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BECAUSE FOREVER IS TOO LONG

AUSHER M. B. KOFSKY*

INTRODUCTION

Is tax fraud worse than sexual molestation of children? Federal and state legislatures limit the government's time to prosecute nearly all heinous offenses, including that particular evil.[1] Yet Congress provides the Commissioner of Internal Revenue with unlimited time to prosecute allegations of tax fraud, false returns, and instances of non-filed tax returns.[2] This Article contends that the incongruent unlimited tax writ is no longer, if it ever was, appropriate.

Consider the following hypothetical example based on a real case. Imagine a small business operator, in his late eighties, with his health

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1. *See* Twersky v. Yeshiva University, 579 Fed. App'x. 7 (2nd Cir. 2014), *aff'd* 993 F. Supp. 2d 429 (S.D.N.Y. 2014) (in conspicuous contrast to the unlimited time to investigate allegations of tax fraud discussed throughout this Article, the United States Court of Appeals for the Second Circuit recently upheld the dismissal of a $680 million lawsuit for sexual abuse of students by faculty of a high school). *See generally* 993 F. Supp. 2d at 432-433 (the plaintiffs, 34 former high school students, alleged that three faculty members, one of whom who became the high school's principal, abused the boys from the 1970 through the 1990s). The Court ruled "all of the claims in the Complaint are *prima facie time-barred*." *Id.* at 436 (*emphasis added*). Similarly, in Massachusetts, the statute of limitations for indictment on murder is unlimited, 27 years from the date of the crime for rape of a child; 10 years for armed robbery; and 6 years for all other crimes. *See*, MASS. GEN. LAWS. ch. 277 § 63 (2012).

2. This Article interchangeable refers to the person or party holding the power to assess a tax as the Commissioner, the Crown, the Executive, the Government, the Internal Revenue Service (IRS), the King, or the Sovereign.

and mental capacity slipping. He continued to prepare the business's payroll reports himself, refusing to let family or professionals help him.[3] Total payroll was around $125,000 per year. Minor reporting errors began to creep, such as a $1,000 discrepancy in one year's year-end payroll reports. This particular error should have resulted in the owner owing at most $153 for 15.3 percent FICA tax on $1,000. The business owner, however, ignored, did not understand, or no longer had the ability to correct the errors, contact the Internal Revenue Service (IRS), or take any action. Years went by fast. The IRS eventually discovered the mistakes and determined a ten percent penalty under the section 6721 punishment for intentional disregard of information reporting reports.[4]

Unfortunately, the section 6721 penalty is 10 percent of the total payroll, not just 10 percent of the tax deficiency. Consequently, by near the end of the owner's life, the penalties and interest accumulated for a three-year period to nearly $100,000 from a tax base that was more than twenty times smaller. The owner could not understand how the government's penalties could be so large, and did not have the financial or mental state to seek help. The IRS ultimately garnished the owner's pension from a prior long-time job, and liened the owner's modest estate. This left his children and grandchildren nothing despite a lifetime of hard work and modest living.

The issue of limitless tax investigations came to a fore recently because of two seemingly unrelated lawsuits. In one event, a court tossed out a suit by nearly three-dozen former high school students who alleged that three of their teachers had sexually molested students over three decades.[5] Significant here, the court dismissed their suit as being "*prima facie time barred*."[6]

In sharp contrast, on April 10, 2013, Sumner Redstone (Redstone) filed a petition in what became *Redstone v. Commissioner*, (hereinafter *Redstone*).[7] Redstone contested a notice of deficiency dated January 11, 2013.[8] The notice determined that Redstone owed about $1.1 million in tax and penalty, plus interest.[9] Per the notice, Redstone did not file a gift

3. Payroll reports include Form 941, Employer's Quarterly Federal Tax Return, Form W-2, Wage and Tax Statement, and Form W-3, Transmittal of Wage and Tax Statements.

4. 26 U.S.C. § 6721(e)(2)(A) (2012).

5. Twersky v. Yeshiva University, 579 Fed. App'x. 7 (2nd Cir. 2014), aff'd 993 F. Supp. 2d 429 (S.D.N.Y. 2014).

6. *Id.*

7. Amended Petition, Redstone v. Commissioner, (2014) (No. 8097-13) (referencing the Notice of Deficiency attached to Redstone's petition).

8. *Id.*

9. *Id.* Specifically the Notice of Deficiency determined that Redstone owed $738,000 in

tax return and, similarly, did not pay gift tax on his transfer of stock to trusts for his two children.[10]

The type of determination that the Commissioner made in *Redstone* was unremarkable. What was unusual was the timing of the notice. Redstone had transferred the stock in question in 1972.[11] Thus, the determination did not occur until forty-one years after the transfer.[12] By then, Redstone was nearly ninety years old.[13]

The reason that the Commissioner could reach back that far is that sections 6501(e)(1)-(3), (9) of the Internal Revenue Code (IRC) provides the Sovereign with an unlimited time to determine a deficiency arising from fraud, a false tax return, or where the taxpayer has not filed a tax return.[14] In *Redstone*, the Commissioner alleged fraud as well as lack of filing a gift tax return.[15]

Forty years or 140 years would not have mattered. All periods of time are fair game, especially considering that transferee liability can extend the liability to the next generation(s).[16]

The disparate treatment of limitations periods in the two cases lead to the following question of societal priorities: does our society truly want to protect its purse better than its children? This article analyzes that disturbing incongruity by focusing on the reasons behind the unlimited tax statute. The Article concludes that Congress should bring tax investigations in line with most other laws by enacting a reasonable limit on tax investigations.

That seemingly modest proposal, however, engenders strong

gift tax and $369,000 in a fraud penalty under Internal Revenue Code (IRC) § 6653(b); 26 U.S.C. § 6653(b) (2014).

10. Amended Petition, Redstone v. Commissioner, (2014) (No. 8097-13). The Notice of Deficiency on Schedule Two, page one, determined that Redstone made simultaneous gifts of National Amusements, Inc., stock, each gift worth $1.25 million, to trusts for his son Brent and to his daughter Shari.

11. *Id.* The Notice of Deficiency stated the transfer occurred in the tax year ending September 1972. Likewise, Redstone's Amended Petition, filed Feb. 28, 2014, stated the alleged transfer occurred during the period ending Sept. 30, 1972.

12. The duration is a similar magnitude to the biblical forty-year wanderings of the Israelite nation. *See* Deuteronomy-Devarim- 1:3. *See also* Exodus-Shemot 16:35.

13. Redstone, *supra* note 7 (stating that the transfer occurred in the tax year ending Sept. 1972). Likewise, Redstone stated the alleged transfer occurred during the period ending Sept. 30, 1972. *Id.* Specifically. the Commissioner determined that Redstone owed $738,000 in gift tax and $369,000 in a fraud penalty under IRC § 6653(b); 26 U.S.C. § 6653(b) (2014).

14. Unless otherwise specified, IRC in this article refers to Title 26 of the United States Code of 1986, as amended, entitled the Internal Revenue Code.

15. *See* Redstone, *supra* note 7.

16. 26 U.S.C. § 6901 (2000) (allowing the Commissioner in certain circumstances to collect unpaid tax from a transferee when collection from the transferor is unavailable).

reactions. Scholars contend that laws should not enable rich people or cheats to prosper. On the other hand, other similarly intelligent people perceive that an unlimited investigation period sets a Damocles sword of unchecked government power hanging over the heads of ordinary citizens. For the reasons discussed below, this Article agrees with the latter group, and urges Congress to enact a reasonable limit on the Sovereign's time to investigate tax matters related to fraud, false returns, or non-filed returns.

Reasonable minds can differ as to what assessment period would be appropriate. This Article suggests that ten years is the correct statute of repose to apply. The Article, however, proposes an interim ceiling of twenty-one years until the new policy has had a trial period and until the government can adopt new procedures. Notwithstanding, whatever is the correct period, the point is that forever is too long.

Section II of this Article reviews the current law, discusses the legislative history, and analyzes Congress's original rationales for an unlimited period. Section III reviews the main equitable and statutory doctrines on limitations of actions. Section IV analyzes the pros and cons of a finite assessment period. Section V lays out the Article's proposal in further detail, offering a new way forward to balance the competing policy concerns at stake here. Section VI brings the analysis back to the *Redstone* case to illustrate the many pitfalls of continuing with a system that enables unrestricted investigations.

I. INTERNAL REVENUE CODE STATUTES LIMITING ASSESSMENTS

This section analyzes the status, history, and original purpose of the Internal Revenue Code's sections related to limitations on assessments.

A. *Current Provisions*

Below are the pertinent provisions of the Code. Section 6501, entitled "Limitations on Assessment and Collection," contains these provisions.[17]

The law's general rule is that the Commissioner has three years to assess a tax after the taxpayer has filed a return or after the due date of the return, whichever is later.[18] In circumstances where the taxpayer has omitted more than twenty-five percent of gross income, the Commissioner's scope expands to six years.[19] As pertinent here, when

17. 26 U.S.C. § 6501 (2012).

18. 26 U.S.C. § 6501(a)-(b)(1) (2012).

