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TIME TO RECONSIDER *NULLUM TEMPUS OCCURRIT REGI*—THE APPLICABILITY OF STATUTES OF LIMITATIONS AGAINST THE STATE OF MAINE IN CIVIL ACTIONS

Sigmund D. Schutz

NULLUM TEMPUS OCCURRIT REGI

No time runs against the king.

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TIME TO RECONSIDER *NULLUM TEMPUS OCCURRIT REGI*—THE APPLICABILITY OF STATUTES OF LIMITATIONS AGAINST THE STATE OF MAINE IN CIVIL ACTIONS

Sigmund D. Schutz*

I. INTRODUCTION

Did your car scratch a guardrail on a State highway seven years ago?¹ Did you damage a bridge by driving an overweight vehicle over that bridge eight years ago?² Are you the beneficiary of an estate that includes property on which the State assisted in the clean-up of an oil spill ten years ago?³ States have actually pursued claims for recovery of damages under these circumstances, where the events giving rise to the claim are long past.⁴ Many states, including the State of Maine, take the position that they have, essentially, an infinite time within which to bring a civil action.

The basis for the State's claim of immunity from statutes of limitations is the old English common law doctrine, "*nullum tempus occurrit regi*"—literally, no time runs against the King—which purports to exempt the State from statutes of limitations of general applicability unless statutes expressly provide otherwise. There has not been a Maine Supreme Judicial Court (Law Court) opinion mentioning the *nullum tempus* doctrine since 1955,⁵ but the doctrine continues to be actively asserted by the State of Maine in civil actions filed in Superior Court. At least six Superior Court decisions since 1990 reference the *nullum tempus* doctrine.⁶

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1. The State of Colorado Department of Transportation filed suit against a tractor-trailer owner for damaging the wall of a tunnel beyond Colorado's two-year statute of limitations for tort actions. *Shootman v. Dept. of Transp.*, 926 P.2d 1200, 1201 (Colo. 1996) (abrogating *nullum tempus* doctrine).

2. The Commonwealth of Pennsylvania sued a trucking company for allegedly driving an overweight vehicle over a bridge, causing damage eight years and four months after the incident. *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101 (Pa. 1981).

3. The State of Maine filed suit against the estate of a sole proprietor of a wholesale and retail oil distribution business for reimbursement of clean up costs resulting from a ten-year-old petroleum spill. *State v. Knightly*, CV-00-265 (Me. Super. Ct., Ken. Cty., July 12, 2001) (Studstrup, J.).

4. See *supra* notes 1-3.

5. *State v. Crommett*, 151 Me. 188, 193, 116 A.2d 614, 616 (1955).

6. See *State v. Minervino*, CV-02-28, slip op. at 2 (Me. Super. Ct., Ken. Cty., July 5, 2002) (Studstrup, J.); *State v. Knightly*, CV-00-265, slip op. at 2 (Me. Super. Ct., Ken. Cty., July 12, 2001) (Studstrup, J.); *Caruso v. State Tax Assessor*, CV-99-80, slip op. at 6 (Me. Super. Ct., Ken. Cty., Nov. 14, 2000) (Marden, J.); *Maine Mfd. Hous. Bd. v. Holly Park, Inc.*, CV-93-599 (Me. Super. Ct., Ken. Cty., July 25, 1994) (Atwood, J.); *State v. Int'l Paper Co.*, CV-88-47, slip op. at 2 (Me. Super. Ct., Fra. Cty., Sept. 27, 1990) (Fritzsche, J.); *State v. Claude Dubois Excavating, Inc.*, CV-87-578 (Me. Super. Ct., Yor. Cty., June 4, 1990) (Brennan, J.).

It is high time to consider whether the doctrine should remain good law in Maine. The Law Court abolished common law sovereign immunity from tort claims in 1976;⁷ over the last twelve years the high courts of the states of Colorado,⁸ New Jersey,⁹ and South Carolina¹⁰ have abrogated the *nullum tempus* doctrine, and the doctrine is ripe for policy reevaluation in light of the split in authority and changing concepts of justice. Given the not infrequent assertion of the doctrine by the State of Maine in civil actions, it is only a matter of time before the *nullum tempus* doctrine again comes before the Law Court.

This Article analyzes current Maine law on the applicability of statutes of limitations to the State, specifically whether the *nullum tempus* doctrine should remain good law in Maine, and suggests that the doctrine is ripe for abrogation. Part II presents a survey of the *nullum tempus* doctrine in Maine, and questions whether the doctrine survives Maine's generally applicable six-year statute of limitations on all civil actions. Part III argues that the abolition of common law sovereign immunity from tort claims in Maine removed the historic underpinning of the *nullum tempus* doctrine and its rational justifications. Part IV demonstrates that the public policies favoring statutes of limitations apply with equivalent force to both private parties and to the State. Finally, Part V shows the flaws in the stated policy underlying the *nullum tempus* doctrine. Immunity from statutes of limitations in all civil actions does not necessarily foster the preservation of public rights, and may actually undermine an incentive for the state to promptly and efficiently pursue meritorious actions.

II. THE NULLUM TEMPUS DOCTRINE

The Latin phrase *nullum tempus occurrit regi* translates as: time does not run against the king.¹¹ It was inherited in the United States as part of English common law.¹² In recent times the phrase has been reconstituted as *nullum tempus occurrit reipublicae*, to substitute "state" for "king" in light of the outcome of the American Revolution.¹³ The phrase stands for the doctrine that the State is not bound by a statute of limitations unless the statute expressly mentions the State by name.¹⁴ There is a split in authority among the states with respect to the doctrine, which remains the common law or has been codified in some states, but has been abrogated by statute or judicial opinion in others.¹⁵ The doctrine remains viable in

7. *Davies v. City of Bath*, 364 A.2d 1269, 1273 (Me. 1976).

8. *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d 776, 782-83 (Colo. 1992).

9. *New Jersey Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d 559, 561 (N.J. 1991).

10. *South Carolina ex rel. Condon v. City of Columbia*, 528 S.E.2d 408, 413 (S.C. 2000).

11. BLACK'S LAW DICTIONARY 1096 (7th ed. 1999).

12. *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d at 778 ("The *nullum tempus* doctrine was imparted to the colonies as an incident of sovereignty when the colonies achieved their independence.").

13. *See id.* at 777-79 (defining *nullum tempus* as it came to be applied to the states).

14. *Id.* at 778.

