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Commencement Rules and Tolling Statutes of Limitations in Federal Court: Walker v. Armco Steel Corp.

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COMMENCEMENT RULES AND TOLLING STATUTES OF LIMITATIONS IN FEDERAL COURT: *Walker v. Armco Steel Corp.*

With *Walker v. Armco Steel Corp.*,[1] the Supreme Court laid to rest a quiet controversy over how a suit is commenced for the purpose of tolling statutes of limitations.[2] In diversity actions prior to *Walker*, federal courts applied either state commencement rules[3] or rule 3 of the Federal Rules of Civil Procedure.[4] In nondiversity actions, however, federal courts uniformly applied rule 3.[5]

In *Walker*, the Supreme Court held that, in diversity actions, state law defines commencement for the purpose of tolling the state statute of limitations.[6] By concluding that rule 3 does not govern the tolling of the state statute of limitations when state law is the source of a legal right,[7] the Court avoided a direct conflict between the federal rule and the state law. The Court, however, offered no principled method for measuring the scope of a federal rule. Moreover, the analysis in *Walker* provides little guidance for resolving choice of law problems in the absence of an applicable federal rule. Finally, by limiting the scope of rule 3 in diversity actions, *Walker* raises new questions about the role of rule 3 in suits to enforce federally created rights.

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[1] 100 S. Ct. 1978 (1980).

[2] Statutes of limitations define the duration of a potential defendant's exposure to liability. Under most limitation schemes, "a limited period of time is provided for the bringing of an action and, if the action is not commenced in time, the lapse of time will constitute a defense to the suit or will deprive the plaintiff of his right." W. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 1 (1980). The limitations period usually begins to run when the plaintiff's right of action accrues, but numerous circumstances may postpone the start of the statutory period. *See Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-37 (1950). Tolling, which is the suspension of the statute of limitations, may also occur for various reasons after the period begins to run. *See id.* Commencement defines the activity that permanently tolls the statute of limitations. For a discussion of the purposes of statutes of limitations, see Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1016-18 (1980).

[3] *See* note 31 and accompanying text *infra*.

[4] *See* note 32 and accompanying text *infra*. For the text of rule 3, see text accompanying note 8 *infra*.

[5] *See* notes 76-84 and accompanying text *infra*.

[6] 100 S. Ct. at 1985. Unless otherwise indicated, "commencement" in this Note means commencement for the purpose of tolling the statute of limitations.

[7] *Id.*

I

TOLLING STATUTES OF LIMITATIONS IN FEDERAL COURT

Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court."[8] In drafting the federal rules, the Advisory Committee recognized that the tolling of a statute of limitations might affect substantive rights. As a result, the Committee was reluctant to define the scope of rule 3.[9] Nevertheless, for more than a decade following the adoption of the federal rules in 1938, most federal courts in diversity actions held that commencement pursuant to rule 3 tolled the applicable state statute of limitations.[10] In *Ragan v. Merchants Transfer & Warehouse Co.*,[11] however, the Supreme Court indicated that state commencement rules, and not rule 3, apply in diversity cases.[12]

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[8] FED. R. CIV. P. 3.

[9] When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

FED. R. CIV. P. 3, Notes of Advisory Committee on Rules, note 4, 28 U.S.C. app. at 394-95 (1976). *See* 2 MOORE'S FEDERAL PRACTICE ¶ 3.07[1], at 3-45 to -47 (2d ed. 1980). The Advisory Committee was concerned with the limitations imposed by the Rules Enabling Act, 28 U.S.C. § 2072 (1976), which provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions ....
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury ....
>
> ....
>
> All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. . . .

[10] *See, e.g.*, Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), *cert. denied*, 323 U.S. 781 (1944); Robinson v. Waterman S.S. Co., 7 F.R.D. 51 (D.N.J. 1947); Krisor v. Watts, 61 F. Supp. 845 (E.D. Wis. 1945); Gallagher v. Carroll, 27 F. Supp. 568 (E.D.N.Y. 1939). *But see* Zuckerman v. McCulley, 170 F.2d 1015 (8th Cir. 1948).

[11] 337 U.S. 530 (1949).

[12] *Id.* at 533. In *Ragan*, a diversity action, the plaintiff filed his complaint within the state's two year statute of limitations. Under Kansas law, however, an action commenced for the purpose of tolling the statute of limitations when the defendant was served, or on filing, provided the plaintiff faithfully, properly, and diligently endeavored to procure service and accomplished service within 60 days. The plaintiff in *Ragan* served the defen-

Relying on the rationale of *Erie R.R. Co. v. Tompkins*[13] and *Guaranty Trust Co. v. York*,[14] the *Ragan* Court reasoned that state commencement rules control because a federal court cannot give a cause of action arising under state law longer life than would a state court.[15] The Court also found in *Ragan* that the state commencement procedure was an integral part of the state statute of limitations.[16] In diversity actions after *Ragan*, federal courts either uniformly applied state commencement rules[17] or distinguished *Ragan* by finding that a state commencement procedure was not an integral part of the state statute of limitations.[18]

Almost twenty years later, in *Hanna v. Plumer*,[19] the Supreme

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dant after both the statute of limitations and the 60 day extension had run. Applying the Kansas law, the Court held that the plaintiff's action was time barred.

[13] 304 U.S. 64 (1938). In *Erie*, the Supreme Court overruled the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which stated that federal courts exercising diversity jurisdiction need not apply the non-statutory law of the state. The Court in *Erie* concluded that "[e]xcept in matters governed by the Federal Constitution or by Act of Congress, the law to be applied in any case is the law of the State." 304 U.S. at 78.

[14] 326 U.S. 99 (1945). In *York*, the Court held that federal courts must apply state statutes of limitations when enforcing state created rights.

> In essense, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result.

Id. at 109.

[15] 337 U.S. 533-34. By relying on the rationale of *Erie*, the *Ragan* Court implicitly applied the Rules of Decision Act, 28 U.S.C. § 1652 (1976), which states: "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." *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 n.16 (1956) ("Technically, [*Erie*] can be viewed as an interpretation of the Rules of Decision Act . . . .").

