Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose

By Joseph Mack

QUOD NULLUM TEMPUS occurrit regi literally means "no time runs against the King." This ancient doctrine exempts certain governmental bodies from statutes of limitations, laches, and statutes of repose. It is a controversial doctrine, attracting criticism that it is based on the ancient formalities of sovereign immunity that cannot be justified in modern times.[1] Nevertheless, *nullum tempus* continues to persist in most jurisdictions today. Furthermore, the doctrine has gained new significance in light of the advent of controversial mass tort suits by state attorneys general on behalf of governmental bodies seeking reimbursement for public expenditures for injuries caused by products such as tobacco,[2] lead paint,[3] and firearms.[4]

The doctrine of *nullum tempus* allows the government to sue defendants that could not be sued by any private party due to the time limitations posed by statutes of limitations, laches, and statutes of repose. This paper will explore whether this result is justifiable, examining the roots of the doctrine and the various limitations placed on it by different jurisdictions. Additionally, the paper will compare the policies the doctrine purports to serve with those protected by statutes of limitations, laches, and statutes of repose. I conclude that the policies served by statutes of limitations and laches are not so important so as to require the abolition of *nullum tempus* due to their focus on punishing tardy plaintiffs; however, the policies behind statutes of repose are distinct and significant enough to undermine the governmental use of the doctrine because those statutes focus solely on protecting defendants.

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[1] *See, e.g.*, South Carolina ex rel. Condon v. City of Columbia, 528 S.E.2d 408, 413 (S.C. 2000); City of Colorado Springs v. Timberlane Assoc., 824 P.2d 776 (Colo. 1992); New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991); Sigmund D. Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi – The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 ME. L. REV. 373 (2003); Susan Lillian Holdsclaw, *Reviving a Double Standard in Statutes of Limitations and Repose:* Rowan County Board of Educ. v. United States Gypsum Co., 71 N.C.L. REV. 879 (1993); Thomas A. Bowden, *Sovereign Immunity From Statutes of Limitation in Maryland*, 46 MD. L. REV. 408 (1987).

[2] *See, e.g.*, State of Texas v. American Tobacco Co., 14 F.Supp.2d 956, 962 (E.D.Tex. 1997).

[3] *See, e.g.*, State v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. 2001 WL 345830 (R.I. April 2, 2001).

[4] *See, e.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002).

I. History and Policy of Statutes of Limitations, Laches, and Statutes of Repose

Limitations on the time a plaintiff may bring suit have existed almost as long as the laws allowing plaintiffs to bring suit. Time limits find their origins in Roman law and have continued to be used in subsequent legal systems to this day. As early as 1236, English "statutes were enacted prohibiting real property actions if they were based on a seisin prior to a given date, such as the coronation of Henry II."[5] The modern time bar statutes first appeared in England in the Limitations Act of 1623.[6] This statute provided different time limits for different actions, running from the time the action accrued.[7] In order to gauge the potential injustice posed by *nullum tempus*, one must first understand the recent developments and policies behind laches and statutes of limitations and repose.

A. Statutes of Limitations

General statutes of limitations are the most common time limitation on a tort plaintiff's rights to bring suit. These statutes set a prescribed time in which a plaintiff must file a complaint after a cause of action accrues. If a plaintiff does not file a complaint within the time period, the complaint is dismissed and the cause lost, regardless of the underlying merit of the suit.[8] Normally, the cause of action accrues on the date which the injury occurs, although a minor's cause does not accrue until he or she reaches the age of majority.[9] Additionally, the statute can be "tolled" in some jurisdictions if there is some procedural defect in a prior timely complaint, such as incorrect venue[10] or fraud by the defendant.[11]

There are three policy reasons supporting statutes of limitations. The first reason is to protect defendants from stale claims.[12] Statutes of limitations are said to allow defendants security in their business and planning by allowing them to rest assured after a certain period that they cannot have liability for acts committed far in the past.[13] Furthermore, statutes of limitations serve to protect defendants by insuring that they will not be disadvantaged by the effect of time on their ability to defend themselves.[14] Defendants will not be able to produce evidence to absolve themselves if "memories have faded, witnesses have died or disappeared, and evidence has been lost."[15]

The second policy consideration is to protect the courts from having to hear stale claims when their time could be better spent on more recent, and thus more important, disputes.[16] Thus, court dockets are cleared of these older claims, increasing judicial efficiency and preventing wastes of time. There is an underlying assumption that these claims will be "groundless or inconsequential" due to the passage of time, because matters of fact are more difficult to prove if they are too remote in time.

The third policy justification for statutes of limitation is to punish plaintiffs who "sleep on their rights" for an inexcusably

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[5] *Developments in the Law – Statutes of Limitation*, 63 HARV. L. REV. 1177, 1178 (1950).
[6] LIMITATIONS ACT, 1623, 21 JAC. 1, c. 16.
[7] *See Developments in the Law, supra* note 5.
[8] Kavanagh v. Noble, 332 U.S. 535,539 (1947); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
[9] *E.g.*, Mason v. Board of Educ., 375 Md. 504 (Md. 2003).
[10] *See* Hosogai v. Kadota, 700 P.2d 1327, 1333 (Ariz. 1985) for a discussion of the equitable tolling standards.
[11] Michael E. Baughman, *Comment,Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1074 (1995).
[12] *See* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).
[13] *See Developments in the Law, supra* note 5.
[14] *See* Railroad Telegraphers, 321 U.S. at 342.
[15] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
[16] *See Developments in the Law, supra* note 5.

long time.[17] As courts have observed, "the primary purpose of limitation periods is to require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims."[18] Thus, the plaintiff who delays a suit beyond a certain period brings the punishment upon themselves and deserves to be penalized for allowing their claim to go stale.[19] A plaintiff's knowing delay in filing suit increases the chances that justice will be frustrated by the loss of evidence and cripples the defendant with fear of perpetual liability. As a result, a plaintiff must have some incentive to file suit in a timely fashion.

All three of these policies may be served in most tort suits, where the defendant's wrongful actions and the plaintiff's discovery of her injury are concurrent. However, some of the policies have been undermined by recent developments in the law of limitations when the discovery of the damage and the defendant's wrongdoing do not occur at the same time.