15. *See, e.g., Pima County v. State*, 850 P.2d 115, 117 (Ariz. Ct. App. 1992.) (quoting ARIZ. REV. STAT. § 12-510 (2000)) (Arizona statutes provide, "the state shall not be barred by the limitations of actions prescribed in this chapter."); N.J. STAT. ANN. § 2A:14-1.2 (West 2000) (New Jersey's ten-year limitations period applicable to the State and its subdivisions); *State v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 909 (W. Va. 1997) (citing W. VA. CODE § 55-2-19 (1923)) (West Virginia's doctrine of *nullum tempus* abrogated by statute); *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d at 782-83 (abrogating *nullum tempus* doctrine). *See also infra* Chart 1 (split in common law authority in six states).

federal jurisprudence,¹⁶ although its applicability has been limited by federal statutes imposing limitations periods on tort and contract actions, as well as actions for enforcement of any civil fine, penalty, or forfeiture brought by the federal government.¹⁷

The doctrine historically originated as one of the personal prerogatives of the King of England, “justified on the ground that the king was too busy looking after the welfare of his subjects to sue.”¹⁸ Its modern justification rests on the public policy that “public remedies, in preserving the public rights, revenues, and property, ought not to be lost by the laches of public officers.”¹⁹ Justice Story articulated this policy as follows:

The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects . . . , is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.²⁰

Based on this policy, some courts have distinguished between actions by the government to preserve proprietary rights from actions to preserve public rights, finding that only the latter are immune from statutes of limitations.²¹ Likewise, many

16. See, e.g., *United States v. Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125 (1886); *United States v. Beebe*, 127 U.S. 338, 344 (1888).

17. In 1966, Congress enacted a general statute of limitations, now found in 28 U.S.C. § 2415 (2000) applicable to most tort (three years) and contract (six years) actions brought by the government or by a federal officer or agency. A separate statute limits the federal government to five years after accrual within which to bring an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture. 28 U.S.C. § 2462 (2000).

18. *New Jersey Educ. Facilities Auth. v. Gruzen P’ship*, 592 A.2d 559, 563 (N.J. 1991) (quoting Comment, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1251 (1950)). See also *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 103 (Pa. 1981) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *247-48).

19. *Inhabitants of Topsham v. Blondell*, 82 Me. 152, 154, 19 A. 93, 94 (1889). See also *Dept. of Transp. v. Sullivan*, 527 N.E.2d 798, 799 (Ohio 1988); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874, 876 (Ill. 1983) (“the doctrine of immunity from statutes of limitation . . . ‘is supported in modern law by the policy judgment that the public should not suffer because of the negligence of its officers and agents’”) (quoting *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Andrus*, 671 F.2d 271, 274 (8th Cir. 1982), *rev’d on other grounds sub nom. Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983)); *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d at 778 (“The contemporary *nullum tempus* doctrine is grounded not on notions of royal privilege, but on considerations of public policy.”).

20. *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373) (citation omitted).

21. *Champaign County Forest Pres. Dist. v. King*, 687 N.E.2d 980, 982, 984 (Ill. 1997) (holding that the statute of limitations is applicable to a governmental entity suit to recover excessive liability insurance premiums); *Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1989) (stating that immunity depends upon whether action is taken in a sovereign capacity and whether the rights at issue rise to the level of public rights); *New Jersey Educ. Facilities Auth. v. Gruzen P’ship*, 592 A.2d at 561 (stating that whether “State agencies . . . were acting in a governmental rather than a proprietary capacity . . . arises from a distinction that courts have long made in curtailing the doctrine of sovereign immunity”) (citations omitted); *Caruso v. State Tax Assessor*, CV-99-80, slip op. at 7 (Me. Super. Ct., Ken. Cty., Nov. 14, 2000) (Marden, J.).

jurisdictions have found that *nullum tempus* is an attribute of sovereignty only, and so does not extend to local government.²²

A. Maine Common Law

The Law Court has historically recognized the *nullum tempus* doctrine, often in the context of adverse possession claims against the State.²³ The doctrine is not based on any statute or constitutional provision, but rather is a creature of the common law.²⁴ The most recent reference to the doctrine by the Law Court was in its 1955 *State v. Crommett*²⁵ opinion in which the Law Court found that “[a] statute of limitations does not apply against the State unless the State is expressly named therein, or in some manner it is specifically so stated.”²⁶ Several recent Superior Court decisions have also referenced the doctrine.²⁷ Unlike some jurisdictions that have distinguished between statutes of limitations and statutes of repose,²⁸ the two concepts appear to have merged in Maine,²⁹ rendering *nullum tempus* generally applicable to all time limitations on causes of action.

There appears to be a conflict of authority in Maine with respect to whether municipalities or other institutions of local government can raise the *nullum tem-*

22. *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d at 778 (“Some jurisdictions fully shield their political subdivisions from limitations on actions under the *nullum tempus* doctrine, while a minority of jurisdictions have declined to extend the *nullum tempus* doctrine to local government.”); *Dept. of Transp. v. Sullivan*, 527 N.E.2d at 800 (holding that *nullum tempus* does not extend to townships, counties, school districts or boards of education); *Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d at 139 (Opala, J., dissenting) (arguing that “the ascription of sovereign status to a governmental entity other than the state is a pernicious, aberrational norm that should today be excised from the body of [Oklahoma] jurisprudence”).

23. *See In re Meier's Estate*, 144 Me. 358, 365-66, 69 A.2d 664, 667-68 (1949); *Phinney v. Gardner*, 121 Me. 44, 48-49, 115 A. 523, 525 (1921); *Inhabitants of Charlotte v. Pembroke Iron-Works*, 82 Me. 391, 393, 19 A. 902, 903 (1890); *Inhabitants of Topsham v. Blondell*, 82 Me. 152, 154-55, 19 A. 93, 94 (1889); *Stetson v. City of Bangor*, 73 Me. 357, 359 (1882); *cf. United States v. Burrill*, 107 Me. 382, 385-86, 78 A. 568, 569 (1910) (“no title by adverse possession can be acquired except by statute against the sovereign, be it crown or national government or state”); *Cary v. Whitney*, 48 Me. 516, 532 (1860) (“A title cannot be acquired by adverse possession of the land of the State, whilst the title and property is in the State.”).

24. *See* cases cited *supra* note 23.

25. 151 Me. 188, 116 A.2d 614 (1955). *Crommett* was cited by the Law Court in the more recent case, *Jeness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994) for the proposition that “it is the general rule in Maine that the State is not bound by a statute unless expressly named therein.” *Jeness* held that the State is not a “person” as that term is used in the Maine Civil Rights Act, and, therefore is not subject to suit under the Act. *Id.*

26. *State v. Crommett*, 151 Me. at 193, 116 A.2d at 616.

27. *See* cases cited *supra* note 6.

28. *E.g., Smith v. Westinghouse Elec. Corp.*, 732 P.2d 466, 468-69 n.11 (Okla. 1987) (distinguishing between statutes of limitations and statutes of repose).