[16] 337 U.S. at 534.

[17] *See, e.g.*, Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957); Byrd v. Bates, 243 F.2d 670 (5th Cir. 1957); Frith v. Associated Press, 176 F. Supp. 671 (E.D.S.C. 1959); Hagy v. Allen, 1053 F. Supp. 302 (E.D. Ky. 1957); Ackerly v. Commercial Credit Co., 111 F. Supp. 92 (D.N.J. 1953).

[18] *See, e.g.*, Wright v. Lumbermen's Mut. Cas. Co., 242 F.2d 1 (5th Cir.), *cert. denied*, 354 U.S. 939 (1957); Reisinger v. Cannon, 127 F. Supp. 50 (D. Conn. 1954); Glebus v. Fillmore, 104 F. Supp. 903 (D. Conn. 1952).

[19] 380 U.S. 460 (1965). In *Hanna*, a diversity action, the plaintiff claimed damages for personal injuries resulting from an automobile accident. Service was made by leaving copies of the summons and the complaint with defendant's wife at his residence, in compliance with rule 4(d)(1) of the Federal Rules of Civil Procedure. State law, however, re-

Court determined that the Rules Enabling Act (REA),[20] and not the Rules of Decision Act (RDA),[21] governed the applicability of a federal rule.[22] *Hanna* prescribed a three-part test. First, a federal court must determine whether a Federal Rule of Civil Procedure applies.[23] Second, the court must determine whether the rule regulates procedure according to the terms of the REA.[24] Finally, the Court must determine whether the rule is within constitutional limitations.[25] If the federal rule satisfies each of these three

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quired in-hand service. The district court granted defendant's motion for summary judgment, citing *Ragan* and *York* to support the conclusion that in diversity cases state law measured the adequacy of service of process. *See* 380 U.S. at 462. The First Circuit affirmed, concluding that the conflict between the state and federal rule concerned a "substantive rather than a procedural matter." 331 F.2d at 159. The Supreme Court reversed, holding that the federal rule controlled. 380 U.S. at 474.

[20] 28 U.S.C. § 2072 (1976), *quoted at* note 9 *supra.*

[21] *Id.* § 1652, *quoted at* note 15 *supra.*

[22] 380 U.S. at 471.

[23] *Id.* at 461.

[24] *Id.* at 464. In *Hanna*, the Court construed the test created by the Rules Enabling Act as "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recoguized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

Professor Ely offers an alternative interpretation of the Rules Enabling Act. *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-38 (1974). He argues that the Act creates two types of limitations. First, the Act authorizes a checklist—"anything that relates to process, writs, pleadings, motions, or to practice and procedure generally, is authorized." *Id.* at 718. Second, the Act contains an "enclave" limitation— "such rules shall not abridge, enlarge or modify any substantive right . . . ." 28 U.S.C. § 2072 (1976). Ely argues that Courts should examine "the character of the state provision that enforcement of the Federal Rule in question will supplant, in particular . . . whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation." Ely, *supra*, at 722 (footnote omitted). By applying this test, he argues, courts would avoid the wholesale defeat of the Rules Enabling Act that would result from making the substantive/procedural distinction based on an outcome-determinative test. *Id.* at 721-22.

Ely recoguized that in Sibbach v. Wilson & Co., 312 U.S. 1 (1941), the Court collapsed the two types of limitations into one. Ely, *supra*, at 719. Nevertheless, some courts have applied the analysis suggested by Professor Ely. *See, e.g.*, Platis v. Stockwell, 630 F.2d 1201, 1204-05 (7th Cir. 1980). At least one federal court, however, has criticized Ely's analysis:

> If the suggested test were adopted, the attorney in this position would have to research state law with regard to the matter covered in practically every federal rule of civil procedure to determine if there were a contrary state rule supported by non-procedural state policies contrary to the policy of the rule in question. No end of confusion, expense, and loss of judicial time and effort would result.

Boggs v. Blue Diamond Coal Co., 49 U.S.L.W. 2197, 2198 (E.D. Ky. September 8, 1980). *See generally* Chayes, *The Bead Game*, 87 HARV. L. REV. 741, 751-52 (1974); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the* Erie *Doctrine*, 85 Yale L.J. 678, 701-05 (1976).

[25] 380 U.S. at 471-72. In *Hanna*, the Court indicated that the constitutional test is satisfied if the regulated activity can be rationally classified as procedural:

tests, then it controls.[26]

The *Hanna* Court did not overrule *Ragan*. Instead, the Court distinguished *Ragan* on two grounds. First, the Court characterized *Ragan* as involving a federal rule that did not govern the tolling of statutes of limitations.[27] Thus, because no federal rule covered the point, an REA inquiry was unnecessary in *Ragan*. Second, the Court explained that in *Ragan* the application of the state commencement procedure would have wholly barred recovery, whereas in *Hanna* the state rule only would have altered the manner in which process was served.[28] In distinguishing *Ragan*, however, the *Hanna* Court overlooked the significant similarities. The state service of process law in *Hanna* was also a statute of limitations tolling provision that affected substantive state policies.[29] By enforcing the federal rule for service of process,

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> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleadings in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. at 472. For discussions of the constitutional limitations on Congress and the courts to regulate judicial procedures, see Ely, *supra* note 24, at 700-06; Note, *Medical Malpractice Panels and Federal Diversity Jurisdiction: Preserving Access to Federal Courts by Analyzing the Nature of the Panel*, 66 CORNELL L. REV. 337, 357 n.112 (1981); Note, *supra* note 24, at 701-05.

[26] In *Hanna*, the Court determined that rule 4(d)(1) satisfied the requirements of the three-part test. *See* 380 U.S. at 473-74.

[27] 380 U.S. at 470. In *Ragan*, however, the Court did not imply that rule 3 did not cover the issue in dispute. Indeed, the *Ragan* Court recognized the use of rule 3 to toll statutes of limitations in federal question actions. 337 U.S. at 533. *See* Note, *Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases*, 20 STAN. L. REV. 1281, 1286 n.41 (1968); Note, *Amending the Rules of Civil Procedure after Hanna v. Plumer: Rule 3*, 42 N.Y.U. L. REV. 1139, 1144 (1967).

