THE CONTINUING DRIFT OF FEDERAL SOVEREIGN IMMUNITY JURISPRUDENCE

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ABSTRACT

With the enduring doctrine of federal sovereign immunity, it is too late in the day to suggest that the United States should be treated as an ordinary party in the federal courts. Yet as the Supreme Court has become more comfortable with the increasingly common encounter with a statutory waiver of immunity, the rigidity of interpretive approach has eased. An early jaundiced judicial attitude has resolved into a greater respect for the legislative promise of relief to those harmed by their government. After sketching the history of statutory waivers over the past century-and-a-half and examining Supreme Court decisions across the decades, this Article maintains that a coherent and principled jurisprudence of federal sovereign immunity has been gradually emerging. The Court now reserves absolute jurisdictional analysis for verifying the existence of a statutory waiver for a general class of claims, while judiciously employing strict construction to preclude judicial implication of new causes of actions or remedies. By contrast, the Court is more inclined to use ordinary modes of statutory construction when examining other standards, limitations, or exceptions in statutory waivers, even presuming that procedural rules apply in government cases in the same manner as in private litigation. Unfortunately, a recent Supreme Court decision resurrected an old line of cases that translated a statute of limitations for certain claims against the

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United States into a jurisdictional rule. This Article suggests that the negative effect of this decision on the course of the law, although not negligible, is limited by the decision's reliance on stare decisis. This Article concludes that the Court should speak more purposively to its interpretive approach in the future if the renewed drift in its federal sovereign immunity jurisprudence is to be arrested.

TABLE OF CONTENTS

INTRODUCTION

In its 2008 decision in *John R. Sand & Gravel Co. v. United States*,[1] the Supreme Court addressed a question that seemingly only a lawyer could love (or care about): whether the statute of limitations governing non-tort money claims against the federal government in the United States Court of Federal Claims is *jurisdictional*. In other words, is this an ordinary statute of limitations, that is, an affirmative defense and a procedural time constraint that may be waived or forfeited by the government? Or is this instead a special and absolute rule of subject matter jurisdiction, one that cannot be relinquished and indeed that must be raised by the court on its own motion, even if both the claimant and the government agree that the lawsuit was timely filed?

Resolving whether a statute of limitations on claims against the federal government is jurisdictional or waivable sounds like an esoteric legal inquisition. But this seemingly abstruse query implicates the broader and more fundamental question of how strictly or generously the courts should regard statutes enacted by Congress that yield the sovereign immunity of the United States and open the courthouse doors to claims by the governed against their government. Even after the government has waived its sovereign immunity for a particular category of claims, does the citizen who seeks judicial redress for a governmental wrong still have a steep hill to climb, with every word of text and every term of the statute being slanted against the claimant?[2] Should the courts regard suits against the sovereign as "suspect, even when allowed," pursuant to a parsimonious canon of strict construction?[3] Do the rules of construction for statutory waivers "load the dice for or

1. 128 S. Ct. 750 (2008).

2. *See infra* Part II.A.

3. *See* Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517, 517-18 (1991) (referring to the traditional "story of sovereign immunity," which "includes the principle that waivers of sovereign immunity will be strictly construed").

against a particular result,"[4] the upshot being that the government usually wins?

In recent decades, the Supreme Court has drifted toward a jurisprudential approach that, while carefully protecting governmental policymaking prerogatives when considering the nature and extent of liability by the government, upholds the statutory promise of an individual judicial remedy for official wrongdoing. An early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government. Under this coalescing interpretive regime, jurisdictional analysis is increasingly confined to the core questions of the existence and basic capacity of a consent to suit.[5] The traditional rule of strict construction in favor of the sovereign has become more attentively focused upon the general scope of the waiver in terms of the cause of action and remedy allowed against the government.[6] As the distance grows between a statutory standard or limitation and the core substance of the waiver, presumptions in favor of the government fade and statutory construction assumes an ordinary shape.[7] Indeed, the Court has adopted a rebuttable presumption that procedural rules, including statutes of limitation, are to be applied in the same manner as among private parties, with no special solicitude for the government.[8]

Under the Supreme Court's modern interpretive approach to statutory waivers of federal sovereign immunity, section 2501 of Title 28 of the United States Code[9]—the statute of limitations for money claims in the Court of Federal Claims at issue in *John R. Sand*—might have offered an easy case for a less rigid reading and for classification under the general rule that the time limitation should be applied in accordance with the same rules that govern private litigation.[10] The plain language of the statute suggests that

4. ANTONIN SCALIA, A MATTER OF INTERPRETATION 27-28 (1997) (generally criticizing preferential rules and presumptions of strict or liberal construction that detract from a focus on text).

5. *See infra* Part II.B.3.

6. *See infra* Part II.C.

7. *See infra* Part II.C.3.

8. *See infra* Part II.D.

9. 28 U.S.C. § 2501 (2000).

10. *See infra* Part III.A.

the jurisdictional inquiry is to be completed separately before application of the time limitation: "Every claim of which the United States Court of Federal Claims *has* jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[11] The legislative history when the predecessor statute was enacted in 1863 indicates that members of Congress expected this statute of limitations to apply to the government in the same manner as to private parties.[12] The contemporary legal understanding at the time of enactment was that a statute of limitations was a waivable defense.[13] Indeed, Congress had selected language from typical state statutes of limitations of the period, thus drafting § 2501 to be what the Supreme Court later called an "unexceptional" statute of limitations.[14]

In deciding the *John R. Sand* case, the Court disagreed with none of these points on the merits. Nonetheless, a majority held that the statute of limitations had jurisdictional force, requiring a court to "raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue."[15] The Court's decision was premised squarely and exclusively on the principle of stare decisis.[16] The majority adhered to a nineteenth century line of cases from a very early stage in the Court's sovereign immunity jurisprudence that reflected a rigid jurisdictional disposition toward then-novel legislation affording a judicial remedy against the federal government.[17] The majority acknowledged that the Court's more recent decisions "represent a turn in the course of the law" and further admitted that the contrasting lines of case authority reinforced by its decision in *John R. Sand* may create an "anomaly" in the case law.[18] But the majority believed that the resulting conflict was not "critical" and did not produce "'unworkable' law" so as to justify overturning supposedly well-

11. 28 U.S.C. § 2501 (emphasis added).
12. *See infra* Part III.A.
13. *See infra* Part III.A.
14. Franconia Assocs. v. United States, 536 U.S. 129, 145 (2002).
15. John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 752 (2008).
16. *Id.* at 753-57.
17. *See infra* Part II.B.2 (discussing the early cases).
18. *John R. Sand*, 128 S. Ct. at 756.

settled precedent.[19] Two justices dissented, agreeing both that the jurisdictional rule reaffirmed by the majority had been abandoned in prior decisions and that any ambiguity in the case law "ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago."[20]

Whither, then, the Supreme Court's jurisprudence on statutory waivers of sovereign immunity? In so many ways in recent decades, the Supreme Court has moved beyond a narrow and restrictive posture toward such statutes that sometimes defeated congressional intent.[21] The Court has developed a more mature and refined approach toward the increasingly common judicial encounter with statutes authorizing suit against the federal government.[22] In dissent, Justice Stevens feared that the *John R. Sand* decision might "revive the confusion" of that earlier jurisprudence.[23] More optimistically, *John R. Sand* may come to be identified as what Justice Stevens characterized as "a carve-out" from the modern approach for those specific statutory provisions that had been the subject of early Supreme Court decisions with a different interpretive attitude.[24]

Even if *John R. Sand* proves to be only a bump on the road toward a principled and coherent regime for interpretation and application of statutory waivers of federal sovereign immunity, it nonetheless is a big bump that threatens to rip off the muffler and make for a very noisy ride in the near future.[25] Because a money suit in the Court of Federal Claims is the vehicle for a large category of important claims against the federal government—suits to be compensated for takings of property under the Fifth Amendment, certain contract disputes, breach of trust claims by Indian tribes, military employment claims, etc.[26]—an exception from the general trend of sovereign immunity jurisprudence for these claims creates

19. *Id.* (citations omitted).
20. *Id.* at 759 (Stevens, J., dissenting); *see also id.* at 759-60 (Ginsburg, J., dissenting).
21. S*ee infra* Part II.B.2.
22. S*ee infra* Part II.C.2.
23. *John R. Sand*, 128 S. Ct. at 759 (Stevens, J., dissenting).
24. *Id.* at 758.
25. *See infra* Part III.C.
26. *See infra* text accompanying notes 476-78.

a large gap in the doctrine. And because so many questions of statutory construction in suits against the United States remain to be definitively decided, the Supreme Court's *John R. Sand* decision likely presages a new era of disputation in the courts, even if the Supreme Court in the end wanders back onto the path that it had followed for decades before this stare decisis-justified detour.[27]

In the very context of sovereign immunity and the discordant notes sounded by inconsistent decisions in this area of the law, Justice Frankfurter wrote half a century ago that "[t]here comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony."[28] Taking up Justice Frankfurter's suggestion here by examining the 150-year history of statutory waivers of sovereign immunity[29] and the changing course of the Supreme Court's decisions across those decades,[30] this Article endeavors to "take soundings in order to know where we are and whither we are going."[31] Although the *John R. Sand* decision may have set the Court's federal sovereign immunity jurisprudence back adrift just as it appeared to have found its way to a secure anchorage, the current of case law may be strong enough to bring it back to port.

I. THE CONCEPT AND WAIVER OF FEDERAL SOVEREIGN IMMUNITY

A. The Conceptual Grounding, Persistent Criticism, and Perseverance of the Doctrine of Federal Sovereign Immunity

From the founding of our nation, the mantle of sovereign immunity has rested uneasily on a government designed to be limited in powers and understood to draw its authority from the people.[32] Rather than requiring consent by the government before

27. *See infra* Part III.C.

28. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 706 (1949) (Frankfurter, J., dissenting).

29. *See infra* Part I.

30. *See infra* Part II.

31. *Larson*, 337 U.S. at 706.

32. *See* United States v. Lee, 106 U.S. 196, 208-09 (1882) (criticizing the general doctrine of federal sovereign immunity as grounded on a mistaken analogy to the English system,

enduring suit by its citizens, the opposite might have been assumed with respect to a government that depends upon the consent of the governed.[33] Akhil Amar writes that "in America, neither federal institutions nor state governments were truly sovereign," but rather "[o]nly the people were," so that a government "could not, properly speaking, claim a sovereign's immunity."[34] Susan Randall contends that "the founding generation did not intend state sovereign immunity and instead viewed the ratification of the Constitution as consent to Article III suits by the states individually and collectively for the United States."[35] Because Article III expressly defines the judicial power to include "Controversies to which the United States shall be a party,"[36] she argues that the authority for claims to be pursued in court against the federal government was granted in the founding charter itself.[37]

At the same time, the emergence of something like sovereign immunity probably was inevitable, at least as a clear point of departure for developing a refined policy and practice of government liability in court to private complainants. Although casting off the autocracy of historical monarchy and being grounded instead upon democratic approval, the United States *is* a sovereign government, empowered to act for the collective good in an authoritative manner, distinct from any private individual or private organization.[38] Although its powers are granted pursuant to a written Constitution and its agents are beholden to a greater or lesser extent to an electorate, the executive and legislative branches do possess powers of government that may and sometimes must be exercised, despite the objections of a particular individual who may be aggrieved by

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saying that "[u]nder our system the *people*, who are [in England] called *subjects*, are the sovereign").

33. *See* Malone v. Bowdoin, 369 U.S. 643, 650 (1962) (Douglas, J., dissenting) (criticizing sovereign immunity as "plac[ing] the advantage with an all-powerful Government, not with the citizen").

34. AKHIL REED AMAR, AMERICA'S CONSTITUTION 335 (2005).

35. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 3 (2002).

36. U.S. CONST. art. III, § 2, cl. 1.

37. *See* Randall, *supra* note 35, at 38.

38. *See* United States v. Lee, 106 U.S. 196, 226 (1882) (Gray, J., dissenting) (asserting that the "maxim" of sovereign immunity "is not limited to a monarchy, but is of equal force in a republic" because "it is essential to the common defence and general welfare").

such actions.[39] As Alexander Hamilton wrote in *The Federalist No. 81* while urging ratification of the Constitution, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*."[40] Likewise, John Marshall, who would later become Chief Justice of the United States, assured the Virginia ratifying convention that "[i]t is not rational to suppose that the sovereign power should be dragged before a court."[41]

The question of the legitimacy of sovereign immunity in a democratic society is inextricably intertwined with the two-century-old American question of the proper role of the judiciary in resolving disputes that implicate the public policy choices made by officials in the political branches of the government. In this respect, Harold Krent explains sovereign immunity as "deriv[ing] not from the infallibility of the state but from a desire to maintain a proper balance among the branches of the federal government, and from a proper commitment to majoritarian rule."[42] The moral claim of those injured by government wrongdoing (or even as collateral damage to the proper workings of government) is not to be ignored. But the legal authority for redressing that harm resides with the political branches of government, at least initially in determining whether to extend a judicial venue. And "[i]n determining whether waiver is appropriate," Krent writes, "Congress plausibly may conclude that the potential harm to majoritarian policymaking from damage actions outweighs the benefits in added deterrence of tortious conduct by the government, increased efficiency in contracting, and more equitable compensation of injured parties."[43]

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39. *See* Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868) (claiming that "but for the protection which [sovereign immunity] affords, the government would be unable to perform the various duties for which it was created"). *But see* Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 395 (1970) (arguing that "from the standpoint of sound legal engineering, we do not need a doctrine of sovereign immunity as a judicial tool," because the judiciary may be trusted to remain within legal limits defined by scope of review and judicial competence).

40. THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

41. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed., 2d ed. 1888).

42. Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992).

43. *Id.* at 1531.

In any event, uneasily and awkwardly but quite definitively, the concept of sovereign immunity has attached firmly to the United States government. Scholars may continue to debate "[w]hether federal sovereign immunity and its jurisprudential cousin, state sovereign immunity, were accepted premises underlying—or instead intended casualties of—the ratification of the United States Constitution."[44] Sovereign immunity may be deprecated by some as "a legal anachronism canonized as a legal maxim"[45] that persists only as a matter of "historical accident, habit, a natural tendency to favor the familiar, and inertia."[46] Or instead the concept may be defended by others as "stem[ming] from concerns for preserving majoritarian policymaking and not from any need to honor hoary traditions."[47] Since at least its 1821 decision in *Cohens v. Virginia*,[48] the Supreme Court has embraced the sovereign immunity principle that the United States may not be sued without its consent as the "universally received opinion."[49] In sum, as Laurence Tribe says, "the doctrine of sovereign immunity is in no danger of falling out of official favor any time soon."[50]

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44. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 443 (2005); *see also* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 867 (1970) ("Since the end of the last century, learned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth [sovereign immunity]."). For a critical review of the ongoing debate on the justifications for the doctrine of sovereign immunity, see Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of the Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. (forthcoming 2008); *see also* Kurt Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Principle of Strict Construction*, 50 WM. & MARY L. REV. (forthcoming 2009) (discussing founding-era sentiments of sovereign immunity).

45. Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924).

46. Davis, *supra* note 39, at 384.

47. Krent, *supra* note 42, at 1531.

48. 19 U.S. (6 Wheat.) 264 (1821).

49. *Id.* at 411-12.

50. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-25, at 520 (3d ed. 2000).

B. A History of Statutory Waivers of Sovereign Immunity

Reserving a central place for statutory waivers, Vicki Jackson describes sovereign immunity as "a place of contest between important values of constitutionalism":

> On the one hand, constitutionalism entails a commitment that government should be limited by law and accountable under law for the protection of fundamental rights; if the "essence of civil liberty" is that the law provide remedies for violations of rights, immunizing government from ordinary remedies is in considerable tension with all but the most formalist understandings of law and rights. On the other hand, a commitment to democratic decisionmaking may underlie judicial hesitation about applying the ordinary law of remedies to afford access to the public fisc to satisfy private claims, in the absence of clear legislative authorization.[51]

By virtue of the doctrine of sovereign immunity, when seeking as a nation to resolve the imperative question of how to uphold individual rights and remedies while preserving democratic rule, Harold Krent explains that "we trust Congress, unlike any other entity, to set the rules of the game."[52] Under the doctrine of federal sovereign immunity as it has evolved in Supreme Court jurisprudence over the past 200 years,[53] the amenability of the federal government to legal action in court turns upon consent by the government, expressed through legislation enacted by a democratically elected congress.

As suggested above, sovereign immunity—or something like it—may have been an inevitable legal development, because open-ended and unconstrained access to the courts by those who object to governmental policies or actions could undermine effective governance by the people through an electoral majority. Ideally then, sovereign immunity should be a level foundation upon which Congress may construct a statutory regime that establishes

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51. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521 (2003) (citations omitted).

52. Krent, *supra* note 42, at 1531.

53. On the evolution of the doctrine of federal sovereign immunity in the Supreme Court, see generally Sisk, *supra* note 44, at 446-56.

government accountability in court for carefully designed remedies, balanced by well-justified policy limitations.[54] When policy initiatives are most prominently presented, public concerns perhaps should not bow to private complaints, and judicial authority appropriately may be withheld.[55] But when mundane government activity is involved, devoid of policy implications, we should expect legislative waivers to be readily adopted.[56]

Unfortunately, during more than two centuries of American history under our Constitution, Congress has often proven to be an indolent builder of a regime for governmental accountability in court, leaving the foundation bare for decades and then slowly adding a wall at a time, with large breaks of time in between, and only reaching a stage of rough completion in the last few decades. The work of Congress in authorizing suit against the sovereign is summarized in the next several subparts of this Article.

1. The Origin of Statutory Waivers: Contracts, Money, and the Court of Claims

Three quarters of a century passed after the ratification of the Constitution before Congress enacted the first significant grant of permission by the sovereign United States to its citizens to seek relief against it in the courts.[57] In 1855, Congress created the United States Court of Claims and conferred upon it limited authority to hear claims against the United States founded upon federal

54. *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 333 (2000) (describing sovereign immunity as a "background structural understanding" that may be surrendered "only on the basis of a judgment to that effect by the national legislature").

55. *See* Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 415 (1970) ("[T]he application of the sovereign immunity doctrine should rest on whether the benefits of judicial review of administrative action are outweighed by the possible interference with governmental programs that may result from the grant of relief.").

56. Krent, *supra* note 42, at 1529-33; *see also* Sisk, *supra* note 44, at 442.

57. For a discussion of the various administrative and legislative claim processes that were developed in these early years of the Republic, as well as the increasing burdens imposed on administrators and members of Congress, together with episodes of injustice and corruption, see William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387 (1968).

statutes, regulations, and contracts.[58] Prior to 1855, individuals with contract or other monetary claims against the federal government had been barred by sovereign immunity from seeking redress in court, and thus were left to petition Congress to enact legislation—in the form of "private bills"—appropriating funds to pay those claims.[59] The Court of Claims originally had authority only to recommend that Congress pay claims, thereby serving as an advisor to Congress on the merits of such claims.[60] President Lincoln urged Congress to give the "power of making judgments final" to the Court of Claims, arguing that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[61] In 1863, Congress granted the Court of Claims power to make binding and final judgments, with appellate review by the Supreme Court.[62]

In 1886, Virginia Representative John Randolph Tucker, a former law professor and future dean of the Washington & Lee Law School, introduced a bill in Congress to revise the jurisdiction and procedures of the Court of Claims and to replace the earlier 1855 and 1863 statutes.[63] The Tucker Act,[64] enacted in 1887, confirmed the powers and nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and expanded that court's authority to include actions based upon the Constitution.[65] Moreover, the Tucker Act granted the then-circuit courts (what today are

58. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. On the creation of the Court of Claims and the waiver of sovereign immunity for money claims against the United States, see generally GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 4.02(a)-(c) (4th ed. 2006).

59. *See* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 175 (1998).

60. *See* Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After* Bowen v. Massachusetts, 40 CATH. U. L. REV. 571, 575 (1991); *see also* Wiecek, *supra* note 57, at 397.

61. CONG. GLOBE, 37th Cong., 2d Sess. app. at 2 (1861).

62. Act of Mar. 3, 1863, ch. 92, §§ 3, 5, 12 Stat. 765.

63. H.R. 6974, 49th Cong. (1886); *see* 18 CONG. REC. 597, 622-24 (1887); 17 CONG. REC. 2424, 2454 (1886). On the enactment of the Tucker Act, see generally *United States v. Mitchell*, 463 U.S. 206, 213 (1983).

64. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

65. For discussion of the constitutionally-founded category of claims under the Tucker Act as it evolved in the Supreme Court, see *infra* Part II.C.2.

the district courts) concurrent jurisdiction with the Court of Claims over monetary claims not exceeding $10,000.[66] With certain structural modifications,[67] the substance of the Tucker Act and the jurisdictional authority of what is now called the Court of Federal Claims has been remarkably stable during the past century and remains the "foundation stone" in the adjudication of non-tort money claims against the United States.[68]

Although the enactment of the Tucker Act and its predecessor statutes certainly was a major step forward after a decades-long delay in congressional attention to affording individual justice through a judicial remedy for governmental wrongs, the immediate motivation for the government may have been self-interest as much as social justice. Harold Krent explains that the pre-Civil War waiver of immunity from contract suit was "viewed as indispensable to the efficient operation of government, for without it, qualified private contractors might not undertake government projects and the government could not obtain the goods and services it needed at affordable prices."[69] Nonetheless, while no one suggests that the Tucker Act was a pure act of governmental altruism, Gillian Hadfield emphasizes that the waiver of sovereign immunity in contract cases served not only practical ends but promoted democratic principles:

> The ability of the sovereign to bind itself in contract has been an important step in the evolution of the modern democratic state. Through the use of contracts, government has been able to perform its functions more effectively by drawing on private resources to deliver governmental goods and services. Politically,

66. The concurrent jurisdiction of the district courts over "Little" Tucker Act claims not exceeding $10,000 is codified today at 28 U.S.C. § 1346(a)(2) (2000). *See infra* note 166 and accompanying text.

67. The Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25, bifurcated the original Court of Claims into two separate but related judicial entities. Congress established the slightly renamed United States Claims Court as the trial court for Tucker Act claims, and then created the United States Court of Appeals for the Federal Circuit to hear appeals involving these and other claims. FCIA §§ 105(a), 133(a). In 1992, the Claims Court was renamed the "United States Court of Federal Claims." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

68. C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time To Roll Back Sovereign Immunity?*, 28 PUB. CONT. L.J. 545, 546 (1999).

69. Krent, *supra* note 42, at 1564-65.

> by honoring its contracts, government has reinforced its democratic legitimacy as a government subject to the rule of law.[70]

2. The Decades of Slow Growth of Statutory Waivers: Admiralty and Tort

Neither before the creation of the Court of Claims in 1855 nor for another six decades afterward did Congress afford a judicial remedy for personal injuries or property damage caused by the negligent or other wrongful conduct of government instrumentalities and agents.[71] Even then, the initial consent to suit for such harms was limited to the narrow category of maritime jurisdiction. More than ninety years elapsed between congressional consent to suit in contract and creation of a general federal cause of action in tort against the federal government. As had been true with the move to lower the shield of immunity in contract,[72] Congress's belated opening of the courthouse doors to tort claims was motivated in part by governmental self-interest—in this instance, the growing frustration over the mechanism of legislative enactment of private bills to address claims of tortious wrongdoing by the government.[73]

Enacted in 1920, the Suits in Admiralty Act (SIAA)[74] was the first significant waiver of federal sovereign immunity that included a

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70. Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 467 (1999).

71. On the evolution of remedies for torts committed by the government or public officials, see generally PETER H. SCHUCK, SUING GOVERNMENT ch.2 (1983).

72. *See supra* Part I.B.1.

73. *See* Feres v. United States, 340 U.S. 135, 140 (1950) ("The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication.").

74. Act of Mar. 9, 1920, ch. 95, § 2, 41 Stat. 525, 525-26. In 2006, the Suits in Admiralty Act was reclassified and revised by Congress, as part of the completion of the recodification of statutes and enactment of Title 46 of the United States Code as positive law. Pub. L. No. 109-304, § 6(c), 120 Stat. 1485, 1509 (2006). The reorganization and recodification was not intended to change the existing legal principles governing admiralty claims against the United States. *See* H.R. REP. NO. 109-170, at 2 (2006) (explaining that the reorganization and restatement of laws now to be codified in Title 46 "codifies existing law rather than creating new law").

judicial remedy for tortious injuries.[75] The SIAA, as revised today, provides in pertinent part:

> In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation.[76]

The SIAA does not create any new rights to recovery, but rather waives the sovereign immunity of the United States to impose the same liability that would be visited by general admiralty law upon a private shipowner:

> [T]he Suits in Admiralty Act does not itself provide a cause of action against the United States. Instead, it only acts as a waiver of the sovereign immunity of the United States in admiralty suits. Thus, the act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim.[77]

Following legislative consent to admiralty-based claims, two-and-a-half decades would pass before Congress allowed suit by those who had suffered tortious injury at the hands of their government other than on navigable waters. Before 1946, the only means of recovery from the government for injury in tort was a private bill enacted by Congress through the ordinary legislative process.[78] As both a matter of equity to citizens and to relieve itself of the burden of considering a multitude of private bills, Congress finally passed the Federal Tort Claims Act (FTCA) in 1946.[79] As the Supreme Court later explained:

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75. A similar predecessor statute had been enacted in 1916. Shipping Act of Sept. 7, 1916, ch. 451, 39 Stat. 728.

76. 46 U.S.C. § 30,903(a) (2000).

77. Trautman v. Buck Steber, Inc., 693 F.2d 440, 443-44 (5th Cir. 1982) (citation omitted).

78. *See* Dierdre G. Brau, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1, 8-9 (2007).

79. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842, 843 (enacted as Title IV of the Legislative Reorganization Act of 1946).

> [The FTCA] was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work. And the private bill device was notoriously clumsy. Some simplified recovery procedure for the mass of claims was imperative. This Act was Congress' solution, affording instead easy and simple access to the federal courts for torts within its scope.[80]

As it happens, the FTCA was enacted just months after a collision between an aircraft and the highest landmark in New York City, an episode that was shocking to the people of the time and that also resonates with our recent national experience.[81] As described by historian Stanley Weintraub:

> What war might have been like to Americans had enemy technology [in World War II] a little more time to develop came home to New Yorkers when, at 9:49 A.M. on a misty Saturday morning [July 28, 1945], the equivalent of an unguided missile struck the Empire State Building, tallest in the world, 915 feet above street level. A B-25 "Mitchell" bomber, the type of twin-engine plane used for the Doolittle raid on Tokyo in April 1942, lost in blinding fog as it flew west from Squantum Army Air Force Base in Massachusetts, crashed into the seventy-ninth floor and engulfed two stricken floors in fire from its fuel tanks.[82]

The horrors that follow when a large airplane strikes the tallest building in a major city became all too familiar to modern day Americans with the terrorist attacks on the World Trade Center on September 11, 2001. Fortunately, on the prior 1945 occasion of an airplane-building encounter, fewer people than usual were in the Empire State Building because it was not a weekday;[83] nonetheless, ten people on the ground, in addition to the flight crew of the American military aircraft, lost their lives, others were injured, and substantial property damage resulted.[84]

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80. Dalehite v. United States, 346 U.S. 15, 24-25 (1953) (citations omitted); *see also* 1-2 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 2.01 (2007).

81. *See* 1-2 JAYSON & LONGSTRETH, *supra* note 80, § 2.01.

82. STANLEY WEINTRAUB, THE LAST GREAT VICTORY: THE END OF WORLD WAR II, JULY/AUGUST 1945, at 294 (1995).

83. *Id.*

84. *Id.*

Lester Jayson and Robert Longstreth, the authors of a treatise on the Federal Tort Claims Act, note that, despite the obvious culpability of the military for the 1945 incident, "[t]he victims of this frightful accident must have been shocked to learn later from their attorneys that there was no judicial remedy available to them through which they could recover damages from the United States Government. The doctrine of sovereign immunity from suit provided an insurmountable barrier."[85] Although the Empire State Building incident was not the actual impetus for the enactment of the FTCA (which had been pending in Congress for more than two decades),[86] the statute was made retroactive to 1945, thus allowing the victims of that crash to seek recovery, and indeed they were among the first to file suit under the new statute.[87]

Although today dozens of statutes authorize claims against the government for personal injury or property damage arising from specific programs and generally limited to small claims,[88] the FTCA is the most comprehensive and commonly invoked waiver of federal sovereign immunity for tort claims.[89] The FTCA grants United States District Courts

> exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[90]

Thus, the United States is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort

85. 1-2 JAYSON & LONGSTRETH, *supra* note 80, § 2.01.

86. *See* Dalehite v. United States, 346 U.S. 15, 24 (1953).

87. *See* Comm'rs of the State Ins. Fund v. United States, 72 F. Supp. 549, 551-52 (S.D.N.Y. 1947).

88. 1-2 JAYSON & LONGSTRETH, *supra* note 80, §§ 1.01-1.02.

89. SISK, *supra* note 58, § 3.02, at 104.

90. 28 U.S.C. § 1346(b)(1) (2000). For further discussion of the FTCA and its construction by the Supreme Court, see *infra* Parts II.B.3 and II.C.3.

committed under like circumstances by a private person in that state.[91]

While the FTCA does waive federal sovereign immunity for tort claims generally, the United States remains the beneficiary of several special rules and protections, notably including restrictions on the standards of liability (such as the exclusion of strict liability);[92] numerous defined exceptions to liability that bar certain types of claims (such as claims for assault, libel, misrepresentation, and interference with contract)[93] and preclude liability arising out of certain governmental activities (including discretionary or policymaking functions,[94] transmission of mail,[95] and military combat);[96] restrictions on damages available (precluding prejudgment interest and punitive damages);[97] and the exclusion of certain categories of people (federal civilian employees covered by a compensation act[98] and military servicemembers injured incident to service)[99] from eligibility to seek a damages remedy under the FTCA.

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91. *See* United States v. Olson, 546 U.S. 43, 44 (2005). On the standards for liability under the FTCA, including the analogy of the government to a private person, see generally SISK, *supra* note 58, § 3.05, at 124-40.

92. *See* Laird v. Nelms, 406 U.S. 797, 797-803 (1972) (construing 28 U.S.C. § 1346(b)(1), making the government liable for the "negligent or wrongful act or omission" of any government employee, as encompassing only fault-based causes of action, such as negligence or intentional wrongdoing). On the exclusion of strict liability, see generally SISK, *supra* note 58, § 3.05(d), at 138.

93. 28 U.S.C. § 2680(h) (2000). On the exceptions for certain claims, see generally SISK, *supra* note 58, § 3.06(c)-(d), at 154-62.

94. 28 U.S.C. § 2680(a) (2000). On the discretionary function exception, see generally SISK, *supra* note 58, § 3.06(b), at 141-54.

95. 28 U.S.C. § 2680(b) (2000). For discussion of the mail carriage exception as construed by the Supreme Court, see *infra* Part II.C.3.

96. 28 U.S.C. § 2680(j) (2000).

97. *Id.* § 2674 (2000). On damages under the FTCA, see generally SISK, *supra* note 58, § 3.07, at 167-70.

98. Federal Employees Compensation Act, 5 U.S.C. § 8116(c) (2000). On the exclusion from the FTCA of federal civilian employees covered by the Federal Employees Compensation Act, see generally SISK, *supra* note 58, § 3.08(b), at 170-77.

99. *See* Feres v. United States, 340 U.S. 135, 141-46 (1950) (holding that claims by military personnel for injuries sustained incident to service should be excluded from the FTCA). On the *Feres* doctrine, see generally SISK, *supra* note 58, § 3.08(c), at 177-87.

3. The Modern Acceleration of Statutory Waivers: From Employment Discrimination to Attorney's Fees

During the past three decades, the move away from sovereign immunity as a blanket exemption for the government and toward allowing individualized justice in a judicial forum for most categories of claims against the federal government has accelerated. As discussed below, this last stage in congressional enactment of waivers of sovereign immunity began with employment discrimination and open government laws in the early 1970s, continued with environmental protection statutes in the 1970s, included expanded access to the courts for benefits claims into the 1990s, and culminated with the broad extension of attorney's fee-shifting throughout this period.

Although the federal government did not initially hold itself subject to judicial action when it enacted laws prohibiting employment discrimination by private employers, the injustice of denying equal protection in employment to federal employees was recognized within only a few years, resulting in much swifter legislative consent to suit than had occurred during earlier periods of American history. When originally enacted in 1964, Title VII of the Civil Rights Act provided no judicial remedy for employment discrimination by the federal government because the federal government is excluded from the definition of employer for purposes of the main antidiscrimination provisions in the Act.[100] In 1972, however, Congress expressly waived the sovereign immunity of the federal government for employment discrimination claims within the scope of Title VII—not by changing the definition of employer, but instead by adding a new and separate section of the statute for the federal government.[101] Under this provision, the federal government as an employer is prohibited from discriminating on the basis of race, color, religion, sex, or national origin.[102]

100. 42 U.S.C. § 2000e(b) (2000) (providing that "[t]he term 'employer'... does not include[ ] the United States, [or] a corporation wholly owned by the Government of the United States").

101. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16 (2000)). On the history of employment discrimination claims against the United States, see generally *Brown v. General Services Administration*, 425 U.S. 820, 824-33 (1976).

102. 42 U.S.C. § 2000e-16(a) (2000).

Similarly, in 1974, the Age Discrimination in Employment Act (ADEA)[103] was extended to federal employees.[104] As with Title VII, rather than simply incorporating federal employees within the Act's existing provisions, Congress added a new section applicable to federal employees.[105] Although the Americans with Disabilities Act (ADA),[106] enacted by Congress in 1990, specifically excludes the federal government from the coverage of the statute,[107] federal employees continue to receive protection from disabilities-related discrimination through the Rehabilitation Act of 1973,[108] which requires federal agencies to accommodate disabled persons[109] and prohibits discrimination against an "otherwise qualified individual with a disability."[110] The Rehabilitation Act adopts the same procedures that apply to federal employees under Title VII.[111] Thus, the case law arising under the ADA will generally also apply to Rehabilitation Act claims by federal employees.[112]

During this fertile period for statutory waivers of sovereign immunity, Congress also added causes of action that are unique to a governmental entity, such as the Freedom of Information Act (FOIA)[113] which authorizes court suits demanding access to government information. Under FOIA, initially enacted in 1966,[114] the federal government is obliged to make information available to "any person" upon simple request.[115] As for judicial relief, the FOIA provides that if the agency fails to release requested information, the requester may bring suit and seek a court injunction to disclose the documents.[116] The burden is on the government to justify

103. 29 U.S.C. §§ 621-634 (2000).

104. Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 74 (1974).

105. 29 U.S.C. § 633a.

106. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12,111-213 (2000)).

107. 42 U.S.C. § 12,111(5)(B). For decisions holding that federal employees have no remedy under the ADA, see *Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005), and *Rivera v. Heyman*, 157 F.3d 101, 103 (2d Cir. 1998).

108. Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 791-795n (2000)).

109. 29 U.S.C. § 791(b).

110. *Id.* § 794(a).

111. *Id.* § 794a(a)(1). *See generally* MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 322 (4th ed. 1999).

112. *See* Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

113. 5 U.S.C. § 552 (2000).

114. Pub. L. No. 89-554, 80 Stat. 383 (1966).

115. 5 U.S.C. § 552(a)(3)(A).

116. *Id.* § 552(a)(4)(B).

nondisclosure, by showing that the information falls within the nine exemptions from disclosure.[117] If a plaintiff substantially prevails on a FOIA claim, the statute authorizes an award of attorney's fees.[118] As a further demonstration of the present-day congressional amenability to lowering the shield of sovereign immunity, in December 2007, Congress amended the FOIA to expand the circumstances under which an award of attorney's fees is appropriate to include not only a judicial order, but also when there is "a voluntary or unilateral change in position by the agency,"[119] that is, when the requester's lawsuit served as a catalyst in bringing about disclosure by the agency.

With greater vigor beginning in the 1970s, Congress has regulated private activities that negatively impact the environment, including provisions for civil actions against those who violate environmental protection rules. Simultaneously, Congress has made the federal government amenable to suit under environmental protection laws. First, citizens may initiate judicial action or review to challenge the government in its capacity as a regulator, contending that the government has failed to fulfill its statutory obligations or has improperly implemented an environmental statute.[120] Absent a specific judicial review provision in a particular environmental statute, general judicial review of agency action also is available under the Administrative Procedure Act (APA),[121] which itself contains a broad waiver of the sovereign immunity of the United States for specific relief other than money damages.[122] Second, citizens may challenge the government in its capacity as a polluter or an actor whose conduct threatens the environment.[123] Citizen suit provisions, including those in the Clean Water Act and the Clean Air Act, allow individuals to bring action against any person—expressly including the United States—alleged to be in violation of

117. *Id.* § 552(b).

118. *Id.* § 552(a)(4)(E).

119. Pub. L. No. 110-175, § 4(a)(2), 121 Stat. 2525, 2525 (2007).

120. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1365(a)(2), 1369(b) (2000); Clean Air Act, 42 U.S.C. §§ 7604(a)(1)-(2), 7607(b) (2000).

121. 5 U.S.C. §§ 701-706 (2000).

122. *Id.* § 702.

123. *See generally* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 2.08, at 2-18 to -22 (2d ed. 1993).

environmental restrictions.[124] Moreover, these citizen suit authorizations "are accompanied by separate 'federal facilities' provisions waiving the sovereign immunity of the United States and making federal facilities subject to state and federal pollution control laws to the same extent as 'any nongovernmental entity.'"[125]

Applicants for governmental benefits long have had access to judicial review, with a key exception that proved to be one of the last plates of the government's sovereign immunity armor to be shattered. For decades, judicial review has been authorized to challenge administrative denials of disability benefits under the Social Security Act,[126] one of the largest classes of court claims against the federal government. But, historically, military veterans who sought benefits for service-connected disabilities encountered an absolute bar of sovereign immunity.[127] From the time of the first significant statutory waiver of sovereign immunity with the authorization of contract claims before the Civil War,[128] Congress had expressly withheld access to the courts from veterans.[129] As Robert Rabin had observed, the Veterans' Administration stood in "splendid isolation as the single federal administrative agency whose major functions [were] explicitly insulated from judicial review."[130] Not until 1988, through the Veterans' Judicial Review Act, did Congress finally drop the sovereign immunity shield.[131] Not only did Congress then

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124. *See, e.g.*, 33 U.S.C. § 1365(a)(1) (2000); 42 U.S.C. § 7604(a)(1) (2000).

125. AXLINE, *supra* note 123, § 2.08, at 2-18 (quoting "federal facilities" provisions in the Clean Water Act, 33 U.S.C. § 1323(a)); *see also* Clean Air Act, 42 U.S.C. § 7418 (2000); Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (2000); Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9620(a) (2000).

126. 42 U.S.C. § 405(g) (2000).

127. Steven W. Feldman, *United States Court of Appeals for Veterans Claims*, *in* WEST'S FEDERAL FORMS § 13,401, at 616-27 (perm ed., rev. vol. 2002). On the historical story of veterans claims and the bar of sovereign immunity, see generally Gregory C. Sisk, *The Trial Courts of the Federal Circuit: Diversity by Design*, 13 FED. CIR. B.J. 241, 259-63 (2004).

128. *See supra* Part I.B.1.

129. Stephen Van Dolsen, Note, *Judicial Review of Allegedly Ultra Vires Actions of the Veterans' Administration: Does 38 U.S.C. § 211(a) Preclude Review?*, 55 FORDHAM L. REV. 579, 594 (1987).

130. Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 905 (1975); *see also* H.R. REP. NO. 100-963, at 10 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5791 (quoting Rabin, *supra* at 905).

131. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

reverse the prohibition on judicial review, it created a new forum that today is called the United States Court of Appeals for Veterans Claims.[132]

As the culmination (for the moment at least) of the modern congressional movement to lift the curtain of federal sovereign immunity, the United States has regularly included itself in the proliferating number of statutes that shift attorney's fees to those who succeed in litigation. Although "Congress began cautiously, waiving federal sovereign immunity for attorney's fees only with respect to claims made under selected statutes that protect fundamental rights,"[133] such as Title VII employment discrimination claims,[134] Congress subsequently broadened consent to awards of attorney's fees to prevailing parties under other civil rights statutes,[135] environmental statutes,[136] and FOIA.[137] This "trend against immunity from fee awards reached its crescendo with the enactment of the Equal Access to Justice Act, which puts the government on equal footing with private defendants for fee-shifting and further makes the government liable in fees whenever its position is not substantially justified."[138]

4. The Broad Tapestry of Statutory Authorizations for Suit Against the Federal Government

As the foregoing discussion illustrates, the past century and a half has witnessed "the progressive relaxation by legislative enactments of the rigor of the immunity rule."[139] Today, there is a general presumption that the federal government should be held responsible for its obligations and accountable for its mistakes *and*

132. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (codified at 38 U.S.C. § 7251 (2000)).

133. SISK, *supra* note 58, § 7.05, at 435.

134. 42 U.S.C. § 2000e-5(k) (2000).

135. *See, e.g.*, Fair Housing Act, 42 U.S.C. § 3613(c)(2) (2000).

136. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1365(d), 1369(b)(3) (2000); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f) (2000).

137. 5 U.S.C. § 552(a)(4)(E) (2000).

138. SISK, *supra* note 58, § 7.05, at 436 (citing the Equal Access to Justice Act, 28 U.S.C. § 2412 (2000)).

139. Dalehite v. United States, 346 U.S. 15, 30 (1953) (describing the Federal Tort Claims Act as "another example" of the trend in legislative waivers of sovereign immunity and quoting, without acknowledgment, *United States v. Shaw*, 309 U.S. 495, 501 (1940)).

be subject to judicial review to ensure that those obligations are legally satisfied and its mistakes are corrected. Through a pattern of causes of actions created by Congress, the United States government has been made amenable to suit in most areas of substantive law and covering most situations in which a person would seek relief.[140] Exceptions to liability are designed primarily to protect the public fisc from excessive claims (such as punitive damages)[141] and to preclude the courts from evaluating the wisdom rather than the legality of a policy decision by government officials.[142]

In sum, as I have previously described it, congressional enactments "have woven a broad tapestry of authorized judicial actions against the federal government."[143] Whether those statutory enactments achieve their liberal purpose, however, depends on faithful interpretation and application by the courts.

