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I. INTRODUCTION

For many years controversy has been escalating about the appropriate method of implying a statute of limitations in private actions brought under Rule 10b-5, which was created by the Securities and Exchange Commission pursuant to rulemaking powers granted in section 10(b) of the 1934 Securities Act.¹ Traditionally, federal courts have borrowed the statute of limita-


This issue arises in the context of claims brought under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 that was promulgated by the Securities and Exchange Commission ("SEC") to augment the statutory proscriptions. Section 10(b) states:

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange-

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j(b) (1982).

Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
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tions from the most analogous state statute when required to fix a limitations period in a private action under Rule 10b-5. Recently, however, three circuit courts of appeal deserted the time honored state borrowing doctrine, and applied a federal statutory limitations period.

The controversy about the derivation of a time bar in Rule 10b-5 litigation is a reflection of the broader issue of determining the correct limitations period for actions arising under federal statutes. In several recent decisions, the United States Supreme Court has addressed the issue of implying a statute of limitations for federal causes of action. These decisions have created an analytic framework for borrowing the most appropriate limitations period when federal causes of action lack an express limitations period. Lower federal courts, however, have not uniformly resolved the issue of the appropriate limitations period in Rule 10b-5 cases. This lack of uniformity has created greater uncertainty concerning the applicable statute of limitations.

Although the precise issue of implying an appropriate statute of limitations in Rule 10b-5 cases has eluded definitive resolution by the Supreme

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(1) to employ any device, scheme, or artifice to defraud,
(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security.


3. Ceres Partners v. GEL Assocs., 918 F.2d 349 (2d Cir. 1990); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990); In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir. 1988) (en banc).


5. See supra note 3.
Court, this Article argues the Court’s recent decisions do provide a general, but workable, framework for determining an appropriate limitations period in these cases. The recent Supreme Court cases identify the public policy principles and judicial processes involved in the determination of the appropriate statute of limitations for federal actions. A review of these principles and processes, in the context of the Supreme Court’s rulings, demonstrates an analytic method of defining the appropriate limitations period for Rule 10b-5 lawsuits.

This Article contends the policy considerations previously defined by the Court can be crafted into a principled analysis for defining the appropriate statute of limitations in Rule 10b-5 actions. The first part of the Article considers the role of courts in performing essentially legislative activities by fashioning statutes of limitations when Congress has failed to do so. This judicial role is often difficult because courts generally lack the legislative experience and authority to perform interstitial lawmaking functions. These judicial difficulties require that courts attempt to make decisions by emulating legislative decisionmaking in articulating bright line repose and limitations rules. In addition, however, the current implication analysis requires the application of judicial skills, such as claim characterization and reasoning by analogy, which judges customarily perform.

The second part of this Article describes the law of judicial implication of statutes of limitations, including the state borrowing or absorption doctrine and a trio of recent Supreme Court decisions which articulate the current implication analysis. This part concludes with an identification of the policy considerations that shape judicial consideration of interstitial lawmaking responsibilities. The third part of this Article applies these principles to claims under Rule 10b-5 and critiques several recent lower court cases adapting a uniform federal rule to supply a limitations period in Rule 10b-5 cases. This part concludes with a recommendation that a single state statute be borrowed to supply the statute of limitations for Rule 10b-5 claims.

II. INTERSTITIAL LAWMAKING: THE ABSENCE OF STATUTORY LIMITATIONS PERIODS FOR FEDERAL CAUSES OF ACTION

This section considers the appropriate role of courts in fashioning statutory limitations periods when Congress has failed to expressly provide for a time bar. In the absence of a statutory limitations period, the courts are asked to imply one. This function, which is essentially legislative, presents the difficult questions of judicial competency and authority.6

6. The legislative nature of the task involved in selecting a statute of limitations when Congress has failed to do so has been noticed by several federal judges. Judge Friendly once commented that the “selection of a period of years [is] not . . . the kind of thing judges do.” Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir. 1961). Judge Richard Posner
The problem of interstitial lawmaking arises in a couple contexts. First, the problem arises when Congress expressly provides a private right of action but fails to expressly provide a statute of limitations to govern that right of action. In this situation, there is often legislative history regarding the importance of the private right of action in achieving the policies of the federal statutory scheme. Certainly, it is possible to reach an understanding about the importance of the federal policy underlying the statute from the mere fact that Congress permits private parties to vindicate those policy interests, even though Congress fails to fill in the detail of a limitations period.

A more troublesome problem arises when courts imply a private right of action and then are required to imply a statute of limitations to govern actions brought under the implied cause of action. Implication of a statute of limitations for an implied cause of action is, in many respects, more difficult for courts than implying a statute of limitations for an expressly created cause of action. It is more difficult because there is often no legislative indication of the importance of the substantive rights created by the statute from which the private right of action is implied. Further, there is often no

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discussed the arbitrary nature of the judicial decision to select a limitations period and indicated that making arbitrary decisions was "a legislative rather than a judicial task." Short v. Belleville Shoe Mfg. Co., 908 F.2d at 1394 (Posner, J., concurring). He continued:

Legislators can be as arbitrary as they please within the broad limits set by the Constitution but judges are supposed to reason to their conclusions, and how can you reason to 3 years over 2, 300 days over 240, 20 years over 15? You cannot; but neither can you reason to the right statute of limitations to borrow.

Id. (emphasis in original).

7. See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987). The Court in Agency Holding Corp. was required to imply a statute of limitations period for private actions under the Racketeering Influence Corrupt Organization Act ("RICO"). Although Congress had expressly provided a private right of action for persons injured by reason of racketeering activity, Congress had failed to provide a statute of limitations to govern RICO actions. Id. at 146.

8. This problem is presented, for example, in actions brought under a variety of federal statutes, including the federal securities laws. See Comment, The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action, 136 U. Pa. L. Rev. 1447 (1988); Sobol, supra note 1. The problems of legislative interpretation may be exacerbated in actions under Rule 10b-5. The private right of action was implied from a regulation, and there is little agency history concerning the creation of the rule and, of course, there is no legislative history about the purpose or objectives of the rule that the SEC was to promulgate pursuant to the powers of section 10(b). For some history on Rule 10b-5, see Exchange Act Release No. 34-3230 (May 21, 1942)("The new rule closes a loophole in the protections against fraud administered by the commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase.").

9. The process of judicial implication of a right of action, when Congress has failed to provide an express cause of action, requires an examination for "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." Cort v. Ash, 422 U.S. 66, 78 (1975). In Transamerica Mortgage Advisors, Inc. v. Lewis, the Court described the instrumental significance of congressional intent to the process of implying a private right of
legislative history explaining the practical implications of a cause of action for violation of the statutory provisions.

The judicial function in creating an appropriate limitations period is essentially the same whether Congress has created an express right of action or the court has implied a private right of action. However, the judicial role in determining an appropriate statute of limitations is difficult because it requires skills normally exercised by legislators and is based on authority usually reposed in Congress. The role of judges, then, is to determine how Congress would act had it considered the issue of an appropriate limitations period. This hypothetical lawmaking session, which judges are forced to perform when considering an appropriate limitations period, is difficult for several reasons.

First, a determination of the statute of limitations requires certain policy-making skills which are normally considered to be possessed by legislators. A statute of limitations is a legislative manifestation of the policy of repose; that is, at some point a wrongdoer's exposure to liability for his or her wrongdoing should end and the wrongdoer should be permitted to continue his or her life without fear of retribution. This decision reflects com-

action under section 206 of the Investment Advisers Act:

The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us.


10. One judge has remarked that when Congress has failed to provide a limitation period, judges bear a greater responsibility for fashioning an appropriate limitations period when they create a private right of action. Short v. Belleville Shoe Mfg. Co., 908 F.2d at 1387 (7th Cir. 1990)("Federal courts have an obligation to create stable periods of limitations for their handiwork.").

11. One commentator suggested these interstices may be viewed as flaws occurring in the legislative process or as an inevitable consequence of legislating in a complex society. Comment, The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action, 136 U. Pa. L. Rev. 1447, 1448 (1988). However, irrespective of the reason for the legislative interstices, the federal courts have been perceived as an appropriate instrument to fill the gaps. See U.S. v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973)("[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.").

12. This form of statutory interpretation, which has been referred to as "imaginative reconstruction," requires a judge to place himself "in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him." R. Posner, The Federal Courts: Crisis and Reform 286-87 (1985). The judge must study the language, history, and structure of the statute in question and must consider the historical context in which the statute was passed. Id. at 287.

moral values about culpability and retribution, and it is argued that a more representative institution should decide the weight of these values in the decision about length of exposure.