Originally, statutes of limitations were interpreted to begin running at the time of the defendant's bad act.[20] However, in the past thirty years there has been an increase in the use of the "discovery of damage" rule.[21] This doctrine places the time of accrual as when a reasonable person would have discovered the injury.[22] States have almost uniformly adopted this rule for personal injury mass toxic suits.[23]

The adoption of the discovery rule reflects a recognition of the harsh effect of a statute of limitations on a plaintiff who never even knew she had a cause of action until too late. Courts and legislatures responded to the challenges of latent injuries by refusing to allow statutes of limitations to begin running until the injury should have reasonably been discovered. This reaction demonstrates that the policies behind the statute of limitations that protect the defendant and the courts from stale claims are not nearly as important as protecting the plaintiff's right to redress her injuries. It is only when the plaintiff knowingly delays a suit after discovery of the injury that statutes of limitations bar the claim.

The modern focus of statutes of limitations has shifted to the plaintiff's accountability. Although defendants will still be disadvantaged by delay, and courts will still adjudicate claims involving incidents that occurred decades ago, these policies are only protected if the plaintiff knew or had reason to know of the injury during the delay.[24] Thus, protection of the

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[17] Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, 334 N.E.2d 160, 162 (Ill. 1975).

[18] *Id*.

[19] J. ANGELL, A TREATISE ON THE LIMITATIONS OF ACTIONS AT LAW AND SUITS IN EQUITY AND ADMIRALTY (4th ed. 1861).

[20] *See, e.g.,* Thornton v. Roosevelt Hosp., 391 N.E.2d 1002 (N.Y. 1979) (holding that the cause accrued on the date the defendant injected a substance into the plaintiff's body, not when the cancer caused by the injection manifested itself twenty years later).

[21] *See, e.g.*, Ayers v. Morgan, 154 A.2d 788 (Pa. 1959) (when a doctor left a sponge inside a patient during the course of an operation, the statute of limitations did not begin to run until nine years later when the malpractice was discovered by an x-ray); Schiele v. Hobart Corp., 587 P.2d 1010 (Or. 1978) (products liability suit for meat packer who contracted pulmonary pneumonia from machine.) *See generally The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983) (discussing the need for discovery of damage rules and the rejection of statutes of repose).

[22] *See, e.g.*, Carter v. Brown & Williamson Tobacco Corp., 778 So. 2d 932 (Fl. 2000) (focusing on whether plaintiff should have reasonably discovered his injuries within the three year statute of limitations, even though plaintiff's injuries were due to smoking that started forty-four years and ended twenty-nine years before the suit); *cf.* Corp. of Mercer Univ. v Nat'l Gypsum Co. 368 S.E.2d 732 (Ga. 1988) (refusing to extend discovery rule to actions involving purely property damage).

[23] *See, e.g.*, Braune v. Abbott Labs., 895 F.Supp. 530, 549-50 (E.D.N.Y. 1995).

[24] *See, e.g.*, Kenneth DeCourcy Ferguson, *Repose or Not? Informal Objections to Claims of Exemption After* Taylor v. Freeland, 50 OKLA. L. REV. 45, 73 (1997).

first two policy justifications for statutes of limitations is conditional on satisfaction of the third.

B. Laches

Like the modern statutes of limitations, the equitable doctrine of laches focuses on the plaintiff's conduct after she discovers, or should have reasonably discovered, an injury.[25] Laches thus serves predominantly the same interests as the modern statutes of limitations, protecting defendants who are prejudiced by a plaintiff's delay only if the plaintiff should be held accountable for their tardiness.

The defense of laches developed as a parallel limitation on actions in equity because statutes of limitations only applied to actions at law.[26] Although the ancient equitable defense has a limited modern impact on tort suits, it is still available in some contexts, such as suits for fraud.[27] However, most jurisdictions limit the defense to actions asking for equitable relief, such as rescission of a fraudulently induced contract.[28]

In order for the defense of laches to be available to a defendant, there must be unreasonable delay by the plaintiff.[29] Laches functions essentially the same as statutes of limitations under the discovery rule; the possibility of the necessary "unreasonable delay" only begins once the injury is discovered or should have been discovered.[30] If the plaintiff waits for an unreasonable amount of time after discovery and the defendant suffers prejudice because of the delay, a court will not grant equitable relief to the unworthy plaintiff.[31]

The policy goals for laches are the same as for statutes of limitation: protecting the defendant from perpetual liability,[32] protecting the courts from having to hear stale claims,[33] and encouraging plaintiffs to bring their suits in a reasonably prompt manner.[34] Furthermore, like the modern statutes of limitation under the discovery rule, laches will only protect the defendant and the courts upon a showing of the plaintiff's knowledge of injury.[35] Again, the plaintiff's conduct is the chief focus, and defendants may not assert laches against a plaintiff whose delay is justified, even if the defendant is prejudiced by the delay.

C. Statutes of Repose

In response to the widespread adoption of the discovery rule in statutes of limitations, a number of jurisdictions determined that it was necessary to circumvent the elastic nature of the accrual of actions by explicitly requiring plaintiffs to bring suit a set number of years from certain defendant's wrongful actions.[36] These "statutes of repose" were first employed in the context of architects, engineers, and contractors who were held liable for injuries caused by their negligence despite lack of privity of contract in the 1950s.[37] Thus, even though

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[25] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002) (laches "bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant.")

[26] *See, e.g.*, County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 244 n.16 (1985).

[27] *See* STUART M. SPEISER, CHARLES F. KRAUSE, ALFRED W. GANS THE AMERICAN LAW OF TORTS, §32:115 at 487 (2003).

[28] *See* Mother Earth, Ltd. v. Strawberry Camel, Ltd., 390 N.E.2d 393, 406 (Ill. App. 1979); Brown v. Lockwood, 76 A.D.2d 721, 729 (N.Y.2d Dept. 1980).

[29] *See* Nat'l R.R. Passenger, 536 U.S. at 121.

[30] *E.g.*, Bashton v. Ritko, 517 N.E.2d 707, 710 (Ill. App. 3rd Dist. 1987).

[31] *See* Nat'l R.R. Passenger, 536 U.S. at 121.

[32] *See* Wilson v. Meredith, Clegg & Hunt, 268 S.W.2d 511, 517 (Tex. Civ. App. 1954).

[33] *See* Hagan Estates v. New York Min. & Mfg. Co., 37 S.E.2d 75, 79 (Va. 1946).

[34] *See* Hudson v. Hudson, 242 S.W.2d 154, 156 (Ark. 1951).

[35] Nat'l R.R. Passenger, 536 at 121.

[36] *See The Fairness and Constitutionality of Statutes of Limitations*, *supra* note 21.

