MARTINEZ V. BYNUM AND RESIDENCY REQUIREMENTS FOR FREE PUBLIC EDUCATION

In the majority of American jurisdictions, minors must meet residency requirements to attend public schools tuition-free.[1] Litigation concerning the scope of these residency requirements began even before the turn of the century.[2] Recently, in *Martinez v. Bynum*,[3] the United States Supreme Court upheld the validity of the Texas school residency statute.[4]

Martinez follows a factual pattern which most often occurs in border communities. Roberto Morales is a United States citizen, born in McAllen, Texas in 1969. His parents are Mexican citizens residing in Reynosa, Mexico. They are currently unable to migrate legally into the United States. In 1977, Roberto Morales left his parents' home in Reynosa and returned to McAllen to reside with his sister, Oralia Martinez. His acknowledged purpose in establishing a home in McAllen was to attend the public schools.[5]

According to Texas law, a minor who resides away from his parents' or legal guardian's school district primarily to attend school in another district may not attend that school tuition-free.[6] Consequently, the McAllen Independent School District denied Roberto's application for admission to school in the fall of 1977 because he was not residing with his parents or guardian.[7] Since both Roberto and his sister were indigent and unable to pay tuition, Roberto was unable to attend school.[8]

Oralia Martinez, as next friend of Roberto Morales, and four adult custodians of other school age minors who had been denied tuition-free education under the same statute brought suit in United States District Court in December of 1977.[9] The plaintiffs originally sought to challenge section 21.031(d) of the Texas Education Code, both on its face and as it applied to them.[10] The court noted that the Texas statute allows schools to

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1. Martinez v. Bynum, 461 U.S. 321 (1983). *See, e.g.*, MASS. GEN. LAWS ANN., ch. 76 § 6 (West 1982); OR. REV. STAT. § 332.595(S) (1981); TEX. EDUC. CODE ANN. § 21-031 (Vernon 1982).

2. *See, e.g.*, Yale v. West Middle School-Dist., 59 Conn. 489, 22 A. 295 (1890); Board of Educ. v. Lease, 64 Ill. App. 60 (1895); Wheeler v. Burrow, 18 Ind. 14 (1862); Board of Educ. v. Foster, 116 Ky. 484, 76 S.W. 354 (1903); School Dist. No. 1 v. Bragdon, 23 N.H. 507 (1851); State v. Thayer, 74 Wis. 48, 41 N.W. 1014 (1889).

3. 461 U.S. 321 (1983).

4. TEXAS EDUC. CODE ANN. § 21.031 (Vernon Supp. 1984). This statute states in relevant part:

> d) In order for a person under the age of 18 years to establish residence for the purpose of attending the public free schools separate and apart from his parent, guardian or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools.

5. The facts in *Martinez* are set out at 461 U.S. 322-25.

6. *See supra* note 4.

7. 461 U.S. at 322-23.

8. *Id.*

9. Arredondo v. Brochette, 482 F. Supp. 212, 214 (1979), *aff'd*, 648 F.2d 425 (5th Cir. 1981), *aff'd sub nom.* Martinez v. Bynum, 461 U.S. 321 (1983).

10. 461 U.S. at 323.

exclude children whose *primary* purpose for living in the school district is to attend school. Nonetheless, these school districts had liberally construed the statute, admitting children so long as their presence in the district was not for the *sole* purpose of attending school. The district court stated that the school districts in question had attempted to admit as many children as they possibly could and therefore denied both preliminary and permanent injunctive relief.[11]

The plaintiffs then narrowed their claims, alleging only that section 21.031(d) facially violated the Equal Protection Clause, the Due Process Clause and the Privileges and Immunities Clause of the United States Constitution. Applying a rational basis analysis, the district court denied relief.[12] Two of the plaintiffs appealed, and the Fifth Circuit affirmed.[13] Since the vast majority of states have school residency requirements, some very similar to that of Texas, the United States Supreme Court granted certiorari.[14] Ultimately, the Supreme Court affirmed the decisions of the lower courts.[15]

School Residency Requirements: A Brief Overview

Prior to *Martinez*, courts struggled with statutes conditioning free public school education upon residency. Although most jurisdictions agree students must be bonafide residents to attend public schools free,[16] much litigation has focused upon the definition of residency. Most courts agree that residency differs from domicile.[17] Accordingly, legal domicile requirements necessary to acquire rights, such as voting, are too strict for school residency requirements. Thus, courts have held that a student meets school residency requirements when the student presently resides in the school district without current plans to leave.[18]

Since children normally live with their parents, most jurisdictions hold that a minor's residency is determined by that of the minor's parents or legal guardian.[19] Despite this general rule, some courts allow emanci-

11. *Id.*

12. Arredondo v. Brochette, 482 F. Supp. at 217. The district court found that education is not a fundamental right and that "there is some rational basis for defining the residency of minors living apart from a parent or guardian or other person in lawful control under court order." *Id.* at 222.

13. Arredondo v. Brochette, 648 F.2d at 431. The Fifth Circuit applied the rational basis test and found that there was "some reasonable basis" for the classifications in § 21.031(d).

14. 461 U.S. at 325.

15. *Id.* at 333.

16. Comstock v. Joint School-Dist., 65 Wis. 631, 27 N.W. 829 (1886). The student in *Comstock* wished to attend school tuition-free in an adjoining school district because it had better schools. The court held the school district was only required to educate residents tuition-free. *Id.* at 631, 27 N.W. at 829. *See also infra* note 26 and accompanying text for the Supreme Court definition of a bona-fide resident.