19. 26 U.S.C. § 6501(e)(1) (2012). For estate and gift transfer taxes, *see also* 26 U.S.C. § 6501(e)(2) (2012).

the taxpayer commits fraud, files a false return, or fails to file a tax return, the Commissioner can assess a tax "at any time."[20] Similarly, the Code separately repeats the unlimited period for unreported gift tax. Namely, if a taxpayer fails to report a gift for which the taxpayer would have owed a gift tax, the Commissioner can also assess "at any time."[21]

B. *Legislative History*

This section discusses Congress' evolution to the current unlimited assessment period. After prior intermittent federal impositions of income tax, beginning in 1862 with the American Civil War, the saga began in earnest with the States' ratification of Article XVI amending the United States Constitution.[22] The Sixteenth Amendment, which the U.S. Secretary of State certified on February 25, 1913, made constitutional the federal government's authority to impose income taxes.[23]

Specifically, the Sixteenth Amendment provided that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[24] "Whatever source derived" includes all accretion to a person's wealth with the exception of adoption expense reimbursements, child support payments, gifts received, bequests, inheritances, workers' compensation benefits, meals and lodging for the convenience of your employer, compensatory damages awarded for physical injury or sickness, welfare benefits, and cash rebates from a dealer or manufacturer.[25]

Congress wasted no time in addressing assessments. In the preamble to the statutes in the Revenue Act of 1913, also known as the Underwood Tariff Act, Congress provided a three-year limit for the Commissioner to assess a non-filed, false, or fraudulent returns, as follows:

20. 26 U.S.C. § 6501(c)(1)-(3) (2012).

21. 26 U.S.C. § 6501(c)(9) (2010).

22. *See* Revenue Act of 1862, ch. 119, §§ 89-93, 12 Stat. 432, 473-75 (1862) (enacting a 3% tax on "annual gains, profits, or income of every person residing in the United States" above $600, with 5% rate applicable over $10,000). U.S. CONST. amend. XVI; Ratified Amendments, 1795-1992; General Records of the United States Government; Record Group 11; National Archives, *available at 16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, *100 Milestone Documents*, OURDOCUMENTS.GOV, http://www.ourdocuments.gov/doc.php?doc=57 (last visited May 26, 2015).

23. U.S. CONST. amend. XVI.

24. *Id.*

25. *Taxable or Non-Taxable Income?*, INTERNAL REVENUE SERV. (Feb. 4, 2011), http://www.irs.gov/uac/Taxable-or-Non-Taxable-Income%3F.

> E. That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, *except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time* ***within three years after said return is due,*** make a return upon information obtained as provided for in this section or by existing law . . . .[26]

The first instance of unlimited time for assessment appears to have arisen just five years later in the Revenue Act of 1918.[27] The Act both extended the time for a regular assessment to five years and added for the first time the "at any time" language at issue here, as follows:

> (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. *In the case of such false or fraudulent returns, the amount of tax due may be determined* ***at any time*** *after the return is filed, and the tax may be collected at any time after it becomes due*.[28]

C. *Congressional Rationales for Unlimited Assessments*

Unfortunately, a search of the Committee reports did not reveal an explanation of the 1918 Revenue Act's change to unlimited assessments.[29] This Article, however, speculates that three factors

26. Sixty-Third Congress. Sess. I. Chs. 15, 16 (38 Stat. 114, 1913), The Statutes at Large of the United States of America, from March 1913 to March 1915, Volume XXXVIII, Part 1, p. 169.

27. A year-by-year statutory review forms this conclusion. *See* first inclusion in Sixty-Fifth Congress. Sess. III. Ch. 18, 40 Stat. 1083 (1919), The Statutes at Large of the United States of America, from April 1917 to March 1919, vol. XL, § 250(d). The Supreme Court, in dicta, appears to confirm this timing. *See* Badaracco v. Comm'r, 464 U.S. 386, 393 n.7 (1984) ("Under every general income tax statute since 1918, the filing of a false or fraudulent return has indefinitely extended the period of limitations for assessment of tax."). *See* Revenue Act of 1918, § 250(d), 40 Stat. 1083. Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083 (1919).

28. Revenue Act of 1918, ch. 18, § 250(d), 40 Stat. 1083 (1919).

29. Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Limitation Period*, 116 TAX NOTES 687 (2007) [hereinafter Camp's Compendium] (noting the lack of committee reports by explaining that "[t]he first change [the change to unlimited assessments] is, I hope, self-explanatory (especially since there is not a word about it in the committee reports that I could find).").

motivated Congress. These factors relate to the United States history of income taxation that the text below summarizes.

1. Revenue to Finance U.S. Participation in World War I

One major cause relates to Congress' goal in implementing the first income tax. That goal was to help fund the Civil War.[30] Similarly, when Congress implemented the limitless assessment period through the Revenue Act of 1918, the United States was again deep in military expenditures. The United States had occupied Haiti beginning in 1915, and America became heavily involved in World War I, officially declaring war in 1917.[31]

Evidence of the urgent financial need includes the following. The Committee on Ways and Means report that accompanied the 1918 Revenue Act unmistakably identified the war's exigent revenue need. For instance, the opening subtitle begins by stating that, "[t]he first problem i[s] determining our fiscal policy to finance this war."[32] The report goes on to state that imperative need for additional revenue, as follows:

> On May 27, 1918, the President address[ed] the Congress in joint session and recommended that the Congress set to work immediately to draft the new revenue measure and recommended that the necessary additional taxes be secured from war profits, incomes, and luxuries. . . .
> The Committee on Ways and Means announce to all concerned that it will hold public hearings at Washington, D.C., beginning June 6, 1918. It is deemed necessary large to increase the revenue from taxation. It seems to the committee that it will be necessary to raise the necessary increased revenue chiefly from taxes upon incomes, excess of war profits, luxuries, and semi-luxuries. In the preparation of the new tax measure the committee will give careful consideration to all suggestions with reference to the measure, together with suggestions of other revenue sources.[33]

Similarly, or perhaps even more so, a special news report in the

30. *Id.*

31. The United States invaded Haiti in July 1915 following the assassination of Haiti's President. *U.S. Invasion and Occupation of Haiti, 1915-34, Milestones: 1914-1920,* OFFICE OF THE HISTORIAN, U.S. DEPARTMENT OF STATE, https://history.state.gov/milestones/1914-1920/haiti (last visited April 10, 2015). Similarly, the United States had officially declared war on the Axis Powers on December 7, 1917, signaling the U.S.'s official entry into the war. *Id.*

32. H.R. REP. NO. 65-767, at 1 (1918).

33. *Id.* at 2.

New York Times detailed the fiscal urgency, as follows:

> The largest revenue raising bill in the history of this or any other nation was unanimously reported to the House today by Representative Claude Kitchin, Chairman of the Ways and Means Committee, which drafted the measure after public hearings and daily executive sessions covering three months. . . .
> The bill follows closely the taxation sources of the last two revenue laws, increasing the rates greatly in most cases and *correcting inequities of the present laws*.[34]

2. Change in Tax Administration Methodology

A second probable factor related to the implementation of an unlimited assessment period arose as a curative to the federal government's prior tax administration practices. The nation's initial primary revenue sources were customs duties, tariffs, and excise taxes.[35] As noted above, federal taxation of income began during the Civil War and continued intermittently until becoming permanent with ratification of the Sixteenth Amendment in 1913.[36]

In response to the State's ratification of the Sixteenth Amendment, Congress, as noted above, swiftly enacted the Revenue Act of 1913.[37] A key element is that Congress mainly carried over language from its prior tax administration.[38] Under the prior system, because of the limited number of taxpayers, taxpayers simply prepared lists with values.[39] Tax assessors then personally visited the taxpayers to determine the correctness of the taxpayers' lists.[40]

With the establishment of income tax, however, the number of returns ballooned.[41] Importantly, taxpayers also began mailing their returns to the Commissioner.[42] The prior procedures became inadequate to handle the increased volume and lack of personal visits.[43] Many

34. *New Revenue Bill Reported; May Be Law In A Month*, N.Y. TIMES, Sept. 4, 1918 (emphasis added).

35. U.S. v. James Daniel Good Real Property, 510 U.S. 43, 69 (1993) (stating that the adoption of the Sixteenth Amendment permitted income tax to replace excise taxes as the federal government's main source of revenue.

36. *See* U.S. CONST. amend. XVI.

37. *See* Revenue Act of 1913 (Underwood-Simmons Act), chs. 15-16, 38 Stat. 114 (1913).

38. Camp's Compendium, *supra* at note 29, § II.A.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

taxpayers apparently took advantage of the situation by underreporting their true tax liability.[44] Consequently, the avalanche of incoming tax returns may have caused Congress to react, or more precisely, overreact, by increasing the assessment period to forever as one of the means to correct inequities.

In recent times, however, technological advances have enabled the tax monitoring system to become highly digitalized.[45] Recent developments include advances to the IRS's Business Systems Modernization Program that integrates e-filing, real-time data entry, and web-based services.[46] Further, the IRS's annual assessment of its own information technology references the progress of new technological tools, including the Customer Account Data Engine 2 database validation, Information Reporting and Document Matching case management system, and the Taxpayer Advocate Service Information System.[47] These ever-expanding technologies are evidence that the IRS does not need an unlimited window to uncover non-filings and tax fraud, especially at the expense of garnishing an individual's life work as in the hypothetical scenario this Article discussed in the introduction.

3. Populist Concerns

The final major factor attributable to the creation of the "at any time" provision is more speculative. Populism, led by major figures such as Williams Jennings Bryan, was active at the time.[48] For instance, "[w]e demand a graduated income tax" was a demand in 1892 of the

44. *Id.*

45. Joe Taylor Jr., *5 Tips for Digitizing Small Business Tax Receipts*, SMALL BUSINESS COMPUTING (Mar. 15, 2013), http://www.smallbusinesscomputing.com/tipsforsmallbusiness/5-tips-for-digitizing-small-business-tax-receipts.html.

