Determining whether the limitations provision of a federal statute bars a cause of action is not always a simple chronological calculation. Where a plaintiff’s action might otherwise be barred as untimely, a court may apply an equitable exception to the limitations period to save the case. Courts often do so without first analyzing whether Congress intended for the exception to apply to the particular federal statute. For example, without any statutory analysis, courts have applied a discovery rule of accrual to many federal statutes of limitations. Under a discovery rule, the time period of the limitations provision does not begin until the plaintiff discovers, or should have discovered, her injury. The United States Supreme Court, in a series of recent cases, has held that there must be a basis for inferring Congressional intent to incorporate an equitable exception, including the discovery rule of accrual, into a federal statute. The Court, however, has not articulated a comprehensive interpretive approach for determining when Congress intends to include (or exclude) equitable considerations in a statute of limitations.

In this Article, we propose such an approach. Our interpretive model is based not only upon the Supreme Court’s decisions, but also upon principles of statutory interpretation and the policies underlying federal statutes of limitations. Our interpretive approach provides that when a statute is silent regarding equitable exceptions, a court can presume Congress intended to incorporate those exceptions that were generally-recognized at the common law at the time of the statute’s enactment. On the other hand, if an exception was not generally-recognized at common law, a court can presume Congress did not intend to incorporate the exception by silence. Whichever presumption applies, it can be overcome if there is relevant and reliable evidence of Congressional intent regarding the exception in the language.

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of the statute, its legislative history, or its purposes. In describing and applying this interpretive approach, we conclude that federal courts, including the Supreme Court, have incorporated equitable exceptions into many federal statutes even when there was no reliable basis to infer that Congress intended those exceptions to apply. This is particularly true with respect to the discovery rule of accrual, which we show had a questionable interpretive origin, yet has been reflexively incorporated into many federal statutes of limitations.

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INTRODUCTION

In his concurring opinion in *TRW, Inc. v. Andrews,* Justice Scalia called a discovery rule of accrual for a federal statute of limitations a "bad wine of recent vintage." As the sommelier of statutory interpretation, the Supreme Court over the past fourteen years has frequently cultivated the vineyards of federal statute of limitations law. *TRW* is one of many recent cases in which the Supreme Court has grappled with equitable exceptions to the time periods in federal limitations provisions. Some of these cases have involved the discovery rule of accrual, Justice Scalia's "bad wine", while others have involved the doctrine of equitable tolling.

A discovery rule of accrual determines when a statute of limitations begins to run. Under the most typical discovery rule, a cause of action "accrues" — that is, starts the limitations period running — when the plaintiff knows, or has reason to know, of his injury. For lack of a better description, this rule has been dubbed a "due diligence injury discovery rule." Although, as we shall see, there are variations

4. See *TRW,* 534 U.S. at 27-33; *Rotella,* 528 U.S. at 553-61; *Klehr,* 521 U.S. at 186-96.
5. See *Young,* 535 U.S. at 49-53; *Beggerly,* 524 U.S. at 48-49; *Brockamp,* 519 U.S. at 348-54; *Irwin,* 498 U.S. at 90-96.
6. The rule focuses on discovery of the injury, as opposed to discovery of some other element of the cause of action, and requires the plaintiff to exercise due diligence to discover the injury. Thus, the statute of limitations begins to run when the plaintiff discovered the injury or when the plaintiff should have discovered the injury, whichever occurs earlier. Depending on what part of this rule a court focuses upon, the rule has been labeled the "injury discovery rule" or the "due diligence discovery rule." See, e.g., *Rotella,* 528 U.S. at 554 (referring to an injury discovery rule); *Peck v. United States,* 470 F. Supp. 1003, 1018 (S.D.N.Y. 1979) (referring to a "due diligence-discovery rule"). Therefore, the most complete, though somewhat unwieldy, moniker is the one we use here, the "due diligence injury discovery rule." Unless otherwise indicated, when we use the term "discovery rule" in this article, we are speaking of the "due diligence injury discovery rule."
of this rule, the justification for this particular discovery rule lies in
the perceived unfairness to a plaintiff when a statute of limitations begins to run while the plaintiff is "blamelessly ignorant" of the "unknown and inherently unknowable" fact of her injury, to use the words of the Supreme Court.

For example, suppose a plaintiff has been exposed to a carcinogen by the negligence of the defendant. Under the discovery rule, the statute of limitations for the plaintiff's cause of action would not begin to run until the plaintiff learned, or should have learned, that she has cancer — a discovery that may occur many years after the initial exposure and after the disease process began. As another example, imagine that a farmer tests his underground water well and learns that his water is contaminated with hazardous chemicals. Suppose, too, that the contamination was caused by a negligent release of chemicals from a nearby industrial plant that occurred decades ago. Under the discovery rule of accrual, the statute of limitations on the farmer's tort action for property damages would not begin to run until the farmer detected — or should have detected — the contamination, even if the groundwater beneath his property had, in fact, been contaminated for several years.

On their face, many federal statutes of limitations do not contain a discovery rule of accrual. The limitations provision merely requires the plaintiff to file the action within a certain period of time from the date the cause of action "accrues" or "arises." Nevertheless, many federal courts have incorporated a discovery rule of accrual into federal statutes containing such language. In TRW, Justice Scalia argued against incorporating a broad discovery rule of accrual into

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7. See, e.g., Rotella, 528 U.S. at 553-55 (rejecting an "injury and pattern discovery" rule for civil actions under RICO); United States v. Kubrick, 444 U.S. 111, 121-23 (1979) (rejecting an injury and negligence discovery rule for actions under the Federal Tort Claims Act ("FTCA")).

8. See Urie v. Thompson, 337 U.S. 163, 169-71 (1949) (stating that prior to diagnosis, the plaintiff's disease was "unknown and inherently unknowable," and Congress could not have intended that the plaintiff's action be barred by the statute in the face of "blameless ignorance").

9. See, e.g., Nicolo v. Philip Morris, Inc., 201 F.3d 29, 32, 35-36 (1st Cir. 2000) (stating that a statute of limitations did not begin to run until cancer was readily foreseeable based upon the nature and extent of the plaintiff's current disabilities).

10. See, e.g., Louisiana-Pacific Corp. v. ASARCO Inc., 24 F.3d 1565, 1581 (9th Cir. 1994), cert. denied, 513 U.S. 1103 (1995) (concluding that the statute of limitations began to run when the plaintiff discovered the contamination); McClellan Highway Corp. v. United States, 95 F. Supp. 2d 1, 10-14 (D. Mass. 2000) (same).


12. See infra notes 327-37 and accompanying text.
statutes that do not reference a discovery rule. He noted that the traditional, standard rule for commencement of the time period of a statute of limitations was when the plaintiff first had a complete and present cause of action. In other words, for Justice Scalia, limitations periods are not tethered to a plaintiff’s knowledge, whether actual or putative. Rather, the limitations clock starts running at the moment the plaintiff possessed the right to apply to a court for relief, regardless of whether the plaintiff knew of that right or of the essential facts from which that right arose.

The discovery rule departs from this conception. According to Justice Scalia, it is a modern, unjustified departure, hence, a “bad wine of recent vintage.” But, why is the discovery rule an unjustified departure, or “bad wine,” if it saves the claims of plaintiffs who are blamelessly ignorant of their injuries? After all, the law generally favors resolution of claims on their merits, rather than dismissals for non-compliance with “technical” time periods in federal statutes. This, of course, does not represent the full spectrum of policy interests implicated in the statute of limitations context. Just as it may seem “unfair” to declare a potentially meritorious claim time barred, it is equally “unfair” to disregard the principle of repose, which provides defendants certainty that potential claims — whose adjudication may be materially hampered by the passage of time — will expire on a date certain. Even so, an abstract consideration of these policy considerations alone can lead courts astray from their law-interpreting role and into the precarious — and some say undemocratic and unconstitutional — role of lawmaking. Accordingly, whether the discovery rule of accrual or any other equitable exception should be imported into a federal statute of limitations necessarily requires an inquiry into Congressional intent, using well-known rules of statutory construction.

The process of statutory interpretation serves its own policies (most notably, consistency and separation of powers), and it strives to arrive at a meaning that corresponds to the intent of the legislature that enacted the statute. In deciding cases involving limitations issues over the past fourteen years, the Supreme Court has construed several federal statutes. Drawing on those cases and the process of statutory interpretation itself, we prescribe an interpretive approach for adjudicating issues which involve the discovery rule of accrual or other equitable exceptions to federal limitations provisions. The key

14. Id. at 36 (Scalia, J., concurring) (quoting Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal., 522 U.S. 192 (1997)).
15. Id. at 37 (Scalia, J., concurring).
16. Id. (Scalia, J., concurring).
17. See infra notes 129-32 and accompanying text.
to our approach, to borrow Justice Scalia's metaphor, is the "vintage" of a particular equitable exception — such as the discovery rule — at the time of a statute's enactment. Simply stated, if the courts generally-recognized a particular equitable exception for statutes of limitations at the time a given federal law was enacted, then a presumption arises that Congress intended for that same equitable exception to apply to the new law's statute of limitations. However, if the courts did not recognize the equitable exception at that time, then the opposite presumption arises — that Congress did not intend for the exception to apply. The normal indicia of Congressional intent — the language of a statute, its legislative history, and its purposes — can overcome either presumption.

This interpretive approach for federal statutes of limitation first appeared in the Supreme Court's equitable tolling cases, starting with *Irwin v. Department of Veterans Affairs.*\(^{18}\) The Court's recent decision in *TRW* shows how the approach has evolved to apply to the discovery rule of accrual as a unique equitable exception. Although these recent Supreme Court cases confirm the applicability of our approach, our rule is at odds with an earlier Supreme Court decision, *Urie v. Thompson,*\(^{19}\) which first incorporated a discovery rule of accrual into a federal limitations provision. Equally, the interpretive approach we advocate casts substantial doubt upon a body of case law applying the discovery rule of accrual to the Federal Tort Claims Act and to many other federal statutes.\(^{20}\) Given the recent Supreme Court decisions, and the interpretive approach that we extract from them, we believe it is time for an across-the-board reassessment of the practice of automatically applying a discovery rule of accrual to federal statutes of limitations that are silent on the subject.

In Part I, we discuss the various equitable exceptions that delay the running of federal statutes of limitations. Although courts generally discuss these equitable exceptions using terms such as "equitable tolling," "equitable estoppel," "fraudulent concealment," or the "discovery rule," there are actually several distinct equitable exceptions that these terms cover. It is important to understand each distinct equitable exception in its own right because each has its own unique history. This history, we suggest, is important for purposes of statutory interpretation. Some equitable exceptions are traditionally included in statutory language, while others are traditionally incorporated through judge-made common law. As an interpretive matter, courts can presume Congress intended to include a particular equitable ex-


\(^{19}\) 337 U.S. 163 (1949).

\(^{20}\) See infra notes 283-368 and accompanying text.
ception for a statute of limitations through legislative silence only if that equitable exception was generally-recognized at common law at the time of a statute's enactment. We show how the mere invocation of the terms "equitable estoppel" and "equitable tolling" falls far short of this standard. Part I first discusses how courts use these terms generally, and then reveals some of the distinct equitable exceptions that the terms actually encompass. Finally, Part I considers how an equitable exception first comes to be generally-recognized at common law as well as the implications this has for determining Congressional intent.

In Part II, we discuss various methods of statutory construction and explain how they are relevant to interpretation of federal statutes of limitations. Initially, we describe the underlying principle of statutory construction that drives our interpretive approach: the presumption that Congress enacts legislation in light of the common law existing at the time, and that Congress does not supplant the common law absent strong evidence of an intent to do so. Accompanying this presumption is the corollary that Congress does not intend to incorporate equitable exceptions that are not generally-recognized in the common law at the time of enactment. With this foundation, we consider the type of evidence of Congressional intent that is necessary to overcome a presumption for or against incorporating a specific equitable exception into a federal statute of limitations.

Next, in Part III, we analyze several Supreme Court cases which, over the past several years, have decided issues involving federal statutes of limitations. We will show how these cases support our interpretive approach to federal limitations issues. Most recently, the Court's decisions in TRW and Young v. United States demonstrate how this approach applies to particular equitable exceptions, including the discovery rule of accrual.

In Part IV, we take a critical look at the Supreme Court's decisions in Urie v. Thompson and United States v. Kubrick, which established a discovery rule of accrual for the Federal Employers' Liability Act ("FELA") and the Federal Tort Claims Act ("FTCA"), respectively. We demonstrate that, in light of recent Supreme Court decisions and the interpretive approach that we draw from them, the

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Urie and Kubrick decisions represent a departure from the appropriate method of statutory interpretation. We also show that lower federal courts have frequently applied the discovery rule of accrual to the FTCA without ever pausing to consider whether Congress intended such a rule to apply to the Act's statute of limitations. Moreover, federal courts have expanded on the holdings of Urie and Kubrick, and incorporated the general discovery rule of accrual into several other federal statutes of limitations, usually without any analysis at all of Congressional intent.

Finally, in the last section, we justify the interpretive approach that we propose by considering the interests at stake in deciding the meaning of a federal statute of limitations. Our all-inclusive analysis examines particular federal statutes, specific equitable exceptions, statutes of limitations generally, and principles of statutory construction. We show that, by accounting for the principles of statutory construction along with all of the other interests at stake, our interpretive approach is faithful to Congressional intent in setting time limits within which to vindicate a federal right.

I. THE "SUBTLE, INTRICATE, OFTEN MISUNDERSTOOD" LAW OF FEDERAL STATUTES OF LIMITATIONS: EQUITABLE EXCEPTIONS TO A CHRONOLOGICAL CALCULATION

Judge Richard Posner has written: "Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues." But how can this be? As attorneys, we are led to believe that mathematical calculations do not lie — or, at the very least, do not leave room for debate. On their face, most statutes of limitations appear to require simple math. However, when faced with a limitations defense, it is not always a simple matter for a court to determine whether the plaintiff has complied with the chronological limitations deadline of the applicable statute. To decide the issue, a court must determine, first, when the limitations period began to run and, second,  

24. Wolin v. Smith Barney, Inc., 83 F.3d 847, 849 (7th Cir. 1996). See also Chase Securities Corp. v. Donaldson, 325 U.S. 304, 313 (1945) (stating that "[s]tatutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law").

25. See Eli J. Richardson, Eliminating the Limitations of Limitations Law, 29 Ariz. St. L.J. 1015, 1015 (1997) (noting that "[a]ccording to the conventional wisdom, statutes of limitations operate like clockwork, producing predictable, inevitable results."). The article nevertheless demonstrates that, in practice, the operation often diverges from this conventional wisdom. Id. at 1016.
whether there is any reason for suspending the running of the limitations period.

These determinations often involve complex questions of law and fact. Traditionally, the limitations period began to run at the moment the plaintiff had a “right to apply to a court for relief” regardless of whether the plaintiff knew about the underlying facts giving rise to this right. Moreover, under this rule, once the limitations period began to run, it did not stop. However, courts, the Congress, and state legislatures have recognized exceptions to the traditional rule. We call these exceptions, which either delay the commencement of the limitations period or suspend its operation, “equitable exceptions” because their function is to take the sting out of a statute of limitations for equitable reasons. That is to say, when a statute of limitations on its face extinguishes a person’s right to sue without regard to the merits of a claim, courts and legislatures may reject such a result when they perceive the result as unfair.

Courts often discuss the equitable exceptions to a statute of limitations as “equitable estoppel” or “equitable tolling.” However, because these terms actually include several concepts, each with its own distinct historical pedigree, the terms themselves are not particularly useful for purposes of statutory interpretation. Under our interpretive approach, an important step in determining whether Congress intended to include an equitable exception in a federal statute of limitations is whether the particular exception existed at common law at the time of the statute’s enactment. Because different types of equitable tolling and equitable estoppel have been recognized at different times, it is necessary to consider the specific equitable exception at issue to determine whether it was generally-recognized at common

27. See infra notes 67-81 and accompanying text.
28. See infra note 68 and accompanying text.
29. See infra notes 82-123 and accompanying text.
law when Congress enacted a particular federal statute. Thus, even if a court finds that some types of equitable tolling were recognized in the common law at the time that the statute was enacted, it is also necessary to know which types of equitable tolling the common law recognized. Congress cannot intend to incorporate, by silence, various forms of equitable tolling that were not generally-recognized in the common law at the time of enactment.

This is particularly important when considering the discovery rule of accrual. Some courts may consider the discovery rule to be a type of equitable tolling or equitable estoppel. But Congress certainly could not have intended to incorporate the discovery rule into a statute of limitations just because some types of equitable tolling or equitable estoppel were generally-recognized at common law when it passed a statute. The discovery rule itself, as an equitable exception, must have been specifically established in the common law at the time Congress enacted a statute before there can be any presumption Congress intended to incorporate it into a federal statute by silence. Logically, Congress cannot intend to incorporate a common law rule if it either did not exist at the time of enactment or was otherwise so new to the common law landscape that Congress could not have intended its incorporation.

Thus, for purposes of statutory interpretation, it is not useful to classify the discovery rule as equitable tolling or equitable estoppel. Indeed, for all of the equitable exceptions to statutes of limitations, it is necessary to go beyond general labels such as equitable estoppel or equitable tolling, and consider the specific exception at issue.

A. COMMON TERMS FOR EQUITABLE EXCEPTIONS TO LIMITATIONS PROVISIONS

Before presenting specific rules for, and exceptions to, statutes of limitations, we first discuss how courts and legislatures have historically used and understood equitable exceptions to limitations provisions. As we have said, the terms equitable estoppel and equitable tolling are the terms of choice, but courts also sometimes use the terms “fraudulent concealment” and the “discovery rule” to describe equitable exceptions to limitations provisions. These terms do not always carry the same meaning in all contexts, but we can make some generalizations about them.

Equitable estoppel is based on the equitable principle that one may not take advantage of one's own wrong. If the defendant commits a wrong to the prejudice of the plaintiff's interest, then the court,

under the doctrine of equitable estoppel, can prevent the defendant from taking advantage of that wrong. In the context of limitations law, if a defendant takes actions which prevent the plaintiff from complying with the statute of limitations, then the court can estop the defendant from asserting the statute as a defense to the plaintiff’s claim. For example, a court may find equitable estoppel is justified where a defendant promises the plaintiff that he will not plead the statute of limitations as a defense and thereby induces the plaintiff to file her claim after the applicable statute of limitations has expired. Likewise, a court may estop a defendant from raising the statute of limitations when the defendant has concealed information that is essential to the plaintiff’s claim. Because equitable estoppel prevents a defendant from taking advantage of his own wrongdoing, it is, by definition, limited to situations in which the actions of the defendant are at issue. The doctrine of equitable tolling, however, is not so limited. Courts have used the term to capture many justifications for delaying the commencement of the statute of limitations, or suspending its operation altogether, and have even likened it to equitable estoppel. For example, courts have stated that equitable tolling could apply: (1) if the plaintiff is incompetent, (2) if the plaintiff filed a timely, 33. See, e.g., Glus, 359 U.S. at 233 (citing Schroeder v. Young, 161 U.S. 334, 344 (1895)). 34. See id. See also Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990) (stating that equitable estoppel is a general equity principle that is not confined to the statute of limitations framework, and can apply if the defendant takes affirmative steps to impede the plaintiff from suing in time, such as promising to refrain from pleading the statute of limitations as a defense); 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 9.1, at 25 (1991) (stating that “[judicial application of the doctrine of equitable estoppel may prevent the effective use of the statute of limitations”); 54 C.J.S. LIMITATIONS OF ACTIONS, § 24, at 53 (1987) (stating that a court may apply equitable estoppel under appropriate facts to prevent the defendant from using the statute of limitations as a bar “even in the absence of an express statutory basis for tolling the period”). 35. See, e.g., Glus, 359 U.S. at 233 (citing Schroeder, 161 U.S. at 344). 36. See, e.g., Santa Maria v. Pac. Bell, 202 F.3d 1170, 1173 (9th Cir. 2000) (holding that “reasonable reliance on a fraudulent concealment is required for application of the doctrine of equitable estoppel”); Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878-79 (5th Cir. 1991) (citing Pruet Prod. Co. v. Ayles, 784 F.2d 1275, 1280 (5th Cir. 1986)) (applying equitable estoppel where employer concealed or misrepresented facts to support a discrimination charge). 37. See, e.g., Bennett v. Coors Brewing Co., 189 F.3d 1221, 1235 (10th Cir. 1999) (stating that equitable tolling, like equitable estoppel, provides for tolling of the statute of limitations where the plaintiff is unaware of facts necessary to support a claim due to defendant’s misconduct); Browning v. AT&T Paradyne, 120 F.3d 222, 226 (11th Cir. 1997) (stating that many courts and litigants confuse the doctrines of equitable tolling and equitable estoppel); Allison v. Frito-Lay, Inc., No. 91-4193-C, 1992 WL 123799, at *4 (D. Kan. Mar. 27, 1992) (stating that “[where the defendant’s actions are the alleged basis for equitable tolling or equitable estoppel, the plaintiff must prove affirmative misconduct by the defendant”). 38. See, e.g., Lake v. Arnold, 232 F.3d 360, 370-71 (3d Cir. 2000) (holding that equitable tolling might be appropriate “where a guardian conspires to deprive a mentally
though defective, pleading, if the defendant has concealed its fraud, (4) if the plaintiff has been unable to discover his injury, or (5) if the plaintiff could not file an action during wartime.

Because the terms “equitable estoppel” and “equitable tolling” are neither precise nor mutually exclusive, using these terms can lead to confusion and misunderstanding. One commentator has said that distinguishing between equitable estoppel and equitable tolling is “elusive and ultimately unproductive.” For purposes of statutory construction, however, the distinction is irrelevant because the question is not whether the equitable exception is labeled as equitable tolling or equitable estoppel, but whether Congress intended that any particular exception apply to a specific federal statute. Answering this question involves an analysis of whether the particular equitable exception was generally-recognized at common law at the time of the statute’s enactment and whether the equitable exception is incorporated, or foreclosed, by the language of the statute or other indications of legislative intent.

The equitable exception known as “fraudulent concealment” illustrates the problem of classifying every equitable exception as equita-
ble estoppel or equitable tolling. Under this exception, the statute of limitations governing a fraud-based cause of action does not begin to run until the plaintiff, in the exercise of reasonable diligence, discovers the fraud. Depending upon the circumstances, one can classify this exception as either equitable estoppel or equitable tolling. Where the defendant has affirmatively concealed its fraudulent conduct, a court could apply the doctrine of equitable estoppel to prevent the defendant from raising the statute of limitations defense. Yet, the doctrine of fraudulent concealment can also apply when the defendant has not taken any steps to affirmatively conceal the fraud. In an action based upon fraud, if the plaintiff is unable through reasonable diligence to discover the fraud, the Supreme Court has stated that “equity tolls” the statute of limitations until the plaintiff discovers, or should have discovered, the fraud.

Most courts do not explicitly classify fraudulent concealment as either equitable estoppel or equitable tolling, but rather treat it sui generis. This is certainly appropriate for purposes of statutory interpretation. As we show below, the fraudulent concealment doctrine has its own unique history in the common law. In determining whether Congress intended to include fraudulent concealment as an equitable exception to a federal limitations provision, it is error to ask whether Congress intended to incorporate equitable tolling, a term which includes many equitable exceptions, each with its own unique history. Rather, a court should consider whether fraudulent concealment, as a specific equitable exception, was generally established in the common law at the time the statute was enacted and, if so,

44. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 347 (1874). See also 2 H. G. Wood, LIMITATION OF ACTIONS § 275, at 1363 (4th ed. 1916) (stating that it is a rule of equity in United States courts “that where relief is asked on the ground of actual fraud, especially if the fraud has been concealed, that time will not run in favor of the defendant until the discovery of the fraud or until, with reasonable diligence, it might have been discovered”).

