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An "Outside Limit" for Refund Suits: The Case Against the Tax Exception to the Six-Year Bar on Claims Against the Government

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Longstanding judicial precedent and the official position of the IRS agree that federal tax refund suits are limited only by the two-year statute of limitations of § 6532(a)(1) of the Internal Revenue Code, which is triggered only when the IRS mails the claimant a notice of disallowance. This Article contends that tax refund litigation is also governed by the six-year limitation of 28 U.S.C. § 2401(a) on "every civil action commenced against the United States," which is triggered upon the accrual of a claim. The Supreme Court alluded to this dual-limitation scheme in 2008 in United States v. Clintwood Elkhorn Mining Co.*, stating in dicta that the six-year bar places an "outside limit" on the tax-specific limitation.*

Applying the six-year bar as a backstop to tax refund suits would enforce its plain meaning, would accord with multiple canons of statutory construction, would promote timely resolution of tax refund claims, and would bring tax refund litigation into line with the rest of federal claims jurisprudence, thereby eliminating one manifestation of the tax exceptionalism that the Supreme Court criticized last term in Mayo Foundation for Medical Education & Research v. United States.

Even while abandoning its tax-exceptional doctrine, the IRS may be able to soften the blow to potential claimants' reliance interests by systematically granting extensions of the limitation period pursuant to § 6532(a)(2). This would buy time for attentive taxpayers to file suit while putting future claimants on notice that they must pursue their claims in court within six years of accrual.

INTRODUCTION

The world of federal tax law has long been plagued by "tax exceptionalism,"[1] the notion that "tax law is somehow *different* from other areas of the law" and plays by different rules.[2] The Supreme Court may have sounded the death knell for such "tax myopia" this year in *Mayo Foundation for Medical Education & Research v. United States*, when it unanimously declined "to carve out an approach to administrative review good for tax law only."[3] Instead the Court emphasized "the importance of maintaining a uniform approach to judicial review of administrative action"[4] and held that Treasury regulations are subject to *Chevron* deference rather than a tax-specific standard.[5] Although this passage in *Mayo* was particularly concerned with curing just one of tax myopia's most acute symptoms—idiosyncratic standards of judicial deference to agency action—it signaled a broader policy of harmonizing tax law with the rest of administrative law.[6] One symptom of tax exceptionalism that stands in the way of that project is the notion that tax refund suits are exempt from the time limit that applies to every other kind of suit against the government.

According to 28 U.S.C. § 2401(a), "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[7] A companion

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1 Kristin E. Hickman, *The Need for* Mead: *Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006) ("The view that tax is different or special creates, among other problems, a cloistering effect that too often leads practitioners, scholars, and courts considering tax issues to misconstrue or disregard otherwise interesting and relevant developments in non-tax areas, even when the questions involved are not particularly unique to tax.").

2 Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 519 (1994) (discussing tax-specific theories of the role of legislative history in statutory construction and deference to administrative guidance, *inter alia*, and calling for a "symbiotic relationship between tax and nontax law").

3 131 S. Ct. 704, 713 (2011).

4 *Id.* (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

5 *Id.* ("The principles underlying our decision in *Chevron* apply with full force in the tax context. . . . We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations." (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984))).

6 *See* Kristin Hickman, *Goodbye* National Muffler*! Hello Administrative Law*, TAXPROF BLOG (Jan. 11, 2011), http://taxprof.typepad.com/taxprof_blog/2011/01/hickman-.html (noting a general "orientation toward equating the tax and non-tax contexts").

7 28 U.S.C. § 2401(a).

statute imposes the same limitation period on claims brought in the Court of Federal Claims.[8] Despite the plain meaning of this statute of limitations, federal courts and the Treasury Department have for the past half century read into it an unwritten exception for tax refund suits in the district courts and the Court of Federal Claims.[9] This Article contends that tax refund suits are governed by the six-year bar, no less than by the tax-specific statute of limitations, 26 U.S.C. ("I.R.C.") § 6532(a)(1), which requires that a tax refund suit be filed no later than two years from the date the IRS mails notice of its disallowance of the underlying administrative claim. The tax-specific provision states no limitation where a notice of disallowance has not been mailed, so an administrative claim that the IRS never disallows remains actionable indefinitely unless the general, six-year limitation applies.

A tax refund suit pending in the Court of Federal Claims illustrates the problem with the prevailing tax exception to the six-year bar. Kerry Lynn Edwards claims she overpaid her federal taxes in the years 1998 through 2001 by a total of almost $80,000.[10] She filed suit on August 5, 2009, more than six years after those claims accrued.[11] Thus, according to the plain meaning of 28 U.S.C. § 2501, Ms. Edwards's claims are time-barred. But the Department of Justice has not challenged the court's jurisdiction on that ground, and the court so far has not raised the issue.[12] The parties' only jurisdictional dispute concerns whether Ms. Edwards filed timely administrative refund claims with the IRS, as required by I.R.C. § 7422(a), before she filed suit.[13] Ms. Edwards admits she did not make a formal refund claim within three years of filing each return or within two

8 *Id.* § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

9 *See infra* Part I and notes 30, 61, 66. The issue of the timeliness of a suit that claims an overpayment of tax might also arise in the Tax Court, which does have limited overpayment jurisdiction in its deficiency suits. *See* 26 U.S.C. § 6512(b). But like the district courts or the Court of Federal Claims, the Tax Court may not allow an overpayment "after the expiration of the period of limitation for filing suit." 26 U.S.C. § 6514(a)(2); *see* Brady v. Comm'r, 136 T.C. 19, at *5–6 (2011). If 28 U.S.C. § 2401(a) is an outside limit on that "period of limitation for filing [a refund] suit," then refund claims prosecuted in the Tax Court are also subject to the six-year bar.

10 Edwards v. United States, 92 Fed. Cl. 277, 278 (2010).

11 *Id.*

12 *See id.* at 280 n.6 ("The parties do not dispute that plaintiff timely filed her Complaint in the United States Court of Federal Claims." (citing I.R.C. § 6532(a))).

13 *Id.* at 281–82.

years of paying the tax for each year at issue.[14] She argues that she satisfied the administrative claim requirement of § 6511 nonetheless by filing timely Form 4868 applications for extensions of time to file her returns and making other unspecified "submissions" to the IRS.[15] Considered together, Ms. Edwards contends, these filings constitute "informal claims for refund."[16] The court denied the Government's motion to dismiss, permitting Ms. Edwards to try to prove through discovery that her submissions satisfied the informal claim doctrine.[17] Because the IRS did not recognize her submissions as refund claims, the agency did not render a decision on them. In the absence of a notice of disallowance, the two-year, tax-specific limitation period of § 6532(a)(1) never began to run. Because the Government and the court do not enforce the six-year bar of § 2501, Ms. Edwards was free to file suit whenever she pleased, no matter how much time had passed since she submitted her informal refund claims. If the six-year bar does not apply, a taxpayer can wait for decades before forcing the Government to litigate claims that, for whatever reason, the agency has never officially disallowed.[18]

This result is contrary to sound administrative policy and contrary to the express intent of Congress. Under the dual-limitation regime Congress enacted, a tax refund suit is untimely if it is filed later than *either* two years after the IRS mails a notice of disallowance *or* six years after the claim accrues—i.e., six-and-a-half years after the taxpayer's timely administrative claim for refund.[19] Even if Ms.

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14 *Id.* at 284; *see* I.R.C. § 6511(a).

15 *Edwards*, 92 Fed. Cl. at 284.

16 *Id.*

17 *Id.* at 284–85; *see infra* notes 127–36 and accompanying text (discussing the informal claim doctrine).

18 *See infra* note 65 (discussing Gillespie v. United States, No. 08-169 T (Fed. Cl. Nov. 16, 2010)).

19 A tax refund claim accrues six months after the taxpayer files an administrative claim with the IRS. *See* I.R.C. § 7422(a) (prohibiting suit prior to filing an administrative claim for refund); *id.* § 6532(a)(1) (requiring that suit be filed no earlier than "6 months from the date of filing the [administrative] claim . . . unless the Secretary renders a decision thereon within that time"); *see also* Crown Coat Front Co. v. United States, 386 U.S. 503, 510 (1967) (holding that under 28 U.S.C. § 2401(a), a suit is "barred if the right to bring it first accrued more than six years prior to the date of filing the suit"); Kahn v. United States, 55 Ct. Cl. 271, 285 (1920), *aff'd*, 257 U.S. 244 (1921) (holding that a tax refund claim accrues six months after the filing of an administrative claim unless the administrative claim is disallowed before that time); Fort Pitt Gas Co. v. United States, 49 Ct. Cl. 224, 235 (1914) (holding that "the cause of action accrued at the end of six months from" the date the taxpayer filed his application with the Commissioner); Breland v. United States, No. 5:10-CV-0007, 2011 U.S. Dist. LEXIS 104499, *21 (N.D.N.Y. Sept. 15, 2011); Goss

Edwards can prove she filed a timely informal refund claim that the IRS failed to disallow, her suit falls outside the six-year window of 28 U.S.C. §§ 2501 and 2401(a) and thus outside the jurisdiction of the Court of Federal Claims and the district courts.

Part I of this Article analyzes *Detroit Trust Co. v. United States*,[20] the 1955 Court of Claims case responsible for the prevailing view that the general statute of limitations has no application to tax refund litigation. Using several mutually reinforcing canons of statutory construction, Part II explains why *Detroit Trust* was wrongly decided. Part III summarizes the long parallel histories of the general and tax-specific statutes of limitations, in an effort to demonstrate their compatibility. Part IV examines recent cases that point the way to restoring the general limitation in tax refund litigation. These include *United States v. Clintwood Elkhorn Mining Co.*, in which the Supreme Court stated in dicta that the six-year bar places an "outside limit" on the time during which a tax refund suit may be brought,[21] and *Wagenet v. United States*, in which the U.S. District Court for the Central District of California expressly held that it lacked jurisdiction over a tax refund suit brought after the six-year deadline.[22] Part V recommends possible taxpayer-friendly approaches to enforcing the six-year bar in the IRS and in the courts. The agency may be able to systematically grant extensions of the limitation period to protect taxpayers' reliance interests in *Detroit Trust*'s tax exception, and courts may be able to announce prospectively the applicability of the general statute of limitations to the tax context.

I
THE *DETROIT TRUST* TAX EXCEPTION TO THE SIX-YEAR BAR ON SUITS AGAINST THE GOVERNMENT

In *Detroit Trust Co. v. United States*,[23] the Court of Claims held that only the I.R.C.'s two-year statute of limitations[24] is relevant to

v. United States, 293 F. Supp. 2d 816, 818 (N.D. Ohio 2003) ("[A] [refund] claim accrues 'when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue for his money.'" (alteration omitted) (quoting Gerstein v. United States, 56 Fed. Cl. 630, 633 (2003))).

20 130 F. Supp. 815 (Ct. Cl. 1955).

21 553 U.S. 1, 8 (2008).

22 No. SACV 08-00142 AG (ANx), 2009 U.S. Dist. LEXIS 115547, at *3 (C.D. Cal. Sept. 14, 2009), *appeal dismissed*, No. 09-56800 (9th Cir. Dec. 7, 2010).

23 130 F. Supp. 815 (Ct. Cl. 1955).

24 Internal Revenue Code of 1939, ch. 37, § 3772(a)(2), 53 Stat. 1, 465 (codified at 26 U.S.C. § 3772(a)(2)) ("No such suit or proceeding shall be begun before the expiration of

the question of when a taxpayer may file suit to recover taxes that the Government assessed or collected illegally. This case reversed *sub silentio* previous Court of Claims authority suggesting the dual-limitation view advocated in this Article.[25] Under *Detroit Trust*, a taxpayer may bring suit anytime between six months after filing an administrative claim and two years after the IRS disallows that claim.[26] Because *Detroit Trust* held the general limitation period to be inapplicable to tax refund suits,[27] a long-delayed disallowance by the IRS is understood to start the clock on the tax-specific two-year statute of limitations,[28] even if the underlying claim accrued more than six years earlier. IRS guidance advises that if the Service never disallows a refund claim—even an informal claim that the IRS never recognizes as such[29]—the taxpayer may indefinitely sit on her right to sue.[30] With one exception,[31] commentators agree that the *Detroit*

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six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.").

25 *See* Fort Pitt Gas Co. v. United States, 49 Ct. Cl. 224, 234 (1914) (citing the *in pari materia* canon and the presumption against implied repeal for the point that the I.R.C. and Tucker Act statutes of limitations are "not necessarily inconsistent" with each other, and holding that the taxpayer's suit was barred by the former); *cf. infra* Part II.C (presumption against implied repeal); *infra* Part II.D (*in pari materia* canon).

26 *Detroit Trust*, 130 F. Supp. at 817.

27 *Id.* at 817–18.

28 I.R.C. § 6532(a)(1).

29 *See infra* notes 127–36 and accompanying text (discussing the informal claim doctrine).

30 *See* Rev. Rul. 56-381, 1956 C.B. 953 (stating that an Agreement to Suspend Running of Statute of Limitations is not necessary absent a registered notice of disallowance because "the period of limitations for filing suit does not commence in such a case"); I.R.S. Chief Couns. Advice Mem. 200202069, at 5 (Nov. 30, 2001) ("The 2-year limitations period in section 6532(a) will not start running . . . if the IRS does not issue a notice of claim disallowance and the taxpayer does not waive the right to a notice of claim disallowance. This means that the period of limitations remains open indefinitely and the taxpayer could file a lawsuit many years after the taxpayer filed the claim with the IRS." (citing *Detroit Trust*, 130 F. Supp. 815)), *available at* http://irs.gov/pub/irs-sca/0202069.pdf; I.R.S. Field Serv. Advice Mem., 1998 FSA LEXIS 540 (Mar. 17, 1998) ("In the absence of [disallowance or waiver], it would appear the taxpayer would have an indefinite amount of time in which to file a refund suit."); IRM 34.5.2.2(5) (Aug. 11, 2004) ("The statute of limitations does not begin to run until the Service issues a notice of claim disallowance."), *available at* http://www.irs.gov/irm/part34/irm_34-005-002.html; *see also* 1998 IRS Non Docketed Serv. Advice Rev. 5829, 1998 WL 1993209 (Mar. 17, 1998) (taking this position but noting the contrary authority of *Finkelstein v. United States*, 943 F. Supp. 425 (D.N.J. 1996)).

31 MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 49.08 (3d ed. 2003 & Supp. 2010) ("Section 6532 does not address the

Trust approach still governs tax refund suits, so the general, six-year limitation period does not bar such suits, no matter how long ago the underlying claim accrued.[32]

In *Detroit Trust*, a trust company acting as the executor of an estate filed with the IRS an administrative refund claim in 1923 for tax assessed for the year 1917.[33] The tax had been assessed against the decedent in connection with the reorganization of a company of which he was a stockholder.[34] For more than two decades, the IRS took no action on the 1923 refund claim.[35] In 1948, following the favorable resolution of a parallel suit brought by the trust company as

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applicable statute of limitations on a refund suit if the IRS simply fails to mail a notice of disallowance of a properly filed administrative refund claim. In such a case, the generally applicable six-year period of limitations provided for suits against the United States in 28 [U.S.C.] § 2401(a) applies." (citing Wagenet v. United States, No. SACV 08-00142 AG (ANx), 2009 U.S. Dist. LEXIS 115547 (C.D. Cal. Sept. 14, 2009))).