29. *See Nuccio v. Nuccio*, 673 A.2d 1331, 1334 (Me. 1996) (“Statutes of limitation are statutes of repose and . . . should be construed strictly in favor of the bar which it was intended to create and not liberally in favor of a promise, acknowledgement or waiver.”) (quoting *Duddy v. McDonald*, 148 Me. 535, 538, 97 A.2d 445, 446 (1953)); *State v. Crommett*, 151 Me. at 194, 116 A.2d at 617:

The counsel for the defendant in a carefully prepared and comprehensive brief, insists that this statute of limitation is a statute of “non claim” and cites decisions from some other jurisdictions to this effect. Statutes of “non claim” not only affect the remedy but extinguish the right of recovery. Maine is not familiar with this doctrine, under such a name as against the State, where the State is not specifically referred to.

pus shield, or whether the doctrine is limited to the State and its agencies and instrumentalities.³⁰ There is also uncertainty with respect to whether Maine distinguishes actions by the government in its public capacity, from actions in its proprietary capacity for purposes of the *nullum tempus* doctrine.³¹ At least one Superior Court Judge has found that a determination as to whether the *nullum tempus* doctrine applies depends upon the nature of the activity engaged in by the State. If that activity is purely contractual, then the statute of limitations will be applicable.³² The Law Court, however, has yet to address whether the public/proprietary function distinction is applicable to the *nullum tempus* doctrine under Maine law.

B. Maine's Six-Year Statute of Limitations for All Civil Actions

A Maine statute provides for a six-year statute of limitations for all actions where no other limitations period is specified. The statute provides:

All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State, and except as otherwise specially provided.³³

This statute was enacted in its present form in 1959, and has not been substantively amended since.³⁴ Prior versions of the statute listed seven categories of "actions" subject to statutes of limitations if not commenced within six years after accrual.³⁵

30. *Compare* *Inhabitants of Charlotte v. Pembroke Iron-Works*, 82 Me. 391, 393, 19 A. 902, 903 (1890):

The doctrine that to the sovereign power the maxim, "*nullum tempus occurrit regi*," applies, has long been understood. . . . Towns and other municipalities are regarded as public agencies, exercising, in behalf of the state, public duties in the administration of civil government, and as such are but the auxiliaries of the sovereign power. *with* *Inhabitants of Topsham v. Blondell*, 82 Me. 152, 155, 19 A. 93, 94 (1889) ("[T]he overwhelming weight of authority holds that municipal corporations, even in their public character, are not so vested with the rights and privileges of sovereignty as to be within the protection of the maxim *nullum tempus*, etc.").

31. *See* *Caruso v. State Tax Assessor*, CV-99-80, slip op. at 6 (Me. Super. Ct., Ken. Cty., Nov. 14, 2000) (Marden, J.):

A determination of whether the [*nullum tempus*] doctrine applies in this case is dependent upon the nature of the activity engaged in by the defendant. . . . [I]f the activity is purely contractual, as the plaintiffs aver, the rationale underlying the doctrine would be best served by enforcing the statute of limitations affirmative defenses against the defendant [State Tax Assessor], should it apply under the circumstances.

32. *Id.*

33. 14 M.R.S.A. § 752 (1980).

34. P.L. 1959, ch. 317, § 143 (repealing and replacing R.S., ch. 112, § 90 (1954)). In 1959 the statute provided in full:

All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state, or a municipal court, trial justice, or justice of the peace in this State, and except as otherwise specially provided.

Id. The statute was amended in 1963 to eliminate the "municipal court, trial justice or[.]" P.L. 1963, ch. 402, § 170. This was a simplification of the statute given that it is sufficient simply to reference actions on a judgment or decree of any court of record of any state. A list of the types of court or justices was not necessary and did not substantively change the statute.

These earlier statutes did not include the phrases “all civil actions” or “except as otherwise specially provided.”³⁶ There is no debate or statement of fact attached to the 1959 legislation and no other explanation of legislative intent has been located to explain whether the 1959 changes were meant to effect the *nullum tempus* doctrine. Apparently, one reason for the change in the statute’s language, however, was the merger of law and equity, effective December 1, 1959, which created the need for a limitations period for actions formerly cognizable in equity only.³⁷ Regardless of the Legislature’s reasons for the change, the reformulation of statutes of limitations in 1959 introduced substantial new language not found in prior Maine statutes of limitations.

The six-year “all civil actions” limitations period is subject to interpretation under the plain meaning rule, which is the first principle of all statutory construction.³⁸ The term “civil actions” includes all actions “to enforce, redress, or protect a private or civil right.”³⁹ Any action that is not criminal is a civil action.⁴⁰ The distinction between civil and criminal actions is the only one in the statute, which notably does not distinguish by the identity or status of the party bringing the action.⁴¹ In light of the plain meaning rule, finding that a civil action by the State is somehow not a “civil action” would be “to indulge in a fantasy.”⁴²

The six-year limitations period also provides that civil actions are excepted only “as otherwise specially provided.”⁴³ The plain meaning here is that exceptions exist only where specifically set forth by statute. There is no Maine statute that expressly exempts the State from statutes of limitations, and so recognizing an exception not “otherwise specially provided” would be contrary to the plain meaning rule.

Also useful for interpretation of the six-year “all civil actions” statute of limitations is the maxim *expressio unius est exclusio alterius*,⁴⁴ which holds that the inclusion of one thing implies the exclusion of the others, or of alternatives.⁴⁵ The only two categories of actions excepted on the face of the statute itself are “actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State.”⁴⁶ This listing of certain enumerated

35. R.S. ch. 112, § 90 (1954); R.S. ch. 99, § 90 (1944); R.S. ch. 95, § 90 (1930); R.S. ch. 86, § 85 (1916); R.S. ch. 83, § 85 (1904); R.S. ch. 81, § 82 (1884); R.S. ch. 81, § 79 (1871); R.S. ch. 81, § 82 (1857); R.S. ch. 146, § 1 (1847); 1821 Me. Laws LXII.

36. See sources cited *supra* note 35.

37. See *Bowden v. Grindle*, 651 A.2d 347, 350 n.1 (Me. 1994).

38. *E.g.*, *Merrill v. Sugarloaf Mountain Corp.*, 2000 ME 16, ¶ 11, 745 A.2d 378, 384. (“The most fundamental rule of statutory construction is the plain meaning rule. When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction.”).

39. BLACK’S LAW DICTIONARY 30 (7th ed. 1999).

40. *Id.*

41. See 14 M.R.S.A. § 752 (1980).

42. *Dept. of Transp. v. Sullivan*, 527 N.E.2d 798, 802 (Ohio 1988) (Brown, J., dissenting).

43. 14 M.R.S.A. § 752.

44. *Wescott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) (“The maxim—*expressio unius est exclusio alterius*—is well recognized in Maine as in other states. It is a handy tool to be used at times in ascertaining the intention of the lawmaking body.”).

45. BLACK’S LAW DICTIONARY 602 (7th ed. 1999).

46. 14 M.R.S.A. § 752.

exceptions to an otherwise all encompassing statute of limitations is an indication that the Legislature intended no special treatment for the State.