Second, a statute of limitations also reflects legislative policy concerning the nature of the conduct addressed by the underlying private right of action. A statutory limit reflects the congressional policy about the efficacy of the private right of action in achieving statutory objectives (e.g., compensatory, remedial, or deterrence objectives). The courts have found the most appropriate limitations period among a menu of possible choices. The menu has been defined by judicial reference to analogous statutory schemes. The courts have solved the problem of legislative intersticies by applying the skills of claim characterization and reasoning by analogy to the task.14

III. TYPOLOGY OF IMPLICATION ANALYSIS

A. In General

Courts faced with the issue of implying an appropriate statute of limitations for a federal cause of action have traditionally borrowed the state statute of limitations most analogous to the federal cause of action.15 This analysis requires the federal judge to take several steps. First, the court must decide that no statute of limitations under federal law expressly applies to the federal cause of action.16 Second, the court must characterize the federal cause of action to determine the nature and type of federal interest involved.17 Third, the court must locate a state statute of limitations that governs state causes of action or claims for relief most analogous to the characterized federal cause of action.18

This implication analysis has presented several difficulties for courts in determining the most appropriate limitations policy. Courts must consider whether a state statute of limitations must be reviewed exclusively to determine an appropriate statute of limitations for a federal cause of action. This requires consideration of the borrowing doctrine in its historical context. Second, courts must consider whether the characterization process proceeds as a matter of federal or state law. Finally, courts must determine whether to create a federal statute of limitations for a federal cause of action when there is no analogous state cause of action.

The complexities of the implication analysis are, in large part, attributable to the origin of the borrowing doctrine and to some surprising turns in the course of judicial treatment of the doctrine. The next section explores these complexities in the context of the state borrowing doctrine.

14. See infra notes 103-09 & accompanying text.
15. See generally, Special Project, supra note 1, at 1012-13.
16. Sobol, supra note 1, at 899.
17. Id.
18. Garrett, supra note 1, at 5-11.
B. The Context of the State Borrowing Doctrine

The state borrowing doctrine and the circumstances in which state law is absorbed into federal law for purposes of determining the appropriate statute of limitations for a federal cause of action are examined in this section. The analysis necessarily begins with *McCluny v. Silliman*, and the Federal Rules of Decision Act. In *McCluny* a purchaser of public lands sued a federal land office registrar after the officer refused to enter a land purchase application. The lower federal court held that a state statute of limitations for actions on the case barred the plaintiff's action, and the plaintiff appealed to the Supreme Court. The plaintiff argued that state statutes of limitations may now be pled in federal courts when the plaintiff possessed a federal cause of action. The Supreme Court held the Rules of Decision Act required "the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the Courts of the United States, and the same effect is given to them as is given in the State Courts." The Court held that because the state statute encompassed all actions on the case, including actions brought against federal officers for failure to act pursuant to federal law, the action was barred.

The Court's analysis in *McCluny* is problematic because it does not appear that the Rules of Decision Act was intended to apply to federal causes of action. Indeed, the Court in *McCluny* assumed that the Rules of Decision Act required the absorption of state limitations into federal law, and never considered other alternatives.

The Court's reasoning in *McCluny* was extended in *Campbell v. Haverhill*. *Campbell* involved a patent infringement action brought in federal court, which had exclusive jurisdiction over such claims. The lower court held that a state statute of limitations barred the action for patent infringe-

20. 28 U.S.C. § 1652 (1976). The Rules of Decision Act provides that "[t]he laws of the several states, except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

The Act, which was passed in 1789, originally contained language that was substantially similar to its modern version. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).

22. *Id.* at 276.
23. *Id.*
24. *Id.* at 277.
25. *Id.* at 278-79.
26. Special Project, *supra* note 1, at 1026 n.79.

27. *Id.* at 1027-28. Among the choices available to the *McCluny* Court were the creation of a federal statute of limitations applicable to malfeasance actions against federal officers, application of the laches doctrine finding of no applicable limitations period at all, and selection of an analogous federal statute. *Id.*

ment. The Supreme Court affirmed and held the Rules of Decision Act required the application of a state time bar. Thus, the Campbell Court read the Rules of Decision Act to apply in all cases, even those in which the federal court had exclusive jurisdiction over a federal claim, except when Congress had expressly provided a limitations period to the federal right involved. However, the Campbell Court also held the absorption requirement could be waived if the limitations period borrowed from state law unduly burdened or discriminated against a federal right.

For many years, the Supreme Court continued to mechanically apply its decision in the McCluny case. The Rules of Decision Act was routinely applied to a variety of federal causes of action without any thoughtful review or reconsideration of its appropriateness. The Court was mistaken in its decision that the Rules of Decision Act required application of the state statute of limitations in all actions for which Congress had not expressly provided a cause of action. It seems clear that the Rules of Decision Act was not meant to apply to federal causes of action, particularly those in which the Court's jurisdiction was exclusive. Moreover, it appears that the Rules of Decision Act required federal courts to apply state limitation rules with discretion in cases involving state causes of action.

The state borrowing doctrine was re-evaluated in Holmberg v. Armbrecht. In that case, creditors sued the shareholders of a bank under the Federal Farm Loan Act. The suit occurred ten years after the plaintiffs learned that a bank shareholder had concealed his stock ownership. The district court rejected the shareholder's assertion that the state statute of limitations and the doctrine of laches barred the action. The court of appeals disagreed and held the state statute of limitations must be applied.

The Supreme Court, in a decision authored by Justice Frankfurter, reversed the court of appeals and held that prior Supreme Court precedent did not require the application of state law. The Court then considered what law it should choose in fashioning an appropriate statute of limitations. The Court

29. Id. at 611.
30. Id. at 614.
31. Special Project, supra note 1, at 1032.
33. See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)(applying a state statute of limitations to a federal antitrust action and holding the state period applied because the "matter [had been] left to the local law by the silence of the Statutes of the United States."); O'Sullivan v. Felix, 233 U.S. 318, 321 (1914) (Civil Rights Act); McClaine v. Rankin, 197 U.S. 154, 158 (1905) (National Bank Act).
34. Special Project, supra note 1, at 1037.
36. Id. at 393.
37. Id.
38. Id. at 394.
39. Id.
40. Id.
pointed out that Congress had "usually left the limitation of time for commencing actions under national legislation to judicial implications" and that congressional silence had been "interpreted to mean that it is federal policy to adopt the local law of limitation." The Court held:

The implied absorption of State statutes of limitation within the interstices of federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.

Thus, the Holmberg Court rejected the conclusion that the Rules of Decision Act compelled application of state statutes of limitations in litigation involving federally created rights of action. This conclusion permitted the federal courts, in the absence of an express statutory time bar, to choose state law. This shift in judicial thinking created the possibility that federal limitation statutes may apply to federal causes of action which had no applicable time bar. More fundamentally, the Court indicated that interstitial, judicial lawmaking should proceed according to a "general framework of familiar legal principles."

After the Holmberg decision, the federal courts continued to absorb state time bars and apply them to litigation involving federal causes of action. Federal courts, however, have refused to adopt state periods under two circumstances: (1) when the state statute would impermissibly undermine a federal right, or (2) when the state statute would discriminate against the federal right by providing a longer limitations period for an analogous state

41. Id. at 395. The depth of this assertion, that congressional silence on the limitations issue implies an intention to incorporate state law, is uncertain in the case law. After the Holmberg case freed the federal courts from any mandatory requirement that state law be applied, the courts continued to routinely apply the state limitations period. See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 529-30 (1954); Special Project, supra note 1, at 1043. This practice of preferring state law is a product of judicial interpretation of legislative intent. For example, if Congress, at the time it passed a substantive provision, knew that absent limitation periods were supplied from state law, the legislative intent was to incorporate state limitations periods. More recently, in DelCostello, the Court stated "the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions." DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158-59 n.12 (1983).

42. Holmberg v. Armbrecht, 327 U.S. at 395.
43. Special Project, supra note 1, at 1041-42.
44. The Holmberg Court did not define either the nature or the process of the "general framework," nor did the Court precisely describe the "familiar legal principles." However, the Court's opinion makes it clear the Court meant that it was federal policy to adopt the local law of limitation when Congress has failed to provide a time limit, and all general rules of equity should be incorporated into the process of deciding the appropriate limitations period. Holmberg v. Armbrecht, 327 U.S. at 394-97.
cause of action. The cases interpreting these exceptions from the state absorption doctrine involve somewhat unusual circumstances in which federal interests represented by the substantive federal law are subordinated to, or discriminated against by, state law. For example, in *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission,* the lower court applied a California statute governing tort actions to bar a claim by the Equal Employment Opportunity Commission that Occidental had engaged in discriminatory employment practices violating Title VII of the Civil Rights Act of 1964. The Supreme Court held the one-year state statute of limitations applied by the lower court directly conflicted with the time table for administrative action in the federal act; therefore, the importation of state law would frustrate or interfere with the implementation of national policy.

Similarly, the courts have refused to apply state limitations periods which impermissibly discriminate against a federal cause of action. For example, when state law expressly provides a statute of limitations for federal law, and that bar is shorter than the time bar for an analogous state right of action, the courts have routinely refused to apply the state limitations period created expressly for the federal right of action. These exemptions from the general rule favoring absorption of state statutes of limitations are based on the supremacy clause. Federal courts will refuse to apply a state limitations period when the period is so short that it burdens the assertion of federal rights and when the state statute impermissibly discriminates against federal rights in the absence of a compelling state policy.