45. See also Cada, 920 F.2d at 450-51 (stating that where fraudulent concealment acts to postpone the accrual of a cause of action until the defendant discovers the fraud, the fraudulent concealment exception should be considered a “discovery rule”). This “discovery rule,” however, with its focus on discovery of the fraud, is different from a traditional due diligence injury discovery rule.

46. See Jackson v. Rockford Housing Auth., 213 F.3d 389, 394 (7th Cir. 2000) (stating that "equitable estoppel," which is also known as "fraudulent concealment," can apply where the defendant takes active steps to prevent the plaintiff from suing in time, such as hiding the evidence); Cada, 920 F.2d at 451 (stating that "[e]quitable estoppel in the limitations setting is sometimes called fraudulent concealment").

47. See TRW, 534 U.S. at 27 (citing Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)). In Holmberg, the Court held that equitable tolling applies where plaintiff has been injured by fraud and remains ignorant of the fraud, “though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.” Holmberg, 327 U.S. at 397.
whether there are any reliable indications that Congress intended to preclude its application to the particular statute.

The same analysis should apply to the discovery rule of accrual, even though some courts have stated that the discovery rule is a form of equitable tolling.\(^48\) Compared to the fraudulent concealment doctrine, the discovery rule is a much more recent equitable exception. While some types of equitable tolling were well-established in the common law in the early 1900s, the discovery rule of accrual was not among them.\(^49\) Whether Congress intended to incorporate a discovery rule at any given point in time must be determined in reference to the discovery rule's own unique history.

B. **Equitable Exceptions in Statutory Language or at Common Law**

One may find equitable exceptions to statutes of limitations in one of two places: (1) in the language of the statute itself, or (2) in the common law. Some equitable exceptions are traditionally found in statutory language. The seminal statute of limitations, the statute of James I, specifically included an equitable exception; it provided that the limitations period did not run while the plaintiff was "within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas."\(^50\) This statute — known as the original Statute of Limitations\(^51\) — was the basis for many American statutes of limitations, and many early state legislatures adopted the statute verbatim.\(^52\) The particular "disabilities" to bringing an action within the statutory period that are listed in the statute of James are still included in the language of some statutes of limitations.\(^53\) While these

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48. See supra note 41 and accompanying text.
49. Compare infra notes 82-101 and accompanying text, with infra notes 67-79 and accompanying text.
50. An Act for Limitation of Actions, and for Avoiding of Suits in Law, 1623, 21 Jam. ch. 16, reprinted in H. G. Wood, *Limitation of Actions* 631-33 (1st ed. 1883). The term "feme covert" means a married woman, who was formerly not entitled to bring an action on her own behalf while married. See *Black's Law Dictionary* 556 (5th ed. 1979). "Non compos mentis" means not of sound mind. Id. at 948. "Beyond the seas" means outside of the territorial waters of the United States. Id. at 147.
52. See Hangar, 73 U.S. at 538; 1 Wood 4th Ed. supra note 44, § 6, at 12; 2 Wood 4th Ed. supra note 44, § 237, at 1070; Note, 63 Harv. L. Rev. at 1192.
53. See, e.g., 28 U.S.C. § 2401(a) (2000) (the general statute of limitations for civil actions against the United States provides that the action must be brought within six years from the time the right of action first accrues but "[t]he action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"); 28 U.S.C. § 2501 (2000) (same provision for persons filing a petition in the United States Court of Federal Claims); 15 U.S.C. § 714b(c) (2000) (the Commodity Credit Corporation Charter Act provides that "in the
exceptions have a long tradition in the law, they are not necessarily part of the common law backdrop against which Congress enacts a statute of limitations because they are usually included within a statute’s language. For this reason, there can be no presumption that these disabilities act as equitable exceptions to the operation of the statute when they are not included within the statute’s text. Accordingly, if a disability is to be included as an equitable exception to a statute of limitations, it either must be included within the language of the statute or there must be other strong evidence of Congressional intent to include the exception.\(^{54}\)

In addition to including such “disabilities” specifically within statutes of limitations, many legislatures have also enacted specific “transfer” and “savings” provisions which affect the operation of statutes of limitations.\(^{55}\) Under these laws, the statute of limitations does not bar a plaintiff’s action if the plaintiff has filed what would otherwise have been a timely action in a court of improper venue.\(^{56}\)

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54. See 2 Wood 4th Ed. supra note 44, § 237a(1), at 1078 (“[l]imitations run against persons under disability, unless there is an express saving in the statute in their favor”); id. § 252, at 1192 (“[t]he statute of limitation begins to run against a party immediately upon the accrual of a right of action, unless at the time he was under some of the disabilities named in the statute; and a saving or exception not found in the statute will not be implied, however much it may be within the reason of other exceptions”); William Blanshard, A Treatise on the Statute of Limitations § 194, at 202-203 (1826) (stating that “unless persons are under disabilities expressly mentioned in the statute, they cannot be excepted from its operation by judicial construction”). However, there has been a recent trend to apply equitable tolling to certain disabilities, even if not included within the terms of a statute. See, e.g., Nunnally v. MacCausland, 996 F.2d 1, 2, 5 (1st Cir. 1993) (tolling 30-day limitation period for filing a suit under the Civil Service Reform Act for mental illness); Bassett v. Sterling Drug, Inc., 578 F. Supp. 1244, 1247 (S.D. Ohio 1984) (holding that mental incompetence can toll the period for filing a claim with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act). This has been justified on the ground that the legislation is “remedial and humanitarian” and should be “liberally interpreted.” Bassett, 578 F. Supp. at 1246-47 (quoting Dart v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976)). See also Nunnally, 996 F.2d at 5. Even though disabilities are traditionally included within the language of statutes of limitations, there could conceivably be other indications of legislative intent that would justify incorporating a disability into a statute when the text does not specifically provide for any disability. However, implying a disability from the general purpose of a statute is, as we will show below, inappropriate as a matter of statutory construction. See infra notes 166-79 and accompanying text.


56. Burnett, 380 U.S. at 431, 432. Similarly, in an amendment to the Federal Tort Claims Act (“FTCA”), Congress provided that when a plaintiff filed an action against a government employee when the United States was the proper party defendant, the plaintiff’s action was not barred by the FTCA’s two-year statute of limitations, provided that the action would have been timely had it originally been filed against the United States and it was presented to the appropriate federal agency within sixty days of the
a "transfer provision," the action is transferred to another court without being considered a new action for purposes of the limitations provision and, under a "savings provision," the action is specifically saved from the operation of the statute under particular circumstances.

Other equitable exceptions have not traditionally been included in the language of federal statutes of limitations, but are instead recognized as a matter of common law. In the following circumstances, courts have recognized equitable exceptions by operation of the common law: (1) the defendant has induced the plaintiff to let the statute of limitations run;\(^57\) (2) war has prevented a plaintiff from complying with the statute of limitations;\(^58\) and (3) a plaintiff, through the exercise of reasonable diligence, has been unable to discover the defendant's fraudulent conduct.\(^59\) Courts have traditionally incorporated these exceptions into statutes of limitations even though they are not specifically provided for by the language of the statute.

Whether, at the time of a statute's enactment, an equitable exception was typically included in the language of a statute or was traditionally recognized at common law is an important factor in determining Congressional intent. Because legislatures have almost always included certain disabilities in statutory language,\(^60\) the absence of such language does not give rise to a presumption that the legislature intended for a disabilities exception to apply. By contrast, if an equitable exception is traditionally recognized at common law but not typically included in a statute, it would be appropriate to presume that the legislature intended to incorporate that exception into a statute which is silent on the matter.

It will not always be easy for a court to determine whether an equitable exception was typically included in the language of a statute or whether it was generally-recognized at common law at the time Congress enacted the statute. Some exceptions which were historically recognized at common law have, over time, been specifically incorporated into statutory language. For example, courts had traditionally incorporated the fraudulent concealment exception in the absence of any specific statutory provisions.\(^61\) However, by 1916, many states had specifically included a fraudulent concealment excep-

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\(^57\) See Glus, 359 U.S. at 232-33.
\(^59\) Bailey, 88 U.S. (21 Wall.) at 347-48; Holmberg, 327 U.S. at 397.
\(^60\) See 2 Corman, supra note 34, § 8.1, at 2 (stating that legislatures usually specify which disabilities toll the statute of limitations).
\(^61\) See Amy, 130 U.S. at 324; Bailey, 88 U.S. (21 Wall.) at 347-49.
tion, in whole or in part, in the language of a limitations provision. The question is whether subsequent statutory provisions have so supplanted the common law rule that the exception can no longer be considered as generally-recognized at common law. That is to say, in light of the emergence of the exception in statutory language, it may no longer be reasonable to presume that the legislature intended to incorporate the equitable exception through silence. With respect to the fraudulent concealment exception, this apparently was not the case by 1946 when the Supreme Court determined that the exception was “read into every federal statute of limitation.”

In sum, the historic lineage of the particular type of equitable exception — be it a type of equitable tolling, a brand of equitable estoppel, or a discovery rule of accrual — is the key to determining whether there should be a presumption that the exception applies to any given federal statute of limitations. A court must look at the status of the particular exception at the time of a statute’s enactment to draw a conclusion about the presumed intent of the legislature. A court must first determine whether the particular exception was established in the law and, second, whether the exception was typically included in statutory language or was instead incorporated into statutes through judge-made law. This is a crucial first step in the interpretive approach. Only after understanding the historic status of the particular equitable exception can one make a valid presumption regarding the intent of the legislature to incorporate that exception when the statute is silent. Once the presumption is established, courts must turn to traditional sources of evidence of legislative intent — the language of the statute, its legislative history, and its purposes — to determine whether Congress intended to incorporate the exception into the statute.

C. THE HISTORIC LINEAGE OF PARTICULAR LIMITATIONS CONCEPTS

It is possible to trace the historic lineage of particular limitations concepts which are key to interpreting federal statutes of limitations. Treatises on Anglo-American limitations law date back to the nineteenth century. Indeed, in two recent statute of limitations opin-

62. 2 WOOD 4TH ED., supra note 44, § 274, at 1358-59. In some states, the statutes provided that the limitations period did not begin to run until fraud was discovered in actions based upon fraud, while in other states the statute provided that the limitations period did not begin to run until discovery where the action was based upon fraud or where the action was fraudulently concealed. Id.

63. See J. K. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY (6th ed. 1876); BLANSHARD, supra note 54; WILLIAM BALLANTINE, A TREATISE ON THE STATUTE OF LIMITATIONS (1812).
FEDERAL STATUTES OF LIMITATIONS

ions. Justice Scalia cited the fourth edition of H.G. Wood's LIMITATIONS OF ACTIONS AT LAW AND IN EQUITY from 1916 as authority for traditional rules regarding the operation of statutes of limitations. These treatises, in conjunction with case law, law review commentary, statutory texts, legislative history, and other historical materials, can provide courts a rich historical perspective on statute of limitations law.

The concepts that control the operation of statutes of limitations are the traditional rule and its equitable exceptions. The traditional rule is that a statute of limitations begins to run when the plaintiff first has a right to seek relief and, once it has begun to run, it does not stop. Equitable exceptions to this traditional rule have unique historic lineages. As we now demonstrate, some equitable exceptions have a long history in the law, whereas others are more recent creations of the courts. We discuss the historic status of the traditional rule for calculating statutes of limitations and then describe some of the equitable exceptions the United States Supreme Court has historically recognized.

1. The Traditional Rule: The Statute of Limitations Begins to Run When the Cause of Action Arises.

The typical statute of limitations provides the limitation period begins at the time the cause of action "accrues" or "arises." The traditional rule is that "all statutes of limitations begin to run when the right of action is complete." As Professor Wood stated in his treatise

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64. See TRW, 534 U.S. at 35, 37 (Scalia, J., concurring); See also Young, 535 U.S. at 44, 47.
66. Other historical materials that courts often overlook, such as legal encyclopedias, legal dictionaries and legal restatements, can provide historical insights. For a historical perspective on limitations law we examined legal encyclopedias from three different periods of the twentieth century: 17 R.C.L. Limitation of Actions (William M. McKinney et al. eds., 1929); 54 C.J.S. Limitations of Actions (1987); and 51 AM. JUR. 2D Limitation of Actions (2000). We also examined historical treatises, historical editions of legal dictionaries and substantive restatements of the law from past periods. While these sources, when considered in isolation, do not always provide irrefutable statements of the law, when considered together, they can provide historical insight into the development of the law.
67. Clark v. Iowa City, 87 U.S. (20 Wall.) 583, 589 (1874). See also United States ex rel. Louisville Cement Co. v. Interstate Commerce Comm'n, 246 U.S. 638, 644 (1918), superceded by statute as stated in Reiter v. Cooper, 507 U.S. 258 (1993) (stating that "we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted upon it . . .") (citation omitted). See also Braun v. Sauerwein,
on limitations of actions, “One of the most important and universal rules (which is not, however, without exception) is that time [in a statute of limitations], when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which is not within the saving of the statute.”68 Thus, the statutory period begins the moment the plaintiff first “has the right to apply to a court for relief and commence proceedings to enforce his rights.”69 In recent times, this has been referred to as the “standard rule” for commencement of the statute of limitations.70 Under this rule, a limitations period begins to run even though “the person entitled to an action has no knowledge of his right to sue, or the facts out of which his right arises.”71 The plaintiff’s inability to discover his injury, or other facts supporting his cause of action, is irrelevant to the commencement of the limitations period.72 In 1950, a commentator recognized this “convenient rule” where “knowledge of the wrong is immaterial,” but advo-

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68. WOOD 1ST ED., supra note 50, § 6, at 8.
69. 1 WOOD 4TH ED., supra note 44, § 122a, at 684. See also 1 CORMAN, supra note 34, § 6.1, at 370 (stating that a cause of action accrues “when the plaintiff has a complete and present cause of action”); 17 R.C.L. Limitation of Actions § 116, at 749 (stating that a “cause of action accrues at the moment the right to commence an action comes into existence”); 1 WOOD 4TH ED., supra note 44, § 122a, at 684-85 (stating that “[t]he time when a cause of action has accrued within the statute of limitations means the time when plaintiff first became entitled to sue”); ANGELL, supra note 63, § 42, at 37 (stating that “the cause of action or suit arises when and as soon as the party has the right to apply to the proper tribunals for relief”).
70. See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc., 522 U.S. 192, 201 (1997) (citations omitted); TRW, 534 U.S. at 36-37 (Scalia, J., concurring) (citing Bay Area Laundry, 522 U.S. at 201). The majority opinion in TRW, however, noted that the Bay Area Laundry case answered only the question of “whether a statute of limitations could commence to run on one day while the right to sue ripened on a later day,” implying that the Bay Area Laundry Court did not necessarily state a standard rule for commencement of the statute of limitations. TRW, 534 U.S. at 34 n.6.
71. 2 WOOD 4TH ED., supra note 44, § 276c(1), at 1411. See also 2 CORMAN, supra note 34, § 11.1.1, at 134 (stating that the statute of limitations begins at the time of a “judicially recognizable injury or event constituting a breach of duty... even though the plaintiff is unaware of the accrual of his or her cause of action”); 17 R.C.L. Limitation of Actions § 193, at 831 (stating that “[t]he fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not, as a general rule, prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his rights thereunder.”).
72. See 2 WOOD 4TH ED., supra note 44, § 276c(1), at 1408-10 (stating that “[m]ere ignorance of the existence of a cause of action does not prevent the running of a statute of limitations unless there has been fraudulent concealment on the part of those invoking the benefit of the statute.”).
cated an exception for "situations where the plaintiff is generally unlikely to learn of the harm before the remedy expires." 73

As a matter of interpretation, the question in all cases is: What does Congress mean when it uses the term "accrues" or "arises" to describe when a statute of limitations begins to run? As we discuss in more detail below, the guiding rule of construction is that, absent an express definition of a particular statutory term, Congress intends to adopt the same meaning of terms that was recognized at common law at the time of the statute's enactment. 74 We begin with the most basic source for defining terms — dictionaries.

For much of the twentieth century, the definition of the word "accrue" in legal dictionaries did not include a discovery component. In the early twentieth century, dictionaries typically stated that, in the context of a statute of limitations, the word accrue meant "to arise, to happen, to come to pass." 75 For example, one dictionary stated that a cause of action "accrues when a suit first may be legally instituted upon it." 76 In 1968, Black's Law Dictionary still did not recognize that accrual could turn on a plaintiff's discovery of injury. 77 That edition of the dictionary defined accrual as "when a suit may be maintained" and "[w]henever one person may sue another." 78 As examples, it noted that a cause of action accrues when damage is sustained, when the injury occurs, and when a contract is breached. 79 Black's Law Dictionary did not recognize a discovery component for the word "accrual" until the fifth edition in 1979, which noted, "An action for malpractice against an attorney does not accrue until a client knows or should know of the attorney's error." 80 Subsequently, encyclopedias, treatises, and dictionaries typically recognized that accrual of a cause of action could be delayed until discovery of the injury. 81

73. Note, 63 Harv. L. Rev. at 1203.
74. See infra notes 133-40 and accompanying text.
75. See Bouvier's Law Dictionary 34 (2d ed. 1928) ("to arise, to happen, to come to pass"). See also Black's Law Dictionary 29 (3d ed. 1933) ("to arise, to happen, to come into force or existence; to vest"); Cyclopedic Law Dictionary 14 (2d ed. 1922) ("to arise, to happen, to come to pass"); Black's Law Dictionary 18 (2d ed. 1910) ("to arise, to happen, to come into force or existence; to vest").
76. Bouvier's Law Dictionary 34 (2d ed. 1928) (citing United States ex rel. Louisville Cement Co. v. Interstate Commerce Comm'n, 246 U.S. 638, 644 (1918)).
78. Id. (citations omitted).
79. Id. (citations omitted).
81. Some legal references still stated the general rule that ignorance of the cause of action did not delay the commencement of the statute of limitations, but noted that some courts had applied a "discovery rule of accrual" where justified by the equities. See 51 Am. Jur. 2d Limitation of Actions §§ 148, 179, at 546-47, 565-66 (stating the general rule that discovery of the injury is irrelevant to commencement of the statute
The evolution of the definition of "accrual" in legal dictionaries reflects a more general historical movement away from the traditional rule. Partly for reasons of fairness, and partly because of the natural evolution of a legal system — in which new situations are presented for adjudication — courts began chipping away at the traditional rule. The result: not only would limitations periods be stopped, but they would be halted for a number of reasons deemed to be equitable.

2. Defendant Misconduct

When the defendant, through misconduct, has affirmatively induced the plaintiff to allow the statute of limitations to expire, courts have traditionally estopped the defendant from asserting the statute of limitations as a defense. The Supreme Court recognized this equitable exception in *Glus v. Brooklyn Eastern District Terminal*, and noted that the exception was based upon the maxim "that no man may take advantage of his own wrong." According to the Court, this principle was "[d]eeply rooted in our jurisprudence" and had been "applied in many diverse classes of cases by both law and equity courts." Moreover, the principle had "frequently been employed to bar inequitable reliance on statutes of limitations." The Court noted it had previously applied the equitable exception itself to estop a defendant from raising the limitations bar in a nineteenth century case, and noting that "[s]ome courts have relaxed limitations statutes by applying an equitable 'discovery rule ...'"); 2 CORMAN, supra note 34, § 11.1.1, at 134-35 (noting that some judicial decisions had developed the discovery rule "to mitigate potential harshness," and "[t]he rule is essentially one of equity, which calls for the weighing of the equitable claims of the parties"). Other references imply that the discovery rule is the prevailing one. See, e.g., BLACK'S LAW DICTIONARY 21 (7th ed. 1999) (stating that the word "accrete" means "to arise" or "to come into existence as an enforceable claim or right" such as "the plaintiff's cause of action for silicosis did not accrue until the plaintiff knew or had reason to know of the disease"); 1 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 46 (1998) (stating that the word "accrete" means "to arise, to happen, to come into force or existence" and that "[w]hen a cause of action is not readily discoverable, the cause of action accrues when the plaintiff in fact discovers the injury").

82. 359 U.S. 231 (1959). See generally 2 CORMAN, supra note 34, § 9.1, at 32 (recognizing the defendant's "affirmative inducement to the plaintiff to delay bringing the action" as a basis for equitable estoppel); 54 C.J.S. LIMITATIONS OF ACTIONS § 24, at 53-54 (stating that a court may estop a defendant from asserting a statute of limitations when "his actions have fraudulently or inequitably invited a plaintiff to delay commencing legal action until the relevant statute of limitations has expired ..."); Dawson, 34 MICH. L. REV. at 19-23 (discussing misleading conduct of the defendant that can be recognized as a basis for equitable estoppel).


84. *Id.* at 232-33. The Court cited several cases, one dating back to 1822, applying the equitable principle outside the context of the statute of limitations. *Id.* at 233 n.6 (citations omitted).


86. *Id.* at 233 (citing Schroeder v. Young, 161 U.S. 334, 344 (1896)).
that state courts had also invoked the exception.\textsuperscript{87} In fact, the Court stated that the principle was "older than the country itself."\textsuperscript{88} Finally, the Court found nothing in the language or history of the statute at issue in \textit{Glus} to indicate that Congress did not intend the equitable exception to apply to actions arising under that statute.\textsuperscript{89}

3. \textbf{Fraudulent Concealment}

When the plaintiff's cause of action is based upon fraud, courts have traditionally held that the statute of limitations does not begin to run until the plaintiff, in the exercise of reasonable diligence, discovers the fraud. This equitable exception is commonly known as "fraudulent concealment." The Supreme Court recognized the equitable exception in \textit{Bailey v. Glover}.

\textsuperscript{90} There, the Court noted that courts, sitting in equity, had traditionally applied this exception whether or not the plaintiff's ignorance of the fraud resulted from affirmative acts of the defendant to conceal the fraud.\textsuperscript{91} With respect to actions at law, the Court noted there was a conflict of authority regarding whether this equitable exception should apply,\textsuperscript{92} but stated:

we are of the opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or ex-

\textsuperscript{87} Id. at 233 n.7 (citations omitted).
\textsuperscript{88} Id. at 234.
\textsuperscript{89} Id. Thus, the \textit{Glus} Court, in effect, applied an interpretive approach. It first embraced a presumption that the exception was incorporated into the statute by virtue of its existence in the common law. Furthermore, the Court found nothing in the language or history of the statute to overcome the presumption that the equitable exception applied.
\textsuperscript{90} 88 U.S. (21 Wall.) 342 (1874).
\textsuperscript{91} Bailey, 88 U.S. (21 Wall.) at 347-48. \textit{See also Amy}, 130 U.S. at 324 (stating that courts in equity had long applied the rule). Some courts have applied equitable tolling where subsequent affirmative acts of the defendant have prevented discovery of wrongdoing that could not be called "fraud" itself. \textit{See} Dawson, 31 Mich. L. Rev. at 880. Indeed, where the concealment is "fraudulent," this, in itself, might be regarded as a fraud depriving the plaintiff of his cause of action, and because the "damage would be the value of the claim barred by the statute, the same result could be achieved by use of the fraud concept alone." \textit{See} Note, 63 Harv. L. Rev. at 1220. The Supreme Court has not recognized an equitable exception that extends to such circumstances, either under an estoppel theory or under a theory of fraudulent concealment.
\textsuperscript{92} \textit{See} Bailey, 88 U.S. (21 Wall.) at 348. \textit{See also Amy}, 130 U.S. at 324-25 (citations omitted) (recognizing that the rule had been applied as a matter of common law in American courts, even in the absence of statutory language).
tinguished if they did exist. To hold that by concealing a fraud, or by committing fraud in such a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. 93

The Supreme Court subsequently reiterated this principle in Holmberg v. Armbricht, 94 stating that the Court "had long ago adopted as its own" this "old Chancery rule." 95 Moreover, the Court reasoned that "[t]his equitable doctrine is read into every federal statute of limitation." 96 Therefore, the Supreme Court declared that the doctrine of fraudulent concealment was part of the common law background for statutes of limitation.