46. RICHARD J. DURBIN ET AL., BUSINESS SYSTEMS MODERNIZATION: INTERNAL REVENUE SERVICE'S FISCAL YEAR 2011 EXPENDITURE PLAN 49-50 (United States Government Accountability Office Oct. 2011), *available at* http://www.gao.gov/assets/590/585642.pdf.

47. MICHAEL E. MCKENNEY ET AL., ANNUAL ASSESSMENT OF THE INTERNAL REVENUE SERVICE INFORMATION TECHNOLOGY PROGRAM 21-23 (TIGTA Sep. 30, 2014), *available at* http://www.treasury.gov/tigta/auditreports/2014reports/201420095fr.pdf (highlighting specifically, the IRDM Case Management System was implemented to narrow the tax gap by requiring third party payors, to submit information returns to the IRS to report income earned by businesses on merchant payment cards and the cost basis for securities transactions).

48. SAMUEL E. MORISON ET AL., A CONCISE HISTORY OF THE AMERICAN REPUBLIC: VOLUME 1, 446 (1970) (running on the Populist and Democrat lines, Bryan lost to William McKinley, but still garnered 46.8 percent of the popular vote in the 1896 presidential campaign).

Populist party.[49] Further, from a vertical equity standpoint, the wealthy are more likely to have sufficient assets or significant income to surreptitiously transfer than moderate or low net worth individuals. Whether these considerations were an important influence at the time is only conjecture, but remains a possibility.

II. DEFINITIONS OF EQUITABLE AND STATUTORY LIMITATIONS ON ACTIONS

This section provides definitions for pertinent equitable canons and statutory laws pertaining to limitations of actions. The purpose of these definitions is to provide a foundation for the discussion that this Article later provides.

A. *Sovereign Immunity*

Sovereign immunity is an equitable doctrine that arose from the principle that "[t]he King can do no wrong."[50] The King or Sovereign was therefore immune from suits for injuries the Sovereign may have caused.[51]

American jurisprudence adopted sovereign immunity. The principle "is elementary that 'the United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'"[52] Further, courts continue to enforce sovereign immunity.[53]

Notwithstanding, the United States republic seeks as an ideal the consent of the governed to guard against wrongdoings that the Sovereign might impose.[54] Congress has slowly loosened the Sovereign's strict

49. 26 CONG. REC. APP. 601 (Jan. 30, 1894) (statement by Rep. Lafe Pence, Populist-CO).

50. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246 (Garland Publ'g 1978) ("The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing: in him is no folly or weakness").

51. Joseph Mack, *Nullum Tempus: Governmental Immunity to Statutes of Limitation, Laches, and Statutes of Repose*, 73 DEF. COUNS. J. 180, 185 (Apr. 2006); Stanwood R. Duval, *Sovereign Immunity, Anachronistic or Inherent: A Sword or a Shield?*, 84 TUL. L. REV. 1471, 1472 (2010).

52. United States v. Mitchell, 445 U.S. 535,538 (1980) (citations omitted).

53. Sarah L. Brinton, *Three-Dimensional Sovereign Immunity*, 54 SANTA CLARA L. REV. 237, 239 (2014) (citing John Paul Stevens, *Is Justice Irrelevant?* 87 NW. U. L. REV. 1121, 1126 (1993) for the proposition that "the doctrine [of sovereign immunity] is unquestionably alive and well today").

54. *Id.* at p. 238 (citing JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, § 95 (Broadview Press 2015) (1989) (explaining that securing a civil society requires consent of the governed)).

infallibility.[55] Significant waivers of sovereign immunity include the Judiciary Act of 1799, which Congress enacted to ensure that citizens were not' "subjected to the inconvenience of unwarranted and untimely law suits instigated by the government."[56] Other official waivers of sovereign immunity were the Tucker Act in 1887, the Federal Tort Claims Act in 1946, and the Administrative Procedures Act, also in 1946.[57] Further, critics continue to challenge sovereign immunity as inappropriate for today's large administrative bureaucracy.[58]

The above waivers evidence that when good cause exists, the crown does waive its claim to sovereign immunity to protect the interests of individual citizens. The matter of unlimited prosecution of tax investigations is another area in which the government must waive its unlimited power over its citizens.

B. *Quad Nullum Tempus Occurrit Regi*

A close offshoot to sovereign immunity, and directly applicable to the matter at hand, is the equitable doctrine of *quod nullum tempus occurrit regit* (hereinafter *nullum tempus*).[59] "No time runs against the

55. George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 492 (1953).

56. Judiciary Act of 1799, ch. 22, § 89, 1 Stat. 695 (1799).

57. Brinton*, supra* note 55, at 250 (explaining that The Tucker Act, Mar. 3, 1887, ch. 359, 24 Stat. 505, 505, waived sovereign immunity by granting the U.S. Court of Claims the authority to decide contract, constitutional, and other non-tort money claims against the United States); *Id.* at 249-250 (the Federal Tort Claims Act, ch. 646, 62 Stat. 982, 983-85 (1948), waived sovereign immunity for injured citizens to sue the federal government for tortious acts by federal employees, in response to a U.S. military aircraft smashing into the Empire State Building); *Id.* at 250 (explaining that The Administrative Practices Act, ch. 324, 60 Stat. 237 (1946), enabled suits against the U.S. if an agency action caused a legal injury to a person, amended in 1976 to make the waiver definitive).

58. Pugh, *supra* note 55, at 494 (1953), which concluded that with respect to sovereign immunity:

> Thus the matter rests-a confused, conflicting, but tenacious acceptance of an outmoded and undemocratic dogma. Perhaps it is now too late for the court to make a *volte face*, and completely reject the doctrine-as historically, theoretically and practically unsound and undesirable. Nevertheless, corrective legislation is needed-legislation which would combine and integrate our present law, and eliminate the quirks and injustices that must characterize a hodge-podge, sporadic legislative process. . . . The courts might use as their guide the phrase inextricably linked with the history of English attempts to evade the tentacles of the immunity concept-'Let right be done!

See also former Justice John Paul Stevens, *Is Justice Irrelevant?,* 87 NW. U.L. REV. 1121, 1126 (1993), for the proposition that sovereign immunity is in reality a "judge-made doctrine" that deposits seeds of injustice.

59. Mack, *supra* note 61..

king" is the literal translation.[60] *Nullum tempus* exempts the Sovereign from laches and from statutes of limitations that bind ordinary private parties.[61] The IRC's current unlimited time to assess tax mirrors this doctrine.[62]

Nullum tempus shares a common heritage with sovereign immunity.[63] In 1938, however, the Supreme Court articulated a separate purpose for *nullum tempus*, 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.[64]

Notwithstanding the laudable goal of protecting the public purse, that goal does not mean the government should have unlimited time to prosecute its claims. Competing interests can outweigh the financial ones. For instance, critics of *nullum tempus* express concerns similar to the following principle: "[a] similar balancing of interests leads to the conclusion that *nullum tempus* should be abandoned. Statutes of limitation should be permitted to fulfill their primary function: protection of defendants from stale claims."[65]

60. *Id.*

61. U.S. v. Hoar, 26 Fed. Cas. 329, 330 (1821) (proposing that "no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it. For it is said, that, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king shall not be bound, unless the statute is made by express words to extend to him. Bac. Abr. 'Prerogative,' E. 5"). *See Case of Magdalen College*, 11 Cooke, 68, 74b, 1 Rolle, 151, (explaining that 'the king has a prerogative, *quod nullum tempus occurrit regi*, and, therefore, the general acts of limitation or of plenarty, shall not extend to him.'"); *U.S. v. Kirkpatrick*, 22 U.S. 720, 735 (1824); Guaranty Trust Co. of NY v. U.S., 304 U.S. 126, 132 (1938). *Cf.* U.S. v. Summerlin, 310 U.S. 414, 416 (1940) (stating that "[i]t is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights").

62. As noted throughout this Article, IRC § 6501(c) allows the Commissioner in certain instances to assess a tax "at any time." 26 U.S.C. § 6501(c) (2014).

63. Mack, *supra* note 51.

64. U.S. v. Hoar, 26 Fed. Cas. 329, 330 (1821); Guaranty Trust Co. of NY v. U.S., 304 U.S. 126,132 (1938).

65. Thomas A. Bowden, *Sovereign Immunity from Statutes of Limitation in Maryland*, 46 MD. L. REV. 408, 413 (1987). *See* 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, 375 (2003) (stating that the doctrine of nullum tempus is

In a similar critical vein, "the nullum tempus doctrine likewise [to sovereign immunity] has grossly inequitable and unjust effects . . . [t]he 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."[66] The untenable situation of citizens being vulnerable, forever, to the Sovereign's whip or whim is one of the prime reasons to enact a limitation on tax assessments.

C. *Laches*

Laches is another pertinent equitable principle. Laches decides whether the injured party acted within a reasonable time in filing a claim.[67] The goal is to avoid prejudicing the defendant from a plaintiff's unreasonable delay.[68] Accordingly, the concept of laches is highly relevant here. The law's currently unlimited period for tax investigations is susceptible to the Executive bringing claims after the parties have lost or purposely destroyed relevant documents. The crown's claims can arise late in the taxpayer's life or even after the individual's death. Because laches, however, provides an equitable relief, and because statutory law governs most tax disputes, tax petitioners must rely instead on statutory relief, as discussed below.[69]

Statutory relief does not preclude the application of the reasoning behind the equitable relief of laches to the issue at hand. The goal is to ensure that laws do not forever burden citizens with the fear of being the target of a government investigation.

