

# The Right to Trial by Jury under the WARN Act

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## INTRODUCTION

Outsourcing. Downsizing. Eliminating redundancy. The mass layoff is a phenomenon susceptible to endless labeling and relabeling, be it by epithet or euphemism, but under any name it represents a massive trauma for workers. Legislators are by no means insensitive to the economic—and political—dimensions of this trauma. In 1988, back when the bogeyman was not China but Japan, Congress tackled the issue with the Worker Adjustment and Retraining Notification Act<sup>1</sup> (WARN Act), which requires firms above a certain size to provide notice before either a plant closing or a mass layoff.<sup>2</sup> To encourage compliance, the Act allows for civil actions against employers who fail to give notice, with liability of up to sixty days' backpay and lost benefits.<sup>3</sup>

Unfortunately, when Congress passed the WARN Act, it neglected to specify the appropriate finder of fact for these lawsuits. In the absence of any express direction, the federal courts have been forced to grapple with whether a plaintiff bringing a civil action under the WARN Act has a Seventh Amendment right to demand a trial by jury.<sup>4</sup> A convincing answer has yet to rise from the scrum—at present litigants are faced with a division of authority. This Comment seeks to resolve that division by using existing interpretations of the Act's remedies to inform the Seventh Amendment analysis. On the basis of this analysis, the Comment concludes that WARN Act plaintiffs have a constitutional right to a jury trial.

Part I describes two seemingly unrelated areas of law: the Supreme Court's prevailing analysis of the Seventh Amendment and its interpretation of federal statutes that lack explicit statutes of limita-

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<sup>1</sup> Pub L No 100-379, 102 Stat 890 (1988), codified at 29 USC § 2101 et seq.

<sup>2</sup> 29 USC §§ 2101–02. Sixty days' notice is required when: (1) an employer with 100 or more employees closes a plant, (2) an employer conducts a mass layoff of 500 or more employees, or (3) an employer with at least 150 employees lays off more than one-third of its workforce. 29 USC § 2102.

<sup>3</sup> 29 USC § 2104.

<sup>4</sup> See US Const Amend VII.

tions. Part II then explores how the Court's Seventh Amendment analysis has been applied to the WARN Act. Part III demonstrates how precedent arising in the statute of limitations context has repeatedly been used by the Supreme Court to resolve Seventh Amendment questions. Building on this observation, it then surveys the relevant case law spawned by the absence of an explicit statute of limitations in the WARN Act. This precedent is found to militate strongly for the preservation of a right to jury trial in actions under the Act. Finally, the conclusion briefly reflects on the broader applicability of a framework under which extrinsic case law is integrated into the prevailing Seventh Amendment analysis.

#### I. THE PREVAILING ANALYSIS OF THE SEVENTH AMENDMENT

The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>5</sup> In interpreting this language, the Supreme Court has developed a historical test that attempts to situate claims in the context of the English common law system as it existed at the time of the Seventh Amendment's adoption.<sup>6</sup> This analysis focuses on whether a justiciable issue would have been heard by an English court of common law, as opposed to a court of equity or court of admiralty.<sup>7</sup> The historical inquiry thus demanded has proven daunting to the federal courts, particularly for novel causes of action created by Congress. Though the applicability of the Seventh Amendment to such statutory causes of action is ac-

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<sup>5</sup> US Const Amend VII.

<sup>6</sup> See, for example, *Baltimore & Carolina Line, Inc v Redman*, 295 US 654, 657 (1935) (“The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted.”); *Dimick v Schiedt*, 293 US 474, 476 (1935) (holding that interpretation of the “scope and meaning of the Seventh Amendment” necessitates resort to “the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791”). See also Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 *Geo Wash L Rev* 183, 187–92 & n 24 (2000) (dating the birth of the historical test to the *Redman* and *Dimick* decisions and arguing that it arose by practical necessity following the merger of the courts of law and courts of equity at the state and federal levels).

<sup>7</sup> See *Parsons v Bedford, Breedlove, and Robeson*, 28 US 433, 446 (1830) (holding that the phrase “common law” in the Seventh Amendment “is used in contradistinction to equity, and admiralty, and maritime jurisprudence”).

cepted “as a matter too obvious to be doubted,”<sup>8</sup> the actual application has often devolved into “abstruse historical inquiry.”<sup>9</sup>

While the Supreme Court has elaborated upon the historical test several times in the past half century, its prevailing expression is found in *Chauffeurs, Teamsters and Helpers Local No. 391 v Terry*,<sup>10</sup> where the Court assessed whether respondents suing for backpay under § 301 of the Labor Management Relations Act, 1947<sup>11</sup> (LMRA) were entitled to a jury trial. In addressing this issue, Justice Thurgood Marshall outlined a two-part inquiry. First, a court must “compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.”<sup>12</sup> Next, a court must “examine the remedy sought and determine whether it is legal or equitable in nature.”<sup>13</sup> The second prong of this inquiry is the more important.<sup>14</sup>

The *Chauffeurs* Court’s application of this test provides a useful example of the typical Seventh Amendment analysis. Considering the first prong, a plurality of the *Chauffeurs* Court weighed a range of possible eighteenth-century analogues to the LMRA action under scrutiny. The petitioner-union presented two equitable analogies—an action by a trust beneficiary against a trustee for breach of fiduciary duty and an action to set aside an arbitration award. The respondents, meanwhile, analogized the LMRA action to an attorney malpractice action.<sup>15</sup> Ultimately, the plurality concluded that the statutory action encompassed both legal and equitable issues and hence determined that the first prong left the Court in “equipoise as to whether respondents [were] entitled to a jury trial.”<sup>16</sup> Two justices penned separate concurrences to expressly reject the pursuit of an extended historical analysis.<sup>17</sup>

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<sup>8</sup> *Rogers v Loether*, 467 F2d 1110, 1114 (7th Cir 1972) (collecting cases). See also *Curtis v Loether*, 415 US 189, 194 (1974) (“The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.”).

<sup>9</sup> *Ross v Bernhard*, 396 US 531, 538 n 10 (1970).

<sup>10</sup> 494 US 558 (1990).

<sup>11</sup> Pub L No 80-101, ch 120, 61 Stat 136, 156–57, codified at 29 USC § 185.

<sup>12</sup> *Chauffeurs*, 494 US at 565 (Marshall) (plurality), quoting *Tull v United States*, 481 US 412, 417 (1987).

<sup>13</sup> *Chauffeurs*, 494 US at 565 (Marshall) (plurality), quoting *Tull*, 481 US at 417–18.

<sup>14</sup> *Granfinanciera, SA v Nordberg*, 492 US 33, 42 (1989).

<sup>15</sup> *Chauffeurs*, 494 US at 566–69 (Marshall) (plurality).

<sup>16</sup> *Id* at 569–70.

<sup>17</sup> See *id* at 575 (Brennan concurring) (opining that the first prong should be disregarded since it “needlessly convolutes [the Court’s] Seventh Amendment jurisprudence”); *id* at 581 (Stevens concurring) (arguing that the plurality “exaggerat[ed] the importance of finding a precise common-law analogue”).

Turning to the second prong, the *Chauffeurs* Court began by noting that money damages were traditionally the remedy available in courts of law.<sup>18</sup> Thus, while an award of monetary relief need not necessarily be construed as legal, the “general rule” is that money damages are legal in nature.<sup>19</sup> The Court then addressed two possible exceptions to this general rule: Damages that are restitutionary and damages that are “incidental to or intertwined with injunctive relief.”<sup>20</sup> Neither of these exceptions was found to be applicable, and the Court ultimately concluded that the remedy of backpay in the LMRA context is legal in nature.<sup>21</sup> Because of this second-prong analysis, the respondents were held to be entitled to a jury trial in their LMRA action.<sup>22</sup>

## II. WARN ACT SEVENTH AMENDMENT ANALYSES

This Part documents how the lower courts have applied the *Chauffeurs* framework to actions brought under the WARN Act. It begins by laying out the remedies provided under the Act. It then examines how divergent characterizations of those remedies have engendered a division of legal authority.

### A. Remedies under the Act: Backpay, Lost Benefits, and Attorney’s Fees

Remedies under the WARN Act are not expansive. Aggrieved workers can receive, at most, sixty days’ backpay, lost benefits, and attorney’s fees, with even that liability open to diminution by other forms of compensation or at the court’s discretion. Moreover, these remedies are designated as “the exclusive remedies” for any violation of the WARN Act, with federal courts explicitly stripped of the “authority to enjoin a plant closing or mass layoff.”<sup>23</sup> The prospects of a local government unit bringing a civil action are similarly meager—at most, a defendant can be forced to forfeit \$30,000 plus attorney’s fees. Thus, the provisions of the WARN Act do not saddle offending employers with outsized penalties.

The relevant language in 29 USC § 2104 lays bare the limited remedies available under the Act, providing that a nondisclosing

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<sup>18</sup> Id at 570 (majority), citing *Curtis*, 415 US at 196.

<sup>19</sup> *Chauffeurs*, 494 US at 570.

<sup>20</sup> Id at 570–72, quoting *Tull*, 481 US at 424.

<sup>21</sup> *Chauffeurs*, 494 US at 573.

<sup>22</sup> Id.

<sup>23</sup> 29 USC § 2104(b).

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employer “shall be liable to each aggrieved employee who suffers an employment loss” for

(A) back pay for each day of violation . . .

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employment benefit plan if the employment loss had not occurred.<sup>24</sup>

Where an employer fails to notify a local government unit as required under the Act,<sup>25</sup> such employer “shall be subject to a civil penalty of not more than \$500 for each day of such violation.”<sup>26</sup> In any case, liability is capped at a maximum of 60 days, or one-half the employment tenure for employees who have worked less than 120 days.<sup>27</sup> Supplementing this primary liability, “the court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.”<sup>28</sup>

Further diminishing the efficacy of these remedial provisions, the Act grants employers wide latitude to diminish or eliminate damages. Liability to aggrieved workers can be reduced if the employer otherwise compensates the employee through, for example, wages or voluntary payments.<sup>29</sup> Moreover, any civil penalties can be avoided so long as “the employer pays to each aggrieved employee the amount for which the employer is liable . . . within 3 weeks from the date the employer orders the shutdown or layoff.”<sup>30</sup> Even if the employer does not otherwise compensate aggrieved employees, the Act grants the court broad discretion to reduce or eliminate liability where an employer has demonstrated good faith.<sup>31</sup>

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<sup>24</sup> 29 USC § 2104(a)(1)(A)–(B). The employment benefit plans referenced in this statutory language include the broad array of health and pension benefit plans regulated by the Employee Retirement Income Security Act of 1974 (ERISA), Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

<sup>25</sup> The WARN Act requires that employers serve a written notice “to the State or entity designated by the State to carry out rapid response activities . . . and the chief elected official of the unit of local government.” 29 USC § 2102(a)(2).

<sup>26</sup> 29 USC § 2104(a)(3).

