. \textit{See generally infra} notes 37-71 and accompanying text (discussing methods adopted by lower courts prior to the Supreme Court's decision in Wilson); Garcia v. Wilson, 731 F.2d 640, 643-48 (10th Cir. 1984), aff'd, 471 U.S. 261 (1985) (discussing development of various analogies used by circuit courts in assigning limitations periods); Siehler, \textit{Limiting the Right to Sue: The Civil
1. Factual Analogies

In their quest to choose the most appropriate or analogous limitations periods for section 1983 claims, the federal courts developed an array of analyses. Under the factual analysis, determining the appropriate local limitations period required a case-by-case review of the facts of each alleged civil rights violation. Courts adopting this approach drew analogies between section 1983 constitutional torts and common-law tort actions. Finding a proper analogy, courts selected the limitations period a state court would have applied to that species of state claim.

When a claimant filed an action alleging deprivation of his constitutional rights after a police officer allegedly beat and threatened him, for example, the Court of Appeals for the District of Columbia Circuit applied the limitations period for an analogous common-law assault cause of action.

The factual analysis forced courts to undertake time-consuming dissections of individual claims and to assign different limitations periods to allegations within the same section 1983 complaint. In addition, litigants spent a great deal of time attempting to force constitutional claims into favorable state

---

37. Several commentators have adopted the term factual analysis when discussing the problem of choice of a limitations period for § 1983 claims. See Biehler, supra note 36, at 16; Kibble-Smith, supra note 36, at 418.


39. See, e.g., Shaw v. McCorkle, 537 F.2d 1289, 1292 (5th Cir. 1976) (applying “state limitation period the state itself would have enforced had plaintiff . . . [sought] similar relief in a court of that state” to § 1983 action).


41. Id. at 376. The court applied D.C. CODE ANN. § 12-301(4) (1981) (providing one-year limitations period for assault and battery). Id.

42. See, e.g., Polite v. Diehl, 507 F.2d 119, 123 (3d Cir. 1974) (en banc) (ap-
mon-law pigeon holes. This approach was costly in terms of judicial resources and advanced neither predictability nor the policies of repose underlying federal statutes of limitations. Nonetheless, at least seven circuits employed the factual analysis.

2. Statutory Liability Analogies

Another popular method of determining the analogous or most appropriate limitation focused on statutory rather than common law. Under the statutory liability analysis, courts reasoned that because the section 1983 action stemmed from a federal statute, they should borrow the local limitations period from a state statute governing actions created by statute. In some cases, courts applying this analysis drew upon state statutes expressly intended to govern section 1983 claims, reason-

plying one-year state statute to § 1983 claims analogous to false arrest and two-year wrongful injury statute to claims analogous to assault and battery).


Attempting to compare civil rights claims with particular state law actions creates other problems that are clearly revealed by our own experience and by our examination of the results of this approach in other circuits. Virtually any section 1983 claim is arguably analogous to more than one state cause of action.

Id. (emphasis added) (citing Clulow v. Oklahoma, 700 F.2d 1291, 1299-1300 (10th Cir. 1983) ("Although it could be argued that [plaintiff's] claims are in part similar to a false imprisonment action . . . [we apply a] general tort of interference with individual rights . . . ."); Shah v. Halliburton Co., 627 F.2d 1055, 1059 (10th Cir. 1980) (§ 1981 case) ("there is a substantial question in this case whether to apply the Oklahoma two-year statute applicable or the three-year statute applicable to contract actions and liability created by statute").

Nonetheless, some commentators found the flexibility of this approach attractive. See Kibble-Smith, supra note 36, at 418-19 ("Presumably, this approach preserved the flexibility to characterize a claim by analogy to state law, as a right arising under statute, or by referring to a 'catch-all' statute of limitation.") (footnotes omitted).

44. See supra notes 13-16 and accompanying text.

45. See supra notes 13-16.

46. See supra note 38.

47. In some instances, state law supplied a limitations period for actions created by statute. See, e.g., Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155, 158 n.2 (8th Cir. 1979) (per curiam) (applying MO. REV. STAT. § 516.120(2) (1952), which imposed five-year limitations period on statutory actions, to § 1983 claim alleging conspiracy to deprive plaintiff of constitutional rights).

48. See, e.g., OR. REV. STAT. § 30.265(1) (1975) (assigning two-year limitations period to § 1983 claims). In relevant part, the statute reads:

every public body is liable for its torts, and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function
ing that state legislatures should be allowed to select an applicable limitations period. Some commentators criticized the statutory liability analogy because it created inconsistent section 1983 limitations periods when federal courts in different states applied the same analysis. Others disliked adopting limitations periods motivated by state interests, or noted analytical flaws in the analogy. To its credit, the statutory liability analogy achieved state-wide uniformity and avoided forcing constitutional torts into common-law pigeon holes. Four cir-

---

49. In the view of the Ninth Circuit Court of Appeals: “[w]hen the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law . . . .” Kosikowski v. Bourne, 659 F.2d 105, 107 (9th Cir. 1981) (applying OR. REV. STAT. § 30.265(1) (1975), two-year statute applicable to § 1983 claims). But see Johnson v. Davis, 582 F.2d 1316, 1319 (4th Cir. 1978) (rejecting VA. CODE ANN. § 8-24 (1950), one-year limitation on all § 1983 claims).

50. See WAYNE Note, supra note 36, at 68 (“an inherent inconsistency exists . . . . [when] two courts might agree as to the proper characterization of the federal action, [and] the results may be different if the courts sit in different states”).

51. This criticism goes beyond the statutory liability 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. Proponents of this approach often cite Justice Harlan’s famous concurrence in Monroe v. Pape, 365 U.S. 167 (1961): “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.” Id. at 196. See generally ARIZONA Comment, supra note 5, at 112-15 (discussing Justice Harlan’s concurring opinion and citing cases in which courts adopted limitations periods enacted for § 1983).

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 a remedy. See, e.g., Jarmie, Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit’s Resolution, 15 N.M.L. REV. 11, 25 (1985) (noting that statutory liability analogy “is flawed in that it focuses on the statutory remedy and away from the elements of the cause of action”); Sagafi-Nejad, Proposed Amendments to Section 1983 Introduced in the Senate, 27 ST. LOUIS U.L.J. 373, 404 (1983) (noting importance of national interest in protecting constitutional rights); NOTRE DAME Note, supra note 38, at 443 (noting that § 1983 does not create substantive rights, but rather enforces rights originating elsewhere in federal law).

53. The Seventh Circuit defended its application of the statutory liability analysis because it avoided “the strained process of characterizing civil rights claims as common law torts.” See Beard v. Robinson, 563 F.2d 331, 336-37 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978). The court also noted that
cuits adopted this method.\textsuperscript{54}

3. Catch-All Analogies

When courts applying the statutory liability analysis occasionally failed to locate a statutory liability provision in relevant state law, they often employed a \textit{catch-all} analysis.\textsuperscript{55} Catch-all statutes provide limitations periods for all state actions not otherwise limited.\textsuperscript{56} Under the logic of the catch-all analogy, because Congress enacted section 1983 without a limitations period, a state catch-all limitations provision should be applied. This approach provided more predictable outcomes than the factual analogy because it did not require courts to review claims on the basis of their underlying facts. The catch-all approach, however, provided less uniformity than the statutory liability approach. Presumably, a “settled” catch-all limitations period could be displaced if a state legislature adopted a more closely analogous limitations period. Like the statutory liability analogy, the catch-all approach proved objectionable\textsuperscript{57} because it used an arbitrary means to choose a federal limitations pe-

\begin{quote}
“[i]nconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action.” \textit{Id.} at 337 (quoting \textit{Smith v. Cremins}, 308 F.2d 187, 190 (9th Cir. 1962)).
\end{quote}

\textsuperscript{54} \textit{See} \textit{Plummer v. Western Int’l Hotels Co.}, 656 F.2d 502, 506 (9th Cir. 1981); \textit{Pauk v. Board of Trustees}, 654 F.2d 855, 866 (2d Cir. 1981), \textit{cert. denied}, 455 U.S. 1000 (1982); \textit{Cole v. Cole}, 633 F.2d 1083, 1092 (4th Cir. 1980); \textit{Beard v. Robinson}, 563 F.2d 331, 336 (7th Cir. 1977), \textit{cert. denied}, 438 U.S. 907 (1978); \textit{see also} \textit{Garmon v. Foust}, 668 F.2d 400, 406 n.11 (8th Cir.) (en banc), (stating that state limitations period for actions based on statutory liability “may appropriately govern” federal civil rights action although state law provided no such period in this case), \textit{cert. denied}, 456 U.S. 998 (1982) \textit{noted in} \textit{Biehler}, \textit{supra} note 36, at 16-27; \textit{NOTRE DAME Note, supra} note 38, at 443 n.25.