[37] *See* SPEISER, KRAUSE, & GANS, *supra*, note 27 at §5:35 (page 391).

the discovery rule had not yet been widely adopted, these builders could still be held liable for their negligence decades after the event occurred because the actual injury caused by their negligence might not occur until after many years of use. When a plaintiff was injured by negligence that occurred thirty years previously, even traditional statutes of limitations without the discovery rule would not begin to run until the injury.[38] In response to this perceived timeless liability, builders' professional associations pushed legislation that set a certain time period after completion of the work in which any claims relating to the work must be brought. Today, such statutes exist in over forty-five states and in the District of Columbia.

In response to the application of the discovery rule to products liability cases later in the twentieth century, many jurisdictions (twenty-nine states) passed statutes of repose for products liability cases.[39] These statutes, like the earlier statutes designed to protect builders, avoid the element of the plaintiff's delay entirely by prohibiting suit beyond the initial entry of the product into the market. Statutes of repose are not subject to any tolling provisions, thus doctrines such as the discovery rule do not apply.[40] A plaintiff must satisfy the time limits of both the applicable statute of limitations and the statute of repose in order to file suit.[41]

The policy goal of statutes of repose is solely "to relieve potential defendants from anxiety over liability for acts committed long ago."[42] "Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists."[43] Thus legislatures, fearing that certain economically valuable classes of potential defendants would be crippled by the lack of a guarantee of freedom from liability after a given point, pass statutes of repose in order to encourage them to continue to do business and to lower insurance rates. These legislatures determine that statutes of limitations do not adequately serve this goal of protecting defendants because of the potential for accommodation of tardy plaintiffs, and thus completely remove any relevance of the plaintiff's reasons for delay.

Statutes of repose are extremely controversial because they can bar a plaintiff from bringing suit before the plaintiff is even injured, depriving her of a cause of action regardless of how quickly she files suit if the statute of repose has run before the injury occurs.[44] Recognizing the tension between protecting defendants and depriving a plaintiff's a cause of action regardless of when the injury is discovered, legislatures make the time limitations contained in statutes of repose much longer than statutes of limitations, typically around ten years.[45]

Courts have split as to whether statutes of repose are constitutional. A number of states have declared the statutes

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[38] *See* Howell v. Burk, 568 P.2d 214, 219 (N.M. 1977).

[39] *See* Jay M. Zitter, Annotation, *Validity and Construction of Statute Terminating Right of Action for Product-Caused Injury at Fixed Period After Manufacture, Sale, or Delivery of Product*, 30 A.L.R.5TH 1 (1995).

[40] First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).

[41] *See, e.g.*, O'Brien v. Hazelet & Edral, 299 N.W.2d 336, 341 (Mich. 1980).

[42] Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987).

[43] *Id*.

[44] *See generally The Fairness and Constitutionality of Statutes of Limitations*, *supra* note 21. ("toxic tort statutes of limitations [that do not incorporate the discovery rule] have the effect of eliminating a victim's claim before it can even arise.")

[45] *See, e.g.*, ALA. CODE § 6-5-502; CONN. GEN. STAT. ANN. § 52- 577A; FLA. STAT. ANN. § 95.031(2); TENN. CODE ANN. § 29-28-103.

unconstitutional based on open courts,[46] due process,[47] or equal protection[48] clauses in their state constitutions. These courts essentially rest their opinions on the idea that "the right to recover for personal injury is an important substantive right."[49] Thus, legislatures cannot deprive their citizens of the right to be heard in court on mere economic grounds. However, many other courts have held that statutes of repose are constitutional,[50] notably federal courts under the United States Constitution.[51] These courts reason that since the legislature provides the causes of action, the legislature may take them away, stating that there "is no federal or state constitutional right to the continued existence of common law causes of action."[52]

III. Nullum Tempus

The doctrine of *nullum tempus* exempts governmental actors from the effects of the time limitations placed on private litigants. It finds its roots in the common law as an aspect of sovereign immunity,[53] but has its own independent justifications today. Courts have split as to whether the doctrine has survived the abrogation of sovereign immunity,[54] whether it applies to municipalities in addition to state governments,[55] whether it applies to statutes of repose in addition to statutes of limitation,[56] and whether the government may bring suit in a proprietary role. Nevertheless, the doctrine holds immense significance in light of the gaining momentum of massive tort suits by governmental entities.[57]

A. Policy

Nullum tempus originally derived from the same common law principals that drove sovereign immunity. The crown could not be negligent, and therefore could not suffer from any negligent delay, just as is could not suffer for negligently causing its citizens injury. Thus, the "great public

[46] *See* Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993); Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984); Daugard v. Baltic Coop. Bldg. Supply Ass'n, 349 N.W.2d 419 (S.D. 1984); Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

[47] *See* Lankford v. Sullivan, Long & Haggerty, 416 So. 2d 996 (Ala. 1982).

[48] *See* Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986); Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

[49] Hanson, 389 N.W.2d at 325.

[50] *See, e.g.,* Love v. Whirlpool Corp., 449 S.E.2d 602 (Ga. 1994); Jones v. Five Star Eng'g, Inc., 717 S.W.2d 882 (Tenn. 1986); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del. 1984); Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[51] *See, e.g.*, Dinh v. Rust Int'l Corp., 974 F.2d 500 (4th Cir. 1992); Eaton v. Jarvis Prods. Corp., 965 F.2d 922 (10th Cir. 1992); Harris v. Black Clawson Co., 961 F.2d 547 (5th Cir. 1992).

[52] *E.g.*, Dinh v. Rust Int'l Corp., 974 F.2d 500, 501 (4th Cir. 1992).

[53] Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938).

[54] *See* City of Shelbyville v. Shelbyville Restorium, Inc., 451 N.E.2d 874 (Ill. 1983) (the doctrine survives) *cf.* South Carolina ex rel. Condon v. City of Columbia, 528 S.E.2d 408, 413 (S.C. 2000) ("the abolition of the common law doctrine of sovereign immunity signaled the end of the common law doctrine of nullum tempus.")

[55] *See* Oklahoma City Mun. Improvement Auth. v. HTB, Inc., 769 P.2d 131, 134 (Okla. 1988) ("statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation") *cf.* State Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800 (Ohio 1988).

[56] *See* Rowan Cty. Bd. of Educ. v. United States Gypsum Co., 418 *S.E.*2d 648 (N.C. 1992) (*nullum tempus* applies not only to statutes of limitations but to statutes of repose as well since such statutes are still time limitations) *cf.* Commonwealth v. Owens-Corning, 385 S.E.2d 865 (Va. 1989) (*nullum tempus* does not exclude the government from statutes of repose) *cf.* Oklahoma City Mun. Improvement, 769 P.2d at 137 (as long as the original cause of action accrued during the limited time period, then action is not barred.)