No Law Court opinion has yet expressly addressed whether Maine's general six-year statute of limitations applicable to "all civil actions" is trumped by the *nullum tempus* doctrine, but two recent Law Court opinions have ignored and are inconsistent with the doctrine. In the 1987 case, *State v. Bob Chambers Ford, Inc.*,⁴⁷ the Law Court held that a claim brought by the State for violations of the Unfair Trade Practices Act⁴⁸ was subject to the "all civil actions" six-year limitations period.⁴⁹ The court analyzed whether to apply the general six-year "all civil actions" limitations period or instead the four-year limitations period for breaches of warranties.⁵⁰ Ultimately, the court held that the six-year limitations period for "all civil actions" applied to the State's claim.⁵¹ Presumably, if in fact no limitations period applied at all to the State's action under the *nullum tempus* doctrine, the Law Court would neither have reached the thorny question of which limitations period to apply nor would it have applied the six-year statute of limitations.

Another recent Law Court opinion, an appeal by a father of a Department of Human Services's order that he pay child support and reimburse the Department for benefits paid to the child's mother, also subjected the State to a statute of limitations of general applicability.⁵² Although the general six-year limitations period was not at issue, *Jack v. Department of Human Services*⁵³ involved a statute of limitations that did not mention the State by name: "[t]he father's liabilities for past education and necessary support are limited to a period of 6 years next proceeding the commencement of the action."⁵⁴ Both the mother and child were entitled to bring an action for past education and necessary support by statute,⁵⁵ but in *Jack* the claim was brought by the State. Nonetheless, the Law Court held, "The Department by statute is limited to recovery of past support accrued within 6 years of commencement of the action . . ."⁵⁶ As in the *Bob Chambers Ford* case, had the State been free from limitation periods that do not specifically include it, the court in *Jack* would, presumably, have refused to hold that the State's claim was limited to six years.

47. 522 A.2d 362 (Me. 1987).

48. 5 M.R.S.A. §§ 205-A to 214 (2002).

49. *State v. Bob Chambers Ford, Inc.*, 522 A.2d at 364.

50. *Id.*

51. *Id.*

52. *Jack v. Dept. of Human Servs.*, 556 A.2d 1093, 1094-95 (Me. 1989).

53. 556 A.2d 1093 (Me. 1989).

54. 19 M.R.S.A. § 273 (1988) (repealed 1997).

55. 19 M.R.S.A. § 272 (1988) (repealed 1997).

56. *Jack v. Dept. of Human Servs.*, 556 A.2d at 1095.

III. THE ABOLITION OF COMMON LAW SOVEREIGN IMMUNITY IN MAINE AND THE NULLUM TEMPUS DOCTRINE

A. *The Abolition of Common Law Sovereign Immunity from Tort Claims in Maine*

The Law Court abolished common law sovereign immunity from tort claims⁵⁷ in its 1976 decision, *Davies v. City of Bath*.⁵⁸ The court held: "We will no longer dismiss actions in tort brought against the State or its political subdivisions solely on the basis of governmental immunity."⁵⁹ Since *Davies*, the court has repeatedly emphasized the effect of the decision: "[W]e held that sovereign immunity would no longer be a bar to tort actions against the state for causes of action arising on or after February 1, 1977."⁶⁰ *Davies* applied to the particular plaintiff involved, and was otherwise prospective.⁶¹

The *Davies* opinion abrogated sovereign immunity in the strongest terms. The court found that it resulted in "substantial injustices[,] "could no longer be logically defended[,] and was "no longer a rational judicial doctrine."⁶² Earlier decisions by the Law Court had likewise observed that the doctrine had "served its usefulness and ought to be destroyed[,] "⁶³ was not "a rational legal concept[,] "⁶⁴ and was "incorrect and its application cannot withstand the test of logic."⁶⁵ Promptly after the Law Court abrogated common law sovereign immunity from tort claims, the Legislature enacted the Maine Tort Claims Act,⁶⁶ which restored

57. The common law sovereign immunity from tort claims that was abrogated in *Davies*, see *infra* note 58 and accompanying text, (and replaced by the Maine Tort Claims Act) should not be confused with the branch of sovereign immunity derived from the Eleventh Amendment to the United States Constitution, which immunizes states from suit in state court to vindicate federal rights. *Alden v. State*, 1998 ME 2000, ¶ 8, 715 A.2d 172, 174 (states are immune from suit in their own courts for violations of federal labor law). The extent to which sovereign immunity exists with respect to non-tort claims, and the exact scope of sovereign immunity as a whole is beyond the scope of this Article. However, with respect to contract claims it does appear that, notwithstanding sovereign immunity, the State is "not free to disregard contracts into which it has entered . . ." *KHK Assoc. v. Dept. of Human Servs.*, 632 A.2d 138, 141 (Me. 1993).

58. 364 A.2d 1269, 1273 (Me. 1976).

59. *Id.*

60. *Brann v. State*, 424 A.2d 699, 701 (Me. 1981); see also *Noel v. Town of Ogunquit*, 555 A.2d 1054, 1056 (Me. 1990) ("*Davies* abrogat[ed] the defense of sovereign immunity."); *Couturier v. Penobscot Indian Nation*, 544 A.2d 306, 309 n.6 (Me. 1988) (noting that *Davies* "abrogated common law sovereign immunity"); *Darling v. Augusta Mental Health Inst.*, 535 A.2d 421, 424 (Me. 1987) (Maine Tort Claims Act enacted "[f]ollowing our abolition of the common law doctrine of sovereign immunity"); *Myrick v. James*, 444 A.2d 987, 1001 n.14 (Me. 1982) (noting that *Davies* "abolished the doctrine of sovereign immunity"); *Nadeau v. State*, 395 A.2d 107, 111 (Me. 1978) ("sovereign immunity was an absolute bar to a suit against the State prior to our decision in *Davies*"); *Turner v. Collins*, 368 A.2d 1160, 1161 (Me. 1977) (*per curiam*) ("Sovereign immunity was abrogated by *Davies* on November 30, 1976.").

61. *Davies v. City of Bath*, 364 A.2d at 1274. Cases that arose prior to February 1, 1977, such as *Drake v. Smith*, 390 A.2d 541 (Me. 1978) (civil action filed on July 28, 1970), were not entitled to take advantage of the abrogation of sovereign immunity recognized in *Davies*. The *Drake* decision also involved Eleventh Amendment immunity from suits against the State to vindicate federal rights in state court, not common law immunity. See *id.* at 546.

62. *Davies v. City of Bath*, 364 A.2d at 1270, 1272-73.

63. *Nelson v. Maine Turnpike Auth.*, 157 Me. 174, 186, 170 A.2d 687, 693 (1961).

64. *Bartashevich v. City of Portland*, 308 A.2d 551, 552 (Me. 1973).

