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Filing of an Employment Discrimination Charge under Title VII as Tolling the Statute of Limitations Applicable to a 1981 Action: The Unanswered Questions of Johnson v. REA

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Note

FILING OF AN EMPLOYMENT DISCRIMINATION CHARGE UNDER TITLE VII AS TOLLING THE STATUTE OF LIMITATIONS APPLICABLE TO A 1981 ACTION: THE UNANSWERED QUESTIONS OF Johnson v. REA

There now exist two remedies for employment discrimination: Title VII of the 1964 Civil Rights Act, a Congressional remedy, and 42 U.S.C. § 1981, recently resurrected as a remedy for private job discrimination by the Supreme Court in Johnson v. REA. The rebirth of 1981 has added little to the already existing Title VII remedy for job discrimination, however, and has, instead, increased the work load of an already overburdened judiciary, especially since 1981 contains no statute of limitations. The author discusses how the courts have attempted to handle the limitations problem and suggests an analysis which should be employed in future cases. He concludes that, because it is extraneous and because of the problems it creates, 1981 should be relegated to its pre-Johnson status.

I. INTRODUCTION: THE TWO REMEDIES

In 1964, Congress enacted Title VII of the Civil Rights Act to give employees a remedy for employment discrimination. After a 1968 Supreme Court housing discrimination decision, the courts of appeals began to allow employees to use an old post-Civil War statute, section 1981 of Title 42 of the United States Code, as another remedy for racial discrimination in private employment. In Johnson v. REA, decided in May 1975, the Supreme Court sanctioned the appellate courts' interpretation of 1981 and attempted to define the relationship between the now overlapping remedies of Title VII and section 1981.

Under Title VII, an employee is required to file a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) to preserve any relief to which he may be entitled. Under 1981, an employee preserves any relief he may have by filing a timely action in a court of proper jurisdiction before

the statute of limitations has run. The issue before the Court in \textit{Johnson} was whether the filing of the Title VII charge with the EEOC tolled the statute of limitations on a 1981 action based on the same alleged incident of discrimination. Such a formulation of the issue highlighted the tension stemming from the Title VII/1981 overlap.

Employees, employers, and the courts have sizable interests in the 1981/Title VII relationship. The employee seeks swift effective relief from discrimination which may thwart his access to a needed job. The employer has an interest in knowing how his freedom to deal with employees has been limited and what sanctions may be imposed on him for exceeding those limits. The courts seek to provide functional remedies for discrimination for which society has demanded a particular accommodation of justice. From almost any viewpoint, then, the precise nature of the two overlapping remedies is of significant interest.

This Note will suggest that there should be no overlap between the remedies offered by 1981 and Title VII, for affording both remedies to the employee does not increase his measure of protection or further the social objective of allowing each individual to earn a living through honest labor free from the discouraging barriers of racial discrimination. In affording the dual overlapping remedies, the already overburdened courts are creating unnecessary work for themselves and needless confusion for employers seeking to clarify the restrictions on employment practices, as well as for employees seeking an effective remedy for discrimination. The statute of limitations problems, such as in \textit{Johnson}, involved in using 1981 as an employment discrimination remedy evidence the confusion and unnecessary work resulting from the continued use of both remedies. The courts could avoid these problems by recognizing Title VII as the sole remedy for employment discrimination. Absent this result, the courts should at least understand the proper analysis and the problems involved in resolving the statute of limitations issues in 1981 actions.

This Note will discuss the historical development of the two overlapping remedies and demonstrate that the rather recent development of 1981 as a job discrimination remedy is unnecessary and potentially wasteful of judicial and party time. The 1981 statute of limitations problems raised in \textit{Johnson} will then be discussed in a four-step analysis: the general procedure of using state statutes of limitations for 1981 actions; the possibility of a court's

\footnotesize{6. See notes 64-70, 74-76 infra and accompanying text.}
\footnotesize{7. See S. REP. No. 415, 92d Cong., 1st Sess. 8 (1971).}
departing from those statutes because of federal policy grounds; the method of selecting a particular statute of limitations; and a consideration of the procedure for utilizing state exceptions to state statutes of limitations. This analysis will confirm that the current scheme of dual remedies results in confusion and an overburdened judiciary, and will illuminate a better approach for remedying discriminatory employment practices.

II. HISTORICAL DEVELOPMENT OF THE TWO REMEDIES

A. The Development of Title VII

In order to provide a broad remedy for private discrimination in employment, Congress enacted Title VII of the Civil Rights Act in 1964. The statute contained carefully considered legislative compromises necessary to obtain the support of the required number of lawmakers. These major compromises determined the character of Title VII and the EEOC. Coverage of employers by the Act was restricted, certain procedures were required for an aggrieved employee to utilize the Act's machinery, and enforcement of the Act was left largely to the aggrieved individual. When Congress amended the legislation in 1972, it rearranged the balances struck in the earlier compromises. Coverage of the Act was extended, procedures were modified, and the EEOC was given some enforcement powers.

A litigant's claim under the statute typically proceeds as follows. First, the employee files a claim of employment discrimination with the EEOC. The Commission then notifies the employer of the charge and investigates. Next, the EEOC attempts conciliation if it finds reasonable cause to believe the charge. Finally, the Commission, the Attorney General, or the employee may institute a lawsuit. The employee will receive notification (the "right-to-sue" letter) that he may institute a court action in three instances: if the EEOC fails in its conciliation attempts, if the government decides

13. Id. at 862-64.
not to sue, or even if the EEOC fails to discover reasonable cause for the charge. Because of administrative backlogs and lack of resources, the Commission handles many discrimination charges simply by sending the right-to-sue letter to the employee when it is so required. What appears to be largely an administrative remedy thus, in many instances, ends up in court after little more than the formality of filing a charge.

B. The Development of Section 1981

Until recently, it was widely believed that section 1981 did not apply to private acts of discrimination. This section and its companion, 1982, both originated in section 1 of the Civil Rights Act of 1866 which, on its face, applied to a wide range of racially discriminatory activities by private individuals. The Supreme Court, however, implied that these sections did not apply in private contexts for several reasons. At times, the Court suggested that Congress did not intend for these statutes to reach private actions, or that, since Congress enacted the sections under its enforcement power in section 5 of the fourteenth amendment, state action, not merely private activity, was required to bring an action. At other times, the Court implied that Congress could not enact sections 1981 and 1982 under the thirteenth amendment because the scope of that amendment was confined to an abolition of slavery, not "the infliction of an injury upon one individual citizen by another solely on account of his color." As a result, despite the broad language of the section which could be construed as applying to employment discrimination by the state, the courts did not

16. "This interpretation was based on the argument that § 2 of the 1866 act was intended to enforce the rights protected by § 1. Since § 2 applied only to actions 'under color of any law, statute, regulation, or custom,' then § 1 must be similarly restricted." Id. at 615; see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 454 (1968) (Harlan, J., dissenting); Civil Rights Cases, 109 U.S. 3, 16-17 (1883); Cook v. Advertiser Co., 323 F. Supp. 1212, 1216-17 (M.D. Ala. 1971).
apply 1981 to employment discrimination by private employers.\textsuperscript{20} Faced with the refusal of the courts to allow litigants relief from private employment discrimination under 1981, Congress sought to afford those aggrieved individuals a remedy by enacting Title VII.

Following this initial attempt to legislate a remedy for job discrimination, the Supreme Court sparked the judicial creation of another job discrimination remedy. In \textit{Jones v. Alfred H. Mayer Co.},\textsuperscript{21} the Court held for the first time that the broadly written language of section 1982 applied to private acts of discrimination. Petitioner Jones alleged that the defendants had refused to sell him a home solely because of his race, and sought injunctive and other relief under several federal statutes, including 1982. The lower courts,\textsuperscript{22} in the absence of state action, denied relief although the Eighth Circuit Court of Appeals invited the Supreme Court to expand the scope of 1982.\textsuperscript{23} The Court accepted the invitation by characterizing language in prior cases, which indicated that 1982 was unavailable in the absence of state action, as dicta\textsuperscript{24} and holding that the language and legislative history of 1982 demonstrated that Congress intended to reach private acts of racial discrimination.\textsuperscript{25} The Court also held that Congress had the constitutional power to reach private discrimination by 1982. Justice Stewart, writing for the majority, relied on the language in the \textit{Civil Rights Cases}\textsuperscript{26} to interpret the enabling clause of the thirteenth amendment broadly, finding that Congress was given the power to determine and to eradicate not only slavery, but also its "badges,"\textsuperscript{27} including restraints on 1982 rights to purchase property.\textsuperscript{28} Stewart reasoned that the thirteenth amendment was intended to reach the private

\begin{itemize}
\item \textsuperscript{22} Jones v. Alfred H. Mayer Co., 255 F. Supp. 115 (E.D. Mo. 1966), aff'd, 379 F.2d 33 (8th Cir. 1967).
\item \textsuperscript{23} 42 U.S.C. § 1982 (1970) states:
\begin{itemize}
\item All citizens of the United States shall have the same right in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
\end{itemize}
\item \textsuperscript{24} 392 U.S. at 417-20 & n.25.
\item \textsuperscript{25} \textit{id.} at 420-22, 429-36.
\item \textsuperscript{26} 109 U.S. 3, 20-21 (1883).
\item \textsuperscript{27} 392 U.S. at 439-40.
\item \textsuperscript{28} \textit{id.} at 441-43.
\end{itemize}
acts underlying the slave system and that since, unlike the fourteenth amendment, it contained no state action requirement, Congress could legislate against the imposition of the badges of slavery by private individuals as well as by the State. Only Justices Harlan and White dissented, counselling "that by far the wisest course would be for this Court to refrain from decision and to dismiss the writ as improvidently granted."

In so applying 1982, Jones opened the door for similar application of 1981. Using the rationale of Jones, the lower federal courts were indeed quick to hold that 1981 as well as 1982 applied to private discrimination. Section 1981 provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The lower courts reasoned that if Congress intended 1982 to apply to private acts, as the Supreme Court found in Jones, its intent for 1981 was the same, since both sections were derived from the Civil Rights Act of 1866. Similarly, the courts stated that 1981 was enacted under Congress' thirteenth amendment power to determine and eradicate badges of slavery imposed by private individuals as well as the State. Finally, construing the term "contracts" in 1981 to include employment contracts, the courts held that 1981 applied to discrimination in employment by private employers. The Supreme Court adopted this line of cases in Johnson v. REA, and granted employees direct access to the courts to present their claims, thereby avoiding entirely the Title VII procedural path. Section 1981 had finally arrived, for better or worse, as a full-fledged remedy for private job discrimination.

29. Id. at 438.
30. Id. at 450.
33. See note 31 supra.
34. 421 U.S. at 459-60.
Neither the lower courts nor the Supreme Court in *Johnson* suggested, as had the dissenters in *Jones*, that "by far the wisest course" might be to refrain from deciding whether 1981 applied to private acts of discrimination. Such restraint as to 1981 might have been quite appropriate, however, for many of the reasons suggested by Justice Harlan in *Jones*. When both the lower courts and the Supreme Court in *Johnson* held that 1981 applied to private acts of employment discrimination, remedies similar to those sought by the 1981 petitioners had already become available through Congress' enactment of Title VII. Just as the fair housing provisions of the 1968 Act diminished the importance of the 1982 remedy found in *Jones*, Title VII should have reduced the necessity of holding 1981 to be an employment discrimination remedy. In fact, the problems that promise to arise from the *Johnson* decision are threatening precisely because there are now two statutes providing overlapping remedies for the same evil.

One could argue that the position of the dissent in *Jones*, that the difficult constitutional questions should be avoided, is not applicable to *Johnson* because those questions were answered by the majority in *Jones*. However, the complexity of a constitutional question is not necessarily diminished in later cases merely because it was reached in an earlier one. Upholding Congress' power to legislate against private discrimination under the thirteenth amendment in *Jones* was controversial enough without the aggravation of *Johnson's* application of 1981. The Court may well have been better advised not to have breathed life into that old statute.

C. The Needless Development of 1981

As suggested above, the remedies available under Title VII and 1981 are quite similar. In addition, the proof of the plaintiff's case is practically identical under either statute. In those cases where one remedy does offer more complete relief, that remedy is Title VII. It appears, then, that the courts afford no additional protection to an employee from job discrimination by interpreting 1981 to cover private employment discrimination claims. An un-
necessary remedy alone might have been tolerable. However, 1981 is not only unnecessary, but actually harmful to both courts and litigants.

That 1981 is unnecessary seems clear from the broad remedies available under both Title VII and 1981. When Congress amended the remedies available under Title VII in 1972, it generally intended to provide broad remedial powers to the courts. The new section 2000e-5(g) of Title 42 gives a court the power to issue injunctions, determine appropriate affirmative action or fashion any other equitable relief, and award back pay. Section 2000e-5(k) provides for an award of attorneys’ fees to the prevailing party when that party is not the United States or the EEOC. In a single exception to its intent to provide for wide remedial powers, Congress limited back pay awards to the two-year period prior to the filing of the charge of discrimination with the EEOC.

Section 1981 remedies as fashioned by the courts seem to enjoy a similar breadth. Court decisions have authorized the use of equitable relief. Such remedies would apparently include reinstatement, hiring, and promotion for individuals and possibly affirmative action for groups. Damages in the form of back pay and “extraordinary compensatory damages” for the “severe injury” that “deprivation solely upon the color of a person’s skin causes” are also available to the litigant invoking 1981. Attorneys’ fees


Finally, Title VII covers sex discrimination in employment, but 1981 apparently does not. Comment, supra, at 341 & n.22.

36. The managers of the House and Senate Conference described the powers in broad terms. The Conference Committee Report contained similar language. Sape & Hart 880-81.