4. Legal Incapacity

The common law also traditionally recognized an equitable exception where an action cannot be brought because there was no party capable of bringing an action or because the law prohibited the bringing of an action. 97 In Amy v. City of Watertown, 98 the Supreme Court recognized this exception and provided two examples of its operation. 99 In the first example, a person died after bringing an action;

93. Bailey, 88 U.S. (21 Wall.) at 349. One commentator has noted that because actions based upon fraud, as well as actions based upon mistake and breach of confidence, were creations of equity, the equitable doctrine of laches did not bar a plaintiff from seeking relief if the plaintiff's delay in filing an action resulted from justifiable ignorance of his cause of action. See Note, 63 Harv. L. Rev. at 1213. Because these actions became available at law and were subject to fixed limitations periods, courts incorporated the flexible equitable exception that in an action based upon fraud, the cause of action only accrued upon discovery of the fraud. See generally Dawson, 31 Mich. L. Rev. at 597-606 (noting instances in which undiscovered fraud had tolled the statute of limitations).

94. 327 U.S. 392 (1946).
95. Holmberg, 327 U.S. at 397.
96. Id.
97. See generally 17 R.C.L. Limitation of Actions § 228 at 870-71 (stating that "[w]here the character of the legal proceedings is such that the law restrains one of the parties from exercising a legal remedy against another, the running of the statute of limitations applicable to the remedy is postponed, or if it has commenced to run, is suspended, during the time the restraint incident to the proceedings continues"). One commentator has stated that this exception recognizes tolling where "extraordinary circumstances beyond the plaintiff's control have prevented the plaintiff from asserting the claim in a timely manner." See McGovern, 65 Mo. L. Rev. at 807. However, the Supreme Court has not adopted such a general rule.
98. 130 U.S. 320 (1889).
99. The Court stated that "[b]esides this general exception created by act of law, it is difficult to find any other ground or cause for suspending the operation of the statute not specified in the act itself." Amy, 130 U.S. at 326. The Court must have meant to exclude a "concealed fraud" from this statement, which it had recognized as an exception earlier in the opinion. The Court may have considered "concealed fraud" to be a basis for estoppel rather than a ground for suspending operation of the statute. Techni-
however, the statute of limitations for bringing another action expired before the appointment of an executor of the estate to file the action. Citing limitations treatises, the Supreme Court stated that “courts have held that as there is no person to bring suit, the statute is suspended for a reasonable period, in order to give an opportunity to those interested to have the proper representative appointed.”

In the second example, a party residing in a country that was belligerent with the country of the putative defendant could not file suit during a time of war because the law prevented the filing of such lawsuits. In those circumstances, the operation of the statute of limitations would be suspended during the pendency of the war.

5. Defective Pleading, Wrong Forum and Constructive Notice

The Supreme Court has recently stated that equitable tolling is justified when a claimant “has actively pursued his judicial remedies by filing a defective pleading during the statutory period.” The exception that arises from this line of cases can be called “constructive notice.” The statute of limitations is suspended when a plaintiff has actively pursued judicial remedies and put the defendant on notice of the claims within the limitations period, even if the individual plaintiff has not filed an action in a court of proper jurisdiction before the statute expires. Unlike other equitable exceptions — such as the exception for fraudulent concealment — this equitable exception is not firmly rooted in the common law. The 1945 case of Herb v. Pitcairn appears to be the earliest Supreme Court case on the subject. However, the Herb Court merely held that an action brought in a court that did not have power to proceed to final judgment was nevertheless “commenced,” within the language of the FELA’s statute of

cally, estoppel does not suspend the statute of limitations, but prevents the defendant from asserting the statute as a defense.

100. Amy, 130 U.S. at 325 (citing Blanshard, supra note 54, at 104-12; Wood 1st Ed., supra note 50, § 6 at 11 n.4). But, if the plaintiff had not brought suit, and he died after the cause of action accrued, there is no tolling of the statute of limitations for the appointment of a representative of the estate to bring an action. See generally 1 Wood 4th Ed., supra note 44, § 6 at 13. See also Note, 63 Harv. L. Rev. at 1233. Yet, where the cause of action accrues after the plaintiff’s death, courts have held that the limitations period does not begin until a representative is appointed. Id.

101. Amy, 130 U.S. at 325-26 (citations omitted). In Wiley, 78 U.S. (11 Wall.) at 513, the Supreme Court applied this exception to suits brought by the United States where the war made it impossible to effectuate service in a Confederate state. This principle was also extended to apply to a plaintiff who was a prisoner of war overseas when the statute of limitations expired. Osborne v. United States, 164 F.2d 767, 769 (2d Cir. 1947). Professor Wood stated that the suspension of the statute “by implication” for the Civil War, could “only be justified upon the ground of paramount necessity, and can only be applied so far as such necessity exists.” 1 Wood 4th Ed., supra note 44, § 6 at 17.

102. See Young, 535 U.S. at 50 (quoting Irwin, 498 U.S. at 96).

103. 325 U.S. 77 (1945).
limitations, provided that the law permitted transfer to a venue which did have proper jurisdiction.\footnote{104} Because the case turned on the meaning of the word “commenced,” the Court avoided the issue of whether an equitable exception suspended the statute of limitations when a plaintiff filed a defective pleading within the limitations period in the wrong forum.

The issue arose again under the same statute in \textit{Burnett v. New York Central Railroad Co.}\footnote{105} However, because the jurisdiction where the plaintiff filed the action did not allow for transfer, the doctrine of \textit{Herb v. Pitcairn} did not apply. Instead of deciding the case by interpreting the word “commenced,” as it had done in \textit{Herb}, the Court held that equitable tolling saved the plaintiff’s action.\footnote{106} The Court recognized the “basic question” was one of legislative intent to allow equitable tolling in these circumstances.\footnote{107} There was no rule in the common law that would have allowed a presumption of legislative intent to incorporate this particular equitable exception. The Court noted that there was precedent for incorporating an equitable exception where fraudulent inducement had caused the plaintiff to miss the statutory deadline\footnote{108} and where the plaintiff could not file suit because of war.\footnote{109} The Court reasoned that the filing of a defective pleading within the limitations period presented similar equities because the plaintiff had not slept on his rights.\footnote{110} Yet, it is far from clear that the common law recognized a general equitable exception for plaintiffs who “do not sleep on their rights,” and the Court did not suggest otherwise. Moreover, there is a material difference between the circumstances the Court cited and those actually at issue in \textit{Burnett}. Whereas fraudulent inducement or war can actually prevent

\footnote{104}{Herb v. Pitcairn, 325 U.S. 77, 78-79 (1945).} \footnote{105}{380 U.S. 424 (1965).} \footnote{106}{Burnett v. N.Y. Cent. R. R. Co., 380 U.S. 424, 426 (1965). It seems that the Court could have easily avoided the equitable tolling issue as it had done in \textit{Herb}. Perhaps the explicit language in \textit{Herb}, which stated that the law must permit transfer to a court that has proper jurisdiction, see \textit{Herb}, 325 U.S. at 77, 78, gave the \textit{Burnett} Court pause in broadening the interpretation of the word “commenced.” But, if the import of “commencing” an action is to put the defendant on notice, then an action is “commenced” under the statute whether or not the law allows for transfer to a court with jurisdiction.} \footnote{107}{\textit{Burnett}, 380 U.S. at 426 (citing Mid-State Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 360 (1943)).} \footnote{108}{Fraudulent inducement is different than fraudulent concealment. As the Court uses the term here, “fraudulent inducement” is where defendant has “misled the plaintiff into believing that he had more than [the statutory period] in which to bring the action.” \textit{Burnett}, 380 U.S. at 428 (citing \textit{Glus}, 359 U.S. 231). We discussed this exception under Section I.C.2, supra.} \footnote{109}{\textit{Burnett}, 380 U.S. at 428-29 (citing Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947); Frabutt v. N. Y., Chicago & St. Louis R.R. Co., 84 F. Supp. 460 (W.D. Pa. 1949)).} \footnote{110}{Id. at 429.}
plaintiffs from asserting their rights, there was nothing that prevented the plaintiff in *Burnett* from filing his action in a proper forum.

The *Burnett* Court also reasoned that Congress could not have intended for the statute of limitations to bar the plaintiff's claim because there were many statutory transfer and savings provisions that insulated a defectively pled action from the statute of limitations bar.\(^{111}\) Without equitable tolling in this particular situation, the Court reasoned, there would be non-uniformity among jurisdictions — a plaintiff's action could only continue in jurisdictions that had a savings or transfer provision.\(^{112}\) However, the existence of these statutory provisions just as plainly evinces Congressional intent *not to save* a defectively pled action from the FELA's statute of limitations. Had the common law recognized this equitable exception, the statutory transfer and savings provisions would have been unnecessary. Yet, many legislatures enacted transfer and savings provisions presumably because the statute of limitations would otherwise bar actions. Thus, one could infer from the absence of any savings provision in the FELA that Congress did not intend to save defectively pled actions from the bar of the FELA's statute of limitations.\(^{113}\)

Because there was no indication that this form of equitable tolling existed at common law, there was no legitimate basis for the *Burnett* Court to *presume* that Congress intended to incorporate this equitable exception into the FELA's statute of limitations. Nevertheless, even with a *presumption against this equitable exception*, a court could incorporate it into the FELA's statute of limitations if the language of the FELA, its legislative history, or its purposes demonstrated that Congress intended to incorporate the exception. Indeed, the *Burnett* Court relied on the purposes of the FELA to support its decision. The Court reasoned that equitable tolling during the pendency of a defectively filed action "effectuates the basic congressional purposes in en-

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111. Id. at 431, 432.
112. See id. at 434.
acting this humane and remedial Act.”\textsuperscript{114} The Court also noted that the policy of repose of the statute of limitations, which is designed to protect defendants from having to defend stale claims, “is frequently outweighed . . . where the interests of justice require vindication of plaintiff’s rights.”\textsuperscript{115}

The Court’s references to the “humane and remedial” purpose of the FELA and the “interests of justice” are not sufficiently specific to support a reasonable inference of Congressional intent to incorporate this equitable exception. Further, the Court gave short shrift to the policies supporting the statute of limitations; it mentioned only one of several policies supporting limitations provisions and simply stated that the policy was “frequently outweighed by the interests of justice.”\textsuperscript{116} Thus, although the Court cited several policy reasons for allowing an action to continue when the plaintiff has filed an action in a court of improper venue, its decision comes up short as a matter of statutory interpretation. For example, the Court’s analysis did not show why Congress must have intended that this particular type of equitable tolling should apply to the FELA’s statute of limitations. Instead, the Court’s opinion shows why it believed Congress should have provided as a matter of policy for this equitable exception through a savings provision in the statute. But the policy judgment that Congress should have endorsed is not the business of courts, which interpret rather than make law.

Burnett’s exercise in law-making has its adherents. Relying in part on Burnett, the Supreme Court, in American Pipe and Construction Co. v. Utah,\textsuperscript{117} articulated a similar equitable exception for class actions. The Court held that the filing of a class action tolled the Clayton Act’s statute of limitations for all class members who had timely intervened after class action status had been denied for failing to comply with the numerosity requirement of Fed. R. Civ. P. 23.\textsuperscript{118} The Court reasoned that when class representatives asserted claims that were typical of the class and could fairly and adequately protect the interests of the class, all members of such a class stood as “parties” to

\begin{itemize}
  \item \textsuperscript{114} Burnett, 380 U.S. at 427.
  \item \textsuperscript{115} Id. at 428. Other than citing cases where courts had applied established equitable exceptions, the Court did not cite any other authority for this proposition. Later, the Court implied that the policy of repose of the statute of limitations is satisfied as long as the plaintiff puts the defendant on notice of the action within the statutory period, regardless of whether the action was properly filed. See id. at 428-30. Indeed, this is the equitable justification for this particular exception, which becomes even more clear in American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554-55 (1974). See infra notes 117-23 and accompanying text.
  \item \textsuperscript{116} Burnett, 380 U.S. at 428. See also infra notes 372-87 and accompanying text (discussing the interests supporting statutes of limitations).
  \item \textsuperscript{117} 414 U.S. 538 (1974).
\end{itemize}
the action unless they received notice of the action and chose to opt out.\textsuperscript{119} The Court held that, under these circumstances, assertion of the class claims satisfied a purpose of the statute of limitations, which was “to put the adversary on notice to defend within the period of limitation.”\textsuperscript{120} A contrary rule would have subverted a central purpose of class action litigation — judicial economy and efficiency — by encouraging potential class members “to file protective motions to intervene or to join in the event that a class was later found to be unsuitable.”\textsuperscript{121}

The Court did not even attempt to analyze whether Congress, in enacting the Clayton Act, intended to incorporate such an equitable exception into its limitations provision. Instead, the Court framed the inquiry as “whether tolling the limitation in a given context is consonant with the legislative scheme,” and found that equitable tolling of the statute of limitations “did not abridge or modify a substantive right” of the Act.\textsuperscript{122} This is a marked departure from earlier (and later) decisions that peg equitable exceptions in statutes of limitations to Congressional intent.\textsuperscript{123}

D. **Equitable Exceptions as a By-Product of Judicial Law Making**

The genesis and development of the “constructive notice” exception show how courts have created equitable exceptions to limitations provisions without a basis for concluding that Congress intended that the particular exception apply to the federal statute at issue. The development of this exception provides valuable insight into how a broad, generally-applicable equitable exception can develop divorced from the intent of Congress in enacting particular legislation. This is not a new phenomenon, however. The fraudulent concealment exception is now accepted without question as generally-applicable to all federal statutes of limitations.\textsuperscript{124} But that was not always so. At the turn of the century, Professor Wood remarked:

It is unfortunate that in this country the legislatures of all the States have not put this question at rest by some decisive provision instead of leaving it to judicial legislation, because, when the courts engrain upon these statutes exceptions which the statute does not make or warrant, its action is nothing more or less than an assumption of legislative functions. The

\textsuperscript{119} American Pipe, 414 U.S. at 549, 550-51, 552.  
\textsuperscript{120} Id. at 554.  
\textsuperscript{121} Id. at 553.  
\textsuperscript{122} Id. at 558 & n.29.  
\textsuperscript{123} See, e.g., TRW, 534 U.S. at 28; Irwin, 498 U.S. at 95; Glus 359 U.S. at 234.  
\textsuperscript{124} See Holmberg, 327 U.S. at 397 (stating that the fraudulent concealment doctrine “is read into every federal statute of limitations”).
cause of action, except where the statute otherwise provides, in cases of fraud, arises from the time of commission; and when courts of law hold to the contrary, it is by force of a judicial exception grafted upon the statute by the assumption of legislative and equitable powers, and is not warranted by any principle or rule of law, nor can it be supported by any known rule for the construction of statutes.\textsuperscript{125}

As we consider the discovery rule of accrual for federal statutes of limitations, it is worth asking whether this exception had its genesis in any “known rule for construction of statutes,” or whether it was an equitable creation of the judiciary. The question sharpens the critical distinction between (1) whether Congress intended a discovery rule to apply, and (2) whether courts are incorporating the rule into the statute because Congress should have provided for one as a matter of legislative policy. We first consider the rules of statutory construction — the tools of the trade, so to speak — and how they may apply to federal statutes of limitations.

II. GIVING MEANING TO FEDERAL STATUTES OF LIMITATIONS: AN EXERCISE OF STATUTORY INTERPRETATION

Courts must frequently interpret a federal statute to apply a limitations provision to the facts of the case before it. In the simplest case, Congress will have specifically addressed the equities of the case in the language of the statute. For example, Congress could specifically provide that a statute of limitations provision is equitably tolled while the plaintiff is a minor, and the plaintiff has the benefit of the full limitations period upon reaching majority. With such a statute, it is relatively easy to determine when the limitations period expires for a plaintiff who was injured while a minor, provided there are no other equitable reasons to delay the statute even further. Often, however, Congress will not give the courts any explicit guidance regarding the applicability (or inapplicability) of a particular equitable exception. Congress may simply provide that the plaintiff must file her action within a certain period from the date her cause of action “accrues” or “arises,” without specifically including any equitable exceptions in the limitations provision. Or, Congress may include a particular equitable exception in the statute that does not address the equities presented by the facts of the case before the court.

Suppose the plaintiff’s action is based upon defendant’s fraud, but the plaintiff has been unable through reasonable diligence to discover the fraud, though not because of actions of the defendant in concealing

\textsuperscript{125} 2 \textit{Wood 4th Ed.}, supra note 44, \S 274 at 1362.
it. The limitations provision of the relevant federal statute provides that the plaintiff must file her action within six years of the date of injury, except in situations where the defendant has concealed its fraudulent conduct, in which case, the plaintiff must file her action within three years of the date she discovered the fraud. The court must determine whether the statute allows for equitable tolling for the concealed fraud, even though the equitable exception set forth in the language of the statute does not specifically address the situation in which the defendant’s actions did not conceal the fraud.

Applying statutes of limitations to the facts of a particular case therefore becomes a quintessential exercise of statutory interpretation. The court must determine whether the particular statute allows for any equitable exception to the chronological calculation that can save the plaintiff’s claim. Because statutory interpretation is the foundation of limitations law for federal statutes, we first discuss the theoretical underpinnings of statutory interpretation as well as those rules of statutory interpretation that are most relevant to interpreting limitations provisions.

It is an oversimplification to say that under our system of separation of powers, it is the role of the legislature to enact laws and the role of the courts to interpret them. But, when a court oversteps appropriate bounds of statutory interpretation and engages in judicial law-making, the court certainly violates the separation of powers doctrine by infringing upon the legislative function. The Supreme Court has recognized this in the context of interpreting a statute of limitations:

It seems, therefore to be well established that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself.” The observation is undoubtedly correct; but the cases in which it applies are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering [sic] it. The general rule is that the language of the act must prevail, and no reasons based upon apparent inconvenience or hardship can justify a departure from it.

What are the appropriate bounds of statutory interpretation for a court? The answer to that theoretical question clearly is beyond the scope of this article and has been the subject of much legal commen-

126. See 2A Singer, supra note 21, § 45.03, at 19-20 (footnotes omitted).
127. Amy v. City of Watertown, 130 U.S. 320, 323-24 (1889) (quoting Braun v. Sauerwein, 77 U.S. (10 Wall.) 218, 223 (1869)). See also Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (stating that statutes of limitations “have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate”) (footnote omitted).
But principles of statutory interpretation do offer guidelines by which to assess the appropriate outer bounds of statutory construction. If a court's interpretation of a statute is not based upon an accepted and rational principle of statutory construction, the court risks engaging in judicial law-making in violation of the separation of powers. Considering whether a court has followed a rational interpretive approach will help determine whether a court is actually deciding what Congress must have intended in a statute — which is a legitimate judicial function — or whether the court is instead deciding what Congress should have provided in a statute as a matter of policy — which is illegitimate judicial law-making.

A. AN INTENTIONALIST APPROACH TO FEDERAL STATUTES OF LIMITATIONS

There are two basic approaches to statutory interpretation. The court can follow a strict textualist approach and draw meaning from the text of the statute and nothing else. Or, the court, following an intentionalist approach, can go beyond the text of the statute and draw meaning from the intent of the legislature, as inferred from the language of the statute, its legislative history and its purposes.129

A textualist approach relies upon “generalizations regarding customary language usage” and the “conventional meanings of words from dictionary definitions.”130 In the context of federal statutes of limitations, a textualist inquiry will leave no room for equitable exceptions to limitations provisions unless Congress has specifically provided for the equitable exception in the language of the statute. For example, if a limitations provision simply states that the plaintiff must file the claim within a certain period of time from the date the


129. See 2A Singer, supra note 21, § 45:08, at 40-41 (footnotes omitted). See also Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 864-68 (1992) (articulating an intentionalist approach); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 67-70 (1994) (articulating a textualist approach). Professor Singer has suggested that the choice between these approaches depends upon the perspective in looking at the statute. 2A Singer, supra note 21, § 45:08, at 40-41. If the perspective is that of the “recipient” of the statute, then the natural criterion for interpretation is the ordinary meaning of the text of the statute. Id. § 45:08, at 41. If, on the other hand, the perspective is that of the “sender” of the statute, then the criterion for statutory interpretation is the legislature’s intent. Id.

130. 2A Singer, supra note 21, § 45:08, at 43 (footnotes omitted).
cause of action "accrues," then a "due diligence injury discovery" rule only can apply if the ordinary meaning of the word "accrues" is the time when the plaintiff first knew, or should have known, of his injury. However, if the ordinary meaning of the word "accrues" does not contain a discovery component, then there can be no discovery rule. Equally significant, if the language of the statute is silent regarding any circumstances for suspension of the statute of limitations, then there can be no other equitable exceptions.

In contrast to the textualist approach, the intentionalist approach attempts to determine the intent of the legislature in enacting the statute by going beyond just the language of the statute in an attempt to carry out the legislature's intent. While statutory text is one indication of Congressional intent, the intentionalist draws upon other indications of intent. A court may be able to draw inferences of legislative intent from language used in a statute, even when the language does not directly address the issue. Additionally, a court can draw inferences of Congressional intent from: (1) the state of the common law in existence at the time of a statute's enactment; (2) the legislative history of a statute; and (3) the perceived purposes of a statute.

One potential problem with a textualist approach — which becomes apparent in its application to limitations law — is its inefficiency. In enacting a statute, Congress may not have provided for specific exceptions to the limitations provisions in the language of the Act. But that does not necessarily mean Congress intended to preclude all equitable exceptions that are not spelled out in the statutory text, especially with respect to equitable exceptions that have a long history in the common law. If a court were to adopt a textualist approach to interpretation, then each time a situation arose that justified an equitable exception which the language of the statute did not cover the court would have to bar the plaintiff's action until Congress amended the statute. This would be true even for equitable exceptions that were generally-recognized in the common law at the time the statute was enacted. The efficiency argument only goes so far, however. Courts, for the sake of efficiency, cannot effectively amend a statute of limitations merely on the basis that Congress may have provided for the exception had it considered the issue. Interpreting a statute should not be an exercise of hypothesizing about what might have been. Instead, there must be some evidence to infer a legislative intent to incorporate the exception; otherwise, a court effectively amends the statute rather than interprets it.