65. *Bale v. Ryder*, 286 A.2d 344, 345 (Me. 1972).

66. 14 M.R.S.A. §§ 8101-8118 (1980 & Supp. 2001).

aspects of sovereign immunity, but also provided to claimants harmed by activities within the scope of liability under the Act an opportunity to seek compensation.⁶⁷ The Law Court has interpreted the Maine Tort Claims Act as having entirely displaced the common law of sovereign immunity in all respects.⁶⁸

B. Shared Historic Roots

The *nullum tempus* doctrine shares common historic roots with sovereign immunity. Historically, “[t]he *nullum tempus* doctrine was imported to the colonies as an incident of sovereignty when the colonies achieved their independence.”⁶⁹ Sovereign immunity originated, as the Law Court recognized, in the “personal prerogative of the King of England.”⁷⁰ Likewise, *nullum tempus* doctrine “originated ‘as one of the royal prerogatives.’”⁷¹ Either the King could do no wrong (*rex non potest peccare*), or any wrong done by the King (such as laches) is deemed to be excusable in light of the greater public good, and, therefore, should not be prejudicial to the rights of the crown.⁷² Sovereign immunity put this principle into effect by shielding the state from suit, while *nullum tempus* immunized the state from the effects of delay in bringing suit in the name of the greater public good. Considerations of sovereign immunity and *nullum tempus* were justified on the principle that “the king established his own rules for litigation.”⁷³ Based on the historical relationship between sovereign immunity and immunity from statutes of limitations, it appears to be the majority position among those states that have considered the issue that immunity from statutes of limitations is one facet of the broader principle of sovereign immunity.⁷⁴

67. *Erickson v. State*, 444 A.2d 345, 351 (Me. 1982) (Roberts, J., dissenting) (“It cannot be denied that the Legislature by enacting the Act acknowledged that fairness requires claimants harmed by activities within the scope of liability under the Act have a realistic opportunity to seek compensation.”).

68. *Darling v. Augusta Mental Health Inst.*, 535 A.2d 421, 424 (Me. 1987) (“the Maine Tort Claims Act has in this state entirely displaced the common law of sovereign immunity, including any exceptions to immunity”).

69. *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d 776, 778 (Colo. 1992).

70. *Bale v. Ryder*, 286 A.2d at 345-46.

71. *New Jersey Educ. Facilities Auth. v. Gruzen P’ship*, 592 A.2d at 562 (quoting Comment, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1251 (1950)); see also *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d at 777-78 (“Labelled the royal prerogative, the rule protected the king when he brought suit in the posture of a plaintiff.”); *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 103 (Pa. 1981) (“Like the doctrine of sovereign immunity, the doctrine of *nullum tempus* appears to have had its roots in the prerogative of the Crown.”).

72. *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874, 876 (Ill. 1983) (“The doctrine of, sovereign immunity from suit . . . went under the slightly misleading but popular maxim of ‘the King can do no wrong’ (*Rex non potest peccare*), from which it was but a slight jump in logic to conclude that the King could not commit mistakes such as laches either”) (citations omitted).

73. *Devins v. Borough of Bogota*, 592 A.2d 199, 202 (N.J. 1991).

74. *South Carolina ex rel. Condon v. City of Columbia*, 528 S.E.2d 408, 413 (S.C. 2000) (“We find persuasive the reasoning of the New Jersey and Colorado courts, which concluded the *nullum tempus* doctrine is but an aspect of sovereign immunity.”); *Washington Suburban Sanitary Comm’n v. Pride Homes, Inc.*, 435 A.2d 796, 801 (Md. 1981) (“the doctrine that limitations do not run against the State stems from the theory of sovereign immunity”); *New Jersey Educ. Facilities Auth. v. Gruzen P’ship*, 592 A.2d at 561 (“*nullum tempus* is but an aspect of sovereign immunity”); *Shootman v. Dept. of Transp.*, 926 P.2d 1200, 1205 (Colo. 1996) (“*nullum tempus*

Once immunity from statutes of limitations is considered one application of sovereign immunity, the necessary corollary is that the former must yield once the later is extinguished. The Supreme Court of South Carolina succinctly held in a 2000 opinion that, "the abolition of the common law doctrine of sovereign immunity signaled the end of the common law doctrine of *nullum tempus*."⁷⁵ Likewise, the New Jersey Supreme Court had earlier observed:

[W]e believe that despite its different evolution, the doctrine of *nullum tempus* is but an aspect of sovereign immunity. This Court has previously determined that the doctrine of sovereign or governmental immunity, in the areas of the State's tort and contract liability, does not accord with notions of fundamental justice applicable to our elected representative form of government. . . . Having 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 suit in a timely manner.⁷⁶

In addition to New Jersey and South Carolina, the Colorado Supreme Court concurs that once sovereign immunity is abrogated, the *nullum tempus* doctrine is left without its historic and logical underpinning and must, therefore, be abrogated.⁷⁷

Not all courts agree. The split in authority is summarized in Chart 1 below, which reviews those jurisdictions that have considered whether abolition of common law sovereign immunity is grounds for abrogating the *nullum tempus* doctrine. This split is primarily due to the relative importance placed by these various courts on the preservation of public rights policy previously outlined in Part II of this Article as compared to countervailing policy considerations.⁷⁸ Whether the preservation of public rights is a useful distinction between sovereign immunity and the *nullum tempus* doctrine is analyzed below in Part III.D, and the assumption that *nullum tempus* does in fact foster the preservation of public rights is questioned in Part V, below.

is simply one aspect of sovereign immunity"); *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 691 P.2d 178, 186 (Wash. 1984) ("once sovereign immunity was eliminated, the rule of *nullum tempus* became inapplicable"); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d at 875-76 ("sovereign immunity from liability and governmental immunity from statutes of limitation shared a philosophical origin and have the similar effect of creating a preference for the sovereign over the ordinary citizen"); *but see* *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d at 104 (finding "the doctrines have been consistently recognized as distinct").

75. *South Carolina ex rel. Condon v. City of Columbia*, 528 S.E.2d at 413.

76. *New Jersey Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d at 561 (citations omitted).

77. *Shootman v. Dept. of Transp.*, 926 P.2d at 1205 ("the *nullum tempus* doctrine as applied to the State was left with few underpinnings after we both abrogated sovereign immunity in relation to the State . . . and determined that *nullum tempus* is simply one aspect of sovereign immunity") (citations omitted).

78. The policy weight of the preservation of public rights rationale is discussed, *infra*, in Part IV of this Article. The countervailing policy implications of the *nullum tempus* doctrine are reviewed in detail, *infra*, in Parts III.C, III.D, and IV of this Article.

