

The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act

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INTRODUCTION

Suppose Jack Plaintiff collides with a truck owned by the United States Postal Service and driven by a postal employee who was on his way to deliver the mail. Jack, having suffered serious injuries, files an administrative claim pursuant to the Federal Tort Claims Act (FTCA) with the Postal Service on November 16, 1990, claiming that the postal employee's negligence caused Jack's injuries. Seven months pass and Jack does not receive a settlement or denial of his claim. On June 16, 1991, Jack, by certified mail, sends a letter to the Postal Service in which he states that he filed an administrative claim more than six months ago and that the Service has failed to act on the claim. Pursuant to 28 U.S.C. § 2675(a),¹ Jack informs the Service that he is deeming his administrative claim denied due to agency inaction. Jack then hires an attorney, provides the attorney with a copy of the administrative claim and the deemed-denial letter, and instructs the attorney to file suit. The attorney files suit on June 16, 1992, one year after Jack provided the

1. Section 2675(a) provides:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

28 U.S.C. § 2675(a) (1994).

Postal Service with written notice that he was deeming his claim denied.

Now suppose Jill Plaintiff is allegedly exposed to radioactive materials by an agency of the United States, and that as a result of the alleged exposure, she has cancer. Jill files an FTCA claim with the relevant federal agency in 1970, claiming that employees of the United States acting within the scope of their employment negligently exposed her to those cancer-causing chemicals. The agency neither settles nor denies the claim, and Jill thereafter deems her administrative claim denied by filing suit in federal district court on November 29, 1975. Jill, however, is unable to drum up the evidence to prove causation, and her case is eventually dismissed without prejudice in 1980. In the interim, epidemiological studies are conducted that arguably establish a cause-effect relationship between Jill's cancer and the chemicals to which she was allegedly exposed. On November 29, 1995, a full twenty years after she deemed her claim denied, Jill files a second suit in federal district court.

In response to the United States' contention that the claims are time-barred because the suits were filed outside of the six-month limitations period prescribed in 28 U.S.C. § 2401(b), Jack and Jill argue that their suits are not barred because § 2401(b) does not mention deemed denials, only formal denials, and the administrative agencies never formally denied their claims in writing.² As the law now stands, in certain courts, Jack and Jill would likely defeat any argument by the United States that their FTCA claims are time-barred.³ Jack's suit and Jill's second suit

2. Section 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1994).

3. See *Lehman v. United States*, 154 F.3d 1010, 1013-15 (9th Cir. 1998); *Pascale v. United States*, 998 F.2d 186, 187-93 (3d Cir. 1993); *Parker v. United States*, 935 F.2d 176, 177-78 (9th Cir. 1991); see also *Arigo v. United States*, 980 F.2d 1159, 1161 (8th Cir. 1992) (stating in dictum that the six-month limitations period in § 2401(b) does not apply to deemed denials); *Leonhard v. United States*, 633 F.2d 599, 624 n.36 (2d Cir. 1980) (same), *cert. denied*, 451 U.S. 908 (1981); *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 388-90 (E.D.N.Y. 1988) (holding that the six-month limitations period in § 2401(b) does not apply to deemed denials). But see *Miller v. United States*, 741 F.2d 148, 150 (7th Cir. 1984) (stating in dictum that deemed denials are subject to the six-month limitations period prescribed in § 2401(b)); *Moore v. United States Postal Serv.*, No. 95-1021, 1995 WL 632365, at *2 n.5 (7th Cir. Oct. 26, 1995) (same);

would not be time-barred, so the cases say, because, although § 2675(a) provides two methods of exhausting FTCA administrative remedies (formal denials by federal agencies and deemed denials by FTCA claimants), § 2401(b) does not prescribe a limitations period for suits brought on the heels of a deemed denial.⁴

This oddity in the FTCA poses the following problem. The FTCA represents a limited waiver of the United States' sovereign immunity that must be strictly construed, and the statute of limitations applicable to FTCA actions is intimately tied to that waiver.⁵ Could it be that Congress waived the United States' sovereign immunity to the extent that no limitations period applies to deemed denials? Did Congress intend to provide "deemed deniers" a right against the United States enforceable in perpetuity? Although commentators have discussed various aspects of the 1966 amendments to the FTCA,⁶ no commentator

Catherman v. United States, No. 90-CV-576, 1992 WL 175258, at *1 (N.D.N.Y. July 21, 1992) (holding that if an agency does not formally deny a claim within six months after the claim is properly presented to a federal agency, the claim is automatically deemed denied, thereby triggering the six-month limitations period in § 2401(b)).

4. See *Lehman*, 154 F.3d at 1013-15; *Pascale*, 998 F.2d at 188-89; *Arigo*, 980 F.2d at 1161; *Parker*, 935 F.2d at 177; *Hannon*, 701 F. Supp. at 389.

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

6. See Philip H. Corboy, *The Revised Federal Tort Claims Act: A Practitioners View*, 2 FORUM 67 (1967) (discussing the 1966 amendments to the FTCA); Philip H. Corboy, *Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities*, 28 DEPAUL L. REV. 609, 635-42 (1979) (discussing the presentment requirements of the FTCA); Carl T. Grasso, *The Statute of Limitations as Applied to Medical Malpractice Actions Brought Under the Federal Tort Claims Act*, 117 MIL. L. REV. 1 (Summer 1987) (discussing *Kubrick* and accrual); Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212 (1967) (presenting general discussion of 1966 amendments to the FTCA); Richard Parker, *Is the Doctrine of Equitable Tolling Applicable to the Limitations Periods in the Federal Tort Claims Act?*, 135 MIL. L. REV. 1 (Winter 1992) (discussing equitable tolling of § 2401(b)); Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act*, 29 SETON HALL L. REV. (forthcoming March 1999) (same); Michaelle F. Pitard, *Procedural Aspects of the Federal Tort Claims Act*, 21 LOY. L. REV. 899 (1975) (discussing the administrative-exhaustion scheme of the FTCA); Philip Silverman, *The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act*, 45 J. AIR L. & COM. 41 (1979) (discussing the 1966 amendments to the FTCA); Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1 (1991) (discussing the meaning of accrual in § 2401(b)); Scott D. Stubblebine, *Mass Toxic Claims Under the F.T.C.A., the First Steps: The Administrative Claim Requirement and Statute of Limitations*, 35 FED. B. NEWS & J. 328 (1988) (discussing exhaustion and statute of limitations in the context of mass toxic tort claims); Rollin A. Von Broekhoven, *The Federal Tort Claims Act and Administrative Claims*, 20 BAYLOR L. REV. 336 (1967) (discussing administrative-exhaustion procedure in § 2675(a)); Carl M. Wagner, *United States v. Kubrick: Scope and Application*, 120 MIL. L. REV. 139 (Spring 1988) (discussing accrual in § 2401(b)); Donald N. Zillman, *Presenting a Claim Under the Federal Tort Claims Act*, 43 LA. L. REV. 961 (1983) (discussing the presentment requirements of the FTCA); Robert M. Hamblett, *Case Comment*, 14 SUFFOLK U.L. REV. 1428 (1980) (discussing *Kubrick* and accrual); Daniel M. Katlein,

has critically examined the statute of limitations problem posed by deemed denials—this, despite the fact that an estimated one-third of administrative claims are deemed denied by the filing of a lawsuit.⁷

In this Article, I suggest that, contrary to the conclusion reached by some courts, Congress did not waive the United States' sovereign immunity to the extent that no limitations period applies to deemed denials. The central thrust of court decisions to the contrary is that the FTCA's statute of limitations is silent with respect to deemed denials, and that Congress's silence therefore evinces an intent not to impose a limitations period on deemed denials. I argue that this analysis of congressional silence is fundamentally mistaken, for it ignores the well established practice of borrowing a state or federal limitations period when Congress is silent on the limitations question. I show that although the borrowing principle has not been imported into the FTCA context, the deemed-denial problem is a perfect candidate for application of that principle, that a federal (not state) statute of limitations should be borrowed, and that the six-month period prescribed in § 2401(b) should apply to deemed denials.

Part I provides the background to the statute of limitations problem posed by the deemed-denial option, presenting the contours of the administrative-exhaustion scheme of the FTCA. Part II demonstrates

Comment, *Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?*, 29 EMORY L.J. 755 (1980) (discussing the administrative-settlement process); Note, *Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?*, 81 MICH. L. REV. 1641 (1983) (discussing claim-presentation requirements of the FTCA); Note, *Federal Tort Claims Act: Notice of Claim Requirement*, 67 MINN. L. REV. 513 (1982) (same).

7. Interview with Judith Regan, Counsel for the United States Air Force (Jan. 21, 1998). Commentators have made only passing reference to the deemed-denial/statute of limitations problem. See, e.g., Silverman, *supra* note 6, at 42. In a law review article published in the *Loyola Law Review* over twenty years ago, an Assistant United States Attorney came closest to discussing the deemed-denial problem:

If after six months from the date of filing the agency does not formally deny the claim, the claimant has the option to deem the claim denied and commence suit. Presumably, the six month period in which to file suit begins to run from the time the claimant exercises his option and deems the claim denied; however, the Tort Claims Act neglects to specify what acts constitute the exercise of the option. While the filing of suit or written notice to the agency should reasonably constitute exercise of the option, it is conceivable that a claimant who takes no affirmative action could extend the statute of limitations indefinitely.

Pitard, *supra* note 6, at 904 (footnote omitted). Unfortunately, no further discussion of the problem was provided.

that the deeming option presents a statute of limitations problem when a claimant (like Jack) provides an agency written notice of the deemed-denial decision, or when a claimant (like Jill) files a second suit. Part II also suggests that much of the confusion over the statute of limitations applicable to deemed denials arises from a misunderstanding of the Justice Department's position on the issue. Part III discusses the role statutes of limitations play in our civil-liability system, the separation of powers problem presented when Congress fails to prescribe a limitations period, and introduces the borrowing principle as a statutory construction tool courts have developed to fill statute of limitations gaps left by Congress. In Part IV, I apply the borrowing principle to the deeming option and conclude that courts should impose the six-month federal limitations period prescribed in § 2401(b) on deemed-denial lawsuits. Finally, Part V shows that court decisions holding that a no-limitations rule applies to deemed denials are wrongly decided.

I. THE FEDERAL TORT CLAIMS ACT

A. *The Evolution of the FTCA's Administrative-Exhaustion Scheme*

"The King . . . is not only incapable of *doing* wrong, but even of *thinking* wrong," wrote Blackstone.⁸ This sentence states quite succinctly the doctrine of sovereign immunity, which, for a long time, insulated the United States from liability for torts committed by its employees.⁹ Prior to 1946, the only nonmaritime tort remedies available to injured persons consisted of suing the government employee individually or seeking compensation from Congress through the private bill.¹⁰ Over time, however, suits against individual government employees proved inadequate, Congress was flooded with claims for tort compensation, and a number of meritorious claims were either never settled or never heard.¹¹ This system of adjudicating tort claims against the government increasingly became the subject of academic criticism, with some calling for a wholesale change in the tort-claims process.¹²

8. 1 WILLIAM BLACKSTONE, COMMENTARIES 239.

9. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821).

10. See *German Bank v. United States*, 148 U.S. 573, 579-80 (1893); 1 LESTER S. JAYSON, *HANDLING FEDERAL TORT CLAIMS* 2-6 (1982). The private bill consisted of a legislative proposal presented to Congress that would provide compensation to an individual killed or injured at the hands of a government employee. See Roscoe Pound, *The Tort Claims Act: Reason or History?*, 37 TUL. L. REV. 685, 689 (1963).

11. See *Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953); J. Grant McCabe III, *Observations on the Federal Tort Claims Act*, 3 FORUM 66, 67 (1968).

12. See, e.g., Irvin M. Gottlieb, *Tort Claims Against the United States*, 30 GEO. L.J. 462, 464 (1942); Alexander Holtzoff, *The Handling of Tort Claims Against the*

That change came in 1946. After a long and protracted battle in previous Congresses,¹³ the cumbersome, often inequitable, and “notoriously clumsy”¹⁴ process of resolving tort claims against the United States was scrapped with the enactment of the Federal Tort Claims Act (FTCA). The FTCA waived the United States’ sovereign immunity from tort suits arising out of the negligent acts or omissions of government employees acting within the scope of their employment.¹⁵ Under the FTCA, the United States is liable to the same extent as a private person in the place in which the act or omission occurred.¹⁶ The FTCA has the dual benefit of providing injured persons redress for their injuries while at the same time relieving Congress of the burden of earmarking tort compensation through the cumbersome private-bill process.¹⁷

Although Congress waived the United States’ immunity from tort suits more than fifty years ago, the scope of that waiver still remains far from clear. In particular, confusion persists over the mandatory administrative-exhaustion scheme of the FTCA, confusion that is rooted in the changes made to the FTCA since its enactment. The original version of the FTCA did not contain a mandatory administrative-settlement process. FTCA claimants could submit their tort claims to agencies only if the claims amounted to less than \$1,000 (later raised to \$2,500), and claimants were expressly given the option to withdraw their claims with fifteen-days’ notice to the agency.¹⁸ Submitting a tort claim to the appropriate federal agency was not a condition precedent to filing suit in an Article III court.¹⁹ In addition, prior to 1966, because administrative agencies had limited authority to settle claims, FTCA

Federal Government, 9 LAW & CONTEMP. PROBS. 311, 321-22 (1942); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-1925).

13. See Irvin M. Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1, 2-3 (1946).

14. *Dalehite*, 346 U.S. at 25.

15. Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified in scattered sections of 28 U.S.C.); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1994). There are a number of exceptions to the waiver (found in 28 U.S.C. § 2680), the most notable of which is the discretionary function exception. See David S. Fishback & Gail Killefer, *The Discretionary Function Exception to the Federal Tort Claims Act: Dalehite to Varig to Berkovitz*, 25 IDAHO L. REV. 291 (1988-89).

16. 28 U.S.C. § 1346(b)(1) (1994 & Supp. 1998).

17. See 1 JAYSON, *supra* note 10, at 2-6.

18. 28 U.S.C. § 2675(b), *repealed and replaced by* 28 U.S.C. § 2675(a) (1994).

19. See *Whistler v. United States*, 252 F. Supp. 913, 917 (N.D. Ind. 1966); *Schlingman v. United States*, 229 F. Supp. 454, 455 (S.D. Cal. 1963).

claimants had an incentive to file suit in an Article III court because, once in court, the claimant could negotiate a settlement with the Justice Department, which was not hamstrung by artificially low settlement authority.²⁰

After the FTCA was enacted in 1946, the Justice Department's experience in handling tort claims revealed that most claims were settled without the need for expensive and time-consuming litigation.²¹ Armed with this experience, the Department in 1966 presented and Congress enacted legislation that changed the FTCA by imposing on FTCA claimants a mandatory administrative-exhaustion procedure. The 1966 amendments required FTCA claimants first to present their tort claims, regardless of the dollar amount, to administrative agencies for possible settlement. The exhaustion provision is found in § 2675(a), and it provides in part as follows:

An action shall not be instituted upon a claim against the United States . . . [1] unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. [2] The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.²²

Section 2675(a) of the FTCA precludes claimants from filing suit in federal district court for six months after the claim is properly presented to an administrative agency. After the six-month period expires, Congress gave claimants a choice to negotiate further with the agency until the claim is resolved, or deem the claim denied. The legislative history bears this out:

Under the bill a claimant must file his claim with the agency within two years after the claim accrues. The agency shall have six months to consider the claim prior to granting or denying it. At the end of this six month period, if the agency does not act, the claimant may at his option elect to regard this inaction as a final denial and proceed to file suit.

20. See, e.g., *Warren v. United States Dep't of the Interior Bureau of Land Man.*, 724 F.2d 776, 778-79 (9th Cir. 1984) (en banc).

21. See HOUSE COMM. ON THE JUDICIARY, AMENDING THE FEDERAL TORT CLAIMS ACT TO AUTHORIZE INCREASED AGENCY CONSIDERATION OF TORT CLAIMS AGAINST THE GOVERNMENT, AND FOR OTHER PURPOSES, H.R. REP. NO. 89-1532, at 6 (1966) [hereinafter H.R. REP. NO. 1532]; SENATE COMM. ON THE JUDICIARY, INCREASED AGENCY CONSIDERATION OF TORT CLAIMS AGAINST THE GOVERNMENT, S. REP. NO. 89-1327, at 2-3 (1966) [hereinafter S. REP. NO. 1327].

22. Improvement of Procedures in Claims Settlement and Government Litigation: Hearing Before Subcomm. of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 13 (1966) (testimony of John W. Douglas, Assistant Attorney General) [hereinafter Hearings]; see also *Mack v. United States Postal Serv.*, 414 F. Supp. 504, 507-08 (E.D. Mich. 1976).

It is recognized that there will be some difficult tort claims that cannot be processed and evaluated in the six months period given to the agency. The great bulk of them, however, should be ready for decision within this period. For those claims that are not ready for decision, we expect that in some instances the agency will have convinced the claimant that it is sincerely seeking to reach a fair decision. Under such circumstances, the claimant might well wish not to break off negotiations and file suit. Thus, even though this six months period may prove insufficient in some instances, we do not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims.²³

Moreover, the 1966 amendments also eliminated the incentive to file suit by raising agencies' settlement authority to \$25,000 and by permitting agencies to settle a case for more than that amount with approval from the Attorney General of the United States.²⁴ As stated in the legislative history,

[t]here is good reason to believe that . . . in many . . . cases a claimant may decide to file suit because of the present limits upon administrative settlement. This is because as soon as the case is filed, the Government can negotiate a settlement without regard to that limitation. It does not appear that this procedure is conducive to efficient claims administration. The filing of the suit and the consequent expense to the Government in preparing the case would appear to be unnecessarily involved when the case is a proper one for early settlement.²⁵

To be sure, imposing an administrative-exhaustion requirement on claimants who bring tort actions against the sovereign was not a novel idea. The 1966 amendments to the FTCA were modeled after similar schemes adopted by the States, in which plaintiffs seeking tort damages from municipalities were required to submit their claims to appropriate state agencies before filing suit in state court.²⁶ These state schemes "protect[ed] the municipality from the expense of needless litigation, giv[ing] the municipality an opportunity for investigation, and allow[ing] it to adjust differences and settle claims without suit."²⁷ In

23. *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing Before Subcomm. of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 13 (1966) (testimony of John W. Douglas, Assistant Attorney General) [hereinafter *Hearings*]; see also *Mack v. United States Postal Serv.*, 414 F. Supp. 504, 507-08 (E.D. Mich. 1976).

24. 28 U.S.C. § 2672 (1994).

