Notes

The Retroactive Effect of *Wilson v. Garcia**

I. Introduction

42 U.S.C. § 1983[1] is a federally created individual action for "the deprivation [under the color of state law] of any rights, privileges or immunities secured by the Constitution and the laws"[2] of the United States. Because Congress did not provide section 1983 with a statute of limitations, courts follow the well established practice of "borrowing" a state statute of limitations for an analogous state claim.[3] 42 U.S.C. § 1988 is the statutory provision that directs federal courts to "borrow" a state law statute of limitations when no federal limitations period exists.[4] Federal courts had employed divergent approaches when borrowing state statutes of limitations for section 1983 actions, and in some circuits litigants had little precedential guidance upon which they could predict which state statute of limitations would govern their claim.[5] In

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[1]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
42 U.S.C. § 1983 (1982).

[2]*Id.*

[3]*See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); O'Sullivan v. Felix, 233 U.S. 318 (1914).

[4]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 . . . 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 . . . .
42 U.S.C. § 1988 (1982).

[5]*See infra* text accompanying notes 68-120.

an effort to inject certainty and uniformity into statute of limitations selection for section 1983 claims, the U.S. Supreme Court held in *Wilson v. Garcia*[6] that all section 1983 actions should be characterized as "claims for personal injuries" for purposes of "borrowing" a state statute of limitations.[7] The Court noted the divergent approaches among the circuits, some circuits characterizing section 1983 claims as actions arising under statute,[8] others analyzing the particular facts of each case and selecting a state claim analogue for the purpose of "borrowing" a state statute of limitations.[9] After reviewing the Congressional intent behind the passage of section 1983,[10] and cataloguing the offenses section 1983 was intended to redress,[11] the Court held that "[h]ad the 42d Congress expressly focused on the issue decided, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights."[12] The Court reasoned that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach."[13] Justice O'Connor, dissenting in *Wilson*, contended that abandoning the practice of "borrowing" the most analogous state claim statute of limitations for a uniform "personal injury" limitation period abandons the policy that section 1988 embodies.[14] O'Connor, recognizing that *Wilson*'s mandate for "borrowing" the forum state's "personal injury" statute of limitations will be problematic where the forum state provides more than one "personal injury" statute which could apply to a section 1983 claim,[15] stated that "[t]oday's decision does not so much resolve confusion as banish it to the lower courts."[16]

The accuracy of Justice O'Connor's prediction that *Wilson* would not resolve confusion but banish it to the lower court is borne out in the body of case law which has followed the mandate of *Wilson*. A primary issue for resolution is whether to apply *Wilson* retroactively to section 1983 claims that accrued before April 17, 1985, the day *Wilson* was decided.[17] If *Wilson* is applied retroactively to a section 1983 claim,

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[6]471 U.S. 261 (1985).

[7]*Id.* at 279.

[8]*Id.* at 278.

[9]*Id.* at 273-74.

[10]*Id.* at 267-77. "The specific historical catalyst for the Civil Rights Act of 1871 [now section 1983] was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Id.* at 276.

[11]*Id.* at 273.

[12]*Id.* at 278.

[13]*Id.* at 275.

[14]*Id.* at 280 (O'Connor, J., dissenting).

[15]*Id.* at 285-87.

[16]*Id.* at 286.

[17]471 U.S. at 261.

it may time-bar a complaint that may have been timely had *Wilson* not been decided.[18] Thus, if the statute of limitations applied to section 1983 claims prior to *Wilson* was five years and the forum state's personal injury statute of limitations is two years, retroactive application of *Wilson* would time-bar the plaintiff's section 1983 claim. If, however, the forum state's personal injury statute of limitations is longer than the statute of limitations formerly applied to section 1983 claims, a retroactive application would lengthen the period in which the plaintiff could bring suit.[19] In the first case, a plaintiff's reliance upon a pre-*Wilson* statute of limitations may be subverted by a retroactive application of that decision. In the latter situation, a defendant's determination that she is free of a stale claim is undermined. The Supreme Court has not granted certiorari to hear the issue of the retroactivity of *Wilson*,[20] and has not guided the lower courts in selecting which forum state's "personal injury" statute of limitations applies to a section 1983 claim when more than one state statute of limitations may apply to a "personal injury" action.[21]

Chevron Oil Co. v. Huson[22] outlines the mode of analysis federal courts should apply when addressing the retroactivity of a civil judicial decision. This Note will develop a paradigmatic analysis of *Wilson*'s

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[18]*See, e.g.*, Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 349 (1985). *See also infra* text accompanying notes 71-75.

[19]*See, e.g.*, Farmer v. Cook, 782 F.2d 780 (8th Cir. 1986) (per curiam). *See also infra* text accompanying notes 132-36.

[20]*See, e.g.*, Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902, 2903 (1985) (White and Marshall, J.J., dissenting) ("Given the square conflicts among the circuits, and the frequency with which these cases arise, I would grant the petition for certiorari in this case."); Rivera v. Green, 775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986); Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986); Smith v. City of Pittsburgh, 764 F.2d 188 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 349 (1985).

[21]*See, e.g.*, Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 893 (1986) (White, J., dissenting). In *Jones*, two Alabama statutes of limitations for "personal injury" may have applied to section 1983 claims. 106 S. Ct. at 893. *See also* Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986). In *Gates*, the Fifth Circuit rejected a six-year Mississippi statute of limitations for negligence and strict liability in favor of a one-year statute of limitations for intentional torts, finding that "[m]ost 1983 actions are predicated on intentional rather than negligent acts. . . .[i]t follows that the 1983 action is more analogous to intentional torts . . . ." 771 F.2d at 920. *But cf., e.g.*, Small v. City of Belfast, 796 F.2d 544 (1st Cir. 1986) (applying a six-year Maine statute of limitations for negligent torts). This Note will not address the problem that arises when a forum state provides more than one personal injury statute of limitations that may apply to a section 1983 action in light of *Wilson*. For a discussion of this issue, see Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440 (1986); Smucker, *All Section 1983 Actions Must Apply a Single State Statute of Limitations*, 15 STETSON L. REV. 1042 (1986); Pagan, *Virginia's Statute of Limitations for Section 1983 Claims After* Wilson v. Garcia, 19 U. RICH. L. REV. 257 (1985).

[22]404 U.S. 97 (1971).

retroactivity employing the analysis outlined in *Chevron*. The Note will then analyze the decisions which have addressed the issue of *Wilson*'s retroactivity.

II. The Retroactivity of Judicial Decisions in Light of *Chevron v. Huson*

Generally, judicial decisions are applied retroactively.[23] Exceptions to the retroactivity doctrine have developed, however. *Linkletter v. Walker*,[24] a criminal law case decided in 1965, held that an earlier decision[25] requiring the exclusion of illegally obtained evidence would receive only partial retroactive effect.[26] In the context of civil cases, *Chevron Oil Co. v. Huson*[27] is the polestar case addressing the retroactivity of a judicial decision. The issue in *Chevron* was similar to the *Wilson* retroactivity issue; whether a plaintiff's claim should be time-barred when a subsequent judicial decision shortens the statute of limitations.[28] The Court in *Chevron* did not apply the shorter statute of limitations to the plaintiff's claim because the plaintiff was justified in relying upon the longer statute of limitations that was in effect when the claim accrued.[29] In reaching its decision, the *Chevron* majority

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[23]Solem v. Stumes, 465 U.S. 638, 642 (1984). For a thorough discussion of the jurisprudential theories that underlie the presumption of the retroactivity of judicial decisions, see Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 Va. L. Rev. 201 (1965); Note, *Confusion in Federal Courts: Applications of the Chevron Test in Retroactive-Prospective Decisions*, U. Ill. L. Rev. 117 (1985) [hereinafter *Confusion*]. *See also infra* note 24.

[24]381 U.S. 618 (1965). In *Linkletter*, Justice Clark traced the presumption of retroactivity to the jurisprudential philosophy of Blackstone. Justice Clark stated that under the Blackstonian model, the judge was not the creator of the law, but the discoverer of the law. When a decision was overruled, the overruling decision was not considered to be new law, but a correct application of what was and had always been the law. Thus, an overruled decision was merely a failure by the former court to divine the true law. In contrast to the Blackstonian model of jurisprudence is the Austinian view of the judicial process. John Austin posited that over time judges modified common and statutory law. The Austinian model gives courts the flexibility to overrule past decisions while still applying the older rule to cases already decided. *Id.* at 622-24.

[25]Mapp v. Ohio, 367 U.S. 643 (1961) (held that illegally obtained evidence must be excluded in state proceedings because the "due process" clause of the fourteenth amendment applies to state court proceedings).

[26]*Linkletter*, 381 U.S. at 639.

[27]404 U.S. 97 (1971).

[28]The plaintiff in *Chevron*, who had been injured on an offshore oil rig, argued that he had reasonably relied on admiralty law in gauging the timeliness of his suit. After the defendant had filed suit, the Supreme Court held in Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), that admiralty law does not apply to personal injuries that occur upon fixed structures on the Outer Continental Shelf. In light of *Rodrique*, Louisiana law and its one-year personal injury statute of limitation [absent a retroactive application of admiralty law] would then apply to Huson's claim.

[29]404 U.S. at 100.

outlined a test to be applied in determining whether a decision should receive only prospective application:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that 'we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. . . . Finally, we have weighed the inequity imposed by a retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[30]

Two very recent Supreme Court decisions have applied the *Chevron* analysis to the issue of a statute of limitation's retroactivity: *Goodman v. Lukens Steel Co.*,[31] and *St. Francis College v. Al-Khazraji*.[32] The *Goodman* decision extends *Wilson v. Garcia's* uniform application of the personal injury statute of limitations to section 1981 claims,[33] and using *Chevron* analysis, applied the personal injury statute of limitations retroactively.[34]

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[30]*Id.* at 106-07 (citations omitted).