17. *See, e.g.*, Cline v. Knight, 111 Colo. 8, 137 P.2d 680 (1943); Crain v. Walker, 222 Ky. 828, 2 S.W.2d 654 (1928); School Dist. v. School Dist., 236 Mich. 677, 211 N.W. 60 (1926); Grand Lodge I.O.O.F. v. Bd. of Educ., 90 W. Va. 8, 110 S.E. 440 (1922).

18. *See id.*

19. *See, e.g., In re* Webb's Adoption, 65 Ariz. 176, 179, 177 P.2d 222, 224 (1947). The Arizona Supreme Court decided that an infant's residence is that of his parents or guardian. He cannot fix or change his own. *See also* Sulzen v. School Dist., 144 Kan. 648, 62 P.2d 880 (1936); Black v. Graham, 238 Pa. 381, 86 A. 266 (1913); Brownville Indep. School Dist. v. Gamboa, 498

pated minors or children living alone to establish residency for free public schooling.[20] Additionally, a majority of courts hold that minors residing apart from their parents or guardian for a "legitimate" reason other than for the sole purpose of attending school are eligible for tuition-free education.[21] Conversely, where minors reside in school districts apart from their parents or guardian solely to acquire tuition-free education, the majority of courts decline to recognize residency.[22]

Texas follows this majority rule. A Texas school district must provide tuition-free education for a minor who has any valid reason for residing in the school district, even if an alternative situation entitles him to obtain an education, so long as his primary purpose is not to attend the public schools.[23]

A minority of courts, however, adhere to the traditional view that a minor's residence is completely tied to that of his parents or legal guardian.[24] Under this view, the circumstances surrounding the minor's presence in the school district are immaterial.

Finally, some courts adhere to a view somewhere between the majority and minority rules. In this middle ground, courts consider whether the minor has a viable alternative living situation which entitles him to obtain an education. If the minor has no option except to live apart from his parents or guardian, he receives free public education. If, however, he could reasonably live with his parents or guardian and obtain an education in that location, he pays tuition.[25]

Although a minor's residency is determined by that of his parent or guardian, many courts look to the validity of guardianships. In several

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S.W.2d 448 (Tex. 1973); DeLeon v. Harlinger Consol. Indep. School Dist., 552 S.W.2d 922 (Tex. Civ. App. 1977).

20. Wirsig v. Scott, 79 Neb. 322, 112 N.W. 655 (1907) (two minors lived separately from their parent and also had an alternative guardian appointed); Stillman v. School Dist., 60 Misc. 2d 819, 304 N.Y.S.2d 20 (1969) (a student, though supported by her father, lived alone, and by agreement of the parents, was emancipated), *aff'd*, 34 A.D. 2d 553, 310 N.Y.S.2d 1006 (1970); Kidd v. Joint School Dist., 198 Wis. 385, 216 N.W. 499 (1927) (a minor supported himself and lived alone).

21. *See, e.g.*, Cline v. Knight, 111 Colo. 8, 137 P.2d 680 (1943) (aunt raised child from birth although child's father was still alive and earned an adequate income); Fangman v. Moyers, 90 Colo. 308, 8 P.2d 762 (1932) (widower father placed son with relatives while he was attempting to establish a business and to give child desirable upbringing). *See also* Yale v. West Middle School, 59 Conn. 489, 22 A. 295 (1890); Halbert v. Clymer, 164 Mo. App. 671, 147 S.W. 1119 (1912); Gentile v. Board of Educ., 56 Misc. 2d 216, 288 N.Y.S.2d 269 (1968); Anderson v. Breithbarth, 62 N.D. 709, 245 N.W. 483 (1932).

22. *See, e.g.*, Spriggs v. Altheimer Ark. School Dist., 385 F.2d 254 (8th Cir. 1967); Turner v. Board of Educ., 54 Ill. 2d 68, 294 N.E.2d 264 (1973); Mt. Hope v. Hendrickson, 197 Iowa 191, 197 N.W. 47 (1924); Mansfield Township v. Board of Educ., 101 N.J.L. 474, 129 A.765 (1925); School Dist. v. School Dist., 45 Wyo. 365, 18 P.2d 1010 (1933).

23. TEX. CODE ANN. § 21.031(d) (Vernon Supp. 1984). *See also* Cline v. Knight, 111 Colo. 18, 137 P.2d 680 (1947) (Vernon Supp. 1984). *Cline* is a liberal interpretation of residency requirements and exemplifies the modern majority rule. Section 21.031 is similar to the rule applied in *Cline* in that it allows a child who is not in the district primarily to attend school to register in school without paying tuition.

24. *See, e.g.*, Board of Educ. v. Foster, 116 Ky. 484, 76 S.W. 354 (1903); Laubach v. Nippenose Township School Dist., 40 Pa. C. 321, 22 Pa. D. 815 (1912); Lewis v. Holden, 118 Vt. 59, 99 A.2d 758 (1953).