\textsuperscript{56} \textit{See} \textit{Rinehart v. Locke}, 454 F.2d 313, 315 (7th Cir. 1971); \textit{Franklin v. City of Marks}, 439 F.2d 665, 670 (5th Cir. 1971); \textit{Wakat v. Harlib}, 253 F.2d 59, 63-64 (7th Cir. 1958); \textit{Shorters v. City of Chicago}, 617 F. Supp. 661, 666 (N.D. Ill. 1985); \textit{see generally} \textit{ARIZONA Comment, supra} note 5, at 101 (citing cases in which courts employed catch-all analogy).

\textsuperscript{57} \textit{See NOTRE DAME Note, supra} note 38, at 443.
period. The catch-all approach also chose federal limitations periods based on legislation enacted by state legislators to satisfy state interests. At least four circuits adopted the catch-all approach.

4. General Tort Analogies

The general tort analysis characterized all section 1983 actions by analogy to the same common-law tort. Thus, after an initial determination that a certain class of tort characterized section 1983 actions, uniformity resulted. A section 1983 action alleging wrongful termination of employment would receive the same characterization as a section 1983 action alleging police brutality. This approach aided policies of repose and predictability and created uniformity within states. Nevertheless, some critics questioned the wisdom of applying a single classification to section 1983, an action capable of encompassing myriad claims.
Although section 1983 is used frequently to redress widely differing civil rights claims, the statute lacks a limitations period. Federal courts have struggled with vague and potentially contradictory commands that they apply analogous or appropriate limitations periods to claims and have produced little symmetry or predictability. Different courts have assigned limitations based on individual facts, general tort characterizations, or a system of statutory liability; some courts have adopted more than one approach. Against this confused backdrop, the Tenth Circuit attempted to establish a rule and the Supreme Court passed judgment.

II. THE WILSON CASE

On January 28, 1982, Gary Garcia filed an action in the United States District Court for the District of New Mexico. In his complaint Garcia named as defendants Richard Wilson, a

limitations periods, a nonuniform classification might assign many different limitations periods to elements of the same claim. Such a confusing system does not effectuate the intent of § 1983 because "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." Wilson v. Garcia, 471 U.S. 261, 275 (1985).

65. See supra note 33 and accompanying text.
66. See supra note 32 and accompanying text.
67. See Wilson, 471 U.S. at 266.
68. See supra notes 37-46 and accompanying text.
69. See supra notes 61-64 and accompanying text.
70. See supra notes 47-54 and accompanying text.
72. See Garcia, 731 F.2d at 642.
73. See Wilson, 471 U.S. at 280.
74. See Garcia, 731 F.2d at 651. Garcia framed his cause of action under § 1983. Id. at 642. Two elements are needed to bring this cause of action. See supra note 1.
New Mexico state police officer, and Martin Vigil, the state police chief. Garcia alleged that Wilson violated his constitutional rights by severely beating him and spraying him with tear gas. Garcia also alleged that Vigil had been grossly negligent in the performance of his supervisory duties. The defendants moved to dismiss, asserting that the two-year statute of limitations provided in the New Mexico Tort Claims Act barred the suit. The district court denied the motion and held that a four-year catch-all statute governed the claim. This holding conflicted with a ruling of the New Mexico Supreme Court supporting the defendants' position. The district court certified the limitations issue to the Tenth Circuit on interlocutory appeal.

The Court of Appeals for the Tenth Circuit, in a unanimous en banc decision, affirmed the district court's denial of the motion to dismiss but found that every section 1983 claim "is in essence an action to recover for injury to personal

75. Garcia, 731 F.2d at 642.
76. Id.
77. Id. Specifically, Garcia alleged that Vigil had not properly supervised, trained, and disciplined Wilson, that he had hired Wilson with the knowledge that the officer had been convicted of several serious crimes, and that he had not issued reprimands after Wilson had beaten other county residents. Id. In addition, two high-ranking New Mexico state police officers had advised Vigil not to hire Wilson. Id.
78. Garcia filed his complaint approximately two years and nine months after the claim allegedly arose. See Wilson, 471 U.S. at 263.
79. Id. Two years earlier, the New Mexico Supreme Court had held that the New Mexico Tort Claims Act, N.M. STAT. ANN. § 41-4-12 (1978), governed all § 1983 claims filed against state police officers. See DeVargas v. State, 97 N.M. 563, 564, 642 P.2d 166, 167 (1982).
80. See Garcia, 731 F.2d at 642.
81. See N.M. STAT. ANN. § 37-1-4 (1978) (applying to "all actions not herein otherwise provided for and specified within four years").
82. See Wilson, 471 U.S. at 264.
83. See supra note 79.
84. See Garcia, 731 F.2d at 642. A federal district court may certify issues to the appellate level under 28 U.S.C. § 1292(b) (1982). This provision allows a federal district judge to appeal an order when "such [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion [if that appeal] . . . may materially advance the ultimate termination of litigation." Id.

In earlier cases, the Tenth Circuit Court of Appeals had used at least three different analogies to characterize § 1983 claims. See Garcia v. University of Kansas, 702 F.2d 849, 851 (10th Cir. 1983) ("injury to rights" analogy); Clulow v. Oklahoma, 700 F.2d 1291, 1299 (10th Cir. 1983) (general tort analogy); Spiegel v. School Dist. No. 1, 600 F.2d 264, 265-66 (10th Cir. 1979) (statutory liability analogy).
rights.\textsuperscript{85} Dismissing both the district court's choice of a catch-all statute and the defendants' contention that the New Mexico Tort Claims Act controlled, the Court of Appeals determined that a third statute, governing "injur[ies] to the person or reputation of any person," best characterized section 1983 actions.\textsuperscript{86} The United States Supreme Court granted certiorari.\textsuperscript{87}

After noting the pivotal importance of limitations periods,\textsuperscript{88} and summarizing the conflicting methods by which the lower courts had characterized section 1983 actions,\textsuperscript{89} the Court affirmed the Tenth Circuit.\textsuperscript{90} Writing for the majority,\textsuperscript{91} Justice Stevens communicated the Court's view that "[i]f the 42d Congress expressly focused on the issue decided today, . . . it would have characterized § 1983 as conferring a general remedy for injuries to personal rights."\textsuperscript{92} The opinion concluded that "§ 1983 claims are best characterized as personal injury actions."\textsuperscript{93}

In her lone dissent, Justice O'Connor criticized the majority for adopting a single classification for all section 1983 claims. She found no justification for abandoning the practice of applying state law analogies to section 1983 claims and "the policies § 1988 embodies."\textsuperscript{94} In Justice O'Connor's view, the state borrowing rule remained workable.\textsuperscript{95} She questioned the value of the personal injury classification\textsuperscript{96} and expressed concern that