[31]55 U.S.L.W. 4881 (U.S. June 19, 1987).

[32]107 S. Ct. 2022 (1987).

[33]"*Wilson*'s characterization of § 1983 claims is thus equally appropriate here [§ 1981] . . . The Court of Appeals was correct in selecting the Pennsylvania 2-year limitations period governing personal injury actions." 55 U.S.L.W. at 4882. The Court rejected the petitioners' arguments that section 1981 claims are actions for denial of economic rights because of race and should be governed by contract statute of limitations. "Section 1981 has a much broader focus than contractual rights . . . . It is thus part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person." *Id. But see* (J.J., Brennan, Marshall, and Blackmun, dissenting) stating that section 1981 actions should be governed by state statutes of limitations for interference with contract rights. 55 U.S.L.W. at 4884.

42 U.S.C. 1981, like section 1983, does not contain a statute of limitations, so federal courts borrow an analogous state claim statute of limitations. 55 U.S.L.W. at 4882. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1974).

[34]55 U.S.L.W. 4882-83. Both *St. Francis* and *Goodman* are cases appealed from the Third Circuit and both apply Pennsylvania law. Some discussion of the appellate court history is necessary for a fuller understanding of the cases. *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985) held on November 13, 1985 that the personal injury statute of limitations *Wilson* mandated for section 1983 claims should also be applied to section 1981 actions. 777 F.2d at 120. The appeals court in *Goodman* also held that the two-year statute of limitations was to be retroactively applied. *Id. Al-Khazraji v. St.*

III. Applying the *Chevron* Test to the Issue of *Wilson*'s Retroactivity

A. The Determination of Whether Wilson Overruled "Clear Past Precedent"

Because federal courts "borrowed" state statutes of limitations for section 1983 claims prior to *Wilson*, that decision did not address an issue of "first impression."[35] The operative question, therefore, is whether

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Francis College, 784 F.2d 505 (3d Cir. 1986), employing *Chevron* analysis, declined to apply *Goodman*'s personal injury statute of limitations retroactively because the plaintiff was justified in relying upon a longer statute of limitations when he filed suit in 1980. 784 F.2d at 513-14.

The Supreme Court announced its decision in St. Francis College v. Al-Khazraji, 107 S. Ct. at 505, on May 18, 1987, more than one month before *Goodman* was decided on June 19, 1987. 55 U.S.L.W. at 4881. *St. Francis* reserved the issue of whether the personal injury statute of limitations was to be uniformly applied to section 1981 claims, 107 S. Ct. at 2025, but upheld the lower court's finding that *Goodman* should not be applied retroactively. *Id.* at 2026. After restating the rule in *Chevron*, the court in *St. Francis* said:

> The Court of Appeals found these same factors [factors militating against retroactive application] were present in this case and foreclosed retroactive application of its decision in *Goodman*. We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior case.

107 S. Ct. at 2026.

In *Goodman* the Supreme Court held that the lower court was correct in applying the personal injury statute of limitations retroactively. The Court found that "there was no clear precedent on which petitioners relied [for a six-year contract action statute of limitations] when they filed their complaint in this case in 1973." 55 U.S.L.W. at 4883. The Court, in addressing the second and third *Chevron* factors, stated:

> applying the 2-year personal injury statute, which is wholly consistent with *Wilson v. Garcia* and with the general purposes of statutes of repose, will not frustrate any federal law or result in inequity to the workers who are charged with knowledge that it was an unsettled question as to how far back from the date of filing their complaint the damages period would reach.

Id.

The *Goodman* case distinguished *St. Francis* because the precedent was clear when the plaintiff filed in 1980. 55 U.S.L.W. at 4883. The issue of *Goodman*'s retroactivity will probably be a fertile source of litigation and will require *Chevron* analysis in each case to determine the retroactive effect. It may also be argued that *Goodman* selection of the personal injury statute of limitations for section 1981 claims is not an explicit direction to federal courts to apply that limitations period to all claims, but the tenor of the case suggests otherwise. A fuller discussion of those issues is mercifully left to other commentators. These decisions came too late in the preparation of this Note, however, for a full discussion of their impact upon the issue of *Wilson*'s retroactivity.

[35]Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986). "The issue presented to the Supreme Court in *Wilson* had not previously been addressed by that Court. The issue had, however, been addressed in virtually every circuit and this cannot realistically be considered one of 'first impression.'" *Id.* at 986 (citations omitted).

Wilson overruled "clear past precedent on which litigants may have relied."[36] The method a lower federal court employed for statute of limitations selection prior to *Wilson* may dictate whether *Wilson* overruled clear past precedent. Some circuits analyzed the factual basis of each section 1983 claim and applied the forum state's statute of limitations for a state claim analogous to the facts of the instant section 1983 action.[37] Other circuits determined that section 1983 actions have a source distinct from state law[38] and uniformly applied a statute of limitations for a "liability created by statute"[39] or a "catch-all" statute of limitations[40] to all section 1983 actions.

In circuits where the federal courts employed the factual analysis method of statute of limitations selection, clear precedent may not have existed that would have guided litigants in selecting an analogous state claim statute of limitations. Commentators have noted that unless an appellate court has ruled upon a similar fact pattern within the state where the section 1983 claim arose, there was often no clear precedent to guide litigants in predicting which state claim analogue would apply to their section 1983 action.[41] The Supreme Court in *Wilson* noted the selection of limitation periods in circuits that employed the factual analysis method often involved an arbitrary selection of one state claim analogue over another,[42] and that multiple periods of limitations may apply to

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[36]*See Chevron*, 404 U.S. at 106. *See also* Williams v. City of Atlanta, 794 F.2d 624, 627 (11th Cir. 1986); Anton v. Lehpamer, 787 F.2d 1141, 1143 (7th Cir. 1986); Rivera v. Green, 775 F.2d 1381, 1383 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986) (all analyzing the issue of *Wilson*'s retroactivity by determining whether *Wilson* overruled "clear past precedent"). The Supreme Court has never defined "clear past precedent," but in a dissenting opinion in Milton v. Wainwright, 407 U.S. 371 (1972), Justice Stewart stated that no retroactivity-prospectivity issue arose without a "sharp break in the web of the law." *Id.* at 381 n.2 (Stewart, J., dissenting).

[37]*See* Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1, 16-27 (1983-84). *See also infra* text accompanying notes 68-120.

[38]*See* Biehler, *supra* note 37, at 27-33. *See also infra* text accompanying notes 121-61.

[39]*See* Biehler, *supra* note 37, at 4. *See also* Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986). Prior to *Wilson*, federal courts applied California statutes of limitations for "liability created by statute" uniformly to all California section 1983 actions. *Id.* at 1339.

[40]*See* Biehler, *supra* note 37, at 3. *See also* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (applying Illinois five year "catch-all" statute of limitations for "actions not otherwise provided for" to all future section 1983 actions).

[41]*See* Biehler, *supra* note 37, at 5-6, "[u]nless the appellate court for that jurisdiction has faced the same facts within the same state, there remains no precedential guidance." *See also* Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L. J. 97, 98, "[i]n some circuits today neither plaintiffs nor defendants can know whether a federal civil rights claim is barred unless they seek a circuit decision on the facts of the case."

[42]471 U.S. at 272 n.24.

different elements of the same claim.[43] Analysis of decisions in circuits that applied the factual analysis method of statute of limitations selection prior to *Wilson* reveals that section 1983 litigants in those circuits were faced with conflicting precedent.[44]

Circuits that interpreted section 1983 as an action distinct from state law generally have provided litigants with clear precedential guidance. In these circuits federal courts applied the same statute of limitations to all section 1983 actions and litigants could reasonably assume that this same statute of limitations would apply to their claim.[45]

B. Chevron's "Purpose" Test

The second element of the *Chevron* analysis requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[46] The Supreme Court in *Wilson* stated that characterization of section 1983 actions as "personal injury" actions for purposes of borrowing a state statute of limitations furthers the "interests [of] certainty, uniformity, and the minimization of unnecessary collateral litigation."[47] *Anton v. Lehpamer*,[48] a decision that applied *Wilson* prospectively, reasoned that the *Wilson* decision serves another purpose which is that of "safeguarding the rights of federal civil rights litigants."[49]

Three general approaches have emerged in the analysis of the second *Chevron* factor: (1) *Wilson*'s interests in promoting uniformity, certainty, and the reduction of unnecessary collateral litigation[50] will be furthered by a retroactive application of the personal injury statute of limitations to future claims and those claims already pending;[51] (2) a retroactive

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[43]*Id.* at 274.

[44]*See infra* text accompanying notes 68-120.

[45]*See infra* text accompanying notes 121-61.

[46]404 U.S. at 106-07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

[47]471 U.S. at 275.

[48]787 F.2d 1141.

[49]*Id.* at 1144.

[50]*Wilson*, 471 U.S. at 275.

