The Accrual of Wrongful Death Claims under the FTCA

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INTRODUCTION

Consider a thirty-five-year-old man out for a jog on an autumn afternoon. He regularly runs the same route through his Virginia suburb and is always careful to take precautions to avoid injury; this afternoon is no different. But as he makes his way along the sidewalk, a United States Postal Service (USPS) truck approaches from behind. It is not traveling at a particularly high speed, but its driver is distracted; he negligently swerves onto the sidewalk, and he strikes the jogger. The nature of the collision is such that the jogger is not immediately killed, but he sustains critical and ultimately fatal injuries—his doctors place him on life support, and although he clings to life for a time, he dies twenty months later.

At the time of his death, the man clearly had a valid state law cause of action for personal injury against the USPS driver: under Virginia law, a personal injury claim can be brought within two years of the date of the injury.[1] Moreover, he had a valid federal claim under the Federal Tort Claims Act[2] (FTCA), which allows individuals to bring suit against the United States for the torts of federal employees.[3] Indeed, under 28 USC § 2401(b), a provision of the FTCA, an individual who has been injured by a government employee has two years, beginning at the time that his cause of action "accrues," to file an administrative claim with the appropriate federal agency.[4] Since his personal injury claim accrued when he was struck, his administrative claim would have been

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1 See Va Code Ann § 8.01-243(A) (Michie 2007); *Castillo v Emergency Medicine Associates, P.A.*, 372 F3d 643, 646 (4th Cir 2004).

2 60 Stat 842 (1946), codified in various sections of Title 28.

3 28 USC § 1346(b).

4 28 USC § 2401(b).

barred neither from resolution by the USPS nor from subsequent adjudication in federal court.

However, when his widow files an FTCA wrongful death claim against the government five months after her husband's death—well within the statutorily defined two-year limitations period—her complaint is dismissed as time-barred. Surprisingly, it turns out that the cause of action for her husband's wrongful death accrued not at the time of his death but *before* he even died—that is, at the time of the accident. This paradoxical result is the consequence of two factors. First, the FTCA does not create federal causes of action[5] but rather defines the contours of the potential liability of the United States by incorporating state substantive law—that is, by permitting tort liability only "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."[6] Thus, the federal statute incorporates state law in defining the injury to be compensated. And second, Virginia law provides a cause of action for wrongful death that is derivative of and dependent on the decedent's underlying injury.[7] Under the approach that prevails in the Fourth Circuit—and among the majority of the circuits—the conjunction of these two facts creates a situation in which an FTCA wrongful death claim brought within two years of death but not within two years of the underlying injury is time-barred under § 2401(b).

This counterintuitive result is just one branch of a broader confusion that stems from the ambiguity inherent in § 2401(b)'s use of the word "accrues." Because the statute fails to define the term "accrues," it is not clear what triggers the running of this two-year limitations period. Granted, in many cases, the nature of the injury renders the question of accrual unproblematic—when an individual is injured in a car accident involving a federal employee, it is usually obvious that the plaintiff's personal injury claim accrues at the time of the accident.[8] However, when an injury's full extent is delayed in its manifestation, there may be

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5 *Feres v United States*, 340 US 135, 141 (1950) (noting that the FTCA is concerned not with "the creation of new causes of action but [rather with] acceptance of liability under circumstances that would bring private liability into existence").

6 28 USC § 1346(b)(1).

7 See Va Code Ann § 8.01-243(A) (Michie 2007).

8 See, for example, *Arias v United States*, 2007 WL 608375, *3 n 3 (D NJ) (finding that an FTCA personal injury claim arising out of a car accident accrued at the time of the accident).

multiple points at which a cause of action can be held to have accrued.

This is a problem that demands resolution. With approximately two thousand federal suits[9] and fifteen thousand to thirty thousand administrative claims[10] filed under the FTCA each year, the lack of a clear rule may well have substantial systemic effects. Most saliently, it creates significant uncertainty for potential plaintiffs, who, like our hypothetical widow, might have valid wrongful death claims against the federal government but might not understand exactly when they must file those claims against the relevant federal agency. Concomitantly, many deserving plaintiffs may be denied recovery—a result that engenders the systematic undercompensation of such plaintiffs and subverts the FTCA's aim of providing just compensation for individuals who are injured by the agents of the US government.[11] Furthermore, this lack of clarity undermines the efficient and consistent administration of the FTCA, as the resultant myriad of accrual rules undercuts the federal uniformity interest embodied in § 2401(b)'s two-year limitations period.[12]

In spite of these concerns, federal courts have been unable to arrive at a solution. The Supreme Court addressed the question of FTCA accrual in *Kubrick v United States*,[13] but it failed to provide an answer applicable to the wrongful death context. And the circuits are split on this question. The majority of circuits hold that the rule determining accrual should be sensitive to the character of the underlying state cause of action for wrongful death—specifically, whether the statute provides for an independent or a derivative cause of action.[14] This approach emphasizes fidelity to

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9 See *Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, during the 12-Month Period Ending March 31, 2014*, archived at http://perma.cc/YH9D-7HGH; *Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, during the 12-Month Period Ending March 31, 2013*, archived at http://perma.cc/CC67-338W.

10 Lester S. Jayson and Robert C. Longstreth, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 1.01 (Matthew Bender 2014).

11 See *Indian Towing Co v United States*, 350 US 61, 68 (1955). See also *Tort Claims against the United States*, HR Rep No 76-2428, 76th Cong, 3d Sess 2 (1940) (noting that the system to be supplanted by the FTCA was "unjust to the claimants, in that it [did] not accord to injured parties a recovery as a matter of right").

12 For a more complete discussion of this uniformity interest, see text accompanying notes 146–54.

13 444 US 111 (1979).

14 See *Miller v Philadelphia Geriatric Center*, 463 F3d 266, 272 (3d Cir 2006); *Chomic v United States*, 377 F3d 607, 612 (6th Cir 2004); *Miller v United States*, 932 F2d 301, 303–

state substantive tort law at the expense of the uniform implementation of the FTCA's limitations period, which is undermined when the effective length of the limitations period with respect to death varies from state to state. By contrast, a minority of circuits adopt a blanket rule that establishes that, as a matter of federal law, a wrongful death claim can never accrue before death.[15] Such a blanket federal rule supports justice, efficiency, and uniformity in the application of the FTCA's statute of limitations, but it undermines the Act's sensitivity to state law, as well as the limited nature of its waiver of sovereign immunity.

This Comment attempts to clarify this issue by interpreting § 2401(b) in light of both the FTCA as a whole and the underlying legislative purpose embodied therein. Part I outlines the FTCA and its statute of limitations, while Part II examines the judicial response to the statutory ambiguity. The core of this project, however, is in Part III's examination of the intersection of incorporated state law and legislatively manifested federal policy interests. The product of this analysis is a proposal for a new federal rule, under which wrongful death claims would always accrue at death when a state statute provides for an independent cause of action, while the two-year limitations period for claims arising from a derivative cause of action like Virginia's would accrue at death *unless* the decedent's underlying personal injury action were already barred under the federal statute of limitations by the time he died.

I. THE FTCA AND ITS STATUTE OF LIMITATIONS

In order to resolve the question of when a wrongful death claim accrues under the FTCA, it is first necessary to understand both the FTCA generally and its statute of limitations in particular. To that end, Part I.A provides background on the FTCA while explaining both its waiver of sovereign immunity as well as the statutory framework implementing this waiver. Part I.B then outlines the mechanics of the FTCA's statute of limitations.

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04 (4th Cir 1991); *Kynaston v United States*, 717 F2d 506, 511–12 (10th Cir 1983); *Fisk v United States*, 657 F2d 167, 171 (7th Cir 1981). For a discussion of the independent/derivative distinction, see text accompanying notes 83–85.

15 See, for example, *Johnston v United States*, 85 F3d 217, 224 (5th Cir 1996).

A. The FTCA and Tort Liability for the United States

Under the doctrine of sovereign immunity, "[t]he United States, as sovereign, is immune from suit."[16] Deriving from the ancient common-law principle of *rex non potest peccare* ("the king can do no wrong"),[17] this doctrine is well established in American law—indeed, it was officially recognized by the Supreme Court in the early nineteenth century,[18] and it is referenced in cases stretching back to the Founding era.[19] Moreover, the Supreme Court has recognized that several important policy considerations underpin this doctrine, most notably executive efficiency.[20] It is similarly well established that the United States' sovereign immunity can be waived only by consent of the United States,[21] and that the United States is free to subject any such waiver to restrictive conditions.[22]

The FTCA is precisely such a limited waiver. Passed in 1946 after nearly two decades of failed attempts,[23] the FTCA was, in part, the outgrowth of a congressional assessment that tort claims against the United States should be resolved not by the "notoriously clumsy"[24] traditional mechanism—namely, the introduction of private bills for relief in Congress[25]—but rather by a more streamlined procedure.[26]

Thus, the FTCA provides that the United States consents to be sued "for injury or loss of property, or personal injury or death

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16 *United States v Sherwood*, 312 US 584, 586 (1941).

17 See William Blackstone, 3 *Commentaries on the Laws of England* 254–55 (Chicago 1979).

18 See *Cohens v Virginia*, 19 US (6 Wheat) 264, 411–12 (1821).

19 See, for example, *Chisholm v Georgia*, 2 US (2 Dall) 419, 478 (1793). See also Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 Wake Forest L Rev 765, 776–77 (2008).

20 See *Larson v Domestic and Foreign Commerce Corp*, 337 US 682, 704 (1949) ("The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.").

21 See *Sherwood*, 312 US at 586.

22 See *Kubrick*, 444 US at 117–18.

23 See *The Federal Tort Claims Act*, 56 Yale L J 534, 535 (1947).

24 *Dalehite v United States*, 346 US 15, 24–25 (1953).

25 Private bills for relief were traditionally issued by Congress to compensate for "injuries to private persons caused by the negligence of" agents for the United States. *Glasspool v United States*, 190 F Supp 804, 805 (D Del 1961). These bills each had to be approved by an individual act of Congress, so private bills were an "onerous and unsatisfactory" means of providing relief to people injured by the United States. Id.