[57] *See* Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPPERDINE L. REV. 685 (2000).

policy of preserving the public rights, revenues, and property from injury and loss, [*sic*] by the negligence of public officers"[58] justifies immunity to statutes of limitations, just as it had justified sovereign immunity. Another policy justification of sovereign immunity, the impracticality of suing the sovereign in a judicial system created by the sovereign, is also shared by statutes of limitations when used to constrain the very government which created them.

Regardless, *nullum tempus* has evolved its own policy justifications that are separate from, but nevertheless close to, the policies driving sovereign immunity. Even at ancient common law, the doctrine was independently justified on the grounds that "the king was too busy looking after the welfare of his subjects to sue"[59] and that *nullum tempus* was necessary in order to protect public rights. Thus, the Supreme Court reasoned that "the government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses."[60]

Although perhaps the government has become more streamlined and organized since Justice Story's rationalization in 1824, the doctrine of *nullum tempus* continues to satisfy its policy goal of protecting public rights and funds from the negligence of individual agents of the government. In fact, one court has argued that "our everchanging, increasingly complex society places even more demands on the limited resources of our state government than were visited on it one hundred years ago, with a concomitant increase in the risk of laches, neglect and mistake."[61] Further, attorneys general have broad discretion as to which claims to bring and limited resources to do so. Courts reason that the public should not be made to suffer based solely on the delay of one individual; the defendant's interest in repose is outweighed by the public's interest in preserving its remedies from the negligence of elected officials.[62]

B. Application by Courts

In most jurisdictions, *nullum tempus* remains a common law doctrine and is thus interpreted and applied by the courts. *Nullum tempus* can only apply when the legislature explicitly exempts or remains silent about the applicability of statutes of limitations to the government.[63] Some legislatures have specifically included governmental bodies in certain statutes of limitation, thus disclaiming the doctrine.[64] Others have codified their doctrines of *nullum tempus*, explicitly claiming exemption from statutes of limitations.[65] Where legislatures remain silent, courts have adopted a number of divergent positions on how, if at all, *nullum tempus* should be applied.

1. Constitutionality

Almost all courts agree that *nullum tempus* does not violate the Constitution. Courts have taken a very strict view of the policies served by statutes of limitations, essentially allowing states to do whatever they wish in terms of prescribing statutes of limitations. They reason that "the history of

[58] United States v. Hoar, 26 F.Cas. 329, 330 (C.C.D. Mass. 1821) (Story, J.).
[59] New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559, 563 (N.J. 1991).
[60] U.S. v. Kirkpatrick, 22 U.S. 720, 735 (1824).
[61] Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800 (Ohio 1998).
[62] Dept. of Transp. v. J.W. Bishop, 439 A.2d 101, 103-04 (Pa. 1981).
[63] State v. City of Columbia, 528 S.E.2d 408, 412 (S.C. 2000) ("Under the *nullum tempus* doctrine, statutes of limitation do not run against the sovereign unless the legislature specifically provides otherwise.").
[64] *See, e.g.*, MD. CODE ANN. § 12-201 (1999) (state is subject to the statute of limitations for suites arising from written contacts.).
[65] *See* VA. CODE ANN. § 8.01-231 (West 2006) ("No statute of limitations which shall not in express terms apply to the Commonwealth shall be deemed a bar to any proceeding by or on behalf of the same.").

pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."[66] In other words, the protection given to defendants by time limitations "has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual."[67]

Judicial treatment of *nullum tempus* in constitutional analysis reflects this view of statutes of limitations as public policy, rather than a right. Most jurisdictions do not even question the constitutionality of allowing the state to file suit against a defendant, instead resorting to policy to evaluate whether the common law doctrine should continue.[68] Virginia is a notable exception, where, although *nullum tempus* is actually codified by the legislature,[69] the expiration of a statute of repose vests a "substantive right of repose" that could not be abridged by the legislature.[70] Virginia, however, appears to be in the distinct minority.[71]

Nullum tempus remains a common law doctrine in most states, neither prohibited by a constitution nor mandated or disclaimed by the legislature. Like any common law doctrine, therefore, courts are free to evaluate the policies served by *nullum tempus* and arrive at their own conclusions about its continued validity.[72]

2. The Effect of Waiver of Sovereign Immunity

In some jurisdictions courts determined that *nullum tempus* is so intertwined in policy and practice with sovereign immunity that abrogation of the latter compels abrogation of the former.[73] These courts reason that "despite its different evolution, *nullum tempus* is but an aspect of sovereign immunity… [and sovereign immunity] does not accord with notions of fundamental justice applicable to our elected representative form of government."[74] Furthermore, these courts reason, "[h]aving yielded the greatest aspect of sovereign immunity, immunity from any suit at all, it would be anomalous in the extreme not to conclude that the sovereign who can now be sued should not have to bring its own in a timely manner"[75] The courts identify the common policy between statutes of limitations and *nullum tempus* as the theory that the public at large should not have to pay for the negligence of its agents, which was undermined by the abrogation of sovereign immunity. They conclude that the policies of repose and deterring unreasonable delay by the plaintiffs compel the abrogation of *nullum tempus*.[76]

Other jurisdictions do not include abrogation of *nullum tempus* in the abrogation of immunity from suit.[77] These jurisdictions emphasize the divergent evolutions of the policies behind the doctrines, identifying the policy of *nullum tempus* as protection of the "great public

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[66] *See* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945).
[67] *Id.*
[68] *See, e.g.*, J.W. Bishop, 439 A.2d at 103-04.
[69] VA. CODE ANN. § 8.01-231 (West 2006).
[70] Commonwealth v. Owens-Corning, 385 S.E.2d 865, 868 (Va. 1989).
[71] No other states have invalidated *nullum tempus* on constitutional grounds, instead performing a policy analysis.
[72] *See, e.g.*, Robinson v. State, 517 A.2d 94, 100 (Md.,1986) ("this Court is authorized to adapt and modify the common law to meet modern day demands and needs.").
[73] *See* South Carolina ex rel. Condon v. City of Columbia, 528 S.E.2d 408, 413 (S.C. 2000); City of Colorado Springs v. Timberlane Assoc., 824 P.2d 776 (Colo. 1992); New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991).
[74] New Jersey Educ. Facilities Auth., 592 A.2d at 561.
[75] *Id.*
[76] *See* Timberlane Assoc., 824 P.2d at 782-83.
[77] Dept. of Transp. v. Sullivan, 527 N.E.2d 798 (Ohio 1988); City of Shelbyville v. Shelbyville Restorium, Inc., 451 N.E.2d 874 (Ill. 1983); Dept. of Transp. v. J.W. Bishop & Co., 439 A.2d 101 (Pa. 1981).

policy of preserving public rights, revenues and property from injury and loss" due to their agent's inability, unwillingness, or forgetfulness to bring suit.[78] These courts then go on to further distinguish sovereign immunity and *nullum tempus* on the grounds of who is disadvantaged; sovereign immunity seeks to "deny those whom [the state] has allegedly wronged the opportunity to obtain relief,"[79] while *nullum tempus* disadvantages parties who allegedly wronged the state. These courts find no support for the proposition that, by allowing innocent plaintiffs to recover from the public coffers, they must allow wrongful defendants to avoid contributing to it.