25. Cline v. Knight, 111 Colo. 8, 16, 137 P.2d 680, 684 (1943) (Jackson, J., dissenting). Justice Jackson advocated this middle view, citing cases that tend to support his position as the correct interpretation of previous case law. *Id.* at 8, 137 P.2d at 684.

cases, school districts have successfully challenged guardianships and required tuition payments.[26] Courts have affirmed these challenges when guardianships were sought solely for the purpose of obtaining free public school education.[27]

The United States Supreme Court has dealt with numerous challenges to state residency requirements underlying various rights and privileges, including education. Although the Court has struck down some state residency requirements on various constitutional and statutory grounds, it has never ruled that residency requirements are per se invalid.[28] Rather, the Court has concluded that a bona fide residency requirement is consistent with both the Constitution and the legitimate police power of the state.[29]

Martinez v. Bynum: *Issue Analysis*

The Supreme Court analyzed *Martinez* in light of other decisions declaring various forms of residency requirements unconstitutional.[30] The Court stated that although its decisions recognized the general legitimacy of bona fide residency requirements, specific reasons sometimes exist which mandate the invalidation of certain residency requirements.[31] The Court found no such reasons in *Martinez.* If a residency requirement is

26. *See* School Dist. No. 3 of Maricopa County v. B.B. Daily, 106 Ariz. 124, 471 P.2d 736 (1970); Turner v. Board of Educ., 54 Ill. 2d 68, 294 N.E.2d 26 (1973); *In re* Proios, 111 Misc. 2d 252, 443 N.Y.S.2d 828 (1981).

27. *Id.*

28. The Supreme Court has declared unconstitutional state statutes that establish durational residency requirements as a prerequisite to receiving some government benefit or exercising some constitutional right. The Court reasons that durational residency requirements infringe upon the constitutionally protected right to travel. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (Court invalidated a state statute requiring one year of residency as a prerequisite to receiving government benefits); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (Court invalidated a statute requiring one year of residency as a prerequisite to an indigent's receipt of medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (Court declared unconstitutional a statute requiring one year of residency before newly arrived citizens could exercise the right to vote).

The Court has also declared unconstitutional statutes that create an irrebuttable presumption of nonresidence or create residence standards that Congress did not intend when enacting a federal statute. *See* Toll v. Moreno, 458 U.S. 1 (1982) (Court declared invalid on statutory grounds a statute that denied in-state tuition to children of non-immigrant resident aliens; Vlandis v. Kline, 412 U.S. 441 (1973) (Court struck down a Connecticut statute requiring a non-resident student enrolled in the University to keep that status for his entire tenure at school).

The Court has also determined that a statute that invidiously discriminates against a discrete class of children has no rational basis. In Plyler v. Doe, 457 U.S. 202 (1982), the Court invalidated a Texas statute (portion of TEX. CODE ANN. § 21.031 which is also at issue in the *Martinez* case) that barred children of illegal aliens from attending the public schools tuition-free. Nowhere in the *Plyler* decision did the Court deny Texas' right to promulgate legitimate residency requirements. In fact, Justice Powell stated in his concurring opinion:

> Of course a school district may require that illegal alien children, like other children, actually reside in the school district before admitting them to school. A requirement of de facto residency, uniformly applied, would not violate any principle of equal protection.

Id. at 246-47.

The Court has invalidated residency requirements that explore the motivation of the party in establishing residency. *See* Wyman v. Bowens, 397 U.S. 49 (1970). *See also* Gladdis v. Wyman, 304 F. Supp. 717 (D.N.Y. 1969) (holding invalid a New York statute that required the state to look at the parties' motivation for establishing state residency before approving welfare payments).

29. *Martinez,* 461 U.S. at 333.

30. *Id.* at 325-33.

31. *Id.* at 325. *See also supra* note 28.

appropriately defined and uniformly applied, the constitutional level of scrutiny is rational basis review.[32] Applying that standard of review, the Court concluded that Texas Education Code section 21.031(d) was a constitutional residency requirement because it satisfied the traditional school residency requirement standards: residence in a location with no present intention of removal.[33] The majority emphasized that section 21.031(d) is more permissive than the traditional residency standard because it allows some potentially excludable children to enroll in school tuition-free.[34] Justice Marshall alone dissented in this opinion.[35]

Effect of Martinez v. Bynum *on Arizona Law*

Undoubtedly, Arizona would also deny Roberto Morales a tuition-free education.[36] Like Texas, Arizona links a minor's residency to that of his parents or guardian.[37] In addition, Arizona courts have denied the validity of guardianships obtained solely to allow minors to obtain free public education in a particular school district.[38] Further, a minor in Arizona may not establish his own residency or domicile.[39]

Assuming school districts strictly enforce Arizona law, it is unlikely that Arizona conforms to the majority view providing tuition-free education to minors living apart from parents or guardians for "legitimate" rea-

32. A bona-fide residency requirement implies no suspect classification and there is nothing discriminatory if it is uniformly applied. *Id.* at 328. *See also supra* note 28.

33. 461 U.S. at 332. The Court cited Warren v. Inhabitants of Thomaston, 43 Me. 406, 418 (1857) as authority for this two part standard. The Court stated this standard applied not only to situations involving children like Morales but also to situations where the parents (or guardian) and the child reside in the school district.

34. Texas gives residency status to some children it could legitimately exclude if it so desired. *Martinez*, 461 U.S. at 332-33. *See infra* note 11 and accompanying text.

35. Justice Marshall concluded that the statute would not pass the careful scrutiny he believes is warranted under the Equal Protection Clause. The Justice views education as a fundamental right that warrants a higher level of scrutiny. 461 U.S. at 346. Justice Marshall noted that the Texas statute is not narrowly tailored to achieve a substantial state interest because the classification "grants and withholds education in a haphazard way." This haphazard approach does not meet what Texas claims are its statutory goals. Accordingly, Justice Marshall concluded that the statute is unconstitutional. *Id.* at 351.