II. ARRESTING THE DRIFT: TOWARD A COHERENT THEORY OF JUDICIAL CONSTRUCTION OF STATUTORY WAIVERS OF SOVEREIGN IMMUNITY

A. The Importance of Sound Rules of Construction: Upholding the Promise of Statutory Waivers of Sovereign Immunity

The concept of federal sovereign immunity—that the United States is immune from suit without its permission and is subject to suit only on such terms and conditions as it may prescribe[144]—

140. *See supra* Part I.B.1-3.

141. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (2000) (excluding punitive damages); *see also* Molzof v. United States, 502 U.S. 301, 305-12 (1992) (interpreting and applying punitive damages exclusion of the FTCA).

142. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2000) (excepting liability for discretionary functions); *see also In re* Joint E. & S. Dists. Asbestos Litig. (Robinson v. United States), 891 F.2d 31, 35 (2d Cir. 1989) (holding that a discretionary function exception must be read into the Suits in Admiralty Act because "[i]f substantial constitutional issues are not implicated, the wisdom of decisions made by the executive and legislative branches are not subject to judicial review"); Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978) (holding that the discretionary function exception to the FTCA applies "when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency").

143. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603 (2003).

144. *See supra* Part I.A.

continues to influence the Court's interpretive jurisprudence, even in the modern era of numerous and broad-sweeping statutory waivers of that immunity. As the Supreme Court framed the dilemma of faithful statutory interpretation in *Bowen v. City of New York*,[145] on the one hand, when Congress places "a condition on the waiver of sovereign immunity," the statutory limits "must be strictly construed."[146] On the other hand, "in construing the statute [the Court] must be careful not to 'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively.'"[147]

The disposition and care with which a court approaches a statutory waiver of federal sovereign immunity is far from academic or without practical consequence. If a governmental liability statute is given an unduly expansive reading or extended beyond textual and contextual justification by judicial implication, governmental prerogatives necessary to efficient administration of government activities or programs may be impaired, or policy-making decisions by the democratic branches of government may be second-guessed and subjected to chilling interference by the courts. But if a statutory waiver is too narrowly construed in a parsimonious manner, the affirmative congressional grant of access to justice in the courts may be frustrated, leaving an individual without a meaningful remedy for the wrongful acts or omissions of the government.

Because of this tension in guiding principles, the vicissitudes in the interpretive doctrine for statutory waivers of sovereign immunity are regularly evidenced by anomalies and inconsistencies that persist in the various lines of Supreme Court precedent. Nonetheless, when the Court's jurisprudence is reviewed longitudinally over decades and holistically across different types of statutory waivers, decisions may be found to cluster together in reasoning. Although exceptions might be cited for many of the propositions that are presented in the discussion that follows, there remains great value in sketching out the patterns that appear to be emerging, even if the shapes are not always perfectly rendered and the lines between one

145. 476 U.S. 467 (1986).

146. *Id.* at 479.

147. *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 118 (1979), and Block v. North Dakota, 461 U.S. 273, 287 (1983)); *see also* Smith v. United States, 507 U.S. 197, 203 (1993) (same).

figure and another are not always distinct. Whether the forthcoming diagram of interpretive methods survives the Supreme Court's latest foray into the field is the subject of a later part of this Article.[148]

B. Sovereign Immunity and Jurisdiction: Preserving Jurisdictional Analysis in Its Place

Behind every statutory waiver lies the backdrop of sovereign immunity. Because the United States may not be sued without its consent, the existence of a statutory waiver of sovereign immunity is necessarily a jurisdictional inquiry.[149] Because that consent defines the authority of the courts to hear a claim against the government, the identification of the class of claims covered by the statutory waiver takes on a jurisdictional cast as well.[150] Thus, if a court assumes authority to hear a claim that falls outside the general scope of a waiver of sovereign immunity, fundamental jurisdictional limitations on the judiciary may be breached.

Yet if another statutory provision that sets standards for an allowable claim, limits or excepts liability, or establishes procedural rules is mistakenly characterized as jurisdictional in nature, unfortunate deleterious consequences follow close behind.[151] The determination of which issues deserve to be litigated (or instead may be waived or forfeited) is taken out of the hands of the parties (both claimants and the government).[152] The party that prevails on the merits may be deprived of victory by a belated jurisdictional ruling after trial.[153] The courts are forced to raise and answer new, sometimes difficult, and often fact-based issues sua sponte.[154] As David Currie lamented about the duty of the courts to "investigat[e]

148. *See infra* Part III.B-C.
149. *See infra* Part II.B.1.
150. *See infra* Part II.B.1.
151. *See infra* Part II.B.2-3.
152. *See* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1 (forthcoming 2008) ("Waiver, consent, and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them.").
153. *See infra* Part II.B.2.
154. *See infra* Part II.B.2.

the existence of jurisdiction on their own and at any stage of the proceedings," this is an "expensive habit."[155]

1. Existence of Legislative Consent for a Class of Claims as a Jurisdictional Prerequisite

Beginning with a basic premise, if federal sovereign immunity is to be an enduring doctrine,[156] an express legislative waiver of sovereign immunity is necessary to confer any authority to the judiciary to adjudicate claims against the federal government.[157] In rather formulaic, but nonetheless accurate, words, the Supreme Court stated in *United States v. Mitchell*[158] that "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."[159] It naturally follows, then, as the Court also has said, "[a]bsent that consent, the attempted exercise of judicial power is void."[160] Accordingly, as a jurisdictional precondition to adjudication, the preliminary question of whether sovereign immunity has been waived must be addressed by the court on its own initiative, even if not raised by the parties, and may not be waived or forfeited by government officers or lawyers either by affirmative concession or by a failure to timely object through a motion to dismiss or in a responsive pleading.

Further securing a central place for jurisdictional analysis in the jurisprudence of sovereign immunity, the earliest statutory waivers were enacted in conjunction with, and indeed were components of, statutes that expressly granted subject matter jurisdiction to particular federal tribunals.[161] As a general rule, the Supreme Court

155. David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 298 (1969).

156. *See supra* Part I.A.

157. *See* United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.").

158. 463 U.S. 206 (1983).

159. *Id.* at 212.

160. United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 514 (1940); *see also* Lewis v. Hunt, 492 F.3d 565, 571 (5th Cir. 2007) ("The absence of such a waiver is a jurisdictional defect.").

161. *See* Scott Dodson, *Jurisdictionality and* Bowles v. Russell, 102 NW. U. L. REV. COLLOQUY 42, 44 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/21/

in *Arbaugh v. Y&H Corp.*[162] stated that "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue."[163]

For example, as discussed earlier, the Tucker Act and its predecessor statutes integrated the waiver of sovereign immunity for money claims, notably in contract, with the creation and reaffirmation of the then-Court of Claims as a new federal tribunal granted jurisdictional authority to hear such claims.[164] Today, trial court jurisdiction over Tucker Act claims against the United States is assigned by statute to the Court of Federal Claims,[165] with concurrent jurisdiction over claims for $10,000 or less being granted to the United States District Courts under what is commonly known as the "Little" Tucker Act.[166] As another example, the Federal Tort Claims Act (FTCA), which waives sovereign immunity for tort claims against the United States,[167] also grants exclusive jurisdiction over such claims to the United States District Courts.[168] By virtue of being formulated as part and parcel of new jurisdictional grants to the federal courts, the basic scope of these statutory waivers is coextensive with the parameters of federal subject matter jurisdiction.

Accordingly, whether a cognizable claim has been presented that falls within the general boundaries of an express statutory waiver of sovereign immunity and that has been filed in a tribunal with statutory authority over that class of claims presents a nonwaivable

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(stating that the "first guideline" for determining whether a provision is jurisdictional is "whether the limit was phrased in jurisdictional terms").

162. 546 U.S. 500 (2006).

163. *Id.* at 515-16 (footnote omitted).

164. *See supra* Part I.B.1.

165. 28 U.S.C. § 1491(a)(1) (2000). On the Tucker Act as a jurisdictional statute for the Court of Federal Claims, see generally SISK, *supra* note 58, § 4.02(b), at 236-37.

166. 28 U.S.C. § 1346(a)(2) (2000). On the Little Tucker Act as a jurisdictional statute for the District Courts, see generally SISK, *supra* note 58, § 4.02(c), at 237-39.

167. *See supra* Part I.B.2.

168. 28 U.S.C. § 1346(b)(1) (2000). On jurisdiction and venue for Federal Tort Claims Act suits, see generally SISK, *supra* note 58, § 3.04(b), at 119. The Suits in Admiralty Act is similar, although it speaks in terms of "venue" rather than "jurisdiction," by directing that a civil action be brought in the United States District Court either where the plaintiff resides or has its principal place of business or where the vessel or cargo is located. 46 U.S.C. § 30,906(a) (2000).

question of subject matter jurisdiction in the federal courts. If the court lacks authority to adjudicate the claim, any judgment entered against the United States would be void for lack of jurisdiction by reason of sovereign immunity.[169]

Not every statutory provision that relates to a waiver of sovereign immunity, however, should be regarded as having a jurisdictional character.[170] As the Supreme Court also stated in *Arbaugh v. Y&H Corp.*, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[171] Other provisions defining the standards for allowable claims, limitations on liability, exceptions to the waiver of immunity, or procedural rules may also be established by statute, distinct in text and separate in codified location from the statutory waiver and any jurisdictional grant. Statutory provisions, as examples, address the role and compensation of attorneys,[172] govern discovery and presentation of evidence,[173] or carve out exceptions to the liability that otherwise is afforded under the statute.[174] And, as with other federal causes of action, statutory waivers of sovereign immunity are typically covered by a statute of

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169. *See* United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 513-15 (1940) (holding that the United States was not bound by a prior judgment on a claim in a court as to which the government had not waived sovereign immunity). For discussions of *United States Fidelity & Guaranty* as a possible sovereign immunity exception to res judicata and recent controversies in the lower federal courts about the reach of that exception, see generally SISK, *supra* note 58, § 6.08, at 413-18; Florey, *supra* note 44.

170. For further discussion of the modern trend in removing prescription of standards, limitations, exceptions, and procedural rules from the jurisdictional inquiry, see *infra* Part II.B.3.

171. Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006); *see also* Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 NW. U. L. REV COLLOQUY 215, 216 (2008), http://law.northwestern.edu/lawreview/Colloquy/2008/6/ (arguing "that courts should consider a provision of positive law as jurisdictional only when its plain language is addressed to the court and speaks in terms of judicial power about the class of cases that courts can hear and resolve").

172. *See, e.g.*, 28 U.S.C. § 2503(a) (2000) (authorizing a party to be represented by an attorney before the Court of Federal Claims); *id.* § 2678 (prohibiting an attorney from charging more than 25 percent of the judgment to a client seeking recovery under the Federal Tort Claims Act).

173. *See, e.g.*, *id.* § 2503(a) (authorizing production of evidence and examination of witnesses in the Court of Federal Claims); *id.* § 2507 (allowing discovery of the government by the Court of Federal Claims).

174. *See, e.g.*, *id.* § 2680 (establishing a number of exceptions to liability under the Federal Tort Claims Act).

limitations, which ordinarily is not embedded within the particular statutory section that articulates the waiver and speaks in the language of jurisdiction.[175]

Moreover, most recent statutory waivers have been enacted separate from any jurisdictional grant. For example, the waiver of sovereign immunity found in the APA[176] for claims seeking specific relief against the federal government does not provide an independent grant of jurisdiction to the federal courts.[177] Instead, the authority of the United States District Courts to review federal agency action under the APA is found in the general federal-question jurisdictional statute.[178] As another example, the free-standing general waiver of sovereign immunity for awards of attorney's fees against the United States found in the Equal Access to Justice Act (EAJA)[179] is not only separate from any specific jurisdictional grant but also is unattached to any particular cause of action. The EAJA provides that fees may be awarded in civil actions against the United States "in any court having jurisdiction of that action" (that is, the underlying cause of action against the federal government).[180] Thus, this statute may operate, inter alia, in the United States District Courts, the United States Courts of Appeals, the Court of Federal Claims, the United States Court of International Trade, and the Court of Veterans Appeals.[181]

Although the core jurisdictional requirement of an express waiver for the class of claims remains, the nonjurisdictional textual character of these more recent statutes accomplishing the waiver

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175. *See, e.g.*, *id.* § 2401(b) (establishing a two-year statute of limitations for the Federal Tort Claims Act in a separate section and code chapter from the waiver and grant of jurisdiction); *id.* § 2501 (establishing a six-year statute of limitations for claims in the Court of Federal Claims, in a separate section and code chapter from the waiver and grant of jurisdiction). For more on statutes of limitations as nonjurisdictional, see *infra* Part II.B.3.

176. 5 U.S.C. § 702 (2000) (allowing claims under the Administrative Procedure Act against the United States).

177. Califano v. Sanders, 430 U.S. 99, 106-07 (1977).

178. 28 U.S.C. § 1331 (2000). On jurisdiction over and judicial review under the APA, see generally SISK, *supra* note 58, § 4.10(c), at 335-36.

179. 28 U.S.C. § 2412 (2000). On the EAJA, see generally SISK, *supra* note 58, § 7.11, at 474-501.

180. 28 U.S.C. § 2412(d)(1)(A).

181. On the scope of the EAJA in federal tribunals, see generally Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 229-46 (1994).

confirms that the specific elements for defining and presenting these claims against the sovereign, or defending against them by the government, are not jurisdictional mandates requiring sua sponte judicial attention.

2. Early Decisions that Overextended Jurisdictional Analysis

When the earliest statutory waivers of sovereign immunity came before the judiciary for consideration, the Supreme Court extended jurisdictional assumptions well beyond the core questions of the existence and basic scope of the waiver. Most prominently, at a very early stage in the jurisprudence, a series of early Supreme Court decisions suggested, in what was largely ill-considered dicta, that the predecessor statute of limitations[182] for cases in the then-Court of Claims had jurisdictional force.[183] Not only was the jurisdictional edifice for this nonsubstantive element grounded on unnecessary dicta, but the Court failed to carefully analyze the text of the statute, ignored the legislative history, and neglected the ubiquitous legal understanding of the period that a statute of limitations was a waivable affirmative defense.[184]

Because the early statutory waivers for money claims before the then-Court of Claims were intertwined with a grant of jurisdiction to a new tribunal,[185] it is understandable, if unfortunate, that a dense thicket of jurisdictionally embedded rules grew up around these statutes. The aggressive importation of jurisdictional concepts beyond substantive provisions and into an ordinary statute of

182. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (codified as revised at 28 U.S.C. § 2501 (2000)).

183. *See, e.g.*, United States v. Wardwell, 172 U.S. 48, 50, 52 (1898) (declaring that the statute of limitations for the Court of Claims was "not merely a statute of limitations but also jurisdictional in its nature," although the jurisdictional question was not presented because the government openly challenged the timeliness of the action in the courts); Kendall v. United States, 107 U.S. 123, 124-25 (1883) (describing the claims as to which judgment could not be entered against the United States as including those "declared barred if not asserted within the time limited by the statute," although the case did not present the question of whether the statute of limitations was a non-waivable jurisdictional matter because "[t]he government demurred" in the case on limitations grounds).

184. For a detailed discussion of the text, legislative history, and contemporary legal understanding of what today is codified at 28 U.S.C. § 2501, see *infra* Part III.A.

185. *See supra* Part I.B.1.

limitations,[186] however, is difficult to ascribe to anything other than judicial discomfort with the then-novel concept of a broad statutory waiver of sovereign immunity. These early holdings are perhaps best understood as the Supreme Court's hesitant and skeptical introduction to what was then a new category of legislation that afforded general judicial remedies against the government for monetary claims based on governmental wrongs.

From these early[187] inelegant judicial encounters with waiving legislation emerged the troublesome recitation that any "term" or "condition" on the waiver of sovereign immunity is elevated to jurisdictional status.[188] If this condition-equals-jurisdiction recipe simply identifies the core requirement of an express statutory waiver for the general class or category of claim, the formula is unremarkable (if largely unhelpful, because calling something a "term" or a "condition" on the government's waiver of immunity appears to be more a conclusory label than a meaningful guide to analysis). If, however, the reference to a jurisdictional condition or term was read to encompass every matter pertinent to a statutory waiver—meaning that every provision that could limit, constrain, except, or regulate the process for adjudicating governmental liability constitutes a prerequisite to exercise of judicial author-

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186. *See* Franconia Assocs. v. United States, 536 U.S. 129, 145 (2002) (finding 28 U.S.C. § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous [nineteenth century] state statutes of limitations applicable to suits between private parties").

187. The earliest use of the term "condition" as a jurisdictional mandate appears to have been made in *Finn v. United States*, 123 U.S. 227, 232-33 (1887), which said that, whether pleaded by the government or not, the court has a duty to dismiss an untimely suit in the Court of Claims because:

> [T]he statute [of limitations], in our opinion, makes it a condition or qualification of the right to a judgment against the United States that ... the claim must be put in suit by the voluntary action of the claimant ... within six years after suit could be commenced thereon against the Government.

188. *See* Block v. North Dakota, 461 U.S. 273, 287-89 (1983) (stating "that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed," and suggesting that failure to observe such a condition would result in a dismissal for lack of jurisdiction); United States v. Testan, 424 U.S. 392, 399 (1976) ("[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941))).

ity—then every jot and tittle in each statutory waiver would be transformed into a jurisdictional command.[189]

The consequences of an all-consuming jurisdictional imperative for statutory waivers of sovereign immunity would include, but extend beyond, the denial of justice to individual claimants who could not rely upon decisions by government litigators to waive or concede statutory and other defenses and who were repeatedly forced to anticipate and litigate new and unanticipated statutory disputes.[190] In addition, under a comprehensive jurisdictional regime, federal judges would have a sua sponte duty to ascertain the satisfaction of each statutory element, regardless of whether the government raises or even deliberately waives the matter. The federal courts would be obliged to identify and thoroughly explore each item on an exhaustive (and exhausting) list of every statutory element, limitation, exception, procedural requirement, time limitation, etc., that conceivably could be invoked as a defense to the statutory waiver of sovereign immunity.

3. Reserving Jurisdictional Inquiry for Core Matters, While Removing Other Standards, Limitations, Exceptions, and Procedural Rules from Jurisdictional Analysis

Fortunately, although nineteenth century decisions mistakenly fell back upon the familiar but misplaced concept of subject matter jurisdiction as part of a primitive approach to a new statutory category, the Supreme Court since has developed a more mature and better tailored approach toward the increasingly commonplace judicial encounter with a statutory waiver of sovereign immunity. Today, the Court continues to demand an express and unambiguous congressional statement of governmental consent to suit for a class or category of claims. But the jurisdictional inquiry focuses on the initial grant, often expressed in the language of jurisdiction, and

189. *But see* Henderson v. United States, 517 U.S. 654, 665-66 (1996) (rejecting the government's argument that the section in the Suits in Admiralty Act that waives immunity for admiralty claims and includes court venue provisions, should be read, "in its entirety," as "spelling out the terms and conditions of the Government's waiver of sovereign immunity" and thus should be regarded as "jurisdictional" (internal quotation marks omitted)).

190. For further discussion of the unhealthy nature of overextended jurisdictionalism, see *infra* Part III.C.

does not absorb every standard, limitation, exception, or procedural rule.

As the Supreme Court explained in *Feres v. United States*,[191] one of its first decisions interpreting the FTCA, the statute "confers jurisdiction to render judgment upon all such claims," over civil actions for money damages against the United States, "[b]ut it does not say that all claims must be allowed."[192] "Jurisdiction of the defendant now exists where the defendant was immune from suit before"; the Court added, "it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."[193] Thus, statutory provisions that "prescribe the test of allowable claims" and "exceptions" to liability fall within the court's jurisdiction to grant or deny a claim on its merits but are not jurisdictional rules in and of themselves.[194]

As an important illustration of the increasing reservation of jurisdictional scrutiny to core and general matters,[195] for nearly two decades, the Supreme Court has repeatedly turned aside the government's insistence that time limitations should be treated as jurisdictional conditions on the waiver of sovereign immunity. In *Bowen v. City of New York*,[196] the Court rejected the government's argument that the statute of limitations for disability benefit claims under the Social Security Act[197] is "jurisdictional," instead characterizing the provision as "a period of limitations" that may be equitably tolled.[198] In *Irwin v. Department of Veterans Affairs*,[199] the Court reversed the lower court's ruling that the statutory filing deadline for Title VII employment discrimination claims against the federal government[200] "operates as an absolute jurisdictional limit."[201]

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191. 340 U.S. 135 (1950).

192. *Id.* at 140-41.

193. *Id.* at 141.

194. *See id.* at 140-41.

195. For further discussion of interpretation of procedural limitations, including statutes of limitations, on statutory waivers of sovereign immunity, see *infra* Part II.D.

196. 476 U.S. 467 (1986).

197. On the Social Security Act as a waiver of sovereign immunity for benefit claims, see *supra* Part I.B.3.

198. *Bowen*, 476 U.S. at 478-79.

199. 498 U.S. 89 (1990).

200. On Title VII as a waiver of federal sovereign immunity for employment discrimination claims against the federal government, see *supra* Part I.B.3.