[28] 380 U.S. at 469. In *Hanna*, the defendant moved for dismissal before the state statute of limitations had run, claiming improper service of process. A delay of four days, however, would have presented the same problem confronted in *Ragan*. The application of the state service requirement would have wholly barred recovery.

[29] Judge Aldrich, writing for the First Circuit in *Hanna*, recognized that the issue involved more than defining the appropriate manner for serving process. Because the defendant in *Hanna* was the executor of an estate, Massachusetts law imposed special notice requirements "to effectuate the safe and 'speedy settlement of estates that the heirs might be quieted.'" 331 F.2d 157, 159 (1st. Cir. 1964) (quoting Brown v. Anderson, 13 Mass. 201, 202 (1816)), *rev'd*, 380 U.S. 460 (1965). Massachusetts protected these interests by creating a special statute of limitations:

> The so-called "short statute of limitations," Mass. G.L. (Ter.Ed.) c. 197, § 9, provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to timely commencement, the statute provides that the executor "shall not be held to answer" unless within the year he had been served in hand, or "service * * * [is] accepted by him," or

the *Hanna* Court had undermined the reasoning in *Ragan*.[30]

Because the court refused to overrule *Ragan*, the confusion regarding the application of rule 3 in tolling state statutes of limitations persisted. Federal courts responded to *Hanna* in one of three fashions. Some courts concluded that *Ragan* was still good law and applied the state commencement procedure.[31] Others concluded that *Hanna* had overruled *Ragan*, and that rule 3 governed the tolling of state statutes of limitations.[32] The remaining courts recognized that *Ragan* was still good law, but distinguished it on the ground that a state commencement procedure was not an integral part of the state statute of limitations.[33] In *Walker v. Armco Steel Corp.*[34] the Supreme Court reaffirmed *Ragan* and

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there has been filed in the proper registry of probate a notice identifying the claim, the claimant and "the court in which the action has been brought."

331 F.2d at 158-59.

In Marshall v. Mulrenin, 508 F.2d 39 (1st Cir. 1974), Judge Aldrich limited the holding of *Hanna* by focusing on the Court's failure to recognize the substantive component of the state law. In *Marshall*, a diversity action, the First Circuit ruled on a conflict between federal rule 15(c) and the state rule governing the relation back of amendments in pleadings. Under *Hanna*'s three-part test, the federal rule should have controlled. Judge Aldrich, however, argued that the Supreme Court had failed to recognize the substantive implications of the state law in *Hanna*. *Id.* at 41-42. As a result, he contended, *Hanna* only states "a principle for resolving a direct conflict between two strictly procedural rules." *Id.* at 44. Faced with a conflict in *Marshall* involving clearly substantive implications, Judge Aldrich distinguished *Hanna* and applied a balancing test under which he ultimately adopted the state rule.

[30] Indeed, Justice Harlan, in his concurring opinion in *Hanna*, recognized the weakness in the Court's treatment of *Ragan*, and concluded that *Ragan*, "if still good law, would . . . call for affirmance of the result reached by the Court of Appeals." 380 U.S. at 476. Justice Harlan argned, however, that *Ragan* "was *wrong*." *Id.* at 477. For contemporaneous discussions of the impact of *Hanna*, see Stason, *Choice of Law Within the Federal System: Erie v. Hanna*, 52 CORNELL L.Q. 377, 394-404 (1967); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 52 VA. L. REV. 884, 888-92 (1965); Note, 20 STAN. L. REV., *supra* note 27, at 1286-87.

[31] *See, e.g.*, Rose v. K.K. Masutoku Toy Factory Co., 597 F.2d 215, 218 (10th Cir. 1979); Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1123 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979); Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 166 (3d Cir. 1976); Anderson v. Papillion, 445 F.2d 841, 842 (5th Cir. 1971) (per curiam); Groninger v. Davison, 364 F.2d 638, 642 (8th Cir. 1966) (questioning *Ragan*); Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965) (per curiam), *cert. denied*, 382 U.S. 1011 (1966).

[32] *See, e.g.*, Ingram v. Kumar, 585 F.2d 566, 568 (2d Cir. 1978), *cert. denied.*, 440 U.S. 940 (1979); Smith v. Peters, 482 F.2d 799, 802 (6th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); Sylvestri v. Warner & Swasey Co., 389 F.2d 598 (2d Cir. 1968); Manatee Cablevision Corp. v. Pierson, 433 F. Supp. 571, 575-76 (D.D.C. 1977); Benn v. Linden Carne Co., 370 F. Supp. 1269, 1281 (E.D. Pa. 1973); Krout v. Bridges, 58 F.R.D. 560, 562 (N.D. Iowa 1973).

[33] *See, e.g.*, Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 953 (8th Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); Chappell v. Rouch, 448 F.2d 446, 450-51 (10th Cir. 1971); Chladek v. Sterns Transp. Co., 427 F. Supp. 270, 274 (E.D. Pa. 1977).

[34] 100 S. Ct. 1978, 1983-84 (1980).

eliminated the confusion over the application of rule 3 in diversity actions.[35]

II

WALKER v. ARMCO STEEL CORP.

Fred Walker was injured on August 22, 1975.[36] Claiming diversity of citizenship, he filed suit in federal court on August 19, 1977,[37] shortly before the state's two year statute of limitations would have expired.[38] Although a summons was issued that same day, service of process was not made on defendant's authorized agent until December 1, 1977.[39] Because of the delay, the action did not commence under state law until the summons was served on the defendant.[40] Relying on *Ragan*, the district court held that the plaintiff's action was time barred because the state commencement procedure was an integral part of the state statute of limitations.[41] On appeal, the plaintiff argued that *Hanna* had implicitly overruled *Ragan*, and that rule 3 was a valid tolling provision.[42] The Tenth Circuit concluded that *Hanna* was "ir-

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[35] *See, e.g.*, Calhoun v. Ford, 625 F.2d 576 (5th Cir. 1980) (per curiam).