32 *See* JACOB RABKIN & MARK H. JOHNSON, FEDERAL INCOME, GIFT, AND ESTATE TAXATION 5-80, § 80.05 (2d ed. 1985) ("Until [either the IRS sends the taxpayer a written notice of claim disallowance or the taxpayer files a written waiver of the notice], both the Service and the courts are in agreement that the limitations period does not start running and the taxpayer has an indefinite period in which to file suit."); LEANDRA LEDERMAN & ANN MURPHY, FEDERAL TAX PRACTICE AND PROCEDURE 1–10, § 10.05 (2010) (same); WILLIAM D. ELLIOTT, FEDERAL TAX COLLECTIONS, LIENS & LEVIES ¶ 7.07[2][c] & n.287 (2009 & Supp. 2010) ("Absent a notice of disallowance, a refund suit can be brought at any time. . . . Laches may be a bar, however, if the taxpayer has no reason to believe that the Service is continuing to evaluate the claim and the delay is egregious."); MARVIN J. GARBIS ET AL., FEDERAL TAX LITIGATION ¶ 16.02[1], at 16-5 (1985) ("If no notification of claim disallowance is ever issued, and the claim is never formally rejected, the statutory period [for filing suit] never commences running. Thus a cause of action can theoretically remain alive indefinitely." (citing *Detroit Trust*, 130 F. Supp. 815)); MARVIN J. GARBIS & ALLEN L. SCHWAIT, TAX REFUND LITIGATION 56 (1971) ("If the Internal Revenue Service delays its action upon a claim for refund, no matter how long, the limitations period for suit still does not expire until two years after the claim is formally rejected or a waiver of notice of disallowance is filed." (citing *Detroit Trust*, 130 F. Supp. 815)); GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶ 15.05 n.111 (2d ed. 1998 & Supp. 2010) ("If no claim disallowance is mailed, there is no period of limitations within which a refund [suit] must be brought." (citing *Detroit Trust*, 130 F. Supp. 815)); MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 11.11[2], at 11-118 (2009) ("If no notice of claim disallowance is sent, the two-year statute of limitations does not begin to run."); THE UNITED STATES COURT OF FEDERAL CLAIMS: A DESKBOOK FOR PRACTITIONERS 15 n.106 (4th ed. 1998) ("If no notice of disallowance is issued, then no limitation on the time for filing of a refund suit exists." (citing Consol. Edison Co. of N.Y. v. United States, 135 F. Supp. 881, 883 (Ct. Cl. 1955))); *see also* Ronald A. Stein, *Does Section 7426 Provide Exclusive Remedies for a Wrongful Levy?*, 88 J. TAX'N 169, 169 (1998) ("[A] lawsuit to recover the tax normally may be commenced only if and when the IRS denies the claim." (citing *Detroit Trust*, 130 F. Supp. 815)).

33 130 F. Supp. at 815.

34 *Id.*

35 *Id.* at 816.

executor of another estate, the plaintiff filed an amended refund claim.[36] In 1951, twenty-eight years after the original administrative claim was filed, the IRS officially disallowed it.[37] The trust company filed suit within two years of the belated disallowance, satisfying § 3772, the predecessor to current § 6532(a)(1),[38] but long after the expiration of the six-year statute of limitations in 28 U.S.C. § 2501.[39] The Court of Claims declared the suit timely.[40]

In holding that "[t]he six-year statute of limitations does not apply,"[41] the Court of Claims relied on language of the Supreme Court in *United States v. Michel*,[42] which interpreted 26 U.S.C. § 156, the tax-specific statute of limitations that preceded § 3772 in *Detroit Trust* and § 6532(a)(1) in the current I.R.C. Instead of a simple, two-year, post-disallowance limit like that of its successors, former § 156 allowed suit within the longer of five years after payment of the tax or two years after disallowance of the refund claim.[43] In *Michel*, the Supreme Court disallowed two suits brought outside both of § 156's limitation periods.[44] In its analysis of § 156, the Court confirmed what was evident from the text of that statute: in the event of a belated disallowance, the two-year, post-disallowance limitation supplanted the five-year, post-payment limitation in the same statute.

> By the terms of [§ 156] the period within which the government consented to be sued commenced at the expiration of . . . six months [after the administrative claim was filed], and continued uninterruptedly through the five-year period following the date of payment and until "two years after the disallowance."[45]

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36 *Id.*

37 *Id.*

38 *Id*. (citing I.R.C. § 3772 (1952)).

39 *Id*. (citing 28 U.S.C. § 2501 (1952)).

40 *Id.* at 818.

41 *Id.*

42 282 U.S. 656 (1931).

43 Revenue Act of 1924, ch. 234, § 1014(a), R.S. § 3226, 43 Stat. 253, 343 (codified at 26 U.S.C. § 156) ("No [tax refund] suit or proceeding shall be begun before the expiration of six months from the date of filing [an administrative refund claim] unless the [C]ommissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."), *quoted in Michel*, 282 U.S. at 658.

44 282 U.S. at 658.

45 *Id.* at 659 (quoting 26 U.S.C. § 156). The *Michel* Court's notion that the post-disallowance limit would extend the post-payment limit "uninterruptedly" rather than simply creating a second chance for the taxpayer to file suit upon disallowance was pure dicta: the taxpayers in that case filed suit *after* disallowance—not between the expiration

Because the IRS did not disallow the claims in *Michel* until after or soon before the expiration of § 156's five-year limitation period,[46] the two-year, post-disallowance limit extended the time in which a taxpayer could file suit over and above the five-year, post-payment limit. *Michel* did not discuss the application of the general six-year limitation at all, presumably because each taxpayer filed suit within six years of the date his claim accrued.[47]

Although the interaction of former § 156 with the general limitation is purely hypothetical, there is no compelling reason to believe the *Michel* Court would not have applied the latter as an alternative basis for decision if the taxpayers had filed suit more than six years after their claims accrued in 1924 and 1925. More important, even if § 156 did trump the six-year bar, that fact would have no bearing on whether its simpler successor statutes did as well. A much stronger argument can be made for the implied repeal of the six-year bar by former § 156 than by current § 6532 and its immediate predecessors. The *Detroit Trust* court erred in both respects: it misread *Michel* as stating that § 156 preempted the general limitation on claims against the government, and it misapplied that false premise to the significantly simplified tax-specific limitation then (as now) in effect.

Detroit Trust transposed *Michel*'s treatment of § 156's dual-limitation scheme onto its successor statute, as if the same principle that made the two-year limitation in § 156 survive its own five-year limitation should apply to the relationship between the singular two-year limitation of § 3772 and the entirely separate six-year limitation in title 28. *Detroit Trust*'s reliance on *Michel* was misplaced. The Court of Claims ignored important differences between § 156 and the present limitation regimes. Unlike the tacit interaction between

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of the five-year, post-payment limit and disallowance. *Id.* at 658. Thus no case or controversy required a decision about the permissibility of a suit within the window between expiration of the five-year limit and disallowance. Rather than an uninterrupted period in which suit would have been permitted, the text of § 156 indicates that whenever the IRS disallowed an administrative claim after the five-year limit, it created a new two-year window in which to file suit—not an extension of the original limitation period.

[46] Both taxpayers in *Michel* paid the relevant tax on unspecified dates in 1920, and their administrative claims were disallowed on September 2, 1925, and April 20, 1925, respectively. *Id.* at 657.

[47] The first taxpayer's claim accrued on August 7, 1924 (six months after he filed his administrative claim for refund), and he filed suit sometime between September 3, 1927 ("more than two years after the [disallowance]"), and June 27, 1930 ("less than two years after the notice[of disallowance]"). The second taxpayer's claim accrued on March 15, 1925, and he filed suit sometime between April 21, 1927, and June 27, 1930. *Id.*

current § 6532 and the general six-year limit, the old § 156 had been explicit about the interrelation of its two limitation periods. Section 156 stated clearly that the two-year, post-disallowance limit could operate over and above the five-year limit: it prohibited suits filed "after the expiration of five years from the date of the payment of such tax . . . *unless* such suit or proceeding is begun within two years after the disallowance."[48] By contrast, current § 6532, like all of its predecessors since the Revenue Act of 1932,[49] includes just a single post-disallowance limitation of two years and makes no mention of its trumping another statute of limitations. The two- and five-year limitations in old § 156 are thus not analogous to the two- and six-year limitations in current § 6532 and 28 U.S.C. § 2501.

The short and somewhat cryptic *Detroit Trust* opinion seems to interpret legislative history to support its notion that the two-year, post-disallowance limitation in § 3226 overrode the six-year, post-accrual limitation.[50] The Senate Report said of the Senate version of the 1923 amendment to § 3226 that it would "permit bringing suits within two years after the disallowance of a claim, *the statute of limitations notwithstanding* . . . ."[51] The Court of Claims implicitly read "the statute of limitations" as a reference to the six-year limitation in 28 U.S.C. § 2501.[52] The better interpretation of that phrase, however, is that it refers to the I.R.C.'s own five-year, post-payment limitation period then in effect. The 1921 version of § 3226 had included only a five-year, post-payment limitation, and the 1923 amendment added the two-year, post-disallowance limitation that the Supreme Court interpreted in *Michel*.[53] The Court of Claims arrived at its rather strained interpretation of the legislative history as referring to the general, six-year statute of limitations rather than the tax-specific, five-year limit by finding that the five-year limit was "not a statute of limitation within the meaning of 28 U.S.C.

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48 26 U.S.C. § 156 (emphasis added).

49 *See infra* Part III.B.

50 130 F. Supp. 815, 817 n.3 (Ct. Cl. 1955).

51 S. REP. NO. 67-1137, at 8 (1923) (emphasis added), *cited in Detroit Trust*, 130 F. Supp. at 817 n.3.

52 *See Detroit Trust*, 130 F. Supp. at 817 n.3.

53 26 U.S.C. § 3226 (1923) ("No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance . . . ."). The five-year limitation period was deleted in the subsequent amendment. Revenue Act of 1932, tit. 9, § 1103, 47 Stat. 269, 286 (codified at R.S. § 3226).

§ 2501."[54] It cited *Arnson v. Murphy*[55] and *John F. Jelke Co. v. Smietanka*,[56] for this conclusion even though neither case stated that § 3226 and its predecessors were not statutes of limitations.[57]

There is no evidence that the Senate Finance Committee had in mind such a punctilious distinction when it said that disallowance created a two-year window in which the taxpayer could file suit "the statute of limitations notwithstanding." The theory that Congress did not consider § 3226 to be a statute of limitations is belied by the House Conference Report on the subsequent amendment to that statute, which explicitly called it a "statute of limitations."[58] The *Detroit Trust* court failed to consider this contrary legislative history from the House of Representatives when it relied on the prior Senate Report.[59] The Court of Claims' innovation in *Detroit Trust* is not supported by the legislative history of the tax-specific statute of limitations. Instead, that legislative history is consistent with a dual-limitation scheme in which the general and tax-specific statutes of limitations operate in tandem. By 1955, when *Detroit Trust* was decided, the general and tax-specific statutes of limitations had both been reenacted and amended repeatedly over many decades with no mention of limiting the other's effect.[60]

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54 *Detroit Trust*, 130 F. Supp. at 817.

55 109 U.S. 238 (1883).

56 86 F.2d 470 (7th Cir. 1936).

57 *Arnson* interpreted a similar waiver of sovereign immunity allowing suit for erroneously exacted duties within prescribed time limits. 109 U.S. at 240–41 (citing 13 Stat. 202 (1864)); *see also* Arnson v. Murphy, 115 U.S. 579, 584 (1885) (stating that failure to comply with the limitation period need not be "pleaded by the defendant as a statute of limitation" because "[t]he right of action does not exist independently of the statute, but is conferred by it"). However, the Court never hinted that the limit on duty actions is *not* a statute of limitations. Similarly, in *John F. Jelke Co. v. Smietanka*, the Seventh Circuit distinguished a limitation period that limits the remedy from one that limits liability itself, characterizing § 3226 as being of the latter variety. 86 F.2d at 471–72. The distinction drawn in these cases is relevant to whether the Government must raise the statute of limitations as an affirmative defense—not whether the statute is a statute of limitations in the first place.

58 H.R. REP. NO. 72-1492, at 28 (1932) (Conf. Rep.). The courts have consistently recognized § 6532 and its predecessors as statutes of limitations. *See* United States v. A.S. Kreider Co., 313 U.S. 443, 447 (1941) (holding that the predecessor to § 6532 imposes a "different and shorter period of limitation" than the Tucker Act); RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1461 (Fed. Cir. 1998) ("The statute of limitations applying to [the taxpayer's] refund claim filed in the Court of Federal Claims is 26 U.S.C. § 6532."); Gordon v. United States, 649 F.2d 837, 844 (Ct. Cl. 1981) ("In seeking a refund of taxes . . . a taxpayer must ascribe to the period of limitation established by I.R.C. §§ 6511(a) and 6532(a) . . . .").

59 *See* 130 F. Supp. at 817 n.3.

60 *See infra* Part III.

The *Detroit Trust* tax exception to the six-year statute of limitations was upheld in several subsequent Court of Claims cases,[61] and it is binding on the U.S. Court of Appeals for the Federal Circuit[62] and on the Court of Federal Claims, whose appeals are to the Federal Circuit.[63] Because the Court of Federal Claims shares its tax-refund jurisdiction with the federal district courts,[64] the Article III courts have also had to wrestle with the relationship between the tax-specific and general statutes of limitations. Unfortunately, by effectively acquiescing in *Detroit Trust*, the IRS has provided little incentive to challenge its holding. As a rule, the Government does not raise the general statute of limitations as a defense even in cases filed many more than six years after the claim accrues.[65] Deferring to the expertise of the Federal Circuit and its predecessors, the courts have largely followed the rule that the six-year bar does not apply in

[61] *See Gordon*, 649 F.2d at 844 ("In seeking a refund of taxes, for example, a taxpayer must ascribe to the period of limitation established by I.R.C. §§ 6511(a) and 6532(a) rather than the general 6-year period of 28 U.S.C. §§ 2501 and 2401."); Alexander Proudfoot Co. v. United States, 454 F.2d 1379, 1380 (Ct. Cl. 1972) ("[I]f the special tax requirements are applicable, they dominate and exclude the general pre-conditions for suit against the United States."); Consol. Edison Co. of N.Y. v. United States, 135 F. Supp. 881, 883 (Ct. Cl. 1955) ("[The I.R.C. statute of limitations] was the governing statute of limitations and . . . the six-year statute of limitations contained in 28 U.S.C. § 2501 was not applicable." (citing *Detroit Trust*, 130 F. Supp. 815)); *see also* Hampton v. United States, 513 F.2d 1234, 1243 (Ct. Cl. 1975) ("Plaintiff's argument that refunds under [26 U.S.C.] § 692(1) are governed by the 6-year period of limitations prescribed in 28 U.S.C. § 2401, the general statute of limitations for civil actions against the United States, is based upon the incorrect assumption that the filing of a claim for the 'refund of an overpayment' is not required under § 692(1).").

[62] *See* S. Corp. & Seal Fleet, Inc. v. United States, 690 F. 2d 1368, 1369 (Fed. Cir. 1982).

[63] 28 U.S.C. § 1295(a)(3).

[64] *See* 28 U.S.C. § 1346(a)(1).

[65] For example, the Department of Justice settled a case with more than $100,000 at stake even though the underlying refund claims had been filed more than twenty-five years earlier, because the IRS could not prove it had mailed a notice of disallowance. *See* Complaint at 4, ¶ 16, Gillespie v. United States, No. 08-169 T (Ct. Fed. Cl. Mar. 14, 2008), ECF No. 1-8 ("On April 8, 1982, the Trust claimed a refund of an overpayment of tax for the 1978 and 1979 tax years."); *id.* at 10, ¶ 45 ("The Internal Revenue Service has not provided the Plaintiffs with any proof that the June 24, 2003 [disallowance] letter was sent to the Plaintiffs."); Joint Preliminary Status Report at 1, *Gillespie*, No. 08-169 T (Sept. 4, 2008), ECF No. 7 ("At this time, the United States does not expect to contend that the Court is without jurisdiction."); Joint Status Report at 1, *Gillespie*, No. 08-169 T (Nov. 16, 2010), ECF No. 31 ("Defendant has recently mailed refund checks to plaintiffs' counsel based on the settlement."). *But see* Motion to Dismiss at 6, Wagenet v. United States, No. SACV 08-00142 AG (ANx) (C.D. Cal. June 3, 2009), ECF No. 14 (Assistant United States Attorney's argument that 28 U.S.C. § 2501 barred the tax refund suit).

tax refund litigation.[66] In so holding, however, they have neglected its explicit scope: "every civil action commenced against the United States."[67]

II
A CANON-BASED RECONSTRUCTION OF THE DUAL-LIMITATION SCHEME FOR TAX REFUND SUITS

This Article's proposed restoration of the general statute of limitations to tax refund litigation comports with the traditional tools of statutory construction, whereas *Detroit Trust* is at odds with them. Canons of statutory construction have been disparaged because too often they seem arbitrary and even contradictory.[68] Sometimes, though, the canons applicable to a given statutory problem reinforce rather than undermine one another. That is so here. Multiple canons support the application of the six-year bar as an outside limit in tax refund litigation.