38. Id. § 2000e-5(k).

39. Id. § 2000e-5(g).


42. Larson, supra note 10, at 98-99; Comment, supra note 41, at 350-53.
would also have seemed readily available\textsuperscript{43} as relief under 1981 until a recent decision of the Supreme Court. Now, such an award appears more unlikely.\textsuperscript{44}

The only areas in which Title VII and 1981 appear to differ, then, are back pay recovery and attorneys' fees. The back pay

\footnotesize{

44. The American rule is that a prevailing party does not recover the cost of his attorneys' fees. Comment, \textit{The Discretionary Award of Attorney's Fees by the Federal Courts}, 36 \textit{Ohio St. L.J.} 588, 591 (1975). The courts, however, often have awarded attorneys' fees to the prevailing plaintiff in civil rights actions under the "private attorney general" exception to the no-fee rule. Larson, \textit{supra} note 10, at 101; Comment, \textit{supra}, at 619-23; see Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972). The rationale of the private attorney general exception was that fees would be awarded to a plaintiff when plaintiffs should be encouraged to bring such actions, as "private attorneys general," because they are furthering a public policy or interest and benefiting a class, which it is socially desirable to benefit, through private litigation. Larson, \textit{supra} note 10, at 101; Comment, \textit{supra}, at 627-28. The courts have applied this doctrine to racial discrimination cases by holding that discrimination was against public policy, that remedying it by private litigation benefitted the class of discriminatees who ought to be benefitted, and that this could be accomplished in practically no other way. Larson, \textit{supra} note 10, at 101; Comment, \textit{supra} at 619-23; see Cooper v. Allen, \textit{supra}; Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1972) (§ 1982 case); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) (§ 1983 state action employment discrimination case).

Recently, however, in \textit{Alyeska Pipeline Serv. Co. v. Wilderness Soc'y}, 421 U.S. 240 (1975), the Supreme Court decided that the private attorney general exception to the general no-fee rule was an unwarranted judicial invasion of legislative discretion. The Court reasoned that the federal costs and docket fee statutes expressed congressional intent to reserve to Congress any fee-shifting, and that Congress had not authorized the private attorney general exception. In the costs and docket fee statutes Congress stated what the prevailing party could be awarded in litigation. Still, the Court reasoned, Congress meant to allow the federal courts to exercise two older equitable exceptions to fee-shifting because Congress had not repudiated those exceptions. The case has been severely criticized. For criticism and a general exposition of \textit{Alyeska}, see Comment, \textit{supra}, at 645-58.

Of the two fee-shifting exceptions which the \textit{Alyeska} Court preserved, a court might be able to use one—bad faith by the defendant employer—to award fees to the prevailing plaintiff in a 1981 employment discrimination suit: When a litigant has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," an equity court may, to achieve justice between the parties, allow an exception to the no-fee rule. \textit{Id.} at 603 & n.107, \textit{quoting} 6 J. \textit{Moore, Federal Practice} ¶ 54.77[2], at 1709 (2d ed. 1974). A court may find the necessary bad faith in the behavior of the defendant out of which the suit arises, dilatory tactics pursued after institution of the action, repeated failures to satisfy a legal obligation, and so on. Comment, \textit{supra}, at 604 & nn. 116-22. However, the courts have required relatively extreme behavior to satisfy the bad faith test. Some courts have required willfulness, and the Supreme Court has required fraud upon the court so that "the very temple of justice has been defiled." \textit{Id.} at 603-04 & nn.114-15, \textit{quoting} Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946). If an employer in a 1981 suit were guilty of such gross bad conduct, the court would be able to award attorneys' fees to a prevailing plaintiff employee under this equitable exception. The Title VII plaintiff would seem to have a much easier road to travel to recover fees under section 2000e-5(f). \textit{See} note 38 \textit{supra} and accompanying text.
}
recovery under Title VII, however, may not be any more restricted than the 1981 recovery as limited by statutes of limitations or an equitable decision of the Court. The extraordinary compensatory damages available under 1981 might also be awarded under Title VII pursuant to that Act's grant of equitable powers. As to attorneys' fees, the employee appears better off proceeding under Title VII, where fees are more readily available.

The similarities between the two statutes are not limited to the remedies available. The evidentiary elements that must be proved to support a claim have become virtually identical. Three principles of proof to support a claim of racial discrimination in hiring have been developed in Title VII cases: (1) statistical proof of racial imbalance is sufficient to create a prima facie case; (2) willful intent need not be proved; and (3) statistical proof of imbalance or perpetuation of past discrimination by even neutral employment practices may be used to support a cause of action.

Because of the more recent recognition of the availability of 1981 as a remedy for job discrimination, there has been less time to develop fully the methods of proof for such a cause of action. This has caused one commentator to suggest that the courts simply transplant Title VII proof principles to 1981 actions. Some courts have clearly followed this suggestion, while others have done so implicitly, consolidating the actions without comment when plaintiffs have made claims under both Title VII and 1981. This consolidation apparently assumes that the plaintiff has to prove identical facts for either claim. Before the widespread recognition of 1981 as an applicable statute affording relief for private job discrimination, courts not desiring to apply 1981 where a timely Title VII claim had been filed merely stated that the Title VII claim would

45. Larson, supra note 10, at 98.
46. See Sape & Hart 883.
47. Additionally, Title VII grants the employee plaintiff some procedural advantages unavailable to him under 1981. See note 196 infra and accompanying text.
49. Id. at 90-91.
51. E.g., Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974).
entail the same proof and possible relief as a 1981 claim and that applying 1981 was unnecessary.\textsuperscript{52}

Given the similarities between Title VII and 1981, one can question the necessity for and wisdom of applying 1981 in the private context, particularly after a consideration of the problems created by a 1981 remedy for job discrimination.

D. Johnson v. REA and the Potential Disadvantages of Using 1981

\textit{Johnson} is at once both the Supreme Court's first explicit adoption of the lower courts' holdings that 1981 is applicable to racial discrimination in private employment\textsuperscript{53} and the Court's first attempt at solving several of the problems inherent in recognizing this applicability of 1981. Apparently well aware of the number of intricate problems raised by utilizing 1981, the Court carefully limited its consideration to the single question presented and did not attempt to solve further the difficulties in applying 1981 to a factual situation which is also covered by Title VII.

On May 31, 1967, petitioner Johnson filed a charge with the EEOC complaining that REA had discriminated in its seniority rules and job assignments. On June 20, the date of his dismissal, Johnson amended his charge to include that he had been discharged because of his race. On January 15, 1971, Johnson received his right-to-sue letter from the EEOC and on February 12, filed the letter with the district court in satisfaction (by permission of the court) of the then 30-day requirement for commencing a Title VII action.\textsuperscript{54} On March 18, Johnson's recently appointed counsel filed a "Supplemental Complaint" seeking redress against REA and two involved unions, not only under Title VII, but also under section 1981.\textsuperscript{55} Although the 1981 claim was first made almost four years after petitioner claimed injury, he argued that since the Title VII charge tolled the statute of limitations, the 1981 action was timely.

Once it decided that 1981 was applicable to private job discrimination, the Court had to select a statute of limitations to apply to the 1981 action. Since 1981 itself contains no statute of limitations,


\textsuperscript{53} 421 U.S. at 459-60. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 n.7 (1974), the Court hinted that it was aware of the use of 1981 in the lower courts, but said no more.

\textsuperscript{54} Once an aggrieved employee receives his "right-to-sue" letter from the EEOC, he may commence an action in court against the employer under Title VII. The time limit has been extended. 42 U.S.C. § 2000e-5(f)(1) (Supp. III, 1973).

\textsuperscript{55} 421 U.S. at 455-57.
the Court followed the usual practice of adopting a state limitation.\textsuperscript{56} The majority accepted the lower courts' use of a Tennessee statute specifically applicable to 1981 actions arising within the State.\textsuperscript{57} That statute established a one-year period of limitation so if the running of the statute were not tolled, the period had already expired. This presented the issue for which certiorari had been granted: Whether the statute of limitations had indeed been tolled.

The majority further limited its inquiry to the single issue of whether the filing with the EEOC had served to toll the statute because of some congressional policy in Title VII requiring that the period of limitations for 1981 be tolled when a charge is filed with the EEOC. The question of whether the statute had been tolled for any other reason was thus explicitly avoided.\textsuperscript{58} The Court majority decided that Title VII revealed no requirement that a statute of limitations applicable to 1981 be tolled. For the litigant desiring to pursue both remedies, Justice Blackmun offered the solution of filing a 1981 action before the applicable period passed and petitioning the court for a stay of that action pending EEOC deliberations concerning the Title VII charge.\textsuperscript{59}

Because of the very narrow holding of \textit{Johnson}, several questions concerning 1981 were left unanswered. The Court did not decide whether Congress had expressed elsewhere any policy favoring tolling the 1981 time limit when a related Title VII charge is filed, did not decide whether any federal judicial policies would favor such a tolling, expressly refused to decide which statute of limitations of the forum state was applicable to the 1981 action, and did not determine whether any state exceptions to the statute of limitations were applicable.\textsuperscript{60} The lower courts, however, must resolve these issues causing substantial work for the judiciary and confusion for the employer and employee.

If indeed the use of 1981 in private employment discrimination cases generates such confusion, it is appropriate to ask why the \textit{Johnson} court recognized the applicability of 1981. Since the rem-

\textsuperscript{56} See notes 64-70 infra and accompanying text.
\textsuperscript{57} 421 U.S. at 462 & n.7. The Court stated that the question of whether the selection of the particular statute was proper was not before it on the limited grant of certiorari.
\textsuperscript{58} \textit{Id.} at 465. It could be argued as a matter of statutory interpretation that the Court should have looked to § 1981 alone. It has been the practice of the judiciary, however, to look to Title VII as well as a source of Congressional intent.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} As to the last issue left undecided by the Court, petitioner Johnson had conceded, at least implicitly, that there were no circumstances which would trigger the state exceptions to the statute of limitations. The Court stated that it was leaving Johnson in this position. \textit{Id.} at 463.
edies afforded the aggrieved employee under Title VII and under 1981 are very similar, it does not seem likely that the Court was attempting to preserve any special relief for the injured. The Court still could have upheld the strong federal policy against discrimination by restricting redress for job discrimination to Title VII. Furthermore, when a litigant files a claim under Title VII, a court faces none of the statute of limitations problems associated with 1981, since Congress established definite statutory limits on a Title VII claim. Indeed, the only apparent explanation of the Johnson recognition of 1981's applicability may be the Court's dissatisfaction with the administrative delays within the EEOC, as Justice Blackmun suggested in a footnote.

III. Federal Adoption of State Statutes of Limitations in 1981 Actions

When Congress enacted 1981, it did not include a statute of limitations applicable to that section. The judiciary has responded by applying state statutes of limitations to 1981 as well as other federally created rights. Whether the recent legislative development of Title VII and the judicial extension of 1981 will affect the mode of establishing a limitation for the expanded 1981 rights is a question of major importance now facing the courts.

A. State Statutes of Limitations in Federal Courts as Applicable to Federally Created Rights

1. The General Propositions

Before the decision of Erie R.R. v. Tompkins, federal courts enforcing federal rights which had no prescribed statute of limitations followed state procedural rules of limitation. Those courts reasoned that the Rules of Decision Act required such adherence,

62. 421 U.S. at 465 n.11.
64. 304 U.S. 64 (1938).
66. 28 U.S.C. § 1652 (1970), originally enacted as section 34 of the Federal Judiciary Act of 1789. "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.
holding that Congress had expressed an intention through the Act to adopt state statutes of limitations rather than to create limitless actions.\textsuperscript{67} This practice had become a matter of federal common law. Nevertheless, the courts appear never to have held that the state statutes \textit{must} invariably be adopted, especially where there was a paramount federal policy.\textsuperscript{68} Since \textit{Erie} the federal judiciary has continued the same practice of adopting state limitations on federal actions, adhering to the traditional interpretation of the Rules of Decision Act.\textsuperscript{69} In a moment of clarity in which he revealed perhaps the true rationale for the continued use of state statutes of limitations, Mr. Justice Brennan stated that "[S]tate statutes were chosen by default."\textsuperscript{70}

It seems that continued adherence to the traditional practice of adopting state statutes of limitations for federal claims is warranted after \textit{Erie}. The Supreme Court has suggested that in an action to enforce a federally created right, federal law applies and the \textit{Erie} doctrine is inapplicable, since its command is that a federal court adopt state law only when a state-created right is adjudicated.\textsuperscript{71} Furthermore, the Court has characterized the \textit{Erie} doctrine as "irrelevant" where the ground of jurisdiction is other than diversity.\textsuperscript{72} Therefore, it appears that a court should feel no compulsion from \textit{Erie} to depart from well-developed federal law on adopting state statutes of limitations because of presumed congressional intent in actions to enforce federally created rights in nondiversity jurisdiction.\textsuperscript{73}

\textsuperscript{67} Hill, supra note 65, at 79, citing Campbell v. Haverhill, 155 U.S. 610, 616 (1895).
\textsuperscript{68} Campbell v. Haverhill, 155 U.S. 610, 615 (1895); Hill, supra note 65, at 80; see text accompanying notes 79-82 infra.
\textsuperscript{69} 2 J. Moore, \textit{Federal Practice} \S 3.07, at 742 et seq. (2d ed. 1948).
\textsuperscript{70} McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 229 (1958) (Brennan, J., concurring).
\textsuperscript{71} Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949). The Court cited and distinguished Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947), where a federal tolling rule was applied to a state statute of limitations in an action to enforce a federal right. In \textit{Ragan}, the Court reached a different result in a diversity action to enforce a state-created right. See C. Wright, \textit{Federal Courts} \S 60, at 251-52 & n.36 (2d ed. 1970).
\textsuperscript{72} Levinson v. Deupree, 345 U.S. 648, 651 (1953); C. Wright, supra note 71, at 252.
\textsuperscript{73} Despite the hornbook interpretation of the \textit{Erie} doctrine as stated in the text, it may be possible to construct an argument that the doctrine requires adherence to state statutes of limitations on actions where the jurisdiction is nondiversity and the claim is federally created. The inapplicability of \textit{Erie} to nondiversity litigation may not be as settled as it sometimes appears. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956); Mishkin, \textit{The Variousness of Federal Law: Competence and Discretion in the Choice of National and State Rules for Decision}, 105 U. Pa. L. Rev. 797, 798 & n.8 (1957). Furthermore, although a 1981
2. Application to 1981 Actions

This general approach of adopting state statutes of limitations for federal claims has provided limitation periods for 1981 actions.\(^{74}\) Within the context of civil rights actions like 1981, however, the courts need not rely solely on the Rules of Decision Act. Another statute, 42 U.S.C. section 1988,\(^{75}\) provides more explicit evidence of congressional intent. Usually, a court will rely on both statutes to justify adopting a state limitation—although more heavily on the former.\(^{76}\) Finding some statute of limitations to apply to a 1981 action is not a major problem for a court. Two related difficulties, however, raise much confusion and present a major problem to the practicing bar. Once a court has decided to adopt a state statute of limitations for a 1981 action, that court must decide which particular statutory limit (that applicable to torts, contracts, etc.) to utilize. In addition, it must be determined under what circumstances and in what manner federal policy allows a departure from adherence to the state act.\(^{77}\)

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74. 2 J. Moore, supra note 69, ¶ 3.07, at 749 n.12; Larson, supra note 10, at 76 & n.1 (cases cited).