[36] Walker, a carpenter, was injured while pounding a nail into a cement wall. Walker claimed that the nail contained a defect that caused its head to shatter and strike him in the right eye, resulting in permanent injury. 100 S. Ct. at 1980.

[37] *Id.* at 1980-81.

[38] *Id.* at 1981 & n.3. *See* OKLA. STAT. ANN. tit. 12, § 95 (1971).

[39] 100 S. Ct. at 1981.

[40] *See id.* n.4; OKLA. STAT. ANN. tit. 12, § 97 (1971). Under state law, if the complaint is filed within the limitations period, and the plaintiff serves the defendant within 60 days, then the action is deemed to commence, for the purpose of tolling the statute of limitation, on the date of filing, even though service may have occurred outside the limitations period. OKLA. STAT. ANN. tit. 12, § 97 (West Supp. 1980) provides:

> An action shall be deemed commenced, within the meaning of this article [statute of limitations], as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, . . . within sixty (60) days.

In *Walker*, service of process was not effectuated within this 60 day period. 100 S. Ct. at 1981. The reason for the delay was unclear. During oral argument, Walker's attorney stated that the summons was found in an unmarked folder in a filing cabinet in counsel's office some 90 days after the complaint had been filed. *Id.* at 1981 n.2.

[41] 452 F. Supp. 243, 245 (W.D. Okla. 1978), *aff'd*, 592 F.2d 1133 (10th Cir. 1979), *aff'd*, 100 S. Ct. 1978 (1980).

[42] 592 F.2d 1133, 1135 (10th Cir. 1979), *aff'd*, 100 S. Ct. 1978 (1980).

reconcilable" with *Ragan*,[43] but nonetheless felt constrained by *Ragan*, and affirmed.[44]

The Supreme Court also recognized that *Walker* was indistinguishable from *Ragan*,[45] and confronted the apparent inconsistency between *Ragan* and *Hanna*. The *Walker* Court expressly approved the reasoning used in *Hanna* to distinguish *Ragan*,[46] and held that in diversity actions rule 3 does not toll the state statute of limitations.[47] Referring to the plain meaning of the rule, the Court reasoned that nothing in rule 3 indicates that it had been intended to toll state statutes of limitations, much less displace state tolling rules.[48] The Court concluded that in diversity cases no federal rule applies, and that the RDA, as interpreted by *Erie* and *Ragan*,[49] commands that federal courts apply state law.

III

Walker: A Failure of Methodology

Walker does not merely reaffirm *Ragan*. By expressly limiting the scope of rule 3, *Walker* renders the *Ragan* rationale superfluous. In *Ragan*, the Court applied state law because the state commencement procedure was substantive—an integral part of the state statue of limitations.[50] In contrast, by constricting the

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[43] Inasmuch as *Ragan* is based entirely upon the *Guaranty Trust* conception that outcome determinative is the answer, the refusal of the Court to apply this result in the *Hanna* decision is irreconcilable with that in *Ragan*.

> We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in *Hanna*, although it could be said to have shown dissatisfaction with *Ragan*, did not expressly overrule it.... It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that *Ragan* continues to be viable.

592 F.2d at 1136.

[44] *Id.*

[45] 100 S. Ct. at 1984.

[46] *Id.* at 1983-84. *See* notes 27-28 and accompanying text *supra*.

[47] "In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the federal rules begin to run, but does not affect state statutes of limitations." 100 S. Ct. at 1985. (footnote omitted).

[48] *Id.* at 1985 & nn. 9 & 10.

[49] *See* notes 13-14 and accompanying text *supra*.

[50] *See* 337 U.S. at 533-34. Before *Walker*, courts could limit *Ragan* to state commencement procedures that were an "integral-part" of the state statute of limitations. *See, e.g.*, Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 953 (8th Cir. 1972). There the court said:

> We conclude that it is only when a state legislates a rule regarding the commencement of action as an integral part of the statute of limitations that a state policy making a mode of enforcing a state-created right intrinsically material to

scope of rule 3, *Walker* eliminates the necessity of determining whether each state's commencement procedure is an integral part of the state's statute of limitations.[51] Even when a state commencement procedure is not an integral part of the state statute of limitations, rule 3 does not apply. After *Walker*, rule 3 has no tolling substance in actions to enforce state created rights.

In *Walker*, the Court purported to determine the scope of rule 3 by examining the plain meaning of the rule. Although acknowledging the Advisory Committee's suggestion that rule 3 might serve to toll statutes of limitations,[52] the Court concluded that the plain meaning of rule 3 indicates that it is not a tolling provision.[53] This conclusory analysis ignores numerous commentaries[54] and lower federal court decisions[55] that have con-

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> the right involved becomes clearly discernible and substantial. It is only then that *Erie* principles as set forth in *Ragan* must govern the litigation.

Id.; *see* Note, 20 STAN. L. REV., *supra* note 27, at 1283 n.21; notes 16-18 and accompanying text *supra*. *But see* 2 MOORE'S FEDERAL PRACTICE ¶ 3.07 [4.-3-1], at 3-97 (2d ed. 1980).

[51] In one sense, every commencement procedure is an integral part of the state statute of limitations because every statute of limitations must have a tolling provision. Nonetheless, some statutes of limitations incorporate specific commencement procedures designed to implement special state policies. *See* Ely, *supra* note 24, at 730-32. In *Walker*, for example, the Court noted that the Oklahoma commencement procedure involved more than the general policies behind all statutes of limitations:

> The importance of actual service, with corresponding actual notice, to the statute of limitations scheme in Oklahoma is further demonstrated by the fact that under Okla. Stat., Tit. 12, § 97 (1971) the statute of limitations must be tolled as to each defendant through individual service, unless a codefendant who is served is "united in interest" with the unserved defendant. That requirement, like the service requirement itself, does nothing to promote the general policy behind all statutes of limitations of keeping stale claims out of court. Instead, the service requirement furthers a different but related policy decision: that each defendant has a legitimate right not to be surprised by notice of a lawsuit after the period of liability has run.