26 See *Tort Claims against the United States*, HR Rep No 79-1287, 79th Cong, 1st Sess 2 (1945). See also Kent Sinclair and Charles A. Szypszak, *Limitations of Action under the FTCA: A Synthesis and Proposal*, 28 Harv J Legis 1, 5–6 (1991).

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."[27] Under the FTCA, a tort plaintiff with a claim against the United States may file an administrative claim with the appropriate federal agency; if that claim is denied, the plaintiff may subsequently bring suit against the United States in federal court.[28]

The FTCA, however, provides a significant substantive restriction on this waiver of sovereign immunity: it limits the potential liability of the United States to only those situations "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."[29] Put another way, the United States can be liable in tort only when the substantive tort law of the state would create liability for a private individual.[30] Thus, as the Supreme Court has noted, the FTCA is concerned not with "the creation of new causes of action"[31] but rather with the provision of a procedural mechanism whereby substantive rights and remedies established under state law can be brought to bear against the United States.[32] In this way, the FTCA "outsources [the] complexity" of defining the contours of federal tort liability, relying on state lawmakers to collectively undertake a task that would be too intricate and time-consuming for Congress.[33]

B. The FTCA's Statute of Limitations

The FTCA also imposes several significant procedural restrictions on its waiver of sovereign immunity,[34] including the statute of limitations set out in § 2401(b). Section 2401(b) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate

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27 28 USC § 1346(b)(1).

28 28 USC § 2675(a).

29 28 USC § 1346(b)(1) (emphasis added).

30 See *Richards v United States*, 369 US 1, 10 (1962).

31 *Feres v United States*, 340 US 135, 141 (1950).

32 See Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 14 *Federal Practice and Procedure* § 3658 at 317 (West 3d ed 2014).

33 William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan L Rev 1371, 1426 (2012).

34 The presentment requirement—according to which a potential plaintiff cannot bring an action against the United States in federal court until he has filed an administrative claim with the relevant federal agency and that claim has been denied—is foremost among these. See 28 USC § 2675(a).

Federal agency within two years after such claim accrues."[35] The plain meaning of this provision appears determinate: an individual who has been injured by a government employee has two years, beginning at the point at which his cause of action accrued, to file his administrative claim with the relevant federal agency; failure to make a timely filing will result in the claim being barred. There is, however, a critical ambiguity in the statutory language: the FTCA does not define the term "accrues" and thus does not delineate when the two-year limitations period begins running.[36] Nevertheless, § 2401(b), on its face, conclusively establishes a single two-year period that is applicable to all claims arising under the FTCA, regardless of the nuances of the underlying state law.

This procedural requirement qualifies the substantive right created by the FTCA in a method emblematic of the broader policy underlying statutes of limitations in general and § 2401(b)'s statute of limitations in particular. It has long been established that statutes of limitations are, at least in part, expressions of a general policy preference for a clearly defined period in which litigation can be brought.[37] This preference is in turn underpinned by a strong sense that defendants ought to be protected from both the uncertainty[38] and the evidentiary problems[39] that arise with the passage of an inordinate amount of time after an occurrence. Thus, the FTCA's statute of limitations represents "the balance struck by Congress in the context of tort claims against the Government"[40]—that is, Congress's legislative judgment about the optimal balance between its policy favoring tort liability for the United States on the one hand and the systemic value of repose on the other.[41]

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35 28 USC § 2401(b).

36 28 USC § 2401(b).

37 See *Adams v Woods*, 6 US (2 Cranch) 336, 342 (1805) (noting that "actions . . . [that could] be brought at any distance of time . . . would be utterly repugnant to the genius of our laws").

38 See *Order of Railroad Telegraphers v Railway Express Agency, Inc*, 321 US 342, 349 (1944).

39 See *Kubrick*, 444 US at 117.

40 Id.

41 See id at 123 (noting that "the purpose of the limitations statute . . . is to require the reasonably diligent presentation of tort claims against the Government"). Although the immense resources of the federal government might suggest that the United States has a comparatively less substantial interest in repose than an individual defendant, there are, nonetheless, significant considerations that favor repose in the federal government

Moreover, because the FTCA is the legislative means by which the United States waives its sovereign immunity from tort liability, this balance, as embodied in § 2401(b)'s limitations provision, is essentially a condition on the United States' consent to be sued in tort.[42] Indeed, § 2401(b) effectively functions to limit the scope of the United States' liability based on the timeliness of claims filed under the FTCA. As such, the limitations provision, along with the broader waiver of which it is a part, must be strictly construed. Indeed, the Supreme Court has repeatedly emphasized "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."[43]

Nevertheless, the procedural line circumscribing the FTCA's waiver of sovereign immunity may be somewhat ambiguous, as the Supreme Court has held that the statute of limitations under the FTCA is *not* a "jurisdictional" limitation.[44] As a general matter, the Supreme Court has distinguished between two types of statutes of limitations: statutes that "seek primarily to protect defendants against stale or unduly delayed claims" and "typically permit courts to toll the limitations period in light of special equitable considerations"; and statutes that "seek . . . to achieve a broader system-related goal, such as facilitating the administration of claims . . . , limiting the scope of a governmental waiver of

context. For example, the United States has a manifest interest in maintaining the statutorily circumscribed boundaries of its waivers of sovereign immunity. See *John R. Sand & Gravel Co v United States*, 552 US 130, 133 (2008). Furthermore, as a general matter, the FTCA's statute of limitations preserves government resources by reducing the overall volume of litigation in federal courts; thus, it functions as a "practical and pragmatic"—albeit "arbitrary"—device that conserves the resources of the United States. *Chase Securities Corp v Donaldson*, 325 US 304, 314 (1945). See also Tyler T. Ochoa and Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac L J 453, 495 (1997) (noting that, "[i]n this era of increasing court filings and shrinking government budgets," statutes of limitations serve to "reduce the volume of litigation that is processed through the legal system"). This purpose is intensified by the evidentiary problems often engendered by the passage of time—as one commentator has noted, the FTCA's statute of limitations "protects the United States from having to dip into the public fisc to compensate individuals whose tort claims, because of the passage of time, may not rest on an accurate factual foundation." Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought pursuant to the Federal Tort Claims Act*, 35 San Diego L Rev 391, 415 (1998).

[42] See *Kubrick*, 444 US at 117–18. See also *Soriano v United States*, 352 US 270, 276 (1957).

[43] *Soriano*, 352 US at 276.

[44] *United States v Kwai Fun Wong*, 2015 WL 1808750, *12 (US).

sovereign immunity . . . , or promoting judicial efficiency."[45] Statutes in the latter category are "jurisdictional," and their "time limits . . . [are] more absolute."[46] By contrast, the "nonjurisdictional" statutes in the former category are looser restrictions, and they do not foreclose the possibility that statutes of limitations might be equitably tolled in suits against the United States in the same way that they are tolled in suits against private individuals.[47]

In *United States v Kwai Fun Wong*,[48] the Supreme Court considered this jurisdictionality question with respect to § 2401(b) of the FTCA and concluded that the FTCA's limitations provision falls into the former class of nonjurisdictional statutes. Because nothing in the language, legislative history, or Supreme Court's interpretation of the FTCA definitively marked the Act's statute of limitations as jurisdictional in character, the Court reasoned that the general "rebuttable presumption of equitable tolling" was not, in fact, rebutted vis-à-vis § 2401(b).[49]

The logical force of this rationale is beyond the scope of this Comment, but it is important to note that, to the extent that the nonjurisdictional character of the FTCA's statute of limitations bears on the accrual issue at the core of this project, there is significant ambiguity even within the metes of the Court's formulation.[50] Indeed, the fact that § 2401(b) is a nonjurisdictional limitation could, as a superficial matter, suggest that Congress did

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45 *John R. Sand & Gravel*, 552 US at 133.

46 Id at 133–34.

47 See *Irwin v Department of Veterans Affairs*, 498 US 89, 95–96 (1990).

48 2015 WL 1808750 (US).

49 Id at *4, quoting *Irwin*, 498 US at 95–96.

50 That there is room for disagreement on this issue is perhaps most clearly evidenced by the fact that four justices dissented from the majority opinion in *Kwai Fun Wong*. Justice Samuel Alito, joined in dissent by Chief Justice John Roberts, Justice Antonin Scalia, and Justice Clarence Thomas, argued that the language of the FTCA's limitations provision, in conjunction with historical judicial interpretations of analogous legislation, offers proof of Congress's intent that § 2401(b) establish a jurisdictional time-bar. Briefly, the argument is as follows: In enacting § 2401(b), Congress employed language that is virtually identical to that of the limitations provision contained in the act creating the Court of Common Claims. See *Kwai Fun Wong*, 2015 WL 1808750 at *14 (Alito dissenting). See also Act of Mar 3, 1863 ("Tucker Act") § 10, 12 Stat 765, 767 (providing that "every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court . . . within six years after the claim first accrues"). And because Congress chose this language against an interpretive backdrop of Supreme Court decisions characterizing the Tucker Act's statute of limitations as jurisdictional, "Congress must be considered to have adopted also the construction given by [the Supreme Court] to such language, and made it a part of the enactment." *Kwai Fun Wong*, 2015 WL 1808750 at *14 (Alito dissenting),

not enact the FTCA's limitations period to further such system-related goals as the efficiency of statutory administration or the limitation of the Act's waiver of sovereign immunity. This in turn might inform one's reading of the word "accrues," suggesting that the term should not be inflected by any federal interest in uniformity. But nothing in the Court's opinion indicates that § 2401(b)'s nonjurisdictionality is a touchstone of the congressional intent underlying the FTCA's limitations period. On the contrary, the Court seemed to hedge against such confusion of the inverse, repeatedly emphasizing not that Congress *did not intend* § 2401(b) to realize any systemic objectives but rather that Congress simply *made no clear statement* designating § 2401(b) as jurisdictional.[51] Thus, the nonjurisdictional nature of the FTCA's limitations provision says little about Congress's interest in uniform and efficient administration of the FTCA.