201. *Irwin*, 498 U.S. at 91-92.

Indeed, even the labeling of such a statutory element as a "condition" on a statutory waiver no longer moves the Court to invoke jurisdictional absolutes. In *Irwin*, the Court acknowledged that the limitations period for Title VII suits against the government was "a condition to the waiver of sovereign immunity," but the Court nonetheless chose to "mak[e] the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits."[202]

Because the Supreme Court "has no authority to create equitable exceptions to jurisdictional requirements,"[203] the Court's presumptive allowance of equitable tolling of statutes of limitations on claims against the government removes such provisions from the category of jurisdictional commands. The *sine qua non* of a jurisdictional rule is a demand for strict and nonwaivable compliance with its terms. By instead adopting a general rule of equitable tolling in civil cases against the government in *Irwin*, the nonjurisdictional nature of these statutes of limitations was emphatically confirmed.[204] In sum, under the Court's sovereign immunity jurisprudence over the past quarter-century, a jurisdictional construction has been maintained for evaluation of the essential character of claims for relief that are permitted against the federal government, but procedural requirements generally have been applied in the same manner as among private parties.[205]

The Court's current understanding of the central, but not all-consuming, place for jurisdictional analysis in construction of

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202. *Id.* at 94-95.

203. Bowles v. Russell, 127 S. Ct. 2360, 2366 (2007); *see also* Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 60 (2008) ("Defects in subject matter jurisdiction cannot be forfeited, waived, or consented to; they are not subject to principles of estoppel; and they can be raised at any time and by any party, including a court sua sponte.").

204. *See Irwin*, 498 U.S. at 94-96; *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (noting that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 969 n.3 (Fed. Cir. 1993) (Plager, J., concurring) ("Since *Irwin*, compliance with statutory time limits is no longer jurisdictional, in the old sense that when a Congressionally specified time limit had expired a court had no power to entertain the case.").

205. *Cf.* Dodson, *supra* note 203, at 59 (generally distinguishing jurisdiction from procedure, saying that "[p]rocedure is the regulation of that power or authority [of jurisdiction over a matter] once obtained").

statutory waivers of sovereign immunity is well illustrated by the jurisdictional line adopted in construction of the various elements of the Federal Tort Claims Act (FTCA).[206]

In *Federal Deposit Insurance Corp. v. Meyer*,[207] the Supreme Court considered whether the FTCA superseded a statute that generally permits a particular agency to "sue and be sued" and thereby precluded a direct claim for money damages against the agency for a constitutional violation.[208] By express directive, the FTCA is the exclusive venue for suits against agencies that are authorized to "sue and be sued" in their own name *if* the claim is "cognizable" under the FTCA.[209] Defining "cognizable" as meaning that a claim is within the adjudicative authority of a court, the Court ruled that the "inquiry focuses on the jurisdictional grant provided by § 1346(b)."[210] Examining this statute, which speaks in the language of jurisdiction, the Court explained:

> Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. This category includes claims that are:
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> "[1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).
>
> A claim comes within this jurisdictional grant—and thus is "cognizable" under § 1346(b)—if it is actionable under § 1346(b). And a claim is actionable under § 1346(b) if it alleges the six elements outlined above.[211]

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206. On the FTCA as a waiver of sovereign immunity for tort claims against the federal government, see *supra* Part I.B.2.

207. 510 U.S. 471 (1994).

208. *See id.* at 475-86 (internal quotation omitted).

209. 28 U.S.C. § 2679(a) (2000).

210. *Meyer*, 510 U.S. at 476 (citing 28 U.S.C. § 1346(b)).

211. *Id.* at 477 (citations omitted); *see also* Feres v. United States, 340 U.S. 135, 140-41 (1950) (describing § 1346(b) as conferring jurisdiction, while regarding § 2674 and other

Because constitutional tort claims, such as those raised in *Meyer*, do not fall within the jurisdictional scope of the FTCA,[212] that statute is not the exclusive remedy in such cases.[213]

Looking then at the FTCA as a statutory waiver, under the light shed by the *Meyer* decision, the jurisdictional part of the interpretive analysis focuses upon § 1346(b), which the Court had previously characterized as the "principal provision" of the FTCA.[214] Section 1346(b) outlines the basic scope of the waiver and the jurisdictional compass of court authority over tort claims against the United States, setting forth the six requisite elements. Thus, for example, whether a government employee was "acting within the scope of his ... employment," and whether the "circumstances" are such that a "private person" would be liable, are jurisdictional questions that must be satisfactorily answered before the court has the authority to adjudicate the claim.[215]

Section 2674 of the FTCA[216] further defines the elements of the waiver, but in a nonjurisdictional section.[217] Section 2674 more specifically describes the standard of liability and adds the exclusion of governmental liability for "interest prior to judgment" and "for punitive damages."[218] When the Supreme Court construed this

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provisions in the FTCA as prescribing what claims are allowable, to be determined by courts in exercising that jurisdiction).

212. On constitutional torts as falling outside of the FTCA, see generally SISK, *supra* note 58, § 3.05(b)(2), at 127-29, § 3.06(d)(1), at 156-58.

213. Although the agency's sue-and-be-sued clause thus was not superseded in *Meyer*, the Court ultimately refused to recognize a valid cause of action against a federal government entity for money damages for an alleged constitutional violation. *Meyer*, 510 U.S. at 483-86.

214. Richards v. United States, 369 U.S. 1, 6 (1962).

215. *See Meyer*, 510 U.S. at 477 (quoting 28 U.S.C. § 1346(b)).

216. 28 U.S.C. § 2674 (2000) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

217. *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 484-85 (2006) (describing the FTCA as waiving sovereign immunity "in two different sections," the first (§ 1346(b)(1)) which "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second (§ 2674) which further outlines the elements of "claims falling within this jurisdictional grant"); *see also* Feres v. United States, 340 U.S. 135, 141 (1950) (describing § 2674 as "go[ing] on to prescribe the test of allowable claims," which involve the court's adjudication on the merits as a matter of law "in exercise of their jurisdiction" which had been granted by § 1346(b)).

218. 28 U.S.C. § 2674.

prohibition on awards of punitive damages in *Molzof v. United States*,[219] the Court rejected the government's suggestion of a special definition that would limit governmental liability to strictly compensatory damages, instead adopting the traditional common-law understanding of punitive damages as that which is designed to punish a party for egregious misconduct.[220] The "cardinal rule" of statutory construction, by which a term of art borrowed by Congress is to be given its traditional meaning, was declared by the *Molzof* Court to "carr[y] particular force in interpreting the FTCA."[221] The Court also noted the practical difficulties in applying the government's demand that any excessive damage award be treated as somehow punitive in effect.[222] In thereby relying on ordinary principles of statutory construction and giving considerable weight to the practical consequences, the Court declined to defer to the "Government's restrictive reading of the statute,"[223] much less apply a rigid jurisdictional analysis. Indeed, after quoting the punitive damages limitation as found in § 2674, the Court referred to the "jurisdictional grant over FTCA cases" as being separately found in § 1346(b).[224]

Even more so, then, the numerous exceptions to liability under the FTCA—from the discretionary function exception through the transmission of mail exception and to the military combat exception[225]—presumably should not be treated as jurisdictional provisions.[226] As elsewhere in this field of law, the Supreme Court's

219. 502 U.S. 301 (1992).

220. *Id.* at 304-12.

221. *Id.* at 307.

222. *Id.* at 309-10.

223. *Id.* at 310.

224. *Id.* at 305.

225. On the exceptions to the FTCA, see *supra* Part I.B.2.

226. In appropriate cases, some exceptions to the FTCA may have jurisdictional implications by way of justiciability limitations on the federal judiciary. For example, through the discretionary function exception, 28 U.S.C. § 2680(a) (2000), "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813-14 (1984). In sum, the discretionary function exception is grounded in "separation of powers concerns." Mark C. Niles, *"Nothing But Mischief": The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1323 (2002). Accordingly, as I have written previously, "the discretionary function exception appears to be a species of the 'political question' doctrine, under which the courts will refuse to hear complaints when the challenged

statements have not always been consistent, although suggestions that the FTCA exceptions have jurisdictional force have arisen only as dicta. Thus, for example, the Supreme Court has spoken of the grant of jurisdiction in the FTCA as not extending to the matters covered by the exceptions,[227] and has described an exception as "preclud[ing] the exercise of jurisdiction,"[228] although such jurisdictional questions as whether exceptions were subject to waiver or forfeiture were not presented in these cases. By contrast, in both *Indian Towing Co. v. United States*[229] and *Block v. Neal*,[230] the Court noted that the government had conceded that the discretionary function exception was not implicated, a concession the Court did not question as it would have been obliged to do sua sponte were it a jurisdictional element. Importantly, in the decade since the Court clarified the jurisdictional reach of the FTCA in *Meyer*, no decision has ascribed jurisdictional significance to an exception.[231] In its

governmental decision is regarded as being constitutionally committed to the political branches of government or beyond the expertise of the courts to resolve." SISK, *supra* note 58, § 3.06(b)(3), at 145. Indeed, for reasons of constitutional separation of powers, every court of appeals to address the question has held that a discretionary function exception must be implicit in the Suits in Admiralty Act, even though it is not expressly included in that statutory waiver. *See, e.g.*, McMellon v. United States, 387 F.3d 329, 338-49 (4th Cir. 2004) (en banc); *In re* Joint E. & S. Dists. Asbestos Litig. (Robinson v. United States), 891 F.2d 31, 35 (2d Cir. 1989); Gordon v. Lykes Bros. S.S., 835 F.2d 96, 98-100 (5th Cir. 1988); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1085-87 (D.C. Cir. 1980). *See generally* SISK, *supra* note 58, § 3.11, at 192-94 (collecting and discussing cases). Similar justiciability issues may arise in particular cases with respect to the military combat exception, 28 U.S.C. § 2680(j) (2000), and the foreign country exception, 28 U.S.C. § 2680(k) (2000). But, in general and as a matter of theory (not being part of the core waiver) and location within the code (codified separately from the jurisdictional grant), the exceptions to the FTCA should be treated as separate from the jurisdictional inquiry.

227. Sheridan v. United States, 487 U.S. 392, 398 (1988).

228. Smith v. United States, 507 U.S. 197, 199 (1993).

229. 350 U.S. 61, 64 (1955).

230. 460 U.S. 289, 294 (1983).

231. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 710 (2004), the Court did say that foreign substantive law might apply in FTCA cases "if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign harm" that had been planned or supervised inside the borders of the United States, which was another reason to read the foreign country exception, 28 U.S.C. § 2680(k) (2000), as barring claims involving injury in another nation. In this part of the opinion, however, the Court was speaking of "jurisdiction" primarily in terms of the geographic location of the court, whether in one or another state or country, with choice of law consequences, rather than in terms of federal judicial authority to hear a particular class of claims. In any event, the Court did not directly rule or suggest that the FTCA exception was a nonwaivable jurisdictional prerequisite. *See id.* at 710-12.

recent decision in *Dolan v. United States Postal Service*,[232] which is discussed in more detail below,[233] the Court explained that it was inclined to construe exceptions to the waiver more narrowly, so as not to defeat the sweeping purpose of the FTCA in waiving sovereign immunity.[234]

For the same reason, the statute of limitations governing FTCA claims,[235] which is not included within the general section waiving sovereign immunity and simultaneously conferring district court jurisdiction,[236] presumably would not be given a jurisdictional read and would not constitute a nonwaivable constraint on judicial authority. Although the Supreme Court in the past has described this statute of limitations as a "condition of [the] waiver" of sovereign immunity,[237] the Court has never expressly characterized it as jurisdictional nor addressed the question of whether it is subject to equitable tolling. Reasoning that the FTCA contains "a garden variety limitations provision,"[238] every court of appeals to address the question has concluded or suggested that the FTCA provision is not jurisdictional and instead falls within the presumption of *Irwin v. Department of Veterans Affairs*[239]—that statutes of limitations in federal government cases are subject to equitable tolling.[240]

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232. 546 U.S. 481 (2006).

233. *See infra* Part II.C.3.

234. *Dolan*, 546 U.S. at 491-92; *see also* United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (saying that the Court has "narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act") (citation omitted).

235. 28 U.S.C. § 2401(b) (2000).

236. 28 U.S.C. § 1346(b) (2000).

237. United States v. Kubrick, 444 U.S. 111, 117-18 (1979).

238. Perez v. United States, 167 F.3d 913, 917 (5th Cir. 1999).

239. 498 U.S. 89, 95-96 (1990). For more on the *Irwin* presumption in favor of equitable tolling of statutes of limitations in federal government cases, see *infra* Parts II.D and III.A.

240. *See, e.g.*, Gonzalez v. United States, 284 F.3d 281, 288-91 (1st Cir. 2002); Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); *Perez*, 167 F.3d at 917-19; Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1997); Glarner v. U.S. Dept. of Veterans Admin., 30 F.3d 697, 701 (6th Cir. 1994); Pipkin v. U.S. Postal Serv., 951 F.2d 272, 274-75 (10th Cir. 1991); *see also* Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991) (holding that strict compliance with FTCA statute of limitations is not a jurisdictional prerequisite). *But see* Wukawitz v. United States, 170 F. Supp. 2d 1165, 1169 (D. Utah 2001) (holding that Congress did not intend to permit equitable tolling of the FTCA statute of limitations); Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 SETON HALL L. REV. 174 (2000) (arguing that the

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In sum, the initial jurisdictional hold on the jurisprudence of statutory waivers of sovereign immunity has loosened significantly since the early and inhospitable judicial reception to such statutes in the mid- to late-nineteenth century. Over the past twenty years, the Supreme Court appears to have developed a more refined approach in which the jurisdictional inquiry is reserved for the core and general waiver of the statute for a class of claims, which provisions also frequently speak expressly in terms of conferring jurisdiction upon a particular tribunal.

But then, in *John R. Sand & Gravel Co. v. United States*,[241] the Court departed from its recent course and resurrected the precedential force of a line of decisions from that earlier era that had extended absolute and nonwaivable status to the statute of limitations governing a particular category of statutory waivers. Is the jurisdictional grip on statutory waivers tightening again? The potential significance of this deviation from recent trends in the Court's sovereign immunity jurisprudence is addressed in a later part of this Article.[242]

C. Construction of a Waiver's Substantive Scope: Strict in Theory, Calibrated and Pragmatic in Practice[243]

Nearly sixty years ago, the Supreme Court observed that "'[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by

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legislative history of the FTCA indicates Congress did not intend the statute of limitations to be subject to equitable exceptions); Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 SETON HALL L. REV. 885, 890 (1999) (same).

241. 128 S. Ct. 750 (2008).

242. *See infra* Part III.

243. Gerald Gunther once described the Supreme Court's approach of strict scrutiny as applied to certain statutory provisions that made distinctions based on race as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). By my riff on that theme, I argue that the Court's "strict" construction of statutory waivers of sovereign immunity is not invariably fatal to claims against the government, but pragmatic in application, calibrated to the type of provision at issue, and not eliding careful attention to text, context, and legislative purpose.

refinement of construction where consent has been announced.'"[244] As Justice Scalia has said with respect to general principles of legal interpretation, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[245] Unfortunately, over the decades, the Court often has recited "the traditional principle that the Government's consent to be sued 'must be construed strictly in favor of the sovereign,'"[246] but without explaining what strict construction means and without placing this rubric in qualifying context within a coherent framework for interpretation of statutory waivers of sovereign immunity.

As recently as two years ago, while acknowledging tension in the case law in this field of law, I wrote that the "strict construction approach appears to predominate."[247] In fact, on further review, the domination of this parsimonious judicial attitude toward statutory waivers of sovereign immunity appears to be fading somewhat. But the principal questions are not so much *whether* a form of strict construction persists, as *when* such a method is appropriately invoked and *what* it entails in application. Formulaic references to "strict construction" are unlikely to advance understanding and uphold the legislative intent. Instead, we must examine the rationale for, and meaning of, this interpretive canon, calibrate this method of construction to the character and animating purpose of the statutory provision at issue, and insist upon close attention to text, context, and history. When the canon of strict construction is properly employed, it should be an aid to analysis and not merely a make-weight to justify a ruling in favor of the government that has already been reached for other, perhaps unstated, reasons.

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244. United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949) (quoting Anderson v. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926)).

245. SCALIA, *supra* note 4, at 23. For Justice Scalia's views on a clear statement rule for waivers of federal sovereign immunity, see *infra* note 268.

246. United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)) (internal quotation marks omitted); *see also* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 206 (1999) (critically referring to the rule that "statutes waiving sovereign immunity are narrowly construed," as an example of those canons or "rules of thumb" that are "based on judicially identified policies").

247. SISK, *supra* note 58, § 2.03, at 97.

It is far too late in the day to contend that the United States is an ordinary party. As the representative of the collective polity, the federal government must be empowered to act, within its constitutional and statutory authority, in a manner that is not subject to second-guessing by the courts in the guise of a civil suit for damages or an equitable action for specific relief. In this sense, as the Supreme Court said more than a century ago, "in its dealings with individuals, public policy demands that the government should occupy an apparently favored position."[248] But it is one thing to favor the government in cases of genuine interpretive doubt when one of the choices would expose the government to a new cause of action or subject the federal government to a previously unrecognized form of relief.[249] It is quite another thing to allow the canon of strict construction to devolve into a methodology by which the government wins automatically whenever plausible arguments can be made for alternative interpretations of a statutory provision that sets forth standards, limitations, exceptions, or procedural rules for claims against the government already authorized by an express waiver.

1. Strong Presumption Against Interpreting a Waiver To Allow a New Cause of Action or Remedy

Given the longstanding rule that permission for suit against the United States must be unequivocally and unambiguously expressed, the Supreme Court understandably has shown solicitude for unique governmental interests when determining whether the people's representatives have consented to suit at all and in sketching the material breadth of a statutory waiver of sovereign immunity. Asking when civil litigation is an appropriate response to harms caused by governmental activities, which claims are suited for the judicial venue rather than being redressed by legislation or administrative procedures, what types and theories of liability that should be recognized in suits alleging governmental wrongs, and

248. United States v. Verdier, 164 U.S. 213, 219 (1896).

249. *See* Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 2007, 2019 (2008) (observing that the Court had "resort[ed] to the canon" of strict construction in *Department of Energy v. Ohio*, 503 U.S. 607, 626-27 (1992), "only after a close reading of the statutory provision had left the Court 'with an unanswered question and an unresolved tension between closely related statutory provisions'" (citing *Dep't of Energy*, 503 U.S. at 626)).

which forms of relief that may be imposed against the government as an entity, are all questions that go to the very core of the concept of sovereign immunity and its grounding in constitutional separation of powers.[250]

Articulated as a "strong presumption against the waiver of sovereign immunity,"[251] the principle of strict construction applies most readily to these core questions of whether the government is amenable to suit based upon a particular theory of liability and whether the government should be subject to the remedy requested. Accordingly, the presumption that a statutory waiver is narrow in scope is at its strongest when the matter at issue is the theory of liability (the cause-of-action) or the availability of a particular remedy (money, interest, specific performance, declaratory judgment, injunction, etc.). As the Supreme Court stated in *Lane v. Pena*,[252] "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its *scope*, in favor of the sovereign."[253]

In *Office of Personnel Management v. Richmond*,[254] the Court cited the rule that "authorizations for suits against the Government must be construed strictly in its favor," as justifying the Court's refusal to allow equitable estoppel to excuse the explicit terms of a statute when a government employee's misstatement caused a person claiming government benefits to fail to satisfy statutory eligibility requirements.[255] Similarly, in *United States v. Nordic Village, Inc.*,[256] the Court invoked the "traditional principle" that the government's consent to suit must be strictly construed in the course of finding that there was no unequivocal textual provision that unambiguously waived the government's immunity from monetary relief sought by a bankruptcy trustee in an adversary

250. On the concept of federal sovereign immunity, see *supra* Part I.A.

251. *See* Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981); *see also* E. Transp. Co. v. United States, 272 U.S. 675, 686 (1927) (saying that "[t]he sovereignty of the United States raises a presumption against its suability, unless it is clearly shown").

252. 518 U.S. 187 (1996).

253. *Id.* at 192 (emphasis added); *see also* Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (saying that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign").

254. 496 U.S. 414 (1990).

255. *Id.* at 432.

256. 503 U.S. 30 (1992).

proceeding in a bankruptcy court.[257] In *Orff v. United States*,[258] the Court held that an attempt by purported third-party beneficiaries to enforce a contract against the United States, absent express statutory permission for such a noncontracting plaintiff to sue the United States alone, "founders on the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign."[259] In each of these cases, the rule of strict construction was applied to preclude judicial implication of what essentially would have been new causes of action against the United States, with direct or indirect fiscal consequences.

Several examples may also be adduced of the Court's strong aversion to allowing a new remedy against the government without explicit legislative leave, even if general consent has been granted for the general category of claim. The Court cited the rule of strict construction in *Library of Congress v. Shaw*[260] when refusing to allow an award of prejudgment interest on an award of attorney's fees against the United States under the Title VII waiver of sovereign immunity,[261] absent an express provision in the statutory text for allowing interest as "an element of damages separate from damages on the substantive claim."[262] Similarly, in *Department of the Army v. Blue Fox, Inc.*,[263] the Court employed the rubric of strict construction in rejecting the suggestion that a party seeking funds allegedly owed to them could obtain a lien on those funds held by the United States through the general provision for specific relief under the Administrative Procedure Act.[264] As yet another example, "one of the most venerable and enduring rules of government contract law specifically, and indeed of sovereign immunity doctrine in general, has been that the remedy of specific performance is not available to compel the government to accept or discharge the duties

257. *Id.* at 33-37.