"ripe for abrogation"). *See also* State of So. Carolina v. City of Columbia, 339 S.C. 8, 18, 528 S.E.2d 408. 413 (2000) (citing Shootman v. Dep't of Transp., 926 P.2d 1200, 1203-1205 (Colo.1996) and New Jersey Educ. Facilities Auth. v. Gruzen Partnership, 125 N.J. 66, 592 A.2d 559, 561 (1991) for the agreement of the Supreme Court of South Carolina with the Colorado and New Jersey courts that the abolition of sovereign immunity in those states also removed the underlying purpose for the related doctrine of nullum tempus). *Cf.* Mack, *supra* note 51, at 180 (countering that nullum tempus has an increasingly important role in helping state attorneys general recover for slow to discover mass tort harms, including tobacco, lead paint, and firearm products).

66. Schutz, *supra* note 65, at 384-85.

67. Mack, *supra* note 51, at 183.

68. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002) "('[A] party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party. In such cases, the federal courts have the discretionary power to "to locate 'a just result' in light of the circumstances peculiar to the case" (citations omitted)).

69. Comm'r v. McCoy, 484 U.S. 3, 7 (1987) ("The Tax Court is a court of limited jurisdiction and lacks general equitable powers." (citations omitted)); Cohen v. Comm'r, 139 T.C. 299, 303 (USTC 2012) ("This [U.S. Tax] Court, however, is not a court of equity and does not provide for equitable relief." (citations omitted)). Although Redstone and other taxpayers are generally petitioners and not defendants, they are in substance defending a tax position that the Commissioner has disputed.

D. *Statutes of Repose*

Statutes of repose are a statutory response to laches in that they serve to protect potential defendants from delayed lawsuits.[70] Statutes of repose prevent litigation after a statutorily defined period regardless whether the potential plaintiff had yet discovered or suffered the injury.[71] Service or product providers, such as architects, builders, or manufacturers, might otherwise be liable decades later for negligence, tort, or product liability.[72] Many important economic activities might slow or cease because of the near endless potential liability.[73] Accordingly, more than forty-five states have enacted statutes of repose.[74] Pertinent to this discussion, statutes of repose tend to provide longer spans than statutes of limitation.[75] Statutes of repose generally limit actions to ten years.[76]

The doctrine of repose is directly applicable to the case of the hypothetical business owner that this Article described in the introduction. Congress should extend similar repose to tax matters to protect ordinary citizens from the Executive garnishing their life's work. This legislature should adopt the reasoning behind statutes of repose not only to protect the individual citizen, but also to free the citizenry's ability to partake in economic activities without the need to protect against potential claims the government might bring decades after error had occurred. This would further policy aims of economic growth.

E. *Statutes of Limitations*

Statutes of limitations date back at least as far as Roman law.[77] Later, in 1236 in England, "statutes were enacted prohibiting real property actions if they were based on a seisin [fee simple] prior to a given date, such as the coronation of Henry II."[78] England continued similarly with the Limitations Act of 1623.[79] The Limitations Act set distinct limitations on actions beginning with when the certain act

70. Mack, *supra* note 51, at 183-184.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Harvard Law Review Association, *Developments in the Law—Statutes of Limitation*, 63 HARV. L. REV. 1177 (1950) (citing Sohm, The Institutes of Roman Law 318-22 (Ledlie's transl., 3d ed. 1907)).

78. *Id.* (citing 2 Pollock and Maitland, The History of English Law 81 (2d ed. 1898)).

79. *Id.* (citing Limitations Act, 1623, 21 JAC. 1, c. 16).

occurred, equivalent to a statute of repose discussed above.[80]

Similar to statutes of repose, the purpose of statutes of limitations is to set a period after which the injured party can no longer commence a lawsuit.[81] Main reasons for the implementation of a statute of limitations include protecting defendants from stale claims, judicial economy, and to exclude dilatory plaintiffs.[82] Although overlapping with statutes of repose, the difference is the statutes of limitations, at least originally, sought to cutoff a lawsuit from the time of the original transaction or harm.[83] In contrast, statutes of response, as noted above, sought to cutoff litigation from the potentially long delayed discovery of the injury.[84]

The Supreme Court has succinctly summarized the rationales for statutes of limitations, as follows:

> Statutes of limitation find their justification in necessity and convenience, rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are, by definition, arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay.[85]

In summary, statutes of limitations, while arbitrary and imperfect, serve an important role in the judicial system. As the Supreme Court stated above, legislatures implement a statute of limitation out of necessity to protect defendants from defending against purported injuries that challenge faded memories and lost records. Thus, the aim of statutes of limitations is not to set the guilty free, but to serve justice by ensuring that plaintiffs do not bring claims against which a defendant cannot properly defend. Consequently, to preserve the integrity of the judicial system, Congress must limit the Executive's time to prosecute claims of fraud, false filing, and non-filing of tax returns.

III. REASONS FOR AND AGAINST A FINITE ASSESSMENT PERIOD

Below are the major pros and cons for enacting a limitations period.

80. *Id.*
81. Mack, *supra* note 51, at 181.
82. *Id.* at 181-82
83. *Id.* at 181.
84. *Id.* at 183-84.
85. Chase Securities Corp. v. Donaldson*,* 325 U.S. 304, 313-314 (1945).

A. *Against a Limitation*

This subsection analyzes the factors against enacting a limitations period on assessments.

1. Preserving Confidence in the Voluntary Tax System

Perhaps the number one reason against enacting a limitation is the concept that under the volunteer tax system, taxpayers want to have confidence that the rest of the citizenry, especially the well-to-do, cannot easily cheat the system.[86] In other words, from a fairness or vertical equity standpoint, the highest concern is that the largest undisclosed transfers or biggest fraud would likely arise from people or businesses with the most income or wealth to hide.[87]

Echoing the above sentiments, co-commentators wrote favorably of the open-ended assessment period that unpinned *Redstone*.[88] After recapitulating the facts of the case, the commentators provided the following conclusion:

> Although it may seem unfair for the IRS to look back over 40 years at a transaction, in this instance the IRS has every right to do so. If a gift tax return is never filed, the IRS has an unlimited amount of time to proceed. As unhappy as it may make taxpayers, an open-ended statute of limitations in cases of nondisclosure is key to the integrity of a self-reporting system like the gift tax. The rules apply to Sumner Redstone as equally as to other taxpayers.[89]

In counterpoint, this Article contends that equipping the Commissioner with an unlimited time to prosecute claims undermines the aims of equity that the open-ended writ seeks to protect. The unlimited window allows the Commissioner to investigate cases by whatever means, at whatever time, and by whichever priorities the Executive sees fit. This unbound writ leads to mounds of concern related to arbitrary and capricious prosecutions. For instance, the observer can never know what truly motivated the government to prosecute Redstone 40 years later, whether it was his wealth, jealously,

86. *See* Couch v. U.S., 409 U.S. 322, 335 (1973) (the tax system is "largely dependent upon honest self-reporting"); Spies v. United States, 317 U.S. 492, 495 (1943) (stating that in the era before income tax withholding the tax "system can function successfully only if those within and near taxable income keep and render true accounts").

87. From a definitional standpoint, the principle of horizontal equity ensures that similarly situated taxpayers are responsible for a similar proportion of tax. Vertical equity ensures that people who earn higher income pay a proportionate increase in their tax.

88. Bridget J. Crawford & Theresa Fortin, *Sumner Redstone's 40-Year-Old Gift, Estate and Gift Rap*, TAX NOTES, Aug. 19, 2013, at 833-835.

89. *Id.* at 835.

political leanings, religion, or any other factor.[90]

A better path would be to increase reporting requirements and implement a stronger penalty system to discourage, deter, or detect unreported or underreported transactions. By requiring the Commissioners to use tools of investigation to bring claims timely against violators of the self-reporting tax system, society can better achieve goals of vertical and horizontal equity without the potential for looming prejudicial suits hanging over the head of citizens and their heirs for all eternity.

2. Facilitating Tax Fraud

Similar to the above contention, another theory against the implementation of a limitation is that tax cheats may plan to profit, or attempt to profit, knowing that at a foreseeable date, they will benefit from their misdeeds. The following quotation expresses the important axiom that a person should not benefit from intentionally committing a misdeed:

> To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.[91]

Moreover, a similar censure toward fraud is a prevailing sentiment in the laws, as the following Supreme Court condemnation illustrates:

> The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the nonperformance which he has himself occasioned, for the law says to him, in effect: This is your own act, and therefore you are not damnified. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong.[92]

90. Josh Gerstein, *Political Affiliations of Viacom Board Could Impact CBS Case*, N.Y. SUN (Sep. 21, 2004), *available at* http://www.nysun.com/national/political-affiliations-of-viacom-board-could/1993/; David Marc, Sumner M. Redstone, in REFERENCE FOR BUSINESS: ENCYCLOPEDIA FOR BUSINESS (2d ed. 2015), *available at* http://www.referenceforbusiness.com/biography/M-R/Redstone-Sumner-M-1923.html.

91. Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 232-233 (1959).

92. R.H. Stearns Co. of Boston, Mass., v. U.S., 291 U.S. 54, 61-62 (1934) (internal quotations and citations omitted).

This Article agrees that fraud is a repugnant matter. Similarly, prominent tax commentators have expressed concern that the current system for reporting gifts leaves wide gaps that taxpayers can easily exploit.[93] The existence of gaps, however, does not justify the use of unlimited time to investigate these acts. Instead, Congress and the Executive should consider reorganizing gift tax reporting requirements to more effectively fight against specific instances of fraud.

