

# A Morass of Confusion and Inconsistency: The Application of the Doctrine of *Nullum Tempus Occurrit Regi* in North Carolina

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## INTRODUCTION

The doctrine of *nullum tempus occurrit regi* has been an acknowledged part of the fabric of North Carolina's jurisprudence since 1834.<sup>1</sup> With historic origins that can be traced at least as far back as the seventeenth century,<sup>2</sup> the doctrine, which prescribes the application of statutes of limitations on sovereign bodies, has weathered the torrents of changing societal attitudes and survives in North Carolina today—for the most part unscathed and in some respects more robust than when it was first introduced. This is altogether astonishing when one considers that in a number of other jurisdictions, the doctrine has been abolished altogether or significantly abrogated.<sup>3</sup>

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1. *Armstrong v. Dalton*, 15 N.C. (1 Dev.) 568 (1834). The doctrine is translated as "time does not run against the king." *Id.*

2. The precise origins of the *nullum tempus* doctrine and associated doctrines of governmental immunity are somewhat clouded. Sir Edward Coke is documented acknowledging that the doctrine precluded application of statutes of limitation against the king. See 1 H.C. Jour. (Feb. 13, 1621) 520. The idea continued to have currency in the latter half of the eighteenth century when the English Crown tried the case of *Russell v. Men of Devon*. *Ayala v. Phila. Bd. of Pub. Ed.*, 305 A.2d 877, 878-84 (Pa. 1973) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.)).

3. *Nullum tempus* has been abolished in four states: Colorado, *Shootman v. Dep't of Trans.*, 926 P.2d 1200 (Colo. 1996); New Jersey, N.J. Educ. Facilities Auth. v. *Gruzen P'ship*, 592 A.2d 559 (N.J. 1991); South Carolina, *State ex rel. Condon v. City of Columbia*, 528 S.E.2d 408 (S.C. 2000); and West Virginia, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901 (W. Va. 1997). *Nullum tempus* has been abrogated in a number of jurisdictions, including: Alabama, *State v. Mudd*, 143 So. 2d 171, 174 (Ala. 1962); Delaware, *Mayor of Wilmington v. Dukes*, 157 A.2d 789, 795 (Del. 1960); Idaho, *Bannock County v. Bell*, 65 P. 710, 712 (Idaho 1901); Indiana, *City of Bedford v. Willard*, 33 N.E. 368, 369 (Ind. 1893); Maryland, *Balt. County v. RTKL Assoc.*, 846 A.2d 433, 444 (Md. 2004); Missouri, *In re Estate of Thomas*, 743 S.W.2d 74, 80 (Mo. 1988); Nebraska, *State ex rel. Chem. Nat'l Bank v. Sch. Dist. No. 9*, 46 N.W. 613, 615 (Neb. 1890); Rhode Island, *Ramsden v. Ford*, 143

While *nullum tempus* remains a judicially recognized doctrine in this state, the uniform and consistent application of the doctrine by the courts has yet to be realized despite 170 years of trying to do so. This is not a fact unknown to North Carolina's courts, which have at times candidly admitted that application of the doctrine in one instance with a given set of facts is no guarantee that another instance with a similar set of facts will likewise benefit from application of the doctrine.<sup>4</sup> At one point, where the court of appeals seemed poised to toss aside the doctrine, the tribunal snatched the doctrine from the jaws of death, setting it free and giving it a new lease on life.<sup>5</sup> However, in so doing, the court failed to annunciate clear principles to guide application in the future. While the doctrine was validated and extended to broader application, the blueprint for practical application continued to develop in the ad hoc fashion that has remained in place for nearly a century and a half.

Given the courts' and legislature's desire to maintain the doctrine of *nullum tempus*, the need for guiding principles of application is great. This article seeks to piece together the disparate guiding principles the courts have articulated regarding the *nullum tempus* doctrine from its initial introduction in North Carolina to the present time. Secondly, the article will explore the case for modification of the current interpretation of the doctrine so as to provide a more uniform and consistent application to governmental actions. In so doing, an inquiry will be made into the approach other jurisdictions upholding *nullum tempus* take toward applying the doctrine. Finally, the article will explore the implications of abolishing the doctrine altogether, weighing the competing advantages and disadvantages of disgorging a doctrine which has for so long been a component of North Carolina law.

#### I. THE RATIONALE UNDERLYING *NULLUM TEMPUS OCCURRIT REGI*

The doctrine of *nullum tempus* was initially developed at common law as an assertion of the proposition that the king should not suffer from the negligence of his officers to pursue legal claims:

From the presumption that the King is daily employed in the weighty and public affairs of government, it has been an established rule of common law, that no laches shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent. "Vigi-

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A.2d 697, 698-99 (R.I. 1958); and Virginia, *Burns v. Bd. of Supervisors*, 315 S.E.2d 856, 859 (Va. 1984).

4. *Sides v. Cabarrus Mem'l Hosp., Inc.*, 213 S.E.2d 297 (N.C. 1975).

5. *Rowan County Bd. of Educ. v. U.S. Gypsum*, 418 S.E.2d 648 (N.C. 1992).