\textsuperscript{85} Garcia, 731 F.2d at 651.
\textsuperscript{86} Id. (citing N.M. STAT. ANN. § 37-1-8 (1978)).
\textsuperscript{87} "[T]he conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons" for the Supreme Court to hear the case. Wilson, 471 U.S. at 266.
\textsuperscript{88} "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Id. (quoting Chardon v. Fumero Soto, 462 U.S. 650, 671 (1983) (Rehnquist, J., dissenting)).
\textsuperscript{89} Id. at 276.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 262. Justice Powell took no part in the consideration or decision of the case; Justice O'Connor filed the sole dissenting opinion.
\textsuperscript{92} Wilson, 471 U.S. at 278 (emphasis added).
\textsuperscript{93} Id. at 280.
\textsuperscript{94} Id. (O'Connor, J., dissenting).
\textsuperscript{95} See id. at 282 ("Despite vocal criticism of the 'confusion' created by individualized statutes of limitations, most Federal Courts of Appeals and state courts have continued the settled practice of seeking appropriate factual analogies for each genus of § 1983 claim.").
\textsuperscript{96} See id. at 284 ("The Court's all-purpose analogy is appealing; after all, every compensable injury, whether to constitutional or statutory rights, through violence, deception or broken promises, to a person’s pocketbook, person or dignity, might plausibly be described as a 'personal injury.' But so sweeping an analogy is no analogy at all.").
the statutes of many states would not provide a single, clearly applicable limitations period. Further, Justice O'Connor accused the Court of legislating a limitations rule where congressional silence counseled restraint and of foreclosing legislative creativity on the part of the states to gain "only a half measure of uniformity." 

III. THE PROBLEMS REMAINING AFTER WILSON

The Supreme Court's decision in Wilson represented an incremental improvement over previous methods used in choosing the appropriate statute of limitations for section 1983. The decision provided plaintiffs a clear timetable for filing at least some section 1983 claims. By providing a general tort characterization, the Court freed judicial resources in federal districts where the characterization could be easily applied. Although it promoted these worthy ends, the Wilson decision was flawed. When lower courts applied the decision, practical problems surfaced. These practical problems made Wilson's application uncertain and confusing and raised serious policy questions.

A. APPLYING THE WILSON ANALOGY: PRACTICAL PROBLEMS

1. Locating an Appropriate Tort Statute

As Justice O'Connor had anticipated in her dissent, After noting that most states have several different personal injury statutes from which to choose, and citing several Tenth Circuit cases, Justice O'Connor commented that "there is no guarantee state law will obligingly supply a limitations period to match an abstract analogy." Id. at 287.

In making this criticism of the Court's general tort analogy, Justice O'Connor anticipated a problem that would come to plague lower courts applying Wilson. The majority's direction to select limitation periods applicable to "personal injury statutes" or "generalized personal injury statutes" lacked specificity needed to provide meaningful guidance. Although New Mexico law provided a single general personal injury statute, see N.M. STAT. ANN. § 37-1-8 (1978), in Wilson, other states offered a statutory cafeteria. In New York, for instance, federal courts were asked to choose from a three-year period for personal injury claims based upon negligence, see N.Y. CIV. PRAC. L. & R. § 214(5) (1972), and a one-year period for personal injury claims based on intentional torts, see id. § 215(3), noted in Schwartz, supra note 27, at 640.

98. Wilson, 471 U.S. at 284 (O'Connor, J., dissenting).
99. Id. at 285.
100. Although after Wilson § 1983 claims brought within the same state were treated identically, the decision did not create uniformity among or even within the federal circuits. Thus, plaintiffs and defendants involved in interstate § 1983 litigation remained uncertain as to what statutes of limitations would apply in their cases.
lower courts found the Wilson rule difficult to use when state law in a given jurisdiction contained no obvious "general" personal injury statute. Although the majority had stated that section 1983 claims are "best characterized as personal injury actions," this abstract analogy has offered little guidance when applied to a concrete body of state law. Several cases illustrate this problem.

In Jones v. Preuit & Mauldin, the Eleventh Circuit failed to find a general personal injury statute in Alabama law. Although state law contained a provision for "injury to the person or rights of another not arising from contract," the Jones court, reviewing legislative history, found that this statute did not apply to the "acts of intentional and direct violence" that prompted passage of section 1983. The court held that a statute governing claims for "trespass to person or liberty such as false imprisonment or assault and battery" best suited the intentional nature of section 1983 claims. In Jones, neither state statute that the court considered provided an exact fit. The Eleventh Circuit, forced to analogize, resorted to the legislative history of section 1983 and reached an unpredictable outcome. This lack of certainty is exactly what Wilson's

O'Connor also believed that because states characterized their tort actions in many different ways, "[t]oday's decision [selecting a general tort analogy for all § 1983 claims] does not so much resolve confusion as banish it to the lower courts." Id. at 286.

102. The Wilson court had instructed the lower courts to borrow limitations periods for § 1983 claims from state statutes providing "general remedy for injuries to personal rights." See id. at 278.


103. See Wilson, 471 U.S. at 280.

104. 763 F.2d 1250 (11th Cir. 1985).

105. Id. at 1254 (citing ALA. CODE § 6-2-39(a)(5) (1975)).

106. Id. at 1255-56.

107. Id. at 1254 (citing ALA. CODE § 6-2-34(1) (1975)).

108. Id. at 1255.

109. The language of the Alabama "injury to the person" statute more closely parallels the language selected by the Tenth Circuit in Garcia than the "trespass to person" statute the Jones court selected. Nonetheless, the Wilson court stressed the need for a generally applicable statute. In this respect, the
uniform characterization sought to remedy. Although the Jones court may or may not have reached an acceptable result, the general tort analogy provided no easy answer.

Other courts have had difficulty choosing an appropriate statute based on the Wilson Court’s characterization. In Shorters v. City of Chicago, an Illinois district court refused to apply a state statute covering certain personal injury claims because the statute did not apply broadly. Basing its decision on language in Wilson stressing the general applicability and broad remedial sweep of section 1983, the Shorters court applied a five-year catch-all statute. Arguably, the language and the analysis announced in Wilson might have supported either choice. As in Jones, the Shorters court found that the Supreme Court’s abstract analogy yielded neither easy application nor an obvious state law counterpart.

Eleventh Circuit’s application of such criteria cannot be read as inconsistent with Wilson.

113. See id. at 663-64.

Commentators are divided on whether Shorters reflects a gap in the Wilson general tort analogy, or simply a misapplication. Compare Kibble-Smith, supra note 36, at 430 (noting that Shorters is “well reasoned” and supporting “soundness of this approach”) with Notre Dame Note, supra note 38, at 447 (arguing that Shorters “plainly ignored” Wilson Court’s personal injury characterization).

Despite these conflicting views, Shorters demonstrates that the general tort characterization does not always provide easy analogies to state law.

115. Compare Shorters, 617 F.2d at 663-64 (listing instances in which Wilson Court stressed “general” nature of § 1983 and of New Mexico statute chosen to characterize § 1983 claims, and view that 42d Congress would have approved general remedy for injuries to personal rights) with Wilson, 471 U.S. at 278 (stating that “[t]he relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catch-all periods of limitations for statutory claims that were later enacted by many States”)

The Tenth Circuit also chose a generally applicable catch-all over two more specific personal injury statutes. See McKay v. Hammock, 730 F.2d 1367, 1370 (10th Cir. 1984) (en banc) (choosing to apply broadly applicable catch-all statute, instead of two limited personal injury statutes, to § 1983 claims).

116. Three Fifth Circuit panels have set the limitations period for § 1983 claims by reference to a statute governing “actions ... for injury done to the estate or property of another.” See Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988) (per curiam) (citing TEX. REV. CIV. STAT. ANN. art. 5526(1) (Vernon 1979)) (emphasis added); Peter Henderson Oil Co. v. City of Fort Ar-
The problem of choosing an appropriate limitations period based upon an abstract analogy is illustrated most clearly when state law contains no personal injury limitation. *Mismash v. Murray,*\(^ {117}\) decided by the Tenth Circuit before the Supreme Court affirmed *Wilson,* reflects this problem. In *Mismash,* the court applied a Utah catch-all limitations period in the absence of a general personal injury provision.\(^ {118}\) The abstract analogy drawn by the *Wilson* Court adds little guidance in this situation. Although this problem has yet to emerge in post-*Wilson* section 1983 litigation, courts have not yet applied the personal injury analogy in every state. It is only a matter of time before such a case arises.

