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STATUTES OF LIMITATION AND SECTION 1983: IMPLICATIONS FOR ILLINOIS CIVIL RIGHTS LAW

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I. INTRODUCTION

The Reconstruction-era Civil Rights Acts provide individuals with the means to seek compensation for the illegal deprivation of constitutionally-guaranteed rights and to safeguard those rights from future interference. In particular, the Act[1] of 1871 ("Section 1983") is designed to prohibit the deprivation of constitutional rights "under color of law." Such deprivation takes many forms including physical attack, employment discrimination, destruction of property, and interference with contracts and relationships, to name a few.

Section 1983 does not contain a limitation period. It is therefore a standard practice for federal courts to adopt a limitation period for Section 1983 suits from other federal and state laws controlling statutory and common law causes. In *Wilson v. Garcia*,[2] the Supreme Court attempted to bring uniformity to the process of selecting an appropriate limitation, a process that has yielded confusing results both among and within the federal circuits. Under *Wilson*, courts in all states are now directed to refer to state personal injury law for the limitation periods applicable to civil rights actions.[3] What seemed to be a clear Court mandate has, however, produced conflicting results as Illinois federal district courts grope to properly apply the *Wilson* guidelines.[4] Close examination of the policies underlying *Wilson*, together with the historical interpretation of state limitation periods, indicates that a literal application of *Wilson* is contrary to the purpose and intent of Illinois limitation laws. Illinois district courts must read beyond the surface of the *Wilson* opinion to discern and implement the policies underlying the decision and

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1. 42 U.S.C. § 1983 (1982) [hereinafter "the Act," or "Section 1983"].
2. 471 U.S. 261 (1985).
3. *Id.* at 280.
4. Wegrzyn v. Ill. Dept. of Children and Family Services, 627 F. Supp. 636 (C.D. Ill. 1986); Johnson v. Arnos, 624 F. Supp. 1067 (N.D. Ill. 1985); Moore v. Floro, 614 F. Supp. 328 (N.D. Ill. 1985); West v. County of Will., No. 84 C 7540, slip op. at 3 (N.D. Ill. June 6, 1985); Winston v. Sanders, 610 F. Supp. 176 (C.D. Ill. 1985).

implicitly endorsed by the Supreme Court.

II. Section 1983 and Limitation Periods

Section 1983 was enacted to enforce Section 5 of the fourteenth amendment.[5] The Act was modeled after Section 2 of the Civil Rights Act of 1866,[6] and was intended to "enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[7] Section 1983 allows plaintiffs to seek both injunctive and compensatory relief.[8] The Supreme Court has interpreted it as providing an opportunity for private citizens to assert a federal remedy "against incursions under the claimed authority of state law upon the rights secured by the Constitution and laws of the Nation."[9] The "incursions" which Section 1983 is designed to remedy include violations of fourteenth amendment rights through the passage of unconstitutional laws, violation of certain federal statutes and illegal activity "under color of state law"[10] that deprives plaintiffs of rights recognized under the Constitution.[11]

The authority of courts to refer to other laws for Section 1983 limitations is based upon 42 U.S.C. Section 1988[12] ("Section 1988").

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5. Monroe v. Pape, 365 U.S. 167, 171 (1961). Section 5 provides Congress with the authority to enforce the fourteenth amendment "[b]y appropriate legislation." U.S. CONST. amend. XIV, § 5.

6. Adickes v. Kress & Co., 398 U.S. 144, 162-63 (1970).

7. 17 Stat. 13. *See generally* NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 (1979) [hereinafter NAHMOD I].

8. Carey v. Piphus, 435 U.S. 247 (1978).

9. Mitchum v. Foster, 407 U.S. 225 (1972). The *Foster* Court characterized the role of Section 1983 as "interpos[ing] the federal courts between the States and the people, as guardians of the peoples' Federal rights. . . ." *Id.* at 242.

10. Section 1983 reads as follows:

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

42 U.S.C. § 1983.

11. Recently, the Supreme Court broadly described the purpose of 1983. The Court noted that as a result of the new structure of law that emerged in the post-Civil War era, especially the fourteenth amendment, which was its centerpiece, the role of the federal government as a guarantor of basic federal rights against state power was clearly established. *Foster*, 407 U.S. at 239. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* "The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242.

12. Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons

Congress has implicitly endorsed this approach in civil rights cases.[13] Section 1988 requires courts to select a limitations period that is consistent with federal law.[14] Section 1988 also directs district courts to enforce the Civil Rights Act "in conformity with the laws of the United States so far as such laws are suitable" to give effect to the purposes of Section 1983.[15] In *Burnett v. Grattan*,[16] the Supreme Court interpreted these directions as creating a three step approach.[17]

The first step is to examine federal law for a limitation period applicable to the claim. The second step, if there is no appropriate federal choice,[18] is to consider relevant state law "as modified and changed by the Constitution of the United States."[19] The third step is to assure the predominance of federal interest. With this in mind, the *Burnett* Court admonished lower courts that state law is to be applied only if it is not "inconsistent with the laws of the United States."[20]

For many years, federal courts emphasized selecting a limitation period through substantive characterization of the suit in such a way that the applicable state statute of limitation could be identified by analogy.[21] This philosophy resulted in varying approaches, frequently dependent upon what federal consideration the deciding court deemed relevant.[22] Although some Supreme Court guidance was available prior to *Wilson*,[23] procedures for selecting a limitation

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

42 U.S.C. § 1988 (1970).

13. *Wilson*, 471 U.S. at 267.

14. *Id.* at 268.

15. 42 U.S.C. § 1988. *See Wilson*, 471 U.S. at 268.

16. 468 U.S. 42 (1984).

17. *Id.* at 48.