<sup>27</sup> 29 USC § 2104(a)(1).

<sup>28</sup> 29 USC § 2104(a)(6).

<sup>29</sup> 29 USC § 2104(a)(2).

<sup>30</sup> 29 USC § 2104(a)(3).

<sup>31</sup> This good faith consideration is described as follows,

If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a viola-

## B. WARN Act Jury Trial Decisions

At present, only a handful of courts have considered Seventh Amendment rights in the WARN Act context. Two decisions in particular—*Bentley v Arlee Home Fashions, Inc.*<sup>32</sup> and *Bledsoe v Emery Worldwide Airlines, Inc.*<sup>33</sup>—represent the lion’s share of direct precedent. In *Bentley*, a 1994 decision by the Eastern District of Arkansas, the court held that a right to trial by jury exists for actions brought under the WARN Act. *Bledsoe*, a 2011 decision out of the Sixth Circuit, arrived at the opposite conclusion. Though each decision focused almost entirely on an application of the *Chauffeurs* test, the two courts differed sharply on the proper characterization of the WARN Act actions and its remedies.

### 1. Decisions finding a jury trial right in WARN Act actions.

a) *Bentley*. Taking up the *Chauffeurs* test, the *Bentley* court favorably compared actions under the WARN Act to three actions at law: breach of contract, personal injury, and wrongful termination.<sup>34</sup> With respect to the breach of contract analogy, the court noted that the *Chauffeurs* majority had taken a similar tack in its Seventh Amendment analysis.<sup>35</sup> In order to harmonize the disparities between the WARN Act and the cause of action in *Chauffeurs*—a suit under the LMRA for the breach of a collective bargaining agreement—the court noted that collective bargaining agreements are often a vehicle for mandating disclosures of plant closings or mass layoffs.<sup>36</sup>

In deciding that an action brought by an aggrieved employee under the WARN Act is similar to a personal injury claim, the court once again followed a path broken by the Supreme Court. In particular, the district court sought guidance from *Wooddell v International Brotherhood of Electrical Workers, Local 71*,<sup>37</sup> where a similar analo-

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tion of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

29 USC § 2104(a)(4).

<sup>32</sup> 861 F Supp 65 (ED Ark 1994).

<sup>33</sup> 635 F3d 836 (6th Cir 2011), cert denied, 132 S Ct 114 (2011).

<sup>34</sup> *Bentley*, 861 F Supp at 67. The court was somewhat vague on whether the personal injury and wrongful termination analogies are distinct. Though it phrased them separately at the outset of its analysis, it later provided support for what it referred to as an analogy to a “personal injury wrongful termination claim.” Id at 68.

<sup>35</sup> Id at 67–68, quoting *Chauffeurs*, 494 US at 570. The *Chauffeurs* Court failed to present any explicit argument for the breach of contract analogy. Rather, the Court proceeded by eliminating alternative analogies, then anointed breach of contract as a victor by attrition. *Chauffeurs*, 494 US at 566–70 (Marshall) (plurality).

<sup>36</sup> *Bentley*, 861 F Supp at 67–68.

<sup>37</sup> 502 US 93 (1991).

gy was adopted to vindicate the Seventh Amendment rights of a union member who sued his local union under the Labor-Management Reporting and Disclosure Act of 1959<sup>38</sup> (LMRDA) for lost wages.<sup>39</sup> Hampering this analysis was the conclusory nature of the decision in *Wooddell*, which made no effort to explicitly substantiate its embrace of the personal injury analogy.

Addressing the second prong of the *Chauffeurs* test, the *Bentley* court contrasted legal and equitable remedies by reference to the aims they are designed to advance. The court asserted that whereas legal awards seek to provide compensation for a plaintiff's loss, equitable awards provide restitution to deprive the defendant of his unjust gain.<sup>40</sup> Having provided this definitional distinction, the court suggested that the WARN Act remedies fall firmly on the legal side of the divide, insofar as they seek not to claw back an undeserved benefit from an employer but rather to compensate employees for damages caused by the employer's failure to provide requisite notice.<sup>41</sup> To buttress this characterization, the court noted that the Act explicitly forbids a federal court from enjoining a plant closing or a mass layoff—a prototypical equitable remedy.<sup>42</sup> Next, the court confronted the equitable characterization of a similar backpay remedy provided in Title VII<sup>43</sup> actions for discriminatory employment practices, concluding that the differing aims of Title VII and the WARN Act sufficed to distinguish this apparently contrary precedent.

In tandem with its *Chauffeurs* analysis, the *Bentley* court also noted that, during the congressional debate, an opponent of the Act insisted that it grants a right to jury trial.<sup>44</sup> Senator Orrin Hatch,

<sup>38</sup> Pub L No 86-257, 73 Stat 519, codified as amended at 29 USC § 401 et seq.

<sup>39</sup> *Bentley*, 861 F Supp at 68, citing *Wooddell*, 502 US at 112. See also *Reed v United Transportation Union*, 488 US 319, 326–27 (1989) (holding that an action under the LMRDA for violation of a union member's right to free speech should borrow the statute of limitations from state personal injury actions and reasoning from an analogy between the actions).

<sup>40</sup> *Bentley*, 861 F Supp at 68, citing Dan B. Dobbs, *Handbook on the Law of Remedies* 136–37 (West 1973).

<sup>41</sup> *Bentley*, 861 F Supp at 68. See also *United Steelworkers of America, AFL–CIO–CLC v Dietrich Industries, Inc.*, 1994 WL 661193, \*1 (ND Ala) (“The statute does not talk in terms of ‘lost pay’ but uses an employee’s rate of pay as a measure of damages or civil penalty, applying the rate to each day of violation regardless of whether the employee would have worked but for the closure or layoff.”).

<sup>42</sup> *Bentley*, 861 F Supp at 68. The court neglected to explain the significance of this statutory provision. *Id.* However, the implication is that Congress, by denying the federal courts authority to grant specific equitable relief, intended that the Act provide legal relief.

<sup>43</sup> Civil Rights Act of 1964 §§ 701–16, Pub L No 88-352, 78 Stat 241, 253–66, codified as amended at 42 USC § 2000e et seq.

<sup>44</sup> *Bentley*, 861 F Supp at 66 (“The Plaintiffs cite the statements of Senator Orrin Hatch, a rigorous opponent of the WARN Act, in support of its argument that the right to a jury trial was an assumed right of the WARN Act.”).

speaking in opposition to the Act, warned that “jury trials would be available in any suit for damages claiming employer violation of [the WARN Act],”<sup>45</sup> referencing the 1978 Supreme Court decision in *Lorillard v Pons*<sup>46</sup> for support.<sup>47</sup> The *Bentley* court recognized that the Supreme Court has questioned the value of remarks from opponents of legislation<sup>48</sup> but noted that such remarks are relevant where proponents fail to respond.<sup>49</sup> Combining its *Chauffeurs* analysis and this reasoning from legislative history, the court concluded that the relief granted under the WARN Act is legal in nature. Consequently, the court held that the Act supports a Seventh Amendment right to trial by jury.

b) *Dietrich Industries*. While the *Bentley* decision has not exerted much influence on other federal courts, a second district court simultaneously reached an equivalent holding. In *United Steelworkers of America, AFL–CIO–CLC v Dietrich Industries, Inc.*,<sup>50</sup> the Northern District of Alabama denied a defendant’s motion to strike a demand for a jury trial in a WARN Act suit.<sup>51</sup> The unreported opinion—issued one month before *Bentley* was decided—justified this disposition by following Eleventh Circuit precedent that the WARN Act does not award a “‘make whole’ remedy in the form of back pay,” but rather provides for compensation using the employee’s rate of pay “as a measure of damages or civil penalty.”<sup>52</sup> Insofar as this precedent directly countermanded the only argument raised by the defendant-employer, the court held that the plaintiffs correctly characterized the WARN Act as providing a legal remedy. Thus, in an analysis sharply restricted to the arguments presented by the par-

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<sup>45</sup> 134 Cong Rec 15760, 15763 (June 23, 1988) (statement of Sen Orrin Hatch) (“[A]ll of this [WARN Act litigation] can be thrown to a jury.”).

<sup>46</sup> 434 US 575 (1978).

<sup>47</sup> 134 Cong Rec at 15763 (cited in note 45) (statement of Sen Hatch) (“Supreme Court cases, such as the 1978 decision in *Lorillard versus Pons*, demonstrate clearly that jury trials would be available in any suit for damages claiming employer violations of this law.”). See also *Lorillard*, 434 US at 577, 580–82 (finding a congressional intent to provide for jury trials in suits under the Age Discrimination in Employment Act of 1967, insofar as that Act was modeled on the Fair Labor Standards Act of 1938, suits under which had long been established to support a right to trial by jury).

<sup>48</sup> *Bentley*, 861 F Supp at 67, quoting *NLRB v Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 US 58, 66 (1964).

<sup>49</sup> *Bentley*, 861 F Supp at 67, citing *Arizona v California*, 373 US 546, 582–83 (1963).

<sup>50</sup> 1994 WL 661193 (ND Ala).

<sup>51</sup> *Id.* at \*1.

<sup>52</sup> *Id.*, citing *United Steelworkers of America, AFL–CIO–CLC v North Star Steel Co.*, 5 F3d 39, 43 (3d Cir 1993) (rejecting the argument that the use of the phrase “back pay” implies a “lost earnings concept”).



ties before it, the court found that actions under the Act must receive Seventh Amendment protection.

c) *Similar decisions in other courts.* Several other courts have permitted jury trials in WARN Act suits without expressly adopting a stance on the issue. In *Sheinberg v Sorenson*,<sup>53</sup> for example, the District of New Jersey noted the division of authority over the jury question but declined to reach a decision.<sup>54</sup> Instead, the court reasoned that since the plaintiffs were entitled to a jury trial on independent state law claims within the same complaint, a motion to strike jury demand should be denied in order to conserve judicial resources.<sup>55</sup> Finally, two circuit courts of appeals have affirmed jury verdicts in WARN Act actions without addressing whether it was appropriate for a jury to be appointed as fact finder.<sup>56</sup>

## 2. Decisions denying a jury trial right in WARN Act actions.

After a decade-long lull following the decision in *Bentley*, the WARN Act jury question has seen a recent resurgence. Notably, the decisions in the last several years have come out unanimously in opposition to a right to a jury trial under the Act. While this unanimity might herald the emergence of a new consensus, at the moment it merely represents a sharp division of authority. Presently, the Sixth Circuit's opinion in *Bledsoe* is the chief counterpoint to *Bentley*.

a) *Bledsoe.* While the Sixth Circuit in *Bledsoe* did not itself pursue a detailed analysis of the first step of the *Chauffeurs* test, the district court opinion that it broadly affirmed provides an extended rebuttal of the *Bentley* court's treatment of the issue. Considering first the analogy to a breach of contract action, the *Bledsoe* district court noted the difficulty of discerning any agreement between employers and employees in the context of the WARN Act.<sup>57</sup> In the absence of any such agreement, the analogy to a breach of contract claim was brusquely discarded. Moving on to the analogy to a legal

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<sup>53</sup> 2006 WL 2460649 (D NJ).