2. Choosing Among State Tort Statutes

Another problem arose when lower courts selecting limitations periods for section 1983 claims faced a choice between more than one personal injury statute. In *Garcia,* the Tenth Circuit applied the general tort analogy to choose one of three potentially applicable limitations statutes.\(^ {119}\) Because two of these statutes applied narrowly and one did not, the choice of a "general remedy for injuries to personal rights"\(^ {120}\) posed no great difficulty. Unfortunately, the law in some states offers several almost indistinguishable choices.\(^ {121}\) Federal courts applying the *Wilson* analogy in these jurisdictions have found the selection process difficult. While Utah law had no general personal injury statute and Alabama law offered few choices, some states have multiple tort limitations periods.\(^ {122}\) The Supreme Court's implicit assumption in adopting the general tort analogy, that most or all states provided the same narrow range of

\(^ {117}\) 730 F.2d 1366 (10th Cir. 1984) (en banc), cert denied, 471 U.S. 1052 (1985).

\(^ {118}\) The Tenth Circuit specifically rejected a limitations period applicable to "'action[s] for libel, slander, assault, battery, false imprisonment or seduction.'" *Id.* at 1367. *See* UTAH CODE ANN. § 78-12-29(4) (1953).

\(^ {119}\) *See* supra notes 79, 81, 86 and accompanying text.


\(^ {121}\) *See* supra notes 104-116 and accompanying text.

\(^ {122}\) *See* infra notes 125-27 and accompanying text (discussing Ohio's multiple text statutes); *supra* note 97 (noting two of New York's tort statutes of limitations).
limitations periods present in New Mexico law, flawed *Wilson v. Garcia*. A uniform characterization, quite useful in New Mexico, is confusing when applied in states with more than one general tort statute. Federal courts in these states have drawn unpredictable and arbitrary distinctions.

In *Mulligan v. Hazard*, for instance, the Sixth Circuit was hard pressed to choose between two Ohio statutes. The *Mulligan* court conducted a review of the legislative history of section 1983 and chose a one-year limitations period applicable to "libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice" over a two-year period for "bodily injury." Forced to choose between two closely related and equally applicable statutes, the Sixth Circuit found *implied* guidance in Supreme Court dicta. The court narrowed its statutory choice based on a distinction between intentional and nonintentional torts. Although this distinction seems plausible in light of legislative history, it was not drawn in the Supreme Court's opinion and was hardly predictable.

125. *Mulligan*, 777 F.2d at 343. See Ohio Rev. Code Ann. § 2305.11 (Anderson 1981). At the time the cause of action arose in *Mulligan*, the statute provided a limitations period for seven enumerated torts: "an action for libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice will be barred if not brought within one year after the cause accrued." *Mulligan*, 777 F.2d at 343.
127. *Mulligan*, 777 F.2d at 344. The Court of Appeals based its distinction on its perception of congressional intent:

The concern of Congress, thus, was with the perpetrators of intentional tortious conduct. While both [the general and the specific state statutes] theoretically encompass intentional tort actions, [the specific statute], which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned Congress when it enacted the civil rights statutes.

Id. at 344.

Although this finding may or may not represent the will of the 42d Congress in enacting § 1983, it is a distinction that the *Wilson* Court never raised. The intentional-nonintentional tort distinction, although helpful in choosing between two closely related general tort statutes, is cut from whole cloth.

128. See supra note 17. Nonetheless, because the *Wilson* Court fully addressed congressional intent, any speculation or de novo review by the Sixth Circuit was inappropriate.
129. See *Wilson v. Garcia*, 471 U.S. 261, 278 (1985). According to the Court, the 42d Congress would have "characterized § 1983 as conferring a general remedy for injuries to personal rights." Id. (emphasis added).
Two other courts also have seized on the intentional-noninten-
tional tort distinction to choose between equally applicable per-
sonal injury statutes.130

The Mulligan case illustrates a fundamental flaw in Wilson's
general tort analogy. Because the Supreme Court as-
sumed that the range of personal injury statutes contained in
the law of New Mexico reflected the range in other states, the
Court made no allowance for situations in which two or more
statutes might be equally applicable. Compelled to use a blunt
instrument,131 federal courts drew arbitrary distinctions.132 In
the process, parties have been denied predictability. Moreover,
it is likely that courts have barred valid civil rights claims
unfairly.

3. Deciding Retroactive Application

When the Supreme Court decided Wilson, many section
1983 claims were pending or soon to be filed. Federal courts
hearing these cases had to decide whether to apply the Wilson
analogy retroactively or to select a previously established limi-
tations period.133 Because the Supreme Court failed to address
the issue of retroactive application in Wilson, it sent an ambig-

130. See Gates v. Spinks, 771 F.2d 916, 919 (5th Cir. 1985), cert. denied, 475
U.S. 1065 (1986); Cook v. City of Minneapolis, 617 F. Supp. 461, 463-65 (D.
Minn. 1985).

131. Justice O'Connor noted the Tenth Circuit's inability to apply its own
§ 1983 characterization in her dissent. See Wilson, 471 U.S. at 286-87.

132. In McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984), for example,
the court approved the general tort analogy later adopted in Wilson, but faced
two personal injury statutes and so chose to apply Colorado's catch-all statute.
Id. at 1370. See Wilson, 471 U.S. at 287 (O'Connor, J., dissenting).

133. As a general rule, judicial decisions apply retroactively. See Solem v.
(1973)). In some cases, however, the Supreme Court has recognized excep-
tions. See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 51

Federal courts resolve the retroactivity issue by determining "(1) whether
the decision establishes a new principle of law; (2) whether retroactive applica-
tion will further or retard the purposes of the rule in question; and
(3) whether applying the decision will produce substantial[ly] inequitable re-
uous message to the lower courts. This flaw led to inconsistent treatment of section 1983 claims and increased litigation. Courts disagreed about the intent of the Supreme Court in *Wilson*. Some opinions have held that, because the Court did not expressly address retroactivity, *Wilson* counseled retroactive application. Other courts, perhaps noting the Supreme Court's observation that the Tenth Circuit itself had chosen not to apply *Wilson* retroactively, reached opposing results. A circuit split resulted.

134. Because *Wilson* dealt with a limitations issue, claims could be barred or revived by retroactive application of a shortened limitations period. Clear guidance was crucial to achieving the *Wilson* Court's goals of “uniformity, certainty, and the minimization of unnecessary litigation.” *Wilson*, 471 U.S. at 275.

135. Compare Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (holding that *Wilson* does not apply retroactively), Eades v. Thompson, 823 F.2d 1055, 1058 n.1 (7th Cir. 1987) (same), Anton v. Lehpamer, 787 F.2d 1141, 1146 (7th Cir. 1986) (same), Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986) (same), and Abbit v. Franklin, 731 F.2d 661, 664 (10th Cir. 1984) (en banc) (same) with Thomas v. Shipka, 818 F.2d 496, 499 (6th Cir. 1987) (holding that *Wilson* applies retroactively), Williams v. City of Atlanta, 794 F.2d 624, 626 (11th Cir. 1986) (same), Mulligan v. Hazard, 777 F.2d 340, 344 (6th Cir. 1985) (same), Wycoff v. Menke, 773 F.2d 983, 987 (8th Cir. 1985) (same), and Smith v. City of Pittsburgh, 764 F.2d 188, 196-97, 197-98 (3d Cir. 1985) (same).

136. Because the retroactivity issue remains unsettled, courts must address it in all cases in which a plaintiff or defendant would benefit from a lengthened or shortened limitations period.