In particular, the Commissioner has even more powerful tools unimaginable one hundred years ago when Congress first enacted the limitless decree. For instance, the Sovereign now has computer matching to check reporting of SSNs for dependents, Forms W-2s for wages, and Forms 1099 for dividends, gambling winnings, and miscellaneous income. As a yardstick, the IRS has the largest concentration of computer power outside the Pentagon.[94] Recently, the IRS had five times more employees than the FBI.[95]

Congress has already designed the Code to punish the fraudulent taxpayer. For instance, the Code attaches a seventy-five percent penalty to incidents of fraud as compared to a twenty percent penalty for instances of negligence.[96] Similarly, the above tax commentators proposed stiff penalties for the non-reporting of taxable gifts.[97] Likewise, this Article suggests that Congress or the Treasury could promulgate a requirement for reporting real property transfers and a subsequent penalty for not complying with the requirement. These steps would not prevent or catch every crook, but the number of undetected transfers would potentially drop without holding the uncertainty of suit over the public, similar to the small business owner this Article depicted in the introduction. In summary, the development and use of tools would protect against fraud such that an unlimited assessment period would no longer have adequate justification.

3. Government Revenue Needs

No doubt the federal government needs money. Every dollar helps. For example, the 2014 fiscal year deficit was $485 billion, with an

93. Jay A. Soled, Paul L. Caron, Charles Davenport, *Rethinking the Penalty for the Failure to File Gift Tax Returns*, TAX NOTES, Nov. 18, 2013, at 757.

94. Robert D. Hershey Jr., *I.R.S. Chief Faces Task of Rebuilding*, N.Y. TIMES, Mar. 4, 1990, at F23, col. 1, *available at* http://www.nytimes.com/1990/03/04/business/ your-taxes-irs-chief-faces-task-of-rebuilding.html.

95. DAVID BURNHAM, A LAW UNTO ITSELF: POWER, POLITICS AND THE IRS 16, 79 (1989).

96. *Avoiding Penalties and the Tax Gap*, IRS, http://www.irs.gov/uac/ Avoiding-Penalties-and-the-Tax-Gap (last updated Aug. 20, 2010).

97. Soled, *supra* note 93, at 760.

accumulated debt at the end of the year of $16.7 trillion.[98]

Notwithstanding, the amount collected from late government investigations is likely to be small. Currently, transfer taxes, which include gift, estate, and generation skipping taxes, account for less than two percent of federal gross domestic product.[99] The foregone revenue after a prudent limitations period and a stronger enforcement program is likely to be further insignificant. For instance, even the three million dollar potential collection in the *Redstone* case will probably yield a *de minimis* or even a negative financial return to the federal government after considering expenditures on investigation, prosecution, and judicial resources. Similarly, from the citizen's standpoint, consider the hypothetical this Article posed at the beginning. For not having paid a $153 FICA tax in one year, and similar amounts in the next two years, the IRS subjected the business owner to garnishment of his entire life's work. These kinds of penalties do not justify the Treasury's *de minimis* forgone revenue because of a person's senility.

Thus, here too perspective needs to apply. One must recognize tradeoffs, such that "[a]s statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out."[100] In pointing out these advantages and disadvantages, it is clear that the Treasury's *de minimis* at best financial benefits are not substantial enough to place a constant threat of suit on the populace through the implementation of unlimited prosecutorial power.

B. *In Favor of a Limitation*

This subsection analyzes the key factors that favor a limitation on assessments.

1. Violation of Constitutional Protections

An in-depth examination of constitutional law is beyond the scope of this Article. Nonetheless, unlimited intrusions by the Sovereign may violate fundamental constitutional rights of procedural and/or

98. *See Historical Tables*, OFFICE OF MANAGEMENT AND BUDGET, Tables 1.1 and 7.1, *available at* https://www.whitehouse.gov/omb/budget/Historicals.

99. *An Update to the Budget and Economic Outlook: 2014 to 2024*, CONGRESSIONAL BUDGET OFFICE, 23 (Aug. 2014), *available at* https://www.cbo.gov/sites/default/files/45653-OutlookUpdate_2014_Aug.pdf (stating that combined revenue from "excise taxes, estate and gift, taxes, customs duties, remittances from the Federal Reserve, and miscellaneous fees and fines," totaled 1.6 percent of gross domestic product for 2014).

100. Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 301-02 (1946).

substantive due process. These rights encapsulate nearly all, or all, of the succeeding reasons in favor of implementing a reasonable prosecution period. The Supreme Court has explained these crucial constitutional protections as follows:

> The Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint. Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.[101]

Thus, the unlimited assessment period causes serious concern about the government's constitutional overreach because the statute does not narrowly tailor the unlimited time on when the Commissioner can bring a claim against deficiencies arising from fraud, nonfiling, or false returns.[102] By allowing the unlimited writ, the courts and Congress have endangered the citizenry's fundamental right to demanding that the state not deprive any person of life, liberty, or property without due process of law. Because the law does not narrowly tailor the limitations period, the courts must examine the law by strict scrutiny to determine whether the interests of the Treasury are a compelling state interest that outweighs the individual citizen's right to due process.

This Article contends that the interest of the King's fisc does not outweigh the interest of the individual citizen in being free from perputual threat of the Sovereign's claims. As the *Twersky* case showed, not even the state's compelling interest in protecting against perpetrators of childhood sexual molestation justify the implementation of an unlimited prosecution period.[103]

101. Washington v. Glucksberg, 521 U.S. 702, 719-21 (1997) (internal quotations and citations omitted).

102. Michael Cohn, *U.S. Sued for Seizure of Tax Refunds to Settle Old Social Security Overpayments*, ACCOUNTING TODAY (Feb. 18, 2015), https://fairtax.org/articles/u-s-sued-for-seizure-of-tax-refunds-to-settle-old-social-security-overpayments (explaining that '[i]n recent years, both the SSA and the Treasury Department amended their regulations to revoke a limitations period that had prevented the government from offsetting tax refunds to collect overpayment debts more than 10 years old."). This too is a violation of the principles of judicial and economic efficiency, as often, citizens spend their tax returns, and thus stimulate the economy, with purchases made with their tax refunds. Additionally, because this money is often spent, it is not available beyond ten years to be recollected. It is also unjust to demand such a payment.

103. Twersky v. Yeshiva University, 579 Fed. App'x. 7 (2nd Cir. 2014), aff'd 993 F. Supp. 2d 429 (S.D.N.Y. 2014).

2. Finality

Finality is an indispensable principle of justice. After a certain time, almost all matters, except for murder and harms of similar magnitude, to which financial claims do not rise, should end. Citizens should be able to turn their gaze forward. The Supreme Court has encapsulated this fundamental maxim with respect to taxes through the following holding in *Rothensies v. Electric Storage Battery Co.*[104] In *Rothensies*, the Court declared the importance of a limitations period in the event of a recoupment of tax paid by a taxpayer who, it was eventually determined, overpaid his tax obligation:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.[105]

Although the court was discussing a claim of recoupment of taxes paid, there is no overwhelming evidence that contradicts the application of this reasoning to the implementation of a limit on investigations into tax deficiencies. The Court further asserted that statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[106] Had Congress or the Executive previously applied the principle of finality, then, in cases similar to that of the hypothetical business owner, the Commissioner would not have been able to seize all of the defendant's wealth because of simple errors. In summary, the principle of finality is an indispensable instrument of justice.

3. Proportionality with Other Limitations

As noted at the outset of this Article, even molestation of high school students has a limitations period.[107] In the criminal realm,

104. *Rothensies*, 329 U.S. at 301-02 (1946). *See also*, Chertkof v. United States, 676 F.2d 984, 991 (4th Cir. 1982) (stating that "[o]ne must, after expiration of a fixed period, be able to know that a matter is over and done with"); Steven J. Willis, *Some Limits of Equitable Recoupment, Tax Mitigation, and Res Judicata: Reflections Prompted by Chertkof v. United States*, 38 TAX LAW 625 (Spring 1985).

105. *Rothensies*, 329 U.S. at 301.

106. *Id.*

107. *See Twersky*, 579 Fed. App'x. 7, aff'd 993 F. Supp. 2d 42.

generally only murder carries an open-ended prosecution period.[108] Otherwise, prosecution of even the most heinous crimes such as manslaughter or rape of a child carries a limitations period.[109] Likewise, financial crimes by government officials carry a finite prosecution period.[110]

Applicable here, 28 U.S.C. § 2462 provides the default limitations period on civil government actions. The statute, entitled, "[t]ime for commencing proceedings," provides the following limitation:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.[111]

The background to the statute is as follows:

> For nearly two centuries, section 2462 and its predecessors have provided a catch-all statute of limitations that applies to certain actions initiated by the federal government. The origins of the present version of title 28, section 2462 of the United States Code date back to the Judiciary Act of 1799. In the Judiciary Act of 1799, Congress moved away from the rule of sovereign immunity and subjected the federal government to statutory limitations periods. The language of the statute of limitations has changed over the years, but the basic purpose of maintaining an equitable system of government has remained the same. Congress did not want citizens to be subjected to the inconvenience of unwarranted and untimely lawsuits instigated by the government.[112]

108. For example, *see* MASS. GEN. LAWS ch. 277 § 63 (2012) ("an indictment for murder may be found at any time").

109. MASS. GEN. LAWS ch. 277 § 13B (2012) (stating that in Massachusetts the government has twenty-seven years to indict for manslaughter). *Id.* § 22A (stating that in Massachusetts the government has twenty-seven years to indict for rape of a child).