Because the textualist approach is perceived either to be unworkable or too mechanistic, it is not surprising that courts have taken an intentionalist approach to the interpretation of federal statutes of lim-
If courts confined themselves to statutory text, many federal statutes of limitations would have few, if any, equitable exceptions. Therefore, putting theory aside, as a practical matter, courts construe statutes of limitations like any other statutory provision and find legislative intent by considering the state of the common law at the time of a statute's enactment, the language of the statute, its legislative history, and its stated or perceived statutory purpose.

B. FINDING LEGISLATIVE INTENT FOR FEDERAL STATUTES OF LIMITATIONS IN THE COMMON LAW

Some equitable exceptions to statutes of limitations have a long history in the common law, while others do not. It is a well-recognized principle of statutory construction that legislation is interpreted in light of the common law that existed at the time of the legislation's introduction. Justice Scalia has criticized the intentionalist approach as allowing judges too much room to substitute their own objectives for those of the legislature. According to Justice Scalia, in determining what the legislature meant, a judge will be tempted to ask herself what the legislature should have meant; this will lead the judge to conclude that the law means what she thinks it ought to mean. However, this will only occur when a judge strays from an objective inquiry into legislative intent and instead engages in a subjective inquiry into what Congress should have provided had it considered the issue. As we discuss below, the greatest danger of judicial subjectivity arises when legislative intent is derived from the perceived purposes or spirit of the statute.

131. Justice Scalia has criticized the intentionalist approach as allowing judges too much room to substitute their own objectives for those of the legislature. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-18 (1997). According to Justice Scalia, in determining what the legislature meant, a judge will be tempted to ask herself what the legislature should have meant; this will lead the judge to conclude that the law means what she thinks it ought to mean. See id. at 18. However, this will only occur when a judge strays from an objective inquiry into legislative intent and instead engages in a subjective inquiry into what Congress should have provided had it considered the issue. As we discuss below, the greatest danger of judicial subjectivity arises when legislative intent is derived from the perceived purposes or spirit of the statute. See infra notes 166-79 and accompanying text.

132. Even Justice Scalia, who advocates textualism, see SCALIA, supra note 131, at 23-25, has followed a limited intentionalist approach with respect to interpretation of federal statutes of limitations. For example, in Young v. United States, 535 U.S. 43, 44, 49-50 (2002), he reasoned that the Court must presume that Congress drafts limitations provisions in light of the "background" principle that they are subject to traditional forms of equitable tolling. Thus, Justice Scalia accepts the presumption that Congress intends, even when silent in the language of a statute, to incorporate common law principles of equitable tolling. Justice Scalia also abandoned the strict textualist approach in joining the majority in Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990), which — based upon the availability of equitable tolling in actions against private parties — adopted a rebuttable presumption that Congress intended tolling in similar actions against the United States. Notably, Justice Scalia did not join Justice White's concurring opinion that held that equitable tolling was not permissible because the text of the statute did not provide for it. Irwin, 498 U.S. at 97 (White, J., concurring).

The Supreme Court has applied an intentionalist approach in the interpretation of federal statutes of limitations regardless of whether the federal statute creates rights between private parties or creates rights between private parties and the United States, even though the latter situation should give rise to a strict statutory construction. While the Supreme Court has given lip service to the idea that Congress’ waiver of the United States’ sovereign immunity to suits by private individuals cannot be broader than that expressed by the text of a federal statute, the Court’s jurisprudence shows that it has adopted an intentionalist approach to the interpretation of these federal statutes of limitation as well. See Colella & Bain, 31 SETON HALL L. REV. at 186-89.
enactment. There is a presumption in favor of the retention of "long established and familiar" common law principles, except when there is an evident statutory purpose to the contrary. With respect to Congressional intent in enacting legislation, Congress is presumed to know the state of the common law at the time it enacts a statute. Therefore, Congress intends to endorse the common law rule unless Congress demonstrates a contrary intent.

This principle has been applied to the interpretation of federal statutes of limitations. In TRW, Justice Scalia's concurring opinion noted that Congress was operating against the background (i.e., the common law) rule that statutes of limitations begin to run when the cause of action is complete, not when the plaintiff discovers his injury. A discovery rule would supplant the common law. Justice Scalia specifically noted instances in which Congress had included a discovery rule within the language of a federal statute, thereby showing an intent to supplant the common law rule. With respect to

133. 2B SINGER, supra note 21, § 50.01, at 137. The common law provides "one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined." Id. § 50.01, at 139 (footnotes omitted). Justice Scalia identifies Professor Singer's treatise, which is also known as Sutherland Statutory Construction, as the only modern treatise that purports to deal with the law of statutory interpretation in "a systematic and comprehensive fashion . . . ." SCALIA, supra note 131, at 15. That being said, Justice Scalia notes that its primary function is as a litigator's research tool which leads the "litigator to cases that say, why the statute should be interpreted the way your client wants." Id. However, this treatise is useful in identifying principles of statutory construction that courts have considered. It is up to litigators and judges to determine whether the principle provides a rational basis of decision.


135. 2B SINGER, supra note 21, § 50.01, at 140 (footnotes omitted).

136. Id. (footnotes omitted). See Texas, 507 U.S. at 534 (stating that "to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law") (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)). See also Milwaukee v. Illinois, 451 U.S. 304, 315 & n.8 (1981) (stating that Congress need not affirmatively proscribe use of the common law, but it supplants the common law when it directly addresses the question at issue).

137. TRW, Inc. v. Andrews, 534 U.S. 19, 38 (2001) (Scalia, J., concurring). See also Louisville Cement Co. v. Interstate Commerce Comm'n, 246 U.S. 638, 644 (1918), superceded by statute as stated in Reiter v. Cooper, 507 U.S. 258 (1993) (stating that at the time the statute was enacted, it was settled "by repeated decisions of this court" that a cause of action accrued "when a suit may first be legally instituted upon it," and absent controlling language to the contrary, "it must be assumed that Congress intended that this familiar expression should be given the well understood meaning which had been given to it by this court").

other equitable exceptions to statutes of limitations, the Court stated in *Young v. United States* that "Congress must be presumed to draft limitations periods in light of [the] background principle" that federal statutes of limitations can be subject to equitable tolling unless it is inconsistent with the statute. In determining what type of equitable tolling was appropriate for statutes of limitations, the Supreme Court has looked to "considerations ‘[d]eeply rooted in our jurisprudence.’"140

C. FINDING LEGISLATIVE INTENT FOR FEDERAL STATUTES OF LIMITATIONS IN THE LANGUAGE OF THE STATUTE

Another source of legislative intent relevant to equitable exceptions to federal limitations provisions is the language of the statute. As we have suggested, statutory language is dispositive to a textualist. But, for the intentionalist, the language of a statute can give rise to inferences regarding Congressional intent. Certain canons of statutory interpretation provide rules for inferring Congressional intent from statutory language. Courts have applied some of these canons to interpret federal statutes of limitations.

The most relevant canon of statutory interpretation for equitable exceptions to statutes of limitations is *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another.141 Pursuant to this canon, when Congress explicitly lists equitable exceptions of a certain type, one can infer that Congress intended to preclude the incorporation of other equitable exceptions of the same type. In *TRW*, the Supreme Court relied on this maxim to find that Congress did not intend to incorporate a general discovery rule of accrual into the FCRA, because it had explicitly incorporated a limited discovery rule into the statute. Likewise, in *United States v. Brockamp*, the Court reasoned that because Congress included specific tolling provisions within the language of the statute, it did not intend for courts to incorporate "other open ended 'equitable' exceptions.”

141. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the canon). See also 2A SINGER, supra note 21, §§ 47.23, 47.24, at 304-25 (describing the maxim and noting that it is "a product of 'logic and common sense' . . . [that] acts merely as an aid to determine legislative intent and does not constitute a rule of law"). *Id.* § 47.24 at 319 (quoting BROOM'S LEGAL MAXIMS 453 (10th ed. 1939)). Justice Scalia finds that this maxim is consistent with his theory of textualism. See *Scalia, supra* note 131, at 25-26 (footnotes omitted).
However, courts must be careful in applying this canon in particular cases. Just because Congress lists some equitable exceptions in a statute does not necessarily justify an inference that it intended to preclude all other equitable exceptions.\footnote{143} Some equitable exceptions, such as disabilities, are traditionally included within the language of limitations provisions. Yet, singling out disabilities within a statute would not justify an inference that Congress intended to exclude all other equitable exceptions, even those traditionally recognized at common law. By the same token, because equitable exceptions such as fraudulent concealment and the discovery rule are so unique, courts should treat them as independent exceptions. The inclusion of one would not justify an inference to exclude the other. In \textit{TRW}, the Supreme Court was justified in drawing the inference that Congress' inclusion of one type of discovery rule showed an intent to preclude a more general discovery rule, but it would not necessarily support an inference that Congress intended to preclude all other equitable exceptions.

In \textit{United States v. Beggerly},\footnote{144} the Court arguably misapplied \textit{expressio unius est exclusio alterius} in holding that Congress' inclusion of a discovery rule in the Quiet Title Act's statute of limitations precluded all other equitable tolling.\footnote{145} Just because Congress included a discovery rule within a statute does not necessarily demonstrate an intent to preclude all other equitable exceptions recognized at common law. To take a more stark example, it would not be rational to infer that Congress, by including a discovery rule, intended to supplant the equitable exception that preserves the plaintiff's action in circumstances in which the defendant had induced the plaintiff to allow the statute of limitations to expire.

The point is that in applying the canon \textit{expressio unius est exclusio alterius}, it is crucial that there be a rational basis for characterizing "the one" and "the other."\footnote{146} In the recent \textit{TRW} and \textit{Young} decisions,
the Supreme Court signaled the importance of considering the individual equitable exception at issue in interpreting a limitations provision. In reaching its decision, the TRW Court distinguished the fraudulent concealment doctrine from a general discovery rule, and it also noted the distinction between the specific discovery rule that Congress articulated in the statute and the "prevailing discovery rule" that the plaintiff proposed. Likewise, in Young, the Court specifically distinguished among equitable exceptions in evaluating a debtor's argument that expressio unius est exclusio alterius precluded the incorporation of an equitable exception.

Another canon of statutory construction that arises in the context of limitations issues is that a statute should be construed so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant." In TRW, Justice Ginsburg, writing for the Court, reasoned that incorporating a general discovery rule into the FCRA would render the more specific discovery rule of the statute virtually meaningless. Thus, a court must ask about the effect of incorporating equitable exceptions into particular statutes of limitations. If the incorporation of an exception would have the effect of rendering a specific provision in a statute superfluous, then the court can reasonably infer that Congress did not intend to include that exception in the statute.

In sum, through application of canons of statutory construction, the language of a federal statute can provide evidence of Congressional intent with respect to particular equitable exceptions to limitations provisions, either through the plain meaning of the language itself or through reasonable inferences from the language. Under our

infer that Congress, in including an equitable exception that was not traditionally recognized at common law, intended to exclude those equitable exceptions that were traditionally recognized at common law.

147. Many of the Supreme Court's equitable tolling cases treat equitable exceptions that toll the statute of limitations in a categorical fashion. Statutes are either subject to equitable tolling or they are not. See, e.g., Irwin, 498 U.S. at 95-96; Brockamp, 519 U.S. 350-51; Beggerly, 524 U.S. at 48-49. There is little, if any, attempt to distinguish among different equitable exceptions. Indeed, the Brockamp Court discussed the category of equitable tolling in terms of "open ended 'equitable' exceptions." Brockamp, 519 U.S. at 352. However, as an interpretive matter, it may be more appropriate to perform a particularized analysis of equitable exceptions. See Beggerly, 524 U.S. at 49-50 (Stevens, J., concurring) (acknowledging the distinct equitable exceptions of "fraudulent concealment" and "equitable estoppel," and stating that the application of these exceptions to the QTA has not been foreclosed by the Court's opinion).

148. TRW, 534 U.S. at 27.
149. Id. at 25, 27, 28.
150. See Young, 535 U.S. at 52-53.
152. TRW, 534 U.S. at 28, 29.
interpretive approach, where a statute is silent regarding a particular equitable exception, the court must first ask whether the exception existed at common law at the time of the statute's enactment. If so, the next question is whether any language of the statute shows Congressional intent — either directly or through a reasonable inference — to preclude incorporation of the exception. If the exception did not exist at common law, then the presumption shifts, and the court should consider whether the language shows a Congressional intent to include the exception.

D. FINDING LEGISLATIVE INTENT FOR FEDERAL STATUTES OF LIMITATIONS IN THE LEGISLATIVE HISTORY OF THE STATUTE

Another source of evidence of legislative intent is the statute's legislative history. Courts frequently examine the legislative history of a statute to determine intent. Some judges and commentators have criticized this practice. They posit that an inquiry into legislative history can involve a great deal of subjectivity and that the relevance of legislative history to Congressional intent is questionable. For example, Justice Scalia, as a textualist, naturally concludes that "legislative history should not be used as an authoritative indication of a statute's meaning." Yet even under an intentionalist theory of statutory interpretation, Justice Scalia believes that reliance upon legislative history is invalid because, in most instances, there is no legislative intent that squarely addresses the issue, and, therefore, "any clues in the legislative history are bound to be false." For Justice Scalia, most sources of legislative history, such as Committee reports and Congressional testimony, are unreliable indications of the true thinking of Congress. According to this view, the legislative history for a statute, which is usually quite extensive, provides "some-


155. Id. at 32.

156. See id. at 34-35.
thing for everyone;" it can "be relied upon or dismissed with equal plausibility" and, therefore, it has facilitated decisions "based upon the courts' own policy preferences."157 Another critic has described the process of analyzing legislative intent as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."158

This view of legislative history analysis may have some merit, but it is too narrow and overly discounts the possibility that courts can ever find objective insight into the meaning of a statute through an examination of its legislative history. Legislative history does not consist entirely of Committee reports and Congressional testimony. Instead, legislative history also includes the history of the particular words of the statute itself. How the wording of the statute evolved during the legislative process can be insightful in interpreting the final enactment.159 In particular, amendments to the legislation, whether defeated or adopted, can show how a legislature objectively perceived the meaning of a statute.

We have previously argued that the legislative history of the FTCA demonstrates that Congress did not intend to incorporate equitable exceptions into the Act.160 Prior to its enactment, many equitable exceptions were proposed and considered for the legislation — including one for "reasonable cause shown" in certain categories of cases — but none of them were adopted in the final statute.161 Additionally, subsequent to the FTCA's enactment, Congress amended the FTCA several times to correct perceived injustices resulting from the application of the statute of limitations. In 1949, Congress lengthened the limitations period;162 in 1966, it provided for an administrative claim process;163 and, in 1988, it adopted a savings provision for circumstances in which a plaintiff sued a federal employee in state court when the plaintiff's action should have been brought against the United States in federal court.164 These amendments all reflected a

157. Id. at 35, 36.
159. See 2A Singer, supra note 21, § 48.03, at 427-28, 429 (stating that "[t]he legal history of a statute, including prior statutes on the same subject, is a valuable guide for determining what object an act is supposed to achieve") (citations omitted). See also Breyer, 65 S. Calif. L. Rev. at 848-61 (endorsing use of legislative history to determine statutory meaning in particular circumstances).
161. Id. at 196-97.
162. See id. at 197-200.
163. See id. at 200-202.
164. See id. at 202-205.
Congressional understanding that certain equitable exceptions were unavailable to plaintiffs under the FTCA.\textsuperscript{165}

Thus, in some circumstances, legislative history can provide insight into Congressional intent. The answer to critics of a legislative history analysis is not to dismiss legislative history entirely as a source of Congressional intent. After all, whether we like it or not, the analysis of legislative history has become a fixture of statutory interpretation, and lawyers rely on it all of the time when they argue their cases to courts. Yet, we can learn from the skeptics. A critical assessment of the legislative history is necessary to arrive at an objective determination of legislative intent. Courts should first consider whether any given piece of legislative history is a relevant and reliable source for determining Congressional intent with respect to a particular issue. For example, the legislative history must show the objective intent of the legislative body rather than the subjective motives of a particular legislator, or even of a particular Congressional Committee. Such a critical inquiry will help insure a legislative history analysis that reflects a search for Congressional intent, rather than a subterfuge for judicial policy-making.

E. \textbf{Finding Legislative Intent for Federal Statutes of Limitations in the Purposes of a Statute}

A final source of legislative intent that can play a role in interpreting federal statutes of limitations is the stated or perceived purpose of the statute. Courts may consider the overriding goals Congress sought to achieve through the legislation, expressed as its purposes, policy, or spirit.\textsuperscript{166}

This source of legislative intent presents the greatest potential for a court to insert its own ideas of what Congress should have done as a matter of policy, despite what Congress actually intended. Professor Singer noted that some courts have rejected this source of legislative intent "on the ground that it invades the province of the legislature for a court to extend or restrict the application of a statute in reliance on its own notions concerning its spirit."\textsuperscript{167} Yet, Professor Singer states that such "equitable interpretation has been and is widely practiced in American jurisprudence."\textsuperscript{168} In particular, through subjective notions of equity, statutes have been "restrictively interpreted" where a literal interpretation would result in a perceived injustice.\textsuperscript{169} This is pre-

\textsuperscript{165} See id. at 197-205.
\textsuperscript{166} See 2B Singer, supra note 21, § 54:03, at 343-49 (footnotes omitted).
\textsuperscript{167} Id. § 54:03, at 344 (footnotes omitted).
\textsuperscript{168} Id.
cisely what happens when a court incorporates an equitable exception into a statute of limitations based upon a statute's "spirit" when there is no other basis for doing so.\textsuperscript{170} A literal interpretation of the limitations provision would bar the plaintiff's action; but by restricting the application of the statutory bar through incorporation of an exception, the court saves the plaintiff's claim.\textsuperscript{171}

We have already discussed an instance in which the Supreme Court relied upon the "purpose of the statute" to incorporate an equitable exception into a limitations provision. A key to the \textit{Burnett} Court's incorporation of a "constructive notice" equitable exception into the FELA's statute of limitations was the purpose of that statute. The Court reasoned that allowing equitable tolling for a defectively filed claim effectuated "the basic congressional purposes in enacting [a] humane and remedial Act."\textsuperscript{172} As we discuss below, the "humane" spirit of the FELA also was a driving force in the incorporation of a discovery rule of accrual into its statute of limitations.\textsuperscript{173}

Indeed, appealing to the overriding purpose of a statute appears to be the easiest way to justify an equitable exception to a limitations provision in the absence of any other evidence of Congressional intent to incorporate the exception. As in \textit{Burnett}, a court may characterize the statute as remedial and justify the exception as necessary to implement the statute's purpose. By defining the purpose of the statute so broadly, the court gives itself virtual carte blanche to supplement the statute in a way that comports with its own idea of what Congress should have provided in the legislation.

Using a perceived legislative purpose in this way adds subjectivity and non-uniformity to statutory interpretation because there is no clear consensus about how to define a "remedial" statute or how far a court may go to effectuate a statute's "remedial" purpose.\textsuperscript{174} This

\textsuperscript{170} See 2B SINGER, supra note 21, § 54:06 at 363 (footnotes omitted). For Justice Scalia's textualist criticism of this reasoning in the \textit{Church of the Holy Trinity} case, see generally SCALIA, supra note 131, at 18-23.

\textsuperscript{171} See id. at 366-67 (footnotes omitted).


\textsuperscript{173} See infra notes 286-88 and accompanying text.

\textsuperscript{174} See Antonin Scalia, \textit{Assorted Canards of Contemporary Legal Analysis}, 40 \textit{CASE W. RES. L. REV.} 581, 581-86 (1990) (discussing these problems with the presumption that "remedial statutes are to be liberally construed.") Justice Scalia states "[o]f what value, one might reasonably ask, is a rule that is both of indeterminate coverage (since no one knows what a 'remedial statute' is) and of indeterminate effect (since no one knows how liberal is a liberal construction)." Scalia, 40 \textit{CASE W. RES. L. REV.} at 581, 586. \textit{See also} Ober United Travel Agency, Inc. v. United States Dept. of Labor, 135 F.3d 822, 825 (D.C. Cir. 1998) (noting that any statute might be thought of as remedial, and stating that "[w]e suspect that the phrase typically has been used to give judicial approval to a particular set of policy viewpoints"); East Bay Mun. Util. Dist. v. United States Dept. of Commerce, 142 F.3d 479, 484 (D.C. Cir. 1998) (citations omitted) (noting
source of legislative intent allows a court to impose its own policy preferences on a statute, by placing a "thumb on the scales" of justice.\textsuperscript{175} With respect to the oft stated presumption that "remedial statutes are to be liberally construed"\textsuperscript{176} — which is just another way for a court to say it is interpreting a statute to "effectuate its remedial purpose" — Justice Scalia has written:

[The presumption] is so wonderfully indeterminate, as to both when it applies and what it achieves, that it can be used, or not used, or half-used, almost ad libitum, depending mostly upon whether its use, or nonuse or half-use, will assist in reaching the result the court wishes to achieve.\textsuperscript{177}

To be sure, we are not suggesting that a court can never objectively interpret a statute with reference to the statute's purpose. Rather, if the statute's purpose is clear and specific, then it may serve as an aid to statutory interpretation. For example, in \textit{Beggerly}, the Court determined that a specific purpose of the Quiet Title Act ("QTA") was to create certainty with respect to property rights and when those rights could be challenged.\textsuperscript{178} That purpose provided some evidence Congress did not intend for any "open ended" equitable tolling to delay the running of the QTA's statute of limitations.\textsuperscript{179}
F. An Interpretive Approach to Federal Statutes of Limitations

Given these principles, we arrive at the following interpretive approach to federal statutes of limitation.

**Step 1.** Assuming the language of the statute does not directly address whether a particular equitable exception applies to the limitations provision, a court should first determine what presumption it should make regarding Congressional intent given the state of the common law at the time of a statute’s enactment, asking the following questions:

1. Was the specific equitable exception generally-recognized in the law at the time of the statute’s enactment?
2. If the equitable exception was recognized, was it typically included in the language of the statute or incorporated through operation of the common law?

The answer to these first two questions will determine whether there is a presumption that Congress intended to incorporate the equitable exception into the statute. If an exception was generally-recognized in the law at the time of a statute’s enactment but not typically included within the language of statutory provisions, then it should be presumed that Congress intended to incorporate the exception into the Act. If, on the other hand, the exception was not generally-recognized in the law at the time of enactment, or, though recognized, was typically included within the language of the statute, then it should be presumed that Congress did not intend to incorporate the exception into the Act.

**Step 2.** If there is a presumption that a particular equitable exception should apply to a statute, then the court should consider whether there is sufficient evidence of Congressional intent in the language of the statute, its legislative history, or its purposes to overcome the presumption. Among the relevant questions are:

1. Did Congress include language in the statute that supports an inference that Congress did not intend to include the particular equitable exception? For example, did Congress include particular equitable exceptions within the language of the statute which justifies an inference that Congress did not intend to include the particular equitable exception that saves the plaintiff’s cause of action?
2. Is there any evidence in the legislative history that Congress did not intend to include the particular equitable exception? Was the equitable exception ever proposed as part of the legislation or as an amendment to the legislation? Was the statute ever amended to account for inequities covered by
the equitable exception? Were other equitable exceptions ever added to the statute?

(3) Are there specific purposes of the statute which support an inference that Congress did not intend to include the particular equitable exception in the statute?

STEP 3. If there is a presumption that a particular equitable exception should not apply to a statute, then the court should consider similar questions to determine whether there is evidence of Congressional intent to overcome that presumption:

(1) Did Congress include language in the statute which supports an inference that Congress intended to include the particular equitable exception? For example, would some language of the statute be rendered superfluous, void, or insignificant without the particular equitable exception?