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[66] *See* Bruno v. United States, 547 F.2d 71, 73 (8th Cir. 1976) ("[Section] 2401 does not apply to actions for tax refunds, which are governed by the more specific period of limitation set forth in §§ 6511 and 7422 of the [I.R.C.]"); Phoenix State Bank & Trust Co. v. Bitgood, 28 F. Supp. 899, 900 (D. Conn. 1939) ("While the plaintiff bases its authority for bringing an action against the United States in the District Court on the provisions of 28 U.S.C.A. § 41(20) [predecessor to § 2401], the six year limitation prescribed therein must yield before the more specific limitation of two years found in 26 U.S.C.A. §§ 1672–1673. Actions against the United States under 28 U.S.C.A. § 41(20) for internal revenue taxes erroneously collected have been held to be subject to the shorter time limitation."). *But see* Wagenet v. United States, No. SACV 08-00142 AG (ANx), 2009 U.S. Dist. LEXIS 115547, at *10 (C.D. Cal. Sept. 14, 2009) ("*Bruno*, *Hampton* [*v. United States*, 513 F.2d 1234 (Fed. Cir. 1975),] and *Phoenix State Bank* each involved *plaintiffs* arguing § 2401(a) *allowed* refund actions against the United States for six years after accrual despite the existence of other statutes with shorter limitations periods."); *infra* Part IV.B–C (discussing *Wagenet*, Finkelstein v. United States, 943 F. Supp. 425, 432 (D.N.J. 1996), and Breland v. United States, No. 5:10-CV-0007, 2011 U.S. Dist. LEXIS 104499, *21-22 (N.D.N.Y. Sept. 15, 2011)).

[67] 28 U.S.C. § 2401(a).

[68] Karl Llewellyn famously listed the canons of construction in two parallel columns with a parry for every thrust. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). Llewellyn's approach has been criticized as selective and overly cynical. *See* Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," One to Seven*, 50 N.Y.L. SCH. L. REV. 919 (2005–2006); Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Eight to Twelve*, 51 N.Y.L. SCH. L. REV. 1003 (2006–2007); Michael Sinclair, *"Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," Pairs Thirteen to Sixteen*, 53 N.Y.L. SCH. L. REV. 953 (2008–2009).

A. Plain Meaning

When federal courts interpret acts of Congress, they start from the presumption that Congress means what it says. As the Supreme Court has said, "In cases of statutory construction we begin, of course, with the language of the statute. And 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'"[69] With one explicit exception not pertinent here,[70] §§ 2401 and 2501 purport to apply their six-year limitation to "[e]very claim" and "every civil action" brought against the United States in the district courts and Court of Federal Claims.[71] This is an "unexceptional" statute of limitations[72] whose plain meaning embraces tax refund suits—the quintessential claim against the Government.[73] Indeed, it is hard to imagine how Congress could have given the six-year limitation a broader scope than by applying it to "[e]very claim" and "every civil action" against the United States.[74] Following this plain meaning, the Federal Circuit interprets 28 U.S.C. § 2501 to bar late-filed suits in virtually every area of federal claims litigation except for tax.[75] Even claims for interest on

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69 Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980) (citation omitted) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)); *Perrin*, 444 U.S. at 42 (describing this as "[a] fundamental canon of statutory construction"); *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) ("The starting point in every case involving construction of a statute is the language itself."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."); *see also* Pierce v. Underwood, 487 U.S. 552, 576 (1988) (Brennan, J., concurring) ("The Court begins, as is proper, with the plain meaning of the statutory language."); Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 801 (1985) (White, J., dissenting) ("A more conventional reading of the statute [is] one that takes as its starting point the plain meaning of the statutory language.").

70 *See infra* Part II.E (discussing the Contract Disputes Act of 1978 and its introduction of an explicit exception to the six-year limitation for government contract suits).

71 *See* 28 U.S.C. § 2401 (barring "every civil action commenced against the United States" more than six years "after the right of action first accrues," "[e]xcept as provided by the Contract Disputes Act of 1978"); *id.* § 2501 (barring "[e]very claim of which the United States Court of Federal Claims has jurisdiction . . . unless the petition thereon is filed within six years after such claim first accrues").

72 Franconia Assocs. v. United States, 536 U.S. 129, 145 (2002).

73 Tax refund suits were among the earliest suits heard in the Court of Claims. *See infra* notes 158, 159 and accompanying text.

74 28 U.S.C. §§ 2401(a), 2501; *cf.* United States v. Five Gambling Devices, 346 U.S. 441, 454 (1953) (Clark, J., dissenting) ("It would be difficult for Congress to be more explicit than to direct the statute's mandate, as it has here, to 'every' manufacturer and dealer without qualification.") (interpreting 15 U.S.C. § 1173 (1951)).

75 *See, e.g.*, Ingrum v. United States, 560 F.3d 1311 (Fed. Cir. 2009) (land takings); Young v. United States, 529 F.3d 1380 (Fed. Cir. 2008) (Veterans Affairs); W. Shoshone

a belated tax refund are subject to the six-year bar.[76] The statute itself suggests no reason why tax refund suits should be treated any differently.

Where the meaning of a statute is unambiguous, courts should have no need to resort to other canons of statutory construction.[77] But since the meaning of a statutory provision is seldom indisputably clear, plain meaning is rarely the end of statutory construction.[78] Even if there is some ambiguity about the six-year bar's stated application to "every civil action commenced against the United States,"[79] the other tools of statutory construction confirm that this

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Nat'l Council v. United States, 279 F. App'x 980 (Fed. Cir. 2008) (Indian Claims Commission appeal); Wilder v. United States, 277 F.App'x 999 (Fed. Cir. 2008) (federal employment); Zakiya v. United States, 277 F. App'x 985 (Fed. Cir. 2008) (unjust imprisonment); Glaude v. United States, 248 F. App'x 175 (Fed. Cir. 2008) (Merit System Protection Board appeal); *see also* Bonwit Teller & Co. v. United States, 283 U.S. 258 (1931) (suit on an account stated).

76 *See* Gen. Elec. v. United States, 384 F.3d 1307, 1312 (Fed. Cir. 2004) ("[T]he statute of limitations for collecting interest on an overpayment [pursuant to 26 U.S.C. § 6611] is not the three-year limitations period applicable to recovery of the overpayment itself, 26 U.S.C. § 6511, but the general six-year statute that applies to suits against the government, 28 U.S.C. § 2401. The principle underlying that distinction is that an overpayment is a payment that relates to a tax obligation, while interest on an overpayment is simply a general debt of the government, which is not subject to the special rules associated with the adjustment and collection of obligations under the tax laws.").

77 Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."), *cited in* Carcieri v. Salazar, 129 S. Ct. 1058, 1064 (2009), *and* Jimenez v. Quarterman, 129 S. Ct. 681, 685 (2009).

78 *See* Watt v. Alaska, 451 U.S. 259, 266 (1981) ("[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (quoting Boston Sand Co. v. United States, 278 U.S. 41, 48 (1928))); Maine v. Thiboutot, 448 U.S. 1, 13 (1980) ("Although plain meaning is always the starting point, this Court rarely ignores available aids to statutory construction." (citation omitted)); *see also* Mass. Bonding & Ins. Co. v. United States, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting) ("Of course one begins with the words of a statute to ascertain its meaning, but one does not end with them. The notion that the plain meaning of the words of a statute defines the meaning of the statute reminds one of T.H. Huxley's gay observation that at times 'a theory survives long after its brains are knocked out.' One would suppose that this particular theory of statutory construction had had its brains knocked out in *Boston Sand & Gravel Co.* . . . .").

79 28 U.S.C. § 2401(a).

phrase includes tax refund claims.[80] Courts should be especially slow to contradict a statute's ordinary meaning under such circumstances.

B. Giving Effect to Every Word

Closely related to the plain meaning presumption is the rule that "a court should give effect, if possible, to every clause and word of a statute."[81] By inferring an exception for tax refund suits, *Detroit Trust*, which declined to quote 28 U.S.C. § 2501 while holding it inapplicable to the tax context, failed to give the word "every" any meaning whatsoever. The expansive language Congress used—"[*e*]*very* civil action commenced against the United States"[82]—militates against any qualification on the scope of the six-year bar.[83] If Congress had intended to create a mere presumption that claims against the government are barred after six years, rebuttable by the existence of any other applicable limitation period, Congress would not have emphasized the limitation's application to "[*e*]*very* claim."[84]

C. Presumption Against Implied Repeal

Detroit Trust inferred what later Court of Claims cases stated explicitly: that the I.R.C.'s context-specific statute of limitations for suits founded on tax refund claims (first enacted in 1866) implies an exception to the general, six-year statute of limitations (first enacted

80 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 686 (1990) (proposing that canons of statutory construction should be used in conjunction with a statute's plain language to determine statutory meaning).

81 Moskal v. United States, 498 U.S. 103, 109 (1990) (internal quotation marks omitted).

82 28 U.S.C. § 2501 (emphasis added).

83 *Cf.* United States v. Gonzales, 520 U.S. 1, 5 (1997) ("The question we face is whether the phrase 'any other term of imprisonment' means what it says, or whether it should be limited to some subset of prison sentences—namely, only federal sentences. Read naturally, the word 'any' has an expansive meaning . . . . Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all 'term[s] of imprisonment,' including those imposed by state courts." (citation and internal quotation marks omitted)); Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) ("To most, 'every person' would mean *every person*, not every person *except* judges."); Brooks v. United States, 337 U.S. 49, 51 (1949) ("The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. None exclude petitioners' claims.").

84 28 U.S.C. § 2501 (emphasis added).

in 1863).[85] This suggestion of an implied amendment contravenes the Supreme Court's repeated admonition "that absent a clearly established congressional intention, repeals by implication are not favored."[86] The presumption against implied repeal applies with equal force against implied statutory amendments.[87] The Supreme Court has applied this canon to preserve Tucker Act takings remedies from implied repeal by other federal statutes[88] and to preserve context-specific statutes of limitations from implied repeal by the Tucker Act's general, six-year limitation.[89] The Court of Claims'

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85 *See* Alexander Proudfoot Co. v. United States, 454 F.2d 1379, 1380 (Ct. Cl. 1972) ("[I]f the special tax requirements are applicable, they dominate and exclude the general pre-conditions for suit against the United States.").

86 Branch v. Smith, 538 U.S. 254, 273 (2003) (plurality opinion) (citation and internal quotation marks omitted); *see also* United States v. Burroughs, 289 U.S. 159, 164 (1933) ("Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is to remain in force.").

87 *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 664 n.8 (2007) ("It does not matter whether this alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) ("'A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled'"); United States v. Welden, 377 U.S. 95, 103 n.12 (1964) ("Amendments by implication . . . are not favored"))); 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 22.30 (7th ed. 2009 & Supp. 2010) ("[T]here is a presumption against the implied repeal or amendment of any existing statutory provision." (footnote omitted)).

88 *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017–18 (1984) (rejecting a contention that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) repealed by implication a Tucker Act remedy for governmental taking of property without just compensation, and reconciling the two statutes by implying a requirement that remedies under FIFRA must be exhausted before relief under the Tucker Act could be obtained); *id.* at 1017 ("In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but 'whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] founded . . . upon the Constitution.'" (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 126) (alteration in original) (internal quotation marks omitted)).

89 *See* United States v. Greathouse, 166 U.S. 601, 605 (1897) ("The [Tucker A]ct of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the Government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes [the six-year statute of limitations that preceded the Tucker Act] in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one

suggestion that 26 U.S.C. § 3226, predecessor to § 6532, impliedly amended 28 U.S.C. § 2501 was and remains unjustified, because both statutes of limitations can function in parallel: "An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute."[90]

It is true as a general rule that "a specific statute will not be controlled or nullified by a general one."[91] If applying the six-year limitation in the tax context were to thwart the application of the tax-specific limitation, this principle would favor the application of § 6532 as a replacement for the general statute of limitations. But this principle only applies when the statutes are actually incompatible with one another.[92] "It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, 'when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.'"[93] In this case, the general and tax-specific limitations are fully compatible with one another because they are triggered by different events—accrual and disallowance.[94] As the Eighth Circuit held long before *Detroit Trust*,

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years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them.").

90 *Branch*, 538 U.S. at 273 (internal quotation marks and citations omitted).

91 Morton v. Mancari, 417 U.S. 535, 550–51 (1974); *see also* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("It is a commonplace of statutory construction that the specific governs the general.").

92 *See* St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981) (It is a "long-established canon of construction" that "'[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.'" (quoting *Morton*, 417 U.S. at 550)); *see also Morton*, 417 U.S. at 550 ("When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal must be clear and manifest." (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)) (alteration and internal quotation marks omitted)).

93 Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) (quoting *Morton*, 417 U.S. at 551).

94 *Compare* 28 U.S.C. §§ 2401(a), 2501, *with* I.R.C. § 6532. From the beginning, the general and tax-specific statutes of limitations have been compatible because they measure from accrual and disallowance respectively. *Compare* An Act To Amend "An Act To Establish a Court for the Investigation of Claims Against the United States," ch. 92, sec. 10, 12 Stat. 765, 767 (1863) (codified at R.S. § 1069) ("[E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting

> [T]here is certainly no repugnancy between a general law to the effect that no action upon any of several classes of claims shall be brought after six years from the accrual of the cause of action, and a statute that no action upon any of a specific class of these claims shall be sustained unless it is commenced within two years of the time when the cause of action arose; and, as there is no inconsistency between the two limitations, the [Tucker A]ct of 1887 neither repealed nor modified the provision of section 3227 [of the Revised Statutes, predecessor to 26 U.S.C. § 6532(a)].[95]

Because both statutes of limitations can operate in tandem, courts have no reason to resort to the preference for specific statutes over general ones.

In *Hinck v. United States*, the Supreme Court articulated in the tax context the principle that "in most contexts, a precisely drawn, detailed statute pre-empts more general remedies."[96] The Court applied this principle to hold that Congress's specific grant to the Tax Court of jurisdiction over interest-abatement claims in I.R.C. § 6404(h) impliedly precluded jurisdiction over such claims in the Court of Federal Claims and the district courts.[97] The Supreme Court concluded that

> the implied-repeal doctrine is not applicable here, for when Congress passed § 6404(h), § 6404(e)(1) [providing for abatement of interest by the IRS] had been interpreted not to provide *any* right of review for taxpayers. There is thus no indication of any language on the statute books that Congress wished to change, implicitly or explicitly. Congress simply prescribed a limited form of review where none had previously been found to exist.[98]

Thus, *Hinck* stands for the proposition that the specific terms of a novel statutory remedy may preclude (and, by arguable extension, may impliedly repeal) any general remedy that would otherwise arise

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forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues."), *with* Act of July 13, 1866, ch. 184, § 19, 14 Stat. 98, 152 ("[N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal.").

95 Christie-St. Comm'n Co. v. United States, 136 F. 326, 332–33 (8th Cir. 1905).

96 550 U.S. 501, 506 (2007) (internal quotation marks omitted).

97 *Id.* at 503.

98 *Id.* at 508 (alteration, internal quotation marks, and citation omitted).

from the waiver of sovereign immunity that enabled the specific remedy.[99] More broadly, *Hinck* may be thought to stand for the proposition that specific tax rules moot non-tax rules. *Hinck* does not go so far, however, and the actual reasoning of *Hinck* does not apply to the dual-limitation scheme defended here.

