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WHAT STATUTE OF LIMITATIONS SHOULD APPLY TO THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT?

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INTRODUCTION

The Worker Adjustment and Retraining Notification Act of 1988 ("WARN") requires an employer planning a plant closing or mass layoff to give the employees' union (or each affected employee individually if no union exists) and the state dislocated worker unit at least sixty calendar days notice of such action. In enacting this statute, Congress intended to buffer the economic, emotional, and physical stress that workers experience after unexpectedly losing their jobs. WARN attempts to address these problems by providing a short period of transition so that the affected employees can adjust to the impending unemployment, seek new employment, and, if necessary, learn a new skill. To enforce this obligation, Congress created a
private right of action allowing WARN victims to recover back pay and benefits for each day they are deprived of notice, up to a maximum of sixty days. 10 These victims may commence WARN suits in federal courts in any district where the alleged violation occurred or where the employer transacts business. 11 Unfortunately, Congress failed to supply this right with a statute of limitations. 12

In cases where Congress neglected to prescribe a statute of limitations for a statutory right, federal courts generally borrow the period from state law. 13 The Supreme Court, however, has recognized an exception to this general rule. 14 Courts may borrow a limitations period from federal law 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." 15 Four Courts of Appeals have addressed this issue concerning WARN claims. The Second and Third Circuits concluded in favor of state-borrowing, 16 whereas the Fifth and Sixth Circuits applied the National Labor Relations Act's ("NLRA") 17 six-month statute of lim-

11. Id. § 2104(a)(5).

Statutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.

15. Id. at 172.
The Supreme Court has recently granted certiorari to resolve this current conflict among the circuits. This Note argues that the Fifth and Sixth Circuits have taken the correct position. Applying state limitations periods to WARN actions can lead to undesirable results, as illustrated by the following hypothetical.

Graft, Inc. is a retailer of auto supplies that operates numerous stores nationwide, maintains corporate headquarters in State X, and employs over one thousand workers. Due to severe financial difficulties in the past three years, Graft's Board of Directors has decided to down-size operations by closing its Central City store, which is located in State A and has sixty employees. Unaware of WARN's requirements, Graft's management gives notice of the store's closing only one week before the complete shutdown, thus violating WARN's provisions. Pursuant to WARN, Graft is liable to each affected worker for back pay and benefits for each day of the violation, up to a maximum of sixty days.

Four years after the layoff, two former employees of the Central City store, Louis and Michael, sue Graft. Louis lives in State A and Michael lives in State B, and each files suit in the state in which he resides. Graft pleads the statute of limitations to both claims. States A and B are located within the Fifteenth Circuit.

Because courts typically look to state law when faced with a federal cause of action lacking a limitations period, the question then becomes which state's law should supply the limitations period. Unfortunately, federal courts do not address this issue uniformly. Some circuits automatically choose the forum state as the state from which to borrow. Others consult the conflict of laws principles of

18. 29 U.S.C. § 160(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board . . . . ").
20. Norwood, supra note 13, at 480.
21. Id.
22. Id.
23. Id. at 481; see, e.g., Shaw v. McCorckle, 537 F.2d 1289, 1292 n.5 (5th Cir. 1976) ("Congress has created many federal rights without prescribing a period for enforcement. In such cases the federal courts borrow the limitations period prescribed by the state where the court sits.").
24. Black's Law Dictionary defines "conflict of laws" as follows: Inconsistency or difference between the laws of different states or countries, arising in the case of persons who have acquired rights, incurred obligations, injuries or damages, or made contracts, within the territory of two or more jurisdictions. Hence, that branch of jurisprudence, arising from the diversity of the laws of different nations, states or jurisdictions, in their application to rights and remedies, which reconciles the inconsistency, or decides which law or system is to govern in the particular case, or settles the degree of force to be accorded to the law of another jurisdiction, (the acts or rights in question
the forum state to determine which state's law will provide the limitations period.\textsuperscript{25} Still others refer to federal common law to decide which state's law is applicable.\textsuperscript{26} Assume that courts within the Fifteenth Circuit (where Louis and Michael initiate their respective suits) follow the first approach listed above.

Consider Louis' case first. In determining whether his WARN claim is timely, the district court judge, utilizing the first approach, automatically borrows a limitation period from State A. Assume that the judge adopts a six-year statute of limitations and, thus, concludes that Louis' claim is timely. Now consider Michael's claim. In determining whether his suit is timely, the court, also utilizing the first approach, borrows a limitations period from State B. Assume the court here borrows a statute possessing only a two-year statute of limitations; Michael's claim, therefore, is barred by the statute of limitations.

This scenario illustrates one of several problems with borrowing a state statute of limitations for WARN claims. Two plaintiffs suing under the same federal statute have differing periods of time within which they must bring suit. One federal court permitted Louis to pursue his claim, while another federal court dismissed Michael's claim as time barred. This disparity is inconsistent with both perceived and actual fairness in the federal justice system. In enacting WARN, Congress intended to create the same substantive right for all qualified workers nationwide.\textsuperscript{27} Granting some workers a longer period of time to bring suit than others is simply incompatible with this intention.

Now assume that seven years after the layoff, Nancy, a former Graft employee who resides in State A, befriends a law student. After telling the student about her employment with Graft and the sudden layoff, the student informs Nancy that she may have rights against Graft. Nancy consults an attorney who confirms the student's statements. After researching the relevant case law, the attorney concludes that the suit would be untimely if commenced in States A or B. If he files the complaint in State C (also located within the Fifteenth Circuit),

\textsuperscript{25} Norwood, supra note 13, at 481; see, e.g., Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982) (stating that when federal jurisdiction is based on § 27 of the Securities Exchange Act, "[t]he federal court is required to follow the conflicts of laws rules prevailing in the forum state.").

\textsuperscript{26} Norwood, supra note 13, at 481; see, e.g., Edelmann v. Chase Manhattan Bank, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) ("When jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law.").

\textsuperscript{27} See McHugh, supra note 8, at 4-12 (discussing the national problem of worker displacement leading to the passage of WARN).
however, the federal court, automatically borrowing a limitations period from State C, would probably borrow a ten-year statute of limitations. Thus, the attorney files suit in State C, and the court permits Nancy to pursue her claim.

These actions by Nancy's attorney illustrate a second problem with borrowing limitation periods from state law. Because federal courts use different approaches to determine which state's law will provide the limitations period, some courts may borrow from one state while another court, under the same facts, may borrow from another jurisdiction. Moreover, because WARN permits claims to be brought in any district where the employer does business, a plaintiff will often have a choice of forums where he may commence suit. This generous forum provision, coupled with the different approaches federal courts utilize to determine the applicable state law, clearly creates the potential for a wily plaintiff to forum shop for the most favorable limitations period.

These hypotheticals also illustrate a third problem that occurs when statutes of limitations can be borrowed from various states for WARN claims. Employees such as Louis and Nancy, who were permitted to pursue their claims, may recover back pay and benefits many years after the alleged WARN violation occurred. This defeats the primary purpose of WARN, which is to provide short-term assistance so that workers can quickly adjust to an impending unemployment, seek new employment, and learn a new skill if needed. To fulfill this purpose, it is obvious that workers must be able to claim and receive assistance as quickly after discharge as possible. Permitting recovery many years after the violation occurred, thus, fails to accomplish this objective.

This Note addresses what statute of limitations should apply to WARN claims. Part I discusses how the federal government regulates, via WARN and the NLRA, an employer's decision to close a plant or to initiate large reductions in the workforce. Part II tracks the development of the state-borrowing doctrine from its roots in 1830 to the present. Part III examines the different analyses utilized by the federal circuits to supply a limitations period to WARN claims. As noted above, the Supreme Court will soon resolve this dispute. Part IV argues that federal courts should apply the NLRA's six-month statute of limitations to WARN causes of action and concludes that borrowing the NLRA's limitations period best effectuates Congress' intended purpose when it enacted WARN. This part also concludes

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29. "Forum shopping occurs when a litigant attempts to have his claim heard by a court in a jurisdiction where he would receive a favorable decision." Stephen W. Balkowski, Note, 16 Seton Hall L. Rev. 831, 848 (1986).
31. 29 U.S.C. § 160(b) (1988) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board . . . ").
that borrowing from the NLRA provides a uniform limitations period, thus reducing the potential of forum shopping and ensuring that all plaintiffs suing under WARN are treated equally.

I. FEDERAL REGULATION OF PLANT CLOSINGS AND MASS LAYOFFS

On August 4, 1988, after fifteen years of debate, Congress finally passed the Worker Adjustment and Retraining Notification Act. Congress enacted WARN to address the growing national problems associated with worker displacement resulting from plant closings and permanent mass layoffs. As one commentator succinctly stated:

In addition to severe emotional and physical problems, displaced workers often experienced lengthy unemployment and reduced income. Communities realized the effects of employer shutdowns through decreased revenues. States confronted with increased unemployment levels also assumed additional financial burdens. The situation was exacerbated because very few employers disclosed their decision to significantly reduce or cease operations in advance, thus leaving workers and communities without an opportunity to adjust and plan for the impending dislocation.

WARN attempts to address these problems by requiring an employer planning a plant closing or mass layoff to give the employees' union (or each affected employee individually if no union exists) and the state dislocated worker unit at least sixty calendar days notice of such action. This advance notice is intended to protect workers, their families, and communities by providing a period of transition to adjust to the prospective loss of employment. During this period, the worker has the opportunity to seek new employment opportunities and learn new skills required to compete in the job market. In addition, this period provides notice to state dislocated worker units so that they can promptly deliver relief assistance to dislocated workers.

Employers not providing the required advance notice are subject to federal suits in districts where either (1) the alleged violation occurred or (2) the employer transacts business. Affected employees, their

34. Id. (footnotes omitted).
37. Id.
38. Id.
union representatives, or units of local government may initiate such actions.\textsuperscript{40} Employers failing to comply with the Act's notice requirements are liable for back pay and benefits for each day the employee is deprived of notice as well as civil penalties of $500 per day to the local government.\textsuperscript{41}

\textsuperscript{40} 20 C.F.R. § 639.1(d) (1994).