*lantibus sed non dormientibus jura subveniunt*<sup>6</sup> is a rule for the subject, but *nullum tempus occurrit regi*, is the King's plea.<sup>7</sup>

This view was also maintained by Blackstone, who considered the doctrine to be a component of the Royal Dignity, which the law confers upon the king in the form of the triple attributes of sovereignty, perpetuity and absolute perfection.<sup>8</sup> *Nullum tempus* was a manifestation of absolute perfection, which implied the sovereign was incapable of doing or thinking wrong, incapable of meaning anything improper, possessed neither folly nor weakness, could not be corrupt of blood and could never act in a state of incapacity or minority.<sup>9</sup> This Royal Dignity was a necessary badge of office which distinguished the king from his subjects and was viewed as being essential to the preservation of the monarchial form of government. As noted by Blackstone:

The law ascribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in a light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government.<sup>10</sup>

The Royal Dignity, and the immunity of the sovereign which composed a part of that dignity, was a creation of the common law of England.<sup>11</sup> As the inheritor of the common law, the United States received various immunity doctrines including *nullum tempus occurrit regi*.<sup>12</sup> These immunity doctrines helped form the sovereign dignity of the various states prior to the ratification of the Constitution.<sup>13</sup> Following ratification, the inherited immunity doctrines were woven into the fabric of our national Constitution's state sovereignty clauses, finding oblique expression in both the Tenth and Eleventh Amendments.<sup>14</sup>

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6. Literally "the law assists those who are vigilant, not those who sleep over their rights." *Thungpalan v. Estaquio*, G.R. No. 136207, (S.C. June 21, 2005), available at <http://www.supremecourt.gov.ph/jurisprudence/2005/jun2005/136207.htm>.

7. *Armstrong v. Dalton*, 15 N.C. (1 Dev.) 568, 569 (1834) (citations omitted).

8. WILLIAM BLACKSTONE, 1 COMMENTARIES \*232-40.

9. *Id.* at \*240.

10. *Id.* at \*234.

11. *Alden v. Maine*, 527 U.S. 706, 715-16 (1999).

12. *Id.*

13. *Id.* at 715.

14. *Id.*

II. *NULLUM TEMPUS* DIFFERENTIATED FROM SOVEREIGN IMMUNITY

*Nullum tempus* should be differentiated from the analogous doctrine of sovereign immunity, *rex non potest peccare*.<sup>15</sup> Both the *nullum tempus* and sovereign immunity doctrines have at their core a common function of providing sanctuary to the sovereign against the missteps or incompetence of the officers of the state. This commonality has led some to view *nullum tempus* as merely a sub-species of sovereign immunity; quite logically, since both doctrines spring from the concept of absolute sovereign perfection (a component of the Royal Dignity).<sup>16</sup> However, a key difference between the doctrines exists, which can be explained by reference to the type of public evil each doctrine attempts to affect. Sovereign immunity provides protection against liability for tortious actions arising out of the conduct of governmental workers, while *nullum tempus* merely provides a safeguard against the government's failure to take action prior to the onset of a statute of limitations. Appreciating the distinct nature of the two doctrines is important because sovereign immunity, with the modern advent of liability insurance, has not enjoyed the legislative and judicial longevity enjoyed by *nullum tempus*. Some jurisdictions have completely abolished the former doctrine while still maintaining, in a more truncated form, the latter doctrine.<sup>17</sup>

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15. The phrase translates to "the king cannot sin (or can do no wrong)." E.g., *Williamson v. U.S. Dept. of Agric.*, 815 F.2d 368, 374 n.1 (5th Cir. 1987).

16. See *Wash. Suburban Sanitary Comm'n v. Pride Homes*, 435 A.2d 796, 801 (Md. 1981). The organic connection between *nullum tempus* and sovereign immunity has been considered by some jurisdictions to be the basis for eliminating both doctrines when sovereign immunity came under attack. See *State ex rel. Condon v. City of Columbia*, 528 S.E.2d 408 (S.C. 2000). However, other jurisdictions have disagreed with this analysis and have viewed the doctrines as distinct. See *Evergreen Park Sch. v. Fed. Ins. Co.*, 658 N.E.2d 1235 (Ill. App. Ct. 1995); *Dep't of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101, 104 (Pa. 1981). Despite abolition of sovereign immunity, the Illinois Supreme Court holds the doctrine of *nullum tempus* remains viable in that the doctrine supports the policy of protecting the public from injury and loss due to the negligence of public officers. *City of Shelbyville v. Shelbyville Restorium Inc.*, 451 N.E.2d 874, 876-78 (Ill. 1983).

17. Jurisdictions that have rejected sovereign immunity while at the same time retaining the protections afforded by the *nullum tempus* doctrine include: Illinois, *Shelbyville*, 451 N.E.2d 874; Ohio, *State Dep't of Transp. v. Sullivan*, 527 N.E.2d 798 (Ohio 1988); Oklahoma, *Okla. City Mun. Improvement Auth. v. HTB Inc.*, 769 P.2d 131 (Okla. 1988); and Pennsylvania, *Commonwealth, Dep't of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101 (Pa. 1981).