Even more saliently, in the wrongful death context it is not clear that the set of FTCA claims saved by equitable tolling would be anything but coextensive with the set of such claims already preserved in its absence: Equitable tolling is a doctrine derived from "the old chancery rule" that when a plaintiff is ignorant of his injury "without any fault or want of diligence or care on his part," the limitations period does not begin to run until the injury is discovered.[52] It is not obvious that a significant number of FTCA wrongful death cases meet this standard.[53] In the wake of *Kwai Fun Wong*, then, it is clear that the FTCA's limitations provision is nonjurisdictional; it is less clear, however, that this fact does anything to illume the shadowy morass of FTCA wrongful death–claim accrual.

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quoting *Hecht v Malley*, 265 US 144, 153 (1924). Thus, the FTCA, like the Tucker Act, must be understood to impose a jurisdictional limitations period.

51 *Kwai Fun Wong*, 2015 WL 1808750 at *5–7.

52 *Holmberg v Armbrecht*, 327 US 392, 397 (1946).

53 One might imagine that such situations could arise with respect to wrongful deaths resulting from medical malpractice, but, as is discussed below, plaintiffs in such situations are already protected by a discovery rule for accrual. See text accompanying notes 62–71. In fact, in such circumstances, it may be that a nonjurisdictional reading of § 2401(b) yields no different a result than would a jurisdictional one—after all, a statute of limitations governed by a discovery rule for accrual "already effectively allow[s] for equitable tolling." *United States v Beggerly*, 524 US 38, 48 (1998).

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Thus, while the FTCA provides for a waiver of the United States' sovereign immunity from tort liability, that waiver is subject to crucial substantive and procedural limitations that circumscribe plaintiffs' abilities to recover for injuries caused by agents of the federal government. These limitations, however, complicate the FTCA's statutory picture. Most notably for the purposes of this Comment, § 2401(b)'s ambiguity with respect to the term "accrues" destabilizes the statute's temporal definition of the life of a cause of action. It is to the description and resolution of that ambiguity that this Comment now turns.

II. THE PROBLEM OF ACCRUAL AND THE JUDICIAL RESPONSE

The FTCA's statute of limitations uses accrual as the anchor for its two-year limitations period but does not delineate when a claim accrues. Consequently, it is unclear from the statutory text how claim accrual is determined. Does an FTCA claim always accrue at the time of injury? Does accrual hinge on the plaintiff's awareness of the injury? Should state or federal law determine when a claim accrues? These are but a few of the central questions arising out of § 2401(b)'s ambiguous text, and these issues become even more problematic in the context of FTCA wrongful death claims in which the nature of the injury, along with the great variety in state substantive law, often creates special difficulties regarding accrual. The Supreme Court has addressed the general issue in only one case (*Kubrick*), but it is unclear how far that decision extends. Part II.A analyzes *Kubrick* and concludes that, while its holding establishes that federal law controls FTCA-claim accrual, its "discovery rule" applies only in the medical malpractice context and thus cannot determine when a wrongful death claim accrues under the FTCA.[54]

Appellate courts have struggled with and are currently divided on the question of how to determine when a wrongful death claim accrues under the FTCA. Specifically, courts disagree on

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[54] It is worth noting that when a wrongful death claim is based on an instance of medical malpractice, the *Kubrick* discovery rule does determine when the underlying malpractice claim accrues. Under the current wrongful death framework, however, this application of the discovery rule impacts accrual only in those circumstances in which the wrongful death claim is derivative of the underlying malpractice claim. See Part II.B.1. Thus, the *Kubrick* rule, while presently applicable to some wrongful death claims, ultimately has little impact on wrongful death claims qua wrongful death claims.

how sensitive a federal rule for accrual should be to the nuances of state substantive law. Some have held that the accrual of wrongful death claims under the FTCA should be determined by reference to the specific character of the state wrongful death statute; by contrast, others have adopted a blanket federal rule that does not consider the nature of the underlying state cause of action. Part II.B outlines this circuit split, analyzing both the majority and minority approaches through the lens of certain representative cases.

A. The *Kubrick* Discovery Rule

This Section begins with a detailed analysis of the Supreme Court's opinion in *Kubrick*. It then proceeds to argue that, while *Kubrick* answers some prominent general questions regarding FTCA-claim accrual, it fails to define the point at which wrongful death claims accrue under § 2401(b).

1. The *Kubrick* decision.

In 1979—more than three decades after the enactment of the FTCA—the Supreme Court heard *Kubrick*, its first case dealing with FTCA-claim accrual. Specifically, *Kubrick* presented the question of when a medical malpractice claim accrues under the meaning of § 2401(b).[55] In April 1968, Kubrick was treated at a Veterans Administration hospital for an infected leg, and as part of his treatment he received the antibiotic neomycin.[56] He subsequently experienced hearing loss, and in January 1969, a private physician informed him that it was highly probable that his hearing loss was caused by the administration of the neomycin.[57] But it was not until a different private physician told him in June 1971 that the neomycin had in fact caused his hearing loss that he decided to seek redress for his injury.[58] He filed suit under the FTCA in 1972.[59] Both the district court and the appellate court held that under the meaning of § 2401(b), the claimant's cause of action did not accrue until June 1971, at which point he was

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55 *Kubrick*, 444 US at 113.
56 Id.
57 Id at 114.
58 Id.
59 *Kubrick*, 444 US at 114–15.

aware not only of his injury and its cause but also of the fact that the injury was negligently inflicted.[60]

On review, the Supreme Court reversed. Justice Byron White, writing for a majority of six justices,[61] found that Kubrick's claim was barred, holding that a claim accrues within the meaning of § 2401(b) when the plaintiff knows both the existence and cause of his injury, rather than at a later time when he also knows that the acts inflicting the injury may have constituted medical malpractice.[62] For the parties to this case, the critical component of this holding was its assertion that the plaintiff need not know that the injury was negligently inflicted, or that he may have a viable cause of action against the United States or the individual who caused his injury, before the claim can accrue. Indeed, this part of the holding enunciates the legal principle barring the respondent's claim: the 1972 malpractice claim was time-barred because, by January 1969, Kubrick was "armed with the facts about the harm done to him" such that he could "protect himself by seeking advice in the medical and legal community."[63]

But from the broader perspective of stare decisis, this element of the Court's holding is largely secondary to its adoption of a discovery rule for determining accrual in FTCA medical malpractice cases. Under a discovery rule, FTCA malpractice claims do not accrue at the time of injury—the "general rule" for accrual[64]—but rather accrue only when the plaintiff knows of both the existence and the cause of his injury.[65] In arriving at this rule, the Court first emphasized the fact that the FTCA's statute of limitations is a qualification of the United States' waiver of its sovereign immunity and must be strictly construed by the lower court.[66] The Court then examined the legislative history of the FTCA and noted that, to the extent that it provided any guidance

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60 Id at 115–16.

61 Justice John Paul Stevens, joined by Justices William Brennan and Thurgood Marshall, dissented. Id at 125 (Stevens dissenting). These justices argued that the majority's narrow discovery rule would produce the "harsh consequence of barring a meritorious claim" before a victim of medical malpractice had "a reasonable chance to assert his legal rights." Id at 126–27 (Stevens dissenting). But this argument is largely irrelevant to the question addressed in this Comment, as this epistemic disconnect is less prevalent with respect to death qua injury than it is to pure medical malpractice cases.

62 Id at 123.

63 *Kubrick*, 444 US at 123.

64 Id at 120.

65 See id at 123.

66 Id at 117–18.

at all regarding accrual, it "seem[ed] almost to indicate that the time of accrual is the time of injury."[67] Finally, the Court turned to policy, ultimately grounding its decision to adopt the discovery rule in the medical malpractice context on the pragmatic justifications offered by the Restatement (Second) of Torts. The Restatement—from which the Court quoted extensively—offers two policy bases for the adoption of a discovery rule in medical malpractice cases: first, the fact that injuries arising from malpractice often take a long time to develop; and second, the vulnerability of malpractice victims, whose injuries are frequently self-concealing and who are often forced to rely largely on their physicians for information.[68]

2. What did *Kubrick* decide?

Because *Kubrick*'s analysis was largely fact oriented, the Court's legal conclusions are closely bound up with its characterization of the specific facts of Kubrick's malpractice claim. Furthermore, as noted above, the Court's adoption of the discovery rule in the medical malpractice context is premised on the Restatement's two justifications for the rule provided—the delayed nature of injuries caused by malpractice and the victim's position of relative ignorance in comparison with his physician[69]—both of which are largely specific to malpractice cases. As a result, it is unclear whether *Kubrick* applies in other contexts. For example, many wrongful death claims are premised on medical malpractice, but the unique difficulties associated with the accrual of wrongful death claims mean that the factual conditions justifying *Kubrick* do not always (or even regularly) obtain.[70] Thus, it is not obvious whether the discovery rule it adopted in

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67 *Kubrick*, 444 US at 119 & n 6. For example, the House report on the 1949 amendment that extended the limitations period from one to two years stated that the reason for the extension was to avoid unfairness toward those whose injuries take longer to manifest. Id, citing *Amending the Federal Tort Claims Act to Increase Time within Which Claims under Such Act May Be Presented to Federal Agencies or Prosecuted in the United States District Courts*, HR Rep 81-276, 81st Cong, 1st Sess 3–4 (1949), reprinted in 1949 USCCAN 1226, 1229.

68 See *Kubrick*, 444 US at 120 n 7, quoting Restatement (Second) of Torts § 899, comment e (1979).

69 See *Kubrick*, 444 US at 120 n 7.

70 As is argued below, the proper rule for wrongful death accrual does not link accrual directly to the date of the injury. See Part III.C.1. This characteristic largely eliminates the need for the kind of plaintiff protection that is provided by the *Kubrick* discovery rule.

the malpractice context should be applicable in other contexts. Indeed, the *Kubrick* Court seemed to assume that, even in the wake of its holding, the time-of-injury rule remains the "general rule" for accrual under the FTCA.[71]

Kubrick did not explicitly address the question whether state or federal law determines when a cause of action accrues under the FTCA. In *Kubrick*'s wake, however, the appellate courts have uniformly assumed that federal law controls the resolution of this question even outside the medical malpractice context[72] and that this conclusion is solidly grounded in the Supreme Court's opinion. Indeed, *Kubrick*'s analysis is based in part on a previous decision, *Urie v Thompson*,[73] in which the Court held that federal law determines when a claim accrues under the Federal Employers' Liability Act[74] (FELA), another statute providing a cause of action for certain government torts.[75] If *Kubrick* did in fact establish this, however, the result is interesting from the perspective of *Erie Railroad Co v Tompkins*:[76] the FTCA incorporates state substantive law, and the Supreme Court has held that statutes of limitations are, as a general matter, substantive law.[77] While it is true that Congress incorporated state substantive law into the FTCA, it did so only to the extent that it chose to do so; Congress was free to impose federal rules modifying the scope of the state cause of action, and it did so when it imposed a uniform federal statute of limitations.[78]

Thus, *Kubrick* established that federal law does, in fact, govern the accrual of FTCA wrongful death claims. But that opinion fails to give content to this controlling federal law, and it does not

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71 *Kubrick*, 444 US at 120.