\textsuperscript{41} 29 U.S.C. § 2104(a) (1988). WARN also provides seven exceptions that either shorten the 60-day notice period or eliminate the notice requirement altogether. McHugh, supra note 8, at 21. First, if an employer sells all or part of his business, the responsibility to give notice remains with the seller up to and including the date of the sale. 29 U.S.C. § 2101(b)(1) (1988). After the date of sale, however, the seller is no longer responsible; rather, the buyer must provide notice of any plant closing or mass layoff that takes place thereafter. \textit{Id.} Second, if the employer relocates or consolidates part or all of its business, an employee does not suffer an employment loss, provided that prior to the plant closing or mass layoff, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment. \textit{Id.} § 2101(b)(2). The statute does not require a reasonable commuting distance if the employee accepts the offer of transfer within 30 days of the offer or of the closing or layoff, whichever is later. \textit{Id.} If the transfer meets these requirements, then it is excluded from the calculation of employment losses utilized to determine whether a plant closing or mass layoff has occurred. \textit{Id.} Third, when the employer, at the time that notice would have been required, was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown, WARN allows an employer to shorten the 60-day notice period. \textit{Id.} § 2102(b)(1). The employer must have a good faith belief that giving the proper notice would have prevented the employer from obtaining the capital or business. \textit{Id.} Furthermore, a realistic opportunity to obtain the financing or business must exist. 20 C.F.R. § 639.9(a)(2) (1994). This exception is only available for plant closings, not mass layoffs. See 29 U.S.C. § 2102(b)(1) (1988). Fourth, if the plant closing or mass layoff is caused by business circumstances unforeseeable as of the time that notice would have been required, an employer may order a plant closing or mass layoff before the conclusion of the 60-day period. \textit{Id.} § 2102(b)(2)(A). An employer must exercise commercially reasonable business judgment that a similarly situated employer would use in predicting market demands. 20 C.F.R. § 639.9(b)(2) (1994). Employers, however, are not required to predict general economic trends. \textit{Id.} Fifth, the statute does not require notice for a plant closing or mass layoff resulting from a natural disaster, such as a flood, earthquake, or drought. 29 U.S.C. § 2102(b)(2)(B) (1988). Sixth, the Act exempts employers from the notice requirement if the plant closing or mass layoff results from a closing of a temporary facility or the completion of a particular undertaking. \textit{Id.} § 2103(1). This exemption, however, only applies if the affected employees were hired with the understanding that their employment was limited to the duration of the facility or undertaking. \textit{Id.} The employer bears the burden to show that the temporary nature of the facility or undertaking was clearly communicated to the affected employees. 20 C.F.R. § 639.5(c)(2) (1994). Seasonal but recurring employees are not entitled to notice, provided that they understood at the time they were hired that the work was temporary. \textit{Id.} § 639.5(c)(3). Permanent employees assigned to temporary facilities or projects are, however, entitled to notice upon a plant closing or mass layoff. \textit{Id.} Seventh, the Act also exempts the employer from the notice requirement if the plant closing or mass layoff results directly from a strike or lockout not intended to evade the Act's requirements. 29 U.S.C. § 2103(2) (1988). A lockout occurs when, "for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work." 20 C.F.R. § 639.5(d) (1994). Nonstriking employees who experience an employment loss due to the strike are still entitled to notice. \textit{Id.} However, when a strike affects nonstriking employees, the required notice period may
WARN, however, is not the only federal legislation governing an employer's decision to initiate reductions in the workforce. The National Labor Relations Act\(^{42}\) regulated these decisions long before WARN ever existed,\(^{43}\) and today, both the NLRA and WARN oversee these decisions.\(^{44}\)

Congress passed the NLRA to minimize the "[i]ndustrial strife [between management and labor] which interferes with the normal flow of [interstate] commerce."\(^{45}\) To promote this free flow of commerce, Congress sought "to . . . proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare."\(^{46}\) Furthermore, Congress established collective bargaining as the method of resolving labor-management disputes.\(^{47}\) Although management and labor may bargain about any legal matter, the NLRA specifically mandates that management and labor "meet at reasonable times and [bargain] in good faith [regarding] wages, hours, and other terms and conditions of employment."\(^{48}\) An employer's decision to close or relocate a plant may constitute a "term[] [or] condition[] of employment" and thus qualify as a mandatory subject of good faith bargaining.\(^{49}\) In addition, the employer must bargain in good faith with the union over the effects of the decision to close a

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43. For a thorough analysis of how the NLRA's provisions apply to plant closures and mass layoffs, see Peter F. Munger et al., Plant Closures and Relocations Under the National Labor Relations Act, 5 Ga. St. U. L. Rev. 77 (1988).

44. See 20 C.F.R. § 639.1(g) (1994) ("The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies.").


46. Id.

47. Id.; Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."); see Munger et al., supra note 43, at 78 ("[O]ne of the NLRA's bedrock principles is that labor peace is advanced by good faith bargaining between management and labor.").

48. 29 U.S.C. § 158(d) (1988). Congress created the National Labor Relations Board ("NLRB") to enforce the NLRA's requirements. Id. § 153. The NLRB has the power to condemn labor or management actions as unfair labor practices that attempt to circumvent the collective-bargaining process. Id. § 160.

49. The NLRB has established a three-prong test for determining whether a decision to relocate or to close a plant is a mandatory subject of good faith bargaining. United Food & Commercial Workers, Local No. 150-A v. NLRB, 1 F.3d 24, 30 (D.C. Cir. 1993), cert. granted, 62 U.S.L.W. 3653 (U.S. Apr. 4, 1994) (No. 93-1103). The first prong exempts decisions that lie "at the core of entrepreneurial control." Id. (citing
plant. To comply with these requirements of good faith bargaining, the employer must provide the union with prior notification of the intended closure so that the union has a "significant opportunity to bargain about these matters of job security . . . mandated by . . . [the NLRA]."

Even though WARN and the NLRA both regulate employer decisions to initiate reductions in the workforce, the two statutes are not identical. Viewed from a narrow perspective, the two legislations share different purposes. The NLRA focuses on the continuing employer-employee relationship, seeking to protect the rights of workers to unionize and bargain collectively with their employers and to provide for the rapid resolution of labor disputes. In fact, the Supreme Court has stated that the NLRA's six-month statute of limitations represented Congress' attempt to balance the national interest in stable bargaining relationships with the employee's interest in setting aside an unfair settlement under the collective bargaining system. WARN's purpose, on the other hand, is to furnish short-term assistance to displaced workers after the employer-employee relationship has ended.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)). Specifically, employers are not required to bargain over decisions involving (1) "a basic change in the nature of the employer's operation," (2) "a change in the scope and direction of the enterprise," (3) situations in which "the work performed at the new location varies significantly from the work performed at the former plant," or (4) situations in which "the work performed at the former plant is to be discontinued entirely and not moved to the new location." Id. (quoting Dubuque Packing Co., 303 N.L.R.B. 386, 391 (1991)). The second prong excuses employers from bargaining over relocation decisions that were motivated by labor costs. Id. (citing Dubuque Packing, 303 N.L.R.B. at 391). The third prong relieves employers from bargaining when the union could not have offered concessions that could have changed the employer's plan to close or relocate its plant. Id. (citing Dubuque Packing, 303 N.L.R.B. at 391).


53. Id. § 157; Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the [NLRA] is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.").


56. See 29 U.S.C. § 2104(a) (1988) (stating that cause of action accrues after an employer orders a plant closing without giving proper notice; thus, WARN provides relief to workers who have already been terminated).
WARN and the NLRA also differ in how claims under each statute are prosecuted. Whereas WARN creates a private right of action allowing alleged victims to recover back pay and benefits, the NLRA possesses an administrative structure to help workers protect their statutory rights. Under the NLRA, an aggrieved worker first must file a claim with the National Labor Relations Board ("NLRB"), and the Board prosecutes the claim, if it chooses to do so. One might reasonably infer that this administrative structure further justifies a relatively short limitations period for actions brought under the NLRA.

Although possessing somewhat different purposes and structures, significant interrelationships and similarities exist between WARN and the NLRA. The Department of Labor's regulations implementing WARN illustrate two of these interrelationships. The regulations state:

The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

Thus, these regulations stipulate that the WARN notice shall automatically increase if the collective bargaining agreement so provides. The regulations also permit WARN to clarify the "terms and conditions" of the agreement. In fact, the Department of Labor referred frequently to the NLRA when issuing WARN's regulations, and because of this extensive borrowing, courts often refer to NLRA case law when interpreting WARN. Indeed, one may even view WARN as a clarification of the NLRA. As noted above, the NLRA requires

58. See id. § 153 (creating the NLRB to enforce the NLRA's requirements).
59. Id. § 160.
61. 20 C.F.R. § 639.1(g) (1994).
63. See 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to §§ 9(a) and 8(f) of the NLRA); id. § 639.3(a)(2) (defining "independent contractors and subsidiaries" by reference to "existing legal rules," that is, case law interpreting the NLRA); see also 54 Fed. Reg. 16,045 (1989) (explicitly looking to NLRA for guidance in promulgating a definition of "independent contractors and subsidiaries" pursuant to 20 C.F.R. § 639.3(a)(2)); 54 Fed. Reg. 16,044-45 (1989) (discussing promulgation of "reasonable expectation of recall" language in 20 C.F.R. § 639.3(a)(1) by referring to NLRB case law).
64. Halkias, 31 F.3d at 232; see, e.g., Damron v. Rob Fork Mining Corp., 739 F. Supp. 341, 344 (E.D. Ky. 1990) (determining whether an employee would "reasonably experience an employment loss" by referring to the NLRB's use of the "reasonable expectation of recall" test), aff'd, 945 F.2d 121 (6th Cir. 1991).
65. See Halkias, 31 F.3d at 232.
an employer to bargain in good faith with the union concerning the effects of a decision to close a plant.\textsuperscript{66} To satisfy this duty, employers must notify the union prior to the closing so that the union has a meaningful opportunity to bargain.\textsuperscript{67} WARN essentially sets a specific time period for notice and expands this protection to cover all employees regardless of union status.\textsuperscript{68} Finally, viewed from a broader perspective, both statutes essentially seek to protect workers by restricting management decisions, and the NLRA's objective of proscribing management activities "[that] affect commerce and are \textit{imimical to the general welfare}\textsuperscript{69} is entirely consistent with WARN's goal of protecting both workers and their communities.\textsuperscript{70}

While WARN provides for a private federal cause of action as the enforcement mechanism against employers violating its terms,\textsuperscript{71} WARN, unlike the NLRA, does not contain a statute of limitations.\textsuperscript{72} When a federal claim lacks a statute of limitations, federal courts must determine within what period of time a plaintiff must sue.\textsuperscript{73} The following section addresses how federal courts traditionally have made this determination—by borrowing a limitations period from state law.

\textsuperscript{66} First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (stating that § 8(a)(5) of the NLRA requires that "bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time").

\textsuperscript{67} Munger et al., \textit{supra} note 43, at 115; Yost, \textit{supra} note 33, at 684.

\textsuperscript{68} Halkias, 31 F.3d at 232.


\textsuperscript{70} United Mine Workers v. Peabody Coal Co., 38 F.3d 850, 856 (6th Cir. 1994).


\textsuperscript{72} United Paperworkers Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51, 52 (2d Cir. 1993).

\textsuperscript{73} Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805) (noting that to impose no time limitation on a federal cause of action would be "utterly repugnant to the genius of our laws").


II. The Evolution of the State-Borrowing Doctrine

When Congress explicitly creates a new cause of action but fails to include an applicable statute of limitations, courts generally borrow a limitations period from state law. Federal courts must then determine which state's law supplies the limitations period. Federal circuit courts have used three different approaches to make this determination. Under one approach, courts automatically borrow a limitations period from the state where the court sits. Under the second approach, federal courts refer to the conflict of laws rules of the forum state to determine which state's law would have governed had federal subject matter jurisdiction been based upon diversity of citizenship rather than federal question. Under the third approach, conflict of laws principles in federal question cases are a matter of federal common law. Some courts that follow this third approach consult the Restatement (Second) of Conflict of Laws for guidance in selecting the state whose law should apply; other courts have held that under "federal choice of law [principles], ... the forum state's statute of limitations ... controls, unless a party can demonstrate that the adoption of the forum state's limitation period will substantially undermine federal ... policy." Under each approach, the court still borrows a statute of limitations from state law. Which state's statute of limitations a court applies, however, depends in part on where the plaintiff commences suit. As a result, federal courts sitting in different states might conceivably apply differing limitations periods for the same federal cause of action simply because an action is brought in one state instead of another.