100 S. Ct. at 1986 n.12. Not all state commencement procedures are integral parts of the state statute of limitations. *See, e.g.*, KAN. STAT. ANN. § 60-203 (1976); S.D. CODIFIED LAWS ANN §§ 15-2-30, 39 (1967). *See also* 231 PA. CODE Rule 1007. Nevertheless, by narrowly interpreting rule 3, the Court adopted a prophylactic convention that avoids the necessity of determining whether each state's commencement procedure is an integral part of its statute of limitations.

[52] For the text of the Advisory Note, see note 9 *supra*. In *Walker*, the Court explained:

> This Note establishes that the Advisory Committee predicted the problem which arose in *Ragan* and arises again in the instant case. It does not indicate, however, that Rule 3 was *intended* to serve as a tolling provision for statute of limitations purposes; it only suggests that the Advisory Committee thought the Rule *might* have that effect.

100 S. Ct. at 1985 n.10 (emphasis in original).

[53] *Id.* at 1985 & nn. 9 & 10.

[54] *See, e.g.*, Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 CORNELL L.Q. 28, 30 (1939). There the author observes:

> Until a complaint has been filed no action has been commenced. However, the

strued rule 3 as a tolling provision. Moreover, the Court recognized that in actions to enforce federal rights, federal courts have universally applied rule 3 to toll statutes of limitations.[56] If the plain meaning of the rule controls, then the scope of rule 3 should not differ in actions to enforce federal rights. Nevertheless, the Court explicitly refrained from deciding the scope of rule 3 in actions based on federal law.[57]

The opinion in *Walker* suggests that the Court looked beyond the plain meaning of rule 3. Under a plain meaning analysis, the substantive nature of state law should not affect the scope of a potentially conflicting federal rule.[58] In *Walker*, however, the Court compared rule 3 to the state commencement procedure. The Court described the state commencement law as "an integral part of the several policies served by the statute of limitations,"[59] and concluded that "[r]ule 3 does not replace such policy determinations found in state law."[60] By focusing on the substantive component of state law, the Court undermined its plain meaning rationale.

If the Court did not apply a plain meaning analysis, then *Walker* implicitly reformulates the process for testing the validity of the federal rule. Under the test prescribed by *Hanna*, a court must first determine whether a federal rule applies. If a federal

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> filing of the complaint with the court tolls the statute of limitations, irrespective of the fact that the period of limitation expired before service of summons and complaint on defendant, for an action is commenced by filing the complaint. The language of Rule 3 is too plain to admit of discussion or to leave any doubt as to this. A commentator has said he thinks the filing of a complaint *conditionally* suspends the running of a statute of limitations, provided the summons is issued forthwith and served within a reasonable time thereafter.

Id. (emphasis in original) (footnote omitted) (referring to Rowstein, *Pleading and Practice under the New Federal Rules*, 73 U.S.L. REV. 21 (1939)).

[55] *See* notes 32-33 *supra*.

[56] *See* 100 S. Ct. at 1985 n. 11; notes 76-84 and accompanying text *infra*.

[57] 100 S. Ct. at 1985.

[58] Under the plain meaning rule, the sole evidence of legislative intent is the language of the statute:

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from . . . any extraneous source. In other words, the language being plain, and not leading to asurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Caminetti v. United States, 242 U.S. 470, 490 (1917). *See generally* 2A C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §.46.01 (4th ed. 1972); *see also* Murphy, *Old Maxims Never Die: The "Plain-meaning Rule" and Statutory Interpretation in the Modern Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (discussing the use of the plain meaning rule to preclude resort to legislative history in interpreting federal statutes).

[59] 100 S. Ct. at 1985.

[60] *Id.* at 1986.

rule does apply, then the court must determine whether the rule transgresses either the REA or the Constitution.[61] In *Walker*, the Court reversed the order of *Hanna*'s three-part test. The Court first determined the statutory and constitutional restrictions by analyzing the state commencement rule. After concluding that the state rule was an integral part of the state's statute of limitations, the Court recognized the restrictions placed on the federal rule,[62] and defined the rule in a manner that avoided any conflict.[63] Although the Court denied that it was narrowly construing the rule "in order to avoid a 'direct collision' with state law,"[64] the analysis in *Walker* suggests the opposite.[65]

After determining that rule 3 did not apply, the *Walker* Court concluded that the state commencement procedure controlled. The Court's RDA analysis, however, contains troubling omissions. The Court failed to examine properly the "twin aims of the *Erie* rule: the discouragement of forum shopping and avoidance of inequitable administration of the laws."[66] The Court acknowledged that failure to apply state law "might not create any problem of forum shopping,"[67] but concluded that "the

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[61] *See* notes 19-26 and accompanying text *supra*.

[62] Had the Court held that rule 3 tolls statutes of limitations in diversity actions, strong arguments exist that the REA would have invalidated the application of the rule because of the substantive nature of the right involved. The right involved, the state commencement procedure, is substantive because it is an integral part of the state statute of limitations. *See* Ely, *supra* note 24, at 730-33; notes 23-26 and accompanying text *supra*. *But see* Chayes, *supra* note 24, at 748-50.

[63] This procedural reversal is not merely a formalistic change. Under *Walker*'s implicit approach, the impact of the federal rules may be significantly reduced. Whenever a federal rule is capable of a narrow interpretation, as was rule 3, federal courts may narrowly interpret the rule to avoid any possible conflict with substantive state law. Rather than give a federal rule its broadest meaning, federal courts may narrowly construe the rule regardless of the rule's ability in its broadest form to satisfy the *Hanna* test. *See* Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 343 (1980) ("[T]he *[Ragan]* Court may have deliberately construed rule 3 narrowly in order to avoid deciding whether a broader construction would be valid.").

[64]

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis in *Hanna v. Plumer* applies.