(2) Is there any evidence in the legislative history that Congress intended that the particular equitable exception apply to the statute? For example, are there any statements in the legislative history indicating that Congress assumed the equitable exception was part of the statute?

(3) Is the equitable exception necessary to effectuate a specific purpose of the statute?

We believe this interpretive approach provides a rational basis for determining Congressional intent. If applied objectively, it will produce a result which comes as close as possible to a determination of what Congress intended in enacting a statute with respect to particular limitations issues. Moreover, this approach will act as a check on courts’ exercising independent policy judgment in areas where there is no reasonable basis for inferring Congressional intent. We have not pulled the approach out of the air, nor have we shaped it to match policy preferences of our own. To the contrary, as we show in the following sections, our approach draws support from recent Supreme Court jurisprudence and provides some insight into the application of a discovery rule of accrual and other equitable exceptions to federal statutes of limitations.

III. DEVELOPING AN INTERPRETIVE APPROACH FOR RESOLVING STATUTE OF LIMITATIONS ISSUES: RECENT SUPREME COURT CASES INTERPRETING FEDERAL LIMITATIONS PROVISIONS

A. IRWIN V. DEPARTMENT OF VETERANS AFFAIRS: ESTABLISHING A PRESUMPTION

Over the past fourteen years, Supreme Court decisions involving the application of federal statutes of limitations provide helpful clues
about how the Supreme Court perceives the interpretive role of courts in this area. The first case is *Irwin v. Department of Veterans Affairs*. The issue in *Irwin* was whether equitable tolling could apply in an action against the United States under Title VII of the Civil Rights Act of 1964, even though Congress had not provided for equitable tolling in the language of that statute. The Court initially noted that it had been somewhat inconsistent in its prior decisions that had construed statutes of limitations in actions against the United States; minor differences in statutory language, the Court stated, did not necessarily indicate differences in Congressional intent. The Court concluded that an ad hoc determination of limitations provisions based upon minor differences in language had "the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress."

Accordingly, the Court pronounced "a general rule to govern equitable tolling in suits against the government." The Court stated that equitable tolling is:

applicable to suits against the Government in the same way it is applicable to private suits . . . . Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise it if wishes to do so.

Thus, the Court found that if equitable tolling applied to similar suits brought against private parties, there should be a presumption that such tolling applies to suits against the United States. This "principle of interpretation" was a "realistic assessment of legislative intent." If courts allowed for equitable tolling in Title VII actions against private defendants, then, absent any contrary indications of Congressional intent, there should be an inference that Congress intended for equitable tolling to apply in Title VII suits against the United States.

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181. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 94, 95 (1990). The Court contrasted language in Title VII 42 U.S.C. § 2000e-16(c) (stating that an employee “may file a civil action . . .” within thirty days of receipt of a final notice), with language in the Tucker Act 28 U.S.C. § 2501 (stating that “every claim . . . shall be barred unless the petition . . . is filed . . . within six years . . .”). *Irwin*, 498 U.S. at 94-95. While the latter language may be more stringent, the Court stated that it was “not persuaded that the difference between [the language in the two statutes] is enough to manifest a different congressional intent with respect to the availability of equitable tolling.” *Id.* at 95.
182. *Irwin*, 498 U.S. at 95.
183. *Id.* at 95-96.
184. *Id.* at 95.
This principle of interpretation is similar to the rebuttable presumption of our interpretive approach. They both flow from the same principle; namely, that courts should presume Congress does not intend to disturb the status quo unless there is fairly clear evidence of Congressional intent to do so. In *Irwin,* the Supreme Court assumed that, in enacting legislation that created a cause of action against the United States, Congress intended to adopt whatever equitable tolling applied to similar actions against private defendants. Our interpretive approach suggests that, in enacting federal legislation generally, Congress intends to incorporate whatever equitable exceptions exist in the common law at the time. Both interpretive approaches share the same assumption: if Congress wanted to include traditional common law exceptions to a federal limitations provision, it did not have to include language specifying the equitable exceptions because courts were already incorporating the equitable exceptions into the statutes as a matter of law. On the other hand, if Congress wanted to preclude any particular equitable exception — or all equitable exceptions generally — then there had to be some indication of Congressional intent to do so, given the prevailing common law practice. Thus, through a common mode of statutory interpretation, the *Irwin* Court created a rebuttable presumption in favor of equitable tolling in actions against the government.

Many lower courts, however, misinterpreted *Irwin* and reflexively held — without any analysis of the language, legislative history or purpose of the federal statute — that equitable tolling applied to all federal statutes of limitations in actions against the United States. Even though the *Irwin* Court pronounced a "general rule," it was not a general rule allowing equitable tolling for all federal statutes of limitations. The rule was simply a rebuttable presumption in favor of equitable tolling of limitations provisions in actions against the United

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185. See Parker & Colella, 29 *Seton Hall L. Rev.* at 897 n.68.
186. *Id.* We presume that this means equitable tolling that is incorporated by common law as opposed to equitable tolling that is specified in the language of a statute that creates rights between private parties. It would be illogical to hold that Congress presumed to include by silence a type of equitable tolling against the United States that was specified in the language of a statute creating rights between private parties.
187. See Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946) (noting that historically, courts have equitably tolled statutes of limitation where plaintiff has been injured by fraud, but remains in ignorance of it, and stating that this doctrine is read into every federal statute of limitation).
188. See Parker & Colella, 29 *Seton Hall L. Rev.* at 888, n.13 (citing decisions dealing with the Federal Tort Claims Act); Capital Tracing, Inc. v. United States, 63 F.3d 859, 860 (9th Cir. 1995) (holding that equitable tolling may be applied to extend the period for bringing a wrongful levy claim against the government under 26 U.S.C. § 7426); Bull S.A. v. Comer, 55 F.3d 678, 680-81 (D.C. Cir. 1995) (applying equitable tolling under the Lanham Trade Mark Act).
States where tolling was allowed in similar actions against private defendants. Courts still had to determine: (1) whether equitable tolling was allowed in similar actions against private defendants and, if so, (2) whether there were any indications of Congressional intent to preclude equitable tolling in actions against the United States.

The Irwin Court did not perform a detailed analysis of what type of equitable tolling might be allowed. It noted federal courts had “typically extended equitable relief only sparingly,” and cited recognized exceptions where a claimant had actively pursued judicial remedies, but filed a defective pleading, or had been tricked by a defendant's misconduct to let the filing deadline pass. In the case before it, the Court determined that the plaintiff's failure to meet the filing deadline was “at best, a garden variety claim of excusable neglect” which was not a recognized basis for equitable tolling.

B. United States v. Brockamp and United States v. Beggerly: Rebutting the Presumption

In United States v. Brockamp, and United States v. Beggerly, the Supreme Court demonstrated that the rebuttable presumption of Irwin was indeed rebuttable. In Brockamp, the issue was whether equitable tolling could apply to the limitations period applicable for tax refund claims against the United States. The Court posed the rebuttable presumption of Irwin in the form of a question: “Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply in a suit against the Government?” The Court found there were, in fact, “strong reasons” to believe Congress did not intend for equitable tolling of these actions.

189. Irwin, 498 U.S. at 96.
190. See id. (citations omitted).
191. Id. The plaintiff alleged that his “lawyer was absent from his office at the time the EEOC notice was received, and that he thereafter filed within 30 days of the day on which he personally received notice.” Id.
194. Several years earlier, the Supreme Court had demonstrated that equitable tolling could be precluded where it was inconsistent with the limitations scheme. In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991), the Court found that there could be no intent to include equitable tolling for a statute which included a one-year statute of limitations triggered by discovery of facts constituting a statutory violation and a three-year statute of repose.
196. Brockamp, 519 U.S. at 350.
197. Id. at 350. The Court assumed, arguendo, that there was a rebuttable presumption in favor of equitable tolling tax refund claims against the government because a tax refund suit was sufficiently similar to a private suit for restitution, to which equitable tolling principles would apply. Id.
Initially, the Court reasoned that the language of the statute of limitations for tax refund claims was “emphatic,” and set “forth its limitations in a highly detailed technical manner, that, linguistically speaking, [could not] easily be read as containing implicit exceptions.”\textsuperscript{198} The language of the statute also showed Congressional intent to preclude equitable tolling because the limitations provisions included very specific, explicit exceptions to its basic time limits, which did not include equitable tolling.\textsuperscript{199} The Court further found that the purposes of the tax laws demonstrated Congressional intent to preclude equitable tolling of the limitations period. The Court reasoned that tax law itself is “not normally characterized by case-specific exceptions reflecting individualized equities.”\textsuperscript{200} Allowing equitable exceptions to the limitations period would “create serious administrative problems” by leaving open “large numbers of late claims accompanied by requests for equitable tolling.”\textsuperscript{201} This would be contrary to a congressional objective of “strong statutory protection against stale demands.”\textsuperscript{202} The Court found evidence of this Congressional objective in the legislative history of prior tax refund provisions that contained clear time limits without any equitable tolling.\textsuperscript{203} The Court also cited legislative history showing Congress had deleted an equitable provision that excused tax deficiencies in the estates of insane or deceased individuals.\textsuperscript{204}

\textsuperscript{198} Brockamp, 519 U.S. at 350. This argument comes close to making determinations of Congressional intent based upon minor differences in language, an approach that the Irwin Court cautioned against. See Irwin, 498 U.S. at 94-95.

\textsuperscript{199} Brockamp, 519 U.S. at 350-51. This argument is an application of \textit{expressio unius est exclusio alterius}. The Court concluded that the inclusion of any exceptions to the general limitations rule showed an intent to exclude all other exceptions. This inference may not be justified if the only exception was the special time limit rules for refunds related to particular statutory categories. See \textit{id.} at 351-52. The inclusion of such an exception, which is not a generally-recognized common law equitable exception, would not necessarily justify an inference to exclude all other equitable exceptions. However, the inclusion of an exception tolling the limitations period during wartime, see \textit{id.} at 352, an equitable exception usually incorporated by common law, is an indication that Congress did not intend to include other equitable exceptions typically incorporated by common law. \textit{Id.} at 350-52.

\textsuperscript{200} Brockamp, 519 U.S. at 352.

\textsuperscript{201} \textit{Id.} at 352. This comes close to inferring congressional intent from a general statutory purpose for a limitations provision; indeed, the Court emphasized only one of several purposes underlying a statute of limitations. See infra notes 380-95 and accompanying text.

\textsuperscript{202} Brockamp, 519 U.S. at 353 (quoting United States v. Garbutt Oil Co., 302 U.S. 528, 533 (1938)). The Court does not cite any \textit{Congressional source particular to the statute} for this stated objective of the tax refund law; a purpose of any statute of limitations is to protect the defendant against stale claims. Indeed, in the case that the Court cites, the Supreme Court stated, “The function of the statute, like that of limitations generally, is to give protection against stale demands.” Garbutt Oil Co., 302 U.S. at 533 (emphasis added).

\textsuperscript{203} Brockamp, 519 U.S. at 353.

\textsuperscript{204} \textit{Id.} at 352 (citing H.R. CONF. REP. No. 356, 69th Cong., 1st Sess., 41 (1926)).
In Beggerly, the Court engaged in a similar, though much less detailed, analysis of the Quiet Title Act ("QTA") and its statute of limitations. In finding evidence to overcome the presumption in favor of equitable tolling, the Court focused on the substance of the QTA's limitations provision and the purpose of the Act. First, the Court noted that the QTA's statute of limitations "already effectively allowed for equitable tolling" because, under language in the statute, the limitations period did not begin to run until the plaintiff "knew or should have known of the claim of the United States." Second, the Court stated that the QTA's limitations provision was "unusually generous." Given those factors, the Court found that "additional equitable tolling" would be contrary to a central purpose of the QTA—a statute dealing with land ownership—which was to create certainty with respect to property rights and when those rights can be challenged. Equitable tolling, said the Court, would "throw a cloud of uncertainty" over those rights and therefore be incompatible with the Act.

While the Beggerly Court was undoubtedly correct in its determination that equitable tolling would be inconsistent with a central purpose of the QTA, its analysis deserves closer scrutiny. Initially, the Court may have incorrectly applied *expressio unius est exclusio alterius*, in reasoning that the QTA's inclusion of a discovery rule of accrual in its statute of limitations excluded all other equitable tolling. The QTA, in providing that the limitations period did not begin to run until the plaintiff "knew or should have known of the claim of the United States," did not address traditional notions of equitable tolling at all. The discovery rule of accrual historically was distinct from other equitable exceptions. Unlike some equitable exceptions, at the time of the QTA's enactment, the discovery rule of accrual was not a well-established feature of the common law. Accordingly, it was necessary for Congress to put the discovery rule directly into the language of the limitations provision. In so doing, it did not necessarily follow that Congress intended to exclude all other equitable exceptions which were recognized at common law at the time of the

206. Beggerly, 524 U.S. at 48 (quoting 28 U.S.C. § 2409a(g), the QTA's statute of limitations).
207. Id. at 48-49.
208. Id. at 49.
209. Id.
210. In contrast to the QTA, the FTCA's discovery rule is not included in the text of the Act, but was rather incorporated into the statute through judicial interpretation. See infra notes 293-315 and accompanying text.
211. See infra note 314 and accompanying text.
QTA's enactment. Therefore, the existence of a discovery rule of accrual in the statute did not address the Irwin equitable tolling question. Under Irwin, if the QTA was enacted against a common law backdrop that allowed equitable tolling exceptions against private parties in similar actions, then there must be some evidence that Congress did not intend to include those exceptions for the QTA. The Beggerly Court did not provide that evidence.

Additionally, the Supreme Court's reasoning that Congress provided for a "generous" statute of limitations does not pass muster. Putting aside the standardless criteria for what may count as a "generous" time limitation, Congress could have provided a generous statute of limitations for a number of reasons, only one of which was to provide enough time to account for equitable reasons for delay in filing suit. Absent some indication of the basis for establishing the QTA's limitations period in the legislative history or elsewhere, this reasoning fails to persuade.

Nevertheless, despite weaknesses in the reasoning of Beggerly, the Court's decision, together with its decisions in Irwin and Brockamp, shows that it is essential for courts to look to evidence of Congressional intent in construing limitations provisions of federal statutes. In both Brockamp and Beggerly, the Court found sufficient indications of Congressional intent to overcome a presumption in
favor of equitable tolling. Those decisions, therefore, appear to be more of a response to the lower courts' failure to treat Irwin's presumption as rebuttable than a general pronouncement about the way in which courts should interpret federal statutes of limitations.

C. TRW, INC. v. ANDREWS AND YOUNG v. UNITED STATES: 
REDEFINING THE PRESUMPTION AND ITS REBUTTAL

In its 2001 Term, the Supreme Court decided two cases that provided additional insight into the Court's treatment of equitable exceptions in federal statutes of limitations. First in TRW, Inc. v. Andrews, the Court decided whether to incorporate a general discovery rule of accrual into the statute of limitations for the Fair Credit Reporting Act ("FCRA"). Because the FCRA created rights between private parties and because the case involved the discovery rule of accrual rather than traditional equitable tolling, the Irwin rebuttal presumption did not specifically apply. Nevertheless, in its decision, the Court revealed a broader approach that applied generally to interpreting equitable exceptions in federal statutes of limitations. The Court confirmed that an analysis of the particular equitable exception at issue was a necessary part of the interpretive process. Later in the term, in Young v. United States, the Court — in contrast to its decisions in Brockamp and Beggerly — demonstrated what type of evidence was not sufficient to rebut a presumption in favor of equitable tolling. There, the Court showed that focusing on a particular equitable exception was not only important in establishing the presumption, but it was also important in determining whether the presumption has been rebutted. Because these decisions form the basis for our interpretive approach, we describe them in some detail.

1. TRW, Inc. v. Andrews: Expanding the Interpretive Approach

In TRW, the Supreme Court addressed whether a discovery rule of accrual applied to the statute of limitations of the FCRA. Because violations of the FCRA can occur long before the injured party is aware of the violations and injury, there are potentially compelling equities in favor of a discovery rule of accrual. The Act requires credit reporting agencies to maintain "reasonable procedures" to avoid improper disclosure of credit information. Additionally, agencies can only disclose credit reports for specifically enumerated purposes. The FCRA establishes a private right of action for damages caused by

negligent violations of its provisions. The facts of TRW show how violations of the FCRA and resulting injury can occur without the injured party’s knowledge.

In June 1993, the plaintiff, Adelaide Andrews, visited a doctor’s office in California and, in completing a new patient form, provided the office with basic personal information, including her name, birth date and social security number. Unbeknownst to Adelaide Andrews, the office receptionist, Andrea Andrews, copied plaintiff’s personal information, moved to Las Vegas, and there used the information to apply for credit. On four occasions — on July 25, 1994, September 27, 1994, October 28, 1994 and January 3, 1995 — the defendant, TRW, Inc., provided plaintiff’s credit history to companies from which the imposter, Andrea Andrews, had sought credit. The plaintiff did not learn of these disclosures until May 31, 1995, when she sought to refinance her home and saw her credit report which showed the imposter’s requests for credit. Indeed, had plaintiff not sought to refinance her home, she may not have learned of TRW’s disclosures for years.

The question for the Supreme Court was whether the statute of limitations for private actions under the FCRA could begin to run before the plaintiff had learned of the violations of the Act and the resulting injury. The plaintiff filed her lawsuit on October 21, 1996, which was more than two years after two of the allegedly improper disclosures occurred. The statute of limitations for the FCRA generally provided that an action may be brought “within two years from the date on which the liability arises.” However, it also contained an equitable exception: if the defendant willfully misrepresented information that was material to the establishment of liability under the FCRA, then the plaintiff could bring an action “at any time within two years after discovery . . . of the misrepresentation.”

The district court found that because the FCRA’s statute of limitations contained a discovery rule for misrepresentations, it did not contain a more general discovery rule for other types of violations.

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223. Id. at 24.
224. Id.
225. This would have made the equities even more compelling. The plaintiff in TRW actually waited almost seventeen months after learning of the disclosures before filing her claim. TRW, 534 U.S. at 24. Had she filed her claim within a year of discovering the disclosures, she could have maintained an action for all four violations, even under the strictest construction of the two-year statute of limitations.
226. TRW, 534 U.S. at 24.
228. Id.
under the Act.\textsuperscript{229} Therefore, the district court found that the plaintiff could not maintain an action for the July 25, 1994 disclosure or the September 27, 1994 disclosure, which occurred more than two years before she filed her suit in October 1996.\textsuperscript{230} The Ninth Circuit Court of Appeals disagreed with the district court's holding.\textsuperscript{231} The Ninth Circuit held that there was a rebuttable presumption in favor of a general discovery rule similar to \textit{Irwin}'s rebuttable presumption in favor of equitable tolling. The court stated that "unless Congress has expressly legislated otherwise, the equitable doctrine of discovery 'is read into every federal statute of limitations.'"\textsuperscript{232} Applying the general discovery rule, the Ninth Circuit concluded that the FCRA's statute of limitations did not bar any of the plaintiff's disclosure claims.\textsuperscript{233}

The Supreme Court disagreed with the Ninth Circuit's reasoning. First, the Supreme Court found that the Ninth Circuit's basis for finding a general presumption in favor of a discovery rule was flawed.\textsuperscript{234} The Ninth Circuit had principally relied upon \textit{Holmberg v. Armbrrecht},\textsuperscript{235} to support the presumption. But the Supreme Court stated that \textit{Holmberg} was an equitable tolling case that merely recognized the long-standing proposition that "equity tolls the statute of limitations in cases of fraud or concealment" until the time when the plaintiff, through reasonable diligence, discovers the fraud or concealment.\textsuperscript{236} Thus, the Court signaled that it was inappropriate to lump all equitable exceptions together for purposes of determining whether there was a presumption in favor of any particular equitable exception. The "fraudulent concealment" equitable exception, which the Court had found in \textit{Holmberg} applied to all federal statutes of limitations, was separate and distinct from a general discovery rule of accrual, and the Court indicated that the two exceptions should be analyzed separately.

The Court next noted it had never adopted a general discovery rule, nor was it willing to decide whether there was any presumption

\begin{footnotesize}
\begin{enumerate}
\item In reaching this decision, the District Court quoted the maxim \textit{expressio unius est exclusio alterius}: "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." \textit{Id.} (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)).
\item Trans Union, 7 F. Supp. 2d at 1060-61, 1063, 1066, 1067. The court declared that the misrepresentation exception did not apply to this case. \textit{Id.} at 1067.
\item Andrews v. TRW, Inc., 225 F.3d 1063 (9th Cir. 2000).
\item Andrews, 225 F.3d at 1067 (quoting \textit{Holmberg}, 327 U.S. at 397).
\item \textit{Id.} at 1065, 1067, 1068.
\item TRW, 534 U.S. at 27.
\item 327 U.S. 392 (1946).
\item Holmberg v. Armbrrecht, 327 U.S. 392, 392 (1946).
\end{enumerate}
\end{footnotesize}
in favor of a general discovery rule. Moreover, even if there were such a presumption, the Court stated its disapproval of the Ninth Circuit's reasoning that the presumption could only be rebutted by an explicit Congressional command; the Court said that the presumption could also be rebutted "by implication from the structure or text of the particular statute." Indeed, without deciding whether there was any presumption in favor of a discovery rule of accrual, the Court found that the text and structure of the FCRA statute of limitations evinced "Congress' intent to preclude judicial implication of a discovery rule." Applying the principle of expressio unius est exclusio alterius, the Court reasoned that the existence of a limited discovery rule for misrepresentations was evidence of Congressional intent to preclude a more general discovery rule. Additionally, the Court found that another rule of statutory construction supported its decision, namely, the canon holding that a statute should be construed so that no clause will be "superfluous, void or insignificant." The Court reasoned that the incorporation of a general discovery rule would make a limited discovery rule virtually meaningless.

237. Holmberg, 327 U.S. at 392. The Court implied that a general discovery rule was not so well-established in the law to justify a presumption that Congress intended for a discovery rule in every federal statute of limitations. The Court noted that the only cases in which it had recognized a "prevailing discovery rule" were decided in the context of a latent disease and medical malpractice, "where the cry for [such a] rule is the loudest." Id. (quoting Rotella, 528 U.S. at 555, and citing Kubrick, 444 U.S. at 111, and Urie, 337 U.S. at 163). We discuss those cases below. See infra notes 274-315 and accompanying text.

238. TRW, 534 U.S at 27-28. The Ninth Circuit's presumption in favor of a discovery rule is much stronger than Irwin's rebuttable presumption for equitable tolling. The Ninth Circuit's presumption can only be rebutted where Congress has "expressly legislated otherwise ..." Andrews, 225 F.3d at 1067. By contrast, as Brockamp and Beggerly demonstrated, Irwin's presumption can be rebutted explicitly or implicitly through evidence in the language of the statute, in its purpose, or in its legislative history. See Parker & Colella, 29 SETON HALL L. REV. at 894-902. Here, the Supreme Court mentions the structure and text of the statute but not the statute's purpose or legislative history.