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


77. The material which follows suggests that the order of analysis for a court deciding to adopt a state statute of limitations for a federal claim is first to determine if any federal policy allows departure from the state statutes and then, if no policy is found, to determine which particular statute is applicable. This order of analysis makes more sense and is followed in the leading cases of United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), Holmberg v. Armbrecht, 327 U.S. 392 (1946), Campbell v. Haverhill, 155 U.S. 610 (1895). However, courts on occasion
B. Federal Policy Considerations in Utilizing State Statutes of Limitations

Federal courts may depart from adherence to state statutes of limitations because of federal policy considerations. As Justice Blackmun stated in Johnson:

Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide. As the Court noted in Auto Workers v. Hoosier Corp., 383 U.S., at 706-707, considerations of state law may be displaced where their application would be inconsistent with federal policy underlying the cause of action under consideration.78

In the first of the two following sections, an investigation of the major case law will be undertaken to determine what sources a court may search to find relevant federal policy allowing it to alter or depart from state statutes of limitations in enforcing federal claims. In the second section, these possible sources will be investigated to determine if there is any federal policy allowing a court to depart from a state statute when enforcing a 1981 claim where Title VII is also applicable.

1. How Federal Policy Alters Adoption of State Statutes of Limitations

The Supreme Court and the lower federal courts have suggested three sources of relevant federal policy which allow a court to depart from a state statutory limit: (1) fundamental differences in federal and state policies, (2) federal legislative pronouncements in statutes and other materials, and (3) traditional federal judicial spheres of action. These same courts also suggest a flexibility in the manner of departure from the statutes.

As to the first policy source, in Campbell v. Haverhill, the leading case in the area,79 the Supreme Court held that blind adherence to state limitations was not required where paramount federal considerations were present. The Court suggested two such

78. 421 U.S. at 465.
79. 155 U.S. 610 (1895). In an earlier case, McCluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830), the Court declared, with little discussion, that state statutes of limitation are applicable to federally created rights because of the Rules of Decision Act.
possible federal considerations. First, where a state discriminated against a federal cause of action by a statutory limit, the Court suggested that Congress probably did not intend for such a statute to be adopted.\textsuperscript{80} Second, the Court suggested that the language of the Rules of Decision Act, that state laws be used "in cases where they apply," might give federal judges "a certain discretion with respect to the enforcement of state statutes."\textsuperscript{81} The Court held, however, that the particular statute before it did not discriminate against the federal claim, and that it was not argued that its time limit was unreasonable.\textsuperscript{82}

As to the second policy source for departing from state limitations, the Supreme Court suggested that federal courts examine legislative acts to determine if any policy would allow an alteration of a state limit in an application of that law to a federal claim. In \textit{United Auto Workers v. Hoosier Cardinal Corp.},\textsuperscript{83} a union sued the defendant employer to recover accumulated vacation pay required by contract but not paid to certain employees upon discharge. The Court held that the suit was properly instituted under the Labor Management Relations Act, which contained no statute of limitations, and that the state statute of limitations applied. The Court further stated that Congress had expressed a policy of rapid resolution of labor disputes, but none promoting uniformity of limitations. Even though the Court did not depart from the state statute of limitations in this case, it was clear that federal policy was an important consideration, and that there was freedom to fashion an independent federal limitations period when congressional policy as expressed in a statute was clear.\textsuperscript{84}

A traditional federal judicial sphere of action is the third relevant source of federal policy permitting a court to depart from a state statute of limitations. In \textit{Holmberg v. Armbrecht},\textsuperscript{85} plaintiff creditors instituted an action to hold defendant bank shareholders liable for 100 percent of their holdings under the Federal Farm Loan Act. That Act created a federal equitable right but no statutory time limit. The Court stated that, where Congress had not placed a time limit on the enforcement of a federal claim, it left the fashioning of the remedial details of the claim to the Court. This power allowed the federal courts to absorb but also to alter

\textsuperscript{80} 155 U.S. at 615.
\textsuperscript{81} \textit{Id}.
\textsuperscript{82} \textit{Id.} at 615-16.
\textsuperscript{83} 383 U.S. 696 (1966).
\textsuperscript{84} \textit{Id.} at 700-02. For a case distinguished by the \textit{Hoosier Cardinal} Court, where the Court found a federal policy favoring tolling of a federal statute of limitations, see \textit{Burnett v. New York Cent. R.R.}, 380 U.S. 424 (1965).
\textsuperscript{85} 327 U.S. 392 (1946).
the limitations period on an equitable claim when federal policy was compelling. The Holmberg Court recognized an equitable policy of relief from fraud in the case and held that the lower court could "cut down or extend" the state statute of limitations applicable to the action because of that policy.

There are, then, three rather solid sources of federal policy allowing alteration of state statutes of limitations. Holmberg stands for the proposition that a federal court can discover such federal policies in a traditional judicial sphere such as equity practice. Hoosier reveals that legislative acts may be searched. Campbell shows at least that fundamental differences in state and federal policy is another reason for change. The Campbell dictum which suggested that a court could depart from the statutes in its "discretion" appears not to have been followed; indeed, the courts are reluctant to alter state statutes when they cannot discover a federal policy favoring doing so. The cases also illustrate the wide range of alterations in which a court may engage once a policy allowing such alteration is discovered: extending, shortening, or tolling the statute (Holmberg), fashioning a federal replacement (Hoosier), and ignoring the statute (Campbell).

2. Application to 1981 Actions

Where both Title VII and 1981 are applicable, it is necessary to determine whether any of the possible policy sources suggested above are present. In this way, it can be determined whether a court may depart from a state statute of limitations otherwise found applicable to 1981 actions.

a. Fundamental Differences in State and Federal Policy. The Campbell Court held that a state statute of limitations which discriminates against a federal claim can be ignored, although that statute is otherwise applicable to the claim. The Court in Johnson accepted the Campbell premise that a state statute could be ignored if discriminatory, although it did not decide whether the particular Tennessee statute (specifically applicable to federal civil

86. Id. at 395.
87. Id. at 398 (Rutledge, J., concurring). For a similar holding by a lower court cited in the Johnson dissent, 421 U.S. at 470, see Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.) cert. denied, 368 U.S. 821 (1961).
88. Hill, supra note 65, at 81.
90. This aspect of Campbell has been followed repeatedly. Hill, supra note 65, at 80-81 n.73.
rights actions) was in fact discriminatory. Nevertheless, because Johnson adopted Campbell, employees who find that very short state statutes of limitations particularly applicable to 1981 actions have run while they were following EEOC procedures may successfully be able to show that a federal court should depart from those statutes to preserve the possibility of redress for the violation of federal rights.

b. Federal Legislative Pronouncements. Since the petitioner in Johnson argued that the relevant source of federal policy was the history of Title VII, the Court restricted itself to that source. The face of the statute exposed no relevant policy and the majority did not recognize one in the legislative history. Citing the same documents as the dissent, the majority did decide that there was a congressional purpose "allow[ing] an individual to pursue independently his rights," and that if the individual litigant chose the truly independent Title VII procedures his individual choice did not toll the limit on the remaining separate 1981 claim. From this, the federal policy present, if any, would be one of freedom of choice for the litigant. This policy, the Court suggested, was the same fundamental policy behind a state statute of limitations—freedom to exercise or sleep on one's rights up to such a time when this freedom would no longer be fair to the other party. Since the federal policy in Title VII was thus consistent with the policy behind any state statute of limitations, the majority perceived no reason to depart from the state statute of limitations used.

The Johnson dissent, however, discovered from the same sources a legislative intent to provide "a flexible network of remedies," reasoning that although an individual retained all possible remedies, he might have to follow a certain order in pursuing those remedies to preserve the integrity of the different procedures. Since the Congress established a "network" of remedies, and since that network required an ordering of remedies to be effective, the dissenters suggested that the federal policy was to fix a priority of remedies and not to give the litigant free choice. That policy would require state statutes of limitations frustrating it to give way. Since the policy would postpone 1981 litigation until after Title VII conciliatory negotiations with the EEOC were attempted, the dissenters stated that a state statute of limitations which forces

91. 421 U.S. at 462 n.7.
92. Id. at 459, 471.
94. 421 U.S. at 461.
95. Id. at 466.
96. Id. at 472.
an early filing of a 1981 action should be ignored.\textsuperscript{97} Johnson thus brings into clear focus the question of whether there was a federal policy inherent in Title VII justifying alteration of the state limitations period.

A brief review of some significant points in the legislative history of Title VII helps to clarify the division of the Johnson Court. On the face of the Act, Congress expressed no federal policy relevant to the question of adherence to the state statute. The history of the Act, therefore, becomes the prime source for any policy. But Congress made no explicit pronouncement of an intent to determine the order in which the remedies in Title VII and 1981 should be pursued. If the Tennessee statute of limitations were to be tolled, such a policy would have to be found. The search thus becomes one for evidence from which to infer an implicit legislative intent to establish a policy of ordering.

Throughout the legislative history of the original Title VII of the Civil Rights Act of 1964, the purpose of Congress seemed to be mainly a preservation of independent concurrent federal remedies, not any special ordering of those remedies. During the debates on the bill, the Senate was aware of concurrent judicial remedies.\textsuperscript{98} Senator Clark inserted in the Congressional Record three memoranda recognizing other judicial remedies under federal statutes. These three documents—one from a group of prominent attorneys in practice and at academic centers, another from the deputy attorney general, and the third from the Secretary of Labor—discussed the constitutionality of Title VII. In the analyses, each of the writers also discussed other federal labor legislation offering similar relief. While inferences from legislative inaction are often misleading, at least it can be noted that concurrent judicial remedies were known to the Senate, and yet that body enacted no legislation altering the existence or independence of those remedies. The senators also rejected an amendment by Senator Tower to make the EEOC the exclusive federal agency dealing with employment discrimination,\textsuperscript{99} thus expressly refusing to destroy these separate federal avenues of relief.

During its deliberations on the 1972 amendments to Title VII, Congress more clearly\textsuperscript{100} indicated its intent to preserve concur-

\textsuperscript{97} Id. at 472-73.
\textsuperscript{98} 110 CONG. REC. 7207-12 (1964).
\textsuperscript{99} Id. 13650-52.
\textsuperscript{100} Due to the unusual and confused procedural history of the 1964 Act, including a wholesale substitution for the original bill on the floor of the Senate, the usual volumes of congressional material expressing legislative intent on a near-final version of the bill are not available. The Congressional Record thus becomes more
rent remedies. The legislature also somewhat more explicitly suggested that it did not intend to subordinate the independence of those remedies. Since by the time of the 1972 amendments the Supreme Court had decided Jones v. Alfred H. Mayer Co. and the lower courts had begun to apply the reasoning of that case to 1981, Congress was able to consider specifically the existence and separateness of 1981 as a remedy. Both the House and Senate Committee Reports emphasized an intention to continue the existing employment discrimination remedies. The House Report specifically mentioned 1981, and the Senate Committee seemed to suggest that existing provisions like 1981 were truly independent of Title VII: "[T]he Committee would also note that neither the above provisions regarding the individual's right to sue under Title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." It is important to note that the Committee seemingly intended that Title VII could not affect 1981 by conditioning an action based on the latter on any particular order in pursuing the remedies.

In other actions and expressions, the legislators further indicated the intention that concurrent job discrimination remedies continue independently of Title VII. The Senate twice rejected floor attempts to repeal the post-Civil War Act from which 1981 was derived, and the House-Senate Conference Committee rejected the House bill's language making Title VII the exclusive remedy for employment practices. The managers of the House and Senate conferees issued statements declaring that the then-existing court interpretations of Title VII (1964 version) should be retained except where Congress had expressed a contrary interpretation.

The lower federal courts had interpreted the 1964 congressional intent to be the independence of employment remedies, especially 1981 and Title VII. Through the conference managers, Congress thus signaled that the courts had correctly interpreted this intent. This strongly stated congressional intent would seem to leave little room for a court to infer a legislative policy of procedurally linking the remedies by, for example, making recourse to

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103. 118 CONG. REC. 1526, 1797 (1972); Sape & Hart 888 & n. 406.
105. 118 CONG. REC. 7564, 7166 (1972).
106. See Sape & Hart 885-87 & n.388 and cases cited therein.
the EEOC a prerequisite to a 1981 action. Furthermore, Congress also expressed the intention to preserve previously existing remedies, making it difficult for a court to restrict the availability of remedies by inferring a legislative intent to put procedural prerequisites on their utilization.

Since Congress never specifically established an order for pursuing employment discrimination remedies, a court must be willing to infer an implicit congressional policy ordering the remedies if that court is to find a federal legislative policy allowing departure from a state statute of limitations. This willingness so to infer is the precise division between the majority and dissent in *Johnson*. The majority perceived the explicit congressional emphasis on the availability of multiple remedies and the strong suggestion of independence of those remedies, and refused to infer an ordering, stating that an express legislative statement was necessary. The dissent gave more weight to the overall conciliatory scheme of Title VII and inferred the ordering from Congress' implied desire to effect such conciliation without an intrusive adversary 1981 proceeding.