36. ARIZ. REV. STAT. ANN. § 15-824B (Supp. 1981) states in relevant section:

> The residence of the person having legal custody of the pupil is considered the residence of the pupil . . . . For the purposes of this section "legal custody" means:
>
> 1) Custody exercised by the natural or adoptive parents with whom the pupil resides.
>
> 2) Custody granted by order of a court of competent jurisdiction to a person or persons with whom the pupil resides.

37. Chapp v. High School Dist. No. 1 of Pima County, 118 Ariz. 25, 574 P.2d 493 (Ariz. App. 1978). *Chapp* involved a high school age minor residing in Tucson with his aunt and uncle. His mother, a California resident, had no intention of giving up guardianship, but wanted her son to remain in Tucson. The appeals court required the minor to pay tuition because he was not an Arizona resident. *Id.* at 26-27, 574 P.2d at 494.

Chapp also rejected the minor's argument that power of attorney under ARIZ. REV. STAT. ANN. § 14-5104 was sufficient to establish residency in lieu of guardianship. The court said power of attorney was only valid in case of emergency. *Id.* at 27, 574 P.2d at 495. *See also* Op. Ariz. Att'y. Gen. I79-173 (1979) (opinion restates the *Chapp* principle); Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972) (case supports the *Chapp* principle as applied to university students regarding tuition).

38. *See* School Dist. No. 3 of Maricopa County v. B.B. Daily, 106 Ariz. 128, 471 P.2d 736 (1970). *See also* Op. Ariz. Att'y. Gen. 77-235 (1977).

39. *In re* Webb's Adoption, 65 Ariz. 176, 179, 177 P.2d 222, 223 (1947).

sons.[40] While there is no case law exactly on point, an Arizona Attorney General's Opinion and one Arizona case bear upon Arizona's approach to the issue.

In a 1979 opinion, the Arizona Attorney General stated that if the natural parent or guardian resides outside the state, then a school district must charge tuition.[41] The Attorney General made no provision for a school district's consideration of a minor's "legitimate" reason for being in the school district.[42] Accordingly, out-of-state minors with backgrounds similar to that of Roberto Morales would be required to pay tuition in Arizona. Arizona school districts even have the option to charge tuition to minors whose parents reside within the state but not within the school district. Once again, school districts are not required to look at "legitimate" reasons for the student's presence in the district.[43]

One Arizona case implies that "legitimate" factors will not be taken into account. In *Chapp v. High School District*,[44] the court failed to consider the circumstances surrounding the minor's presence in the school district. This suggests that the court considered such factors unimportant.[45]

Although it appears that Arizona does not allow tuition-free education for students with "legitimate" reasons for residing in a school district, the state recognizes an exception under very specific factual circumstances. Under this exception, known as a *de facto* guardianship,[46] a minor may qualify for residency without living with his parent or legal guardian. If a minor is: 1) abandoned by his parents or his parents cannot be located, 2) living with someone who is not the legal guardian, and 3) living with someone who has taken custody without the parents' consent, then the minor qualifies for tuition-free education.[47] This narrow Arizona exception, however, does not help nearly as many minors gain residency as does the Texas standard.

Implications and Questions Raised by the Martinez Decision

In *Martinez*, the Supreme Court considered a facial challenge to

40. *See, e.g.*, IND. CODE § 20-8.1-6.1-1(c) (Supp. 1982); MASS. GEN. LAWS ANN. ch. 76 § 6 (West 1982). *See also supra* note 16 and accompanying text.

41. Op. Ariz. Att'y Gen. I79-173 (1979).

42. *Id.* The Attorney General, citing Fangman v. Moyers, 90 Colo. 308, 8 P.2d 762 (1932) recognized that other states require admission without tuition if the minor is not in the school district solely to attend a particular school and the resident/custodian is *in loco parentis*. The opinion, however, does not allude to application of this rule in Arizona.

43. *Id. See supra* note 41.

44. 118 Ariz. 25, 574 P.2d 493 (Ariz. App. 1978) (discussed *supra* note 37).

45. The relevant facts in *Chapp* are discussed *supra* note 37. There is no indication in the *Chapp* opinion that the minor particularly desired to attend the Tucson Public Schools. It is more reasonable to conclude that the youth lived in Tucson because this was the most viable living situation. The court did not take these factors into account even though, on the surface, there were legitimate reasons for the child's Arizona residency. Although the court did not specifically address the extenuating circumstances issue, its lack of consideration seems to be a de facto rejection of the majority rule. *See id.* at 25, 27, 574 P.2d at 493-95.

46. *See* Ranes v. First National Bank of Arizona, 18 Ariz. App. 583, 504 P.2d 524 (1972); School Opinion No. 78-5, Op. Mesa City Att'y (1979); Marsh v. Valenzuela, 71 Ariz. 426, 229 P.2d 248 (1951); *In re* Harris, 17 Ariz. 405, 153 P. 422 (1915).

47. *See supra* note 46.

Texas Education Code section 21.031(d). The Court did not consider the constitutionality of the statute as applied to Roberto Morales.[48] Thus, some interesting and as yet unanswered questions arise regarding the constitutional and legal rights of Roberto Morales and others in similar circumstances.