239. TRW, 534 U.S. at 28.

240. Id. at 28.

241. Id. at 31 (quoting Duncan v. Walker, 533 U.S. 167 (2001)).

242. Id. at 29. Plaintiff Andrews and the United States, appearing as amicus curiae, argued that the equitable exception in the language of the FCRA's statute of limitations was a codification of the doctrine of equitable estoppel, and that equitable estoppel can only operate after the limitations period has been triggered by the discovery rule. Id. Rejecting the argument, the Supreme Court reasoned that this express exception (misrepresentation) would be rendered superfluous by a more general discovery rule. Id. at 31. However, this is true only if a general discovery rule includes discovery of both the injury and the misrepresentation. Though a general discovery rule has traditionally been confined to discovery of injury, see Rotella, 528 U.S. at 555 (stating that in applying the discovery rule of accrual, it is "discovery of the injury, not discovery of the other elements of a claim [that] starts the clock"), the Court apparently believed it might have a wider application by stating that "[t]he uncovering of that concealment would remain the triggering event for both the discovery rule and the express excep-
The Court also noted that the legislative history of the FCRA supported its decision.\textsuperscript{243} Congress had heard testimony urging the enactment of a statute of limitations that began to run from "the date on which the violation is discovered."\textsuperscript{244} Congress rejected this language in favor of a limitations period that is triggered on the date "liability arises."\textsuperscript{245} Congress inserted the "liability arises" language — replacing language that would trigger the statute on the "date of the occurrence" of the violation — at the same time that it added the limited "discovery of the misrepresentation" exception.\textsuperscript{246} For the Court, this history demonstrated that Congress did not intend to adopt \textit{sub silen\textit{tio}} "a general discovery rule in addition to the limited discovery rule it expressly provided."\textsuperscript{247}

\textit{TRW} is significant in several respects. Initially, it provides an approach to: (1) determining whether there should be a presumption of Congressional intent in favor of an equitable exception to a limitations provision; and (2) when a presumption applies, considering whether there is sufficient evidence of Congressional intent to overcome the presumption.\textsuperscript{248} The \textit{TRW} Court also expanded the interpretive approach — which had been confined in \textit{Irwin} to the interpretation of statutes creating rights against the United States — to the interpretation of federal statutes generally. Finally, without deciding whether or not there was a presumption in favor of a general discovery rule, the Court demonstrated that courts should treat a general discovery rule differently from other equitable exceptions — such as fraudulent concealment — which are distinct and consequently have a different history in the common law.

2. Young v. United States: \textit{Refining the Rebuttal}

A few months after the \textit{TRW} decision, the Supreme Court once again applied an interpretive approach to a limitations provision. In \textit{Young}, the Supreme Court construed the Bankruptcy Code to determine whether equitable tolling should apply to a limitations provision...
for the discharge of tax liens. The provision stated that certain tax liabilities were not extinguished in bankruptcy if the tax return was due within three years of the debtor’s bankruptcy petition. The debtor had originally filed a Chapter 13 bankruptcy petition that did not extinguish a tax liability. The debtor subsequently moved to dismiss the Chapter 13 petition and filed a new petition under Chapter 7 of the Bankruptcy Code one day before the court dismissed the Chapter 13 petition. Because the debtor filed his Chapter 7 petition more than three years after the relevant tax return was due, the issue was whether the filing of the original Chapter 13 bankruptcy petition equitably tolled the limitations provision, thereby preserving the tax liability in the Chapter 7 proceeding.

After finding the provision was a statute of limitations, the Court reiterated the presumption in favor of equitable tolling. The Court, citing Irwin, stated it was "hornbook law that limitations provisions are customarily subject to equitable tolling." Accordingly, with respect to particular federal statutes, "Congress must be presumed to draft limitations periods in light of this background principle." Indeed, the Court found this was "doubly true" when Congress enacted limitations periods to be applied by bankruptcy courts, which are courts of equity and apply principles of equity jurisprudence.

With this presumption in place, the Court considered the debtor’s argument that there was evidence of Congressional intent to preclude tolling. Most significantly, the debtor argued that the doctrine of expressio unius est exclusio alterius precluded equitable tolling because two provisions of the Bankruptcy Code provided for equitable tolling. One section of the Code arguably contained a tolling provision for non-bankruptcy courts to toll non-bankruptcy limitations peri-

250. Young, 535 U.S. at 45.
251. Id.
252. Id.
253. Id. at 47-48.
254. Id. (quoting Irwin, 498 U.S. at 95). This overstates Irwin. That decision stated that “[t]ime requirements in lawsuits between private litigants are customarily subject to ‘equitable tolling,’” Irwin, 498 U.S. at 95 (emphasis added), and held that equitable tolling is presumed to apply in actions against the United States if it applies in similar actions against private parties. Id. at 95-96.
256. Id. at 50 (citations omitted). Interestingly, the Court’s opinion was written by Justice Scalia who adheres to the textualist school of statutory interpretation and has written in criticism of an intentionalist approach. See Scalia, supra note 131, at 16-23. The Court’s opinion, however, cannot be justified under a textualist interpretation. The language of the limitations provision at issue contains no equitable exception that would preserve the tax liability.
257. Young, 535 U.S. at 52.
The Court found that this provision did not necessarily show any Congressional intent to preclude bankruptcy courts from exercising their "inherent equitable powers" to toll limitations provisions in the Code. Thus, given that the provision applied to non-bankruptcy courts which did not possess the same equitable powers as bankruptcy courts, the Court reasoned that inclusion of the tolling provision did not justify an inference of Congressional intent to exclude other equitable tolling.

The other provision the debtor cited was actually contained within the section that included the three-year limitations period at issue. That tolling provision stated that a 240-day limitations period for preserving assessed tax claims could be tolled during the pendency of an offer in compromise. Rejecting the debtor's argument that this showed an intent to preclude other equitable tolling, the Court reasoned that this tolling provision was distinct from traditional equitable tolling because the debtor, in making an offer in compromise, "voluntarily [chose] not to protect his rights within the statutory period." Thus, because this tolling principle was not one traditionally recognized at common law, its inclusion did not justify an inference of Congressional intent to exclude traditional equitable tolling. As the Court stated, the "offer in compromise" tolling provision "supplements rather than displaces principles of equitable tolling." Ultimately, the Court ruled that the plaintiff had not rebutted a presumption in favor of equitable tolling and held that the limitations provision was tolled during the pendency of the Chapter 13 petition.

Whereas TRW showed that it is important to focus on the particular equitable exception at issue in determining whether there should be a presumption that Congress intended to incorporate that equitable exception into the statute, Young illustrated the importance of analyzing the specific equitable exception at issue in determining whether the applicable presumption of Congressional intent has been rebutted. Even so, the Court's Young decision is subject to criticism. Initially, the Court did not provide a very detailed analysis of whether the specific equitable tolling that the government sought was sufficiently well-established in the common law to be considered part of the historical background against which Congress drafted the Bankruptcy Code. The Court merely noted it had previously permitted equitable tolling in situations where the claimant had "pursued his judicial rem-

258. Id. (discussing 11 U.S.C. § 108(c)(1)).
259. Id.
260. Id. at 53 (discussing 11 U.S.C. § 507(a)(8)(A)).
261. Id. (citing Irwin, 498 U.S. at 96).
262. Id. (emphasis added).
263. Id. at 43, 45, 54.
edies by filing a defective pleading during the statutory period" and where the claimant had "been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." The Court also stated it had acknowledged that tolling might be appropriate in other situations as well. Yet, the Court did not cite any precedent in the common law for the particular equitable tolling it applied. To be sure, the tolling of a limitations period during the pendency of a prior bankruptcy petition is much like the tolling of a statute of limitations during the time that a plaintiff has actively pursued judicial remedies pursuant to a defective claim. In Young, all of the parties were on notice of their rights under the Chapter 13 petition; the mere substitution of a Chapter 7 petition for a Chapter 13 petition should not change those rights, particularly where debtors otherwise could manipulate the system. As in the situation where the plaintiff had filed a defective pleading within the limitations period, the strict application of the statute of limitations following substitution of petitions under the Bankruptcy Code would allow the complexities of modern civil litigation to trump the equities of individual cases. The question is whether the courts should provide the remedy to this limitations dilemma by creating an equitable exception or whether Congress should provide the remedy through amending the Bankruptcy Code.

Additionally, the Young Court gave the presumption in favor of equitable tolling more weight than it deserved. Citing Beggerly, the Court stated that the presumption prevailed "unless tolling would be 'inconsistent with the text of the relevant statute.'" While the Beggerly opinion indeed stated that the presumption was rebutted when equitable tolling is inconsistent with the text of the relevant statute,

264. Id. at 50 (quoting Irwin, 498 U.S. at 96). This is the equitable exception discussed at supra notes 102-16 and accompanying text.

265. Young, 535 U.S. at 50 (quoting Irwin, 498 U.S. at 96). This is the equitable exception discussed at supra notes 82-89 and accompanying text.

266. Young, 535 U.S. at 50. The Supreme Court cited Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984), in which the Court recognized that lower courts had identified reasons for tolling the ninety-day statute of limitations for filing a Title VII complaint after receiving a right to sue letter. The reasons included (1) the plaintiff had received an inadequate notice of the right to sue; (2) there was a motion pending for appointment of counsel; (3) a court had informed plaintiff that she had done everything required of her; and (4) the defendant's affirmative misconduct had lulled the plaintiff into inaction. Baldwin, 466 U.S. at 151 (citations omitted). Only the fourth situation is an equitable exception with an established common law background. See supra notes 82-89 and accompanying text. The first situation is not a reason for equitable tolling at all, but a reason why the statute of limitations would not begin under the language of the statute. The Baldwin Court failed to do any analysis of whether equitable tolling would be appropriate for the second or third situations.

267. See supra notes 102-16 and accompanying text.

the Beggerly Court did not state that this was the exclusive basis for rebutting the presumption.\textsuperscript{269} In addition to the language of the QTA, the Beggerly Court itself found the purposes of the QTA supported its finding of Congressional intent to preclude equitable tolling.\textsuperscript{270} Equally, in Brockamp, the Court cited statutory language, legislative history and statutory purpose in concluding that Congress intended to preclude equitable tolling.\textsuperscript{271} Thus, contrary to the Court's statement in Young, a presumption in favor of equitable tolling can be overcome even when tolling would not be inconsistent with the text of the relevant statute, so long as there is other evidence of Congressional intent to preclude tolling.

Thus, the important lesson of recent Supreme Court cases is that courts cannot — without an analysis of Congressional intent — reflexively hold that equitable exceptions apply to federal limitations provisions. It is essential that courts examine the traditional guideposts of congressional intent — the statute's language as well as its purposes and legislative history — to determine whether Congress intended to preclude the particular equitable exception. Even more important is the Court's recognition that equitable exceptions are distinct and should be treated as such in the interpretation of limitations provisions. TRW revealed that the discovery rule of accrual is a unique equitable exception. While it is subject to the same interpretive analysis as the equitable exceptions analyzed in Brockamp, Beggerly, and Young, the discovery rule of accrual has a much different historical pedigree than those equitable exceptions. With respect to the discovery rule, as a unique equitable exception, the initial interpretive question must be whether there should be a presumption in favor of the rule for a particular federal statute. This turns on whether the discovery rule, as a unique equitable exception, was generally-recognized in the common law at the time of the statute's enactment. Justice Scalia noted in his concurrence in TRW that the discovery rule represented a relatively recent development in the law.\textsuperscript{272} The majority skirted the issue of whether there should be a presumption in favor of the rule and, instead, based its decision upon the second half of the interpretive approach — finding evidence of Congressional intent to preclude a general discovery rule for the statute.\textsuperscript{273} Yet, the question remains whether courts can properly incorporate a discovery rule of accrual.

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\item \textsuperscript{269} See generally Beggerly, 524 U.S. at 48.
\item \textsuperscript{270} Id. at 48-49.
\item \textsuperscript{271} Brockamp, 519 U.S. at 350-54.
\item \textsuperscript{272} TRW, 534 U.S. at 37 (Scalia, J., concurring).
\item \textsuperscript{273} Id. at 27-29. In finding that there was evidence of Congressional intent to preclude a discovery rule, the Court did not need to determine whether there should be a presumption that a general discovery rule applied to the statute.
\end{itemize}
into federal statutes of limitations through operation of the common law. We now turn to that question.

IV. A BAD WINE OF RECENT VINTAGE: THE DISCOVERY RULE OF ACCRUAL FOR FEDERAL STATUTES OF LIMITATIONS.

A. FINDING A DISCOVERY RULE FOR FEDERAL STATUTES OF LIMITATIONS: URIE V. THOMPSON AND UNITED STATES V. KUBRICK

The genesis of the discovery rule of accrual for federal statutes of limitations was the Supreme Court’s decision in *Urie v. Thompson,* 274 which involved an interpretation of the FELA’s statute of limitations. 275 That provision simply stated: “No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.” 276 As discussed above, at the time the Supreme Court decided *Urie,* the standard rule for statutes of limitations with such language was that the statute began to run once the tort was complete, irrespective of the knowledge of the plaintiff. 277

Without any analysis of the state of the common law, the language of the FELA’s statute of limitations, or the legislative history of the Act, the Supreme Court found that the FELA’s statute of limitations included a discovery rule of accrual. This significant departure from the standard rule of accrual for statutes of limitations may have been a product of the equities presented in the *Urie* case.

Tom Urie was a long-time fireman on a steam locomotive of the Missouri Pacific Line. 278 After having worked for the railroad for almost thirty years, he developed a severe pulmonary affliction that eventually disabled him. 279 Several weeks after his incapacitation, a

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274. 337 U.S. 163 (1949).
275. The FELA provided that railroad employees could sue their employers for injuries sustained on the job resulting from the employer’s negligence. 45 U.S.C. §§ 51-60.
276. 45 U.S.C. § 56. The statute was changed to three years by 53 Stat. 1404 (1948). It remains the same to date.
277. See Restatement of Torts § 899 cmt. e (1939) (noting that “it is still true in many of the States that, in the absence of fraud or concealment of the cause of action, the statutory period runs from the time the tort was committed although the injured person had no knowledge or reason to know of it”). However, some states recognized a limited discovery rule where the defendant had “concealed the existence of the tort.” See generally 1 Wood 4th Ed., supra note 44, § 122a, at 684 (stating that under the “general rule,” the statute of limitations begins when a plaintiff has a “right to apply to a court for relief”) and 2 Wood 4th Ed., supra note 44, § 276c(1) at 1411 (stating “[t]hat [the fact that] a person entitled to an action has no knowledge of his right to sue or the facts out of which his right arises, does not postpone the period of limitation”). See also supra notes 67-81 and accompanying text.
279. Id. at 165-66.
doctor diagnosed his disease as silicosis, a condition that resulted from his exposure to silica dust which had been blown or sucked into the locomotives where he worked.\textsuperscript{280} In November 1941, shortly after learning of his diagnosis, Urie brought his action under the FELA.\textsuperscript{281} When the case reached the Supreme Court, the defendant, a trustee for the railroad, argued that because Mr. Urie had been exposed to silica dust since 1910, Urie must have contracted silicosis long before November 1938 and, therefore, the FELA’s three-year statute of limitations barred his action.\textsuperscript{282}

There was no language in the FELA itself, or, apparently, in the legislative history of the statute, to indicate that Congress intended to give special consideration to circumstances such as Urie’s in applying the Act’s statute of limitations. Neither was there any precedent in the common law for a discovery rule of accrual for a latent injury. Nevertheless, to avoid a harsh result, the Court “construed” the FELA’s statute of limitations based upon what it saw as the purposes of the Act. If Congress intended the FELA to cover occupational diseases at all, the Court reasoned, the Act’s statute of limitations could not bar Urie’s action either in whole or in part.\textsuperscript{283} Urie may have contracted the disease prior to 1938, but that was “unknown and inherently unknowable in retrospect.”\textsuperscript{284} If Urie’s action were barred entirely because of a circumstance that he could not have possibly known about, then the statute would only provide him a “delusive remedy.”\textsuperscript{285}

At bottom, the Court’s decision was based upon its notion of fairness. The Court could not find that the FELA’s statute of limitations barred Urie’s action because it did not believe a “humane legislative plan intended such consequences to attach to blameless ignorance.”\textsuperscript{286} Additionally, the Court stated that barring Urie’s action could not “be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of a claim within the specified period of time after notice of the invasion of legal rights.”\textsuperscript{287}

By basing its decision on these broad statements of policy, the Court essentially imposed its own policy preferences regarding the operation of the FELA’s statute of limitations. There was no common law precedent on which to base a presumption of Congressional intent

\textsuperscript{280} Id.
\textsuperscript{281} Id. at 165, 168.
\textsuperscript{282} Id. at 165, 168, 169.
\textsuperscript{283} Id. at 169.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id. at 170.
\textsuperscript{287} Id. at 169, 170.
to incorporate a discovery rule. Moreover, there was no language in the statute or its legislative history to show that Congress intended to incorporate a discovery rule into the FELA. Therefore, the Court could only reason that Congress, in enacting "humane" legislation, must not have intended for the FELA's statute of limitations to preclude the claim of a plaintiff who had not discovered his injury within the statutory period. Instead of basing its decision on any specific evidence of Congressional intent, the Court, under cover of effectuating the statute's "humane legislative plan," in effect determined what it thought Congress should have provided in the statute, or would have provided had it considered the issue. As we discussed above, reasoning from such broad, amorphous statutory purposes allows courts to supplement a statute with its own ideas about how the limitations provision should operate.288

What is more, the Urie Court failed to cite any authority for its assumptions regarding the scope of the FELA's intended coverage or for its description of the "traditional purposes of statutes of limitations." As in Burnett,289 the Court focused on only one policy underlying the statute of limitations — the policy requiring a plaintiff to diligently assert his claim within a specified time.290 It failed to discuss other countervailing policies supporting limitations provisions, such as the policy of protecting the courts and parties from litigating cases in which the evidence has become stale.291

While the decision contained the seeds of judicial activism in its apparent incorporation of a notice requirement into the statute of limitations, the Court ultimately couched its decision in terms of a common law tort analysis of when the plaintiff's injury occurred. The Court reasoned that a tort is not complete, and the plaintiff does not have a right to bring an action, until all of the elements, including the injury, are present. Where the injurious consequence of an harmful exposure occurs over a period of time rather than at a fixed point in time, such as when the plaintiff is exposed to a substance which, over time, latently begins a disease process, the Court stated that the plaintiff becomes injured only when "the accumulated effects of the
deleterious substance manifest themselves...."

The Court noted that this interpretation of injury was unique to the FELA's statute of limitations, and was not a universally-applicable determination of when a party possesses an injury for purposes of a common law tort action. Yet, the Court failed to explain why this interpretation of "injury" is required by the FELA, other than stating that the FELA was a "humane legislative plan," and therefore, Congress could not have intended Urie's "blameless ignorance" to bar his claim.

By tying its decision to the FELA's "humane legislative plan" and by discussing the concept of notice or "discovery," the Court invited lower courts to develop a discovery rule of accrual which extended beyond the latent disease scenario presented in *Urie*. That is exactly what happened. In 1962, the Fifth Circuit Court of Appeals applied *Urie* to create a discovery rule for medical malpractice claims under the Federal Tort Claims Act ("FTCA"), and other circuits followed suit.

Thirty years after *Urie*, the Supreme Court next addressed the discovery rule of accrual for a federal statute of limitations in *United States v. Kubrick*. There, the issue was not whether a discovery rule of accrual applied to the FTCA. Instead, the issue was whether any discovery rule under the Act included discovery of both the fact of injury *and* the fact that it was negligently inflicted. The Supreme Court conceded there was "nothing in the language or legislative history" of the FTCA that supported a discovery rule that would include discovery of both the fact of injury and the fact that it was negligently inflicted. Yet, the Court never directly addressed the threshold question of whether the FTCA included a discovery rule at all. For one thing, the United States had conceded, for purposes of the appeal, that the plaintiff's medical malpractice claim did not accrue until he

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293. Unlike the Federal Tort Claims Act, where the Court looks to substantive state law, see 28 U.S.C. § 2674, under the Federal Employers' Liability Act ("FELA"), where the Court considers general common law tort principles in certain circumstances. See Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994); *Gottshall*, 512 U.S. at 558 (Souter, J., concurring). In his concurring opinion, Justice Souter noted the duty of courts "in interpreting FELA... is to develop a federal common law of negligence... informed by reference to the evolving common law." *Id.* at 558 (Souter, J., concurring).

294. See generally Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

295. See, e.g., Hungerford v. United States, 307 F.2d 99 (9th Cir. 1962); Toal v. United States, 438 F.2d 222 (2d Cir. 1971); Tyminski v. United States, 481 F.2d 257 (3rd Cir. 1973); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); Reilly v. United States, 513 F.2d 147 (8th Cir. 1975); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976).


was aware of his injury and its cause. Thus, the parties did not contest the issue of whether the FTCA’s statute of limitations contained a discovery rule. Additionally, the Court did not need to reach this threshold issue to decide the case. The statute of limitations barred the plaintiff’s claim unless the FTCA contained a discovery rule that included both discovery of the injury and discovery of negligence. The Court ultimately concluded that the plaintiff’s claim was time-barred when it found that any discovery rule of accrual did not require discovery of negligence.

Language in the *Kubrick* Court’s decision certainly implies that the Supreme Court would recognize a discovery rule of accrual for the FTCA’s statute of limitations that is triggered by a plaintiff’s discovery of the “critical facts” of injury and causation. However, footnote six in the Court’s decision reveals that the FTCA’s legislative history contains evidence that Congress did not intend to incorporate a discovery rule into the FTCA. In 1949, Congress extended the FTCA’s limitations period from one year to two years. A House Report for the amendment showed that one of the reasons for the extension was

299. *Id.* at 120-21.

300. This is one instance in which the syllabus of the Supreme Court’s Reporter of Decisions went beyond the Court’s actual holding. In the syllabus, the Reporter stated that the Court held that “[a] claim accrues within the meaning of § 2401(b) when the plaintiff knows both the existence and the cause of his injury, and not at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.” *Kubrick*, 444 U.S. at 111. Yet, one will search in vain for a holding in the Court’s opinion that states that the FTCA’s definition of accrual includes discovery of the injury and its cause. In reaching its decision, the Court simply contrasted an injury-discovery rule with a rule that required discovery of negligence. In his concurring opinion in *TRW*, Justice Scalia recognized that the *Kubrick* opinion did not hold that Congress intended that the discovery rule be part of the FTCA’s statute of limitations. Justice Scalia stated that *Urie* was the only instance where the Court deviated from the traditional injury rule for accrual of a statute of limitations and imputed a discovery rule. *TRW*, 534 U.S. at 37 (Scalia, J., concurring). With respect to *Kubrick*, Justice Scalia stated that the Supreme Court “simply observed (without endorsement) that several Courts of Appeals had substituted injury-discovery for the traditional rule in medical malpractice actions under the Federal Tort Claim Act . . .” *Id.* at 37 n.2. See also 3 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 14.03[2], at 14-30 (2001) (footnotes omitted), which states:

"Strictly read, *Kubrick* does not clearly adopt a discovery rule for FTCA malpractice claims; instead, it merely assumes *arguendo* that a discovery rule is to be applied, and holds that any discovery rule which may be adopted in FTCA cases cannot be employed to delay accrual of a claim beyond the time the injury and cause are discovered. Nevertheless, virtually every court has read *Kubrick*, along with pre-*Kubrick* appellate precedents, as requiring application of a discovery rule in medical malpractice cases, and most have applied the rule to other types of claims as well."