Aside from the general presumption favoring the absorption of state limitations periods, there has been a correlative hesitancy on the part of the courts to create uniform federal rules. For example, in *UAW v. Hoosier Car-

45. Special Project, *supra* note 1, at 1045.
49. Special Project, *supra* note 1, at 1045; Sobol, *supra* note 1, at 902-03.
50. *See,* e.g., *Caldwell v. Alabama Dry Dock & Shipbldg. Co.,* 161 F.2d 83 (5th Cir. 1947) (one-year state statute of limitations intended to govern actions brought under Fair Labor Standards Act not applied when an analogous three-year state period was provided for claims on implied employment contracts and a six year limitation period for claims under an express employment contract); *Van Horn v. Lukhard,* 392 F. Supp. 384 (E.D. Va. 1975) (Virginia statute that barred civil rights actions under 42 U.S.C. § 1983 brought more than one year after they accrued was not applied because Virginia had a two-year period for personal injury actions).
51. U.S. Const. art. VI, cl. 2. In its truest sense, the effect of the supremacy clause is to pre-empt state laws that interfere with federal interests. *See Special Project, supra* note 1, at 1045-46 n.148.
52. Special Project, *supra* note 1, at 1054.
The Court refused to create a federal limitations period for claims arising under section 301 of the Labor Management Relations Act.\(^{54}\) Notwithstanding the widespread inconsistency among federal courts in choosing an appropriate limitations period for claims under the Act, the Court considered the creation of a uniform federal period of limitation as a "bald . . . form of judicial innovation."\(^{55}\) The Court acknowledged the importance of uniform federal labor laws but held the need for uniformity is important only when its "absence [threatens] the smooth functioning of [the] consensual processes" that underlie congressionally created federal labor law.\(^{56}\)

The implication analysis designed by the Supreme Court in the early period was premised on two essential principles. First, state law should presumptively be applied to imply a statute of limitations for federal actions lacking an express limitations period. Second, state law should be borrowed unless its adoption or application flatly conflicts with the federal policy underlying the substantive federal right of action. These general principles facilitated the implication process and provided bright line rules for federal judges searching for an appropriate limitations period. However, interest in federal limitations periods was growing, and litigants increasingly advocated the use of these federal statutes of repose.\(^{57}\)

C. Recent Supreme Court Cases on Borrowing Periods

The Supreme Court, in several cases decided since 1982, has reformulated an analytic format for implying a statute of limitations for federal causes of action.\(^{58}\) These cases articulate a thoughtful framework for borrowing an appropriate limitations period when Congress has failed to articulate one. These cases also reflect a more comprehensive analysis for implying a statute of limitations than prior case law. This section discusses those cases and identifies the critical analytic considerations for implying a statute of limitations.

In DelCostello v. International Brotherhood of Teamsters,\(^{59}\) the Court held federal statutory law can serve as a source for a borrowed limitations period.\(^{60}\) The case involved a "hybrid" suit under section 301 of the Labor

\(^{54}\) Id. at 703.  
\(^{55}\) Id. at 701.  
\(^{56}\) Id. at 702.  
\(^{57}\) A significant factor in the increased interest of federal statutes as the source of an implied limitations period is the growth of federal statutory law and the greater number of federal statutes that could be used as analogues. See Note, A Functional Approach to Borrowing Limitations Periods for Federal Statutes, 77 CALIF. L. REV. 133, 148 (1989).  
\(^{58}\) See supra note 2.  
\(^{60}\) Id. at 171-72.
Management Relations Act and the union's duty of fair representation. The claim against the employer was based on section 301, which does not have an express limitations bar, and the claim against the union was implied under the scheme of the National Labor Relations Act. The Court, noting that neither claim was covered by an express federal limitations period, held the six month limitations bar for filing unfair labor practice complaints should be borrowed and applied to both claims. The Court departed from its reasoning in previous borrowing cases and held that courts could imply a federal statute of limitations when a state limitations period conflicts with federal policy as well as when the state statute is less attractive than a federal statute. The DelCostello Court held that federal courts searching for an appropriate limitations period should initially resort to state law, and federal law may be applied only when a federal rule "clearly provides a closer analogy than available state statutes," and the "federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

The analysis of the plaintiff's claims proved interesting. The Court rejected possible analogies to state law because there were no close parallels for hybrid actions in state law. The Court, however, did find the limitations period in section 10(b) of the National Labor Relations Act was superior to any state statute of limitations because it governed similar underlying conduct, represented a congressional balancing of similar interests, and promoted national uniformity in federal labor law. The Court balanced the strong federal policy in favor of prompt resolution of labor disputes and the relative unsophistication of plaintiffs in hybrid actions.

In Wilson v. Garcia, the Court again departed from a long-established

61. Id. at 154. The plaintiff in DelCostello had lost his job because he refused to operate allegedly unsafe equipment. Id. at 155. His union unsuccessfully maintained a formal grievance against the employer. Id. The plaintiff sued the employer for breach of a collective bargaining agreement and the union for breach of its fair representation duties. Id. at 155-56.
62. Id. at 164 n.14.
63. Id. at 155.
64. Note, supra note 57, at 143.
65. DelCostello v. International Bhd. of Teamsters, 462 U.S. at 171-72. The Court did not identify any generally applicable "federal policies at stake" or "practicalities of litigation." Id. However, the Court's opinion did identify several relevant considerations in the context of the plaintiff's claims for relief. Id. at 166-68. The Court discussed the policies of the underlying federal claims to permit an aggrieved employee to vindicate his statutory rights in a reasonable period of time and to collect damages against an employer. Id. Finally, the DelCostello Court referred to the duty of the courts in fashioning a federal law of collective bargaining to ensure that "the law reflect the realities of industrial life and the nature of the collective bargaining process." Id. at 172 (citing Humphrey v. Moore, 375 U.S. 335, 358 (1964)(Goldberg, J., concurring)).
66. Id. at 165.
67. Id. at 170-71.
68. Id. at 165-66.
rule and held that all section 1983 civil rights claims should be characterized as tort claims, and the state statute of limitations for torts should be borrowed.\textsuperscript{70} The Court found a problem associated with the state borrowing doctrine arises when a federal cause of action can be brought for a variety of different types of claims.\textsuperscript{71} According to the Court, it might be possible for courts to recognize multiple statutes of limitations for section 1983 claims within the same state and even within the same case.\textsuperscript{72} The Court failed to examine any federal limitations periods to determine whether they might serve as a more appropriate limitations period for section 1983 actions.\textsuperscript{73} Rather, it stated that “the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.”\textsuperscript{74} The Court did, however, stress the unacceptability of multiple limitations periods for the same federal cause of action.\textsuperscript{75} The Court emphasized the federal interests in “uniformity, certainty, and the minimization of unnecessary litigation” and concluded these considerations require the use of a single characterization for all claims under the same statute.\textsuperscript{76} Later, in \textit{Agency Holding Corp. v. Malley-Duff & Associates, Inc.},\textsuperscript{77} the Court was required to derive an appropriate limitations period for private actions brought under the Racketeer Influenced and Corrupt Organization Act (“RICO”).\textsuperscript{78} The Court examined federal law to find an appropriate analogy and found the Clayton Act was approximately analogous to RICO.\textsuperscript{79} According to the Court, the remedial and standing to sue provisions of RICO were patterned after section 4 of the Clayton Act.\textsuperscript{80} The Court also noted there was no “comparable single state law analogue to RICO,” and the substantial federal interests implicated by the use of interstate commerce to commit RICO offenses counseled the use of a federal statutory norm.\textsuperscript{81} The

\textsuperscript{70} Id. at 276.  
\textsuperscript{71} Id. at 272-74.  
\textsuperscript{72} Id. at 274.  
\textsuperscript{73} Id. at 266.  
\textsuperscript{74} Id. at 266-67.  
\textsuperscript{75} Id.  
\textsuperscript{76} Id. at 275. The \textit{Wilson} Court, however, failed to develop the importance of its concern about “uniformity, certainty and minimization of unnecessary litigation.” Id. The Court again conducted a “practical inquiry” into the most appropriate statute of limitations to be borrowed in \textit{Owens v. Lessard}, 488 U.S. 235 (1989). Id. at 272. The Court expressed concern about the lack of predictability when courts attempted to determine whether a personal injury limitations period of a forum state should be applied to all section 1983 claims or whether the statute of limitations for intentional torts should be applied. Id. at 272-74. According to the Court, concerns about predictability required that the limitations period for personal injury torts should be selected as the most appropriate time bar. Id. at 275.  
\textsuperscript{79} Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. at 150-53.  
\textsuperscript{80} Id.  
\textsuperscript{81} Id. at 152.
Court, however, reiterated its admonition that state law should be rejected as the appropriate borrowed limitations period only "in limited circumstances" and when it conflicts with federal policy.  