18. The second step, to resort to state law, "should not be undertaken before [all] principles of federal law are exhausted." *Wilson*, 471 U.S. at 268.

19. *Burnett*, 468 U.S. at 48 (quoting 42 U.S.C. § 1988 (1982)).

20. *Id. See infra* text accompanying notes 24-48. *See also* NAHMOD, CIVIL RIGHTS AND LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 4.13 (Supp. 1985) [hereinafter NAHMOD II].

21. *See infra* text accompanying notes 24-48. *See also* NAHMOD II, *supra* note 20.

22. Garcia v. Wilson, 731 F.2d 640, 643 (10th Cir. 1984).

23. *See, e.g., Burnett*, 468 U.S. at 48; Board of Regents v. Tomanio, 446 U.S. 478 (1980); Runyon v. McCrary, 427 U.S. 160 (1976); Johnson v. Railway Express

period among the circuits, and even within individual circuits, varied.

A. *Factual Analogies Prior to Wilson*

The First Circuit, for example, issued a series of conflicting opinions, beginning with *Ramirez de Arellano v. Alvarez de Choudens*.[24] *Ramirez* analogized a Section 1983 claim alleging the unconstitutional termination of public employment to a general tort. The *Ramirez* court then applied the Puerto Rican limitation statute appropriate for a general tort action. A later First Circuit case, *Gashgai v. Leibowitz*,[25] selected without discussion the Maine statute that applied to various specific torts. Subsequently, the First Circuit in *Walden, III, Inc.*,[26] refused to analogize a civil rights claim to specific torts.[27] Another more recent case claimed to follow the analogy to tort law, but seemed to subordinate its analysis to a desire to keep personnel disputes out of federal court.[28]

Similar confusion existed in the Third Circuit, where opinions characterized claims by their "essential nature."[29] Courts in that circuit faithfully analogized claims to factually comparable state law claims, and then selected an appropriate limitation.[30] This method was extended to absurdity, however, as different limitations were applied to different parts of the Section 1983 claim.[31]

The Fifth Circuit developed two lines of limitation cases. The first line followed the two-step process of characterizing the offense by factual analogy to state law as a means of selecting the appropriate limitation period.[32] The second line took a more direct approach. The Fifth Circuit courts following this method avoided the factual characterization step by determining which limitation period the state itself would apply if the plaintiff brought a suit in state court seeking similar relief.[33] Presumably, this approach preserved the

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Agency, 421 U.S. 454 (1975); O'Sullivan v. Felix, 233 U.S. 318 (1914).

24. 575 F.2d 315 (1st Cir. 1978).

25. 703 F.2d 10 (1st Cir. 1983).

26. 576 F.2d 945 (1st Cir. 1978).

27. The *Walden* court, anticipating *Wilson* in part, stated that it was "obviously preferable that one statute of limitations . . . apply generally to most if not all of Section 1983 actions arising in a particular jurisdiction." *Id.* at 947.

28. Burns v. Sullivan, 619 F.2d 99, 107 (1st Cir.), *cert. denied*, 449 U.S. 893 (1981).

29. Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894, 900 (3d Cir. 1977); Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1974).

30. *See, e.g.*, Davis v. United States Steel Supply, 581 F.2d 335 (3rd Cir. 1978); *Meyers*, 559 F.2d 894 (3rd Cir. 1977); Polite v. Diehl, 507 F.2d 119 (3rd Cir. 1974).

31. *Polite*, 507 F.2d at 123-24.

32. *See* Shay v. McCorkle, 537 F.2d 1289, 1292 (5th Cir. 1976).

33. *Id.* at 1292. *See also* Morell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982); White v. United Parcel Service, 692 F.2d 1 (5th Cir. 1982); Lavelle v. Listi, 611

flexibility to characterize a claim by analogy to state law,[34] as a right arising under statute,[35] or by referring to a "catch-all" statute of limitation.[36]

The Sixth Circuit's approach apparently varied according to the statutes of limitation that were available.[37] For example, the court in an employment discrimination suit applied the Michigan limitation period covering personal injuries.[38] Subsequent employment discrimination suits, however, were heard under the period applying to actions on rights created by statute.[39] In later cases, the Sixth Circuit refused to characterize suits as claims based on statutory rights and instead derived limitations from statutes controlling factually similar torts.[40]

Other circuits also employed varying factual analogical methods in determining limitation periods. The Eighth Circuit which appeared to follow the analogical approach, but recently reconciled two inconsistent lines of cases in *Garmon v. Foust*.[41] The *Garmon* court rejected the tort analogy in favor of a "rights under statute" characterization.[42] The Tenth Circuit variously characterized Section 1983 suits according to their underlying facts,[43] as contractual[44] and noncontractual[45] injuries to the rights of another, and as liability based upon statute.[46] The Eleventh Circuit generally followed the approach of the Fifth and Sixth Circuits, drawing heavily upon state law and available statutes.[47] The District of Columbia Circuit also endorsed this method.[48]

F.2d 1129 (5th Cir. 1980).

34. *Morrell*, 690 F.2d at 469.

35. *See, e.g.*, Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978). *See infra* text accompanying notes 49-53.

36. *See infra* note 136 and accompanying text.

37. *See* Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1 (1983-84).

38. Madison v. Wood, 410 F.2d 564 (6th Cir. 1969).

39. Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975).

40. *See, e.g.*, Kilgore v. City of Mansfield, 679 F.2d 632 (6th Cir. 1982); Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977).

41. 668 F.2d 400 (8th Cir. 1982) (en banc), *cert. denied*, 456 U.S. 998 (1982).

42. *Id.* at 406.

43. *See, e.g.*, Clulow v. Oklahoma, 700 F.2d 1291 (10th Cir. 1983); Shah v. Halliburton Co., 627 F.2d 1055 (10th Cir. 1980); Zuniga v. Amfac Foods, Inc., 580 F.2d 380 (10th Cir. 1978).