25. H.R. REP. NO. 1532, *supra* note 21, at 8; S. REP. NO. 1327, *supra* note 21, at 4.

26. See H.R. REP. NO. 1532, *supra* note 21, at 7; S. REP. NO. 1327, *supra* note 21, at 3-4.

27. H.R. REP. NO. 1532, *supra* note 21, at 7 (quoting 18A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.153 (3d ed. 1937)); S. REP. NO. 1327, *supra*

addition, requiring a claimant first to submit a tort claim to the relevant state agency puts the municipality on notice that it may be liable in tort, permitting state agencies “to get their proof in hand before the witnesses scatter, and while the facts are fresh in their minds.”²⁸

In addition to keeping tort claims out of court and permitting federal agencies to gather relevant evidence, the six-month no-suit period in the FTCA also raises administrative-exhaustion questions because the previous version of § 2675(b) permitted FTCA claimants to withdraw their administrative claims with fifteen days’ notice to the agency.²⁹ Plainly, former § 2675(b) provided FTCA claimants the option of backing out of the administrative process at any time if (1) agency delay somehow compromised the claimant’s ability to pursue a claim in an Article III court,³⁰ or (2) the claimant believed she could get a better deal by filing suit and negotiating a settlement with the Justice Department. The 1966 amendments preserved the claimant’s option to withdraw from the administrative-settlement process and at the same time imposed the six-month mandatory no-suit period to encourage fruitful settlement negotiations, and perhaps settlement itself, with administrative agencies.³¹

As the text of § 2675(a) makes clear, Congress put the deeming option on the same exhaustion footing as a formal denial by defining both as a “final denial” for purposes of FTCA administrative exhaustion.³² Because similar terms in a statute are to be accorded the same meaning,³³ § 2675(a) speaks of one “final denial” that can be achieved in two different ways. This conclusion also follows logically from the plain language of § 2675(a), which states in part that a deemed denial is “a final denial . . . *for purposes of this section*,” and from the legislative history, which defines a final denial alternatively as a written or

note 21, at 4 (same).

28. 18A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.153 (3d ed. 1937 & rev. 1993).

29. See 28 U.S.C. § 2675(b), *repealed and replaced by* 28 U.S.C. § 2675(a) (1994).

30. See Gottlieb, *supra* note 13, at 24 (stating that the withdrawal provision “will prevent the claimant from suffering undue delay and leave in his hands the initiative for expeditious action”).

31. See H.R. REP. NO. 1532, *supra* note 21, at 4 (“Subsection (b) amends subsection (b) of section 2675 by deleting the first sentence of the subsection. This sentence is in effect replaced by the provision of subsection (a) of section 2675, as amended, which states that after 6 months without final action, the individual at his own option can deem the claim to be finally denied and be free to commence suit.”); S. REP. NO. 1327, *supra* note 21, at 7.

32. 28 U.S.C. § 2675(a) (1994).

33. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995).

“deemed” denial.³⁴ Accordingly, exhaustion of administrative remedies (i.e., final administrative denials) for purposes of the FTCA includes formal, written denials and deemed denials. Courts have so held.³⁵

From an exhaustion standpoint, what happens when the six-month settlement period expires and a federal agency has not yet settled or denied the administrative claim? The answer is nothing—a limitations period does not begin running nor is the claim automatically deemed denied or formally denied six months and one day after the claim is submitted to the agency. Rather, if six months passes and the agency has not acted on the tort claim, the only change (from an exhaustion standpoint) is that the option to deem a claim denied is triggered. That does not mean, of course, that the claimant alone has the power to exhaust her administrative remedies through a deemed denial. The agency remains free formally to deny the claim at any time after the six-month settlement period expires, but before the claimant exercises the deeming option.³⁶ Plainly, this is how the United States can avoid lengthy delays in suits filed against it.

The FTCA’s revised settlement scheme promotes a number of policy objectives. By encouraging settlement of tort claims within administrative agencies,³⁷ Congress intended to reduce court congestion and avoid unnecessary litigation.³⁸ Plainly, to the extent that claims are

34. See 28 U.S.C. § 2675(a) (1994) (emphasis added); H.R. REP. NO. 1532, *supra* note 21, at 8; S.REP. NO. 1327, *supra* note 21, at 5.

35. See *Lehman v. United States*, 154 F.3d 1010, 1013-15 (9th Cir. 1998); *Pascale v. United States*, 998 F.2d 186, 188 (3d Cir. 1993); *Arigo v. United States*, 980 F.2d 1159, 1160-61 (8th Cir. 1992); *Parker v. United States*, 935 F.2d 176, 177 (9th Cir. 1991); *McCallister v. United States*, 925 F.2d 841, 843 (5th Cir. 1991) (per curiam); *Conn v. United States*, 867 F.2d 916, 920-21 (6th Cir. 1989); *Stahl v. United States*, 732 F. Supp. 86,88 (D. Kan. 1990); *Boyd v. United States*, 482 F. Supp. 1126, 1129-30 (W.D. Pa. 1980); see also *Silverman*, *supra* note 6, at 60.

36. See *McCallister*, 925 F.2d at 843; *Conn*, 867 F.2d at 920-21; *Anderson ex rel. Anderson v. United States*, 803 F.2d 1520, 1522 (9th Cir. 1986); *Stahl*, 732 F. Supp. at 88; *Chambly v. Lindy*, 601 F. Supp. 959, 963-64 (N.D. Ind. 1985); *Boyd*, 482 F. Supp. at 1129-30; *Mack v. United States Postal Serv.*, 414 F. Supp. 504, 507 (E.D. Mich. 1976).

37. See HOUSE COMM. ON THE JUDICIARY, ESTABLISHING A STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT, H.R. REP. NO. 89-1534, at 3 (1966) [hereinafter H.R. REP. NO. 1534]; SENATE COMM. ON THE JUDICIARY, ESTABLISHING A STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT, S. REP. NO. 89-1328, at 2 (1966) [hereinafter S. REP. NO. 1328]; H.R. REP. NO. 1532, *supra* note 21, at 3, 6-8, 10; S. REP. NO. 1327, *supra* note 21, at 2, 3, 5-6, 11.

38. See H.R. REP. NO. 1532, *supra* note 21, at 6, 8, 10, 12; H.R. REP. NO. 1534, *supra* note 36, at 3; S. REP. NO. 1327, *supra* note 21, at 2, 4, 10, 13; S. REP. NO. 1328, *supra* note 36, at 2.

settled within agencies, suits are not filed in district court, thereby decreasing judicial case loads. Moreover, the 1966 amendments to the FTCA were intended to create a dispute resolution framework that is fair to FTCA claimants as well as the United States.³⁹ The primary benefit accruing to the United States, and in particular the Justice Department, is that the settlement of claims within administrative agencies frees up limited Department resources for more pressing matters.⁴⁰ At the same time, the administrative-settlement scheme benefits FTCA claimants by permitting them to forego the expense of full-blown litigation.⁴¹ It is clear, therefore, that the administrative-exhaustion scheme of the FTCA benefits all relevant parties (courts, claimants, agencies, and the Justice Department) with a system of dispute resolution that was more efficient and equitable.⁴²

B. Administrative Exhaustion and Article III Jurisdiction

The FTCA's mandatory exhaustion requirement contains a jurisdictional component, so that exhaustion of administrative remedies is a jurisdictional prerequisite for filing an FTCA suit in federal court, a prerequisite that cannot be waived.⁴³ This concept of exhaustion first, jurisdiction second is grounded in two well settled principles. First, the United States' waiver of sovereign immunity is tied to § 2675(a), such that "the right to sue the government exists only by virtue of § 2675, which fixes the terms and conditions on which suit may be instituted."⁴⁴

39. See H.R. REP. NO. 1532, *supra* note 21, at 6; S. REP. NO. 1327, *supra* note 21, at 2; *Hearings*, *supra* note 22, at 15.

40. See H.R. REP. NO. 1532, *supra* note 21, at 6; S. REP. NO. 1327, *supra* note 21, at 2; *Hearings*, *supra* note 22, at 15.

41. See H.R. REP. NO. 1532, *supra* note 21, at 7; S. REP. NO. 1327, *supra* note 21, at 3; *Hearings*, *supra* note 22, at 15.

42. See, e.g., H.R. REP. NO. 1532, *supra* note 21, at 10 (statement by Attorney General Nicholas de B. Katzenbach); S. REP. NO. 1327, *supra* note 21, at 10 (same).

43. See *McNeil v. United States*, 508 U.S. 106, 110-13 (1993); *Bruns v. National Credit Union Admin.*, 122 F.3d 1251, 1254 (9th Cir. 1997); *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997); *Porter v. Fox*, 99 F.3d 271, 274 (8th Cir. 1996); *Price v. United States*, 81 F.3d 520, 521 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 295 (1996); *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *Cotto v. United States*, 993 F.2d 274, 280 (1st Cir. 1993); *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 273 (10th Cir. 1991); *Plyler v. United States*, 900 F.2d 41, 42 (4th Cir. 1990); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1463 (10th Cir. 1989); *GAF Corp. v. United States*, 818 F.2d 901, 916 n.86 (D.C. Cir. 1987); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986); *Jackson v. United States*, 730 F.2d 808, 809 (D.C. Cir. 1984) (per curiam); *Swift v. United States*, 614 F.2d 812, 814-15 (1st Cir. 1980); *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972).

44. *Plyler*, 900 F.2d at 42; see *Gregory v. Mitchell*, 634 F.2d 199, 205 (5th Cir. 1981).

A condition for filing suit against the United States is that an FTCA claimant first submit her tort claim to the relevant federal agency for possible settlement and wait six months before filing suit in federal district court. Failure to do so deprives federal district courts of jurisdiction to adjudicate that claim.⁴⁵ Second, exhaustion of administrative remedies means that all administrative remedies prescribed by Congress have been pursued unsuccessfully.⁴⁶ That leaves an FTCA claimant with the option of turning to an Article III court in the hopes that she may be awarded compensation there.

The respective jurisdiction of administrative agencies and federal courts is central to any garden-variety exhaustion scheme like the FTCA. "The doctrine of exhaustion of administrative remedies," the Supreme Court has said, "is one among related doctrines . . . that govern the timing of federal-court decisionmaking."⁴⁷ Providing agencies the first shot at resolving a claim suggests that agency expertise should, in the first instance, be brought to bear on the legal claim asserted.⁴⁸ So, for example, when Congress amended the FTCA in 1966 and imposed on claimants a mandatory administrative-settlement process, Congress recognized the indispensability of agency expertise in the resolution of tort claims brought against the United States.⁴⁹ That expertise, in turn, should (or so Congress thought) result in less litigation because claims that would ordinarily be adjudicated in an Article III court, perhaps even without agency input, would now be resolved within the agency.⁵⁰

45. See, e.g., *McNeil*, 508 U.S. at 110-13 (holding that failure to present tort claim to administrative agency divests federal district court of jurisdiction over the claim); *Caton v. United States*, 495 F.2d 635, 638-39 (9th Cir. 1974) (holding that suit filed within six months after an administrative claim was filed with the agency deprives federal district court of jurisdiction over the claim).

46. See *McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992); *McKart v. United States*, 395 U.S. 185, 193-95 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985) (construing § 2675(a) of the FTCA).

47. *McCarthy*, 503 U.S. at 144.

48. See *id.* at 145; *Bowen v. City of New York*, 476 U.S. 467, 484 (1986); *McKart*, 395 U.S. at 194; Israel Convisser, *Primary Jurisdiction: The Rule and Its Rationalizations*, 65 YALE L.J. 315, 315, 329-30, 335-37 (1956); Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037-38 (1964); Note, *Primary Jurisdiction — Effect of Administrative Remedies on the Jurisdiction of Courts*, 51 HARV. L. REV. 1251 (1938) [hereinafter *Primary Jurisdiction*].

49. See H.R. REP. NO. 1532, *supra* note 21, at 7; S. REP. NO. 1327, *supra* note 21, at 3.

50. See H.R. REP. NO. 1532, *supra* note 21, at 7; S. REP. NO. 1327, *supra* note 21, at 3.

Intimately connected to the agency-expertise rationale behind administrative-exhaustion schemes is the well recognized notion that agencies have “primary jurisdiction” over legal claims.⁵¹ This means, of course, that a claim filed in an Article III court, either before that claim was submitted to an agency or before the prescribed administrative process has been exhausted, deprives an Article III court of jurisdiction to adjudicate the claim. In this way, the doctrine of administrative exhaustion ensures that federal agencies exercise their authority to adjudicate claims without undue interference from Article III courts, while at the same time promoting judicial efficiency by keeping out of court claims susceptible to resolution at the administrative level.⁵²

The principle of primary jurisdiction finds its expression in the FTCA, for it is well settled that an FTCA suit filed before a claim is presented to an agency or before the six-month no-suit period expires precludes federal district courts from considering the claim.⁵³ At the same time, the converse is also true; that is, once an administrative claim has been finally denied, an agency’s primary jurisdiction is terminated altogether. When a claim is finally denied by the agency or deemed denied by the claimant, there is nothing left for the agency to do; the claimant has complied with the administrative process and come away empty-handed. But an agency’s expertise is not conclusive, for conferring on agencies primary jurisdiction over FTCA claims does not preclude Article III jurisdiction if the claimant is unsuccessful in the administrative process.⁵⁴ The FTCA claimant’s “consolation prize,” if you will, is that upon exhaustion, she receives a jurisdictional ticket to federal district court.

What that ticket buys the claimant depends upon the nature of the final denial. With respect to formal denials and written-notice deemed

51. See, e.g., *McCarthy*, 503 U.S. at 145; *United States v. Jones*, 336 U.S. 641, 652-53 (1949); *Litton Sys., Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418, 420 (5th Cir. 1976) (opinion of Wisdom, J.); *Civil Aeronautics Bd. v. Modern Air Transport, Inc.*, 179 F.2d 622, 624 (2d Cir. 1950); *Civil Aeronautics Bd. v. Aeromatic Travel Corp.*, 341 F. Supp. 1271, 1280 (E.D.N.Y. 1971); *Charles Gabus Ford, Inc. v. Iowa State Highway Comm’n*, 224 N.W.2d 639, 647 (Iowa 1974); Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 993-94 (1939); Jaffe, *supra* note 48, at 1037-38; *Primary Jurisdiction*, *supra* note 48, at 1251-52.

52. *McCarthy*, 503 U.S. at 145.

53. See *supra* note 43 (authorities cited therein).

54. To be sure, if the FTCA claimant accepts a settlement offer from the agency, Article III jurisdiction is eliminated.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2672 (1994).

denials, the FTCA claimant floats in jurisdictional limbo, for neither the agency (because there has been a “final denial” of the claim) nor an Article III court (because no lawsuit has yet been filed) have jurisdiction over the claim. However, if a claimant exercises the deeming option by filing a lawsuit, a federal district court maintains “exclusive jurisdiction” over the claim pursuant to 28 U.S.C. § 1346(b)(1).⁵⁵ And federal district courts logically have exclusive jurisdiction over lawsuits filed on the heels of a formal or written-notice denial. Thus, once FTCA administrative remedies are exhausted and a suit in federal district court has been filed against the United States, state courts, federal agencies, or any other bodies are deprived of jurisdiction to adjudicate the tort claim.⁵⁶

55. Section 1346(b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have *exclusive jurisdiction* of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (1994 & Supp. 1998) (emphasis added). *See* Kanar v. United States, 118 F.3d 527, 530 (7th Cir. 1997) (opinion of Easterbrook, J.) (holding that § 1346(b) is the statute which invests federal district courts with jurisdiction over an FTCA claim); *Rutkofske v. United States*, No. 95-2038, 1997 WL 299382, at *2 (6th Cir. June 4, 1997) (same); *Cupit v. United States*, 964 F. Supp. 1104, 1107 & n.2 (W.D. La. 1997) (same).

56. In an unpublished decision, the D.C. Circuit appears to have confirmed this reading of the administrative-exhaustion scheme of the FTCA. In *Daniel v. Wolpert*, No. 93-5094, 1993 WL 485640, at *1 (D.C. Cir. Oct. 14, 1993) (per curiam), the court reversed a district court’s order of dismissal, holding among other things that the plaintiff had stated a claim under the FTCA. Because the opinion is short, it is difficult to determine precisely the facts and circumstances surrounding the plaintiff’s FTCA claim. Nevertheless, the court did discuss administrative exhaustion. The facts showed that the plaintiff filed an administrative claim in July 1992 and deemed his claim denied by filing suit on March 1993. Approximately five months after the plaintiff deemed his claim denied, the agency handling the plaintiff’s claim interposed a formal denial. The D.C. Circuit, however, held that the plaintiff had exhausted his administrative remedies when he deemed his claim denied. *Id.* at *1. *Daniel*, therefore, supports the view that interposing a formal denial after an FTCA claimant has deemed a claim denied has no legal effect. I shall have more to say about this later. *See infra* Part IV.B.2.b (discussing the meritless contention that interposing a formal denial after a deemed denial precludes the application of the borrowing principle).

II. THE STATUTE OF LIMITATIONS PROBLEM POSED BY THE DEEMED-DENIAL OPTION OF THE FTCA

A. *The Problem*

The FTCA's statute of limitations, § 2401(b), imposes two limitations periods on claimants. The claimant must first submit an administrative claim to the relevant federal agency within two years after the claim accrues.⁵⁷ The claimant then has six months after the agency formally denies the claim in writing, by certified or registered mail, to file suit in federal district court.⁵⁸ Like most exhaustion schemes, the FTCA statute of limitations is triggered at two distinct times — when the claim accrues and when administrative remedies have been exhausted.⁵⁹ In the FTCA context, then, the two-year period in § 2401(b) prescribes a time limit within which a claimant must submit her claim to an administrative agency, and the six-month period prescribes a time limit within which a claimant must file suit in an Article III court. These limitations periods represent the balance Congress struck between the competing policies underlying statutes of limitations, and because the FTCA's statute of limitations is intimately connected to the United States' waiver of sovereign immunity, courts are not free to expand those time periods.⁶⁰

The six-month limitations period in § 2401(b) is at the center of the statute of limitations problem in the FTCA. Specifically, although the FTCA provides for formal and deemed-denial methods of exhausting administrative remedies, § 2401(b) prescribes a six-month limitations period only for formal-denial suits.⁶¹ Section 2401(b) on its face says nothing about deemed denials. Prior to 1966, when the FTCA permitted claimants to withdraw their administrative claims, § 2401(b) prescribed

57. 28 U.S.C. § 2401(b) (1994). Section 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Id.

58. *Id.*

59. *See, e.g.*, *Crown Coat Front Co. v. United States*, 386 U.S. 503, 507, 511-12 (1967); *Group Health Inc. v. United States*, 662 F. Supp. 753, 762-63 (S.D.N.Y. 1987) (and authorities cited therein).

60. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Manko v. United States*, 830 F.2d 831, 839 (8th Cir. 1987) (quoting *Kubrick*, 444 U.S. at 117-18).

