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Anne R. Traum

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LAST BEST CHANCE FOR THE GREAT WRIT: EQUITABLE TOLLING AND FEDERAL HABEAS CORPUS

ANNE R. TRAUM*

ABSTRACT

This Article examines an important unsettled question in federal habeas law: whether equitable tolling is available under the statute of limitations applicable to federal habeas petitions filed by state prisoners. The answer to this question will determine access to federal judicial review of thousands of prisoners' claims that their convictions resulted from violations of their federal constitutional rights in state courts. In twelve cases reviewing the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Supreme Court has curtailed the availability of statutory tolling of the limitations period. Equitable tolling of the statute of limitations represents the last best chance for habeas petitioners who find themselves shut out of federal court by the Supreme Court's restrictive interpretation of the AEDPA. Without it, their constitutional claims will never be heard. The Supreme Court has twice signaled in recent cases that the availability of equitable tolling under the AEDPA remains unsettled, suggesting that it could reject equitable tolling under the AEDPA.

*This Article examines the AEDPA's equitable tolling issue in light of the Court's meandering equitable tolling jurisprudence and its historical role in habeas corpus. Although lower courts have held that equitable tolling is available under the AEDPA, they have failed to articulate convincingly why equitable tolling is justified in the context of federal habeas corpus. This Article fills the void by examining the Court's seminal equitable tolling cases, from *Irwin v. Department of Veterans Affairs*, to its most recent decision in *John R. Sand & Gravel Co. v. United States*. Three contextual factors influence the Court's role in applying the statute at issue. Applying these factors to the AEDPA, equitable tolling is justified for institutional, constitutional, and statutory reasons, including the Court's unique role in ensuring access to the Great Writ and remedying constitutional violations.*

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* Associate Professor of Law, Boyd School of Law, University of Nevada Las Vegas; A.B., Brown University, 1991; J.D., University of California, Hastings College of the Law, 1996. I am grateful to Randy Hertz, Evan Lee, Joan Howarth, Ann McGinley, David Thronson, Bret Birdsong, Katherine Kruse, Elaine Shoben, and the Boyd School of Law Faculty Colloquium for their helpful comments and guidance.

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I. INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")¹ for the first time created a statute of limitations for state prisoners seeking federal habeas review.² Since its enactment, the overwhelming majority of habeas decisions have involved the interpretation or application of the statute of limitations provision, and the Supreme Court of the United States has decided more than twelve such cases.³ The attention paid to the AEDPA's statute of limitations is a reflection of its importance as a key and novel feature of the AEDPA,⁴ its function of guarding the door to federal habeas review, and, some argue, poor statutory drafting.⁵ The Court's interpretation of the statute of limitations has shuttered the possibility of federal habeas review for many petitioners,⁶ as they face an increasingly complicated and restrictive procedural environment.⁷

As the Court curtails the availability of statutory tolling under Section 2244(d), federal habeas petitioners will look to equitable tolling as the sole alternative means to obtain any federal habeas review. So far, every federal circuit court of appeals to have considered the issue

1. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of Titles 8, 18, 22, 28, and 42 of the U.S.C.).

2. See 28 U.S.C. § 2244(d) (2000) (applying a one-year statute of limitations period to applications for habeas writs filed by state prisoners).

3. See 17 JOHN H. BLUME ET AL., *FEDERAL HABEAS CORPUS UPDATE* § III(A) (2005) (listing statute of limitations decision cases); *infra* note 36 (listing the Court's decisions under § 2244(d)).

4. See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 280 (2006) (arguing that AEDPA marked less of a seminal change because the Court, in the face of repeated failed habeas legislation, reformed the law in the decades before AEDPA was enacted).

5. See *id.* at 261 n.13 ("AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar." (quoting LARRY YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 57 (2003))); see also Transcript of Oral Argument at 14, *Dodd v. United States*, 545 U.S. 353 (2005) (No. 04-5286) (quoting Justice Scalia, who asked at oral argument regarding AEDPA's statute of limitation, "[W]ho's responsible for writing this . . . ?").

6. See NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996* (EXECUTIVE SUMMARY) 6 (2007) (explaining, based on a survey of habeas cases in several federal district courts, that twenty-two percent of non-capital and four percent of capital cases are dismissed as time-barred under the statute of limitations).

7. Procedural hurdles include the total exhaustion rule, as recognized in *Rose v. Lundy*, 455 U.S. 509, 510, 513-15 (1982), that bars federal habeas review of claims not exhausted in state court and "mixed petitions," which include exhausted and unexhausted claims; and the procedural default doctrine, as recognized in *Coleman v. Thompson*, 501 U.S. 722, 726, 729-31 (1991), that bars federal habeas review of claims denied by the state court under a state procedural rule.

has held that the AEDPA's statute of limitations can be equitably tolled in limited circumstances. Despite the circuit unanimity on this point, the Supreme Court has stated twice that the availability of equitable tolling of the AEDPA's statute of limitations is an open question.⁸ Although avoiding the question thus far, the Court now appears poised to answer it.

First, this Article will examine the AEDPA equitable tolling question by looking at how the Court has resolved whether various federal statutes other than the AEDPA can be equitably tolled. Part II will describe the history of the limitations provision, the Supreme Court cases that have discussed the availability of equitable tolling, and the lower federal appellate courts' reasons supporting the availability of equitable tolling under the AEDPA. While using the Court's major equitable tolling cases as a guide, the circuit courts have neither fully explained how the Court's equitable tolling cases should bear on resolving the AEDPA question, nor articulated why habeas is distinct from other areas of legislation considered in those cases.

Next, this Article will argue that the law of habeas corpus is distinct for historical and constitutional reasons that impact the analysis of whether equitable tolling is available under the AEDPA's statute of limitations. Part III will make sense of the Court's equitable tolling decisions, beginning with *Irwin v. Department of Veterans Affairs*,⁹ where the Court created a rebuttable presumption favoring equitable tolling in suits against the government, and will trace the ebb and flow of the *Irwin* presumption in several major cases. Part III also will argue that the Court's equitable tolling jurisprudence, although disjointed, can be harmonized by viewing each equitable tolling question in context as a dialogue between Congress and the courts. Moreover, Part III will identify three contextual factors that influence the equitable tolling analysis: (1) the subject matter of the legislation and the Court's and Congress's expertise and historical roles in addressing that subject; (2) the source and scope of congressional powers in enacting legislation; and (3) the text and purpose of the statute. At some level, any theory of statutory interpretation is about constitutional law and the

8. See *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("Because the parties agree that equitable tolling is available, we assume without deciding that it is."); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8 (2005) (noting that the Court had "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations," but because the parties assumed it was available, the Court also "assume[d] without deciding its application for purposes of this case").

9. 498 U.S. 89 (1990).

institutional roles of Congress and the courts.¹⁰ This is especially true in equitable tolling in which courts create a judicial or equitable exception to the limitations period created by Congress to allow an action to proceed despite non-compliance with the statutory limitations period. Part III will conclude that courts appropriately exercise their equitable powers to allow equitable tolling when they have an institutional, historical, and possibly constitutionally driven basis for doing so. By contrast, when the statute of limitations deals with a subject in which courts have not exercised equitable powers, or have no constitutional role, equitable tolling is less appropriate or justifiable.

Analyzing these factors in the federal habeas context, Part IV will argue that the AEDPA permits equitable tolling for institutional, constitutional, and statutory reasons. Until the late twentieth century, habeas law was exclusively the domain of the courts, whereas Congress, though its role is evolving, is a relative newcomer to the field. Habeas law is a mixture of judicially created constitutional law, statutory rules, and equitable principles.¹¹ Both before and after the passage of the AEDPA, the Court has asserted equitable powers in the face of congressional action in order to manage its habeas cases and ensure access to the writ, especially for first time petitioners. In reviewing petitions of state court judgments, the Court occupies a unique constitutional function both in terms of its relationship with Congress and the state courts. Because the Suspension Clause limits Congress's authority to suspend the Great Writ, habeas is distinct from the subject areas considered in other equitable tolling cases because in habeas cases, courts must ensure that Congress has not exceeded its authority by impermissibly restricting access to the writ. Further, federal courts have an institutional interest in reviewing state court rulings on federal constitutional law. Finally, Part IV will show that equitable tolling is not inconsistent with the text, structure, and purpose of the AEDPA.

II. THE PROBLEM OF EQUITABLE TOLLING UNDER THE AEDPA

The Court first signaled in 2005 that it remained an open question whether the AEDPA's statute of limitations was subject to equitable tolling when in a footnote it stated, "We have never squarely

10. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 57 n.231 (2001) (citing Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988)) (arguing that statutory interpretation is based in theories of constitutional law and informed by the institutional roles and procedures).

11. *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring) ("[F]ederal habeas corpus has evolved as the product of both judicial doctrine and statutory law.").

addressed the question whether equitable tolling is applicable to the AEDPA's statute of limitations."¹² That the Court considered the question unsettled came as a surprise to many, as the federal circuit courts had already concluded that equitable tolling was available in limited circumstances. In both *Pace v. DiGuglielmo*¹³ and *Lawrence v. Florida*¹⁴ the parties assumed that equitable tolling was available, and the Court, accepting that assumption, concluded that neither petitioner was entitled to equitable tolling.¹⁵ How the Court settles the equitable tolling question will determine whether many diligent, but untimely, petitioners get any federal habeas review.

Below is a brief background of the AEDPA's limitation provision and the lower courts' treatment of equitable tolling under the AEDPA. In analyzing this issue, the federal appellate courts have looked to the Court's major equitable tolling cases for guidance. But those "equitable tolling" cases arise in diverse statutory contexts, and they steer a meandering path. This Part sketches a list of context neutral rules from those equitable tolling cases that form the backdrop against which courts have reasoned that equitable tolling is available under the AEDPA, and examines some of the counter-arguments that courts have grappled with in reaching that conclusion. As Part III will explain, viewing the equitable tolling cases by the contextual factors that unite and separate them provides a more helpful framework for analyzing the AEDPA's statute of limitations.

A. *The Statute of Limitations Provision in Federal Habeas Corpus Law*

1. *Habeas Rule 9(a), the Precursor to the Statute of Limitations*

Before the AEDPA, there was no time bar in federal habeas cases,¹⁶ and the Court had "repeatedly asserted that the passage of time alone could not extinguish the habeas corpus rights of a person subject to unconstitutional incarceration."¹⁷ The AEDPA instituted many reforms governing the adjudication of federal habeas cases, and for the first time created a statute of limitations. Before the AEDPA, the closest Congress had come to restricting the time for federal habeas review was Rule 9(a) of the Federal Rules of Habeas Corpus,

12. *Pace*, 544 U.S. at 418 n.8.

13. 544 U.S. 408.

14. 549 U.S. 327 (2007).

15. *Id.* at 335–36 & n.3; *Pace*, 544 U.S. at 418 & n.8.

16. See *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) ("Historically, 'there [wa]s no statute of limitations governing federal habeas . . .'" (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (alteration in original))).

17. *Id.* at 215.

adopted in 1977, which “‘introduce[d] for the first time an element of laches into habeas corpus.’”¹⁸ Rule 9 was not a statute of limitations,¹⁹ but an equitable rule of laches premised on the concept that “habeas corpus has traditionally been regarded as governed by equitable principles.”²⁰

In *Lonchar v. Thomas*,²¹ the Court interpreted Rule 9(a), a precursor of the AEDPA’s limitations provision,²² expressing both its respect for congressional regulation of the writ and its special concern for first-time habeas petitioners in federal court.²³ The Court reversed the dismissal of a capital petitioner’s first federal habeas petition under Rule 9(a)²⁴ because the appellate court had dismissed the petition for “special ad hoc ‘equitable’ reasons” not encompassed within the rule, without making the required finding that the state had been prejudiced by the delay in filing.²⁵ *Lonchar* recognized that a “concern about habeas petition abuses,” over time, had led to “‘a complex and evolving body of equitable *principles* informed and controlled by historical usage, statutory developments, and judicial decisions.’”²⁶ At the same time, the Court underscored the need to follow the habeas rules “[w]ithin constitutional constraints,”²⁷ explaining that “[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.”²⁸

That the Court should apply equitable concerns in the context of a statutory innovation explicitly incorporating equitable principles is perhaps not surprising, but it nonetheless foreshadows the Court’s appetite to do so even after Congress adopted a statute of limitations.

18. *Id.* (quoting 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4268.2, at 454 (3d ed. 2007)).

19. See 28 U.S.C. § 2254 (2000) (R. 9, 1976 advisory committee note) (“Subdivision (a) is not a statute of limitations.”).

20. *Fay v. Noia*, 372 U.S. 391, 438 (1963).

21. 517 U.S. 314 (1996).

22. Rule 9(a) was “deleted as unnecessary” after the AEDPA established a one-year statute of limitations for § 2254 petitions. See 28 U.S.C. § 2254 (2000 & Supp. V 2005) (R. 9, 2004 advisory committee note).

23. *Lonchar*, 517 U.S. at 330.

24. *Id.* at 316.

25. *Id.* at 322, 326–27. Although the petitioner’s brother and sister had previously filed petitions on his behalf, this was the first petition the petitioner filed on his own. *Id.* at 331.

26. *Id.* at 323 (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). Those equitable principles include the doctrines of exhaustion, procedural default, and retroactivity. *Id.* at 324.

27. *Id.* at 323 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 623–33 (1993)).

28. *Id.* at 324.

Just months after *Lonchar*, Congress finally succeeded in enacting habeas reform legislation, including the limitations provision codified in Section 2244(d).²⁹

2. *The AEDPA's Statute of Limitations*

The AEDPA created a one-year statute of limitations for all federal habeas petitions, requiring in most cases that the petition be filed "within one year of the conviction becoming final on direct review."³⁰ The limitations provision reflects Congress's goal of promoting finality of state court judgments.³¹ The statute has two parts:³² Section 2244(d)(1) defines the events that trigger the commencement of a one-year limitations period, and Section 2244(d)(2) provides that the limitations period is "tolled" during the period that a properly

29. The Court in *Lonchar* recognized Congress's as-of-then failed efforts to create a statute of limitations, wondering aloud if the "present Rule properly balances the relevant competing interests." *Id.* at 328 (citing congressional and ABA reports referring to statute of limitations and eighty bills proposing statute of limitations from 1986 to 1996).

30. Blume, *supra* note 4, at 288–89 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 411 (2005)).

31. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (2007) (citing *Day v. McDonough*, 547 U.S. 198, 205–06 (2006)); *see Rhines v. Weber*, 544 U.S. 269, 276 (2005) (noting that one purpose of AEDPA was to "'reduce delays in the execution of state and federal criminal sentences'" (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003))); *Duncan v. Walker*, 533 U.S. 167, 179 (2001) (stating that the statute of limitations "quite plainly serves the well-recognized interest in the finality of state court judgments," and "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review"); *see also* Blume, *supra* note 4, at 289 (observing that "the limitations period reflected 'Congress'[s] decision to expedite collateral attacks by placing stringent time restrictions on [them]'" (quoting *Mayle v. Felix*, 545 U.S. 644, 657 (2005) (alteration in original))).

32. The statute of limitations is contained in 28 U.S.C. § 2244(d), which provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (2000).

filed state post-conviction application is pending in state court.³³ Subsection (d)(1) incorporates two important equitable tolling principles into the triggering mechanism: a rule against “fraudulent concealment” provided that the limitations period does not begin to run until “the date on which the impediment to filing an application” due to unconstitutional or unlawful state action is removed,³⁴ and a “discovery rule,” which begins the limitations period on “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”³⁵ The statute does not contain any general equitable tolling provision for those cases that do not fit into one of the statutory tolling categories listed in Section 2244(d)(1).

Since its enactment, the Court has reviewed the AEDPA’s limitation provisions in Section 2244(d) in twelve cases.³⁶ Some have ar-

33. See 28 U.S.C. § 2244(d); see also *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (discussing a “pending” state habeas application); *Carey v. Saffold*, 536 U.S. 214, 216–17 (2002) (same).