Unlike most minors, Roberto Morales has no viable options that would allow him to attend school in the United States.[49] There is no third party willing and qualified to be his guardian.[50] He cannot establish residency on his own, and his parents cannot establish residency in the school district since they are unable to immigrate legally into the United States.[51] Both Roberto and his sister are indigent and cannot afford to pay tuition.[52] Obviously, and most importantly, if Roberto returns to Mexico, he will be unable to attend an American school. Although he is an American citizen, his only option would be to attend the Mexican public schools. Thus, Roberto is unable to attend school in the United States; yet, as an American citizen, he is legally entitled to live in this country.

Had Roberto challenged the Texas statute as it applied to him, the Supreme Court would have reason to question its constitutionality.[53] The Court has long recognized that education is of special importance to society.[54] This recognition is based on the premise that an education is essential in order for an individual to become a contributing citizen and to effectively utilize certain constitutional rights.[55]

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48. 461 U.S. at 321-33. Justice Brennan addressed this issue at his concurrence. He pointed out that the *Martinez* decision was based solely on a facial challenge to the statute and that the Court did not decide the statute's constitutionality as applied to Roberto Morales. Justice Brennan stated if that question was before the Court, different considerations would be involved which might affect the analysis. He did not discuss what those different considerations might be. *Id.* at 333.

49. Most minors have other options: 1) The minor, the minor's parents or some third party could pay tuition; 2) the minor's parents or guardian could move to the desired school district to establish residency; 3) the minor could have a resident of the school district appointed guardian; 4) the minor could move back into the school district where his parent or guardian resides and attend school there.

50. Morales' sister does not want to become his guardian. 461 U.S. at 323. It is important to remember that guardianships sought for the sole purpose of gaining a tuition-free education have been successfully challenged. *See supra* note 26. If, however, Roberto did have a relative willing to be his guardian, Roberto could probably establish residency. *See* Brownville Indep. School v. Gamboa, 498 S.W.2d 448 (Tex. 1973) (aunt gained guardianship and the minor received tuition-free education).

There is a possibility that if Morales' family completely and totally abandoned him, he would become a ward of the state, have a guardian appointed and thus gain residency. *See* ARIZ. REV. STAT. ANN. § 8-531 to 544 (1974 & West 1984). This, however, is an extreme measure which results in great hardship on the minor and the family.

51. Ironically, if Morales' parents were to illegally enter the country, he could attend school tuition-free. *See* Plyler v. Doe, 457 U.S. 202 (1982). *See also supra* note 28.

52. *See* 461 U.S. at 322-23.

53. *See* San Antonio v. Rodriguez, 411 U.S. 1 (1973). *See also infra* note 57.

54. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 222-23 (1982); Ambach v. Norwich, 441 U.S. 68, 76 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Abington Township School Dist. v. Schempp, 374 U.S. 203, 238 (1963) (Brennan, J., concurring); Brown v. Board of Educ., 347 U.S. 483, 488, 493 (1954); Myer v. Nebraska, 262 U.S. 390, 400 (1923).

55. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (some degree of education is necessary to prepare citizens to participate in the political system and preserve freedom and independence); San Antonio v. Rodriguez, 411 U.S. at 35; Plyler v. Doe, 457 U.S. 202 (Justice Blackmun's concurrence compares the denial of education to the denial of the right to vote).

In *San Antonio v. Rodriguez*,[56] the Supreme Court stated that there is no fundamental right to an equal education.[57] *San Antonio v. Rodriguez* involved a factual situation far different from *Martinez*. *Rodriguez* involved a disparity in school district financing of public schools. The plaintiffs argued that it was unconstitutional for wealthy school districts to spend more money per student thereby providing a better education than less affluent school districts. The Court rejected the argument that a state must guarantee all children an equal education. The *Rodriguez* Court suggested, however, that a complete denial of an education may violate constitutional law.[58] The Court's statement thus seems to guarantee American citizens the right to at least an adequate education.

In contrast, the operation of the Texas residency statute totally denies Roberto Morales an education. He cannot receive even the minimal education that the *Rodriguez* Court implies is his constitutional right. The Texas statute is therefore unconstitutional as it applies to him.

Minors in Roberto Morales' position also have a strong argument that their legal status should be separate from that of their parents. The Supreme Court in *Plyler v. Doe*,[59] indicated that courts traditionally separate the legal status of the child from that of the parent.[60] In other words, Roberto Morales' right as a United States citizen to attend school should not be linked to his parents' inability to immigrate legally into the United States. Contrary to the Court's decision in *Plyler*, Roberto Morales' rights are determined by his parents' legal status. Additionally, minors should not be penalized for their presence in the United States or for their parents' conduct.[61] Roberto Morales is being penalized by his very presence in the United States in that he is not allowed to attend school tuition-free. He

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56. 411 U.S. 1 (1973).

57. The Court stated:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

Id. at 35. While this language seems to declare that education is not a constitutionally protected right, other language in *Rodriguez* implies that there is a fundamental right to at least some education. Justice Powell stated:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [free speech and voting], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short, whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children . . . .

Id. at 36-37. Two articles address Justice Powell's language and hypothesize that *Rodriguez* makes an adequate education a fundamental right. *See* Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75 (1980); Levin, *The Courts, Congress and Educational Adequacy: The Equal Protection Predicament*, 39 MARYLAND L. REV. 187 (1979).

58. *See* 411 U.S. at 35, 36.

59. 457 U.S. 202. *See supra* note 28.