<sup>54</sup> *Id.* at \*4-5.

<sup>55</sup> *Id.* at \*5. However, the court retained discretionary authority to adjust any jury award under the WARN Act. *Id.*

<sup>56</sup> See generally *Local Union No. 1992 of the International Brotherhood of Electrical Workers v The Okonite Co.*, 358 F3d 278 (3d Cir 2004) (upholding the jury verdict for the plaintiff union who brought a WARN Act action alleging that the defendant-employer failed to give employees sufficient advance notice of a plant closing); *Hollowell v Orleans Regional Hospital LLC*, 217 F3d 379 (5th Cir 2000) (upholding the jury verdict in favor of the plaintiff, who asserted claims under the WARN Act arising from closure of the hospital).

<sup>57</sup> *Bledsoe v Emery Worldwide Airlines*, 258 F Supp 2d 780, 792 (SD Ohio 2003) (explaining that the plaintiffs did not have an agreement of their own with the defendant-employer requiring it to provide them with sixty days' notice of a mass layoff or plant closing).

action for personal injury arising out of a wrongful discharge, the court sought to distinguish the Supreme Court's characterization of LMRDA damages as a legal remedy by highlighting the differences between the labor laws. Unlike the WARN Act, the court observed, the LMRDA seeks to compensate an employee for discrimination suffered, not backpay. Moreover, the LMRDA provides a broad range of remedies, as contrasted with the limited remedies provided under the WARN Act.<sup>58</sup>

Ultimately, the *Bledsoe* district court concluded that WARN Act actions are more plausibly analogized to equitable actions for breach of fiduciary duty.<sup>59</sup> Fleshing out this analogy, the court cast the employer as a trustee that owes a fiduciary duty to safeguard the welfare of its employees by giving sixty days' notice of impending plant closures or mass layoffs. Under this characterization of the Act, an employer who flouts the provisions of the Act and fails to notify its employees of their impending termination is effectively withholding or mismanaging the pay and benefits that would otherwise be disbursed. Thus, the remedy of backpay and benefits would be analogous to the restitution of funds wrongly managed or withheld.<sup>60</sup> This analogy was explicitly affirmed on appeal.<sup>61</sup>

In addressing the second step of the *Chauffeurs* test, the Sixth Circuit broadly characterized the remedies of the Act as restitutionary in nature, insofar as they are "tailored to restoring the pay and benefits that the employer should have provided."<sup>62</sup> To support this reasoning, the court emphasized that the Act places the entire damages award within the district court's discretion. The court noted that then-Justice William Rehnquist had been influenced by a similar grant of discretion in his concurrence in *Albemarle Paper Co v Moody*,<sup>63</sup> where the majority held that backpay in Title VII cases is restitutionary in nature.<sup>64</sup> Justice Rehnquist wrote separately to emphasize that where an award of backpay is analogized to an award of damages, "such an award upon proper proof would follow virtually as a matter of course from a finding that [the elements of the action

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<sup>58</sup> *Id.* at 793.

<sup>59</sup> *Id.*, citing *Chauffeurs*, 494 US at 567 (Marshall) (plurality) (noting that such actions for breach of fiduciary duty were historically "within the exclusive jurisdiction of courts of equity").

<sup>60</sup> *Bledsoe*, 258 F Supp 2d at 793.

<sup>61</sup> *Bledsoe*, 635 F3d at 842.

<sup>62</sup> *Id.* at 843.

<sup>63</sup> 422 US 405 (1975).

<sup>64</sup> *Bledsoe*, 635 F3d at 844 (discussing Justice Rehnquist's distinction between mandatory and discretionary remedies), citing *Albemarle Paper*, 422 US at 443 (Rehnquist concurring); *Albemarle Paper*, 422 US at 419–23.

had been satisfied].”<sup>65</sup> He concluded that to “the extent [ ] that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial.”<sup>66</sup>

Within the confines of its second-prong discussion, the Sixth Circuit also cited an unreported decision by a bankruptcy court in *Cain v Inacom Corp.*,<sup>67</sup> a case that indirectly implicated the Seventh Amendment question. In *Cain*, plaintiffs bringing a WARN Act suit against a bankrupt defendant sought to avoid the automatic stay of bankruptcy,<sup>68</sup> which protects the claim resolution process by excluding adversary proceedings that are conventional actions at law.<sup>69</sup> Relying heavily on the *Albemarle Paper* concurrence, the *Cain* court held that WARN Act suits seek equitable relief.<sup>70</sup>

In response to an argument raised by the *Bledsoe* plaintiffs, the Sixth Circuit also devoted some attention to distinguishing its earlier analysis of the Family and Medical Leave Act of 1993<sup>71</sup> (FMLA) in *Frizzell v Southwest Motor Freight*.<sup>72</sup> In *Frizzell*, the Sixth Circuit concluded that the FMLA provides a right to a jury trial in suits for damages.<sup>73</sup> The *Bledsoe* court characterized that earlier decision as hinging on the FMLA’s separate provision for “damages” and “such equitable relief as may be appropriate,” a structural feature absent from the WARN Act.<sup>74</sup> Moreover, the *Frizzell* court relied upon the fact that the FMLA was explicitly modeled on the Fair Labor Standards Act of 1938<sup>75</sup> (FLSA), a statute that has been interpreted to provide a right to jury trial.<sup>76</sup> Both of these factors—separate remedy provisions and emulation of the FLSA—were cited by the Supreme Court in *Lorillard* as grounds for holding that Congress had intended to preserve the right to jury trials in claims brought under the Age

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<sup>65</sup> *Albemarle Paper*, 422 US at 442 (Rehnquist concurring), citing *Curtis v Loether*, 415 US 189, 197 (1974).

<sup>66</sup> *Albemarle Paper*, 422 US at 443 (Rehnquist concurring).

<sup>67</sup> 2001 WL 1819997 (Bankr D Del).

<sup>68</sup> See *id.* at \*1, citing *Loehrer v McDonnell Douglas Corp.*, 1992 US Dist LEXIS 22555 (ED Mo).

<sup>69</sup> For the automatic stay provision of bankruptcy law, see 11 USC § 362.

<sup>70</sup> See *Cain*, 2001 WL 1819997 at \*1 (holding that a WARN Act suit for backpay sought equitable relief).

<sup>71</sup> Pub L No 103-3, 107 Stat 6, codified at 29 USC § 2601 et seq.

<sup>72</sup> 154 F3d 641 (6th Cir 1998).

<sup>73</sup> *Id.* at 642–44.

<sup>74</sup> *Bledsoe*, 635 F3d at 844–45, quoting 29 USC § 2617(a)(1)(A)–(B).

<sup>75</sup> Pub L No 75-718, ch 676, 52 Stat 1060, codified as amended at 29 USC § 201 et seq.

<sup>76</sup> *Bledsoe*, 635 F3d at 845.

Discrimination in Employment Act of 1967<sup>77</sup> (ADEA).<sup>78</sup> Neither of these factors are present in the WARN Act.

Lastly, the Sixth Circuit briefly addressed, in a footnote, the significance of cases in which courts have decided to apply borrowed state-law statutes of limitations to WARN Act actions.<sup>79</sup> In interpreting federal laws where Congress has failed to supply an express limitations period, the Supreme Court has “generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.”<sup>80</sup> While the Supreme Court directly approved such borrowing for the WARN Act in *North Star Steel Co v Thomas*,<sup>81</sup> the Sixth Circuit in *Bledsoe* concluded that the Court provided no guidance on the proper state-statute analogue in that case—and hence that the decision in *North Star* had no bearing on the Seventh Amendment question.<sup>82</sup>

For its part, the *Bledsoe* district court also exerted great effort to situate the WARN Act within the universe of Supreme Court Seventh Amendment labor law decisions. Central to this discussion was an examination of *Lorillard* and *Frizzell* that would later be recapitulated on appeal.<sup>83</sup> However, the court also extensively discussed how the backpay remedy of the WARN Act is analogous to similar remedies under Title VII and the Employee Retirement Income Security Act of 1974<sup>84</sup> (ERISA), as opposed to the remedies provided by the FMLA, FLSA, or ADEA.<sup>85</sup>

This effort to distinguish Title VII and ERISA involved both a close interpretation of the statutory texts and a loose examination of legislative intent. First, the *Bledsoe* district court reasoned that the

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<sup>77</sup> Pub L No 90-202, 81 Stat 602, codified as amended at 29 USC §§ 621–34.

<sup>78</sup> See *Lorillard*, 434 US at 580–83.

<sup>79</sup> *Bledsoe*, 635 F3d at 842 n 7 (noting that its decision was “not altered by plaintiffs’ reliance on two cases in which the courts decided to apply a borrowed state-law limitations period for contract actions to the WARN Act actions at issue”).

<sup>80</sup> *DelCostello v International Brotherhood of Teamsters*, 462 US 151, 158 & n 12 (1983).

<sup>81</sup> 515 US 29 (1995).

<sup>82</sup> *Bledsoe*, 635 F3d at 842 n 7, citing *North Star*, 515 US at 35–36 (concluding that any of the four proposed statutes were suitably analogous as to comply with the rule in *DelCostello* but declining to “choose the best of four” since the action in question was timely).

<sup>83</sup> See *Bledsoe*, 258 F Supp 2d at 794–96.

<sup>84</sup> Pub L No 93-406, 88 Stat 829, codified as amended at 29 USC § 1001 et seq.

<sup>85</sup> In the context of the relevant binding precedent, this was equivalent to an argument that the WARN Act remedy is equitable in nature. See *Lorillard*, 434 US at 580, 585 (noting that the FLSA has been widely held to support a right to trial by jury and holding the same for the ADEA); *Albemarle Paper*, 422 US at 415–23 (characterizing the award of backpay under Title VII as equitable in the context of scrutinizing a judge’s refusal to grant the remedy); *Schwartz v Gregori*, 45 F3d 1017, 1022–23 (6th Cir 1995) (holding that backpay is available as an equitable remedy under § 502(a)(3) of ERISA).