61. *See* 28 U.S.C. § 2401(b) (1994); 28 U.S.C. § 2675(a) (1994).

a six-month limitations period for withdrawals.⁶² In 1966, however, Congress “simplif[ied]” § 2401(b) to comport with the new mandatory administrative exhaustion scheme codified in § 2675(a).⁶³

Congress’s simplification of § 2401(b) lays the groundwork for the statute of limitations problem posed by the deeming option. To begin with, an examination of § 2675(a) and the legislative history accompanying that provision suggests that Congress did not anticipate that the deemed-denial option would raise a statute of limitations problem at all. As explained below,⁶⁴ § 2675(a) does not prescribe a particular method of deeming a claim denied. That section simply says that the FTCA claimant has the “option” to deem a claim denied, but the text of § 2675(a) does not define “option” or “deemed.”⁶⁵ The legislative history, however, suggests that Congress anticipated that most FTCA claimants would deem their claims denied by filing a lawsuit,⁶⁶ even though § 2675(a) does not prohibit FTCA claimants from deeming their claims denied by, for example, providing an agency written notice of their deemed-denial decision. Of course, if an administrative claim is deemed denied through the filing of a lawsuit, the statute of limitations applicable to that suit arguably becomes irrelevant. In fact, it would have made no sense for Congress to provide a limitations period for deemed denials in § 2401(b) because *every* deemed-denial suit would, by definition, be timely.

Yet, deeming a claim denied *does* raise statute of limitations problems if (1) the claimant deems a claim denied by performing some act short of filing suit (i.e., written notice to the agency), or (2) after deeming the claim denied by filing suit, the claimant’s first suit is dismissed without prejudice and a second suit is later filed. These two classes of cases—which, for simplicity’s sake, I shall call the “written-notice” and “second-suit” problems, respectively—represent the statute of limitations gap created by the deemed-denial option of the FTCA.

62. 28 U.S.C. § 2401(b), *repealed and replaced by* 28 U.S.C. § 2401(b) (1966).

63. See H.R. REP. NO. 1532, *supra* note 21, at 5; S. REP. NO. 1327, *supra* note 21, at 8.

64. See *infra* Part IV.A.1.

65. 28 U.S.C. § 2675(a) (1994).

66. See S. REP. NO. 1327, *supra* note 21, at 7 (“After the claim has been presented to the agency and 6 months passes without final disposition of the claim, the claimant is expressly given the option to consider the claim as denied *and to file suit*.” (emphasis added)); H.R. REP. NO. 1532, *supra* note 21, at 4 (same); *Hearings*, *supra* note 22, at 13 (statement of Assistant Attorney General Douglas to the effect that once the six-month period expires, FTCA claimants have the option to deem the claim denied by filing suit).

Because § 2401(b) on its face does not address the deeming option, the question naturally arises whether a limitations period should apply to the written-notice and second-suit problems. Given that Congress has charged the Justice Department, and, in particular, the Civil Division, with the primary responsibility of interpreting the FTCA,⁶⁷ an analysis of the statute of limitations problem posed by the deemed-denial option begins with a consideration of the Justice Department's position on the question.

B. The Position of the Justice Department

An analysis of the Department's position must keep two issues separate. The first is whether a limitations period is triggered at the expiration of the six-month settlement period, imposing on the FTCA claimant a time period within which she must deem her claim denied. The second, a fundamentally different issue, is whether a limitations period begins to run once the FTCA claimant takes action deeming her claim denied. The Justice Department has taken a firm position on the first issue, but not the second.

1. The Department's Position in 1966

The Justice Department drafted the 1966 amendments to the FTCA, and Assistant Attorney General John W. Douglas provided the only testimony before the House on the purpose of the new amendments.⁶⁸ In his testimony, Douglas stated explicitly that the six-month limitations period prescribed in § 2401(b) applies to formal denials *and* when an agency "refuses to act."⁶⁹ There is nothing in the legislative history accompanying the 1966 amendments to suggest that no statute of limitations applies once an FTCA claimant deems a claim denied.

2. The Department's Position in 1990

The Department's position on the limitations question, at least as far as the courts see it, appears to have changed in 1990. Now, the Department allegedly endorses the view that no statute of limitations applies to deemed denials.⁷⁰ This "position" emerged from the

67. See H.R. REP. NO. 1532, *supra* note 21, at 9; S. REP. NO. 1327, *supra* note 21, at 5.

68. See IRVIN M. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 26 (1967).

69. *Hearings*, *supra* note 22, at 18.

70. See *Pascale v. United States*, 998 F.2d 186, 193 (3d Cir. 1993).

Department's concession in *Taumby v. United States (Taumby I)*.⁷¹

The facts of *Taumby I* are critical to a proper understanding of the Justice Department's position on the limitations issue. Taumby filed a medical malpractice claim with the Bureau of Prisons ("BOP"). Shortly after receiving the claim, BOP sent Taumby a letter that informed him that the agency had six months within which to consider Taumby's claim. Four days after the six-month period expired, BOP denied Taumby's claim. However, Taumby was not properly notified because the denial letter was either misfiled or lost. Thus, as far as Taumby was concerned, BOP had not acted on his claim. Approximately one year after BOP denied Taumby's claim, Taumby filed suit in federal district court. Taumby stated in his complaint that because BOP failed to act on his claim within six months, he deemed the claim denied. The district court granted the United States' motion to dismiss the case on the ground that it was time-barred by the six-month limitations period set forth in § 2401(b).

The issue before the Eighth Circuit was whether expiration of the six-month settlement period triggered a limitations period. The court concluded, after reviewing the legislative history of the 1966 amendments, that a limitations period is triggered at the end of the six-month settlement period, but that the six-month time limit in § 2401(b) does not apply because § 2401(b) does not mention deemed denials.⁷² The Eighth Circuit imposed its own "reasonable-time" limitation, concluding as follows:

When Congress revised section 2675(a) in 1966, it did not formally address what would happen if a party, faced with no formal agency disposition six months after filing a claim, simply failed to act for a long period of time. We believe that such behavior runs contrary to the policies supporting both the FTCA and its statute of limitations, and we cannot be certain it was considered by Congress. We are concerned that adopting Taumby's contrary reading of section 2675(a) would fly in the face of the FTCA, its statute of limitations, and the legislative history of the section, because, it would, in essence, reward claimants for doing nothing.⁷³

The Justice Department argued on rehearing that the *Taumby I* panel incorrectly interpreted § 2675(a). The Department's brief on rehearing stated that:

71. 902 F.2d 1362 (8th Cir. 1990), *vacated on reh'g*, 919 F.2d 69 (8th Cir. 1990) (*Taumby II*).

72. *Taumby I*, 902 F.2d at 1366.

73. *Id.* at 1365-66.

It is defendant's position that—as the [] dissent in the case at bar argues, and as the court in *Conn v. United States* held—there is no time limit for the filing of an FTCA action when an administrative claim is deemed to be denied under 28 U.S.C. 2675(a) by virtue of an agency's failure to finally dispose of the claim within six months. We concur in the view that the statutory language—which states in pertinent part that “[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section”—is plain and unambiguous, and mandates the conclusion that a claimant is free to bring suit at any time after the expiration of the six-month period prescribed in section 2675(a).

....

In the event that the “open-ended” character of 28 U.S.C. § 2675(a)⁷⁴ poses a serious problem, defendant will seek an appropriate legislative solution.

After stating that the plain language of the statute controlled and that the legislative history accompanying § 2675(a) was irrelevant, the Justice Department nonetheless noted that the legislative history comported with the plain language of the statute, such that no limitations period begins to run at the expiration of the six-month settlement period.⁷⁵

Given the Department's reversal on rehearing, it is important to know exactly what the Department conceded. Plainly, the Justice Department did *not* concede that after an FTCA claimant deems a claim denied, no statute of limitations is triggered. Rather, consistent with the facts of Taumby's suit and the cases,⁷⁶ the Department argued that (1) the mere expiration of the six-month settlement period, without any action taken by the claimant or the agency, does not automatically deem a claim denied; and (2) no limitations period is triggered at the conclusion of the six-month settlement period if the agency does not formally deny the claim or the claimant does not take action to deem the claim denied.⁷⁷

Unfortunately, the Justice Department's concession can be construed as somewhat ambiguous because the first sentence in the quoted portion of the United States' brief is much broader than the second sentence. The first sentence seems to state the sweeping proposition that no limitations period applies to *all* deemed denials—in other words, that § 2675(a) somehow solves the written-notice and second-suit problems.

74. Appellee's Response to Petition for Rehearing with Suggestion for Rehearing En Banc, at 5-6, 8, *Taumby II* (No. 89-1516WM) (first emphasis added).

75. *Id.* at 6-7.

76. See *supra* note 35 and accompanying text.

77. See, e.g., GOTTlieb, *supra* note 68, at 6-7 (“Because of loose legislative draftsmanship, there is no cutoff period within which suit must be brought other than six months after the mailing of the notic [sic] of the denial of the claim by the agency. If the claimant does not elect to file court action at the end of six months of inaction, this makes it quite possible, though improbable, that a suit may be filed in court several years after the filing of a claim with the appropriate administrative agency.”).

But *Taumby I* did not address either of these problems. Taumby never received a formal denial from the agency, never took any action (before filing suit) indicating that he deemed his administrative claim denied, and never filed a second suit.

On rehearing, the Eighth Circuit in *Taumby II* reversed itself on the limitations issue and held that no limitations period was triggered at the conclusion of the six-month settlement period.⁷⁸ *Taumby II* thus far has precluded the Justice Department from so much as hinting that any statute of limitations begins to run once an FTCA claimant exercises the deeming option. In fact, the Third Circuit has since cited the decision as suggesting that the Justice Department “implicitly” conceded that no limitations period applies once an FTCA claimant deems her claim denied.⁷⁹ But the concession in *Taumby II* addresses a fundamentally different question than the statute of limitations problem posed by the deemed-denial option of the FTCA. Nothing the Justice Department said in *Taumby II* precludes the Department from arguing that a limitations period is triggered once an FTCA claimant takes some action—written notice to the agency or, as in *Taumby I*, filing a lawsuit—that deems a claim denied.

A contrary conclusion would suggest that the Justice Department argued in *Taumby II* that the “any time thereafter” language in § 2675(a) prescribes the limitations period for deemed denials. However, that would mean that the Department asserted a self-defeating position in *Taumby II*. Remember, the Department argued on rehearing that, contrary to the holding in *Taumby I*, no limitations period is automatically triggered at the conclusion of the six-month settlement period.⁸⁰ Of course, if § 2675(a) is the statute of limitations for deemed denials, a limitations period would in fact be triggered when the six-month settlement period expires, giving deemed deniers an indefinite period within which to file suit.⁸¹ This construction of the FTCA not only overlooks the well settled fact that an agency is free to issue a formal denial any time before a claimant exercises the deeming option, but, more importantly, suggests that an FTCA claim is automatically

78. *Taumby v. United States*, 919 F.2d 69, 70, 72 (8th Cir. 1990) (emphasis added).

79. *See Pascale v. United States*, 998 F.2d 186, 193 (3d Cir. 1993).

80. *See supra* notes 76-77 and accompanying text.

81. *See infra* notes 154-55 and accompanying text (arguing that limitations period in the FTCA is triggered when administrative remedies are exhausted).

deemed denied six months and one day after a tort claim is properly presented to the appropriate federal agency. Both of these interpretations of the FTCA flatly contradict the Justice Department's position in *Taumby II*.

C. Conclusions

A number of important points emerge from the statute of limitations problem posed by deemed denials. To begin with, when Congress amended the FTCA in 1966 and imposed a mandatory administrative-settlement process on FTCA claimants, Congress did not account for the deemed-denial method of exhaustion in the statute of limitations applicable to lawsuits brought at the conclusion of an unsuccessful settlement process. This omission, of course, raises the question of whether courts should interpret the 1966 amendments as providing deemed deniers rights against the United States that are enforceable in perpetuity or whether Congress had something else in mind. Moreover, the Justice Department's concession in *Taumby II* does not prevent the Department from asserting that a limitations period does in fact apply to suits brought on the heels of a deemed denial.

In light of these background principles, courts may use a variety of tools to resolve the statute of limitations problem posed by the deemed-denial option of the FTCA. In particular, the next section examines the role of statutes of limitations in our civil-liability system, discusses the method of statutory construction used to divine congressional intent in the statute of limitations context, and ultimately unveils the tool that may close the statute of limitations gap in the FTCA—the borrowing principle.

III. STATUTES OF LIMITATIONS, THE SEPARATION OF POWERS, AND THE BORROWING PRINCIPLE

A. Statutes of Limitations and the Policies They Promote

Statutes of limitations operate to extinguish persons' rights regardless of the merits of a legal claim. This is especially true, for example, in the context of toxic-tort litigation. As Professor Green has observed, plaintiffs are often barred from bringing causes of action because the necessary epidemiological evidence is unavailable within the prescribed limitations period—epidemiological evidence that may later reveal the

viability of the injured person's claim.⁸² Professor Green has proposed, in his words, the "revolutionary" solution of abolishing all statutes of limitations in toxic-tort cases in which the plaintiff suffers from an insidious disease.⁸³

Interestingly, the FTCA accounts somewhat for Professor Green's concerns about statutes of limitations. The FTCA does so, however, without endorsing the drastic proposition that limitations periods should be eliminated. Rather, by permitting FTCA claimants who have not received formal denials of their claims to delay deeming their claim denied until "any time" after the mandatory six-month settlement period expires, FTCA claimants may wait, gather the relevant evidence to prove a toxic-tort claim, and then deem the claim denied. In other words, if a claimant does not receive a formal denial from an agency, the FTCA gives claimants an indefinite period within which they may exhaust their administrative remedies, an option that buys claimants time to obtain the evidence that Professor Green states is often unavailable within restrictive limitations periods.

Nevertheless, Professor Green's proposal to eliminate limitations periods in the toxic-tort context raises the question of the role of statutes of limitations in our civil-liability scheme generally. Professor Epstein has suggested that statutes of limitations have the benefit of "forc[ing] a plaintiff to sue early in the process or forever hold his peace."⁸⁴ But why should this be so? The answer is largely historical. Despite their perceived harshness, statutes of limitations have always been considered necessary to the orderly administration of justice.⁸⁵ Writing in 1805, Chief Justice Marshall said that a federal cause of action "brought at any distance of time [would] . . . be utterly repugnant to the genius of our

82. See Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 989-1010 (1988); see also Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1684-86 (1983) (arguing that rejecting the discovery-of-damage accrual rule operates to deprive toxic tort plaintiffs of their constitutional liberty and property rights); Palma J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 580-81 (1983) (arguing that traditional rules governing discovery of one's injury should not apply in the toxic-tort context).

83. Green, *supra* note 82, at 968.

84. Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1183 (1986).

85. Imposing a limitations period on causes of action dates back to Roman Law and early English common law. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-79 (1950) [hereinafter *Statutes of Limitations*].

laws.”⁸⁶ There must be, the Supreme Court has since said, “some definitely ascertainable period [that signifies] an end to litigation.”⁸⁷ Thus, imposing time limitations on causes of action achieves predictability.⁸⁸ Predictability, in turn, inures to the benefit of defendants, courts, and society as a whole. Statutes of limitations permit defendants to structure their affairs without the fear of later having to defend stale claims; courts need not preside over lawsuits in which evidence has spoiled or disappeared, witnesses’ memories have faded, and the witnesses themselves have died; and society benefits because scarce judicial resources will not be squandered on ultimately unprovable claims.⁸⁹ Statutes of limitations, in short, are premised on the value of repose, which in its most basic sense provides individuals with the “comfort of knowing that [they] no longer [have] the threat of a legal action looming over [them].”⁹⁰

The benefits of repose are realized because statutes of limitations impose on plaintiffs a requirement that they pursue their causes of action with diligence.⁹¹ Captured by the long-standing maxim that “[e]quity aids the vigilant, not those who slumber on their rights,”⁹² the diligence requirement plainly goes hand-in-hand with protecting courts and defendants from adjudicating or defending stale claims. A plaintiff who proceeds diligently does not put courts and defendants in the compromising position of having to adjudicate and respond to factual contentions that, with the passage of time, have dimmed in clarity. Viewed from this perspective, statutes of limitations can be seen as a legislative device for punishing plaintiffs who have slept on their rights.⁹³

In addition to promoting these process-based concerns, statutes of limitations also vindicate substantive legislative policy objectives. In tort law, for example, Professor Epstein has suggested that limitations periods ensure that the policies underlying tort-liability schemes in

86. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

87. *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926).

88. *See Owens v. Okure*, 488 U.S. 235, 240 (1989).

89. *See Epstein, supra* note 84, at 1181-82; *Green, supra* note 82, at 980-82.

90. *See Green, supra* note 82, at 981; *see also* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-83 (1997) (discussing statutes of limitations and the value of repose); *Statutes of Limitations, supra* note 85, at 1185-86 (same).

91. Ochoa & Wistrich, *supra* note 91, at 488-92.

92. 2 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 418-19 (5th ed. 1941) (“*Vigilantibus non dormientibus aequitas subvenit*”); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983).

93. *See Nathan Kahan, Statutes of Limitations Problems in Cases of Insidious Diseases: The Development of the Discovery Rule*, 2 J. PROD. LIAB. 127, 136 (1978).

general are not undermined.⁹⁴ This is so, argues Professor Epstein, because

[t]he length of the interval between cause and effect—or more generally the length of the interval between the constellation of facts that generate tort liability and the liability itself—is critical to the operation of the system. With the passage of time, the evidence available regarding a given legal issue necessarily becomes stale. The reliability of any determination thus decreases, and with it the effectiveness of the system no matter its objectives. If factual determinations are less than 100 percent reliable, there is a loss in making social objectives operational, whether the objective is compensation or deterrence, liberty or efficiency. The signal is weakened by the noise in transmission.⁹⁵

The same can be said in the context of congressional waivers of the United States' sovereign immunity. Specifically, when Congress waives the United States' immunity from suit, congressionally prescribed statutes of limitations place bounds upon the waiver by contracting the jurisdiction of federal courts.⁹⁶ The FTCA is a good example. Because compliance with § 2401(b) is jurisdictional,⁹⁷ it operates as a jurisdiction-limiting statute as well as a statute that vindicates the value of repose. By circumscribing an Article III court's power of judicial review, Congress protects the public fisc by cutting off persons' right to sue the United States, thereby freeing up government resources for more immediately relevant matters.⁹⁸ Accordingly, unless Congress clearly indicates otherwise, applying the limitations period in § 2401(b) to FTCA suits protects the United States from having to dip into the public fisc to compensate individuals whose tort claims, because of the passage

94. Epstein, *supra* note 84, at 1181.

95. *Id.* (footnote omitted); *see also* Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 534-43 (1984) (discussing the effects of long limitations periods on deterrence, risk allocation, and regulatory costs).

96. *See generally* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 741-42 (1983) (arguing that imposing limitations period on challenges to federal statute operates as a congressional limit on Article III review).

97. *See* *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam); *Parker & Collela, supra* note 6. *But see* *Glarner v. United States, Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994) (holding that § 2401(b) requirements are not jurisdictional); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (same).