110. *Id.* § 17 (stating that in Massachusetts the government has ten years to indict for improper receipt of a gift/bribe); *Id.* § 19 (stating that in Massachusetts the government has 10 years to indict for having a financial self-interest in a government matter).

111. 28 U.S.C. § 2462 (2014).

112. Edward J. Carroll, III, Note, Mullikin v. United States*: "Big Brother" Is Still Watching; The IRS Can Assess Penalties at any Time*, 16 W. NEW ENG. L. REV. 181, 185-86 (1994); 28 U.S.C. § 2462 (1978) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992)) (originally Pub.L. 80-773, 62 Stat. 974 (1948)); 26 U.S.C. §§ 6501(a), (b)(1), (c)(1)-(3)(9), (e)(1) (2010); Judiciary Act of 1799, ch. 22, § 89, 1 Stat. 695 (1799); Mullikin v. United States, 90-2 U.S. Tax Cas. (CCH), 85,304, 85,306 (E.D.Ky.1990), *rev'd*, 952 F.2d 920 (6th Cir.1991), *cert. denied*, 113 S. Ct. 85 (1992).

This Article concurs strongly that a limitations period is imperative to prevent unwarranted and untimely lawsuits by the government. For instance, a shorter period would have prevented the government's intrusion in *Redstone* and in the hypothetical scenario at the start of this Article.

4. The Decline of Tax Exceptionalism

Tax exceptionalism is the concept that administrating tax law is above all other areas of administrative law and therefore requires greater deference.[113] This concept is under serious reconsideration. For instance, on February 21, 2014, the Duke Law Journal hosted its Forty Fourth Annual Administrative Law Symposium entitled "Taking Administrative Law to Tax," which focused on whether tax exceptionalism is still relevant after three recent Supreme Court decisions.[114]

If tax law is no different from other administrative law, then harmonizing the limitations period with other administrative limits makes strong sense. As noted above, the 5-year limitation of 28 U.S.C. § 2462 is the default statute for financial claims by the federal government.[115] For the reasons stated below, five years appears to be too brief a time, but the current unlimited period is far too long. This Article suggests that if tax revenues are not fundamentally different from any other government receipt, then this circumstance provides another reason why an unlimited period to assess is inappropriate. The harms attendant to unlimited time to investigate tax deficiencies are identical if not more unsettling than claims brought to prosecute other financial crimes. As evidenced by the hypothetical posed by this Article and the *Redstone* case, citizens subject to tax investigation under the unlimited decree may not commit errors out of deceit, but because of simple error,

113. Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222-24 (2014).

114. Duke Law Journal's 44th Annual Administrative Law Symposium (Feb. 21, 2014). The Symposium's announcement provided the following explanation: "*Duke Law Journal's* 44th Annual Administrative Law Symposium will focus on the vigorous debate about the proper relationship between tax administration and general administrative law. The Supreme Court alone has considered the interplay of tax and administrative law three times in the last two years. National Federation of Independent Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (reshaping the relationship of the Anti-Injunction Act to APA suits); United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012) (reshaping *Brand X* in ways similar to how *Mead* reshaped *Chevron*); Mayo Foundation for Medical Education and Research v. United States, 131 S.Ct. 704 (2011) (reshaping judicial review of tax regulations by rejecting claims that tax regulations were subject to tax-specific precedent rather than *Chevron* deference).

115. 28 U.S.C. § 2462 (1978) (current version at 28 U.S.C. § 2462 (1988 & Supp. IV 1992)) (originally Pub.L. 80-773, 62 Stat. 974 (1948)).

lack of knowledge, or genuine disagreement regarding the taxability of certain transactions.

5. Preventing Stale Claims

As the case of *United States v. Kubrick*, illustrates, "the right to be free of stale claims in time comes to prevail over the right to prosecute them."[116] The government's interest in preventing stale claims is connected with the interest of preserving judicial economy and upholding justice.[117]

Likewise, allowing stale claims denies justice, as follows:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.[118]

Similar sentiments of unfairness include the following: "'Long delays by the government in instituting suit, of course, cause harm to the defendant and are in the interest of no one.'"[119] Likewise, "'[l]ong dormant claims have often more of cruelty than of justice in them.'"[120] For example, the government stripped the elderly business owner depicted at the beginning of this Article of nearly all his earthly wealth because of recording errors that originally began by depriving the Treasury of only $153. The disproportion in amount due versus penalties collected provides an important depiction of how the imposition of an exceedingly old claim can cause more cruelty than justice. Further, in the *Redstone* case, if he were to unfortunately pass, his heirs would be left to answer for an exorbitant penalty because of a substantive disagreement in whether gift tax applied to a transfer of stock to trusts that Redstone timely reported on the pertinent corporate tax return.

116. United States v. Kubrick, 444 U.S. 111, 117 (1979).

117. Carroll, *supra* note 112, at 201..

118. *Kubrick*, 444 U.S. at 117; Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-349 (1944).

119. South Carolina *ex rel.* Condon v. Columbia, 528 S.E.2d 408, 414 (S.C. 2000) (citing Shootman v. Dep't of Transp., 926 P.2d 1200, 1206 (Colo. 1996)).

120. Bowden, supra note 65, at 413 (1987) (citing A'Court v. Cross, 130 Eng. Rep. 540, 541 (1825), for the observation that "statutes of limitation address the defendant's overriding need for access to evidence, including live testimony, before it is lost, destroyed, or forgotten").

6. Spurring the Sovereign's Timeliness

The government should not sleep on its claims.

> Subjecting government to limitations would promote justice by eliminating stale claims, which force the courts to render judgments based on unreliable evidence. Surely, if government can survive responsibility for negligent acts and breaches of contract on the part of its truck drivers, health care workers, and procurement officers, then government can survive responsibility for failures to timely file lawsuits on the part of its litigators.[121]

In the end, this Article agrees with the sentiment that "'[r]esponsibility on the part of the Crown does not involve its degradation; it is nothing more than the obvious principle that in a human society acts involve consequences and consequences involve obligation[s].'"[122] The law should not burden the general citizen with fear of potential claims that the Executive may bring for tax deficiencies simply because the IRS did investigate claims in a timely manner. Further, timelier investigations may promote confidence in the tax system in a vertical and horizontal equity sense as citizens see justice executed promptly.

7. Administrative and Judicial Economy

Pursuing old claims distracts the Commissioner from easier to audit current transactions, and clogs up the courts with old matters. As noted above, the purpose of the 28 U.S.C. § 2462 statute is as follows:

> Not only is it clear from the legislative history of section 2462 that Congress sought to impose time restraints on the federal government for penalty proceedings, but it is also clear that Congress believed statutes of limitations against the government are necessary for a just and efficient system of government.[123]

Allowing the Executive to pursue stale claims also consumes valuable judicial resources that government could use to adjudicate justice. Based on the *de minimis* returns that section V(A)(3) of this Article explores, the public's interest would be better served by the Commissioner pursuing current deficiencies as opposed to investigating stale transactions that occurred decades earlier.

121. *Id.* at 429-30.

122. Pugh, *supra* note 55, at 492, n.68 (quoting from Laski, *Responsibility of the State in England*, 32 HARV. L. REV. 447, 451-452 (1919)).

123. Carroll, *supra* note 112, at 201; S.REP. NO. 363, 89th Cong., 1st Sess. 7 (1965), reprinted in 1965 U.S.C.C.A.N. 1826, 1832.

8. Discouraging Arbitrary Assessments

Allowing an unlimited assessment period opens the door to selective prosecution. This is not to cast aspersions on the IRS, the Commissioner, or any other government servant. It is just a simple statement that humans are fallible. Allowing unlimited assessment time may enable government agents to pursue political or personal goals. The current controversy over the IRS's handling of not-for-profit tax exemption requests of conservative groups is an example.[124]

Moreover, as the IRS faces budget cuts it is increasingly important that the Services use its limited resources in the most efficient manner possible.[125] By pursuing tax deficiencies caused by fraud, false filing, and non-filings that occurred outside of 21 years the IRS is expending efforts for *de minimis* gain.[126] Maintaining an unlimited statute of limitations in the aforementioned instances is directly encouraging the assessment of arbitrary claims that have long since gone stale.

IV. AUTHOR'S PROPOSAL

After balancing the above pros and cons, the Author strongly believes that limiting the Sovereign's temporal reach to twenty-one years would be a wise first step, for the following reasons.

Considering Congress's default limitations of five years on government actions pursuant to 28 U.S.C. § 2462, this Article recommends a long-term goal of a three year, five year, and ten year assessment regimen. This regimen would function by maintaining the current three years to assess for regular filings, five instead of six years for gross omissions, and ten years instead of infinite time to assess for false, fraud, or non-filed tax returns.

Ten years also is a common limit for statues of repose, as noted

124. *See*, e.g., Robert W. Wood, *IRS Hid Conservative Targeting Until After 2012 Presidential Election. Smidgen Corrupt?*, FORBES (Dec. 23, 2014), http://www.forbes.com/sites/robertwood/2014/12/23/irs-hid-conservative-targeting-until-after-2012-presidential-election-smidgen-corrupt/ (providing a quotation from the report issued the House Oversight and Government Reform Committee, entitled, *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* stating as follows: "Conservative organizations were not just singled out because of their political beliefs—they were targeted by IRS officials and employees who expressed a general loathing toward them even while begrudgingly admitting that those organizations were in compliance with the only thing the IRS should care about: the federal tax code.").