75. Norwood, supra note 13, at 480.
76. Id.
77. Id. at 481; see, e.g., Shaw v. McCorkle, 537 F.2d 1289, 1292 n.5 (5th Cir. 1976) ("Congress has created many federal rights without prescribing a period for enforcement. In such cases the federal courts borrow the limitations period prescribed by the state where the court sits.").
78. Norwood, supra note 13, at 481; see, e.g., Loveridge v. Dregoux, 678 F.2d 870, 877 (10th Cir. 1982) (stating that when federal jurisdiction is based on § 27 of the Securities Exchange Act, "[t]he federal court is required to follow the conflicts of laws rules prevailing in the forum state").
79. Norwood, supra note 13, at 481; see, e.g., Edelmann v. Chase Manhattan Bank, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) ("When jurisdiction is not based on diversity of citizenship, choice of law questions are appropriately resolved as matters of federal common law.").
80. Norwood, supra note 13, at 481; see, e.g., Edelmann, 861 F.2d at 1295 (looking at several Restatement factors in choosing the applicable rule of law).
82. Norwood, supra note 13, at 482.
A. *Traditional Rationale for the State-Borrowing Doctrine*

Traditionally, the Supreme Court cited the Rules of Decision Act\(^3\) as the source of the obligation to utilize a state statute of limitations for causes of action arising under federal law. In *McCluny v. Sil-\(^4\) liman*,\(^5\) for example, the Court held that the Rules of Decision Act mandated application of state statutes of limitations whenever Congress failed to provide one.\(^6\) In that case, the plaintiff sought to buy land under a federal statute providing for public sales of land owned by the United States.\(^7\) When the defendant, the United States land office register in Ohio, refused to enter the application in his office’s books, the plaintiff sued, seeking a common-law writ of trespass on the case.\(^8\)

In reaching its decision, the Supreme Court never questioned the state’s ability to enact statutes of limitations for federal rights, absent some act by Congress stating otherwise.\(^9\) It simply proclaimed that "[u]nder th[e] [Rules of Decisions Act], the acts of limitations of the several states, where no special provision ha[d] been made by [C]ongress, form[ed] a rule of decision in the courts of the United States."\(^10\)

Although the federal statute in *McCluny* was clearly the source of the plaintiff’s claim, that statute did not expressly create the cause of action.\(^11\) What if, however, the federal statute explicitly created the cause of action? Did the Rules of Decision Act mandate adopting state statutes of limitations in this scenario as well?

\(^3\) 28 U.S.C. § 1652 (1988). The Rules of Decision Act provides: “The 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.*

\(^4\) 28 U.S. (3 Pet.) 270 (1830).

\(^5\) *See id.* at 277-78.

\(^6\) *Id.* at 275-76.

\(^7\) *See id.* at 278. The defendant prevailed at the trial level on the ground that the plaintiff did not file suit until after the state’s statute of limitations had run. On appeal, the plaintiff argued that a state’s statute of limitations is not applicable in a suit brought in federal court against a federal officer for a violation of a right granted by Congress. The plaintiff based this argument on the premise that the state legislature, in enacting its statute of limitations, did not intend for it to apply to federally created rights. *Id.* at 276-77.

\(^8\) *Id.*

\(^9\) In determining which state’s law might apply, the Court only considered a limitations period from Ohio, the forum state. *Id.* at 276-77. In so doing, the Court stated that the applicable “statute of limitations is the law of the forum [state].” *Id.* at 277.

In *Campbell v. City of Haverhill*, the Supreme Court held that a state statute of limitations applied in a suit for patent infringement even though Congress had given federal courts exclusive jurisdiction over such cases. As in *McCluny*, the Court reasoned that the Rules of Decision Act mandated use of state limitations periods when Congress failed to provide one. The Court also noted that the fact that the patent statute created exclusive federal jurisdiction was not significant. The Rules of Decision Act did not suggest a distinction between cases where the jurisdiction was concurrent with state courts and those where federal courts had exclusive jurisdiction.

**B. Modern Rationale for the State-Borrowing Doctrine**

The Rules of Decision Act authorizes application of state law only when federal law does not "otherwise require or provide." Despite the early precedents of *McCluny* and *Campbell*, later Supreme Court decisions have recognized that choosing a limitations period (even if the court borrows a statute of limitations from state law) is a question of federal law. Because federal law is applicable, the Rules of Decision Act cannot mandate applying state law when supplying a federal statute with a limitations period, and, as a result, cannot serve as the rationale for the state-borrowing doctrine.

Although the Supreme Court did not explicitly reject the Rules of Decision Act as the source of the state-borrowing doctrine until 1983, the Court began justifying the doctrine with a different rationale many years earlier. In *Holmberg v. Armbrecht*, the Court contin-

91. 155 U.S. 610 (1895). In *Campbell*, the plaintiff sued the City of Haverhill for patent infringement almost seven years after the last day the patent was vested in him. The defendant pleaded the statute of limitations, arguing that Massachusetts’ six-year limitations period was applicable. The plaintiff countered that the six-year state statute of limitations was not applicable to his patent claim. He contended that the "[s]tates, having no power to create the right or enforce the remedy [because of exclusive jurisdiction], ha[d] no power to limit such remedy or to legislate in any manner with respect to the subject-matter." *Id.* at 613-15.

92. *Id.* at 620-21.


94. *Campbell*, 155 U.S. at 616. The Court did not undertake an analysis to determine which state’s law applied. *See id.* at 613-14. It only considered Massachusetts law, presumably because the plaintiff brought the action in Massachusetts, the defendant was a city in Massachusetts, and the defendant only argued for a limitations period from this state.

95. *Id.*


98. *See id.*

99. 327 U.S. 392 (1946). In *Holmberg*, the creditors of a failed bank sued the bank’s shareholders, seeking to enforce a liability imposed upon the shareholders by a federal statute. This statute lacked a limitations period. The plaintiffs filed suit in 1932, but the suit failed on procedural grounds; it was dismissed without prejudice. The creditors brought suit against certain shareholders again in 1943. The defendant’s
ued to adhere to the general rule that when Congress neglected to prescribe a statute of limitations for a cause of action, federal courts shall apply state limitation periods. The Court, however, did not cite the Rules of Decision Act as the source of this proposition. Instead, the Court stated that "federal courts, sitting as national courts throughout the country, [must] apply their own principles in enforcing a[]... right created by Congress." Therefore, the Court suggested that supplying a limitations period for a federally created right is a question of federal law, and, thus, the Rules of Decisions Act is not controlling. In rationalizing state borrowing, the Court interpreted congressional silence to mean that "it is federal policy to adopt the [state] law of limitation." In *UAW v. Hoosier Cardinal Corp.*, the Supreme Court adopted an approach similar to the one used in *Holmberg*. In *Hoosier Cardinal*, employees filed suit in federal court under section 301 of the Labor Management Relations Act. Section 301 confers jurisdiction upon the federal district courts over suits upon collective bargaining agreements, but it does not provide a statute of limitations. The company moved to dismiss, arguing that Indiana's six-year limitation period barred the suit. The employees argued, predictably, that a state statute of limitations could not bar the action. They urged the court to adopt a uniform limitation period to fill the statutory gap.

pleaded the statute of limitations, invoking New York's 10-year limitations period. The district court ruled in favor of the plaintiffs. The Court of Appeals reversed, however, holding that the cause of action was time-barred. *Id.* at 393-95.

100. *Id.* at 395.
101. *See id.*
102. *Id.*
103. *Id.*
104. 383 U.S. 696 (1966). In *Hoosier Cardinal*, a union and the company had a collective bargaining agreement. A provision in that agreement provided for payment of accumulated vacation pay upon an employee's termination. In 1957, the company, while the agreement was still in effect, terminated employees covered by the agreement and refused to pay them for unused vacation time. In 1958, the aggrieved employees sued the company in state court. The state court dismissed the suit because it found the action impermissible as a matter of state law. A second suit was brought in state court, but the court dismissed on the same grounds. The employees then filed suit in federal court. *Id.* at 698-99.

105. *Id.*
106. *Id.* at 697. Section 301 of the Labor Management Relations Act provides:
   (a) [. . .] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined [by the Labor Management Relations Act], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties . . . .

108. *Id.* at 699.
109. *Id.* at 701.
110. *Id.*
The Court stated that supplying a statute of limitations period is a question of federal law:111 "[T]he question of [the suit’s] timeliness is squarely presented. It is clearly a federal question, for in [section] 301 suits the applicable law is ‘federal law, which the courts must fashion from the policy of our national labor laws.’ ”112 Thus, the Court once again did not utilize the Rules of Decisions Act as the source of this judicial power.113 Nevertheless, it still declined to explicitly reject this proposition.114

In Hoosier Cardinal, the Court adhered to the general rule it first adopted in McCluny: when a federally created action lacks a limitations period, the appropriate state statute of limitations should determine the timeliness of the suit.115 The Court stated:

[I]t cannot be fairly inferred that when Congress left [section] 301 without a uniform time limitation, it did so in the expectation that the courts would invent one. . . . Since [1830], state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question. Yet when Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations.116

Thus, the Court once again reasoned that congressional silence meant that Congress implicitly approved of borrowing state statutes of limitations.117

In DelCostello v. International Brotherhood of Teamsters,118 the Supreme Court finally conceded that the Rules of Decision Act no longer provides the source of the general rule of state borrowing.119 The Court reaffirmed the proposition that supplying a limitations period for a federally created right is a question of federal law.120 It stated that "we [apply state limitations to many federal causes of action] as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act . . . requires it."121 The Court rationalized the state-borrowing doctrine in the following manner:

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111. Id.
112. Id. (quoting Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957)).
113. See id.
114. See id.
115. Id. at 704-05. The Court did not engage in a choice of law analysis to determine which state’s law applied. Id. at 705 n.8. It only considered statutes of limitations from Indiana law because Indiana was the forum state, all operative events occurred there, and neither party argued that a limitations period of another state was applicable. Id.
116. Id. at 703-04 (citations and footnote omitted).
117. Id. at 704.
119. Id. at 159 n.13.
120. Id. at 159 n.12.
121. Id. at 160 n.13.
In such cases [where Congress has not given any express consideration to the problem of selecting a limitation period], the general preference for borrowing state limitations periods . . . [is] a sort of fallback rule of thumb . . .; 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.\textsuperscript{122}

Thus, as it did in \textit{Holmberg} and \textit{Hoosier Cardinal}, the Court justified the doctrine by interpreting congressional silence as implicit approval of federal courts continuing to adhere to their state-borrowing practice.\textsuperscript{123}

C. The Exception to the General Rule of State-Borrowing

Although the Supreme Court in \textit{Hoosier Cardinal} continued the practice of applying a state statute of limitations to a federal cause of action otherwise lacking one, the Court hinted that an exception may exist to this general rule. The Court stated that the federal policy at issue in that case was the "formation of the collective agreement and the private settlement of disputes under it."\textsuperscript{124} It then noted that the statute of limitations was implicated only when these bargaining processes had broken down already.\textsuperscript{125} Thus, because statutes of limitations did not affect these processes, the Court concluded that a uniform limitations period was unnecessary.\textsuperscript{126} This discussion suggests, however, that a uniform statute of limitations would be necessary when federal policies are affected. If uniformity were the objective, borrowing different limitations periods from each state obviously would not achieve this end.