100 S. Ct. at 1985 n.9.

[65] The *Walker* Court further undermined its claim by noting that in *Hanna*, "the 'clash' between Rule 4(d)(1) and the state in-hand service requirement was *'unavoidable.'*" *Id.* at 1985 (emphasis added) (quoting Hanna v. Plumer, 380 U.S. at 470). Presumably, if a court can avoid a conflict by narrowly construing a rule, then the "clash" is not "unavoidable."

[66] Hanna v. Plumer, 380 US. at 468 (footnote omitted).

[67] 100 S. Ct. at 1986 n.15.

result would be an 'inequitable administration' of the law."[68] The Court, however, failed to explain the inequities of such a result, noting only that the outcome would differ.[69] Ironically, *Hanna* had rejected the outcome determination test in "considered dictum."[70] In *Hanna*, the Court explained that even in the absence of an applicable federal rule, "outcome determination" analysis is not controlling.[71] According to *Hanna*, the "twin aims of *Erie*" are not violated unless the failure to adopt state law substantially alters the enforcement of state created rights.[72] The *Walker* Court never explained how the failure to adopt the state commencement procedure would substantially alter the enforcement of a state created right.[73] Thus, while expressing concern

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[68] *Id.* at 1986 (quoting Hanna v. Plumer, 380 U.S. at 468).

[69] There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

100 S. Ct. at 1986.

[70] Ely, *supra* note 24, at 710. Professor Ely points out that the majority in *Hanna* carefully added the dictum concerning the rule of decision in the absence of an applicable federal rule in an attempt to clarify the meaning of *Erie*:

> The point of the *Hanna* dictum is that it is difficult to find unfairness of a sort that would have troubled the framers of the Rules of Decision Act, or of a sort whose elimination would justify disrupting a federal court's routine, when the difference between the federal and state rules is trivial, when their requirements are essentially fungible.... Thus, whenever the sanction for noncompliance is dismissal, there is a sense in which "enforcement" of the rule can be outcome determinative. But it is a backhanded sense, and one that implicates the concerns that gave rise to the Rules of Decision Act only when the underlying mandate thus enforced is sufficiently more or less burdensome than its state counterpart to support a plausible claim of unfairness.

Id. at 713-14 (footnotes omitted).

[71] Hanna v. Plumer, 380 U.S. at 466-69.

[72] That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum. The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the law.

Id. at 467-68 (citation and footnote omitted).

[73] The Court may have assumed that all commencement procedures are an integral part of the state's statute of limitations, and, thus, an integral part of the state created right. Hence, failure to adopt the state commencement procedure would substantially alter the enforcement of a state created right. *See* 100 S. Ct. at 1986.

over the doctrine of stare decisis,[74] the *Walker* Court failed to analyze the choice of law issues in accord with *Erie* and its progeny.[75]

IV

COMMENCEMENT IN NON-DIVERSITY ACTIONS AFTER *Walker*

Three years before *Ragan*, in *Bomar v. Keyes*,[76] the Second Circuit held that the filing of a complaint pursuant to rule 3 tolls the statute of limitations in federal question cases.[77] Following *Bomar*, federal courts uniformly applied rule 3 as a tolling provision in actions to enforce federally created rights,[78] whether the statute of limitations was set by Congress[79] or borrowed from state law.[80] *Ragan* did not upset this uniformity;[81] indeed, *Ragan*

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[74] *Id.* at 1984.

[75] The weakness of the Court's RDA analysis is also evident from *Walker*'s failure to consider Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958). In *Byrd*, the Court adopted a balancing test to decide between conflicting state and federal rules in the absence of an applicable Federal Rule of Civil Procedure. Prior to *Walker*, many commentators had argued that *Byrd* did not survive *Hanna*. *See, e.g.*, Ely, *supra* note 24, at 717 n.130; Redish & Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 368-69 (1977); Stason, *supra* note 30, at 404. *But see* Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 715 n.375 (1967). The Court's silence in *Walker* may give added strength to these predictions.

[76] 162 F.2d 136 (2d Cir.) (L. Hand, J.), *cert. denied*, 332 U.S. 825 (1947).

[77] *Id.* at 140-41. *Bomar*, however, explicitly avoided considering whether any subsequent delay should be charged to the plaintiff in computing the period of limitations. *Id.* at 141. A number of federal courts additionally have required the plaintiff to exercise due diligence in securing issuance and service of the summons after the filing of the complaint. *See, e.g.*, Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 606 (2d Cir. 1968); Benn v. Linden Crane Co., 370 F. Supp. 1269, 1279 (E.D. Pa. 1973); Hukill v. Pacific & Artic Ry. & Navig. Co., 159 F. Supp. 571, 575 (D.C. Alaska 1958). *But see* Moore Co. v. Sid Richardson Carbon & Gas Co., 347 F.2d 931, 924 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966) (adequate remedy for lack of due diligence available under rule 41(b)); McCrea v. General Motors Corp., 53 F.R.D. 384, 385 (D. Mont. 1971) (adequate remedy for lack of due diligence available under rule 41(b)).

[78] Of course, where Congress specifically mandates what steps are necessary to toll the applicable statute of limitations, rule 3 does not operate. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 256 (1977) (specifically stating that an action is commenced for the purpose of tolling statute of limitations upon filing).

[79] *See, e.g.*, 15 U.S.C. § 156 (1976) (antitrust, four years); 17 U.S.C. § 507 (1976) (copyright, three years); 35 U.S.C. § 286 (1976) (patent, six years).

[80] Congress continues to create federal rights without providing a limitations period. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1976) (antifraud provision); Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760h (1976); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976); Civil Rights Acts, 42 U.S.C. §§ 1981-1988 (1976); Outer Continental Oil Shelf Lands Act, 43 U.S.C. §§1331-1343 (1976); Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976); Military Selective Service Act, 50 U.S.C. §§ 459-473 (1976). Federal courts have responded by borrowing applicable state statutes of limitations. *See* Special Project, *supra* note 2, *passim*.