258. 545 U.S. 596 (2005).

259. *Id.* at 601-02.

260. 478 U.S. 310 (1986).

261. *Id.* at 318.

262. *Id.* at 314; *see also* United States v. Idaho, 508 U.S. 1, 7-8 (1993) (explaining that "[i]n several of our cases exemplifying the rule of strict construction of a waiver of sovereign immunity, we rejected efforts to assess monetary liability against the United States for what are normal incidents of litigation between private parties," and citing cases precluding awards of court costs, interest, and punitive fines absent express congressional consent).

263. 525 U.S. 255 (1999).

264. *Id.* at 260-61.

agreed to under a contract."[265] Thus, from the nineteenth century forward, the Supreme Court has interpreted the Tucker Act to authorize an award of monetary damages for breach of contract,[266] while rejecting the remedy of specific performance as likely to interfere unduly with the exercise of governmental discretion by the other branches of government.[267]

In all of these cases, the rule of strict construction applies not as a prescription for resolving all questions in favor of the government, but as an emphatic pronouncement that new causes of action and remedies against the government will not be created by judicial implication. Indeed, in these cases—where the matter at issue was recognition of a new theory of liability or a new form of relief against the sovereign—the Court has established what scholarly commentators term a "clear statement rule," that is, a demand for a plain and unequivocal expression by Congress in the text of a statute concerning the core elements of any waiver of federal sovereign immunity.[268] John Nagle explains that the Supreme Court requires

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265. SISK, *supra* note 58, § 4.08(b)(4), at 308.

266. *See* United States v. King, 395 U.S. 1, 3-5 (1969).

267. *See, e.g.*, *In re* Ayers, 123 U.S. 443, 503-06 (1887); Hagood v. Southern, 117 U.S. 52, 71 (1886); Louisiana v. Jumel, 107 U.S. 711, 727-28 (1883). *See generally* Seamon, *supra* note 59, at 199 ("The [restriction on specific performance] prevents judicial interference with the discretion of officials in the political branches. In particular, the rule gives officials flexibility to get out of contracts that, they determine, no longer serve the public interest.").

268. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4, 643 (1992); Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 460-61 (1994); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 773-76, 796-98, 806 (1995). William Eskridge, Philip Frickey, and Elizabeth Garrett characterize the adoption of a clear statement rule for determining whether there is a waiver of federal sovereign immunity as a "great expansion in the power of the canon" of strict construction, which the Supreme Court has failed to justify. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 338 (2000). Although acknowledging that "rules of construction that load the dice for or against a particular result" are difficult for the "honest textualist" to justify, Justice Scalia argues that "congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation." SCALIA, *supra* note 4, at 27-29. He then adds: "[a]nd the same, perhaps, with waiver of sovereign immunity." *Id*. at 29. Note that the matter for which a clear congressional statement is expected is the existence of an express waiver of federal sovereign immunity—not for every element of liability or procedure that accompanies such a waiver. William Eskridge criticizes Justice Scalia's justification for a clear statement rule on

"specifically targeted statutory language and refuse[s] to consider other indicia of legislative intent" in the construction of a grant of judicial relief against the federal government.[269] When the cause of action is not expressly recognized in the statute and the government has not explicitly indicated its willingness to assume a form of liability through legislative consent, the strong presumption against an inexplicit waiver of immunity leads ineluctably to a ruling in favor of the government.

The traditional rule of strict construction is most secure when employed to narrowly define the general subject of a claim and the type of relief afforded by the waiver. But this unyielding approach becomes less stable and not easily justified when invoked to demand an obdurate reading in favor of the government with respect to every standard, limitation, exception, or procedural rule that accompanies or is pertinent to a statutory waiver.

2. Strictness of Construction Lessens with Greater Judicial Familiarity with a Statutory Waiver: The Evolution of the Tucker Act in the Supreme Court

As one federal court stated many decades ago, the rule of strict construction should not become "a judicial vise to squeeze the natural and obvious import out of ... a statute or to sap its language of its normal and sound legal meaning."[270] Moreover, the text should be read in context within a statutory code and with a pragmatic understanding of the legal environment in which the statute was

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abridgment of sovereign immunity, noting among other reasons that "such legislation is no longer extraordinary." William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1544 n.127 (1998) (reviewing ANTONIN SCALIA, A MASTER OF INTERPRETATION (1997)). While Eskridge was speaking of legislation eliminating state sovereign immunity, statutes waiving federal sovereign immunity are even more ubiquitous today. *See supra* Part I.B.

269. Nagle, *supra* note 268, at 773. Nagle criticizes the requirement of a "clear statement," complaining that "while it is easy for Congress to write a provision that waives sovereign immunity generally, it is hard for Congress to write a provision that specifies the *scope* of a waiver of sovereign immunity." *Id.* at 776. Similarly, in an era of greater acceptance of the government's amenability to suit and of judicial independence, Vicki Jackson argues that the "abstract idea of sovereign immunity" should not be invoked to deny "remedies to address violations of legal rights" in cases in which "there is room for interpretation on questions of jurisdiction and remedies." Jackson, *supra* note 51, at 607-09.

270. Herren v. Farm Sec. Admin., 153 F.2d 76, 78 (8th Cir. 1946).

enacted, so that the "intent to waive immunity and the scope of such a waiver [is] ascertained by reference to underlying congressional policy."[271] Unfortunately, the rubric of strict construction has sometimes obscured the essential meaning of a statutory waiver of sovereign immunity, although the Supreme Court tends to find its way back home to the central purpose of the statute as interpretive questions recur across the decades and as the Court becomes more familiar and more comfortable with a particular statutory waiver.

The adjudication history of the Tucker Act[272] before the Supreme Court, from its nineteenth century enactment to the present, provides an illustrative example of the ebb and flow of strict construction over time in the context of a specific statutory waiver. As noted earlier, because the legislative consent to suits for money damages in the then-Court of Claims was enacted as part of a grant of subject matter jurisdiction to a new tribunal, the Court's initial approach was to impose not merely a strict but also a jurisdictional reading to each statutory element.[273] In that discussion, I suggested that these early holdings may have reflected the Supreme Court's uneasiness with what was then a new category of legislation, that is, statutes which offered general consent to suits against the government for categories of claims. In any event, the Court's skeptical approach to this first major statutory waiver of sovereign immunity extended well beyond implying jurisdictional status into the accompanying statute of limitations. In the early decades, the Court read the Tucker Act so narrowly as to effectively deprive a central provision of any meaningful force as a remedy for the loss of private property to the government. Over time, however, the Court has rediscovered the judicial remedy originally intended by Congress and, further, has moved away from a confining and narrow definition of the Tucker Act cause of action, limiting the strict approach to the initial question of whether sovereign immunity has been waived, a question which of course is directly answered by the Tucker Act itself.

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271. Franchise Tax Bd. of Cal. v. U.S. Postal Serv., 467 U.S. 512, 521 (1984).

272. 28 U.S.C. § 1491 (2000). On the Tucker Act as a waiver of sovereign immunity, see *supra* Part I.B.1.

273. *See supra* Part II.B.2.

When the Tucker Act was originally enacted in 1887,[274] the provision of a judicial review mechanism for claims that the federal government had taken private property without just compensation was most clearly within the contemplation of Congress.[275] In addition to confirming the existing authority of the then-Court of Claims to hear contract and statutory claims for money, the Tucker Act enlarged the waiver of sovereign immunity to include claims against the federal government "founded" on "the Constitution."[276] The Fifth Amendment of the United States Constitution states, in pertinent part, that no "private property [shall] be taken for public use, without just compensation."[277]

Nevertheless, for more than fifty years, the scope of the Tucker Act was read narrowly to apply only to condemnation cases, that is, when the government affirmatively sought to obtain title to property and thus was effectively purchasing the property (albeit involuntarily from the seller's standpoint). Indeed, the Court construed the Tucker Act so strictly that even a condemnation case did not give rise to a direct claim in court for a taking of the property founded on the Constitution. Instead, the Court implied a contractual promise by the government to pay just compensation, thus allowing a judicial remedy under the government contract jurisdiction of the Court of Claims.[278] In *United States v. Jones*,[279] the Court remarked that "[t]he jurisdiction here given to the Court of Claims [in the Tucker Act] is precisely the same as that given" in the earlier statutes creating the Court of Claims,[280] thereby effectively discarding the legislative augmentation of judicial authority through the Tucker Act to include claims founded upon the Constitution.[281] As

274. Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.).

275. Noone & Lester, *supra* note 60, at 575 & n.28.

276. 28 U.S.C. § 1491(a)(1) (2000) (waiving the federal government's sovereign immunity for monetary claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort").

277. U.S. CONST. amend. V.

278. *See* United States v. Great Falls Mfg. Co., 112 U.S. 645, 656-57 (1884); Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301, 309 (1997).

279. 131 U.S. 1 (1889).

280. *Id.* at 16.

281. *See* Charles C. Binney, *The Element of Tort as Affecting the Legal Liability of the*

one commentator stated early in the twentieth century, before the change of jurisprudential course, the Court had "so construed the Act as to limit very materially the broad terms of relief which the Act appears to grant," with the result that "[p]ractically no case has been able to stand" on the Constitution and every claim instead has had to be proven as a contract, express or implied.[282]

During the latter half of the nineteenth century and well into the twentieth century, if the government seized property (other than by statutorily-authorized condemnation) or deprived individuals of the use of their property, the Court treated the government's conduct as a tort (such as trespass or wrongful appropriation).[283] The Tucker Act specifically provides that the jurisdictional grant to the then-Court of Claims, and the waiver for certain money claims against the United States, applies only to "cases not sounding in tort."[284] Accordingly, and appropriately because the condition is stated as part of the jurisdictional grant, the courts have treated the tort exception to the Tucker Act as limiting the jurisdiction of the federal judiciary.[285] As discussed earlier,[286] no general waiver of sovereign immunity for tortious injuries was enacted by Congress until the Federal Tort Claims Act in 1946. As a consequence, during this period, the Court left those who had suffered a taking of their property by the federal government in the awkward position of trying to file suit for specific relief, such as ejectment, against the

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United States, 20 YALE L.J. 95, 99 (1910) (noting that the Court's statement in *Jones* "is clearly inaccurate, as it makes no mention of claims founded upon the Constitution, and it must be regarded as a *dictum* except in so far as it bears upon the precise question before the court").

282. Borchard, *supra* note 45, at 29 & n.115; *see also* Schillinger v. United States, 155 U.S. 163, 167 (1894) (ruling that "[s]ome element of contractual liability must lie at the foundation of every action" under the Tucker Act); Note, *Developments in the Law: Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 876 (1957) ("[T]he result of the decisions was that the 'founded upon the Constitution' clause was entirely submerged into the clause conferring jurisdiction over contract actions.").

283. *See Schillinger*, 155 U.S. at 166-67; Hill v. United States, 149 U.S. 593, 598 (1893); Borchard, *supra* note 45, at 11 (saying that while governmental occupation of property "might have been regarded as a taking of land for public use under the [C]onstitution," and thus falling within the Tucker Act, the Court "preferred to consider it a tort ... with resulting immunity from suit").

284. 28 U.S.C. § 1491(a)(1) (2000).

285. Basso v. United States, 239 U.S. 602, 606-07 (1916); Jentoft v. United States, 450 F.3d 1342, 1349-50 (Fed. Cir. 2006).

286. *See supra* Part I.B.2.

individual government official in possession of the property, while contending that sovereign immunity did not bar the suit because the government officer was acting unconstitutionally.[287] As observed by a mid-twentieth century commentary on these early decisions barring most takings claims against the federal government under the Tucker Act, "[t]he spirit of these decisions is indicated by the maxim, often quoted even in recent years, that waivers of sovereign immunity must be strictly construed."[288]

Over time, the Supreme Court adopted a more hospitable approach as it has become more familiar with this statutory waiver of sovereign immunity, bringing about a correction of its earlier missteps. In 1933, in *Jacobs v. United States*,[289] which involved the exercise of eminent domain by the federal government, the Court forthrightly recognized the claim brought under the Tucker Act for compensation (including interest) as being founded upon the Constitution, rather than upon an implied contract.[290] In 1946, the Supreme Court abandoned its rigid approach to the Tucker Act and held that seizures of property, even outside of the deliberate exercise of eminent domain powers, were indeed takings under the

287. *See* Cramton, *supra* note 55, at 392 ("In the nineteenth century, prior to the enactment of a profusion of statutory remedies, the action against the wrongdoing officer was the mainstay of the system."). In an unwieldy attempt to accommodate the concept of sovereign immunity while allowing some remedy for governmental wrongdoing, the Court indulged the legal fiction that a suit for equitable relief against a government officer was not in substance a claim against the government itself, notwithstanding that the officer acted for the government, held property in the name of the government, and the relief granted directly affected the government. *See* United States v. Lee, 106 U.S. 196, 204-18 (1882). The Court abandoned the officer suit fiction in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (plurality), holding that the Court must look to the relief sought in the suit to determine whether, although nominally framed against an officer, the complaint in reality is pressed against the federal government itself. *See also* Malone v. Bowdoin, 369 U.S. 643 (1962) (holding that, unless a government officer acts beyond statutory or constitutional powers, the suit is one against the government itself and within the doctrine of federal sovereign immunity). This clarification of the underlying sovereign immunity doctrine in turn set the stage for renewed legislative consent to judicial review, including the expansive 1976 amendment to the Administrative Procedure Act that expressly waives the sovereign immunity of the government and allows suits seeking judicial review of an agency's action to be brought directly against the government itself. Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified at 5 U.S.C. § 702 (2000)).

288. *Developments in the Law*, *supra* note 282, at 876.

289. 290 U.S. 13 (1933).

290. *Id*. at 16.

Fifth Amendment and thus compensable under the Tucker Act, even if they alternatively could be characterized as torts.[291]

The doctrinal change came in the first of the major airplane overflight cases in which landowners adjoining airports made claims for the damage caused by the noise and vibration of low-flying aircraft.[292] In *United States v. Causby*,[293] the owner of a chicken farm sought compensation because the chickens were literally being frightened to death by the noise of heavy bombers overflying at sixty-five feet. Effectively overturning fifty years of case law, the Court upheld jurisdiction under the Tucker Act for claims alleging any form or manner of the taking of property rights by the government: "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."[294]

Over the course of six decades, as the Supreme Court became more comfortable with this landmark statutory waiver of sovereign immunity and more respectful of its original legislative purpose in providing a judicial remedy for certain constitutional wrongs, the Court has journeyed a considerable distance in its sovereign immunity jurisprudence. The Court abandoned early rulings that effectively erased the textual provision for Constitution-based claims from the Tucker Act and moved to openly accept claims under the Act that allege any form of taking. Indeed, today, the Supreme Court holds that the Tucker Act is presumptively available in all cases where a person alleges that the federal government has taken property without just compensation.[295]

Having confirmed the full range of the Tucker Act vehicle, including contract, statutory, and Constitution-based claims, the primary question surrounding the Tucker Act in the past couple of decades has been defining the cause of action afforded by this

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291. United States v. Causby, 328 U.S. 256, 265-67 (1946).

292. *See id.* at 258.

293. *Id.* at 256.

294. *Id.* at 267; *see also* Kirgis, *supra* note 278, at 309 (explaining that "*Causby* discarded the Court's prior jurisprudence" and held that a taking claim is founded on the Constitution as provided in the Tucker Act).

295. *See* Presault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990) (citing *Causby* as confirming jurisdiction of the then-Claims Court over takings claims as founded upon the Constitution and holding that the Tucker Act is presumptively available for all claims arising out of a taking).

waiver of sovereign immunity.[296] For a relatively brief moment in jurisprudential time, the Supreme Court appeared to disclaim the Tucker Act as a waiver of sovereign immunity at all,[297] a mistaken retreat from its more generous approach that the Court fortunately soon righted. In 1983, in *United States v. Mitchell*,[298] the Supreme Court clarified that the Tucker Act speaks both to subject matter jurisdiction in the federal courts and to the amenability of the United States to suit.[299] However, beyond establishing jurisdiction and waiving sovereign immunity, the Tucker Act does not create substantive law or define the substance of a claim in and of itself. To be cognizable under the Tucker Act, a claim must be based upon a "money-mandating" provision in the Constitution or a statute or regulation, that is, a provision that contemplates compensation in money for a violation of the government's duty.[300]

In addressing the question of the substantive right under the Tucker Act, the Court has confirmed the loosening of the strictures of construction as applied to familiar statutory waivers of sovereign immunity and when the interpretive question moves beyond the preliminary matters of whether a waiver exists for the general category of claims and whether jurisdiction is assigned to a particular federal forum. In its 2003 decision in *United States v. White Mountain Apache Tribe*,[301] the Supreme Court reiterated that the Tucker Act claimant must premise the substantive right to relief upon a statutory provision that "can fairly be interpreted as mandating compensation by the Federal Government for the

296. *See generally* SISK, *supra* note 58, § 4.04(b), at 257-61.

297. United States v. Mitchell, 445 U.S. 535, 538 (1980) (saying that a claimant must "look beyond" the Tucker Act to find a waiver of sovereign immunity); United States v. Testan, 424 U.S. 392, 398 (1976).

298. 463 U.S. 206 (1983).

299. *Id.* at 212-16.

300. *See* Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967) (ruling that the Tucker Act claimant must demonstrate that the source of substantive law he or she relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"); *see also* United States v. Testan, 424 U.S. 392, 400 (1976) (adopting the money-mandating formulation from *Eastport Steamship*).

301. 537 U.S. 465 (2003). For a detailed description of the *White Mountain Apache* decision and the requirements for establishing an actionable fiduciary relationship for a breach of trust claim by an Indian tribe against the federal government under the Tucker Act, see generally Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313 (2003) (Indian Trust Doctrine Symposium).

damage sustained."[302] The Court rejected the suggestion, however, that this stage of the analysis should include the kind of strict construction approach that would govern the preliminary inquiry into whether a statute has been identified that waives federal sovereign immunity.[303]

Given that the Tucker Act itself accomplishes the waiver of sovereign immunity, the *White Mountain Apache* Court said that the "'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity."[304] In holding that the underlying statutory source of law need only be "reasonably amenable to the reading that it mandates a right of recovery in damages,"[305] the Court deliberately adopted ordinary rules of statutory interpretation, as contrasted with the stringent demand for an explicit statement applicable to the preliminary stage of confirming the existence of a legislative waiver of the government's sovereign immunity. Retaining a decent respect for the sovereign United States, the Court nonetheless counseled caution, saying that "[w]hile the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do."[306]

Accordingly, at least as of the day before the January 8, 2008 decision in *John R. Sand & Gravel Co. v. United States*,[307] the Supreme Court's interpretive approach toward the important and broad waiver of sovereign immunity exemplified in the Tucker Act has depended upon the stage of the analysis, with jurisdictional expectations and strict construction being limited to the preliminary core substantive inquiries. As a robust example in which the various threads of case law appeared to come together just a few years ago, in *Franconia Associates v. United States*[308] the Court unanimously

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302. *White Mountain Apache*, 537 U.S. at 472 (internal quotation marks omitted).

303. *See id*. at 472-73. As Nell Jessup Newton observed two decades before the Court eased the stringency of the analysis, if "the question [of a substantive right to relief under the Tucker Act] is posed as a search for a statutory waiver of sovereign immunity, the doctrine of strict construction must be addressed, and a general statute ... has little chance of being viewed as a waiver." Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635, 656-57 (1982).

304. 537 U.S. at 472-73.

305. *Id*. at 473.

306. *Id*. (citation omitted).

307. 128 S. Ct. 750 (2008). For a discussion of the decision in *John R. Sand* and its potential impact, see *infra* Part III.

308. 536 U.S. 129 (2002).

found the requirement of a statutory waiver of sovereign immunity to be "satisfied" under the Tucker Act, meaning that the government no longer was "cloaked with immunity."[309] The prerequisites having been satisfied, and thus the jurisdictional and strict construction preliminaries having been satisfied as well, the *Franconia Associates* Court examined the question of accrual under the applicable statute of limitations without presumptions or preconceptions. The Court then concluded "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties."[310]

3. The Fading of Strict Construction with Distance from the Core Substance of the Waiver of Immunity

When the question before the Court is whether a new cause of action has been recognized against the federal government or whether Congress has authorized a new form of judicial relief, strict construction continues to dominate the Court's sovereign immunity jurisprudence, establishing a strong presumption against waiver and demanding explicit statutory text to overcome that presumption.[311] Even in this class of core substantive issues, the Court has moved away from a mechanical application of the strict construction rule that had sometimes suffocated a newly born legislative waiver in its cradle, as was initially the case with the express Tucker Act remedy for constitutional claims, as discussed immediately above.[312]

The Court is no longer willing to blind itself in the name of strict construction to the luminous purpose of Congress in expanding judicial remedies against the federal government.[313] "The canon in favor of strict construction is not an inexorable command to override

309. *Id.* at 141.