[51]Wycoff v. Menke, 773 F.2d at 986-87 (8th Cir. 1985). *Accord* Williams v. City of Atlanta, 794 F.2d 624, 627-28 (11th Cir. 1986); Arvidson v. City of Mankato, 635 F. Supp. 112, 113 (D. Minn. 1986). The first approach, holding that *Wilson*'s interests in promoting uniformity, certainty, and avoiding unnecessary collateral litigation finds support in the Supreme Court's most recent *Chevron* pronouncement, Goodman v. Lukens Steel Co., 55 U.S.L.W. 4881 (U.S. June 19, 1987). *See supra* note 34. The Court in *Goodman* stated that a retroactive application of the personal injury statute to a section 1981 action is consistent with the general purposes of statutes of repose and will not frustrate any federal law. Even if *Wilson*'s (*Goodman*'s) purposes may be served by a retroactive application, the Court's refusal to apply *Goodman* retroactively to the plaintiff who

application of the personal injury statute of limitations will not retard the interests that *Wilson* promotes because the decision sought only to mandate the specific type of statute of limitations for section 1983 claims, not to require the blanket application of a uniform time period to all pending and future cases;[52] (3) a retroactive application will serve the interests that *Wilson* seeks to promote if the other *Chevron* factors direct a retroactive application.[53] The third approach, which holds that a retroactive application of *Wilson* will serve the "purpose" of that decision if the other *Chevron* factors direct a retroactive application, may actually embody the outcome-determinative reasoning that courts employ in deciding the second *Chevron* factor. In many cases where *Wilson* is retroactively applied, courts hold that a retroactive application will further *Wilson*'s interests,[54] while decisions that apply *Wilson* only prospectively often hold that a prospective application will not retard *Wilson*'s operation.[55]

C. Chevron's "Inequity" and "Hardship" Element

The third component of the *Chevron* test directs a court to "weigh the inequity imposed by a retroactive application."[56] The Supreme Court in *Chevron* stated that "[i]t would also produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law

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reasonably relied upon a longer statute of limitations in St. Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2026 (1987) suggests the second *Chevron* factor alone is not dispositive in the retroactivity finding. In *Goodman*, the Court specifically found that all three *Chevron* factors militated in favor of a retroactive application. 55 U.S.L.W. at 4882-83.

[52]Since the personal injury statute of limitations period varies from state to state, *Wilson* merely promotes nationwide uniformity in deciding which of a state's several statutes of limitations applies in section 1983 actions. It does not secure nationwide uniformity as to the actual time within which such actions may be filed, and retroactive application in the present case would not make any appreciable contribution to such uniformity.

Ridgway v. Wapello County, Iowa, 795 F.2d 646, 648 (8th Cir. 1986). *Accord* Anton v. Lehpamer, 787 F.2d 1141, 1145 (7th Cir. 1986). Regarding *Wilson*'s interest in the reduction of unnecessary litigation, the *Anton* court stated: "[s]imilarly, the reduction of unnecessary litigation hardly seems to be affected by a nonretroactive application. The *Wilson* decision reduces litigation to the extent that, after *Wilson*, parties will no longer argue over which state statute of limitations is most analogous to their section 1983 claim." *Id.* at 1145.

[53]Smith v. City of Pittsburgh, 764 F.2d 188, 196 (3d Cir. 1985); Young v. Biggers, 630 F. Supp. 590, 592 (N.D. Miss. 1986).

[54]*See supra* notes 51 and 53.

[55]*See supra* note 52. *See also* Chris N. v. Burnsville, Minn., 634 F. Supp. 1402, 1411 (D. Minn. 1986) (non-retroactive application will not retard *Wilson*'s interests).

[56]404 U.S. at 107.

imposed upon him.''[57] Even prior to *Chevron*, courts gave rulings only prospective effect to protect people who had relied upon the existing state of the law[58] and to ensure stability of judicially created relations such as res judicata and statutes of limitation.[59]

Courts that have addressed the issue of *Wilson*'s retroactivity generally analyze the third *Chevron* factor by determining whether the plaintiff reasonably could have relied upon a statute of limitations which was longer than the forum state's personal injury statute of limitations.[60] If not, courts have held that it would not be inequitable to apply *Wilson* retroactively.[61] However, if the plaintiff could have reasonably relied upon a limitations period longer than the forum state's personal injury statute of limitations, courts have generally held that a retroactive application is inequitable.[62] The reliance interests of defendants upon statutes of limitations shorter than the forum state's personal injury limitations period have been addressed by the courts;[63] nevertheless, in cases where the defendants were justified in determining that the plaintiff's claims were time-barred, most courts have applied *Wilson* retroactively to revive the plaintiff's claims.[64] Courts have also considered the extent to which the plaintiffs have expended time and resources in the prosecution of their claims.[65]

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[57]404 U.S. at 108 (citation omitted). The *Chevron* Court cited Cipriano v. City of Houma, 395 U.S. 701 (1969), for the proposition that the Court will not apply a decision retroactively where a retroactive application will impose injustice or hardship. 404 U.S. at 107. In *Cipriano* the Court held that a Louisiana statute that allowed only property taxpayers to vote in municipal bond issuance elections violated the ''equal protection'' clause of the Fourteenth Amendment. The Court gave its decision only prospective effect, however, so the validity of securities issued prior to that decision would not be affected. 395 U.S. at 706.

[58]Currier, *supra* note 23, at 235.

[59]Moody, *The Retroactive Application of Law-Changing Decisions in Michigan*, 28 WAYNE L. REV. 439, 460 (1982).

[60]*See, e.g.*, Williams v. City of Atlanta, 794 F.2d 624, 627-28 (11th Cir. 1986); Wycoff v. Menke, 773 F.2d 983, 987 (8th Cir. 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 196 (3d Cir. 1985) (plaintiff could not have reasonably relied upon a statute of limitations longer than the forum state's personal injury statute of limitations). *But see* Ridgway v. Wapello County, Iowa, 795 F.2d 646, 648 (8th Cir. 1986); Anton v. Lehpamer, 787 F.2d 1141, 1145 (7th Cir. 1986) (because the plaintiff may have reasonably relied upon a longer statute of limitations, it would be inequitable to apply *Wilson* retroactively).

[61]*See supra* note 60.

[62]*Id.*

[63]*See, e.g.*, Farmer v. Cook, 782 F.2d 780 (8th Cir. 1986); Rivera v. Green, 775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986); Marks v. Parra, 785 F.2d 1419 (9th Cir. 1986). *See also infra* text accompanying notes 166-84.

[64]*See* cases cited *supra* note 63, applying *Wilson* retroactively to revive the plaintiffs' time-barred complaints.

[65]*See, e.g.*, Anton v. Lehpamer, 787 F.2d 1141, 1145-46 (7th Cir. 1986); Loy v.

The vast majority of courts that have addressed the issue of *Wilson*'s retroactivity have employed the *Chevron* analysis. The Ninth Circuit, while ostensibly employing the *Chevron* test, applies *Wilson* either retroactively or prospectively, whichever result would lengthen the period in which the plaintiff may file.[66] The Sixth Circuit does not employ the *Chevron* analysis; instead, that circuit uniformly applies *Wilson* retroactively, reasoning that because the Supreme Court applied its decision retroactively in *Wilson*, the Court was impliedly mandating that *Wilson* should be retroactively applied to all cases.[67]

IV. Analysis of Circuits That Employed the Factual Analysis Method of Statute of Limitations Selection Prior to *Wilson v. Garcia*

In circuits that analyzed the facts of each section 1983 claim to find a state claim analogue for the purpose of "borrowing" a state statute of limitations, there may be no clear past precedent upon which a litigant may have relied for the proposition that a particular statute of limitations would apply to their section 1983 claim. In the Third, the Fifth, and the Eleventh Circuits, *Wilson* will generally receive retroactive application. Eighth Circuit cases that accrued prior to 1980 have also been subjected to a retroactive application of *Wilson*, because, prior to 1982, the Eighth Circuit used a factual analysis method of statute of limitations selection.[68]

A. The Third Circuit

The Third Circuit consistently used the factual analysis method of selecting statutes of limitations prior to *Wilson*.[69] Generally no clear past

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Clamme, 804 F.2d 405, 408 (7th Cir. 1986) (noting that the plaintiffs had expended considerable time and resources prosecuting their claims). *But see Smith*, 764 F.2d 188, 196 (noting that the case had not been tried nor had there been "massive discovery"). *But cf.* Gobla v. Crestwood School Dist., 628 F. Supp. 43 (M.D. Pa. 1985) where plaintiff had received a jury verdict in her favor in a section 1983 claim. While the court was considering the defendant's motion for judgment notwithstanding the verdict, *Wilson* was decided. The court requested supplemental briefing on the issue of *Wilson*'s retroactivity and granted the defendant's motion for judgment notwithstanding the verdict by applying *Wilson* retroactively to time bar the claim. *Id.* at 46.

[66]*See, e.g.*, Marks v. Parra, 785 F.2d 1419, 1419-20 (9th Cir. 1986) ("We apply *Wilson* retroactively when it has the effect of lengthening, as it does here, the limitations period.") *See also infra* text accompanying notes 162-85.

[67]*See* Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986). *See also infra* text accompanying notes 186-92.

[68]*See* Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982) (en banc), *cert. denied*, 456 U.S. 998 (1982). In *Garmon*, the Eighth Circuit rejected the factual analysis method of characterizing section 1983 claims in favor of the uniform characterization of the section 1983 action as a "liability created by statute." *Id.* at 406.