The legislative history seems to support the majority's view of refusing to state an order in which the federal remedies were to be pursued. Congress had suggested that the remedies be independent, so no policy of making the remedies dependent by ordering their pursuit was implicit. Even if the congressional policy had not been so clear, an inference of the independence of the remedies—from the clear Congressional intent to preserve remedies—would support the majority's refusal to make them dependent unless Congress explicitly so required.

The *Johnson* majority also seems more in line with precedent than does the dissent. In *United Auto Workers v. Hoosier Cardinal Corp.* the Court had been unwilling to imply an overall

107. Most of the courts which considered the possible intent in the 1964 Act of requiring a litigant to utilize EEOC conciliation under Title VII before initiating a 1981 action held that there was no congressional intention of prior recourse. In 1972, the House and Senate conferees' managers presumably adopted these holdings when they stated that prior interpretations of Title VII remained in effect unless Congress had otherwise specified. See note 106 supra. Of course any such intent in the 1964 Act may be a fanciful, though not unusual, type of statutory interpretation, since the applicability of 1981 did not arise until after the *Jones* case in 1968.

108. A federal policy contained in Title VII, note 58 supra and accompanying text, was the only ground on which the majority was prepared to allow a tolling. 421 U.S. at 465. The dissent similarly restricted itself. Id. at 468-70.

109. Id. at 461.

110. Id. at 472-73.

111. 383 U.S. 696 (1966); see notes 83, 84 supra and accompanying text.
federal policy from the mere existence of a congressional scheme of treating labor-management relations. From this, the Johnson Court could also hesitate to infer a federal policy from the mere scheme of Title VII in order to avoid "the drastic sort of judicial legislation" against which the Hoosier Court cautioned. More recently, in Alexander v. Gardner-Denver Co., a case involving the relation of Title VII remedies and arbitration pursuant to a collective bargaining agreement, further support for the majority's position in Johnson was evident. Although the Johnson dissent cited and accurately relied on Alexander for that case's emphasis on the cooperative scheme of Title VII, the Johnson majority is more strongly supported by the Alexander holding, which was that a prior arbitration decision did not foreclose a separate adjudication under Title VII due to independence of the remedies.

Justice Powell, writing for a unanimous Court in Alexander, stated that Congress had expressed Title VII policies of opposition to job discrimination, multiple avenues of relief from it, and support for arbitration. Furthermore, the Court unanimously held that these various policies could best be served by permitting employees to pursue both remedies—contractual and statutory—unfettered by any judicial restrictions relating to the impact of one on the other. Judicial restrictions were additionally unwarranted because Congress intended the multiple remedies for job discrimination to be independent: “Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.”

112. 383 U.S. at 701, 703.
114. 421 U.S. at 459, 470-72.
115. 415 U.S. at 59-60.
116. Id. at 47.
117. Id.
118. Id. at 59.
119. Id. at 48. Justice Powell supports this statement in footnote 9, citing Senator Clark's letter, note 98 supra and accompanying text; the rejection of Senator Tower's amendment, note 99 supra and accompanying text; a similar amendment during the deliberation on the 1972 amendments, H.R. 9247, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972); the Senate Committee report on the 1972 Act, note 102 supra and accompanying text; and Sape and Hart's article, supra note 10. However, as discussed above at text accompanying notes 98, 99 supra, most of these documents and actions support only the congressional intent of maintaining the existence of other remedies. That intent is to be distinguished from the suggestion in the Senate Committee report and the statements by the House and Senate conferees' managers. See notes 102, 105 supra and accompanying text. The latter support the view that Congress also intended the remedies to be independent—i.e., not related by procedural restrictions as order of pursuit or impact of
Johnson is thus quite consistent with the unanimous Alexander opinion. In Johnson, Justice Blackmun sought to reconcile the same federal policies. The Court held that the federal policy of multiple independent remedies for job discrimination could not be the basis for ordering the remedies and making them dependent on one another by requiring recourse to Title VII's conciliatory approaches prior to the filing of a 1981 adversary action. Admittedly, the Johnson Court's approach might neglect the Alexander policy of promoting arbitration if EEOC conciliation fits within that policy. But, if the policies were competing, the Court had to strike a balance between them. Since congressional support for multiple independent remedies was more evident, this policy prevailed. The precise balance which Justice Blackmun struck did not even entirely neglect the policy of conciliation since, as he stated, the EEOC measures would be available to the litigant obtaining a stay of his 1981 action.

It might be argued that in Johnson the petitioner would have had more available remedies, and the policy favoring multiplicity would thus be served, if the Court had tolled the 1981 limitation. Yet, this argument ignores the policy of independence of the remedies. That policy is entwined with the policy of multiplicity. It might further be argued that the policy of conciliation should surely favor a tolling of the statute of limitations applicable to the 1981 action because conciliation would be most effective if it occurred prior to any adversary proceeding. This second argument was precisely that made by the dissent in Johnson. It ignores, however, the fact that congressional expression of policy favoring conciliation is apparently nonexistent—the dissent cited no legislative authority—in the face of abundant evidence of legislative intent and suggestion concerning the other relevant policies. Furthermore, the argument is based upon a double inference of congressional intent. The first inference would be to deduce a policy of conciliation from the overall scheme of Title VII. The second inference, based upon the policy of conciliation, would be to deduce a legislative intent to order the pursuit of remedies to effect conciliation. This second inference, however, would fail because of the congressional intent to maintain multiple independent remedies. The failure of these dissenting arguments indicates the solid ground upon which the majority is based.

The Johnson Court could have examined one other congression-
al act as a legislative source of federal policy—1981. Neither faction of the Court questioned whether 1981 contained any explicit or implicit policy upon which a court could base a departure from an applicable state statute of limitations. Apparently the Johnson Justices were following accepted practices, for in *O'Sullivan v. Felix*, the Court rejected the argument that the rights created by a federal civil rights statute could not be limited by a state statute of limitations.\(^\text{120}\) Thus, *O'Sullivan* implicitly held that a civil rights statute akin to 1981 contained no explicit or implicit federal legislative policy making state statutes of limitation inapplicable. The Court opted for the usual approach of adopting the state limitation.\(^\text{121}\) Later courts have consistently followed this practice.\(^\text{122}\)

c. Federal Judicial Spheres of Action. A court confronted with an employee-plaintiff still has one other source of federal policy to determine whether it may depart from an applicable state statute of limitations: a court may search for a previous controlling or analogous federal judicial policy in traditional judicial spheres of action. In *Holmberg v. Armbrecht*,\(^\text{123}\) the Court suggested that recognition of a judicial policy is only possible in a clearly established judicial sphere of action. In that decision, the established judicial sphere of action was the federal practice of fashioning equitable remedies.\(^\text{124}\)

Justice Marshall, dissenting in *Johnson*,\(^\text{125}\) may have attempted to use the *Holmberg* analysis. He cited *Holmberg* in support of the maxim that "historic principles of equity" can be used to depart from state statutes of limitations\(^\text{126}\) and reasoned that filing a Title VII charge would put a defendant on notice of a possible 1981 suit, so that the 1981 statute of limitations should be suspended.\(^\text{127}\) Marshall assumed that the 1981 rights were equitable as well as legal. His analysis may be based on the equitable principle of regarding what is substantially done as done. This policy, he concluded, required a tolling of the statute of limitations on the 1981 action, for the plaintiff had substantially complied with the requirements for commencing an action. Commencement of an action tolls the statute and was substantially achieved here because the plaintiff had notified the defendant of his intent

\(^{120}\) 233 U.S. 318, 322-23 (1914).
\(^{121}\) See notes 74-76 *supra* and accompanying text.
\(^{123}\) 327 U.S. 392 (1946).
\(^{124}\) Id.; see notes 85-87 *supra* and accompanying text.
\(^{125}\) 421 U.S. at 470, 473, 474.
\(^{126}\) Id. at 470.
\(^{127}\) Id. at 473-74 & n.2.
to sue. The majority answered this analysis in a footnote. Justice Blackmun noted the burden which a long extension of the statute during protracted EEOC negotiations would place on a defendant. Furthermore, he doubted that the policies underlying a limitations period were substantially met where there was not a complete identity of the causes of action.

Courts also have traditional spheres of action in determinations of primary jurisdiction. Here, a court would seem to have a rich source of judicial policies allowing departure from state statutes of limitations applicable to federal actions. The Title VII/1981 overlap, however, is unlike those factual configurations to which primary jurisdiction analysis is generally applied. Even if the primary jurisdiction analysis were applied, it does not embrace judicial policies applicable to the limitations problem in situations such as Johnson.130

128. Id. at 467-68 n.14.  
129. A determination of primary jurisdiction establishes whether the court or an agency has initial jurisdiction over a given dispute. For a discussion of primary jurisdiction see L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 124 (abridged student ed. 1965) [hereinafter cited as JAFFE]; Travis, Primary Jurisdiction: A General Theory and its Application to the Securities Exchange Act, 63 CALIF. L. REV. 926 (1975).  
130. Regardless of whether under a primary jurisdiction analysis a court defers to an agency or not, that court will not find a judicial precedent of recognizing a policy applicable to the Johnson limitations problem. When a court decides that a litigant must exercise prior recourse to an agency for some type of treatment of all or part of his claim, that court will ordinarily stay the action pending before it to preserve litigants' rights—especially against a running of the statute of limitations. Travis, supra note 129, at 926 n.3 and cases cited therein. On the other hand, when an aggrieved party first resorts to an agency and later seeks redress in a court of law, if that court does decide that it has concurrent jurisdiction, it treats the agency and court remedies separately. Where a court finds that a statute of limitations on a litigant's administrative remedy has run, it examines the limitations on his judicial remedy independently, since the remedies are concurrent and not identical. United States v. Western Pac. R.R., 352 U.S. 59, 70-74 (1956); Travis, supra note 129, at 931 & n.28.

Therefore, within this recognized judicial sphere of action concerning agency-court relations, it appears that the courts have developed no federal policy allowing an alteration of state statutes of limitations applicable to a federal cause of action, whether or not prior recourse to an agency is necessary. A court apparently stays a pending judicial action if prior recourse to an agency is necessary because the court does not perceive in the ordering of remedies a federal policy requiring a tolling of the statute of limitations applicable to the judicial action by an earlier initiation of the administrative proceedings. If a court did not stay the action, the statute of limitations would run. Furthermore, in deciding that agency statutes of limitations have no effect on concurrent judicial actions, the courts have apparently suggested no connection between the agency proceedings and the judicial statute of limitations; instead, they have suggested the independence of the two actions and, it seems, their statutes of limitations. This latter judicial resolution squares with the Johnson majority's decision on the Title VII/1981 overlap. That Court similarly stressed the independence of the judicial and administrative remedies and, there-
In fact, a primary jurisdiction analysis is useful only as part of an inquiry into congressional intent. When Congress establishes a "specialized administrative tribunal," the legislators seldom make their statutory purpose sufficiently clear to resolve any conflict between the agency's jurisdiction and previously existing judicial jurisdiction. When this occurs, the courts must develop a system of "what is necessary to make all the prescribed procedures workable." The courts then become involved in two processes of statutory interpretation. One is to determine whether Congress repealed any pre-existing statutory grants of jurisdiction to the federal courts. The other is to determine how Congress allocated jurisdiction between the courts and the agency for claims under the new legislation; i.e., an analysis of primary jurisdiction. In a Johnson situation, where Title VII and 1981 overlap, a court would invoke primary jurisdiction to determine how Congress had allocated jurisdiction for Title VII claims between the courts and the EEOC. It should be noted, however, that only under the inquiry into repealed jurisdiction would a court hope to find any explicit or implicit congressional intent relevant to the altering of a state statute of limitations applicable to a 1981 action. Under the primary jurisdiction framework, the Court would only be examining the relations of court and agency under Title VII.

A court could possibly fashion judicial policies allowing departure from a state statute of limitations applicable to a federally created right by examining the traditional judicial sphere of statutory interpretation to determine possible repeals of legislation. For example, a court might determine that, by a later statute, Congress meant to repeal a previous vesting of original jurisdiction in a federal district court, and to modify the jurisdiction so it could not be properly invoked until a later time. In that situation, the court might find a policy to toll the statutory limitation until jurisdiction became proper in the court. However, any doubt Con-
gress may have left in 1964 about repealing previously existing remedies was dispelled in 1972. As discussed above,\textsuperscript{135} the lawmakers in enacting the 1972 amendments, made it clear that Title VII was to contain no implicit or explicit repeal of 1981. In the face of the expressions of congressional intent in the legislative history to preserve, not repeal, existing remedies, a court could not expect to unearth a policy to favor tolling by finding an implicit or explicit repeal.

The Title VII/1981 overlap is not likely to fit within a traditional sphere of judicial action, whether equity or otherwise. Nor has Congress expressed a policy allowing a departure from state limitations in either Title VII or 1981. It seems, then, that if a court is to avoid state limitations, it must find supporting policy from the differences between state and federal policy. If, for example, a state were to discriminate against the 1981 claim by enacting an especially short statute of limitations, a court would be justified in ignoring that statute. Otherwise, it seems that if the courts are to use 1981, they must adopt state limitations for those claims except in cases where those limitations are discriminatory.

IV. Utilization of State Statutes of Limitations in 1981 Actions

Once a court decides to apply a state statute of limitations to a federally created right, it is left with two further questions: (1) which particular statute of limitations of the state is applicable, and (2) which exceptions, if any, to the statute are applicable. The Johnson Court decided to use a state statute of limitations in a 1981 action, but did not answer the two questions. It is appropriate to consider these questions, since other courts may not be able to avoid them so easily and since they appear to create most of the confusion surrounding the Title VII/1981 issue.

A. Which Statute of Limitations Applies

As discussed in Part III,\textsuperscript{136} a court decides whether to adopt a

\textsuperscript{135} See notes 103-07 supra and accompanying text. If in 1972 Congress was still not altogether clear on whether remedies were to be independent, it was at least specifying that they were to remain in existence, as indicated in the House and Senate Committee reports, the Conference Committee rejection of the House action making Title VII the exclusive remedy, and the joint statement issued by the managers of the conferees.