98. *See, e.g.*, H.R. REP. NO. 1532, *supra* note 21, at 6; S. REP. NO. 1327, *supra* note 21, at 2; *Hearings, supra* note 22, at 15; *see also Statutes of Limitations, supra* note 85, at 1186 (“[L]imitations on private actions against the sovereign serve the purpose not so much of fairness as of public convenience.”).

of time, may not rest on an accurate factual foundation.⁹⁹ This certainly explains why courts strictly construe § 2401(b) and reach what some may say are “harsh” results.¹⁰⁰

Of course, one may argue that, in the deemed-denial context, because Congress provided FTCA claimants an indefinite time period within which to exhaust their administrative remedies and because the administrative-exhaustion requirement permits federal agencies to gather relevant evidence while that evidence is still fresh, the United States’ interest in repose is at its lowest ebb. So, the argument would go, if a federal agency fails to adjudicate a claim and the claimant waits a few years before exercising the deeming option—a result consistent with the plain terms of § 2675(a)—the United States cannot complain that it must thereafter defend an arguably stale claim. However, that a claimant may wait indefinitely before exercising the deeming option is no reason to conclude that, once the claimant has exhausted her administrative remedies, the United States’ interest in repose vanishes. Indeed, precisely the opposite is true: As time passes, witness’ memories fade and documents may be destroyed, regardless of who may be “responsible” for the delay and irrespective of whether the agency collected evidence early in the process. Nor does the passage of time on the exhaustion end diminish in any way the claimant’s responsibility to act diligently once she exhausts her FTCA administrative remedies. The United States’ interest in repose is as strong in cases involving deemed denials as it is in cases involving formal denials.

B. Statutes of Limitations, the Judiciary, and the Separation-of-Powers Doctrine

When Congress specifies a limitations period for a civil cause of action, it expresses its judgment that the policies generally promoted by statutes of limitations apply to the statute for which the limitations period has been prescribed. Congress, however, is not always so comprehensive. Just a few terms ago, for example, the Supreme Court noted that “[a] look at this Court’s docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create”¹⁰¹ What are courts to do when Congress

99. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (interpreting the FTCA, and explaining that statutes of limitations “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence”).

100. See, e.g., *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270-71 (10th Cir. 1991).

101. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995).

creates a federal cause of action but does not enact a statute of limitations applicable to that cause of action? The question of whether federal courts should remain in their Article III box and permit persons to enjoy rights enforceable in perpetuity until Congress is motivated to enact a statute of limitations or whether courts should on their own impose a limitations period naturally raises a separation-of-powers question.

The two separation-of-powers theories that have emerged in Supreme Court jurisprudence—formalism and functionalism—are useful guides for understanding the judiciary's role in ascertaining Congress's intent in the statute of limitations context.¹⁰² For a formalist, governmental functions should be strictly separated so that the powers of the legislative, executive, and judicial branches are clearly demarcated.¹⁰³ A violation of the separation of powers occurs whenever actors within one branch of government step out of their narrowly defined category and carry out functions reserved for another branch of government.¹⁰⁴ It comes as no surprise that the formalist theory of separation of powers is the theoretical justification for the familiar plain-meaning method of statutory construction, which holds that if a statute on its face is unambiguous, courts should look no further than the plain language of that statute to divine Congress's intent.¹⁰⁵ By limiting courts to interpreting the words on the face of a statute, courts are essentially stripped of any power to legislate by adding to or subtracting from the statute under review. For a formalist, then, Congress's failure to prescribe a statute of limitations means that Congress intended that no limitations period applies. An Article III court, according to the formalist, should simply not enter the business of making policy judgments about the time limitations applicable to suits that seek to vindicate legislatively created rights.

The functionalist approach to separation of powers operates

102. See generally Keith Werhan, Essay, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2681-83 (1996) (stating that the Court has followed formalist and functionalist conceptions of separation of powers).

103. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); *INS v. Chadha*, 462 U.S. 919, 951 (1983).

104. See *Chadha*, 462 U.S. at 955-56.

105. See, e.g., *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989); *Busic v. United States*, 446 U.S. 398, 405 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Oneale v. Thornton*, 10 U.S. (6 Cranch) 53, 68 (1810).

differently. The functionalist focuses less on rigid categories of governmental functions and more on the pragmatic, real-world problem of efficient government operation.¹⁰⁶ For the functionalist, separation of powers must be flexible, adaptable, and responsive to the needs of a constantly changing, fluid democratic political system.¹⁰⁷ Functionalism sanctions “innovative action” when such action is necessary to strike the appropriate balance among the branches of government or when doing so prevents one branch from interfering with another branch’s “constitutionally assigned functions.”¹⁰⁸ As such, the functionalist approach to statutory construction is less strict than the formalist one, taking a totality-of-the-circumstances approach to ascertaining legislative intent.¹⁰⁹ In the statute of limitations context, the functionalist will not only look past the language of the statute and into the legislative history, but may also consider the effects a no-limitations rule may have on defendants and courts. Compared to the formalist, then, the functionalist is more likely to take “innovative action” and supply a limitations period if doing so comports—or, at least, does not interfere—with some legislative policy objective and at the same time promotes a more efficiently functioning government.

Although the formalist and the functionalist offer two competing conceptions of an appropriate separation of powers, they may be fused together to form what Professor Werhan has described as a “separation norm.”¹¹⁰ At its core, the norm locates the separation-of-powers doctrine in the process by which the government affects individual rights. That is to say, the separation norm recognizes that no one branch of government should have the power unilaterally to control individual liberty.¹¹¹ Before liberty is restricted, the separation norm requires consensus among each branch of government, so that diverse perspectives inform

106. See Werhan, *supra* note 102, at 2685.

107. See *id.*

108. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977); see *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

109. Judge Learned Hand perhaps best captured the functionalist approach to statutory construction when he wrote:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff’d*, 326 U.S. 404 (1945).

110. Werhan, *supra* note 102, at 2687-91.

111. See *id.* at 2689-90.

and legitimize the government action taken.¹¹² A deviation from this process of deliberation does not, as a formalist may suggest, *ipso facto* render government action unconstitutional. Rather, this norm allows the acting branch to make a showing that the deviation is necessary to vindicate some overriding government objective.¹¹³

The separation norm accounts for the respective strengths and weaknesses in formalist and functionalist conceptions of the separation of powers, providing a separation-of-powers doctrinal base that neither theory standing alone can provide. The norm endorses the formalist's view that departures from a strict separation of powers are suspect, and, at the same time, recognizes that "[t]here must be some functional accounting of a governmental departure from the separation norm and some judicial openness to the need for innovation in special circumstances."¹¹⁴ But the separation norm does not adopt—lock, stock, and barrel—the functionalist desire to innovate. Rather, the norm “approaches the functional inquiry with a normative stance that is skeptical of the deviation.”¹¹⁵

The separation norm translates quite nicely in the statute of limitations context. Statutes of limitations operate to extinguish nondiligent persons' rights, so that the legitimacy (in a separation-of-powers sense) of a chosen limitations period depends upon the process by which the particular time period was chosen. The legitimacy of a statute of limitations is at its apex when Congress prescribes a limitations period, for inherent in the give-and-take of politics lies the deliberative process contemplated by the separation norm. At the same time, however, if the legislative branch fails to prescribe a limitations period, that failure may operate to the detriment of the judicial branch, which may be required to adjudicate stale claims or otherwise abandon any realistic attempt to fulfill its truth-seeking function.¹¹⁶ Likewise, permitting plaintiffs to enjoy rights enforceable in perpetuity deprives defendants of the benefits

112. See *id.* at 2690-91.

113. See *id.* at 2691.

114. *Id.*

115. Werhan, *supra* note 102, at 2691.

116. See, e.g., *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72 (1956); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-42 (4th Cir. 1990) (en banc); see also Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1464 (1988) (“[S]tatutes of limitation are by now rather uniformly recognized as a useful mechanism for reducing court dockets.”).

of repose. Viewed in this way, the separation norm would permit the judiciary some leeway in protecting itself and defendants from having to adjudicate or defend stale legal claims.

C. *The Borrowing Principle*

What rule of statutory construction would the separation norm support when Congress does not provide a statute of limitations for a federally created right? This question was answered long ago. Statutes of limitations are so widely accepted, the principle of repose so revered, and the truth-seeking function of Article III courts so important that, in an uninterrupted line of cases dating back to 1830, the Supreme Court has held that if federal statutes that confer federal rights on civil litigants are silent on the limitations question, courts should borrow from and apply analogous state or federal statutes of limitations.¹¹⁷ Indeed, because the policies promoted by statutes of limitations have been a fixture in American jurisprudence since the earliest days of this Republic, federal courts have been in the business of “interstitial lawmaking” for a long time now, developing that rare bird of modern jurisprudence, the federal common law.¹¹⁸

117. See *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-37 (1995); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355-58 (1991); *Reed v. United Transp. Union*, 488 U.S. 319, 323-25 (1989); *Owens v. Okure*, 488 U.S. 235, 239 (1989); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 146-48 (1987); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987); *Wilson v. Garcia*, 471 U.S. 261, 266-67 & n.12 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240-41 (1985); *Burnett v. Grattan*, 468 U.S. 42, 48-49 (1984); *Chardon v. Fumero Soto*, 462 U.S. 650, 656-57 (1983); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158-63 (1983); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 (1981); *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977); *Runyon v. McCrary*, 427 U.S. 160, 180 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-05 (1966); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224-26 (1958); *Cope v. Anderson*, 331 U.S. 461, 463 (1947); *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946); *Guaranty Trust Co. v. York*, 326 U.S. 99, 110-11 (1945); *Herget v. Central Nat'l Bank & Trust Co.*, 324 U.S. 4, 6-9 (1945); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *Board of County Comm'rs v. United States*, 308 U.S. 343, 350-51 (1939); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906); *McClaine v. Rankin*, 197 U.S. 154, 158 (1905); *McDonald v. Thompson*, 184 U.S. 71, 72 (1902); *Brady v. Daly*, 175 U.S. 148, 158 (1899); *Campbell v. Haverhill*, 155 U.S. 610, 613-20 (1895); *Leffingwell v. Warren*, 67 U.S. (2 Black) 599, 603 (1862); *M'Cluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830).

118. See William Wirt Blume & B.J. George, Jr., *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 939-40 (1951); Mitchell A. Lowenthal et al., *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1012-13 (1980); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957); Boswell, *supra* note

The practice of filling the interstices of federal law has important consequences for judicial inquiry into congressional intent in the statute of limitations context. Even though, as Judge Kozinski has noted in a different context, “interpreting the sounds of silence is a euphemism for rewriting,”¹¹⁹ the Supreme Court has said that, as a matter of statutory construction, it is simply incorrect to assume, in the face of congressional silence on the limitations issue, that Congress intends to confer rights enforceable in perpetuity.¹²⁰ Rather, the Court has held that Congress’s awareness of the practice of borrowing statutes of limitations permits courts to “assume that Congress intends by its silence that [courts] borrow state[-]law [statutes of limitations].”¹²¹ Even Justice Scalia, the modern-day godfather of strict constructionism, does not believe that congressional silence on the statute of limitations question means that Congress intends that no limitations period applies, at least if an applicable state-law limitations period is available.¹²²

Although the Supreme Court has held that state rather than federal law should be the “lender of first resort,”¹²³ the Court has not limited its borrowing to state law alone. Courts may also borrow a statute of limitations from some other, more analogous federal statute.¹²⁴

116, at 1451-74.

119. *Graham v. United States*, 96 F.3d 446, 450 (9th Cir. 1996) (Kozinski, J., dissenting).

120. *See Felder v. Casey*, 487 U.S. 131, 140 (1988).

121. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987). At least one commentator has suggested that congressional silence on the limitations issue should not automatically trigger state-law borrowing. *See* Ellen E. Kaulbach, Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133, 155-57 (1989). Rather, courts should look to federal law and borrow federal limitations periods that promote federal policies. *Id.* at 157, 159-69.

122. *See Agency Holding Corp.*, 483 U.S. at 164-65 (Scalia, J., concurring in judgment). To be sure, Justice Scalia has quite a different view about the operation of the borrowing principle. He has argued that once a court concludes that no state statute of limitations should be borrowed, courts should not look to federal statutes of limitations, but rather should conclude that no limitations period applies at all. *See id.* at 170. In this way, Congress would be prompted “to enact a limitations period that it believes ‘appropriate,’ a judgment far more within its competence than ours.” *Id.* This, of course, is not the view of a clear majority of the presently-constituted Supreme Court. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-37 (1995) (holding that borrowing from analogous federal statutes of limitations is appropriate under certain circumstances).

123. *North Star Steel*, 515 U.S. at 34.

124. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 171-72 (1983); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 301 (1993) (Thomas, J., dissenting) (“A limitations period is almost indispensable to a

According to the Court, there are two criteria that must be satisfied before courts should eschew a state-law limitations period in favor of a federal one. First, the federal statute must provide a “‘closer analogy’” to the federal law at issue than available state statutes.¹²⁵ Second, courts will borrow from analogous federal statutes if “the federal policies at stake and the practicalities of litigation make that [federal] rule a significantly more appropriate vehicle for interstitial lawmaking” than state law.¹²⁶ In other words, if applying state law would be “at odds with the purpose or operation of federal substantive law” or would “frustrate or interfere with the implementation of national policies,”¹²⁷ the Supreme Court has applied the common-sense notion that “Congress would not wish courts to apply a limitations period that would only stymie the policies underlying the federal cause of action.”¹²⁸

Article III courts do not, however, blindly apply the borrowing principle and abandon any search for legislative intent in the face of congressional silence on the limitations issue. Rather, in keeping with a generally held duty to divine congressional intent, courts refrain from borrowing a state or federal statute of limitations if Congress has either stated explicitly in the legislative history that no limitations period should apply or if a legislative policy objective is furthered by not imposing a limitations period on a federal cause of action.¹²⁹

Of course, the borrowing principle is not without its critics. Attacks have come on essentially two fronts. First, the borrowing principle is seen as inconsistent with a proper conception of the separation of powers, for the act of borrowing a statute of limitations permits Article III courts to assume policymaking functions traditionally reserved for the legislative branch.¹³⁰ Second, called on one instance a “tottering parapet of a ramshackle edifice,”¹³¹ the borrowing principle is

scheme of civil liability; even when federal law prescribes no express statute of limitations, we will not ordinarily assume that Congress intended no time limit.” (citing *DelCostello*, 462 U.S. at 158)).

125. *Agency Holding Corp.*, 483 U.S. at 148 (quoting *DelCostello*, 462 U.S. at 171-72).

126. *Id.*

127. *DelCostello*, 462 U.S. at 161 (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)).

128. *North Star Steel*, 515 U.S. at 34. *See generally* *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 600-01 (1973) (“Our Federal Union is a complicated organism, but its legal processes cannot legitimately be simplified through the inviting expedient of special legislation which has the effect of confiscating interests of the United States.”).

129. *See* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Occidental Life Ins. Co.*, 432 U.S. at 356.

130. *See, e.g., Tellis v. USF&G*, 805 F.2d 741, 747 (7th Cir. 1986) (Ripple, J., dissenting).

131. *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *cert. denied*, 484 U.S.

admittedly indeterminate in its application, sometimes producing inconsistent and unprincipled results.¹³² These criticisms, however, have had little impact on courts' application of the borrowing principle.¹³³

Although the borrowing principle has been the subject of much commentary,¹³⁴ no commentator has offered a separation-of-powers defense of the principle. The borrowing principle strikes a balance

943 (1987), *but overruled by* *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990).

132. See *McCartney C. v. Herrin Community Unit Sch. Dist. No. 4*, 21 F.3d 173, 174-75 (7th Cir. 1994); Lowenthal et al., *supra* note 118, at 1013.

133. To be sure, Congress has provided a limited response. In 1990, Congress enacted 28 U.S.C. § 1658, which establishes a default, four-year statute of limitations for civil statutes passed after December 1, 1990 that do not contain a limitations provision. The provision states: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C.A. § 1658 (West 1994). The statute has been criticized for not going far enough, for "it will be many years, if not decades, before any such assortment of future-created claims can match the quantum of those already on the books." David D. Siegel, *Practice Commentary*, in 28 U.S.C.A. § 1658, at 240 (West 1994).

134. See, e.g., Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235 (1989); Katharine F. Nelson, *The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454 (1993); Kimberly Jade Norwood, 28 U.S.C. § 1658: A Limitation Period with Real Limitations, 69 IND. L.J. 477 (1994); David D. Siegel, *The Statute of Limitations in Federal Practice, Including the New "General" One in Federal Question Cases*, 134 F.R.D. 481 (1991); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683; Michael B. Brennan, Note, *Okure v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983*, 82 NW. U. L. REV. 1306 (1988); Edwin Scott Hackenberg, Comment, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 LA. L. REV. 1411 (1988); Carole Novak Harrod, Comment, *Judicial Gap-Filling in WARN Claims: The Uncertainty Continues*, 32 HOUS. L. REV. 1125 (1995); Cathy H. Herndon & Monroe Hill, Jr., Note, *In re Data Access Systems Security Litigation: Finally, a Step Towards Uniformity in 10b-5 Statute of Limitations Disputes*, 40 MERCER L. REV. 1045 (1989); Peter J. Mignone, Note, *What Statute of Limitations Should Apply to the Worker Adjustment and Retraining Notification Act?*, 63 FORDHAM L. REV. 1419 (1995); Charles Benjamin Nutley, Comment, *Triggering One-Year Limitations on Section 10(b) and Rule 10b-5 Actions: Actual or Inquiry Discovery?*, 30 SAN DIEGO L. REV. 917 (1993); Paul Rathburn, Note, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More Than "A Half Measure of Uniformity"*, 73 MINN. L. REV. 85 (1988); Cynthia Reed, Note, *Time Limits for Federal Employees Under Title VII: Jurisdictional Prerequisites or Statutes of Limitation?*, 74 MINN. L. REV. 1371 (1990); David Reisman, Comment, *The Move Toward Uniformity: The Statute of Limitations for Rule 10b-5*, 51 LA. L. REV. 667 (1991); Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953); John A. Ray, *Recent Development, Statute of Limitations for Employee Actions under the Worker Adjustment and Retraining Notification Act*, 46 WASH. U. J. URB. & CONTEMP. L. 323 (1994).

between formalist and functionalist conceptions of the separation of powers consistent with the separation norm, accounting for both formalist and functionalist concerns. The practice of borrowing state statutes of limitations should pose no separation-of-powers problem for the formalist because courts have often derived their authority to borrow state law from the Rules Decision Act of 1789, which permits Article III courts to apply state law to fill gaps left in federal law.¹³⁵ Plainly, there can be no violation of a strict separation of powers where Congress has explicitly conferred on Article III courts the power to choose an appropriate state-law limitations period in the face of congressional silence. And even if, as the Supreme Court and some commentators have suggested,¹³⁶ the Rules Decision Act does not provide courts the statutory authority to borrow state limitations periods, Congress's failure to prescribe limitations periods for the rights it creates suggests that Congress has left it to Article III courts to fill statute of limitations gaps in federal law.¹³⁷ An Article III court surely does not usurp the separation of powers by doing that which Congress expects it to do.