34. See *Miller v. N.J. State Dep’t of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (discussing subsection (d)(1)(B)).

35. 28 U.S.C. § 2244(d)(1)(D); see *Miller*, 145 F.3d at 618.

36. See, e.g., *Allen v. Siebert*, 128 S. Ct. 2, 4–5 (2007) (per curiam) (holding that the inmate’s state post-conviction petition was not “properly filed” under § 2244(d)(2), regardless of the jurisdictional nature of state time limits); *Lawrence v. Florida*, 549 U.S. 327, 332, 337 (2007) (holding that the one-year limitations period is not tolled during the pendency of a certiorari petition in the Supreme Court and, even assuming equitable tolling were available, petitioner failed to make a showing of “extraordinary circumstances” to support its application); *Day*, 547 U.S. at 209–11 (holding that where the state failed to raise a statute of limitations defense and its error was obvious, the district court did not abuse its discretion in invoking an untimeliness defense *sua sponte*); *Evans*, 546 U.S. at 200 (applying *Carey* to hold that an appeal filed in the California Supreme Court over three years after the intermediate court of appeals denied relief was not timely under California law and thus would not toll as “pending” the interval between the court of appeals and state supreme court decisions); *Mayle v. Felix*, 545 U.S. 644, 650, 664 (2005) (holding that an amended claim not based on a “core of operative facts” similar to claims pled in the original petition does not “relate back” under Federal Rule of Civil Procedure 15(c)(2) and thus does not avoid AEDPA’s one-year statute of limitations); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (holding that because time limits, regardless of their form, “are ‘filing’ conditions,” a state petition rejected by a state court as untimely was not “properly filed” and “not entitled to statutory tolling under § 2244(d)(2)"); *Pliler v. Ford*, 542 U.S. 225, 231 (2004) (holding that a federal court is not required to warn a *pro se* petitioner that one of the consequences of dismissing a federal petition containing both exhausted and unexhausted claims “without prejudice” may be that his petition will be untimely when he returns to federal court (citation and internal quotation marks omitted)); *Woodford v. Garceau*, 538 U.S. 202, 210 (2003) (holding that AEDPA applies to cases involving an actual application for habeas corpus relief filed after AEDPA’s effective date); *Carey*, 536 U.S. at 217 (holding that a state habeas application is “pending” under § 2244(d)(2) during the time between a lower state court’s decision and the filing of a notice of appeal, so long as the application is timely filed under state law); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) (holding that a federal habeas petition is not within the ambit of § 2244(d)(2) and thus

gued the Court's continued attention to the tolling provision reflects that the statute is "very poorly drafted," resulting in splits in the federal courts that need to be resolved by the Supreme Court.³⁷ But the AEDPA's limitations provision has also garnered attention because it represents a far-reaching, unprecedented legislative reform, which impacts a high volume of cases, and guards the door of federal habeas review.³⁸

B. *Framing the Issue: Lower Court Decisions*

Only four Justices have endorsed some form of equitable tolling under the AEDPA,³⁹ but the concept enjoys wide support in the lower courts. By 2005, when *Pace* was decided, virtually every circuit had recognized that equitable tolling is applicable to the AEDPA's statute of limitations.⁴⁰ In the lower courts, the Court's "equitable tolling"

does not toll the statutory limitations period); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that "an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" including "time limits upon its delivery"); *Lindh v. Murphy*, 521 U.S. 320, 322–23, 336 (1997) (holding that AEDPA does not apply to non-capital habeas cases pending in federal court on the date of its enactment, April 24, 1996).

Three additional decisions have addressed the nearly identical statute of limitations applicable to federal prisoners seeking habeas relief under 28 U.S.C. § 2255. *See Dodd v. United States*, 545 U.S. 353, 360 (2005) (holding that the one-year limitations period in 28 U.S.C. § 2255 begins to run on the date on which the Supreme Court initially recognized the right asserted, not from the date on which that right was made retroactive); *Johnson v. United States*, 544 U.S. 295, 298, 302 (2005) (holding that the vacatur of a prior state conviction used to enhance a sentence is a "fact" that could start the one-year limitations period, but that petitioner failed to exercise "due diligence" in challenging the prior state conviction); *Clay v. United States*, 537 U.S. 522, 527–28 (2003) (holding that a federal conviction is final either when the Supreme Court denies certiorari review or the time to file a petition for writ of certiorari expires).

37. *Blume*, *supra* note 4, at 289–90.

38. *Day*, 547 U.S. at 214–15 (Scalia, J., dissenting); *see Blume*, *supra* note 4, at 291 (stating that the "overwhelming majority of the post-AEDPA cases, even to this day, involve the interpretation or application of the various statute of limitations provisions" contained in AEDPA (citing *BLUME ET AL.*, *supra* note 3, at 304–459)).

39. Justices Stevens, Breyer, Ginsburg, and Souter endorsed some form of equitable tolling in *Duncan v. Walker*. *See, e.g., Duncan*, 533 U.S. at 182 (Souter, J., concurring) ("[A] claim for equitable tolling could present a serious issue on facts different from those before us."); *id.* at 184 & n.3 (Stevens, J., concurring) (suggesting that the Court's ruling did not preclude equitable tolling, which the lower court was free to consider on remand); *id.* at 192 (Breyer, J., dissenting) (noting Justice Stevens's "sound suggestions" allowing abeyance and equitable tolling). Former Justice O'Connor also suggested that equitable tolling might apply to the AEDPA in circumstances where noncompliance with the statute of limitations would unfairly deprive a petitioner of habeas relief. *See Piller*, 542 U.S. at 235 (O'Connor, J., concurring) ("[I]f the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate.").

40. Eleven circuits have held that the one-year limitation period under 28 U.S.C. § 2244 (or § 2255) is a statute of limitations, subject to equitable tolling. *See, e.g., Harris v.*

cases across a variety of contexts have provided the backdrop against which arguments supporting equitable tolling of the AEDPA's limitation period have emerged. Arguments derived from analysis of Supreme Court cases have dominated. Habeas-specific reasons have figured less prominently. By contrast, when the Justices have suggested the availability of equitable tolling, they have not connected its availability to the Court's equitable tolling analysis of other limitations statutes.⁴¹ The lower courts' unanimity on the issue seems to reflect a shared sense, not yet fully articulated, that courts serve a role in habeas that is different from its role in other areas. But how this special role figures into the lower courts' legal analysis in any given case is not clear.

The lower courts' reasons for equitable tolling under the AEDPA correspond nominally to five context-neutral rules or guidelines evident in the Court's major equitable tolling cases. Stripped of their context, the Supreme Court cases can be distilled into the following rules on equitable tolling:

Rule 1: A limitations period that is "jurisdictional," or, "more absolute," is not subject to equitable tolling. This rule derives from *Zipes v. Trans World Airlines*,⁴² a sex discrimination case against a private employer, which held that the limitations provision in the Civil Rights Act of 1964 was non-jurisdictional and thus subject to waiver forfeiture

Hutchinson, 209 F.3d 325, 329–30 (4th Cir. 2000) (holding that the one-year limitation period under § 2244(d) is subject to equitable tolling); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000) (same); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (discussing in dicta that "the judge-made doctrine of equitable tolling is available, in principle at least"); Sandvik v. United States, 177 F.3d 1269, 1270 (11th Cir. 1999) (per curiam) (holding that the one-year limitation period under § 2255 is subject to equitable tolling); Moore v. United States, 173 F.3d 1131, 1134 (8th Cir. 1999) (same); Davis v. Johnson, 158 F.3d 806, 810 (5th Cir. 1998) (holding that the one-year limitation period under § 2244 is subject to equitable tolling); Miller v. N.J. State Dep't of Corr., 145 F.3d 616, 617 (3d Cir. 1998) (same); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (same); Calderon v. U.S. Dist. Court, 128 F.3d 1283, 1288 (9th Cir. 1997) (same), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc); *see also* United States v. Pollard, 416 F.3d 48, 56 n.1 (D.C. Cir. 2005) (listing cases holding that the one-year limitation period under § 2244 or § 2255 is subject to equitable tolling, and noting that the District of Columbia Circuit has not decided the question (citing United States v. Cicero, 214 F.3d 199, 203 (D.C. Cir. 2000))).

41. *See Piler*, 542 U.S. at 235 (suggesting the availability of equitable tolling "if the petitioner is affirmatively misled, either by the court or by the State"); *id.* (Stevens, J., concurring) (stating that a remand to determine propriety of equitable tolling is correct); *Duncan*, 533 U.S. at 183 (Stevens, J., concurring) (discussing the availability of equitable tolling); *id.* at 182 (Souter, J., concurring) (noting the possibility of equitable tolling in a future case); *id.* at 192 (Breyer, J., dissenting) (noting Justice Stevens's "sound" suggestion of employing equitable tolling).

42. 455 U.S. 385 (1982).

and equitable tolling,⁴³ and *John R. Sand & Gravel Co. v. United States*,⁴⁴ which affirmed that the limitations provision applicable to suits against the government in the Court of Federal Claims is jurisdictional and thus not subject to equitable tolling.⁴⁵

Rule 2: For non-jurisdictional statutes of limitations, there is a general, rebuttable presumption in favor of equitable tolling. This rule derives from *Irwin v. Department of Veterans Affairs*,⁴⁶ which held that equitable tolling is available under the limitations provision applicable to employment discrimination suits against the government, just as it is against private employers under *Zipes*.⁴⁷

Rule 3: Congress is presumed to draft limitations provisions in light of the background principle that they are “customarily subject to ‘equitable tolling,’” unless tolling would be inconsistent with the text of the statute. This rule derives primarily from *Young v. United States*,⁴⁸ which held that a limitations provision under the Bankruptcy Code could be equitably tolled because the inclusion of the equitable tolling feature in the statute supplements rather than displaces principles of equitable tolling.⁴⁹

Rule 4: Any presumption favoring equitable tolling is rebutted if the limitations provision is worded in an emphatic and “highly detailed technical manner,” and the listed statutory exceptions to the time limits “do not include ‘equitable tolling.’” This rule derives from *United States v. Brockamp*,⁵⁰ a tax refund case in which the Court held that the detailed, emphatic, and technical text of the limitations provision reflected a congressional intent to preclude equitable tolling.⁵¹

Rule 5: Equitable tolling is inconsistent with a statute that contains a generous tolling period and already includes a form of equitable tolling. This rule derives from *United States v. Beggerly*,⁵² which held that equitable tolling was unavailable under the twelve-year statute of limitations that applied to suits to quiet title to property in which the United States claims an interest.⁵³

43. *Id.* at 387–88, 393 (discussing 42 U.S.C. § 2000e-5 (2000)).

44. 128 S. Ct. 750 (2008).

45. *Id.* at 753–54.

46. 498 U.S. 89 (1990).

47. *Id.* at 95–96.

48. 535 U.S. 43 (2002).

49. *Id.* at 47.

50. 519 U.S. 347 (1997).

51. *Id.* at 348, 350–51.

52. 524 U.S. 38 (1998).

53. *Id.* at 48 (citing *Brockamp*, 519 U.S. at 348).

These rules, and the cases from which they stem, are in tension with each other and fail to provide clear guidance. Rules 2 and 3 suggest a default presumption favoring equitable tolling, whereas Rule 4 suggests the opposite presumption; that equitable tolling is unavailable unless the statute specifically provides for it. More generally, Rules 1, 4, and 5 suggest the presumption does not apply or is rebutted if the limitations provision is “jurisdictional” (Rule 1), technical and detailed (Rule 4), or very generous and/or already includes forms of equitable tolling (Rule 5).

Grappling with these contradictory rules, the lower courts have collectively established that equitable tolling is available under the AEDPA for reasons that comport with Rules 1, 2, and 3, namely that the limitations provision: (1) is non-jurisdictional, and thus a statute of limitations that can be equitably tolled; (2) was enacted after the Court created a presumption favoring equitable tolling of limitations statutes, and Congress was presumed to have drafted against that presumption; (3) does not explicitly preclude equitable tolling; and (4) does not impliedly reflect a congressional intent to prohibit equitable tolling. Rules 4 and 5 have proven more vexing, as the lower courts have struggled to explain why equitable tolling is justified in the face of a fairly detailed tolling scheme that already accounts for some equitable exceptions.

1. Rule 1 in the Lower Courts: Is the AEDPA’s Limitations Period “Jurisdictional”?

For the threshold issue of whether the AEDPA’s limitations period is jurisdictional, courts have looked to the text, legislative history, and structure of the habeas statute to conclude that Section 2244(d) is a non-jurisdictional statute of limitations. Statutes of limitations are treated typically as an affirmative defense, which is subject to waiver and forfeiture,⁵⁴ and *Irwin* established a general rule that statutes of limitations are presumptively subject to equitable tolling.⁵⁵ The term “jurisdictional” in this context refers to “more absolute” statutory time limits, that cannot be waived or forfeited and are not subject to equitable tolling.⁵⁶

54. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008).

55. *Irwin v. Dep’t of Veteran Affairs*, 498 U.S. 89, 95–96 (1990).

56. See *John R. Sand & Gravel Co.*, 128 S. Ct. at 753–54. The Court in *John R. Sand & Gravel Co.* revived the “jurisdictional” terminology despite having criticized it in earlier decisions. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (“‘Jurisdiction,’ this Court has observed, ‘is a word of many, too many, meanings.’” (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998))); *id.* (“[I]n recent decisions, we have clarified that

Judge Kozinski's opinion in *Calderon v. U.S. Dist. Court*⁵⁷ was the first to conclude that the AEDPA's limitations provision is non-jurisdictional, and remains one of the most thorough discussions.⁵⁸ Focusing first on the text, the court reasoned that Section 2244(d)(1) is "remarkably lucid" because "[i]t is phrased only as a 'period of limitation,' and 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'"⁵⁹ Structurally, the jurisdictional provision of the habeas statute, 28 U.S.C. § 2241, is separate and does not "'limit jurisdiction to those cases in which there has been a timely filing.'"⁶⁰ The legislative history, the court added, "speaks with equally resounding clarity," as congressional legislators repeatedly referred to the provision as a "statute of limitations."⁶¹ Finally, *Calderon*, like other decisions, recognized that the purpose of the AEDPA was to curb abuse of federal habeas for state prisoners while preserving its availability. The court in *Calderon* concluded that "[e]very relevant signal—from the Act's plain language, to its legislative history, to its structure—points in the same direction: [The] one-year timing provision is a statute of limitations subject to equitable tolling, not a jurisdictional bar."⁶²

time prescriptions, however emphatic, 'are not properly typed jurisdictional.'" (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004))).

57. 128 F.3d 1283 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

58. *See id.* at 1287–89.

59. *Id.* at 1288 (quoting *Zipes v. Trans World Airlines*, 455 U.S. 385, 394 (1982)).

60. *Id.* (quoting *Zipes*, 455 U.S. at 393). The court underscored, "[i]ndeed, both the Supreme Court and this court have repeatedly held that timing provisions even more unyieldingly phrased than AEDPA's are statutes of limitations subject to tolling." *Id.*; *see Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 426 (1965) ("[N]o action shall be maintained . . . unless commenced within three years of the day the cause of action accrued." (alteration in original) (internal quotation marks omitted))).

61. *Calderon*, 128 F.3d at 1288. As the court summarized in *Calderon*:

Neither the conference report, nor any statements of individual House or Senate members, describe the one-year limitation as a restriction on federal court jurisdiction. Many members of Congress—including AEDPA's authors in the Senate and its sponsors in the House—did, however, describe [S]ection 101 as a "statute of limitations."

Id. Within this context, the court cited to the AEDPA'S legislative history. *See, e.g.*, 142 CONG. REC. 7961 (1996) (statement of Rep. Hyde) ("Now, we have a 1-year statute of limitations in habeas."); 142 CONG. REC. 7799 (1996) (statement of Sen. Specter) (noting that AEDPA is designed to "impose a statute of limitations on the filing of habeas corpus petitions"); 141 CONG. REC. 15055 (1995) (statement of Sen. Cohen) ("I support a statute of limitations for filing habeas petitions."); *id.* at 15056 (statement of Sen. Biden) ("I agree with my Republican colleagues from Utah and Pennsylvania that we ought to have a strict statute of limitations and a strict limit on successive petitions.").