125. Josh Hicks, *White House budget: Obama wants to boost IRS funding by 18 percent*, WASHINGTON POST (Feb. 2, 2015), http://www.washingtonpost.com /blogs/federal-eye/wp/2015/02/02/white-house-budget-obama-wants-to-boost-irs-funding-by-18-percent/ (explaining that the IRS is currently operating under a 10 percent funding decline since 2010 and a workforce decline of 15 percent since 2009).

126. Discussion on the Government Revenue Needs, *supra* section (V)(A)(3).

above. For all the above reasons, ten years has an appeal as the eventual upper limit.

In the interim, however, ten years seems too short as an initial ceiling because the period would be an abrupt change from the current unlimited time. Further, fraud is a vile matter, and cheaters can be sophisticated. The government needs additional time to establish procedures, enhance penalties, and additional reporting mechanisms as discussed above. Thus, until the government has had time to implement the administrative improvements, this Article recommends twenty-one years as a temporary upper limit.

Twenty-one years finds its foundation in the rule against perpetuities. The rule against perpetuities is a common law doctrine that provides that no interest in property is valid unless it vests, if at all, not later than twenty-one years after some life or lives in being that existed at the time of the creation of the interest.[127] Specifically, the Crown initial adopted this canon to protect against the remoteness of vesting interests to promote economic and judicial efficiency, as well as to promote free marketability of title.[128] Preventing remoteness of vesting interests is important to keep an owner of property from "unduly and unreasonably diminishing the value of ownership to his successors."[129]

Because the rule against perpetuities focuses on property, as do the transfer taxes that form the main issue here, sharing the same timeframe appears proper. The rule against perpetuities and the establishment of a collar on tax investigations related to fraud, non-filings, and false returns both serve the function of ensuring that property interests are unencumbered. Thus, limiting the king's time bring these claims furthers general principles of economic participation, growth, and prosperity. Additionally, twenty-one years also approximates one generation of time, which also seems an appropriate analogy in an effort to avoid liability to transferees of a taxpayer's estate upon death.

No one target can be perfect. A statute of limitation or repose is a balancing act. Nonetheless, 21 years as the initial limit seems to be a good compromise first step, with a foundation in the common law of property.

127. 61 AM. JUR. 2D PERPETUITIES AND RESTRAINTS ON ALIENATION TO PLANT AND JOB SAFETY— OSHA AND STATE LAW § 35 (2012).

128. Burt v. Commercial Bank & Trust Co., 260 S.E.2d 306 (1979).

129. Edwin H. Abbot, Jr., *Leases and the Rule against Perpetuities*, 27 YALE L.J. 878, 885-86 (May, 1918) (discussing the policy justifications behind the Rule against Perpetuities).

V. THE ILLUSTRATIVE CASE OF *REDSTONE V. COMMISSIONER*

This Section provides a detailed review of the case of *Redstone v. Commissioner*.[130] As of the time of this writing, the case had not yet reached a conclusion. Regardless of the outcome, however, the case provides a prime example of the larger issues that this Article raises.

A. *Summary of the Facts of Redstone*

The facts of the *Redstone* case help illustrate the evidentiary and fairness issues that compromise the integrity of any prosecution that takes place too many years after the underlying events have occurred. Below is a summary of the facts of *Redstone*.

1. Business Inception

Michael (Mickey) and Belle Redstone had two sons.[131] One was Sumner, the taxpayer at bar here, born around 1924.[132] The other was Sumner's younger brother, Edward. [133] Starting around 1938, Mickey began buying land on which Mickey constructed drive-in movie theaters. Mickey formed three corporations for each site.[134] One corporation received title to the real estate, another managed refreshments, and the third operated the theater.[135] Edward and Sumner joined the business in 1952, and 1954, respectively.[136]

2. Initial Capital Accounts

In 1959, Mickey formed a new corporation, National Amusements, Inc. (NAI).[137] Mickey made an initial capital contribution of $3,000.00 to NAI.[138] NAI served as a holding company for more than thirty movie theater corporations that the Redstones had created.[139] Mickey, Sumner, and Edward were the directors and officers of NAI.[140] At an initial board meeting, the directors authorized the issuance of up to 300 shares

130. Amended Petition, *supra* note 7, at 13 .

131. *Id.* at 3-4. Sumner was age 89 as of the date of the Original Petition filed on Apr. 10, 2013, Petitioner provided a nearly identical recitation of the facts in his Pretrial Memorandum as he listed in his amended petition. The authors have chosen for consistency to cite the facts mainly from the Amended Petition, which Redstone filed two weeks after his Pretrial Memorandum.

132. *Id.* at 4.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 5.

137. *Id.* at 5, 12.

138. *Id.* at 7.

139. *Id.* at 5, 7.

140. *Id.* at 5-6.

of Class A stock.[141]

Soon after, the three Redstones made disproportionate capital contributions to NAI.[142] The resulting capital ownership percentages were 47.9%, 26.5%, and 25.6% for Mickey, Sumner, and Edward, respectively.[143] NAI did not deliver the stock certificates to shareholders.[144]

3. Sumner's Rise

Toward the end of the 1960s, Mickey began easing out of the business.[145] In 1968, Mickey retired to Florida.[146] Also in 1968, through a series of issuances, cancellations, and endorsements of stock certificates, Mickey transferred fifty shares of NAI stock to a trust that Mickey created for the benefit of Mickey's four grandchildren.[147] Sumner and Edward had two children's each.[148]

During these years, a respected international accounting firm, J.K. Lasser & Company (J.K. Lasser), was the tax advisor to NAI and to the Redstone family.[149] J.K. Lasser prepared gift tax returns for Mickey's transfer of NAI stock in 1968 to the trust for the grandchildren.[150]

In 1969, Mickey redeemed his other 50 Class A shares.[151] As Mickey's role diminished, Sumner became the leader of NAI.[152]

4. Edward's Litigation

Edward grew disgruntled at his brother's rise.[153] In 1971, Edward quit NAI but still received no NAI stock certificates.[154] As an initial capital contributor, Edward should have received his shares or the cash equivalent.

Toward the end of 1971, Edward sued Mickey, Sumner, and

141. *Id.* at 6
142. *Id.* at 7.
143. *Id.* at 8.
144. *Id.* at 10.
145. *Id.* at 9.
146. Respondent's Pretrial Memorandum, *supra* note 131, at 4.
147. Amended petition, *supra* note 7, at 9.
148. *Id.*
149. *Id.* at 27 (showing that eventually, J.K. Lasser was acquired by Touche Ross & Co., which in turn merged into Deloitte Touche Tohmatsu Limited, or commonly Deloitte, a "Big Four" public accounting firm); *see* Petitioner's Pretrial Memorandum, *supra* note 131, at 24, n.3.
150. Amended petition, *supra* note 140, at 27.
151. *Id.* at 9-10.
152. *Id.* at 10.
153. *Id.*
154. *Id.*

NAI.[155] Edward claimed he was entitled to 100 shares of NAI Class A stock.[156]

Mickey countered that because of the disproportionate capital contributions, Sumner and Edward were each entitled to only fifty shares.[157] Mickey allegedly wanted the other 100 shares to go for the benefit of Sumner and Edward's children regardless how NAI had nominally registered the shares.[158] An impassioned letter from Edward's mother Belle emphasized Mickey's intent to benefit the grandchildren.[159] The letter pleaded with Edward that his actions were tearing apart the family.[160]

5. Settlement and Stock Transfer

The parties reached a settlement in 1972.[161] The settlement entitled Edward to 66 2/3 shares.[162] The settlement required one-half of those shares, 33 1/3 Class A shares, to go into separate trusts for each of Edward's two children at 16 2/3 shares per trust.[163] NAI redeemed Edward's other 33 1/3 shares for $5 million in cash to Edward.[164] In return, Edward agreed to have no further claims against NAI or the other defendants.[165]

The same structure applied to Sumner.[166] Accordingly, shortly thereafter, Sumner transferred 16 2/3 Class A shares of NAI stock into each of two trusts for his children.[167]

The result fulfilled Mickey's purported original goal.[168] One-half of the NAI stock belonged to Mickey's children: 33 1/3 shares to Sumner and 33 1/3 shares, albeit immediately redemption of Edward's shares.[169] The other half went into trusts for the benefit of Mickey's four grandchildren at 16 2/3 shares apiece.[170]

155. *Id.* at 10-12.
156. *Id.* at 11.
157. *Id.*
158. *Id.*
159. *Id.* at 15.
160. *Id.*
161. *Id.* at 16.
162. *Id.*
163. *Id.* at 17.
164. *Id.*
165. *Id.* at 16, 19.
166. *Id.* at 19.
167. *Id.* at 19-20.
168. *Id.* at 20-21.
169. *Id.* at 21.
170. *Id.*

6. No Gift Tax Returns

The firm of J.K. Lasser, still engaged as the Redstone family tax advisor, allegedly advised Sumner and Edward that the 1972 stock transfers to trusts for their children did not generate a gift tax liability.[171] Accordingly, Sumner and Edward did not file gift tax returns for 1972.[172]

7. Stock Transfer Epilogue: Sumner's Control of NAI

In 1984, NAI redeemed the shares held in trust for Edward's children.[173] The redemption left Sumner and the trusts for Sumner's two children as the sole owners of NAI class A stock.[174]

B. *Redstone's Contentions*

Sumner Redstone presented a number of legal grounds by which the Court should reject the Commissioner's determination.