[69]*See, e.g.*, Perri v. Aytch, 724 F.2d 362, 368 (3d Cir. 1983); Polite v. Diehl, 507 F.2d 119, 121-22 (3d Cir. 1974); Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974).

precedent existed to foster justifiable reliance upon a particular statute of limitations for section 1983 claims.[70]

The leading retroactivity decision in the Third Circuit is *Smith v. City of Pittsburgh*.[71] In *Smith* the court applied *Wilson* retroactively to the plaintiff's section 1983 claim for wrongful discharge without due process.[72] Despite the plaintiff's contention that a six-year Pennsylvania statute of limitations should apply to his claim, the court held that at the time his claim accrued in 1979, there was no clear past precedent upon which the plaintiff could have relied for a six-year statute of limitations.[73] Regarding the "purpose" component of the *Chevron* test, the court stated that *Wilson*'s purpose of promoting uniformity and minimizing unnecessary litigation would be served by a retroactive application if the other *Chevron* factors dictated a retroactive application.[74] The court also held that it would not be inequitable to apply *Wilson* retroactively because the plaintiff could not reasonably have relied upon a statute of limitations longer than the two-year Pennsylvania personal injury limitations period and there had not been a trial or "massive discovery."[75]

In *Pratt v. Thornburgh*,[76] by contrast, the Third Circuit held that a retroactive application of *Wilson* would overrule clear past precedent and applied *Wilson* only prospectively.[77] Pratt's claim accrued in June of 1982, and before two years had elapsed, two Third Circuit decisions established that a six-year Pennsylvania statute of limitations would apply to section 1983 claims for wrongful discharge from state employment.[78]

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[70]*See* Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986) (holding that Knoll v. Springfield Township School Dist., 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 468 U.S. 1204 (1984), *vacated per curiam*, 471 U.S. 288 (1985) in light of Wilson v. Garcia, and Perri v. Aytch, 724 F.2d 362, 368 (3d Cir. 1983), provided the plaintiff with clear past precedent upon which he could rely for a six-year statute of limitations in a section 1983 wrongful discharge from state employment action). *See also infra* text accompanying notes 76-78.

[71]764 F.2d 188 (3d Cir. 1985).

[72]*Id.* at 196-97.

[73]*Id.* at 194-95. The plaintiff argued that *Knoll*, 699 F.2d 137, and *Perri*, 724 F.2d 362, provided support for a six-year statute of limitations for wrongful discharge claims. *See supra* note 70. The *Smith* court reasoned that since *Knoll* and *Perri* were not decided until 1983, more than two years after the plaintiff's claim accrued, the plaintiff could not have relied upon those decisions and should have been on notice that the two-year Pennsylvania personal injury statute of limitations may have been applied to his claim. 764 F.2d at 195.

[74]*Smith*, 764 F.2d at 196.

[75]*Id.*

[76]807 F.2d 355 (3d Cir. 1986).

[77]*Id.* at 358.

[78]*Id.* (holding that Knoll v. Springfield Community Township School Dist., 699 F.2d 137 (3d Cir. 1983), *cert. granted* 468 U.S. 1204 (1984), and Perri v. Aytch, 724 F.2d 362, (3d Cir. 1983), provided plaintiff with clear past precedent for a six-year statute of limitations).

Thus, the plaintiff would be justified delaying filing based upon the six-year statute of limitations.[79] In analyzing the second *Chevron* factor, the *Pratt* court stated "we see no basis for thinking that a denial in the present case of retroactive operation of the rule of *Wilson v. Garcia* will adversely affect its operation in general."[80] Moreover, the *Pratt* court held that retroactive application would be inequitable because the plaintiff had been entitled to rely upon a six-year statute of limitations.[81]

Other courts in the Third Circuit have applied *Wilson* retroactively.[82] In *Fitzgerald v. Larson*,[83] the court held that *Wilson* should be applied retroactively to the plaintiff's section 1983 wrongful discharge claim that accrued in 1979. The court concluded that, as in *Smith v. City of Pittsburgh*,[84] the plaintiff could not reasonably have relied upon a six-year statute of limitations because his claim accrued in 1979.[85] In *Bartholomew v. Fischl*,[86] the plaintiff benefited from a retroactive application, the court holding that the defendants could not reasonably have relied upon a one-year Pennsylvania statute of limitations for defamation to time-bar the plaintiff's wrongful discharge claim.[87]

Courts in the Third Circuit, by carefully analyzing the precedent that section 1983 litigants may have relied upon, have correctly applied the *Chevron* test to the issue of *Wilson*'s retroactivity. The decisions to date have provided judicial relief to litigants only where their reliance upon overruled precedent was reasonable.

B. The Fifth and the Eleventh Circuits

The Fifth and the Eleventh Circuits[88] also employed the factual analysis method of statute of limitations selection prior to *Wilson v. Garcia*.[89] In *Williams v. City of Atlanta*,[90] an Eleventh Circuit case, the

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[79]*Pratt*, 807 F.2d at 358.

[80]*Id.* This conclusion is in accord with the analysis of the second *Chevron* factor in *Smith*, 764 F.2d 188, 196, because in *Pratt*, unlike *Smith*, the other *Chevron* factors favored a prospective application of *Wilson*. *See supra* note 53 and accompanying text.

[81]*Pratt*, 807 F.2d at 358.

[82]*See* Gobla v. Crestwood School Dist., 628 F. Supp. 43 (M.D. Pa. 1985), *supra* note 65. *See also* Weisman v. Insana, No. 84-0436 (E.D. Pa. July 24, 1986) (LEXIS, Genfed library, Dist. file); Wilson v. City of Philadelphia County Board of Assistance, No. 85-972 (E.D. Pa. March 20, 1986) (LEXIS, Genfed library, Dist. file).

[83]769 F.2d 160, 164 (3d Cir. 1985).

[84]764 F.2d 188.

[85]769 F.2d at 164.

[86]782 F.2d 1148 (3d Cir. 1986).

[87]*Id.* at 1155-56.

[88]The Eleventh Circuit, consisting of Alabama, Georgia, and Florida was formed from part of the Fifth Circuit on November 1, 1981.

[89]McMillan v. City of Rockmart, 653 F.2d 907, 909 (5th Cir. Unit B. Aug. 1981); McGuire v. Baker, 421 F.2d 895, 898 (5th Cir. 1970), *cert. denied*, 400 U.S. 820 (1970) (stating that courts determine the essential nature of the section 1983 claim from its facts and analogize it to a state statute of limitations).

[90]794 F.2d 624 (11th Cir. 1986).

Eleventh Circuit held that the Georgia personal injury statute of limitations should be applied retroactively to time-bar plaintiff's section 1983 claim.[91] The plaintiffs contended that a four-year Georgia statute of limitations for conversion or destruction of personal property should apply to their section 1983 claim for damage done to their home by law enforcement officials.[92] The four-year statute of limitations for property damage or conversion had never been applied to an analogous section 1983 claim. The court held that even if the most analogous state statute of limitations would have been four years, it would have been unreasonable to have relied upon that particular limitations period without precedential guidance.[93] Regarding the second *Chevron* factor, the court reasoned that subjecting all section 1983 claims to a retroactive application of the personal injury statute of limitations would serve the purposes of *Wilson*.[94] The *Williams* court also found it "would not work a 'substantial inequity' "[95] to apply *Wilson* retroactively because the plaintiffs could not have reasonably waited beyond two years to file their claim.

In another Eleventh Circuit decision, *Jones v. Preuit & Mauldin*,[96] the court stated in a footnote that the three *Chevron* factors counseled in favor of a retroactive application.[97] The defendants did not contend that *Wilson* should be applied only prospectively, the central issue in the case being which of two Alabama "personal injury" statutes of limitations was more closely analogous to the "essential nature" of a section 1983 claim.[98] The court held that a six-year statute of limitations should be applied to section 1983 actions in light of *Wilson*.[99]

In a Fifth Circuit decision, *Gates v. Spinks*,[100] the court held that *Wilson* should be retroactively applied; however, it did not engage in any *Chevron* analysis.[101] Mississippi district courts in the Fifth Circuit

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[91] *Id.* at 628.

[92] *Id.* at 626.

[93] *Id.* at 627.

[94] *Id.* at 627-28.

[95] *Id.* at 629.

[96] 763 F.2d 1250 (11th Cir.), *cert. denied*, 106 S. Ct. 1893 (1985).

[97] *Id.* at 1253 n.2.

[98] *Id.* at 1254-55. Alabama law contains two "personal injury" statutes of limitations, a six-year statute of limitations for trespass, and a one-year statute of limitations for trespass on the case. The plaintiff filed his claim 22 months after his claim accrued. *See also supra* note 21.

[99] *Id.* at 1256.

[100] 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986).

[101] In *Gates*, 771 F.2d at 916, as in *Jones*, 763 F.2d at 1250, the contested issue was which of two potential "personal injury" statutes of limitations would apply to section 1983 claims. The *Gates* court held that the Mississippi one-year intentional tort statute of limitations addressed a "personal injury" more analogous to the paradigmatic section

reached opposite results regarding *Wilson*'s retroactivity in *Young v. Biggers*[102] and *Stewart v. Russell*.[103] Both cases involved section 1983 claims against law enforcement officials.[104] Prior Fifth Circuit decisions held that a six-year Mississippi statute of limitations applied to section 1983 actions against public officials.[105] The *Young* court held that the *pro se* plaintiff could not reasonably have relied upon a limitations period longer than the Mississippi personal injury statute of limitations.[106] In *Stewart*, however, the court held that the plaintiff was justified in relying upon the six-year statute of limitations and applied *Wilson* only prospectively.[107] The *Stewart* court's holding that *Wilson* overruled clear past precedent is a correct result.[108] Even though the Fifth Circuit used the factual analysis method of statute of limitations selection prior to *Wilson*,[109] particular types of section 1983 actions may have recurred often enough in that circuit so that litigants will be justified in determining that their factually similar section 1983 claims will be analogized to the same state action and governed by the same limitations period.[110]

1983 claim. 771 F.2d at 919-20. *See also* Shelby v. McAdory, 781 F.2d 1053 (5th Cir. 1986) (per curiam), following *Gates* and applying the one-year Mississippi statute of limitations retroactively without *Chevron* analysis. 781 F.2d at 1054. *See also supra* note 21.