WARN Act remedy is substantially narrower than analogous remedies offered under the FMLA, FLSA, or ADEA—insofar as the other statutes contain alternative damages provisions and are not wholly subject to the discretion of the district court judge.<sup>86</sup> Second, the court simply reiterated its earlier discussion surrounding the first prong of the *Chauffeurs* test. Namely, insofar as a WARN Act plaintiff is seeking reimbursement of salary and benefits due rather than compensation for damages flowing from a wrongful discharge, the defendant is liable in equity for wrongfully withholding funds in breach of its fiduciary duty. Third, the court reasoned that Congress would likely not have intended to extend Seventh Amendment protection to a WARN Act claimant seeking lost ERISA benefits when ERISA itself does not provide such protection.<sup>87</sup>

In pursuing this final line of reasoning, the district court also explicitly relied upon persuasive precedent from an unreported 1992 decision in the Eastern District of Missouri, *Loehrer v McDonnell Douglas Corp.*<sup>88</sup> Addressing a WARN Act action for backpay and ERISA benefits, that court concluded that because ERISA benefits are equitable in nature, the backpay sought was a monetary remedy “intertwined with injunctive relief.”<sup>89</sup> Hence, the *Loehrer* court relied on *Chauffeurs*’s intertwined-relief language to conclude that the WARN Act creates an equitable remedy.<sup>90</sup> This conclusion was further bolstered by reference to the fact that WARN Act damage awards remain entirely within the district court’s discretion.<sup>91</sup>

b) *Nelson*. The newly minted decision in *Bledsoe* quickly won converts. In *Nelson v Formed Fiber Technologies, LLC*,<sup>92</sup> a magistrate judge sitting in the District of Maine recommended that a motion to strike jury demand in a WARN Act action be granted, relying largely on the persuasive precedent of the Sixth Circuit.

In opposing the motion to strike, the aggrieved workers bringing suit in *Nelson* retraced the path followed by the plaintiffs in *Bentley*, *Bledsoe*, and *Dietrich Industries*. First, the *Nelson* plaintiffs adopted the argument that had carried the day in *Dietrich Industries*, arguing

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<sup>86</sup> See *Bledsoe*, 258 F Supp 2d at 797.

<sup>87</sup> *Id* at 798. This argument was predicated on the Sixth Circuit’s repeated holding that ERISA claims are equitable in nature. See, for example, *Wilkins v Baptist Healthcare System, Inc.*, 150 F3d 609, 616 (6th Cir 1998).

<sup>88</sup> 1992 US Dist LEXIS 22555 (ED Mo).

<sup>89</sup> *Id* at \*8, quoting *Chauffeurs*, 494 US at 571.

<sup>90</sup> It is not clear whether the *Loehrer* court’s argument would be undercut by a WARN Act suit seeking only backpay.

<sup>91</sup> *Loehrer*, 1992 US Dist LEXIS 22555 at \*8–10. See also note 64 and accompanying text.

<sup>92</sup> 2012 WL 118490 (D Me).

from Second and Eighth Circuit precedent that the WARN Act remedy is not “backpay” but rather uses daily pay as a measure of damages.<sup>93</sup> Second, the plaintiffs argued, in the alternative, that the WARN Act’s backpay remedy is legal in nature, parroting the language of *Bentley* for support.<sup>94</sup> Finally, the plaintiffs attempted to undermine the *Bledsoe* court’s reliance on judicial discretion over the WARN Act remedy by noting the contrary decision in *Frizzell*.<sup>95</sup>

The judge in *Nelson* focused much of his opinion on dispatching the reasoning offered in the plaintiffs’ motion. Countering the argument that the WARN Act does not award a backpay remedy, the judge quickly noted that the Act itself characterizes its remedy as backpay.<sup>96</sup> Moreover, he dismissed the relevance of the Second and Eighth Circuit cases cited by the plaintiffs, insofar as those decisions “analyze[d] the WARN Act for purposes of borrowing an appropriate state statute of limitations, entailing an entirely different analysis than that pertaining to whether the WARN Act remedy properly is characterized as ‘equitable’ or ‘legal.’”<sup>97</sup>

Next, *Nelson* rejected the *Bentley* court’s characterization of the WARN Act, concluding that “the WARN Act remedy is designed to restore the *status quo*, a trademark indicium of equitable relief.”<sup>98</sup> The plaintiff’s final argument—regarding the misplaced emphasis on judicial discretion—was held to be overshadowed by the persuasive precedent of *Bledsoe*, as augmented by the supporting language from Justice Rehnquist’s concurring opinion in *Albemarle Paper*.<sup>99</sup> Thus, relying largely on the precedent set in *Bledsoe*, the magistrate judge recommended that a motion to strike jury demand be granted.

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As is evident from the preceding discussion, the Seventh Amendment analysis of the WARN Act is a morass of analogies to causes of action both ancient and modern. The Sixth Circuit in

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<sup>93</sup> Opposition to Defendant’s Motion to Strike Jury Demand, *Nelson v Formed Fiber Technologies, LCC*, Civil Action No 2:10-00473-GZS, \*3–4 (D Me filed Oct 12, 2011) (“*Nelson* Opposition”), citing *United Paperworkers International Union and Its Local 340 v Specialty Paperboard, Inc.*, 999 F2d 51, 55 (2d Cir 1993). See also *Aaron v Brown Group, Inc.*, 80 F3d 1220, 1225 (8th Cir 1996). For an extended reevaluation of these decisions, see Part III.C.

<sup>94</sup> *Nelson* Opposition at \*4–5, citing *Bentley*, 861 F Supp at 67.

<sup>95</sup> *Nelson* Opposition at \*6.

<sup>96</sup> *Nelson*, 2012 WL 118490 at \*4, quoting 29 USC § 2104(a)(1)(A).

<sup>97</sup> *Nelson*, 2012 WL 118490 at \*4.

<sup>98</sup> *Id* at \*5.

<sup>99</sup> *Id* at \*6, citing *Albemarle Paper*, 422 US at 443 (Rehnquist concurring). See also notes 63–66 and accompanying text.

*Bledsoe* articulated what has become an increasingly dominant position under which the favored analogues support an equitable characterization of the Act. The aging *Bentley* opinion staked out the opposing position, though in recent years it has sustained heavy criticism. Going forward, federal courts outside of the Sixth Circuit are faced with a choice between these standards, with the Seventh Amendment rights of WARN Act plaintiffs hanging in the balance.

### III. TRANSPLANTING BORROWED STATUTE OF LIMITATIONS ANALOGIES INTO SEVENTH AMENDMENT ANALYSIS

Thus far, the Seventh Amendment jurisprudence arising out of the WARN Act has provided an object lesson in the difficulties of applying the historical test pronounced in *Chauffeurs*. As Justice William Brennan lamented in his concurrence to that decision,

[A]ll too often the first prong of the [ ] test requires courts to measure modern statutory actions against 18th-century English actions so remote in form and concept that there is no firm basis for comparison. In such cases, the result is less the discovery of a historical analog than the manufacture of a historical fiction.<sup>100</sup>

True to form, the *Bentley* and *Bledsoe* courts tilted at a variety of analogies. Though both sides of the division of authority claim to have escaped the equipoise that frustrated the *Chauffeurs* Court's first-prong analysis, their conclusions have little persuasive force. The courts are not to be blamed—even Justice Antonin Scalia has complained that the historical inquiry demanded by the search for common law analogues is a “major headache.”<sup>101</sup>

This Part argues that the courts applying the Seventh Amendment to the WARN Act have failed to give adequate attention to relevant precedent arising out of the borrowed statute of limitations context. First, it provides a brief overview of the legal framework that the Supreme Court has developed to impute statutes of limitations for federal statutes that lack such provisions. Next, it argues that the analysis demanded by the framework is in fact highly relevant to the resolution of the *Chauffeurs* test. To support this assertion, it highlights how the Supreme Court has repeatedly used the statute of limitations analysis to inform its Seventh Amendment decisions—a tendency that has until now been overlooked by both the courts and the academic literature. This Part then surveys WARN Act

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<sup>100</sup> *Chauffeurs*, 494 US at 578–79 n 7 (Brennan concurring).

<sup>101</sup> *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687, 726 (1999) (Scalia concurring).

statute of limitations precedent and concludes that this overlooked body of law strongly supports a legal characterization of the Act's remedies.

#### A. Borrowed Statute of Limitations Analysis

Congress frequently neglects to insert specific statutes of limitations into federal civil laws, leaving courts with the difficult task of inferring a rule of timeliness from some other source.<sup>102</sup> In 1990, Congress stepped in to aid the courts, imposing a default four-year statute of limitations on federal civil actions as part of the Judicial Improvements Act of 1990.<sup>103</sup> However, when it enacted this default limitations period, Congress attempted to restrict its retroactive application to existing law, providing that “[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.”<sup>104</sup> Given time, the courts split over how to apply this anti-retroactivity language to post-1990 amendments of preexisting law: the Third, Seventh, and Eighth Circuits determined that the default limitations period applies only where a plaintiff's cause of action is based solely on a post-1990 statute that “establishes a new cause of action without reference to preexisting law”;<sup>105</sup> the Sixth and Tenth Circuits applied the default to all post-1990 legislation whether or not it simply amends a preexisting statute.<sup>106</sup> The Supreme Court stepped in to resolve the split in *Jones v R.R. Donnelley & Sons Co.*,<sup>107</sup> endorsing the Sixth and Tenth Circuits' more generous application of the four-year limitations period.<sup>108</sup>

Now that the dust has settled, courts are still faced with the task of inferring a statute of limitations for certain legislation that, like the WARN Act, was promulgated before 1990. The “fallback rule of thumb” for courts confronted with such legislative lacunae is to

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<sup>102</sup> See, for example, American Recovery and Reinvestment Act of 2009 § 1553, Pub L No 111-5, 123 Stat 115, 297–302; Trafficking Victims Protection Reauthorization Act of 2003 § 4(a)(4)(A), Pub L No 108-193, 117 Stat 2875, 2878, codified as amended at 18 USC § 1595.

<sup>103</sup> Pub L No 101-650, 104 Stat 5089, codified at 28 USC § 1658.

<sup>104</sup> Judicial Improvements Act of 1990 § 301(a), 104 Stat at 5114–15, codified at 28 USC § 1658(a) (emphasis added).

<sup>105</sup> *Zubi v AT&T Corp.*, 219 F3d 220, 224–25 (3d Cir 2000); *Jones v R.R. Donnelley & Sons Co.*, 305 F3d 717, 728 (7th Cir 2002); *Madison v IBP, Inc.*, 257 F3d 780, 798 (8th Cir 2001).

<sup>106</sup> See *Anthony v BTR Automotive Sealing Systems, Inc.*, 339 F3d 506, 514 (6th Cir 2003); *Harris v Allstate Ins Co.*, 300 F3d 1183, 1190 (10th Cir 2002).

<sup>107</sup> 541 US 369 (2004).

<sup>108</sup> *Id.* at 382–83.



“apply the most closely analogous statute of limitations under state law.”<sup>109</sup> The Supreme Court has also provided a “closely circumscribed” exception to this general rule.<sup>110</sup> In *DelCostello v International Brotherhood of Teamsters*,<sup>111</sup> the Court held that it is appropriate to borrow a limitations period from a *federal* law where such law “provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that [statute of limitations] a significantly more appropriate vehicle for interstitial lawmaking.”<sup>112</sup>

Of course, this description of the *DelCostello* framework is unnecessarily complex. While the Court has exerted much energy in weighing whether state- or federal-law analogues should be preferred, the polarity of that preference is irrelevant to the present inquiry. For the purposes of this Comment, it is not the source of the borrowing that matters but rather the legal or equitable characterization of the analogue ultimately selected. As the Supreme Court has repeatedly demonstrated, *DelCostello* statute of limitations analysis is pertinent in the Seventh Amendment context because it requires a court to search for analogous statutory actions. This crucial methodological feature is present whether Congress or a state legislature authored the analogues.