62. *Calderon*, 128 F.3d at 1289.

Consistent with *Calderon* and other lower court cases, the Supreme Court has also recognized, at least implicitly, that Section 2244(d) functions as a statute of limitations, and is not “jurisdictional.”⁶³ In *Day v. McDonough*,⁶⁴ the issue was “whether a federal court lack[ed] authority, on its own initiative, to dismiss a habeas petition as untimely” after the State failed to raise the statute of limitations as an affirmative defense.⁶⁵ The Court held that a federal court could *sua sponte*, but was not required to, dismiss a habeas petition as untimely, provided the parties were given notice and an opportunity to respond.⁶⁶ The Court reinforced that a “statute of limitations defense . . . is not ‘jurisdictional,’ hence courts are under no *obligation* to raise the time bar *sua sponte*.”⁶⁷ That said, the Court made clear that this affirmative defense was atypical in that it could be raised *sua sponte* by a court because it “‘implicat[es] values beyond the concerns of the parties.’”⁶⁸ In this way, the Court treated the limitations defense under the AEDPA the same as other “‘nonjurisdictional’” threshold constraints on federal habeas petitions, like exhaustion and procedural default.⁶⁹ It is thus uncontroverted that the AEDPA’s statute of limitations is not considered a jurisdictional bar.⁷⁰

2. *Rules 2 and 3 in the Lower Courts: Does the AEDPA Reflect a Congressional Intent Not to Permit Equitable Tolling?*

Because Section 2244(d) is a statute of limitations rather than a jurisdictional bar, Rules 2 and 3 strongly point to the availability of equitable tolling, unless it would be inconsistent with the text of the statute. As a non-jurisdictional limitations provision, two presumptions apply: *Irwin* provides that statutes of limitations are presumptively subject to equitable tolling (Rule 2), and *Young* presumes that Congress drafts legislation with knowledge of the *Irwin* presumption

63. *Day v. McDonough*, 547 U.S. 198, 205 (2006). The Court held in *Day* that courts “are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner’s habeas petition.” *Id.* at 209. By contrast, where a time bar is jurisdictional, courts are obliged to raise it *sua sponte*. *See id.* at 205.

64. 547 U.S. 198.

65. *Id.* at 202.

66. *Id.* at 202, 209.

67. *Id.* at 205.

68. *Id.* (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

69. *Id.* The dissenters agreed that the AEDPA’s statute of limitations was non-jurisdictional, but did not approve of the Court raising the limitations defense *sua sponte*. *See, e.g., id.* at 218–19 (Scalia, J., dissenting) (asserting that the state waived its limitations defense under the civil rules and that the Court’s *sua sponte* assertion of the limitations defense as an “unwarranted expansion of the timeliness rule enacted by Congress that is inconsistent with the statute, the Habeas Rules, the Civil Rules, and traditional practice”).

70. *Id.* at 218.

(Rule 3).⁷¹ Because the AEDPA was drafted after *Irwin* and does not expressly preclude equitable tolling, there is a strong presumption that it is subject to equitable tolling.⁷²

3. Rules 4 and 5 in the Lower Courts: *The Flies in the Ointment*

Rules 4 and 5 have proved more difficult for the lower courts. The cases from which these rules stem, *Brockamp* and *Beggerly*, returned the *Irwin* presumption and ultimately concluded that equitable tolling was inconsistent with the text of the limitations statutes at issue.⁷³ The failure of the lower courts to convincingly address the application of Rules 4 and 5 in the habeas corpus context suggests the distinct possibility that the Supreme Court could reject equitable tolling under the AEDPA.

Appreciating the lower courts' failure to deal satisfactorily with Rules 4 and 5 requires some analysis of *Brockamp* and *Beggerly*. The Court's analytical starting point in *Brockamp*, which concerned a tax refund statute,⁷⁴ was not the *Irwin* presumption, but a narrower question: "Can courts toll, for nonstatutory equitable reasons, the statutory

71. Since *Young*, numerous courts have invoked these two presumptions. See, e.g., *Griffin v. Rogers*, 399 F.3d 626, 631 (6th Cir. 2005) (noting that statutes of limitations are generally subject to equitable tolling (citing *Young v. United States*, 535 U.S. 43, 49–50 (2002))); *Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005) (concluding that, "[b]ecause at the time AEDPA was enacted there was a rebuttable presumption that equitable tolling applied to statutes of limitations and no indication that Congress intended otherwise," § 2244(d) is subject to equitable tolling); *Neversen v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004) (recognizing the presumption that equitable tolling applied to statutes of limitations (citing *Young*, 535 U.S. at 49–50)); *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (assuming that equitable tolling is available under AEDPA because "Congress acts against the background of existing decisional doctrine unless it negates the doctrine" (citing *Young*, 535 U.S. at 49–50)); *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997) (recognizing the *Irwin* presumption), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

72. The *Calderon* court presumed that, under *Irwin* and *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985), equitable tolling applied. *Calderon*, 128 F.3d at 1289 (citing *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 95–96 (1990)); see *id.* ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." (quoting *Locke*, 471 U.S. at 94 n.10)).

73. *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *United States v. Brockamp*, 519 U.S. 347, 351 (1997).

74. The tax refund statute at issue in *Brockamp*, § 6511 of the Internal Revenue Code of 1986, required a taxpayer to file for a refund within two years of paying the tax or within three years of filing the return. See *Brockamp*, 519 U.S. at 351 (citing 26 U.S.C. § 6511(a) (1994)). The Ninth Circuit found that the statute allowed equitable tolling where mental disability, senility or alcoholism prevented the taxpayer from timely filing. *Id.* at 348. The five other circuits that had considered the issue held that the statute did not authorize equitable tolling, and the Supreme Court agreed. *Id.* at 349 (citing *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996); *Lovett v. United States*, 81 F.3d 143, 145 (Fed. Cir. 1996); *Webb v. United States*, 66 F.3d 691, 702 (4th Cir. 1995);

time (and related amount) limitations for filing tax refund claims set forth in [Section] 6511 . . . ?”⁷⁵ Building on the theme of whether to deviate from the statutory text, the Court posited that equitable tolling would be available, “*if, but only if*, [Section] 6511 contains an implied ‘equitable tolling’ exception.”⁷⁶ This phrasing shifted the focus from a presumption of equitable tolling, to an exercise in discerning congressional intent to allow equitable tolling, creating a greater burden on the proponent of equitable tolling.⁷⁷ Focusing on the text of the limitations provision, the *Brockamp* Court emphasized that Congress worded it in “unusually emphatic form” and in a “highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions.”⁷⁸ There were, the Court said, “no counterindications” to support equitable tolling.⁷⁹ The Court concluded that Congress “did not intend the ‘equitable tolling’ doctrine to apply” and “would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods,” rather than allowing courts to make such decisions.⁸⁰ The Court more recently categorized the limitations provision at issue in *Brockamp* as “jurisdictional.”⁸¹

In *Beggerly*, decided one year after *Brockamp*, the Court held that equitable tolling did not apply in suits to quiet title against the government because the Quiet Title Act’s generous limitations provision “already effectively allowed for equitable tolling.”⁸² The Quiet Title Act permits parties to sue the United States as a party defendant in a suit to quiet title to real property in which the United States claims an

Oropallo v. United States, 994 F.2d 25, 32 (1st Cir. 1993); Vintilla v. United States, 931 F.2d 1444, 1445, 1447 (11th Cir. 1991)).

75. *Id.* at 348.

76. *Id.* at 348–49.

77. Assuming only for argument’s sake that the *Irwin* presumption applied, the Court rejected it because “there are strong reasons for answering *Irwin*’s question in the Government’s favor.” *Id.* at 350 (referring to “*Irwin*’s negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?”).

78. *Id.* The statute provided that a refund claim “shall be filed” within the limitations period, no refund “shall be allowed” after the period, noncompliant refund claims “shall be considered erroneous,” and listed “explicit exceptions” to its “basic time limits” without including “equitable tolling.” *Id.* at 351 (citing 26 U.S.C. §§ 6511(a), (b)(1), (d), 6514 (1994)). Section 6511 also imposed substantive limitations on tax refunds. *See id.* at 350–52 (citing 26 U.S.C. § 6511 (1994)).

79. *Id.* at 352.

80. *Id.* at 353, 354 (observing that there was no history of equitable tolling for § 6511’s predecessor tax refund provisions).

81. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008).

82. *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (citing 28 U.S.C. § 2409a(g) (1994)).

interest.⁸³ The Court in *Beggerly* looked first to *Brockamp*, not *Irwin*, for the rule: "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute."⁸⁴ Three features of the statute were important. First, the twelve-year limitations provision under the Quiet Title Act was "unusually generous."⁸⁵ Second, the statute's discovery rule, which dated accrual from the time that the plaintiffs knew or should have known about the government's claim of title, incorporated a form of equitable tolling: Because Congress "already effectively allowed for equitable tolling," the Court stated, "additional equitable tolling would be unwarranted."⁸⁶ Finally, the Court stated that equitable tolling was "incompatible with the Act" because the subject matter—title to land—demanded finality and repose, and equitable tolling "would throw a cloud of uncertainty over these rights."⁸⁷

With limited success, the lower courts have attempted to distinguish the AEDPA's statute of limitations from those considered in *Brockamp* and *Beggerly*. In *Calderon*, decided before *Beggerly*, the United States Court of Appeals for the Ninth Circuit distinguished *Brockamp* on its text, stating that the AEDPA's one-year limit was "neither detailed nor technical; it reads like an everyday, run-of-the-mill statute of limitations," and based on policy grounds, noted the incomparable costs of dismissing a tax refund claim and a capital habeas petition.⁸⁸ In *Brockamp*, the Court explained that in administering a massive tax system, "it is sometimes necessary 'to pay the price of occasional unfairness in individual cases . . . in order to maintain a more workable' regime."⁸⁹ Although such "occasional injustices" may be tolerable in

83. 28 U.S.C. § 2409a (2000). *Beggerly* concerned an island in the Gulf of Mexico off the coast of Mississippi that became part of the Gulf Islands National Seashore. *Beggerly*, 524 U.S. at 40. Pursuant to legislation authorizing the creation of the park, the National Park Service brought suit in 1979 against some 200 defendants to quiet title to lands within the proposed park boundary. *Id.* at 39, 40. That litigation settled, resulting in the government quieting title to the land in exchange for payments it made to the private landowners, including *Beggerly*. *Id.* at 39. In 1994, some twelve years after the judgment, *Beggerly* moved to set aside the settlement based on evidence he had discovered supporting his claim of superior title. *Id.* at 41. Although *Beggerly* renewed his claim beyond the twelve year period, the court of appeals held that the limitations period could be tolled based on *Beggerly*'s diligence in researching his title. *Id.* at 48. The Supreme Court disagreed. *Id.*

84. *Id.* at 48 (citing *Brockamp*, 519 U.S. at 351, 354).

85. *Id.* at 48–49.

86. *Id.*

87. *Id.* at 49 ("It is of special importance that landowners know with certainty what their rights are . . .").

88. *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

89. *Id.* (quoting *Brockamp*, 519 U.S. at 352).

the tax refund arena, the court explained in *Calderon*, “they are decidedly not an acceptable cost of doing business in death penalty cases.”⁹⁰

Lower courts have also distinguished *Brockamp* and *Beggerly* based on an abiding assumption that courts continue to serve a role, even under the AEDPA, in safeguarding the availability of the writ. This theme has been expressed in different ways. The Fourth Circuit explained that the policy of the AEDPA “was to curb the abuse of the writ of habeas corpus, while preserving its availability.”⁹¹ The court reasoned that while the limitations statutes at issue in *Beggerly* and *Brockamp* “served policy interests that would be adversely affected if the statutory limitations provisions were not strictly adhered to,” allowing equitable tolling under the AEDPA would not subvert its purpose in curbing “abuse of the writ.”⁹² Other courts, citing *Lonchar*, have emphasized that courts must balance their faithful application of the habeas statute against the possibility that the denial of habeas review “risk[s] injury to an important interest in human liberty.”⁹³ Courts also have expressed confidence in their own ability to strike this balance, thus assuming that Congress left courts that power. As the Fifth Circuit has stated, “[t]he court’s judicious discretion equitably to toll helps safeguard habeas while still fulfilling Congress’s express desire to accelerate the process.”⁹⁴

The trickier task for courts has been explaining why equitable tolling can exist in the face of the detailed tolling exceptions contained within the statute. As mentioned, generally the one-year limitations period commences on the date the state court conviction becomes final, but will not begin to run before the date on which (1) a state or federal impediment to filing is removed, (2) the Supreme Court recognizes and retroactively applies a new constitutional right, or (3) the factual predicate of the claim(s) “could have been discovered through the exercise of due diligence.”⁹⁵ The limitations period is also tolled during the pendency of a properly filed state post-convic-

90. *Id.*

91. *Harris v. Hutchinson*, 209 F.3d 325, 329 (4th Cir. 2000).

92. *Id.* (citing *Calderon*, 128 F.3d at 1288 n.4). The court distinguished *Brockamp* by concluding that occasional injustices are “‘not an acceptable cost of doing business in death penalty cases.’” *Id.* (quoting *Calderon*, 128 F.3d at 1288 n.4).

93. *See Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (same).

94. *Fisher*, 174 F.3d at 713. The Ninth Circuit has expressed a similar sentiment. *See Calderon*, 128 F.3d at 1288, 1289 (stating that “[w]e have no doubt that district judges will take seriously Congress’s desire to accelerate the federal habeas process, and will only authorize extensions” in “extraordinary circumstances”).

95. *See* 28 U.S.C. § 2244(d)(1)(B)–(D) (2000).

tion petition—while the petitioner is properly exhausting claims that later may be presented in his federal petition.⁹⁶

Several courts have recognized, based on *Beggerly* and *Brockamp*, that Section 2244(d)'s numerous equitable tolling features cut against the availability of equitable tolling. Judge Posner of the Seventh Circuit questioned, in light of the "express tolling provisions" in Sections 2244(d)(1)(B), (C), (D), and (d)(2), "what room remains for importing the judge-made doctrine of equitable tolling."⁹⁷ The First Circuit explained that "[S]ection 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions,"⁹⁸ and surmised that "Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort."⁹⁹ The First Circuit likewise recognized the "forceful objection" that the statutory tolling delays might preclude equitable tolling.¹⁰⁰

To date, these arguments have failed to garner support, as even skeptical courts have left the door open to equitable tolling. Analytically, courts have refused to negatively infer from the text of Section 2244(d) a congressional intent to preclude equitable tolling.¹⁰¹ In *Calderon*, the court rejected the argument that a general "good cause" tolling provision that allowed a thirty-day maximum extension in capital cases reflected a congressional intent not to allow such tolling under Section 2244(d)(1).¹⁰² Refusing to engage in "this kind of negative inferential reasoning," the court concluded that the express tolling provision was "designed to cap what would have otherwise been an unlimited tolling period," whereas in Section 2244(d)(1), "Congress did not intend to upset the normal default rule allowing

96. *See id.* § 2244(d)(2).

97. *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999).

98. *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (adding that "AEDPA reflects Congress'[s] view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up" (citing H.R. REP. NO. 104-518, at 111 (1996))).

99. *Id.* (citing *Taliani*, 189 F.3d at 598).

100. *Neversen v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004).