III. THE HISTORICAL APPLICATION OF *NULLUM TEMPUS*  
IN NORTH CAROLINA: THE PRE-ROWAN HISTORY

North Carolina's recognition of *nullum tempus* was early and followed on the heels of prior recognition by the federal courts.<sup>18</sup> In *Armstrong v. Dalton*, the North Carolina Supreme Court first took up the issue in a case involving county efforts to recoup public money from an estate.<sup>19</sup> The chairman of the Stokes County Court, Thomas J. Armstrong, brought an action of assumpsit against Daniel Dalton, who was executor of the estate of Isaac Dalton.<sup>20</sup> By way of deposition that was read to an empanelled jury, Armstrong was able to establish that Dalton, who prior to his death had been Treasurer of Public Buildings, had received certain public monies and that those monies had neither been disbursed nor had there been a proper accounting.<sup>21</sup> "The defendant [countered with] evidence that . . . more than three years had elapsed since [the deceased had] made a payment on account of the fund in his hands" and asserted the defense that the action of the plaintiff was barred by the three-year statute of limitations.<sup>22</sup> The trial court denied the defendant's motion, indicating that county courts acted in a sovereign capacity when collecting public monies and that such actions were immune from the statute of limitations that would ordinarily apply.<sup>23</sup> In reviewing the lower court's decision, the supreme court, recounting the history of *nullum tempus* as it had been passed down to the United States, acknowledged a role for sovereign exemption from limitation in North Carolina.<sup>24</sup> But the court's approval of the doctrine did not come without severe reservations. First of all, the court pointed out that a distinction was to be made between statutes of general applicability, which do not specifically place limits on governmental actions, and those statutes of express applicability, which are careful to include the sovereign in their scope.<sup>25</sup> The doctrine of *nullum tempus* fully applied to protect the state against the effects of an adverse stat-

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18. See *United States v. Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373); *Armstrong v. Dalton*, 15 N.C. (1 Dev.) 568 (1834). For a general discussion of the historic origins of the doctrine, see also *United States v. Thompson*, 98 U.S. 486 (1879); *Balt. County v. RTKL Assoc.*, 846 A.2d 433 (Md. 2004).

19. *Armstrong*, 15 N.C. (1 Dev.) at 568.

20. *Id.* Assumpsit is a common law form of action in equity for breach of a promise to pay some amount to another person. BLACKS LAW DICTIONARY 133 (8th ed. 2004).

21. *Armstrong*, 15 N.C. (1 Dev.) at 568.

22. *Id.*

23. *Id.*

24. *Id.* at 569.

25. *Id.*

ute of limitation wherever the language of the statute was general—where the language did not expressly make the statute applicable to the sovereign.<sup>26</sup> In all other cases, the sovereign was bound in the same respect as a private citizen to observe the restrictions imposed by the statute.<sup>27</sup> Second, the court pointed out that historically *nullum tempus* was the sole prerogative of the sovereign state, and the benefits of the doctrine did not extend to counties or municipalities, even though these counties and municipalities might be carrying out the mandates of a statute imposed by the state.<sup>28</sup> This point was reinforced by the court's conclusion that states benefit from *nullum tempus* because their actions must always be presumed to be for the good of the commonwealth, a presumption not necessarily applicable to the smaller political subdivision. As the court stated:

The King or the State cannot be presumed to mean wrong, or to have an interest inconsistent with justice. But these communities, like the individuals who compose them, have no such legal presumption in their favour. No authority is shown to support the position that they are not like other corporations or private persons subject to the operation of the Statutes of Limitations, nor can we see any reason which can bring them within the exception which is admitted to apply to the sovereign and the State.<sup>29</sup>

Over time, the *Armstrong* court's approach to *nullum tempus* in situations where counties and municipalities are treated differently from the state gave way to a different analysis. Adopted by later courts, this analysis is based upon a discussion of proprietary-versus-governmental action, largely abandoning earlier per se restrictions that denied the benefits of *nullum tempus* to counties and municipalities.<sup>30</sup> The expansion of the doctrine has occurred even though other state courts have reconsidered the philosophical underpinnings of *nullum*

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26. *Id.*

27. *Id.*

28. *Id.* at 570-71. In this regard, the *Armstrong* court was making a distinction between sovereign immunity as opposed to governmental immunity from applicable statutes of limitations. *Id.* The State, not its subdivisions, was the only sovereign body able to assume the prerogative of exemption from statutes of limitation inherited from the English Crown. *Id.*; see also *United States v. Thompson*, 98 U.S. 486, 489 (1879).

29. *Armstrong*, 15 N.C. (1 Dev.) at 570-71.

30. See *Charlotte v. Kavanaugh*, 20 S.E.2d 97 (N.C. 1942) (analyzing, for one of the first times, applicability of the *nullum tempus* doctrine based upon whether a governmental purpose exists rather than based solely on whether the entity seeking relief from a limitation statute is actually a sovereign).