301. See *Kubrick*, 444 U.S. at 122 (stating that “[t]he prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.”).

to cover situations in which a plaintiff could not discover the injury within one year:

The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making a claim. Moreover, the wide area of operations of Federal agencies, particularly the armed-service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit.303

In an interesting use of language, the Kubrick Court remarked that this passage "seems almost to indicate that the time of accrual is the time of injury."304 Yet, that is exactly what the passage implies. Had the discovery rule been included as a part of the statute of limitations for the FTCA, as passed in 1946, it would have been unnecessary to extend the statutory period from one year to two years for the reasons given. With a discovery rule, the statutory period would not commence until the injury was fully developed (i.e., became manifest) or until the next of kin was notified of the death of a relative. Because Congress perceived a need to extend the statutory period to address inequities that occurred when discovery, or notification, of the injury did not occur until sometime after the date of injury, Congress must have understood the statute began to run on the date of the injury.

But, the Kubrick Court had to say the House Report "seems almost to indicate" a date of injury for accrual of the FTCA's statute of limitations because, had it found the language from the Report to be an unequivocal expression of Congressional intent, its entire discussion of the contours of the discovery rule would have been moot. Other than this language in the 1949 Report, the Court could not find any other statements in the legislative history of the statute or its amendments that shed light on the meaning of the word "accrual."305 Nevertheless, the Court cited for support its own questionable decision in Urie that a claim did not accrue under the FELA until the claimant's disease manifested itself.306 Additionally, the Court noted several Circuit Courts that had applied Urie's discovery rule to medical malpractice claims under the FTCA307 and cited comments to the Restatement of Torts (Second) identifying a group of cases recognizing a
discovery rule of accrual for medical malpractice.\textsuperscript{308} However, with respect to this last bit of reasoning, the relevant source for determining Congressional intent would have been the Restatement \textit{that was in effect at the time the FTCA was enacted}.\textsuperscript{309} The \textit{first} Restatement of Torts recognized that, in the absence of fraud or concealment, "the statutory period runs from the time the tort was committed although the injured person had no knowledge or reason to know of it."\textsuperscript{310}

Since \textit{Kubrick}, lower courts have accepted, without question, that the FTCA incorporates a discovery rule of accrual.\textsuperscript{311} This acceptance is curious given: (1) the complete absence of any indication of Congressional intent to include a discovery rule in the language or legislative history of the FTCA, and (2) a House Report suggesting that Congress believed that a discovery rule of accrual was not part of the FTCA's statute of limitations. Moreover, there is no basis for a court to presume that Congress intended to incorporate a discovery rule of accrual into the FTCA's statute of limitations because there was no generally-applicable discovery rule existing at common law at the time of the FTCA's enactment. Certainly, a court could not make any such presumption of legislative intent based upon the \textit{Urie} decision. The Supreme Court decided \textit{Urie} three years \textit{after} the passage of the FTCA and based its decision in \textit{Urie} upon the FELA's "humane legislative plan."\textsuperscript{312} While it is one thing to say the FELA is a remedial statute subject to a liberal construction, it is much harder to apply that justification to the FTCA. Courts have generally stated that the FTCA, as a

\textsuperscript{308} \textit{Id.} (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 899 cmt. e (1979)).

\textsuperscript{309} See \textit{Louisville Cement Co.}, 246 U.S. at 644, \textit{superceded by statute as stated in} \textit{Reiter v. Cooper}, 327 U.S. 258 (1993) (considering the meaning of the word accrue at the time a statute was enacted to determine congressional intent).

\textsuperscript{310} \textit{RESTATEMENT OF TORTS} § 899 cmt. e (1939). Even the second \textit{Restatement of Torts} recognized that courts still applied the rule "that the action is barred by the statute even though there has been no knowledge that it could be brought." \textit{RESTATEMENT (SECOND) OF TORTS} § 899 cmt. e. The Restatement merely recognized that some courts had used the "discovery rule" exception for medical and other professional malpractice cases, and that other courts had resorted to "various devices to extend the statute," such as a continuous treatment doctrine or a fraudulent concealment doctrine. \textit{Id.} It concluded that a "wave of recent decisions" had held that "the statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it." \textit{Id.} Prior to the time the FTCA was enacted, commentators recognized that the absence of a discovery rule would foreclose many tort claims, including malpractice claims. See Dawson, 31 \textit{Mich. L. Rev.} at 901-904 (discussing the harshness of the application of a statute of limitations to malpractice claims without a discovery rule and stating "the cases are almost unanimous in deciding that the 'cause of action' accrues at the date when a technical beach of duty first occurred, or at the latest when professional treatments ceased") (footnotes omitted).


\textsuperscript{312} \textit{Urie}, 337 U.S. at 169, 170.
waiver of the government’s sovereign immunity, is subject to a strict construction.\textsuperscript{313}

Our interpretive approach calls into question the incorporation of a discovery rule of accrual into the FTCA. Because a general discovery rule of accrual did not exist in the common law at the time of the FTCA’s enactment, there can be no presumption that Congress intended a discovery rule to apply to the Act’s statute of limitations. Additionally, federal statutes, both before and after the enactment of the FTCA, have expressly included a discovery rule within the language of their limitations provisions.\textsuperscript{314} If anything, the absence of a discovery rule in the common law at the time of the FTCA’s enactment justifies a presumption against incorporating a discovery rule into that statute. Further, there is no evidence of legislative intent to support a discovery rule in the language, legislative history or purposes of the FTCA to rebut a presumption against incorporation.\textsuperscript{315} Indeed, the

\textsuperscript{313} In contrast to the FELA, the FTCA waives the government’s sovereign immunity. Whereas remedial statutes are to be liberally construed, statutes that waive the government’s sovereign immunity are subject to strict construction in favor of the sovereign. See, e.g., Williams v. United States, 242 F.3d 169, 172 (4th Cir. 2001) (citations omitted) (stating that the FTCA, as a waiver of sovereign immunity, is to be strictly construed in favor of the sovereign); Metro. Life Ins. Co. v. Atkins, 225 F.3d 510, 512 (5th Cir. 2000) (same). While we do not necessarily endorse the validity of these characterizations of the statutes or the “dice-loading” principles of construction that accompany the characterizations, see supra notes 175-79 and accompanying text, we make this distinction to show how far the incorporation of a discovery rule into the FTCA’s statute of limitations strays from accepted methods of statutory construction.

\textsuperscript{314} See, e.g., 42 U.S.C. § 9612(d)(2) (1994) (The Comprehensive Environmental Response, Compensation and Liability Act of 1980 provides that claims for recovery of damages may be made within three years after the “date of the discovery of the loss and its connection with the release in question”); 28 U.S.C. § 2409a(g) (2000) (The Quiet Title Act provides that the statute of limitation runs from the date that plaintiff “knew or should have known” of the United States’ claim); 18 U.S.C. § 1030(g) (1994 & Supp. V) (The Computer Fraud and Abuse Act provides for a private right of action, but the action must be brought “within 2 years of the date of the act complained of or the date of the discovery of the damage”); 15 U.S.C. § 77m (1994 & Supp. V) (The Securities Act of 1933 provides that certain causes of actions must be brought “within one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence . . .”); 41 U.S.C. § 55(b) (2000) (the Anti-Kickback Act of 1986 provides that the filing period runs from “the date on which the United States first knew or should reasonably have known that the prohibited conduct had occurred”); 22 U.S.C. § 4134(a) (2000) (the Foreign Service Act grievance procedure excludes from the filing period “any time during which . . . the grievant was unaware of the grounds for the grievance and could not have discovered such grounds through reasonable diligence”). See also 42 U.S.C. § 2210(n)(2) (2000) (the Price Anderson Act providing for indemnity agreements that waive any issue or defense based upon the statute of limitations “if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof”).

\textsuperscript{315} One might argue that Congressional silence since the Kubrick decision is an indication of congressional acquiescence to a discovery rule of accrual. However, for many reasons articulated by Justice Scalia in his dissenting opinion in Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 671, 672 (1987) (Scalia, J., dissent-
legislative history of the statute shows Congress understood that claims accrued under the Act on the date of injury and not on the date of discovery of the injury.

B. EXPANSION OF THE DISCOVERY RULE IN FTCA CASES AND BEYOND

While some courts have limited the FTCA's discovery rule of accrual to medical malpractice and latent disease cases, many other courts have applied the discovery rule to other types of FTCA cases. For example, in the context of a claim alleging that a supervisory federal agency negligently allowed an unsafe condition, a court held that the FTCA claim did not accrue until the claimant first discovered the unsafe condition. Likewise, a court held that a malicious prosecution claim did not accrue until the prosecution was dismissed. In groundwater contamination cases, courts have routinely held that the FTCA's statute of limitations does not begin to run until the plaintiff discovers the contamination.
Moreover, the FTCA’s discovery rule has spawned a great deal of litigation regarding precisely what a plaintiff must discover for the cause of action to accrue. In *Kubrick*, the Supreme Court made it clear that it was not necessary that the plaintiff discover the negligent act or omission for the FTCA’s statute of limitations to begin to run.\(^{321}\) Beyond that, however, the Court offered little guidance other than noting that a plaintiff with sufficient information to seek advice in the medical and legal community can begin to pursue his claim.\(^{322}\) Accordingly, there has been a substantial amount of litigation over the application of the FTCA’s discovery rule,\(^{323}\) involving issues such as: (1) what knowledge can reasonably be imputed to the plaintiff;\(^{324}\) (2) whether the plaintiff can rely upon information relayed to him by government officials;\(^{325}\) and (3) whether it is necessary for the plaintiff to know who inflicted the injury.\(^{326}\)

Following the Supreme Court’s lead in *Urie* and *Kubrick*, lower federal courts have incorporated a discovery rule of accrual into other federal statutes of limitations without any exacting inquiry into Congressional intent. For example, several Circuit Courts have incorporated a discovery rule of accrual into the statute of limitations of the Privacy Act,\(^{327}\) which provides, in part, that a plaintiff must bring an action within two years “from the date on which the cause of action

\(^{321}\) Kubrick, 444 U.S. at 123.

\(^{322}\) See id.


\(^{324}\) See, e.g., Bibeau v. Pac. Northwest Research Found. Inc., 188 F.3d 1105, 1110-11 (9th Cir. 1999) (deciding that the plaintiff could not be charged with constructive knowledge of news reports, other lawsuits or a statutory medical expense compensation program); Heinrich v. Sweet, 44 F. Supp. 2d 408, 416, 417 (D. Mass. 1999), *cert denied*, 123 S. Ct. 2273 (2003) (holding that plaintiff could not be charged with constructive knowledge of articles in medical journals or a Congressional report).

\(^{325}\) See, e.g., Osborne v. United States, 918 F.2d 724, 732, 733, 734 (8th Cir. 1990) (determining that the plaintiff was entitled to rely upon statements of government doctors that the cause of seizures was unknown, and the claim did not accrue until plaintiff learned the actual cause); McDonald v. United States, 843 F.2d 247, 248, 249 (6th Cir. 1988) (deciding that doctor’s assurances regarding causation can be reasonably relied upon to delay the accrual of a cause of action).

\(^{326}\) See, e.g., Drazan v. United States, 762 F.2d 56, 59-60 (7th Cir. 1985) (deciding that the statute of limitations need not begin to run until the plaintiff had “reason to believe that an act or omission by the Veterans Administration hospital had been the cause of her husbands death”); Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984) (stating that discovering the cause of an injury “does not mean knowing who is responsible for it”).

\(^{327}\) See Englerius v. Veterans Admin., 837 F.2d 895, 897 (9th Cir. 1988); Diliberti v. United States, 817 F.2d 1259, 1263-64 (7th Cir. 1987); Tijerina v. Walters, 821 F.2d 789, 797-98 (D.C. Cir. 1987); Bergman v. United States, 751 F.2d 314, 316 (10th Cir. 1984).
arises."\textsuperscript{328} Judge Mikva of the D.C. Circuit reasoned that a discovery rule of accrual:

best accords with Congress's intent in passing the Act, which is our touchstone in determining when the statute begins to run. The Act seeks to provide a remedy for governmental conduct that by its very nature is frequently difficult to discover \ldots Because possible violations of the Act are often not immediately apparent to the aggrieved individual, Congress's desire to provide a civil remedy would be poorly served if the cause of action could arise before the plaintiff even had reason to know of the violation.\textsuperscript{329}

Reasoning backward from a vague legislative purpose is what drove the Court in \textit{Urie} to incorporate a discovery rule of accrual into the FELA. Yet, this rationale is contrary to the Supreme Court's reasoning in \textit{TRW}. Had any of the Circuit Courts conducted a thorough interpretive analysis of the Privacy Act's statute of limitations — along the lines of the Supreme Court's analysis of the FCRA in \textit{TRW} — it would have found evidence of Congressional intent to preclude a general discovery rule. Like the FCRA's statute of limitations, the Privacy Act's statute includes a limited discovery rule. The Privacy Act states a plaintiff must bring a cause of action:

within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation \ldots \textsuperscript{330}

Following the Supreme Court's application of \textit{expressio unius est exclusio alterius} in \textit{TRW}, the inclusion of a limited discovery rule in the Privacy Act justifies an inference that Congress intended to exclude a general discovery rule of accrual from that Act.

In addition to the Privacy Act, courts have incorporated — usually without any statutory analysis — a general discovery rule of accrual into the Labor-Management Reporting and Disclosure Act,\textsuperscript{331}
the Age Discrimination in Employment Act of 1967 ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans With Disabilities Act ("ADA"), Section 1983 of the Civil Rights Act of 1871 ("Section 1983"), and the Racketeering Influenced and Corrupt Organizations Act ("RICO"). Thus, what started as a rule applicable to one particular statute, the FELA, based upon the "human legislative plan" of that statute, has now mutated into a general discovery rule of accrual applicable, across the board, to all federal statutes of limitations. In the process, most courts abandoned even going through the motions of an interpretive analysis. One court's holding that a discovery rule of accrual applied to all federal statutes of limitations was passed from case to case without any critical review.

332. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991) (stating that "the 'discovery rule' of federal common law ... is read into statutes of limitations in federal-question cases (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress"); But see Hamilton v. 1st Source Bank, 928 F.2d 86, 87-88 (4th Cir. 1990) (finding that a discovery rule did not apply to the 180-day limitations period of the ADEA because applying a discovery rule would be inconsistent with the language and purpose of the ADEA and with congressional action with respect to other federal statutes of limitations).

333. See, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 n.5 (3rd Cir. 1994) (stating that "[t]he discovery rule ... is not limited in its application to situations involving bodily injury, and may also apply in cases involving alleged employment discrimination, where the actual injury at issue is not physical in the same way that bodily injury is physical"); Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir.1996) (stating that "standard principles of limitations law, notably the discovery doctrine and the doctrines of equitable estoppel and equitable tolling, excuse the claimant from having to file before it is feasible for him to do so, and these principles apply to cases brought under Title VII").

334. See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1266 (9th Cir. 1998) (stating simply that "the general federal rule is that 'a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action'")) (quoting Trotter, 704 F.2d at 1143); Washburn v. Sauer-Sundstrand, Inc., 909 F. Supp. 554, 558 (N.D. Ill. 1995) (stating that the "discovery rule of federal common law, ... is read into statutes of limitations in federal-question cases") (quoting Cada, 920 F.2d at 450).


337. One can trace the evolution of a general discovery rule of accrual for federal statutes of limitations back to Urie. In Young v. Clinchfield R.R. Co., 288 F.2d 499, 503 (4th Cir. 1961), the Fourth Circuit, citing Urie, unremarkably held in a FELA action that the plaintiff's claim did not accrue until the plaintiff had reason to know he was injured. However, fourteen years later, in Cox v. Stanton, 529 F.2d 47, 50 (4th Cir. 1975), the same court, citing the Young decision, applied a discovery rule to a Section 1983 case, stating that "[f]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." (citing Young, 288 F.2d at 503). The court reasoned that its conclusion was "buttressed by Urie." Id. The Fifth Circuit, citing Cox, stated the same general proposition in a Sec-
Just recently, in line with the interpretive approach it had been following for several years in the equitable tolling context, the Supreme Court began to put the brakes on this runaway train.

C. BACK FROM THE BRINK: Rotella v. Wood and TRW, Inc. v. Andrews

In its decisions in Rotella v. Wood,338 in 2000, and TRW, in 2001, the Supreme Court signaled to federal courts that they should not be so quick to adopt a general discovery rule of accrual for federal statutes of limitations. Without ever specifically deciding whether there was a general discovery rule of accrual applicable to all federal statutes, the Court demonstrated that the incorporation of a general discovery rule into any particular federal statute of limitations must be consistent with the intent of Congress in enacting that statute.

Rotella was the third Supreme Court case dealing with the statute of limitations for civil RICO actions.339 Under RICO, it is a criminal violation to engage in a “pattern of racketeering activity” as that term is defined by the statute;340 moreover, the statute allows any person injured by the pattern of racketeering activity to bring a civil action for treble damages and attorneys fees.341 The question presented in Rotella was whether a four-year statute of limitations for civil RICO claims began to run when the plaintiff discovered his injury or when the plaintiff discovered the pattern of racketeering activity.342 In answering this question, the Court had to determine

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342. See Rotella, 528 U.S. at 553. Like some other federal statutes of limitation, RICO itself contains no limitations provision for civil suits. The Supreme Court, in Mal-
whether there was any indication in RICO that the statute of limitations should not begin to run until the plaintiff discovered the pattern of racketeering activity underlying the cause of action. The Court ultimately concluded that a "pattern discovery rule" would be inconsistent with both the intent of Congress in enacting a civil RICO statute and with the policies underlying statutes of limitations generally. The Court stated that the purpose of the civil RICO provisions was to "encourage civil litigation to supplement Government efforts to deter racketeering activity," in effect turning injured parties into private prosecutors.\footnote{Malley-Duff, established a four year statute of limitations for civil RICO actions by borrowing the statute of limitations for civil actions brought pursuant to the Clayton Act. \textit{Malley-Duff}, 483 U.S. at 156. As a matter of congressional intent, the Court reasoned that Congress intended that courts borrow the most analogous statute of limitations and apply it to the statute. Initially, there was a long-standing practice of "borrowing" an analogous statute of limitations from \textit{state law} where a federal statute had failed to provide one. See id. at 147. The Supreme Court, in \textit{Malley-Duff}, concluded that, given this practice, it could assume the tacit after-the-fact approval of Congress, and, in fact, could further assume from its silence that Congress intended for the practice to continue with respect to future federal statutes which lacked a limitations period. See id. However, in certain situations, courts may determine that state statutes of limitations would be "unsatisfactory vehicles for the enforcement of federal law" or "at odds with the purpose or operations of federal substantive law." See id. In those situations, a court could determine that it should use the most appropriate analogous \textit{federal} statute of limitations. Whether or not this is an appropriate method of statutory construction is beyond the scope of this article. Justice Scalia’s concurring opinion in \textit{Malley-Duff} was critical of this method of statutory interpretation. See id. at 165-70 (Scalia, J., concurring).} The Court reasoned that the sooner such private actions deterred racketeering activity the better.\footnote{Id. at 558.} An "unusually long" limitations period that would result from a "pattern discovery rule" would have the effect of "postponing whatever public benefit civil RICO might realize."\footnote{Id. This reasoning from legislative purpose may not have been sufficiently specific to overcome a presumption of legislative intent in favor of a "pattern discovery rule," had one existed. See supra notes 166-79 and accompanying text. However, it is certainly good reason not to incorporate a pattern discovery rule when there is no other basis to find that Congress intended such a rule. Not surprisingly, the plaintiff had argued that the Court should adopt a pattern discovery rule because RICO should be "liberally construed to effectuate its remedial purposes." \textit{Rotella}, 528 U.S. at 557 n.3 (citations omitted).} Additionally, the Court reasoned that, because a pattern could include acts that were several years apart, allowing a pattern discovery rule could require proof of acts that are very remote in time which would be at odds with the basic policies of all limitations provisions, which include "repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities."\footnote{Rotella, 528 U.S. at 555.}
Significantly, the Court did not decide whether or not there was a general discovery rule applicable to all federal statutes of limitations, or even whether an injury discovery rule applied to civil RICO claims. Without endorsing the practice, the Court acknowledged that federal courts had been generally applying "a discovery rule of accrual when a statute [was] silent on the issue." With respect to a discovery rule of accrual, the Court stated it had "been at pains to explain that discovery of the injury, not discovery of other elements of a claim, is what starts the clock." As in Kubrick, however, the Court did not hold that an injury discovery rule applied to the statute. Instead, it merely determined that a pattern discovery rule did not apply. In contrast to its decision in Kubrick, the Supreme Court was explicit in Rotella in what it was not deciding. In a footnote, the Court stated it was not setting forth a final rule of accrual; in fact, it raised the possibility that accrual could be triggered by the date of the occurrence of the injury, "under which discovery would be irrelevant."

One cannot help but wonder why the Court in Kubrick and Rotella did not affirmatively state a rule of accrual for the statutes of limitations for federal tort claims and civil RICO actions, respectively. The Supreme Court after all is supposed to guide the lower courts and has not in the past been shy to lay down rules of law, even when unnecessary to decide the issues in the case before it. With respect to statute of limitations for civil RICO actions, the Court has truly followed a piecemeal approach. After first deciding on the appropriate limitations period for civil RICO actions, the court subsequently rejected one discovery rule of accrual (the "last predicate act discovery

347. Id.
348. Id.
349. Because the plaintiff's claim was barred unless a pattern discovery rule applied, the Supreme Court did not need to reach the issue of whether Congress intended an injury-discovery rule for civil RICO actions. In Khler, 521 U.S. at 186, 187, 188-93, the Court rejected a "discovery of the last predicate act" rule of accrual, but likewise did not decide upon a rule of accrual for the statute. The Rotella Court noted that an amicus brief had urged the Court to adopt the injury discovery rule, but that the parties had not addressed this option. The Court demurred on reaching the issue, explaining that "we would not pass upon it without more attentive advocacy." Rotella, 528 U.S. at 554-55 n.2.
350. Rotella, 528 U.S. at 554 n.2 (citing Klehr, 521 U.S. at 198 (1997) (Scalia, J., concurring-in-part and concurring-in-judgement)).
351. For example, in Irwin, the Supreme Court established a rebuttable presumption in favor of equitable tolling for actions against the United States where equitable tolling was available for similar suits against private defendants. Irwin, 498 U.S. at 95-96. Based upon this presumption the Court also held that equitable tolling applied to actions against the United States under Title VII. Id. However, this rule of law was unnecessary for the Court's decision because the Court ultimately found that there was no factual basis for equitable tolling. Id. at 96.
352. Malley-Duff, 483 U.S. at 156.
rule"), then rejected another (the "pattern discovery rule"), without ever stating, in the end, what the proper rule of accrual should be.

One reason for the Court's reluctance to decide upon a discovery rule of accrual for these statutes could be the difficulty of articulating a defensible interpretive rationale that would garner the support of a majority of the Justices. With respect to the FTCA, there is no basis for incorporating a discovery rule, either in the common law or in the language or purposes of the statute. Moreover, it appears that Congress contemplated an injury-occurrence rule rather than an injury-discovery rule, which explains why Congress extended the statute of limitations from one to two years in 1949. With respect to civil RICO actions, the Court initially borrowed the four-year statute of limitations from the Clayton Act — itself a tricky proposition in terms of effectuating Congressional intent. Having done that, the Court would be hard-pressed to adopt a discovery-accrual rule, given that an injury-accrual rule applied to the Clayton Act's statute of limitations. Then why didn't the Court reject a discovery rule for these statutes and adopt the traditional, injury-accrual rule? It may be that an injury-accrual rule appeared to be too draconian to a majority of the Justices, especially given that many lower courts were already applying a discovery rule to these statutes.