72 See, for example, *Chomic v United States*, 377 F3d 607, 610 (6th Cir 2004); *Skwira v United States*, 344 F3d 64, 74 (1st Cir 2003); *Garza v United States Bureau of Prisons*, 284 F3d 930, 934 (8th Cir 2002); *Johnston v United States*, 85 F3d 217, 219 (5th Cir 1996); *Fisk v United States*, 657 F2d 167, 170 (7th Cir 1981).

73 337 US 163 (1949).

74 Act of Apr 22, 1908 ("Federal Employers' Liability Act"), 35 Stat 65, codified as amended at 45 USC § 51 et seq.

75 See *Urie*, 337 US at 169–70. See also *Kubrick*, 444 US at 120 n 7; Sinclair and Szypszak, 28 Harv J Legis at 12 n 65 (cited in note 26).

76 304 US 64 (1938).

77 See Sinclair and Szypszak, 28 Harv J Legis at 13 (cited in note 26). *Erie* stands for the proposition that, when federal common law and state law conflict on a matter of substance, federal courts must defer to state law. *Erie*, 304 US at 78.

78 For further discussion of whether *Kubrick* established a federal rule for the accrual of FTCA claims, see text accompanying notes 72–78.

define "accrues" outside of the medical malpractice context. *Kubrick*, then, may have resolved one prominent question, but it leaves the underlying statutory ambiguity essentially untouched.

B. Confusion among the Lower Courts

Because *Kubrick* failed to resolve many of the critical FTCA accrual questions specific to the wrongful death context, lower courts have struggled with the question of how to determine when a wrongful death claim accrues under the FTCA, and they are currently split on this issue. A majority of courts hold that the determination of when a wrongful death claim accrues depends on whether state law creates an independent or derivative cause of action for wrongful death. By contrast, a minority of courts employ a blanket federal rule under which a wrongful death claim can never accrue before death. This Section outlines the circuit split. It begins with a discussion of the majority approach, analyzed through the lens of two representative cases: the Sixth Circuit's decision in *Chomic v United States*[79] and the Seventh Circuit's decision in *Fisk v United States*.[80] It then turns to the minority approach, looking to the Fifth Circuit's decision in *Johnston v United States*[81] as an example.

1. The date of accrual depends on the state cause of action.

One method of determining when a wrongful death action accrues under the FTCA is to decide the question on the basis of the state law underlying the suit. This is the approach taken by the Third, Fourth, Sixth, Seventh, and Tenth Circuits,[82] which all hold that the determination of when a wrongful death cause of action accrues depends on whether state law establishes an independent or derivative cause of action for wrongful death. A derivative cause of action is one in which the death itself is not an actionable injury that a plaintiff can seek a remedy for; rather, a plaintiff can step into a decedent's shoes to seek recovery for the underlying wrong that led to death.[83] Under these regimes, death

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79 377 F3d 607 (6th Cir 2004).

80 657 F2d 167 (7th Cir 1981).

81 85 F3d 217 (5th Cir 1996).

82 See *Miller v Philadelphia Geriatric Center*, 463 F3d 266, 272 (3d Cir 2006); *Miller v United States*, 932 F2d 301, 303–04 (4th Cir 1991); *Chomic*, 377 F3d at 612; *Fisk*, 657 F2d at 171; *Kynaston v United States*, 717 F2d 506, 512 (10th Cir 1983).

83 See *Miller*, 463 F3d at 271.

is not an injury that can be remedied; it might enlarge damages (as discussed below[84]), but it is not a wrong that can be separately compensated. By contrast, an independent cause of action is, as the Third Circuit put it, "one which is created for the benefit of and is held by statutorily specified survivors and is intended to compensate them for the pecuniary loss suffered because of the decedent's death."[85] Relying on this distinction, the majority of circuits take the following approach: When a state's wrongful death statute provides for a derivative cause of action, the claim accrues when the decedent or his survivor knows of both the underlying injury and its cause. By contrast, when the wrongful death cause of action is independent, the claim accrues at death. Concomitant with this approach is an interesting and seemingly contradictory result: when a state statute provides for a derivative cause of action, a wrongful death claim could accrue before the decedent has even died. This apparent paradox, as well as the paradigm that engenders it, is best illustrated through an examination of two contrasting but complementary cases: the Sixth Circuit's decision in *Chomic* and the Seventh Circuit's decision in *Fisk*.

Chomic is, in many ways, the archetype of the unusual accrual issues that can arise in an FTCA wrongful death case. On October 21, 1998, the decedent, a resident at the Department of Veteran Affairs Medical Center in Michigan, fell; as a result, he suffered the hip fracture that led to his death on November 23, 1998.[86] It was alleged that this fall was the result of negligence and medical malpractice on the part of the government employees at the center, but Chomic, the representative of the decedent's estate, did not file an administrative claim until November 17, 2000—more than two years after the decedent's fall, but fewer than two years after his death.[87] The district court dismissed the suit, finding that, because his administrative claim was filed more than two years after the injury occurred, Chomic's suit was barred by § 2401(b).[88] Michigan's wrongful death statute provides a paradigmatic derivative cause of action—as the Sixth Circuit noted, "the focus of the act is [not] on death itself" but rather "on

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84 See text accompanying notes 138–39.

85 *Miller*, 463 F3d at 271.

86 *Chomic*, 377 F3d at 608.

87 Id at 609.

88 Id.

the underlying wrong which caused the death."[89] Consequently, the Sixth Circuit held that Chomic's wrongful death claim was time-barred because it accrued in accordance with the *Kubrick* discovery rule—that is, it accrued when Chomic knew of the existence and cause of the injury that ultimately resulted in death.[90] The court seemed to view this conclusion as the logical corollary of Michigan's derivative wrongful death cause of action; because state law gave primacy not to death but rather to the underlying injury, Chomic's claim was based not on his death but rather on the fall that caused it. Put another way, death simply could not constitute an actionable injury, so Chomic's claim was essentially a malpractice claim in which *Kubrick* was controlling.[91]

Fisk represents the other side of *Chomic*'s coin. In 1950, Fisk received treatment for severe headaches at a Veterans Administration hospital, including an injection of radiopaque dye into his carotid artery.[92] Twenty-two years later, however, he complained of hoarseness, and by 1973, surgery had revealed that the original injection had caused calcific scarring in his neck.[93] In 1979, after several surgical attempts to remedy the problem, Fisk died from complications that had resulted from this scarring.[94] Subsequently, after an administrative claim had been filed with and denied by the Veterans Administration, the decedent's widow brought a wrongful death action in the United States District Court for the Southern District of Indiana, which awarded damages upon finding that the death had been caused by negligence.[95]

In contrast to Michigan's wrongful death statute, Indiana's statute creates an independent cause of action whose purpose is "not to compensate for the injury to the decedent, but rather to create a cause of action to provide a means by which the decedent's survivors may be compensated for the loss they have sustained by reason of the death."[96] Thus, the Seventh Circuit held that "when a state statute creates an independent cause of action for wrongful death, it cannot accrue for FTCA purposes until the

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89 Id at 611.

90 See *Chomic*, 377 F3d at 611–12.

91 See id at 612 ("[A]s Michigan law does not create an independent cause of action for wrongful death . . . we apply *Kubrick* to hold that the plaintiff's cause of action accrued on the date of injury and not at the later date of death.").

92 *Fisk*, 657 F2d at 169.

93 Id.

94 Id.

95 See id.

96 *Fisk*, 657 F2d at 170.

date of the death which gives rise to the action."[97] The crux of the rule enunciated by the court was the fact that the claim created by the Indiana wrongful death statute simply did not exist until the decedent's death.[98] As the court put it, "until the death of the plaintiff's decedent there can be no claim for wrongful death, because until that event occurs, the damages the statute is intended to remedy have not been inflicted on the plaintiff."[99]

From these two cases, a clear image of the dual corollaries of this state law–sensitive approach emerges. On the one hand, a derivative wrongful death cause of action produces only one cause of action—for the personal injury leading to death—and so accrues at the time of the underlying injury. For example, in a medical malpractice case like *Chomic*, the *Kubrick* discovery rule necessarily determines the point of accrual because the only legally cognizable injury is the medical malpractice injury.[100] An independent wrongful death cause of action, on the other hand, creates a situation in which one tortious act yields two distinct causes of action, so the fact that the *Kubrick* discovery rule determines when the decedent's underlying malpractice claim accrued is irrelevant to the accrual of the wrongful death cause of action.[101]

2. A wrongful death claim always accrues at death.

The approach on the other side of this circuit split is distinct from the above rule insofar as it gives weight not to the character of the underlying state wrongful death cause of action but rather to the federal interests embodied in the FTCA. This is the approach taken by the Fifth Circuit, which has held that the federal uniformity interest manifested in § 2401(b)'s statute of limitations requires that an FTCA wrongful death claim accrues only at death, regardless of the nature of a given state's wrongful death cause of action.[102] Under this rule, whether a state's wrongful

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97 Id at 171. The Seventh Circuit reaffirmed this holding in *Warrum v United States*, 427 F3d 1048, 1051 (7th Cir 2005).

98 *Fisk*, 657 F2d at 171.

99 Id.

100 See *Chomic*, 377 F3d at 611–12.

101 See *Fisk*, 657 F2d at 171–72. In arriving at its conclusion, the *Fisk* court stated that, "in an 'ordinary' wrongful death action under the FTCA, the federal rule is that the cause of action accrues upon the date of death," and it seemed to assume that such an "ordinary" wrongful death action is a wrongful death action brought under a state statute providing for an independent cause of action. Id at 170.