With respect to borrowing a federal statute of limitations, the formalist should have no objection. As I have suggested, Congress expects courts to borrow statutes of limitations in the face of congressional silence on the limitations issue. Courts will borrow a federal limitations period only where application of state law would undermine or frustrate federal policies. Viewed in this way, Article III courts cannot logically run afoul of the separation norm by vindicating federal policy objectives—which are normally the product of the deliberative process contemplated by the separation norm—through borrowing a federal, rather than state, statute of limitations. Indeed, rather than interfere with Congress's prerogative to establish federal policy, Article III courts protect those policies from unwarranted intrusion by the States.

At the same time, the borrowing principle represents that kind of “innovative action” dear to the heart of the functionalist. The practice of borrowing is driven by the quintessentially pragmatic goal of ensuring that courts do not have to adjudicate legal claims in a manner that compromises a court's ability to discharge its Article III functions. The

135. See 28 U.S.C. § 1652 (1994) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”); see also *Bauserman v. Blunt*, 147 U.S. 647, 652 (1893).

136. See, e.g., *DelCostello*, 462 U.S. at 160 n.13; Lowenthal et al., *supra* note 118, at 1024-42; Nelson, *supra* note 134, at 469.

137. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987); Lowenthal et al., *supra* note 118, at 1013-14; Nelson, *supra* note 134, at 469-70.

principle therefore rejects the formalist presumption that congressional silence on the limitations issue represents a congressional command not to impose a limitations period on a federal cause of action. Consistent with the functionalist method of statutory construction, the borrowing principle endorses a totality-of-the-circumstances approach to divining congressional intent. Courts may assume that congressional silence triggers state or federal borrowing, yet courts must still search the legislative history for any indication that Congress intended that no limitations period applies. The exceptions to the borrowing principle preclude unjustified judicial encroachments into the legislative arena by ensuring that Article III courts respect the separation norm's core notion that consensus between the branches of government legitimize restrictions on individual rights. Only when a court concludes that Congress's silence is "pure" does that court resort to borrowing. And courts are prohibited from engaging in a "bald . . . form of judicial innovation," in which the judiciary constructs from whole cloth its own limitations period, one not borrowed from a state or federal statute of limitations and one cut loose from the deliberative process that bestows legitimacy upon limitations periods.¹³⁸

In addition to striking a proper balance between formalist and functionalist theories of the separation of powers, the borrowing principle also serves as a useful tool in the context of congressional waivers of sovereign immunity. It is well settled that Congress must clearly intend to waive the United States' sovereign immunity, and that courts are not permitted to extend that waiver beyond what Congress intended.¹³⁹ In the statute of limitations context, congressional silence obviously cannot amount to a clear waiver, so that some limitations period must apply. The borrowing principle protects courts from erroneously extending the waiver by providing a methodological bridge to a limitations period.

138. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966); *see id.* at 701-05 (refusing to create a limitations period wholly separate from federal or state statutes of limitations, and instead borrowing from state law); *see also* *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1394 (7th Cir. 1990) (Posner, J., concurring) ("The difficulty with creating a statute of limitations *ex nihilo* lies in the fact that judge-made rules come in the first instance from the bottom of the judicial hierarchy, rather than being imposed from on high.").

139. *See* *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-35, 37 (1992); *see also* *United States v. King*, 395 U.S. 1, 4 (1969) (holding that waivers of sovereign immunity by Congress "cannot be implied but must be unequivocally expressed").

From a normative stance, the fallout from borrowing state or federal statutes of limitations remains somewhat troublesome. The non-uniform application of statutes of limitations to the same federal cause of action creates uncertainty harmful to plaintiffs, defendants, and courts. There are few more important issues facing a plaintiff than the time within which she must file a suit to vindicate federally created rights, for failure to comply with the limitations requirement extinguishes a plaintiff's claim forever. A definite, uniform limitations period eliminates the potential that plaintiffs will lose their rights to an after-the-fact application of the borrowing principle. Defendants, too, may be harmed by the practice of borrowing. The right to repose is rendered hollow if limitations periods vary so widely that defendants cannot efficiently order their affairs because of uncertain liability exposure. And courts, set adrift on a sea of limitless possibilities, must devote an inordinate amount of their resources to deciphering which statute of limitations to apply.¹⁴⁰

From a practical standpoint, however, the problems of indeterminacy and nonuniformity have not troubled courts all that much, for they have (perhaps while holding their judicial noses) routinely applied the borrowing principle. The Supreme Court, for one, has applied the principle to a number of federal statutes.¹⁴¹ Lower federal courts have also joined the fray, applying the borrowing principle to the Individuals

140. Judge Ripple of the Seventh Circuit perhaps captured this sentiment best when he said,

Several centuries from now, when the archeologists have unearthed a copy of the Federal Reporter and turned it over to the legal historians for study and analysis, our descendants will indeed be puzzled to discover that a society in which judicial resources were such a scarce "commodity" expended so much of that "commodity" searching its state codes for "analogous" limitation periods. I doubt very much that, at least in this regard, our priorities will command much admiration.

Tellis v. United States Fidelity & Guaranty Co., 805 F.2d 741, 747 (7th Cir. 1986) (Ripple, J., dissenting). As we shall later see, however, these criticisms are at their perigee in the context of the statute of limitations problem posed by deemed denials. *See infra* notes 192-194 and accompanying text.

141. *See, e.g., Agency Holding Corp.*, 483 U.S. at 147-57 (civil RICO; federal statute applicable); *Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (42 U.S.C. § 1983; state statutes applicable); *DelCostello*, 462 U.S. at 158-72 (Labor Management Relations Act; federal statute applicable); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866 (42 U.S.C. § 1981); state statute applicable); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102-05 (1971) (Lands Act; state statute applicable); *Cope v. Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act; state statute applicable); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1870; state statute applicable); *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act; state statute applicable); *Campbell v. Haverhill*, 155 U.S. 610, 613-18 (1895) (Patent Act; state statute applicable).

with Disabilities Education Act,¹⁴² the Employee Retirement Income Security Act (“ERISA”),¹⁴³ Section 504 of the Rehabilitation Act of 1973,¹⁴⁴ and a number of other federal statutes.¹⁴⁵

IV. THE BORROWING PRINCIPLE AND THE DEEMED-DENIAL PROBLEM

Is the borrowing principle the key that unlocks the statute of limitations problem posed by the deemed-denial option of the FTCA? When Congress amended the FTCA in 1966 and failed to prescribe a limitations period for deemed denials, did Congress intend not to impose any limitations period on deemed-denial lawsuits? Or can Congress’s omission rather be construed as “pure” silence on the limitations issue, thereby triggering the borrowing principle?

No court or commentator has addressed the question of whether the borrowing principle should apply to the deemed-denial provision of the FTCA. Commentators have focused their attention elsewhere.¹⁴⁶ Courts have ignored this application of the principle altogether—even though they have held that § 2401(b) is silent on the limitations period applicable to deemed denials¹⁴⁷—and the Justice Department has not pursued this line of argument. Accordingly, the threshold question is whether the Supreme Court’s borrowing jurisprudence should be applied to the administrative-exhaustion scheme of the FTCA. The answer is yes.

Because the FTCA confers on plaintiffs a cause of action against the United States,¹⁴⁸ and because § 2675(a) provides FTCA claimants with a jurisdictional ticket to federal district court, the borrowing principle may

142. See, e.g., *Zipperer ex rel. Zipperer v. School Bd.*, 111 F.3d 847, 850-52 (11th Cir. 1997) (borrowing state law); *Providence Sch. Dep’t v. Ana C.*, 108 F.3d 1, 2-3 (1st Cir. 1997) (same).

143. See *Schroeder v. Phillips Petroleum Co.*, 970 F.2d 419, 420 (8th Cir. 1992) (borrowing state law); *Jenkins v. Local 705, Int’l Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983) (same).

144. See *Begay v. Hodel*, 730 F. Supp. 1001, 1010-11 (D. Ariz. 1990) (recognizing that state law should be borrowed, but declining to choose which limitations period applied because such a choice was not necessary to the disposition of the case).

145. See *supra* note 134 (authorities cited therein).

146. See *supra* note 133 (authorities cited therein).

147. See *Lehman v. United States*, 154 F.3d 1010, 1013-15 (9th Cir. 1998); *Pascale v. United States*, 998 F.2d 186, 188-89 (3d Cir. 1993); *Parker v. United States*, 935 F.2d 176, 177 (9th Cir. 1991); *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 389 (E.D.N.Y. 1988).

148. 28 U.S.C. §§ 1346(b), 2674, 2675(a) (1994).

be applied to the deemed denial problem. Whether the principle *should* be applied to the deeming option presents a closer question. Although the borrowing principle has been applied to other exhaustion schemes,¹⁴⁹ what makes the deemed-denial question odd is that, unlike many statutes subjected to the borrowing principle (in which no limitations period is specified at all for the cause of action), the FTCA does contain a statute of limitations—§ 2401(b).¹⁵⁰ The problem, of course, is that § 2401(b) does not mention deemed denials. Accordingly, whether a statute of limitations should in fact be borrowed depends upon whether Congress’s silence is “pure.” The next section examines this critical issue.

A. *The FTCA’s Silence on the Limitations Period Applicable to Deemed Denials*

1. *The Borrowing Principle Applies to the Deemed-Denial Problem*

There is nothing to borrow if Congress has spoken on the limitations issue.¹⁵¹ Ordinarily, determining whether Congress is silent on the limitations question is obvious on the face of the statute—Congress creates a federal cause of action, but neglects to enact a statute of limitations. The FTCA is different in this respect because, as I have pointed out, it contains a statute of limitations that omits deemed denials and an exhaustion provision which provides a time period within which the deeming option may be exercised. Accordingly, a determination of whether Congress was silent with respect to deemed denials requires an examination of both provisions. In particular, courts may look to § 2675(a), which specifies a time limit for exhausting FTCA administrative remedies, or to § 2401(b), which is the statute of limitations provision of the FTCA.

Section 2675(a) permits FTCA claimants to deem a claim denied “any

149. See, e.g., *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 158-72 (1983) (Labor Management Relations Act; borrowing federal law); *Providence Sch. Dep’t v. Ana C.*, 108 F.3d 1, 2-3 (1st Cir. 1997) (Individuals with Disabilities Education Act; borrowing state law).

150. Although the FTCA does contain a statute of limitations, that fact alone should not preclude the application of the borrowing principle, for ERISA too contains a statute of limitations that applies only to one of many causes of action available to ERISA plaintiffs. See *Norwood*, *supra* note 134, at 488-91. Yet, in the ERISA context, courts have borrowed (largely from state law) a statute of limitations for those federally created causes of action not subject to the statute of limitations Congress explicitly prescribed for the ERISA remedial scheme. See *id.*

151. See *DelCostello*, 462 U.S. at 169 n.20; *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 371-72 (1977); *Arnson v. Murphy*, 109 U.S. 238, 241-43 (1883).

time” after the six-month settlement period expires.¹⁵² One may argue that an FTCA claimant may deem a claim denied by filing suit, Congress anticipated that most administrative claims would be deemed denied in this manner, and, therefore, because that suit may be filed “any time” after the six-month settlement period, Congress was not silent on the limitations issue. Section 2675(a), the argument would conclude, provides no time limit within which to file a suit coming on the heels of a deemed denial.¹⁵³ The argument, however, is unpersuasive.

Section 2675(a) is the exhaustion provision of the FTCA and logically cannot prescribe a limitations period for lawsuits filed after FTCA administrative remedies have been exhausted. Under exhaustion schemes like the FTCA, a limitations period does not begin to run until administrative remedies have been exhausted, that is, when there has been a final denial of the claim.¹⁵⁴ To suggest that the “any time thereafter” language in § 2675(a) is the limitations provision for deemed denials is to endorse the untenable position that a deemed denier exhausts her administrative remedies six months and one day after she presents her claim to an agency and the agency has failed to adjudicate the claim. Not only is this construction of the FTCA inconsistent with the plain language of § 2675(a)—which permits claimants to exhaust administrative remedies “any time” after the six-month settlement period—it is also irreconcilable with the legislative history, which suggests that the “any time thereafter” provision was designed to provide agencies and claimants time to resolve difficult tort claims not susceptible to settlement within six months.¹⁵⁵ A federal agency retains jurisdiction over a claim until there has been a formal or deemed denial of the claim. Prior to exhaustion, then, the claim is still open and subject to review by the agency.

A contrary conclusion also places undue emphasis on the manner in which an administrative claim is deemed denied. Although § 2675(a) on its face does not state explicitly how an FTCA claimant may deem her claim denied, it is clear that a claimant may either inform the agency that

152. 28 U.S.C. § 2675(a) (1994).

153. See *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 389 (E.D.N.Y. 1988) (holding that § 2675(a) prescribes a limitations period for deemed denials).

154. See *supra* Part I. A. & B.

155. See *supra* note 22 and accompanying text; *Hearings, supra* note 22, at 13 (statement of John W. Douglas, Assistant Attorney General); see also *Mack v. United States Postal Serv.*, 414 F. Supp. 504, 507-08 (E.D. Mich. 1976).

she deems her claim denied or file a lawsuit.¹⁵⁶ So, for example, if the FTCA claimant provides the agency with written notice that she is deeming her claim denied, the “any time thereafter” language of § 2675(a) plainly does not operate as a statute of limitations. Rather, such written notice is the functional equivalent—from an administrative-exhaustion standpoint—of a formal, written denial from the agency, illustrating that the FTCA claimant has concluded that her administrative remedies have been exhausted.

The state-law scheme after which Congress patterned the 1966 amendments confirms this interpretation of the deemed-denial option of the FTCA. When Congress amended the FTCA in 1966, it looked to Iowa’s administrative-exhaustion scheme, noting that Iowa’s system of adjudicating tort claims brought against government entities “provide[s] requirements very similar to those provided in [the amendments to the FTCA].”¹⁵⁷ Under Iowa law, a tort claimant must present her tort claim to an appeals board and, as with the FTCA, wait six months for the board to settle or deny the claim.¹⁵⁸ If six months passes and the board does not act on the claim, a claimant is expressly given the option to withdraw her claim and file suit in an Iowa court.¹⁵⁹ The Iowa Supreme Court, however, has not read the withdrawal provision as requiring written notice (i.e., a letter) to the agency of her withdrawal decision. Instead, the court has held that filing a lawsuit is the functional equivalent of notifying an agency in writing of the decision to withdraw a claim.¹⁶⁰ The Iowa cases therefore demonstrate that, for purposes of administrative exhaustion, the means by which a claimant deems a claim

156. See Pitard, *supra* note 6, at 904 (stating that the deemed-denial option in § 2675(a) permits FTCA claimants to provide written notice to the agency or to file a lawsuit). Nothing in the text of § 2675(a) requires an FTCA claimant to inform the agency in writing of her decision to deem a claim denied. Nonetheless, § 2675(a) is essentially a notice provision, so that, short of filing a lawsuit, an FTCA claimant must, at the very least, communicate her deemed-denial decision to the agency. See, e.g., *Graham v. United States*, 96 F.3d 446, 448 (9th Cir. 1996) (discussing the notice-based character of a formal denial).

157. See H.R. REP. NO. 1532, *supra* note 21, at 7; see also S. REP. NO. 1327, *supra* note 21, at 4. The Iowa Supreme Court has recognized the symmetry between the FTCA and Iowa’s tort claims act. See *Bloomquist v. Wapello County*, 500 N.W.2d 1, 8 (Iowa 1993) (stating that Iowa’s tort claims act is similar to the FTCA); *Feltes v. State*, 385 N.W.2d 544, 547 (Iowa 1986) (same). See generally Don R. Bennett, *Handling Tort Claims and Suits Against the State of Iowa: Part I*, 17 DRAKE L. REV. 189 (1968) (reviewing the contours of Iowa’s tort claims act).

158. See IOWA CODE § 25A.5 (1993), *recodified at* IOWA CODE § 669.5 (1997).

159. See *id.*

160. See *Bensley v. State*, 468 N.W.2d 444, 446 (Iowa 1991); see also *Clites v. State*, 322 N.W.2d 917, 919 (Iowa Ct. App. 1982) (“Service of notice of plaintiffs’ suit constituted notice of withdrawal and substantially complied with the requirements of section 25A.5.”).

denied is immaterial, or as the Iowa Supreme Court put it, a mere “formality . . . prior to filing suit.”¹⁶¹

Applying this reasoning in the FTCA context, when an FTCA claimant deems a claim denied, she is notifying the federal agency that she is deeming her claim finally denied for purposes of administrative exhaustion. It is irrelevant whether that notification is in the form of written notice to the agency or the filing of a lawsuit. That the deemed-denial option can be exercised in different ways does not, therefore, deprive the deeming option of its administrative-exhaustion character.¹⁶²

That leaves § 2401(b), and it is there that the question of whether Congress was silent is solved. Section 2401(b) imposes a six-month limitations period only on formal, written denials properly mailed to FTCA claimants.¹⁶³ Section 2401(b) says nothing about deemed denials. Accordingly, Congress’s failure to impose a limitations period on deemed denials reflects congressional silence on the matter. Through that silence, the borrowing principle must be triggered because, as the

161. *Bensley*, 468 N.W.2d at 446.

162. The Eighth Circuit’s decision in *Arigo v. United States*, 980 F.2d 1159 (8th Cir. 1992), construed the deeming option in an unjustifiably restrictive manner. In *Arigo*, after the six-month no-suit period expired, the plaintiff informed the agency in writing that he was withdrawing his claim from agency consideration and planning to file suit in federal district court. *Id.* at 1160. The plaintiff then filed suit eight months after the date of the letter. *Id.* The Eighth Circuit concluded, correctly, that the plaintiff’s claim was time-barred pursuant to the six-month limitations period in § 2401(b) because “[t]o hold otherwise would effectively give [the plaintiff] unilateral power to toll § 2401(b)’s six-month limitations period.” *Id.* at 1161. In dictum, however, the Eighth Circuit reasoned that, if the plaintiff had not “withdrawn” his claim and simply provided the agency with a written-notice deemed denial (and not used the word “withdraw”), the six-month limitations period would not be triggered because the letter would do nothing more than recognize [the plaintiff’s] administrative remedies were exhausted under § 2675(a). To treat this kind of statement as a formal agency denial overlooks the fact that the agency can still consider the claim and trigger § 2401(b)’s six-month limitations period by denying the claim.

Id. The dictum in *Arigo* represents an incorrect reading of the FTCA’s deeming option because it places significant weight on the way in which an FTCA claimant exercises the deeming option. Whether the plaintiff used the magic word “withdraw” or not is immaterial. Indeed, just as a written-notice deemed denial satisfies the exhaustion requirement of § 2675(a), so too does a withdrawal. This interpretation of the deemed-denial option is in keeping with Congress’s explicit statement in the legislative history that the 1966 changes to § 2675(a) “in effect” replace the pre-1966 option to withdraw a claim from an agency. *See supra* note 31 and accompanying text. The *Arigo* court provided no authority for the proposition that the FTCA discriminates among methods of deeming a claim denied in the manner suggested by the court.

163. 28 U.S.C. § 2401(b) (1994).