Continuing to apply a discovery rule of accrual to these statutes — and to the many other federal statutes for which courts had adopted a discovery rule in the face Congressional silence — will be much more difficult in light of TRW. The Supreme Court in TRW cast doubt on whether there could be any presumption in favor of a general discovery rule of accrual for federal statutes. It noted that the only cases in which it had endorsed a "prevailing discovery rule" were in

354. Rotella, 528 U.S. at 555.
355. Justice Scalia expressed frustration with this approach in a concurring opinion in Khler, stating that the Court would not reach the issue of when a civil RICO action accrued "for no particular reason except timidity, declining to say what the correct accrual rule is, but merely rejecting the only one of the four candidates under which these petitioners could recover." Khler, 521 U.S. at 196 (Scalia, J., concurring-in-part and concurring-in-judgment) (emphasis original; footnote omitted). The four candidates were: the injury accrual rule, the injury discovery rule, the pattern discovery rule, and the last predicate act discovery rule. Judge Scalia concluded, "[w]e thus leave reduced but unresolved the well-known split in authority that prompted us to take this case." Id. at 196 (Scalia, J., concurring-in-part and concurring-in-judgment). Interestingly, while Justice Scalia argued for an injury accrual rule in his concurring opinion in Khler, see 521 U.S. at 198, he did not write separately in Rotella.
356. See supra note 342 and accompanying text.
357. See Khler, 521 U.S. at 197-99 (Scalia, J., concurring-in-part and concurring-in-judgment).
358. See TRW, 534 U.S. at 27.
the context of "latent disease and medical malpractice, 'where the cry for [such a] rule is loudest.'" Moreover, Justice Scalia, in his concurring opinion, made a compelling case that there should be a presumption in favor of the traditional rule — namely, that a cause of action accrues at the moment it arises, regardless of whether the plaintiff knows of the facts giving rise to the action. Justice Scalia called the discovery rule of accrual a "bad wine of recent vintage." It had been adopted relatively recently by courts to effectuate a "humanitarian legislative plan" or where the circumstances cried out for it. Yet, Justice Scalia reasoned, it should be the province of Congress, not the courts "to strike the balance between remediation of all injuries and a policy of repose." Justice Scalia posited that Congress knew this traditional rule of accrual was the common law background against which federal statutes were enacted because when Congress wanted to apply a discovery rule of accrual, it explicitly did so in the language of the federal statute.

Justice Scalia concluded that the opinion of the majority in TRW "casts the meaning of innumerable other limitations periods in doubt." This is so, because, in Justice Scalia's mind, the Court's opinion displays uncertainty that the traditional rule — accrual when the right of action first arises — is the prevailing background rule as opposed to a discovery rule of accrual. We suggest that the general discovery rule of accrual had already become a "background rule" that many courts applied to federal statutes without recognizing the traditional accrual rule or performing any interpretive analysis at all. If anything, the Court's TRW decision — in treating the discovery rule of accrual as a separate equitable exception and in applying an exacting interpretive approach to federal statutes of limitations — casts doubt upon whether courts should continue to apply a discovery rule of accrual to many federal statutes in the face of legislative silence on the question.

359. TRW, 534 U.S. at 27 (quoting Rotella, 528 U.S. at 555). Rotella actually only addressed the circumstance of medical malpractice. Rotella, 528 U.S. at 555-56 (citing Kubrick, 444 U.S. at 122). But the TRW Court also cited Urie, a latent disease case. TRW, 534 U.S. at 27.
360. See TRW, 534 U.S. at 36, 37 (Scalia, J., concurring).
361. Id. at 37 (Scalia, J., concurring).
362. Id. at 37-38 (citing Urie, 337 U.S. at 170, and Rotella, 528 U.S. at 555).
363. Id. at 38 (citing Amy, 130 U.S. at 323-24).
364. Id. at 38 (citations omitted).
365. Id.
366. See id. at 36, 38.
367. See supra notes 327-37 and accompanying text.
V. IT ALL COMES DOWN TO POLICY: THE INTERESTS AT STAKE IN CONSIDERING EQUIitable EXCEPTIONS TO FEDERAL STATUTES OF LIMITATIONS.

Ultimately, in considering equitable exceptions to federal statutes of limitations, it is necessary to take into account all of the interests at stake and examine how our interpretive approach balances those interests. The relevant interests include: (1) the interests that underlie particular federal statutes; (2) the interests that support statutes of limitations generally; (3) the interests that underlie particular equitable exceptions to federal statutes; and (4) the interests that support principles of statutory interpretation.

A. INTERESTS SUPPORTING PARTICULAR FEDERAL STATUTES

As we have seen, the perceived or stated purposes underlying particular federal statutes can have a great impact on how a court interprets an Act's statute of limitations. Where the incorporation of an equitable exception would be at odds with a specific purpose of the statute, the legislation's purpose provides some evidence that Congress did not intend to include the exception in the Act.\(^369\) Whether that purpose alone is sufficient to overcome a presumption in favor of the exception can turn upon how central that purpose is to the Act.\(^370\)

When a court defines the purpose of a statute in vague or general terms as part of its analysis, the court may seek to impose its own policy preferences under the cover of statutory interpretation. This can occur when a court determines a general purpose of a statute and justifies its construction of the statute based upon that purpose and nothing else. For instance, the Supreme Court has justified the incorporation of equitable exceptions that were not generally-recognized at common law based merely upon a statute's "remedial purposes" or "humane legislative plan."\(^371\)

While the district court found that the arguments were "strong," the court declined to hold that there was no discovery rule applicable to the FTCA simply because no Supreme Court or First Circuit case contains an explicit holding to that effect." Id. at 224.


\(^370\) In Rotella there was no presumption in favor of the incorporation of pattern discovery rule. The fact that incorporation of the rule would undermine a congressional purpose of civil RICO actions was just additional evidence that the rule should not apply. See supra notes 345-51 and accompanying text. In Beggerly, there arguably was a presumption in favor of incorporation of some equitable exceptions (though not necessarily "open ended" equitable exceptions). The specific purpose of the Quiet Title Act overcame the presumption. Beggerly, 524 U.S. at 49.

Of course, any particular interest or purpose underlying a statute is just one indicia of legislative intent. The weight any particular legislative purpose carries in determining legislative intent will be a factor of: (1) the specificity of the purpose, (2) the amount of support for the purpose in the language of the statute or its legislative history and (3) the relevance of the purpose to determining legislative intent with respect to the particular equitable exception.

B. INTERESTS SUPPORTING STATUTES OF LIMITATIONS GENERALLY

Statutes of limitations “have long been respected as fundamental to a well-ordered judicial system.”\(^{372}\) This is because there are several important policy interests supporting statutes of limitations.\(^{373}\) The three most recognized policies supporting statutes of limitations are that: (1) statutes of limitations encourage the reasonably diligent presentation of claims; (2) statutes of limitations promote the just and efficient adjudication of claims; and (3) statutes of limitations provide repose, or peace of mind, to the defendant after a set period of time.

Statutes of limitations encourage the reasonably diligent presentation of claims by precluding claims that are not brought within a certain time.\(^{374}\) Thus, statutes of limitations benefit plaintiffs and society by encouraging plaintiffs to investigate and pursue their claims promptly and, as a natural consequence, limitations provisions encourage plaintiffs to vindicate their rights promptly.\(^{375}\)

Another interest supporting statutes of limitations is that limitations provisions promote just and efficient adjudication of claims. As time passes, “the search for the truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise.”\(^{376}\)

\(^{372}\) Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980). See also Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that “[s]tatutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence.”).

\(^{373}\) See generally Richardson, Ariz. St. L.J. at 1019-25 (discussing the different interests implicated by statutes of limitations); Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitations, 28 PAC. L.J. 453, 460-510 (1997) (describing in detail the policies favoring and disfavoring limitations of actions).

\(^{374}\) See, e.g., United States v. Kubrick, 444 U.S. 111, 123 (1979) (stating that a purpose of FTCA’s statute of limitations was to “require the reasonably diligent presentation of tort claims against the Government”).

\(^{375}\) See Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) (stating that statutes of limitations have “a manifest tendency to produce speedy settlements of accounts”); Wood, 101 U.S. at 139 (stating that statutes of limitations “stimulate to activity and punish negligence”). See also 1 CORNAN, supra note 34, § 1.1 at 13 (stating statutes of limitations induce plaintiffs “not to neglect valid claims”) (footnotes omitted).

\(^{376}\) Kubrick, 444 U.S. at 117 (citations omitted). See also Tomanio, 446 U.S. at 487 (stating that the function of a judge or jury “is obviously more reliable if the witness or testimony in question is relatively fresh” and that at some point in time, the plaintiff’s
retically, the "fresher" the claim, the more reliable the fact-finding process. As the quality of the evidence declines with age, so does the quality of justice. Moreover, the just and speedy determination of the rights of the parties certainly promotes judicial efficiency.

A final, related interest underlying statutes of limitations is to provide repose, or peace of mind, to the defendant. Just as the loss of evidence over time will impair a court's search for the truth, it will also impair a defendant's ability to provide a defense. Thus, the statute of limitations provides repose to the defendant from defending "stale claims" where the quality of the evidence has deteriorated. Statutes of limitations provide repose in a more general sense as well. In setting a time limit for bringing suits, statutes of limitations provide security and stability to a defendant in conducting its affairs. The defendant can plan for the future with a clear understanding of its potential legal liabilities. Thus, under a statute of limitations, "the defendant's right to be free from stale claims in time comes to prevail over the plaintiff's right to prosecute them."

Statutes of limitations are also meant to prevent the assertion of fraudulent claims. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349 (1874) (recognizing that statutes of limitations "were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished if they did exist"); Blanshard, supra note 54, at 1 (stating that statutes of limitations were to "guard against the commission of perjury, and prevent fraud and injustice, which an unrestrained power of commencing an action at any period, however remote from the original cause of action, was found to encourage").

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See also 1 CORMAN, supra note 34, § 1.1 at 11-13 (discussing the purposes of statutes of limitations in protecting defendants from stale claims and unfair surprise).

See also 1 CORMAN, supra note 34, § 1.1 at 16 (stating that statutes of limitations promote judicial efficiency).

See Tomanio, 446 U.S. at 487 (stating that statutes of limitations protect "settled expectations that a substantive claim will be barred without respect to whether it is meritorious"); Wood, 101 U.S. at 139 (stating that statutes of limitations "promote repose by giving security and stability to human affairs"). See also 1 CORMAN, supra note 34, § 1.1 at 16 (stating that statutes of limitations promote "certainty and finality in the administration of affairs"); Dawson, 34 Mich. L. Rev. at 4 ("[c]ourts have repeatedly announced their conviction that the limitation of actions is necessary for the sake of stability and permanence in social relationships.").

Order of R.R. Telegraphers, 321 U.S. at 349.
As we have seen, a court may emphasize one of these policies to
the exclusion of the others to support the result it intends to reach. In its decisions in both Burnett and Urie, the Supreme Court empha-
sized the importance of vindicating plaintiffs' rights without giving
sufficient consideration to other policies that support limitations pro-
visions. The Burnett Court stated that the policy of repose is "fre-
quently outweighed . . . where the interests of justice require
vindication of plaintiff's rights." In Urie, the Court found that a
discovery rule was necessary because the "purposes of statutes of limi-
tations . . . require the assertion of a claim within a specified period of
time after notice of the invasion of legal rights." There is no men-
tion in either decision of the policy against the deterioration of evi-
dence that supports limitations provisions.

A recent article noted that the policies emphasized in judicial
opinions have varied over time. As courts have increasingly
adopted a discovery rule of accrual, they have shifted in their discus-
sion of policies supporting statutes of limitations. Courts placed "rela-
tively greater emphasis on the plaintiff's knowledge of the claim and
the lack of intentional delay, and relatively less emphasis on the value
of repose and other adverse consequences of deferred filing." In
this way, the policies underlying a particular equitable exception —
here the discovery rule — are subsumed directly into a policy support-
ing statutes of limitations generally. The Supreme Court did this in
Urie by incorporating the concept of notice into the policy of promoting
the diligent presentation of claims. However, the standard rule of
accrual did not include a discovery component. Therefore, the "knowl-
edge of the plaintiff" was irrelevant to policies supporting statutes of
limitations that applied the standard rule. Such statutes promoted
the reasonably diligent presentation of known claims, but did not, by
their terms, make exceptions for those claims that were unknown.

Only an objective evaluation of the policies supporting statutes of
limitation will provide an objective determination of Congressional in-
ent. When a court emphasizes one policy supporting statutes of limi-
tations to the exclusion of others, or incorporates an equitable
exception directly into a statement of policy, it is likely that a court

382. See supra notes 114-16 and accompanying text. See also Ochoa & Wistrich, 28 PAC. L.J. at 457 (footnotes omitted) (stating that "[t]he policies selected by a court for emphasis in an opinion are influenced, in part, by the result the court intends to reach and by the facts which support that result").
384. Urie, 337 U.S. at 170.
385. See Ochoa & Wistrich, 28 PAC. L.J. at 458.
386. Id. (footnote omitted).
387. See generally Urie, 337 U.S. at 168-73.
will be making its own policy choices rather than deferring to the policy choices of Congress.

C. INTERESTS SUPPORTING PARTICULAR EQUITABLE EXCEPTIONS

There are also specific interests that support each equitable exception. For example, the equitable exception that applies when the defendant's misconduct has affirmatively induced the plaintiff to let the statute of limitations expire is based upon the policy that a defendant may not profit from his own wrong.\(^3\)\(^8\) A due diligence injury discovery rule serves the policy of saving the claim of a plaintiff who is "blamelessly ignorant" of the "unknown and inherently unknowable" fact of her injury.\(^3\)\(^8\)\(^9\)

These policies can be in tension with other policies that support statutes of limitations generally. Suppose a plaintiff did not discover her injury for ten years after it occurred. Further, assume that without a discovery rule, the statute of limitations would have expired two years after the injury occurred. If a discovery rule allows the plaintiff to bring the claim, then other policies supporting the statute of limitations will necessarily suffer. Theoretically, the quality of the evidence will be in much worse shape after ten years than it would have been after only two years. Also, the fact-finding process will not be as reliable as it would have been had the claim been brought earlier. Moreover, the policy of repose will be compromised. The defendant may have a harder time gathering reliable evidence for a defense, and the discovery rule will have added a great deal of uncertainty to the defendant's future endeavors.

Whenever an equitable exception is incorporated into a statute of limitations, a policy choice has been made. To some degree, the policies supporting the equitable exception are found to outweigh the policies supporting statutes of limitations generally. Once we recognize that the incorporation of an equitable exception into a statute of limitations involves a judgment as to the relative value of competing policies, the question becomes how one should make that judgment.

D. INTERESTS SUPPORTING PRINCIPLES OF STATUTORY INTERPRETATION

In addition to the interests discussed above, there are interests that underlie the interpretive process itself, and courts often overlook or underplay the importance of these interests in interpreting federal statutes of limitations. Like any other methodology, statutory inter-

389. See Urie, 337 U.S. at 169, 170, 171.
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pretation strives to produce reliable results.\textsuperscript{390} The interpretive process is reliable if the methodology yields consistent results. Therefore, one of the primary interests underlying the principles of statutory interpretation is consistency.\textsuperscript{391} As we have seen, some principles of statutory construction are more prone to subjective application than others. When a court interprets a statute based upon a perceived general purpose of the statute, there is a great risk a court will inject its own policy preferences into the statute. The more room there is for subjectivity in statutory interpretation, the less reliable the results of the interpretive process will be.

An interest in reliable results is therefore related to an interest in avoiding judicial law-making and maintaining the separation of powers. Though perspectives on the appropriate judicial role may differ depending on ideology, most would agree, to a certain extent, that the goal of the interpretive process is to implement the will of the legislative body and not the policies of the individual judge or court. Therefore, the principles underlying statutory interpretation attempt to place some limits on the judicial role, recognizing the function of the courts is to apply the law and not make it. Thus, a goal of the interpretive process — even with respect to statutes of limitations — is to remove subjectivity rather than amplify it.\textsuperscript{392}

\textsuperscript{390} This is distinct from whether the methodology produces valid results — in other words, results which actually show what the methodology purports to show. There is a significant divergence in opinions, dependent to large degree on ideology, with respect to what the process of statutory interpretation is supposed to show. See \textit{supra} notes 126-30 and accompanying text.

\textsuperscript{391} While Ralph Waldo Emerson said "a foolish consistency is the hobgoblin of little minds," Justice Scalia has noted that applying this aphorism to legal reasoning not only takes Emerson out of context, but is "destructive beyond measure." See Scalia, 40 \textit{CASE W. RES. L. REV.} at 586-88. Justice Scalia notes that "[c]onsistency is the very foundation of the rule of law," and that consistency has a special role to play in judge-made law, "both judge-pronounced common law and judge-pronounced determinations of the application of statutory and constitutional provisions." \textit{Id.} at 588. "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic." \textit{Id.} By articulating a logical interpretive approach, our hope is to improve consistency in the application of federal statutes of limitations.

\textsuperscript{392} This is contrary to the conclusion of one commentator who suggests supersed- ing all statutes of limitations with an ad hoc balancing of competing interests by individual courts on a case-by-case basis. See Richardson, \textit{Ariz. St. L.J.} at 1060-62. This approach would completely undermine the role of the legislature in establishing statutes of limitations in the first place. The commentator cavalierly dismisses that role by remarking: "There is no reason to believe that limitations periods prescribed by legislatures for particular claims are any more reasonable or just than other periods that might have been chosen, nor is there any reason to believe that the legislature even considered whether the period chosen was especially reasonable. In fact, the limitations periods generally prescribed by legislatures are simply arbitrary." \textit{Id.} at 1058-59 (footnotes omitted).
E. BALANCING THE INTERESTS IN AN INTERPRETIVE APPROACH

Our interpretive approach seeks to balance the interests by giving due weight to the interests underlying the interpretive process itself. The incorporation of a discovery rule of accrual into many federal statutes of limitations represents a trend of incorporating equitable exceptions that were neither well-established at common law nor included within statutory language of federal limitations provisions. The balance of the interests tilted too far in favor of effectuating perceived statutory purposes through allowing individual equities to defeat explicit statutory proscriptions. The TRW decision appears to represent an end to that trend.

But that does not mean that a court may allow only those exceptions specifically mentioned in statutory language. The rule had been that a court could never extend the law to cases that were not included within the "letter of the law," including any limitations provision. Objective principles of statutory interpretation allow for the incorporation of well-recognized equitable exceptions. By incorporating those objective principles into an interpretive approach, we offer a methodology that appropriately balances all of the relevant interests.

CONCLUSION

There will continue to be litigation over whether a plaintiff's action, though untimely under a strict chronological calculation of a federal statute of limitations, is nevertheless saved from the limitations bar by virtue of an equitable exception. We submit that a threshold inquiry must be whether the federal statute incorporates a particular equitable exception that will save the plaintiff's action. In this article, we have attempted to set forth a framework for navigating this inquiry.

Our approach draws its substance from recent Supreme Court decisions that have interpreted federal statutes of limitations. Although the cases, when considered individually, have not always articulated a consistent and exacting analysis, the cases together reflect an evolution in interpretive analysis toward a more reliable and objective de-

393. See Angell, supra note 63, § 194, at 202-203 (stating that "it is not for the court to extend the law to all cases coming within the reason of it, so long as they are not within the letter"); Wood 1st Ed. supra note 50, § 6, at 9-10 (stating "[t]he general rule is, that whatever the courts may think the legislature would have done if it had foreseen a certain contingency, nevertheless, a case coming fairly within a limitation imposed by statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein") (footnotes omitted); 17 R.C.L. Limitation of Actions, § 190, at 829 (stating "[i]t is far better that occasionally one should suffer severely from the enforcement of the law, as the court finds it, than that they should endeavor to bend the law out of its manifest scope to avoid that result").
termination of Congressional intent. We found in the early discovery rule cases, *Urie* and *Kubrick*, that the Court engaged in an analysis that was not grounded in objective principles for determining Congressional intent. The *Urie* Court incorporated a discovery rule of accrual into the FELA based merely upon the perceived "humane legislative plan" of that statute. In *Kubrick* the Court implied that a discovery rule should apply to the FTCA—despite the lack of any evidence that Congress intended such a rule for the statute and in the face of legislative history indicating a Congressional understanding that a discovery rule did not apply to the limitations provision.

Several years after *Kubrick*, in *Irwin*, the Court began to articulate objective standards for determining Congressional intent with respect to limitations provisions. The *Irwin* Court showed that it was reasonable to presume that Congress intended to incorporate "equitable tolling" that applied to private defendants to similar actions against the United States. The Court's decisions in *Beggerly* and *Brockamp* demonstrated this presumption could be rebutted through evidence of Congressional intent. In *TRW*, we saw *Irwin*'s presumption broadened to a more general presumption — namely, that Congress is presumed to incorporate the common law background for federal statutes of limitations absent evidence of Congressional intent to change the common law. Though the *TRW* Court did not explicitly describe what that common law background was for the statute at issue, the Court’s opinion — and certainly Justice Scalia’s concurrence — suggested that the inquiry must be an exacting one. It was not enough to find a background of "equitable tolling," as *Irwin* and other cases suggested. Instead, because the particular equitable exception at issue — the discovery rule of accrual — had a unique history, a court must evaluate it independently to determine Congressional intent.

It follows that courts should also independently evaluate other equitable exceptions. The Supreme Court has recognized a few distinct equitable exceptions that are generally-recognized at common law, and there may be others. A court can presume that Congress intends to incorporate by silence only those particular equitable exceptions that were generally-recognized at common law at the time a statute was enacted.

The interpretive approach that we draw from these cases is supported by principles of statutory interpretation. Yet, the principles are subject to manipulation, and we have seen how courts can inject their own policy preferences under the cover of statutory interpretation. This can occur when a court bases its statutory interpretation on a broad statement of a statute’s purpose and nothing else, or when a
The courts emphasize one policy supporting limitations provisions to the exclusion of others.

The potential pitfalls of statutory construction do not justify an abandonment of the interpretive endeavor entirely. The goal of the interpretive process should be the even-handed implementation of Congress' policy choices. The law of limitations is particularly vulnerable to manipulation. The nature of statutes of limitations is that they "often make it impossible to enforce what are otherwise perfectly valid claims." The equities of individual cases can present compelling reasons to excuse compliance. Thus, it is even more important that courts, in applying statutes of limitations, scrupulously adhere to objective principles of statutory construction.

We have concluded that the Supreme Court failed in this endeavor when it incorporated a discovery rule of accrual into the FELA. Since that time, courts have incorporated the discovery rule into many other federal statutes, often without any interpretive analysis at all. By demanding a more exacting interpretive approach, the Court in TRW has hopefully put an end to that practice.

The equities in individual cases must sometimes give way to the consistent and evenhanded administration of the law to all cases. Our interpretive approach strikes the balance through a rebuttable presumption that Congress intends to incorporate only those particular equitable exceptions that were generally-recognized at the common law at the time of a statute's enactment. This approach restrains the courts from creating their own equitable exceptions, which can only undermine the interests supporting statutes of limitations and the interpretive process itself.

395. See Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980) (stating that "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law").