The Supreme Court did, in fact, create an exception to the general rule in \textit{DelCostello v. International Brotherhood of Teamsters}.\textsuperscript{127} The Court recognized that state law is not the sole source for borrowing

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 158 n.12.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{UAW v. Hoosier Cardinal Corp.}, 383 U.S. 696, 702 (1966).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 702-03.
\item \textsuperscript{127} 462 U.S. 151 (1983). In \textit{DelCostello}, the plaintiff, a unionized employee of a tractor-trailer company, was allegedly discharged for refusing to drive what he thought was an unsafe tractor-trailer. The date of discharge was June 27, 1977. Pursuant to the collective bargaining agreement, the union instituted a formal grievance. The grievance ultimately failed. Subsequently, the plaintiff, on March 16, 1978, instituted an action in federal court against the employer and the union. Against the employer, the plaintiff, pursuant to § 301 of the NLRA, alleged wrongful discharge pursuant to the collective bargaining agreement. Against the union, the plaintiff asserted violations of the union's duty of fair representation, alleging "discriminatory, arbitrary and perfunctory" representation in the formal grievance procedure that resulted in the grievance's failure. The employer and union pleaded the statute of limitations, asserting that Maryland's 30-day statute of limitations for vacating arbitration awards was applicable. \textit{Id.} at 155-56. The Court concluded that in appropriate circumstances, timeliness rules may be drawn from federal law because Congress would
\end{itemize}
limitations periods. In certain circumstances, courts may also borrow a statute of limitations from federal law.

The Court in *DelCostello* created two conditions precedent that must be present for a federal court to invoke an exception to the state-borrowing doctrine: "[First,] . . . a rule from elsewhere in federal law [must] clearly provide[ ] a closer analogy than available state statutes, and [second,] the federal policies at stake and the practicalities of litigation [must] make that rule a significantly more appropriate vehicle for interstitial lawmaking."128

In *DelCostello*, the employee-plaintiff brought an action under section 301 of the Labor Management Relations Act against an employer for wrongful termination and against the union for breaching its duty of fair representation.129 This action followed the union's unsuccessful attempt to vindicate the employee's grievance through formal grievance procedures established by the collective bargaining agreement.130 The Court first considered two state statutes of limitations, one for vacating arbitration awards and the other regarding legal malpractice.131

not choose "to adopt state [limitation] rules at odds with the purpose or operation of federal substantive law." Id. at 161.

In an accompanying case joined for consideration, the facts were substantially the same. Throughout 1975 and 1976, two unionized employees filed several grievances against their employers, alleging violations of the collective bargaining agreement that ultimately resulted in their layoffs or reassignments. The union unsuccessfully pursued the grievances pursuant to the procedure established in the collective bargaining agreement. It then invoked arbitration, but the arbitrator ruled in favor of the employer. On January 9, 1979, these employees filed suit against the employer and the union. The complaint against the employer alleged violations of the collective bargaining agreement. The complaint against the union alleged violations of the union's duty of fair representation. Both defendants argued that the suits were barred by New York's 90-day statute of limitations as applied to actions vacating arbitration awards. Id. at 156-57.

A union's duty of fair representation is implied under the NLRA. Id. at 164. The Court explained the duty's existence in the following manner:

"[I]t is the policy of the [NLRA] to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any . . . ." Id. at 164 n.14 (quoting Vaca v. Sipes, 386 U.S. 171, 177). An employee has the option to sue either the employer, the union, or both. Id. at 165. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union." Id. at 165 (quoting United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 66-67 (1981) (Stewart, J., concurring) (citation omitted)). Essentially, the employees' claim is a hybrid § 301/fair representation claim. Id. at 165.

129. Id. at 155-57, 164.
130. Id. at 155.
131. Id. at 165-68.
The Court concluded that the typically short state limitations periods for vacating arbitration awards frustrates a plaintiff’s ability to vindicate his rights against the employer and the union. The Court noted that the plaintiff’s suit consists of a combination of two causes of action—one against the employer for an alleged breach of the collective bargaining agreement and another against the union for breach of the union’s duty of fair representation. Although the plaintiff could sue the employer or the union independently, to recover against either defendant, the employee is required to prove that his discharge had violated the terms of the agreement and that the union had breached its duty of fair representation. Thus, before commencing his suit, the employee needs to evaluate the adequacy of the union’s representation within the limitations period. Because workers are generally unsophisticated in collective bargaining matters, the cause of action requires a statute of limitations longer than that for vacating arbitration awards.

In addition, the Court questioned the similarity between an action to vacate an arbitration award and the plaintiff’s claims against the union, calling the analogy “problematic at best.” An arbitration proceeding pits the employee against the employer only; it does not resolve any dispute between the employee and the union. The union merely acts as the employee’s representative at the proceeding.

The Court then compared the hybrid section 301/fair representation cause of action and an action based upon legal malpractice. The Court admitted that an attorney’s mishandling of an arbitration is

132. Maryland’s statute of limitations for an action to vacate arbitration awards is 30 days. Md. Code Ann., Cts. & Jud. Proc. § 3-224 (1989). New York’s limitations period for the same action is 90 days. N.Y. Civ. Prac. L. & R. 7511(a) (McKinney 1980). See also DelCostello, 462 U.S. at 166 n.15 (noting that the majority of states require a plaintiff to commence such an action within 90 days or three months).

133. DelCostello, 462 U.S. at 166. Quite logically, the Court did not determine which state’s arbitration law might apply. See id. at 165-67. Instead, it noted that the majority of states require plaintiffs to commence such suits within 90 days or three months. Id. at 166 n.15. Because of the brevity of these statutes of limitations, the Court ultimately concluded that borrowing from them is inappropriate. Id. at 166. Thus, undertaking a choice of law analysis to determine which state’s arbitration period might apply would have been futile.

134. Id. at 165.
135. Id.
136. Id.
137. Id. at 166.
138. Id.
139. Id. at 167.
140. See id.
141. Id.
142. Id. at 167-68. Understandably, the Court did not determine which state’s legal malpractice law might apply. Because the Court concluded that legal malpractice actions in general are inappropriate substitutes for hybrid § 301/fair representation claims, id. at 167-69, embarking on such an analysis would have been fruitless.
somewhat analogous to the union's mishandling the plaintiff's grievances. The Court, however, also noted a difference between the two causes of action. A party suing his attorney for the mishandling of an arbitration typically recovers his entire damages, but in a section 301/fair representation claim, the union may only be held liable for increases in the employee's damages caused by the union's actions.

Furthermore, the Court stated that application of a longer malpractice statute against unions would interfere with the important federal policy of facilitating the rapid resolution of labor disputes. The Court observed that the grievance procedure is an integral part of the collective bargaining process because it is a "'vehicle by which meaning and content are given to the collective bargaining agreement.'" This collective bargaining system "could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later."

After addressing both state law alternatives, the Court analyzed whether the NLRA's six-month statute of limitations provides an appropriate analogue from which to borrow. The Court observed that hybrid section 301/fair representation claims against the union and employer also implicate the policy considerations that Congress balanced when determining the length of a limitations period for claims arising under the NLRA. In selecting a six-month limitations period for the NLRA, "Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." The Court reasoned that the facts in DelCostello implicate these interests as well, because such claims represent a direct attack to the private dispute settlement mechanism established under the collective bargaining agreement. In addition, the Court noted that substantial

143. Id. at 167.
144. Id. at 167-68.
145. Id.
146. Id. at 168.
147. Id.
148. Id. at 168-69 (quoting United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 63 (citation omitted)).
149. Id. at 169 (quoting Mitchell, 451 U.S. at 64).
150. 29 U.S.C. § 160(b) (1988) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board . . . .").
151. DelCostello, 462 U.S. at 170-71.
152. Id. at 171 (citing Mitchell, 451 U.S. at 70).
153. See id. at 168-71.
overlap exists between the rights asserted in the two contexts;¹⁵⁴ that is, many duty-of-fair-representation claims and alleged violations by the employer of the collective bargaining agreement often amount to unfair labor practices as well.¹⁵⁵

Thus, the Court concluded that the NLRA's statute of limitations provides a closer analogy than does either state law alternative.¹⁵⁶ Furthermore, the federal policies at stake make the NLRA a "significantly more appropriate vehicle for interstitial lawmaking."¹⁵⁷ Consequently, with both conditions precedent present, the Court invoked the exception and borrowed the NLRA's six-month limitation period.¹⁵⁸

In Reed v. United Transportation Union,¹⁵⁹ the Supreme Court addressed the issue of whether to invoke the exception to the state-borrowing doctrine.¹⁶⁰ A close reading of the decision illustrates, however, that the Court modified the framework it used in DelCostello. In Reed, the plaintiff filed suit under section 101(a)(2) of Title I

¹⁵⁴. Id. at 170.
¹⁵⁵. Id.
¹⁵⁶. Id. at 169.
¹⁵⁷. Id. at 172.
¹⁵⁸. Id.
¹⁵⁹. 488 U.S. 319 (1989). Here, the plaintiff was the secretary and treasurer of the union-defendant. Id. at 321. He sought to receive reimbursement for carrying out union duties, but the union refused this request. Id. at 321-22. Plaintiff charged that he had been denied reimbursement because he had been critical of the union's president. Id. at 322. More than two years after the union denied this charge, the plaintiff filed suit under § 101(a)(2) of Title I of the Labor-Management Reporting and Disclosure Act. Id.

¹⁶⁰. Reed is the most recent Supreme Court decision case dealing directly with the state-borrowing doctrine as it applies to causes of action expressly created by Congress. In Lampf, Pleva, Lipkind et al. v. Gilbertson, 501 U.S. 350 (1991), a plurality of the Court gleaned a three-part hierarchical inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress failed to provide one. Id. at 356-58. "First, the court must determine whether a uniform statute of limitations is to be selected. Where . . . a single state limitations period may not be consistently applied within a jurisdiction, we have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source." Id. at 357. "Second, assuming a uniform limitations period is appropriate, the court must decide whether this period should be derived from a state or federal source." Id. In making this determination, the court should be aware of the potential to forum shop. Id. (citing Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 154 (1987)). Third, even if the limitation should be derived from a federal source, "a court [must] determine that an analogous federal source truly affords a 'closer fit' with the cause of action at issue than does any available state-law source. . . . [S]uch factors as commonality of purpose and similarity of elements will be relevant." Id. at 357-58.