102 See *Johnston*, 85 F3d at 222–24.

death statute creates an independent or derivative cause of action is irrelevant to the question of claim accrual under the FTCA. Rather, every cause of action labeled "wrongful death" should be held to accrue at death, regardless of whether death or the underlying personal injury is characterized as primary by the state's substantive tort law. In examining this rule and its corollaries, it will be instructive to consider the case most fully articulating this approach: the Fifth Circuit's decision in *Johnston*.

In *Johnston*, the Fifth Circuit addressed the paradigmatic wrongful death–claim accrual question, and the factual history of the case was similarly paradigmatic. On June 4, 1990, the decedent had coronary artery–bypass surgery at an Army hospital.[103] The surgery damaged his phrenic nerve, however, and by June 19, 1990, a physician informed the decedent's wife that he had bilateral phrenic nerve apraxia, which ultimately led to his death by pneumonia on July 18, 1990.[104] The decedent's son filed an administrative claim under the FTCA on July 17, 1992—within two years of his father's death but not within two years of the underlying injury—and the district court dismissed the subsequent wrongful death claim, holding that it was barred by § 2401(b).[105]

Texas law provided what the *Johnston* court characterized as a derivate cause of action for wrongful death,[106] but the Fifth Circuit reversed on appeal, holding that the plaintiff's wrongful death claim could not accrue before death.[107] Under the court's approach, the nature of the underlying state law is basically irrelevant to the accrual question because federal law defines a single, clear point at which FTCA wrongful death claims accrue—that is, the time of death.[108] The court grounded its rule primarily in the federal government's interest in uniform application of the FTCA's limitations provision, an interest that was "clearly and unequivocally manifested" in Congress's adoption of a single, uniformly applicable limitations period under § 2401(b).[109] The court argued that a blanket rule would promote uniformity by prevent-

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103 Id at 218.
104 Id.
105 Id.
106 *Johnston*, 85 F3d at 222.
107 Id at 222–24.
108 See id.
109 Id at 220, citing *Quinton v United States*, 304 F2d 234, 236 (5th Cir 1962).

ing a situation in which the accrual date for a wrongful death action—and, concomitantly, the effective length of the limitations period for that action—would vary from jurisdiction to jurisdiction.[110]

III. TOWARD A MORE BALANCED ACCRUAL RULE

The disagreement among the circuits with regard to the accrual of wrongful death claims under the FTCA demonstrates the need for a clear accrual rule. Indeed, in the wake of this ambiguity, there remains the potential for the tremendous injustice, uncertainty, and inefficiency mentioned above.[111] Thus, this Part explores the problems with both of the current approaches. It then proposes the following federal rule for determining when a wrongful death claim accrues under the FTCA: when a state wrongful death statute provides for an independent cause of action, an FTCA wrongful death claim would accrue at the decedent's death; when a state wrongful death statute provides for a derivative cause of action, an FTCA wrongful death claim would also accrue at death, but only if the decedent had a valid personal injury claim under the FTCA at the time of death.

This project is essentially an interpretive one. It is aimed at divining the meaning of § 2401(b), and specifically the word "accrues," with respect to wrongful death claims. As noted above, the relevant statutory text is ambiguous; the word "accrues," on its own, is indeterminate, and the FTCA provides no other explicit guidance on this question. Furthermore, as the Supreme Court noted in *Kubrick*, the legislative history of the FTCA does little to illuminate Congress's intent vis-à-vis the question of accrual.[112] And for the most part, the corpus of linguistic and substantive interpretive canons does not suggest a reading of § 2401(b) that clearly resolves that provision's ambiguity. Nevertheless, two interrelated canons of statutory interpretation can direct the reading of "accrues" so as to give content to this obscure term—specifically, the venerable principles that a statute should be read as a whole[113] and that the interpretation of ambiguous language

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110 *Johnston*, 85 F3d at 223–24.

111 See text accompanying notes 9–12.

112 *Kubrick*, 444 US at 119 & n 6.

113 See Edward Coke, 1 *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton* § 728 at 381a (1628).

should be guided by a statute's broader purpose.[114] With respect to § 2401(b), two components of the FTCA are of particular interpretive relevance: (1) the congressional intent, expressed in 28 USC § 1346(b), that state substantive tort law define the contours of liability under the FTCA; and (2) the FTCA's more general legislative objective to provide a mechanism for remedying injuries caused by the wrongful actions of government employees. Considering the FTCA's limitations provision in this light makes it possible to both discern and balance the divergent values manifested in the FTCA's limitations provision.

To that end, this Part seeks to understand § 2401(b) as part of an integrated and purposive statutory whole underpinned by Congress's intention that state and federal law work together to determine federal tort liability. Indeed, this clearly expressed legislative purpose seems to demand the interpretive harmonization of incorporated state law and manifest federal interests. This Part seeks to achieve this syncretization by examining both the nuances of statutory interpretation at the FTCA's intersection of state and federal law and the way in which both components of the Act's binary legislative purpose can be reconciled vis-à-vis the accrual of wrongful death claims. Hence, Part III.A discusses the intersection of federal law and incorporated state law, while Part III.B elucidates the competing considerations at play in the FTCA. Finally, Part III.C proposes a federal accrual rule that would accommodate both the state policies and the federal interests.

A. The Intersection of Federal Law and Incorporated State Law

While vertical choice-of-law questions arising in the diversity context are governed by the *Erie* doctrine, a dramatically different set of considerations attends the adjudication of such conflicts in the context of actions arising from federal statutes that, like the FTCA, incorporate state law into a federal legislative scheme.[115]

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[114] See *The Emily and the Caroline*, 22 US (9 Wheat) 381, 388 (1824) ("In construing a statute . . . we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.").

[115] However, because the statute makes the question of the United States' liability dependent on state substantive law, this creates a framework in which federal courts may be forced to resort to the *Erie* analysis as a means of determining whether a state or federal rule applies. See, for example, *Williams v United States*, 754 F Supp 2d 942, 948–49 (WD Tenn 2010) (applying the *Erie* analysis to determine whether a Tennessee statute requiring the submission of a certificate of good faith should apply to a claim under the FTCA);

On the one hand, because the *Erie* doctrine is animated by the constitutionally established structures of American federalism, state law applies "of its own force"[116] in only those cases in which federal court jurisdiction is based on the diversity of the parties' citizenship. By contrast, when a vertical choice-of-law question arises from Congress's incorporation of state law into a federal statute, state law applies "as a matter of federal choice."[117] But on the other hand, when Congress has made clear its intention that state law be assimilated into federal law, as in the case of the FTCA, a federal court is bound to derive its rules of decision from state sources, at least in some sense.

The upshot of these realities is that federal courts applying a federal standard that incorporates state law must look to that state law, but they might not necessarily need to apply that law "accurately"—that is, as state courts would apply it—since they are bound to state law only insofar as it is Congress's means of defining the contours of the federal legislation.[118] As Professor Paul Mishkin put it, "there remains a freedom, after [a] decision to incorporate local law, to control the extent and methods of that adoption which is not present when a determination has been made that state law will apply because the court has no competence to do otherwise."[119] This freedom suggests that a federal court applying state law under a federal statute can do so in whichever way maximizes the realization of the federal interests expressed in the statute. And this freedom is magnified in those situations in which "state law is chosen only because of special difficulty in the judicial framing of a definite federal rule on a specific issue in an area otherwise totally national"[120]—that is, in which a federal statute simply incorporates state law as a means of "outsourc[ing] complexity."[121]

To concretize this idea, consider the Ninth Circuit's decision in *Lutz v United States*.[122] In that case, the plaintiff brought an

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Straley v United States, 887 F Supp 728, 733 (D NJ 1995) (applying the *Erie* substance/procedure distinction to determine whether the admissibility of evidence in an FTCA suit was governed by state statute or by the Federal Rules of Evidence).

116 Radha A. Pathak, *Incorporated State Law*, 61 Case W Res L Rev 823, 842 (2011).

117 Id.

118 Id at 845.

119 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, 804 (1957).

120 Id at 803–04.

121 Baude, 64 Stan L Rev at 1426 (cited in note 33).

122 685 F2d 1178 (9th Cir 1982).

FTCA personal injury claim after he was bitten by the defendant's dog on a military base in Montana.[123] In deciding whether the defendant—who was a government employee acting within the scope of his employment—was in fact negligent in failing to restrain the dog, the court looked to Montana law to determine whether there was a state-created duty that had been breached.[124] However, once the court determined that there was such a duty, it turned to federal law to discern the applicable standard of reasonable care to be taken in carrying out the state law duty.[125] Essentially, the court applied a version of Montana law seen through the lens of a federal rule.[126]

In the FTCA context, this flexibility is perhaps nowhere more evident than in its relation to the question of accrual. Section 2401(b) leaves the meaning of the term "accrues" indeterminate; hence, given the FTCA's incorporation of state law as a means of delineating the boundaries of federal tort law, it might appear that state accrual rules—which play such a fundamental role in defining the limits of the state-created right—should fix the moment at which the statute of limitations begins to run. Nevertheless, as discussed above, the Supreme Court's decision in *Kubrick* suggests that federal judge-made rules govern the accrual of claims brought under the FTCA, and that the circuits have been almost unanimous in explicitly reaffirming this exegesis. This behavior initially seems somewhat paradoxical—after all, how can

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123 Id at 1181–82.