1. Not a Taxable Gift

One main contention was that the 1972 transaction was not a taxable gift.[175] In particular, Redstone contended that the 1972 transfer fit the ordinary course of business exception.[176] Under that exception, a transfer, even an intra-family transfer, for less than full consideration is not a gift if the donor conducted the transaction in an arm's length manner as part of the regular business transaction.[177]

Redstone stated that he executed the 1972 transfer not in main part as a loving gift to his children, or as an estate planning technique.[178] Instead, he was complying with his father's instructions to structure the grandchildren's shares in response to the litigation settlement with

171. *Id.* at 26-27.

172. *Id.* at 29. Notwithstanding, to emphasize his compliance record, Sumner noted that he has filed thirty-three separate gift tax returns reporting taxable gifts during his lifetime.

173. *Id.* at 26.

174. *Id.* at 27 NAI became spectacularly successful under Sumner's guidance. NAI's book value raced from $70 thousand in 1969, to $11 million in 1972, to $100 million 1984, and then to $5 billion in 2006; Petitioner's Pretrial Memorandum, *supra* note 131, at 24 as of 2014, Sumner owned 80% of NAI's equity, which in turn controlled CBS Corporation and Viacom, Inc; *Id.* Viacom's brands included Comedy Central, MTV, Nickelodeon, and Paramount Pictures. *See* VIACOM, http://www.viacom.com/ (last visited Feb. 24, 2015); *See also Forbes 400: Sumner Redstone*, FORBES (Apr. 3, 2015, 11:40 AM) http://www.forbes.com/profile/sumner-redstone/ (listing Sumner Redstone as the world's 225th richest person, with a net worth of $6.4 billion as of Apr. 3, 2015).

175. Petitioner's Pretrial Memorandum, *supra* note 131, at 29.

176. *Id.* at 29-30 (citing Treas. Regs. § 25.2511-1(g)(1) and § 25.2512-8) (*internal citations omitted*).

177. *Id.*

178. *Id.* at 31.

Edward.[179] Moreover, Sumner contended he suffered a minor loss on the transfer, but jumped at the opportunity to gain control of NAI.[180]

2. Stale Claim

Another ground is highly pertinent to this Article. Redstone contended that staleness of the litigation prejudiced his case.[181] Redstone stated he was not able to locate certain key documents that NAI or he discarded in the regular course of business.[182] Similarly, the Commissioner had discarded the documents the IRS had collected pertaining to the 1972 transfer, as well as the files from that era pertaining to Mickey, Sumner, Edward, and NAI.[183]

Moreover, almost all of Redstone's key witnesses from the time had died, including Redstone's accountant from J.L. Lasser, Samuel Rosen, and Redstone's attorney, Louis Winer.[184] Additionally, Mickey (1987), Belle (1987), Edward's daughter (1987), Edward's grandson (2004) who had briefly survived the daughter, and Edward (2011) had all passed away.[185] Memories had dimmed for the few surviving witnesses.[186]

3. Prior IRS Review

In a version of res judicata, double jeopardy, or laches, Redstone contended that the Commissioner had previously investigated the 1972 gift tax issue without determining an adjustment.[187] Redstone produced a letter dated April 23, 1975, from the Commissioner's Chief Counsel Office referring to Redstone's potential gift tax liability from 1971 or 1972.[188] In a similar vein, Redstone stated that the Commissioner had previously examined NAI's corporate income tax returns for fiscal 1966 through 1973, including the year at issue, 1972.[189] The corporate returns reported changes in stock ownership.[190] Likewise, the Commissioner issued Closing Letters after examining the estate tax returns of Mickey and Belle following their deaths in 1987.

179. *Id.*
180. *Id.*
181. *Id.* at 27.
182. *Id.* at 6, 26.
183. *Id.* at 6, 27.
184. *Id.* at 6, 7, 26, 43.
185. Amended Petition, *supra* note 7, at 4.
186. Petitioner's Pretrial Memorandum, *supra* note 131, at 7.
187. *Id.* at 27.
188. *Id.*
189. *Id.* at 28, 29.
190. *Id.*

4. No Fraud

Redstone also contested the Commissioner's determination of a fraud penalty.[191] The Commissioner accused Sumner of fraud in willfully creating an oral trust theory to avoid paying gift tax.[192] Sumner responded that he had previously testified that his father Mickey had created the oral trust concept to prevent Edward from selling shares outside of the family.[193] Further, Sumner contended that Mickey, not Sumner, had inserted the oral trust language into the grandchildren's trust document.[194]

C. *The Commissioner's Response*

The Commissioner provided at least two grounds to support the determination.

1. Prior Admission

The Commissioner's main legal contention was that Sumner had previously admitted under oath that he, Sumner, and not Mickey, had transferred the 33 1/3 shares of NAI stock that went into trust for Sumner's children.[195] Per the Commissioner, under judicial estoppel, Sumner must therefore not adopt an inconsistent position that would create the impression that Sumner was misleading the court then or now.[196]

2. Not an Ordinary Business Transaction

The Commissioner's second main ground was that Redstone erred in contending that the ordinary business transaction exception fit

191. *Id.* at 40.

192. *Id.*

193. *Id.*

194. *Id.*

195. Respondent's Pretrial Memorandum, *supra* note 131, at 7-12 (showing that the Commissioner quoted at length from a transcript of Sumner Redstone's deposition in O'Connor v. Redstone, 452 Mass. 537 (2008) for the proposition that Sumner, not Mickey, owned the NAI stock at the date of transfer in 1972 and that prior litigation centered on Edward's children suing Sumner and Edward for breach of fiduciary duties); *see* Respondent's Pretrial Memorandum, *supra* note 131, at 7, n.2; *see also O'Connor*, 452 Mass. 537, 538 (showing that the children accused Sumner and Edward of self-dealing in 1972 and 1984 in redeeming the NAI stock that the adults were supposed to hold for the benefit of Edward's children); *id.* at 538, 563. Ironic or prophetic to this Article, the court left open for further proceedings the children's claims for the 1972 redemption, but granted Sumner and Edward's motion for summary judgment to dismiss the children's suit regarding the 1984 redemption based on a six-year statute of limitations that time barred the children's complaint.

196. *See e.g.*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 170 (2010), for further explanation of judicial estoppel.

Sumner's 1972 transfer of NAI stock.[197] The Commissioner emphasized that the children did not provide any consideration for the shares as one would expect in an ordinary business transaction as opposed to a gift.[198]

D. *Concluding Commentary on Redstone*

The *Redstone* dispute, as noted above, had not concluded as of the date of this writing. That circumstance is not significant for this article because the normative merits of a limitless assessment period is not the focus of the litigation.

CONCLUSION

Redstone serves as a prime example of the larger issues surrounding unlimited assessments. Redstone's corporation had apparently contemporaneously reported the stock transfer on its books, casting an ill light on the Commissioner's unclean hands. Further, Redstone and the Commissioner had purposely destroyed or lost nearly all of their records due to ordinary events and routine destruction cycles long before the 40 years. Moreover, nearly all of Redstone's advisors to the transaction had died.[199] Under these circumstances, forcing a nonagenarian to litigate a set of facts from nearly a half-century earlier is unconscionable.

A limitation on assessments would not gainsay the importance of taxes. As Justice Holmes famously proclaimed, "[t]axes are what we pay for civilized society. . . ."[200] Further, fraud is a repugnant matter. Regrettably, a sophisticated cheater might benefit from a limitations period. That outcome, however, may be analogous to the criminal law principle that society is better off to let a few guilty people go free than to convict an innocent person.

In the biggest picture, moreover, limitations on actions serve a vital role. Limits provide finality, prevent stale claims, and promote administrative and judicial economy. A limitations period may even cause the Commissioner to investigate sooner.

Moreover, humans are fallible. An open-ended license to fish is ripe for abuse. Who knows why the IRS chose to pursue Redstone after so many years?

197. Respondent's Pretrial Memorandum, *supra* note 131, at 12.

198. *Id.*

199. Amended Petition, *supra* note 7, at 4.

200. *See* Compania Gen. de Tabacos de Filipinas v. CIR, 275 U.S. 87, 100 (1927) (dissenting opinion by Justice Oliver Wendell Holmes, Jr. engraved above the entrance of IRS headquarters at 1111 Constitution Avenue Northwest, Washington, District of Columbia, DC that famous quotation from Justice Holmes).

A requirement for timeliness is especially appropriate given the ever more powerful tools that the Sovereign possesses. The kings of old or the Commissioner of even a few decades ago did not have the sophisticated electronic investigative tools of today. A limitation on investigations would provide a benefit akin to the Fourth Amendment's restriction on unreasonable search and seizure. For all these reasons, limiting the Executive's temporal reach, a so-called waiver of *quad nullum tempus occurrit regi*, is a vital public policy.

A voluntary tax system needs to continue to try to curb tax fraud, and therefore give the Commissioner time to identify that fraud. Unlimited time to investigate, however, is simply unfair, imprudent, and potentially dangerous. Yes, certain tax cheats may profit by a limitation on time. However, with prompt enforcement, expanded penalties and reporting, and ever more powerful investigative tools, long-term profit from tax fraud may diminish.

Moreover, it is imperative to limit the Sovereign's time for the reasons discussed above. The reasons include finality, preventing stale claims, administrative and judicial economy, encouraging the Commissioner's timeliness, harmonizing tax law with other administrative law, and discouraging arbitrary assessments.

Balancing these interests, this Article proposes ten years as the ultimate goal. As a prudent interim measure, however, and relying on the rule against perpetuities, this Article recommends twenty-one years as the upper limit for assessments. Two decades should be plenty long enough to deter all but the most determined fraud, and more than sufficient for the Commissioner to complete its investigations of the ones who are not deterred.