## B. Supreme Court Jurisprudence

### 1. *Chauffeurs*.

The first pertinent example is the *Chauffeurs* decision itself, which directly considered the relevance of dictum from *DelCostello* that suggested that an attorney malpractice action is “the closest

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<sup>109</sup> *DelCostello v International Brotherhood of Teamsters*, 462 US 151, 158 & n 12 (1983) (collecting cases). See note 80.

<sup>110</sup> *Reed v United Transportation Union*, 488 US 319, 324 (1989).

<sup>111</sup> 462 US 151 (1983).

<sup>112</sup> *Id.* at 172 (noting that in these instances, the Court will turn away from state law). A plurality of the Court has also suggested a three-stage inquiry: (1) “whether a uniform statute of limitations is to be selected,” (2) whether such a uniform statute should be derived from a state or federal source, and (3) whether an analogous federal source affords a “closer fit” with the cause of action under scrutiny than does any available state law source. *Lampf, Pleva, Lipkind, Prupis & Petigrow v Gilbertson*, 501 US 350, 356–57 (1991) (Blackmun) (plurality). This suggestion has not gained currency in the lower courts, and the Supreme Court itself has continued to rely on the language in *DelCostello*. See, for example, *North Star*, 515 US at 34 (citing *DelCostello* for the rule and *Lampf* merely as an example of its animating policies). *Lampf* and *DelCostello* merely shift the preference for federal versus state analogues—a preference that has no bearing on the legal or equitable characterization of the analogue ultimately selected. Thus, for the purposes of this Comment, this doctrinal complexity is ignored as irrelevant, and *DelCostello* is regarded as the dominant opinion.

state-law analogy for” a claim brought under § 301 of the LMRA for breach of a duty of fair representation.<sup>113</sup> While the *Chauffeurs* plurality was ultimately not persuaded by this dictum, it found no fault in the provenance of the analogy. Rather, it simply voiced skepticism concerning the failure of the majority in *DelCostello* to consider an analogy to actions against trustees for breach of fiduciary duty.<sup>114</sup> Thus, where it could have straightforwardly rejected the relevance of *DelCostello*’s reasoning to the first prong of its Seventh Amendment analysis, the Court instead merely attacked the thoroughness of its prior decision. From the outset, then, the Court left the door open to transplanting borrowed statute of limitations analogues into the Seventh Amendment inquiry.

## 2. *Wooddell*.

In *Wooddell*, the Court’s Seventh Amendment analysis of an LMRDA action hinged almost entirely on an analogy established in the borrowed statute of limitations context. After reciting the *Chauffeurs* test, the Court devoted a sentence to explaining that the plaintiff’s prayer for injunctive relief was incidental to the lost wages sought, then simply noted that it had “recently held that actions under the LMRDA are closely analogous to personal injury actions,” citing *Reed v United Transportation Union*,<sup>115</sup> a borrowed statute of limitations case.<sup>116</sup> Given the *Wooddell* Court’s heavy reliance on *Reed*, it is illustrative to examine how the analogy to a personal injury action was actually substantiated in the earlier opinion.

The *Reed* Court considered the proper statute of limitations for an action brought under § 101(a)(2) of the LMRDA, in which the plaintiff alleged that the union violated its members’ right to free speech concerning union matters.<sup>117</sup> The Fourth Circuit had interpreted *DelCostello* to require that the statute of limitations be borrowed from the National Labor Relations Act<sup>118</sup> (NLRA), reasoning that the plaintiff’s claims were so closely linked to “the federal labor policy favoring stable labor-management relations” as to fall within the federal law exception to the general rule of *DelCostello*.<sup>119</sup>

<sup>113</sup> *Chauffeurs*, 494 US at 568 (Marshall) (plurality), citing *DelCostello*, 462 US at 167.

<sup>114</sup> *Chauffeurs*, 494 US at 568 (Marshall) (plurality).

<sup>115</sup> 488 US 319 (1989).

<sup>116</sup> *Wooddell*, 502 US at 98, citing *Reed*, 488 US at 326–27.

<sup>117</sup> *Reed*, 488 US at 321.

<sup>118</sup> Pub L No 74-198, ch 372, 49 Stat 449 (1935), codified as amended at 29 USC §§ 151–69.

<sup>119</sup> *Reed v United Transportation Union*, 828 F2d 1066, 1070 (4th Cir 1987), revd 488 US 319 (1989).

Rejecting this argument, the Supreme Court first noted legislative history that portrayed § 102(a)(2) as an attempt to enshrine a “First Amendment value,” or “the right to speak one’s mind without fear of reprisal,” in the labor context.<sup>120</sup> On the strength of this characterization, the Court concluded that the claim was “readily analogized for the purpose of borrowing a statute of limitations to state personal injury actions.”<sup>121</sup> Curiously, the Court declined to flesh out this analogy, save by noting that it had earlier arrived at a similar analogy for § 1983 actions.<sup>122</sup> Having thus suggested a suitable state statute of limitations, the Court considered whether any federal statute existed that would fall within the federal law exception laid out in *DelCostello*.

For this inquiry, the Court was content to focus primarily on the latter condition of the *DelCostello* exception—whether the “federal policies at stake” recommended the adoption of a federal limitations period. At the outset, the Court confined itself to considering whether only one statute—the NLRA—was suitably analogous to compel borrowing its statute of limitations. The NLRA analogy had carried the day in *DelCostello*, where the Court sought to infer a limitations period for a hybrid § 301–fair representation claim brought under the LMRA. There, the Court first emphasized the absence of any “close analogy in ordinary state law,”<sup>123</sup> then embraced the NLRA limitations period as more responsive to the federal interests implicated.<sup>124</sup> In particular, the *DelCostello* majority relied on Justice Potter Stewart’s concurrence in *United Parcel Service, Inc v Mitchell*,<sup>125</sup> which highlighted that the NLRA’s six-month statute of limitations sought to strike the proper balance between “stable bargaining relationships,” “finality of private settlements,” and “an employee’s interest in setting aside what he views as an unjust settlement under the collective-bargaining system.”<sup>126</sup> Insofar as this was the precise balance of interests implicated by the hybrid § 301–fair representation claim under consideration, the NLRA limitations period was selected as a suitable analogue.

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<sup>120</sup> *Reed*, 488 US at 325, quoting *United Steelworkers of America, AFL–CIO–CLC v Sadlowski*, 457 US 102, 111 (1982).

<sup>121</sup> *Reed*, 488 US at 326.

<sup>122</sup> See *id* at 326–27 (“We find it unnecessary to detail here the elements of this analogy.”), citing *Owens v Okure*, 488 US 235, 249–50 (1989) (holding that § 1983 actions are governed by state personal injury statutes of limitations).

<sup>123</sup> *DelCostello*, 462 US at 165.

<sup>124</sup> *Id* at 165–69.

<sup>125</sup> 451 US 56 (1981).

<sup>126</sup> *DelCostello*, 462 US at 171, quoting *Mitchell*, 451 US at 70–71 (Stewart concurring).

The *Reed* Court noted that § 102(a)(2) suits are crucially different in several respects from the LMRA action scrutinized in *DelCostello*. While the unfair labor practices targeted by § 301 of the LMRA had negative effects on the “formation and operation of the collective-bargaining agreement” and “the private settlement of disputes . . . through grievance-and-arbitration procedures,” § 102(a)(2) claims involve “union dispute[s] not directly related in any way to collective bargaining or dispute settlement.”<sup>127</sup> Thus, insofar as § 102(a)(2) suits do not implicate the balance of federal and private interests arising out of collective bargaining, the *DelCostello* Court’s principal rationale for adopting the six-month NLRA statute of limitations was distinguished by the *Reed* majority. Moreover, the *Reed* Court noted, the NLRA limitations period failed to accommodate “the distinct federal interest in the free speech of union members.”<sup>128</sup> In light of this divergence between the federal policies at stake in the NLRA and LMRA, the *Reed* Court concluded that the NLRA statute of limitations was not “‘a significantly more appropriate vehicle for interstitial lawmaking’ than the analogous state statute of limitations that [the Court’s] established borrowing rule favors.”<sup>129</sup>

Three key features of the *Reed* majority’s analysis should be noted. First, the *Reed* opinion devoted almost no attention to substantiating the analogy to state personal injury actions. Second, the Court’s rejection of the NLRA analogy was justified almost entirely by the federal interests served by the statutes and their associated limitations periods. Third, the selection of the state law analogy is heavily favored by the structure of the *DelCostello* rule, which considers federal law analogies only under narrow circumstances. However, despite these weaknesses and biases, the eight-Justice majority in *Wooddell* embraced the analogy advanced by the *Reed* Court as highly persuasive in the Seventh Amendment context.

### 3. *City of Monterey*.

Most recently, in *City of Monterey v Del Monte Dunes at Monterey, Ltd.*,<sup>130</sup> the Court incorporated the fruits of borrowed statute of limitations analysis into an affirmation of Seventh Amendment rights. The plaintiff in *City of Monterey* was seeking compensation under § 1983 for a regulatory taking.<sup>131</sup> While the majority devoted much

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<sup>127</sup> *Reed*, 488 US at 329–30, citing *DelCostello*, 462 US at 165, 168.

<sup>128</sup> *Reed*, 488 US at 332–33.

<sup>129</sup> *Id.* at 333, quoting *DelCostello*, 462 US at 172.

<sup>130</sup> 526 US 687 (1999).

<sup>131</sup> *Id.* at 693–94.

of its analysis to attacking an analogy to condemnation proceedings,<sup>132</sup> it explicitly incorporated a concurrence authored by Justice Scalia into its *Chauffeurs* analysis.<sup>133</sup>

That concurrence devoted special attention to the Court's earlier discussion in *Wilson v Garcia*,<sup>134</sup> a borrowed statute of limitations case Justice Scalia described as being "so precisely [o]n point" as to give "a distinct quality of *déjà vu*."<sup>135</sup> *Wilson* was not technically a *DelCostello* case. Instead, the Court conducted borrowed statute of limitations analysis under 42 USC § 1988(a).<sup>136</sup> But the Court interpreted that statute as simply requiring "the selection of the most appropriate, or the most analogous state statute of limitations to apply to [the] § 1983 claim."<sup>137</sup> In other words, the statute was interpreted to provide a test functionally equivalent to the general rule of *DelCostello*. The *Wilson* Court applied the test and determined that a "tort claim[] for personal injury" was the cause of action most analogous to § 1983 suits.<sup>138</sup> Justice Scalia used this conclusion in his *City of Monterey* concurrence as support for § 1983's "identity as a personal-injury tort" in the Seventh Amendment context.<sup>139</sup>

<sup>132</sup> *Id* at 711–14.