\textsuperscript{136} See notes 64-70 supra.
state statute of limitations and whether to depart from that statute because of some federal policy consideration. The determination of which particular statute of limitations of a state applies in an action to enforce a federal claim is also decided as a matter of federal law.  

The approach which the courts uniformly use to select the specific statute is twofold.  

First, the courts characterize or determine the nature of the litigant's underlying claim. They then select the state statute of limitations for the state claims most analogous to the nature of the federal claim. For example, a plaintiff might sue a defendant state hospital for damages for wrongful incarceration and detention under a federal civil rights statute protecting all persons against state deprivations of rights secured by the Constitution. If the court were to select a state statute of limitations to apply to the plaintiff's claim, it would probably begin by characterizing the claim as one for damages for false imprisonment. If the state had a statute of limitations for assault, battery, or false imprisonment, the court would probably choose this statute as most applicable to the underlying character of the federal claim.

A crucial step in selecting the particular statutory limit for any federal claim not limited by Congress is thus the characterization or determination of the nature of that claim. Once a court decides the underlying nature of the federal claim, its selection of the particular state statute may be rather mechanical because of the likelihood that the court will try to pigeonhole the federal claim into some common law class of actions (e.g., contracts, torts, etc.) and then apply the state statute applicable to that class. Despite the importance of the initial step of characterization, the Supreme Court has reasoned that federal courts should accept the characterizations that state courts have given to federal claims unless those characterizations are unreasonable or contrary to federal policy. In selecting limitations periods for 1981 claims, how-

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140. A conflict of laws question may arise as to which particular state's statutes of limitations are to be used. United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 705 n.8 (1966); Smith v. Cremins, 308 F.2d 187, 189 & n.14 (9th Cir. 1962); Developments in the Law: Statutes of Limitations, 63 HARV. L. REV. 1177, 1267 (1950) [hereinafter cited as Developments].

ever, it seems the federal courts have for the most part been operating without prior state characterizations of the 1981 claims.

Furthermore, the fact that a court, federal or state, has decided the nature of a 1981 claim does not foreclose future reclassifications. Characterization of the claim begins as a matter of statutory interpretation. If the judicial task ceased at this point, a claim once characterized under a federal statute like 1981 would rarely be reclassified since the decision would be a constructional clarification of the statute. However, the nature of a federal statutory claim often cannot be classified merely from the statute; rather, the facts surrounding the particular litigant's claim must be examined. If a court has a statute before it which requires a consideration of such facts, that court faces a case-by-case analysis to determine, in good common law fashion, when prior adjudications are sufficiently similar to provide guidance. The matter is then no longer one of mere statutory interpretation.\(^ 142 \)

The characterization given to 1981 by various courts will be analyzed with two purposes in mind. First, it is appropriate to consider what statutes of limitations have been applied. Second, the confusion and extraneous effort resulting from the utilization of 1981 as a vehicle for employment discrimination relief will be discussed. The varying and sometimes inconsistent results which have been reached in the circuit courts are no doubt attributable in large degree to the method with which the characterization of 1981 actions has been approached.

1. **Various Statutes of Limitations Used**

When an employee has a claim for job discrimination under the 1981 right to make and enforce contracts, the federal appellate courts have applied various state statutes of limitations to the action. Since the *Johnson* Court refused to determine whether a particular type of statute of limitations was most applicable or if the particular statute applied in that case was appropriate, the division among the lower federal courts remains. An excellent article by E. Richard Larson\(^ 143 \) suggests that the diversity of statutes selected has sometimes resulted from confused analyses by the courts. Ideally, the analysis should classify the nature of the 1981 action of federal claim would use the same analysis as it uses in deciding whether to depart from a state statute of limitations.

\(^{142}\) In 1981 claims for relief from private employment discrimination based on the statutory right to "make and enforce contracts," the courts have not engaged in statutory construction alone in order to characterize the nature of the claim. See notes 143-96 infra.

\(^{143}\) Larson, *supra* note 10, at 76-82.
and select the applicable statute of limitations by choosing the statute applied to state claims most nearly analogous to the nature of the federal claim. The courts often have treated the first step of this analysis only superficially. The appellate courts have applied one of six types of statutes of limitations—limitations applicable to contracts, torts, liabilities created by statutes, civil actions not otherwise provided for, specific federal civil rights actions, and specifically named civil actions—to 1981 actions on varying occasions.

a. Contracts. Despite the fact that the 1981 claim for employment discrimination is based upon the statute's "make and enforce contracts" language, few courts have adopted state limitations applicable to contracts\(^{144}\) for the 1981 suits.\(^{145}\) In \textit{Boudreaux v. Baton Rouge Marine Contracting Co.}, the Fifth Circuit adopted—in a footnote—the contracts statute of limitations for 1981 actions generally,\(^{146}\) stating, "It is, after all, the right 'to make and enforce contracts' which is protected by 1981."\(^{147}\) Larson has criticized this analysis as superficial because it does not take into account the nature of the "substantial federal right significantly different from the common law of contracts."\(^{148}\) He explains that the federal right is different because it "involves not only the loss of the contract, but more significantly, the insult and humiliation of racial classification, if not relegation to second-class citizenship."\(^{149}\) Larson's criticism is essentially that the court looked only at superficial qualities of

\(^{144}\) \textit{E.g.}, CAL. CODE CIV. PROC. §§ 337, 339 (West 1954) (4 years, 2 years); ILL. ANN. STAT. ch. 83, §§ 16, 17 (Smith-Hurd 1966) (5 years, 10 years); IND. CODE §§ 34-1-2-2, 34-1-2-1 (1971) (20 years, 6 years); LA. CIV. CODE ANN. art. 3544 (West 1953) (10 years); MONT. REV. CODES ANN. §§ 93-2603, 2604 (1964) (8 years, 5 years); N.Y. CIV. PRAC. § 213(2) (McKinney 1972) (6 years); OHIO REV. CODE ANN. §§ 2305.06–07 (Page 1954) (15 years, 5 years); PA. STAT. ANN. tit. 12, § 31 (1953) (6 years); TENN. CODE ANN. § 28-309 (1955) (6 years).

\(^{145}\) 437 F.2d at 1017 n.16.

\(^{146}\) 437 F.2d 1011, 1017 n.16 (5th Cir. 1971). In that same footnote, the court went on to say that although the contracts limitation generally applied, different limitations would apply depending on the remedy sought. It suggested that back pay statutes of limitations were applicable to claims for back pay and the equitable doctrine of laches applied to equitable relief sought. In later cases, the court has reaffirmed that the state back pay statutes apply when "wages and like damages" are sought. United States v. Georgia Power Co., 474 F.2d 906, 924 (5th Cir. 1973). The Fifth Circuit courts have rarely used the contracts statute of limitations, preferring instead to use other statutes, applicable to the remedies sought, when available.

\(^{147}\) Larson, \textit{supra} note 10, at 82.

\(^{148}\) \textit{Id.}
the 1981 action, not at the substance of the federal statutory protection.\textsuperscript{150}

Courts accepting the \textit{Boudreaux} reasoning face still an additional decision: whether the contract sued upon was oral or written. Since the period of limitations may vary depending on whether a contract is oral or written,\textsuperscript{151} and since 1981 embraces both types of contracts, a different limitation may apply, depending on the court's characterization of the contract. Where a litigant is represented by a union which has negotiated a collective bargaining agreement, it seems the court must decide whether the litigant is attempting to enforce that written contract or his own oral contract of employment, if there was one, with the employer, or both. In \textit{United Auto Workers v. Hoosier Cardinal Corp.},\textsuperscript{152} the Supreme Court accepted a state court holding that the employees' claims for accumulated vacation pay were not exclusively based on their written collective bargaining agreements, but also on their oral contracts of employment. The Court therefore accepted the district court's decision that the Indiana 6-year statute of limitations for suits based on contracts not exclusively written applied to an action based on the federal Labor-Management Relations Act.

For a court to deny a 1981 litigant relief because his employment contract is not exclusively written seems incongruous, yet such a result follows when a court reasons as did the \textit{Boudreaux} court and ignores the substance of the federal right. Such reasoning invites the consideration of irrelevant facts and is inconsistent with the policies of the statutes of limitations in which the oral-written distinction is made. Limitations for oral (or not exclusively written) contracts are generally shorter than those for written contracts because evidence based almost solely on memories of witnesses fades faster than evidence based primarily on written agreements.\textsuperscript{153} The policy underlying the distinction between oral and written contracts would not seem applicable to 1981 job discrimination suits at all, since the defendant-employer does not defend by

\textsuperscript{150} Id. at 78.
\textsuperscript{151} \textit{E.g.}, \textit{CAL. CODE CIV. PROC. § 337} (written contracts) (4 years), § 339 (oral contracts) (2 years) (West 1954); \textit{ILL. ANN. STAT. ch. 83, § 16} (oral contracts) (5 years), § 17 (written contracts) (10 years) (Smith-Hurd 1966); \textit{IND. CODE § 34-1-2-2} (in writing) (20 years), § 34-1-2-1 (not in writing) (6 years) (1971); \textit{MONT. REV. CODES ANN. § 93-2603} (written) (8 years), § 93-2604 (not written) (5 years) (1964); \textit{OHIO REV. CODE ANN. § 2305.06} (in writing) (15 years), § 2305.07 (not in writing) (6 years) (Page 1954).
\textsuperscript{152} 383 U.S. at 706-07.
\textsuperscript{153} \textit{Developments} 1195 & n.172; see \textit{J. WILLIAMS, LIMITATIONS OF ACTIONS IN CANADA} 5, 46 (1972).
proving terms of the plaintiff's employment contract, but rather with evidence of his own employment practices.

b. Torts. Other courts of appeals have selected state tort statutes of limitations154 to limit the time for initiating 1981 job discrimination claims. In Young v. International Telephone & Telegraph Co.,155 the Third Circuit simply cited one of its earlier civil rights decisions156 as authority for adopting an analogous state limitations period. In the earlier case, the court had applied torts statutes of limitations, reasoning that the cause of action could best be analogized to the common law torts of false arrest, false imprisonment, and slander. In Marlowe v. Fisher Body, the Sixth Circuit also reasoned that a 1981 action for the deprivation of civil rights was primarily one for "the violation of personal rather than property rights."157 That court then applied the Michigan statute of limitations for personal injuries to the 1981 employment discrimination claim.158

Larson has criticized courts adopting the Young rationale for making the same mistake as the Boudreaux court, i.e., failing to analyze the significant differences between common law rights and federal statutory rights.159 Another commentator, however, has lauded the selection of these limits, since the 1981 action "does not depend on the conditions of the agreement between the parties, but arises out of a statute creating personal rights that the defendant has deliberately infringed."160 Larson would probably respond that this analysis correctly recognizes 1981 rights as different from contract rights but incorrectly fails to perceive the difference between statutory rights and tort rights. Larson staunchly maintains that the federal statute creates a claim for infringement by discrimination on a unique bundle of rights, including the right to be free from insult and humiliation caused by differentiation in treatment because of race.

154. E.g., CAL. CODE CIV. PROC. § 340(3) (West 1954) (1 year); ILL. ANN. STAT. ch. 83, § 15 (Smith-Hurd 1966) (2 years); LA. CIV. CODE ANN. art. 3544 (West 1953) (10 years); MONT. REV. CODES ANN. § 93-2606 (1964) (2 years); N.Y. CIV. PRAC. §§ 214(5), 215 (McKinney 1972) (3 years, 1 year); OHIO REV. CODE ANN. §§ 2305.09-11 (Page 1954) (4, 2, 1 years); PA. STAT. ANN. tit. 12, §§ 31, 34, passim (1953) (6, 2, 1 years); TENN. CODE ANN. § 28-304 (Supp. 1975), § 28-305 (1955) (1 year, 3 years); TEX. REV. CIV. STAT. ANN. arts. 5524, 5526 (1958) (1 year, 2 years).

155. 438 F.2d 757 (3d Cir. 1971).


157. 489 F.2d 1057, 1063 (6th Cir. 1973).

158. Id.

159. Larson, supra note 10, at 77-78 n.129.

Larson's reasoning leads to the conclusion that no statute of limitations for claims based on common law wrongs can logically be applied to the federal claim. He recommends that, to create greater consistency, the courts adopt either general residuary statutes of limitations or statutes of limitations for liabilities created by statute for these claims. Such reasoning seems to infuse federal policy into 1981 via the back door; i.e., although this federal statute apparently contains no federal policy allowing a court to depart from a state statute of limitations, it does contain a legislative expression of policy that these rights are so unique that a court is restricted in its choice of state statutes. A court which adopted this reasoning, however, would seem to run counter to the reasoning in *O'Sullivan v. Felix* and *Campbell v. Haverhill*. Those cases held that the existence of federal legislation could not be used to justify a refusal to apply state statutes. The *Campbell* Court in fact warned courts not to "limit the defences [sic] to which the defendant would otherwise be entitled" by inferring a congressional intent from the existence of congressional legislation. To limit defenses would seem to include the act of refusing to apply comparatively shorter statutes where they are applicable. A decision that the mere existence of congressional legislation, although not prohibiting the adoption of state statutes, restricts the court's choice among those statutes seems incongruous indeed.

Larson's contention that the federal statute is unlike the common law because it gives the litigant the right to be free from racial insult and humiliation seems unsupported in cases where the state courts have recognized a common law action for a similar wrong and selected an appropriate statute of limitations. A court thus should not be faulted for adopting the reasoning of *Young* or *Marlowe*. The decisionmaker could quite correctly decide either that a 1981 job discrimination claim is like the common law claim for humiliation from racial discrimination, or that it is a type of injury to the person. The court could then apply either the limitation used in racial humiliation suits or the general statutory limit for wrongs to the person.

162. See notes 74-76 *supra* and accompanying text.
163. 155 U.S. 610, 616 (1895).
Which of these two a court selects may depend on the type of limitations in that state. Some states have limitations phrased in terms of common law torts (e.g., for assault and battery, false imprisonment), other states have limitations for general categories of injuries (such as personal injuries in *Marlowe* or injuries to property), and still other states have both types of limitations. In a state where the statutes are phrased in terms of types of injuries, there may not be appropriate statutes of limitations that correspond to various common law torts. A court would then necessarily have to fit the 1981 claim into a category such as "injury to the person." This may not be quite as objectionable to a critic like Larson, since the broad category was meant to encompass many different types of claims whose characteristics vary greatly.