[102]630 F. Supp. 590 (N.D. Miss. 1986), aff'd, 816 F.2d 216 (5th Cir. 1987). The Fifth Circuit Court of Appeals affirmed the district court's retroactive application in Young v. Biggers, 816 F.2d 216 (5th Cir. 1987). Although the court of appeals disagreed with the district court's analysis of the *Chevron* factors, the court affirmed the decision because another Fifth Circuit panel in Shelby v. McAdory, 781 F.2d at 1053, applied the one-year statute of limitations retroactively. 816 F.2d at 217. *See supra* note 101. The court of appeals in *Young* stated: "A week before the district court issued its decision in this case a panel of this court applied *Gates* retroactively [Shelby v. McAdory, applying the one-year statute of limitations]. . . . *Shelby* is indistinguishable from this case. We cannot overrule another panel absent an overriding Supreme Court decision or change in statutory law." 816 F.2d at 217.

[103]628 F. Supp. 1361 (S.D. Miss. 1986).

[104]*Young*, 630 F. Supp. at 590; *Stewart*, 628 F. Supp. at 1361.

[105]*See* Shaw v. McCorkle, 537 F.2d 1289, 1293 (5th Cir. 1976). A subsequent decision, Morrel v. City of Picayune, 690 F.2d 469, 470 (5th Cir. 1982) (per curiam), also held that a six-year Mississippi statute of limitations applied to actions against public officials.

[106]630 F. Supp. at 590.

[107]628 F. Supp. at 1364.

[108]In *Young*, 630 F. Supp. at 590, a convicted armed robber filed a *pro se* complaint against those officials who had arrested and imprisoned him in 1980. Young's section 1983 claim, however frivolous, was an action against a public official and he may have reasonably relied upon Shaw v. McCorkle, 537 F.2d at 1293, for the proposition that a six-year statute of limitations would apply to his claim.

[109]*See supra* note 89 and accompanying text.

[110]*See, e.g.*, Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986) (clear past precedent for wrongful discharge claim within a factual analysis circuit). *See also supra* notes 76-81 and accompanying text.

C. The Eighth Circuit Prior to 1982

Prior to 1982, courts in the Eighth Circuit were split over the characterization of a section 1983 action for purposes of "borrowing" a state statute of limitations.[111] But in *Garmon v. Foust*,[112] decided on January 5, 1982,[113] the Eighth Circuit rejected the factual analysis method of statute of limitations selection in favor of a uniform application of a statute of limitations for "liability created by statute."[114]

In *Wycoff v. Menke*,[115] a section 1983 action that accrued in 1977, the court held that *Wilson* should be retroactively applied to the plaintiff's claim.[116] The court found that when Wycoff's claim accrued in 1977, there was conflicting precedent regarding which limitations period should apply and that the plaintiff should have been on notice that a two-year Iowa personal injury statute of limitation would apply to his claim.[117] Regarding the second *Chevron* factor, the *Wycoff* court held that a retroactive application would advance the *Wilson* interests by achieving uniformity and certainty between future and pending cases by subjecting both to the same statute of limitations and the same limitations period.[118]

Prior to *Garmon v. Foust*, Eighth Circuit section 1983 claimants were faced with conflicting precedent under the factual analysis method of statute of limitations selection and may not have reasonably relied upon a statute of limitations longer than the forum state's personal injury limitations period.[119] The court in *Wycoff v. Menke* correctly

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[111]*See, e.g.*, Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) (rejecting a factual analogy to a personal injury claim). *But see* Johnson v. Dailey, 479 F.2d 86 (8th Cir.), *cert. denied*, 414 U.S. 1009 (1973) (analogizing section 1983 claim to Iowa malicious prosecution action providing a two-year statute of limitations); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (analogizing plaintiff's section 1983 claim to a Minnesota state law action).

[112]Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

[113]*Id.*

[114]*Id.* at 106 n.11. After deciding *Garmon*, the Eighth Circuit was soon confronted with the issue of *Garmon*'s retroactivity. In Occhino v. United States, 686 F.2d 1302 (8th Cir. 1982), the court held that *Garmon* would be applied retroactively because it did not overrule established precedent. 686 F.2d at 1309. This result is consistent with the court's reading of Eighth Circuit precedent in Wycoff v. Menke, 773 F.2d 983 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1230 (1986).

[115]773 F.2d at 983.

[116]*Id.* at 986.

[117]*Id.* Wycoff's claim accrued in 1977 and was filed in 1981. On January 8, 1982, the defendant moved to dismiss based upon the two-year Iowa statute of limitations. The district court denied the motion, applying *Garmon*, 668 F.2d at 400, retroactively. 773 F.2d at 984.

[118]773 F.2d at 987.

[119]*But see* cases cited *infra* note 122, applying a three-year Missouri statute of limitations for actions against public officials to section 1983 claims.

determined that it would be unjust to allow a dilatory plaintiff an extended period in which to file a claim.[120]

V. Circuits That Characterized Section 1983 As An Action Based Upon Statute

In circuits that characterized section 1983 claims as actions based upon statute, clear past precedent will exist upon which the litigants may have relied and *Wilson v. Garcia* will generally be applied only prospectively.

A. The Eighth Circuit Since 1982

Since 1982, the Eighth Circuit generally characterized section 1983 claims as actions based upon a statutory liability,[121] although courts applying Missouri law uniformly applied a three-year statute of limitations to 1983 claims for actions against public officers.[122]

In *Ridgway v. Wapello County Iowa*,[123] an Eighth Circuit panel applied *Wilson* prospectively to allow a plaintiff's section 1983 action to proceed. The plaintiff's claim accrued in 1981 and was filed two and one-half years later.[124] The court held that when *Garmon v. Foust*[125] was decided, lengthening the limitations period from two years to five years, the plaintiff still had one year of the two-year limitations period remaining in which to file.[126] The plaintiff, whose complaint would have been timely on the date that *Garmon* was decided, was then justified in delaying filing suit based upon the longer statute of limitations allowed by *Garmon*.[127] The *Ridgeway* court's analysis of the second *Chevron* factor reaches a different conclusion than that of the Eighth Circuit panel that decided *Wycoff v. Menke*.[128] In *Wycoff*, the court found that a retroactive application of *Wilson* "will achieve uniformity and certainty between future and pending cases by subjecting both to the same statute

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[120]*See also* Arvidson v. City of Mankato, 635 F. Supp. 112 (D. Minn. 1986) (no clear precedent upon which plaintiff could rely for a statute of limitations longer than Minnesota personal injury limitations period where claim accrued in 1980).

[121]*Garmon*, 668 F.2d at 406.

[122]*See, e.g.*, Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); Foster v. Armontrout, 729 F.2d 583, 585 (8th Cir. 1984); White v. Bloom, 621 F.2d 276, 280 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981); Green v. Ten Eyck, 572 F.2d 1233, 1239 (8th Cir. 1978).

[123]795 F.2d 646 (8th Cir. 1978).

[124]*Id.* at 647.

[125]668 F.2d at 400.

[126]795 F.2d at 647-48.

[127] The *Ridgway* court distinguished *Wycoff* because Wycoff filed his complaint before *Garmon* was decided and could not have relied upon that decision. 795 F.2d at 647.

[128]*See supra* text accompanying note 118.

of limitations and thus to the same limitations period."[129] The *Ridgway* court determined that a retroactive application in the instant case "would have only limited significance promoting the greater uniformity that the Supreme Court has sought to create in this area."[130]

An Eighth Circuit decision that did not share the thorough *Chevron* analysis of *Ridgway v. Wapello County, Iowa*[131] is *Farmer v. Cook*.[132] In *Farmer*, a retroactive application of *Wilson* lengthened the statute of limitations from three to five years. The *Farmer* court acknowledged that the result of its decision was to "revive an action that the defendants once reasonably believed barred."[133] The court reasoned that the reliance interest asserted by the defendants was weaker than the reliance interest asserted in *Wycoff v. Menke*.[134] As noted by the *Farmer* court, the defendants were justified in believing that the statute of limitations had expired.[135] This result denies the competing interest that the defendant has in justifiable reliance upon a statute of limitations that has expired.[136]

Eighth Circuit district courts[137] have generally applied *Wilson* prospectively to section 1983 claims that accrued less than two years before the 1982 *Garmon v. Foust* decision.[138]

B. The Seventh Circuit

Since 1977, the Seventh Circuit has held that a five-year statute of limitations should be uniformly applied to all section 1983 claims in

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[129]773 F.2d at 986-97.

[130]795 F.2d at 648. The *Ridgway* court stated that *Wilson* did not seek to achieve nationwide uniformity regarding the actual time in which section 1983 actions may be filed, but only uniformity in selection of which state statute of limitations would apply to section 1983 actions. *See supra* note 52 and accompanying text.

[131]795 F.2d at 646.

[132]782 F.2d 780 (8th Cir. 1986) (per curiam).

[133]*Id.* at 780.

[134]*Id.*

[135]*Id.* at 781. The *Farmer* court also stated that "[i]n *Wycoff* the effect of retroactivity was to defeat an action that a plaintiff had reasonably believed would not be barred." 782 F.2d at 781. The *Wycoff* court specifically found that Wycoff and other similarly situated plaintiffs could not have reasonably relied upon a six-year statute of limitations. 773 F.2d at 987.