The theory that a decision should apply retroactively if the Supreme Court does not expressly reject such an application is grounded in an analysis of DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). In that case, the Supreme Court applied a statute of limitations retroactively even though the Court did not explicitly discuss the retroactivity issue. *Id.* at 152. A minority of courts has adopted the view that *DelCostello* directs retroactive application of statute of limitations decisions in which the court is silent on the retroactivity issue. See Smith v. General Motors Corp., 747 F.2d 373, 375 (6th Cir. 1984) (en banc); Welyczko v. U.S. Air, Inc., 733 F.2d 239, 241 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984). The Sixth Circuit has applied this theory to the *Wilson* holding. See Shipka, 818 F.2d at 499; Mulligan, 777 F.2d at 344.


139. See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987); Eades v. Thompson, 823 F.2d 1055, 1058 n.1 (7th Cir. 1987); Anton v. Lehpamer, 787 F.2d 1141, 1146 (7th Cir. 1986); Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986); Abbit v. Franklin, 731 F.2d 661, 664 (10th Cir. 1984) (en banc); Jackson v. City of Bloomfield, 731 F.2d 652, 655 (10th Cir. 1984).
Guidance is clearly needed; when litigants face unpredictable liability or barred claims, policies of repose suffer. A lack of clarity, the definitive factor in inconsistent lower court application of the Wilson opinion, also surfaced in the retroactivity issue. The existing circuit split shows that Wilson has yet to settle the problem of selecting a limitations period for section 1983.

Retroactive application aside, the Wilson court's opinion did not anticipate situations in which state law refuses to mesh with the general tort analogy. Unfortunately for the lower courts, local law sometimes contains no general personal injury statutes, no obvious candidates, or multiple general tort statutes. The courts necessarily make unpredictable and arbitrary distinctions. In addition to these interpretive problems, several key policy questions remain unanswered or inadequately answered after Wilson.

B. APPLYING THE WILSON ANALOGY: POLICY CONCERNS

1. Lack of Uniformity

Congress enacted section 1983 as a uniquely federal cause of action that would vindicate rights when state remedies or state enforcement proved ineffective. The statute embodies


141. See supra notes 15-16 and accompanying text.

142. At least one member of the Court is eager to resolve the issues of exactly which statute to use for the characterization of § 1983 claims and whether to apply it retroactively. Dissenting from a denial of certiorari, Justice White wrote: "[t]he Court's decision not to review the instant case marks the third time this term that it has refused to address these differences that exist between the courts of appeals; differences that are not likely to disappear without guidance from this Court." See Mulligan v. Hazard, 476 U.S. 1174 (1986), denying cert. to 777 F.2d 340 (6th Cir. 1985).

143. See supra notes 117-118 and accompanying text.

144. See infra notes 104-116 and accompanying text.

145. See infra notes 119-32 and accompanying text.

146. In Felder v. Casey, 108 S. Ct. 2302 (1988) the Court observed:
   "the central objective of the Reconstruction-Era civil rights statutes is... to ensure that individuals whose federal constitutional or statu-
an attempt to provide uniform access to a federal forum that is in no way contingent upon state law. By providing such access, section 1983 protects all persons equally and promotes confidence in legal institutions. Unfortunately, by instructing the lower courts to "select, in each state, the one most appropriate statute of limitations for all § 1983 claims," the Supreme Court created only state-wide uniformity. This "half measure of uniformity" does not harmonize state law differences. As a result, plaintiffs filing identical section 1983 actions will be barred after one year in California, three years in New York, and six years in Maine. Because local personal injury limitations periods are set according to local needs, durations inevitably will differ. Reliance on state law ensures vastly different results among and even within federal circuits and creates an undesirable incentive for forum shopping when constitutional tort claims cross state lines. Thus, Wilson's...
state law characterization promotes the imposition of complex and expensive litigation upon what Congress intended to be a simple matter for litigants, lawyers, and judges.\textsuperscript{155} This complexity places a heavy burden on plaintiffs who cannot secure expert legal advice.\textsuperscript{156} Finally, unpredictable, widely asymmetric outcomes may convince parties that they have been unfairly judged or victimized and may undercut public confidence in judicial institutions.

2. Confusing and Unnecessary Litigation

One of the primary goals of \textit{Wilson} was to minimize unnecessary litigation.\textsuperscript{157} The logic was simple; if litigants could gain no advantage from pigeon-holing claims based on underly-

son for several miles and arrests him without probable cause just inside the Louisiana border. Anderson is strip-searched, assaulted, and detained by Bates in a Mississippi jail for 48 hours.

Under the \textit{Wilson} rule, Anderson would have one year to file a § 1983 action in the officer's home state of Mississippi, see \textit{Gates v. Spinks}, 771 F.2d 916, 917 (5th Cir. 1985), one year to file in Louisiana, where the wrongful arrest occurred, see \textit{Saint Amant v. Benoit}, 806 F.2d 1294, 1296 n.1 (5th Cir. 1986), and six years in his own state of Alabama, see \textit{Jones v. Preuit \\
& Mauldin}, 763 F.2d 1250, 1256 (11th Cir. 1985).


156. Before enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), Congress noted the poverty of civil rights litigants, including those filing under § 1983:

\begin{quote}
In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.
\end{quote}


More recently, Professor Nahmod concluded that § 1983 "is a favorite of prisoners." \textit{See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION} § 3.07, at 134 (2d ed. 1986). Section 1983 also is used frequently to protect the civil rights of migrant workers, mental patients, and nursing home residents. \textit{See id.} § 2.03 and cases noted at 90-95.

Many of these litigants do not possess the resources to enter into complex legal actions. Lack of uniformity and certainty places these plaintiffs at a special disadvantage. \textit{Cf. infra} note 174 (setting forth authorities discussing unfamiliarity of average person injured by state action with constitutional law and resulting delay in recognizing civil rights claims).

ing fact patterns, courts could get on with business. In reality, *Wilson's* uniform characterization will not diminish litigation significantly because courts applying it will spend time attempting to locate a nonexistent general personal injury statute, selecting from unlikely choices, or drawing distinctions among several potentially applicable general tort statutes. Litigants whose claims are barred or who are subject to liability after such an inexact, unpredictable process will appeal frequently. The unresolved circuit split on the issue of retroactive application will also encourage appeals. Finally, shortened limitations periods produced by the personal injury analogy and uncertainty concerning which period will govern and whether it will apply retroactively, will prompt parties to sue first and negotiate later. Courts will squander vital time and resources contending with hasty, unripened claims and immature damages.

3. Shortened Limitations Periods

As a result of the personal injury analogy announced in *Wilson*, several courts have shortened their limitations periods for section 1983 actions. This creates two major problems.

158. Had the personal injury analogy been lucid and easy to apply, it is likely that collateral litigation concerning applicable state limitations periods would have declined. Unfortunately, because the new rule has created interpretive difficulties and shortened the limitations periods applied in many federal courts, it is likely that the number of § 1983 claims filed will actually increase in certain districts. See infra notes 168-72 and accompanying text.

159. *See supra* notes 117-18 and accompanying text.

160. *See supra* notes 104-16 and accompanying text.

161. *See supra* notes 123-30 and accompanying text.

162. *See, e.g.*, Thomas v. Shipka, 818 F.2d 496, 498 (6th Cir. 1987) (unsuccesfully challenging Sixth Circuit's choice of characterizing statute in Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1986)).

163. *See supra* notes 134-41 and accompanying text.

164. *See infra* notes 167-70 and accompanying text.

165. Defendants cannot adequately calculate liabilities or assert defenses if they are uncertain which statute will apply and in which time period. Similarly, plaintiffs may lose valid claims in reliance on an unsettled rule or rush to file spurious ones. See Biehler, *supra* note 36:

> Uncertainty affects every participant in the legal process. Not only are potential plaintiffs and defendants unaware of the time in which they must effectuate their rights, the attorneys to which they turn for advice are not in much better positions. The court is similarly unable to provide the parties before it with the correct solution.