The recent Supreme Court cases depart from the earlier line of cases by setting a different tone and a more comprehensive type of analysis for implying a limitations period. Some of the policy considerations of the earlier cases were retained in the modern analysis. The Court, however, built upon the early absorption doctrine in several important respects.

The new implication analysis articulated by the Court appears to be a type of legislative analysis which considers a number of policy considerations in making a decision. It represents the Court's articulation of a more comprehensive framework of general legal principles that must be considered in borrowing the most appropriate time bar in federal actions. While the early type of implication analysis was relatively simplistic, the new analysis requires an examination and balancing of several factors in determining the most appropriate limitations period to borrow. The next section sets forth a description of the policy considerations involved in the new implication analysis.

D. A Synthesis of Policy Considerations in Conducting an Implication Analysis

The cases decided by the Court in recent years provide a framework for analyzing the implication of a time bar in federal statutory cases. More specifically, they provide a means for designing an appropriate limitations policy concerning private actions under Rule 10b-5. This framework is implemented by balancing several policy considerations or principles that permit a judicial decision on the most appropriate limitations period.

1. The Policy of Repose

The courts have commonly held that a limitations period may be borrowed. Occasionally courts and commentators have concluded that perhaps no statute of limitations period should be borrowed because Congress failed to provide one.  

Justice Scalia returns to this perspective in his concurring opinion in Agency Holding Co. v. Malley-Duff & Assocs., Inc., 483 U.S. at 163-64. He promotes the use of a preemption analy-
The legal concept of repose reflects important communal values in society and the belief that interstitial judicial lawmaking should reflect those values. In addition, the concept of repose reflects strong efficiency characteristics. A limitations period encourages defendants to pursue worthwhile activities without fear of litigation for past transactions and encourages potential plaintiffs to promptly vindicate their perceived wrongs. Further, institutional concerns of courts are advanced by a borrowing policy that measures repose because courts may be run more efficiently when evidence of wrongdoing is fresh, rather than stale, and when the memories of parties are still clear.

2. Federalism

The relationship of federal policy to state law is a delicate one. This consideration has influenced the Supreme Court in its articulation of the rule that state law should be consulted first to determine an appropriate limitations period. In the Malley-Duff case, for example, the Court pointed out that the federal policy underlying the RICO private action was sufficiently great to override the presumption in favor of state limitations periods.

84. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 158 (1983). The DelCostello Court held that when Congress fails to provide an expressed statute of limitations, courts do not find that no time limitations should be recognized. See generally id. Further, in Wilson v. Garcia, the Court held that an absence of limitations period is repugnant to the "genius of our laws." Wilson v. Garcia, 471 U.S. 261, 271 (1985). The Wilson Court stated the borrowing doctrine serves the policies of repose because it "incorporates the States' judgment of the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." Id. at 164.

85. See Sobol, supra note 1, at 897-99. The author contends limitations or repose periods serve to protect three groups: potential defendants, courts, and society in general. Id. These communal values include providing fairness to potential defendants by predictably defining the extent of exposure to suit. Id. at 898. This allows potential defendants to conduct their business without fear of having to defend themselves in suits alleging stale claims. Id. Repose also protects society by preserving stability in commercial and business relations and protecting bona fide purchasers of property who can assure themselves that stale claims may not be asserted against their property. Id; see also Special Project, supra note 1, at 1016-20.

86. See Special Project, supra note 1, at 1018 (arguing that one purpose of a period of repose is to encourage plaintiffs to bring their action quickly); see also Sobol, supra note 1, at 897-98.

87. Sobol, supra note 1, at 898.

There are two principal inquiries with respect to the issue of federal-state relations in determining an appropriate statute of limitations: (1) inquiry into the issue of the primacy of state law, and (2) inquiry into the issue of quantifying the conflict between state limitations and federal law and policy. The first issue considers the appropriate role of state law in determining the best statute of limitations and asks whether state time bars are just one possible source or presumptively the most appropriate source for borrowing. The Supreme Court's recent holdings, as discussed in the preceding section, are unclear on the extent to which there is a presumption that state law should be borrowed. In some cases, the Court held that the state limitations period is presumptively appropriate and that the presumption may be dispelled by a showing of discriminatory impact on federal law. Other cases, such as DelCostello, suggest the state period should be borrowed unless it is less attractive than a federal period.

The appropriate resolution to this substantive and procedural issue appears in Holmberg. State law must be preferred over federal law in implying a statute of limitations for a federal cause of action because of the Rules of Decision Act and because it reflects the experiences of states in determining policies of repose. The preference for state law provides a useful rule of thumb when conflicts arise over the most appropriate limitations period (as between a state and a federal statute), and, when there are no competing

89. This inquiry forms the most significant issue in the process of implication. The Supreme Court has repeatedly held that legislative omission of a limitations period should presumptively require borrowing of a state limitations period. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)(Title VII action); Runyon v. McCrary, 427 U.S. 160, 179-82 (1976)(Civil Rights Act of 1866); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 701-05(1966)(section 301 of Labor Management Relations Act).


91. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 169-72 (1983). The DelCostello Court, however, pointed out that it's refusal to apply a state limitations period did not signal a turn away from the presumption that state law would be borrowed:

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

Id. at 171-72 (citations omitted).

92. "Three pragmatic justifications support the presumption to absorb state limitations periods. The practice (1) promotes local experimentation; (2) avoids undermining the substantive policies of the states; and (3) eliminates the difficult task of analyzing the implications of each new rule in all fifty states." Special Project, supra note 1, at 1043.
statutes of limitation, the preference permits a considered legislative judgment on an appropriate repose period to be supplied.\textsuperscript{93}

Another federalism issue arises when a court considers both state and federal limitations periods. In some circumstances, a state limitations period may discriminate against the substantive policy of the federal statute, and, as the Court has repeatedly held, the state policy must be subordinated to the federal policy.\textsuperscript{94} In a comprehensive consideration of the policies involved, this may indicate the unsuitability of the state law. It does not, however, necessarily prove the suitability of the federal limit against which the state rule is tested.

3. \textit{Institutional Deference}

The courts have expressed concern about the ability of federal judges to create a federal rule of limitations when Congress has failed to act. This deference has been manifested in some rules governing interstitial lawmaking by judges. These rules may govern the form or procedure for resolving the issue of borrowing the most appropriate limitations period.

One rule, articulated in \textit{Holmberg}, is that state limits should be preferred when borrowing a limitations period.\textsuperscript{95} As previously discussed, the Court's recent position on this rule is unclear, but the preferred reading is that state limitations periods should be considered first in determining the most appropriate limitations period.\textsuperscript{96}

Another rule is that Congress' intent in passing the federal statute

\textsuperscript{93} In \textit{DelCostello}, the Court stated that:

\begin{quote}
In some instances, of course, there may be some direct indication in the legislative history suggesting that Congress did in fact intend that state statutes should apply. More often, however, Congress has not given any express consideration to the problem of limitations periods. In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions.
\end{quote}


Others have argued a presumptive absorption of state statutes of limitation serves the important purposes of relieving judges of making the very arbitrary decision on an appropriate limitations period because the decision is better left to the legislatures. \textit{Special Project, supra} note 1, at 1044. Because the values served by definite periods of repose are important to courts, litigants, and society, the collective wisdom of a deliberative decision-making body may legitimate the decision in a way that courts simply cannot.

\textsuperscript{94} \textit{Special Project, supra} note 1, at 1045-55. The authors contend that "[f]ederal courts have refused to adopt state periods if (1) the state statute would provide an unduly short limitations period that would impermissibly undermine a federal right, or (2) the state statute would discriminate against a federal right by providing a longer limitations period for an analogous state right." \textit{Id.} (citing Van Horn v. Lukhard, 392 F. Supp. 384, 389-91 (E.D. Va. 1975)).

\textsuperscript{95} See \textit{Holmberg} v. Armbrecht, 327 U.S. 392, 394-97 (1946).

\textsuperscript{96} See \textit{supra} notes 79-80 and accompanying text.
should be determined by a court addressing the time bar issue. This factor presents difficulty for some courts because the federal policies underlying the statute may not be obvious or discernable from legislative history or any other source. Courts may also find it difficult to correlate different limitation periods and still accomplish statutory objectives.