*tempus* and have, in some cases, decided to dispense with the doctrine's prohibitions altogether.<sup>31</sup>

Despite some changes with regard to how immunity from limitation is applied, on the whole North Carolina has preserved the doctrine.<sup>32</sup> Some restrictions have been placed on the immunity conferred: Immunity generally exists where a governmental function is in play, and immunity is cast aside where the action of government is more proprietary.<sup>33</sup>

Other states have been less generous, abandoning their inherited doctrines of immunity as they found them to be antiquated or no longer justified in a modern society.<sup>34</sup> North Carolina's continued affirmation of conferred immunity upon governmental functions, however, has not been carried out in the most graceful fashion. Defining what exactly one means when declaring a certain action "governmental" as opposed to "proprietary" has not come easily, leading to what one commentator has termed "a morass of confusion and inconsistency."<sup>35</sup> Perhaps as a result of this concern, the doctrine's popular-

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31. Many examples exist where the doctrine of governmental immunity and specifically immunity from statutory limitation has been abrogated to varying degrees. Some states, North Carolina being a leading example, have chosen to preserve such doctrines, but have continued to place restrictions on the applicability of immunity. N.C. GEN. STAT. § 1-30 (2005); *accord* *Oroz v. Bd. of County Comm'rs*, 575 P.2d 1155 (Wyo. 1978) (holding that when confined to the legislative and judicial functions of the government, governmental liability is the rule and immunity is the exception). Other states have chosen to abandon the doctrines of immunity altogether. *See Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (holding municipal entities liable for wrongful actions of police officers); *Ayala v. Phila. Bd. of Educ.*, 305 A.2d 877 (Pa. 1973); *see also* sources cited *supra* notes 3, 17.

32. Reference is made to the treatment of governmental immunity in general even though this article confines itself to *nullum tempus* immunity.

33. *See* N.C. GEN. STAT. § 1-30 (2005). By way of explanation, it should be stated that this statute was passed after judicial acceptance of the doctrine and was initially interpreted as making the same statutory limitations applicable to private parties equally applicable to governmental actions, thus abrogating the common law doctrine of *nullum tempus*. This judicial interpretation no longer holds true. *Compare* *Furman v. Timberlake*, 93 N.C. 66 (1885) (abrogating *nullum tempus*), *with* *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 418 S.E.2d 648, 653 (N.C. 1992) (declining to abrogate *nullum tempus*).

34. *See Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957) (holding municipal entities liable for the wrongful actions of police officers); *Ayala v. Phila. Bd. of Educ.*, 305 A.2d 877 (Pa. 1973).

35. WILLIAM L. PROSSER ET AL., *TORTS* 626 (8th ed. 1988). The North Carolina courts have noted the difficulty of sorting out governmental from proprietary undertakings by governments. In *Pulliam v. City of Greensboro*, the court outlined a brief history of the difficulty which has resulted in illogical distinctions and

ity had decreased significantly by the middle of the twentieth century, maintaining its only robust expression in governmental taxation cases.<sup>36</sup>

IV. THE RE-AFFIRMATION OF *NULLUM TEMPUS*: *ROWAN COUNTY BOARD OF EDUCATION v. U.S. GYPSUM CO.*

The general trend in North Carolina up to 1992 was to restrict governmental immunity without eliminating the doctrine altogether.<sup>37</sup> It was therefore very surprising when this trend was reversed in the case of *Rowan County Board of Education v. U.S. Gypsum Co.*, a case where the North Carolina Supreme Court affirmed the continued vitality of *nullum tempus* in a school board suit concerning asbestos removal.<sup>38</sup> The court stated, "We now clarify the status of this doctrine in this jurisdiction: *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State."<sup>39</sup>

In *Rowan*, the Rowan County School Board brought suit against U.S. Gypsum to recover costs associated with the removal of asbestos-containing ceiling plasters from several county schools.<sup>40</sup> Defendant U.S. Gypsum moved for summary judgment, alleging the plaintiff's claims were barred by the applicable statute of limitations.<sup>41</sup> The trial court granted the motion, which was then appealed by Rowan County. The North Carolina Court of Appeals reversed and remanded the case to trial.<sup>42</sup> A key component of the appellate court's rationale was that the doctrine of *nullum tempus* precludes application of statutes of limitation to governmental subdivisions of the state when the subdivision

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classification of activities in a less than scientific manner. 407 S.E.2d 567, 568-69 (N.C. Ct. App. 1991).

36. See, e.g., *Guilford County v. Hampton*, 32 S.E.2d 606 (N.C. 1945); see also *Charlotte v. Kavanaugh*, 20 S.E.2d 97 (N.C. 1942); *Manning v. Atlantic R.R.*, 125 S.E. 555 (N.C. 1924); *Threadgill v. Wadesboro*, 87 S.E. 521 (N.C. 1916).

37. See *Guilford County*, 32 S.E.2d 606 (recognizing limitation of *nullum tempus* to peripheral tax cases as a trend toward restricting the doctrine's use); see also *Koontz v. City of Winston-Salem*, 186 S.E.2d 897 (N.C. 1972).

38. *Rowan County Bd. of Educ. v. U.S. Gypsum Co. (Rowan III)*, 418 S.E.2d 648 (N.C. 1992).

39. *Id.* at 653.

40. *Id.*

41. *Id.* at 651.