44. Hansbury v. Regents of the Univ. of California, 596 F.2d 944, 949 n.15 (10th Cir. 1979).

45. Garcia v. Univ. of Kansas, 702 F.2d 849, 850-51 (10th Cir. 1983).

46. Spiegel v. School Dist. No. 1 Laramie County, 600 F.2d 264, 265-66 (10th Cir. 1979).

47. *See, e.g.*, McGhee v. Ogburn, 707 F.2d 1312 (11th Cir. 1983); Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

48. McClam v. Barry, 697 F.2d 366, 371-73 (D.C. Cir. 1983).

B. *Rights Arising Under Statutes*

The Second, Seventh, Eighth and Ninth Circuits regarded Section 1983 claims as liability based upon statutory rights.[49] The Seventh Circuit opinion in *Beard v. Robinson*[50] summarizes the reasoning for this position. In *Beard*, an FBI informant murdered Jeff Beard, on whose behalf a claim was filed under Section 1983.[51] The *Beard* court held that a civil rights claim could not be equated with a common law tort.[52] The Seventh Circuit instead chose to characterize the action as one based upon a statutory right. Because Illinois law provided no limitation period applicable to suits for rights based on statutes, the *Beard* court selected the five-year limitation period for "actions not otherwise provided for" in Illinois limitation laws.[53] *Beard*, therefore, became the basis for the limitation period applied to Section 1983 suits in Illinois.

Historically, the principle dispute in selecting the appropriate statute of limitation was whether to reach a general characterization of the civil rights claim, or to examine the facts underlying the specific case to find an appropriate limitation period for a comparable state law action. Where the decision was made to reach a general characterization, the rights under statute approach was both a popular and seemingly logical choice.[54] It was against this background of patchwork decisions and approaches that the Supreme Court granted certiorari in *Wilson*. The *Wilson* Court endorsed the general

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49. *See, e.g.*, Pauk v. Board of Trustees of City University of N.Y., 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Beard*, 563 F.2d at 336-37 (7th Cir. 1977); Plummer v. Western Int'l Hotels, 656 F.2d 502, 506 (9th Cir. 1981).

50. 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978).

51. *Id.* at 332.

52. *Id.* at 336-37. Stating that "the Civil Rights Acts do not create a body of general federal tort law," the *Beard* court quoted with approval from Justice Harlan's concurring opinion in Monroe v. Pape, 365 U.S. 167 (1961). The Justice wrote in that concurrence with regard to the Civil Rights Act that "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 184. In contrast, the Tenth Circuit in its *Garcia* opinion focused upon the elements of the cause of action, not the nature of the remedy, in reaching a contrary conclusion. *Garcia*, 731 F.2d at 651. An important factor in that court's likening of Section 1983 claims to personal injury actions was that Section 1983, in and of itself, creates no new substantive rights. *Id.* at 650. *See also infra* text accompanying notes 72-73.

53. *Beard*, 563 F.2d at 336, 338. In selecting the five-year catch-all limitation contained in ILL. REV. STAT. ch. 110, § 13-205 (1983) [hereinafter "five-year statute"], the Seventh Circuit overruled Jones v. Jones, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), which had endorsed the two-year limitation period, ILL. REV. STAT. ch. 110, § 13-202 (1983) [hereinafter "two-year statute"], for application to suits under Section 1983. *Jones* selected a statute that applied to suits for "injur[ies] to the person, false imprisonment, and abduction." *Id.*

54. The Eighth Circuit, for example, rejected the tort analogy approach because it "unduly cramp[ed] the significance of Section 1983 as a broad, statutory remedy." Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982), *cert. denied*, 102 S. Ct. 2283 (1982).

characterization approach and directed federal courts to select limitation periods by referring to state personal injury law.[55]

III. The *Wilson* Case

On April 27, 1979, a New Mexico state police officer allegedly beat Gary Garcia and sprayed him with teargas.[56] Garcia sued in the United States District Court for the District of New Mexico under Section 1983. Garcia filed his claim two years and nine months after the accrual of his cause of action. The defendants moved to dismiss on the ground that the statute of limitations barred Garcia's claim. The motion to dismiss was based upon a New Mexico Supreme Court decision that held the New Mexico Tort Claims Act[57] to be the "most closely analogous state cause of action"[58] to a Section 1983 claim. Therefore, the defendants argued, the two-year New Mexico statute of limitations applicable to claims under that act barred the claim.[59] Two other New Mexico statutes could have applied, however. First, New Mexico provides a three-year limitation for suits based on "an injury to the person or reputation of any person."[60] Second, there is a four-year limitation for "all actions not . . . otherwise provided for."[61]

The district court held that the state supreme court's decision would not control the selection of a limitation period because a Section 1983 claim should be characterized by federal law, not state law.[62] The court based this choice on a characterization of the plaintiff's claim as one for rights arising under statute. The court, therefore, denied the motion to dismiss.[63]

The Court of Appeals for the Tenth Circuit affirmed both the district court's ruling that Section 1983 claims were to be characterized by federal law, and the denial of the motion to dismiss.[64] The court chose, however, to classify Section 1983 claims as suits for personal injuries. Hence, the Tenth Circuit held that the three-year New Mexico limitation period[65] for personal injury suits applied to plaintiffs. In selecting the general characterization approach, the Tenth Circuit expressly rejected the lines of cases that