60. *Id. Martinez* and *Plyler* are factually distinguishable. Unlike *Martinez*, the *Plyler* parents were illegal aliens and actually resided in the school district. This, however, does not change the applicability of the *Plyler* Court's separation of the parent and the child's legal status to the present case.

61. *Plyler*, 457 U.S. at 220, 230. *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (penalizing a child for his parents' action is unjust, illogical and contrary to the basic

should not be denied an education simply because he has exercised his right as an American citizen to reside in this country.

A statutory right to an education may exist for a minor whose living situation parallels Roberto Morales' if the minor has special disabilities. The Education for Handicapped Children Act[62] gives all handicapped children a seemingly unqualified right to a free appropriate education.[63] In addition, courts have afforded handicapped children rights above and beyond those of other school children.[64] This more protective treatment may also extend to handicapped children having difficulty establishing residency.[65] Consequently, if Roberto Morales were handicapped, the courts might well recognize his statutory right to a free appropriate public education.

A child in Roberto's situation might qualify for free education under the Act if the child were classified as learning disabled.[66] The major criteria used by some school districts to classify children as learning disabled is whether a discrepancy exists between the child's I.Q. and his actual performance.[67] If a child were kept out of school because of residency problems for any significant time period he would eventually qualify as learning disabled under the standard set out above. The child would then be statutorily entitled to free education until his performance caught up

concepts of our system); Trimble v. Gordon, 430 U.S. 762, 770 (1977) (illegitimate children cannot affect their own status or their parent's conduct).

62. Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975).

63. *See id.*

64. The most controversial and well publicized right deals with suspension and expulsion of handicapped students. The general rule is that if the disruptive behavior is related to the child's handicapping condition, he cannot be expelled but only suspended for up to ten days. A hearing is then held to determine possible alternative placement. *See, e.g.*, Blue v. New Haven Board of Educ., 3 E.H.L.R. 552:401 (Conn. 1981); S-1 v. Turlington, 3 E.H.L.R. 552:267 (5th Cir. Fla. 1981). For state agency decisions, see SE-3-83 reported in Current E.H.L.R. Dec. 504-287 (Ill. 1983); California Case No. 82-145, reported in Current E.H.L.R. Dec. 504:151 (1982).

Handicapped children have also been afforded year round education. *See* Lee v. Thompson, Current E.H.L.R. Dec. 554:429 (Hawaii 1983); Gebhardt v. Anbach, Current E.H.L.R. Dec. 554:130 (N.Y. 1982); Yaris v. Special School Dist., Current E.H.L.R. Dec. 554:389 (Mo. 1983). In addition, handicapped individuals have the right to begin school at an earlier age and/or remain in school longer than other students. *See* Oklahoma Case No. 185 *In re* Mustang Public Schools, Current E.H.L.R. Dec. 504:204 (1982); Office of Civil Rights, § 504 Rules, E.H.L.R. § 254:19 (Ohio 1983) Schultz letter.

65. Most cases which deal with the question of residency and handicapped students support traditional residency standards. *See supra* notes 16-26 and accompanying text. *See also* Nelson v. Tuscarora Intermediate Unit Noll, Current E.H.L.R. Dec. 554:498 (Penn. 1983); Connelly v. Gibbs, Current E.H.L.R. Dec. 554:498 (Penn. 1983); William C. v. The Board of Educ., 3 E.H.L.R. 551:288 (Ill. 1979). However, Rabinowitz v. New Jersey State Board of Educ., Current E.H.L.R. Dec. 554:229 (N.J. 1982), supports the hypothesis that the word "All" in Pub. L. 94-142 gives handicapped children a right superceding normal residency standards. The *Rabinowitz* court quoted *Plyler v. Doe* which held that school districts have the right to apply bona-fide residency standards. *See supra* note 28. However, the court said that the statutory language in Pub. L. 94-142 makes the *Plyler* analysis inapplicable. School districts must provide an education for all handicapped minors living within their borders. *Rabinowitz*, Current E.H.L.R. Dec. 554:229 at 554:235.

66. *See supra* note 62 and accompanying text. Learning disability is usually defined as a minimal brain dysfunction. ARIZ. REV. STAT. ANN. § 15-761 (1981).

67. From this author's personal experience it is apparent the major criteria used by school districts to determine whether a child is learning disabled is a lag between the child's potential (I.Q.) and his actual performance. Other measures (i.e. perceptual tests) are also considered, but the significance of those tests are secondary to the I.Q. and achievement tests.

with his ability, only then to be denied education again. This is an absurd cycle, but the *Martinez* decision opens the door to this educational merry-go-round.[68]

Conclusions

In *Martinez v. Bynum*, the United States Supreme Court addressed the constitutionality of Texas Education Code section 23.031(d). This statute prohibits minors who are living in a school district, apart from either a parent or legal guardian, and who are in the school district primarily for educational purposes, from obtaining a tuition-free public education. Roberto Morales is an American citizen whose parents are Mexican citizens, unable to immigrate legally into the United States. He is unable to establish residency so that he can attend school. Roberto brought suit to facially attack the constitutionality of the statute which deprives him of a free education.

The Supreme Court upheld the constitutionality of this school residency statute. This decision is in line with constitutional precedent and past cases involving school residency and is also consistent with current Arizona policy. The decision, however, leaves unanswered the critical question whether the statute is constitutional as applied to Roberto. As an American citizen, Roberto Morales arguably has the right to at least an adequate public education. This issue as well as those raised in *Martinez v. Bynum* will be before the courts once again because the status of education for children residing within our borders has not yet been completely determined.