[136]*Farmer*, 782 F.2d at 781.

[137]*See, e.g.*, Chris N. v. Burnsville, Minn., 634 F. Supp. 1402 (D. Minn. 1986); John Does 1-100 v. Ninneman, 634 F. Supp. 341 (D. Minn. 1986); Cook v. City of Minneapolis, 617 F. Supp. 461 (D. Minn. 1985) (The courts held *Wilson* overruled clear precedent and applied it prospectively). *But see* Richard H. v. Clay County, Minn., 639 F. Supp. 578 (D. Minn. 1986) (plaintiff filed nine months after *Wilson* was decided and the court held that it would not be inequitable to apply *Wilson* retroactively).

[138]668 F.2d at 400.

Illinois.[139] The Seventh Circuit Court of Appeals, recognizing that *Wilson* overruled clear past precedent upon which Illinois section 1983 claimants may have relied, has applied *Wilson* only prospectively.[140] In *Anton v. Lehpamer*,[141] the court held that the two-year Illinois personal injury statute of limitations should not be retroactively applied to time-bar the plaintiff's complaint. The court's holding went beyond the case at bar, however, stating that an "Illinois section 1983 claimant whose cause of action accrued before *Wilson* must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*."[142] In analyzing the second *Chevron* factor, the court reasoned that *Wilson* sought only to achieve uniformity in the type of statute of limitations to be applied to section 1983 claims, not that a specific length of time be applied to every claim.[143] The court found that *Wilson*'s goal of uniformity was not endangered because some claims could be brought more than two years after they accrued.[144] The *Anton* court also found that the third *Chevron* factor, whether a retroactive application would be inequitable,[145] militated against retroactive application because the plaintiff may have reasonably relied upon past precedent and expended substantial resources prosecuting his claim.[146]

Illinois District Courts have uniformly applied *Wilson* prospectively. Decisions filed prior to *Anton v. Lehpamer*[147] recognized that the Seventh Circuit approach to statute of limitations selection provided litigants with clear precedential guidance.[148] A district court decision filed after

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[139]Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied sub nom.*, Mitchell v. Beard, 438 U.S. 907 (1978). The *Beard* court stated that by applying a uniform statute of limitations, "we avoid the often strained process of characterizing civil rights claims as common law torts." 563 F.2d at 337.

[140]Anton v. Lehpamer, 787 F.2d 1141, 1144 (7th Cir. 1986).

[141]*Id.* at 1144.

[142]*Id.* at 1146.

[143]*Id.* at 1145.

[144]*Id.*

[145]404 U.S. 97, 107 (1971).

[146]*Id.* at 1145-46.

[147]*Id.* at 1141. *Anton* was decided on April 3, 1986.

[148]*E.g.*, Wegrzyn v. Ill. Dept. of Children and Family Services, 627 F. Supp. 636 (C.D. Ill. 1986); Morre v. Floro, 614 F. Supp. 328 (N.D. Ill. 1985) *aff'd* 801 F.2d 1344 (7th Cir. 1986); Winston v. Saunders, 610 F. Supp. 176 (C.D. Ill. 1985) (applying the two-year Illinois personal injury statute of limitations retroactively). *But see* Johnson v. Arnos, 624 F. Supp. 1067 (N.D. Ill. 1985); Shorters v. Chicago, 617 F. Supp. 661 (N.D. Ill. 1985) (recognizing that *Wilson* may not apply retroactively, but selecting the same Illinois "catch-all" statute of limitations used before *Wilson* because the two-year Illinois personal injury statute of limitations was not broad enough to encompass all the injuries to "personal rights" that section 1983 contemplates). The holding in *Shorters* is criticized in Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims*, 61 NOTRE DAME L. REV. 440, 446-48 (1986). This holding is specifically rejected in *Anton*, 787 F.2d at 1142.

Anton adopted *Anton*'s reasoning and applied *Wilson* prospectively.[149]

The Seventh Circuit has also extended the reasoning of the *Anton* decision to the issue of *Wilson*'s retroactivity in Indiana section 1983 claims. In *Loy v. Clamme*,[150] the court held that an Indiana plaintiff whose section 1983 claim accrued before *Wilson* must file within the shorter period of five years from the date his action accrued or two years after *Wilson*.[151] Section 1983 claims in Indiana had been subjected to two different statutes of limitations; a five-year period for actions against public officials for acts done in their official capacity,[152] and a two-year statute of limitations for personal injuries.[153] These divergent lines of analysis were never fully reconciled, but the five-year statute of limitations was generally applied when the defendants in the section 1983 action were police officers.[154] The plaintiff's action in *Loy* was a claim against law enforcement officials, and the court held that there was clear precedent on which he may have relied for the five-year statute of limitations.[155] The court in *Loy* did not limit its holding of general prospective application to only section 1983 actions against public officials, however.[156] The *Loy* holding, if followed by other courts, could reap a windfall for Indiana section 1983 plaintiffs who should have been on notice that the two-year personal injury statute of limitations may have applied to their claim.[157]

An Indiana district court decision filed before *Loy v. Clamme*[158] applied *Wilson* prospectively in *Ross v. Sommers*.[159] The court held the plaintiff was justified to rely upon the five-year statute of limitations.[160]

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[149]Cox v. Thompson, 635 F. Supp. 594 (S.D. Ill. 1986).

[150]804 F.2d 405 (7th Cir. 1986).

[151]*Id.* at 408.

[152]Blake v. Katter, 693 F.2d 677 (7th Cir. 1982); Sacks Bros. Loan Co. v. Cunningham, 578 F.2d 172 (7th Cir. 1978); Bottos v. Avakian, 477 F. Supp. 610 (N.D. Ind. 1979), *aff'd*, 723 F.2d 913 (7th Cir. 1983).

[153]Hill v. Trustees of Indiana University, 537 F.2d 248 (7th Cir. 1976). The concurring opinion noted that the Indiana two-year personal injury statute of limitations applied to section 1983 actions. *Id.* at 254, (Kunzig, J., concurring); Bell v. Metropolitan School Dist. of Shakamak, 582 F. Supp. 3 (S.D. Ind. 1983); Minority Police Officers Ass'n v. South Bend, 555 F. Supp. 921 (N.D. Ind.), *aff'd in part*, 721 F.2d 197 (7th Cir. 1983); Sturgeon v. City of Bloomington, 532 F. Supp. 89 (S.D. Ind. 1982).

[154]*See cases* cited *supra* note 152. *But cf. Sacks Bros. Loan Co.*, 578 F.2d at 172 (five-year Indiana statute of limitations for actions against public officials applied in action against township assessor in Marion County, Indiana).

[155]804 F.2d at 407-08.

[156]*Id.* at 408.

[157]*See supra* note 153.

[158]804 F.2d at 405.

[159]630 F. Supp. 1267 (N.D. Ind. 1986).

[160]*Id.* at 1270.

A Wisconsin district court applied *Wilson* only prospectively, but did not engage in its own *Chevron* analysis.[161]

VI. The "Ad Hoc" Application of *Wilson v. Garcia* in the Ninth Circuit

Prior to *Wilson*, the Ninth Circuit consistently characterized section 1983 actions as statutory liabilities and applied the forum state's statute of limitations for liability created by statute.[162] *Wilson*, therefore, will have overruled clear past precedent upon which litigants may have relied and should merit only prospective application. Ninth Circuit courts have given *Wilson* prospective effect where it will not time-bar the plaintiff's complaint, but have denied the defendant retroactive effect where pre-*Wilson* precedent would have barred the dilatory plaintiff's complaint.

In *Gibson v. United States*,[163] *Wilson* was applied prospectively to a California plaintiff's section 1983 claim. The California personal injury limitations period is one year, but the court held that *Wilson* was a clear break from the precedent upon which the plaintiff may have relied.[164] In a footnote, the *Gibson* court stated that "[o]ur result is consistent with a recent line of employee suits under [section] 301 of the Labor Management Relations Act, 1947, in which this court determined the retroactivity of an unforeseen Supreme Court redefinition of the limitations on an openly ad hoc basis, simply by gauging whether the effect was either to shorten or lengthen the governing period."[165]

This Ninth Circuit "ad hoc" approach of automatically giving the plaintiff more time to file dictated the result in an Arizona decision, *Rivera v. Green*.[166] The district court dismissed the plaintiff's complaint based upon clear pre-*Wilson* precedent providing a one-year statute of limitations.[167] The court of appeals applied *Wilson* retroactively, however, reasoning that the second and third *Chevron* factors required a retroactive

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[161]Saldivar v. Cadena, 622 F. Supp. 949 (W.D. Wis. 1985).

[162]Mason v. Schaub, 564 F.2d 308 (9th Cir. 1977); Donavan v. Reinbold, 433 F.2d 738 (9th Cir. 1970); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962).

[163]781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 928 (1987).

[164]*Id.* at 1339.

[165]*Id.* at 1339 n.1. The *Gibson* court cited Glover v. United Grocers, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985), wherein the court applied the six-month statute of limitations retroactively because it lengthened the previous limitations period. *See also* Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984). The issue in these decisions was whether the six-month statute of limitations for 301 labor cases mandated by DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) should be applied retroactively. *See also supra* note 32.

[166]775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1656 (1986).