55. *Wilson*, 471 U.S. at 276.
56. *Id.* at 1940.
57. N.M. STAT. ANN. § 41-4-15(A) (1978).
58. DeVargas v. New Mexico, 97 N.M. 563, 642 P.2d 166 (1982).
59. *Wilson*, 471 U.S. at 263.
60. N.M. STAT. ANN. § 37-1-8 (1978).
61. *Id.* § 37-1-4.
62. *Wilson*, 471 U.S. at 264.
63. *Id.*
64. *Id.*
65. N.M. STAT. ANN. § 37-1-8 (1978).

characterized Section 1983 claims as suits for rights under statutes.[66]

The Supreme Court affirmed the Tenth Circuit.[67] The Court stressed the particular need for clear rules in the area of statutes of limitation.[68] The majority emphasized the importance and primacy of the federal interest under Section 1988,[69] and supported the Tenth Circuit's rejection of the state supreme court precedent.[70] The court then discussed the practical considerations underlying a broad characterization of Section 1983 claims.[71]

The Court agreed with the Tenth Circuit's characterization of Section 1983 claims as analogous to personal injury actions.[72] In discussing the origins of the Civil Rights Act as Congress' attempt to "restore peace and justice" to the turbulent post-Civil War South,[73] the Court maintained that the problems giving rise to the Civil Rights Act "plainly sounded in tort," but acknowledged that Section 1983 encompasses a range of remedies for offenses far beyond the scope of tort law.[74] The Court specifically criticized the "rights under statute" characterization of Section 1983 claims that led to the frequent application of catch-all limitation periods for lack of a better solution.[75]

The central objection in Justice O'Connor's dissent was her view that the majority had abandoned the policies of section 1988.[76] She pointed out the long and successful history of referring to state law for limitation periods where Congress had remained silent.[77] Justice O'Connor stressed the importance of relying upon a state's judgment, expressed in its limitation period, of what is a reasonable time in which to bring suits for varying injuries.[78]

Justice O'Connor criticized the majority for failing to adequately explain why a Section 1983 claim is dissimilar to a factually

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66. Garcia v. Wilson, 731 F.2d 640, 650 (10th Cir. 1984).

67. Justice Powell took no part in the consideration of the case. *Wilson*, 472 U.S. at 280. Justice O'Connor filed the lone dissent.

68. *Id.* at 1942. The Court quoted from Chardon v. Fumero, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting): "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation."

69. *Wilson*, 471 U.S. at 266-71.

70. *Id.* at 271.

71. *Id.* at 272.

72. *Id.* at 273.

73. *Id.* at 277.

74. *Id.* at 278.

75. "The relative scarcity of statutory claims when Section 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." *Id.*

76. *Id.* at 1949 (O'Connor, J., dissenting).

77. *Id.* at 1950.

78. "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit . . . on the prosecution of a closely analogous claim." *Id.* (citations omitted).

analogous state claim.[79] Instead, the Court relied upon "[g]roping to discern what the 42nd Congress would have done" were it confronted with the limitation issue before the Court.[80] O'Connor charged the Court with legislating uniformity where Congress had not found it necessary,[81] calling the Court's uniformity "half-baked" in that it limited state creativity and created new problems of asymmetry.[82]

IV. Understanding and Applying *Wilson*

The *Wilson* decision was intended to correct long-standing confusion, unpredictability, and the misdirection of judicial resources exemplified in the widely divergent approaches to the Section 1983 limitation issue.[83] The Court was apparently content to address the confusion around this issue by mandating a uniform approach through Section 1988 rather than by judicial endorsement of a specific limitation period,[84] thus leaving some selection processes to the lower courts. All federal courts are now expressly limited to referring to "personal injury" statutes of limitation, and implicitly to case law concerning the application of such statutes.

There is sound logic to the Court's decision to reach a uniform characterization of Section 1983 suits according to federal law. The confusion that existed in the limitation selection process prior to *Wilson* will be significantly reduced. Courts no longer have the discretion to vacillate on a case-by-case basis, depending upon what facts dominate the claim. Nor is the "rights under statute" approach, a method that the Reconstructionist Congress probably never envisioned,[85] any longer applicable. Indeed, the historic "rights-under-statute versus factual analogy" dichotomy has been effectively silenced. Justice Stevens conceded that no analogy to a

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79. *Id.* at 1951.
80. *Id.*
81. *Id.*
82. *Id.* at 1952-53.
83. *See supra* text accompanying notes 32-62.
84. The Supreme Court has the power to break new ground in declaring or adopting statutes of limitations for federal causes of action. Indeed, the Court in Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977), declared that enforcement suits under Title VII, a statute without a limitation period, were best served by being subject to *no* statute of limitation. *Id.* at 366. *See* Holkeboer, *A Call for Uniformity: Statutes of Limitation in Federal Civil Rights Actions*, 26 Wayne L. Rev. 61 (1979). The Court, however, may have been reluctant to impose a limitation period in light of the failure of several recent attempts to legislate one. *See, e.g.*, S.436, 99th Cong., 1st Sess. (1985); S.1983, 96th Cong., 1st Sess. (1979); H.R. 12874, 94th Cong., 2d Sess. (1976). Rather than imposing a limitation period, therefore, the *Wilson* Court effectively limited federal court discretion to borrow statutes of limitation under Section 1988.
85. *See Wilson*, 471 U.S. at 275.

particular common-law cause of action could be perfect.[86] But, he correctly stated that *most* of the wrongs the Civil Rights Act contemplates "plainly [sound] in tort."[87] Of all the various common-law actions available, only the personal injury analogy can potentially encompass offenses that range from physical beatings to interference with contracts.

The inconsistency associated with the previous selection process was unfair to both plaintiffs and defendants.[88] Contrary to Justice O'Connor's assertions, the majority did not negate the state's expertise in establishing limitation periods. Rather, the Court limited the extent to which "state expertise" could be allowed to modify the character of federal law. Though, as Justice O'Connor stated, uniformity under *Wilson* is limited,[89] the conflicts and inconsistencies in prior civil rights limitation law contradict her claim that courts were effective in their use of Section 1988 to select limitations.