[81] *See, e.g.*, Hoffman v. Halden, 268 F.2d 280, 302 (9th Cir. 1959); Jackson v. Duke,

appeared to recognize the validity of *Bomar* by explicitly distinguishing it.[82] Even after *Hanna*'s recharacterization of *Ragan*, federal courts continued to rely on *Bomar* when construing rule 3 in non-diversity actions.[83] In *Walker*, the Court expressly reserved the question of what commencement procedure applies in actions based on federal law.[84]

In actions to enforce federally created rights after *Walker*, courts can choose from four alternative approaches for defining commencement. First, federal courts can limit *Walker* to diversity actions and apply rule 3 as a tolling provision. Second, courts can hold that rule 3 no longer applies and create a federal common law rule that applies in all actions arising under federal law. Third, courts can apply state commencement rules in all cases. Fourth, courts can apply a federal common law commencement rule when federal law directly provides the applicable statute of limitations, and apply a state commencement rule when federal law borrows the state statute of limitations. Of these alternatives, a federal common law rule providing that the filing of a complaint tolls the applicable statute of limitations presents the best approach.

The first alternative is the simplest. By applying rule 3 as a tolling provision in actions to enforce federal rights, courts would continue a longstanding rule of federal practice.[85] Since *Walker*, several courts have adopted this alternative.[86] Moreover, this approach comports well with the purposes of the federal rules. One reason for enacting the federal rules was to establish pro-

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259 F.2d 3, 6 (5th Cir. 1958); Von Clemm v. Smith, 204 F. Supp. 110, 113 (S.D.N.Y. 1962).

[82] The *Ragan* Court explained:

> It is accordingly argued that since the suit was properly commenced in the federal court before the Kansas statute of limitations ran, it tolled the statute. That was the reasoning and result in Bomar v. Keyes. But that case was a suit to enforce rights under a federal statute.

337 U.S. at 533 (citation and footnotes omitted).

[83] *See, e.g.*, United States v. Wahl, 583 F.2d 285, 288 (6th Cir. 1978); Moore Co. v. Sid Richardson Carbon & Gas Co., 347 F.2d 921, 922 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); David v. Krauss, 478 F. Supp. 823, 835 (E.D.N.Y. 1979); Triplett v. Azordegan, 478 F. Supp. 872, 878 (N.D. Iowa 1977); Preveza Shipping Co. v. Sucrest Corp., 397 F. Supp. 954, 958 (S.D.N.Y. 1969).

[84] *See* 100 S. Ct. at 1985 n.11 ("We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law.").

[85] *See* notes 76-83 and accompanying text *supra*.

[86] *See* Appleton Elec. Co. v. Graves Truck Line, Inc., No. 79-1640 (7th Cir. Nov. 25, 1980); Smith v. WGBH-TV, No. 77-2902-MA (D. Mass. Oct. 21, 1980).

cedural uniformity in federal courts.[87] Although *Walker* forecloses complete uniformity, courts could minimize disuniformity by broadly interpreting rule 3 in actions to enforce federal rights. Moreover, the federal rules were designed to insure that cases would be decided on their merits.[88] By applying rule 3 in all non-diversity cases, federal courts would remove a trap for unwary litigants.

Although the Supreme Court has never explicitly applied different interpretations of the same federal rule based on the source of a legal right, the *Walker* Court did not foreclose such a practice. One difficulty with this approach, however, is that it contradicts the plain meaning rationale used in *Walker* to determine the scope of rule 3.[89] Because the language of rule 3 is the same in diversity and non-diversity actions, the plain meaning of the rule should also remain the same.

The second alternative would avoid this apparent inconsistency. Under this approach, federal courts could create a uniform common law commencement rule consistent with *Bomar*'s interpretation of rule 3.[90] The filing of a complaint would continue to toll the applicable statute of limitations in all actions arising

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[87] "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the adminstration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers of Congress expressly conferred in the Rules."
Hanna v. Plumer, 380 U.S. 460, 472-73 (1965) (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963)). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 668-76 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER].

[88] *See* United States v. Hougham, 364 U.S. 310, 317 (1960) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.") (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957)).

[89] *See* notes 52-60 and accompanying text *supra*.

[90] The federal common law rule could take a variety of forms. For example, an action could be deemed to commence for the purpose of tolling the statute of limitations at the filing of the complaint (*Bomar*'s interpretation of rule 3), at the filing of the complaint and the issuance of summons, or at the time service is obtained. *See* Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 980-81 (1951). For several reasons, however, the establishment of a federal common law rule consistent with *Bomar*'s interpretation of rule 3 is preferable. First, such a rule would comport with prior uniform practice in non-diversity action. *See* notes 76-84 and accompanying text *supra*. Second, commencement by filing a complaint is an extension of a longstanding practice in equity. Equity courts determined that the purposes behind statutes of limitations only require the filing of the complaint, when accompanied by prompt service of process. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1056, at 179 (1969).

under federal law in the federal courts. This approach would serve the interests of uniformity and simplicity[91] without contradicting the plain meaning of rule 3 as interpreted by the *Walker* Court.[92]

The third alternative would allow federal courts to adopt state commencement rules as the governing federal rule in all cases. In analogous situations arising under federal law, the Supreme Court has often borrowed state law rather than create federal common law.[93] Although this approach would maximize

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[91] The Supreme Court has adopted this approach in similar situations. *See, e.g.*, Cope v. Anderson, 331 U.S. 461 (1947) (applying federal common law rule of accrual); Schreiber v. Sharpless, 110 U.S. 76 (1884) (applying federal common law rule of survival).