310. *Id.* at 145 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)). For further discussion of *Franconia Associates*, see *infra* Part II.D.

311. *See supra* Part II.C.1.

312. *See supra* Part II.C.2.

313. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 506 (1989) (suggesting, in what perhaps was an optimistic overstatement, that the "[n]arrow construction of statutes abrogating sovereign immunity" is an "obsolete" canon of statutory construction).

common sense and evident statutory purpose."[314] As John Nagle suggests:

> If the justification for sovereign immunity is to allow Congress to determine the appropriate balance between protecting government policymaking and providing remedies to those injured by government actions, then the object of interpreting statutory waivers of sovereign immunity should be to ascertain and implement the deliberate balance achieved by Congress.[315]

The Supreme Court itself confirmed quite recently that "[t]he sovereign immunity canon is just that—a canon of construction."[316] As "a tool for interpreting the law," the Court explained that it "never ... displaces the other traditional tools of statutory construction."[317] So understood, the rubric of strict construction is not a substitute for careful attention to the statutory language and structure actually enacted by Congress or a basis for ignoring the manifest purpose of the statutory waiver.

As we turn our examination away from the essential scope of a statutory waiver of sovereign immunity, and look at other statutory standards, limitations, exceptions, and rules applicable to a suit involving the government, it becomes even more apparent that strict construction no longer overwhelms interpretation of every element of a statute related to a waiver of sovereign immunity. In its less dogmatic incarnation, the rule of strict construction is a supple tool that assists, but does not dominate, interpretation. The strict construction canon counsels caution and precludes an excessive liberality at the expense of government prerogatives and appropriate administrative discretion. In this way, the forcefulness of strict construction fades as we move farther away from the core substance

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314. United States v. Brown, 333 U.S. 18, 25 (1948) (addressing the maxim that penal statutes are to be strictly construed); *see also* United States v. Williams, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (stating that the rule of "clear statement of waivers of sovereign immunity" does not "require explicit waivers to be given a meaning that is implausible" nor permit "restricting the unequivocal language" of explicit waivers).

315. Nagle, *supra* note 268, at 818.

316. Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 2007, 2017 (2008).

317. *Id.*

of a statutory waiver, and its potency may disappear altogether when sufficient distance is reached.[318]

One of the Supreme Court's most recent resolutions of an interpretive dispute focused on an exception to a statutory waiver of sovereign immunity and thus may serve as a model for the careful approach toward which the Court is gravitating. In *Dolan v. U.S. Postal Service*,[319] the Supreme Court construed the exception to the Federal Tort Claims Act for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter."[320] Over a dissent that emphasized strict construction,[321] the majority held the exception did not bar a resident's claim arising out of her alleged injury in tripping over letters, packages, and periodicals that had been negligently left on her porch by a mail carrier; rather, the Court majority applied the exception more narrowly to a failure to deliver mail or damage to its contents.[322]

In *Dolan*, the Court began by placing the statutory section in context within the act as a whole, separating the exception at issue from the core provisions that grant subject matter jurisdiction and accomplish the central waiver of sovereign immunity.[323] At the beginning of the majority opinion, the Court observed that the waiver of sovereign immunity for the FTCA comes in two sections of the Code, the first of which "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second of which directs that the United States is liable in the same manner as a private person under like circumstances but not for prejudgment interest or punitive damages.[324] In a separate statutory section, the Court observed that "[t]he FTCA qualifies its waiver of sovereign immunity for certain categories of claims," through thirteen exceptions.[325]

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318. *See infra* Part II.D (discussing construction of procedural rules).

319. 546 U.S. 481 (2006).

320. 28 U.S.C. § 2680(b) (2000). On the FTCA as a waiver of sovereign immunity, see *supra* Part I.B.2.

321. *Dolan*, 546 U.S. at 492-97 (Thomas, J., dissenting).

322. *Id.* at 485-92 (majority opinion).

323. *Id.* at 483-85.

324. *Id.* at 484-85 (citing 28 U.S.C. §§ 1346(b)(1), 2674 (2000)).

325. *Id.* at 485.

At the close of the majority opinion, the *Dolan* Court emphasized that the nature of the statutory provision at issue affects the manner in which it should be construed. Thus, the Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'"[326] The Court explained that "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'"[327]

By contrast, the dissent argued that the rule of strict construction dictated the outcome of the case, saying that "[e]ven if the exception is ambiguous, this Court's cases require that ambiguities as to the scope of the Government's waiver of immunity be resolved in its favor."[328] Drawing upon both jurisdictional presumptions and the rule of strict construction,[329] the dissent insisted that "[t]he well-established rationale for construing a waiver in favor of the sovereign's immunity, thus, applies with equal force to the construction of an exception to that waiver."[330] But on this occasion, the dissenting justice stood alone in invoking the rule of strict construction as both applicable to and directing the result of the case.

The seven-justice majority in *Dolan*,[331] having identified the provision as an exception to the general waiver and thus as not being readily amenable to resolution by the rule of strict construction, stated that "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more."[332]

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326. *Id.* at 491 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)).

327. *Id.* at 491-92 (citations omitted) (quoting Kosak v. United States, 465 U.S. 848, 853 n.9 (1984), and United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

328. *Id.* at 493 (Thomas, J., dissenting).

329. *Id.* at 498 (claiming that a court "may only exercise jurisdiction over the Government pursuant to a 'clear statement'" of waiver and that the waiver will be "strictly construed" in favor of the sovereign (quoting United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003))).

330. *Id.*

331. One justice did not participate in the decision. *Id.* at 492.

332. *Id.* (majority opinion) (quoting *Kosak*, 465 U.S. at 853 n.9, which quoted Dalehite v. United States, 346 U.S. 15, 31 (1953)). In the Court's most recent decision addressing an FTCA exception, *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008)—which held that the

Focusing directly upon the statutory exception for the transmission of mail, the *Dolan* Court acknowledged that, "[i]f considered in isolation, the phrase 'negligent transmission' could embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence."[333] However, the Court maintained, even in the context of a statutory waiver of sovereign immunity, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."[334] Given that the words "negligent transmission" are accompanied by the terms "loss" and "miscarriage," the Court concluded that all of these terms refer to "failings in the postal obligation to deliver mail in a timely manner to the right address."[335] Moreover, the Court cited longstanding precedent, which in turn was firmly grounded in the legislative history[336] and which confirmed that a primary objective of the FTCA was to waive sovereign immunity for claims arising out of automobile accidents, particularly the negligent operation of motor vehicles by postal workers while delivering the mail.[337] Based on text, context, and legislative intent as reflected in existing precedent, the Court concluded that the exception excludes governmental liability

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exception for damage to detained property in 28 U.S.C. § 2680(c) immunized negligence not only by customs officials, but by other law enforcement personnel, such as prison guards—neither the majority nor the dissent made any reference to strict construction.

333. *Dolan*, 546 U.S. at 486.

334. *Id.*

335. *Id.* at 486-87.

336. The most often repeated example for appropriate governmental liability found in the legislative history of the FTCA was that of "negligence in the operation of vehicles." H.R. REP. NO. 76-2428, at 3 (1940); *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 66 (1942); *Tort Claims Against the United States: Hearings on H.R. 7236 Before the Subcomm. No.1 of the H. Comm. on the Judiciary*, 76th Cong. 7, 16, 17 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 9 (1940); 86 CONG. REC. 12,024 (1940); 69 CONG. REC. 2192, 2193, 3118 (1928); *see also* Dalehite v. United States, 346 U.S. 15, 28 (1953) (noting that car accident cases were the kind of ordinary tort "[u]ppermost in the collective mind of Congress").

337. *Dolan*, 546 U.S. at 487-88 (citing Kosak v. United States, 465 U.S. 848, 855 (1984)); *see Kosak*, 465 U.S. at 855 ("One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault.").

"only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address."[338] Finally, the Court recognized that practical aspects of the matter may shed light on the probable congressional intent, namely that harms arising from damage or untimely delivery of postal material "are the sort primarily identified with the Postal Service's function of transporting mail throughout the United States" and that losses of this nature "are at least to some degree avoidable or compensable through postal registration and insurance."[339]

The *Dolan* holding should not be misunderstood as locating a new touchstone, replacing the trump card of strict construction in favor of the government for the talisman of generous construction in favor of the claimant whenever a provision might be labeled as an exception or limitation, separate and secondary to the general waiver of sovereign immunity. The heavy-lifting of interpretation by the courts cannot be avoided. While the distance of a provision from the core substantive waiver may be roughly proportional to the forcefulness of the strict construction rubric, measuring that distance requires nuanced and contextual appreciation of each provision within a statutory scheme. Even with respect to the exceptions to the FTCA, where a narrowing construction generally is better suited to uphold the broad legislative purpose behind the waiver, the *Dolan* Court cautioned that "[o]ther FTCA exceptions paint with a far broader brush."[340] The Court thereby concentrated attention where it always belongs, on the text of the provision at issue.

And it is always essential to have a complete understanding of the particular legislative consent to suit, its animating purpose, the legislative intent underlying it, its place within the overall tapestry of statutory waivers, and the purpose and practical effect of any limitations or exceptions. "Some waivers are broad," John Nagle reminds us, "others are narrow."[341]

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338. *Dolan*, 546 U.S. at 489.
339. *Id.* at 489-90.
340. *Id.* at 489.
341. Nagle, *supra* note 268, at 828.

D. Applying Procedural Rules for Suits Against the Sovereign in the Same Manner as with Private Parties

That the Supreme Court's recent course has been in the direction of a less jaundiced approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of litigation as contrasted with the substantive scope of waiver legislation.[342] As discussed earlier, in its early, awkward encounters with this new form of legislation, the Court had fallen back on jurisdictional rules, even for such procedural provisions as time limitations,[343] an approach which persisted even into the twentieth century.[344] However, the Court has since retreated from the jurisdictional rigidification of every word and phrase contained within a statutory waiver of sovereign immunity.[345] The Court's more recent decisions appear to reserve a strict and jurisdictional construction to those aspects of a statutory waiver of sovereign immunity that define the basic nature and scope of the claim,[346] while applying procedural requirements in the same manner as among private parties.[347]

The contrasting interpretive approaches taken toward core substantive elements of a legislative waiver versus procedural provisions are vividly illustrated in a pair of decisions involving the

342. *See* Henderson v. United States, 517 U.S. 654, 667-68 (1996) (describing as having "a distinctly facilitative, 'procedural' cast," those provisions that "deal with case processing, not substantive rights or consent to suit").

343. *See supra* Part II.B.2.

344. *See* Honda v. Clark, 386 U.S. 484, 501 (1967) ("It is also true that in many cases this Court has read procedural rules embodied in statutes waiving [sovereign] immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity.").

345. *See supra* Part II.B.3.

346. *Id.*

347. *See* Dalehite v. United States, 346 U.S. 15, 31-32 & n.26 (1953) (saying that, "[w]here jurisdiction was clear" under the FTCA, the Court has "allowed recovery despite arguable procedural objections," such as by allowing the United States to be sued in tort for contribution and impleaded as a third-party); *see also* United States v. Yellow Cab Co., 340 U.S. 543, 554-56 (1951) (rejecting the government's strict construction argument and instead holding that the federal government may be impleaded as a third-party defendant under the FTCA by another tortfeasor seeking contribution); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 380-83 (1949) (rejecting the government's strict construction argument and holding that the government may be sued under the FTCA by a subrogee just as would a private defendant).

very same statutory waiver—employment discrimination claims against the federal government under Title VII of the Civil Rights Act of 1964.[348] On the one hand, in *Library of Congress v. Shaw*,[349] the Supreme Court strictly construed the amenability of the United States to suit under Title VII and declined to hold the government liable for the prejudgment interest absent express congressional consent.[350] As discussed previously,[351] the *Library of Congress* decision fits comfortably within the strict construction regime as precluding judicial implication of new causes of action or new remedies without a clear statutory statement. On the other hand, in *Irwin v. Department of Veterans Affairs*,[352] the Court held that the limitations period on claims against the United States arising under that same statute—Title VII—need not be strictly enforced and allowed equitable tolling of the statute of limitations in the same manner as in cases among private litigants.[353]

In past writings, I have fretted that the conflicting outcomes in this precedential pair construing the very same statutory waiver of immunity are difficult to reconcile and thus "reflect[] continuing tension about how to interpret statutes authorizing suit against the federal government."[354] The Court has yet to explicitly reconcile these decisions and explain the decline of strict construction in the procedural category. Nonetheless, the resilience and extension of the *Irwin* approach to other time limitations, as well as the Court's extrapolation of the general *Irwin* stance to issues beyond the particular question of equitable tolling of a limitations period, suggest the Court does conceive of procedural and case-processing regulations as a distinct category of rules in which the federal

348. On Title VII as a waiver of sovereign immunity, see *supra* Part I.B.3. On the contrast between these two decisions interpreting Title VII as applied to the federal government, see generally SISK, *supra* note 58, § 2.03, at 95-99.

349. 478 U.S. 310 (1986).

350. *Id.* at 317-19. Subsequently, in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (1991) (codified at 42 U.S.C. § 2000e-16(d) (2000)), Congress carefully used literal language to expressly allow awards of prejudgment interest in Title VII employment discrimination suits against the federal government, thereby overturning *Library of Congress v. Shaw* in the specific context of that particular statutory cause of action.

351. *See supra* Part II.C.1.

352. 498 U.S. 89 (1990).

353. *Id.* at 93-96.

354. SISK, *supra* note 58, § 2.03, at 97; Sisk, *supra* note 44, at 465.

government should be treated in the same manner as a private person.

If, as I believe the case law confirms, a separate procedural category justifying a different interpretive posture is emerging in the Court's sovereign immunity jurisprudence, the *Irwin* decision will be remembered as the prime generator. As discussed earlier in the context of jurisdiction,[355] the Court in *Irwin* rejected the lower court's ruling that a statute of limitations on a waiver of sovereign immunity was an absolute jurisdictional limit and instead allowed the limitations period for filing an employment discrimination claim against the federal government under Title VII to be equitably tolled.[356] The Court thus plainly withdrew the time bar from the class of jurisdictional absolutes. Moreover, departing from the traditional rule of strict construction, the Court held generally that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver."[357]

For a brief period, the Supreme Court appeared to be retreating from the *Irwin* presumption in favor of equitable tolling of statutes of limitations against the federal government, raising the prospect that *Irwin* might be confined to its particular statutory context. In *United States v. Brockamp*,[358] the Court found that the statutory limitations period on filing claims for tax refunds could not be equitably tolled, because the tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to [the Court] that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into

355. *See supra* Part II.B.3.

356. *Irwin*, 498 U.S. at 93-96.

357. *Id.* at 95. Four years before *Irwin*, setting the stage for a departure from strict construction in the procedural context but without setting forth any general guidance, the Court in *Bowen v. City of New York*, 476 U.S. 467 (1986), had allowed equitable tolling of the statute of limitations governing judicial review in Social Security disability cases. *Id.* at 478. In *City of New York*, the Court explained that it "must be careful not to 'assume the authority to narrow the waiver [of sovereign immunity] that Congress intended,' or construe the waiver 'unduly restrictively.'" *Id.* at 479 (quoting United States v. Kubrick, 444 U.S. 111, 118 (1979), and Block v. North Dakota, 461 U.S. 273, 287 (1983)).

358. 519 U.S. 347 (1997).

the statute that it wrote."[359] In *United States v. Beggerly*,[360] the Court held that equitable tolling is not available in a suit against the United States under the Quiet Title Act,[361] which provides an "unusually generous" twelve-year limitations period and already incorporates a form of tolling by delaying the start of the period until the plaintiff should have known that the United States was making a claim upon the property.[362] Still, even in holding that a particular statute placing a time limitation on a claim against the federal government was not amenable to equitable tolling, the Court reached that conclusion based upon a careful examination of the statutory language and assessment of legislative intent—not by characterizing the statute of limitations as a jurisdictional requirement[363] or by reciting a formulaic commitment to strict construction.

Subsequently, in *Scarborough v. Principi*,[364] the Court relied upon *Irwin* as instructive in another context that also involved a time limitation contained in a waiver of sovereign immunity. In *Scarborough*, the Court held that an otherwise timely application for attorney's fees under the Equal Access to Justice Act (EAJA)[365] that did not contain the statutorily required allegation that the government's position was not "substantially justified" may be amended to cure this defect after the thirty-day filing period had expired.[366] In so holding, the Court found the *Irwin* decision to be "enlightening on this issue," because that precedent recognized that limitation principles should apply to the federal government in the same way as to private parties.[367] The Court further said that

359. *Id.* at 352.

360. 524 U.S. 38 (1998).

361. 28 U.S.C. § 2409a (2000).

362. *Beggerly*, 524 U.S. at 48-49.

363. That Congress may have designed a particular statute of limitations to be mandatory and not subject to deviation does not make it a jurisdictional requirement that cannot be waived or forfeited. *See* Farzana K. v. Ind. Dep't of Educ., 473 F.3d 703, 705 (7th Cir. 2007) ("The law is full of rules that are mandatory in the sense that courts must enforce them punctiliously if a litigant insists. Rules are not jurisdictional, however, no matter how unyielding they may be, unless they set limits on the federal courts' adjudicatory competence."). *See generally* Dodson, *supra* note 152, at 11.

364. 541 U.S. 401 (2004).

365. 28 U.S.C. § 2412 (2000). On the EAJA as a waiver of sovereign immunity, see *supra* Part II.B.1.

366. *Scarborough*, 541 U.S. at 420-21.

367. *Id.*

"[o]nce Congress waives sovereign immunity, [as] observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.'"[368]

The *Irwin* presumption that a time limitation should be applied in government cases in the same manner as in private litigation has been taken beyond the original question of whether a statutory time period may be equitably adjusted. In *Franconia Associates v. United States*,[369] the Supreme Court unanimously held that ordinary rules for when a claim accrues should apply under a statute of limitations governing contract claims before the Court of Federal Claims.[370] Rejecting the government's plea in that case for a "special" rule of accrual to benefit the sovereign, the Court characterized the government's proposition as "present[ing] an 'unduly restrictiv[e]' reading of the congressional waiver of sovereign immunity, rather

368. *Id.* at 421 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)). Justices Thomas and Scalia dissented in *Scarborough*, arguing that the time limitation was "a condition on the United States' waiver of sovereign immunity," and thus was subject to the strict construction rule. *Id.* at 425-27 (Thomas, J., dissenting). The dissent sought to distinguish *Irwin* as applying only "where the Government is made subject to suit to the same extent and in the same manner as private parties are." *Id.* at 426. The majority in *Scarborough* rejected the argument that *Irwin* is "instructive only in situations with a readily identifiable private-litigation equivalent." *Id.* at 422 (majority opinion). In any event, private litigation analogies *are* readily available for most claims under statutory waivers of sovereign immunity, including Title VII employment discrimination claims, the FTCA, and many claims that fall under the Tucker Act, such as contract claims and even claims for just compensation for a taking of property (which could be analogized to a trespass or a contract to purchase the property). Moreover, adoption of a private litigation equivalent for the type of claim as controlling the application of a time bar under a statutory waiver becomes problematic in the context of a general statute of limitations. Consider the statute of limitations for the Court of Federal Claims, 28 U.S.C. § 2501 (2000), which applies to a wide diversity of claims. *See supra* Part II.B.2; *infra* Part III.C. A single statute of limitations presumably should be interpreted the same for all types of claims. The alternative would be to assume that a general statute of limitations behaves like an excitable electron orbiting around the nucleus of an atom. By this theory, when the atom is energized by a claim against the sovereign without an apparent private parallel, the statute of limitations electron would make the quantum leap to a higher jurisdictional and strict construction orbit. But when the claim is one with a private counterpart, the statute of limitations electron drops down to a lower and ordinary orbit. Such basic and typical litigation questions as the application of a statute of limitations in a federal government case should not be decided according to the uncertain probabilistic theories of quantum physics.

369. 536 U.S. 129 (2002).

370. *Id.* at 145 (interpreting 28 U.S.C. § 2501 (2000)).

than 'a realistic assessment of legislative intent.'"[371] Drawing on its earlier decision in *Irwin*, the Court declared "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties."[372] Accordingly, the Court directed that determination of when a claim accrues for purposes of the statute of limitations should proceed in the same manner and under the same legal principles as would apply in a suit among private parties.[373]

The Court's treatment of such case-processing rules in a manner consistent with ordinary expectations arising in private litigation, in contrast with its more stringent approach toward those statutory provisions that grant permission to sue the sovereign and define the scope of cognizable claims, reflects an appreciation of the distinct differences between these types of provisions and the contrast in public policy implications. The purposes underlying a general statute of limitations are essentially equivalent for either the federal government or a private party. Statutes of limitations "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."[374] The primary purpose of a statute of limitations is fairness to the defendant and efficiency of the litigation process,[375] rather than protection of the sovereign government from unconsented claims. The animating principles behind a statute of limitations do not justify special rules in favor of the government, whether in terms of measurement of the time of accrual or the traditional rules of waiver or forfeiture when the

371. *Id.* (citation omitted).