Several Illinois federal district courts have had to calculate the effect of *Wilson* upon Section 1983 claims. Prior to *Wilson*, the *Beard* decision gave Illinois plaintiffs five years from the time of accrual to file their claims.[90] On the surface, *Wilson* mandates a shift from the five-year catch-all statute that *Beard* selected to the Illinois two-year, personal injury limitation. Which statute actually applies, and whether *Wilson* applies retroactively, are the two most significant issues that post-*Wilson* Illinois federal courts have faced.

The consensus view is that *Wilson* will not be applied retroactively to bar unfiled claims. This decision is based on the reasoning of *Chevron Oil Co. v. Huson*[91] in which the Court established a test to determine when a decision changing the law may be applied retroactively to a particular plaintiff.[92] More important, however, is a

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86. Justice O'Connor's most valid criticism is her attack upon the Court's interpretation that personal injury law is the best approximation of the intent of the 42nd Congress. *See supra* text accompanying note 82. It is equally logical that a Congress dedicated to the reconstruction of a free society, unaware of the novel and insidious ways our complex times provide for the denial of civil rights, would have approved of the application of catch-all limitations whenever necessary to provide the broadest possible protection under Section 1983.

87. *Wilson*, 471 U.S. at 277.

88. On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedies if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.

Id. at 1947 n.34.

89. "Even though this approach [will] not bring national uniformity, there [will] at least be uniformity within each state." NAHMOD II, *supra* note 20 at 216.

90. *See supra* text accompanying notes 50-53.

91. 404 U.S. 97 (1971).

92. The *Chevron* factors are (1) the extent to which a decision establishes a new principle of law; (2) the merits in each case and whether, given prior history, purpose, and effect of the rule in question, retroactive application of the rule would further or

line of nineteenth-century cases in which the Court affirmed a state's power to affect unfiled claims by shortening a limitation period.[93] In each case, the power was conditioned upon giving the parties a reasonable time "for the commencement of an [unfiled] action before the bar takes effect."[94] This approach is also recognized in Illinois law.[95]

While there is agreement on the non-retroactivity of *Wilson* in Illinois, the federal courts are divided on the issue of which limitation to apply. As long as Illinois plaintiffs continue to win on the non-retroactivity issue, and as long as they continue to file their claims within a "reasonable" time, the Seventh Circuit is unlikely to have an opportunity to resolve the conflict over which limitation period to apply. Eventually, however, a post-*Wilson* plaintiff will appear whose claim is filed more than two years after accrual. At that point, an appeal will be inevitable and the Seventh Circuit will be required to determine the effect of *Wilson* on Illinois precedent.[96]

Of the Illinois federal district courts to consider the limitation issue, several have applied the two-year statute without substantive discussion.[97] One court to apply the two-year statute, however, considered the issue at some length. In *Wegrzyn v. Ill. Dept. of Children and Family Services*,[98] the United States District Court for the Central District of Illinois held that the appropriate time for filing a Section 1983 claim in Illinois is two years.[99] The court based its decision upon several factors. First, the *Wegrzyn* court maintained that *Wilson*'s rejection of the use of catch-all limitation periods overruled *Beard*.[100] Second, the court referred to the Seventh Circuit's post-*Wilson* decision in *Bailey v. Faulkner*,[101] in which that court applied Indiana's personal injury limitation to a Section 1983

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retard its operation; and (3) the degree of hardship or injustice plaintiffs would suffer under retroactive application of the new rule. *Id.* at 106-07.

93. Terry v. Anderson, 95 U.S. 628, 632-33 (1877); *see also* Wheeler v. Jackson, 137 U.S. 245 (1890); Kosh Konong v. Burton, 104 U.S. 668 (1881); Sohn v. Waterson, 84 U.S. 596 (1873); Webster v. Cooper, 55 U.S. 488 (1852).

94. *Koshkoning*, 104 U.S. at 675.

95. In Nergenah v. Norfolk & Western Ry. Co., 81 Ill. App. 3d 866, 401 N.E.2d 1154 (1980), the appellate court allowed plaintiff to proceed with a loss-of-consortium claim, finding a delay of over seven months after the technical bar of the suit by a shortened limitation period to be a reasonable delay. *See also* Anderson v. Wagner, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978) (eight month delay reasonable).

96. The Seventh Circuit recently held that *Wilson* mandates the application of the Indiana personal injury limitation. Bailey v. Faulkner, 765 F.2d 102 (7th Cir. 1985).

97. *See* Moore v. Floro, 614 F. Supp. 328, 330 n.1 (N.D. Ill. 1985); West v. County of Will, No. 84 C 7540, slip op. at 3 (N.D. Ill. June 6, 1985); Winston v. Sanders, 610 F. Supp. 176, 177 (C.D. Ill. 1985).

98. 627 F. Supp. 636 (C.D. Ill. 1986).

99. *Id.* at 640.