4. Uniformity

It is generally believed that uniformity of rules makes for greater predictability in the application of those rules and, therefore, the courts should strive for uniformity of limitations periods. For example, in Wilson v. Garcia, the Court held the state tort statute of limitations should be implied for claims arising under section 1983. Later, in Owens v. Okure, the Court held the interest of uniformity of application required that when state law provides multiple statutes of limitations for personal injury actions, courts in section 1983 cases should borrow the general or residual statute for per-

97. The Supreme Court has suggested the need to consider the policy underlying the substantive federal statute in a couple of contexts, but has not stated with any precision the role of substantive federal policy in the implication analysis. In DelCostello, the Court held state law must first be consulted for an appropriate statute to borrow, but a federal time limit may be borrowed when it "clearly provides a closer analogy" and "when the federal policies at stake and the practicalities of litigation make that [federal] rule a significantly more appropriate vehicle for interstitial lawmaking." DelCostello v. International Bhd. of Teamsters, 462 U.S. at 171-72. Similarly, federal policy is important in determining whether the application of a unduly short state limitations period would thwart the remedial policy of the federal right of action. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154-55 (1987) (citing DelCostello v. International Bhd. of Teamsters, 462 U.S. at 166-68).

98. For example, it may be difficult for a court to determine the policies underlying a federal statute or implied right of action are advanced by a three-year limitations period, but not a four or five-year limitations period. See supra note 6. On the other hand, the Supreme Court in DelCostello reasoned the state limitations periods that were raised as candidates for borrowing were unsatisfactory because they were too short in length to properly accommodate the remedial and compensatory objectives of the federal labor laws in question. DelCostello v. International Bhd. of Teamsters, 462 U.S. at 166-68.

99. The most frequently encountered argument is that a lack of uniformity permits inconsistent decisions by federal courts. Sobol, supra note 1, at 905-06. In the context of implying a limitations period in Rule 10b-5 cases, the commentary argues the practicalities of litigation require a uniform time bar and a uniform rule would prevent time consuming litigation over the borrowing issue, encourage private enforcement of the securities law, provide greater certainty for defendants, and prevent forum shopping by plaintiffs. Garrett, supra note 1, at 18-22.


101. Owens v. Okure, 488 U.S. 235 (1989). The Court was asked to consider the most analogous state statute of limitations to be applied in a section 1983 case when the state had both a general or residual limitations statute for personal injury claims and a statute of limitations for intentional torts. Id. The Court conducted what it terms a "practical inquiry" to determine "the appropriate personal injury limitations statute that can be applied with ease and predictability in all 50 States." Id.
sonal injury actions.\textsuperscript{103}

A significant difference exists between the intrastate uniformity issue decided in \textit{Wilson v. Garcia}, and the argument that a national uniform federal rule should be applied to supply an absent limitations period. Requiring the use of only one state limitations period when several competing periods might be applicable is not inconsistent with the state borrowing doctrine and limits the uncertainty of a claim-by-claim approach to implying time bars.\textsuperscript{103} On the other hand, the selection of a national uniform limitations period rejects the state borrowing doctrine. The Supreme Court has held that use of a uniform national rule is appropriate only when the absence of such a rule threatens "the smooth functioning of [the] consensual processes" that Congress intended to promote by the substantive federal law in question.\textsuperscript{104} Perhaps \textit{DelCostello} is the only case in which the smooth functioning of federal law has been interfered with to such an extent that a uniform rule is necessary.

5. \textit{The Substance and Process of Implication}

Two of the most intriguing aspects of the implication process are characterizing the federal claim and finding the most appropriate analogue. The Court has described this process as finding a statute of limitations that bears a "family resemblance"\textsuperscript{105} or "similarities in purpose and structure" to the federal cause of action.\textsuperscript{106} This process of characterizing the federal cause of action and determining the most analogous statute of limitations is a task at which courts may be very proficient.

Recent cases have developed both the substantive and procedural components of the implication process.\textsuperscript{107} One aspect is the proximity or similarity of the two statutory provisions in terms of their purposes, language, and remedies.\textsuperscript{108} Legislative intention is an important factor in determining similarity between a federal and state cause of action.\textsuperscript{109} Furthermore, the courts have looked to the nature of injuries that the statutes attempt to correct, the prevalence of similar statutory purposes or objectives (such as compensation for victims and deterrence), and whether the statutory schemes represent similar legislative approaches for dealing with a problem.\textsuperscript{110}

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} \textit{Wilson v. Garcia}, 471 U.S. at 275.
\textsuperscript{104} \textit{UAW v. Hoosier Cardinal Corp.}, 383 U.S. at 696, 702 (1965).
\textsuperscript{105} \textit{Id.} at 705 n.7.
\textsuperscript{106} \textit{Agency Holding Corp. v. Malley-Duff & Assocs., Inc.}, 483 U.S. 143, 152 (1987).
\textsuperscript{109} \textit{Agency Holding Corp. v. Malley-Duff & Assocs., Inc.}, 483 U.S. at 151-52.
\textsuperscript{110} For example, in \textit{Agency Holding Corp. v. Malley-Duff & Associates, Inc.}, the Court held the civil RICO action was more analogous with the private right of action under the Clayton Act than with other state and federal statutory schema. \textit{Agency Holding Corp. v. Malley-
This implication process appears to stress points of congruity or incongruity between statutory schema for the purpose of determining the "most apt" or more appropriate limitations period to imply. The process suggests there is one "most" appropriate statutory scheme that should be borrowed by analogy to supply a statute of limitations.

IV. Implication Analysis and the Most Appropriate Statute of Limitations for Section 10(b) Actions

The implication analysis developed by the Supreme Court in its recent cases lends itself to a consideration of the most apt or appropriate statute of limitation to be applied in cases brought under Rule 10b-5, which implements section 10(b) of the 1934 Securities Exchange Act. Those cases articulate a broader statement of the familiar legal principles that form the analytic framework for implying an appropriate limitations period.

The lower courts, until recently, have almost exclusively looked to the most analogous state statute, usually a state fraud or securities antifraud regulation statute of limitations. The following section reviews the state borrowing approach to providing a limitations period in Rule 10b-5 cases and discuss some of the criticisms of this approach.

The second section describes recent cases that have introduced two federal statutes of limitations in the contest for the most apt limitations period. Three influential circuit courts of appeal have recently departed from the state borrowing approach and have adopted statutes of limitations designed for federal securities law rights of action. These decisions represent a significant departure from the path of the contemporary implication analysis. The concluding section applies the current implication analysis to suggest the most appropriate resolution to the problem of an absent statute of limitations in Rule 10b-5 cases.

A. Contemporary Application of Implication Analysis in Rule 10b-5 Cases

The lower federal courts, until recently, have looked solely to state stat-
uates to determine the most appropriate statute of limitations to be applied in Rule 10b-5 actions. For many years after the federal courts recognized a private right of action for violations of section 10(b) and Rule 10b-5, the courts applied the forum state's statute of limitations for common law fraud. Those courts believed the state common law fraud action was most analogous to Rule 10b-5 actions because of the strong similarities in elements of the statutory and common law claims and the remedies applied by courts. Clearly, however, misunderstandings about the meaning of the Holmberg doctrine, particularly the insistence of some courts that only state statutes could be consulted to imply a limitations period, contributed to the rather limited search performed by many courts.

Later, states began enacting state blue sky statutes, which governed the registration and exemption of securities issuances and prohibited disclosure of misleading and fraudulent information in connection with the sale or purchase of securities. The state blue sky statutes became the most appropriate statute from which to borrow a statute of limitations. These statutes were often patterned after the structure and organization of the federal securities laws, and, more specifically, expressly prohibited fraudulent, deceptive, and manipulative practices in a manner identical to the prohibitions of Rule 10b-5.

State blue sky statutes of limitations have frequently been implied by federal courts as the most appropriate source from which to borrow a limitations period in Rule 10b-5 cases. Those courts have determined that the Rule 10b-5 claim is very similar to state blue sky statutory claims and that the federal and state statutory schemes have common purposes. Some

115. See, e.g., Robuck v. Dean Witter & Co., 649 F.2d 641, 644 (9th Cir. 1980)(allegations of complaint that resemble action for fraud are governed by California statute of limitations for fraud).
116. See, e.g., Deviries v. Prudential-Bache Sec., Inc., 805 F.2d 326 (8th Cir. 1986); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500 (11th Cir. 1986).
117. See, e.g., IOWA CODE §§ 502.401-.407 (1989). The Iowa blue sky law provides in relevant part:

502.401 Offers, sales and purchases

It is unlawful for any person, in connection with the offer to sell, offer to purchase, sale or purchase of any security in this state, directly or indirectly:

1. To employ any device, scheme, or artifice to defraud;
2. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
3. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Id. § 502.401.