372. *Id.* (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)); *see also Irwin*, 498 U.S. at 95-96 (stating that "[o]nce Congress has made such a waiver [of immunity covering a particular type of claim]," then the principle of equitable tolling of the statute of limitations should be "applicable to suits against the Government, in the same way that it is applicable to private suits").

373. *Franconia Assocs.*, 536 U.S. at 145.

374. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *see also* CONG. GLOBE, 36th Cong., 1st Sess. 984 (1860) (statement of Sen. Bayard) (describing the proposed statute of limitations for the Court of Claims as based on the concern that "the transaction [may be] so remote, and the evidence so imperfect, that the Government cannot meet it").

375. *See* Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

timeliness of an action is left unchallenged in an answering pleading or otherwise is conceded.

Confirming that procedural rules in federal government cases generally apply in the same manner as in private litigation, the Supreme Court has ruled that auxiliary matters governing the process of litigation are governed by the Federal Rules of Civil Procedure, even to the extent of overriding conflicting statutory directives. In *Henderson v. United States*,[376] the Court found an irreconcilable conflict between a provision in the Suits in Admiralty Act,[377] which previously required that service of a suit against the government be made "forthwith,"[378] and Rule 4 of the Federal Rules of Civil Procedure, which allows 120 days for service.[379] Finding that the "forthwith" service requirement was neither jurisdictional nor substantive,[380] and notwithstanding the dissent's invocation of strict construction canons as mandating fastidious observation of the statutory rule,[381] the Court majority ruled that the limitation on service contained within a waiver of sovereign immunity was superseded by the Federal Rules of Civil Procedure adopted pursuant to the Rules Enabling Act.[382] The Court explained that the "essential purpose" of a service requirement "is auxiliary, a purpose distinct from the substantive matters aired in the precedent on which the dissent, wrenching cases from context, extensively relies—who may sue, on what claims, for what relief, within what limitations period."[383]

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376. 517 U.S. 654 (1996).

377. On the Suits in Admiralty Act as a waiver of sovereign immunity, see *supra* Part II.B.2.

378. Act of Mar. 9, 1920, ch. 95, 41 Stat. 525, 526 (repealed 2006).

379. FED. R. CIV. P. 4(m).

380. *Henderson*, 517 U.S. at 668. Two justices concurred, arguing that Congress had the power to condition a waiver of sovereign immunity upon strict compliance with a procedural provision, although not explaining how the jurisdictional or absolute character of a statutory procedural rule would be discerned. *Id.* at 672-73 (Scalia, J., concurring).

381. *Id.* at 673, 675 (Thomas, J., dissenting) (arguing that "[a]s a statutory condition on the Government's waiver of its immunity," the statutory rule "demands strict compliance and delimits the district court's jurisdiction to entertain" the suit, and that, under the traditional principle of strict construction, "ambiguity must always be resolved in favor of the Government").

382. *Id.* at 663-71 (majority opinion) (citing Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that federal rules of procedure "shall not abridge, enlarge or modify any substantive right").

383. *Id.* at 671 (footnotes omitted). The *Henderson* Court did identify the "limitations

In sum, in a number of cases over the past two decades, the Supreme Court has directed that procedural rules, including statutes of limitations, that regulate adjudication of suits against the federal government should generally be construed in conformity with the standards applicable to private disputes.

But then came *John R. Sand & Gravel Co. v. United States*,[384] which reaffirmed ancient precedent imposing a nonwaivable jurisdictional status on the statute of limitations applicable to an early statutory waiver of sovereign immunity. That decision and its potential meaning for the future is the subject of the next part of this Article.

III. BEING SET BACK ADRIFT: THE FUTURE COURSE OF SOVEREIGN IMMUNITY JURISPRUDENCE AFTER *JOHN R. SAND*

Just as the formerly disparate strains of case law arising from a diversity of statutory voices appeared to be coming together in a harmonious regime for interpretation of legislative consent to suit, a discordant note was sounded in the Supreme Court's early 2008 decision in *John R. Sand & Gravel Co. v. United States*.[385] Even as the Court forthrightly acknowledged that recent decades had witnessed "a turn in the course of the law" and a shift in the presumptions that apply in interpretation of statutory waivers of sovereign immunity, the Court nonetheless invoked stare decisis to justify adherence to "[t]hose older cases [that] have consequently become anomalous."[386] The Court thereby resurrected the nineteenth-century line of decisions that had judicially implied a jurisdictional condition onto statutes of limitations in federal

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period" as being among substantive statutory matters, but the Court was differentiating between "substance" and "procedure" for the distinct purpose of determining which statutory matters could be superseded by a federal court rule. *Id.* at 664-71. That a statute of limitations is regarded as "substantive" and not subject to being overridden by a court-adopted rule does not mean that such a provision is not properly regarded as a procedural claims-processing rule for purposes of a statutory construction approach. The *Henderson* decision did not question the *Irwin-Franconia* presumption that a statute of limitations in a federal government case should be applied in government cases in the same manner as in private litigation.

384. 128 S. Ct. 750 (2008).

385. *Id.*

386. *Id.* at 756.

government cases.[387] Once the nature and degree of the Court's departure from the path set out in recent decades is fully understood,[388] the question remains whether the *John R. Sand* decision will prove to be a significant obstacle to the continuing development of a coherent federal sovereign immunity jurisprudence.[389]

A. The Statute of Limitations for the Court of Federal Claims in Textual and Historical Context: Setting the Stage for John R. Sand

In 1863, Congress granted the then-Court of Claims authority to enter binding judgments[390] and first introduced a six-year limitations period.[391] When the Court of Claims had been created in 1855, no statute of limitations was included in the original authorizing legislation.[392] Thus, when considering whether to enlarge the judicial authority of the Court of Claims, Congress naturally concluded that a statute of limitations should be added to protect against stale claims. As the 1862 legislative report explained: "A man who neglects his business for six years cannot complain of the government for refusing his suit; and there is no doubt that a statute of limitations is even more demanded in justice to the government than it is to private individuals."[393]

Once having agreed that a statute of limitations should be adopted, however, members of Congress in the early 1860s expressed the sense that such a time bar should be applied in government cases in the same manner as for private parties. One leading senator stated: "As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals."[394] The chair of the Senate Judiciary Committee justified the inclusion of a statute of limitations "because there can be no reason whatever for acts of limitation as between citizen and

387. *See supra* Part II.B.2.
388. *See infra* Parts III.A-B.
389. *See infra* Part III.C.
390. On the history of the Court of Claims, see *supra* Part I.B.1.
391. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765, 767.
392. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.
393. H.R. REP. NO. 37-34, at 3 (1862).
394. CONG. GLOBE, 37th Cong., 3rd Sess. 414 (1863) (statement of Sen. Sherman).

citizen ... which does not apply as between Government and citizen."[395]

Congressional debates preceding enactment of the 1863 legislation highlighted the controversial question of jurisdiction—but always in terms of the authority of the Court of Claims to hear certain types of legal claims and the nature of the remedy against the government that should be cognizable before that tribunal.[396] Members of Congress thus well understood the concept of subject matter jurisdiction and used the term in its ordinary sense of judicial power over a class of claims. By contrast, no participant in the legislative process ascribed jurisdictional status to the statute of limitations that would apply to those claims that were found to come within the jurisdictional authority of the Court of Claims.

The strongest evidence that the 1863 time bar was an ordinary statute of limitations lay in the language that Congress selected: "[E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues."[397] The phrasing of this provision was comparable to that found in many state statutes of limitations of the period.[398] Had

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395. CONG. GLOBE, 36th Cong., 1st Sess. 984 (1860) (statement of Sen. Bayard).

396. *See, e.g.*, H.R. REP. NO. 37-34, at 3 (reporting that the bill would give to the Court of Claims "jurisdiction of all claims for which the government would be liable in law or equity were it liable to be sued in courts of justice," with certain exceptions, and that "[j]urisdiction is also given to the court of all set-offs, counter-claims, and claims for damages, whether liquidated or unliquidated on the part of the government against the claimant"); CONG. GLOBE, 36th Cong., 1st Sess. 983 (statement of Sen. Bayard) (explaining that the committee bill "enlarges the jurisdiction of the court, so as to give it all jurisdiction over all claims proper against the Government, whether founded on contract or on act of Congress; or founded upon legal or equitable obligation, according to the general principles of law"); CONG. GLOBE, 36th Cong., 1st Sess. 985 (statement of Sen. Benjamin) (proposing "exclu[sion] from the jurisdiction of the Court of Claims those claims which are purely political in their character"); CONG. GLOBE, 37th Cong., 2d Sess. app. 124 (statement of Rep. Porter) (stating that the proposed bill "enlarges the jurisdiction of the court, by extending it to all claims for which the Government would be liable in law or equity if it were suable in courts of justice"); CONG. GLOBE, 37th Cong., 3d Sess. 304 (statement of Sen. Fessenden) (criticizing the proposal as "giv[ing] away the whole jurisdiction and power of Congress over claims against the Government" to the court); *id.* at 395 (1863) (statement of Sen. Clark) (proposing "not [to] give the court jurisdiction of anything except things arising under the law of Congress, or an express or implied contract").

397. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765, 767.

398. *See* JOSEPH K. ANGELL, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND SUITS

Congress wished to create a "super" statute of limitations—one that would impose itself on the agenda of a court even when the government had conceded its nonapplicability or waived its assertion—one would have expected different, more direct, and more forceful language to have been crafted to achieve that extraordinary jurisdictional purpose.

After the 1948 revision and codification of Title 28 of the United States Code,[399] section 2501 of Title 28 now reads, in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."[400] In plain language, § 2501 bars a claim that has been filed more than six years after the claim accrues, *when* the claim already is one that falls within the jurisdiction of the Court of Federal Claims.[401] In other words, § 2501

IN EQUITY AND ADMIRALTY, xxxiii to clxi (4th ed. 1861) (setting out state statutes of limitations).

399. Act of June 25, 1948, ch. 646, 62 Stat. 869. When Congress recodified Title 28 of the United States Code (the Judicial Code) in 1948, § 2501 was placed in a procedural chapter, separate in location and distinctly different in language from the jurisdictional chapter. *Compare* 28 U.S.C. §§ 1492-1509 (2000) (organized under Part IV—Jurisdiction and Venue, ch. 91 ("United States Court of Federal Claims")) (containing sixteen sections expressly defining and limiting the subject matter jurisdiction of the Court of Federal Claims), *with* 28 U.S.C. §§ 2501-2522 (2000) (organized under Part VI—Particular Proceedings, ch. 165 ("United States Court of Federal Claims Procedure")) (including § 2501, the statute of limitations). Despite the structural change and intent of the revisers in designating the statute of limitations as procedural, an uncodified section of the 1948 Act provides that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 646, § 33, 62 Stat. 869, 991. For further discussion of and a suggestion for repeal of this little-known provision, see Gregory C. Sisk, Lifting the Blindfold from Lady Liberty: Allowing Judges To See the Structure in the Federal Judicial Code (unpublished manuscript, on file with author).

400. 28 U.S.C. § 2501 (2000). The 1863 predecessor statute used the term "cognizable," Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 765, 767, while the statute as currently codified speaks of the Court of Federal Claims as having "jurisdiction." The word "cognizable" means "within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy." FDIC v. Meyer, 510 U.S. 471, 476 (1994) (quoting BLACK'S LAW DICTIONARY 259 (6th ed. 1990)). Accordingly, in *John R. Sand & Gravel Co. v. United States*, the Court said that it would not presume this revision worked a change in the substantive law without a clear expression by Congress. 128 S. Ct. 750, 754-55 (2008). As neither party suggested that "has jurisdiction" and "cognizable by" were anything other than synonymous, the Court unsurprisingly found "no such expression of intent here" to change the meaning based solely on its text. *Id.* at 755.

401. *See* Grass Valley Terrace v. United States, 69 Fed. Cl. 341, 347 (2005) (Damich, C.J.) (referring to this understanding as the "plain English interpretation of the statute"); *see also* John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1362 (Fed. Cir. 2006) (Newman,

speaks in procedural terms of the potential infirmity of the claim as dependent upon the date of its filing, rather than in jurisdictional terms about the essential authority of the court. By its explicit text, then, § 2501 does not limit the jurisdictional power of the court, because it assumes that the court's jurisdictional authority over the class of claims has already been confirmed under a jurisdictional statute. Instead, § 2501 is best read as imposing an affirmative defense against continuation of the litigation properly filed in the Court of Federal Claims when a claim is untimely.

The long and consistent characterization in American common law of statutes of limitations as nonjurisdictional and waivable rules also suggests that Congress, in enacting the 1863 predecessor to § 2501, did not intend to elevate it to an unusual jurisdictional status. Congressional intent with respect to a statutory provision should be understood in light of the contemporary legal context and the teachings of the common law.[402] Recognizing § 2501 as a nonjurisdictional and waivable statute of limitations comports with the well-established characterization in American common law of such time bars as procedural rather than substantive. The leading American treatise on statutes of limitations in 1863 explained:

> Without destroying, therefore, and simply prescribing a period in which a right may be enforced; and withholding merely the remedy, after the lapse of an appointed time, for reasons of private justice and public policy, a statute of limitations, it has been uniformly considered, is no violation of the sacredness of private rights.[403]

J., dissenting) ("The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already 'has jurisdiction.'"), *aff'd*, 128 S. Ct. 750 (2008); Wasserman, *supra* note 171, at 218 ("Properly read, [§ 2501] addresses the time for bringing claims and not the jurisdiction of the Court of [Federal] Claims.").

402. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 705-06 (2004) (observing that "[w]hen the FTCA was passed, the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred," which provides a "specific reason to believe" that Congress intended the foreign country exception, 28 U.S.C. § 2680(k) (2000), to bar claims where the injury or harm occurred in a foreign country so as to thereby preclude application of foreign law); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 71-72 (1992) (saying that the Court must "evaluate the state of the law" when Congress passed the legislation, including the common-law traditions that form the backdrop against which Congress acted).

403. ANGELL, *supra* note 398, § 22, at 17.

This understanding of statutes of limitations as affecting the remedy and not the underlying right of action was consistently reiterated by the Supreme Court during the period when the 1863 statute of limitations was enacted.[404] As the Supreme Court later explained in *Sun Oil Co. v. Wortman*,[405] the traditional rule in America was that "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld."[406] A statute of limitations, thus, has been a classic example of an affirmative defense left to the defendant to raise and establish and subject to waiver or forfeiture.[407]

Unfortunately, as outlined earlier,[408] a misguided series of Supreme Court decisions from the late nineteenth century,[409] and cited into the twentieth century,[410] suggested that the 1863 predecessor statute of limitations for cases in the then-Court of Claims had jurisdictional force. These decisions failed to carefully analyze the plain directive of the text, ignored the legislative history, and neglected the ubiquitous legal understanding of a statute of limitations as a waivable affirmative defense. This line of cases imported jurisdictional concepts into this statute of limitations contrary to the legal norms of the period and without any indication of legislative intent to contravene the common legal understanding.

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404. *See, e.g.*, Campbell v. Holt, 115 U.S. 620, 624-29 (1885); Townsend v. Jemison, 50 U.S. (9 How.) 407, 413 (1850); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327-28 (1839).

405. 486 U.S. 717 (1988).

406. *Id.* at 725.

407. *See* FED. R. CIV. P. 8(c) (listing "statute of limitations" as among the "affirmative defenses" that a defendant "shall set forth affirmatively"); Day v. McDonough, 547 U.S. 198, 205 (2006) ("A statute of limitations defense ... is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*."); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (stating that, rather than being "a jurisdictional prerequisite ... a statute of limitations, is subject to waiver, estoppel, and equitable tolling").

408. *See supra* Part II.B.2.

409. *See, e.g.*, Finn v. United States, 123 U.S. 227, 232-33 (1887); Kendall v. United States, 107 U.S. 123, 125 (1883).

410. *See* Soriano v. United States, 352 U.S. 270, 273-75 (1957). Under this rule which had its origins in *Kendall*, *Finn*, and *Soriano*, "the terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction" and "'[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.'" United States v. Mottaz, 476 U.S. 834, 841 (1986) (quoting Block v. North Dakota, 461 U.S. 273, 287 (1983)).

This early jurisdictional error appeared to have been corrected in recent decades, however, as also discussed in some detail earlier.[411] In *Irwin v. Department of Veterans Affairs*,[412] the Supreme Court cast aside its prior jurisdiction-bound approach and ruled that, in terms of equitable tolling, statutes of limitations in federal government cases should be applied in the same way as in private suits.[413] With specific and disapproving reference to an earlier case treating § 2501, the Court of Claims statute of limitations,[414] as a jurisdictional bar, the *Irwin* Court acknowledged that "previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent."[415] While observing that an argument could be made that the language of § 2501 "is more stringent" than that in the Title VII limitations provision at issue in *Irwin*, the Court was "not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling."[416] Instead of "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past," the Court said that *Irwin* "affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government."[417] Accordingly, the Court in *Irwin* made a deliberate and conscientious turn away from the obdurate jurisdictional approach reflected in earlier cases.[418]

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411. *See supra* Part II.B.3.

412. 498 U.S. 89 (1990).

413. *Id.* at 94-95.

414. 28 U.S.C. § 2501 (2000).

415. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94 (1990) (citing Soriano v. United States, 352 U.S. 270 (1957)). *Soriano*, which refused to permit equitable tolling under § 2501, was grounded upon and shared in the mistaken jurisdictional characterization of the statute of limitations adopted in such early decisions as *Kendall v. United States*, 107 U.S. 123, 125 (1883). *See Soriano*, 352 U.S. at 273-74 (relying primarily on *Kendall* in refusing to permit equitable tolling of § 2501).

416. *Irwin*, 498 U.S. at 95.

417. *Id.*

418. *See id.* at 94-95; *see also id.* at 98 (White, J., concurring in part and concurring in the judgment) (saying that the decision "directly overrules a prior decision by this Court, *Soriano v. United States*, 352 U.S. 270 (1957)"); Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993) (concluding that, with *Irwin*, "the Supreme Court now considers [*Soriano*] obsolete if not overturned"); Oropallo v. United States, 994 F.2d 25, 29 n.4 (1st Cir. 1993) (recognizing that *Irwin* "overruled or made irrelevant" *Soriano*).

Even more directly on point with respect to the statute of limitations for the Court of Federal Claims is the Supreme Court's decision in *Franconia Associates v. United States*.[419] After re-examining the text and historical context of the predecessor statute, the Court unanimously declared § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous [nineteenth century] state statutes of limitations applicable to suits between private parties."[420] The Court described the government's request in *Franconia Associates* for a special rule of accrual under § 2501 as an "'unduly restrictiv[e]'" reading of the congressional waiver of sovereign immunity, rather than "'a realistic assessment of legislative intent,'" and affirmed that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties."[421]

Thus, after the *Irwin* decision in 1990 and before 2008, the nineteenth-century decisions converting a statute of limitations into a jurisdictional limitation on suits against the sovereign, mistaken as they were at the time and now made anachronistic in light of today's jurisprudence, appeared to have been washed away with the tide.

B. The Supreme Court's Decision in John R. Sand

In its 2008 decision in *John R. Sand & Gravel Co. v. United States*,[422] the Supreme Court considered whether the statute of limitations in § 2501 of Title 28 of the United States Code, which applies to civil litigation against the federal government in the Court of Federal Claims,[423] should be treated as jurisdictional and thus as imposing a duty on the courts to adjudicate the accrual of the claim and application of the time limitation, even when the parties had agreed that no procedural obstacles remain to the action.[424]

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419. 536 U.S. 129 (2002).
420. *Id.* at 145.
421. *Id.* (citations omitted).
422. 128 S. Ct. 750 (2008).
423. 28 U.S.C. § 2501 (2000).
424. *John R. Sand*, 128 S. Ct. at 751-52.

John R. Sand & Gravel Company ("John R. Sand") operates a sand, gravel, and stone quarry on land it leases in Michigan.[425] The landowner operated a landfill in a corner of this leased land, which eventually was placed by the Environmental Protection Agency (EPA) on its national priority list of hazardous waste sites.[426] Beginning in the 1990s, the EPA set up monitoring wells and took other actions to remediate the site, including erecting and then later moving fences that temporarily restricted access by John R. Sand to parts of its leasehold.[427] In 1998, the EPA erected permanent fences that completely and permanently excluded John R. Sand from 42 acres of its leasehold.[428]

In 2002, John R. Sand filed suit[429] in the United States Court of Federal Claims under the Tucker Act,[430] alleging a physical taking of land for which just compensation is due under the Fifth Amendment of the Constitution.[431] The government initially asserted the statute of limitations as an affirmative defense to the claim and sought dismissal on this ground.[432] However, based on the more developed evidentiary record, the government later stipulated that John R. Sand's claim accrued within the six-year limitations period after the permanent fence had been installed by the EPA in 1998.[433] Moreover, on later appeal by the plaintiff after trial on the merits to the United States Court of Appeals for the Federal Circuit, government counsel forthrightly conceded at oral argument that the claim had accrued within the six-year statutory period and thus was not barred by the statute of limitations.[434] Nonetheless, and only over a vigorous dissent, the Federal Circuit raised the statute of limitations sua sponte, holding that § 2501 "creates a jurisdictional condition precedent" to suit in the Court of Federal Claims.[435] The

425. *See* John R. Sand & Gravel Co. v. United States, 457 F.3d 1346, 1347 (Fed. Cir. 2006).