Applying a tort or injury-to-the-person limitation to a 1981 claim is consistent with the underlying policies of such limitation statutes. Since personal injuries are proven by memory evidence, which fades rather quickly, the limitations are usually short. Section 1981 claims likewise are proven in large part by witnesses' memories. It would not seem improper, therefore, to utilize these shorter statutes for job discrimination claims.

c. Liabilities Created by Statute. Still other courts of appeals have adopted state statutes of limitations for liabilities created by


165. *Developments* 1192.
166. *E.g.*, MONT. REV. CODES ANN. § 93-2606 (1964) (2 years).
167. *E.g.*, CAL. CODE CIV. PROC. § 340(3) (West 1967) (1 year); ILL. ANN. STAT. ch. 83, § 15 (Smith-Hurd 1966) (2 years); LA. CIV. CODE ANN. art. 3544 (West 1953) (10 years); MICH. COMP. LAWS ANN. § 600.5805 (1968) (3, 2, 1 years); TENN. CODE ANN. § 28-304 (Supp. 1975) (1 year); TEX. REV. CIV. STAT. ANN. art. 5526 (1958) (2 years).
171. Although statistics may at times play a large part in employment discrimination litigation, *e.g.*, United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), those too are often based on memory. Where the statistics are based instead on industry records, however, there might be an inconsistency in retaining shorter limitations periods. Personal injury limitations were also shortened as part of a policy to protect emerging industry. *Developments* 1193. However, the legislature might be signaling a departure from that older policy by enacting statutes creating a cause of action for employment discrimination.
In *DeMatteis v. Eastman Kodak Co.*, the Second Circuit held that the New York limitation for liability based on statutes applied to actions under 1981. In earlier decisions, the court had simply stated that "§48(2) of the New York Civil Practice Act prescribed a . . . statute of limitations for actions ‘to recover upon a liability created by statute’, and plaintiff’s cause of action derives from a statute, the Civil Rights Act." The court has never since seen fit to dispute that uncomplicated logic, and the reasoning is indeed difficult to question. The logic is supported by Larson. Furthermore, such a statute of limitations is unquestionably intended to be applied to those actions that did not exist at common law, and suggests a policy that those actions be limited separately from actions at common law. However, the argument that the statute creates unique rights may be open to doubt, leading one to conclude that if a court perceives the true nature of the 1981 claim to be a mix of common law rights rather than a new monolithic right, it would be correct in applying a mix of limitations for common law rights, rather than the limitation period for liabilities created by statute.

d. Civil Actions Not Otherwise Provided For. Some circuits have selected for 1981 claims the general residuary statute of limitations applicable to civil actions not otherwise provided for. In *Waters v. Wisconsin Steel Works*, the Seventh Circuit adopted a general residuary limit for 1981 actions based on its treatment of 1982 actions. The court's earlier reasoning was that since the federal remedy was supplemental to common law remedies, its limitation was not to be found in statutes applicable to those remedies but

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172. E.g., CAL. CODE CIV. PROC. § 338(1) (West 1967) (3 years); MONT. REV. CODES ANN. § 93-2607(1) (1964) (2 years); N.Y. CIV. PRAC. § 214(2) (McKinney 1972) (3 years); OHIO REV. CODE ANN. § 2305.07 (Page 1954) (6 years); TENN. CODE ANN. § 28-305 (1955) (3 years).

173. 511 F.2d 306, 311 n.8 (2d Cir. 1975); see Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118, 1119 (9th Cir.), cert. denied, 414 U.S. 859 (1973).


176. Larson, supra note 10, at 81-82.

177. Developments 1196-97.

178. See notes 161-64 supra and accompanying text.

179. E.g., CAL. CODE CIV. PROC. § 343 (West 1967) (4 years); ILL. ANN. STAT. ch. 83, § 16 (Smith-Hurd 1966) (5 years); LA. CIV. CODE ANN. art. 3544 (West 1953) (10 years); MONT. REV. CODES ANN. § 93-2613 (1964) (5 years); N.Y. CIV. PRAC. § 213(1) (McKinney 1972) (6 years); OHIO REV. CODE ANN. § 2305.14 (Page 1954) (10 years); TEX. REV. CIV. STAT. ANN. art. 5529 (1958) (4 years).

in the general residuary limitation statute.\textsuperscript{181} Larson has praised courts using this approach because they recognize the fact that the federal statute is broader than the common law,\textsuperscript{182} although his praise and the courts' reasoning are both based on the assumption, questioned above,\textsuperscript{183} that the 1981 rights are indeed broader than common law rights. A state provides such a limitation as a catch-all so that no action is unlimited.\textsuperscript{184} A court choosing this limit must thus find—at least implicitly—that no other statute of limitations is applicable. In this context, it is appropriate to note that a court could justifiably find a tort limitation appropriate and never reach the catch-all limitation.

e. Federal Civil Rights Actions. Some states have specific statute of limitations for federal civil rights actions.\textsuperscript{185} At the appellate level in \textit{Johnson v. REA},\textsuperscript{186} the Sixth Circuit adopted such a Tennessee statute. Although the plaintiff argued that the statute was unconstitutionally arbitrary,\textsuperscript{187} he did not contend that it discriminated against the federal claim in the manner which the Court had prohibited in \textit{Campbell v. Haverhill}.\textsuperscript{188} If Johnson had made this argument, the court could have looked to the time limits afforded similar claims. Even then, however, if the court had had to characterize the federal claim and select an analogous statute of limitations because no specific statute applied, the time limit would have been similar to that afforded by the statute actually used.

Presumably, where no statute is specifically applicable to federal civil rights actions, a state would not legislate in a fashion discriminatory to federal claims, since to do so would be to discriminate against state claims and to incur the risk that the limitation enacted would not be the one selected by the courts. Tennessee's actions

\textsuperscript{182} Larson, supra note 10, at 81-82.
\textsuperscript{183} See notes 161-64 supra and accompanying text.
\textsuperscript{184} The states, unlike the Federal government, must provide some statutory limit for all civil actions recognized in their courts so that those actions are not limitless. Presumably, states have comprehended the unfairness to the defendant of limitless actions and realize that they cannot choose someone else's statutes "by default." See note 70 supra and accompanying text.
\textsuperscript{186} 489 F.2d 525 (6th Cir. 1973); accord, Guy v. Robbins & Myers, Inc., 525 F.2d 124 (6th Cir. 1975).
\textsuperscript{187} 489 F.2d at 531.
\textsuperscript{188} See note 80 supra and accompanying text. In Bulls v. Holmes, 403 F. Supp. 475 (E.D. Va. 1975), the court held that a Virginia statute of limitations specifically applicable to § 1983 actions would not be applied to 1981 actions since that state statute was discriminatory against the federal claim.
bear this out, for in the particular statutory provision in *Johnson*, the Tennessee legislature provided a one-year limitation not only for civil rights actions, but also for personal injury, tort, and other actions. The state legislature apparently was presuming that the nature of the federal civil rights claim was not that different from the nature of various common law tort claims. That logic is not unreasonable, and since other similar actions are susceptible to a similar time limit, it would seem that the Tennessee statute does not discriminate against the federal claim. Furthermore, a court adopting the Tennessee statute would be following the Supreme Court's counsel in *United Auto Workers v. Hoosier Cardinal Corp.*, that state characterizations of a federal claim should be adopted where not unreasonable.\footnote{190}

f. *Specifically Named Civil Actions.* Finally, some courts of appeals have adopted for 1981 claims limitations which a state has made applicable to specifically designated civil actions. A court might adopt for 1981 claims such limits because these state claims are most analogous to 1981 claims. For example, one relevant specific state limit is that applicable to state civil rights claims under local civil rights statutes.\footnote{191} At least one court has applied such a state limitation to a federal civil rights action. In *Warren v. Norman Realty Co.*,\footnote{192} the Eighth Circuit applied a Nebraska 180-day limit for housing discrimination suits brought under 1982. That court reasoned that the "federal action [was] seeking to remedy precisely the same wrong condemned by the Nebraska statute."\footnote{193} The court distinguished the Seventh Circuit's refusal to apply a state fair employment practices act limitation to a 1981 job discrimination claim in *Waters v. Wisconsin Steel Works*, reasoning that under the state act in *Waters* there was no direct recourse to a court, thus destroying any analogy between the state claim and 1981.\footnote{194} In *Warren*, however, the Nebraska act afforded direct recourse to the courts.

The *Waters* court had also reasoned that the state civil rights act was not appropriate because its short time period was designed

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\footnote{189} TENN. CODE ANN. § 28-304 (Supp. 1975).
\footnote{190} 383 U.S. at 706. The Court did not specify that only judicial characterizations were to be adopted.
\footnote{191} E.g., CAL. LABOR CODE § 1422 (West 1971) (1 year); ILL. ANN. STAT. ch. 48, § 858(a) (Smith-Hurd Supp. 1975) (180 days); KY. REV. STAT. ANN. § 344.200(1) (Baldwin 1975) (180 days); MONT. REV. CODES ANN. § 64-308 (Supp. 1975) (180 days); NEB. REV. STAT. § 20-119 (1974) (180 days); OHIO REV. CODE ANN. § 4112.05(B) (Page Supp. 1975) (6 months).
\footnote{192} 513 F.2d 730 (8th Cir. 1975).
\footnote{193} Id. at 734.
\footnote{194} Id. at 735.
to encourage conciliation under the administrative scheme of the act.\textsuperscript{195} Since no such conciliation scheme is involved in a 1981 claim, the short limitation is unwarranted. This reasoning would also seem to apply in \textit{Warren}, since the Nebraska statute involved a similar scheme encouraging administration conciliation under threat of quick adversary resolution. Whether the threat of resolution comes from the judiciary as in \textit{Warren} or the administrative tribunal with quasi-judicial powers as in \textit{Waters} seems irrelevant.

It would seem that many of the arguments advanced against applying Title VII limitations to 1981 claims for employment discrimination would be equally valid against applying limitations in state acts similar to Title VII. In \textit{Young v. International Telephone \& Telegraph Co.}, the court discussed the availability of such advantages as a court-appointed attorney, waiver of filing fees, permissible entry of the Attorney General into the case, and the award of attorneys' fees to the prevailing party which are available under Title VII but not under 1981. The court stated that this difference justified the extremely short limitation on Title VII which does not apply to 1981.\textsuperscript{196} If a state civil rights act offered similar advantages to a plaintiff, fairness to the defendant would warrant a short limit on such actions. Since 1981 does not generally offer a plaintiff such advantages, the short limitation should not apply.

2. \textit{Divisions Within a Circuit}

Even when the analysis suggested above of characterizing the underlying nature of the federal claim and applying to that claim state limitations for analogous state claims is followed, the court may reach different decisions on which particular statute of limitations is to be applied. The circuit court might decide differently on different occasions because of two variables: a difference in the particular statutes of limitations examined or a difference in the factual configuration examined.

The Sixth Circuit offers an excellent example of a court whose decisions vary because of the first variable. That court, like all the other circuit courts except the District of Columbia, has jurisdiction extending over several states. It thus has several different state statutes of limitations to examine. For example, in \textit{Johnson v. REA}, the Court selected a Tennessee statute specifically applicable to federal civil rights acts, but in \textit{Marlowe v. Fisher Body}, the court selected the Michigan injury-to-person limit.\textsuperscript{197} In other cases

\textsuperscript{195} 427 F.2d at 488.

\textsuperscript{196} 438 F.2d 757, 763 (3d Cir. 1971).

\textsuperscript{197} See notes 186, 157 \textit{supra} and accompanying text.
the court has selected the Kentucky liability-created-by-statute limitation and the Ohio general residuary limitations.198

Appellate courts have also found different limitations applicable to the same federal claim within a particular state because of different fact situations involved. As discussed above,199 both in 1981 and in other federal claims, selecting the appropriate statute may involve more than simple statutory construction. The federal cause of action may encompass several possible factual situations analogous to several different state claims with different state statutory limits. Because of variations in the identity of the defendants, the grounds for the claim, and the remedies sought, courts considering 1981 and other federal civil rights statutory claims have varied their selections of statutes of limitations and have even selected more than one statute for a single federal claim.

In Baker v. F & F Investment,200 the Seventh Circuit held that different statutes of limitations applied to different defendants in the same action. Both an Illinois statute of limitations governing claims against agencies and another applicable to liquidators of savings and loan associations were applied to a housing discrimination claim based in part on 1981. The court also reiterated its earlier decision in a related suit201 that the Illinois general residuary statute of limitations applied to claims against private defendants, reasoning that "all the relevant elements of each lawsuit must be considered before characterizing it for statute of limitations purposes."202 This process seems justifiable where a state has made certain limits applicable to certain defendants, for if the differences were ignored, enunciated state policy would be thwarted.203 If a court has not unearthed a federal policy as outlined in Part III above, it would not be free to thwart the state policy.204 It would therefore not be difficult for different 1981 suits to end up with different periods of limitations, depending on the particular defendant.

198. Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) (Ohio); Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972) (Kentucky). In both cases, the court rejected the short statutes of limitations of the state civil rights acts.
199. See text accompanying notes 141-42 supra.
200. 489 F.2d 829 (7th Cir. 1973).
202. 489 F.2d at 837.
204. The analysis in Part III showed that a court should properly consider federal policy first and, failing to find any, adopt state limits. Campbell v. Haverhill, 155 U.S. 610 (1895), and United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) counsel that state limits, where there is no applicable federal policy, should not be ignored.
Where a court determines that a single 1981 claim, possibly against a single defendant, has been brought on several different theories, it might also apply more than one statute of limitations. Dividing the claim in this manner is more likely in other civil actions than in employment discrimination claims under 1981. For example, in *Polite v. Diehl*, the court considered the plaintiff's complaint alleging false arrest, assault and battery, illegal seizure, and coercion of a guilty plea, as falling under 1981, 1983, and 1985. It then applied a separate Pennsylvania statute of limitation to each of these grounds, following the practice of characterizing the federal claim in terms of various common law tort actions. Again, the selection of multiple limitations seems justifiable. If the court was correct in its characterization of the federal right as one whose nature is essentially a collection of common law rights, it quite correctly selected the statutes of limitations applicable to the various rights.