[92] The power of the federal courts to create common law to fill the interstices of federal statutes is unquestioned. *See generally* HART & WECHSLER, *supra* note 87, at 762-70. Assuming that no federal rule applies to toll statutes of limitations, the determinative choice of law statute is the RDA, not the REA. Unless the Constitution, treaties, or acts of Congress "otherwise require or provide," the RDA mandates the adoption of state law. 28 U.S.C. § 1652 (1976). *See* note 15 *supra*. The Supreme Court has broadly interpreted the "otherwise require or provide" language of the RDA. *See* Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946); Board of County Comm'rs v. United States, 308 U.S. 343, 349-50 (1939). Thus, if the source of the right in issue derives from the Constitution, treaties, or statutes of the United States, then state law need not be applied. *See* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 73 (1956); Special Project, *supra* note 2, at 1038-42. This broad interpretation of the RDA, however, is controversial. Indeed, lower federal courts continue to apply state law based on the Supreme Court's earlier narrow interpretation of the RDA. *See, e.g.*, Wright v. Tennessee, 613 F.2d 647, 648 (6th Cir. 1980); International Union of Operating Eng'rs v. Fishback & Moore, Inc., 350 F.2d 936, 938-39 (9th Cir. 1965); Nickels v. Koehler Management Corp., 392 F. Supp. 804, 805 (N.D. Ohio 1975); *cf.* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966) (citing cases decided under the RDA).

[93] *See, e.g.*, Board of Regents v. Tomanio, 100 S. Ct. 1790 (1980) (borrowing state limitations period and tolling rules in § 1983 action); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (borrowing state tolling rules in a § 1981 action); UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (borrowing state statute of limitations in suit to enforce collective bargaining agreement under § 301 of the Labor Management Relations Act). *See also* Robertson v. Wegmann, 436 U.S. 584 (1978) (borrowing state abatement rules in a § 1983 action because of the command of § 1988).

When Congress is silent, federal courts presumptively apply the limitations law of the forum state:

> [T]he silence of Congress has been interpreted to mean that it is federal policy to adopt the local law.... The implied absorption of State [law] within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles.

Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) (citations omitted) (citing Board of County Comm'rs v. United States, 308 U.S. 343, 349-52 (1939)). *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) (quoting Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946)); Special Project, *supra* note 2, *passim*. Although this implied absorption is the "primary guide, ... it is not [the] exclusive guide." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975). "[C]onsiderations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action

uniformity within each jurisdiction, it would complicate procedures in the federal system because of variations among the states.[94] Moreover, Congress has explicitly defined the limitations period for many federal actions.[95] By establishing a federal statute of limitations, Congress has indicated a desire to govern uniformly defendants' exposure to liability. The lack of uniformity among the states in defining commencement, however, would cause limitation periods to vary.[96] This, in turn, might encourage forum shopping and produce inequitable results.

The fourth alternative recognizes the close relationship between commencement procedures and the substantive policies of statutes of limitations. Under this approach, federal courts would adopt a hybrid of state and federal commencement rules. When federal statutes expressly define the limitations period, courts would apply a federal common law rule of commencement; when federal law borrows a state's limitations period, courts would borrow the state commencement procedure. The underlying rationale of *Ragan* and *Walker*—that state commencement procedures are an integral part of state statutes of limitations—supports this approach. [97] The hybrid approach assumes that when Congress fails to provide a specific limitations period, it has

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under consideration." *Id. See* Board of Regents v. Tomanio, 100 S. Ct. 1790, 1795 (1980); Occidental Life Ins. Co., v. EEOC, 432 U.S. 355, 367 (1977).

[94] Consider, for example, the problems in determining the applicable statute of limitations when suits are transferred within the federal system because of improper venue or lack of personal jurisdiction. *See* Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149, 159-63 (1978). Variations among the states in defining commencement would compound these problems.

[95] *See* note 79 *supra*.

[96] For example, consider three states whose commencement procedures are, respectively, at filing, at service of process, and at filing if service of process is made within 60 days of filing. The limitations period for the first two states is identical, although plaintiffs must satisfy different requirements within that period. The third state, however, extends a defendant's exposure to liability relative to the second state by allowing the plaintiff to toll the statute of limitations for 60 days. In cases where the plaintiff is unable to immediately serve the defendant and the limitations period is about to run, this can produce inequitable results.

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> The statute of limitation establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute.... It is these policy aspects which made the service requirement an "integral" part of the statute of limitations both in this case and in *Ragan*. As such, the service rule must be considered part and parcel of the statute of limitations.

100 S. Ct. at 1985-86 (footnote omitted).

indicated the absence of a strong federal policy.[98] Hence, when federal law borrows the statute of limitations from state law, uniformity and discouraging forum shopping are not compelling considerations. In such situations, courts can fully implement the substantive policies of the borrowed statute of limitations by also borrowing the state commencement rule. At the same time, the hybrid approach guarantees that when Congress has indicated a strong policy by providing a federal limitations period, a uniform federal commencement rule will apply. The hybrid approach, however, would increase procedural disuniformity within the federal court system and might create new traps for unwary litigants.

CONCLUSION

More than three decades after its decision in *Ragan v. Merchants Transfer & Warehouse Co.*, the Supreme Court held in *Walker v. Armco Steel Corp.* that state commencement procedure, rather than rule 3, tolls the statute of limitations in diversity actions. *Walker* does not, however, merely reaffirm *Ragan*. *Walker* goes beyond *Ragan* by holding that the plain meaning of rule 3 precludes its application as a tolling provision in diversity actions. The Court's methodology, however, is flawed. Although purporting to determine the scope of the rule by examining its plain meaning, the Court undermined this rationale by focusing on the substantive nature of the state commencement procedure. Moreover, the Court failed to analyze the choice of law problem in a manner consistent with *Erie* and its progeny, merely concluding that state law should be adopted in the absence of an applicable federal rule. Finally, *Walker* casts doubt on the continued application of rule 3 to toll statutes of limitations in actions to enforce federally created rights. The *Walker* Court expressly reserved the question of the role of rule 3 in actions based on federal law. To promote procedural uniformity in the federal courts and the federal policy of removing unnecessary traps for litigants, federal courts should continue to hold that the filing of a complaint tolls statutes of limitations in actions to enforce federally created rights.

Mark N. Parry

[98] When Congress has not set the statute of limitations, uniformity does not necessitate the displacement of the state commencement procedure. "The need for uniformity, while paramount under some statutory schemes, has not been held to warrant the displacement of state statutes of limitations . . . ." Board of Regents v. Tomanio, 100 S. Ct. 1790, 1797 (1980).