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68. School truancy laws may also put minors like Roberto Morales in a Catch-22 situation. On the one hand, they may be subject to truancy and compulsory education law; on the other hand, they are barred from the schools. It is unlikely that this would happen in Arizona because truancy is defined in terms of the school district where the child resides. ARIZ. REV. STAT. ANN. § 15-802 (1981). Roberto Morales would not be subject to the truancy laws because he is not classified as a resident in any Arizona school district.

BADARACCO V. COMMISSIONER: NO ABSOLUTION IN TAX THEOLOGY FOR TAXPAYERS WHO REPENT

Section 6501 of the Internal Revenue Code prescribes the time period within which the government must make a claim for unpaid taxes.[1] Section 6501(a) requires that income, estate and gift taxes be assessed within three years from the time the return was filed.[2] This period of limitation is, however, not applicable in the case of a false or fraudulent return; if a taxpayer can be shown to have filed a return tainted by fraud, section 6501(c)(1) allows the Commissioner unlimited time to assess and collect taxes from that individual.[3] Recently the United States Supreme Court had occasion to rule on the applicability of these sections to a taxpayer who first filed a fraudulent return but later filed an amended return that was concededly nonfraudulent.

In *Badaracco v. Commissioner*,[4] the Court held that where a taxpayer files a false or fraudulent return but later follows it up with a nonfraudulent amended return, section 6501(c)(1) applies and a tax may be assessed at any time without regard to the three-year limitation of section 6501(a).[5]

Ernest Badaracco Sr. and Ernest Badaracco Jr., partners in an electrical contracting business, filed individual and partnership tax returns for the years 1965-69.[6] In 1971, after federal grand juries subpoenaed their books and records, the Badaraccos filed amended returns for all five years in question.[7] Six years after the amended filing, the Commissioner of In-

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1. It has been understood since ancient times that the sovereign is exempt from the operation of statutes of limitations. United States v. Weintraub, 613 F.2d 612, 614 (6th Cir. 1979). Even though its original rationale no longer exists, the rule is still supported by the public policy of protecting public revenues regardless of the negligence of public officials in collecting them. *Id.* Thus Congress is not obligated to limit the federal government's power to assess and collect taxes. 4 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 113.1, at 113-2 (1981). However, it was determined by Congress that a limited period for tax assessments was essential to a system of fair taxation. H.R. Rep. No. 1035, 66th Cong., 2d Sess., 3, *reprinted in* 94 U.S. REVENUE ACTS (B. Reams ed. 1979). *See* Rothensies v. Electric Battery Co., 329 U.S. 296, 301 (1946):

> It probably would be all but intolerable . . . to have an income tax system under which there never would come a day of final settlement. . . . [A] statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

See also Britton v. United States, 532 F. Supp. 275, 278 (D. Vt. 1981) (section 6501(a) allows the honest taxpayer to "close his books on any particular tax year" three years after he files a return).

2. Internal Revenue Code (I.R.C. or Code) § 6501(a) provides, in pertinent part:

> Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed). . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

3. I.R.C. § 6501(c)(1) states: "False return.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

4. 104 S. Ct. 756 (1984) (*Badaracco III*).

5. *Id.* at 762.

6. Badaracco v. Comm'r, 42 T.C.M. 573, 574, Dec. 38,112(M) (1981) (*Badaracco I*).

7. Badaracco v. Comm'r, 693 F.2d 298, 298 (3rd Cir. 1982) (*Badaracco II*). Three months after they filed the amended returns, the Badaraccos were indicted for filing fraudulent tax returns for the years 1965 to 1969. *Id.* They each entered a plea of guilty to the charge of filing a false

ternal Revenue issued deficiency notices for all the years.[8] The taxpayers appealed successfully to the Tax Court on the ground that section 6501(a) barred deficiency notices after three years following the filing of nonfraudulent amended returns.[9]

The Third Circuit reversed, holding that nothing in the statute or its legislative history indicates that the subsequent filing of an amended return has any effect on the section (6501(c)(1)) which allows the Commissioner unlimited time to make an assessment once a fraudulent return has been filed.[10] This decision was directly in conflict with the holding in *Dowell v. Commissioner*,[11] where the Tenth Circuit, faced with facts very similar to those in *Badaracco*, held that the filing of a nonfraudulent amended return started the three-year limitation period of section 6501(a).[12] The conflict was resolved by the United States Supreme Court's adoption of the Third Circuit's point of view in *Badaracco*.[13]

Statute of Limitations for Tax Assessment and Collection

Section 6501(a) of the Internal Revenue Code requires that income taxes be assessed within three years after the return is filed; in addition, it provides that no proceeding in court for the collection of an unassessed tax shall be begun after the three-year period has expired.[14] The Code states, however, that this three-year period is not applicable under the following circumstances: 1) in case of a false or fraudulent return with the intent to

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and fraudulent partnership tax return for 1967, and in 1973, the district court entered a judgment of conviction. *Id.*

8. *Badaracco I*, 42 T.C.M. at 574.