First, the general and tax-specific statutes of limitations prescribe not remedies but limitations on remedies created elsewhere.[100] *Hinck* simply restated the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[101] The *Hinck* petitioners argued that Congress broadly waived its immunity to interest-abatement claims for all purposes through the specific cause of action it assigned to the Tax Court. The *Hinck* Court rejected that argument, because the cause of action in which the petitioners proposed to locate an all-purpose waiver of sovereign immunity was "a carefully circumscribed, time-limited, plaintiff-specific provision, which also precisely defined the appropriate forum."[102] It was implausible that Congress had intended to give jurisdiction to the Court of Federal Claims and the district courts through such a specific statute. The interaction of two statutes of limitations that are compatible with one another does not give rise to the incongruence (criticized in *Hinck*) of attempting to derive a broad remedy from the narrow remedy prescribed by Congress. The application of the general, six-year limitation to tax refund suits does no violence to its explicit scope ("every civil action").[103]

Second, the Court's reason for not applying the presumption against implied repeal in *Hinck*—the absence of a preexisting cause of action for interest abatement[104]—does not apply to 28 U.S.C. §§ 2401(a) and 2501. The six-year bar had never been interpreted as having a tax exception until, in 1955, *Detroit Trust* decided that the

99 *See id.* at 506 ("[W]hen Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were 'problematic,' the remedy provided is generally regarded as exclusive.").

100 *See* 28 U.S.C. § 1491(a)(1) (giving the Court of Federal Claims jurisdiction over claims against the Government); *id.* § 1346(a)(1) (giving the district courts concurrent jurisdiction with the Court of Federal Claims over tax refund suits).

101 Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

102 *Hinck*, 550 U.S. at 507.

103 28 U.S.C. § 2401(a).

104 *Hinck*, 550 U.S. at 506 ("Congress enacted [§ 6404(h)] against a backdrop of decisions uniformly rejecting the possibility of any review for taxpayers wishing to challenge the Secretary's § 6404(e)(1) determination.").

tax-specific statute of limitations enacted in 1866 had created one.[105] The six-year limitation on all federal claims jurisdiction, which was enacted in 1863 and thus preceded the tax-specific statute of limitations,[106] is therefore unlike the hypothetical cause of action for abatement of interest rejected in *Hinck*, which had already been rejected before the passage of § 6404(h).

Since there is not the least repugnancy between the statutes of limitations in titles 26 and 28 (and since the six-year statute has been repeatedly amended with no indication that it has been partially repealed),[107] there is no reason to believe that the tax-specific limitation in I.R.C. § 6532 impliedly narrows the stated application of 28 U.S.C. § 2401(a) to "every civil action commenced against the United States." Therefore, both statutes should be construed to limit tax refund suits independently.

D. In Pari Materia

A complementary principle to the presumption against implied repeal is the *in pari materia* canon whereby courts interpret related statutes together,[108] presuming "that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter."[109] Thus, a statute is presumed to be "in accord with the legislative policy embodied in" a prior, related statute,[110] and "if it is possible by reasonable construction, both are construed so that effect is given to every provision in all of them."[111] Instead of seeking out statutory conflicts where none exist, courts should strive to interpret

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105 Detroit Trust Co. v. United States, 130 F. Supp. 815, 817 (Ct. Cl. 1955).

106 *See* An Act To Amend "An Act To Establish a Court for the Investigation of Claims Against the United States," ch. 92, sec. 10, 12 Stat. 765, 767 (1863); *infra* Part III.

107 *Cf.* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487, 527 (2004) (arguing that the presumption against implied repeal should be weaker if "the older statute has not recently been enforced, amended, or discussed"). The present version of the six-year statute was reenacted in 1992.

108 *See* Wachovia Bank, Nat'l Ass'n v. Schmidt, 546 U.S. 303, 315–16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" (quoting Erlenbaugh v. United States, 409 U.S. 239, 243 (1972))); Allen v. Grand Cent. Aircraft Co., 347 U.S. 535, 541 (1954) ("To read the Defense Production Act of 1950 without reference to [the Stabilization Act of 1942] is to read it out of the context in which Congress enacted it.").

109 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51:2 (7th ed. 2009 & Supp. 2010).

110 *Id.*

111 *Id.*

related statutes wherever possible in a matter that renders them mutually compatible.[112]

The general and tax-specific statutes of limitations should be read *in pari materia* because they deal with the same general subject matter—time limits for filing claims against the Government.[113] Indeed, "suit[s] or proceeding[s] . . . for the recovery of any internal revenue tax, penalty, or other sum"[114] are just a subset of "every civil action commenced against the United States."[115] The latter subsumes the former entirely.

Reading these two limitation schemes "as if they were one law" reveals no conflict between them.[116] Each limits the Government's exposure to a term of years beginning at disparate starting points. The general limitation protects the Government against all potential claims based on their date of accrual. The tax-specific limitation is appropriately shorter than the general limitation because it is initiated by the mailing of notice to the taxpayer, which is preceded by the taxpayer's own administrative claim. In the absence of disallowance, the taxpayer has a longer opportunity to persuade the IRS of his entitlement to a refund before filing suit, but the six-year bar prevents indefinite delay. Nothing in the tax-specific limitation absolves tax refund claimants of their obligation to file suit within six years of accrual, and there is no "plain inconsistency" to be found between the purposes of the two statutes of limitations.[117] Both should therefore be given their full effect.

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112 *See* Maiatico v. United States, 302 F.2d 880, 886 (D.C. Cir. 1962) ("It is our duty whenever possible to reconcile provisions of varying statutes when and to the extent that conflict may appear.").

113 *Cf.* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 61 (2006) (refusing to read a subject-matter limitation in Title VII's antidiscrimination provision into its antiretaliation provision because "[t]he language of the [antidiscrimination] provision differs from that of the antiretaliation provision in important ways"); *Wachovia Bank*, 546 U.S. at 319 (refusing to "[t]reat[] venue and subject-matter jurisdiction prescriptions as *in pari materia*" because doing so would "overlook[] the discrete offices of those concepts").

114 I.R.C. § 6532(a)(1).

115 28 U.S.C. § 2401(a).

116 *Wachovia Bank*, 546 U.S. at 316.

117 United States v. Key, 397 U.S. 322, 329 (1970) (citing United States v. Emory, 314 U.S. 423, 430 (1941)). In *Key*, the Court applied two related statutes to Chapter X bankruptcy proceedings—giving the United States rights to priority of satisfaction and to "payment" of its tax claims—because they were not logically inconsistent and served distinct purposes. *Id.* at 328–29. The Court explained that "[s]eparate provisions to this effect in the same statute could certainly be read in harmony with each other, and there is no reason why § 3466 should not be read to supplement the requirement of payment contained in § 199 in the same fashion." *Id.* at 328.

E. Expressio Unius Est Exclusio Alterius

The continued adherence of the federal courts to *Detroit Trust* is unconvincing in part because, in the course of decades of parallel amendments and reenactments since that decision, Congress has never ratified the Court of Claims' interpretation of the six-year statute of limitations by excluding tax refund suits from "every civil action commenced against the United States." That omission is all the more telling in light of Congress's explicit exception to the six-year limitation for government contract suits. When Congress passed the Contract Disputes Act of 1978, with its own unique limitation scheme,[118] Congress simultaneously amended 28 U.S.C. § 2401 by inserting the introductory phrase, "Except as provided by the Contract Disputes Act of 1978."[119] Any inference of congressional acquiescence that might otherwise arise from the post-*Detroit Trust* reenactments of §§ 2401(a) and 2501 is undermined by this explicit non-tax exception. Since Congress once excepted an area of federal claims litigation from the general, six-year limitation without gainsaying its application to tax refund litigation, it is increasingly difficult to justify *Detroit Trust*'s implied tax exception.

The canon *expressio unius est exclusio alterius* recognizes that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[120] The explicit exception in § 2401 for government contracts signals that any other congressionally sanctioned exception would also be explicit. Clearly Congress is capable of making its intent clear when it desires

118 The Contract Disputes Act requires a claimant to submit a written claim to the contracting officer within six years of the date the claim accrues, 41 U.S.C. § 7103(a)(4)(A), and it contains additional statutes of limitations for appeals to the board of contract appeals, *id.* § 7104(a) (90 days), and to the Court of Federal Claims, *id.* § 7104(b)(3) (one year).

119 Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(b), 92 Stat. 2383, 2389 (amending 28 U.S.C. § 2401(a)).

120 Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980); *see also* United States v. Johnson, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *cf.* Russello v. United States, 464 U.S. 16, 23 (1983) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration omitted) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

exceptions to the six-year limit.[121] Congress's failure to do so in the tax context suggests that tax refund suits are governed by the general statute of limitations.

F. Narrow Construction of Waivers of Sovereign Immunity

In addition to these *textual* canons, which suggest that the general and tax-specific statutes of limitations both apply to tax refund suits, a *substantive* canon suggests that the resulting dual-limitation mechanism makes for good public policy.[122] This is the rule that "statutes of limitations are construed narrowly against the government."[123] Subject-matter-specific substantive canons of this sort are particularly influential in the tax context.[124] The theory behind this pro-government canon is that because a waiver of sovereign immunity depends entirely on the grace of the sovereign, a statute of limitations, which delimits the scope of that waiver, should be construed in the sovereign's favor.[125] Congress is capable of

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121 *Cf.* Lane v. Pena, 518 U.S. 187, 194 (1996) ("[Section 505(b) of the Civil Rights Act of 1991] likewise illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies for violations of the Act. The clarity of these provisions is in sharp contrast to the waiver Lane seeks to tease out of §§ 504 and 505(a)(2) of the Act."); Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 111 & n.12 (1944) (declining to interpret the word "subcontractor" in § 2(a) of the Miller Act to include materialmen because "Congress has shown its ability in other statutes to make clear an intent to include materialmen within the meaning of the world 'subcontractor'").

122 The rule that statutes of limitations should be interpreted narrowly against the Government is what Eskridge would call a substantive canon because it directly advances a preferred policy, but he does not list it in among the substantive canons employed by the Rehnquist Court. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 325–28 (1994).

123 BP Am. Prod. Co. v. Burton, 549 U.S. 84, 95 (2006); *see id.* at 96 ("This canon is rooted in the traditional rule *quod nullum tempus occurrit regi*—time does not run against the King. A corollary of this rule is that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous." (citation omitted)).

124 *See* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1269 ("The Justices rely on tax-based canons in almost half the tax decisions in which they invoke substantive canons . . . . The heavy focus on tax-specific substantive canons can be seen as a form of expertise borrowing . . . . The Justices may invoke policy norms like construing exceptions against the taxpayer or favoring the IRS's summons power to support if not shape their responses to difficult doctrinal issues of tax law.").

125 *See* Daube v. United States, 289 U.S. 367, 372 (1933) ("High public interests make it necessary that there be stability and certainty in the revenues of government. These ends are not susceptible of attainment if periods of limitation may be disregarded or extended.").

enlarging the scope of its waiver if the courts construe it too narrowly, but it is Congress rather than the courts that should take responsibility for defining the limits of sovereign immunity.[126]

Without the six-year "outside limit," the Government leaves the door open indefinitely to refund suits whenever the IRS fails to disallow an administrative claim. This circumstance occurs more often than one might expect because of the permissive, judge-made standard for what qualifies as a refund claim. The Supreme Court

> has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period.[127]

Despite Treasury regulations attempting to raise the bar for adequate refund claims,[128] the Federal Circuit has maintained a liberal standard that recognizes a valid, informal refund claim wherever the taxpayer's notice to the IRS includes "a written component" and "adequately apprise[s] the [IRS] that a refund is sought and for certain years."[129] Other circuits have followed suit.[130] Under this lax standard, valid administrative refund claims have been identified in a request for information about a failure-to-file penalty,[131] in "various notations and figures" on a tax return combined with "knowledge gained by the revenue agent in auditing [the taxpayer's] returns,"[132] in a written

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126 *See, e.g.*, Webre Steib Co. v. Comm'r, 324 U.S. 164, 176 (1945) ("The cause of action here rests on a waiver of the sovereign immunity to suit which Congress may make upon such conditions as it chooses."); Minnesota v. United States, 305 U.S. 382, 388 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.").

127 United States v. Kales, 314 U.S. 186, 194 (1941) (citing cases).

128 *See* Treas. Reg. § 301.6402-2(b)(1) (1967) ("The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.").

129 Computervision Corp. v. United States, 445 F.3d 1355, 1365 (Fed. Cir. 2006) (quoting Am. Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl. 1963)). The taxpayer's complaint in *Computervision* did not qualify as an informal refund claim because it was formal and gave the IRS no notice that the taxpayer would seek a refund on the interest at issue. *Id.*

130 *Id.* at 1364 n.9 (citing cases).

131 W. Co. of N. Am. v. United States, 323 F.3d 1024, 1035 (Fed. Cir. 2003).

132 *Am. Radiator*, 318 F.2d at 921.

protest made before payment of the relevant tax,[133] in an objection written on the back of a check by which the relevant tax was paid,[134] and even in "oral statements of a taxpayer . . . documented in written form by IRS personnel."[135] Because there is often room for doubt about whether such documentation adequately apprises the IRS of the taxpayer's claim, the IRS may fail to formally disallow what a court later determines to have been an informal refund claim. In that event, the two-year statute of limitations never even starts to run, and the taxpayer's right to sue—unless constrained by the general, six-year limitation on claims against the Government—continues indefinitely.[136]

Indefinite vulnerability to suit is not a reasonable risk to impose on the Government in light of the clear "every claim" language of the six-year limitation, and it is exactly the sort of risk mitigated by the canon favoring narrow construction of statutes of limitations against the Government. Six years after the claim accrues, reliable, new evidence is unlikely to come to light. The prospect of a never-ending right to sue risks the loss of relevant evidence by the Government and the taxpayer, and it may encourage taxpayers to file ambiguous papers with the IRS to be construed years later as informal refund claims. The text of the statutory refund scheme currently in effect suggests that Congress has chosen to protect the fisc through two concurrent statutes of limitations—one limiting taxpayers to two years after administrative disallowance in which to file suit, and the other imposing a six-year backstop for claims that the IRS disallows late or not at all.

Requiring suit within six years of the accrual of a tax refund claim is not too great a hardship to impose on the taxpayer. The same limitation applies unquestionably to other kinds of claims against the Government.[137] A far greater hardship is the one the Court imposed in *United States v. Clintwood Elkhorn Mining Co.*—the requirement that the taxpayer file a timely administrative tax refund claim even

133 Newton v. United States, 163 F. Supp. 614, 619–20 (Ct. Cl. 1958).

134 Night Hawk Leasing Co. v. United States, 18 F. Supp. 938, 941–42 (Ct. Cl. 1937).

135 New Eng. Elec. Sys. v. United States, 32 Fed. Cl. 636, 643 (1995).

136 *See supra* notes 10–17 and accompanying text (discussing Edwards v. United States, 92 Fed. Cl. 277 (2010)); *see also* 2000 IRS Non Docketed Serv. Advice Rev. 11495, 2000 WL 34423449 (Aug. 3, 2000) (identifying a taxpayer's letter as an informal refund claim and declaring that "[b]ecause . . . the Service has never issued . . . a notice [of disallowance], the limitation period for [the taxpayer's] filing of a refund suit may never expire").

137 *See, e.g.*, cases cited *supra* note 75.

before having a good reason to suspect the illegality of the underlying tax.[138] If the taxpayer can be required to anticipate such tectonic shifts as the IRS's acquiescence in the unconstitutionality of a twenty-year-old tax, she may also reasonably be required to bring suit within six years of filing her administrative claim for refund.

III
PARALLEL HISTORIES OF THE GENERAL AND TAX-SPECIFIC LIMITATIONS ON CLAIMS AGAINST THE GOVERNMENT

It may be unnecessary to resort to legislative history to prove that the general, six-year limit applies to tax refund suits. Where the meaning of a statute is unambiguous, as the scope of "[e]very civil action commenced against the United States" seems to be, there is no need to look behind the words enacted by Congress.[139] But courts frequently consult legislative history to confirm what seems clear from the text.[140] The supposed rule that only 26 U.S.C. § 6532(a) applies to tax refund suits despite the plain meaning of 28 U.S.C. §§ 2401(a) and 2501, has been built on a misunderstanding of the history of those provisions and their predecessors.[141] Legislative history confirms that Congress never intended the tax-specific limitation to eclipse the general, six-year bar. The extensive parallel histories and frequent reenactments of both provisions demonstrate that they were designed to complement one another.

Congress created the Court of Claims in 1855 to "hear and determine all claims founded upon any law of Congress, or upon any

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138 *See* 553 U.S. 1, 11–12 (2009); *infra* Part IV.A. The coal tax at issue in *Clintwood Elkhorn* was levied in 1978 and held unconstitutional in 1998. *See* 553 U.S. at 5.