42. *Id.*

is engaged in a governmental purpose.<sup>43</sup> At trial, plaintiff Rowan County was awarded both compensatory and punitive damages.<sup>44</sup> On a second appeal U.S. Gypsum argued, among other things, that the court of appeals had erred by reversing the initial trial court's grant of summary judgment and remanding the case.<sup>45</sup> A divided panel of the appellate court affirmed the trial court's ruling on the statute of limitations issue, and U.S. Gypsum appealed to the North Carolina Supreme Court (*Rowan III*).<sup>46</sup>

In affirming the continued validity of *nullum tempus*, the supreme court laid to rest concerns about chapter 1, section 30 of the North Carolina General Statutes, a provision which facially made all statutes of limitation applicable both to private parties and to the government.<sup>47</sup> The court in *Rowan III* held North Carolina's courts had traditionally interpreted chapter 1, section 30 of the North Carolina General Statutes to make applicable time limits apply only to suits which stem from the proprietary acts of government and noted that, despite invitation by the courts for the legislature to correct this interpretation, the legislature failed to act.<sup>48</sup> Thus, according to the *Rowan III* court, the traditional interpretation should prevail.

While *nullum tempus* was affirmed, the court was quick to assert that the doctrine did not apply in every case in which the state is a party. Continuing to affirm more recent interpretations of the doctrine, the court held:

If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State.<sup>49</sup>

While *Rowan III* accomplished great things in clarifying the status of *nullum tempus*, its principal failure was that the holding did not improve upon the governmental-versus-proprietary dichotomy which

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43. *Id.*; see also *Rowan County Bd. of Educ. v. U.S. Gypsum Co. (Rowan I)*, 359 S.E.2d 814 (N.C. Ct. App. 1987).

44. *Rowan County Bd. of Educ. v. U.S. Gypsum Co. (Rowan II)*, 407 S.E.2d 860, 861 (N.C. Ct. App. 1991).

45. *Rowan II*, 407 S.E.2d at 862.

46. *Rowan III*, 418 S.E.2d at 650-52.

47. *Id.* at 653; N.C. GEN. STAT. § 1-30 (2005) ("The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties.").

48. *Rowan III*, 418 S.E.2d at 653-54. Since 1992, the legislature has done nothing to change the interpretation of N.C. GEN. STAT. § 1-30.

49. *Rowan III*, 418 S.E.2d at 654.

had created so much confusion in the past. Furthermore, the case did nothing to establish a brightline rule for identifying which classification a given governmental activity should receive. Instead, the court deferred to an empirical analysis of how those jurisdictions retaining *nullum tempus* classify school construction within the confines of the governmental-versus-proprietary dichotomy.<sup>50</sup>

#### V. THE POST-*ROWAN* HISTORY

*Rowan* represents the climax of the doctrinal development of *nullum tempus* in North Carolina. Since 1992, no significant clarification has been handed down from the courts to replace or clarify application of the governmental-versus-proprietary function dichotomy.

Unfortunately, this creates significant hardship for the trial courts since neither the *Rowan* court nor its predecessors have painted brightlines for the purpose of providing general principles to guide action. Very few moments of clarity have arisen over time. For instance, prior to *Rowan*, the court in *Sides v. Cabarrus Memorial Hospital, Inc.* was able to pick out a few common characteristics of those cases where the courts were somewhat consistent in labeling a governmental action proprietary or purely governmental:

“[A]pplication of [the governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.” Nonetheless, an analysis of the various activities that this Court has held to be proprietary in nature reveals that they involved a *monetary charge* of some type. While a “charge” has been involved in each case holding a particular function to be proprietary, we note that the basis for each holding was not dependent on the “profit motive.” . . . Furthermore, it appears that all of the activities held to be governmental functions by this Court are those historically performed by the government, and which are not ordinarily engaged in by private corporations.<sup>51</sup>

Additionally, the supreme court in *Rowan* followed up on the observations made in *Sides* by agreeing that a government function should only be labeled “governmental” when the function is histori-

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50. *Id.* at 655-57. As it turns out, the majority of jurisdictions that have addressed the issue of school construction consider the undertaking a purely governmental function.

51. *Sides v. Cabarrus Mem'l Hosp., Inc.*, 213 S.E.2d 297, 302-03 (N.C. 1975) (citations omitted) (quoting *Koontz v. City of Winston-Salem*, 186 S.E.2d 897, 907 (N.C. 1972)).

cally a fundamental exercise of governmental power and prerogative.<sup>52</sup> A proper exercise of a fundamental governmental power, according to the *Rowan* court, is one in which the common health, safety, security, or general welfare of the citizenry is promoted or protected.<sup>53</sup>

#### VI. *NULLUM TEMPUS* TODAY: THE CURRENT PRINCIPLES FOR JUDICIAL APPLICATION

Notwithstanding the limited clarity of appellate court opinions on the subject, application of the *nullum tempus* doctrine in North Carolina can presently be reduced to several guiding principles. First, the doctrine applies to the political subdivisions of the state as well as to the state itself.<sup>54</sup> Second, a governmental-versus-proprietary dichotomous test determines whether a court should apply the doctrine. Generally, governmental activities are protected by *nullum tempus*, while proprietary activities are not.<sup>55</sup> In the process of applying one label over another, a determination must be made as to whether a substantive, but not necessarily profit-motivated, charge was imposed, for in such cases the proprietary label almost always applies.<sup>56</sup> A further determination also needs to be made as to whether the governmental activity seeking *nullum tempus* protection is one that is a fundamental exercise of governmental power; that is, whether the activity seeks primarily to promote the health, safety, and welfare of all citizens.<sup>57</sup> If the activity cannot be broadly cast as being for the common good of all citizens, then the activity must be classified as proprietary in nature and therefore not entitled to the protections of *nullum tempus*.<sup>58</sup>

Such general statements, themselves subject to many exceptions,<sup>59</sup> continue to present problems for proper determination of whether a governmental-versus-proprietary label is appropriate. As mentioned

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52. *Rowan III*, 418 S.E.2d at 654-56. The court specifically noted education was a fundamental governmental function of the state based upon constitutional and statutory mandates. Thus the court ultimately held Rowan County acted "as an arm of the state and pursu[ed] the governmental function of . . . 'construction and maintenance' of its schools." *Id.* at 655.