Gilbertson, however, lacks precedential value for purposes of this Note. First, only a plurality of the Court joined this part of the decision. Id. at 351. Second, the plurality's statements were clearly dicta. In Gilbertson, the Court addressed the issue of supplying a limitations period to a cause of action implied under a statute that already contained an express cause of action. This Note, however, deals with how federal courts should supply a limitations period for a cause of action that Congress explicitly created and which is not implied as part of a larger statutory scheme.
of the Labor-Management Reporting and Disclosure Act\textsuperscript{161} ("LMRDA"), alleging that the union violated its members' right to free speech as to union matters.\textsuperscript{162} Congress failed to supply a statute of limitations for section 101 actions.\textsuperscript{163} The defendant argued that the NLRA's six-month statute of limitations should govern the claim.\textsuperscript{164}

The Court first compared section 101(a)(1) claims to claims brought under 42 U.S.C. § 1983, which lacks a statute of limitations period, but for which the Court has usually borrowed a limitations period from state personal injury statutes.\textsuperscript{165} The Court observed that Congress, in passing the LMRDA, intended to restate a First Amendment value, that is, protection of free speech and assembly rights.\textsuperscript{166} The Court then noted that section 101(a)(1) claims are similar to claims arising under 42 U.S.C. § 1983\textsuperscript{167} because § 1983 prohibits infringement of First Amendment rights by persons acting under color of law.\textsuperscript{168} This similarity, coupled with prior Supreme Court decisions finding that § 1983 is analogous to state personal injury statutes,\textsuperscript{169} led the Court

\textsuperscript{161} 29 U.S.C. § 411(a)(2) (1988). Section 101(a)(2) of the LMRDA provides: FREEDOM OF SPEECH AND ASSEMBLY. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of the meeting . . . .

\textit{Id.} This section is enforceable by private right of action. \textit{Id.} § 412.

\textsuperscript{162} Reed, 488 U.S. at 321.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 322.

\textsuperscript{165} Id. at 326-27.

\textsuperscript{166} Id. at 325. Congress "'adopted the freedom of speech and assembly provision in order to promote union democracy . . . [and] recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal.'" \textit{Id.} (quoting United Steelworkers v. Sadlowski, 457 U.S. 102, 112 (1982)).

\textsuperscript{167} Section 1983 states:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
\end{quote}


\textsuperscript{168} Reed, 488 U.S. at 326-27.

\textsuperscript{169} Id.; see also Owens v. Okure, 488 U.S. 235, 236 (1989) (holding that courts considering § 1983 claims should borrow the state's personal injury statute of limitations).
to conclude that section 101(a)(2) claims are also analogous to claims arising under state personal injury statutes.\textsuperscript{170}

The Court then compared LMRDA claims to claims arising under the NLRA, concluding that the claims are not sufficiently analogous because the interests implicated in each statute are different.\textsuperscript{171} It concluded that the NLRA seeks to accommodate the national interests in """"stable bargaining relationships and the finality of private settlements,""' while section 101(a)(2), on the other hand, seeks to accommodate the national interest in free speech.\textsuperscript{172} The Court also did not give any weight to the overlap in causes of action between the two statutes because the overlap """"would not be attributable to similar federal policies underlying each of these areas of protection.""'\textsuperscript{173}

Based upon this analysis, the Court concluded that state personal injury actions provide a closer analogy to the LMRDA than does the NLRA.\textsuperscript{174} Thus, the first condition precedent of DelCostello required for the exception to be invoked is absent because federal law does not provide a closer analogy than the state law alternative. Because both conditions precedent could not have been present, the Court should have automatically applied the general rule and borrowed a limitations period from state personal injury actions.

The Court, however, did not immediately conclude that it was bound to borrow a state statute of limitations.\textsuperscript{175} Instead, the Court stated:

\begin{quote}
In light of the analogy between [section] 101(a)(2) and personal injury actions, and of the lack of any conflict between the practicalities of [section] 101(a)(2) litigation and state personal injury limitations periods, we are bound to borrow state personal injury statutes absent some compelling demonstration that """"the federal policies at stake""' in [section] 101(a)(2) actions make a federal limitations period """"a significantly more appropriate vehicle for interstitial lawmaking.""'\textsuperscript{176}
\end{quote}

\textsuperscript{170} Reed, 488 U.S. at 327.
\textsuperscript{171} Id.


\textsuperscript{173} Id. at 333.

\textsuperscript{174} Id. at 333 n.7.

\textsuperscript{175} See id. at 331-32. The Court did not embark on an analysis to determine which state's personal injury action applied. It simply reversed the Fourth Circuit's decision applying the NLRA's six-month statute of limitations. Id. at 334. The District Court for the Western District of North Carolina had applied that state's three-year limitations period for personal injury actions. Id. at 322-33. Because the union-defendant was a local chapter of the United Transportation Union, see id. at 321-22, all relevant events presumably occurred in North Carolina, thus obviating the need to engage in a choice of law analysis.

\textsuperscript{176} Id. at 327.

\textsuperscript{177} Id. (quoting DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983)).
This statement suggests that the Court implicitly modified the DelCostello framework by elevating the significance of the second condition precedent while reducing the importance of the first condition. Even if state law provides a closer analogy than any federal law (which it did here), it appears that a federal court still has to invoke the exception and borrow from federal law if any of the "federal policies at stake" are substantial enough to compel it to do so.

The Court then proceeded to analyze whether the federal policies at stake in section 101(a)(2) actions make a federal limitations period a significantly more appropriate vehicle for interstitial lawmaking.\textsuperscript{178} The Court focused solely on whether state statutes of limitations significantly interfere with the federal policy of promoting rapid resolution of labor disputes.\textsuperscript{179} If adoption of a state limitations period were to frustrate this policy, then borrowing from the NLRA—the federal legislation governing the relationship between labor and management—certainly would be more appropriate.

The Court conceded that "interests in stable bargaining relationships and in private dispute resolution under collective-bargaining agreements are implicated by section 101(a)(2) claims."\textsuperscript{180} It concluded, however, that the relationship is only "tangential and remote."\textsuperscript{181} It reasoned that section 101(a)(2) claims only involve internal union disputes.\textsuperscript{182} Such claims do not challenge the relationship between the employer and the union nor do they affect "any interpretation or effect [sic] any reinterpretation of the collective bargaining agreement . . . ."\textsuperscript{183} Consequently, state limitations periods do not frustrate or interfere with the federal interests in collective bargaining and the quick resolution of labor disputes.\textsuperscript{184} Thus, the Court borrowed from state law.\textsuperscript{185}

### III. Different Analyses Utilized by Circuit Courts to Supply WARN with a Limitations Period

Currently, four circuit courts of appeals have addressed the issue of what statute of limitations applies to WARN cases. Two circuits favor state borrowing,\textsuperscript{186} the other two favor federal borrowing.\textsuperscript{187}

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\textsuperscript{178} Id. at 327-31.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 330.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 331.
\textsuperscript{183} Id. (quoting Doty v. Sewall, 784 F.2d 1, 7 (1st Cir. 1986)).
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 334.
\textsuperscript{187} See United Mine Workers v. Peabody Coal Co., 38 F.3d 850, 856 (6th Cir. 1994); Halkias v. General Dynamics Corp., 31 F.3d 224, 241 (5th Cir. 1994).
Despite these differing preferences between the circuits, one should be careful before categorizing the scenario as a circuit court "split." Each circuit applied some form of the DelCostello framework in deciding whether to invoke the exception and borrow a statute of limitations from federal law. Under DelCostello, a court may adopt a federal limitations period only when two conditions precedent are present. The first condition is that a federal statute of limitations clearly provides a closer analogy than available state alternatives. When a claim is multistate in nature, that is, the plaintiff commences the suit in a state not containing the alleged violation, the court must determine which state's law will provide the state law alternatives before it can make this determination. The circuits utilize several different methods to make this determination, and under each method, the law of the forum state plays a prominent role. Thus, deciding whether to invoke the exception to the state-borrowing doctrine hinges in part upon which state provides the forum for the WARN action. Because several states comprise each circuit, it is conceivable that the circuits that have already supplied WARN claims with a statute of limitations may have reached different outcomes had the suit originated in another state.

A. Circuits that Refused to Borrow the NLRA's Six-Month Statute of Limitations

The Second Circuit, in United Paperworkers Local 340 v. Specialty Paperboard, Inc., was the first circuit to determine which statute of limitations courts should apply to WARN claims. In that case, the defendant, Specialty Paperboard Inc., sold its paper mill in Vermont to Rock-Tenn Co. ("RTC") on March 15, 1991. The defendant laid

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188. Reed only modified the basic DelCostello framework by reducing the importance of the second condition. Whereas DelCostello suggested that both conditions must be present before invoking the exception, Reed implied that the federal policies may still require a court to invoke the exception even if state law provided a closer analogy. See supra notes 159-85 and accompanying text.

189. See infra notes 197-330 and accompanying text.


191. Id.

192. WARN permits suits in potentially numerous jurisdictions. See 29 U.S.C. § 2104(a)(5) (1988) ("A person seeking to enforce such liability . . . may sue . . . in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.") (emphasis added).

193. Norwood, supra note 13, at 480.

194. Id.

195. See supra notes 74-81 and accompanying text.


197. 999 F.2d 51 (2d Cir. 1993).

198. Id. at 54 (noting, however, that several district courts had already addressed the issue).

199. Id. at 52.
off all of its 232 employees. That same day, RTC rehired 141 of these employees. One year later, the employees' union brought suit on behalf of the laid off employees under WARN, alleging failure to provide notice of the impending layoff. Defendants moved to dismiss the claim as time barred, claiming that the NLRA's six-month statute of limitation is applicable.

The court concluded that the NLRA's six-month statute of limitations is not analogous to WARN. It provided two reasons to support this conclusion.

First, the two statutes have different purposes. The NLRA's purpose is to protect the rights of workers to unionize and collectively bargain with their employers. WARN's purpose, on the other hand, is to mitigate the distress caused by unexpected layoffs for both union and nonunion workers and their communities. The court noted that WARN "'neither encourage[s] nor discourage[s] ... collective bargaining' " because when a WARN cause of action accrues, the employer-employee relationship already had been terminated for at least six months.

Second, the NLRA has an administrative structure that helps workers protect their statutory rights, thus justifying a short limitations period. Under the NLRA, an aggrieved party (either the workers or the union) files a charge with the Board, and the Board prosecutes the case, if in its discretion it chooses to do so. WARN has no such structure; the workers or union must sue independently. Because the plaintiffs in a WARN claim must institute their own actions, the court implied that a longer limitations period is favorable.

For these two reasons, the court concluded that the NLRA does not provide a "much closer analogy to WARN than any state statute." The court made this statement before analyzing any state law alternative. Presumably, the court reasoned that the dissimilarities between WARN and the NLRA are so extensive that the NLRA could never be a closer analogy than any state law.