The Iowa blue sky law also provides time limitations on rights of action brought for violations of section 502.401. Id. § 502.504.
118. See, e.g., Robuck v. Dean Witter & Co., 649 F.2d 641, 644 (9th Cir. 1980). The an-
courts, however, have noted that state blue sky statutes do not expressly provide a cause of action for certain plaintiffs suing under Rule 10b-5, but have, nevertheless, applied the applicable statute of limitations.\(^\text{119}\)

The widespread use of state blue sky and common law fraud statutes of limitations has been roundly criticized by courts and commentators.\(^\text{120}\) The principal criticisms concern the lack of certainty—to both securities fraud victims and defendants—caused by application of the state borrowing doctrine and the litigation complexity added by use of the doctrine.\(^\text{121}\)

\section{The Contrary View: Resort to a Uniform Federal Statute of Limitations}

Three circuit courts of appeal have recently departed from the prevailing policy of borrowing state statutes of limitations in Rule 10b-5 cases.\(^\text{122}\) These courts have reasoned that the Supreme Court's pronouncement in the \textit{Agency Holding Corp.} case permits the application of a uniform federal statute of limitations in section 10(b) cases.\(^\text{123}\) Moreover, the courts have refused to apply the state borrowing doctrine, reasoning that a federal statute of limitations provided in the 1933 Securities Act and the 1934 Security...
ties Exchange Act are the most appropriate.124 Those courts, however, have failed to perform the analysis required by the Supreme Court in its recent decisions and have merely concluded that a uniform statute should apply.125 The courts did not find the policies of the borrowed state statutes conflicted with federal policies underlying section 10(b) or Rule 10b-5.

In In re Data Access Systems Securities Litigation,126 the Third Circuit Court of Appeals relied on the Agency Holding Corp. decision. It rejected the state statutory claim-by-claim approach used by other federal courts and applied the limitations periods expressly provided for other sections of the Securities Exchange Act.127 The court expressed the belief that it must select only one appropriate limitations period for all Rule 10b-5 claims.128 The statutes of limitations in the several provisions of the 1934 Securities Exchange Act were found to be more appropriate because they had purposes and statutory objectives similar to those in section 10(b) and were designed to create similar remedies.129 Moreover, the court concluded the statutes of limitations under state blue sky laws varied widely and that it would not be possible to ensure a uniform limitations period if repose must be borrowed from state statutory limitations periods.130

124. See, e.g., Ceres Partners v. GEL Assocs., 918 F.2d 349, 361-64 (2d Cir. 1990).
125. For example, in Ceres Partners, the court commences its analysis by arguing the state borrowing doctrine has created a lack of national uniformity. Id. at 354-55. The court, then, notes the practice of borrowing state limitations periods has not been required by Supreme Court cases and recent Court cases “leave open the possibility that courts should look to a federal statute instead.” Id. at 355. After reviewing the recent Supreme Court cases involving implication of limitations periods, the court in Ceres Partners states that a uniform federal limitations period may be implied:

(1) where the statutory claim in question covers a multiplicity of types of actions, leading to the possible application of a number of different types of state statutes of limitations, (2) where the federal claim does not precisely match any state-law claim, (3) where the challenged action is multistate in nature, perhaps leading to forum shopping and inordinate litigation expense, and (4) where a federal statute provides a very close analogy.

Id. at 357.
127. Id. at 1550.
128. Id. at 1544. The court reasoned a single limitations period was appropriate because according to the Supreme Court in Wilson v. Garcia, a factual and claim-based approach “would not promote ‘[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation.’” Id. at 1543 (citing Wilson v. Garcia, 471 U.S. 261, 275 (1985)). The court pointed out actions under section 10(b), like claims under 42 U.S.C. § 1983, “embrace a galaxy of actions” and a claim-based approach would involve great uncertainty and inefficient litigation. Id.
129. Id. at 1548. The court canvassed sections 9(e), 16(b), 18(c), and 29(b) of the 1934 Act, all of which, except section 16(b) have an identical limitations period, and concluded the limitations period common to all 1934 Act provisions (except section 16(b)) should be applied. Id.
130. Id. at 1549. The court concluded it would be “bizarre if not anomalous” to go beyond the express provisions in the 1934 Act and resort to nonuniform state limitations periods. Id.
More recently, the Seventh Circuit, in *Short v. Belleville Shoe Manufacturing Co.*,\(^{131}\) and the Second Circuit, in *Ceres Partners v. GEL Associates*,\(^{132}\) similarly concluded that a uniform federal statute of limitations should be applied in Rule 10b-5 cases. These courts reasoned that application of the state borrowing doctrine injects unnecessary complexity into the implication analysis and that a federal securities law limitations period is a more apt or appropriate source.\(^{133}\)

Those courts, however, failed to systematically perform the implication analysis required by the Supreme Court. They merely reasoned that the state borrowing doctrine is complex and that resorting to a uniform limitations period would simplify litigation.\(^ {134}\) These courts failed to analyze the implication issue within the framework of familiar legal principles established in the Court's recent borrowing cases.

C. The Implication Analysis in Rule 10b-5 Cases

In *Holmberg*, the Court held the implication analysis should consist of a "judicial determination within the general framework of familiar legal principles."\(^ {135}\) Those legal principles have been explained with great care, although not with clear consistency, in the Supreme Court's most recent decisions on the implication analysis. In the following sections those principles are discussed in the context of implying an appropriate limitations period in claims brought under Rule 10b-5.

The Supreme Court's modern implication analysis is based on explicated policy considerations and requires a federal court searching for a limitations period perform a balancing analysis. This analysis stresses the skills that judges are commonly considered to possess, the skills of claim charac-

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\(^{131}\) *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990).

\(^{132}\) *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990).

\(^{133}\) The courts in both *Short* and *Ceres Partners* concluded a uniform federal limitations period was the desired outcome to the issue of implying a limitations period, but they could not agree on the most appropriate source for such a uniform federal rule. The court in *Short* decided section 13 of the 1933 Securities Act, 15 U.S.C. § 77m (1988), should be applied to determine the limitations period in Rule 10b-5 cases. *Short v. Belleville Shoe Mfg.*, 908 F.2d at 1392. The court in *Ceres Partners* decided two candidates under the 1934 Securities Exchange Act, sections 9(e) and 18(a), 15 U.S.C. §§ 78(e) and 78r(c), provided a better outcome. *Ceres Partners v. GEL Assocs.*, 918 F.2d at 362.

\(^{134}\) See, e.g., *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d at 1387-89. The court referred to its prior decisions, and those of other circuit courts, in adopting state statutes of limitation as having done so "on auto-pilot." *Id.* at 1387. Moreover, the court stressed the obligation of courts creating implied causes of action, such as under Rule 10b-5, to also "create stable periods of limitations for their handiwork." *Id.* (citing Smith v. Chicago, 769 F.2d 408 (7th Cir. 1985)).

\(^{135}\) *Holmberg v. Armbricht*, 327 U.S. 392, 395 (1946) (citing Board of Comm'rs v. United States, 308 U.S. 343, 349-50, 351-52 (1939)).
terization and analogy. In addition, the analysis promotes a relationship between the federal policies underlying the private right of action and a period of repose.

1. Repose

At this late point, it is simply untenable to conclude that Congress’ failure to articulate a limitations period for Rule 10b-5 claims indicates a legislative desire for no limitations period. In performing an implication analysis in Rule 10b-5 cases, there is room for dispute about two issues concerning the most appropriate form of judicially created repose for Rule 10b-5 cases. Those issues are: (1) whether there is a clear policy that a period of repose should be designed rather than a limitations period; and (2) what type of policies are advanced by Rule 10b-5 claims and how those policies can guide the determination of the most appropriate limitations period.

Judge Easterbrook, in his opinion in Short v. Belleville Shoe Mfg. Co., strongly promotes section 13 of the Securities Act of 1933 as the most apt analogue because it is a statute of repose rather than statute of limitations.136 As the court in Short correctly observed, the effect of selecting section 13 is to preclude the application of equitable tolling doctrines in Rule 10b-5 cases.137 However, an acknowledged policy promoting the finality of a repose provision over the flexibility of a statute of limitations does not exist. It appears that the flexibility provided by the equitable tolling doctrines may have strong policy implications when the cause of action, as in Rule 10b-5 cases, is directed at the defendant’s fraudulent conduct.

Moreover, important policies under Rule 10b-5 are implicated by the selection of any period of limitations. Rule 10b-5 was intended to target practices and activities that might be characterized as fraudulent and misrepresentative, deceitful or manipulative. The Rule was apparently patterned after section 17(a) of the 1933 Securities Act,138 except that the Rule

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136. Short v. Belleville Shoe Mfg. Co., 908 F.2d at 1391. The court in Short rejected the plaintiff’s claim that the five-year limitations period in section 20A of the 1934 Act, 15 U.S.C. § 78t-1, should be uniformly applied to all Rule 10b-5 actions for the reason that insider trading is only “one atypical kind of violation” of Rule 10b-5 and should not be uniformly applied. Id. at 1392; see also, Ceres Partners v. GEL Assocs., 918 F.2d at 362-63 (rejecting plaintiffs’ and SEC’s arguments that the limitations period in section 20A should be applied in Rule 10b-5 cases).

137. Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990). Courts have created various equitable doctrines when determining whether a claimant’s demand for relief is barred. Those doctrines include equitable tolling (such as by fraudulent concealment by the wrongdoer) and equitable estoppel. See, e.g., Harris v. Union Elec. Co., 787 F.2d 355 (8th Cir.), cert. denied, 479 U.S. 823 (1986); Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980); see generally T. HAZEN, supra note 1, at 727-30.