Supreme Court has said, congressional silence on the limitations question means that Congress intended that a state or federal limitations period should be borrowed and applied.¹⁶⁴

It could be argued that because the language in § 2401(b) about formal written denials tracks quite closely the formal-denial language in § 2675(a) and because Congress amended § 2401(b) and § 2675(a) in the same bill, it follows that, by negative inference, Congress intended that no limitations period should apply to deemed denials.¹⁶⁵ This argument, however, fails for at least three reasons. First, just because the FTCA imposes a time limitation upon one form of exhaustion and not upon another is no reason to reject the notion that Congress was silent on the limitations question. The Supreme Court and lower courts have borrowed and applied a statute of limitations where a limitations period was prescribed for one part of a statute but not another.¹⁶⁶ Second, and perhaps most importantly, because the FTCA represents a congressional waiver of the United States' sovereign immunity, that waiver must be unequivocally expressed and must be strictly construed.¹⁶⁷ Thus, to say, by drawing a negative inference, that Congress intended not to impose a limitations period on deemed denials is to endorse the notion that Congress implicitly waived the United States' sovereign immunity. There can be no implicit waiver of sovereign immunity.¹⁶⁸ Third, that the language in § 2401(b) and § 2675(a) is identical proves, rather than disproves, that Congress was silent on the limitations period applicable to deemed denials. Because Congress provided two mutually exclusive methods of administrative exhaustion and because it did not account for deemed denials in § 2401(b), it follows that Congress had nothing to say about the applicability of a limitations period to deemed denials. Accordingly, at the risk of appearing pedantic, not to say anything about something is to remain silent.

2. *Application of the Borrowing Principle to the*

164. See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987).

165. See, e.g., *Lindh v. Murphy*, 117 S. Ct. 2059, 2064 & n.4 (1997) (applying this principle of statutory construction to the Antiterrorism and Effective Death Penalty Act); *Pascale v. United States*, 998 F.2d 186, 188-89 (3d Cir. 1993) (applying the principle to the deemed-denial problem presented by the FTCA).

166. See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703 (1966) (Labor Management Relations Act; six-month limitations period for provision governing unfair labor practice proceedings, but no limitations period for suits challenging collective bargaining contracts); see also *supra* note 150 (discussing this problem in the ERISA context).

167. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

168. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Sherwood*, 312 U.S. 584, 592 (1941).

Deemed-Denial Problem

Although state law is the “lender of first resort,”¹⁶⁹ and although borrowing from federal law is considered “rare” and “unusual,”¹⁷⁰ there are situations in which a federal statute of limitations must be borrowed. In particular, when the application of state law would undermine federal policy *and* a federal statute provides a closer analogy, borrowing from and applying a federal statute of limitations is appropriate.¹⁷¹ The deemed-denial limitations problem satisfies each of these requirements.

First, applying a state statute of limitations to deemed denials clearly undermines the well-established policy that Congress, and not the States, determines the extent of the United States’ waiver of sovereign immunity. To be sure, Congress has permitted the States to control the United States’ waiver of sovereign immunity in certain limited contexts, so that the characterization of a tort claim filed against the United States would be governed by state law.¹⁷² However, that an FTCA cause of action is governed by state law does not mean that a state-law limitations period should be borrowed. Because the statute of limitations applicable to FTCA actions is intimately connected to Congress’s waiver of sovereign immunity,¹⁷³ there is a clear federal policy of having Congress, and not the States, determine the extent of the United States’ sovereign immunity with regard to statute of limitations questions. As one court has noted, “Section 2401(b) represents a deliberate balance struck by Congress whereby a limited waiver of sovereign immunity is conditioned upon the prompt presentation of tort claims against the government.”¹⁷⁴ It must follow that application of state limitations periods to deemed denials would cede to the States the power to waive the United States’ sovereign immunity on the limitations issue. This

169. *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995).

170. *See Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989); *International Ass’n of Machinists and Aerospace Workers v. Tennessee Valley Auth.*, 108 F.3d 658, 662 (6th Cir. 1997).

171. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147-48 (1987); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161 (1983).

172. *See, e.g.*, 28 U.S.C. §§ 1346(b), 2674 (1994); *Richards v. United States*, 369 U.S. 1, 11-14 (1962); Nelson, *supra* note 134, at 470 n.91.

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

174. *Gould v. United States Dep’t of Health & Human Servs.*, 905 F.2d 738, 742 (4th Cir. 1990) (en banc); *accord Hart v. Department of Labor*, 116 F.3d 1338, 1341 (10th Cir. 1997) (quoting *Pipkin v. United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir. 1991)).

clearly “frustrate[s and] significantly interfere[s] with federal policies” and provides a “compelling [argument] that ‘the federal policies at stake’ in [FTCA] actions make a federal limitations period ‘a significantly more appropriate vehicle for interstitial lawmaking.’”¹⁷⁵

The Supreme Court has touched on the relationship between state law and the FTCA, albeit in a different context. In *Richards v. United States*, the Court was faced with, among other things, the question of whether the whole law of a state applies to claims brought under the FTCA.¹⁷⁶ The Court answered the question in the affirmative.¹⁷⁷ In reaching that conclusion, the Court made certain observations that are relevant to how the borrowing principle may operate in the statute of limitations/deemed-denial context. In particular, the Court stated:

We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so intimately related to state law.

. . . .

In the absence of persuasive evidence to the contrary, we do not believe that Congress intended to adopt the inflexible rule urged upon us by petitioners [i.e., creating a federal common-law rule]. Despite the power of Congress to enact for litigation of this type a federal conflict-of-laws rule independent of the States’ development of such rules, we should not, particularly in the type of interstitial legislation involved here, assume that it has done so.¹⁷⁸

Notably, however, the *Richards* Court excluded from this principle situations in which “Congress has been specific [in its intent that] federal courts . . . depart completely from state law.”¹⁷⁹ In a footnote, the Court listed provisions of the FTCA in which Congress explicitly intended to depart from state law, and among them is § 2401(b).¹⁸⁰

Accordingly, although *Richards* did not explicitly address the question of whether § 2401(b) should be borrowed and applied to deemed denials, the decision indicates that the statute of limitations applicable to FTCA actions is controlled by federal law—§ 2401(b)—and courts have so held.¹⁸¹ It is clear, therefore, that there is a well established federal

175. *Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989) (quoting *DelCostello*, 462 U.S. at 172).

176. *Richards v. United States*, 369 U.S. 1 (1962).

177. *Id.* at 11.

178. *Id.* at 11, 13; *see also* *Molzof v. United States*, 502 U.S. 301, 305 (1992) (“[T]he extent of the United States’ liability under the FTCA is generally determined by reference to state law.”). *See generally* *Mishkin*, *supra* note 118, at 802 n.22 (referring to the FTCA as one of the “clearest instances of federal incorporation of state law”).

179. *Richards*, 369 U.S. at 14.

180. *Id.* at 13 n.28.

181. *See* *Bartleson v. United States*, 96 F.3d 1270, 1276-77 (9th Cir. 1996); *Johnston v. United States*, 85 F.3d 217, 219 (5th Cir. 1996); *Miller v. United States*, 932

policy of having Congress determine the extent of the United States' waiver of sovereign immunity with regard to the statute of limitations applicable to FTCA actions. Allowing the States to control that waiver delivers a fatal blow to this objective.¹⁸²

Second, § 2401(b) provides a more analogous federal statute of limitations for deemed denials than any state law can possibly provide. Section 2401(b) addresses the deemed denial's exhaustion counterpart, the formal denial. Pursuant to § 2675(a), formal denials and deemed denials open the jurisdictional door for FTCA claimants to bring a state-law based cause of action, so that "all claims arising out of [§ 2675(a)] 'should be characterized in the same way.'"¹⁸³ And the only material difference, for borrowing purposes, between formal and deemed denials is who does the denying, the agency or the claimant.¹⁸⁴ This is as

F.2d 301, 303 (4th Cir. 1991); *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1080 (2d Cir. 1988); *Zelevnik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Washington v. United States*, 769 F.2d 1436, 1438 (9th Cir. 1985); *Poindexter v. United States*, 647 F.2d 34, 36 (9th Cir. 1981); *Stoleson v. United States*, 629 F.2d 1265, 1268 (7th Cir. 1980); *Kossick v. United States*, 330 F.2d 933, 935 (2d Cir. 1964); *United States v. Westfall*, 197 F.2d 765, 766 (9th Cir. 1952); *Maryland ex rel. Burkhardt v. United States*, 165 F.2d 869, 871-74 (4th Cir. 1947).

182. *But see Kaulbach, supra* note 121, at 168 & n.215 ("Limitations periods should be drawn from state law whenever Congress has explicitly required this as part of the federal scheme. Thus, for example, state limitations periods apply to claims under the Federal Tort Claims Act, which contains express congressional instructions to implement the remedies in accordance with state law."). Kaulbach, however, does not account for the limitations period set forth in § 2401(b), *Richards*, or the overwhelming view among courts that the statute of limitations applicable to FTCA lawsuits after administrative remedies have been exhausted is a question of federal law.

183. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987) (quoting *Wilson v. Garcia*, 471 U.S. 261, 268 (1985)); *cf., e.g., Zipperer ex rel. Zipperer v. School Bd. of Seminole County, Fla.*, 111 F.3d 847, 851 (11th Cir. 1997) (borrowing from different state statute of limitations where exhaustion scheme of the Individuals with Disabilities Education Act provides plaintiffs different causes of action).

184. The practicalities of litigation coming on the heels of a formal or deemed denial are somewhat different. In the formal-denial context, the FTCA claimant must prepare for litigation once she receives the denial letter, whereas the deemed denier (in the typical case) files suit at the same time she deems her claim denied. *See, e.g., Burnett v. Grattan*, 468 U.S. 42, 51 (1984) (holding that borrowing state administrative-remedies statute of limitations was inappropriate because of the differences inherent in filing an administrative claim versus bringing suit). That difference, however, does not compel the conclusion that a state statute of limitations ought to be borrowed and applied to deemed denials. First, such practical differences in litigation can be found in almost every comparison of two different limitation-triggering events, and nothing in *Burnett* suggests that those differences alone preclude federal borrowing. Second, and perhaps most importantly, that the practicalities of litigation may be different does not alter the fact that application of state statutes of limitations to deemed denials would

analogous as you can get under the cases.¹⁸⁵

Thus, the statute of limitations problem posed by the deeming option of the FTCA comes within the compass of the Supreme Court's federal-borrowing jurisprudence. The FTCA has created the liability so that the FTCA should also dictate the appropriate statute of limitations, one which ensures national uniformity.¹⁸⁶ "[A] uniform statute of limitations is required," the Supreme Court has said, "to avoid intolerable 'uncertainty and time-consuming litigation,'" uncertainty which has

real-world consequences [for] both plaintiffs and defendants in [FTCA] actions. "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."¹⁸⁷

The six-month period in § 2401(b) provides uniformity, is a perfect analogy, and therefore should be borrowed and applied to deemed denials.¹⁸⁸

The ease with which courts can solve the statute of limitations problem posed by deemed denials by borrowing and applying the six-month limitations period in § 2401(b) should not be underestimated. Courts need not, in Chief Judge Posner's words, "beat [their] brains out over the question."¹⁸⁹ Because it is well settled that the statute of limitations applicable to FTCA actions is a question of federal law and because Congress has prescribed a six-month limitations period for formal denials, the problems of indeterminacy and non-uniformity

impermissibly undermine the clear policy of congressionally-authorized waivers of sovereign immunity. *See Reed v. United Transp. Union*, 488 U.S. 319, 327-28 (1989) (reasoning that differences in litigation reality would not compel state-law borrowing where doing so would undermine federal objectives).

185. *Cf., e.g., Agency Holding Corp.*, 483 U.S. at 149-50 (borrowing Clayton Act statute of limitations and applying it to RICO civil actions); *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169-72 (1983) (borrowing § 10(b) of the National Labor Relations Act and applying it to the Labor Management Relations Act).

186. *See, e.g., Herget v. Central Nat'l Bank & Trust Co.*, 324 U.S. 4, 9 (1945).

187. *Agency Holding Corp.*, 483 U.S. at 150 (quoting *Wilson*, 471 U.S. at 272, 275 n.34); *see also Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.").

188. It could be argued that the six-year limitations period in § 2401(a) or the two-year provision in § 2401(b) should be borrowed and applied to deemed denials. The analogies are certainly good ones. But they are not the *best* ones. The Supreme Court has made it clear that the "closest" federal statute of limitations should be borrowed and applied. *See North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995); *Reed*, 488 U.S. at 323; *Agency Holding Corp.*, 483 U.S. at 146; *DelCostello*, 462 U.S. at 158. The six-month time limit in § 2401(b) is, for the reasons stated in Part IV.A.2, *supra*, the best choice for deemed denials.

189. *McCartney C. v. Herrin Community Unit Sch. Dist. No. 4*, 21 F.3d 173, 175 (7th Cir. 1994).

simply do not arise. The borrowing principle has been used for more than 160 years, so that deemed deniers and the United States can hardly assume that § 2401(b)'s silence means that no limitations period applies.¹⁹⁰ Rather, both deemed deniers and the United States should harbor the reasonable expectation that a limitations period is triggered when a claimant exhausts her FTCA administrative remedies by deeming a claim denied. Because § 2401(b) prescribes a six-month limitations period for the deemed denial's counterpart, the formal denial, applying a uniform six-month period to deemed denials does not, by definition, create the uncertainty that has troubled courts and commentators.¹⁹¹ Finally, rather than attempt to absorb state law or search federal statutes for proper analogs to the deemed-denial problem, courts need look no further than the FTCA's own statute of limitations for the proper limitations period to borrow. A court's job is made easier still because, as the next section shows, courts should not have difficulty determining whether the exceptions to the borrowing principle apply, for it is clear that they do not.

B. There's No Escaping the Borrowing Principle

As suggested above, the Supreme Court has identified two exceptions to the application of the borrowing principle.¹⁹² First, and most obviously, if a statute is silent on its face, yet Congress has stated explicitly in the legislative history that no limitations period should apply, courts may not second-guess that judgment by applying the borrowing principle.¹⁹³ Second, if not imposing a limitations period furthers some purpose behind legislation, courts are precluded from undermining that purpose by resorting to the borrowing principle.¹⁹⁴ Neither exception applies to the statute of limitations problem posed by deemed denials.

190. Whether this holds true in those circuits that have concluded that no limitations period applies to deemed denials perhaps raises an issue of retroactivity that is beyond the scope of this Article.

191. See *supra* note 130 and accompanying text.

192. See *supra* Part IV.A-B.

193. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 242-44 (1985).

194. See *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 358-73 (1977).

1. No Part of the Legislative History of the FTCA Suggests That Congress Intended a No-Limitations Rule for the Deeming Option

The legislative history accompanying the 1966 amendments does not contain an explicit statement suggesting Congress intended that no limitations period should apply to deemed denials. In fact, to the extent it can be said that Congress considered the limitations period applicable to deemed denials, the legislative history reveals precisely the opposite: Congress *intended* the six-month period in § 2401(b) to apply when claimants exercise the deeming option. In the House and Senate Reports under the heading “PURPOSE,” the following statement about the applicable statute of limitations appears: “A claim would have to be filed with the agency concerned within 2 years after it accrues and *any* tort action must be brought within 6 months after *final denial* of the administrative claim.”¹⁹⁵ Plainly, neither the House nor the Senate distinguished between formal and deemed denials for purposes of the six-month limitations period in § 2401(b). This conclusion follows because both the House and Senate reports state that “any” tort action must be filed within six months of a “final denial,” and, in § 2675(a), Congress defined both formal and deemed denials as “final denials” for purposes of administrative exhaustion.¹⁹⁶ In addition, when asked about the statute of limitations issue, Assistant Attorney General John W. Douglas—the only person to testify about the meaning of the 1966 amendments to the FTCA—stated: “The statute of limitations is set out in the bill. It actually expands the time within which a suit could be filed in court. At the present time there is a 2-year statute of limitations, and this bill permits 2 years to file with the agency plus 6 months after the agency acts *or refuses to act*.”¹⁹⁷

The only statement in the legislative history that may support a finding that no statute of limitations applies to deemed denials is found in the section-by-section analysis of the 1966 amendments. Both the House and Senate Reports state the following:

This section amends the provisions of section 2401, the limitations section, *to conform the section to the amendments added by the bill*. The amendments have the effect of *simplifying* the language of section 2401 to require that a claimant must file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, and to further require the filing of a court action within 6 months of notice by certified or registered mail of a final decision of

195. H.R. REP. NO. 1532, *supra* note 21, at 3 (emphasis added); S. REP. NO. 1327, *supra* note 21, at 1 (same).

196. *See supra* Part I.A.

197. *Hearings, supra* note 22, at 18 (emphasis added).

the claim by the agency to which it was presented.¹⁹⁸

There is no reason to think, however, that this wooden statement represents an explicit directive from Congress that no limitations period should apply to deemed denials. First, the operative language in the House and Senate Reports merely restates the text of § 2401(b)—nothing more, nothing less. Second, the language shows that in “conform[ing § 2401(b)] to the amendments added by the bill,” Congress envisioned FTCA claimants deeming their claims denied by filing suit sometime after the six-month settlement period expired.¹⁹⁹ As such, the statute of limitations issue becomes moot, and § 2401(b) was “simplified” to reflect this fact. In other words, there would have been no need to include in § 2401(b) a limitations period for deemed denials because the act of deeming a claim denied in most cases consists of filing suit.

But it is quite a different matter to conclude from the statement in the section-by-section analysis of § 2401(b) that Congress did not intend to impose a limitations period when an FTCA claimant deems her claim denied by providing an agency written notice of the deemed-denial decision or when a second suit is filed after a claim is deemed denied by filing suit.²⁰⁰ When Congress amended the FTCA in 1966, it was not acting in a vacuum. Rather, as courts have recognized, the Congress

198. H.R. REP. NO. 1532, *supra* note 21, at 5 (emphasis added); S. REP. NO. 1327, *supra* note 21, at 8 (same).

199. *Id.*; see *supra* note 66 and accompanying text.

200. Although Congress had nothing to say about the second-suit problem in the deemed-denial context, Congress *did* account for this contingency in suits brought by the United States. Section 2415(e), enacted in 1966, provides in part: “In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section.” 28 U.S.C. § 2415(e) (1994). Plainly, Congress knew how to deal with the second-suit problem; it did so in § 2415(e) and applied a one-year limitations period to the second suit. Congress did *not* provide the United States an indefinite period within which to file a second suit, for to do so would have obviously undermined the purpose behind the 1966 amendments, which was to bring the United States-as-plaintiff within the compass of the time-honored principle of repose. Therefore, if Congress had considered the issue, it surely could have provided deemed deniers (and formal deniers) an extended time period within which to file a second suit. *Cf.* Jacoby, *supra* note 6, at 1233 (stating that 28 U.S.C. § 2415(e) represents “a special rule . . . for government suits”). Congress’s failure to do so must either mean (1) that Congress overlooked this problem as it related to deemed denials or (2) that Congress could not possibly have intended to provide deemed deniers that which it did not provide to the United States, that is, an indefinite period within which to file a second suit.

legislates against a background of well settled common-law principles, one of which is the principle of repose, which drives the practice of borrowing statutes of limitations and which must be incorporated into the FTCA unless Congress instructs otherwise.²⁰¹ Thus, it would be extraordinary indeed to conclude that the 1966 Congress intended not to impose a limitations period on deemed denials, yet failed to utter a single word in support of that conclusion.²⁰² That Congress could not have intended a no-limitations rule for deemed deniers is reinforced further still because, in addition to the legislative history suggesting a six-month limitations period applies to deemed denials,²⁰³ other clearly

201. See, e.g., *Molzof v. United States*, 502 U.S. 301, 307-08 (1992) (interpreting the FTCA); *Logue v. United States*, 412 U.S. 521, 526-28 (1973) (same); *Reo v. United States Postal Serv.*, 98 F.3d 73, 77 (3d Cir. 1996) (same).