200. Id.
201. Id.
202. Id.
203. Id.
204. Id. at 54-55.
205. Id. at 54.
206. Id.
207. Id.
208. Id. at 54-55 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-21 (1986) (citation omitted)).
209. Id. at 55.
210. Id.
211. See id.
212. See id.
213. Id. (emphasis added).
214. See id. at 54-57.
Ultimately, however, the court concluded that Vermont’s contract statute of limitations possesses sufficient similarities with WARN, thus providing a closer analogy than the NLRA. In Vermont, claims for workers’ compensation benefits are subject to the state’s contract limitations period, and like a WARN claim, workers’ compensation suits are intended to protect employees from unexpected unemployment.

The court then addressed whether the federal policies at stake and the practicalities of litigation render the application of state law problematic. It concluded that these concerns are not substantial. The court reasoned that WARN does not undermine the federal regulatory scheme for collective bargaining because a plaintiff brings a WARN claim, by definition, only after the employer-employee relationship had been terminated at least six months earlier. The court also stated that the potential to forum shop under WARN is minimal. Even though an aggrieved employee may bring suit where the site of the layoff occurred or where the employer does business, choice of law rules would likely dictate borrowing the law of the state where the site of the layoff occurred regardless of where the plaintiff commences suit.

In United Steelworkers v. Crown Cork & Seal Co., the Third Circuit also refused to borrow the NLRA’s statute of limitations. Instead, it borrowed a limitations period from state law and in many ways imitated the Second Circuit’s reasoning in Specialty Paperboard.

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216. Specialty Paperboard, 999 F.2d at 57. The court only considered Vermont law, presumably because all relevant events occurred in that state. Id. The alleged WARN violation took place in Vermont, and the plaintiff, a local Vermont chapter of the United Paperworkers International Union, commenced the suit there as well. Id. at 52. Furthermore, although not clear from the Second Circuit’s decision, the district court’s opinion noted that the plaintiffs only argued that Vermont’s six-year contract statute of limitations applied. United Paperworkers Local No. 340 v. Specialty Paperboard, Inc., 829 F. Supp. 671, 673 (D. Vt. 1992).
218. Specialty Paperboard, 999 F.2d at 57.
219. Id. at 56.
220. Id.
221. Id. at 55.
222. Id.
223. Id. at 56 n.9. Choice of law rules, however, do not support this proposition. Because the federal circuits do not follow uniform choice of law principles regarding federal question cases, it is quite conceivable that one court may borrow from State A while another court, with the same set of facts, may borrow from State B. See supra notes 74-81 and accompanying text.
225. See id. at 61.
226. Id.
In *Crown Cork*, an employer terminated eighty-five employees at its Georgia plant on September 30, 1991.227 Approximately twelve months later, the union filed a complaint, alleging that the employer failed to comply with WARN’s requirements for notice.228 The employer argued that the NLRA’s six-month statute of limitations provides the most applicable limitations period, and thus, the claim should be time barred.229

The court concluded that the NLRA is not a satisfactory alternative to WARN.230 As in *Specialty Paperboard*, the court compared the statutes’ purposes231 and determined that any effects WARN has on collective bargaining are “tangential at best.”232 Furthermore, WARN has the broader purpose of also protecting communities from any “potentially harmful employment decisions” that may occur within it,233 whereas the NLRA simply addresses the employer-employee relationship.234

The court failed to analyze whether any state law alternative provides an adequate analogy to WARN. It merely suggested that the difference between WARN and the NLRA is so great that the NLRA could never serve as a closer analogy than any state alternatives, even though the state alternative may also be a poor substitute.235

The court then examined the federal policies at stake and the practicalities of litigation,236 concluding that the NLRA’s statute of limitations is not a significantly more appropriate vehicle for interstitial lawmaking.237 First, the court reasoned that WARN claims present no pressing need for a uniform statute of limitations.238 Uniformity would be necessary if WARN contained numerous legal theories, because a cause of action arising under the statute could encompass more than one theory.239 If the limitations period depended upon the

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227. *Id.* at 56.
228. *Id.*
229. *Id.* In an accompanying case, an employer, on February 25, 1991, laid off 270 of its employees. *Id.* at 55. On September 9, 1991, the union filed a complaint against the employer, alleging WARN violations. *Id.* The employer did not raise the statute of limitations defense. *Id.* The district court granted the union’s summary judgment motion. *Id.* Sometime thereafter, the nonunionized employees sued the employer under WARN. *Id.* at 55-56. The employer raised the statute of limitations defense, arguing the NLRA’s six-month limitation period applied. *Id.* at 56.
230. See *id.* at 58-61.
231. *Id.* at 57-58.
232. *Id.* at 58.
233. *Id.*
234. *Id.*
235. See *id.* at 61 (“While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when federal law does not provide a satisfactory alternative.”).
236. *Id.* at 60-61.
237. See *id.*
238. *Id.* at 59-60.
239. See *id.*
precise legal theory of each claim, more than one statute of limitations potentially could apply to each claim.240 Because WARN contains a single cause of action, the court concluded that uniformity concerns are not implicated.241 Second, the court asserted that affected employees would not significantly benefit from forum shopping because choice of law rules generally require applying the state’s law where the site of injury occurred.242 Third, the court observed that a WARN cause of action requires a longer limitation period than six months.243 A short statute of limitations is acceptable under the NLRA because the NLRB, not the complainants, prosecutes the claim.244 WARN has no such administrative framework; the employees must sue directly.245 Consequently, six months may not provide affected employees sufficient time to sue.246 Finally, none of the potential state limitation periods interfere with federal policy.247 The court reasoned that none of the state statutes of limitations are so short as to interfere with the employees’ ability to vindicate their rights.248 In addition, given WARN’s limited effect on collective bargaining, a short statute of limitations is unnecessary to promote rapid resolutions of labor disputes.249

Thus, the court refused to invoke the exception and to apply the NLRA’s six-month statute of limitations to WARN claims.250 Instead, it borrowed a limitations period from state law.251 The court, however, declined to decide specifically which statute’s limitations period

240. Id.
241. Id. at 60.
242. Id.
243. Id. at 60-61.
244. Id. at 60.
245. Id. at 60-61.
246. Id. at 61.
248. Id. at 61.
249. Id.
250. Id.
251. Id. Because one of the actions joined for appeal occurred in Georgia and the other in Pennsylvania, an issue arose regarding whether Georgia or Pennsylvania law should supply the statute of limitations. Id. at 60 n.4. The court noted that “the governing statute of limitations should be that of the state in which the federal court sits, unless a party can make a compelling showing that the application of that statutory time bar would seriously frustrate federal labor policy or work severe hardship to the litigants.” Id. (quoting Consolidated Express, Inc. v. New York Shipping Assoc., 602 F.2d 494, 507-08 (3d Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980)). The court declined to decide whether it should borrow from Georgia or Pennsylvania law because no party argued for a statute of limitations from either state under which either of the actions would have been untimely. Id.
applies because the WARN claims would have been timely under any of the possible state limitation periods that the parties brought to the court's attention.\textsuperscript{252}

Although the Second and Third Circuits cited DelCostello in their opinions, a careful reading of the Specialty Paperboard and Crown Cork decisions illustrates that these courts in fact applied the modified DelCostello framework used in Reed. Under the original DelCostello approach, both conditions must exist before a court may invoke the exception to the general rule,\textsuperscript{253} and both circuits determined that the NLRA is not a closer analogy to WARN than any state law alternative.\textsuperscript{254} Had these courts utilized the original DelCostello framework, they need not have addressed the second condition; they simply should have applied a state statute of limitations. Both circuits, however, still attempted to determine whether federal policies compel borrowing the NLRA's limitations period.\textsuperscript{255} By continuing in this manner, these courts suggested that the federal policies at stake might still require federal borrowing even though state law provides the closer analogy. Thus, similar to the Supreme Court's actions in Reed, the Second and Third Circuits implicitly reduced the importance of the first condition while elevating the importance of the second.

B. Circuits that Borrowed the NLRA's Six-Month Statute of Limitations

The Fifth Circuit, in Halkias v. General Dynamics Corp.,\textsuperscript{256} diverged from the Second and Third Circuits and borrowed the NLRA's six-month statute of limitations for WARN claims.\textsuperscript{257} In Halkias, the Department of Defense canceled a contract with the employer, General Dynamics, on January 7, 1991.\textsuperscript{258} Because of the cancellation, General Dynamics instituted a "mass layoff" the following day at three of its facilities in three different states: Texas, Oklahoma, and Missouri.\textsuperscript{259} Twenty-two months later, two thousand former nonunion employees from the facilities in Texas and Oklahoma filed WARN suits against General Dynamics in the Western District of Texas.\textsuperscript{260} The employer argued that the claims were time barred because the NLRA's six-month statute of limitations is applicable to WARN cases.\textsuperscript{261}

\begin{thebibliography}{9}
\bibitem{252} Id.
\bibitem{253} DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 171-72 (1982).
\bibitem{254} See supra notes 204-18, 230-35 and accompanying text.
\bibitem{255} See supra notes 219-23, 236-49 and accompanying text.
\bibitem{256} 31 F.3d 224 (5th Cir. 1994).
\bibitem{257} Id. at 228.
\bibitem{258} Id. at 227.
\bibitem{259} Id. For WARN's definition of "mass layoff," see supra note 4.
\bibitem{260} Halkias, 31 F.3d at 227.
\bibitem{261} Id. In another case consolidated for appeal, the employer, Glastron, allegedly laid off over 250 employees in its Texas facility between October 31 and December 31,
The court utilized *DelCostello*'s general outline in deciding to adopt the NLRA's statute of limitations.\textsuperscript{262} It first addressed whether the NLRA is more analogous than any available state alternatives.\textsuperscript{263} It noted the many similarities between the NLRA and WARN\textsuperscript{264}—namely that both statutes share similar, although not identical, purposes\textsuperscript{265} and that both seek to protect workers by restricting employer activities.\textsuperscript{266} The NLRA protects the rights of workers to join and collectively bargain by placing "'certain enumerated restrictions on the activities of employers.'"\textsuperscript{267} WARN protects from the devastating impact of a sudden layoff by preventing employers from curtailing or closing an operation without giving sixty-days notice.\textsuperscript{268} Thus, the court observed that the NLRA regulates the general relationship between employer and employee and WARN regulates this relationship in a specific instance.\textsuperscript{269} In addition, both statutes share a linguistic overlap: \textsuperscript{270} "[T]he Department of Labor borrowed extensively from the NLRA in promulgating regulations for WARN."\textsuperscript{271} After WARN's enactment, the NLRB's General Counsel even "'predicted substantial interplay between . . . [(WARN)] . . . and the nation's basic labor law administered by the NLRB.'"\textsuperscript{272} Indeed, given this extensive borrowing from the NLRA, courts have often utilized the NLRA case law in interpreting WARN.\textsuperscript{273}

Furthermore, the court characterized WARN as an "outgrowth" of the NLRA.\textsuperscript{274} The NLRA requires employers to bargain over the ef-

\textsuperscript{1990. *Id.* at 228. On December 17, 1992, the plaintiff filed suit against the employer. *Id.* The employer argued that the action was barred by the limitations period that should be borrowed from the NLRA. *Id.*}