138. Section 17(a) of the Securities Act of 1933 provides as follows:

Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate
reaches misstatements or omissions of material facts occurring in connection with either a purchase or sale of security. 139 In significant part, Rule 10b-5 is intended to prevent fraud or manipulative activities affecting the price of securities, whether they are traded in national or even unorganized markets.

The background concerning the creation of Rule 10b-5 is somewhat helpful in describing the policy implications of any repose provisions made applicable to Rule 10b-5 cases. Because the Rule was intended to attack fraudulent activities, a limitations period should be flexible enough to recognize fraudulent conduct, by its nature, is often hidden or clandestine. This suggests equitable tolling doctrines might best advance the purpose of punishing fraud, even when it is hidden, and any borrowed limitations statute should permit resort to those doctrines. The Rule was also intended to apply to prohibited activities in transactions not involving public or organized markets for the sale and purchase of securities. This fact gives the meaning and nature of the Rule a decidedly local flavor and suggests it was intended to assist the sophisticated as well as the unsophisticated securities trader.

This analysis suggests the borrowed limitations period should not be a repose provision. Such a definite period would conflict with the policies of Rule 10b-5 that foster private remedial actions to recover for fraudulent, deceptive, and manipulative conduct. It must be recognized, however, that some provisions of the federal securities laws, which were intended to prevent fraudulent and manipulative conduct, expressly provide a period of repose. 140

2. Federalism

Contemporary implication analysis requires consideration of federalism issues in determining the most appropriate limitations period. These issues concern the relationship between federal statutory policy and analogous commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or
(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

139. Section 17(a) of the 1933 Act is limited to fraudulent or misrepresentative statements or omissions occurring in connection with the sale of a security. See T. HAZEN, supra note 1, at 669.

140. One federal statute of limitations that has been borrowed by a court looking for a uniform federal limitations period is section 13 of the 1933 Securities Act. This statutory provision provides that a claimant must maintain an action within one year of discovery of the fraudulent conduct, or in all instances no more than three years from the date of the violation. See 15 U.S.C. § 77m (1988). The definiteness of the period of repose made the borrowing of this provision attractive to the court in Short v. Belleville Shoe Mfg. Co., 908 F.2d at 1385.
state statutes that may be borrowed to find an appropriate statute of limitations. The Supreme Court has repeatedly held that it is impermissible to borrow a state statute of limitations when the underlying state statutory claim conflicts with the policy of the federal claim. A second issue concerns the primacy of state law to federal law in finding the most apt limitations period to be borrowed.

The federalism issue does not appear to be determinative in the context of Rule 10b-5 claims, but it has important implications. The state policies underlying common law fraud actions do not conflict with the antifraud principles of Rule 10b-5. Rather, it appears that the courts have been interpreting Rule 10b-5 in harmony with the elements of state common law fraud actions.141

One issue presents a matter of considerable, perhaps instrumental, significance. As discussed earlier, the Supreme Court has implied that state law must be initially considered for purposes of finding the most appropriate analogue and that a federal statute of limitations may be used only when the state statute is inadequate for service as a surrogate limitations period.142 This principle, if it reflects the judgment of the Court, would limit the search for an appropriate statute of limitations in Rule 10b-5 cases to state common law fraud or blue sky statutes of repose only.

This reading appears incorrect for several reasons. First, other Supreme Court cases have seemingly retreated from this primacy of state law perspective and have held that reference to state law is not a preference or presumption, but is a process oriented "rule of thumb" for courts performing an implication analysis.143 The rule from these cases is that unless no state cause of action can supply an appropriate limitations period, then the most analogous state claim should be used to supply a time bar.144 The cases also hold that when no state cause of action is sufficiently analogous to the federal claim, then the court can decline to adopt any state rule and look to federal law to supply a limitations period.145 In that instance, the court must find that the federal analogue is closer than any state analogue and that

141. See Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977), on remand 562 F.2d 4 (2d Cir. 1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). The Supreme Court has been applying common law principles in Rule 10b-5 cases with the effect of limiting the private right of action under the Rule. T. HAZEN, supra note 1, at 723. In Santa Fe the Court insisted the operative language in section 10(b) and Rule 10b-5 be read in accordance with well-recognized and commonly held connotations of fraudulent, deceitful, or manipulative conduct. Santa Fe Indus., Inc. v. Green, 430 U.S. at 476-77; see also Ernst & Ernst v. Hochfelder, 425 U.S. at 199.


federal policies and "the practicalities of litigation" make the federal analogue more appropriate.\textsuperscript{146}

The recent cases applying a federal securities law statute of limitations have misinterpreted the Supreme Court's recent cases by refusing to consider the aptness of state law analogues. For example, in the \textit{Short} case, the court never considered the issue of the primacy of state rules of limitation, nor did the court perform any careful process of analogizing the state and federal statutes. Rather, the court in \textit{Short} presumed the Court's decision in \textit{Agency Holding Co.} permitted lower courts to go directly to federal statutes for an analogue without considering relevant state analogues.\textsuperscript{147}

Finally, it is not clear that the application of borrowed state limitations periods is inconsistent or conflicts with the policies of section 10(b) or Rule 10b-5. The federal statutory provisions often relied on by courts to supply a uniform limitations period (i.e., section 9(e) and section 18(a) of the 1934 Securities Exchange Act and section 13 of the 1933 Securities Act) were passed in 1933 and 1934, long before a private right of action was recognized under Rule 10b-5. In 1975, however, Congress enacted the "most substantial and significant revision" of the 1933 and 1934 acts knowing the federal courts routinely borrowed state laws to supply a limitations period, but did not choose to provide any express limitations period.\textsuperscript{148} Clearly, Congress did not perceive that the implication of state limitations period interfered with federal interests or policies.\textsuperscript{149}

3. \textit{Uniformity}

Uniformity and predictability in the application of a limitations period are significant factors to courts attempting to derive a federal limitations period to Rule 10b-5 actions.\textsuperscript{150} In particular, the concern has been expressed that reliance on the state borrowing analysis might require courts to

\textsuperscript{146} Reed v. United Transp. Union, 488 U.S. at 324; DelCostello v. International Bhd. of Teamsters, 462 U.S. at 172.

\textsuperscript{147} Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1389 (7th Cir. 1990). The court's analysis gave short shrift to the notion that state laws should first be examined to determine if an appropriate fit could be made. The court noted state blue sky laws were frequently consulted but "[f]rom the perspective of practitioners litigating cases ... the situation is a nightmare." \textit{Id.} According to the court, lawyers and judges have devoted "untold hours to identifying proper state analogies and applying multiple (conflicting or cumulative) tolling doctrines." \textit{Id.} Aside from these anecdotal references, the court fails to identify the reason that state blue sky statutes make poor analogues for claims of fraud and manipulation under Rule 10b-5.


\textsuperscript{149} Arguably, Congress' failure in 1975 to provide an express statute of limitation for Rule 10b-5, or section 10(b), emphasizes the presumption articulated in many implication cases that Congress' failure to provide an express time limit reflects the choice to apply a state time bar. \textit{See supra} note 41.

\textsuperscript{150} \textit{See}, e.g., Short v. Belleville Shoe Mfg. Co., 908 F.2d at 1389; \textit{In re Data Access Sys. Sec. Litig.}, 843 F.2d 1537, 1549 (3d Cir. 1988).
imply state limitation periods from several states. Furthermore, the problem of intra-circuit conflicts has also been raised to argue that uniformity requires adoption of one federal limitations period. It appears, however, that the issue of uniformity described in the Supreme Court's decisions has been misapplied in some cases holding that a uniform federal rule is the appropriate policy for Rule 10b-5 litigation.

The issue of uniformity was important to the Supreme Court in Wilson v. Garcia, in which the Court held that federal interests in "uniformity, certainty, and the minimization of unnecessary litigation" favored application of a single limitations period within the same jurisdiction. In Wilson, the Court approved a single characterization for all claims under the federal civil rights statute. The Wilson Court, however, did not explain the meaning of the term "uniformity" or how uniformity of limitations periods significantly advanced the policies underlying federal statutory or implied causes of action that have no express limitations period. Apparently, the notion of uniformity could be construed to completely abrogate the state borrowing doctrine. However, the Court in Wilson actually advanced the state borrowing doctrine by concluding state tort law should be the source of implication.

It appears the issue of uniformity, raised by the Court in Wilson, is about transactional efficiency (i.e., to increase the efficiency of federal courts in determining the most appropriate limitations period to apply in individual Rule 10b-5 cases). This would create a rule requiring a court borrow only one of its state's statutes to imply a limitations period. The litigation costs of searching for the most appropriate limitations period and analyzing the effect of each such period would be reduced or eliminated.