426. *Id.* at 1347-48.

427. *Id.* at 1348-49.

428. *See id.* at 1347, 1349; John R. Sand & Gravel Co. v. United States, 62 Fed. Cl. 556, 560-63 (2004).

429. *John R. Sand*, 457 F.3d at 1349.

430. 28 U.S.C. § 1491 (2000). On the Tucker Act generally, see *supra* Part I.B.1 and II.C.2.

431. U.S. CONST. amend. V. On takings claims under the Tucker Act, see *supra* Part II.C.2.

432. *John R. Sand*, 457 F.3d at 1349; *John R. Sand*, 57 Fed. Cl. at 186-93.

433. *See John R. Sand*, 62 Fed. Cl. at 562-63; *see also John R. Sand*, 128 S. Ct. at 753 (saying that "the Government effectively conceded that certain claims were timely").

434. *John R. Sand*, 457 F.3d at 1353.

435. *Id.* at 1355; *but see id.* at 1363 (Newman, J., dissenting) (arguing that "it is incorrect

Federal Circuit majority then held that the claim had accrued earlier when the EPA had placed temporary fences and thus was time-barred.[436] The Supreme Court granted certiorari limited to the question of whether § 2501 is jurisdictional.[437]

In an opinion by Justice Breyer, a seven-justice majority of the Court held in *John R. Sand* that the statute of limitations does have jurisdictional force, requiring the court to "raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue."[438] Stating that "this Court has long interpreted the court of claims limitations statute as setting forth ... [an] absolute[] kind of limitations period,"[439] the majority rested its decision solidly and solely on stare decisis. Acknowledging that the Court previously in *Irwin v. Department of Veterans Affairs*[440] had established a "'rebuttable presumption of equitable tolling'" for government-related statutes of limitations and had noted that the Title VII statute of limitations at issue in *Irwin* was "linguistically similar to the court of claims statute at issue here,"[441] Justice Breyer nonetheless concluded that "these few swallows cannot make petitioner's summer."[442] Because *Irwin* involved a different statute of limitations and did not explicitly overrule the jurisdictional line of cases for § 2501, the Court ruled that the "definitive earlier interpretation of the statute" in past precedents "should offer a ... sufficient rebuttal" to the general *Irwin* presumption that a statute of limitations applies for the government in the same manner as to private defendants.[443]

In describing the petitioner's argument, the majority acknowledged that the Court's more recent decisions may "represent a turn

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to accord unique status to § 2501 and hold that it is a limit on 'jurisdiction'").

436. *Id.* at 1356-60.

437. John R. Sand & Gravel Co. v. United States, 127 S. Ct. 2877 (2007).

438. 128 S. Ct. at 752.

439. *Id.* at 753-54. For further discussion of these earlier precedents reading § 2501 as jurisdictional, see *supra* Parts II.B.2 and III.A.

440. 498 U.S. 89 (1990).

441. *John R. Sand*, 128 S. Ct. at 755 (quoting and citing *Irwin*, 498 U.S. at 94-96).

442. *Id.*

443. *Id.* at 756. The majority also turned aside the specific reference to § 2501 as an "unexceptional" statute of limitations in *Franconia Associates v. United States*, 537 U.S. 129, 145 (2002), saying that this statement was made in the context of rejecting a special accrual rule for the government and thus added little to the rejected argument that *Irwin* had overruled the earlier jurisdictional line of cases. *John R. Sand*, 128 S. Ct. at 756.

in the course of the law," but nonetheless declined to address the petitioner's position on the text, legislative history, and contemporaneous legal understanding of the statute, saying that "[b]asic principles of *stare decisis* ... require us to reject this argument."[444] The Court appreciated that the contrasting lines of case authority reinforced by its decision in *John R. Sand* may create an "anomaly" in the case-law.[445] But the majority found that the resulting conflict was not "critical" and did not produce "'unworkable' law" so as to justify "reexamination of well-settled precedent."[446] In conclusion, the Court said, a willingness to overturn a precedent "simply because we might believe that decision is no longer 'right'" could "threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."[447]

Justice Stevens, joined by Justice Ginsburg, dissented, arguing that the jurisdictional imperative for a statute of limitations in suits against the government, now reaffirmed by the majority, had been expressly abandoned in prior decisions, most notably in *Irwin*.[448] Justice Stevens insisted that the "decision in *Irwin* did more than merely 'mentio[n]'" the earlier jurisdictional precedents, but rather "expressly declined" to follow them any longer.[449] In any event, Justice Stevens suggested, "if there is in fact ambiguity in our cases, it ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago."[450]

Justice Ginsburg also filed a separate dissent, explaining that even if *Irwin* had not already discarded the jurisdictional rule for statutes of limitations, she "would regard this case as an appropriate occasion to revisit those precedents."[451] Agreeing that stare decisis is an important principle, Justice Ginsburg observed that the law manifestly has "changed significantly" since that earlier period in the development of sovereign immunity doctrine, and contended

444. *John R. Sand*, 128 S. Ct. at 756.
445. *Id.*
446. *Id.* at 756-57.
447. *Id.* at 757.
448. *Id.* at 757 (Stevens, J., dissenting).
449. *Id.* at 758 (quoting majority opinion at 756).
450. *Id.* at 759.
451. *Id.* at 759 (Ginsburg, J., dissenting).

that "[i]t damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions."[452]

C. Diagnosing the Injury of John R. Sand *to Development of a Coherent Federal Sovereign Immunity Jurisprudence*

While the *John R. Sand* decision obviously fails to affirmatively advance a coherent jurisprudence of sovereign immunity, and indeed does not pretend to follow the modern trajectory of the case law, the question remains whether it does any real or lasting harm. What effect will this reaffirmation of an anachronistic jurisdictional time bar have on the development of an integrated interpretive regime for statutory waivers of sovereign immunity? Will this decision stand as a meaningful obstacle to the realization in the courts of the promise of justice offered by the legislative directive of a judicial remedy?

The Court's failure to capitalize on the *John R. Sand* case as a perfect opportunity to bring greater cohesion to sovereign immunity jurisprudence is certainly disappointing. And the Court's invocation of stare decisis as the reason why the doctrine must be left in a state of disarray is most unsatisfying. To be sure, the Supreme Court is generally reluctant to disturb statutory precedents given that Congress remains empowered to correct any error that it perceives in the Court's interpretation of a statute. As the Court said in *John R. Sand*, "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'"[453] But even in cases of statutory interpretation, "[*s*]*tare decisis* is not an inexorable command."[454] Congressional inaction is not a sufficient basis to avoid reconsideration of a statutory precedent when special circumstances warrant a fresh look.[455]

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452. *Id.* at 760.

453. *Id.* at 756 (majority opinion) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)).

454. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (unanimously overruling statutory interpretation precedent) (citations and internal quotation marks omitted).

455. *See Patterson*, 491 U.S. at 175 n.1 (observing that "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation" (quoting Johnson v. Transp. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting))).

The Court's apparent rejection in *Irwin* of the nineteenth-century line of cases imposing jurisdictional status on a statute of limitations[456] fits comfortably within the Supreme Court's general approach to stare decisis in the area of statutory interpretation.

> [One] traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.[457]

With particular pertinence to the question raised in *John R. Sand*, the *Irwin* Court explained that the "ad hoc" approach to statutes of limitations applied in past inconsistent decisions had resulted in "continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress."[458] Accordingly, *Irwin* "cut[] through the tangle of previous decisions"[459] and adopted a general and consistent approach to procedural time limitations on statutory waivers of sovereign immunity. By retreating from *Irwin* and reinstating the previously abandoned jurisdictional decisions in *John R. Sand*, even if narrowly confined to a particular statute of limitations, the Court did little to strengthen the reliability of precedent generally and tore open a hole in its sovereign immunity jurisprudence.

Given that similarly worded statutes of limitations remain to be construed by the federal courts in future cases, the inconsistency in the case law created by the *John R. Sand* outcome may become, as Justice Ginsburg apprehended, "a source of both theoretical incoherence and practical confusion."[460] Justice Stevens rightly feared that the decision might "revive the confusion" of an earlier

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456. *See supra* Parts I.B.3, III.A.

457. *Patterson*, 491 U.S. at 173 (citations omitted).

458. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 94 (1990).

459. *See* Malone v. Bowdoin, 369 U.S. 643, 647 (1962) (describing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (plurality opinion), which clarified the doctrine of federal sovereign immunity and largely abandoned the fiction of a direct suit against a federal officer as an end-run around sovereign immunity); *see also supra* note 273.

460. John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 760 (2008) (Ginsburg, J., dissenting).

period in the evolution of sovereign immunity doctrine.[461] At best, *John R. Sand* may come to be understood as accepting what Justice Stevens called "a carve-out" for specific statutory provisions that had been the subject of early Supreme Court decisions, notwithstanding that the interpretive approach in those decisions has been largely abandoned in the modern era.[462]

Despite the legitimacy of the concerns raised above, the majority opinion in *John R. Sand* has the considerable virtue of being forthright in fixing its result squarely and narrowly on stare decisis[463] and disclaiming any intent to divert from the path that the law of federal sovereign immunity has taken in recent decades. Indeed, even while declining to apply today's more refined interpretive approach, the Court recognized there had been "a turn in the course of the law," specifically in the interpretation of statutes of limitations in government cases, which now "place[s] greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds."[464] Older decisions, while preserved in their specific applications by stare decisis, "have consequently become anomalous,"[465] which presumably means they will not be extended to new situations or statutes.

Moreover, the *John R. Sand* majority appeared uneasy with the classification of the statute of limitations as jurisdictional, saying only that prior decisions through "convenient shorthand" had "sometimes referred" to mandatory statutes of limitations as "jurisdictional."[466] The Court instead framed § 2501 as falling into the category of a "more absolute[] kind of limitations period."[467] Indeed, two early commentators on the decision argue that the *John R. Sand* Court characterized this statute of limitations as something other than "an actual jurisdictional rule," even though it

461. *Id.* at 759 (Stevens, J., dissenting).

462. *Id.* at 758.

463. Indeed, later in the same 2007 term of the Court, Justice Breyer writing for a majority cited to *John R. Sand* for the principle that respect for precedent to "achieve legal stability" should be maintained "whether judicial methods of interpretation change or stay the same." CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1961 (2008).

464. *John R. Sand*, 128 S. Ct. at 756 (majority opinion).

465. *Id.*

466. *Id.* at 753-54.

467. *Id.*

"retains unique rigid characteristics akin to jurisdictional rules,"[468] although one of those commentators then worried that such a hybrid approach "may serve to further cloud the line between jurisdiction and procedure."[469]

Reading *John R. Sand* as pulling the jurisdictional punch may be wishful thinking. While the "convenient shorthand" remark in the majority opinion does appear disparaging in tone toward use of a jurisdictional label, the Court holds directly that § 2501 may not be waived by the parties and also indicates that § 2501 falls outside of the *Irwin* presumption allowing equitable tolling of the time period. A statute of limitations that may not be equitably adjusted, cannot be waived or forfeited, and must be raised sua sponte by the Court thus appears to possess those qualities that define a jurisdictional rule. And, of course, the older decisions preserved by *John R. Sand* as a matter of stare decisis used jurisdictional terminology without reservation.[470]

Nonetheless, the majority's reluctance to speak in the language of jurisdiction, even when simply affirming prior precedent, may reflect a certain discomfort with the result. At least, the Court may have been unwilling to say anything that might encourage a general return to rigid jurisdictional thinking in other cases involving different statutory waivers of sovereign immunity.

In sum, while *John R. Sand* remains a lost opportunity to bring greater coherence to the Court's interpretive approach to statutory waivers of sovereign immunity, the decision may have little effect on the general development of the doctrine. Given the singular grounding of the decision in stare decisis, and in light of the majority's careful acknowledgment that the general course of the law has proceeded in a different direction, the *John R. Sand* opinion

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468. Wasserman, *supra* note 171, at 219; *see also* Scott Dodson, *Three Muted Cheers for* John R. Sand & Gravel, CIVIL PROCEDURE PROF BLOG, Jan. 8, 2008, http://lawprofessors.typepad.com/civpro/2008/01/dodson-three-mu.html (arguing that *John R. Sand* reframed the question as a nonjurisdictional issue and "signaled its willingness to look to middle paths—that a rule might be nonjurisdictional yet nevertheless have jurisdictional features such as being unsusceptible to the kind of waiver that took place").

469. Wasserman, *supra* note 171, at 222.

470. *John R. Sand*, 128 S. Ct. at 754 (describing prior precedents); *see supra* Part II.B.2 (discussing nineteenth-century decisions implying jurisdictional status into the statute of limitations).

may kick up a cloud of dust but leave no permanent track marks on the Supreme Court's federal sovereign immunity jurisprudence.

Except, of course, that the *John R. Sand* decision has direct and continuing force for suits brought in the Court of Federal Claims because it reaffirms the jurisdictional status of the statute of limitations applicable to such claims. The preservation of such an anomaly in modern case law is especially disappointing here, as the Supreme Court has devoted considerable attention and energy over the past half-century to refining that subcategory of sovereign immunity jurisprudence covering Tucker Act claims for money against the federal government in the Court of Federal Claims.[471] As discussed earlier, the Court has abandoned early cramped interpretations of the Tucker Act that had effectively removed its authority over Constitution based money claims, significantly undermined its availability as a remedy for claims alleging a taking of property without compensation, and raised a high threshold for establishing a substantive right to money in a statute that was cognizable as a Tucker Act claim.[472] Gradually moving past a strict construction approach that had treated "suits against the sovereign [as] suspect, even when allowed,"[473] the Supreme Court has released the Tucker Act to become the presumptively available remedy for a taking[474] and has further clarified that the showing necessary to establish a substantive right to money relief in a statute-based Tucker Act claim is "demonstrably lower than the standard for the initial waiver of sovereign immunity."[475] Thus, after considerable progress extending over more than 50 years, the *John R. Sand* decision leaves the Tucker Act jurisprudential project woefully incomplete.

Nor does the jurisdictionalization of the statute of limitations for the Court of Federal Claims leave only a theoretical cavity in the doctrine without practical consequence. Throughout history and into the modern era, what is today the Court of Federal Claims has occupied a central place in the adjudication of suits against the federal government. The docket of the Court of Federal Claims is

471. On the Tucker Act as a waiver of sovereign immunity, see *supra* Part I.B.1.

472. *See supra* Part II.C.2.

473. Fallon, *supra* note 3, at 517-18 (telling the "story" of sovereign immunity under a regime of strict construction).

474. *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990).

475. United States v. White Mountain Apache Tribe, 537 U.S. 465, 472-73 (2003).

varied, although all of the claims that it hears are, in one form or another, claims against the sovereign United States:

> About one-third of the COFC's cases involve contract claims against the government. Another one-quarter or so of its cases are tax refund suits against the government. Yet another major portion of the COFC's docket consists of cases in which civilian employees or members of the military sue the government over pay. Also large in number, as well as doctrinal importance, are cases involving claims that the government has taken the plaintiff's property without paying the "just compensation" required by the Fifth Amendment of the Constitution. Smaller in number, but of historical and political importance, are claims brought against the government by Native Americans and disputes referred to the COFC by Congress. The COFC also hears claims against the United States for patent infringement and copyright infringement and for rights in protected plant varieties.[476]

As of September 30, 2007, 7815 cases (including hundreds of contract, civilian and military pay, and takings cases) were pending before the Court of Federal Claims;[477] during 2007, claims were filed seeking some $25.6 billion and judgments were entered for more than $2.7 billion.[478]

Imposing a duty on the judges of the Court of Federal Claims (and the judges of the United States Court of Appeals for the Federal Circuit which hears appeals from that court) to investigate the timeliness of these thousands of suits and consider when a claim accrues or should have been discovered—even when the government has conceded the point—unnecessarily adds to the burdens on the judiciary and pointlessly expands the subjects for litigation. Moreover, it deprives the parties of the ability to decide which

476. Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 548-49 (2003).

477. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2007 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 305 tbl.G-2A (2007) (U.S. Court of Federal Claims—Cases Filed, Terminated, and Pending for the 12-Month Period Ending September 30, 2007), *available at* http://www.uscourts.gov/judbus2007/appendices/G02ASep07.pdf.

478. *Id.* at 306 tbl.G-2B (U.S. Court of Federal Claims—Judgments and Appeals for the 12-Month Period Ending September 30, 2007), *available at* http://www.uscourts.gov/judbus2007/appendices/G02BSep07.pdf.

issues should be litigated or instead may be waived or forfeited. And, not incidentally, if the government lawyer's deliberate concession of the issue is later revisited because a jurisdictional matter cannot be waived, the reversal of position undermines the trust of the citizenry in the integrity of their government. In sum, for many reasons, as discussed previously,[479] it is unhealthy for an adjudicatory system to unnecessarily embed statutory provisions in jurisdictional bedrock.

Finally, as a matter of practical justice, construing a statute of limitations as jurisdictional and thus immunizing the federal government from the consequences of its waiver or forfeiture of the time bar is least justifiable when the government is defending the case before the Court of Federal Claims. To deny jurisdictional status to the statute of limitations is not to open the door to stale and untimely claims nor denigrate the importance of diligent presentation of claims against the federal government. When a claim is arguably untimely, the government is quite capable of so asserting. As the plethora of cases that are publicly reported demonstrate, the government has hardly been shy or timid in asserting statutes of limitations when faced with affirmative claims of liability. Rather than presenting a particularly poignant case for protection of the public fisc from inadvertent waiver of government defenses, a claim against the government in the Court of Federal Claims is least likely to fall between the cracks or receive inferior attention from government counsel. Even within the prevailing centralization of litigating authority for civil suits involving the federal government under the Attorney General,[480] litigation of cases against the United States before the Court of Federal Claims is closely and directly managed at Main Justice in Washington, D.C., where such litigation is handled by trial attorneys with expertise in the particular category of case and forum for adjudication.[481]

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479. *See supra* Part II.A-B.2.

480. *See* 28 U.S.C. §§ 516, 519 (2000).

481. *See* 28 C.F.R. § 0.45(b) (2007) (assigning most Court of Federal Claims matters to the Civil Division of the Department of Justice); 28 C.F.R. § 0.65(a)-(b) (assigning, inter alia, public lands and Indian law matters to the Environment and Natural Resources Division of the Department of Justice). On assignment of litigation matters within the Department of Justice, see generally SISK, *supra* note 58, § 1.02(d), at 9-11.

Indeed, in the *John R. Sand* case itself,[482] the government did question the timeliness of the lawsuit and litigated that question before the Court of Federal Claims. Only subsequently and based upon the evidence developed before the trial court did the government abandon its objection and concede on appeal that the claim had accrued within the statute of limitations. With the government having made a deliberate decision not to persevere in suggesting the application of a time limitation to this lawsuit, no principle of solicitude for a public defendant or interest of just adjudication of claims against the sovereign justifies allowing a court to set aside that concession and readjudicate an issue apparently resolved to the satisfaction of the government.

CONCLUSION

Over the past 150 years, Congress has gradually and sometimes haltingly, but with progressive expansiveness and generosity, lowered the shield of federal sovereign immunity. Even when Congress has waived federal sovereign immunity by enacting legislation expressly granting permission to seek judicial relief against the government, however, the immunity doctrine exerts a persistent influence upon the statutory analysis that attends adjudication of claims under these statutes.

For several decades now, the Supreme Court's jurisprudence on statutory waivers of sovereign immunity has been traveling away from a petrified regime of jurisdictional absolutes and wooden strict construction. Today, the Court directs a more nuanced reading of such statutes to both protect important government interests identified by Congress and uphold the statutory promise of the judicial remedy, with careful attention to text, context, history, and statutory purpose elevated above mechanical application of presumptions.

Within the Court's coalescing jurisprudence, each canon of statutory interpretation had found a place on board the ship but also had been fixed more securely in its proper place within the vessel. Jurisdictional analysis remains a part of the stern, built upon the general scope of the waiver, but no longer mires every

482. On the litigation history of the *John R. Sand* case, see *supra* Part III.B.

aspect of statutory interpretation in nonwaivable and inflexible absolutes. Strict construction is still the rudder that prevents the ship from tacking too far to port by adding new claims and forms of relief beyond those expressly allowed by Congress, but this rubric no longer leans the ship constantly to starboard in narrowing the remedy afforded by Congress. Overall, the regime of interpretation for statutory waivers of sovereign immunity is no longer waterlogged by obdurate presumptions that failed to effectively balance important public policy limitations incorporated in the statute with pursuit of justice for governmental wrongdoing as intended by Congress.

Just as federal sovereign immunity jurisprudence was coming safely into the harbor and the anchor was being lowered, however, the Supreme Court's recent decision in *John R. Sand & Gravel Co. v. United States*[483] may have pushed the ship back out into the pitching waves. Fortunately, the Court did not appear to fight the current of the modern case law, so the strength of the jurisprudential tide may still bring the ship into its anchorage. In future decisions, the Court should speak more purposively to the question of interpretive approach if the renewed drift in its federal sovereign immunity jurisprudence is to be arrested.

483. 128 S. Ct. 750 (2008).