202. See, e.g., *Reo*, 98 F.3d at 77 (“Given that Congress was legislating against the background of the ‘ancient precept of Anglo-American jurisprudence’ requiring court approval of the settlement of minor’s claims, it would be surprising if the 1966 amendment [to the FTCA] took away this longstanding protection without comment.” (citation omitted) (quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978))).

203. See *supra* notes 198-200 and accompanying text. It is hard to ignore the legislative history accompanying 28 U.S.C. § 2415, which is the statute of limitations applicable to tort claims brought by the United States, for it demonstrates, perhaps more clearly than anything else in the 1966 legislative history, Congress’s view about the importance of statutes of limitations. Prior to 1966, no statute of limitations applied to actions brought by the United States. H.R. REP. NO. 1534, *supra* note 37, at 10 (statement of Attorney General Nicholas de B. Katzenbach); *Statutes of Limitations*, *supra* note 84, at 1251. Congress changed that in 1966 by enacting § 2415, which imposed a three-year limitations period on tort suits brought by the United States. In doing so, Congress intended to put the United States in the same statute of limitations shoes as plaintiffs who sue the government. H.R. REP. NO. 1534, *supra* note 37, at 4. Why? The time-honored principle of repose:

Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented or adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

Id. Because Congress considered § 2415 and the changes to § 2401(b) and § 2675(a) “as a group,” *id.* at 3, this sentiment for the principle of repose reverberated throughout the legislative history. See S. REP. NO. 1328, *supra*

expressed policies underlying the 1966 amendments to the FTCA suggest that Congress must have intended the six-month limitations period in § 2401(b) to apply once an FTCA claimant takes action to deem her claim denied.

2. *No Conceivable Policy Objective is Furthered by Adopting a No-Limitations Rule for Deemed-Deniers*

a. *The Legislative History Accompanying the 1966 Amendments to the FTCA*

The second exception to application of the borrowing principle requires a showing that Congress's silence promotes a congressional policy objective. That is the teaching of *Occidental Life Insurance Co. v. EEOC*,²⁰⁴ in which the Supreme Court was faced with determining whether a statute of limitations should be borrowed and applied to the Title VII administrative settlement scheme, which contained no statute of limitations for suits brought by the EEOC. The Court concluded that although Title VII was silent, the legislative history and purposes behind Title VII evinced a congressional intent to impose no limitations period at all on suits brought by the EEOC.²⁰⁵

What the legislative history in *Occidental* plainly demonstrated was that Congress did not intend to impose a limitations period on the "back end" of the administrative settlement process (i.e., when administrative remedies have been exhausted)—at least not with respect to suits brought by the EEOC. The FTCA, of course, contains no such thing. Section 2401(b) plainly imposes a six-month limitations period on formal denials, and the legislative history accompanying the 1966 amendments to the FTCA demonstrates clearly that Congress intended to impose a limitations period on suits brought after FTCA claimants

note 37, at 2; S. REP. NO. 1327, *supra* note 21, at 11-12 (same); H.R. REP. NO. 1532, *supra* note 21, at 11 (same). In light of this explicit statement in the legislative history, one may well question the legitimacy of concluding that Congress highlighted the importance of repose, imposed a limitations period on all tort suits brought by the United States and formal deniers, but at the same time provided deemed deniers a right enforceable in perpetuity.

204. 432 U.S. 355 (1977).

205. *Id.* at 358-73. The Supreme Court has characterized *Occidental* as "rare." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 356 n.3 (1991).

exhaust their administrative remedies. Moreover, the Court in *Occidental* also pointed to Congress's goal of imposing a greater workload on the EEOC as justification for concluding that Congress's silence evinced an intent not to impose a limitations period on suits brought by the EEOC.²⁰⁶

By contrast, an examination of the policies underlying the 1966 amendments to the FTCA²⁰⁷ reveals quite clearly that, by not imposing a limitations period on deemed denials, courts have undermined each of Congress's objectives and harmed each group Congress intended to benefit.²⁰⁸ At the outset, I should note that the policy objectives behind the 1966 amendments revolved around the settlement of tort claims that were ordinarily resolved in an Article III court, so that when a claim is not resolved in a federal agency and proceeds to resolution in court, those objectives have no relevance. But there is no reason to so limit the reach of Congress's intent when it amended the FTCA to provide a more efficient system of adjudicating tort claims brought against the United States. Rather, any interpretation of the FTCA should keep those policy goals in mind, ensuring that neither claimants nor the United States seize on the new administrative-settlement scheme and gain a litigation advantage in an Article III court.²⁰⁹

A no-limitations rule for deemed deniers certainly does not decrease court congestion or avoid unnecessary litigation. Of course, Congress did not anticipate that every tort claim would be settled; the deemed-denial option is proof of that. Once in court, however, whether by way of a formal agency denial or a deemed denial, the six-month limitations period imposes on FTCA claimants a short, definite time period within which to file suit. The short time frame, in turn, decreases court congestion and avoids unnecessary litigation by weeding out suits that

206. *Occidental*, 432 U.S. at 369-71.

207. See *supra* notes 37-42 and accompanying text (detailing the policies promoted by the administrative-exhaustion scheme of the FTCA).

208. It should be noted that, in the FTCA context, courts routinely look to the legislative history to determine whether Congress has expressly and clearly waived the United States' sovereign immunity. See, e.g., *Smith v. United States*, 507 U.S. 197, 202-03 n.4 (1993); *United States v. Shearer*, 473 U.S. 52, 55-56 (1985); *United States v. Muniz*, 374 U.S. 150, 153-58 (1963); *Richards v. United States*, 369 U.S. 1, 8-10 (1962); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *Dalehite v. United States*, 346 U.S. 15, 24-32 (1953); *United States v. Yellow Cab Co.*, 340 U.S. 543, 549-51 & nn.6-8 (1951).

209. See, e.g., *Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981) (rejecting claimant's argument that a suit filed before the six-month settlement period expired could proceed because doing so would undermine Congress's purpose in decreasing court congestion and avoiding unnecessary litigation); *Adams v. United States*, 615 F.2d 284, 288-93 (5th Cir. 1980) (rejecting United States' position that § 2675(a) imposed requirements on FTCA claimant that ostensibly precluded claimant from exercising the deeming option).

are not diligently prosecuted. With regard to a lawsuit that serves as a deemed denial, although filing suit and deeming a claim denied often occur at the same time, a six-month limitations period (which, of course, is triggered on the day suit is filed, thus making the suit timely) eliminates a cost-free judicial process. If a deemed denier does not prosecute her suit diligently, she will not be able to file another suit outside of the six-month period and avoid a statute of limitations defense. Thus, to the extent Congress's administrative-exhaustion scheme does not produce a settlement, applying the six-month limitations period to formal and deemed denials preserves the pre-1966 status quo, and nothing in the legislative history suggests Congress intended any other result. It is clear that not imposing a limitations period on deemed denials *increases* court congestion by permitting FTCA claimants to repeatedly file suit over an indefinite period of time.²¹⁰ It is self-evident that this construction of the FTCA fatally undermines Congress's objective of decreasing court congestion and avoiding unnecessary litigation.

When an FTCA claimant deems her claim denied, application of the six-month limitations period in § 2401(b) does not harm an FTCA claimant more than the Justice Department, and vice versa. The FTCA claimant must go through the expense of litigation, and the Justice Department must devote its resources to defending the claim. By contrast, not imposing a limitations period on deemed deniers severely prejudices the United States because suits can be repeatedly filed over an indefinite period of time. This puts the Justice Department in the untenable position of having to defend stale claims. Prior to 1966, this would have never happened because all FTCA claimants who filed suit were subjected to a limitations period. It is therefore wrong to suggest (since nothing in the legislative history supports such a conclusion) that despite Congress's intent in 1966 to create a new and improved dispute-resolution system beneficial to FTCA claimants and the United States, Congress nonetheless intended to make the United States worse off than it was prior to 1966.

Finally, those who receive a formal denial are also worse off, relative to deemed deniers, than they were prior to the 1966 amendments. This

210. See *Pascale v. United States*, 998 F.2d 186, 191 (3d Cir. 1993) (holding that deemed deniers may deem a claim denied more than once over an indefinite period of time); *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 390 (E.D.N.Y. 1988) (same).

is so for obvious reasons. Deemed deniers would have a litigation advantage not enjoyed by those who see the administrative process through and eventually obtain a formal, written denial of their claim. Conferring such an advantage on deemed deniers, who voluntarily remove themselves from any continued settlement process, clearly puts an unwarranted onus on the settlement process for those who earnestly want to settle their claims. Congress surely did not intend to undercut the settlement scheme in this way by putting FTCA claimants on such an unequal footing in federal district court, for there is no evidence in the legislative history that Congress intended to treat “formal deniers” different than “deemed deniers” for statute of limitations purposes. What the Supreme Court said over a century ago (in a borrowing case, no less) is particularly relevant in the deemed-denial context: “[W]e [would] have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions.”²¹¹

In short, it is plain that a no-limitations rule for deemed denials harms all four groups Congress intended to benefit: courts will have to deal with repetitive filings over an indefinite period of time; FTCA claimants who receive formal denials are subjected to a more narrow window within which to file suit than deemed deniers; the Justice Department, perhaps years later, will have to relitigate suits that have been litigated and dismissed; and agencies will have to locate witnesses whose memories will surely have faded and documents that may have been destroyed. It would be wrong, therefore, to suggest that the borrowing principle should not be applied to the deemed-denial problem because Congress’s silence somehow promotes a legislative policy objective.

b. The Formal-Denial Escape Hatch

Last, but certainly not least, I now address perhaps the best (yet, ultimately unpersuasive) argument against application of the borrowing principle to the deemed-denial problem. It could be argued that the United States cannot complain about the statute of limitations problem posed by deemed denials because the United States ultimately has the power to trigger the six-month limitations period in § 2401(b) by issuing a formal, written denial after an FTCA claimant has deemed her claim denied. Congress, the argument would go, did not waive the United States’ sovereign immunity to the extent that no limitations period applies to deemed denials because Congress intended to have

211. Campbell v. Haverhill, 155 U.S. 610, 616 (1895).

administrative agencies come to a final decision on all tort claims filed against the United States. The formal-denial “escape” hatch, however, provides no escape at all from the borrowing principle.

The formal-denial argument, of course, is beside the point. Suggesting that the statute of limitations problem can be avoided by issuing a formal agency denial is to provide no answer at all to the question of whether a statute of limitation applies to deemed denials. Section 2675(a) prescribes two mutually exclusive methods of administrative exhaustion, and pointing to one method as a solution to the problem posed by the second method of exhaustion is a classic red herring. More to the point, the formal-denial “escape” hatch cannot serve as a permissible construction of the FTCA because it (1) is fundamentally at odds with the doctrine of administrative exhaustion codified in § 2675(a); (2) is inconsistent with § 1346(b)(1) jurisdiction that is triggered once an FTCA claimant has exhausted her administrative remedies and filed suit; (3) suggests that a deemed denial is no longer a “final denial,” contrary to the plain terms of § 2675(a); and (4) is irreconcilable with the administrative-settlement scheme of the FTCA.

When an FTCA claimant deems a claim denied by filing suit, well accepted doctrines of administrative exhaustion in general and the administrative-exhaustion scheme of the FTCA in particular compel the conclusion that an agency is then powerless to issue a legally effective formal denial.²¹² The doctrine of administrative exhaustion holds that a plaintiff has gone through a legislatively-prescribed administrative process and been unsuccessful in obtaining relief via that process. Exhaustion, then, means that an FTCA claimant was unable to settle her claim in the agency and therefore can obtain relief only (if at all) in an Article III court. Because formal denials and deemed denials present two equally valid ways to exhaust FTCA administrative remedies, it must follow that when an FTCA claimant deems her claim denied, she is saying that her case cannot be settled within the administrative agency. Once an FTCA claimant exhausts her administrative remedies and files suit, § 1346(b)(1) invests Article III courts with exclusive jurisdiction over the claim.²¹³ Thus, when an FTCA claimant deems her claim denied by filing suit, agency issuance of a formal written denial has no legal

212. See *supra* Part I.B.

213. 28 U.S.C. § 1346(b)(1) (1994 & Supp. 1998).

effect because the agency itself no longer has jurisdiction over the claim.²¹⁴

To say that an agency thereafter has the authority to interpose a formal denial suggests that the agency may unilaterally conclude that the FTCA claimant's remedies had not, in fact, been exhausted. There are a number of problems with this reading of § 2675(a). First, such a construction of the FTCA suggests that a deemed denial is no longer a "final" denial—contrary to the express terms of § 2675(a). This is an impermissible interpretation of the FTCA, for a cardinal rule of statutory construction is that words in a statute are to be given their ordinary, common-sense meaning.²¹⁵ It is self-evident that a purportedly effective formal denial interposed after a deemed denial strips the deemed denial of finality.

Second, the contention that an administrative agency has the power to issue a formal denial after an FTCA claimant has deemed her claim denied by filing suit is flatly inconsistent with the doctrine of administrative exhaustion and the plain language of § 1346(b)(1). Plainly, an FTCA claimant cannot exhaust her administrative remedies twice; exhaustion means exhaustion, not quasi-exhaustion. Likewise, once an FTCA administrative claim has been finally denied through the filing of a lawsuit, § 1346 jurisdiction is triggered, and that jurisdiction is exclusive of any other adjudicative body.²¹⁶ An Article III court cannot logically have exclusive jurisdiction over a deemed-denial lawsuit if an administrative agency retains the authority to adjudicate and deny the claim. Jurisdiction means jurisdiction, not some curious notion that an FTCA claimant straddles a jurisdictional fence when she deems her claim denied by filing suit.

That the formal-denial argument is inconsistent with the doctrines of exhaustion and Article III jurisdiction is illustrated further by considering agency regulations governing FTCA claims. For instance, the Department of Energy permits claimants to seek reconsideration of a final, formal agency denial.²¹⁷ If a formal denial, issued after a claim has

214. See *supra* Part I.B. But see *Lehman v. United States*, 154 F.3d 1010, 1013-15 (9th Cir. 1998) (holding that agency has power to issue formal denial after FTCA plaintiff has exercised the deeming option by filing suit).

215. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993); *Smith v. United States*, 507 U.S. 197, 201 (1993).

216. See *supra* Part I.B.

217. See 10 C.F.R. § 1014.9(b) (1997). Whether reconsideration of a formal, final denial represents a permissible construction of the FTCA is, under the case law, unclear. See, e.g., *Bond v. United States*, 934 F. Supp. 351, 353-57 (C.D. Cal. 1996) (holding that agency regulation permitting reconsideration is not jurisdictional and therefore cannot contravene the plain terms of § 2401(b) or § 2675(a)). This Article expresses no opinion on this issue, but merely uses the reconsideration regulation as a means of demonstrating

been deemed denied through the filing of a lawsuit, is legally effective, the right to seek reconsideration of the final denial must also be triggered. It would certainly be odd to suggest that Congress contemplated that a claimant could, after filing a lawsuit in an Article III court due to agency inaction, turn back around and seek reconsideration with the agency that failed to act on the claim until administrative remedies already had been exhausted. There would be nothing for the agency to reconsider because the claimant has taken her tort claim to court. And, in any event, the agency could not reconsider the claim because the district court has exclusive jurisdiction over the claim.

Third, the “logic” of the post-exhaustion-exhaustion argument leads to the anomalous result that an FTCA claimant can deem her claim denied by filing suit, yet, at some point in the future, an agency can present the claimant with a settlement offer. Although this may arguably comport with Congress’s intent to settle claims within administrative agencies,²¹⁸ such a result is simply irreconcilable with the doctrine of exhaustion. Interjecting a settlement offer after a deemed denial plainly suggests that the FTCA claimant still has available to her the prescribed administrative remedy of settlement. This is wholly at odds with the well established rule that administrative exhaustion opens the door to § 1346(b)(1) jurisdiction, investing Article III courts with exclusive jurisdiction over an FTCA lawsuit.

With respect to written-notice deemed denials, to suggest that an agency may interpose a legally effective formal denial after a written-notice deemed denial is to write the deeming option out of § 2675(a). A deemed denial would no longer be a “final denial”—contrary to the express terms of § 2675(a)—and would thereby be rendered

the fallacy, from a real-world perspective, of suggesting that the formal-denial argument solves the statute of limitations problem posed by the deeming option.

218. Promoting the policy of settlement by permitting agencies to interject settlement proposals after an FTCA claimant has deemed her claim denied and filed suit is a cure worse than the disease. In addition to contravening the plain terms of § 2675(a), gutting the doctrine of administrative exhaustion codified in § 2675(a), and rendering hollow the well-established principle that exhaustion of FTCA administrative remedies is a condition precedent to invoking Article III jurisdiction, the argument is belied by the text of the FTCA. Just as Congress could not have intended to permit administrative agencies to interpose formal denials after a deemed denial, it surely could not have intended agencies to present settlement offers to FTCA claimants after they have invoked the jurisdiction of a federal court. The text of the FTCA states as much. See 28 U.S.C. § 2677 (1994) (“The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, *after the commencement of an action thereon.*” (emphasis added)).

meaningless. This is an impermissible construction of the FTCA, for another cardinal rule of statutory construction is that every word in a statute must be interpreted, to the extent possible, as having some operative effect.²¹⁹ And, as I have suggested, the principle of primary jurisdiction codified in the FTCA compels the conclusion that, when there has been a final denial of an administrative claim and a lawsuit has not yet been filed, the FTCA claimant lingers in jurisdictional limbo, not that an agency somehow retains adjudicatory powers over a claim that, by definition, can no longer be resolved in the administrative process.²²⁰

To illustrate this point further, consider the following hypothetical. Suppose an agency formally denies a claim and the FTCA claimant thereafter deems the claim denied either by written notice or by filing a lawsuit. The FTCA claimant surely cannot colorably contend that exhaustion of administrative remedies occurred when she deemed her claim denied. The agency's formal denial was a "final denial" for purposes of administrative exhaustion. Because Congress defined formal and deemed denials as "final denials" for purposes of administrative exhaustion, the converse also must therefore be true: Once an FTCA claimant appropriately deems her claim denied—a "final denial" for purposes of § 2675(a)—administrative remedies have been exhausted and federal district courts may exercise Article III jurisdiction over a subsequently filed lawsuit. Just as an FTCA claimant is powerless to alter this statutory scheme, so too is an agency.