[167]*Id.* at 1383.

application.[168] The *Rivera* court specifically found that a retroactive application of *Wilson* would not work a substantial injustice upon the defendants.[169] The *Rivera* court also cited the line of Ninth Circuit section 301 labor cases[170] that applied the statute of limitations retroactively or prospectively, whichever would lengthen the plaintiff's filing period.[171] *Marks v. Parra*,[172] another Ninth Circuit decision applying Arizona law, followed *Rivera*'s reasoning and applied *Wilson* retroactively to lengthen the plaintiff's time in which to file.[173]

The *Rivera* court reasoned that the importance of judicial access for section 1983 claims outweighed the "disfavored statute of limitations defense."[174] Presumably, however, the one-year statute of limitations was long enough to safeguard the judicial access of Arizona 1983 litigants before *Wilson*. *Rivera* cited an Arizona appellate court decision for the proposition that the statute of limitations defense is "disfavored."[175] However, when addressing the federal court practice of "borrowing" state statutes of limitations and state law "tolling" statutes, the Supreme Court has stated that, "in general, state policies of repose cannot be said to be disfavored in federal law."[176] The Court has also recognized the importance of the statute of limitations defense to a "well-ordered judicial system."[177] In *Board of Regents v. Tomanio*,[178] the Court stated "in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred."[179] Although the accuracy of the fact-finding process may not be seriously impaired if a plaintiff filed within two years of the accrual of the complaint, as opposed to one year,[180] the settled expectation of the defendant is

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[168]*Id.*

[169]*Id.* at 1383-84.

[170]*See supra* note 165.

[171]775 F.2d at 1384.

[172]785 F.2d 1419 (9th Cir. 1986).

[173]*Id.* at 1419-20.

[174]775 F.2d at 1384.

[175]*Id.* at 1384 n.4, citing Woodward v. Chirco Construction Co., 141 Ariz. 520, 524, 687 P.2d 1275, 1279 (Ariz. Ct. App.), *aff'd as supplemented*, 687 P.2d 1269 (1984).

[176]Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). In *Tomanio*, the Court held that New York's "tolling rule" for statutes of limitations was not inconsistent with the policies of section 1983. *Id.* at 491.

[177]446 U.S. at 478.

[178]*Id.* at 487.

[179]*Id.*

[180]One policy rationale underlying the use of statutes of limitations is the concern that the fact-finding process "may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or

subverted and a time-barred claim is revived.[181]

In an Arizona district court decision, *Breen v. City of Scottsdale*,[182] the court reached the opposite conclusion of the *Rivera* and *Marks* courts, applying *Wilson* retroactively to the plaintiff's claims that had accrued more than one year before the date of filing.[183] The *Breen* court found that the plaintiff had not been diligent in prosecuting her claim because she should have known that the statute of limitations for Arizona section 1983 claims was one year.[184]

Other Ninth Circuit district courts have recognized that *Wilson* overruled clear past precedent and have generally applied that decision prospectively.[185]

VII. Implied Retroactivity in the Sixth Circuit

The Sixth Circuit does not use the *Chevron* analysis when determining whether *Wilson* should apply retroactively. Instead, that Circuit applies *Wilson* retroactively because the Supreme Court applied its holding retroactively in the *Wilson* decision. In *Mulligan v. Hazard*,[186] the court held that *Wilson* should be applied retroactively. The *Mulligan* court did not engage in *Chevron* analysis, but reasoned that because the Supreme Court applied its holding retroactively in *Wilson*, the Court

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otherwise." United States v. Kubrick, 444 U.S. 111, 117 (1979). *See also* Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1966); Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

[181]The Supreme Court has held that where a claim has been lost because of failure to institute an action within the statutory period, it is not revived by a subsequently enacted statute extending the period. Fullerton-Krueger Lumber Co. v. Northern Pacific Ry. Co., 260 U.S. 435, 437 (1925).

[182]39 Fair Empl. Prac. Cas. (BNA) 778 (D.C. Ariz. Aug. 5, 1985) (LEXIS, Genfed library, Dist. file). The order on August 5 was reconsidered on January 27, 1986 in Breen v. City of Scottsdale, 39 Fair Empl. Prac. Cas. (BNA) 1802 (D.C. Ariz. 1986). The retroactivity result was not modified when the case was reconsidered.

[183]39 Fair Empl. Prac. Cas. (BNA) 778.

[184]*Id.* The defendants in *Breen*, like the defendants in *Rivera*, 775 F.2d at 1383, and *Marks*, 785 F.2d at 1419, had already won dismissals prior to the *Wilson* decision based upon the one-year Arizona statute of limitations.

[185]*See, e.g.*, Bynum v. City of Pittsburg, 622 F. Supp. 196 (N.D. Cal. 1985); Estate of Cartwright v. City of Concord, Cal., 618 F. Supp. 722 (N.D. Cal. 1985) (applying *Wilson* prospectively). *See also* Cabrales v. County of Los Angeles, 644 F. Supp. 1352 (C.D. Cal. 1986) (*Wilson* applied prospectively to all of plaintiff's section 1983 claim except charge against defendant added more than one year after *Wilson* was decided). *But cf.* Gamel v. City of San Francisco, 633 F. Supp. 48 (N.D. Cal. 1986) (court recognized that *Wilson* overruled clear past precedent but held that third *Chevron* factor militated in favor of retroactive application because plaintiff unreasonably delayed bringing suit until eight months after *Wilson* was decided). For a discussion of claims which accrued before *Wilson* but were filed after that decision, *see infra* notes 212-26 and accompanying text.

[186]777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986).

was implicitly mandating that its holding should be retroactively applied in all cases.[187] The *Mulligan* court justified this conclusion by relying upon the analysis in an earlier Sixth Circuit decision dealing with the retroactivity of section 301 labor cases, *Smith v. General Motors*.[188] In *Smith*, the Sixth Circuit held that the *Chevron* analysis was not appropriate when the Supreme Court applied its decision retroactively to the case at bar.[189]

Other decisions in the Sixth Circuit have also followed the "implied retroactivity" mode of analysis.[190] Prior to *Wilson*, the Sixth Circuit employed the factual analysis method of statute of limitations selection for section 1983 claims.[191] Thus, even if the *Mulligan* court had applied the *Chevron* analysis, it is likely that clear past precedent would not have existed for a particular statute of limitations. However, even in factual analysis circuits, certain types of section 1983 claims may have consistently been analogized to a particular state claim, thus establishing clear past precedent.[192] Despite this fact, the Sixth Circuit's "implied retroactivity" rule will deny judicial relief to litigants who may reasonably have relied upon clear past precedent.

VIII. The Retroactivity of *Wilson* In Other Circuits

A First Circuit decision, *Small v. City of Belfast*,[193] applied *Wilson* retroactively, but selected the longer of two Maine personal injury statutes of limitations,[194] allowing the plaintiff's claim to proceed.

In the Second Circuit, a retroactive application of *Wilson* will not change the limitations period for New York and Connecticut section

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[187]*Id.* at 343-44.

[188]747 F.2d 372 (6th Cir. 1984) (en banc).

[189]*Id.* at 375. In Smith v. General Motors, 747 F.2d 372, the issue was the retroactivity of DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), a recent case which generated considerable retroactivity analysis. In *DelCostello*, the Court held that a six-month statute of limitations should be applied to combined section 301 duty of fair representation claims under the Labor-Management Relations Act of 1947. Following *DelCostello*, courts addressed the retroactivity of that decision to claims that had already accrued. *See, e.g.*, Edwards v. Teamsters Local Union No. 36, 719 F.2d 1036 (9th Cir. 1984), *cert. denied*, 465 U.S. 1102 (1984). *See also infra* text accompanying note 165. *See also* Galant, *The Retroactivity of the Six-Month Statute of Limitations in Section 301 Cases*, 15 U. Tol. L. Rev. 935 (1984).

[190]*See, e.g.*, Fowler v. City of Louisville, 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd*, 803 F.2d 719 (6th Cir. 1986).

[191]*See* Hones v. Board of Educ. of Covington, Ky., 667 F.2d 564 (6th Cir. 1982); Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977).

[192]*See* Pratt v. Thornburgh, 807 F.2d 355 (3d Cir. 1986), *supra* notes 76-81 and accompanying text. *See also* Stewart v. Russell, 628 F. Supp. 1361 (S.D. Miss. 1986), *supra* notes 102-08 and accompanying text.

[193]796 F.2d 544 (1st Cir. 1986).

[194]*Id.* at 545-49.

1983 claimants because the personal injury statute of limitations to be applied in light of *Wilson* is the same number of years as the limitations period consistently applied to section 1983 actions before *Wilson*.[195] In New York the personal injury statute of limitations to be applied in light of *Wilson* is three years.[196] The limitations period previously applied to all section 1983 claims for "liability created or imposed by statute" was three years.[197] In Connecticut, the three-year intentional tort limitations period was consistently applied to section 1983 actions before *Wilson*,[198] and Connecticut district courts have held that the same intentional tort statute of limitations period will apply in light of *Wilson*.[199] The retroactivity of *Wilson* may not be an issue in Fourth Circuit cases applying Virginia law because federal courts applied the Virginia personal injury statute of limitations to section 1983 claims even prior to *Wilson*.[200]

The Tenth Circuit addressed the retroactivity of *Garcia v. Wilson*[201] on the same day that decision was handed down. In *Jackson v. City of Bloomfield*,[202] and *Abbitt v. Franklin*,[203] the Tenth Circuit held that *Garcia v. Wilson* would be prospectively applied to the plaintiff's claims. Prior to *Garcia*, the Tenth Circuit generally analogized section 1983 actions to state law claims for statute of limitations selection.[204] In some

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[195]*See infra* notes 196-98.