53. *Id.* (citing *Rhodes v. Asheville*, 52 S.E.2d 371, 373 (N.C. 1949)); see also *Vaughn v. County of Durham*, 240 S.E.2d 456, 459 (N.C. 1977).

54. *Rowan III*, 418 S.E.2d at 655.

55. *Id.* at 654-55.

56. See *Sides*, 213 S.E.2d at 303.

57. *Rowan III*, 418 S.E.2d at 655 (citing *Rhodes*, 52 S.E.2d at 373).

58. *Rowan III*, 418 S.E.2d at 655.

59. For an overview of North Carolina cases that have outlined exceptions to the *nullum tempus* doctrine see 20A STRONG'S NORTH CAROLINA INDEX 4TH, LIMITATIONS, REPOSE, AND LACHES § 5 (2005).

before, a number of jurisdictions, when confronted with such problems, have concluded that the governmental-versus-proprietary dichotomy is an inappropriate basis for determining whether *nullum tempus* should apply.<sup>60</sup> Unable to find a more suitable alternative, some jurisdictions have disposed of the doctrine altogether.<sup>61</sup> North Carolina has retained the doctrine in its more recently expanded form but has consistently noted the difficulties inherent in determining whether an activity is governmental or proprietary.<sup>62</sup> Having recognized the difficulty, neither the courts nor the legislature have been willing to set forth a clear method of reducing the difficulties inherent in classification. Whether this inaction is due to the impossibility of the task is open to question. Regardless of the reason behind the inaction, the present reality is that the purpose of the doctrine, to shield governments from statutes of limitations and repose which would impede the discharge of core activities, is compromised by the piecemeal and unsatisfactory fashion in which *nullum tempus* protection is granted.

#### VII. *NULLUM TEMPUS* TODAY: IS THE DOCTRINE WITHOUT JUSTIFICATION?

At first blush, it seems *nullum tempus* relies too much upon the seemingly antiquated doctrine of Royal Dignity. For example, while North Carolina's government shares with English royalty the attributes of sovereignty and perpetuity, one would be hard pressed today to find much agreement with the view that the state acts in a manner of absolute perfection. Such skepticism appears very much justified when one considers the current legal landscape where governmental immunity in every form is willingly abrogated by some states.<sup>63</sup> With such abrogation it must be recognized that North Carolina (like the federal government and many other states that have enacted tort claims legislation) is impliedly and expressly acknowledging that it deserves to be held accountable under certain defined circumstances.<sup>64</sup> If a state chooses to cast aside the previously impenetrable veil of immunity, a

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60. See *supra* note 3 and accompanying text.

61. See, e.g., *Balt. County v. RTKL Assoc.*, 846 A.2d 433, 444 (Md. 2004) (referring to the governmental-versus-proprietary analysis as a "mish-mash regime" and refusing to extend *nullum tempus* to contract actions).

62. E.g., *Evans v. Hous. Auth.*, 602 S.E.2d 668, 671 (N.C. 2004).

63. See *supra* notes 3, 31 and accompanying text.

64. See North Carolina Tort Claims Act, N.C. GEN. STAT. § 143-291-143-300.1A (2005).

strong argument can be made that it should not continue to claim the benefits and protection of that veil.

For a state to continue to benefit from *nullum tempus*, the doctrine needs another justification which can be found in other attributes of the state, namely the attribute of sovereignty. Regardless of what contemporary minds think about the state government's perfection, there is little question that the state is sovereign over its people. To be sovereign, according to Blackstone, is to be pre-eminent, which carries with it the attributes of being "the supreme head of the realm . . . and of consequence inferior to no man . . . dependent on no man, accountable to no man . . ."<sup>65</sup> In stating this, Blackstone echoed Bracton, who had earlier stated that the king has no equal within his realm and is only subordinate to God and the law.<sup>66</sup> Thomas Hobbes attributes this pre-eminence to the original act of the multitude of a nation who institute sovereignty by conferring certain "rights and facultyes" which make the sovereign "singulis majores, of greater Power than every one of [his] subjects . . ."<sup>67</sup>

This pre-eminence can be the basis for the state asserting immunity from statutes of limitation. Since the government alone is capable of creating the laws which govern the multitudes, it alone is in a position to determine the content of those laws. If the government wishes to limit its liability and a compelling public policy reason justifies such limitation, then based on the government's pre-eminence, its status as *singulis majores*, it reasonably could be vested with the necessary prerogative to effect such limitation.

This was the justification posited by Justice Holmes early in the twentieth century when he claimed there can be no legal right of suit against a sovereign, who is the font of all legal rights.<sup>68</sup> The United States Supreme Court, in *Alden v. Maine*, recently affirmed this view of the sovereign immunity of the states and also affirmed the existence of

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65. WILLIAM BLACKSTONE, 1 COMMENTARIES \*241-42.