Finally, permitting agencies to interpose formal denials after an FTCA claimant has deemed a claim denied (by either filing suit or providing an agency written notice of the deemed-denial decision) is flatly inconsistent with the settlement scheme Congress created in 1966. Indeed, the suggestion that administrative agencies have the power to trigger the six-month limitations period in § 2401(b) by issuing a formal denial assumes (wrongly) that Congress intended that *all* administrative claims be finally adjudicated by agencies. Congress was well aware that some administrative claims could not be settled within the six-month time frame prescribed in § 2675(a); thus, it encouraged the FTCA claimant and the agency to continue negotiations until the claim is finally resolved.²²¹ At the same time, however, Congress did not intend that all administrative claims be finally determined by agencies.²²²

219. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992).

220. See *supra* Part I.B.

221. See *Hearings*, *supra* note 22, at 13; H.R. REP. NO. 1532, *supra* note 21, at 8; S. REP. NO. 1327, *supra* note 21, at 5.

222. See *Hearings*, *supra* note 22, at 13 ("Thus, even though this six months period may prove insufficient in some instances, *we do not believe that this period ought to be enlarged to attempt to insure time for final decision on all claims.*" (emphasis added));

Rather, Congress declined to enlarge the six-month settlement period, providing the FTCA claimant an option to deem her claim denied any time after the six-month period expired.²²³ Obviously, Congress understood that once the FTCA claimant pulled out of the administrative-settlement process by deeming a claim denied, that process was at an end. Therefore, Congress could not have intended to further the policy of settlement by permitting agencies formally to deny claims once an FTCA claimant has exhausted her administrative remedies and stands ready to invoke the jurisdiction of an Article III court.

In sum, the formal-denial argument does not represent a viable construction of the FTCA and therefore does not bring the deemed-denial problem within the ambit of the second exception to the borrowing principle. Accordingly, suggesting that an administrative agency can interpose a formal denial after an FTCA claimant has deemed her claim denied reduces the Congressional settlement scheme to an absurdity. Did Congress intend to put the Justice Department to the Hobson's choice of either construing the FTCA in an untenable manner or face the unacceptable prospect of defending stale claims? Congress did no such thing. The borrowing principle should be applied to close the statute of limitations gap in the FTCA.

V. THE DEEMED-DENIAL CASES: THE BORROWING PRINCIPLE OVERLOOKED, THE FTCA MISUNDERSTOOD

When presented with the statute of limitations problem posed by the deemed-denial option, however, some courts have come to a different conclusion. They have held that no limitations period applies to deemed-denial lawsuits.²²⁴ Courts have provided four justifications for

H.R. REP. NO. 1532, *supra* note 21, at 8 (same); S. REP. NO. 1327, *supra* note 21, at 5 (same).

223. See *Hearings*, *supra* note 22, at 13; H.R. REP. NO. 1532, *supra* note 21, at 8; S. REP. NO. 1327, *supra* note 21, at 5.

224. See *Lehman v. United States*, 154 F.3d 1010, 1013-15 (9th Cir. 1998); *Pascale v. United States*, 998 F.2d 186 (3d Cir. 1993); *Parker v. United States*, 935 F.2d 176 (9th Cir. 1991); *Hannon v. United States Postal Serv.*, 701 F. Supp. 386 (E.D.N.Y. 1988). It should be noted that *Pascale*, *Parker*, and *Hannon* all dealt with Rule 4 dismissals and that Rule 4 has since been amended to prevent the problems encountered by the plaintiffs in those cases. Rule 4(i)(3) now "allow[s] a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the

this conclusion.²²⁵ First, Congress failed to account for the deeming option in § 2401(b), and that failure evinces an intent not to impose a limitations period on deemed denials.²²⁶ Second, the deemed-denial option was designed to protect FTCA claimants from unreasonable agency delay in claims processing, thereby making it inequitable to impose a limitations period on FTCA claimants who have waited the administrative process out.²²⁷ Third, the United States can, at any time, issue a formal denial and trigger the six-month limitations period in § 2401(b), rendering unpersuasive the contention that by not imposing a limitations period on deemed denials, the United States is forced to defend stale claims.²²⁸ Fourth, nothing in the text of the FTCA or the legislative history states that an FTCA claimant can only deem a claim denied once, so that an FTCA claimant may repeatedly file suit and avoid a statute of limitations defense.²²⁹ None of these rationales is persuasive.

The basic flaw in the decisions is that they overlook the borrowing principle. For example, in *Pascale v. United States*,²³⁰ the Third Circuit, interpreting § 2401(b), reasoned that “if Congress had intended the six-month statute of limitations in section 2401(b) . . . to apply also when a claimant has exercised the deeming option under section 2675(a), we can assume it would have so stated.”²³¹ Of course, this statement is flatly inconsistent with the Supreme Court’s clear admonition that when

United States attorney or the Attorney General of the United States.” FED. R. CIV. P. 4(i)(3). Added in 1993, this new provision “saves the plaintiff from the hazard of losing a substantive right because of failure to comply with the complex requirements of multiple service under this subdivision.” Advisory Committee Note on 1993 Amendment to FED. R. CIV. P. 4 Subdivision (i).

225. A fifth argument was provided by the district court in *Hannon*, in which the court concluded that the “any time thereafter” language in § 2675(a) replaces § 2401(b) as the statute of limitations applicable to the deeming option. *Hannon*, 701 F. Supp. at 389. As I have pointed out, a plain reading of § 2675(a) suggests that an FTCA claimant has an indefinite period within which to exhaust her administrative remedies in the face of agency inaction, not that she has an indefinite period within which to file suit. See *supra* notes 28-34, 154-56 and accompanying text. The deeming option can be exercised in any number of ways, one of which consists of filing a lawsuit. The means by which a claimant deems a claim denied is immaterial. See *supra* notes 157-164 and accompanying text. Deeming a claim denied satisfies the condition precedent to conferring § 1346 jurisdiction on federal courts to entertain an FTCA claimant’s suit—nothing more, nothing less.

226. See *Pascale*, 998 F.2d at 188; *Parker*, 935 F.2d at 177; *Hannon*, 701 F. Supp. at 389.

227. See *Pascale*, 998 F.2d at 189-90; *Parker*, 935 F.2d at 177-78; *Hannon*, 701 F. Supp. at 389.

228. See *Lehman*, 154 F.3d at 1013-15; *Pascale*, 998 F.2d at 192; *Parker*, 935 F.2d at 177-78; *Hannon*, 701 F. Supp. at 389 n.7.

229. See *Pascale*, 998 F.2d at 191; *Hannon*, 701 F. Supp. at 390.

230. *Pascale*, 998 F.2d 186 (3d Cir. 1993).

231. *Id.* at 188 (emphasis added).

Congress is silent on the limitations issue, courts should “assume that Congress intends . . . that [courts] borrow state[-]law [statutes of limitations].”²³² Put simply, the Supreme Court has said that silence triggers borrowing, whereas *Pascale* and other lower courts interpreting the deeming option have held that Congress’s silence requires courts to assume that no limitations period applies.²³³

Moreover, anchoring a no-limitations rule to Congress’s intent to provide more fair and equitable treatment to FTCA claimants represents a myopic reading of the legislative history. It is true, of course, that the 1966 amendments were intended to provide a dispute-resolution scheme beneficial to FTCA claimants. But the purposes of the 1966 amendments were much broader than that. Congress sought to decrease court congestion, avoid unnecessary litigation, and provide a more fair dispute-resolution system for FTCA claimants and the United States.²³⁴ Accordingly, an analysis of the statute of limitations problem posed by deemed denials must take all of these policy objectives into account, something courts have simply failed to do.²³⁵ Plainly, although a no-limitations rule benefits deemed deniers, such a rule undermines Congress’s other objectives of decreasing court congestion, avoiding unnecessary litigation, and providing a dispute-resolution scheme that benefits the United States and administrative agencies.²³⁶

In addition, the act of deeming a claim denied is taken by the FTCA claimant; it is not forced on her by the United States or anybody else. Assuming the administrative agency does not interpose a formal denial, the language of § 2675(a) unambiguously gives the FTCA claimant complete control over her legal options once the six-month settlement period expires, so that any action taken by the claimant which deems an administrative claim denied is taken at her own peril. Plainly, the

232. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 147 (1987).

233. *Id.*

234. *See supra* notes 37-42 and accompanying text.

235. *See, e.g., Holder v. Hall*, 512 U.S. 874, 933 (1994) (plurality opinion) (Thomas, J., and Scalia, J., concurring in judgment) (stating as unreliable “a series of partisan statements about purposes and objectives collected by congressional staffers and packaged into a Committee Report”); *Richards v. United States*, 369 U.S. 1, 10 n.20 (1962) (“[W]e are not persuaded to allow an isolated piece of legislative history to detract from the [FTCA] the words Congress expressly employed.”); *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955) (“Loose general statements in the legislative history to which the Government points seem directed mainly toward [a different statutory provision in the FTCA] and are not persuasive.”).

236. *See supra* Part IV.B.2.

government cannot place the FTCA claimant in any sort of legal straightjacket when the six-month settlement period expires. She has the “option” to deem a claim denied at “any time.”²³⁷ But once she deems a claim denied by filing suit or by taking some other action, the administrative settlement process has come to an end. As such, all of the legal consequences that accompany administrative exhaustion (*i.e.*, triggering a statute of limitations) apply. It is therefore wrong to characterize a procedure that provides the FTCA claimant with total control of her legal situation as somehow brow-beating the FTCA claimant in an inequitable manner.²³⁸

More to the point, the argument that it would be inequitable to impose a six-month limitations period on deemed denials simply proves too much. Claimants receiving formal denials may also be subjected to the precise “inequitable” situation contemplated by the courts. Suppose a claimant receives a formal denial of her claim, filed suit, and had that suit dismissed without prejudice. Assume further that the claimant then filed a second suit more than six months after receiving the formal denial. The second suit plainly would have been time barred. Congress knew this, yet prescribed a six-month limitations period for claimants receiving formal denials. The inequity argument reduces to the wholly insupportable contention that Congress accorded deemed deniers some special statute of limitations status. There is not the slightest hint in the legislative history to support such a construction of the FTCA, and nothing in the cases suggests otherwise.

Furthermore, the suggestion that the United States can trigger the six-month period in § 2401(b) by having agencies issue formal denials after a claimant has deemed her claim denied by filing suit is fundamentally inconsistent with § 1346(b)(1). When FTCA plaintiffs deemed their claims denied by filing suit—as each of the plaintiffs did in the cases that have discussed the limitations problem posed by the deeming option—the district courts retained “exclusive jurisdiction” over those claims.²³⁹ If the term “exclusive” means anything, it surely means that only federal district courts—and, obviously, not federal agencies—have the power to adjudicate those claims. A proper reading of the FTCA therefore renders illusory the courts’ suggestion that a formal denial, issued after a claimant deems a claim denied by filing suit, protects the

237. 28 U.S.C. § 2675(a) (1994).

238. *See, e.g.,* Leaman v. Ohio Dep’t of Mental Retardation & Dev. Disabilities, 825 F.2d 946, 956 (6th Cir. 1987) (holding that FTCA claimants can control whether or not they accept an agency’s settlement offer, rendering unpersuasive the contention that the consequences of plaintiff’s unreasonable choice somehow create an unconstitutional condition), *cert. denied*, 487 U.S. 1204 (1988).

239. 28 U.S.C. § 1346(b)(1) (1994 & Supp. 1998).

United States' interest in repose.

Finally, the suggestion that an FTCA claimant may deem a claim denied more than once is belied by the plain language of § 2675(a). According to the Third Circuit in *Pascale v. United States*:

There is no statutory language indicating that a claimant can only deem a claim denied once. The "option" language appears in the phrase which provides that a claim can be denied "at the option of the claimant *any time thereafter*," and refers only to the timing of claimant's decision to file suit, not to any arbitrary limit on the number of times the deeming option can be exercised.²⁴⁰

Contrary to the *Pascale* Court's assertion that "no" statutory language supports the proposition that a claimant may deem a claim denied only once, § 2675(a) does in fact contain such language. Section 2675(a) states that a deemed denial "*shall . . . be deemed a final denial.*"²⁴¹ "Final" is defined as "of or coming at the end; last; concluding . . . leaving no further chance for action, discussion, or change; deciding; conclusive . . . having to do with the basic or ultimate purpose, aim, or end" ²⁴² Because a bedrock principle of statutory construction is that words in a statute are to be accorded an "ordinary, contemporary, common meaning,"²⁴³ the Third Circuit's construction of § 2675(a) is simply not a permissible one. To say that an FTCA claimant can deem a claim "finally" denied more than once stretches the definition of "final" beyond any "ordinary, contemporary, common meaning."²⁴⁴ And because Congress chose the mandatory "shall" (as opposed to a discretionary "may"), there certainly can be no room for arguing that a "final denial" is anything but that—final.

CONCLUSION

So, should Jack's suit and Jill's second suit be time-barred? This Article suggests that both suits ought to be barred by the six-month limitations period in § 2401(b).²⁴⁵ Jack exhausted his FTCA

240. 998 F.2d 186, 191 (3d Cir. 1993) (first emphasis added).

241. 28 U.S.C. § 2675(a) (1994) (emphasis added).

242. Webster's New World Dictionary 506 (3d college ed. 1991).

243. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

244. *Id.*; *see, e.g., Smith v. United States*, 507 U.S. 197, 201 (1993) (holding that common-sense construction of "country" in § 2680(k) of the FTCA can be gleaned from a dictionary).

245. This Article does not address the question of whether the six-month limitations period in § 2401(b) should be equitably tolled. For an argument that equitable tolling is

administrative remedies on June 16, 1991, when he deemed his claim denied by providing the Postal Service written notice of the deemed-denial decision more than six months after he submitted his claim to the Service. Because the borrowing principle requires application of the six-month limitations period in § 2401(b) to deemed denials, Jack had six months within which to file suit against the United States in federal district court. His suit, however, was filed one year after he exhausted his remedies and therefore is time-barred. So too with Jill. She exhausted her administrative remedies on November 25, 1975, when she deemed her claim denied by filing suit. To be timely, her second suit had to be filed no later than May 26, 1976. Because it was filed twenty years after the claim was deemed denied, Jill's second suit would also be time-barred.

Neither result is unfair. When Congress prescribed a six-month limitations period in § 2401(b), it struck the balance between the policies of repose and diligence that represented the extent to which Congress was willing to waive the United States' immunity from tort suits. With respect to Jill's second suit, one may well question the fairness of barring her subsequent suit because, after all, she did not have the epidemiological evidence to prove her case until years after she filed suit. However, this is no reason to hold that the six-month limitations period in § 2401(b) should not bar the claim. As I have suggested, by permitting claimants to deem a claim denied "any time" after the mandatory, six-month settlement period expires, Jill could have very well waited and not deemed her claim denied until she had the evidence to prove medical causation. Indeed, nothing in the legislative history or the text of the FTCA precludes Jill from striking a deal with the agency, in which the agency agrees not to issue a formal denial until Jill has mustered the evidence to prove her claim. In this way, the FTCA, through its exhaustion provision, permits claimants suffering from insidious disease to avoid the FTCA's restrictive six-month limitations period. Of course, if Jill did in fact strike such a deal, deemed her claim denied by filing suit, and then had that suit dismissed, a second suit filed by Jill six months after the deemed denial would, and should, be time-barred.

In short, an analysis of Jack's and Jill's predicament should proceed as if the two had received formal denials. This conclusion must follow because nothing in the legislative history accompanying the 1966 amendments to the FTCA suggests that deemed deniers should be treated differently, for statute of limitations purposes, than formal

inconsistent with Congress's waiver of sovereign immunity in the FTCA, *see* Parker & Collela, *supra* note 6.

deniers. In doing so, FTCA claimants who exhaust their administrative remedies—whether through a formal denial, a written-notice deemed denial, a lawsuit that deems a claim denied, or some other method of exercising the deeming option—are subject to a uniform and predictable limitations period, a result that has proved hard to come by when the borrowing principle has been applied.

The statute of limitations problem presented by the deeming option of the FTCA is far from being conclusively resolved. The Supreme Court has not decided the issue, nor have a majority of the Circuits. Courts that have not addressed the deemed-denial problem should conclude that the six-month limitations period in § 2401(b) applies to deemed denials. The borrowing principle compels it, the policy goals of the 1966 amendments fully comport with that conclusion, and the intended beneficiaries of the revamped FTCA dispute-resolution process certainly require it to obtain the legislatively-prescribed benefits. To hold otherwise permits deemed deniers to whip-saw the United States with the new and improved administrative-settlement process created by Congress in a manner that undermines the purposes behind the 1966 changes to the FTCA.

In *McNeil v. United States*,²⁴⁶ the Supreme Court recognized the importance of interpreting the FTCA in a manner that promotes the orderly administration of tort claims brought against the United States.²⁴⁷ Those courts that have held that deemed deniers are not subject to a limitations period have put the orderly administration of the FTCA beyond the reach of the Justice Department. As I have suggested, those courts' suggestion that the United States can avoid limitations problems through the formal-denial mechanism requires the Justice Department to interpret § 2675(a) in a manner that distorts the doctrine of administrative exhaustion codified in § 2675(a), and renders hollow (if not meaningless) the bedrock principle that exhaustion of FTCA administrative remedies is a condition precedent to invoking § 1346 jurisdiction. As the chief law enforcement agency of the United States, the Justice Department should not be put to the false choice of either erroneously interpreting the FTCA or facing the disturbing prospect of having to defend stale claims. In addition, courts have transformed a relatively straightforward dispute-resolution scheme (if the six-month

246. *McNeil v. United States*, 508 U.S. 106 (1993).

247. *Id.* at 112 ("The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.").

limitations period in § 2401(b) were applied to deemed denials) into a confusing hodge-podge, in which FTCA claimants, the Justice Department, and administrative agencies become embroiled in a chess match to decipher who can deny what, when, and what legal consequences attach to each move. This surely cannot be what Congress intended when it amended the FTCA in 1966 to provide a more orderly and equitable dispute-resolution system for claimants, agencies, and the Justice Department.

The venerable Justice Holmes wrote, “[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at [Congress], but you have not said it, and therefore we shall go on as before.”²⁴⁸ This statement captures well the statute of limitations problem posed by deemed denials. Courts, on the one hand, have marveled at Congress’s failure to impose a limitations period on deemed denials, yet, on the other hand, have simply failed to apply the appropriate method of statutory construction in the face of congressional silence on the limitations issue. Congress’s failure to prescribe a limitations period for deemed denials is nothing more than a legislative oversight, one that requires minor statutory surgery to correct. The borrowing principle—as it has developed over the past 160 years—was designed to do just that, providing courts with a viable tool with which to close this unjustifiable gap in federal law.

248. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).