139 *See* Whitfield v. United States, 543 U.S. 209, 215 (2005) ("Because the meaning of [18 U.S.C.] § 1956(h)'s text is plain and unambiguous, we need not accept petitioners' invitation to consider the legislative history."); BedRoc Ltd., LLC v. United States, 541 U.S. 176, 186 (2004) ("Because we have held that the text of the statutory reservation clearly excludes sand and gravel, we have no occasion to resort to legislative history.").

140 *See* CBS, Inc. v. FCC, 453 U.S. 367, 382 (1981) ("[T]he legislative history supports the plain meaning of the statute."). *But see* Milner v. Dep't of the Navy, 131 S. Ct. 1259, 1266 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."); Zedner v. United States, 547 U.S. 489, 510–11 (2006) (Scalia, J., concurring) ("[I]f legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous. Because the use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face—I do not join this portion of the Court's opinion.").

141 *See supra* Part I.

regulation of an executive department, or upon any contract, express or implied, with the government of the United States."[142] Initially, the Court of Claims merely reported its determination in each case to Congress, which could then choose whether to enact the court's determination into law.[143] In 1863, Congress gave the Court of Claims power to issue final judgments.[144] Both the general and tax-specific limitations on suits against the Government have their origins in Congress's efforts to grant and circumscribe this court's jurisdiction.

A. The History of the General, Six-Year Statute of Limitations

At the same time Congress gave up its supervisory role over the Court of Claims, it set the outer boundary on the court's jurisdiction. The 1863 Act provided that "every claim against the United States, cognizable by the [C]ourt of [C]laims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court . . . within six years after the claim first accrues."[145] Although the exact wording of this provision and its place in the U.S. Code has changed over time, the six-year bar, measured from accrual, has remained constant.

The Tucker Act of 1887 expanded the jurisdiction of the Court of Claims to embrace constitutional claims.[146] It rephrased the affirmative limit on "every claim against the United States" in the negative: "no suit against the Government of the United States[] shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."[147] This syntactical change clarified that Congress could impose narrower limitations on specific classes of claims without repealing the general limitation. As Congressman Tucker's Report from the House Judiciary Committee explained, the purpose of this provision was "to leave all claims so barred to the special action of

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142 An Act To Establish a Court for the Investigation of Claims Against the United States, ch. 122, § 1, 10 Stat. 612, 612, (1855).

143 10 Stat. 613–14, §§ 7–8.

144 *See* An Act To Amend "An Act To Establish a Court for the Investigation of Claims Against the United States," ch. 92, sec. 10, 12 Stat. 765, 767 (1863).

145 *Id.*

146 *See* An Act To Provide for the Bringing of Suits Against the Government of the United States (Tucker Act), ch. 359, § 1, 24 Stat. 505, 505 (1887).

147 *Id.*

Congress."[148] The next section of that Act—sometimes called the "Little Tucker Act" even though it is a part of the same piece of legislation—gave the district courts concurrent jurisdiction with the Court of Claims for claims up to $1000.[149] Thus, the same Act that first vested the district courts with jurisdiction over tax refund suits, among other claims against the Government, also imposed—in the immediately preceding section—a six-year limitation on all such claims.

The Tucker Act's "no suit" limitation made its way into the Judicial Code in 1911.[150] By 1948, though, Congress had completely reverted to the "every claim" and "every civil action" construction found in current §§ 2501 and 2401(a).[151] There the six-year limitation has remained to this day, but it has not been neglected: A provision for referral of claims to the Court of Claims from Congress and the executive departments was deleted in 1954;[152] the exception for contract claims was added in 1978;[153] and § 2501 underwent minor revisions to recognize the renaming of the Court of Claims as

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148 H.R. REP. NO. 49-1077, at 4 (1886).

149 Tucker Act § 2, 24 Stat. at 505. The cap on district court jurisdiction over claims against the Government was eventually increased to $10,000 and eliminated altogether for tax refund actions. *See* An Act To Permit All Civil Actions Against the United States for Recovery of Taxes Erroneously or Illegally Assessed or Collected To Be Brought in the District Court with Right to Trial by Jury, Pub. L. No. 83-559, 68 Stat. 589, 589 (1954) (amending 28 U.S.C. § 1346(a)). The concurrent tax refund jurisdiction of the district courts and the Court of Federal Claims continues to the present day. *See* 28 U.S.C. § 1346(a)(1). More tax cases are decided in the district courts than in the Court of Federal Claims. *See* Thomas D. Greenaway, *Choice of Forum in Federal Civil Tax Litigation*, 62 TAX LAW. 311, 316 & n.24 (2009).

150 An Act To Codify, Revise, and Amend the Laws Relating to the Judiciary, ch. 231, sec. 24(20), 36 Stat. 1087, 1093 (1911) (codified at 28 U.S.C. § 41(20)). *But see id.* § 156, 36 Stat. 1139 ("Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues.").

151 An Act To Revise, Codify, and Enact into Law Title 28 of the United States Code entitled "Judicial Code and Judiciary," ch. 157, § 2401(a), 62 Stat. 869, 971 (1948) (codified at 28 U.S.C. § 2401(a)) ("Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."); 62 Stat. 976 (1948) (codified at 28 U.S.C. § 2501) ("Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues.").

152 An Act To Amend Various Statutes and Certain Titles of the United States Code, for the Purpose of Correcting Obsolete References, and for Other Purposes, ch. 1263, sec. 52, 68 Stat. 1226, 1246 (1954) (amending 28 U.S.C. § 2501).

153 Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 2389 (amending 28 U.S.C. § 2401(a)); *see supra* Part II.E.

the "United States Claims Court" in 1982[154] and the "United States Court of Federal Claims" in 1992.[155] Despite many opportunities to do so, Congress never codified a tax exception into the six-year limit on every claim against the Government.

B. The History of the Tax-Specific Statute of Limitations

In theory, the jurisdiction of the Court of Claims extended to tax refund claims ever since the court's creation in 1855, because such claims are "founded upon any law of Congress."[156] Until 1861, however, there was no federal income tax, so there was none to be refunded.[157] By the time Congress instituted the six-year bar, though, the Court of Claims had already decided import duty refund claims[158] and a manufacturing tax refund claim that arguably sounded in contract.[159]

In 1866, just three years after imposing the six-year bar on "every claim against the United States,"[160] Congress placed an even more restrictive limitation on a subset of those actions—claims for refund of taxes wrongly collected.[161] Starting in 1866, tax refund suits could be brought only within six months after the commissioner of internal revenue denied an administrative claim or—if the commissioner failed to act within six months—within a year of filing the

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154 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 139, 96 Stat. 25, 42 (amending 28 U.S.C. § 2501).

155 Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902(a), 106 Stat. 4516, 4516 (amending 28 U.S.C. § 2501).

156 An Act To Establish a Court for the Investigation of Claims Against the United States, ch. 122, § 1, 10 Stat. 612, 612 (1855).

157 *Cf.* Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292, 309.

158 *See* Sturges, Bennet & Co. v. United States, 2 U.S. Cong. Rep. C.C. 35, 46–47, 1856 U.S. Ct. Cl. LEXIS 56, at *5 (July 28, 1856).

159 *Compare* Adams's Case, 1 Ct. Cl. 192, 195 (1865) (holding the Government liable for a tax collected from the seller, that had been assessed on manufactured goods the Government had contracted to purchase, because "the assessment and collection of the tax upon the articles delivered under the contract was not authorized by law"), *with* Adams's Case, 1 Ct. Cl. 306, 306 (1865) ("Having paid [the illegal tax] himself, [the petitioner] was entitled to be paid that much more for the goods—to have the sum added to the contract price."). The distinction between tax refund claims and contract claims was inconsequential because, at the time, all were subject to the six-year bar and to no other limitation.

160 An Act To Amend "An Act To Establish a Court for the Investigation of Claims Against the United States," ch. 92, sec. 10, 12 Stat. 765, 767 (1863) (codified at R.S. § 1069).

161 An Act To Reduce Internal Taxation and To Amend an Act Entitled "An Act To Provide Internal Revenue To Support the Government, To Pay Interest on the Public Debt, and for Other Purposes," ch. 184, sec. 19, 14 Stat. 98, 152 (1866).

administrative claim.[162] This tax-specific, six-month limitation inevitably expired before the general, six-year limitation because both measured from the same starting point—accrual. If the tax refund cause of action had lacked its own statute of limitations, or if its only trigger had been the Commissioner's denial rather than accrual, there is no reason to believe the six-year limit would not have applied to bar untimely tax refund suits.

The time limit (or limits) applicable to tax refund claims evolved dramatically over the next several decades. In 1872, Congress lengthened the six-month limitation to two years after accrual, that is, the earlier of two and a half years after filing an administrative claim or two years after the denial of that claim.[163] This amendment did not implicate the general, six-year limitation because, as before, the tax-specific limitation necessarily operated first.

In 1921, a decade after the codification of the Tucker Act's six-year bar in the Judicial Code, Congress replaced the two-year, post-*accrual* limitation on tax refund claims with a five-year post-*payment* limitation.[164] Because payment of a tax necessarily precedes accrual of a tax refund claim, the tax-specific limitation still was, by definition, shorter than the general six-year limitation. The Senate Finance Committee Report indicated that the amended provision would "remove[] the ambiguity and doubts surrounding section 3227

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162 *Id.* ("[N]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal.").

163 An Act To Reduce Duties on Imports, and to Reduce Internal Taxes, and for Other Purposes, ch. 315, § 44, 17 Stat. 230, 257–58 (1872) ("[A]ll suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected . . . shall be brought within two years next after the cause of action accrued and not after.") (codified without material change at R.S. § 3227 (1878) ("No suit or proceeding for the recovery of an internal tax alleged to have been erroneously or illegally assessed or collected . . . shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued.")).

164 Revenue Act of 1921, ch. 136, § 1318, 42 Stat. 227, 315 (codified at R.S. § 3226) ("No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."); *id.* § 1319 (repealing R.S. § 3227).

of the Revised Statutes,"[165] whose two-year limitation started running when a claim accrued. The perceived problem with accrual as a measuring point was that, at the time, claims accrued upon disallowance rather than the mailing of notice. Taxpayers had no way of ascertaining when the IRS disallowed their claims and, therefore, no way of knowing when their claims accrued. Of course, an informed taxpayer would have known that her claim could accrue no later than six months after payment of the tax, but such guesswork effectively shortened the two-year window to eighteen months. The Finance Committee concluded that by "mak[ing] the limitations depend upon the filing of a claim for refund rather than on the payment of the tax," former § 3227 did "not provide a definite time."[166] By contrast, the new five-year limitation was measured from an event within the taxpayer's knowledge and control—the date she paid the tax.

Congress complicated matters in 1923 when it created an exception to the five-year, tax-specific limitation. The new exception allowed a taxpayer to file suit within two years after disallowance, even if more than five years had elapsed since she paid the tax.[167] As the Senate Finance Committee described it, the amended provision would "permit bringing suits within two years after the disallowance of a claim, the [five-year] statute of limitations notwithstanding."[168] Thus, Congress reintroduced the kind of ambiguity and doubt it had sought to eliminate just two years earlier. Moreover, the disallowance trigger introduced a new complexity that the accrual trigger had avoided: for the first time, the tax-specific limitation could conflict with the six-year limitation. Imagine that a taxpayer filed an administrative refund claim on the same day she paid her tax. If the IRS disallowed that claim within the last six months of the five-year, post-payment window, then the two-year, post-disallowance period would, if fully enforced, extend beyond the Tucker Act's post-accrual, six-year limit. And by the amended terms of 26 U.S.C. § 3226, the two-year window could spring into existence even after the expiration of the five-year limitation.

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165 S. REP. NO. 67-275, at 21 (1921).

166 *Id.* at 32.

167 An Act To Amend the Revenue Act of 1921 in Respect to Credits and Refunds, ch. 276, sec. 2, 42 Stat. 1504, 1505 (1923) (appending to R.S. § 3226 the phrase "unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates").

168 S. REP. NO. 67-1137, at 8 (1923); *see supra* notes 51–52 and accompanying text.

Nothing in the text of the 1923 amendment suggests Congress intended to repeal the Tucker Act's general limitation as applied to tax refund claims. Both limitation schemes were compatible. Allowing for the operation of the six-year bar, the new two-year, post-disallowance window was no empty letter. Because an administrative claim could be filed up to four years after payment,[169] the Tucker Act's six-year, post-accrual bar could operate as late as five and a half years after the five-year post-payment limitation. The new two-year, post-disallowance window allowed a taxpayer to make use of that extra time if her claim was disallowed toward the end of—or even after—the five-year period.

One statement in the legislative history of the 1923 amendment can be read to support the view that the two additive limitation periods of § 3226 were the only limitations on tax refund suits. The Senate Finance Committee Report reprinted a memorandum from Arnold L. Guesmer, chairman of the tax committee of the Inland Press Association, who opined that "[t]he law ought not to put the taxpayer in the position wherein he must sue the Government before the Revenue Bureau has acted on his claim for refund."[170] Mr. Guesmer's statement, which was included for its explanation of an unrelated provision of the 1921 Act,[171] proves, at most, that he personally believed the Tucker Act's six-year bar ought to be inapplicable to tax refund claims or, more likely, that he suffered from tax myopia and was unfamiliar with the general limitation on claims against the Government. Congress gave no indication in the 1921 Act that the six-year bar should not apply to tax refund actions like any other claim against the Government.

This five-year-plus-two-year scheme for tax refund suits remained in place for almost a decade, as it was reenacted in the Revenue Acts of 1924[172] and 1926.[173]

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169 Revenue Act of 1921, ch. 136, § 1316, 42 Stat. 227, 314 (codified at R.S. § 3228).

170 S. REP. NO. 67-1137, at 3, 5.

171 *See id.* at 3.

172 Revenue Act of 1924, ch. 234, § 1014(a), R.S. § 3226, 43 Stat. 253, 343 (codified at 26 U.S.C. § 156) ("No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.").

173 Revenue Act of 1926, ch. 27, § 1113(a), 44 Stat. 9, 116 (reenacting without change R.S. § 3226).

In 1932, Congress eliminated the five-year, post-payment limitation, and substituted the mailing of a notice of disallowance—instead of mere disallowance—as the new trigger for the two-year limitation. Thus, the tax-specific statute of limitations assumed the two-year, post-notice form currently found in 26 U.S.C. § 6532(a).[174] The Senate Finance Committee noted that

> [u]nder the [prior] law, the exact date of disallowance is sometimes difficult of ascertainment with the consequent uncertainty in such cases as to when the statute of limitations on suits begins to run. Moreover, the use of the two periods (five years and two years) which run from the happening of different events tends to confusion.[175]

Unlike the straightforward operation of the Tucker Act's six-year, post-accrual limit on tax refund claims, the tax-specific, dual-limitation scheme established in 1921 really had been confusing. The two-year limit had been triggered by disallowance, whether or not the IRS sent the taxpayer notice that her claim had been disallowed. The 1932 Act eliminated this confusion by making the two-year limitation period start at "the date of mailing by registered mail . . . of a notice of the disallowance."[176] It did not purport to nullify the general limitation on claims against the Government.

The Committee also opined that "the best interests of all parties concerned will be served by an amendment which makes the date of disallowance of the claim absolutely certain in every case and which specifies but one limitation period after that date."[177] Taken out of context, the reference to "one limitation period" might suggest that the Committee understood the amendment to exempt tax refund claims from the Tucker Act's six-year bar. In context, though, it is clear that the Committee had no such intention. Although the amendment specified a single, tax-specific limitation, the Committee Report makes no comment on the applicability of a general limitation outside the Revenue Act of 1932.

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174 Revenue Act of 1932, ch. 209, § 1103(a), 47 Stat. 169, 286, (codified at R.S. § 3226) ("No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.") (recodified at Internal Revenue Code of 1939, ch. 37, § 3772, 53 Stat. 1, 465).