100. *Id.*

101. 765 F.2d 102 (7th Cir. 1985).

claim. The court quoted from several points in the *Wilson* opinion, citing Justice Stevens' frequent use of the term "personal injury" and related language.[102]

Before *Wegrzyn*, however, two Northern District cases, *Shorters v. City of Chicago*[103] and *Johnson v. Arnos*,[104] held that the five-year limitation period survived *Wilson* in Illinois. In the better reasoned of the two cases, *Shorters*, the court examined the manner in which the statutes at issue have historically been applied. The court concluded that, in spite of the Court's mandate to use "personal injury" statutes of limitation, the five-year catch-all statute was more consistent with the purposes and policies of Section 1983 than with the two-year, personal injury statute. Understanding the *Shorters* court's reasoning requires examining the relationships among *Beard*, *Wilson*, and *Wilson's* companion case, *Mismash v. Murray City*.[105]

V. Isolating the *Wilson* Policies and Protections

The language of *Wilson* is frequently too general to be useful. It is therefore best to begin by identifying what propositions *Wilson* does not represent. This analysis begins with the *Beard* case. *Wilson* repudiates the fundamental assumptions of the *Beard* court. In characterizing the claim under Section 1983, the *Beard* court first referred to state law and found no comparable action. The *Beard* court next examined the available limitations and selected the "rights-under-statute" analogy as the most applicable. Because there is no specific Illinois limitation to apply to such claims, *Beard* selected the catch-all limitation by default.[106]

The *Wilson* court, on the other hand, looked first to the principles of federal law, then characterized civil rights claims as analogous to personal injury actions,[107] a comparison *Beard* expressly rejected.[108] In contrast, *Wilson* rejected the practice of selecting a catch-all limitation period simply because no other period applied to a court's characterization. Therefore, if the five-year limitation is to survive *Wilson*, it must do so under reasoning other than that which *Beard* provided.

Both *Mismash* and the lower court opinion in *Garcia v. Wilson* provide the needed support for the five-year statute.[109] The Tenth Circuit decided these cases on the same day and both were peti-

102. *Wegrzyn*, 627 F. Supp. at 639.
103. 617 F. Supp. 661 (N.D. Ill. 1985).
104. 624 F. Supp. 1067 (N.D. Ill. 1985).
105. 730 F.2d 1366 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2111 (1985).
106. *Beard*, 731 F.2d at 338.
107. *Wilson*, 471 U.S. at 268-71.
108. *See supra* text accompanying note 60.
109. 731 F.2d 640 (10th Cir. 1984).

tioned for certiorari; but, certiorari was granted only to *Garcia*. Comparing the cases and the Tenth Circuit's treatment of each is illustrative of the policies *Wilson* seeks to protect.

The factual similarity of the cases is striking. The *Mismash* suit also arose from the alleged severe beating of the plaintiff by arresting officers.[110] However, as Justice O'Connor observed,[111] the Tenth Circuit appears to have reached contradictory results. Reconciling the cases is necessary for understanding civil rights limitation policy as the *Wilson* court has expressed it.

In *Garcia*, the Tenth Circuit explicitly referred to a Section 1983 claim as "an action for injury to personal rights."[112] That court applied the New Mexico statute of limitation that controlled suits over injuries to the person or to reputation.[113] It rejected a limitation period contained in the New Mexico Tort Claims Act[114] and a catch-all statute previously held by a state court to be inapplicable to personal injuries.[115] Therefore, the only limitation period under New Mexico law that was broad enough to encompass injuries to the rights of others, or personal rights, was the limitation applying to a suit for "an injury to [persons] or to [their] reputation."[116]

The *Mismash* case arose in Utah and addressed the same limitation issue in virtually the same fact context as did the *Garcia* opinion. Consistent with its *Garcia* opinion, the Tenth Circuit in *Mismash* noted in a terse discussion that Section 1983 claims "should be characterized as actions for injuries to the *rights* of others."[117] The court rejected a Utah limitation governing "actions for libel, slander, *assault, battery, false imprisonment*, or seduction."[118] The court called these "personal torts" and held that the longer, catch-all statute[119] was to be used in Section 1983 suits. The rejection of a catch-all limitation, combined with the approval of a catch-all over a "personal tort" limitation in another case seems inconsistent.[120] However, examination of past state court interpreta-

110. *Mismash*, 730 F.2d at 1366.
111. *Wilson*, 471 U.S. at 286 (O'Connor, J., dissenting).
112. *Wilson*, 731 F.2d at 651.
113. *Id.*
114. N.M. STAT. ANN. § 41-4-15(A) (1978).
115. N.M. STAT. ANN. § 37-1-4 (1978) was held inapplicable to personal injury actions in Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1969).
116. N.M. STAT. ANN. § 37-1-8 (1978).
117. *Mismash*, 730 F.2d at 1362 (emphasis added).
118. UTAH CODE ANN. § 78-12-29 (1953) (emphasis added).
119. UTAH CODE ANN. § 28-12-25 (2) (1953).
120. In Justice O'Connor's dissent, she indicated a number of apparently "inconsistent" cases that the Tenth Circuit decided on the same day as it decided *Wilson*. Included in these are *Mismash* and two other cases, Hamilton v. City of Overland Park, Kansas, 730 F.2d 613 (10th Cir. 1984) and McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984). *See Wilson*, 471 U.S. at 286 (O'Connor, J., dissenting). The Colorado case which Justice O'Connor indicated, *McKay*, rejected COLO. REV. STAT. §

tions of the Utah statutes showed that the catch-all statute was the only one broad enough to apply to Section 1983 claims, if regarded as suits based on injuries to the rights of others.[121]

The situation in Illinois is similar to that in Utah. Illinois courts have interpreted the two-year Illinois statute that expressly applies to "personal injuries" to be applicable only to direct, physical injuries. *Shorters*[122] and *Johnson*[123] both pointed this out. This narrow interpretation, though consistently followed by Illinois courts,[124] cannot give full effect to the protection of Section 1983 as *Wilson* and other civil rights cases have interpreted it. On the other hand, the applicability of the five-year limitation period to such a wide range of injuries and claims provides an approach consistent with an interpretation of civil rights suits as arising from offenses to personal rights. The five-year period, for example, has been applied to suits for unpaid city relief for the blind,[125] negligence resulting in non-physical injury,[126] wrongful dissolution of a corporation,[127] and to numerous other cases best described as suits for injuries to the personal rights of others.[128] Such actions are clearly more similar to the deprivation of personal rights in modern society than is a statute interpreted to apply under the narrow situation of direct, physical personal injury.