166. *See Biehler, supra* note 36, at 6.

167. *See, e.g.*, Usher v. City of Los Angeles, 828 F.2d 556, 558-59 (9th Cir. 1987) (noting that California limitations period for § 1983 actions decreased
First, plaintiffs have less time to negotiate settlements and to pursue nonlitigious, administrative remedies before filing claims. Indeed, shortened limitations periods may actually increase the volume of litigation. In federal courts in Ohio, for example, where the section 1983 limitations period is one year, claimants have little opportunity to explore alternatives to litigation. It is also likely that parties will file actions before they are truly ripe or damages have matured. Settlement negotiations may be sacrificed in an effort to toll a brief or uncertain limitations period.

Second, shortened limitations periods reduce the availability of section 1983 actions. As the Supreme Court has noted, the length of a limitations period reflects a value judgment concerning the point at which the interests in prohibiting the prosecution of stale claims outweigh the interests in prosecuting valid ones. In state tort statutes, this value judgment is premised on compensation and orderly administration of personal injury claims. Although these are significant interests, they pale when compared to constitutional concerns. These findings from three years to one year as result of Wilson rule); Loy v. Clamme, 804 F.2d 405, 408 (7th Cir. 1986) (shortening Indiana § 1983 limitations period from five to two years); Ridgeway v. Wapello County, 795 F.2d 646, 647 (8th Cir. 1986) (stating that Wilson shortened Iowa period from five to two years); Anton v. Lehpamer, 787 F.2d 1141, 1142 (7th Cir. 1986) (stating that Illinois limitations period has been shortened from five years before Wilson to two years afterwards); Mulligan v. Hazard, 777 F.2d 340, 343 (6th Cir. 1986) (decreasing Ohio § 1983 limitations period from two years to one year).

In a recent case that applied the personal injury analogy to 42 U.S.C. § 1981, Justice Brennan made the following observation:

A longer statute of limitations might actually reduce federal litigation. Cases arising under the Fair Housing Act of 1968 and Title VII of the Civil Rights Act of 1964 are likely to overlap with § 1981 claims. If a short limitations period is imposed, plaintiffs in such cases will be forced to file their suits before exhausting administrative remedies, for fear of running out of time.


This observation is equally valid in the case of § 1983. Section 1983 might also overlap with remedies contained in the acts Justice Brennan cites. Other state and federal remedies might also overlap, and be abandoned, with a short limitations period.


Justice Brennan has argued with some force that the application of brief limitations pushes claimants to litigate before exhausting economical administrative remedies. See supra note 168.

Id. at 6.

mental constitutional interests must not be trivialized. Unfortunately, due to the complex nature of constitutional law, individuals often have difficulty recognizing rights violations and securing legal counsel. Thus, brief limitations periods for section 1983 claims may seriously harm plaintiffs.

Although a personal injury analogy based on state law may harm civil rights plaintiffs, interests of defendants and the courts also are implicated. Because federal courts must apply an awkward analogy, judicial resources are wasted, uniformity suffers, and the appearance of arbitrary and unfair decision making may surface. Asymmetry encourages appeals and undercuts faith in judicial institutions. Defendants suffer because shortened limitations periods incite plaintiffs to file unripe claims, discourage settlement negotiations, and leave insufficient time for pursuit of administrative remedies. Finally, unduly brief limitations periods may provide inadequate time to


"The definition of rights and remedies under the Civil Rights Acts has been an ongoing, dynamic process. Although experienced federal and state judges, members of the professoriat, and many, but not all, lawyers may be acutely aware of this definitional process, this professional familiarity is not widespread among members of the public. We are persuaded, therefore, that the average plaintiff who has been injured by state action is not sufficiently conversant with the intricacies and subtleties of constitutional law to recognize the constitutional deprivation, consult a lawyer, and prepare a case for filing (within a short limitations period)."

Id. at 142 (quoting Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977)) (emphasis added). Accord Okure v. Owens, 816 F.2d 45, 48-49 (2d Cir. 1987) (noting that due to "constitutional dimensions . . . recognition problems . . . are endemic in section 1983 litigation"); Childers v. Independent School Dist., 676 F.2d 1338, 1343 (10th Cir. 1982) (overturning lower court decision to apply six-month limitations period to § 1983 claim); Green v. Coughlin, 633 F. Supp. 1166, 1169 (S.D.N.Y. 1986) (finding one-year period inadequate); Saunders v. New York, 629 F. Supp. 1067, 1070 (N.D.N.Y. 1986) (same); see also infra note 191 and accompanying text (discussing formidable task facing civil rights litigants before § 1983 claims may be filed).

175. It also is important to remember that many plaintiffs seeking redress through § 1983 litigation do not have access to private counsel. Prisoners incarcerated in state prisons, persons residing in state institutions, and other individuals whose situations make them vulnerable to rights violations by state actors file many § 1983 suits. Many of these plaintiffs appear pro se or must rely on Legal Aid attorneys who may lack the time and resources available in the private sector. See supra note 156 and accompanying text.

176. Several courts have recognized the difficulties inherent in constitutional tort litigation and have refused to apply brief limitations statutes. See infra notes 187-189.
recognize and prosecute legitimate constitutional rights violations.

IV. RESOLUTION OF THE LIMITATIONS PROBLEM

A. A LEGISLATIVE SOLUTION

The Supreme Court crafted a well-meaning but flawed opinion in Wilson v. Garcia. The personal injury characterization is too ambiguous to provide guidance when state law does not contain obvious choices. Wilson compelled courts to waste vital judicial resources and to draw their own distinctions concerning the choice of limitations periods and retroactive application. The resulting lower court decisions appear arbitrary and asymmetrical. In addition, the federal circuits diverge on key interpretive issues.

Plainly the fault lies not with the notion of a uniform limitations period for section 1983, but with the incomplete uniformity created by an imprecise state law analogy. Congress is best able to supply a uniform limitations rule. If the Supreme Court decided to address the § 1983 limitations issue again, it could lessen confusion by clarifying Wilson or adopting another analogy. If the Court decided to salvage Wilson, it would need to delineate principles by which the lower courts could assess retroactive application and choose between different personal injury statutes. Such principles are beyond the scope of this Note.

If the Court determined that borrowing limitations from state law was “inconsistent” with the federal policies underlying § 1983, it could borrow a period from federal law, as long as “such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.” Burnett v. Grattan, 468 U.S. 42, 48 (1984) (quoting 42 U.S.C. § 1988 (1982)). A portion of the Federal Tort Claims Act dealing with time limits for commencing actions against the United States, 28 U.S.C. § 2401 (1982), provides a likely analogy. See id. § 2401(a)-(b). Although borrowing from federal law once seemed inconceivable, recent decisions of the Supreme Court show that the Court will borrow from federal law when federal concerns are paramount. See Agency Holding Corp. v. Malley-Duff & Assocs., 107 S. Ct. 2759, 2767 (1987) (adopting four-year limitations period from federal Clayton Act for RICO claims); McAlister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958) (applying federal limitations period to unseaworthiness action combined with action under federal Jones Act).

Despite the availability of judicial remedies, congressional enactment of a federal limitations period remains the best solution. See infra note 179 and accompanying text.

178. Several commentators have suggested that congressional enactment of a uniform statute of limitations is the best solution to the § 1983 limitations problem. See Biehler, supra note 36, at 34 (“The most effective solution to the convolution of civil rights limitation law would be the congressional passage of a federal limitation.”); Arizona Comment, supra note 5, at 141 (“The most appropriate solution . . . would be Congress’ enactment of a federal statute of
of a federal limitations period would minimize collateral litigation, increase predictability, and benefit litigants. A defined statute of limitations for section 1983 would allow parties to assess liabilities accurately and to know with certainty when claims were stale. Additionally, judicial decisions would appear more rational and reasonable and would strengthen public faith in legal institutions.