[196]*See* Williams v. Allen, 616 F. Supp. 653, 655 (E.D.N.Y. 1985); Ladson v. New York City Police Dept., 614 F. Supp. 878, 879 (S.D.N.Y. 1985) (three-year New York negligence action personal injury statute of limitations applies to section 1983 claims in light of *Wilson*). *But see* Doty v. Rochester City Police Dept., 625 F. Supp. 829, 830 n.1 (W.D.N.Y. 1985) (suggesting that a one-year New York statute of limitations for intentional torts might apply to section 1983 claims rather than a three-year negligence statute of limitations).

[197]Taylor v. Malone, 626 F.2d 247, 253 (2d Cir. 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980); Meyer v. Frank, 550 F.2d 726, 728 (2d Cir. 1977), *cert. denied*, 434 U.S. 830 (1977) (three-year New York statute of limitations for "liability created by statute" governed section 1983 claims).

[198]Williams v. Walsh, 558 F.2d 667, 670-71 (2d Cir. 1977); Members of Bridgeport v. City of Bridgeport, 85 F.R.D. 624, 637 (D. Conn. 1980) (three-year Connecticut personal injury statute of limitations applied to all section 1983 claims).

[199]Weber v. Amendola, 635 F. Supp. 1527, 1531 (D. Conn. 1985); DiVerniero v. Murphy, 635 F. Supp. 1531, 1534 (D. Conn. 1986) (holding that Connecticut three-year statute of limitations for intentional tort should apply to section 1983 claims in light of *Wilson*).

[200]*See, e.g.*, Cramer v. Crutchfield, 648 F.2d 943, 945 (4th Cir. 1981); Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972). *But cf.* Pagan, *supra* note 21, at 267-68 (suggesting that Virginia one-year statute of limitations for non-physical "personal injuries" may apply to section 1983 actions in light of *Wilson*).

[201]731 F.2d 640 (10th Cir. 1984) (en banc). *Garcia v. Wilson* was the decision from which *Wilson v. Garcia* was appealed. *Garcia v. Wilson* was decided on March 30, 1984.

[202]731 F.2d 652 (10th Cir. 1984).

[203]731 F.2d 661 (10th Cir. 1984).

[204]Garcia v. Wilson, 731 F.2d at 648 (citing Clulow v. Oklahoma, 700 F.2d 1291, 1299 (10th Cir. 1983); Shah v. Halliburton Co., 627 F.2d 1055, 1059 (10th Cir. 1980); Zuniga v. Amfac Foods Inc., 580 F.2d 380, 383-87 (10th Cir. 1978)).

cases, however, the Tenth Circuit characterized section 1983 wrongful discharge claims as a "liability created by statute."[205] In *Jackson v. City of Bloomfield*,[206] the plaintiffs contended that their section 1983 wrongful termination claim should be characterized as contractual and be governed by a four-year New Mexico statute of limitations for unwritten contract actions.[207] The court found that the plaintiffs were justified in relying upon the four-year statute of limitations because the Tenth Circuit had previously held that if a section 1983 action could be analogized to more than one state claim for statute of limitations selection, the longer limitations period should be applied.[208] *Abbitt v. Franklin*,[209] tracking the reasoning of *Jackson v. Bloomfield*, held that because either a two-year Oklahoma personal injury statute of limitations or a three-year limitations period "for liability created by statute" may have applied under the former Tenth Circuit mode of analysis,[210] the plaintiff was justified in relying upon the longer of the two statutes.[211]

IX. The Effect of *Wilson v. Garcia* Upon Plaintiffs Who Have Filed their Section 1983 Claims After April 17, 1985

Wilson v. Garcia was decided on April 17, 1985.[212] The bulk of the case law addressing the retroactivity of *Wilson* dealt with actions that had been filed before *Wilson* was decided. A few decisions, however, have addressed the retroactivity of *Wilson* in the context of actions that accrued before *Wilson* was decided but were filed after that decision. In *Anton v. Lehpamer*,[213] a Seventh Circuit panel held that Illinois plaintiffs whose claims accrued before April 17, 1985 must file suit within the shorter period of either five years from the date the claim accrued or two years after April 17, 1985.[214] The statute of limitations applied to section 1983 actions before *Wilson* was five years,[215] and the

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[205]731 F.2d at 649 (citing Spiegel v. School Dist. No. 1, 600 F.2d 264, 265-66 (10th Cir. 1979)).

[206]731 F.2d 652.

[207]*Id.* at 653.

[208]*Id.* at 653-55 (citing *Shah*, 627 F.2d at 1059).

[209]731 F.2d 661.

[210]*Id.* at 663-64.

[211]The *Abbitt* court found that the plaintiff may have relied upon *Spiegel*, 600 F.2d 264, for the proposition that a three-year statute of limitations for "liability created by . . . statute" would apply to his 1983 action, and that *Shah*, 627 F.2d at 1059, provided support for the proposition that the longer of two potentially applicable statutes of limitations should apply to 1983 actions. *Abbitt*, 731 F.2d at 663.

[212]471 U.S. at 261.

[213]787 F.2d 1141 (7th Cir. 1986).

[214]*Id.* at 1146.

[215]*See* Beard v. Robinson, 563 F.2d 331, 335 (7th Cir. 1977), *cert. denied sub nom.*, Mitchell v. Beard, 438 U.S. 907 (1978).

Illinois personal injury statute of limitations is two years.[216] This same time frame was adopted for Indiana section 1983 claims in *Loy v. Clamme*.[217]

A California district court in the Ninth Circuit adopted a similar approach in *Cabrales v. County of Los Angeles*.[218] The personal injury statute of limitations in California is one year,[219] and the statute of limitations consistently applied to section 1983 claims in California before *Wilson* was three years.[220] The *Cabrales* court held that a plaintiff whose section 1983 action accrued prior to *Wilson* must file within the shorter period of three years from the date his action accrued or one year after *Wilson* was decided.[221] Another Ninth Circuit district court in California has held, however, that an eight-month delay in filing after *Wilson* was decided was unreasonable and applied *Wilson* retroactively.[222]

Two Eighth Circuit district courts have split over *Wilson*'s retroactivity where the claims were filed after *Wilson* was decided. In *Chris N. v. Burnsville, Minn.*,[223] the court held that a claim filed six months after *Wilson* was decided was brought within a reasonable time.[224] But in *Richard H. v. Clay County, Minn.*,[225] the court found that a plaintiff who did not file until almost nine months after *Wilson* was decided unreasonably delayed bringing suit.[226]

X. Conclusion

The primary purpose of the *Chevron* formulation is to provide judicial protection to litigants who have justifiably relied upon the law as it existed before the overruling decision. The diverse approaches the circuit courts apply in determining the retroactivity of *Wilson v. Garcia* often deny the reasonable reliance interests of section 1983 litigants. The "ad hoc" approach of the Ninth Circuit lacks mutuality in that it

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[216] *Anton*, 787 F.2d at 1145.

[217] 804 F.2d at 405 (7th Cir. 1986). "Accordingly, we find, as in *Anton*, an Indiana 'plaintiff whose section 1983 cause of action accrued before the *Wilson* decision, April 17, 1985, must file suit within the shorter period of either five years from the date his action accrued or two years after *Wilson*.' " *Id.* at 408 (quoting *Anton*, 787 F.2d at 1146). The personal injury statute of limitations in Indiana is two years and the pre-*Wilson* statute of limitations applied to *some* section 1983 claims was five years. *See supra* notes 152-58 and accompanying text.

[218] 644 F. Supp. 1352 (C.D. Cal. 1986).

[219] *Id.* at 1354.

[220] *Id.* at 1353.

[221] *Id.* at 1356.

[222] Gamel v. City of San Francisco, 633 F. Supp. 48, 50 (N.D. Cal. 1986).

[223] 634 F. Supp. 1402 (D. Minn. 1986).

[224] *Id.* at 1413.

[225] 639 F. Supp. 578 (D. Minn. 1986).

[226] *Id.* at 581.

protects the reasonable reliance interests of plaintiffs, while denying that same protection to defendants. A fortuitous overruling decision then becomes a windfall for dilatory plaintiffs. The "implied retroactivity" test employed in the Sixth Circuit has the potential for ignoring the reliance interests of either party in a section 1983 claim. Applying *Wilson* retroactively to dilatory plaintiffs in circuits that employed the factual analysis method of statute of limitations selection comports with the *Chevron* doctrine by recognizing only the reasonable reliance interests of litigants. Although the denial of a claim by the retroactive application of *Wilson* seems harsh upon a cursory reading, the result may have been the same even if *Wilson* had not been decided because the plaintiff should have been on notice to file within the shorter of the potentially applicable periods. Any injustice that existed under the factual analysis method was already in progress before *Wilson* was decided.

The *Wilson* decision noted that one of the criticisms against the factual analysis method is that it provided little guidance for litigants to gauge the timeliness of their section 1983 claims. Cases applying *Wilson* retroactively to claims in factual analysis circuits posthumously confirm the Court's observation. A retroactive application of a decision designed to inject certainty will work no hardship upon diligent plaintiffs, it merely confirms the result which would have been reached in the absence of the overruling decision.

Justice O'Connor's prediction that the *Wilson* decision will "not so much resolve confusion as banish it to the lower courts"[227] has been amply affirmed in the wake of that decision. Absent further guidance from the Supreme Court, the confused approaches some circuits have taken to the retroactivity of *Wilson* will perpetuate the uncertainty and inequity that decision sought to rectify.

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[227]Wilson v. Garcia, 471 U.S. 261, 286 (1985).