124 Id at 1182.

125 Id at 1183–85.

126 It is true that some courts have stated that a federal court faced with an unresolved question of state law in the course of adjudicating an FTCA claim should predict how the state supreme court would decide that question. See, for example, *Molsbergen v United States*, 757 F2d 1016, 1020 (9th Cir 1985) (predicting whether the California Supreme Court would impose a duty to warn the plaintiff of danger). But it is not clear that this approach is consistent with the principles elaborated above as outgrowths of the Supreme Court's decision in *Kubrick*. Furthermore, it might be possible to avoid these concerns by imposing certain limitations on a court's ability to modify state law. For example, the principles established by the Supreme Court in *United States v Kimball Foods*, 440 US 715 (1979), provide helpful signposts. While the suit in *Kimball Foods* was not exactly analogous to an FTCA claim, it did involve an incorporated–state law element, and it established three criteria for determining when incorporated state law should take precedence over a federal rule: (1) whether there is a need for a "nationally uniform body of law"; (2) whether the operation of the state rule would frustrate federal interests; and (3) whether there were strong reliance interests with respect to the state rule. Id at 728–29. These factors can be similarly used in the FTCA context to determine the scope of a federal court's discretion in applying incorporated state law.

an application of "the law of the place"[127] involve the use of a non-statutory federal rule that has the potential to radically alter the scope of the state cause of action? But if courts applying state law under the FTCA are not strictly bound to apply that law faithfully, then they can apply what is in effect a *federal understanding* of state law—that is, state rights and remedies seen through the prism of federal laws and policies. Thus, the FTCA's incorporation of state substantive tort law contains an inherent interpretive flexibility that justifies the adoption of a judicially crafted federal rule for determining when wrongful death claims accrue under the FTCA.

B. Balancing State and Federal Interests

A federal court's interpretive task in divining the meaning of § 2401(b) is nuanced. On the one hand, courts are bound by Congress's unequivocally expressed intent that state substantive law should define the scope of the United States' liability under the FTCA. But on the other hand, the unique quality of incorporated state law removes the most-restrictive constraints on a federal court's discretion in applying state law so as to maximize the realization of federal interests. This interpretive freedom is augmented by the fact that the FTCA's incorporation of state law was intended in part to outsource the complex task of defining the myriad of rules under which the United States could be held liable, which the Fourth Circuit has called an "almost impossible undertaking."[128] Thus, this Section proceeds by first analyzing the extent to which an emphasis on the state policies manifest in state tort law are inherent in the FTCA's definition of the situations in which the United States might be liable in tort. It then assesses the federal interests that are reflected both in the FTCA generally and in § 2401(b) in particular. Together, these examinations reveal the competing interests that a federal accrual rule should strive to balance.

1. State law, state policy, and federal tort claims.

Although the FTCA is a federal statute that provides for a waiver of federal sovereign immunity, it is, nonetheless, inextricably intertwined with state substantive law. For this reason, in

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[127] 28 USC § 1346(b)(1).

[128] *Maryland v United States*, 165 F2d 869, 871 (4th Cir 1947).

addressing the question of wrongful death–claim accrual under the FTCA, it is critical to examine the extent to which the specific character of a state wrongful death cause of action—that is, independent or derivative—gives rise to a substantive right created by state law. Of course, the states do not actually have any cognizable interest here—after all, it is the federal government that bears the economic burden of liability under the FTCA. But 28 USC § 1346(b)(1)—which defines the contours of the United States' potential tort liability under the FTCA with reference to "the law of the place"[129]—manifests Congress's unequivocal intent to assimilate state substantive tort law and its attendant policy judgments into the federal framework. Thus, the state policy manifested in state tort law is effectively incorporated into federal policy, and it delineates the boundaries of federal tort liability except insofar as it has been circumscribed by federal law and policy.

Hence, to discern how the FTCA's incorporation of state law should inflect our assessment of the extent to which state law should bear on the accrual question, it is first necessary to understand the history of the wrongful death cause of action and the various statutory schemes through which states recognize these causes of action. The English common law provided no recovery for the wrongful death of a human being: the principle of *actio personalis moritur cum persona* ("a personal action dies with the person") prevented a decedent's rights from passing to his survivors, and an individual's death did not create any new cause of action in his survivors.[130] Consequently, no wrongful death claim existed in English law until Lord Campbell's Act[131] created a new cause of action under which certain statutorily designated beneficiaries could recover for the decedent's wrongful death.[132] Throughout the nineteenth century, American states passed similar statutes modifying the common law. These statutes appear to be uniformly underpinned by the policy judgment that the common-law rule denying survivors recovery for the death of a decedent was overly harsh because it denied recovery for an injury that demanded compensation.[133]

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129 28 USC § 1346(b)(1).

130 Wex S. Malone, *The Genesis of Wrongful Death*, 17 Stan L Rev 1043, 1044 (1965).

131 Stat 9 & 10 Vict, ch 93, reprinted in 37 Am L Reg 584 (1889).

132 Malone, 17 Stan L Rev at 1051 (cited in note 130).

133 See, for example, *Farley v Sartin*, 466 SE2d 522, 525 (W Va 1995); *Volk v Baldazo*, 651 P2d 11, 14 (Idaho 1982); *Vaillancourt v Medical Center Hospital of Vermont, Inc*, 425 A2d 92, 94 (Vt 1980).

Although the policies underlying them may be largely uniform, the statutory schemes adopted by states in the wrongful death context fall into two distinct categories: those that create a new cause of action for survivors on the one hand and those that simply allow the decedent's right of recovery to pass to his representatives on the other.[134] These are the aforementioned categories of independent and derivative causes of action. The majority of state wrongful death statutes fall into the former category and create a new cause of action in statutorily designated survivors that is conceptually distinct from any right that the deceased might have possessed.[135] Such an action can arise only at death, and damages are determined not in reference to what the victim could have recovered but rather in reference to the pecuniary loss suffered by the survivors as a result of the victim's death—for example, their loss of services and loss of society.[136]

By contrast, statutes falling into the latter category provide only that any cause of action that existed in the deceased is not extinguished by death but rather survives for the benefit of his representatives.[137] But even under these schemes, the extent to which the survivor's recovery for death relates back to the victim's potential recovery for his injury is, as a general matter, limited. Most derivative state statutes at least provide for enlarged damages to a survivor, magnifying personal injury damages based on subsequent death and on the decedent's concomitant inability to earn money or carry on life's activities.[138] Consequently, even when the wrongful death statute provides for a derivative cause of action, state law still recognizes some policy ground for compensating death as a distinct injury.

The statute of limitations question, however, implicates the inverse state policy judgment—namely, the judgment of how the

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134 Theodore I. Koskoff, *Wrongful Death Actions*, 12 Am Jur Trials 317 § 3 (1966).

135 See, for example, *Mohler v Worley*, 116 A2d 342, 344 (Pa 1955); *Holmes v City of New York*, 54 NYS2d 289, 292 (App Div 1945).

136 See, for example, Ind Code § 34-23-1-2 (West 2014); Fl Stat Ann § 768.21 (West 2011); Colo Rev Stat Ann § 13-21-201 (West 2009).

137 Koskoff, 12 Am Jur Trials at § 5 (cited in note 134). See also, for example, *In re Labatt Food Services, LP*, 279 SW3d 640, 644 (Tex 2009); *Estate of Hull v Union Pacific Railroad Co*, 141 SW3d 356, 360 (Ark 2004).

138 See, for example, Mich Comp Laws Ann § 600.2922 (West 2010) (providing damages for the loss of financial support and loss of society); Tenn Code Ann § 20-5-113 (LexisNexis 2009) (allowing the recovery of "damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received").

scope of a cause of action should be limited—which, in turn, encompasses such general policy aims as the promotion of repose and prevention of the deterioration of evidence.[139] Indeed, these policy objectives are equally applicable in the federal government context as they are in cases involving only private parties.[140] And the Supreme Court has recognized that statutes of limitations are closely bound up with state-created rights and obligations, as the time at which a claim accrues is inextricably tied to the limitations period during which that claim must be brought.[141] Thus, adopting a rule that wrongful death claims under the FTCA always accrue at death comes dangerously close to creating a new cause of action. In *Johnston*, for example, Texas law created a derivative wrongful death cause of action, effectively fixing the relevant injury not at the point of death but at the point of the underlying personal injury. Thus, by determining that the claim accrued not at the time of injury but rather at the time of death,[142] the court effectively recognized an actionable injury that was not recognized in state law—a move that is diametrically opposed to the Supreme Court's statement that the FTCA does not create new federal causes of action.[143]

2. The federal interests embodied in the FTCA.

Regardless of the indeterminacy of the state law inquiry, it is critical to remember that although the FTCA incorporates state substantive tort law and so subsumes into itself the state policies underlying that law, it is nevertheless a federal statute that Congress enacted with certain federal policy aims in mind. It is the federal interest that is primary here, not in the sense that it overrides state law—it does not, since Congress also made an explicit decision to incorporate state law into the federal legislative scheme—but rather in the sense that it must necessarily shape a

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139 See notes 37–41 and accompanying text. See also Ochoa and Wistrich, 28 Pac L J at 495 (cited in note 41) (noting that, "[i]n this era of increasing court filings and shrinking government budgets," statutes of limitations serve to "reduce the volume of litigation that is processed through the legal system").

140 For a fuller discussion of the role of statutes of limitations when the federal government is the defendant in a tort suit, see note 41.

141 See *Guaranty Trust Co v York*, 326 US 99, 110 (1945).

142 *Johnston*, 85 F3d at 222–24.

143 *Feres v United States*, 340 US 135, 141 (1950) (finding that the FTCA does not create "new causes of action" but instead imposes liability for the United States in cases involving its employees who committed acts for which they would have faced "private liability" under state law).

federal court's understanding of how state law should apply under the FTCA. Thus, it is necessary to both elucidate the federal interests embodied in the FTCA and assess whether these interests favor either a state law–sensitive approach to accrual or a blanket federal rule.

In enacting the FTCA, Congress was primarily motivated by two central policy concerns. First, sovereign immunity's robust protection of the United States from liability almost inevitably meant that there would be situations in which individuals injured by agents of the federal government would be denied recovery despite the fact that they were deserving plaintiffs; the FTCA was intended to provide a remedy for these individuals.[144] Second, as discussed above, the FTCA was also the outgrowth of Congress's desire to supplant the private bill mechanism with a more efficient procedure for resolving tort claims against the United States.[145] The FTCA as a whole, therefore, reflects the twin aims of justice and efficiency.