\textsuperscript{262. *Id.* at 230.}

\textsuperscript{263. *Id.* The court only considered limitations periods from the law of the forum state, Texas, because no party, even the plaintiffs from Oklahoma, suggested borrowing from an Oklahoma period. *Id.* at 234 n.19.}

\textsuperscript{264. *Id.*}

\textsuperscript{265. *Id.* at 231.}

\textsuperscript{266. *Id.*}

\textsuperscript{267. *Id.* (quoting American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).}

\textsuperscript{268. *Id.*}

\textsuperscript{269. *Id.* at 233-34.}

\textsuperscript{270. *Id.* at 231; see, e.g., 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to §§ 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(ii) (1994) (defining "reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to "existing legal rules," that is, case law interpreting the NLRA).}

\textsuperscript{271. *Id.* at 231; see, e.g., 20 C.F.R. § 639.3(d) (1994) (defining "representative" for WARN purposes by explicit reference to §§ 9(a) and 8(f) of the NLRA); 20 C.F.R. § 639.3(a)(1)(ii) (1994) (defining "reasonable expectation of recall"); 20 C.F.R. § 639.3(a)(2) (1994) (defining "independent contractors and subsidiaries" by reference to "existing legal rules," that is, case law interpreting the NLRA).}

\textsuperscript{272. *Halkias,* 31 F.3d at 231-32 (quoting *NLRB General Counsel Outlines Overlap Between Plant Closing Law and Taft-Hartley,* 226 Daily Lab. Rep. (BNA), Nov. 23, 1988, at A-3) (brackets in original)).}

\textsuperscript{273. *Id.*; see, e.g., Damron v. Rob Fork Mining Corp., 739 F. Supp. 341, 344 (E.D. Ky. 1990) (determining whether an employee would "reasonably experience an employment loss" by referring to the National Labor Relations Board's use of the "reasonable expectation of recall" test), aff'd, 945 F.2d 121 (6th Cir. 1991).}

\textsuperscript{274. *Halkias,* 31 F.3d at 232.}
fects on employees of a decision to close a plant.275 To meet this obligation, employers must provide unions with adequate notice for unions to have a meaningful opportunity to bargain.276 "In a sense, WARN amends the NLRA by setting a specific time period for notice, in addition to expanding coverage to all employees, regardless of union status."277

Finally, because collective bargaining agreements ordinarily contain provisions requiring notice before mass layoffs and shutdowns, "WARN merely codifies a frequent practice facilitated by the NLRA."278 The Department of Labor's regulations also "inject[ ] WARN into collective bargaining agreements" in two additional ways.279 First, the regulations provide that WARN's notice period automatically increases if the collective bargaining agreement requires a notice period of longer than sixty days.280 Second, the regulations permit WARN to clarify or amplify the "terms and conditions" of the agreement.281

The Halkias court then compared WARN to the state alternatives brought to its attention,282 including Texas' tort statute,283 residual statute of limitations,284 and contract statute.285 It rejected the notion that a WARN claim is similar to the tort of "conversion of an employee's right to continued employment."286 The court reasoned that WARN has nothing to do with a right to continued employment; it is only concerned with employers providing notice in certain instances.287 "Regardless of whether notice is given, the employer is [still] free to terminate ... the employee ..."288 The court quickly dismissed the state's residual statute, stating that borrowing a catchall limitations period is a disfavored practice.289 Finally, the court rejected the notion that a WARN claim is similar to a breach of contract.

275. See id. (citing Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 26 (1st Cir. 1983)).
276. Id.
277. Id.
278. Id.
279. Id. at 233.
280. Id. at 232.
281. Id. at 233.
282. Id. at 234.
284. Id. § 16.051.
285. Id. § 16.004.
286. Halkias, 31 F.3d at 235.
287. Id.
288. Id.
289. Id. In stating this proposition, the court cited Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143 (1987). In Agency Holding, the Court refused to apply a state's catchall statute of limitations to a federal cause of action. Id. at 152-53. In reaching this conclusion, the Court reasoned that it is unlikely Congress intended such a limitations period to apply to the right it had created. Id.
claim.\(^{290}\) Once again, the court noted that WARN is unrelated to the contractual right to continued employment.\(^{291}\)

After comparing WARN to the NLRA and the available state alternatives, the court concluded that the NLRA provides the closer analogy.\(^{292}\) Under the DelCostello framework, however, before a court may borrow the NLRA's statute of limitations, the federal policies at stake and the practicalities of litigation must make the NLRA's rule a significantly more appropriate vehicle for interstitial lawmakers.\(^{293}\)

Addressing this issue, the court concluded that the NLRA does provide a more appropriate vehicle for interstitial lawmakers.\(^{294}\) The court first observed that borrowing a state statute of limitations presents troublesome litigation practicalities because such borrowing poses the risk of forum shopping.\(^{295}\) WARN permits a plaintiff to bring an action not only in any district in which the violation allegedly occurred, but also in any district in which the employer conducts business.\(^{296}\) Thus, affected employees likely will have the opportunity to commence a suit in a forum that does not include the site of the WARN violation. Because forum possibilities potentially may span more than one state, a conflict would arise as to which state's statute of limitations applies.\(^{297}\) The court noted that in federal question cases arising in the Fifth Circuit, conflict of law principles derive from federal common law.\(^{298}\) The district court, however, may follow the forum state's choice of law rules as a surrogate for federal common law.\(^{299}\) Because many states regard statutes of limitations as procedural, a federal court following that state's choice of law principles must necessarily apply that forum's limitation period, even though the WARN violation did not occur in that state.\(^{300}\) Because plaintiffs may have numerous options regarding where to commence a WARN suit, the potential to forum shop is quite real. In addition to forum shopping, the possibility of multistate WARN litigation, especially in class actions, also requires time-consuming litigation regarding which state's limitations period would be applicable.\(^{301}\)

The Halkias court then reasoned that state borrowing would disserve important federal policies.\(^{302}\) Congress, in enacting a six-month statute of limitations for NLRA claims, sought to "bar litigation over

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290. Halkias, 31 F.3d at 235.
291. Id.
292. Id. at 235-36.
294. Halkias, 31 F.3d at 236.
295. Id.
296. Id. (citing 29 U.S.C. § 2104(a)(5) (1988)).
297. See Restatement (Second) of Conflict of Laws § 1 (1969).
298. Halkias, 31 F.3d at 236-37.
299. Id. at 237.
300. Id.
301. Id. at 237-38.
302. See id. at 238.
past events after records have been destroyed, witnesses have gone elsewhere, and recollection of the events in question have become dim and confused." The court stated that these availability-of-evidence concerns are no less applicable to WARN claims. Furthermore, the court observed that application of state limitations periods, which can be several years in length, disserves WARN's "most specific objective: the provision of a cushion of time for employees to explore other job opportunities and, if necessary, seek retraining. . . . [P]roviding funds to workers several years after their termination does not serve that objective." 

Parenthetically, the court rejected the argument that six months is too short a period of time for an employee to bring suit. It reasoned that the Supreme Court in DelCostello adopted the six-month provision for hybrid section 301 actions against the employer's union for breach of the duty of fair representation (and against the employer for breach of the collective bargaining agreement). Despite the employee's lack of sophistication, the Supreme Court held that six months provides sufficient time to bring suit. Because the hybrid cause of action is just as complex as, if not more complex than, a WARN claim, the court here suggested that six months is an adequate period for WARN plaintiffs to commence their claims.

The Sixth Circuit, in United Mine Workers v. Peabody Coal Co., soon joined the Fifth Circuit in holding that the NLRA's six-month statute of limitations provides the more analogous limitations provision and better effectuates WARN policies than state law alternatives. Here, the defendant operated a coal mining facility in Kentucky. On June 3, 1991, the Kentucky Department of Natural Resources ordered the defendant to stop blasting at the mine. The defendant obeyed this order and, as a result, laid off eighty-two mine employees by June 28, 1991. On May 15, 1992, the plaintiff filed suit in federal court, alleging WARN violations. The defendant filed a motion for summary judgment, claiming that the plaintiff's claim was untimely because the NLRA's six-month statute of limitations applies.

303. Id. (internal quotation marks omitted).
304. Id.
305. Id. at 239.
306. Id. at 238 n.35.
307. Id.
308. Id.
309. See id.
310. 38 F.3d 850 (6th Cir. 1994).
311. Id. at 855-56.
312. Id. at 851.
313. Id.
314. Id.
315. Id.
316. Id.
From Supreme Court cases following *DelCostello*, the court gleaned a three-prong analysis for determining whether to borrow a statute of limitations from federal law instead of state law.\(^{317}\) Under this test, borrowing is indicated when "uniformity [is] desirable[,] . . . federal law provide[s] a much clearer analogy than state law[, and] . . . federal law significantly and directly advance[s] the policy underlying the statute in a way that state law does not."\(^{318}\)

Because of the "multi-state nature of decisions that implicate WARN," the Court concluded that a uniform statute of limitations, rather than the nonuniformity caused by state borrowing, is "highly desirable."\(^{319}\) Otherwise, WARN would create "limitless" opportunities to forum shop because it authorizes commencement of suits in "any federal district 'in which the employer transacts business,' . . . including districts other than where a plant is closed or the plant closing decision was made."\(^{320}\) In addition, it noted that courts may have to confront "potentially daunting choice of law problems arising from claims brought in several different states as a result of forum shopping."\(^{321}\) It also reasoned that an employer who decided to shut down operations in several states could possibly be sued in all those states and thus be subject to several different statutes of limitations for the same, single federal violation.\(^{322}\)

\(^{317}\) *Id.* at 855.

\(^{318}\) *Id.* The court here added the "uniformity" inquiry to the *DelCostello* framework. The court gleaned this inquiry from *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987). See *Peabody Coal*, 38 F.3d at 853-55. In *Agency Holding*, an insurance company, on February 13, 1978, terminated the plaintiff's agency for failing to meet a production quota. *Agency Holding Corp.*, 483 U.S. at 145. On March 20, 1981, plaintiff brought suit against defendant. *Id.* He alleged causes of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 42 U.S.C. § 1985 (1988), stemming from the termination. *Agency Holding Corp.*, 483 U.S. at 145. Congress failed to provide a limitations period for RICO claims. *Id.* at 146. In concluding that the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b (1988), is applicable to RICO claims, the Court stated that a uniform statute of limitations period is desirable. *Agency Holding Corp.*, 483 U.S. at 154. The predicate acts that may establish a civil RICO claim often will occur in several states, thus creating the possibility of multiple state limitation periods. *Id.* Because of this possibility, "the use of state statutes would present the danger of forum shopping and . . . would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'" \(^{321}\) *Id.* (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 392 (1985)).

Practically, however, this "new" layer has no effect on the *DelCostello* framework because the desire for uniformity is essentially a subcomponent to *DelCostello's* second condition. Halkias v. General Dynamics Corp., 31 F.3d 224, 230 (5th Cir. 1994). For simplicity's sake, this Note presents the Sixth Circuit's analysis in the framework that court followed.

\(^{319}\) *Peabody Coal*, 38 F.3d at 855.