Finally, because of varying remedies sought, a court might select several statutes of limitations for a single 1981 claim or select different limitations for quite similar actions. The *Boudreaux* court suggested that, although a 1981 job discrimination claim was generally analogous to a state action on a contract, the contract statute of limitations might not apply if a plaintiff claimed different remedies. The state limitations period applicable to back pay disputes applied to the extent that the plaintiff sought damages for loss of back pay, but the doctrine of laches controlled to the extent that the plaintiff demanded equitable relief. This approach of applying multiple limitations seems correct, although it is based on the view that the 1981 claim is ultimately reducible into discreet state claims. This view is at odds with Larson, who argues that the federal claim is based on a unique right created by federal statute. These two positions naturally lead to two approaches.

205. 507 F.2d 119 (3d Cir. 1974).
206. See notes 155-56 *supra* and accompanying text.
207. See notes 159-64 *supra* and accompanying text.
209. 437 F.2d at 1017 n.16.
210. *Id.* There appear to be two possible reasons for not adhering to state limits for the part of the claim seeking equitable relief. Analogous state claims in equity presumably do not have the statutory limits applied as controlling, although courts might consider them persuasive. *Developments* 1183-85. In addition, the practice in Holmberg v. Albrecht, 327 U.S. 392 (1946), of judicial recognition of federal policy in the traditional sphere of action, equity, might also allow the departure from the statutes. See notes 85-87 *supra* and accompanying text.
211. See note 164 *supra* and accompanying text.
The *Boudreaux* view would have a court reduce the federal claim to a collection of analogous state-created claims and then adopt state statutes of limitations applicable to such claims. Such a procedure would seem required by both *Campbell v. Haverhill* and *United Auto Workers v. Hoosier Cardinal Corp.*, in which the Court warned tribunals not to depart from state statutes applicable to analogous state claims in the absence of federal policy favoring departure. Following the Larson view, however, a court would conceive of the federal claim as unique so that no state claim analogous to the substance of the federal claim existed. The court would then probably apply a state's general residuary or liability-created-by-statute limitation, since these limitations apply to state claims analogous to the 1981 claim in the sense of being unique and not otherwise provided for. It follows that the possibility that a court will choose varying limitations periods because of differing theories of the action or differing remedies sought depends upon whether the court rejects Larson's argument that 1981 creates only a single federal right. Even if a court accepts Larson's view, however, as some courts have, it could presumably still vary its selections where certain defendants were specifically covered by express statutes enunciating state policy.

One must conclude that the possible number of limitations periods resulting from 1981 claims could be quite large. There are, after all, several contributing factors; factual variations, different limitations in every state, and several different justifications for selecting various limitations periods all contribute to the growing list of choices facing a given court. When it breathed life into 1981, the Supreme Court in *Johnson* left these problems to the lower courts, thereby perpetuating the present division among the courts of appeals and the lack of uniformity in the treatment of 1981 actions.

Only if it is presumed that *Johnson* was correct in recognizing 1981 is this course of action defensible. In essence, the Court refused to impose by judicial fiat a uniform limitations treatment for 1981 actions. This decision is in accord with the judicial doctrines previously discussed. When courts presume that Congress intends to adopt state limits, they presume that the legislature has chosen to eschew uniformity. In *Johnson*, the Court held that Congress

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212. 155 U.S. 610 (1895).
214. See notes 141, 163 *supra* and accompanying text.
215. See notes 173-83 *supra* and accompanying text.
216. See *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); notes 64-70 *supra* and accompanying text.
had failed to express a federal policy favoring uniformity when it enacted of Title VII. Therefore, by its own traditional doctrine, the Johnson Court could not mandate uniformity in limitations treatment for 1981 private employment discrimination actions. If Congress desires to act contrary to this presumption it can enact a uniform statute of limitations applicable to 1981 actions, or express a policy by amending Title VII so that initiation of proceedings with the EEOC uniformly tolls the applicable state limit on a 1981 action. Even if it had so desired, the Johnson Court could not have injected much uniformity into the process of selecting statutes of limitations for 1981 claims, since many states do not have statutes explicitly applicable to federal actions. Some other limitation, e.g., the general residuary limit, could have been selected by the Court, if the Tennessee limit had been found discriminatory against the federal claim. Even then, however, uniformity would not be enhanced, since time periods in a given statute vary from state to state.

B. State Exceptions to State Statutes of Limitations

When the Johnson Court decided that the filing of a Title VII charge of employment discrimination with the EEOC did not toll the state statute of limitations on the 1981 claim based on the same incident of discrimination, it apparently did not preclude lower courts from holding that the filing indeed had tolled the statute. Although this statement may seem contradictory, it is supported by the opinion, since the Court merely decided that the statute had not been tolled because of any federal policy in Title VII or, in other words, that the statute could not be departed from on grounds of federal legislative policy expressed in Title VII. There is therefore no reason why a lower court could not still find that the statute had been tolled on different grounds. If a court were to adopt state tolling provisions and then find that the filing of the Title VII charge fulfilled one of those provisions for the 1981 action, that court could hold, consistently with Johnson, that the statute had been tolled.

1. Adopting State Exceptions

Whenever a federal court adopts a state statute of limitations for a federally created right, that court also adopts state measures

219. See, e.g., notes 108-10 supra and accompanying text.
for suspending, tolling, or extending the statute. In *Barney v. Oelrichs*, the Supreme Court stated "[w]hatever limitation existed was to be found in state law, and in this instance, in sections 91 and 100 [of the New York Code]." Section 91 was the statutory limit and section 100 an exception to the limit. The Court assumed that the adoption of state law on limitations included both the time periods and the exceptions to the running of those periods. Thus, if no federal policy allowing departure from statutory limits is found, a federal court can use state exceptions to state statutes to afford plaintiffs relief from a running of a time limit.

Other courts have adopted state exceptions by referring to the basic policies inherent in limitations. The fundamental rationale of a limitation is to prevent unfairness to a defendant by preventing a plaintiff from pressing stale claims. Exceptions to these statutory periods are a recognition of the balancing consideration: that there are instances in which the unfairness in barring the plaintiff's claim outweighs any unfairness to the defendant. Therefore, if a federal court adopts a state statute of limitations because of the policy of fairness, that court should also adopt state exceptions intimately intertwined with the time limit and necessary to effect the underlying policy.

Even if a federal court has doubts about the source of the state exceptions, those exceptions must be adopted, without discriminating against state judicial exceptions, under the holding of *Barney v. Oelrichs* and the implications in *Johnson*. *Campbell*, based on its interpretation of the Rules of Decision Act, also supports this result. State determinations, as the Court in *Campbell* and *Hoosier Cardinal* advised, should not be altered absent an overriding federal policy.

220. 138 U.S. 529, 530 (1891). Although decided before Campbell v. Haverhill, 155 U.S. 610 (1895), this case is properly in the *Campbell* line because M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270 (1830), had already decided the issue of adoption of state limits in the same fashion. In addition, in cases like *Johnson*, the Court apparently makes *Barney* part of the *Campbell* line. 421 U.S. at 464.

221. *E.g.*, Johnson v. REA, 421 U.S. 454, 463-64 (1975); see Developments 1185-86.

222. 421 U.S. at 463-64; Developments 1220, 1229, 1233.

223. 421 U.S. at 463-64.

224. 138 U.S. at 530.

225. 421 U.S. at 463-64.

226. *See* note 66 *supra* and accompanying text.

227. 155 U.S. at 615.

228. 383 U.S. at 706.
2. Fulfilling a State Exception by Filing a Title VII Claim

According to Johnson, the federal courts are precluded from holding that Congress expressed in Title VII a federal policy allowing them to favor tolling the statute of limitations applicable to a 1981 action. Those courts may, however, find that the employee's filing of the Title VII charge meets some state legislative or judicial exception to the adopted statute of limitations for the 1981 action. If so, the courts can toll the 1981 time limit in a way not considered by the Johnson court.

No circuit court other than the Sixth Circuit in Johnson appears to have addressed the question of whether a Title VII charge tolls a state exception to a state limit on 1981. In Johnson, the circuit court dismissed the plaintiff's argument for tolling on state grounds. It cited an early case in which it had decided that the "time in jail" did not toll, under the Tennessee savings statute, the limit applicable to a 1983 action and noted that the two remedies, 1981 and Title VII, were independent. The court may have reasoned that the pursuit of one of two independent claims could not affect the limitation applicable to the other and that the filing of the EEOC charge did not fit any exception under Tennessee law.

The lower federal courts have apparently had trouble recognizing the possibility—still viable after the Supreme Court's decision in Johnson—of tolling the 1981 limit on state grounds. Of the

229. In Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973), and Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971), the D.C. and Fifth Circuits decided that the filing of a Title VII charge tolled the applicable state limit because of a federal policy contained in Title VII. Neither court reached the question of whether an adopted state exception was triggered by the filing.

230. 489 F.2d at 529-30.


Some courts have already used Johnson in analogous fact situations, holding that Johnson indicates that the institution of remedies parallel to 1981 does not toll the 1981 limitation, and similarly ignoring state exceptions. Guy v. Robbins &
more widely recognized state exceptions, three are arguably applicable to the filing of a Title VII charge prior to the prosecution of a related section 1981 action. Two of these exceptions, estoppel and government prohibition of suit, are judicial, while the third, savings statutes, is legislative.

a. Estoppel. Estoppel as fashioned by state courts within their equitable powers is an elusive judicial doctrine. Generally, estoppel works in the following manner: a defendant is estopped from pleading the statute of limitations as a bar when, through his conduct or representations, he induces the plaintiff not to prosecute his known action, and the statutory period expires before plaintiff does in fact bring his action. Some courts have extended the concept to "any situation in which the plaintiff's reasonable failure to sue appears to result from reliance on any sort of misleading conduct." Some courts find that this misleading conduct includes an agreement by the defendant to arbitrate or enter into negotiations over a plaintiff's claim when, after the statute has run, the plaintiff institutes an action to enforce the claim because the arbitration or the negotiations have failed. Under this theory, a court could, without finding inducement by the defendant, estop the defendant from pleading the statute of limitations. The majority of courts find that the mere agreement to arbitrate or act of negotiating—without an affirmative attempt to induce the plaintiff to delay in-


232. The purpose of this Note has been to illuminate the analysis to be used in applying state limitations to 1981 employment discrimination actions and to reveal the confusion engendered by judicial recognition of 1981 for such discrimination claims. For this purpose, a simple illustration of arguably applicable state exceptions is sufficient. A more intensive investigation of a single state's exceptions which a court might use in the Title VII/1981 context is, of course, possible.

233. Developments 1222.

Where a federal court uses a federal equitable rule of estoppel, then under the analysis discussed, that exception would be classified as a departure from a state limitation because of federal policy fashioned in a traditional sphere of judicial action—equity. Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 89 (2d Cir.), cert. denied, 368 U.S. 821 (1961); see notes 85-87 supra and accompanying text.

234. Developments 1223.

stitution of the legal action—is not enough for the application of the estoppel doctrine.\footnote{236}

In \textit{Howard University v. Cassell}, the District of Columbia followed the majority rule and required affirmative action by the defendant, holding the "[N]egotiations looking toward an amicable settlement [were] not enough to bring into operation the doctrine of equitable estoppel."\footnote{237} The plaintiff, an architect bringing suit for payment for services rendered, had corresponded with the university for three years and was repeatedly assured by the authorities there that he would be dealt with fairly. Near the end of that period, the architect and a representative of the university discussed arbitration of the salary claim. The court held that even if the parties had actually agreed to arbitrate, the defendant was not estopped to plead the limitations statute. Quoting one of its prior decisions, the Court stated, "It is not sufficient, if it should appear, that defendant failed, or even refused, to appear before the arbitrator and submit its case. Defendant must have done something that amounted to an affirmative inducement to plaintiffs to delay bringing action."\footnote{238}

Basing its reasoning on basic statute of limitations policy, the \textit{Howard} court found that the university's opposition to the architect's claim was completely unlike the inducement not to sue that triggers estoppel. The university's action, unlike an inducement, did not lull the plaintiff into inaction until the statutory period had run. There was thus no injustice in holding that the statute had not been tolled. Some courts have also indicated that if a plaintiff consults a lawyer during the bargaining process, a defendant might not be estopped even if he actually induced the plaintiff to delay.\footnote{239}

After the plaintiff consults counsel the question becomes one of whether plaintiff relied on defendant's conduct or the lawyer's advice. This question is usually one of fact for the jury. In \textit{Kuntsman v. Mirizzi},\footnote{240} a California appellate court held that since


\footnotesize{\textit{Id.}}


\footnotesize{234 Cal. App. 2d 753, 44 Cal. Rptr. 707 (1965).}
the plaintiff knew of the statute of limitations through her attorney and introduced no facts to show inducement by the defendant, there was no estoppel against the defendant as a matter of law. The court reasoned that to permit a plaintiff with knowledge of the limitations to negotiate beyond the statutory period where defendant's conduct did not specifically induce such prolonged negotiations would "seriously impair the climate and effectiveness" of out-of-court settlements and the "effect" of the statutes of limitations. 241

A court applying these judicial concepts of estoppel to the Title VII/1981 situation would probably find that the defendant employer was not estopped from pleading the statute merely because of the employee's filing of a charge of employment discrimination with the EEOC. The plaintiff's argument would be that the EEOC conciliation measures are akin to either negotiations or arbitration and that, if during such proceedings the defendant's conduct misled or induced him to forbear filing a 1981 claim, the defendant should be estopped from using the statute of limitations as a defense in a 1981 action based upon the same allegation. The employee has an uphill battle to convince a court to accept the line of reasoning for as the Howard court stated, even a defendant's refusal to arbitrate after a binding agreement to do so does not estop that defendant, since such conduct should not induce plaintiff to forbear. Therefore, if an employer refused to engage in EEOC deliberations, then even if these deliberations were regarded as a type of "arbitration," the employee could not successfully assert estoppel. If the employer's attitude is "questioning and opposing" during EEOC efforts, Howard again indicates that the employee is not induced to sleep on his rights. Furthermore, the EEOC, like the private lawyer in Kuntsman, might be regarded as supplying the plaintiff employee with some legal knowledge on which to rely. The employee might then not be able to raise estoppel because of his reliance on this knowledge over any conduct of the defendant.

b. Government Prohibition of Suit. Where governmental action prohibits a plaintiff from filing a timely suit, state courts have held that it is unjust to penalize him for late filing. Since such a prohibition, whether by legislative enactment or judicial decree, often protects the defendant the courts have held it to be fair to suspend or postpone the applicable statutory limits on the plaintiff's action for the duration of the prohibition. 242 This judicial

241. Id. at 758, 44 Cal. Rptr. at 710-11.
242. Developments 1233.
solution attempts to balance degrees of fairness and unfairness to each of the litigants. The defendant, freed for a time from fear of suit, is amenable to a later date. The plaintiff must wait with his claim, but can also press it after the statute normally would have run.