The policy underlying § 2401(b)'s statute of limitations in particular is less clear,[146] but it is evident that there is a certain uniformity interest inherent in the FTCA's adoption of a single, uniformly applicable limitations provision. As the Fifth Circuit noted in *Quinton v United States*,[147] in enacting the FTCA, Congress incorporated state law into its definition of federal liability because to explicitly define all these tort rules would have been "an almost impossible undertaking."[148] By contrast, "[t]he matter of limitations . . . was a simple one which Congress could easily determine for itself," and the fact that it selected a clearly defined limitations period reflected its intention that such a limitations period uniformly govern all actions under the FTCA.[149] Indeed, Congress's emphasis on uniformity in the implementation of the FTCA is evident in its treatment of an even more byzantine issue relating to wrongful death actions: damages. Under 28 USC

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144 See *Indian Towing Co v United States*, 350 US 61, 68 (1955). See also HR Rep No 76-2428 at 2 (cited in note 11) (noting that the system to be supplanted by the FTCA was "unjust to the claimants, in that it [did] not accord to injured parties a recovery as a matter of right").

145 *Dalehite v United States*, 346 US 15, 25–26 (1953). See also note 26 and accompanying text.

146 As the Supreme Court explained in *Kubrick*, the legislative history relating to the FTCA's statute of limitations is sparse. *Kubrick*, 444 US at 119 & n 6.

147 304 F2d 234 (5th Cir 1962).

148 Id at 237.

149 Id.

§ 2674, the United States cannot be held liable for punitive damages under the FTCA.[150] But because the FTCA derives its damages calculus from state law[151] and because some states provide only punitive damages for wrongful death, this provision appears to have the effect of denying recovery to a certain class of wrongful death plaintiffs.[152] Consequently, Congress, intending to "eliminate the discrepancy,"[153] amended the FTCA in 1947 to provide that, when state law allows only punitive damages for wrongful death, damages awarded under the FTCA are to be "measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought."[154] This amendment suggests that strong uniformity interests underlie the FTCA,[155] but it also suggests that Congress saw wrongful death as a distinct injury that must be compensated on a broad, national level.[156]

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150 28 USC § 2674.

151 28 USC § 2674.

152 See Cyrus B. Richardson III, *Understanding the Limited Effect of* Molzof v. United States *on Wrongful Death Damages under the Federal Tort Claims Act*, 20 NIU L Rev 69, 77–79 (2000) (discussing the concern over the interplay between the FTCA and Alabama's and Massachusetts's wrongful death statutes).

153 *Massachusetts Bonding & Insurance Co v United States*, 352 US 128, 131 (1956) (citing unpublished hearings). See also *Amending the Federal Tort Claims Act*, HR Rep No 80-748, 98th Cong, 1st Sess 2 (1947) ("1947 Amendment") ("This bill simply amends the Federal Tort Claims Act so that it shall grant to the people of the two States the right of action already granted to the people in the other 46.").

154 28 USC § 2674.

155 It is true that, based on the legislative history, fairness considerations are as likely an impetus for the 1947 Amendment as uniformity interests. Nevertheless, it is not clear that fairness and uniformity can be conceptually disentangled from one another—after all, uniformity is, as a general matter, essential to fairness because it "facilitates equal treatment" by treating similarly situated parties in like ways. Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 Yale L J F 499, 501 (2014). It may further be argued that the uniformity interest reflected in the 1947 Amendment cannot be inferred to apply to the accrual question in the same way that it applies to the punitive damages issue; in fact, it might cut against a uniformity interest vis-à-vis accrual, as Congress acted to promote uniformity with regard to damages but not with regard to accrual. But as the insights of public-choice theory show, there are many reasons for legislative inaction aside from legislative indifference. For example, interest group pressures, the problem of "cycling" in legislatures, and legislative deal brokering can all prevent a legislature from addressing lacunae in a statute. See Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 21–33, 38–40, 111 (Chicago 1991). But although it is not a tremendous logical leap to infer from the 1947 Amendment a general uniformity interest underlying the FTCA, there is unavoidable uncertainty.

156 See HR Rep No 80-748 at 2 (cited in note 153) (characterizing the 1947 Amendment's passage as "remov[ing] an unjust discrimination never intended, but which works a complete denial of remedy for wrongful homicide").

Moreover, the same uniformity interest that inheres in all federal statutes of limitations inheres equally in § 2401(b). Indeed, the Supreme Court has emphasized the importance of a uniform limitations period in the federal law context, stating that "a uniform statute of limitations is required to avoid intolerable uncertainty and time-consuming litigation," which "has real-world consequences to both plaintiffs and defendants."[157] These "real-world consequences" are twofold. First, plaintiffs may delay in bringing their claims, falsely believing that the limitations period is longer than it actually is.[158] And second, defendants may be plagued by uncertainty, since they cannot be certain of the period in which an action can be brought against them; consequently, they cannot order their affairs.[159]

Taken together, these interests suggest that federal policy aims are, as the Fifth Circuit asserted in *Johnston*, better served by a blanket federal rule holding that the accrual of a wrongful death claim cannot occur before death. Such a rule would have the effect of compensating a marginally greater number of survivors for the deaths of their decedents than would be compensated under a bifurcated rule. After all, allowing plaintiffs to file their claims within two years of the time of death (as opposed to at the time of injury or some other point prior to death) would allow many actions that would otherwise be time-barred to go forward.[160] Similarly, by allowing marginally more plaintiffs to seek recovery through the mechanism established by the FTCA, this rule would prevent a situation in which plaintiffs—who are inequitably barred from seeking recovery under the FTCA—flood Congress with private bills for relief.[161] And finally, a blanket federal rule would certainly promote uniform implementation of the

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[157] *Agency Holding Corp v Malley-Duff & Associates, Inc*, 483 US 143, 150 (1987) (quotation marks omitted).

[158] See id.

[159] See id.

[160] For example, Chomic's claim would not have been barred under such a rule. Because the decedent possessed a valid personal injury cause of action at the time of death, his survivor's wrongful death claim would be timely as long as it were brought within two years of death—even if it were not brought within two years of the underlying injury. See text accompanying notes 86–91.

[161] In the decades following the passage of the FTCA, the number of private bills (largely involving immigration cases and private claims) that have been introduced has decreased dramatically. For example, the 81st Congress enacted 1,103 such bills; by contrast, the 107th Congress enacted only 6. See Jennifer E. Manning, *Congressional Statistics: Bills Introduced and Laws Enacted, 1947-2003* *2–3 (Congressional Research Service, Mar 3, 2004), archived at http://perma.cc/C9ZL-E947.

FTCA's statute of limitations. Instead of a time period that fluctuates based on the nature of the underlying state wrongful death cause of action, FTCA wrongful death claims would be controlled by a single, clearly defined limitations period that begins running at death.

But other federal interests cut in another direction. As a general matter, the United States has a clear interest in restricting its potential liability by limiting its waivers of sovereign immunity. This interest is unequivocally reflected in the aforementioned canon that waivers of sovereign immunity are to be strictly construed.[162] Indeed, if, as the *Kubrick* Court maintained, § 2401(b)'s statute of limitations represents a legislative balance that fixes the boundaries of the FTCA's waiver of sovereign immunity,[163] then Congress has a manifest interest in this balance being effectuated. Given this fact, Congress's creation of a two-year period might represent a legislative judgment that certain long-tailed injuries would simply not be compensated under the FTCA. Furthermore, the legislative history of the FTCA suggests the possibility that Congress, in defining § 2401(b)'s balance, assumed that the FTCA's statute of limitations would run from the date of the injury. Specifically, the House report on the 1949 amendment that extended the limitations period from one to two years stated that the reason for the extension was to avoid unfairness toward those whose injuries take longer to manifest: "The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim."[164] As the Court in *Kubrick* noted, this reasoning suggests the possibility that Congress intended to establish a clearly defined limitations period that begins to run at the point of injury.[165]

Thus, the federal interests inherent in the FTCA—like the state interests bound up with state substantive tort law—do not conclusively suggest one rule over another. Rather, they seem to conflict with uniformity, efficiency, and justice in apparent opposition to the limited nature of the FTCA's waiver of sovereign immunity.

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[162] See text accompanying notes 42–43.

[163] *Kubrick*, 444 US at 117–18.

[164] HR Rep No 81-276 at 3 (cited in note 67).

[165] *Kubrick*, 444 US at 119 n 6.

C. A New Federal Rule

Ultimately, as neither state nor federal interests weigh dispositively in one direction or another, it is necessary to ask not whether state or federal considerations should prevail but rather whether these considerations might be balanced in a new federal accrual rule. This Section proposes such a rule, which would adopt the following bifurcated approach: when a state wrongful death statute provides for an independent cause of action, an FTCA wrongful death claim accrues at the decedent's death; when a state wrongful death statute provides for a derivative cause of action, an FTCA wrongful death claim accrues at death only if the decedent had a valid personal injury claim under the FTCA at the time of his death. Put another way, the first prong of this rule would preserve the stand-alone character of independent wrongful death causes of action by measuring § 2401(b)'s two-year limitations period from the date of death regardless of when the underlying injury occurred, while in cases involving derivative causes of action the rule's second prong would temporally link the cause of action not only to the death but also to the injury causing the death.

This Section proceeds by grounding the proposed rule in the text and legislative history of the FTCA. It then concludes by discussing the way in which this new rule would balance the competing state and federal interests embodied in the FTCA.

1. The rule's statutory basis.

This proposed rule is, in essence, the rule contained in Lord Campbell's Act. Indeed, although Lord Campbell's Act, as originally enacted, imposed a one-year limitations period that began running at the time of death,[166] it nevertheless premised liability explicitly on the existence of a decedent's valid right to relief at the time of his death,[167] and English courts interpreted this to mean that "[i]t is material to see if the deceased could have maintained an action."[168] Consequently, even if an action under Lord Campbell's Act was brought within one year of death, it was

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166 Stat 9 & 10 Vict, ch 93, § 3.