3. State Government – Municipality Dichotomy

Even when *nullum tempus* is retained, jurisdictions further disagree about the scope of the immunity. Apparently drawing from *nullum tempus*' shared roots with sovereign immunity, some states refuse to allow municipalities to take advantage of the doctrine.[80] Other jurisdictions unconditionally extend its protection to all governmental entities.[81] Another extremely prevalent approach is to extend *nullum tempus* to political subdivisions on a limited basis, refusing to grant the immunity unless the suit is on behalf of the sovereign in a public fashion, rather than in a private or proprietary function.

Courts that limit the application of *nullum tempus* to states do so on the grounds that that "political subdivisions do not possess the full attributes of sovereignty held by the states."[82] These courts rely on the common roots of sovereign immunity and *nullum tempus* to restrict *nullum tempus* in the same manner that common law sovereign immunity was limited. Similarly, jurisdictions that extend *nullum tempus* to political subdivisions appear to do so based on similar extensions of sovereign immunity to those bodies.

4. Public v. Proprietary Function

Some courts also limit the applicability of *nullum tempus* according to the type of action the governmental body is bringing.[83] This limitation on the doctrine is much more prevalent when a court examines whether limitations will apply to municipalities and political subdivisions,[84] but is sometimes also applied to the state.[85]

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[78] J.W. Bishop & Co., 439 A.2d at 104.

[79] *Id.*

[80] *E.g.*, Lakesville Township v. Northwestern Trust Co., 22 N.W.2d 591, 592 (N.D. 1946); Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800 (Ohio 1988) ("the rule . . .does not extend to townships, counties, school districts or boards of education, and other subdivisions of the state, nor, at least in some cases, to municipalities.").

[81] *E.g.*, Enroth v. Memorial Hosp. at Gulfport, 566 So. 2d 202, 206 (Miss. 1990) (All governmental bodies are immune, but the Mississippi *nullum tempus* doctrine is constitutionally based); City of Medford v. Budge-McHugh Supply Co., 754 P.2d 607, 610 (Or. App. 1988) ("The common law rule that statutes of limitations do not apply against government bodies unless they are included expressly or by necessary implication is still in force.").

[82] Timberlane Assoc., 824 P.2d at 799; *See also* Baltimore County v. RTKL Assocs., 380 Md. 670, 688 (Md. 2004).

[83] Some courts make distinction between enforcement of public rights or private rights.

[84] *See* Timberland, 824 P.2d at 799 n.5 (listing "the majority" of states that impose such restrictions on municipalities and subdivisions); Philadelphia v. Lead Indus. Assoc., 1992 U.S. Dist. LEXIS 3720 (D. Pa. 1992) ("The doctrine of nullum tempus applies to any claim brought by the Commonwealth or an arm thereof. . .Political subdivisions like the City of Philadelphia are also entitled to nullum tempus immunity, but only for a limited class of claims").

[85] *See* People ex rel. Ill. Dept. of Labor v. Tri State Tours, Inc., 795 N.E.2d 990, 992-93 (Ill. App. 1st Dist. 2003) (statute of limitations will not bar a claim by governmental entity acting in public capacity, under the doctrine of governmental immunity, but where government is acting in a private capacity, its "claim may be subject to a limitations defense"); Oklahoma City Mun. Improvement Auth. v. HTB, Inc., 769 P.2d 131, 134 (Okla. 1988) (statutes of limitation won't bar suit by government entity acting in its sovereign capacity to vindicate public rights).

Thus, in Rhode Island's recoupment suit against lead pigment manufacturers, the court allowed the state to seek damages incurred by the presence of lead paint in public buildings, but not for expenditures relating to private properties.[86]

Again, this distinction is best explained as a residual effect of the common roots between sovereign immunity and *nullum tempus*. Some courts have articulated that the policy reasons for *nullum tempus* are not present when the right enforced is a private one.[87] However, most rely on precedent created when *nullum tempus* was viewed as an aspect of sovereign immunity and was subject to the same rules, refusing to look further to justify the distinction.

5. Applicability to Statutes of Repose

One final point of disagreement among jurisdictions is whether *nullum tempus* exempts governmental entities from statutes of repose in addition to statutes of limitation. Most jurisdictions, although recognizing the differences between statutes of limitations and statutes of repose, nevertheless find that *nullum tempus* protects the state from all time based limitations on suit.[88] However, at least one jurisdiction (Virginia) has held that although statutes of limitations do not run against the government, statutes of repose do.[89] The Virginia court reasoned that since statutes of repose represent an explicit determination by the legislature that liability is undesirable after a given time period, statutes of repose vest a statutory right in the defendant not to be sued after they expire. Although Virginia codified *nullum tempus*, it did not mention governmental immunity from statutes of repose.[90] Therefore, the court evaluated whether the remnants of the doctrine at common law should apply to statutes of repose and concluded that the vested right provided by statutes of repose could not be trumped by a common law doctrine.[91]

C. Use in Tort Suits

It is undisputed that *nullum tempus* provides governmental actors with a great advantage in tort litigation. Attorneys general have recently grown extremely autonomous and have become far more bold in their selection of targets.[92] Changes in their roles are bringing new opportunities to take advantage of *nullum tempus*, and the manners in which they and their staff have used *nullum tempus* have been extremely diverse. The ability of government lawyers to take advantage of *nullum tempus*, however, is still constrained by the tolerance of the courts (who can abolish a common law doctrine if its application seems unjust), the legislature (who can amend limitations to include the government whenever an attorney general's actions becomes too pronounced a problem) and the general population (who can endeavor to see that the current attorney general does not remain in office much longer if they perceive the his actions to be unjust.)

Nullum tempus has been applied both to everyday fender benders and cutting edge governmental recoupment actions. In

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[86] State v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. 2001 WL 345830 (R.I. April 2, 2001).