101. *See Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1289 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

102. *Id.* In *Calderon*, the respondents had argued that the thirty-day "good cause" tolling provision in § 2263(b)(3)(B), which applies in certain capital cases, reflected a congressional intent not to allow such tolling under § 2244(d)(1). *See id.* at 1289 n.5 (citing 28 U.S.C. § 2263(b)(3)(B) (2000)). Section 2263(b)(3)(B) provides: "The time requirements established [for capital cases from opt-in states] shall be tolled during an additional period not to exceed 30 days, if a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section." 28 U.S.C. § 2263(b)(3)(B).

longer tolling periods.”¹⁰³ The Fourth Circuit refused to conclude that the express tolling provisions contained in Section 2244(d)(1) and (2) were exhaustive and “absolute,”¹⁰⁴ explaining that these “explicit exceptions” do not give rise to the inference that “Congress did not intend the statute to have other exceptions.”¹⁰⁵ Rather, the court explained, “[w]ithout these exceptions, a petitioner could inappropriately be denied the writ altogether, ‘risking injury to an important interest in human liberty.’”¹⁰⁶ Building on the Supreme Court’s decision in *Young*, courts have reasoned that no such negative intent could be inferred from the listed exceptions because Congress enacted the AEDPA “against the background of the *Irwin* presumption” in favor of equitable tolling.¹⁰⁷

Although courts have attempted to distinguish the AEDPA from the statutes in *Beggerly* and *Brockamp* based on its text and purpose, ultimately their arguments are dissatisfying. There is nothing in the text or legislative history that signals that Congress wanted courts to retain flexibility, or that the statutory purpose, which was to curb abuse and speed up the adjudication process, would be equally well served by such flexibility. Courts focus to a much lesser degree on the reasons why the AEDPA and habeas are categorically different from the tax refund and federal property title areas at issue in *Brockamp* and *Beggerly*. Those differences are suggested more subtly, however, by courts’ repeated concerns about access to habeas for first-time petitioners, their instinctive belief that they retain discretion to apply the AEDPA flexibly,¹⁰⁸ and their special concern for incompetent, actually innocent, and capital defendants.¹⁰⁹ These passing references may reflect courts’ collective, though unarticulated, sense that they have a different role in habeas cases than in most other statutory actions. Part III seeks to articulate what lower courts have not. It does so by looking beyond the context neutral rules expressed above to the rich contexts in which the Court announced those rules in the major equitable tolling cases.

103. *Calderon*, 128 F.3d at 1289.

104. *Harris v. Hutchinson*, 209 F.3d 325, 329–30 (4th Cir. 2000).

105. *Id.* at 329 (citing 28 U.S.C. §§ 2244(d)(1)(B)–(D), (d)(2) (2000)).

106. *Id.* (quoting *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996)).

107. *Neversen v. Farquharson*, 366 F.3d 32, 41 (1st Cir. 2004).

108. *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (citing *Evicci v. Comm’r of Corr.*, 226 F.3d 26, 28 (1st Cir. 2000)).

109. *See, e.g.*, *Souter v. Jones*, 395 F.3d 577, 588, 602 (6th Cir. 2005) (actual innocence); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (actual innocence and incompetence); *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1977) (death penalty), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

III. BEYOND THE RULES: THE SUPREME COURT'S EQUITABLE TOLLING JURISPRUDENCE IN CONTEXT

What the lower courts have not fully articulated is that the Court's willingness to infer a right of equitable tolling is context driven and reflects the statutory setting of the limitations provision. This Part identifies three contextual factors that guide the Court in determining when to infer a right of equitable tolling: (1) the subject matter, including the Court's and Congress's historical roles in addressing that subject; (2) the scope and source of congressional authorization for the legislation; and (3) the text and stated purpose of the statute. The term context¹¹⁰ is used broadly here to encompass policy, history, and institutional and constitutional structure, as those considerations form the lens through which the equitable tolling question is best viewed—as an interaction among institutions.¹¹¹

What emerges from the main cases are two paradigms: one, represented by *Brockamp*, *Beggerly*, and *John R. Sand & Gravel Co.*, in which the Court was unwilling to exercise its equitable powers to toll the limitations period, and another, reflected in *Irwin* and *Young*, in which the Court, by virtue of its historical role and expertise, was both equipped and willing to allow equitable tolling to prevent unforeseen injustices from operation of the statute of limitations. As Part IV explains, habeas and the AEDPA fit more comfortably into the latter category based on the Court's historical role in administering its habeas docket, adjudicating habeas claims, and safeguarding access to habeas proceedings.

A. *Subject Matter Matters: From Irwin to John R. Sand & Gravel Co.*

In the Supreme Court's equitable tolling jurisprudence, subject matter is the starting point of the inquiry. It matters whether the case at issue concerns civil rights, tax, property, or bankruptcy. In each subject area, Congress and the Court occupy slightly different terrain based on historical experience, competence, and constitutional direc-

110. Context, though always relevant to statutory interpretation, means different things to different people. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 94–95 (2006) (explaining that, “in short, textualists give precedence to contextual evidence concerning likely semantic usage,” including linguistic data and customary usage, “while purposivists do the same with contextual cues that reflect policy considerations”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 43 (2006) (arguing that whether textualists and purposivists consult extrastatutory context is more important than when they do or which contextual sources they consult).

111. *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008) (explaining that the Court applies a clear statement rule in deciding whether to suspend the writ of habeas corpus because “[t]his interpretive rule facilitates a dialogue between Congress and the Court”).

tive. Consideration of subject matter at a macro-level leads to an analysis of which branch, Congress or the Court, has primary responsibility for resolving these kinds of issues. Equitable tolling is, after all, a judicial fix of a statute that a court deems either unclear or unfair. The Court's willingness to take such a step is subject-matter specific and reflects the Court's confidence to tinker within a particular legislative area.

The Supreme Court has acknowledged the importance of subject matter in equitable tolling analysis, although this acknowledgement occurs less often than subject matter actually appears to play a role. In *Brockamp*, the tax refund case, the Court reasoned that its textual analysis was supported by "[t]he nature of the underlying subject matter—tax collection,"¹¹² and in *Beggerly*, the federal property case, the Court justified its refusal to allow equitable tolling because "[i]t is of special importance that landowners know with certainty what their rights are."¹¹³ Subject matter also played a role more recently in *John R. Sand & Gravel Co.*, in which the Court found that the limitations provision for court of claims lawsuits was jurisdictional, even though it was "linguistically similar" to the limitations provisions at issue in *Irwin*. The *John R. Sand & Gravel Co.* Court held that *Irwin* had not overruled earlier case law holding that the court of claims limitations provision was "jurisdictional."¹¹⁴ More importantly, *John R. Sand & Gravel Co.* highlighted a continuing debate within the Court on whether *Irwin* created a generally applicable rule and suggested that subject matter is relevant to equitable tolling analysis.

1. *Irwin v. Department of Veterans Affairs*

Examining *Irwin* within its subject matter context as a civil rights case helps explain why the Court allowed equitable tolling in *Irwin* when it had previously (and now again) interpreted "linguistically similar" limitations provisions as "jurisdictional."¹¹⁵ The subject matter story begins with *Zipes v. Trans World Airlines*, in which the Court held

112. *United States v. Brockamp*, 519 U.S. 347, 352 (1997).

113. *United States v. Beggerly*, 524 U.S. 38, 49 (1998).

114. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 755 (2008) (citing *Soriano v. United States*, 352 U.S. 270, 273–74, 277 (1957)); see *id.* at 757–58 (Stevens, J., dissenting) (explaining how *Irwin* "expressly declined to follow" *Soriano* and instead "adopted 'a more general rule to govern the applicability of equitable tolling in suits against the Government'" (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990))).

115. *Id.* at 755 (majority opinion).

that equitable tolling applied against a private employer in a federal civil rights suit under the Civil Rights Act of 1964.¹¹⁶

Zipes, a flight attendant, sued her employer in a class action lawsuit for unlawful sex discrimination in violation of the Civil Rights Act of 1964 based on the employer's policy of grounding female flight attendants who became mothers, while permitting male flight attendants who became fathers to continue flying.¹¹⁷ While finding the "no motherhood" practice discriminatory, the court of appeals held that most of the class plaintiffs' claims were jurisdictionally barred because of their failure to file charges within ninety days of the alleged unlawful employment practice.¹¹⁸ The case came before the Supreme Court on the issue of "whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the [limitations provision] is subject to waiver and estoppel."¹¹⁹

Zipes, unlike *Irwin*, highlighted the special policy concerns supporting equitable tolling in civil rights cases. The Court based its conclusion on the "structure of Title VII, the congressional policy underlying it, and the reasoning of our cases."¹²⁰ The legislative history acknowledged that Title VII had been construed liberally by courts "so as to give the aggrieved person the maximum benefit of the

116. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982).

117. *Id.* at 388.

118. *Id.* at 389. The ninety-day period was later enlarged to 180 days. Although *Zipes* may still be good law, the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), suggests that the current Court might not decide *Zipes* the same way. In *Ledbetter*, the Court did not revisit the jurisdictional question, but instead focused on the accrual period, holding that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the 180-day period prescribed in 42 U.S.C. § 2000e-5(e)(1). *Id.* at 2170. The plaintiff in this case complained of discriminatory practices over a nearly twenty year period that resulted in her current salary being substantially lower than similar male colleagues. *Id.* at 2165-66. The question in *Ledbetter* appears to have been whether recurrent conduct that occurred outside the 180-day period can be redressed in a Title VII suit; the Court said it could not. *Id.* at 2166, 2171-72. *Ledbetter* presented a statute of limitations question of sorts: It focused not on the act of filing, but on the period of conduct reached by the statute. The Court relied on the policy common to statutes of limitations, namely to "serve a policy of repose," and the legislative judgment that after a period "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* at 2170. Justice Ginsburg criticized the Court's opinion as "incompatible with the statute's broad remedial purpose." *Id.* at 2188 (Ginsburg, J., dissenting). Noting that Congress had previously overturned the Court's restrictive interpretation of civil rights statutes, Justice Ginsburg added, "Once again, the ball is in Congress'[s] court." *Id.* Indeed, President Obama recently signed legislation effectively reversing the Court's *Ledbetter* ruling. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

119. *Zipes*, 455 U.S. at 392.

120. *Id.* at 393.

law,” and that the timing requirement was not intended to change that.¹²¹ The Court cited its “guiding principle” for construing Title VII, explaining that “a technical reading [of the statute] would be ‘particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.’”¹²² In concluding that Title VII’s filing period is subject to waiver and “tolling when equity so requires,” the Court explained, “we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”¹²³

The reasoning in *Zipes* highlights the confluence in *Irwin* of civil rights and sovereign immunity, and suggests the Court considered *Irwin*, first and foremost, a civil rights case. In *Irwin*, the plaintiff claimed that he had been unlawfully fired by the Veterans Administration (“VA”) based on his race, age, and disability.¹²⁴ After the VA dismissed the complaint, the Equal Employment Opportunity Commission (“EEOC”) affirmed that decision and mailed copies of a right-to-sue letter to Irwin and his attorney of record.¹²⁵ That letter arrived at his attorney’s office four days later, but because the attorney was out of the country at the time, Irwin did not learn of the EEOC actions until two-and-a-half weeks later, just three days after Irwin received his copy of the letter.¹²⁶ Irwin filed suit in federal court forty-four days after the EEOC notice was received at his attorney’s office and twenty-nine days after he claimed to have received the letter.¹²⁷ The district court held that the suit was untimely under 42 U.S.C. § 2000e-16(c), which required plaintiffs to initiate discrimination suits against the federal government within thirty days “of receipt of notice of the final action taken” by the EEOC.¹²⁸ The court of appeals held that the thirty-day rule imposed a jurisdictional bar, precluding the court from exercising jurisdiction over the case.¹²⁹ The Supreme Court agreed that Irwin’s suit was untimely,¹³⁰ but held that the thirty-

121. *Id.* at 395 (citation and internal quotation marks omitted).

122. *Id.* at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)).

123. *Id.* at 398.

124. *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 91 (1990).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 91–92 (citing 42 U.S.C. § 2000e-16(c) (1988)).

129. *See Irwin v. Veterans Admin.*, 874 F.2d 1092, 1095–97 (5th Cir. 1989).

130. *Irwin*, 498 U.S. at 92.

day deadline was subject to equitable tolling. With this rationale, the Court implicitly held that the thirty-day rule was not jurisdictional.¹³¹

The Court in *Irwin* fashioned a generally applicable rule for evaluating the availability of equitable tolling under federal limitations statutes in suits against the government. The Court conceded in *Irwin* that its equitable tolling jurisprudence was “not . . . entirely consistent,” and seized the “opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.”¹³² The Court’s earlier decisions encompassed a spectrum of approaches, from contemplating that a statute of limitations could be subject to equitable principles like equitable tolling and waiver, to viewing a statute of limitations as a jurisdictional bar.¹³³ The Court recognized, however, that suits involving private parties are “customarily subject to ‘equitable tolling,’”¹³⁴ and that “statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.”¹³⁵ The Court adopted the rule that “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States,” unless Congress otherwise provides.¹³⁶

Irwin’s civil rights focus favored equitable tolling, but the Court adopted a rule that minimized sovereign immunity implications. Justice White, concurring in the judgment, expressed concern that the Court’s interpretation enlarged the waiver of sovereign immunity beyond what the statute required, despite the general rule that waivers of sovereign immunity are construed in favor of the government.¹³⁷ The majority rejected this argument, while admitting that its rule might press the waiver beyond congressionally imposed limits. The

131. *Id.* at 95–96.

132. *Id.* at 94, 95.

133. *Id.* at 94. Compare *Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (cautioning against construing the waiver of sovereign immunity “‘unduly restrictively’” (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983))), and *United States v. Locke*, 471 U.S. 84, 94 & n.10 (1985) (leaving open the question of whether statutory deadlines in suits against the government are subject to equitable principles like equitable tolling, waiver, and estoppel), with *United States v. Soriano*, 352 U.S. 270, 276 (1957) (holding that the petitioner’s claim was jurisdictionally barred because “Congress was entitled to assume that the limitation period it prescribed meant just that period and no more”).

134. *Irwin*, 498 U.S. at 95 (citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)).

135. *Id.* (citing *Zipes v. Trans World Airlines*, 455 U.S. 385, 394 (1982); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 n.3 (1983)).

136. *Id.* at 95–96.

137. *Id.* at 98 (White, J., concurring).

Court ultimately held that equitable tolling was not available in Irwin's specific situation.¹³⁸

The Court's approach to equitable tolling in *Zipes* and *Irwin*, and its willingness to embrace flexibility to forward the goals of a remedial statute, reflects the Court's broad equitable powers in remedying civil rights violations. The Court pioneered civil rights law by determining when constitutional violations occurred and how to remedy them. The Court's 1954 decision in *Brown v. Board of Education*¹³⁹ shows the Court's leadership role in modern civil rights law was well ahead of Congress, which did not enact major Post-Reconstruction civil rights legislation until the Civil Rights Act of 1964.¹⁴⁰ *Brown* and other cases were rooted in the Court's evolving interpretation of the Equal Protection Clause of the Fourteenth Amendment. When Congress enacted the Civil Rights Act of 1964, Congress acknowledged having not set foot in the civil rights arena since the Court's 1883 *Civil Rights Cases*, which struck down an 1875 civil rights law. Rather, it was the Court, with *Brown* in particular, that dominated that arena. By enacting the Civil Rights Act of 1964, Congress evidenced its intent to share equally with the Executive and Judiciary branches the responsibilities of enforcing civil rights law.¹⁴¹ Even so, the Court retained its reputation as the primary force in enforcing civil rights legislation and remedying violations.

Even as Congress's role in civil rights expanded, the Court retained a strong role in enforcing civil rights laws and remedying constitutional violations. The Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*¹⁴² made clear that the 1964 legislation in no way diminished federal courts' traditional equitable powers in redressing constitutional violations. School authorities argued in *Swann* that the equity powers of the federal district court were limited by various provisions in Title IV of the Civil Rights Act of 1964, particularly an anti-busing proviso.¹⁴³ The Court rejected this argument,

138. *Id.* (majority opinion) (describing Irwin's situation as "at best a garden variety claim of excusable neglect").

139. 347 U.S. 483 (1954).

140. *See id.* at 489-95.

141. *See, e.g.,* Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 *RUTGERS L. REV.* 945, 950 (2005) (discussing how the Civil Rights Act of 1964 reshaped Congress's role in protecting civil rights).

142. 402 U.S. 1 (1970).