This Note proposes a model amendment containing a three-year statute of limitations\(^{180}\) for section 1983 claims. This amendment addresses the issue of retroactive application\(^{181}\) and allows for the pursuit of administrative remedies.\(^{182}\) Although the suggested limitations period insures that alert plaintiffs will have adequate time to recognize and prepare civil rights claims, the three-year limit is brief enough to protect defendants’ interests in repose and to relieve courts of the burden of stale claims. To avoid the problems surrounding past attempts to amend section 1983,\(^{183}\) the model amendment offers extremely limited changes and attempts to balance all competing limitations.

---

\(^{180}\) The only exception to the three-year limit applies to those plaintiffs temporarily out of the United States or suffering from a disability when the claim arises. In these unique situations, claimants could bring § 1983 actions within two years after return or recovery. See Model Amendment, infra, at lines 9-11.

\(^{181}\) The model amendment applies to actions arising after and pending on the date of enactment. See Model Amendment, infra, at lines 14-18.

\(^{182}\) The model amendment is drafted to facilitate state and federal administrative remedies. Because pursuit of these remedies and other state judicial remedies often consumes long time periods, the model amendment suggests that any time used pursuing such remedies should not be counted in determining the time within which a complaint must be filed. See Model Amendment, infra, at lines 11-13. This is consistent with the intent and remedial purpose of section 1983. See infra notes 187, 196 and accompanying text; see also Felder v. Casey, 108 S. Ct. 2302, 2308 (1988) (holding that state notice-of-claim statutes do not apply to § 1983 because they undermine statute’s “uniquely federal remedy”) (quoting Mitchum v. Foster, 407 U.S. 225, 239 (1972)); Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (holding that claimants need not exhaust state remedies before filing § 1983 actions).

\(^{183}\) See infra note 184 for a discussion of previous, unsuccessful § 1983 amendments. Because the amendment process tends to divide along partisan lines, and because § 1983 traditionally has been a political “hot potato,” a less controversial legislative proposal might ultimately settle the § 1983 dilemma. A federal catch-all statute would greatly simplify federal litigation. For an early and unsuccessful attempt to legislate a one-year federal catch-all, see H.R. 2788, 79th Cong., 1st Sess., 91 CONG. REC. 2926 (1945) and S. 1013, 79th Cong., 1st Sess., 91 CONG. REC. 4692 (1945); see also ARIZONA Comment, supra note 5, at 98 n.3 (noting H.R. 2788); see generally NOTRE DAME Note, supra
interests.\textsuperscript{184}

B. THE MODEL AMENDMENT\textsuperscript{185}

A BILL

To amend section 1979 of the Revised Statutes (42 U.S.C. § 1983 (1982)), relating to civil actions for the deprivation of rights, to provide a limitations period applicable to all actions brought under this provision.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That Sec. 2. Section 1979 of the Revised Statutes (42 U.S.C. § 1983 (1982)) is amended to read as follows:

1. (1) by inserting “(a)” immediately before “Every”; and

2. (2) by adding at the end thereof the following new subsection:

note 38, at 453 n.100 (citing H.R. 2788 and commentators favoring federal catch-all).

Although a federal catch-all of sufficient length would be a better solution to the limitations problem than the present personal injury characterization, such a catch-all is undesirable because it would not represent a deliberative attempt to weigh the interests inherent in § 1983 litigation.


The bills that reached committee reflected radically different conceptions of § 1983. Apparently, the divisions were also political. For example, S. 436, supra and S. 585, supra, sponsored by Senators Hatch and Thurmond, conservative Republicans, attempted to limit § 1983 to enforcement of equal rights laws and to add an exhaustion of state remedies requirement and an 18-month limitations period. S. 1983, supra, resubmitted as S. 990, supra, sponsored by Senators Mathias, Kennedy, and Metzenbaum, all liberal Democrats, tried to expand municipal and supervisory liability, foreclose state exhaustion requirements, and impose a four-year limitations period. See Sagafi-Nejad, supra note 52, at 401-03.

Unlike these bills, the model amendment proposed in this Note attempts no great change in the scope or enforcement of § 1983. Its goals include the minimization of unnecessary litigation, certainty through uniformity, and the promotion of fairness to plaintiffs and defendants. The model amendment attempts to forge a limited and reasonable compromise that can survive political pressures.

185. Although this amendment differs substantially in length and scope, it owes much in form and structure to previous congressional attempts to amend § 1983. See S. 436, § 1983, supra note 184. See supra note 184 for a discussion of these attempts.
Every civil action commenced under this Act shall be barred unless the complaint is filed within three years after the right of action first accrues. The action of any person under legal disability or outside the United States at the time the claim accrues may be commenced within two years after the disability ceases. Any time spent seeking relief through federal or state administrative or state judicial remedies shall not be counted in determining the time within which the complaint must be filed.

(2) This Act shall apply in any action arising as a result of any deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States and with respect to the amendment herein made, to any action pending on the date of enactment of this Act and to any action subsequently brought.

C. ADVANTAGES OF A THREE-YEAR LIMITATIONS PERIOD

The three-year period is desirable because it promotes the fairness embodied in the policies of section 1983. Several courts, both before and after Wilson, have found that limitations periods of two years or fewer than two years violate the federal policies manifested in section 1983. These courts borrowed a three-year statute of limitations because they found

---

186. The Supreme Court outlined the policies underlying § 1983 in Robertson v. Wegmann, 436 U.S. 584 (1978): “The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under the color of state law.” Id. at 590-91.


Courts invalidating limitations periods of two years or fewer generally found short limitations inconsistent with the legislative purpose of § 1983. For example, in Pauk, the Second Circuit held that a statute providing a 15-month limitations period was incompatible with the purposes of § 1983 claims, and selected a three-year period provided by another statute. Id. at 866. The court cited a limitations statute applicable to the wrongful actions of federal law enforcement officers, 28 U.S.C. §§ 1346(b), 2680(h) (1976), and noted:

A federal court, searching for an analogous state limitations period for a § 1983 suit, should not select any period shorter than the two years Congress has specified as the time within which notice must be given of claims against the United States for unlawful actions by federal law enforcement officers.


188. See Pauk, 654 F.2d at 866; Coughlin, 633 F. Supp. at 1169; Saunders, 629 F. Supp. at 1170; see also infra note 196 and accompanying text (arguing
this period consistent with the policies of equity and fairness underlying section 1983.\textsuperscript{189} Fairness, in fact, mandates a three-year period. Because section 1983 is often the vehicle for highly complex claims,\textsuperscript{190} a two-year limitations period will not provide sufficient time to recognize and prepare many section 1983 claims.\textsuperscript{191} The inability of many section 1983 claimants to hire

that Supreme Court implicitly endorsed three-year limitations period for § 1983 claims.

\textsuperscript{189} In Okure v. Owens, 816 F.2d 45 (2d Cir. 1987), the Second Circuit recently selected a three-year limitations period because the “three year limit . . . more faithfully represents the federal interest in providing an effective remedy for violations of civil rights than does [a] restrictive one year limit.” \textit{Id.} at 49 (emphasis added).

\textsuperscript{190} Section 1983 has been and continues to be used in highly complex litigation aimed at correcting systemic inequality. \textit{See, e.g., Morgan v. Hennigan, 509 F.2d 580, 582 & n.3 (1st Cir. 1974) (ordering desegregation of Boston public school system), cert. denied, 421 U.S. 963 (1975); Ruiz v. Estelle, 503 F. Supp. 1285, 1276 (S.D. Tex. 1980) (class action brought under § 1983 compelling improvements in prison conditions throughout the Texas correctional system), aff'd in part, rev'd in part, 679 F.2d 1115 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); see also cases noted by Blackmun, \textit{supra} note 2, at 19-20 (illustrating significance of § 1983 in civil liberties litigation since Monroe v. Pape, 265 U.S. 167 (1961)); supra note 174 and accompanying text and \textit{infra} note 191.