<sup>133</sup> *Id* at 709 ("Justice Scalia's opinion . . . presents a comprehensive and convincing analysis of the historical and constitutional reasons for this conclusion. We agree with his analysis and conclusion.").

<sup>134</sup> 471 US 261 (1984), recognized as superseded by statute in *Jones*, 541 US at 377–81 (documenting how the passage of 28 USC § 1658 superseded *Wilson*).

<sup>135</sup> *City of Monterey*, 526 US at 725 (Scalia concurring).

<sup>136</sup> Section 1988 serves as an alternate gap-filling regime for 42 USC § 1983 and various other civil rights actions. It provides that, in the event the statutory language creating such actions is

deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 USC § 1988(a).

<sup>137</sup> *Wilson*, 471 US at 268 (quotation marks omitted). See also *Okure*, 488 US at 235 (reaffirming *Wilson* and specifying that where a state has both specific and residual limitations periods for personal injury claims, a § 1983 action should be governed by the residual limitation period).

<sup>138</sup> *Wilson*, 471 US at 277.

<sup>139</sup> *City of Monterey*, 526 US at 728 (Scalia concurring) ("[I]n *Wilson* and *Okure*, we used § 1983's identity as a personal-injury tort to determine the relevant statute of limitations under . . . § 1988(a).") (internal cross references omitted). This is not to suggest that Justice Scalia reasoned only from *Wilson* and *Okure*, as the majority had in *Wooddell*—he also broadly cited other Supreme Court cases in which § 1983 was characterized as sounding in tort. See *id* at 727–28 (collecting cases).

While he used *Wilson* as precedent to support his Seventh Amendment analysis, Justice Scalia also acknowledged that “[i]t is entirely possible to analogize § 1983 to the ‘common law’ in one fashion for the purposes of [§ 1988], and in another fashion for purposes of the constitutional guarantee.”<sup>140</sup> He noted, however, that

[f]or both purposes [§ 1983] is a “unique federal remedy” whose character is determined by the federal cause of action, and not by the innumerable constitutional and statutory violations upon which that cause of action is dependent. And for both purposes the search for (often nonexistent) common-law analogues to remedies for those particular violations is a major headache.<sup>141</sup>

While this discussion was primarily aimed at Justice David Souter’s dissenting opinion in *City of Monterey*—which urged against a “unified field theory of jury rights under § 1983”<sup>142</sup>—the reasoning is generally applicable to the transplantation of *DelCostello* analysis into the Seventh Amendment context.

While Justice Scalia’s first line of reasoning is ostensibly specific to § 1983’s provision of a “unique federal remedy,”<sup>143</sup> its thrust is universal. Though Seventh Amendment and borrowed statute of limitations analyses certainly arise in different legal domains, the remedy under scrutiny does not inherit new qualities simply because it is being reconsidered in a new context. Thus, when parties seek to diverge from an analogy established in borrowed statute of limitations precedent, a court weighing Seventh Amendment rights should follow the model of Justice Scalia, who put the burden upon Justice Souter to “explain why a different approach is appropriate in the present context.”<sup>144</sup>

Justice Scalia’s second assertion implicates a more pragmatic concern—it is a waste of judicial resources to conduct a Seventh Amendment search for historical analogues when there exists relevant borrowed statute of limitations precedent. This problem is further aggravated by the difficulty and uncertainty of the historical test demanded in *Chauffeurs*, a process that spawns a seemingly endless string of circuit splits.<sup>145</sup> While this pragmatic concern certainly does not free a court from its responsibility to carefully weigh

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<sup>140</sup> *Id.* at 726.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 751 (Souter concurring in part and dissenting in part).

<sup>143</sup> *City of Monterey*, 526 US at 726 (Scalia concurring) (addressing the unique nature of § 1983 claims).

<sup>144</sup> *Id.*

<sup>145</sup> See note 17.

the application of the Seventh Amendment, it does offer practical support for the repurposing of *DelCostello* analyses. At bottom, the appeal of this repurposing is quite simple—the products of the borrowed statute of limitations inquiry are highly relevant in the application of the historical test established in *Chauffeurs*.

### C. WARN Act Statute of Limitations Precedent

There is significant cross-pollination between borrowed statute of limitations and Seventh Amendment case law. Can courts use similar cross-pollination to determine whether plaintiffs have a jury right under the WARN Act? The Sixth Circuit in *Bledsoe* apparently thought not, giving the relevant precedent a quiet death in a footnote.<sup>146</sup> The district court in *Nelson* reached a like conclusion, disregarding several arguments in the plaintiff's brief,<sup>147</sup> on the ground that *North Star* "entail[ed] an entirely different analysis" from *Chauffeurs*.<sup>148</sup> Given the Supreme Court's repeated reliance on such borrowed statute of limitations precedent in its own Seventh Amendment analysis, this tack by both the *Bledsoe* and *Nelson* courts unnecessarily blinkered them to a useful body of persuasive law from their sister circuits. By ignoring relevant jurisprudence on the WARN Act, the courts sapped the strength of their ultimate conclusions and robbed themselves of the opportunity to achieve a unified interpretation of the statute.

The *Bledsoe* court's rejection of relevant precedent would have been less problematic were the neglected body of law not so rich. However, the question of what limitations period is most appropriate for WARN Act actions has been weighed by four courts of appeals,<sup>149</sup>

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<sup>146</sup> *Bledsoe*, 635 F3d at 842 n 7 ("Our determination that the issue to be tried is not analogous to a breach of contract is not altered by plaintiffs' reliance on two cases in which the courts decided to apply a borrowed state-law limitations period for contract actions to the WARN Act actions at issue.").

<sup>147</sup> See *Nelson* Opposition at \*7–9.

<sup>148</sup> *Nelson*, 2012 WL 118490 at \*4. In their brief, the *Bledsoe* plaintiffs cited several WARN Act statute of limitations decisions without even noting that they arose outside of the Seventh Amendment context. The plaintiffs then cited a relevant Supreme Court decision on the WARN Act limitations period but provided no argument for why the analogy suggested in that decision was relevant to WARN Act jury rights. See Brief of Plaintiffs-Appellants, *Bledsoe v Emery Worldwide Airlines, Inc.*, No 09-4346, \*62–63 (6th Cir filed Jan 26, 2010) (available on Westlaw at 2010 WL 466771). In their reply brief, the plaintiffs once again neglected to substantiate the link between *North Star* and *Chauffeurs* analyses, even after being challenged on this point by the defendants. See Reply Brief of Plaintiffs-Appellants, *Bledsoe v Emery Worldwide Airlines, Inc.*, No 09-4346 (6th Cir filed Apr 20, 2010) (available on Westlaw at 2010 WL 7325152).

<sup>149</sup> See *United Mine Workers of America, AFL-CIO v Peabody Coal Co.*, 38 F3d 850, 856 (6th Cir 1994) (holding that the WARN Act is most closely analogous to the NLRA), vacd and

the Supreme Court,<sup>150</sup> and a smattering of district courts and commentators.<sup>151</sup> Much of this attention stemmed from an early division of authority among the circuit courts, with the Fifth and Sixth Circuits applying the NLRA's statute of limitations<sup>152</sup> and the Second and Third Circuits looking to state law.<sup>153</sup> After the Supreme Court explicitly resolved this split in *North Star* by rejecting borrowing from federal law, it still remained for the lower courts to determine the appropriate state-law limitations periods. Thus, even if one ignores the vacated opinions of the Fifth and Sixth Circuits,<sup>154</sup> it is possible to draw upon the various courts that have identified analogous state-law limitations periods. In net, each of these sources supports a characterization of WARN Act actions as actions at law.

### 1. Supreme Court precedent.

For the purposes of selecting an appropriate WARN Act limitations period, the dominant precedent is, of course, *North Star*. In that

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remd, 515 US 1119 (1995); *Halkias v General Dynamics Corp.*, 31 F3d 224, 229 (5th Cir 1994) (holding that the WARN Act and the NLRA have sufficient "similarities in purpose" to permit borrowing of the § 10(b) limitations period), vacd and remd, 56 F3d 27 (5th Cir 1995) (en banc); *United Steelworkers of America, AFL-CIO-CLC v Crown Cork & Seal Co.*, 32 F3d 53, 61 (3d Cir 1994) (holding that despite the absence of a "perfect analogy" to the WARN Act in state law, various state-law limitation periods would suffice); *United Paperworkers International Union and Its Local 340 v Specialty Paperboard, Inc.*, 999 F2d 51, 57 (2d Cir 1993) (holding that a contract statute of limitations is sufficiently analogous to permit application to WARN Act actions).

<sup>150</sup> See *North Star*, 515 US at 33–37.

<sup>151</sup> See, for example, Jason E. Markel, Note, *Divining a Statute of Limitations for the Worker Adjustment and Retraining Notification ("WARN") Act: Application of State Statutes of Limitations versus the NLRA Six-Month Statute of Limitations*, 1995 Detroit Coll L Rev 1029, 1053–64 (summarizing the circuit split and analyzing the aftermath of *North Star*); Peter J. Mignone, Note, *What Statute of Limitations Should Apply to the Worker Adjustment and Retraining Notification Act?*, 63 Fordham L Rev 1419, 1455–58 (1995) (arguing on the eve of *North Star* that federal courts should apply the NLRA's six-month statute of limitations to WARN Act actions).

<sup>152</sup> See *Peabody Coal*, 38 F3d at 856; *Halkias*, 31 F3d at 229.

<sup>153</sup> See *Crown Cork*, 32 F3d at 61; *Specialty Paperboard*, 999 F2d at 57.

<sup>154</sup> For a general defense of vacated opinions as persuasive precedent, see Charles A. Sullivan, *On Vacation*, 43 Houston L Rev 1143, 1187–96 (2006) (arguing that opinions can retain vitality as persuasive precedent after being vacated on "other grounds"). See also *In re Smith*, 964 F2d 636, 638 (7th Cir 1992) (stating that courts of appeals "vacate unappealable decisions, to prevent them from having a preclusive effect," not "to prevent them from having a precedential effect"); *Berkley v United States*, 48 Fed Cl 361, 370 n 3 (2000) ("Although [a prior case] was eventually vacated . . . and is no longer binding precedent in the Eleventh Circuit, it still provides sound guiding analysis."). While it could be argued that the structure of the *DelCostello* test—which permitted the Supreme Court in *North Star* to overturn the Fifth and Sixth Circuits without directly undermining the value of the analogy to the NLRA—preserved the relevance of these vacated opinions, this Comment does not pursue that line of argument. Given that the relevant reasoning in the vacated opinions largely duplicates that of the unscathed opinions, economy dictates the more focused inquiry.



case, the Supreme Court directly addressed the issue, indicating that any of several state statutes of limitations were suitably analogous to satisfy *DelCostello's* directive.<sup>155</sup> In particular, the Court approved of four possible limitations periods under Pennsylvania law: (1) a two-year period for enforcing civil penalties generally,<sup>156</sup> (2) a three-year period for claims under the Pennsylvania Wage Payment and Collection Law,<sup>157</sup> (3) a four-year period for breach of an implied contract,<sup>158</sup> and (4) a six-year residual statute of limitations.<sup>159</sup>

As the Sixth Circuit recognized in *Bledsoe*, the *North Star* Court declined to identify which state law statute was *most* analogous, since the suit at issue would have been timely under even the strictest of the available options.<sup>160</sup> Still, it is worth noting that, of the four analogous statutes suggested, three are ambiguous as to the law-equity distinction and one—the implied breach of contract claim—unequivocally supports a legal characterization of WARN Act actions.