143. *Id.* at 16, 17. The anti-busing proviso stated that "nothing herein shall empower any official or court of the United States" to order transportation of pupils to achieve racial balance, "or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." *Id.* at 17 (citing Civil Rights Act of 1964, 42 U.S.C. § 2000(c) (6) (2000)).

citing its broad equitable power to remedy constitutional violations.¹⁴⁴ The Court interpreted the anti-busing proviso as assurance that courts would not have expanded powers under the Act to enforce the Equal Protection Clause.¹⁴⁵ The Court refused to infer any diminution of its powers: "There is no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers."¹⁴⁶ Although the Court has since retreated from *Swann*, tightening the required nexus between the constitutional violation and court-ordered remedy,¹⁴⁷ *Swann* remains a strong statement that the Court will not lightly infer that its historical equitable powers have been restricted absent some clear indication by Congress.¹⁴⁸

144. See *id.* at 15–16 (explaining that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right").

145. *Id.* at 17.

146. *Id.*

147. See *Missouri v. Jenkins*, 515 U.S. 70, 87–89 (1995) (discussing *Swann* and holding that the judiciary's remedial power may be exercised only on the basis of a constitutional violation); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (reiterating the *Swann* principle that the judiciary's remedial power may be limited to constitutional violations); *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1977) (clarifying "that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself"); see also David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1126–33 (2004) (tracing and critiquing the Court's change in direction from *Brown*, *Swann*, and *Green v. County School Board*, 391 U.S. 430 (1968), to its later decisions in *Board of Education v. Dowell*, 498 U.S. 237 (1991), and *Jenkins*).

148. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (holding that courts retained their traditional equitable discretion to achieve compliance with the Federal Water Pollution Control Act). In *Weinberger*, the issue was whether district courts were required to enjoin activities in violation of the statute or whether they retained equitable discretion to decide when to issue an injunction. *Id.* at 306–07. The Court highlighted that the law relating to injunctions being sought in federal court reflected a "practice with a background of several hundred years of history." *Id.* at 313 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). Congress "may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *Id.* (citing *Hecht*, 321 U.S. at 329). The *Weinberger* Court further stated:

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

Id. (citation and internal quotation marks omitted).

2. John R. Sand & Gravel Co. v. United States

The Court's most recent debate about the reach of *Irwin* highlights the importance of its civil rights' origins.¹⁴⁹ *John R. Sand & Gravel Co.* exposes the ongoing practice of categories of statutes being treated differently despite sharing similar language.¹⁵⁰ Both the majority and the dissenters in *John R. Sand & Gravel Co.* acknowledged that the limitations provisions in the civil rights statute in *Irwin* and the court of claims statute in *Soriano v. United States* and *John R. Sand & Gravel Co.* were essentially the same.¹⁵¹ The majority described *Irwin* as a case about a "civil rights statute," limited its reach to prospective cases, and thus carved out from *Irwin*'s reach the pre-*Irwin* cases that held that the limitations period applicable to court of claims cases was "jurisdictional."¹⁵²

John R. Sand & Gravel Co. confirms that subject matter and historical practice are an essential aspect of equitable tolling analysis. The Court in *John R. Sand & Gravel Co.* resurrected the "jurisdictional/non-jurisdictional" dichotomy that the *Irwin* rule sought to jettison,¹⁵³ and categorized past cases along those lines.¹⁵⁴ The Court characterized *Brockamp* and *United States v. Dalm*,¹⁵⁵ pre-*Irwin* tax refund cases, as belonging to the "jurisdictional" category, even though neither case

149. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 755 (2008).

150. Compare *id.* (addressing the limitations provision in 28 U.S.C. § 2501 that states, "every claim . . . shall be barred unless the petition . . . is filed within six years"), with *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) (citing the limitations provision in 42 U.S.C. § 2000e-16(c), which provides that "within thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title"). Although *Irwin* acknowledged the differences in these provisions, including the "shall" and "may," the Court concluded that it was "not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.* at 94–95.

151. See *John R. Sand & Gravel Co.*, 128 S. Ct. at 755 (describing the two statutes as "linguistically similar"); *id.* at 758 (Stevens, J., dissenting) (describing how the Court in *Irwin* found the two statutes to be "functionally indistinguishable").

152. *Id.* at 754–55 (majority opinion) (citing *Soriano v. United States*, 352 U.S. 270, 273–74, 277 (1957); *United States v. Greathouse*, 166 U.S. 601, 602 (1897); *United States v. New York*, 160 U.S. 598, 616–19 (1896); *De Arnaud v. United States*, 151 U.S. 483, 495–96 (1894); *Finn v. United States*, 123 U.S. 227, 232–33 (1887); *Kendall v. United States*, 107 U.S. 123, 125–26 (1883)).

153. See *id.* at 758 (Stevens, J., dissenting) (claiming that *Irwin* "definitively rejected" the jurisdictional approach taken in the court of claims cases without having suggested "a carve-out for statutes we had already held ineligible for equitable tolling").

154. *Id.* at 759 ("[T]oday's decision threatens to revive the confusion of our pre-*Irwin* jurisprudence . . ."); *id.* at 760–61 (Ginsburg, J., dissenting) (noting that "[t]oday's decision hardly assists lower courts endeavoring to answer" whether other similar provisions, which have not been interpreted, are governed by *Irwin* or *John R. Sand & Gravel Co.*).

155. 494 U.S. 596 (1990).

had been analyzed that way.¹⁵⁶ The Court categorized two employment discrimination cases—*Zipes* and a lower court case involving the federal age-discrimination statute—as dealing with typical limitations periods that are subject to equitable tolling.¹⁵⁷ The Court placed the AEDPA’s statute of limitations in the non-jurisdictional category,¹⁵⁸ and the statute and rule governing appeal deadlines in the jurisdictional category.¹⁵⁹

3. *Young v. United States*

The Court’s historical role in bankruptcy law also shaped its equitable tolling analysis in *Young v. United States*, in which the Court traced its broad equitable power to a general statutory directive to act as a court of equity in bankruptcy cases. At issue in *Young* was a “three-year lookback period” in bankruptcy cases, which provided that “[a] discharge under the Bankruptcy Code does not extinguish certain tax liabilities for which a return was due within three years before the filing of an individual debtor’s petition.”¹⁶⁰ The Youngs owed taxes and had filed successive bankruptcy petitions—a Chapter 13 petition (seeking reorganization) followed by a Chapter 7 petition (seeking liquidation).¹⁶¹ The Youngs maintained that because their tax debt owed to the Internal Revenue Service (“IRS”) predated the Chapter 7 filing by more than three years, it was discharged and need not be paid. The lower court held that the tax was not discharged because the “three-year lookback period” was equitably tolled during the pendency of the Chapter 13 proceeding.¹⁶² The Supreme Court agreed and held that the IRS’s right to recover the debt was preserved as a result of equitable tolling.¹⁶³

The Court’s analytical starting point in *Young* was two presumptions: the *Irwin* presumption¹⁶⁴ and the presumption that Congress

156. *John R. Sand & Gravel Co.*, 128 S. Ct. at 753 (majority opinion) (citing *United States v. Brockamp*, 519 U.S. 347, 352–53 (1997); *Dalm*, 494 U.S. at 609–10).

157. *Id.* (citing *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450–53 (7th Cir. 1990)).

158. *Id.* (citing *Day v. McDonough*, 547 U.S. 198, 202 (2006)).

159. *Id.* (citing *Bowles v. Russell*, 127 S. Ct. 2360, 2363–66 (2007)). For a critique of *Bowles*, see Colloquy, *Jurisdictionality* and *Bowles v. Russell*, 102 Nw. U. L. REV. 42 (2007), and Colloquy, *Appreciating Mandatory Rules: A Reply to Critics*, 102 Nw. U. L. REV. 228 (2007).

160. *Young v. United States*, 535 U.S. 43, 44 (2002) (citing 11 U.S.C. §§ 507(a)(8)(A)(i), 523(a)(1)(A) (2000)).

161. *Id.* at 44–45.

162. *Id.* at 45–46.

163. *Id.* at 46–47.

164. The Court stated: “It is hornbook law that limitations periods are ‘customarily subject to equitable tolling’ . . . unless tolling would be ‘inconsistent with the text of the

drafts legislation “in light of this background principle.”¹⁶⁵ The second presumption was “doubly true” in bankruptcy cases because bankruptcy courts “are courts of equity and ‘appl[y] the principles and rules of equity jurisprudence.’”¹⁶⁶ The Court explained in *Pepper v. Litton*,¹⁶⁷ a 1939 case relied on in *Young*, that the statute authorizing bankruptcy courts invested them “with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings,”¹⁶⁸ and that it had “exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates” and could overlook timing defects, despite a statutory directive.¹⁶⁹ *Young* shows that the Court deemed equitable tolling available based on its statutorily derived equitable powers, which were undisturbed by the technical requirements contained in the statute of limitations provision.

In both *Irwin* and *Young*, the Court was operating in subject areas in which the Court had traditionally exercised broad equitable powers, had considerable, though not exclusive, institutional expertise, and a mandate to do justice. By contrast, in *Brockamp*, the tax refund case, the Court admitted that tax law “is not normally characterized by case-specific exceptions reflecting individualized equities,”¹⁷⁰ equitable tolling historically was not available under prior versions of the limitations statute,¹⁷¹ and broader policy concerns about tax adminis-

relevant statute.” *Id.* at 49 (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

165. *Id.* at 49–50. The provision at issue in *Young*, 26 U.S.C. § 6511(a), pre-dated *Irwin* and had not been amended, though it appears that Congress made minor adjustments to the statute in the years between *Irwin* and *Young*. See 26 U.S.C.A. § 6511 (West 2002) (listing amendments to the statute in 1990, 1994, 1997, 1998, and 2001).

166. *Young*, 535 U.S. at 50 (alteration in original).

167. 308 U.S. 295 (1939).

168. *Id.* at 303–04 (citing Bankruptcy Act, ch. 541, 30 Stat. 544, 545 (1898)); see also *id.* at 304 n.7 (noting subsequent immaterial reorganization of the statute).

169. *Id.* at 304. The Court explained: “And even though the act provides that claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication, the bankruptcy court in the exercise of its equitable jurisdiction has power to permit claims . . . to prevent a fraud or an injustice.” *Id.* at 305 n.11.

170. *United States v. Brockamp*, 519 U.S. 347, 352 (1997); see *Webb v. United States*, 66 F.3d 691, 694–95 (4th Cir. 1995) (noting that “equity generally plays a very limited role in tax cases,” and adding that statutes of limitations are “almost indispensable” to the “administration of an income tax policy” (citing *Lewyt Corp. v. Comm’r*, 349 U.S. 237, 249 (1955) (Frankfurter, J., dissenting); *Rothensies v. Elec. Storage Battery Co.*, 329 U.S. 296, 301 (1946))).

171. *Brockamp*, 519 U.S. at 353–54.

tration weighed against equitable tolling.¹⁷² There appeared to be no trace of equitable flexibility in *Brockamp* and *Beggerly*, in which the Court readily, and unanimously, dismissed the notion of equitable tolling.¹⁷³ The Court's willingness to infer equitable tolling in the area of federal property or tax cases is a reflection that Congress, not the Court, has primary responsibility to resolve tax and federal property issues. This difference in the Court's willingness to exercise its equitable powers also reflects the Court's and Congress's constitutional roles in these subject areas.

B. The Source of Congressional Power Authorizing the Legislation

In equitable tolling jurisprudence, subject matter has a constitutional dimension. Looking at the source of constitutional power supporting the statute of limitations provides another way to examine the relationship between Congress and the courts, and correlates to the Court's willingness to infer a right of equitable tolling.

The equitable tolling cases span three constitutional categories, each reflecting a slightly different relationship between the two branches. In an area like civil rights, where constitutional violations and constitutional interpretation are at stake, Congress and the courts both exercise important constitutional roles. In such areas, courts are more aptly characterized as Congress's partners in effectuating a legislative scheme with constitutional significance.¹⁷⁴ In other areas, like tax, bankruptcy, and federal property, Congress has broad, if not plenary authority, and the courts must apply the statute as Congress's faithful agents.¹⁷⁵ A third category is when Congress has limited con-

172. *Id.* at 352–53 (observing that “[t]he nature and potential magnitude of the administrative problem suggest” that these policy considerations were not derived from § 6511 or its legislative history, but ostensibly from broader tax policy concerns).

173. See *United States v. Beggerly*, 524 U.S. 38, 49 (1998); *Brockamp*, 519 U.S. at 348. In his concurrence in *Beggerly*, Justice Stevens, joined by Justice Souter, distinguished equitable tolling, which was built into the statute, from other equitable defenses, like fraudulent concealment or equitable estoppel, that might affect a claim under the Quiet Title Act. *Beggerly*, 524 U.S. at 49–50 (Stevens, J., concurring).

174. See Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 19 (1998) (“Students of constitutional law are familiar with an alternative conception of democracy in which courts play a vital role as partners with, rather than mere servants of, the legislature.”).

175. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 268 (2d ed. 2002) (identifying Congress's broad authority to tax); Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 7–9 (2001) (discussing Congress's power under the Property Clause and advocating a broad, plenary interpretation of such power); Richard Collin Mangrum, *Tithing, Bankruptcy and the Conflict Between Religious Freedom and Creditor's Interests*, 32 CREIGHTON L. REV. 815, 830 (1999) (explaining Congress's power over bankruptcy laws).

stitutional powers—under the Eleventh Amendment, for example—and the courts' job is to police those limitations.¹⁷⁶ In those situations, courts interpret statutes with the goal of maintaining constitutional balance among constitutional actors.

1. *Shared Judicial and Congressional Responsibility for Remedying Constitutional Violations*

The Court appears most willing to exercise its equitable powers when its role is to enforce or interpret constitutional rights. In civil rights cases, Congress and the Court share in enforcing and remedying constitutional violations. The Court will not lightly infer that Congress has diminished the Court's traditional powers in this area. And, while the Court occupies a special constitutional role in civil rights, Congress shares an equally important role with its broad-based authorization to legislate in this area.

2. *Congressional Dominance Based on Broad Legislative Authority*

The Court plays a less central role in the areas of tax and federal property, where Congress has broad powers to legislate and a court's function is to interpret and apply the statute. The power to tax is a core legislative function, the first enumerated function in the Constitution, and further strengthened by the Sixteenth Amendment, which authorized Congress to collect federal income taxes.¹⁷⁷ Taxation is the "life-blood of government,"¹⁷⁸ and the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation"¹⁷⁹ This makes tax collection and tax refund suits distinct in that there is no private suit analog. Similarly, the federal Property Clause grants Congress virtually plenary power

176. See generally *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) (holding that the federal supplemental jurisdiction statute, 28 U.S.C. § 1367, does not toll the limitations period for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds).

177. See U.S. CONST. art. I, § 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

178. *Webb v. United States*, 66 F.3d 691, 698 (4th Cir. 1995) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)).

179. *Id.* at 697 (quoting *Int'l Harvester Co., v. Wis. Dep't of Taxation*, 322 U.S. 435, 444-45 (1944)).

over federal property.¹⁸⁰ A typical tax or property case does not present constitutional issues.

The Court's discussion of equitable tolling in *Brockamp* and *Beggerly* reflected the high level of deference to Congress's policy choices in those areas and an unwillingness to tinker or perceive gaps or oversights. In *Brockamp*, the Court acknowledged that tax policy and administration was entirely Congress's bailiwick. Similarly, in *Beggerly*, the Court's cursory discussion of equitable tolling reflected deference for Congress's policy decisions regarding federal property. In both cases, the Court's role was minimal and Congress's was heightened as it exercised its broad and core constitutional powers.

The Court's broad equitable powers in bankruptcy, discussed in *Young*, are a variation on this theme. The Constitution grants Congress broad authority to legislate in the area of bankruptcy and to create bankruptcy courts.¹⁸¹ In creating the bankruptcy courts, however, Congress granted broad latitude to the courts to act as equity courts and do justice. *Young* demonstrates that courts have fully embraced that role over time and looked to that authorizing grant to construe the statute to allow equitable tolling. Unlike in the civil rights cases, the Court had a historical role, but no constitutional role, in adjudicating bankruptcy cases.