175 S. REP. NO. 72-665, at 57 (1932).

176 Revenue Act of 1932 § 1103(a), 47 Stat. at 286.

177 *Id.*

At a Senate hearing on the 1932 Act, Hugh Satterlee of the New York City Bar Association's Tax Committee made statements tending to support the view that tax refund claims are not subject to the general limitation on claims against the Government.[178] Mr. Satterlee's written submission, which was entered into the record, expressed the belief that "[i]n all fairness the taxpayer should be entitled to begin suit at any time after the expiration of six months from the date of filing his claim and before two years after the commissioner shall have sent notice of the disallowance of his claim."[179] If Mr. Satterlee's idea of fairness were the law, the sun would never set on a tax refund claim that the IRS fails to disallow. Fair or not, this result is contrary to the six-year bar, which he did not discuss. As Mr. Satterlee recommended, Congress made the two-year period for filing suit commence upon the mailing of a notice of disallowance, but Congress did not enact the notion that this is the exclusive limitation on tax refund suits.

The tax-specific statute of limitations has remained substantially the same since 1932.[180] It was recodified as § 3772(a)(2) of the first Internal Revenue Code in 1939,[181] and recodified again with minor changes as § 6532(a)(1) in 1954.[182] The 1954 Code included a cross-reference that might incorrectly be read to support the *Detroit Trust* rule. It referred to the five-year limitation of 28 U.S.C. § 2462 as the "period of limitations in respect of civil actions for fines, penalties,

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178 *Revenue Act of 1932: Hearing on H.R. 10,236 Before the S. Comm. on Fin.*, 72d Cong. 1388 (1932) (statement of Hugh Satterlee, Chairman, N.Y City Bar Ass'n Comm. on Taxation) ("[T]he chief amendment we suggest to [§ 3226] is an amendment to the effect that the statute should run only from the time of notification of disallowance of his claim, instead of the date of rejection of the claim for refund.").

179 *Id.* at 1396.

180 *Compare* I.R.C. § 6532(a)(1) (1980), *with* Revenue Act of 1932, ch. 209, tit. 9, § 1103, 47 Stat. 169, 286; *supra* note 174.

181 Internal Revenue Code of 1939, ch. 37, § 3772(a)(2), 53 Stat. 1, 465 ("No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.").

182 Internal Revenue Code of 1954, ch. 66, subch. D, § 6532(a)(1), 68A Stat. 3, 816 (codified at I.R.C. § 6532(a)(1)) ("No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.").

and forfeitures," without mentioning the general, six-year statute of limitations in the same title.[183] It is not irrational, however, to reference a narrower, context-specific limitation but not the generally applicable limitation that serves as an outside limit on all claims against the Government. Moreover, whatever interpretive value this cross-reference might otherwise have is negated by I.R.C. § 7806(a), which provides that "[t]he cross references in this title to other portions of the title . . . are made only for convenience, and shall be given no legal effect."[184]

Despite numerous reenactments of § 6532(a)(1),[185] Congress has never expressed the intent, ascribed to it by *Detroit Trust*, to trump the general six-year limit on claims against the Government.

C. The History of the Extension Provision

A possible argument in favor of the *Detroit Trust* rule, never discussed by any court, could be based on a provision found in neither statute of limitations. A separate provision allows the IRS and the taxpayer to extend the period for filing a tax refund suit. Today the extension provision appears in the paragraph immediately following the tax-specific statute of limitations that it modifies. It provides that

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183 *Id.* § 6533 (codified at I.R.C. § 6533(1)).

184 I.R.C. § 7806(a) (1954). Even if the cross-reference were a legitimate aid to interpretation, it would be difficult to argue with any specificity that it signaled an implied repeal of the six-year bar. The insertion of the cross-reference in 1954 bears no relation in time to any of the statutory amendments by which the six-year bar might arguably have been implicitly amended. If the 1954 Congress believed that the 1866 Congress had amended the six-year bar when it enacted the first tax-specific statute of limitations (a proposition for which there is no evidence), that 1954 belief could not have changed the effect of the 1866 enactment. Similarly, the 1954 cross-reference came too late to define the effect of the 1928 amendment that first permitted extensions of the period for filing suit. *See* Massachusetts v. EPA, 549 U.S. 497, 530 n.27 (2007) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." (quoting United States v. Price, 361 U.S. 304, 313 (1960))); *id.* ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight." (quoting Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005))).

185 *See* Technical Amendments Act of 1958, Pub. L. No. 35-366, § 89(b), 72 Stat. 1606, 1666 (replacing "registered mail" with "certified mail or registered mail"); Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 110(b), 80 Stat. 1125, 1144 (adding subsection (c), which imposes more restrictive time limits on suits by third parties claiming an interest in property the IRS has levied); Tax Reform Act of 1976, Pub. L. No. 94-455, § 1906(b)(13), 90 Stat. 1520, 1834 (replacing "Secretary or his delegate" with "Secretary"); Bankruptcy Tax Act of 1980, Pub. L. 96-589, § 6(d)(4), 94 Stat. 3389, 3408 (adding a cross-reference to 11 U.S.C. § 505(a)(2), allowing a bankruptcy court to determine an estate's entitlement to a tax refund 120 days after the trustee requests a refund or after a determination is made on that request).

"[t]he 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary."[186] The provision does not expressly limit the length or number of permissible extensions, and the applicable regulations impose no such limit.[187]

One might argue—although no court has held—that Congress's failure to impose on permissible extensions an explicit limit to correspond with the six-year jurisdictional bar of 28 U.S.C. §§ 2401(a) and 2501 demonstrates Congress's intent to exempt all tax refund suits from that general limitation. Section 6532 contains no affirmative evidence that Congress intended the parties to be able to extend the tax-specific limitation indefinitely, but the provision puts no limit on the extensions that can be agreed to, and it was undoubtedly foreseeable that parties would have occasion to agree to lengthy extensions of the two-year limit. The circumstances that make an extension mutually beneficial to the IRS and the taxpayer, such as a pending test case or complicated settlement negotiations, often last for years.[188] Although these factors can be fairly argued to suggest that Congress anticipated the parties would agree to extensions beyond the six-year bar and that it implicitly approved such extensions, there is no indication that Congress intended to repeal that bar entirely in the tax context. An agreement pursuant to § 6532(a)(2) may allow suit more than six years after the underlying claim accrues, but it does not follow that refund suits escape the six-year bar altogether, even in the absence of agreements to extend the statute. The history of the extension provision lends no support to the *Detroit Trust* rule, because it is silent as to the provision's effect on the six-year bar.

The first version of the extension provision was adopted as § 608(b)(2) of the Revenue Act of 1928. It permitted tolling of "the

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186 I.R.C. § 6532(a)(2).

187 *See* Treas. Reg. § 301.6532-1(b); *see also* IRM 8.7.7.2.3(2) (Oct. 26, 2007) ("The taxpayer may file for extension on Form 907, Agreement to Extend the Time to Bring Suit, as long as the taxpayer and the Service execute Form 907 before the 2-year period expires."), *available at* http://www.irs.gov/irm/part8/irm_08-007-007.html#d0e59; *id.* pt. 8.7.7.2.3(3) (Oct. 26, 2007) ("Multiple Form 907's may be executed by the Service and the taxpayer to extend the period to file a refund suit under IRC 6532(a)(2) as long as each extension is executed before the period previously agreed upon has expired."); I.R.S. Form 907, "Agreement to Extend the Time to Bring Suit" (Rev. 1-2001) (specifying no limitation on the expiration date of the extension).

188 *See* IRM 4.24.8.12.4(1) (Aug. 13, 2008) (indicating that a Form 907 Agreement should be used when an excise tax refund claim that is expected to settle may be "delayed for years"), *available at* http://www.irs.gov/irm/part4/irm_04-024-008.html#d0e963.

statute of limitations for filing suit" until the issuance of a decision in a case pending at the time of the agreement.[189] The statute did not say whether it applied only to the tax-specific, five-plus-two-year statute of limitations then in effect or also to the general, six-year bar. The Senate Finance Committee explained that the extension provision was designed to reduce redundant litigation by allowing taxpayers with related legal theories to await the resolution of a test case before having to file suit.[190]

In response to a question that had arisen "as to whether [the extension] agreement extends the period for filing suit in case the Commissioner refuses to allow the refund,"[191] Congress clarified, in 1934, that an extension agreement enlarged the period for filing suit—not just the period in which the IRS could grant a refund.[192]

The extension provision took its current form in 1954 as the second paragraph of § 6532(a).[193] For the first time, the extension provision specified that it applied to the tax-specific, two-year limitation of § 6532(a)(1). The House Ways and Means Committee and the Senate Finance Committee both noted that the new provision allowing extension of the statute of limitations "for such period as may be agreed upon" was more flexible than its prior iteration, which

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189 Specifically, the first extension provision decreed that a tax refund "shall be considered erroneous . . . if the refund was made after the expiration of the period of limitation for filing suit, unless—(1) within such period suit was begun by the taxpayer, or (2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts." Revenue Act of 1928, ch. 852, § 608, 45 Stat. 791, 874.

190 S. REP. NO. 70-960, at 42 (1928) ("It seems desirable to provide some means whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other cases involving the same point may be held in abeyance until the test suit is decided. . . . [The Senate's] amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill," which provided only that refunds issued after the expiration of the statute of limitations were erroneous.).

191 H.R. REP. NO. 73-704, at 37 (1934).

192 Revenue Act of 1934, ch. 277, § 503, 48 Stat. 680, 756 (amending Revenue Act of 1928, ch. 852, § 608(b)(2), 45 Stat. 791, 874, by adding, "If such agreement has been entered into, the running of such statute of limitations shall be suspended in accordance with the terms of the agreement") (codified at Internal Revenue Code of 1939, ch. 37, § 3774, 53 Stat. 1, 466).

193 Internal Revenue Code of 1954, Pub. L. No. 83-591, § 6532(a)(2), 68A Stat. 3, 816 ("The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary or his delegate.").

required that the end point of the extension be "the date of final decision in one or more named cases then pending."[194]

This history provides no basis for *Detroit Trust*'s view that the tax-specific limitation nullifies the six-year bar for all purposes in the tax context. Congress gave no indication that it intended such a broad repeal of the general limitation, and that result should not be presumed unnecessarily.[195] Any implicit amendment of 28 U.S.C. §§ 2401(a) and 2501 by § 6532(a)(2) must be construed as narrowly as is feasible, in light of the rule that waivers of sovereign immunity are to be read in favor of the government.[196] The best interpretation of § 6532(a)(2) is the one that gives maximum effect to both the extension provision and the six-year bar.[197] Thus § 6532(a) trumps the six-year bar only where the parties agree to extend the two-year deadline more than six years after accrual. In other words, the six-year bar places an outside limit on tax refund suits unless the parties execute an agreement pursuant to § 6532(a)(2) that suspends the two-year statute of limitations beyond that period. In the absence of such an agreement, nothing prevents the operation of the six-year bar according to its own terms. This harmonization of § 6532(a) with the general limitation does less violence to the plain meaning of "every civil action" than the *Detroit Trust* rule does, and it avoids the problematic results of that rule. Because the IRS's written consent is necessary for an extension agreement under § 6532(a)(2), this narrow exception to the six-year bar does not risk leaving the Government perpetually vulnerable to suit as the *Detroit Trust* rule does whenever the IRS fails to mail a notice of disallowance. This interpretation—holding that an agreement to extend the tax-specific limitation also extends the general limitation—assures that the extension provision has its intended effect and is not frustrated by the six-year bar.

IV

RECENT CASES UNDERMINING THE *DETROIT TRUST* RULE

In addition to the general skepticism the Supreme Court exhibited toward tax exceptionalism in *Mayo Foundation for Medical Education & Research v. United States*,[198] other tax cases interpreting

194 H.R. REP. NO. 83-1337, app. at 417 (1954); S. REP. NO. 83-1622, at 588 (1954).

195 *See supra* Part II.C (discussing the presumption against implied repeal).

196 *See supra* Part II.F (discussing the rule favoring narrow construction of waivers of sovereign immunity).

197 *See supra* Part II.D (discussing the *in pari materia* canon).

198 131 S. Ct. 704, 713–14 (2011); *see supra* notes 1–6 and accompanying text.

the general limitation on suits against the Government indicate that *Detroit Trust*'s tax exception to the six-year bar is nearing its end.

A. United States v. Clintwood Elkhorn

In *United States v. Clintwood Elkhorn Mining Co.*, a unanimous Supreme Court enforced the shorter of two parallel limitation periods to hold that a tax refund claim was time-barred even though the underlying tax had been held unconstitutional.[199] The Court held that the statutory refund scheme barred a suit by three coal companies for recovery of money collected pursuant to a tax "on coal from mines located in the United States sold by the producer."[200] That tax previously had been held to violate the Export Clause of the Constitution in *Ranger Fuel Corp. v. United States*,[201] a district court decision that the Government did not appeal, and in which the IRS acquiesced.[202] The coal companies successfully filed administrative claims for refund of the taxes paid in 1997, 1998, and 1999 but not earlier years, because the three-year statute of limitations on filing administrative refund claims, I.R.C. § 6511, had expired. Under § 6511, an administrative claim must be filed within three years of filing a return or within two years of paying a tax. Instead of filing a time-barred administrative claim for refund—the prerequisite to suit under I.R.C. § 7422(a)—the companies sued the Government directly under the Tucker Act for a refund of the unconstitutional taxes paid in the years 1994 through 1996, on the theory that unconstitutional taxes are not taxes at all and therefore not limited by the three-year statute of limitations in § 6511 but only by the six-year statute of limitations in the Tucker Act itself.[203] The Court of Federal Claims allowed the suit to proceed,[204] and the Federal Circuit affirmed[205] on the basis of its decision in *Cyprus Amax Coal Co. v. United States* that companies could sue for refunds of unconstitutional taxes directly under the Tucker Act.[206]

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[199] 553 U.S. 1, 8–9 (2008).

[200] *Id.* at 5 (quoting I.R.C. § 4121(a)(1)).

[201] 33 F. Supp. 2d 466, 469 (1998).

[202] *See* I.R.S. Notice 2000-28, 2000-1 C.B. 1116, 1116–17.

[203] *See* 28 U.S.C. § 2501.

[204] Andalex Res., Inc. v. United States, 54 Fed. Cl. 563, 564 (2002).

[205] Clintwood Elkhorn Mining Co. v. United States, 473 F.3d 1373, 1374 (Fed. Cir. 2007). The Court of Appeals went even further than the Court of Federal Claims, holding not only that the companies could pursue their claim under the Export Clause, but also that they could recover interest on the unconstitutionally imposed taxes. *Id.* at 1374–75.

[206] 205 F.3d 1369, 1376 (2000).

The Supreme Court reversed, holding that "the plain language of 26 U.S.C. §§ 7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government."[207] The Court reasoned that the Tucker Act's six-year statute provides an "outside limit" on the I.R.C.'s statute of limitations—not an alternative procedure for the recovery of unconstitutional taxes.[208]

In enforcing the more restrictive of the two limitations, while acknowledging the six-year "outside limit," the *Clintwood Elkhorn* Court followed many of the canons of statutory construction discussed above. The Court's repeated application of the plain meaning rule to § 7422(a)'s requirement of an administrative claim before filing suit in "*any* court for the recovery of *any* internal revenue tax" and § 6511's limitation on claims for refunds of "*any* tax" provides a good model for enforcing the plain meaning of the six-year limitation on "*every* claim."[209] Although not invoking the *in pari materia* canon explicitly, the Court followed the logic of that interpretive principle, reading both statutes of limitations together and interpreting them so as to give a plausible meaning to each. The Court resisted the taxpayers' expansive reading of the Tucker Act (with its six-year limitation period) because, in the case before it, to do so would have rendered the Internal Revenue Code's refund scheme (with its requirement of an administrative claim prior to filing suit and its three-year limitation period on administrative claims) of

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207 United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 14 (2008).

208 *Id.* at 8 (quoting United States v. A.S. Kreider Co., 313 U.S. 443, 447 (1941)). The Federal Circuit has cited *Clintwood Elkhorn* for the proposition that "the more specific limit prevails." Bormes v. United States, 626 F.3d 574, 583 (Fed. Cir. 2010). More accurately, *Clintwood Elkhorn* stands for the proposition that when two relevant statutes of limitations are compatible, both apply—the longer, more general statute remaining in force as an "outside limit" on the shorter, context-specific statute. 553 U.S. at 8–9.