[87] *See* Oklahoma City Mun. Imp. Authority v. HTB, Inc., 769 P.2d 131, 135 (Okla. 1988) ("We merely adhere to existing law that confers upon them by virtue of their status as state agencies the power to act in a sovereign *capacity* free from statutes of limitation in order to vindicate vested public rights.").

[88] Rowan Cty. Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, (1992); Rutgers v. The Grad Partnership, 269 N.J. Super 142, 148 (N.J. Sup. 1993); Bellevue School Dist. No. 405 v. Brazier Const. Co., 691 P.2d 178 (Wash. 1984).

[89] Commonwealth v. Owens-Corning, 385 S.E.2d 865 (Va. 1989).

[90] VA. CODE ANN. § 8.01-231 (West 2006).

[91] Owens-Corning, 385 S.E.2d at 868.

[92] Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563 (2001).

Commonwealth, Department of Transportation v. J.W. Bishop,[93] the Pennsylvania Department of Transportation successfully invoked the doctrine to sue a truck driver for damaging a public bridge by driving an overly-laden truck eight years before the suit was filed. More recently, the Rhode Island attorney general's ambitious attack on lead pigment manufacturers was partially spared by the doctrine.[94] In fact, the restriction of *nullum tempus* to claims based on public buildings was the only thing that prevented the attorney general from successfully getting a trial to recoup all the money the state of Rhode Island has ever spent on lead poisoning treatment and abatement programs.

The doctrine will take new significance if more attorneys general continue to target new enterprises for mass recoupment actions, predicted in areas such as lead paint, firearms, and even fast food.[95] Under the protections of *nullum tempus*, governmental bodies could bring recoupment actions regardless of how long ago they paid out funds to correct the alleged torts of these industries. However, the impact of *nullum tempus* will vary depending on the restrictions each state has placed on the doctrine, such as availability to municipalities and non-public or proprietary actions.

The lead paint cases provides a good sample of the potentially divergent treatment by various states. For instance, the state of Rhode Island was limited by statutes of limitation to recovery for public buildings,[96] and the city of Philadelphia was denied reliance on *nullum tempus* because it is a municipality, while the Philadelphia Housing Authority was protected because it is an agency of the Commonwealth.[97] If either of these actions had been brought in Mississippi, all of the actions for all of the governmental entities would have been afforded the protection of *nullum tempus*.[98] These interstate differences will be further complicated by differing judicial treatment of the recoupment actions, some courts seeing subrogation as "quasi-sovereign"[99] while others viewing them as more of a private or proprietary action.[100] If the Rhode Island litigation had occurred in a jurisdiction that treated subrogation as "quasi-sovereign," any requirement that the action was of a public nature would presumably have been satisfied and the litigation could have continued for private buildings, as well.

As the use of *nullum tempus* increases with more mass torts suits by attorneys general, the policies underlying the doctrine will come under closer and more skeptical scrutiny.

IV. Analysis For Tort Suits: Nullum Tempus Will Likely Survive Statutes of Limitation But Not Statutes of Repose

The policies behind *nullum tempus* remain viable unless governmental suits fall under the prohibitions of statutes of repose. Most battles over whether *nullum tempus* should be followed are questions of the common law, and therefore are decided on policy grounds.[101] A number of scholarly works[102] and courts have proposed policy arguments against the doctrine. Although they raise a number of interesting points, these arguments fail to overcome the strong public policy favoring the preservation of public rights that is protected by *nullum*

[93] 439 A.2d 101, 103-04 (Pa. 1981).
[94] State v. Lead Indus. Ass'n, No. 99-5226, 2001 R.I. Super. 2001 WL 345830 (R.I. April 2, 2001).
[95] *E.g.*, DeBow, *supra* at note 92.
[96] Lead Indus. Ass'n, 2001 WL 345830.
[97] Philadelphia v. Lead Indus. Assoc., 1992 U.S. Dist. LEXIS 3720 (D. Pa. 1992).
[98] Mississippi places no restrictions on *nullum tempus*. *See* Enroth v. Memorial Hosp. at Gulfport, 566 So. 2d 202, 206 (Miss. 1990).
[99] *See* State of Texas v. American Tobacco Co., 14 F. Supp. 2d 956, 962 (E.D.Tex. 1997).
[100] *See* Lead Indus. Ass'n, 2001 WL 345830.
[101] *E.g.*, South Carolina ex rel. Condon v. City of Columbia, 528 S.E.2d 408, 413 (S.C. 2000).
[102] *See* Schutz, *supra* note 1; Holdsclaw, *supra* note 1; Bowden, *supra* note 1.

tempus as applied to statutes of limitations. However, some of those same arguments prove extremely compelling when applied to the statutes of repose.

A. Statutes of Limitations

Common law doctrines should not be discarded without sufficient reason.[103] The doctrine of *nullum tempus*, although born in a time with different values, has nevertheless persisted through immense changes in our culture. Although courts are free to discard common law doctrines when they are "no longer reflective of economic and social needs of society,"[104] *nullum tempus* has survived generations of scrutiny.[105] The policy arguments are not made on a clean slate, and analysis of *nullum tempus* should keep in mind the due deference to precedent. In fact, the discovery rule, the only truly significant change in statutes of limitations, ultimately strengthens the argument for retaining *nullum tempus*.

1. Waiver of Sovereign Immunity Does Not Remove Policy for Nullum Tempus

The most popular attack on *nullum tempus* is the proposition that the doctrine should be removed in light of the abrogation of sovereign immunity.[106] Proponents of this view assert that *nullum tempus* relies on the same foundation as sovereign immunity, and thus, both doctrines have expired with the modern rejection of this principal.

This argument reflects a superficial reading of the policies behind *nullum tempus* and the reasons for rejecting sovereign immunity. *Nullum tempus* does indeed protect public rights and funds from the negligence of public officials, but unlike sovereign immunity, it does so on the grounds that the governmental officials are too busy to timely pursue all claims. In contrast, sovereign immunity from suit reflects no such policy, instead merely protecting public funds from private parties based on antiquated notions that the government can do no wrong.[107]

Furthermore, as courts have observed, the policies of sovereign immunity only prove distasteful and inadequate when used to justify attempts to deprive an injured plaintiff from a redress of their injury.[108] *Nullum tempus* disadvantages wrongful defendants, rather than wronged plaintiffs; the policy of protecting public funds and rights is not so reprehensible under those circumstances. The reason behind the abrogation of sovereign immunity is the injustice of depriving a plaintiff redress, not a more general categorical imperative that no person's individual interests can be undermined for the benefit of the public at large.

The better view, therefore, appears to be taken by the courts that have determined that *nullum tempus* survived the abrogation of common law sovereign immunity.