66. HENRY OF BRACTON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 33 (Samuel E. Thorne ed., Harvard Univ. Press 1968) (1268), available at <http://hsl.law.harvard.edu/bracton/Unframed/English/v2/33.htm>. Bracton also noted that while the king may be subordinate to the law no writs may run against the king. *Id.*

67. THOMAS HOBBS, LEVIATHAN 189 (Wash. Sq. Press 1964) (1651).

68. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). Justice Holmes, speaking for the majority on the issue of the rationale for governmental liability at the turn of the century decidedly distanced himself from traditional explanations couched in notions of monarchical prerogative when he chose a more contemporary approach. *Id.* "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Id.*

the sovereign dignity of each state and the constitutional basis for that sovereign dignity.<sup>69</sup> While some of the original justification for *nullum tempus* has eroded with time, the doctrine's rationale nevertheless remains robustly vital and adequately supported. State sovereignty is a matter of common law inheritance and constitutional design. Thus, a state's sole ability to create law within its territorial realm gives it the prerogative to be free of the effect of the laws it creates.

VIII. THE PUBLIC PURPOSE APPROACH TO *NULLUM TEMPUS*  
APPLICATION: DOES IT FURTHER THE PURPOSE BETTER?

If *nullum tempus* can be grounded upon the sovereign prerogatives of the state, a fair question arises as to whether the governmental-versus-proprietary dichotomy can be clarified by reference to other jurisdictions' jurisprudence. At one time, *nullum tempus* was formally adopted by case law, by statutory enactment, or through constitutional integration in twenty-two states and the District of Columbia.<sup>70</sup> But there are distinctions between the states with regard to the manner in which they apply *nullum tempus*. One notable example is that some states, such as North Carolina, extend the doctrine to the state and its political subdivisions while other states, Alabama for instance, confine application of the doctrine to the state alone. But as has been noted previously, such a distinction only affects the reach of the doctrine and has no implication for the governmental-versus-proprietary determination.

The states of Oklahoma, Arizona, and Tennessee also retain the doctrine and apply it to actions involving the state as well as its political subdivisions.<sup>71</sup> Like North Carolina, these states have resorted to a dichotomous test to determine applicability of the doctrine, which imposes a more general application. However, unlike North Carolina's test for application of *nullum tempus*, the courts of these states inquire

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69. 527 U.S. 706, 715 (1999).

70. Alabama, Arkansas, Connecticut, Delaware, Maine, Maryland, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island and Wyoming have recognized the doctrine through their case law. California, the District of Columbia, Mississippi, Oregon, Tennessee, Texas, Virginia, and Washington have adopted *nullum tempus* through statutory enactment. The states of Louisiana and Mississippi have provisions related to the adoption of *nullum tempus* in their constitutions. Brady L. Greene, *The King Never Dies: The Application of Nullum Tempus Occurrit Regi to Statutes of Repose in Product Liability Cases*, 11 CORP. ANALYST 94, 94-95 nn.4-6.

71. *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131 (Ariz. 1986); *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988); *Hamilton County Bd. of Educ. v. Asbestospray Corp.*, 909 S.W.2d 783 (Tenn. 1995).

as to whether a public or a private right is affected rather than as to whether a given action is governmental or proprietary.<sup>72</sup> The test for determining which label applies is simply whether the right affects the public generally or only affects a limited class of individuals within the political subdivision.<sup>73</sup> More significantly, Oklahoma confers, as a matter of public policy, “every reasonable presumption favorable to governmental immunity from . . . limitations” when determining whether public or private rights are at issue.<sup>74</sup> In Tennessee, statutes of limitation, when applied against actions brought by the government, are “looked upon with disfavor . . . .”<sup>75</sup>

The semantic differentiation along with the public policy inclination to favor governmental immunity from statutes of limitation produces a significant clarifying effect. Courts determining whether a governmental action implicates a public right versus a merely private right rule heavily in favor of the government, to the point where practically any governmental entity claiming it is acting in a sovereign capacity, whether or not the entity is actually a sovereign, is afforded protection for its actions. This pro-government slant certainly clarifies analysis of whether a statute of limitation applies. The only relevant question seems to be whether each member of the general public in a state could benefit by the governmental action in some way, however circumscribed that benefit may be.

Despite the virtue of added clarity, such a liberal approach to *nul-lum tempus* has been criticized for its side effects, such as encouraging “slothful, dilatory behavior” by those who serve governmental bodies, since nearly every action can be shielded by the armor of *nullum tempus*.<sup>76</sup> Further criticism of this approach is that because such immunity from limitations is so broad-based, applying to the state as well as to each political subdivision, the citizenry is exposed to the specter of their government holding eternal claims and remedies

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72. See cases cited *supra* note 71. In Arizona and Oklahoma, the legislatures have renounced the governmental-versus-proprietary dichotomy. See ARIZ. REV. STAT. § 12-510 (LEXIS through 2005 legislation); cf. OKLA. STAT. tit. 51, § 152.1 (LEXIS through 2005 Extraordinary Session, Act 1) (speaking to the governmental-versus-proprietary dichotomy in the context of sovereign immunity).