\(^{320}\) *Id.* (quoting 29 U.S.C. § 2104(a)(5) (1988)).

\(^{321}\) *Id.*

\(^{322}\) *Id.*
Regarding the second prong, the court concluded that the NLRA provides a closer analogy to WARN than any state law alternative.\textsuperscript{323} It observed that both WARN and the NLRA protect employees against unemployment.\textsuperscript{324} It also stated that the NLRA's purpose to regulate management activities "which affect commerce and are imical to the general welfare" is consistent with WARN's purpose of protecting both workers and their communities as well.\textsuperscript{325} It additionally pointed to WARN's references to the NLRA as another similarity between the two legislations.\textsuperscript{326}

Comparing WARN to Kentucky's five-year catchall limitations period applicable to all statutory claims, the court concluded that the state alternative "in essence provides no analogy. . . . The only commonality between WARN and the proffered state statute is that both are pieces of legislation."\textsuperscript{327}

Under the third prong, the court concluded that the NLRA's six-month statute of limitations furthers the policies underlying WARN in a way that the state's five-year alternative could not.\textsuperscript{328} The court observed that Congress, in passing WARN, intended only to provide short-term assistance to employees, their communities, and state agencies.\textsuperscript{329} A long limitations period "would do nothing to achieve WARN's aim of starting employees on the road to retraining and re-employment before unemployment becomes a problem."\textsuperscript{330}

When reading \textit{Halkias} and \textit{Peabody}, it is not clear whether the Fifth and Sixth Circuits were implicitly applying the modified \textit{DelCostello} framework used in \textit{Reed}. By first determining whether the NLRA is WARN's closest analogue \textit{and then} addressing whether federal policies require borrowing from the NLRA, it appears, at first glance, that these circuits followed the original \textit{DelCostello} framework. Because these courts, however, concluded that the NLRA provides the closer analogy than state law, one still does not know if the these courts would still have borrowed from the NLRA had state law provided the closer alternative. Thus, one cannot infer whether these circuits incorporated \textit{Reed}'s modification into their analyses.

\textsuperscript{323} \textit{Id.} at 856. The court only considered Kentucky's residual statute of limitations, presumably because it was the only alternative the plaintiff proffered. \textit{Id.} at 851.
\textsuperscript{324} \textit{Id.}
\textsuperscript{325} \textit{Id.} (quoting 29 U.S.C. § 141(b) (1988)).
\textsuperscript{326} \textit{Id.}
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} \textit{Id.}
\textsuperscript{330} \textit{Id.}
IV. FEDERAL COURTS SHOULD APPLY THE NLRA'S SIX-MONTH STATUTE OF LIMITATIONS TO WARN CLAIMS

As discussed above, when Congress created a federal right without prescribing a period for enforcement, courts generally have borrowed a limitations period from state law. Recently, in *DelCostello*, the Supreme Court created an exception to this general rule. Federal courts may diverge from state law and borrow from federal law, provided that a federal law rule clearly provides a closer analogy than available state statutes, and that the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.

In *Reed*, the Supreme Court revisited this exception. A close reading of this decision illustrates that the Court modified the *DelCostello* framework by elevating the importance of federal policies in the analysis. *Reed* implied that the federal policies at stake might still require borrowing from a federal statute even when state law provides the more analogous statute of limitations. Indeed, when federal policies and litigation practicalities are so compelling (as they are in WARN cases), federal courts should not waste valuable time and resources even addressing the question of which state's limitations period should govern. Instead, the courts should apply the NLRA's six-month statute of limitations to WARN claims.

Some circuits argue that federal policies and litigation practicalities do not make the NLRA's limitations period a better vehicle for interstitial lawmaking. These proponents of state borrowing offer several arguments to support this position. They first contend that the potential for forum shopping under WARN is minimal. Even though WARN permits the commencement of the suit not only in the district where the violation is alleged to have occurred but also where the employer does business, these opponents argue that choice of law rules would likely dictate borrowing the law of the site of the layoff regardless of where the plaintiff commences suit. Choice of law rules, however, do not support this proposition. Because WARN contains a generous forum provision, affected employees will likely have the opportunity to commence a suit in a state that does not include the site of the WARN violation. When a plaintiff brings a claim in a state not containing the alleged violation, the court must determine which state's law will provide the alternative that it will compare to the federal option. The circuits utilize several different methods to make

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332. *Id.*
335. *Id.*
this determination, and in adhering to any particular method, some
courts may be required to apply a limitations period from the forum
state, even if the WARN violation did not occur in that state. Thus,
the potential to forum shop clearly exists.

Another argument against borrowing from the NLRA is that
WARN claims present no pressing need for a uniform statute of limi-
tations. Proponents of state borrowing concede that uniformity would
be necessary if WARN contained numerous legal theories because a
cause of action arising under the statute could quite conceivably en-
compass more than one of these theories; if the limitations period de-
pended upon the precise theory of each claim, more than one statute
of limitations could potentially apply to each claim. Because WARN
contains a single cause of action, proponents of state borrowing con-
clude such borrowing does not implicate uniformity concerns.

Admittedly, WARN contains only one type of action. This argu-
ment, however, fails to recognize that uniformity is desirable for other
reasons as well, most notably to avoid the potential to forum shop.
Nonuniformity also results in "two or more plaintiffs . . . suing under
the identical federal statutory claim . . . [possibly] end[ing] up with
different lengths of time within which to pursue their actions. This
time differential directly impacts perceptions of fairness in the federal
judicial system." In addition, in multistate WARN litigation, bor-
rowing statutes of limitations from state law requires time-consuming
and expensive litigation concerning what state's limitations period is
applicable. Furthermore, predictability, a primary goal of statutes of
limitations, is frustrated by the nonuniformity that state borrowing
creates. As noted earlier, the forum state plays a critical role in deter-
mining which state's law supplies the limitations period for WARN
claims. Because plaintiffs may often have several options regarding
where to commence a WARN suit, the employer frequently will be
uncertain when an action becomes time barred.

Further, opponents to borrowing the NLRA's statute of limitations
argue that a WARN cause of action requires a longer limitation pe-
riod than six months. A short statute of limitations is acceptable for
the NLRA because the NLRB prosecutes claims arising under the
NLRA. An employee pursuing a WARN claim, on the other hand,
must prosecute the suit individually. This argument overlooks the fact
that the Supreme Court in DelCostello adopted the NLRA's six-
month provision for hybrid section 301 actions against unions for
breach of its duty of fair representation and against the employer for

337. Id. at 481; see also supra notes 74-81 and accompanying text.
338. See supra notes 77-81 and accompanying text.
341. See supra notes 74-81 and accompanying text.
breach of the collective bargaining agreement.\textsuperscript{342} Like WARN claims, employees must pursue hybrid section 301 claims individually.\textsuperscript{343} Despite this fact, the Court still held that six months is sufficient time to bring suit.\textsuperscript{344} \textit{DelCostello}'s holding belies the argument that employees who must pursue their claims individually need a longer statute of limitations.

The argument that WARN requires a longer statute of limitations also neglects to consider Congress' purpose in passing WARN. By enacting WARN, Congress intended to provide short-term assistance to employees, their communities, and local governments to accelerate retraining, relocation, and reemployment.\textsuperscript{345} To achieve this purpose, it is important that workers claim and receive this relief promptly after discharge. A limitation period permitting a worker to recover on a WARN claim several years after the violation obviously fails to further this objective.

Proponents of state borrowing also maintain that the NLRA is a poor analogy to WARN. In particular, they point to differing purposes between the statutes. The NLRA's general purpose is to protect the rights of workers to unionize and collectively bargain with their employers, whereas WARN's purpose is to provide transition time to adjust to the prospective loss of employment. As noted above, however, \textit{Reed} essentially reduced the importance of this inquiry when determining whether to invoke the exception to the general rule. \textit{Reed} suggested that even if the NLRA was a poor analogy to WARN, the federal policies at stake and litigation practicalities might still be compelling enough to require federal-borrowing.

Indeed, in WARN actions, the federal policies and litigation practicalities are so compelling that federal courts should not waste valuable time and resources even attempting to determine which state's limitations period should govern WARN. WARN's fundamental purpose is to provide short-term assistance to displaced workers.\textsuperscript{346} To accomplish this objective, it is imperative that displaced employees obtain this relief as soon as possible. Many state limitation periods, however, are several years in length.\textsuperscript{347} Borrowing a limitation from state law is obviously inconsistent with WARN's basic objective. In addition, state borrowing results in federal courts applying nonuniform limitation periods to WARN suits. This nonuniformity leads to inefficient allocation of judicial resources, unfairness in the federal judicial system, and, most importantly, the potential to forum shop. Borrowing


\textsuperscript{343} See id. at 155 (noting that the plaintiff initiated the action).

\textsuperscript{344} \textit{Id.} at 172.

\textsuperscript{345} See 20 C.F.R. § 639.1(a) (1994).

\textsuperscript{346} Id. § 639.1(a).

the NLRA's six-month statute of limitations provides a uniform limitations period for all WARN claims and furthers WARN's purpose of providing only short-term relief to displaced workers.

Despite Reed, although WARN and the NLRA admittedly possess somewhat different purposes, significant interrelationships and similarities exist between the legislations. First, the Department of Labor's regulations implementing WARN stipulate that the WARN notice shall automatically increase if the collective bargaining agreement so provides. The regulations also permit WARN to clarify the "terms and conditions" of the collective bargaining agreement. In fact, the Department of Labor "borrowed extensively" from the NLRA when issuing WARN's regulations, and because of this extensive borrowing, courts have often referred to NLRA case law in interpreting WARN. Second, one may even view WARN as a clarification of the NLRA. The NLRA requires an employer to bargain in good faith with the union regarding the effects of a decision to close a plant. To satisfy this duty, employers must notify the union prior to the closing so that the union has a meaningful opportunity to bargain. Courts, however, have declined to mandate a specific time in advance by which employers must give notice. WARN, in essence, sets a specific time period for notice and expands this protection to cover all employees regardless of union status. Third, both statutes essentially seek to protect workers against unemployment by restricting management decisions. Finally, the NLRA's objective of proscribing management activities "which affect commerce and are inimical to the general welfare" is entirely consistent with WARN's goal of protecting both workers and their communities.

**Conclusion**

Federal courts should apply the NLRA's six-month statute of limitations to all WARN claims, regardless of what alternative state law provides. WARN and the NLRA, although not perfectly analogous, possess many similarities and interrelationships, indicating that selecting the NLRA's limitation period is a logical and obvious choice. In addition, unlike state limitation periods, which may be several years in length, the NLRA's statute of limitations better serves WARN's objective of providing short-term assistance to workers and their com-

348. Halkias v. General Dynamics Corp., 31 F.3d 224, 233 (5th Cir. 1994).
349. Id. at 231.
352. Id.
353. Yost, supra note 33, at 684.
munities to accelerate retraining and employment. Furthermore, borrow-
ing from the NLRA results in a uniform limitation period for all claims arising under WARN, thus curtailing the potential for forum shopping and wasteful litigation, while also ensuring fairness in the federal judicial system.