3. *Judicial Oversight of Congressional Adherence to Limits on Authority*

In a third category of cases, Congress's powers are limited by the Constitution and the Court's role is to police those boundaries. The Eleventh Amendment and the Suspension Clause are two areas where Congress's legislative authority is constitutionally limited.¹⁸² In *Raygor*

180. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940))); see also Appel, *supra* note 175, at 7-9.

181. See U.S. CONST. art. I, § 8, cls. 4, 9 (granting Congress the powers "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States" and "[t]o constitute Tribunals inferior to the supreme Court").

182. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008) (interpreting the Suspension Clause); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 548 (2002) (interpreting the Eleventh Amendment); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (interpreting the Suspension Clause).

v. Regents of the University of Minnesota,¹⁸³ the Court refused to imply a right to equitable tolling for claims against state defendants, which were dismissed on Eleventh Amendment grounds and then re-filed in state court. The Court concluded that Congress had not clearly intended to waive state defendants' immunity. *Raygor* concerned the tolling provision in the federal supplemental jurisdiction statute that authorizes federal jurisdiction over claims (and parties) otherwise lacking a federal court jurisdictional basis.¹⁸⁴ In *Raygor*, the plaintiffs sued the University of Minnesota for age discrimination in federal court based on state and federal law and, after the federal lawsuit was dismissed on Eleventh Amendment immunity grounds, refiled in state court.¹⁸⁵ Although the supplemental jurisdiction statute provides that state law claims are tolled pending the federal suit and thirty days after it is dismissed,¹⁸⁶ the Supreme Court held that the tolling provision did not apply to claims dismissed in federal court against non-consenting states.¹⁸⁷

Though *Raygor* focused on statutory tolling, not equitable tolling, it is significant because the Court's analysis turned on the special concerns raised in a case with Eleventh Amendment implications. Although the Court acknowledged the *Irwin* presumption favoring equitable tolling,¹⁸⁸ it required that any waiver of Eleventh Amendment immunity must be "unmistakably clear" in the statutory language.¹⁸⁹ This more demanding test was based on a concern that Congress had not clearly intended to alter the "usual constitutional

183. 534 U.S. 533.

184. See 28 U.S.C. § 1367(a), (d) (2000) (providing that the period of limitations will be tolled).

185. See *Raygor*, 534 U.S. at 536–38 (citing Age Discrimination in Employment Act, 29 U.S.C. §§ 621–633a (1994 & Supp. V 2000) (current version at 29 U.S.C. §§ 621–634 (2000)); Minnesota Human Rights Act, MINN. STAT. § 363 (1991) (current version at MINN. STAT. ANN. § 363A (West 2004))).

186. 28 U.S.C. § 1367(d). The statute provides:

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Id.

187. *Raygor*, 534 U.S. at 548.

188. See *id.* at 542–43 (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

189. *Id.* at 543–44 (requiring that it be "unmistakably clear in the language of the statute . . ." when Congress "intends to pre-empt the historic powers of the States" or when it legislates in "traditionally sensitive areas" that "affect the federal balance" (alteration in original) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989))).

balance between the States and the Federal Government.”¹⁹⁰ The Court justified its use of the unmistakably clear statement rule as a means of avoiding the need to resolve a problem that “at least raises a serious constitutional doubt.”¹⁹¹ Finding such clarity lacking in Section 1367(d), a generally applicable statute that did not address tolling of claims against nonconsenting state defendants, the Court refused to apply the tolling rule.¹⁹²

Raygor illustrates how constitutional limitations on Congress’s power can impact the Court’s equitable tolling analysis. In *Raygor*, the *Irwin* presumption yielded to Eleventh Amendment concerns and the Court applied the doctrine of constitutional avoidance to avoid having to decide whether Congress exceeded its legislative authority. As discussed below, the analysis in *Raygor* mirrors the Court’s approach in several habeas cases in which the Court has been concerned that Congress eliminated the availability of habeas remedies.

C. *The Text and Purpose of the Statute*

The text and purpose of the statute are typically the analytical starting point in any equitable tolling analysis. Although the statutory text is key, it is not the sole focus, as the subject matter and constitutional concerns also inform equitable tolling analysis. The Court’s different treatment of similar statutory language, as *Irwin*, *John R. Sand & Gravel Co.*, *Young*, and *Beggerly* demonstrate, illustrates the indeterminacy of statutory text in equitable tolling analysis. As discussed, in *Irwin* and *John R. Sand & Gravel Co.*, the Court interpreted “linguistically similar” limitations provisions in opposite ways—treating the former as a typical statute of limitations subject to equitable tolling, and the latter as a jurisdictional time bar.¹⁹³

In *Young* and *Beggerly*, the Court treated statutory tolling features in opposite ways. The limitations provisions in *Beggerly*, the Quiet Title Act case, and *Young*, the bankruptcy case, each incorporated a traditional equitable tolling concept. In *Beggerly*, it was a discovery rule that

190. *Id.* at 543; see U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Before the enactment of § 1367, the Court held that “the Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court.” *Raygor*, 534 U.S. at 540–41 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984)).

191. *Raygor*, 534 U.S. at 543.

192. *Id.* at 544–46.

193. See *supra* notes 150–157.

triggered the accrual of the claim,¹⁹⁴ and in *Young* the “lookback period” was tolled pending an “offer in compromise.”¹⁹⁵ In *Beggerly*, the inclusion of an equitable tolling concept in the statute weighed against equitable tolling, the Court said, because the statute “already effectively allowed for equitable tolling.”¹⁹⁶ The Court thus viewed the inclusion of an equitable tolling feature as displacing or precluding other bases for equitable tolling. Support for this view could be found in *Block v. North Dakota*,¹⁹⁷ which provided a detailed history on the evolution of the Quiet Title Act’s unusually long statute of limitations period,¹⁹⁸ and held that the Act provided the exclusive remedy to challenge title of the United States to real property.¹⁹⁹ The exclusive nature of the Quiet Title Act was important to the equitable tolling analysis because it demonstrated that Congress intended to displace all other remedies, including judicially created equitable remedies, for settling title disputes against the federal government.²⁰⁰ The Quiet Title Act thus made such property disputes a creature of statute, and diminished courts’ traditional equitable role in resolving them.

In *Young*, by contrast, the Court concluded that the inclusion of an equitable tolling feature weighed in favor of equitable tolling. The Court looked to its broad equitable powers under the Bankruptcy Code, which were unaltered by the limitations provision, and its prac-

194. See *United States v. Beggerly*, 524 U.S. 38, 47–48 (1998) (discussing 28 U.S.C. § 2409a(g) (1994)).

195. *Young v. United States*, 535 U.S. 43, 53 (2002).

196. *Beggerly*, 524 U.S. at 48.

197. 461 U.S. 273 (1983).

198. The unusually long twelve-year statute of limitations period resulted from a compromise between Congress and the Justice Department, which litigates federal property claims. The Justice Department wanted the Act to apply prospectively, while Congress wanted a “grandfather clause” that would have allowed claims which accrued before the enactment of the Quiet Title Act. *Id.* at 283–84 & n.18. The compromise was a twelve-year statute of limitations in exchange for eliminating the grandfather clause, which essentially made the Quiet Title Act retroactive for twelve years. *Id.* at 284. The discovery rule was also negotiated; under an earlier version, the claim would accrue when the claimant actually knew of the United States’ claim. *Id.* at 284 & n.20.

199. See *id.* at 276–77 (holding that the limitations period applies to states as well as private parties).

200. See *id.* at 280–81. Because of the doctrine of federal sovereign immunity, prior to the Quiet Title Act, states and other parties could not sue the United States as a party and thus “had only limited means of obtaining a resolution of the title dispute.” *Id.* at 280. Parties could induce the government to file a quiet title action against them, petition Congress or the Executive for special relief, or bring an “officer’s suit,” in which the party would sue the “federal officials charged with supervision of the disputed area, rather than . . . the United States.” *Id.* at 281. The “officer’s suit” was a creature of equity in which the party would seek an ejectment, or “an injunction or a writ of mandamus forbidding the defendant officials to interfere with the claimant’s property rights.” *Id.*

tice of allowing equitable tolling when the complainant has been “‘induced or tricked’” by his party opponent into allowing the deadline to pass.²⁰¹ The Court in *Young* refused to negatively infer from related statutory provisions a congressional intent to preclude equitable tolling of the lookback period: The Youngs had argued that two other provisions in the Bankruptcy Code, including one in the same subsection as the lookback period, “display[ed] an intent to preclude equitable tolling of the lookback period.”²⁰² Rejecting this reasoning, the Court stated that it would “draw no negative inference from the presence of an express tolling provision” in one subsection and the absence of one in the lookback provision, and that inclusion of an equitable tolling feature demonstrated “that the Bankruptcy Code *incorporates* traditional equitable principles” and “*supplements* rather than displaces principles of equitable tolling.”²⁰³

D. Two Emerging Paradigms: A Dialogue Between the Courts and Congress

The focus on context shows that the statutory text alone may not supply the correct analysis in deciding the availability of equitable tolling. Only by looking to broader contextual clues, such as subject matter, constitutional concerns, historical practice, and legislative purpose, can one explain why the limitations provisions in *Irwin* and *John R. Sand & Gravel Co.* were interpreted so differently. At a textual analysis level, *Young* and *Beggerly* demonstrate that the Court will not negatively infer a congressional intent to preclude equitable tolling absent some indication that Congress intended to change the Court’s traditional role. In *Beggerly*, Congress modified the Court’s role in deciding federal property title disputes, as it replaced a judicially created regime with a statutory one. In *Young*, the Court perceived no desire by Congress to alter the Court’s broad, statutorily created authority to sit as a court of equity in bankruptcy cases. That dialogue between the Court and Congress is essential to analyzing the statutory text of the limitations provision.

The contextual framework outlines three core questions. First, on subject matter, do courts exercise and retain traditional equitable powers in the subject area of the legislation? In civil rights and bankruptcy, the answer is yes. In the areas of tax refunds and Quiet Title

201. *Young v. United States*, 535 U.S. 43, 50 (2002) (quoting *Irwin v. Dep’t of Veteran Affairs*, 498 U.S. 89, 96 (1990)).

202. See *id.* at 52–53 (discussing 11 U.S.C. § 108(c)(1) and 11 U.S.C. § 507(a)(8)(A)(iii)).

203. *Id.* at 52–53.

Act disputes, the answer is no. Second, does the Constitution support the Court's exercise of its equitable powers to allow equitable tolling? The answer is more likely to be yes when courts play a constitutional role, as in civil rights, and more likely to be no when Congress is acting pursuant to its plenary authority, such as in tax, federal claims, or federal property disputes, or when other constitutional concerns weigh against equitable tolling. Third, does the text foreclose equitable tolling? Although *Irwin* created a presumption favoring equitable tolling against which newer statutes are enacted, the Court has shown its willingness to carve out certain statutes from *Irwin*'s ambit, as it did in *John R. Sand & Gravel Co.*

IV. THE AEDPA AND EQUITABLE TOLLING IN CONTEXT

This Part applies the context analysis developed in Part III to the question of equitable tolling under the AEDPA and concludes that equitable tolling should be available. The focus of this analysis is the question left open by *Pace* and *Lawrence*, namely, whether the AEDPA's statute of limitations can ever be equitably tolled.²⁰⁴ The context analysis enables full consideration of and fidelity to *Irwin*, *Beggerly*, *Brockamp*, *Young*, and *John R. Sand & Gravel Co.*, while providing a framework to account for special habeas concerns under the AEDPA. Although the lower courts have expressed some habeas-specific arguments supporting equitable tolling, by hewing close to the main equitable tolling cases, they have not had an analytical template in which to fully develop the habeas-specific concerns. The factor analysis provides that analytical model.

Each of the context-factors supports the conclusion that the AEDPA permits courts to equitably toll the statute of limitations. First, courts have historically dominated habeas review without legislative involvement and continue to do so post-AEDPA. Second, there is a constitutional basis for allowing equitable tolling of Section 2244(d), namely the Suspension Clause, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁰⁵ This provision limits Congress's power to regulate habeas review and provides a constitutional basis for the Court's repeated concern that prisoners

204. For analysis of why federal habeas petitioners should be entitled to equitable tolling in individualized circumstances, see Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 46 (2004), and Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 368–69 (2005).

205. U.S. CONST. art. I, § 9, cl. 2.

be afforded access to the "Great Writ." That constitutional concern supports equitable tolling of Section 2244, while the doctrine of constitutional avoidance supports construing the limitations provision in a way that avoids the possibility that Congress has overreached its powers in creating a limitations provision that unfairly denies access to federal habeas review. Finally, the text and purpose of the limitations provision do not foreclose equitable tolling.

A. Subject Matter: Courts Retain Their Equitable Powers Under the AEDPA

The writ of habeas corpus enjoys a unique status in judicial and constitutional history as an essential bulwark of liberty²⁰⁶ and a safeguard to the right to due process of law.²⁰⁷ The writ operates as an essential check against the abuse of executive power by empowering the judiciary to review the legality of executive detention and insist on the rule of law.²⁰⁸ It forms a core part of the judiciary's historical role, having been "given voice 800 years ago by Magna Carta,"²⁰⁹ and "preserved in the Constitution—the only common-law writ to be explicitly mentioned."²¹⁰ The equitable tolling question turns in part on whether, after the AEDPA, courts still occupy that hallowed ground and exercise their traditional equitable powers in habeas law.

Although the AEDPA changed habeas law, it has not stripped courts of their institutional dominance or their traditional equitable powers in federal habeas. The Court has stated that "federal habeas corpus has evolved as the product of both judicial doctrine and statutory law,"²¹¹ governed less by "'statutory developments' than by 'a complex and evolving body of equitable principles informed and controlled by historical usage . . . and judicial decisions.'"²¹² That continues to be true post-AEDPA. The Court's post-AEDPA decisions, particularly those related to the technical aspects of the statute of limi-

206. See *Engle v. Isaac*, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence. Tracing its roots deep into English common law, it claims a place in Art. I of our Constitution. Today, as in prior centuries, the writ is a bulwark against convictions that violate fundamental fairness." (citation and internal quotation marks omitted)).

207. *Hamdi v. Rumsfeld*, 542 U.S. 507, 557–58 (Scalia, J., dissenting).

208. See *id.* at 552 (Souter, J., concurring in part and dissenting in part) ("[W]e are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by 'the law of the land.'").

209. *Id.*

210. *Id.* at 558 (Scalia, J., dissenting) (citing U.S. CONST. art. I, § 9, cl. 2).

211. *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring).

212. 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 14 (5th ed. 2005) (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)).

tations, display the Court's willingness to resolve problems, fill gaps, and exercise its traditional equitable powers, while respecting the aims of the AEDPA.²¹³ The Court has repeatedly shown that the AEDPA did not deprive courts of their traditionally broad equitable powers in habeas matters.

The Court continues even after the AEDPA to exercise equitable discretion in managing its habeas docket. Before the AEDPA, the Court managed its docket by barring successive, or repeat petitions, to prevent the "abuse of the writ."²¹⁴ Unlike other procedural bars,²¹⁵ such measures were motivated not by federalism concerns, but federal courts' desire to manage their own resources. Since the AEDPA, the Court has developed non-statutory, equitable measures to manage its docket in new ways. Specifically, the Court has endorsed a stay-and-abeyance procedure to resolve two predicaments related to the statute of limitations, showing that the Court is willing to flex its equitable muscle to resolve practical problems related to the AEDPA's limitations provision in order to ensure petitioners are not unfairly denied access to federal habeas review.