209 *See Clintwood Elkhorn*, 553 U.S. at 7-8 ("Five 'any's' in one sentence and it begins to seem that Congress meant [§ 7422(a)] to have expansive reach. . . . Again, this language [in § 6511] on its face plainly covers the companies' claim for a 'refund' of 'tax[es] imposed . . . .'"); *id.* at 11 ("'[T]he strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances.' . . . [T]he language of the relevant statutes emphatically covers the facts of this case." (internal quotation marks omitted) (quoting Ardestani v. INS, 502 U.S. 129, 135 (1991))); *id.* at 14 ("We therefore hold that the plain language of 26 U.S.C. §§ 7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government.").

"no meaning whatever."[210] The rule that statutes of limitations should be construed narrowly against the Government also favored the result in *Clintwood Elkhorn* (enforcing the I.R.C.'s shorter statute of limitations because it is more protective of the Government than the general limitation), though like the *in pari materia* canon, it is only implied. As the Court recognized, "[I]t is certainly within Congress's authority to assure that allegations of taxes unlawfully assessed . . . are processed in an orderly and timely manner, and that costly litigation is avoided when possible."[211]

If the reasoning of *Clintwood Elkhorn* is followed to its logical conclusion, both statutes of limitations—the tax-specific, two-year, post-disallowance limitation and the general, six-year, post-accrual limitation—will operate together. The taxpayers in *Clintwood Elkhorn* lost because they satisfied the Tucker Act's statute of limitations but not the I.R.C.'s. If the Court's reasoning holds true, a taxpayer should also lose if she satisfies the I.R.C.'s statute of limitations but files suit more than six years after her claim accrues. In *Clintwood Elkhorn*, the Supreme Court rejected the taxpayers' interpretation of the six-year bar as the only applicable statute of limitations for suits to recover unconstitutional taxes because that interpretation would have left the I.R.C.'s refund scheme with "no meaning whatever."[212] But the *Detroit Trust* theory of tax refund jurisdiction makes an equal and opposite error. By holding that the tax-specific timing requirements are the only such limits applicable to a tax refund suit, the Court of Claims rendered the six-year bar void as to tax refund litigation. Applying the *in pari materia* reasoning of *Clintwood Elkhorn*, a court should read two such related statutes of limitations together so as to give meaning to each. Thus, the general statute of limitations must function as an "outside limit" on tax refund litigation just as the *Clintwood Elkhorn* Court said it does.[213]

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[210] *Clintwood Elkhorn*, 553 U.S. at 9 (quoting *Kreider*, 313 U.S. at 448); *see also id.* at 5 ("Read together, the import of [26 U.S.C. §§ 7422 and 6511] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund . . . may not be maintained in any court." (quoting United States v. Dalm, 494 U.S. 596, 602 (1990))).

[211] *Id.* at 12.

[212] *Id.* at 9.

[213] *Id.* at 8.

B. Wagenet v. United States

In 2009, the Central District of California expressly held that *Detroit Trust* was "wrongly decided," and enforced the six-year limitation to dismiss a tax refund suit as untimely. The court held that even though the IRS had never disallowed the administrative claim, § 2401(a) barred the suit because it was filed more than six years after the claim accrued.[214] The taxpayer appealed.[215] Before the case was briefed, however, the parties stipulated to voluntary dismissal of the appeal "[p]ursuant to [their] agreement to settle."[216] In apparently declining to defend the district court's decision, the Government—represented by the Appellate Section of the Tax Division of the Department of Justice[217]—missed a promising opportunity to correct the error of *Detroit Trust* and the IRS's acquiescent guidance, at least within the Ninth Circuit. Nevertheless, the district court's decision enforcing the six-year limit on a tax refund claim remains a useful model for future courts confronted with this issue.

Surprisingly, the district court did not cite *Clintwood Elkhorn*, but it did rely heavily on *Clintwood Elkhorn*'s most important precedent, *United States v. A.S. Kreider Co.*, from which the *Clintwood Elkhorn* Court borrowed the "outside limit" language.[218] In *Kreider*, the

214 Wagenet v. United States, No. SACV 08-00142 AG (ANx), 2009 U.S. Dist. LEXIS 115547, at *4–6 (C.D. Cal. Sept. 14, 2009).

215 Notice of Appeal, *Wagenet*, No. SACV 08-00142 AG (ANx) (Nov. 12, 2009), ECF No. 31.

216 Stipulation for Dismissal, Wagenet v. United States, No. 09-56800 (9th Cir. Dec. 2, 2010), ECF No. 24.

217 *See id.*

218 United States v. A.S. Kreider Co., 313 U.S. 443, 447 (1941) ("We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20)."), *quoted in* United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 9 (2008). *Kreider* also contained dicta that seems, out of its context, to suggest that the tax-specific statute of limitations overrides the Tucker Act in tax refund suits: "Indeed, the limitation in § 1113(a) [the predecessor to § 6532(a)] has no meaning whatever unless the limitation in § 24(20) [the Tucker Act] is construed not to govern proceedings for the recovery of 'internal-revenue tax alleged to have been erroneously or illegally assessed or collected.'" 313 U.S. at 447–48. By itself, this sentence suggests that the Tucker Act's limitation period *never* governs tax refund suits. In context, however, the sentence can only mean that the Tucker Act should not be construed as the *exclusive* statute of limitations in such proceedings. This interpretation is indicated by the immediately preceding statement that "the specific provision [the I.R.C. statute of limitations] is entirely consistent with the general provision in § 24(20) [the six-year bar]." *Id.* at 447. In *Kreider*, the question was whether a suit should be allowed that complied with the Tucker Act but did not comply with the I.R.C.'s statute of limitations. In that

Court interpreted the six-year statute of limitations then in effect[219] and observed of its "no suit . . . shall be allowed . . . unless" formulation that by "[p]hrasing the condition negatively, Congress left it open to provide *less liberally* for particular actions which, because of special considerations, required different treatment."[220] To the *Kreider* Court, the 1926 Revenue Act's statute of limitations (barring suits filed more than five years after payment unless filed within two years of disallowance)[221] was "precisely that type of provision."[222] The Court concluded that the tax-specific statute of limitations was "entirely consistent with the general provision"[223] and that the taxpayer's refund claim was barred by the less liberal, tax-specific statute.[224]

After interpreting the plain meaning of "every civil action" in § 2401(a) to include tax refund suits,[225] the district court in *Wagenet* followed the logic of *Kreider*, concluding that it lacked subject-matter jurisdiction over the taxpayer's refund suit because it was filed more than six years after the claim accrued.[226] In response to the taxpayer's argument "that Section 6532(a)(1) is the exclusive time limit in cases where the government does not give notice of disallowance,"[227] the court cited Ninth Circuit precedent characterizing § 2401(a) as "'the catchall statute of limitations provision' that 'applies to all civil actions whether legal, equitable or mixed,'" and instructing that "the words 'every civil action' in Section 2401 'must be interpreted to mean what they say.'"[228]

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context, a statement that the Tucker Act should not be "construed to govern" does not imply that it should *never* be construed to bar tax refund claims. Indeed, *Kreider* assumes that the Tucker Act's six-year limit *does* govern as "an outside limit on the period within which all suits might be initiated under [the Tucker Act]." *Id.*

219 Judicial Code, ch. 231, § 24(20), 36 Stat. 1087, 1093 (1911) (codified at 28 U.S.C. § 41(20)).

220 *Kreider*, 313 U.S. at 447.

221 Revenue Act of 1926, ch. 27, § 1113(a), 44 Stat. 9, 116 (reenacting without change R.S. § 3226, 43 Stat. 253, 343 (1924)) (codified as amended at 26 U.S.C. § 156).

222 313 U.S. at 447.

223 *Id.*

224 *Id.* at 449.

225 Wagenet v. United States, No. SACV 08-00142 AG (ANx), 2009 U.S. Dist. LEXIS 115547, at *5–7; *see supra* Part II.A.

226 *Id.* at *7–8.

227 *Id.* at *6.

228 *Id.* at *7 (quoting Nesovic v. United States, 71 F.3d 776, 778 (9th Cir. 1995)). *Nesovic* applied the six-year limit of 28 U.S.C. § 2401(a) to bar a quiet title action under 28 U.S.C. § 2410(a).

The district court reinforced this conclusion with the observation that "[t]he statutory scheme allowing suits for tax refunds is a limited waiver of the federal government's sovereign immunity, and 'statutes in derogation of sovereignty are strictly construed in favor of the sovereign.'"[229] The court noted the absurd result that flows from *Detroit Trust*. "If the holding in *Detroit Trust* were accepted, plaintiffs could sue the United States for a refund hundreds of years after accrual of their claims."[230] In light of the plain meaning of § 2401(a), the *Wagenet* court concluded that "Congress obviously did not intend such a result."[231]

The *Wagenet* decision conceives of the relationship between the general and tax-specific statutes of limitations more coherently than *Detroit Trust* did, but it is not without its own interpretive flaws. The *Wagenet* court held that the holding of *Detroit Trust* conflicts with the Supreme Court's statement in *Michel* that "permission to sue for a tax refund 'did not depend upon the rejection of the claim or upon the giving of the notice.'"[232] This misreads *Michel*. The quoted statement implied nothing about the effect of the Tucker Act's six-year limit. It meant only that because the Commissioner did not act within "six months from the date of filing [the administrative] claim[s],"[233] the default six-month waiting period between filing an administrative claim and filing a refund suit had not been waived.[234] Only with the Commissioner's notice of an early disallowance could a taxpayer prove an early suit was timely. This confusing statement in *Michel* was not directly relevant to the facts of that case, since the *Michel* appellants did not file suit before the expiration of the six-month waiting period.

The *Wagenet* court also misinterprets the *Michel* Court's statement about another part of § 156. The Supreme Court said of the notice requirement that "the clause reasonably may be read merely as a direction to the Commissioner to send the notice to claimant without making the failure so to do have the effect of enlarging the period for

229 *Id.* (quoting Bruno v. United States, 547 F.2d 71, 74 (8th Cir. 1976)); *see supra* Part II.F.

230 *Id.* at *8.

231 *Id.*

232 *Id.* (quoting United States v. Michel, 282 U.S. 656, 658–59 (1931) ("As the Commissioner did not act within six months, permission to sue did not depend upon the rejection of the claim or upon the giving of the notice.").

233 Revenue Act of 1924, ch. 234, § 1014(a), R.S. § 3226, 43 Stat. 253, 343 (codified at 26 U.S.C. § 156).

234 *See* 26 U.S.C. § 156.

suing as otherwise definitely prescribed."[235] The *Wagenet* court apparently understood this to mean the tax-specific statute of limitations does not enlarge the six-year period prescribed by the Tucker Act.[236] Although this conclusion is consistent with *Michel*, it is not a fair interpretation of the quoted statement. The Supreme Court meant only that the clause in § 156 mandating notice of disallowance within ninety days did not imply that failure to give the required notice tolled the statute of limitations. The tax-specific two-year limit at issue in *Michel* was triggered by the act of disallowance,[237] unlike the two-year limit in today's § 6532, which is measured from "the date of mailing . . . of a notice of the disallowance."[238] The district court's misreading of *Michel* does not detract from its correct interpretation of the six-year statute of limitations—an interpretation that is fully consistent with *Michel*. The primary basis for the *Wagenet* court's rejection of *Detroit Trust* was that case's conflict with *Kreider* and the plain meaning of § 2401(a), not its perceived conflict with *Michel*.

C. Other Cases Applying the Six-Year Limit to Tax Refund Suits

At least two other courts, citing the "outside limit" language in *Kreider*, have concluded that the general and tax-specific limitations should operate together in tax refund cases. Each has cited § 2401(a) as an alternative basis for disallowing a claim that is also untimely under § 6532(a)(1). The District of New Jersey observed in *Finkelstein v. United States* that "[t]he six year limitation period . . . is an outside limit consistent with, but secondary to, the two year limitation period governing a tax refund."[239] Because the taxpayer

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[235] *Michel*, 282 U.S. at 660.

[236] *Wagenet*, 2009 U.S. Dist. LEXIS 115547, at *8.

[237] Revenue Act of 1924, ch. 234, § 1014(a), R.S. § 3226, 43 Stat. 253, 343 (codified at 26 U.S.C. § 156), *quoted in Michel*, 282 U.S. at 658.

[238] 26 U.S.C. § 6532(a)(1).

[239] 943 F. Supp. 425, 432 (D.N.J. 1996); *see id.* ("If 26 U.S.C. § 6532 fails due to the lack of certified or registered mailing, 28 U.S.C. § 2401(a) acts as a secondary limiting period barring this action. . . . [M]ore than six years has passed since accrual of the [tax refund] action and, therefore, the action is barred."); *see also* Ancel v. United States, 398 F.2d 456, 457 (7th Cir. 1968) (recounting without criticism a plaintiff's characterization of timely filing under both statutes of limitations as "conditions precedent to the District Court's entertainment of their [tax refund] suit"); Moses v. United States, 43 F.2d 653, 659 (E.D.N.Y. 1930) (observing that "Revised Statutes, § 3226, as amended, is not inconsistent with the so-called 'Tucker Act,'" and dismissing the taxpayers' complaint because it was untimely under both the tax-specific limitation period and the Tucker Act's "general

filed suit more than six years after her claim accrued, the court held that even though the notice of disallowance was defective, the "general statute of limitations period in 28 U.S.C. § 2401(a) . . . acts as a secondary limitation period barring this [tax refund] action."[240]

Following *Finkelstein*, the Northern District of New York recently cited § 2401(a) as an "alternative reason" for disallowing the taxpayer's refund claim in *Breland v. United States*.[241] The Government had not argued for enforcement of the general, six-year limitation, but the court raised the alternative jurisdictional bar *sua sponte*.[242]

A Court of Claims tax case, *West Publishing Co. Employees' Preferred Stock Ass'n v. United States*, repeated the "outside limit" language of *Kreider*, apparently under the belief that 28 U.S.C. § 2501 provides an additional limit on tax refund claims beyond the two-year limitation period, though it disallowed the suit on the basis of the tax-specific limitation period.[243] That court said as much the next year in *Bowman Transportation Co. v. United States*, a government contract case: "[A]pparently the regular six-year period of limitations contained in 28 U.S.C. § 2501 (1976) [would apply] when no express disallowance of [a tax] refund claim is issued."[244]

The holdings of *Wagenet*, *Finkelstein*, and *Breland*, and the dicta in *West Publishing* and *Bowman Transportation* are at odds with the *Detroit Trust* precedent, but they follow directly from the interpretive principles adopted in *Kreider* and developed in *Clintwood Elkhorn*. Despite these gestures by a few lower courts to the six-year limitation as governing tax refund suits, the Federal Circuit has yet to abandon its *Detroit Trust* precedent,[245] and the IRS holds to the rule that only

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provision as to limitation applicable to all suits, in the absence of the special statute"), *aff'd*, 61 F.2d 791 (2d Cir. 1932).

240 943 F. Supp. at 432.

241 No. 5:10-CV-0007, 2011 U.S. Dist. LEXIS 104499, *22 (N.D.N.Y. Sept. 15, 2011).

242 *See* Motion to Dismiss, Breland v. United States, No. 5:10-CV-0007 (N.D.N.Y. May 24, 2010), ECF No. 6.

243 198 Ct. Cl. 668, 674 n.6 (1972) ("Since [*Kreider*] there has been no question but that the general six-year statute was intended only as an outside limit on the period within which all suits against the United States might be begun, and that 'Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.'" (quoting United States v. A.S. Kreider Co., 313 U.S. 443, 447 (1941))).

244 597 F.2d 254, 257 (1979) (holding that the Tucker Act's six-year statute of limitations controls rather than 49 U.S.C. § 304a, a three-year statute of limitations governing transportation charge disputes).