167 Stat 9 & 10 Vict, ch 93, § 1.

168 *Quattlebaum v Carey Canada, Inc*, 685 F Supp 939, 941 (D SC 1988), quoting *Marks v Portsmouth Corp*, 157 LTR (ns) 261 (1937) (emphasis omitted).

barred if at the time of death the statute of limitations had already run on the decedent's underlying personal injury claim.[169]

More saliently, the language of § 2401(b), read in pari materia with other federal statutes touching on accrual in the wrongful death context, offers a strong textual basis for both branches of this bifurcated approach. It is an established principle of statutory interpretation that laws dealing with the same subject matter should be interpreted congruously.[170] It is useful to note, then, that the FELA, which Congress enacted in 1908 to provide a cause of action for the benefit of the personal representatives of railroad employees killed in the course of employment,[171] includes a statute of limitations that not only bears on wrongful death causes of action but also contains language that is virtually identical to that employed in § 2401(b) of the FTCA: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action *accrued*."[172]

The Supreme Court has previously found its FELA jurisprudence useful in interpreting the meaning of "accrues" under the FTCA.[173] In the wrongful death context, the FELA sheds interpretive light on § 2401(b) in two critical ways: First, it suggests that the word "accrue," as used by Congress in the FTCA, necessarily implies a certain sensitivity to the nature of the wrongful death cause of action whose accrual is at issue. Indeed, in interpreting this term in the context of FELA wrongful death claims, the Court has repeatedly emphasized how its content is inflected by the fact that the wrongful death cause of action created by the FELA is derivative.[174] And second, the Court's delineation of that content provides both positive and negative models for wrongful death–claim accrual under the FTCA. On the one hand, the rule governing the accrual of FELA wrongful death claims provides a basis

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169 See generally *Williams v Mersey Docks and Harbour Board*, 53 WR 488 (KB 1905).

170 See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (Thomson/West 2012).

171 45 USC § 51. See also *Reading Co v Koons*, 271 US 58, 60 (1926).

172 45 USC § 56 (emphasis added).

173 See *Kubrick*, 444 US at 120 n 7.

174 See, for example, *Flynn v New York, New Haven & Hartford Railroad Co*, 283 US 53, 56 (1931) ("It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death."); *Michigan Central Railroad Co v Vreeland*, 227 US 59, 70 (1913) (noting that "it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury").

for the application of a similar rule in the FTCA context when a state's wrongful death cause of action is derivative in character. Under the FELA, a cause of action accrues at death unless the underlying personal injury cause of action was already time-barred at the time of death.[175] Essentially, this approach temporally links the availability of relief not only to death but also to the injury itself. On the other hand, when the state provides for an independent wrongful death action, an in pari materia reading of the FELA takes on a more apophatic quality: the fact that the Supreme Court premised the FELA accrual rule on the derivative nature of that statute's wrongful death cause of action suggests that if that condition precedent does not obtain, there is no necessary temporal link between the underlying injury and the cause of action.

The legislative history of the FTCA further supports this proposed rule, as it suggests that although Congress did not use the FTCA to establish new federal causes of action, it did fashion the § 2401(b) statute of limitations with an independent cause of action for wrongful death in mind. Indeed, while debating the 1949 amendment that ultimately lengthened the limitations period from one to two years, Congress examined statistical data concerning statutes of limitations across the forty-eight states.[176] In considering the average lengths of statutes of limitations among the various states, Congress characterized wrongful death statutes of limitations as distinct from personal injury statutes of limitations.[177] Given the extent to which statutes of limitations define the scopes of causes of action, this fact suggests that Congress thought of personal injury and wrongful death as distinct causes of action. Hence, it is possible that the FTCA's statute of limitations is, in part, inflected by a blanket congressional assumption about state law, which is critical for two reasons. First, this suggests that even if Congress did intend for a strict time-of-injury rule for FTCA accrual,[178] such intent would not preclude the application of the proposed rule—after all, if Congress considered death a distinct injury, then a time-of-death rule for wrongful

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[175] See *Flynn*, 283 US at 56.

[176] See generally *Amending the Federal Tort Claims Act to Increase Time within Which Claims under Such Act May Be Presented to Federal Agencies or Prosecuted in the United States District Courts*, HR Rep No 80-1754, 80th Cong, 2d Sess (1948).

[177] See id at 2–3.

[178] See text accompanying notes 163–64.

death cases would not be problematic. And second, this overarching assumption presents a homogeneous conception of tort law that must be reconciled with the incongruous and heterogeneous reality of substantive law across the several states. This proposed rule effects such a reconciliation by preserving the integrity of the FTCA's uniform two-year limitations period while still taking into account the nuances of the underlying state law.

The proposed rule, then, has more than just the distinguished pedigree of Lord Campbell's Act; it is also grounded in both the text and legislative history of the FTCA. Thus, in spite of this rule's novelty, it is based on a solid interpretive foundation.

2. The rule in practice.

To concretize the impact of this rule, consider again *Chomic*, *Fisk*, and *Johnston*.[179] These three paradigmatic cases—which stand in opposition to one another—would all have the same outcome under this proposed framework. For one thing, the *Chomic* plaintiff's claim would no longer be time-barred: because the decedent's underlying personal injury claim had not expired at the time of death, the statute of limitations would have begun to run only at death in spite of the derivative nature of Michigan's wrongful death cause of action. *Fisk*'s claim would still be timely, as the independent character of Indiana's wrongful death cause of action means that a wrongful death claim could never accrue before death. And in *Johnston*, Texas's derivative wrongful death cause of action would be powerless to sever the tight temporal link between the decedent's death and the underlying personal injury. Because the decedent died within two years of his injury, federal law would recognize his survivor's claim as timely regardless of the nuances of Texas law.

As a practical matter, this rule would accommodate the state policy judgments reflected in a given wrongful death statute—namely, the state's interests in maintaining the clearly delineated boundaries of its causes of action,[180] compensating injured individuals, and avoiding inequitable results.[181] Specifically, this rule

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[179] See Part II.B.

[180] See text accompanying notes 141–43.

[181] This interest is reflected in both the enactment of wrongful death statutes and in the recognition, evinced by states' wrongful death–damages calculi, that there is something unique about death as an injury that demands compensation. See text accompanying notes 135–38.

establishes that a wrongful death claim under the FTCA accrues at death except when there has been a state legislative determination that there is a necessary connection between a wrongful death claim and an underlying personal injury claim, and when enough time has passed between the accrual of the personal injury action and death that the necessary link between the wrongful death claim and the underlying action has been severed. The proposed rule, then, would prevent any vast expansion of the boundaries of a state wrongful death cause of action while, on balance, minimizing the situations in which a worthy plaintiff would be denied recovery.

It could be suggested that such a rule would effectively create a new federal cause of action—a result that is at odds with the Supreme Court's statement that the FTCA does not create any such causes of action.[182] This criticism, however, fails in light of the basic flexibility that federal courts have in applying incorporated state law. Indeed, while it is true that this accrual rule would in some instances expand the scope of derivative wrongful death causes of action, a court need only rely on state law as the source of the right—once the existence of the right has been established, the court can adopt the federal understanding of the state law. In the case of a derivative wrongful death cause of action, for example, the proposed rule would simply adopt the federal understanding of a cause of action that has already been adopted in other contexts (such as the FELA). Moreover, this rule would alter the contours of the state law cause of action no more than the FTCA's two-year limitations period already does—after all, a uniformly applicable limitations period that preempts state statutes of repose could substantially expand or contract the scope of a state-created substantive right.

The proposed rule would also be able to reconcile the conflicting federal interests and maximize their realization. Notably, it would further the justice considerations underlying the FTCA by making marginally more wrongful death claims accrue at death than would accrue under a more state law–sensitive rule. Indeed, assuming that there are a significant number of cases like *Chomic*—in which, even though the decedent had a valid claim at the time of his death, the plaintiff's wrongful death action was barred because it was brought within two years of death but not

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[182] See *Feres*, 340 US at 141.

of the injury leading to death[183]—this rule would lead to a relatively greater number of wrongful death plaintiffs who receive the kind of fair compensation that the FTCA intends. Nevertheless, this rule would not expand the availability of the wrongful death cause of action to so great a degree that it would transgress the limits of § 2401(b)'s circumscription of the FTCA's waiver of sovereign immunity. After all, the rule preserves the clearly defined two-year limitations period and limits the length of an injury's tail by linking the availability of relief not only to the time of death but also to the time of the injury causing death; this furthers the federal uniformity interest while maintaining the procedural limitations on the tort liability of the United States. Finally, this rule would create more certainty for plaintiffs and defendants, who will know that, when the wrongful death statute provides for only a derivative cause of action, a valid claim exists as long as the limitations period for the underlying personal injury claim has not expired by the time of death.[184] In fact, this will further the interest in predictability and repose for the United States as defendant, since once the primary personal injury claim has expired, no further claim can be brought.

CONCLUSION

Having considered the foregoing approaches to wrongful death–claim accrual under the FTCA, one might say that courts hitherto have only *chosen* among the various state and federal interests manifest in the statute; the point, however, is to *balance* them. This Comment attempts to achieve such statutory harmony by proposing a new federal rule under which wrongful death claims would always accrue at death when a state wrongful death statute provides for an independent cause of action, while the two-year limitations period for claims arising from a derivative

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[183] See text accompanying notes 86–91.

[184] Admittedly, this rule does not produce perfect uniformity of consequence. Consider an individual who is injured and dies twenty-six months later. In a state with an independent wrongful death cause of action, the survivor's action would not be time-barred. By contrast, when a state's wrongful death statute provides for a derivative cause of action, the survivor's personal injury claim would have expired after two years, thus barring any subsequent recovery. This variation is the inevitable result of any attempt to balance the state and federal considerations embodied in the FTCA, and the proposed rule seeks to minimize disparities while still remaining true to state law choices about independent versus derivative causes of action.

cause of action would accrue at death *unless* the decedent's underlying personal injury action was already barred at the time of his death. This bifurcated approach would balance the competing state and federal interests at play in the FTCA wrongful death context by supporting the FTCA's legislative objectives—uniformity, justice, and efficiency—while still maintaining a degree of sensitivity to the nuances of underlying state law.

It could be argued that this rule, by inflecting state wrongful death causes of action with a federal understanding of claim accrual, essentially creates new federal causes of action. But this critique fails to take into account the nature of the FTCA's statute of limitations—after all, this rule would no more profoundly alter a state cause of action than does the FTCA's uniform two-year limitations period, which could substantially expand or contract the scope of a state-created substantive right. And, moreover, it must be remembered that courts applying state law that has been incorporated into a federal statute have tremendous flexibility to construe "the law of the place"[185] in such a way as to vindicate broader national interests. The rule proposed by this Comment provides a framework for interpreting the FTCA in just such a way—that is, as a complex balancing of interests that nonetheless ultimately represents an integrated, cohesive statutory whole.

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[185] 28 USC § 1346(b)(1).