2. Nullum Tempus Does Not Unfairly Frustrate the Fundamental Goals of Statutes of Limitation

The fallback position for opponents of *nullum tempus* is that, regardless of whether the doctrine survives abrogation of sovereign immunity, it nevertheless is

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[103] *See, e.g.*, Aranson v. Schroeder, 671 A.2d 1023, 1027 (N.H.,1995) ("we are mindful that fundamental changes in our jurisprudence must be brought about sparingly and with deliberation."); Meng v. Coffey, 93 N.W. 713, 715 (Neb. 1903).

[104] Shannon v. Wilson, 947 S.W.2d 349, 353 (Ark. 1997).

[105] *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938); Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800 (Ohio 1998).

[106] *See* Dept. of Transp. v. J.W. Bishop, 439 A.2d 101, 103-04 (Pa. 1981).

[107] *E.g.*, Mayle v. Pennsylvania Dep't of Highways, 388 A.2d 709, 710 (Pa. 1978).

[108] *See* Sullivan, 527 N.E.2d at 798; City of Shelbyville v. Shelbyville Restorium, Inc., 451 N.E.2d 874 (Ill. 1983); J.W. Bishop & Co., 439 A.2d at 101.

incongruent with the policies behind statutes of limitations. Opponents argue that the doctrine fails to prevent governmental entities from pursuing their claims in a reasonable time; consequentially denying defendants their repose, increasing litigation of stale claims, and eliminating the means of deterring plaintiffs from causing delay.[109] However, statutes of limitations under the discovery rule serve policies that are reconcilable with *nullum tempus* because of their focus on the plaintiff's accountability. Furthermore, statutes of limitation under the discovery rule are far more congruent with the goals of *nullum tempus* than statutes of limitations were when the doctrine was first developed. This confirms the argument that the common law doctrine should be retained because recent events have actually strengthened its policies.

Modern statutes of limitations reflect a policy shift away from protecting defendants from old claims at all costs and instead focus on the plaintiff's conduct. The discovery rule is the perfect example of many jurisdictions' refusal to hold the plaintiff accountable for certain types of delay. In latent disease mass torts, it can take decades for plaintiffs to discover their injuries, yet the courts vindicate their rights because the delay is justified, regardless of the prejudice to the defendants. The protection of public rights at stake for *nullum tempus* and the excusable delay of public officials with numerous public duties justify a similar exception to statutes of limitations. The policies of modern statutes of limitations focus on the plaintiff, sometimes at the cost of the policies they serve for defendants, and it is within those same policy priorities that courts protect public remedies from the negligence of public officials.

Another, perhaps more formalistic argument in favor of retaining *nullum tempus* is that the doctrine developed its own policies supporting it before the adaptation of the discovery rule. Since the doctrine actually survived a harsher form of statutes of limitations, which concentrated far more on the protection of the defendants, it follows that *nullum tempus* should not be disregarded because whatever shift in the "economic and social needs of society"[110] is actually towards accommodating tardy lawsuits when the delay is understandable. Thus the newer statutes of limitation, with their focus on plaintiffs delay, are far more congruent with the goals of *nullum tempus*. The policies between statutes of limitations and *nullum tempus* are more harmonious than in the past, and courts should adhere to precedent and protect the common law doctrine if possible.

3. It is Fair to Hold the Government to Different Standards than Individuals or Corporations

Another grievance opponents have with the doctrine is a sense of injustice that the government should have complete freedom from time limitations while all other plaintiffs are completely bound by them. Statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay"[111] for everyone but the government. Opponents argue that the notion that attorneys general are too busy to bring suit is not nearly as legitimate an excuse as the reasons that many non-governmental plaintiffs fail to timely bring suit.[112] A plaintiff could hire a lawyer who negligently fails to deliver the complaint in time or who gets hit by a bus on the way to the courthouse, yet still be strictly barred from recovery if the statute is not satisfied.

Placing aside the dubious logical weight of an argument that points out the injustices

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[109] *See, e.g.*, Schutz, *supra* note 1; Holdsclaw, *supra* note 1; Bowden, *supra* note 1.

[110] Shannon v. Wilson, 947 S.W.2d 349, 353 (Ark. 1997).

[111] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 313 (1945).

[112] *See, e.g.*, Mason v. Board of Educ., 375 Md. 504 (Md. 2003).

visited on private citizens and then attacks a doctrine for not sharing those flaws, there is a true tension between the government's treatment of private individuals and its treatment of itself. However, there are a number distinguishing factors that mitigate this inconsistency.

Central to the policy of *nullum tempus* is the concept that governmental entities are expected to, and often do, have more important matters to attend to than pursuing a claim. Although private individuals may sometimes face similar conflicting responsibilities, they are free to make the decision of which pursuits to value more and thus are responsible for their own personal loss if they choose against litigation. The situation is reversed for governmental entities, who are required by law to perform a number of duties and are not ultimately responsible for the loss of potential income from a suit any more than the general population in the form of higher taxes. Furthermore, private individuals and corporations are expected to seek profit, and thus must diligently pursue their claims and protect against contingencies. The government, however, is expected to have more important concerns than creating revenue through suits. Ultimately, the governmental entity is serving the public, rather than private litigants who serve themselves, and thus can be afforded leniency where private individuals have none because they only bring suit for the benefit of the public.[113]

Another important distinction is the nature of the office; attorneys general do not work in a political vacuum and it can take quite some time to build the public support that these politicians need in order to bring suit or for new attorneys general who are willing to vindicate public rights to get into office.[114] For instance, attorneys general often have political ambitions and may wish to avoid attacks on powerful interest groups such as products manufacturers. Indeed, it is the element of control that distinguishes the government's claims from private claims. As courts have observed:

> Inasmuch as citizens who share a public right which has been violated may be unable in certain cases to bring suit on their own behalf while the government has a representative interest in the controversy. . .abolition of the government's immunity from limitations defenses would expose these citizens to the harsh consequences of neglect by officials over whose actions they had no control.[115]

Although private litigants may also lack complete control over their attorneys, our republican form of government does not afford the degree of choice and control over the attorney general's actions as is found in the non-governmental attorney-client relationship.

4. Right of Contribution

One of the most ingenious arguments against *nullum tempus* is that it would allow the state, through exploitation of the double standard in statutes of limitations, to place the defendant at an extreme disadvantage by exercising the power to sue after the point that the defendant can bring any potential contribution actions or seek indemnification from third parties due to the normal statute of limitations.[116] However, this is simply not a potential problem, because courts uniformly view contribution and indemnification actions as accruing when a defendant has to pay out more than she should.[117]

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[113] *See* Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 800 (Ohio 1988).