Chart 1
 State Appeals Court Decisions Considering the Effect of the Abolition of
 Common Law Sovereign Immunity on Continued Viability of *Nullum
 Tempus* Doctrine⁷⁹

State	Does Abrogation of Common Law Sovereign Immunity Eliminate <i>Nullum Tempus</i> ?	Year	Notes
Colorado ⁸⁰	Yes	1991, 1996	Unanimous Decisions.
Illinois ⁸¹	No	1983, 1989	One judge filed a strong dissenting opinion in 1983.
New Jersey ⁸²	Yes	1991	Unanimous Decisions.
Ohio ⁸³	No	1988	A six judge panel of the Court affirmed, but two judges dissented and the concurring Judge filed an opinion expressing personal reservations concerning the policy behind <i>nullum tempus</i> .
Pennsylvania ⁸⁴	No	1981	Unanimous decision reversing decision abrogating <i>nullum tempus</i> by intermediate court of appeals.
South Carolina ⁸⁵	Yes	2000	Unanimous decision.

C. Shared Unjust Effects

Just as common law sovereign immunity was found to be unjust by the Law Court,⁸⁶ the *nullum tempus* doctrine likewise has grossly inequitable and unjust

79. This chart is limited to those reported cases that have decided whether the court's abrogation of common law sovereign immunity heralds the elimination of the *nullum tempus* doctrine.

80. *Shootman v. Dept. of Transp.*, 926 P.2d at 1203; *City of Colorado Springs v. Timberlane Assoc.*, 824 P.2d 776, 782-83 (Colo. 1992).

81. *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874, 878 (Ill. 1983); *Bd. of Educ. of Chi. v. A, C & S, Inc.*, 546 N.E.2d 580, 600-02 (Ill. 1989).

82. *New Jersey Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d 559, 564 (N.J. 1991) (holding *nullum tempus* not applicable to contract claims); *Holloway v. State*, 593 A.2d 716 (N.J. 1991) (holding *nullum tempus* not applicable to tort claims based on subrogation).

83. *Dept. of Transp. v. Sullivan*, 527 N.E.2d 798 (Ohio 1998).

84. *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101 (Pa. 1981).

85. *South Carolina ex rel. Condon v. City of Columbia*, 528 S.E.2d 408 (S.C. 2000).

86. See discussion *supra* Part III.A; see also *New Jersey Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d at 561 ("the doctrine of sovereign or governmental immunity, in the areas of the State's tort and contract liability, does not accord with notions of fundamental justice applicable to our elected representative form of government").

effects. At a basic level, it is unfair for the government to have the ability to raise the defense of improper delay against a citizen suing it, while a citizen being sued by the government cannot do so.⁸⁷ If statutes of limitations are thought to be fair when applied to citizens, in a democracy there is little reason why it would be unfair to apply them to the government. Both the government and citizens generally must play by the same rules when prosecuting or defending civil actions, including with respect to pleadings, evidence, depositions, judgment, trial procedure, rights to appeal, and other statutes governing the maintenance of civil actions.⁸⁸

The fundamental injustice caused by the *nullum tempus* doctrine is that it renders the public forever vulnerable to a suit by the State for long past conduct or omissions. The decision when to pursue an action is left to the unfettered discretion of the State. Even where the State chooses to delay, with full knowledge of a claim, and for no good reason, the *nullum tempus* doctrine gives it free reign to do so. In cases where civil penalties assessed on a per day basis are available, the State's delay in asserting a claim may greatly enhance potential liability.⁸⁹ The government is also free to sue after witnesses or information useful for defense may be dead and gone.⁹⁰ This allows the State to wait until a citizen becomes defenseless to pursue an action. For example, a suit could be brought after a crucial witness for the defense has died, or evidence has disappeared. Although there are procedures for the preservation of testimony, there may be little incentive for undertaking the significant efforts to do so based on speculation that the State could at some distant point in the future pursue a claim based on long ago conduct.

This is not a hypothetical concern. In the recent case of *State v. Knightly*,⁹¹ the State of Maine filed a claim against the Special Administrator of the Estate of the sole proprietor of a wholesale and retail oil distribution business to recoup costs spent cleaning up an oil spill.⁹² The oil spill was discovered ten years prior to the filing of a claim, and shortly after discovery of the spill the State began to incur expenses it would later claim as reimbursable. The deceased sole proprietor of that business was the hands-on operator of the business, and would have been a key witness and a crucial source of the information required to defend the claim. It was plainly unjust for the State to have filed suit ten years after the discovery of the spill, years after it had expended all or most of the costs later claimed for reimbursement, and after the operator of the business was deceased and no longer able to testify or locate insurance or other documentary evidence. Yet, the *nullum tempus* doctrine countenances this practice. This is similar to the sort of brazen injustice that led the Law Court to abrogate sovereign immunity in the first place.

87. *City of Shelbyville v. Shelbyville Restorium, Inc.*, 481 N.E.2d 874, 879 (Ill. 1983) (Clark, J., dissenting).

88. *Dept. of Transp. v. Sullivan*, 527 N.E.2d at 802 (Brown, J., dissenting).

89. *See, e.g.*, 38 M.R.S.A. § 349(2) (2001) (authorizing penalties of between \$100 and \$25,000 per day); *Town of Orono v. LaPointe*, 1997 ME 185, ¶ 12, 698 A.2d 1059, 1062 (imposing minimum \$100 per day penalty to violation lasting 730 days).

90. In expressing "personal reservations concerning the public policy considerations underlying [the *nullum tempus* doctrine,]" an Ohio Supreme Court Justice wrote, "I am not enamored with the notion that the state may sue at its leisure while some taxpayer's records draw dust and his or her witnesses' memories fade." *Dept. of Transp. v. Sullivan*, 527 N.E.2d at 801 (Wright, J., concurring).

91. CV-00-265 (Me. Super. Ct., Ken. Cty., July 12, 2001) (Studstrup, J.).

92. *Id.* slip op. at 1-2.

It is also unjust for the State to have the right to pursue a claim against a private party whose own right to pursue a counterclaim or a third-party claim may long have expired. The State may, in some circumstances, be entitled to assert the statute of limitations as a defense to a counterclaim when the State's own claim survives only by virtue of the *nullum tempus* doctrine. Third-party claims for contribution, indemnification, or other third-party actions might once have been available to cover some or all of the liability flowing from a claim by the State, but may be subject to generally applicable limitations periods in some circumstances, or otherwise unavailable because a party might have been insured under a claims-made insurance policy, and might once have had the opportunity to file a claim. A party that is sued for tax liability, for example, might once have been in a position to pursue claims against third-parties jointly liable for the tax but now bankrupt, dead, or otherwise unavailable.