In many states like Illinois, selecting the correct statute of limi-

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13-80-102 (1973) (applying to actions for false imprisonment) and COLO. REV. STAT. § 13-80-106 (1973) (applying to actions for liability that federal statutes create). Instead, it adopted the residuary limitation. *Id.* § 13-80-108(1)(b). *McKay* underscores the point of the *Garcia/Mismash* analysis: where a court is faced with statutes of limitation inapplicable to a personal rights suit under Section 1983, it is proper, even under *Wilson*, to select a residuary limitation statute. *McKay*, 730 F.2d at 1369-70.

121. This statute has been held to apply to negligence suits. *See* Matheson v. Pearson, 619 P.2d 321 (Utah Sup. Ct. 1980); Hansen v. Petrof Trading Co., 527 P.2d 116 (Utah Sup. Ct. 1974); nuisances, 68 Utah 309, 249 P.2d 1036 (1972) (predecessor statute); a suit versus a third party for personal injuries received in the course of employment, Salt Lake City v. Industrial Comm., 81 Utah 213, 17 P.2d 239 (1932) (predecessor statute); as well as to "tort actions not otherwise provided for," O'Neill v. San Pedro, 38 Utah 475, 114 P. 127.

122. *Shorters*, 617 F. Supp. at 665.

123. *Johnson*, 624 F. Supp. at 1071.

124. *See, e.g.*, Mitchell v. White Motor Co., 58 Ill. 2d 159, 317 N.E.2d 505 (1974); Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Bassett v. Bassett, 20 Ill. App. 543 (1886).

125. Lyons v. Morgan County, 313 Ill. App. 296, 40 N.E.2d 103 (1942).

126. Society of Mount Carmel v. Fox, 90 Ill. App. 537, 413 N.E.2d 480 (1980).

127. Krauter v. Adler, 328 Ill. App. 127, 65 N.E.2d 215 (1946).

128. Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) (tortious interference with plaintiff's business through false and defamatory statements); Henon v. Lever Bros. Co., 144 Ill. App. 3d 608, 449 N.E.2d 196 (1983) (compensation for wrongful discharge from employment); Loughran v. A & M Moving & Storage Co., 17 Ill. App. 3d 119, 307 N.E.2d 794 (1974) (damages to personal property); *In re Franke's Estate*, 124 Ill. App. 2d 24, 259 N.E.2d 754 (1970) (recovery of balances due for services rendered by an employee); Schlossen v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921) (permanent injury to realty).

tation will pose some problems even under the *Wilson* guidelines.[129] This is true because the *Wilson* definition of "personal injury" is too broad to be meaningful. The Court could, of course, have been more specific in defining personal injury, or could even have imposed a standard limitation period upon all Section 1983 suits.[130] The absence of specificity is the basis for the imperfections in *Wilson*'s uniformity. Still, even some uniformity is an improvement over the confusion of the past. Indeed, perfect uniformity has never been a high priority of the Court in its civil rights decisions.[131] It is just as possible that the Court, openly concerned about the overburdened federal system, sought to reduce the flow of legal resources in a direction that will never produce concrete answers.

Whatever the Court's motives, lower courts are now left to sort out the *Wilson* policies and apply them correctly. In Illinois, and possibly in other states, dogmatic application of a particular statute, simply because it is labeled one for "personal injuries," would be contrary to the very policies *Wilson* seeks to protect. The difficulty of applying *Wilson* will be reduced if *Wilson* is regarded as establishing a system of sorting possible limitation periods in the context of a personal injury categorization. Given the proposition that state statutes of limitation are controlling in Section 1983 suits, a court searching for the appropriate statute must look first for statutes controlling actions based upon the infringement of personal rights.

The guiding principle at this stage in evaluating the potential

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129. One possible way for states to end the confusion is to enact statutes of limitation more specifically directed to the "personal rights" scheme that the cases discussed in this article established. There is also the possibility of amending existing residuary statutes to make them more clearly applicable in Section 1983 suits where there is no other clear choice. Another device for simplification may be the enactment of a specific statute of limitation to apply to Section 1983 claims brought in that state. This would present a difficult, but not impossible, problem in drafting. States have, on occasion, enacted limitations on federal claims that federal courts have upheld. *See, e.g.*, NEB. REV. STAT. § 25-219 (1975); TENN. CODE ANN. § 28-304 (Supp. 1975). The statute that was rejected in *McKay*, 730 F.2d at 1369-70, COLO. REV. STAT. § 13-80-106 (1973), applies to all federal causes of action that do not provide limitations. Its application was declared unconstitutional in Wolf Sales Co. v. Rudolph Wurlitzer Co., 105 F. Supp. 506 (D. Colo. 1952), an action under the Sherman and Clayton acts. But, Salazar v. Dowd, 256 F. Supp. 220 (D. Colo. 1966) upheld its application to a Section 1983 claim (a result *McKay* obviously overruled). It is unclear whether *Wilson* made enactment of a state limitation for Section 1983 suits impossible. A state statute defining an action consistently with the federal characterization, and not discriminating against the federal action, would cure the irregularities that appear to concern the Court. *See* Brophy, *Statutes of Limitations in Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 99, 133-39 (1976).

130. *See supra* note 84.