\textsuperscript{191} As the Supreme Court has noted, such litigation often requires a great deal of pre-filing planning:

\textit{Litigating a civil rights claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel, or prepare to proceed \textit{pro se}. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed \textit{in forma pauperis}, and file and serve his complaint. . . . He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery.\textit{\textsuperscript{\tiny Burnett v. Grattan, 468 U.S. 42, 50-51 (1984) (footnote omitted).}}

Given this sort of burden, it is questionable whether one- or even two-year limitations periods will provide sufficient time. A three-year period offers additional protection in complex § 1983 cases. In a recent case, the Second Circuit adopted similar reasoning:

\textit{We are not persuaded that because the personal injuries actionable under section 1983 are typically intentional, they are necessarily apparent to the victim at the time they are inflicted . . . . Even where the injury itself is obvious, the constitutional dimensions of the tort may not be. This situation might arise where it is unclear that the tortfeasor acted under color of state law or that the act [complained] of was illegal. It may be that the legality of the act . . . has not been previously adjudicated. Because recognition problems such as these are endemic in section 1983 litigation, we believe that there must be time for plaintiffs to reflect and to probe. The three year period of limitations [chosen by the court] . . . accommodates the many complex section 1983 claims.\textit{\textsuperscript{\tiny Burnett v. Grattan, 468 U.S. 42, 50-51 (1984) (footnote omitted).}}
attorneys enhances the need for a three-year period. In addition to benefitting plaintiffs, a three-year period is fair and equitable to parties defending section 1983 claims. A three-year limit will protect defendants from stale claims and actually lessen their liability in some states. Because a three-year limitations period is currently the law in many jurisdictions, settled expectations will not be disturbed unfairly. Finally, a three-year period will not tax the federal court system excessively. The experience of courts indicates that three years is a workable limit for litigants and the courts.

A three-year limitations period for section 1983 claims is also desirable because the Supreme Court has endorsed it by implication. As noted earlier, the Wilson Court assumed that the lower courts would have little difficulty isolating a general tort statute similar to the New Mexico statute. In addition, the Court apparently assumed that three years was a typical

Okure v. Owens, 816 F.2d at 48-49 (footnote omitted).

192. In some states the limitations period for § 1983 claims exceeds three years. These include Maine, see Small v. Inhabitants of Belfast, 796 F.2d 544, 549 (1st Cir. 1986) (six years), Missouri, see Farmer v. Cook, 782 F.2d 780, 780-81 (8th Cir. 1986) (per curiam) (five years), Alabama, see Jones v. Preuit & Mauldin, 763 F.2d 1250, 1256 (11th Cir. 1985) (six years), and Nebraska, see Epp v. Gunter, 677 F. Supp. 1415, 1420-21 (D. Neb. 1988) (four years). A three-year limitations period would make defendants in these states less susceptible to § 1983 attack.

Because of the importance of the remedy and the significant constitutional interests at stake, shortening any § 1983 limitations period is prima facie undesirable. Nonetheless, the interests of potential defendants, of certainty, of predictability, and of simplification of litigation, together with the interests of plaintiffs in states with periods of less than three years, must be balanced against this undesirable effect. Given that the three-year period suggested by the model amendment should be adequate to vindicate most claims, the former interests must prevail.


194. See supra note 193 and accompanying text (citing jurisdictions that employ a three-year limitations period for § 1983 actions).

195. See text following notes 120-22, supra.
cal limitations period for general tort statutes. Because it affirmed selection of the New Mexico statute, the Wilson Court offered guidance by example and implicitly endorsed a three-year limitations period. This endorsement is fully consistent with other recent Supreme Court opinions affirming three-year limitations periods for section 1983 claims.196

Moreover, enactment of a three-year limitations period for section 1983 claims is politically feasible. In the past,197 bills attempting to amend section 1983 with an eighteen-month period198 and a four-year period199 stalled in committee.200 Generally, these bills represented partisan attempts to narrow or expand liability under section 1983.201 The model amendment attempts to avoid such pitfalls. The model amendment will not alter the remedial scope of section 1983. The three-year limitations period strikes a compromise between the failed limitations periods suggested by opposing political factions.202 Because a three-year limitations period would both limit and

196. In Burnett v. Grattan, 468 U.S. 42 (1984), the Supreme Court declined to apply a six-month limitations period to a discrimination claim brought under § 1983 because such a period was too brief to satisfy the federal policies underlying § 1983. Id. at 55. Instead, the Court affirmed the Fourth Circuit’s decision to borrow a three-year limitations period. Id.

Similarly, in Board of Regents v. Tomanio, 446 U.S. 478 (1980), the Court examined the use of a three-year limitations period in relation to “deterrence” and “compensation,” the policies underlying § 1983. “Neither of these policies is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims... simply by commencing their actions within three years.” Id. at 488.

Considered along with Wilson, these cases indicate, first, that the Supreme Court has tacitly endorsed the application of a three-year limitations period and, second, that such a limitations period is fully consistent with the policies underlying § 1983.

197. See supra note 184 and accompanying text.

198. See S. 436, supra note 184.


200. Other attempts to amend § 1983 without the addition of a limitations period also have been unsuccessful. See S. 35, 96th Cong., 1st Sess., 123 CONG. REC. 476 (1977).

201. See supra note 184.

202. Because the bills supported by prominent Republicans and Democrats have advocated eighteen-month and four-year limitations periods respectively, the true median is two years, nine months. This period is undesirable for two reasons. First, it is unwieldy; courts and parties will value a limitations period that is simple to calculate. Second, several courts have implicitly or expressly endorsed the three-year period. See, e.g., Okure v. Owens, 816 F.2d 45, 49 (2d Cir. 1987) (holding that three-year limitations period serves “the federal interest in providing an effective remedy for violations of civil rights”); Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981) (noting “[a] three year limitations period is consistent with the broad remedial purposes of § 1983”).
expand section 1983 liability depending on local law, all sides
would gain, and resistance to the amendment would be eased.
Although critics may find frank consideration of political fac-
tors distasteful, the unique constitutional nature of section 1983
claims, the confusing state of the present law, the urgent need
for a clear uniform rule, and the failure of past amendments
make consideration of the political barriers imperative.

CONCLUSION

Section 1983 provides a civil cause of action against persons
who deprive others of their constitutional rights under color of
state law. Because the section contains no statute of limita-
tions, each federal court hearing a section 1983 claim must bor-
row a limitations period consistent with federal law and policy
from state law. In Wilson v. Garcia, the Supreme Court ruled
that states' general personal injury statutes would supply the
limitations period applicable to section 1983 claims. Unfortu-
nately, this holding offered little guidance for situations in
which state law lacked an obvious general personal injury stat-
ute or contained multiple possibilities. Similarly, the Court did
not address the issue of retroactive application of the new limi-
tations rule. Forced to remedy these flaws themselves, the
lower courts selecting limitations periods for section 1983
claims found unpredictable and conflicting ways to differentiate
between statutes, and split on the retroactivity issue.

In applying the personal injury characterization to section
1983 claims, many federal courts have assigned unduly short
limitations periods. Often the shortened limitations periods do
not allow adequate time to recognize and settle constitutional
tort claims, making pursuit of administrative remedies unat-
tractive and encouraging litigation. Further, because the new
limitations differ among and within the federal circuits, all par-
ties face uncertainty. These problems show that the section
1983 limitations issue remains unsettled.

This Note has suggested that the best solution rests with
Congress. By adopting the proposed amendment, Congress
could define a clear timetable that would instill uniformity and
predictability into section 1983 litigation. The proposed amend-
ment would settle the retroactivity issue, minimize unnecessary
litigation, and allow all parties to know with certainty which
claims were stale. The proposed solution would strike a ra-
tional and equitable balance among rights of claimants, policies of repose, and the needs of an overworked federal court system.

*Paul Rathburn*