In fact, in the case of *Caruso v. State Tax Assessor*⁹³ this was exactly the circumstance. The defendant was the guarantor of a third party's tax liability.⁹⁴ That third party had been a substantial functional business for approximately six years after the guarantee had been granted, but thereafter went bankrupt.⁹⁵ Because the State pursued its claim against the guarantor only after the underlying debtor became unavailable and the bankruptcy estate was closed, the State eliminated the guarantor's ability to pursue claims against third parties for the debt.⁹⁶ Although the guarantor was successful in achieving the dismissal of the State's claims because the claims were purely contractual, the guarantor was at a substantial disadvantage as a result of the State's delay.⁹⁷ It is unjust and unfairly prejudicial for the State's delay to cause a private party to lose otherwise available opportunities to share with or pass liability on to third parties.

The *nullum tempus* doctrine also operates without regard to culpability. The criminal code protects intentional, even violent, wrongdoers from prosecution after a defined time period set by statutes of limitations.⁹⁸ By contrast, persons who may only be negligent or even strictly liable without regard to intent, are forever subject to a civil suit. It is unjust for someone who is criminally culpable to have the benefit of a statute of limitations, but for someone who exercised due care but may be strictly liable, for example, to be completely exposed, forever, to a claim by the State. Presumably, the law should favor a more lengthy pursuit of those who are more culpable.

There may be some instances where the abolition of the *nullum tempus* doctrine could prevent the government from taking up the cause of citizens who share a public right and are unable to bring suit on their own behalf.⁹⁹ To the extent that the government may sue on behalf of citizens, however, such actions may be deemed more in the nature of private suits and therefore outside the protection of the *nullum tempus* doctrine. There may also be instances where it would be contrary to the public interest and would be difficult for the public to protect that interest if stat-

93. CV-99-80 (Me. Super. Ct., Ken. Cty., Nov. 14, 2000) (Marden, J.).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 17-A M.R.S.A. § 8 (1983 & Supp. 2000).

99. *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874, 877 (Ill. 1983).

utes of limitations applied. For example, the State may have a difficult time asserting rights with respect to the huge tracts of land it owns, and the public may have a great interest in protecting that land. Such cases might require a different weighing of the competing policies at issue than would be the case for a more routine action by the State to collect damages. Exceptional circumstances should not, however, countenance a policy that, when applied in routine matters, is unjust.

D. Shared Applicability of the "Preservation of Public Rights" Rationale

Some courts have distinguished sovereign immunity from the *nullum tempus* doctrine on the grounds that only the latter is justified on the basis that it preserves public rights.¹⁰⁰ The "preservation of public rights" policy rationale for the *nullum tempus* doctrine, however, is in many respects equally applicable to both sovereign immunity and the *nullum tempus* doctrine. While common law sovereign immunity is more broadly applicable, the preservation of the public rights rationale "would serve as well to reinstate the doctrine of governmental immunity from all claims"¹⁰¹ as it would to support the continued vitality of the *nullum tempus* doctrine:

If the State has immunity when its employee forgets a deadline for filing of a claim, then why should the State not have immunity when its employee forgets to engage the emergency brake of a truck, allowing the truck to drive into another's living room? After all, the public in both instances pays the price for the employee's neglect.¹⁰²

Under both doctrines, the public ultimately bears the price of official neglect.¹⁰³ Sovereign immunity operated to prevent the government from paying damages, while, similarly, without *nullum tempus* the government can be time-barred from collecting damages. From the State's perspective, the inability to collect damages has the same effect as the obligation to pay damages. In either case, taxpayers suffer. From the public's perspective, a person's obligation to pay damages may be as devastating as a person's inability to collect damages. An obligation to pay and an inability to collect are, at least financially, two sides of the same coin. In light of the applicability of the preservation of public rights justification to both sovereign immunity and *nullum tempus*, there is little reason why the rationale should have sufficient force to support the continued viability of the *nullum tempus* doctrine when it could not sustain the broader and more widely applicable doctrine of common law sovereign immunity.

100. The Illinois Supreme Court found that *nullum tempus* "is designed to preserve public rights when the government is slow to assert them on the public's behalf, while [sovereign immunity] is used to promote the autonomy of public bodies by insulating them from liability for their actions." *Id.*; see also *Dept. of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 104 (Pa. 1981).

101. *New Jersey Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d 559, 564 (N.J. 1991).

102. *Id.*

103. *Id.*; see also *Shootman v. Dept. of Transp.*, 926 P.2d 1200, 1206 n.8 (Colo. 1996) ("Both liability avoidance and public rights preservation, however, provide protection for the public fisc. We are not persuaded that the distinction supplies an adequate basis in policy to justify retaining *nullum tempus* while rejecting sovereign immunity."); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d at 876 (holding that "both doctrines . . . embody[] a policy of protecting the public purse rather than as perpetuating philosophical notions of sovereign power").

IV. APPLICABILITY OF POLICIES UNDERLYING STATUTES OF LIMITATIONS TO CLAIMS BY THE STATE

The Law Court has recognized that statutes of limitations further a number of compelling public policies. Statutes of limitations "have been created primarily for the purpose of keeping 'stale' claims out of court, . . . a policy favoring potential defendants who 'might otherwise be faced for long periods with the possibility of meeting claims under more difficult conditions.'"¹⁰⁴ Statutes of limitations allow parties to rely on a settled state of affairs, and foster stability in human affairs.¹⁰⁵ "[S]tatutes of limitation promote justice by discouraging long delays, prohibiting the prosecution of stale claims, and providing closure to the parties."¹⁰⁶ Limitation periods also provide an incentive for reasonably prompt investigation of claims and potential wrongdoing.¹⁰⁷ The fact is that meritorious claims are not often allowed to gather dust.

The policy reasons for applying statutes of limitations to private citizens apply with equal force in favor of applying limitation periods to the State.¹⁰⁸ The Supreme Court of South Carolina stated its finding on this score as follows:

[W]e find that applying the . . . statute of limitations to the State as well as private individuals is proper because such statutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs. "Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of the statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose . . . is to protect potential defendants from the protracted fear of litigation. . . ." These principles ring true regardless of whether the party is a private individual, a corporation or a governmental entity.¹⁰⁹

Evidence needed for a claim brought by the State is not magically better preserved than evidence needed for a private party's claim. The courts are no less burdened by a stale claim brought by the State than by a private citizen. There is no reason why the State should not have the same incentives that citizens have to promptly and diligently protect its rights. There is nothing special about state claims per se that make them more difficult for the State to timely bring them.

104. *Williams v. Ford Motor Co.*, 342 A.2d 712, 713 (Me. 1975) (citation omitted) (quoting *Tantish v. Szendey*, 158 Me. 228, 230-31, 182 A.2d 660, 661 (1962)).

105. *Oklahoma City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 141-142 (Okla. 1988) (Opala, J., dissenting).

106. *Shootman v. Dept. of Transp.*, 926 P.2d at 1207.

107. *Myrick v. James*, 444 A.2d 987, 994 (Me. 1982) (limitation periods are intended to "stimulate activity"); cf. *State v. Gammon*, 519 A.2d 721, 722 (Me. 1987) (limitation periods are "justified . . . by the need to protect individuals from having to defend themselves against stale charges and by the need to provide an incentive for reasonably prompt investigation of criminal activity").