245 *See supra* notes 61–62.

the tax-specific statute of limitations applies to bar untimely suits on tax refund claims.[246]

V
THE CASE FOR PROSPECTIVE ENFORCEMENT OF THE SIX-YEAR BAR IN TAX REFUND LITIGATION

A. Prospective Administrative Reform

The "outside limit" refrain of *Clintwood Elkhorn* and the anti-tax-exception tenor of *Mayo* give the IRS good cause to reevaluate its position now, despite the decades that have passed since *Detroit Trust*. The Service need not wait for the courts to reject its misinterpretation of the general, six-year limitation as inapplicable to tax refund suits—and in fact, taxpayer expectations may be more upset if the courts impose the correction than if the agency orchestrates a change of position. The IRS should revise Revenue Ruling 56-381 and other guidance indicating that § 6532(a)(1) is the only statute of limitations applicable to tax refund litigation.[247] The IRS should also amend its standard notice of disallowance, which currently informs the claimant that she has two years from the date of mailing in which to file suit. The revised notice should warn the taxpayer that she must file suit within two years of the date of mailing *and* within six and a half years after the date she filed her administrative claim. The revised notice of disallowance could inform the claimant that if the latter date has passed, judicial review is foreclosed. A comprehensive revision of the relevant IRS guidance would put taxpayers on notice that they have *at most* six and a half years after filing a tax refund claim in which to file suit in a federal district court or the Court of Federal Claims, even if they never receive a formal disallowance from the IRS.

Due to the longstanding administrative and judicial authority misinterpreting 28 U.S.C. §§ 2401(a) and 2501 as inapplicable to the tax context, the Treasury Department would do well to give advance warning that it will seek to enforce the six-year bar in future tax refund suits. Although the prevailing interpretation of the general statute of limitations violates its plain meaning and numerous canons of statutory construction,[248] an unwitting taxpayer who has not

246 *See* sources cited *supra* note 30.
247 *See id.*
248 *See supra* Part II.

received a notice from the IRS disallowing her administrative refund claim might delay filing suit in reliance on the *Detroit Trust* line of tax refund cases,[249] on the IRS guidance acquiescing in those cases,[250] and on the generally compliant conduct of the Department of Justice.[251] Prospective notice that the Government intends to invoke the six-year bar against untimely tax refund suits would warn claimants who intend to sue for tax refunds that they may no longer wait indefinitely to do so when the IRS has not yet mailed a notice of disallowance.

The problem with attempting a prospective-only revision of the administrative guidance on the application of §§ 2401(a) and 2501 to tax refund suits is that the IRS is not permitted to credit or refund an overpayment "after the expiration of the period of limitations for filing suit, unless within such period suit was begun by the taxpayer."[252] If the IRS accepts, as this Article urges, that "the period of limitations for filing suit" is governed by the general, six-year bar as well as the tax-specific, two-year limitation, then as a general rule the Service is statutorily obligated to deny the refund claim of a taxpayer who has failed to file suit within six years of accrual. The IRS will therefore have no choice but to immediately enforce its corrected interpretation of 28 U.S.C. §§ 2401(a) and 2501.

Fortunately, the IRS may be able to accomplish for many refund claimants a result similar to prospective notice by systematically granting extensions of the time in which to file suit. This proposal assumes that I.R.C. § 6532(a)(2) countenances agreements to extend the period for filing suit beyond the six-year, post-accrual limitation.[253] Although this proposition is not beyond dispute, it is a reasonable interpretation of § 6532(a)(2), and it presumes a much narrower implied amendment of 28 U.S.C. §§ 2401(a) and 2501 than *Detroit Trust*'s total nullification of the six-year bar in the tax context.

The IRS may be able to grant extensions even to taxpayers whose claims are more than six years old. Although it is the policy of the IRS not to grant extensions after the expiration of the two-year statute

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[249] *See* sources cited *supra* notes 61 & 66; *see generally* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) ("[R]eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions." (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991))).

[250] *See* sources cited *supra* note 30.

[251] *See supra* note 65 and accompanying text.

[252] I.R.C. § 6514(a)(2).

[253] *See supra* Part III.C.

of limitations,[254] the extension provision itself does not foreclose the possibility of reviving an otherwise expired limitation period. It provides only that the two-year period "shall be extended for such period as may be agreed upon in writing" between the parties.[255] The IRS interprets "extended" to mean "the continuation of an existing period of time with no intervening lapse,"[256] but the word can be defined more broadly.[257]

Paragraph 6532(a)(4) provides that "[a]ny consideration, reconsideration, or action by the Secretary with respect to such claim following the mailing of a notice by certified mail or registered mail of disallowance shall not operate to extend the period within which suit may be begun."[258] But that provision is aimed at unilateral "action[s] by the Secretary"—not joint agreements with the taxpayer. It is designed to avoid accidental renewal of the limitations period by some writing from the agency that the taxpayer construes as a new notice of disallowance. Notably, the Revenue Ruling forbidding post-expiration extension pursuant to § 6532(a)(2) does not mention paragraph (a)(4), which was in effect at the time. In any event, the provision only operates "following the mailing of a notice . . . of disallowance"; by its own terms it has no application in the circumstance relevant here—when the IRS has issued *no* notice of disallowance.

Comparison with a related statute suggests that Congress may have intended to allow the period for filing suit to be extended even after its expiration. At the same time Congress enacted § 6532(a)(2) it

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[254] *See* Rev. Rul. 71-57, 1971-1 C.B. 405 ("District Directors may not enter into agreements to extend the two-year period of limitations prescribed by section 6532(a)(1) of the Code for commencing a refund suit after such period has expired."); IRM 8.7.7.2.3(2) (Oct. 26, 2007), *available at* http://www.irs.gov/irm/part8/irm_08-007-007.html#d0e59; *id.* pt. 8.7.7.2.3(3); *see also* sources cited *supra* note 187.

[255] I.R.C. § 6532(a)(2).

[256] Rev. Rul. 71-57, 1971-1 C.B. 406 (citing State v. Scott, 20 S.W. 1076, 1077 (Mo. 1893) ("The word 'extended' as employed in this [unrelated] statute means 'prolonged;' and of course a prolongation of time cannot occur after the time originally limited has expired."); Schlosser Leather Co. v. Gillespie, 6 S.W. 2d 328, 328 (Tenn. 1928) ("To extend means to stretch out or to draw out or to enlarge a thing. It implies some thing in existence. Extend is a transitive verb, requiring an object. The object of the extension in the statute is the 45 days. The 45 days have lapsed, there is nothing to extend; no period to prolong.")).

[257] *See* OXFORD ENGLISH DICTIONARY ONLINE, "extend, *v.*" def. 6(b) ("To widen the range, scope, area of application of (a law, operation, dominion, state of things, etc.); to enlarge the scope or meaning of (a word)."), http://www.oed.com/view/Entry/66923 (last visited Sept. 20, 2011).

[258] I.R.C. § 6532(a)(4); *see* Treas. Reg. § 301.6532-1 (1967).

enacted another extension provision, I.R.C. § 6501(c)(4), for prolonging the three-year period within which the IRS must assess a tax. That provision twice limits extensions to those agreed upon "before the expiration" of the period to be extended.[259] These related, contemporaneous statutes should be read *in pari materia*,[260] and the inclusion in § 6501(c)(4) of a prohibition on extension after expiration suggests that such a prohibition should not be implied in § 6532(a)(2) where it is absent.[261] Following this line of argument, the Eighth Circuit has held that when the IRS agrees to an extension after the expiration of the two-year limitation period (in violation of its own Revenue Ruling), the extension is effective and the taxpayer may file suit within the period agreed upon.[262]

Simultaneously with the publication of its corrected guidance, the IRS should announce its willingness to grant an extension of two years from the date of the announcement to any taxpayer who comes forward with evidence of an administrative claim for refund that the IRS has failed to disallow. This would give attentive taxpayers with pending refund claims at least two years thereafter to file suit—a time limit equivalent to the two years they would have had under the prevailing single-limitation regime if the IRS were to disallow their claims on the announcement date. A universal, one-time extension policy would be not just equitable but strategic as well, because courts may look with disfavor on an abrupt reversal of the Government's acquiescence in *Detroit Trust*.

B. Prospective Judicial Enforcement

Federal courts also have a role to play in an equitable transition from the *Detroit Trust* tax exception. Understandably, few have addressed the application of § 2401(a) to tax refund suits, not least because both parties to a tax refund suit are usually disinclined to provide any helpful analysis on the subject. Taxpayers will not raise the issue against their own interest, and the Government so far has

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259 *See* I.R.C. § 6501(c)(4)(A) ("Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, . . . both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.").

260 *See supra* Part II.D.

261 *See supra* Part II.E.

262 Kaffenberger v. United States, 314 F.3d 944, 952–53 (8th Cir. 2003).

declined to reverse its acquiescence in *Detroit Trust*.[263] But federal courts "bear an independent obligation to assure [them]selves that jurisdiction is proper before proceeding to the merits."[264] Courts must therefore consider whether the six-year "outside limit" applies, even if the Government fails to invoke it.[265]

A court confronting a tax refund claim filed more than six years after accrual may be able to announce the applicability of §§ 2401(a) and 2501 to such claims prospectively without throwing the taxpayer out of court on that basis. Under *Chevron Oil Co. v. Huson*, a court may announce a new rule of law prospectively, without applying it to the parties at bar and without retroactive effect on nonparties,[266] provided that no controlling case has already announced the rule.[267] This sort of purely prospective adjudication is available even when a jurisdictional rule is at stake.[268] To decide whether nonretroactive adjudication is appropriate in a given case, courts consider three factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, . . . [the court] must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, [the court] weigh[s] the inequity imposed by retroactive application. . . .[269]

263 *See supra* notes 12 & 216.

264 Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324 (2008).

265 *See* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136 (2008) (holding 28 U.S.C. § 2501 to be "jurisdictional and not susceptible to equitable tolling" (internal quotation marks and alterations omitted)); Sinochem Int'l Co. v. Malay Int'l Shipping Corp., 549 U.S. 422, 434 (2007) ("[O]nce a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account.").

266 404 U.S. 97, 106–08 (1971).

267 *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (prohibiting prospective adjudication where a prior case has already applied the new legal principle to different parties).

268 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (applying *Chevron Oil* to give only prospective effect to the Court's holding that the bankruptcy courts were exercising unconstitutional jurisdiction under the Bankruptcy Act of 1978); *see also* Buckley v. Valeo, 424 U.S. 1, 142 (1976) ("[T]he [Federal Election] Commission's inability to exercise certain powers because of the [unconstitutional] method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date.").

269 *Id.* at 91 n.4 (quoting *Chevron Oil*, 404 U.S. at 106–07).

These factors counsel in favor of prospective application of the six-year bar to tax refund suits. First, in jurisdictions that have explicitly followed *Detroit Trust*, there is "clear past precedent" in which taxpayers have a strong reliance interest; in other jurisdictions, the IRS's longstanding acquiescence in *Detroit Trust*[270] means that a contrary holding has not been clearly foreshadowed for any but the most sophisticated taxpayers. Arguably the second *Chevron Oil* factor weighs against nonretroactive adjudication. The "purpose and effect" of the six-year bar, as with any statute of limitations, is to secure the repose of old claims and to prevent the costs associated with their litigation. Allowing old claims to be litigated in spite of the plain language of §§ 2401(a) and 2501 subverts the intended purpose and effect of those provisions. But *Chevron Oil* itself prospectively enforced a statute of limitations,[271] so the six-year bar is not ineligible for prospective application to tax refund suits on that basis alone. Moreover, the costs of delaying enforcement of the statute of limitations are outweighed by the third *Chevron Oil* factor. Retroactive enforcement of the six-year bar in the tax context after decades of forbearance by the IRS and the courts would impose considerable inequities on taxpayers who delayed filing suit in reliance on the *Detroit Trust* rule.

Short of *Chevron Oil*'s extreme remedy of prospective adjudication,[272] courts can mitigate the detrimental effect of taxpayer

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270 *See* sources cited *supra* note 30.

271 *See* 404 U.S. at 100 (holding that state statutes of limitations apply to suits for personal injuries occurring on artificial islands on the outer continental shelf, but declining to enforce Louisiana's one-year statute of limitations in the suit at hand).

272 Courts may be reluctant to apply *Chevron Oil*'s retroactivity analysis because dicta in *Harper v. Virginia Department of Taxation* may be read to suggest nonretroactive adjudication is always inappropriate in civil cases, as it is in criminal cases. The Court had previously held, in *Griffith v. Kentucky*, that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. 314, 328 (1987). At one point, the *Harper* Court purported to apply this broad retroactivity rule to the civil context. *See* 509 U.S. at 97 ("This rule extends *Griffith*'s ban against 'selective application of new rules.'"); *see also id.* at 104 (Scalia, J., concurring) ("[A]fter *Griffith*, *Chevron Oil* can be adhered to *only by rejecting the reasoning of Chevron Oil*—that is, only by asserting that the issue of retroactivity is *different* in the civil and criminal settings." (citations omitted)). But this passage in the majority opinion is dicta. *See id.* at 110 (Kennedy, J., dissenting). *Harper* holds only that nonretroactivity is inappropriate where a controlling case has already "applie[d] a rule of federal law to the parties before it." *Id.* at 97. The opinion makes clear that a court announcing a new rule may decline to apply it retroactively. *See id.* at 97 (noting that the Court may "reserve the question whether its holding should be applied to the parties before it" (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529

reliance on *Detroit Trust* and its progeny by raising *sua sponte* the jurisdictional question of the six-year bar's application to tax refund suits. In so doing, courts will forewarn future claimants that they must file suit within six and a half years of filing an administrative claim, whether or not that rule bars the claim before the court. Especially in cases where the six-year bar is one of multiple grounds for dismissing the taxpayer's suit, a court may prospectively undercut taxpayer reliance by explicitly rejecting *Detroit Trust* in an alternate holding.[273] By emphasizing that untimely suits are barred by the general, post-accrual limitation—and not just the tax-specific, post-disallowance limitation—courts will put future claimants on notice that the six-year bar applies to their claims no matter when, if ever, the IRS mails a notice of disallowance.

CONCLUSION

Applying the six-year bar of 28 U.S.C. §§ 2401(a) and 2501 as an "outside limit" on tax refund claims would restore the plain meaning of those provisions, promote timely resolution of tax refund claims, obviate adjudication of ancient informal claims, and standardize federal claims jurisprudence by bringing the requirements for tax refund claims into line with the time limits applicable to most other claims against the Government. These values are well worth the costs of changing course more than fifty years after the Claims Court's inauspicious decision in *Detroit Trust*. By prospectively abrogating the *Detroit Trust* rule,[274] the IRS and the courts can help to effect this doctrinal correction with minimal damage to taxpayers' reliance interest in the old tax exception.

The Supreme Court's recent, unanimous decisions in *United States v. Clintwood Elkhorn Mining Co.*[275] and *Mayo Foundation for*

(1991))); *see also* Daniel R. Cahoy, *Changing the Rules in the Middle of the Game: How the Prospective Application of Judicial Decisions Related to Intellectual Property Can Promote Economic Efficiency*, 41 AM. BUS. L.J. 1, 36 (2003) (noting that *Harper* does not foreclose the possibility of "a fully prospective decision").

273 *See* Breland v. United States, No. 5:10-CV-0007, 2011 U.S. Dist. LEXIS 104499, *21-22 (N.D.N.Y. Sept. 15, 2011) (holding the suit untimely under I.R.C. § 6532(a)(1), but also holding that "the Court . . . is deprived of subject-matter jurisdiction to hear Plaintiff's claims" for the "alternative reason" that Plaintiff file her complaint more than six years after her claim accrued); Finkelstein v. United States, 943 F. Supp. 425, 432 (D.N.J. 1996) ("[T]he general statute of limitations period in 28 U.S.C. § 2401(a) . . . acts as a secondary limitation period barring this [tax refund] action.").

274 *See* sources cited *supra* note 30.

275 553 U.S. 1 (2008).

Medical Education & Research v. United States[276] make this an ideal time to reexamine the parallel statutes of limitations. Enforcing the six-year bar in the tax context will give effect to *Clintwood Elkhorn*'s characterization of that statute as an "outside limit on the period within which all suits must be initiated"[277] and will heed *Mayo*'s warning against "tax law only" exceptions to generally applicable rules.[278]

[276] 131 S. Ct. 704 (2011).

[277] 553 U.S. at 8 (quoting United States v. A.S. Kreider Co., 313 U.S. 443, 447 (1941)).

[278] 131 S. Ct. at 713.