Some might dispute *North Star's* relevance on the ground that the bulk of the decision is dedicated to undermining the argument for an application of the NLRA statute of limitations—an inquiry that is irrelevant to the Seventh Amendment issue. Even so, something can be gleaned from the curious phrasing that the majority adopted in its central holding: “Since, then, a state counterpart provides a limitations period without frustrating consequences, it is simply beside the point that even a perfectly good federal analogue exists.”<sup>161</sup> While the final clause is dictum, to be sure, its language undercuts contrary suggestions that the WARN Act is most analogous to ERISA or Title VII by implicitly endorsing the NLRA as an adequate federal analogue.

## 2. Second Circuit precedent.

Turning to the lower courts, the Second Circuit, in *United Paperworkers International Union and Its Local 340 v Specialty Paperboard, Inc.*,<sup>162</sup> was the first court of appeals to consider the issue. The court first rejected the NLRA analogy because of the divergent federal policies animating the two statutes, reasoning that the WARN

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<sup>155</sup> See *North Star*, 515 US at 35.

<sup>156</sup> 42 Pa Cons Stat Ann § 5524(5) (Purdon 1981), held unconstitutional by *Commonwealth v Neiman*, 5 A3d 353 (Pa Super Ct 2010).

<sup>157</sup> 43 Pa Cons Stat Ann § 260.9a(g) (Purdon 1992).

<sup>158</sup> 42 Pa Cons Stat Ann § 5525(4) (Purdon 1981).

<sup>159</sup> 42 Pa Cons Stat Ann § 5527 (Purdon 1981).

<sup>160</sup> See *Bledsoe*, 635 F3d at 842 n 7.

<sup>161</sup> *North Star*, 515 US at 37.

<sup>162</sup> 999 F2d 51 (2d Cir 1993).

Act is targeted not at collective bargaining but rather at “alleviat[ing] the distress associated with job loss for both the workers and the community in which they live.”<sup>163</sup> Next, the court attacked any potential analogy to the FLSA. In this discussion, the court used language that is relevant to the Seventh Amendment inquiry (as was recognized by the plaintiffs in *Nelson*<sup>164</sup>): “Although damages are measured as two months['] pay and benefits, the WARN claim is not a claim for backpay because it does not compensate for past services. . . . [V]ictims of a failure to warn will often be unaware that they have suffered a compensable harm.”<sup>165</sup> This rejection of the characterization of WARN Act actions as “backpay” is directly at odds with the *Bledsoe* district court’s Title VII and ERISA analogies. Furthermore, the description of the WARN Act remedy as “damages” belies the “restitutionary” label assigned to it by the Sixth Circuit.

Satisfied that the WARN Act falls within *DelCostello*’s general “rule of thumb,”<sup>166</sup> the Second Circuit proceeded to consider the proper state-law limitations period. Although the court was unable to settle upon any “perfectly analogous” state statute, it quickly determined that the Vermont statute of limitations for contract claims was the best available analogy.<sup>167</sup> To support this conclusion, the court noted that Vermont courts applied the same statute of limitations in the workers’ compensation context, which involves actions that are also aimed at protecting workers from “unexpected joblessness.”<sup>168</sup> Thus, though the Second Circuit was careful to disclaim the notion that WARN Act actions should be treated identically to contract actions, its holding closely aligns such claims with a prototypical action at law: the breach of contract suit for damages.<sup>169</sup>

### 3. Third Circuit precedent.

The Third Circuit followed the Second Circuit’s rejection of federal law analogies. In *United Steelworkers of America, AFL–CIO–CLC v Crown Cork & Seal Co*<sup>170</sup>—a case ultimately affirmed by the

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<sup>163</sup> *Id.* at 54.

<sup>164</sup> See text accompanying notes 92–97.

<sup>165</sup> *United Paperworkers*, 999 F2d at 55.

<sup>166</sup> *DelCostello*, 462 US at 158 n 12. See also text accompanying note 105.

<sup>167</sup> *United Paperworkers*, 999 F2d at 57.

<sup>168</sup> *Id.*, citing *Hartman v Ouellette Plumbing & Heating Corp*, 507 A2d 952, 953 (Vt 1985) and *Fitch v Parks & Woolson Machine Co*, 191 A 920, 922 (Vt 1937).

<sup>169</sup> See *United Paperworkers*, 999 F2d at 57 (“We must emphasize, however, that this determination does not mean that WARN is a contract action and that it should be found to be an implied term in every employment contract.”).

<sup>170</sup> 32 F3d 53 (3d Cir 1994).

Supreme Court in *North Star*—the court similarly noted that the WARN Act and the NLRA serve purposes that are too distinct to invoke the exception to *DelCostello*'s default rule.<sup>171</sup> Indeed, aside from a brief detour to distinguish circuit precedent,<sup>172</sup> the *Crown Cork* opinion very closely followed the path forged by the Second Circuit. Though the court described the WARN Act in a footnote as providing “a strict statutory mechanism for computing *damages*,”<sup>173</sup> little else of relevance can be gleaned from this discussion. Insofar as *North Star* considered an appeal from *Crown Cork*, the four Pennsylvania statutes of limitations that the Supreme Court affirmed are identical to those considered by the Third Circuit. Thus, the *Crown Cork* court's blanket approval of the various analogous statutes does not offer any independent, persuasive precedent.

#### 4. Post-*North Star* precedent: Fifth, Eighth, and Tenth Circuits.

Three circuit courts have considered the appropriate WARN Act limitations period in the years following *North Star*. In *Frymire v Ampex Corp.*,<sup>174</sup> the Tenth Circuit adopted a state-law contract limitations period, holding that “the WARN Act imposes a federal mandate upon employers that effectively obligates them as if bound by the terms of an employment contract.”<sup>175</sup> The Eighth Circuit followed suit in *Aaron v Brown Group, Inc.*,<sup>176</sup> where it embraced a similar interpretation of the WARN Act as notionally “insert[ing] additional terms into covered employment contracts.”<sup>177</sup> In rejecting a contrary analogy to the limitations period from Missouri's wage-and-hour statute, the Eighth Circuit also expressly followed the Second Circuit in asserting that the WARN Act remedy is not “a claim for backpay because it does not compensate for past services.”<sup>178</sup> Finally, in the most recent decision, the Fifth Circuit sanctioned the borrowing of either a two-year tort limitations period or a four-year contract-claims

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<sup>171</sup> Id at 59 (“In order to justify departing from the general rule, the analogy must be more direct.”).

<sup>172</sup> See id, citing *Haggerty v USAir, Inc.*, 952 F2d 781, 787 (3d Cir 1992).

<sup>173</sup> *Crown Cork*, 32 F3d at 59 n 2.

<sup>174</sup> 61 F3d 757 (10th Cir 1995).

<sup>175</sup> Id at 764 (“Additionally, the WARN remedy of back pay mirrors the type of remedy afforded those who fall victim to an implied contract breach—giving individuals what they would have been entitled to had there been no breach.”).

<sup>176</sup> 80 F3d 1220 (8th Cir 1996).

<sup>177</sup> Id at 1225 (holding that Missouri's five-year statute of limitations for contract actions should govern WARN Act actions).

<sup>178</sup> Id, citing *United Paperworkers*, 999 F2d at 55.

and actions-in-debt limitations period.<sup>179</sup> Though the court noted that a WARN Act suit is “not particularly analogous to either,” it nonetheless highlighted comparable features aligning the various actions.<sup>180</sup> Thus, each circuit court to address the WARN Act statute of limitations after *North Star* has analogized it to a state action at law.

#### D. Applying Borrowed Statute of Limitations Precedent to the Seventh Amendment Question

While the case law surrounding the WARN Act statute of limitations is not readily susceptible to pithy summary, several generalizations can be made. As explained in Part III.C, the Second, Third, Fifth, Eighth, and Tenth Circuits have all explicitly embraced an analogy between the WARN Act and an action at law in the context of a *DelCostello* analysis. While the Supreme Court in *North Star* did not explicitly endorse such an analogy, it did sanction an assortment of analogues—three ambiguous statutes and one which was unequivocally “legal.”<sup>181</sup> Two courts—the Fifth and Sixth Circuits—rejected state law in favor of an analogy to the NLRA, but each has since been vacated in light of *North Star*’s contrary holding.

Thus, the consensus of the federal circuits appears to favor an analogy between WARN Act actions and either breach of contract or tort actions at law. In light of the Supreme Court’s past reliance on even the sparest of borrowed statute of limitations precedent,<sup>182</sup> this existing consensus thus militates strongly for the characterization of the WARN Act action and its attendant remedy as legal in nature.

This conclusion is further supported by the reasoning employed by the circuit courts in pursuing their borrowed statute of limitations analyses. The Second and Eighth Circuits have each described the WARN Act backpay remedy as “not a claim for backpay,” an assertion that directly undercuts any attempt to link the remedy to the backpay awards that are equitable in the Title VII and ERISA contexts.<sup>183</sup> In addition, several circuit courts have suggested that the WARN Act’s effect is equivalent to the insertion of additional language into employment contracts, an assertion that directly contradicts

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<sup>179</sup> *Staudt v Glastron, Inc.*, 92 F3d 312, 316 (5th Cir 1996) (declining to determine which of the two potentially analogous statutes of limitations was applicable because plaintiff’s claim was timely under both).

<sup>180</sup> *Id.* (stating that the WARN Act is like a tort claim in that “both require a ‘wrongful’ act by the defendant” and that it is like an action on a debt for wages in that “[t]he worker can recover what he would have earned had his employer provided him the requisite notice”).

<sup>181</sup> *North Star*, 515 US at 36.

<sup>182</sup> See Part III.B.

<sup>183</sup> *United Paperworkers*, 999 F2d at 55; *Aaron*, 80 F3d at 1225.

the *Bledsoe* district court's analysis of the first prong of the *Chauffeurs* test. Thus, the extant borrowed statute of limitations precedent has even more persuasive value in the Seventh Amendment context than did the *Reed* analogy that carried the day in *Wooddell*.