These two predicaments arise from the interplay between the limitations provision and the total exhaustion requirement. The exhaustion requirement is a judicially created equitable doctrine that requires a petitioner to exhaust state remedies before seeking federal habeas relief.²¹⁶ The total exhaustion requirement, which the AEDPA codified,²¹⁷ serves the AEDPA's goal of promoting "'comity, finality, and federalism,'" by allowing state courts to have the first opportunity to correct alleged constitutional violations.²¹⁸ The Court has recognized that the "AEDPA's limitations period—with its accompanying tolling provision—ensures the achievement of this goal because it 'promotes the exhaustion of state remedies while respecting the inter-

213. See, e.g., *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1286 (9th Cir. 1997), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

214. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

215. Exhaustion and procedural default are two judicially created doctrines primarily motivated by federalism concerns, requiring that any federal claims first be presented in state court (exhaustion), and refusing to consider on the merits claims that were defaulted under state procedural rules (procedural default). See *supra* note 7.

216. See *Rhines v. Weber*, 544 U.S. 269, 274 (2005).

217. See 28 U.S.C. § 2254(b)–(c) (2000); see also *Day v. McDonough*, 547 U.S. 198, 214 (2006) (Scalia, J., dissenting) (referring to exhaustion, procedural default, nonretroactivity, and abuse of the writ, but noting that, "unlike AEDPA's statute of limitations, these defenses were all created by the habeas courts themselves, in the exercise of their traditional equitable discretion" (citing *Withrow v. Williams*, 507 U.S. 680, 717–18 (1993) (Scalia, J., concurring in part and dissenting in part))).

218. *Carey v. Saffold*, 536 U.S. 214, 220 (2002) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

est in the finality of state court judgments.’”²¹⁹ By design, the AEDPA’s limitations provision promotes the exhaustion requirement by contemplating that a petitioner first will “‘invok[e] one complete round of the State’s established appellate review process,’”²²⁰ before presenting those exhausted claims in a timely federal habeas petition. Section 2244(d)(2) promotes that goal by tolling the limitations period during the pendency of a petitioner’s “properly filed” state court petition.²²¹

The first predicament arises when a petitioner has filed a “mixed” federal petition, containing both exhausted and unexhausted claims.²²² Courts are required to dismiss a “mixed” petition without prejudice.²²³ This leaves the petitioner “the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.”²²⁴ The Court held in *Duncan v. Walker*²²⁵ that a petitioner is not entitled to tolling under Section 2244(d) during the pendency of his federal petition,²²⁶ but did not address whether the petitioner might be entitled to equitable tolling. Several justices recognized in *Duncan* the petitioner’s predicament in trying to file a fully exhausted petition that is not time-barred. Justice Stevens recommended using equitable powers to redress the problem.²²⁷ A “stay-and-abeyance” would avoid the time-bar problem by allowing the district court to retain jurisdiction over a possibly meritorious, but unexhausted claim, pending the exhaustion of state remedies.²²⁸ Alternatively, a court could equitably toll the statute of limitations, an option Justice Stevens

219. *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 178 (2001)).

220. *Id.* (alteration in original) (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)); see *Duncan*, 533 U.S. at 180 (stating that Congress fashioned 28 U.S.C. § 2244(d)(2) to provide a strong “incentive for individuals to seek relief from the state courts before filing federal habeas petitions”).

221. *Duncan*, 533 U.S. at 176.

222. See *Rhines v. Weber*, 544 U.S. 269, 273 (2005) (citing *Rose v. Lundy*, 455 U.S. 509, 522 (1982)); 28 U.S.C. § 2254(b) (allowing courts to deny unexhausted claims on the merits).

223. *Lundy*, 455 U.S. at 510.

224. *Id.*

225. 533 U.S. 167.

226. *Id.* at 181–82.

227. See *id.* at 182–84 (Stevens, J., concurring) (referring to “the equitable powers of the federal courts, which are unaffected by today’s decision construing a single provision” of AEDPA).

228. See *id.* at 182–83 (arguing that “there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies”).

noted was not precluded by “the Court’s narrow holding, nor anything in the text or legislative history of AEDPA.”²²⁹

The need for equitable measures was supported by a number of concerns facing habeas petitioners and courts. Exhaustion issues can be difficult ones “not just for prisoners unschooled in the immense complexities of federal habeas corpus law . . . but also for district courts.”²³⁰ Petitioners were not necessarily to blame for the delay because federal habeas cases were pending on average some 268 days before being dismissed on procedural grounds and ten percent remained pending for more than two years.²³¹ The Court in interpreting the AEDPA had “assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly.”²³² The Court’s role in creating such equitable fixes was justified based on the concern that Congress may have “simply overlooked” the dilemma facing petitioners “whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted.”²³³ Thus, the proposed equitable measures would provide “safeguards against the potential for injustice that a literal reading of [Section] 2244(d)(2) might otherwise produce.”²³⁴

Since *Duncan*, the Court has approved the stay-and-abeyance procedure, confirming the Court’s flexibility in managing its habeas docket and signaling its role in ensuring access to federal habeas review for diligent, first-time petitioners. In *Rhines v. Weber*,²³⁵ the Court acknowledged that petitioners who file “‘mixed’ petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims,”²³⁶ adding, “[w]e recognize the gravity of this problem and the difficulty it has posed for petitioners and federal dis-

229. *Id.* at 183.

230. *Id.* at 184 n.2 (citations omitted).

231. *Id.* at 186 (Breyer, J., dissenting).

232. *Id.* at 192; *see also id.* (opining that “a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a ‘second or successive’ petition” under § 2244, “lest ‘dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review’” (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998))); *id.* at 192–93 (noting that the complete exhaustion rule should not become a “‘trap’” for “‘the unwary *pro se* prisoner’” (quoting *Slack v. McDaniel*, 529 U.S. 473, 487 (2000))).

233. *Id.* at 183–84 (Stevens, J., concurring).

234. *Id.* at 184.

235. 544 U.S. 269 (2005).

236. *See id.* at 275 (“Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion.”).

strict courts alike.”²³⁷ To resolve this predicament, the Supreme Court in *Rhines* endorsed a stay-and-abeyance procedure like the one proposed by Justice Stevens in *Duncan*, which would allow the district court to stay the case while the petitioner returns to state court to exhaust and to lift the stay when the petitioner returns to federal court.²³⁸

Rhines makes clear that the AEDPA did not strip the courts of their traditional equitable discretion to manage their docket and ensure access to federal habeas review.²³⁹ “District courts . . . ordinarily have authority to issue stays,”²⁴⁰ the Court explained, and the “AEDPA does not deprive district courts of that authority,” so long as any solution to this problem is “compatible with AEDPA’s purposes.”²⁴¹ Those purposes are to “‘reduce delays in the execution of state and federal criminal sentences, particularly in capital cases,’”²⁴² to promote the finality of state court judgments through the exhaustion requirement, and to “‘reduce[] the potential for delay on the road to finality’” through the statute of limitations.²⁴³ While keeping sight of the twin aims of timeliness and exhaustion, the Court signaled that access to the writ is a higher priority. The Court cautioned that to be consistent with the AEDPA, the stay-and-abeyance procedure “should be available only in limited circumstances,” and upon a showing of “good cause for the petitioner’s failure to exhaust,” and should only be applied to potentially meritorious claims.²⁴⁴ If those criteria are met, however, a district court would abuse its discretion in denying a stay because, “[i]n such a case, the petitioner’s interest in obtaining federal review of his claims outweighs the competing interests in finality

237. *Id.*

238. *Id.* at 275–76. In *Rhines*, the district court held that numerous claims were unexhausted and, in lieu of dismissal, stayed the petition pending the petitioner’s return to state court to exhaust. *Id.* at 272–73. The State appealed the stay order and the federal appellate court reversed, holding that a stay-and-abeyance is always impermissible. *Id.* at 273. The Court reversed, holding that district courts have discretion to grant stays in limited circumstances. *Id.* at 277.

239. *Id.* at 276 (noting, however, that AEDPA circumscribes the district courts’ discretion).

240. *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

241. *Id.* (“An application for a writ of habeas corpus . . . shall not be *granted* unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State’ . . .” (quoting 28 U.S.C. § 2254(b)(1)(A) (2000))).

242. *Id.* (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)).

243. *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)).

244. *Id.* at 277; *see id.* at 278 (explaining that district courts also “should place reasonable time limits on a petitioner’s trip to state court and back”).

and speedy resolution of federal petitions.”²⁴⁵ This strong language signals the Court’s willingness to use its equitable powers to ensure access to habeas review.

The Court again looked to the stay-and-abeyance procedure to resolve a second exhaustion-related tolling predicament in *Pace v. DiGuglielmo*. In *Pace*, the Court held that a petitioner’s state post-conviction petition was not “properly filed” under Section 2244(d)(2) because the state court rejected it as untimely under a state statute of limitations.²⁴⁶ Therefore, the petitioner was not entitled to tolling during the pendency of his state habeas application, making his federal petition time-barred.²⁴⁷ This created a predicament for a petitioner exhausting his claims in state court, who may not be entitled to tolling under Section 2244(d)(2) if the state court ultimately holds that his petition is untimely, a fact he may not discover until after the limitations period has run.²⁴⁸ The Supreme Court explicitly stated in *Pace* that a petitioner could avoid this predicament “by filing a ‘protective’ petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted.”²⁴⁹ The Court added that a petitioner’s “reasonable confusion about whether a state filing would be timely will ordinarily constitute ‘good cause’ for him to file in federal court.”²⁵⁰ Thus, again, the Court resolved a statutory problem with a nonstatutory, equitable solution to ensure access to the writ for diligent petitioners.

The Court’s approval of the stay-and-abeyance procedure in *Rhines* and *Pace* evidences the Court’s primacy, even after the AEDPA, as the architect of habeas doctrine and confirms the Court’s equitable power to achieve just results.²⁵¹ The Court’s recognition that access to the writ outweighs the AEDPA’s policy goals and its willingness to create special procedures to resolve limitations problems show that the Court perceives its institutional role as a harmonizer of the AEDPA’s purely statutory provisions with the judicially created doctrine of exhaustion and the constitutionally important goal of access to the writ.

245. *Id.*

246. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

247. *Id.*

248. *See id.* at 416 (summarizing the petitioner’s argument).

249. *Id.*

250. *Id.*

251. *See* Blume, *supra* note 4, at 280–82 (arguing that “[t]he Court, or at least a majority of the Court, believes that the role of Congress is secondary, and that it is primarily the Court’s responsibility [to control the scope of the writ],” and opining that, although the Supreme Court has acknowledged, both before and after AEDPA, that Congress determines the scope of the writ, “I do not think that is true, or—perhaps more accurately—I do not think the Court believes that is true”).

That said, the predicaments faced by petitioners are in large part a product of the Court's own narrow construction of Section 2244(d)(2) in a way that incorporates these values.²⁵² From a structural standpoint, however, the Court's interpretation of Section 2244(d)(2) is court-centric in that the use of the stay-and-abeyance procedure allows the court to control the reins in administering the statute of limitations, reinforcing the Court's primacy in habeas.

B. Constitutional Considerations: Ensuring Access, Avoiding Suspension

The Court's recurring concern about access to the writ is derived from the Suspension Clause and impacts its statutory interpretation. The writ of habeas corpus enjoys a unique status as the only common law writ that is constitutionally preserved.²⁵³ The Suspension Clause is a limitation on Congress's power to legislate and appears in Article I, Section 9, with other limitations on congressional authority.²⁵⁴ It provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁵⁵ The Clause has garnered much attention in recent years as the Court has grappled with whether certain detainees are entitled to federal habeas review as a means of challenging the lawfulness of their detentions.²⁵⁶ The Court's decisions in several cases underscore some basic concepts about the Suspension Clause, namely, the presumption that habeas review is available to persons

252. See *Pace*, 544 U.S. at 427–28 (Stevens, J., dissenting) (arguing that the narrow construction of the term "properly filed" is misguided). *Pace* also suggested a much broader shift in that it appears to eliminate federal review of a state court ruling that a petition is time-barred, "no matter how long the state court has held the petition, how carefully it has reviewed the merits of the petition's claims, or how it has justified its decision." *Id.* at 420.

253. *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 558 (2004) (Scalia, J., dissenting).

254. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 566 (2002). Neuman states that after approval of the language, "[t]he Committee on Style subsequently . . . moved the clause from the judiciary article to its present location in Article I, Section 9, which contains limitations on the power of Congress." *Id.* (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 596 (Max Farrand ed., 1966)).

255. U.S. CONST. art. I, § 9, cl. 2.

256. See *Hamdi*, 542 U.S. at 536–37 (plurality opinion) (holding that due process required that a United States citizen being held as an enemy combatant be given a meaningful opportunity to contest the factual basis for his detention); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that the federal habeas statute conferred on the district court jurisdiction to hear challenges of aliens held at Guantanamo Bay); Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 411–15 (2006) (discussing the recent phenomenon of enemy combatant cases before the Supreme Court regarding habeas corpus).

that are detained, especially for executive detentions, absent suspension of the writ by Congress.²⁵⁷ More importantly, these cases highlight that habeas review enables the Court to play a “necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”²⁵⁸ Although *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *INS v. St. Cyr* all focused on federal executive detentions, where the judiciary has a special role in checking the executive branch, the Court also plays a special role in reviewing the lawfulness of state detentions.²⁵⁹ The Court’s jurisdiction to review petitions is well-established²⁶⁰ and its role in ensuring that state court convictions are constitutional is central to its role of administering the writ, as well as interpreting the federal constitution.²⁶¹

In habeas cases filed by state petitioners, the Court fulfills a dual role of reviewing the constitutionality of the petitioner’s detention and ensuring that Congress has not exceeded its powers in regulating

257. See *Hamdi*, 542 U.S. at 536 (“‘At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.’” (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001))); *id.* at 537 (“Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.”); *Rasul*, 542 U.S. at 481–83 (explaining that the writ was historically available to persons detained by “the Crown”).

258. *Hamdi*, 542 U.S. at 536; see Morrison, *supra* note 256, at 448 (discussing the need for the judicial branch to function as a check on executive power).

259. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006) (discussing a state conviction that was invalidated because a state evidentiary rule that excluded the defendant’s evidence of third party guilt denied the defendant a fair trial).

260. See *St. Cyr*, 533 U.S. at 301 (noting that the writ “‘existed in 1789’” (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996))). In *Felker*, the Court explained that although habeas review of state court judgments dated from Reconstruction and the Act of February 5, 1867 was the “direct ancestor” of § 2241(c)(3), 518 U.S. at 659 & n.2 (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1868)), “we assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.” *Id.* at 663–64.

261. See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 911 (1994) (arguing that the Fourteenth Amendment together with the Suspension Clause solidified courts’ constitutional role in overseeing federal constitutional decisions by state courts in habeas cases); see also Blume, *supra* note 4, at 281–82 (arguing that, although the conservative majority of the Court has a narrow view of habeas, it “also appears to realize, quite correctly, that state courts cannot be completely trusted to vindicate constitutional rights, and thus there must, in some cases, be meaningful federal review of state court [convictions]”); *id.* at 282 n.116 (discussing cases showing that “the Court has been attempting to ‘reel in’ outliers and establish a more uniform [and moderate] application of its decisions in the federal courts of appeals”).

the writ in violation of the Suspension Clause.²⁶² The Court ensures that Congress regulates habeas “[w]ithin constitutional constraints” and retains the power to fill gaps “when Congress has not resolved the question.”²⁶³ From this institutional relationship between the Court and Congress, two principles animate the Court’s interpretation of laws affecting the availability of habeas. First, the doctrine of constitutional avoidance has allowed the Court to adopt a construction that avoids having to squarely resolve a Suspension Clause challenge. Second, the Court’s concern about access to the writ has shaped its interpretation of the AEDPA.

The Court has relied on the doctrine of avoidance to preserve habeas review and avoid the need to decide a Suspension Clause issue. Faced with a suspension issue in *INS v. St. Cyr*,²⁶⁴ in which the government argued that immigration laws suspended habeas review for certain aliens,²⁶⁵ the Court found no suspension in part to avoid “such a serious and difficult constitutional issue.”²⁶⁶ In *St. Cyr*, a permanent resident alien (St. Cyr) petitioned for a writ of habeas corpus to contest an immigration court decision that he was deportable because he pled guilty to a deportable offense.²⁶⁷ St. Cyr would have been eligible for a waiver of deportation at the time of his guilty plea, but was ineligible for “discretionary relief from deportation” under the new law in effect at the time of his removal proceedings.²⁶⁸ St. Cyr argued

262. See 28 U.S.C. § 2241(c)(3) (2000) (“The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . .”).

263. See *Lonchar v. Thomas*, 517 U.S. 314, 322–23 (1996) (explaining that while Congress makes rules regulating habeas, courts retain the “freedom to issue the writ, aptly described as the ‘highest safeguard of liberty’” (quoting *Smith v. Bennett*, 365 U.S. 708, 712 (1961))).