The government prohibition may be a judicial or legislative determination that one of the two remedies must be prosecuted first. For example, in *St. Paul, M. & M. Ry. v. Olson*, the Minnesota Supreme Court held that the time during which the parties were before a federal agency contesting a claim to land did not count against the plaintiff's state action for ejectment. The court reasoned that the statute of limitations did not run during the federal agency adjudication because courts could not entertain state suits relating to the land in question during such an adjudication. In other words, the federal government's exclusive commitment of certain functions to the federal agency constituted "paramount authority," which prohibited the plaintiff from concurrently exercising his state remedy of ejectment.

However, the governmental prohibition exception does not seem applicable to 1981 limitations because of the rationale underlying the *Johnson* decision. That rationale was that federal policy did not require a tolling of the 1981 limit in part because 1981 and Title VII were separate and independent remedies which Congress intended to afford to a litigant concurrently. Therefore, a court following *Johnson*, i.e., not finding an exclusive federal commitment of job discrimination claims to the EEOC, could not hold that paramount government authority prohibited the plaintiff's 1981 suit. Consequently, the governmental prohibition rationale would not provide a basis for tolling the applicable statute of limitations.

c. *Savings Statutes.* The third exception to state limitations periods which may be met by filing a Title VII charge is savings statutes. In many states, where plaintiff's timely filed claim is dismissed due to procedural defects after the statute of limitations has run, these statutes give the plaintiff a specified time after dismissal in which to attempt enforcement. In *Johnson* plaintiff

243. 87 Minn. 117, 91 N.W. 294 (1902).
244. *Id.* at 120-21, 91 N.W. at 296.
245. *See* text following note 110 *supra.* The dissent in *Olson* used reasoning analogous to that of the majority in *Johnson*, inferring that the two remedies in *Olson*, an action for ejectment and an action to determine homestead rights, were separate and independent. 87 Minn. at 123, 91 N.W. at 297 (Brown, J., dissenting).
246. *Developments* 1243-44.
argued at both the appellate247 and Supreme Court248 levels that his filing of a charge with the EEOC under Title VII should be regarded as an initial attempt at enforcement of a claim against job discrimination. He further argued that enforcement had failed when his claim was “dismissed” from EEOC jurisdiction by the mailing of the right-to-sue letter and that the Tennessee savings statute gave him one year to file his 1981 action.

Savings statutes vary from state to state, but Tennessee’s is typical and presents the usual obstacles for a litigant in Johnson’s position who is trying to qualify under such a statute. It provides:

If the action is commenced within the time limited by a rule or statute of limitations, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right to action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest.249

The problems a plaintiff such as in Johnson finds in such a statute are three-fold. First, the employee must convince the court that the EEOC conciliation procedure is an action within the statute. That action commences when the employee files his charge and fails when he receives his right-to-sue letter or when he does not meet the filing deadline, following the letter, for continuing the Title VII claim in court. Secondly, the employee must show that the two possible grounds for failure of the action are grounds not concluding his right. Finally, the employee would be required to fit the 1981 claim with the statutory meaning of “new action.”

Similar statutes would create obstacles for employees complaining of job discrimination in states other than Tennessee. The Tennessee courts, like those in other states, have put extended judicial glosses on the key terms.250 For the most part, the glosses are liberal and expansive, based on the spirit of the statute “that a plaintiff shall not be finally cast out by the force of any judgment or decree whatsoever, not concluding his right of action, without an opportunity to sue again within the brief period limited.”251

247. 489 F.2d at 529-30.
248. 421 U.S. at 463 n.9.
However, according to the Tennessee courts, an "action" in the statutory sense apparently included judicial but not administrative proceedings,\(^252\) thereby preventing an EEOC plaintiff from using the savings statute. Even though the spirit of the legislative savings statute promotes a tendency to define "action" as broadly as possible, the more fundamental policy of fairness has caused courts to draw the line short of situations where the defendant has not been put on notice.\(^253\) An informal EEOC procedure in the nature of nonbinding negotiations makes the defendant aware of an employee grievance and a possible Title VII suit but does not give the defendant warning to be on guard for claims under 1981.

If the employee plaintiff were successful in meeting the definition of "action," he would more easily be able to meet the other requirements of the savings statute. The Tennessee courts have held that grounds for dismissal which do not conclude a plaintiff's right include, for example, voluntary nonsuits, dismissals without prejudice, failures to file a declaration, and failures to appear and prosecute.\(^254\) Although most courts require that the plaintiff act diligently and in good faith,\(^255\) they do not stringently enforce this requirement. If a plaintiff can take a voluntary nonsuit at any time before a suit is submitted to a judge or jury for a binding legal finding and benefit from the savings statute, it would seem that a plaintiff like Johnson should be able to withdraw from EEOC procedures before they are concluded—if these procedures constitute an action—and also receive statutory protection. It would not even make much sense to prohibit the protection after the EEOC had rendered its nonbinding decision, since the policy of the savings statute requires that a plaintiff not be "cast out" by a judgment not concluding his right of action. A nonbinding resolution of a Title VII charge hardly concludes the plaintiff's right of action under Title VII, much less section 1981. Of course, if the savings statute is applicable, it would also be argued that a plaintiff may not file a Title VII charge in bad faith just to take advantage of the statute.

Even after hurdling the first two statutory obstacles, a plaintiff in a state with a savings statute like Tennessee's would still have to show that the 1981 claim is a "new action" essentially similar to the Title VII "action" which failed. The Tennessee courts re-

\(^{252}\) Cf. id. at 288 & nn.11-14.

\(^{253}\) Moran v. Weinberger, 149 Tenn. 537, 542-43, 260 S.W. 966, 967 (1923); Comment, supra note 250, at 290 & n.22.

\(^{254}\) Id. at 295-99.

\(^{255}\) Anderson v. Bedford, 44 Tenn. 464 (1867); Comment, supra note 250, at 296-97 & n.64.
quire that the two suits be "substantially the same cause of action, and the parties in each suit [be] identical." The court's test requires a definition of the term "cause of action." The Tennessee court has suggested that the term include "all facts which together constitute the plaintiff's right to maintain the action." Under that definition, the Title VII and 1981 actions would seem substantially the same since they require the same factual proofs of discriminatory employment practices. Therefore, it appears likely that a plaintiff as in Johnson could fall within a savings statute like Tennessee's if the particular state's courts are willing to regard the EEOC procedure as an "action" within the statute. But as the situation in Tennessee suggests, the EEOC procedure is unlikely to constitute such an action.

In conclusion, while the three specific exceptions discussed are unlikely to prevail in a Title VII/1981 case, the concept of utilizing state exceptions holds tremendous potential. The exceptions raise viable grounds for argument, each of which will ultimately have to be decided. Again, confusion for the litigants and the courts and extra work for the judiciary is certain to result from this additional statute of limitations problem raised by recognizing 1981 as a remedy for private employment discrimination. Courts of appeals will ultimately have to sort through the various exceptions of the various states for the various litigants. These problems could be avoided without excessive harm to employees if 1981 were eliminated as a private job discrimination remedy, leaving Title VII as the exclusive remedy for such claims.

V. CONCLUSION

The Supreme Court's recognition of 1981 as a private job discrimination remedy has caused confusion and unnecessary work for the judiciary. In outlining the framework for analyzing the statutes of limitations problems involved in a 1981 job discrimination claim where a Title VII procedure is also applicable, it has been suggested that a court faced with a claim under 1981 should first recognize the general principle that state limitations, if only by default, apply to federal actions not limited by Congress. Having recognized this general principle, a court should then follow a two-pronged approach. First, it should seek specific sources of federal policy which would allow it to depart from applicable state limitations. Then, if no such policy is found, the court should determine

256. Hughes v. Brown, 88 Tenn. 578, 584, 13 S.W. 286, 287 (1890); Comment, supra note 250 at 299-300 & n.82.
which state limitations are applicable and whether there are any exceptions to those limitations. This analysis would govern the 1981 claim before the court. A court considering which state statutes of limitations to apply could arguably find several applicable to a 1981 job discrimination claim. Courts which have confronted the issue have recognized that more than one limit may be applicable to a particular claim and that different limitations may be applicable to similar claims.

Despite the resulting chaos, the courts are all motivated by one goal: to apply an “analogous” state limitation to the federal claim. This “analogous” limitation might best be found by determining the precise nature of the 1981 claim and finding limitations applicable to state claims essentially similar to the 1981 claim. The court selecting a state limitation must also be aware of state exceptions to state limitations. These exceptions customarily accompany the limitations and may apply where a Title VII charge has been filed. Thus, although Title VII provides no federal policy ground for tolling an applicable state limit, following Title VII procedures might fulfill a state ground for tolling the limit.

This complex analysis may not be necessary in every 1981 action, but much of it, especially with regard to selecting appropriate state limits and exceptions, must be done anew by the courts in each 1981 proceeding. Just why the Supreme Court recognized 1981 as a private employment discrimination remedy, leaving such a workload for the lower courts left to sift through the confusing limitations problems, is unknown. This path was not necessary to insure the availability of relief to the plaintiff employees; a remedy was being developed for these plaintiffs in Title VII in the 1964 Civil Rights Act. In 1968 the Court began to resurrect the 1866 Civil Rights Act containing 1981, and to apply that Act to private contexts, despite existing congressional legislation designed to remedy the same wrongs. Not until Johnson, however, did the Court accept the complete rebirth of 1981 for private, not just state, wrongs, despite the fact that Congress had in 1972 made Title VII an even more potent remedy for employees. There is little difference between the relief that the employee can obtain under the carefully considered and designed legislative remedy of Title VII and the relief the employee could obtain under the court’s new-found 1981 remedy.

Why, then, when there was no need for action of this type, did the Supreme Court adopt an approach which causes such burdensome work for the lower courts. Justice Blackmun may have offered some explanation in a footnote, stating that the Court is “not
unmindful of the significant delays that have attended administrative proceedings in the EEOC. Blackmun may have been indicating that the Court thought any trouble in administering 1981 claims was far outweighed by the need of a litigant for an alternative to the often dysfunctional bureaucracy of the EEOC. If this is indeed the justification for the decision, what does Johnson portend for the future?

It would seem that the opinion is signalling the need for some internal or external reform of the EEOC. Congress can effect external reform and control the division of work between the EEOC under Title VII and the courts under 1981 and can order the remedies, requiring use of the Title VII procedures before resort to 1981. Congress could even make Title VII the exclusive employment discrimination remedy. Of course such legislative action without solving the EEOC administrative bottleneck would be shallow reform. However, coupled with an increase in agency efficiency, such congressional action would be a welcome relief to the current state of affairs.

On the other hand, the agency could pursue a policy of internal reform, processing claims more quickly and efficiently without any legislative changes. Should such reform take place, the Court could reverse the trend of recognizing 1981 and 1982 as separate remedies, thereby effectively relinquishing jurisdiction to the EEOC. A court could also neutralize Johnson in a more subtle fashion by making the statute of limitations on the 1981 action less worrisome to the plaintiff. A plaintiff's costs in utilizing the EEOC are minor compared with those of instituting a 1981 action. If the Court abrogated the need for Justice Blackmun's procedure of requiring the plaintiff to file a 1981 action and seek a stay, it could subtly diminish the impact of Johnson and further minimize the plaintiff's costs, also saving valuable judicial time. The prudent litigant would then use the agency and go to court only as a last resort. The Court could give impetus to this tendency by adopting a single type of statute of limitations for all 1981 claims. By adopting, for example, contract limits, the court could generally insure litigants sufficient time to pursue EEOC conciliation before the limit had run, since contract limits are generally much longer than, inter

258. 421 U.S. at 465 n.11.
259. A direct overruling of Johnson's adoption of 1981 for private employment discrimination would not be as embarrassing to the Court as it might seem. The Court very summarily accepted the lower courts' use of 1981. It might on a later occasion explain that, with the opportunity to consider more fully the ramifications of the applicability of 1981, it finds against the use of that statute.
260. 421 U.S. at 465.
Alternatively, the Court could find a fairly universal state tolling exception, such as a savings statute applicable. Neither of these court-enforced approaches to uniformity, however, would be in keeping with the *Campbell* line of cases, which held that where Congress was silent on limits to a federal claim, Congress eschewed uniformity. If the impact of *Johnson* on the courts is to be mollified, one of two approaches must be taken. Congress must act either to make Title VII the exclusive employment remedy, or to require resort to Title VII conciliation before any Court action is appropriate. If Congress were to choose the latter course without taking steps to make conciliation more effective, the burden would remain with the courts. Of course, the Court might recognize the problems created by *Johnson* and take the wisest course: relegating 1981 to its former existence as a remedy for state, not private, discrimination. This would also leave the resolution of the social problems surrounding job discrimination to the political body best suited for such a task: Congress.

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261. *Developments* 1192-95.
262. See notes 64-70, 141, 163 supra and accompanying text.