#### IV. CLARIFYING THE INTERACTION BETWEEN *DELCASTELLO* AND *CHAUFFEURS* ANALYSES

While the Supreme Court has repeatedly used analogues from its *DelCostello* jurisprudence to inform Seventh Amendment inquiries, the Court has never provided an explicit justification for this cross-pollination. Thus far, this Comment has contented itself with merely highlighting the Court's past practices, with the goal of rebutting the claim that borrowed limitations period analogues are irrelevant to the *Chauffeurs* analysis. This Part takes the next step, exploring *why* analogues advanced in *DelCostello* analyses are germane to the Seventh Amendment context. In particular, this Part addresses two obvious problems with exporting analogues from the *DelCostello* analysis.

The first difficulty arises out of the fundamental mismatch between the analogues considered in borrowed statute of limitations analyses and those considered in a Seventh Amendment inquiry. While *DelCostello*'s default rule demands that courts "apply the most closely analogous statute of limitations under state law,"<sup>184</sup> *Chauffeurs* requires a comparison first of "statutory action[s]" and then of "remed[ies] sought."<sup>185</sup> Thus, the product of a *DelCostello* analysis is an analogous statute of limitations, while the product of a *Chauffeurs* analysis is an analogous civil action and remedy. Viewed from this perspective, it is hard to fault the Sixth Circuit for finding that *DelCostello* entails an entirely different analysis from *Chauffeurs*.

Following on the heels of this observation is an obvious question: Which of the two prongs of the *Chauffeurs* inquiry does a *DelCostello* analysis speak to? When the *Wooddell* Court relied on the statute of limitations analogy produced in *Reed*, was it resolving the first-prong search for an eighteenth-century analogue or the second-prong inquiry into the proper characterization of the statutory remedy? If statute of limitations precedent can inform the Seventh Amendment inquiry, one must determine where exactly it enters into the two-pronged test that structures that inquiry.

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<sup>184</sup> *DelCostello*, 462 US at 158.

<sup>185</sup> *Chauffeurs*, 494 US at 565 (Marshall) (plurality), quoting *Tull v United States*, 481 US 412, 417–18 (1987).

This Part tackles each of these difficulties in turn. First, it addresses the mismatch between the analogues produced by *DelCostello* and *Chauffeurs* analyses, concluding that this superficial incongruity actually poses no barrier to cross-pollination. Next, it explores how statute of limitations precedent can be used to inform both the first and the second prong of the *Chauffeurs* analysis.

A. Untangling the Link between Statutes of Limitations, Civil Actions, and Remedies

This Section grapples with an irrebuttable truth: statutes of limitations are not civil actions, and neither is a remedy. If courts applied the *DelCostello* test simply by casting about for analogous statutes of limitations, this truism would entirely undermine the transplantation of the *DelCostello* analysis into the *Chauffeurs* test. However, a brief reconsideration of the case law surveyed in the previous Part makes evident that courts seldom (if ever) confine themselves to a direct consideration of statutes of limitations. Rather, courts frequently approach the *DelCostello* analysis by analyzing the substantive rights protected by the civil action under scrutiny, characterizing its remedies, and only afterward anointing an analogous statute.

Considering first the WARN Act precedent generated by the circuit courts, the Second Circuit opinion in *United Paperworkers* provides an excellent example of this phenomenon. When the Second Circuit rejected an analogy to the FLSA statute of limitations, it concerned itself not with limitations periods per se but rather with a characterization of the WARN Act's backpay remedy as monetary "damages" pegged to worker salaries.<sup>186</sup> When the same court eventually settled on an analogy to a state-law, contract-claim limitations period, it justified its holding by noting that the same statute was used by state courts to regulate workers' compensation suits.<sup>187</sup> The critical link in this argument was that both workers' compensation actions and WARN Act actions implicate workers' substantive rights to protection from "unexpected joblessness."<sup>188</sup>

Turning to the relevant Supreme Court precedent, this narrative becomes more complicated. As discussed in Part III.B.2, the *Reed* decision—relied upon by the *Wooddell* Court—pursued a course of reasoning somewhat orthogonal to the Seventh Amendment question.<sup>189</sup> In addition, the *DelCostello* opinion cited in *Chauffeurs* also

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<sup>186</sup> *United Paperworkers*, 999 F2d at 55.

<sup>187</sup> *Id.* at 57.

<sup>188</sup> *Id.* See also Part III.B.2.

<sup>189</sup> *Reed*, 488 US at 326–31.

focused primarily on timing issues specific to the limitations period.<sup>190</sup> However, the *Wilson* decision integrated by Justice Scalia into his *City of Monterey* concurrence is much more consistent with the practice of focusing on remedies sought and substantive rights protected.<sup>191</sup>

In fact, *Wilson* provides a particularly striking example of how the search for an analogous statute of limitations bleeds into a search for an analogous cause of action. The *Wilson* majority began its inquiry by straightforwardly announcing an intention to “adopt[] the statute governing an analogous cause of action under state law.”<sup>192</sup> In order to arrive at a suitable analogy, the Court resolved itself to developing a “characterization of § 1983 for statute of limitations purposes,” which was said to be “derived from the elements of the cause of action, and Congress’ purpose in providing it.”<sup>193</sup> The ensuing analysis reflected this methodology, considering analogies to tort and malpractice by comparing the remedies sought and the rights protected by those civil actions.<sup>194</sup>

Though *Wilson* provides strong confirmation of the narrative pursued in this Part, it does little to explain why the *Wooddell* majority and *Chauffeurs* plurality sought support from limitations period analogies with justifications orthogonal to the Seventh Amendment inquiry. One possible answer is that the Court was simply motivated by a desire to harmonize its Seventh Amendment and borrowed statute of limitations jurisprudence.<sup>195</sup> Another possibility is that the Court actually had in mind independent justifications for the analogies in the jury trial context but simply found it unnecessary to express them. At bottom, though, the Justices simply provided too little discussion to definitively resolve this puzzle. Thus, while much of the interaction between the *DelCostello* and *Chauffeurs* analyses can be clarified, this particular corner of the law remains a black box. For these two decisions, it must suffice to conclude that the Court found a borrowed limitations period analogy persuasive in the Seventh Amendment context, though one knows not why.

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<sup>190</sup> *DelCostello*, 462 US at 164–72.

<sup>191</sup> See *City of Monterey*, 526 US at 724–29 (Scalia concurring), citing *Wilson* 471 US at 268–77.

<sup>192</sup> *Wilson*, 471 US at 271.

<sup>193</sup> *Id.* at 268.

<sup>194</sup> *Id.* at 272–79.

<sup>195</sup> This motivation tracks Justice Scalia’s discussion in his concurrence to *City of Monterey*. Unless there exists a compelling reason to sustain divergent—and perhaps contradictory—characterizations of the same statutory language, a court should strive to adopt a unified analysis. See *City of Monterey*, 526 US at 723–26 (Scalia concurring).

B. Locating the Interface between *DelCostello* and *Chauffeurs* Analyses

In the previous Section, this Comment examined the somewhat vague relationship between the analogies adopted in the Seventh Amendment context and those adopted in the borrowed statute of limitations context. While that discussion partly resolved how statute of limitations analogies can be used to inform a Seventh Amendment inquiry, it remains to be shown exactly *where* these analogues can be plugged into the two-prong *Chauffeurs* test. This Section addresses that question, first by considering the Supreme Court's decisions in *Chauffeurs*, *Wooddell*, and *City of Monterey*, and then by noting that the reasoning borne of borrowed limitations period analysis can fruitfully be brought to bear on both prongs of the prevailing Seventh Amendment analysis.

This Comment has documented three decisions in which the Supreme Court used analogues developed in a *DelCostello* analysis to resolve a Seventh Amendment question. Each of these decisions incorporated borrowed statutes of limitations into its first-prong analysis, using *DelCostello* precedent to aid in the search for an "18th-century action[] brought in the courts of England prior to the merger of the courts of law and equity."<sup>196</sup> Thus, to the extent that the Supreme Court has provided guidance on this question for the lower courts, it has indicated that borrowed statute of limitations analysis should be used to inform the first prong of the *Chauffeurs* historical test.

The discussion in the previous Section, however, supports a much broader application of statute of limitations reasoning. Insofar as courts seeking to impute a limitations period frequently scrutinize the statutory remedies and the parties' substantive rights, *DelCostello* precedent is obviously relevant to the second-prong characterization of the remedy sought. Where courts pursuing a *DelCostello* analysis assess the suitability of analogies by reference to the remedies sought, the legal or equitable characterization of the analogy selected has obvious bearing in the Seventh Amendment context. The WARN Act precedent surveyed in Part III offers fertile ground for the application of this approach.

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<sup>196</sup> *Chauffeurs*, 494 US at 565 (Marshall) (plurality), quoting *Tull*, 481 US at 417. See also *City of Monterey*, 526 US at 709; *Wooddell*, 502 US at 98.



## CONCLUSION

Seventh Amendment analyses of novel statutes are inevitably complicated by the impracticality of drawing analogies between the legal forms of the eighteenth and twenty-first centuries. This Comment has illustrated that the abstruse inquiries demanded by *Chauffeurs* and its progeny need not, and should not, be considered in a vacuum. Rather, courts should ground their Seventh Amendment reasoning within a broader construction of the statutes they examine. In the case of the WARN Act, this entails a careful consideration of persuasive precedent arising out of the borrowed statute of limitations analysis. As this Comment has argued, this source of persuasive precedent supports an interpretation under which WARN Act actions are analogous to actions at law. However, the general framework—under which a court confronted with a Seventh Amendment question attempts to situate its holding within the broader body of law—has a wider application.

Indeed, Congress's frequent failure to supply specific statutes of limitations renders the *DelCostello* analysis a common occurrence, despite the legislative effort to provide a default federal limitations period. It is thus no happenstance that the Supreme Court has dipped into this rich source of law on several occasions. As this Comment demonstrates, much can be gained from attempting to integrate the modern jurisprudence surrounding a statute into the historical test.

Moreover, there is a sound pragmatic basis for this approach. When the various circuit courts of appeals interpreted the WARN Act in the borrowed limitations period context, they committed themselves to specific characterizations of civil actions brought under the Act. Insofar as these characterizations, and the analogies that they foster, carry over into the Seventh Amendment context, they should constrain the courts' reasoning under the *Chauffeurs* test. Given the link that the Supreme Court has recognized between analogues developed in these two areas of law, it is counterintuitive and counterproductive for the courts to adopt different characterizations of the Act (and its remedies) in the two contexts. Under this analysis, the courts should follow the sage advice of Justice Scalia and refrain from fracturing their conception of the WARN Act unless they can "explain why a different approach is appropriate" in the Seventh Amendment context.<sup>197</sup>

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<sup>197</sup> *City of Monterey*, 526 US at 726 (Scalia concurring).