73. See *supra* note 71.

74. Bd. of County Comm’rs v. Good Twp., 107 P.2d 805, 806 (Okla. 1940).

75. Hamilton County Bd. of Educ. v. Asbestospray Corp., 909 S.W.2d 783, 785 (Tenn. 1995).

76. State *ex rel.* Schones v. Town of Chanute, 858 P.2d 436, 446 (Okla. 1993) (Opala, J., dissenting).

which can come to roost long into the future when the ability to defend against such a claim may no longer exist.<sup>77</sup>

IX. SHOULD *NULLUM TEMPUS* BE ABANDONED IN NORTH CAROLINA?

In a democracy such as ours, there is a legitimate question whether North Carolina ought to continue to recognize and apply to its own actions a prerogative of the state's former king. Where the state has placed itself on an even playing field with the private citizen in the area of immunity from lawsuits, so the argument goes, it seems incongruous for the state to assert that in other respects the sovereign is nonetheless the better man and entitled to preferential treatment.<sup>78</sup>

From a practical standpoint, critics might further seize upon the dismal history the state has experienced with the dichotomous method of sorting out governmental-versus-proprietary activities which leaves much to be desired and does not lead to an even and just application of the law. Such a state of disarray, it could be argued, cannot be tolerated in a state which has placed such emphasis on precedent and consistency in its judicial functions. Accordingly, without a coherent and justifiable rationale to undergird a principle of law, where the principle cannot practically be vindicated, there is little reason to sustain the principle. It should therefore be discarded.

While such a conclusion is an attractive one, it is not without cost. Inasmuch as state government, counties, and municipalities would be under the same obligation as the private citizen to make sure their lawsuits are timely, the public welfare suddenly would become dependent upon the diligence of every governmental employee charged with overseeing the public interest. While this interest will certainly be looked after for the most part, it almost goes without saying that somewhere, somehow, someone in a place of importance is going to slip up and the public will be forced to bear the consequences. If the protection of *nullum tempus* is eliminated, the tax cheats and slipshod construction firms of the state will most certainly have an extended and indefinite holiday from liability.

Nevertheless, if one accepts the arguments that: 1) the underlying rationale is not antiquated but is supported by both common law and

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77. See *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 141-42 (Okla. 1988) (Opala, J., dissenting).

78. *But see Rowan County Bd. of Educ. v. U.S. Gypsum Co. (Rowan III)*, 418 S.E.2d 648, 657 (N.C. 1992) ("While limiting sovereign immunity diminishes the government's escape of its misdeeds, the same concern for the rights of the public supports retention of *nullum tempus*, as that doctrine allows the government to pursue wrongdoers in vindication of public rights and the public purse.").

constitutional principles; and 2) the doctrine of *nullum tempus* is undergirded by the concept of state sovereignty and possession of the rule-making prerogative, then the only issue remaining is to modify public policy to allow judicial application so as to accomplish the aims of the doctrine. Shaping public policy to favor a governmental-purpose analysis, broad-based and liberally disposed toward finding a governmental purpose, can eliminate the practical problems experienced in North Carolina over the years in applying the doctrine under the present dichotomous test.

Again, there are costs to such a modification as well. Any party who does business with a governmental entity may find itself exposed to litigation arising from transactions that transpired in the distant past. Beyond this, there is also the consideration that taking the pressure off governmental employees to be vigilant in the prosecution of suits encourages a dilatory and slothful habit of mind, clearly not the perfect model for public servants to follow.

#### CONCLUSION

While *nullum tempus* is alive and well in North Carolina today, the uniform and consistent application of the doctrine has yet to be realized despite an expansion of the doctrine's scope. The critical problem in recent history has been identifying proper benchmarks for application of the governmental-versus-proprietary test, which North Carolina courts have used to determine the applicability of *nullum tempus*. Despite recognizing the difficulty, neither the courts nor the legislature have been willing to set forth a clear method of reducing the difficulties inherent in classification. The present reality in the law is that the primary purpose of the doctrine, to shield governments from statutes of limitations which would impede the discharge of core activities, is being significantly compromised.

Two clear solutions exist to resolving the post-*Rowan* problems of proper application of the governmental-versus-proprietary test for application of a statute of limitation against a governmental entity: modification or elimination. There are certainly costs and benefits to each approach and it is unclear which of the approaches mentioned would best serve the citizens of North Carolina. However, given North Carolina's judicial history of interpretation of the dichotomous tests, several things are clear and must be addressed by the courts.

First, while some aspects of the original doctrinal rationale are outmoded, *nullum tempus* has a common law and constitutional underpinning which robustly supports continued survival of the doctrine. Accordingly, continued justification based on the absolute

perfection of the sovereign, misplaced in modern times, should be supplanted by the justification of state sovereignty.

Second, the *nullum tempus* doctrine is not and cannot be consistently applied using existing precedent. Quite simply, the dichotomous governmental-versus-proprietary test does not work.

Finally, modification of existing law is warranted to provide consistency and even application of the law in this area. Changing public policy to grant a strong presumption of a governmental purpose is one way to achieve consistency. However, in the event no modification is undertaken, serious consideration must be given to abrogating the doctrine entirely in order to restore consistency to the judicial decision-making process one way or another.