108. *Shootman v. Dept. of Transp.*, 926 P.2d at 1206 ("the policies underlying statutes of limitation support application of those limitations to the State").

109. *South Carolina ex rel. Condon v. City of Columbia*, 528 S.E.2d 408, 413-14 (S.C. 2000) (citation omitted) (quoting *Moates v. Bobb*, 470 S.E.2d 402, 404 (S.C. Ct. App. 1996)); see also *Metro. R.R. Co. v. District of Columbia*, 132 U.S. 1, 11 (1889) ("It is just as much for the public interest and tranquility that municipal corporations should be limited in the time of bringing suits as that individuals or private corporations should be.").

People will rely on what they believe is a settled state of affairs without respect to potential liability for long past events involving the government. In sum, the reasons for applying statutes of limitations to claims by private citizens counsel with equivalent force in favor of applying limitations to the State.

V. WHETHER THE *NULLUM TEMPUS* DOCTRINE PRESERVES PUBLIC RIGHTS

As noted, the primary justification for the *nullum tempus* doctrine is to preserve public rights for the benefit of all.¹¹⁰ Although there is apparently no empirical evidence on the subject, a number of courts, starting with Justice Story,¹¹¹ have accepted this notion at face value. On closer examination, there are serious questions whether the *nullum tempus* doctrine actually does foster the preservation of public rights. In response to a majority opinion affirming the application of the *nullum tempus* doctrine in Ohio, one dissenting Justice wrote:

The majority, in its laudable aim of protecting the public purse, has, it seems to me, misread human nature and the bureaucratic process. Inviting the state to dally without limitation in the pursuit of revenues or public rights is not likely to produce better results than would be achieved by requiring the state to proceed as expeditiously as every other civil litigant.¹¹²

In short, shielding the government from an incentive to investigate claims diligently and to proceed promptly is not necessarily the best way to protect public rights. Longer delay before asserting a claim often makes it more difficult to succeed.¹¹³ Defendants become unable to pay, go bankrupt, dissolve, disappear, or otherwise become unavailable. In addition, modern information technology and centralized government should allow superior collection and management of information, including deadlines, than would have been the case when the *nullum tempus* doctrine was first imported to colonial America from England.¹¹⁴ It may well be that the effect of the *nullum tempus* doctrine is exactly the opposite of that which is intended.

VI. CONCLUSION

The *nullum tempus* doctrine is ripe for abrogation in the State of Maine. The doctrine is inconsistent with the plain language of Maine's six-year limitation period for "all civil actions." It would also be incongruous for the doctrine to survive the Law Court's abrogation of sovereign immunity, which undercut its historical foundation and rational justifications. The same injustice that led the court to abrogate sovereign immunity lives on in *nullum tempus*. The doctrine is contrary to the good reasons for having any statute of limitations. In the end, the doctrine may not actually do much to preserve public rights given that it removes an incentive for the government to act promptly to investigate and pursue its claims. At

110. See *supra* notes 19-20 and accompanying text.

111. See *supra* note 20 and accompanying text.

112. Dept. of Transp. v. Sullivan, 527 N.E.2d 798, 802 (Ohio 1988) (Brown, J., dissenting).

113. Of course, certain situations may warrant a delay in pursuing a claim. This is not a justification for the *nullum tempus* doctrine given that straightforward tolling agreements, stays, and other mechanisms exist to allow a conscious choice to delay the filing of an action, or to suspend an action once filed.

114. See Dept. of Transp. v. Sullivan, 527 N.E.2d at 801 (Wright, J., concurring).

least three state high courts have abrogated the *nullum tempus* doctrine for these reasons.¹¹⁵

Given the split in authority in those states where common law sovereign immunity has been abrogated and *nullum tempus* remains a creature of the common law and the reasoning of those courts,¹¹⁶ it is clear that whether to retain the doctrine is a policy judgment. The Law Court should not defer to the Legislature. Referring to the common law, the Law Court has recognized "its responsibility to tend to the care and pruning of the perennials of its own garden."¹¹⁷ The court has stated:

[W]here change is required due to obsolescence in court-made rules of law, and where such change may create lacunae in the legal matrix which the Legislature is peculiarly well-equipped to address, the surest and swiftest means to assure progress is for common-law judges to confidently act on their responsibility to abrogate their own work product when reason proves its invalidity.¹¹⁸

In light of this principle the court has time and again acted forcefully to eliminate anachronisms of the common law, including common law sovereign immunity itself.¹¹⁹ The court is not bound to hold blindly to out-dated precedent. It should not leave the citizens of this state at the mercy of the *nullum tempus* doctrine.

115. See *supra* notes 80, 82, 85, and Chart I.

116. See *supra* notes 80, 82, 85, and Chart I.

117. *Myrick v. James*, 444 A.2d 987, 992 n.6 (Me. 1982).

118. *Id.* at 993 n.6; see also *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982) ("When principles fail to produce just results, [we have] found a departure from precedent necessary to fulfill [our] role of reasoned decision making."); *Pendexter v. Pendexter*, 363 A.2d 743, 749 (Me. 1976):

The genius of the common law is its flexibility and capacity for growth and adaptation. When common-law principles are no longer supportable in reason they are no longer supportable in fact. . . . It is fundamental that the rules of common law which are court-made rules can be changed by the court when it becomes convinced that the policies upon which they are based have lost their validity or were mistakenly conceived.

(citation omitted).

119. See, e.g., *LaBier v. Pelletier*, 665 A.2d 1013, 1016 (Me. 1995) (rejecting the common law doctrine of imputed parental negligence as "not only unsound, but absurd and inhuman") (quoting *Denver City Tramway v. Brown*, 143 P.2d 364, 368 (Colo. 1914)); *MacDonald v. MacDonald*, 412 A.2d 71, 75 (Me. 1980) (abolishing the doctrine of interspousal immunity); *Black v. Solmitz*, 409 A.2d 634, 639-40 (Me. 1979) (abolishing doctrine of parental immunity); *Poulin v. Colby Coll.*, 402 A.2d 846, 851 (Me. 1979) (abolishing distinction between licensees and invitees and holding that "an owner or occupier of land owes the same duty of reasonable care in all the circumstances to all persons lawfully on the land"); *Davies v. City of Bath*, 364 A.2d 1269, 1273 (Me. 1976); *Pendexter v. Pendexter*, 363 A.2d at 750 ("[T]he old common-law rule that the father is primarily liable for the support of his children without regard to the mother's earnings and assets is outmoded and must be updated."); see also Comment, *The Role of the Maine Law Court in Abrogating the Common Law Doctrines of Governmental and Charitable Immunity from Tort Liability*, 25 ME. L. REV. 359 (1973).