264. 533 U.S. 289 (2001).

265. *Id.* at 298, 303.

266. *Id.* at 305.

267. *Id.* at 293.

268. *Id.* Three statutes reduced the class of aliens eligible for discretionary relief from deportation: (1) § 212(c) of the Immigration and Nationality Act of 1952 (codified at 8 U.S.C. § 1182(c)), as amended in 1990, precluded discretionary relief of a person convicted of an aggravated felony who had served at least five years in prison; (2) in 1996, the AEDPA amended § 212(c) to preclude discretionary relief for a broad set of offenses, including a “conviction for an aggravated felony, . . . drug conviction, . . . weapons or national security violations, and for multiple convictions involving crimes of moral turpitude”; and (3) the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 replaced § 212(c), the old discretionary relief provision, with a new one that did “not include anyone previously convicted of any aggravated felony.” *Id.* at 297 & n.7 (citations and internal quotation marks omitted).

that the new laws should not apply to him because his guilty plea became final before they were enacted.²⁶⁹

As a threshold issue, the *St. Cyr* Court was faced with deciding whether *St. Cyr* could challenge his removal in a habeas action even though the new laws appeared to have eliminated judicial review of proceedings.²⁷⁰ The Court avoided this “difficult and significant” constitutional question by holding that the right to habeas review of such determinations continued to exist.²⁷¹ The Court applied three rules toward that result. First, the Court rejected any repeal of habeas jurisdiction by implication.²⁷² Second, the Court invoked a clear statement rule because the Suspension Clause is a limitation on Congress’s authority.²⁷³ Third, the Court applied the doctrine of constitutional avoidance, aiming to “save” the statutes from unconstitutionality, because the elimination of judicial or habeas review absent a clear statement of congressional intent “would raise serious constitutional questions.”²⁷⁴

Applying these three rules, the Court rejected the INS’s argument that the new provisions eliminated habeas review, emphasizing that such a result would be “a departure from historical practice,” because the “writ of habeas corpus has always been available to review the legality of Executive detention.”²⁷⁵ Importantly, the *St. Cyr* Court was more concerned with policing the limits of Congress’s power under the Suspension Clause (an issue it ultimately avoided) than with respecting the breadth of Congress’s plenary power over immigration matters.²⁷⁶ *St. Cyr* shows that the Court will go to lengths to preserve habeas review, even in the face of text evidencing Congress’s intent to eliminate judicial review of certain immigration decisions, based on its strong desire to avoid resolving a Suspension Clause chal-

269. *Id.* at 293.

270. *Id.* at 293, 298.

271. *Id.* at 304, 314.

272. *Id.* at 298–99 (“Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.” (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868))).

273. *Id.* at 299 (explaining that “when a particular interpretation of a statute invokes the outer limits of Congress’[s] power, we expect a clear indication that Congress intended that result” (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))).

274. *Id.* at 309–14.

275. *Id.* at 305.

276. See Neuman, *supra* note 254, at 561–62 (noting that “[t]he ‘plenary power’ of Congress over immigration played no explicit role in the opinions,” in that “neither the majority nor the dissent argued that the force of the Suspension Clause was diminished in the field of immigration law”).

lenge and a strong instinct to preserve habeas review. The Court's recent decision in *Boumediene* reinforced how protective it is of habeas jurisdiction.²⁷⁷

Moreover, the Court has embraced the role of ensuring access to the writ, an institutional concern rooted in the Suspension Clause. Although the Suspension Clause is worded as a limitation on Congress, it gives life to the Court's historical view that the writ is constitutionally preserved and that habeas review exists unless it has been suspended. The significance of this concern is that it may influence statutory interpretation in contexts in which there is, technically, no suspension issue.²⁷⁸ The Court expressed this concern in *Lonchar*, before the AEDPA, stating that the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."²⁷⁹ The Court echoed this concern after the AEDPA in *Rhines*, stating that the value of ensuring access to the writ for first-time habeas petitioners "outweighs" the AEDPA's policy goals of speed and finality.²⁸⁰ The Court reiterated this concern more recently in *Panetti v. Quarterman*,²⁸¹ in which the Court held that a petitioner's claim that he was incompetent to be executed was not barred as a successive or second petition.²⁸² The Court considered in *Panetti* "the practical effects of our holdings," especially when petitioners "'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'"²⁸³

277. *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008).

278. In *Hamdi*, for example, no party asserted that the statute authorizing Hamdi's detention suspended the writ. The suspension concern was presented due to the government's position that Hamdi was only entitled to judicial review of whether he was being detained as an "'enemy combatant,'" and could not challenge the "'enemy-combatant label'" by developing facts about the circumstances of his seizure. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

279. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). The concern is for first-time filers. The Court has held that restrictions on successive petitions under § 2244(b) do not violate the Suspension Clause, as they merely modify and codify certain pre-existing limits on successive petitions. *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996). The AEDPA restrictions on successive petitions are "well within the compass of this evolutionary process" and "do not amount to a 'suspension' of the writ" in violation of the Suspension Clause. *Id.* at 664. In *Felker*, the Court explained that "[i]t was not until 1867 that Congress made the writ generally available in 'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.'" *Id.* at 663 (quoting Act of Feb. 5, 1867, ch. 28, 14 Stat. 385).

280. *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

281. 127 S. Ct. 2842 (2007).

282. *Id.* at 2853 (interpreting 28 U.S.C. § 2244 (2000)).

283. *Id.* at 2854 (quoting *Rhines*, 544 U.S. at 275).

In sum, the Court's concerns about the Suspension Clause and the availability of habeas review supply constitutionally derived rules of statutory construction: (1) repeal of habeas review will not be implied; (2) for a statute to restrict or suspend habeas review, Congress's intent must be clearly expressed; and (3) the doctrine of avoidance may save from possible unconstitutionality a statute that restricts or suspends habeas review. The Court's overarching concern about access to habeas review means that these rules should apply where a statutory interpretation may have the practical effect of eliminating habeas review. Importantly, this concern about access to habeas review does not correspond to the outcome of that review; the Court is protective of the availability of habeas review, but still sparingly grants relief under the AEDPA.

The concern about access to federal habeas review is important in the equitable tolling context. There is no evidence that Congress intended the AEDPA's statute of limitations to suspend the writ. But, as many cases have shown, the practical effect of the limitations provision is that habeas review may be unavailable to diligent, first-time petitioners who are unable to timely file for a variety of reasons. In interpreting whether the AEDPA allows equitable tolling, appellate courts have recognized that "[t]here may be circumstances where the limitation period at least raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective."²⁸⁴ It is in those cases where members of the Court have suggested that equitable tolling is an important safety valve to ensure that diligent, first-time petitioners have access to the habeas review.²⁸⁵

C. *The Text and Purpose of Section 2244(d)*

The final step in the context factor analysis focuses on whether the text and purpose of the statute foreclose equitable tolling. As the lower courts have recognized, the text, structure, and purpose of the AEDPA's limitation statute do not foreclose equitable tolling. The limitations statute is separate from the statute granting federal juris-

284. *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (citing *Triestman v. United States*, 124 F.3d 361, 373–80 (2d Cir. 1997)).

285. See *Pliker v. Ford*, 542 U.S. 225, 235 (2004) (O'Connor, J., concurring) (stating that on remand the appellate court could consider the propriety of equitable tolling); *id.* at 239–40 (Breyer, J., dissenting) (discussing the principle of exhaustion as it applies to mixed petitions filed under AEDPA); *Duncan v. Walker*, 533 U.S. 167, 182–83 (2001) (Stevens, J., concurring) (suggesting the availability of equitable tolling).

diction over habeas petitions filed by state prisoners,²⁸⁶ and all courts, including the Supreme Court, have described the limitations period as non-jurisdictional.²⁸⁷ The text of the limitations provision neither expressly allows nor expressly forbids equitable tolling. The statute was enacted after *Irwin* and presumably, under *Young*, Congress drafted it against the presumption favoring equitable tolling of limitations statutes. All these factors, which correspond to Rules 2 and 3 outlined in Part II, strongly support the availability of equitable tolling under the AEDPA.

But, as lower courts have recognized, the AEDPA's limitations provision also shares common features with limitations statutes which the Court has held are not subject to equitable tolling. Specifically, the AEDPA's limitations provision is detailed and contains equitable tolling features, similar to the statutes at issue in *Brockamp* and *Beggerly*, causing lower courts to wonder "what room remains for importing the judge-made doctrine of equitable tolling."²⁸⁸ Although the statute is not worded as emphatically as the tax refund statute in *Brockamp*, it specifically details certain circumstances that delay commencement of and toll the limitations period. And, like the property statute in *Beggerly* and the bankruptcy statute in *Young*, the AEDPA's limitation statute contains built-in equitable exceptions.

Thus far, courts have tried to distinguish the negative cases, *Brockamp* and *Beggerly*, and invoke the positive cases, *Irwin* and *Young*, using textual interpretation. Courts have refused to infer a negative congressional intent to preclude equitable tolling, without exploring why the Court draws negative inferences in some situations and not in others. This line of argument is not particularly convincing in part because it fails to tackle the central question of whether *Brockamp* and *Beggerly* are relevant to determining the availability of equitable tolling under the AEDPA. In failing to address that issue head on, courts have also missed the opportunity to justify equitable tolling of the AEDPA for habeas-specific reasons.

The AEDPA's statute of limitations has little in common with the limitations statutes that the Court has held as not subject to equitable tolling and much in common with those that are subject to equitable tolling. Comparing the detailed and equitably based tolling provisions in the AEDPA to those considered in *Brockamp* or *Beggerly* as-

286. *Calderon v. U.S. Dist. Court*, 128 F.3d 1283, 1288 (9th Cir. 1997) (referring to the habeas jurisdiction statute, 28 U.S.C. § 2241), *overruled on other grounds by* 163 F.3d 530 (9th Cir. 1998) (en banc).

287. *E.g., Day v. McDonough*, 547 U.S. 198, 205 (2006).

288. *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999).

sumes, quite falsely, that those limitations provisions are similar. In fact, those statutes existed in a very different legislative landscape in which Congress's and the Court's roles, in tax and federal property, are very different than their respective roles in habeas. That inter-branch dialogue impacts the textual inferences to be drawn, as Congress legislates against the background of the Court's historical practice and equitable powers. In *Beggerly*, the limitations provision was part of legislative effort to modify and limit the Court's historical role in determining federal property claims; in *Brockamp*, there was no tradition of equitable tolling or considering individual equities in tax refund cases. By contrast, in enacting the AEDPA, there was no apparent congressional intent to fundamentally alter the Court's traditional role in adjudicating habeas cases or managing its habeas docket.

The Court's central role in habeas is much more analogous to its role in other contexts when equitable tolling has been allowed. In *Young* the Court's broad equitable powers were unaffected by the lookback provision at issue, and in *Irwin* and *Zipes* the Court's interest in equitable flexibility can be traced to its role in vindicating constitutional violations through a remedial statute. In fact, the Court's role in habeas is stronger than in either civil rights or bankruptcy because in habeas Congress's powers are limited. Congress, in enacting the AEDPA, did not fundamentally alter the Court's historical role in habeas, and the Court, in applying the AEDPA, has continued to exercise equitable flexibility.

The AEDPA's purpose, the Court has repeatedly acknowledged, was to speed up habeas review, curb habeas abuse, and promote finality of state court judgments. Toward that end, the AEDPA created a statute of limitations, codified judicial doctrines respecting state judgments, like exhaustion and procedural default, and made the standard of review more deferential to state court judgments. That said, there was no apparent intent to eliminate habeas review, to modify the Court's equitable discretion, or to restrict its jurisdiction to decide habeas cases. Under the AEDPA, the Court has retained broad power to manage its docket, and to interpret the AEDPA flexibly to protect such petitioners, who are usually *pro se*, from being snared by an overly technical application of a statute in an already very complicated area of law.²⁸⁹ The Court's equitable flexibility is further supported by the fact that habeas concerns constitutional violations, the Court's dual

289. See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (2007); *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

role of overseeing state law courts' application of constitutional law, and ensuring that the AEDPA has not been applied to unfairly restrict access to the writ.

Finally, the availability of equitable tolling will not frustrate the AEDPA's purposes of curbing abuse, increasing finality of state court judgments and speeding up the road to finality. The test for obtaining equitable tolling is demanding, requiring both diligence and extraordinary circumstances beyond the petitioner's control.²⁹⁰ Courts will determine which petitioners meet that test, have expressed confidence in their ability to exercise that power, and are unlikely to be liberal in granting equitable tolling.²⁹¹ Ultimately, granting equitable tolling does not guarantee habeas relief, the availability of which is strictly constrained by the AEDPA.²⁹² Rather, it merely gets some petitioners in the door to federal court.

V. CONCLUSION

The Court's equitable tolling jurisprudence tells a number of different stories. On the one hand, one could argue that a cohesive equitable tolling jurisprudence does not exist, because each equitable tolling problem is so specific to the statute and its setting. On the other hand, when the Court confronts an equitable tolling issue, it relies on its past equitable tolling decisions.²⁹³ This Article has derived guidance from those cases on when courts should exercise their equitable discretion to toll a statute for equitable reasons. The Court's reasoning has focused on the statutory text and purpose. The contextual framework developed here broadens that focus to include the subject matter of the legislation and the constitutional relationship between the courts and Congress. Those latter factors help to better understand the Court's equitable powers and its role in applying and interpreting a limitations statute.

The contextual framework analysis recognizes that because the Court's and Congress's roles are not static across all areas of legislation, neither is the interpretive function of courts. The contextual framework analysis derived here takes into account the subject matter

290. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

291. See *KING ET AL.*, *supra* note 6, at 2, 6 (explaining, based on a survey of 2,384 cases in thirteen federal district courts, that "[i]n less than 2% of capital and non-capital cases did judges explicitly *reject* the limitations defense" and that equitable tolling was granted in ten of twelve capital cases and twelve of thirty non-capital cases).

292. See 28 U.S.C. § 2254(d) (2000).

293. See, e.g., *Young v. United States*, 535 U.S. 43, 49 (2002) (citing *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *Irwin*, 498 U.S. at 95).

and the constitutional authorization for the statute to gauge whether courts retain judicial flexibility in applying the statute. Equitable tolling is appropriate where that equitable flexibility exists and it is not foreclosed by the statute. Congress drafts legislation against a rich tableau of case law, prior practice, background principles, conventions, and rules. Subject matter and constitutional authorization are two highly relevant factors which help to consider the statutory text in its full context and to identify the Court's role in interpreting the statute.

In federal habeas, the contextual framework supports equitable tolling of the one-year statute of limitations in Section 2244(d) for historical, constitutional, and textual reasons. Federal courts function in a unique capacity in federal habeas because the writ of habeas corpus is constitutionally preserved, turns on constitutional law, and Congress's power to restrict habeas review is limited. In a field dominated by judicial doctrine developed over the past century, Congress is a relative newcomer to habeas. Although the AEDPA's statute of limitations changed the habeas landscape dramatically, the Court has asserted its broad equitable powers post-AEDPA and made clear that the value of ensuring access to the writ "outweighs" the policy goals behind the AEDPA's statute of limitations.²⁹⁴ The Court's strong equitable presence and constitutional concerns signal that Section 2244(d), which does not expressly foreclose equitable tolling, should not be applied inflexibly. Rather, equitable tolling is essential to ensuring that the Court, in applying Section 2244(d), does not unfairly deprive prisoners access to the writ.

294. *Rhines*, 544 U.S. at 278.