131. "Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." Robertson v. Wegmann, 436 U.S. 584, 593-94 n.11 (1978). *See also* Board of Regents v. Tomanio, 446 U.S. 478 (1980); Biehler, *supra* note 37 at 15-16.

limitation period should be the federal court's application of state law and the state court's construction of the statute. Where no statute is applicable, either expressly or by historic construction, to personal rights, selection of a catch-all statute would be appropriate depending upon the manner in which the statute has been applied. Where more than one statute is applicable, policy favors selection of the statute most generous to plaintiffs.[132]

The soundness of this approach is underscored by comparing the *Wegrzyn* and *Shorters* opinions. *Wegrzyn*'s rationale for the two-year statute is weak. It simply imposes a reactive, narrow "personal injury" label to the cause of action. For example, *Wegrzyn*'s reliance on *Bailey* is misplaced, because that case solely and specifically involved Indiana law.[133] Second, *Shorter*'s catalogue of *Wilson*'s broader language discussing a range of "personal rights"[134] countered *Wegrzyn*'s reliance on the *Wilson* Court's frequent use of "personal injury" terminology.[135] Additionally, *Wegrzyn* incorrectly assumed that the Court's rejection of the New Mexico catch-all statute meant that no catch-all could ever be appropriate in a Section 1983 suit.[136] There is no logical basis for such a broad conclusion.

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132. The nature of a Section 1983 claim, if nothing else, is enough to mandate this policy. *See supra* note 52 (Justice Harlan's remarks quoted from Monroe v. Pope). Generally, where more than one limitation may apply, courts will select the longer of the two. *See* Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980); Shah v. Halliburton Co., 627 F.2d 1055, 1059 (10th Cir. 1980); Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1297 (6th Cir. 1975); Payne v. Ostrus, 50 F.2d 1039, 1042 (8th Cir. 1931).

133. *See supra* text accompanying note 102.

134. *Shorters*, 617 F. Supp. at 663-65.

135. *See supra* text accompanying note 103.

136. *See supra* text accompanying note 101. The proposition that *Wilson* stands for the inapplicability of all catch-all limitations was unequivocally rejected in Greenfield v. District of Columbia, 623 F. Supp. 47 (D.C. 1985). The *Greenfield* court identified a situation similar to that in Illinois and Utah in that no specific limitation period was applicable to all personal injury actions. *Id.* at 50. Trying to select a single limitation period, then, would "do exactly what the *Wilson* Court was trying to prevent — to pick and choose from among the various state causes of action the one that most closely resembles the particular Section 1983 action in question." *Id.* That court also criticized the Fifth Circuit for its reliance on the concept of "intentionality" in selecting a limitation period. *See* Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985). *Gates* reasoned that, since "[m]ost 1983 actions are predicated in intentional rather than negligent acts," the *Wilson* rule mandated a one-year limitation on intentional torts. This simplistic dichotomy between intent and negligence may be easy to apply, but its focus is far too narrow for the range of acts and rights that arise in Section 1983 suits. It is particularly inappropriate because the Supreme Court has held that negligence is sufficient to trigger a Section 1983 claim. *See* Parratt v. Taylor, 100 U.S. 1 (1980). Use of an intent/negligence test was recently rejected for civil rights claims arising under 42 U.S.C. § 1985 (1982) in Hobson v. Brennan, 625 F. Supp. 459 (D.D.C. 1985) because of its extreme narrowness. Moreover, even where intentional torts are the basis for a Section 1983 claim, plaintiffs are still required to prove that the act was one "under color of state law" depriving them of rights "secured under the Constitution." *Id.* This burden of proof beyond the mere elements of the tort surely entitles the plaintiff to more time to prepare a case.

The court's reliance on *Wilson*'s criticism of the *Beard*-type rationale confuses the rejection of a line of reasoning with the rejection of a particular result. Most importantly, *Wegrzyn* criticizes *Shorters* for placing "too much emphasis upon the state's own characterization of what is meant by 'injury to the person.'"[137] This criticism, however, flies in the face of the Court's own mandate "to select, in each state, the one most appropriate statute of limitations for all Section 1983 claims."[138] Under this Court directive, few statutes could be less appropriate to a Section 1983 "personal injury" claim than is the Illinois "personal injury" limitation.

IV. Conclusion

The Supreme Court, in *Wilson*, corrected long-standing confusion in limitation periods for suits arising under Section 1983. Wilson has brought some uniformity to the process of selection of limitation periods in individual states. The Court also capped the flow of legal resources in this direction by overruling those cases in which courts focused on specific facts to draw an analogy to misconduct identified in state common or statutory law.

The characterization of civil rights suits as analogous to personal injury actions is imperfect, as would be any broad characterization of such a complicated remedy. Whether another characterization would be more logical is doubtful. Nevertheless, the Civil Rights Act is a federal remedy and should be so characterized.

The most important issue facing courts in the post-*Wilson* era remains selecting the appropriate limitation period. The manner in which courts have interpreted potential limitation periods is of great significance, particularly in searching for the statute applicable to the protection of personal rights. In Illinois, this means that the correct limitation period to apply is the five-year statute, rather than the two-year "personal injury" limitation mandated by that a superficial reading of *Wilson*.

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137. *Wegrzyn*, 627 F. Supp. at 640.

138. *Wilson*, 471 U.S. at 275. *Wegrzyn* also overlooked a crucial point in its conclusion regarding deference to state law. Key to the *Mismash* decision to reject a "personal injury" limitation was a state court decision, Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1969), declaring a New Mexico limitation, similar in scope to the Illinois personal injury limitation, inapplicable to personal injury actions. While the denial of certiorari has no precedential value, there is a strong inference that the Court approved of the Tenth Circuit's treatment of *Mismash*. This inference arises from the factual similarities of the cases and the nature of the statutes involved. The Tenth Circuit's preference in *Garcia* for a "personal injury" statute over a catch-all statute compared to an opposite result in *Mismash* leads to the conclusion that the Tenth Circuit, with the apparent approval of the Supreme Court, engaged in precisely the kind of state law analysis *Wegrzyn* rejected. *See supra* text accompanying notes 111-21.