[114] *See* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 591 (2001).

[115] Sullivan, 527 N.E.2d at 800-801 *quoting* City of Shelbyville v. Shelbyville Restorium, Inc., 451 N.E.2d 874 (Ill. 1983).

[116] *See* Schutz, *supra* note 1.

[117] *See* SPEISER, KRAUSE, & GANS, *supra*, note 27 at §5:27 (pages 254-55).

However, even when the defendant's contribution or indemnity actions are not time-barred, there can still be other complications posed by the passage of time, such as insolvency or loss of evidence (witnesses dying, document purging, etc.)[118] Although this argument has some force, it is somewhat blunted by the recent decline in the use of joint and several liability due to comparative fault.[119] As for those jurisdictions that retain joint and several liability, the legislature or courts have already made the determination that as between the injured plaintiff and the culpable defendant, the defendant will bear the risk of a potential contributor's insolvency. This remains the case even when, due to the discovery rule in most circumstances, a great amount of time can pass before suit is brought. Whatever small aggravation of this "injustice" is posed by *nullum tempus* is not enough to justify elimination of the doctrine, especially since the jurisdiction has already determined that the culpable party should bear this type of risk instead of an injured plaintiff.

B. Laches

Governmental immunity to laches is similarly justifiable. The policy behind this limitations doctrine is essentially the same as statutes of limitations; protection of the defendant only when the plaintiff sleeps on her rights. The same policy arguments in favor of *nullum tempus* still apply, as do the refutations of the potential criticisms of the doctrine.

C. Statutes of Repose

Statutes of repose constitute a far different matter than statutes of limitations and laches when *nullum tempus* is examined in light of its policy support. Statutes of repose concentrate exclusively on protecting defendants and encouraging their business by limiting their liability. The legislative determination that certain defendants must be free from suit after a set period regardless of the merits of the delay would be completely frustrated by the use of *nullum tempus* to provide immunity to statutes of repose. Further, the legislative protection of certain industries is the exact type of change in circumstances that justifies abandoning a common law doctrine.

Courts that fail to account for the distinction between statutes of limitation and repose do so because they fail to look deeper into the policies behind the differing statutes. Thus, in *Rutgers v. The Grad Partnership*, the court proclaimed that:

> whether [the statute] is considered. . .a repose provision, the fact remains that it is still a limitations provision which is triggered by the running of time. It merely calculates the time from a different starting point. The reasons for its existence, though, are no different from the policy considerations underlying all statutes of limitations. That is, it seeks to protect certain defendants from having to remain potentially liable for life.[120]

Although perhaps that is the ultimate aim of both types of statutes, it is the strength of the protection afforded that is the reason behind increasing the normal protections afforded by statutes of limitations for statutes of repose in the first place.

Nullum tempus excuses governmental actors on the basis of public policies that are undermined when applied to statutes of repose. The first policy argument for *nullum tempus*, that governmental actors are sometimes too busy looking after the welfare of the state to bring suit in time, is only a legitimate excuse when the time

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[118] *See* Schutz, *supra* note 1.

[119] *See generally* Walt Disney World Co. v. Wood, 515 So.2d 198 (Fl. 1987); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C21 (2000).

[120] 269 N.J. Super 142, 148 (N.J. Sup. 1993).

limitation is contingent on knowing delay by the plaintiff. This policy argument is sound when applied to immunity from statutes of limitation and laches because those doctrines require that delay before they serve to protect defendants. However, where statutes of limitation under the discovery rule and laches will only protect the defendant's interests when there is delay by the plaintiff after gaining knowledge of the injury, statutes of repose can bar a claim even before the victim knows they have been injured. Since statutes of repose offer no exceptions for good excuses, the justifications for the government's delay are irrelevant.

The second policy justification for *nullum tempus*, to preserve the public assets from the negligence of public officials, is also much less persuasive in the context of statutes of repose. The legislature's decision to absolutely limit the timeframe in which certain types of defendants may be sued is motivated by fear of the economic impact of timeless liability on their beneficial services. The legislature has determined that the economic stability of the classes of defendants protected by statutes of repose outweighs the state's interest in providing a remedy. An argument that governmental bodies should be immune to the balance struck by the legislature in order to preserve public assets cannot be successful because the legislature has already determined that it is ultimately better for the general public to limit the liability. Again, this is distinguished from statutes of limitations and laches on the grounds that those doctrines provide far less stability for defendants because of the requirement of knowing delay. Indeed, it is the exact purpose of statutes of repose to protect defendants from the elastic nature of statutes of limitations and laches because of the doctrines' focus on the plaintiffs.

Not only are the policy considerations behind *nullum tempus* severely undermined by the purposes behind statutes of repose, but the very fact that the legislature has enacted such statutes is indicative of the exact type of change in circumstances that should compel a court to discard a common law doctrine. The legislative action to protect a group at the risk of depriving completely blameless plaintiffs of their causes of action makes it clear that any interference with that protection "is no longer reflective of economic and social needs of society."[121]

V. Conclusion

Nullum tempus offers state attorneys general a strong advantage in their litigation against alleged tortfeasors. In most jurisdictions, a state suing for recoupment need not be concerned about time limitations, allowing them to take their time in amassing a suit against an industry while continuing to fulfill their other public responsibilities. Whether this result seems just is probably dictated by one's opinion about such suits generally, but the policy behind *nullum tempus* remains viable today.

Ultimately, it is the legislature's choice of whether time should run against the government. *Nullum tempus* merely provides a default exclusion from limitations where the legislature remains silent. Although it may seem unjust at times to allow a defendant to be sued by the government when no private parties could maintain the action, we must keep in mind that the legislature is under no obligations to provide time limitations on suits at all. The ability to raise time limitations by tortfeasors who are fortunate enough to injure dilatory parties is by no means a fundamental right;[122] it is a legislative grace that is subject to numerous restrictions such as the discovery rule and the legal incompetence of the plaintiff. Just as a tortfeasor who injures a toddler has her interest in repose disregarded, tortfeasors whose actions injure the government may not rely on the passage of time.

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[121] Shannon v. Wilson, 947 S.W.2d 349, 353 (Ark. 1997).

[122] *See* Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

However, for statutes of repose, where the legislature has determined that the interest in repose should be unconditional, the policies behind *nullum tempus* offer little justification to overcome the legislature's protection. For tort defendants who fall into classes that have been explicitly singled out for protection because of their economic importance and the potentially disastrous impact upon their businesses, any suits outside the time frame, regardless of the merit of their delay, should be forbidden.