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151. See, e.g., Ceres Partners v. GEL Assocs., 918 F.2d 349, 354-55 (2d Cir. 1990). The Ceres Partners court stressed "securities regulation is national in scope and in need of uniform rules," and then provided a useful survey of the varying treatment given to the issue of the most appropriate limitations period in Rule 10b-5 litigation. Id. The court noted that as a result of the variety of borrowed state periods, a plaintiff in one suit may be time barred, but an identical suit in another jurisdiction would not be time barred. Id.

152. See, e.g., In re Data Access Sys. Sec. Litig., 843 F.2d. at 1549. The court in In re Data Access Systems argued that the need for uniform federal remedies in securities cases required courts to look to some federal statute of limitations whenever a Rule 10b-5 case is litigated. Id. The court expressed the concern that resort to state statutory or common law norms for characterizing the federal cause of action under Rule 10b-5 would hopelessly complicate the process of administering the policies of the federal securities laws. Id.

153. The courts applying a uniform federal limitations period have stressed the importance of uniformity of a federal time bar, but they have not articulated the same reasons.


155. See supra note 76 and accompanying text.


157. This is essentially what the Court in Wilson v. Garcia did when it decided the issue of multiple applicable state limitations periods. See generally Owens v. Okure, 488 U.S. 235 (1989).
The substance of the lower court’s “uniformity” argument, however, really goes to the question of whether state limitations periods should ever be borrowed to imply a federal limitations period. Any time a court resorts, as a matter of federal policy, to an appropriate state limitations period, there exists the possibility federal courts may have to consider and apply fifty limitations periods. In other words, the argument for national uniformity proves too much: a uniform national period must always be located, and it is never appropriate to borrow a state limitations period. This conclusion is contradicted by Wilson v. Garcia.

4. The Process of Claim Characterization and Analogy

The process of claim characterization and analogy requires that courts attempt to determine the characteristics of a federal claim and, then, determine if the federal claim is closely similar to, or dissimilar from, a state claim. The process of characterization and analogy permits the courts to treat like things alike and gives some assurance that a common limitations period will be applied to claims that have similar characteristics.

In the context of claims brought under Rule 10b-5, the courts taking a traditional approach to the implication process characterized the plaintiff's claims in accordance with state common law actions for fraud, misrepresentation, or deceit. Other courts characterized the Rule 10b-5 claim as similar to actions recognized under state blue sky laws. The fit between the plaintiff's federal claim and the analogous state claim was not always perfect, and courts were required to determine the most analogous state claim.

Recent cases holding that a uniform federal limitations period is the most appropriate analogue have performed almost no characterization of the

158. In UAW v. Hoosier Cardinal Corp., Justice White, in a dissenting opinion with Justices Douglas and Brennan, made the same arguments asserted by the lower federal courts concerning the goal of uniformity in selecting a uniform federal time bar. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 710-13 (1965). Justice White asserted that congressional silence regarding time limits did not mean Congress intended to apply diverse state laws. Id. at 710. He argued "there is no sense or justice in referring to 50 or more different statutes of limitations," depending on the state in which suit may be brought. Id. at 712. He also noted the complex administrative difficulties facing lower courts in determining which state's period of limitations to apply. Id. at 712-13.

159. It has been persuasively argued that the lack of uniformity is alone an insufficient justification for refusal to borrow a state period of limitations.

Federalism does not preclude a federal court from applying the state statute of limitations]. . . . Neither does the interest in uniformity preclude absorption of state statutes of limitations. Although the time period for the same federal claim will inevitably vary among the states, mere disharmony does not justify mandatory judicial creation of uniform federal limitations periods. Nor does this interstate variation alone conflict with federal interests; only a conflict of state law with basic federal policies would justify such mandatory judicial intervention.

Special Project, supra note 1, at 1029-30.
160. See supra notes 98-103 and accompanying text.
plaintiff's claims to determine if the state analogue (e.g., common law fraud or blue sky provision) is the most appropriate. Rather, those cases have reasoned that a uniform federal rule is the appropriate outcome of the implication process and that the only important issue concerns locating the most appropriate federal limitations period. The process of characterization and analogy fashioned by the Supreme Court, however, is premised on an evaluation of state analogues prior to an evaluation of federal analogues and on the policy that federal time bars will be consulted only when the state statutory candidates conflict with or thwart the federal interests.

For purposes of analysis, the characterization and analogy process in Rule 10b-5 cases should be guided by the Supreme Court's decision in Wilson v. Garcia rather than Agency Holding Co. In Wilson, the Court analyzed the appropriate limitations period for section 1983, the federal anti-discrimination law. The statute was intended to reach conduct that usually occurred at the state or local level, and the federal statute had elements closely similar to elements in state law claims. The Court held the similarity between section 1983 claims and state tort claims required that section 1983 claims be characterized as, and analogized to, tort claims.

A Rule 10b-5 action often addresses conduct occurring at the state or local level and contains elements similar to state fraud claims and identical to many state blue sky statutes. Moreover, the relationship between elements of the federal cause of action (e.g., fraud, misrepresentation, deceit, or manipulation) and claims at state law are very close. Indeed, the state law claims and causes of action have often served to define the meaning of Rule 10b-5 claims.

The federal racketeering statute in Agency Holding Corp. was quite different than the statutory provision of concern in Wilson. Congress expressly patterned the racketeering private right of action after section 4 of the Clayton Act. The language used in the RICO provision was very similar to, and often identical to, that of the Clayton Act. Moreover, the legislative his-

163. It has been argued that violations of Rule 10b-5 often involve interstate transactions and the reach of the federal securities laws is nationwide. That is certainly true, although a great deal of Rule 10b-5 litigation involves localized fraudulent activity or, as it is sometimes referred to, "garden variety fraud." Moreover, the fact that some conduct reached by Rule 10b-5 occurs in interstate commerce proves nothing; much of the discrimination reached by section 1983 is multistate in nature and scope.
164. The close analogies between state claims for fraud, deceit, and manipulation and the conduct challenged in Rule 10b-5 cases are unmistakable. See supra note 141; see also supra note 118 and accompanying text.
165. Section 4 of the Clayton Act provides a private right of action for "[a]ny person who
tory of the RICO right of action demonstrates that it was expressly patterned after section 4 of the Clayton Act.\footnote{166}

Rule 10b-5 has no such strikingly similar counterpart. Rule 10b-5 was patterned after section 17(a) of the 1933 Securities Act, a statutory provision that has recently been found by some courts to lack a private right of action.\footnote{167} Although there is no express statute of limitations for claims under section 17(a), the courts have uniformly applied the most analogous state limitations period in the forum state.\footnote{168} The decisional law of the most analogous federal statutory provision also favors the adoption of the state borrowing doctrine.

V. Conclusion

The Supreme Court's recent implication analysis articulates a "framework of general legal principles" that are intended to be applied when Congress has failed to provide an express statute of limitations. The analysis requires a consideration of those principles in the context of a process that presumes \textit{a priori} the suitability of state law as the most appropriate source for borrowing a repose period. The principles and process are designed to determine the most apt limitations period.

The characterization and analogy process requires a conclusion on whether Rule 10b-5 is "closer" to state common law, blue sky claims, or federal securities claims. The state common law fraud claims are closer to Rule 10b-5 claims because state fraud concepts were used to create section 10(b) and Rule 10b-5. Similarly, the state claims have been used to inform decisions about the meaning of Rule 10b-5 claims. The state blue sky statutes are frequently patterned after section 10(b) and Rule 10b-5. The process concludes that Rule 10b-5 claims should be analogized to state fraud or blue sky statutes because the states claims are close analogues to Rule 10b-

shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit including reasonable attorney's fee." 15 U.S.C. § 15(a) (1988). Under RICO, a private right of action is provided to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (1988).


167. T. HAZEN, supra note 1, at 772 n.10 (collecting cases in which courts have found an implied right of action under section 17(a)). Professor Hazen also points out the current trend among the courts is to refuse to imply a private right of action under section 17(a). \textit{Id.} at 772 n.11 (collecting cases).

168. \textit{See}, e.g., Ohio v. Peterson, Lowry, Rall, Barber & Ross, 651 F.2d 687 (10th Cir.),\textit{ cert. denied} 454 U.S. 895 (1981); \textit{see generally}, T. HAZEN, supra note 1, at 776.
5. Finally, the courts should apply the presumption that state law should be borrowed because there is no compelling reason to reject application of state law. Therefore, the courts should apply the statute of limitations applicable to those state causes of action in federal Rule 10b-5 cases.

The courts’ implication analysis, in the context of Rule 10b-5 cases, is conflicting and needs further resolution by the Supreme Court. Some cases appear to apply an earlier form of implication analysis and proceed from the assumption that state law must be found to supply a limitations period. More recent cases, decided after the development of the more comprehensive analysis, have failed to properly consider the importance of state law in the modern implication analysis.

A proper application of the Court’s implication analysis concludes that courts should borrow state limitations periods for common law fraud and blue sky law violations to supply a limitations period. Courts should presumptively apply state law unless it conflicts with the policies of Rule 10b-5 or is clearly inadequate to perform the objectives of the Rule.