Ordinarily, once a deficiency is assessed, Code § 6212(a) requires that IRS send a notice to the taxpayer. For a definition of deficiency see Code § 6211(a). Within 90 days (or 150 days if the addressee is outside the United States) the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Code § 6213(a). The Tax Court is the taxpayer's prepayment forum. Once he misses the opportunity to litigate in Tax Court, he must pay the deficiency, make a claim for refund and, if that is denied, bring suit in federal district court within the period provided by Code § 6532. 28 U.S.C. § 1346(a)(1) grants the district courts original jurisdiction of civil actions against the United States for recovery of tax. However, 26 U.S.C. § 7422(a) requires a taxpayer to file for an administrative refund before such a suit can be maintained.

9. *Badaracco I*, 42 T.C.M. at 576. Faced with a similar situation, the district court in New Jersey, like the Tax Court, agreed with the petitioners. Deleet Merchandising Corp. v. United States, 535 F. Supp. 402, 404 (D.N.J. 1981). Deleet Merchandising Corporation had filed timely corporate tax returns for 1967 and 1968; in 1973, before any charges were filed against the corporation, it filed amended returns for those years. *Id.* at 402. The corporation itself was not charged with criminal tax violations and no formal criminal investigations were initiated although there were criminal and civil investigations involving certain of its former officers. *Badaracco III*, 104 S. Ct. at 760.

When, in 1977 Deleet received notices of deficiency, it paid the amount and brought suit for refund in federal court. *See Badaracco I*, 42 T.C.M. at 574. The court, agreeing with the petitioners' contention that no deficiencies could be assessed more than three years after a nonfraudulent amended return had been filed, granted summary judgment for Deleet. 535 F. Supp. at 404.

10. *Badaracco II*, 693 F.2d at 301-03. The Third Circuit also reversed the district court's decision in *Deleet*.

11. 614 F.2d 1263 (10th Cir. 1980).

12. *Id.* at 1265.

13. *See supra* note 5 and accompanying text.

14. *See supra* note 2. Even though the language of the section specifies only that "proceedings in court" are prohibited after the three-year limitation period, the section has been held to prohibit any method of collection by the government, including distraint. *See* Bowers v. New York & Albany Lighterage Co., 273 U.S. 346, 349 (1927).

evade taxes,[15] 2) in case of willful evasion,[16] 3) in case of a failure to file,[17] and 4) where the taxpayer omits from gross income an amount in excess of 25 percent of the gross income stated in the return.[18] In the first three situations, sections 6501(c)(1), (c)(2) and (c)(3) allow the government to assess taxes "at any time." In the last situation, section 6501(e)(1)(A) provides the Commissioner with an extended period of six years.

Once an assessment is made within the applicable period of limitation, the tax may only be collected within six years after the assessment.[19] This applies even if the return was fraudulent, so that the tax could have been assessed at any time.[20]

The Code contains a large number of civil and criminal penalties for tax evasion, fraud and failure to file.[21] The civil penalties are assessed,

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15. I.R.C. § 6501(c)(1).

16. I.R.C. § 6501(c)(2) states in pertinent part: "Willful attempt to evade tax—In case of a willful attempt in any matter to defeat or evade tax . . . the tax may be assessed or a proceeding in court for the collection of such tax may be begun without assessment, at any time." This subsection does not apply to the tax imposed by subtitles A or B (income, estate and gift taxes).

17. I.R.C. § 6501(c)(3) provides: "No return—In case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time."

18. I.R.C. § 6501(e)(1)(A) states, in pertinent part:

> If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

19. I.R.C. § 6502.

Unlike statutes of limitation applicable to nontax matters, the Code's statutes of limitation not only bar any remedy but also extinguish the liability. 4 B. BITTKER, *supra* note 1, § 113.1, at 113-3. For example, if the taxpayer voluntarily pays a deficiency after the time for assessment has run, the IRS must refund this amount as an overpayment even though the amount was clearly owning. *See* I.R.C. § 6401(a).

20. 4 B. BITTKER, *supra* note 1, § 113.7, at 113-11, 12 and cases cited therein.

21. For a general discussion of the civil penalties, see Asimow, *Civil Penalities for Inaccurate and Delinquent Tax Returns*, 23 U.C.L.A. L. REV. 637 (1976); Comment, *The Civil Penalty Triad: Delinquency, Negligence and Civil Fraud—Prevention and Avoidance*, 11 GONZ. L. REV. 628 (1976). Criminal penalties for tax fraud and evasion are generally discussed in H. BALTER, TAX FRAUD AND EVASION (4th ed. 1976). The most frequently encountered civil penalties are those imposed for failure to file a return or to pay the tax (I.R.C. § 6651), failure to pay the tax because of negligence or intentional disregard of the rules or regulations (I.R.C. § 6653(a)) and failure to pay the tax because of fraud with intent to evade payment (I.R.C. § 6653(b)). Of these, the one with the most serious consequences to the taxpayer is the civil fraud penalty of § 6653(b). According to § 6653(b)(1), if any part of any underpayment of tax required to be shown on a return is due to fraud, a penalty of 50% of the underpayment is added to the tax.

The most serious of the tax crimes is defined in § 7201, providing that "any person who willfully attempts in any manner to evade or defeat any tax" is guilty of a felony, punishable by a maximum fine of $100,000 or a maximum period of imprisonment of five years, or both, plus any other penalties provided by the law. One of the "other penalties provided by the law" is the 50% civil fraud penalty.

The Department of Justice has the sole authority to prosecute for tax crimes. 28 U.S.C. § 547(1). Thus the IRS must refer cases warranting criminal prosecution to the Department of Justice. After the referral, the authority to settle rests with the Department of Justice. United States v. Lasalle National Bank, 437 U.S. 298, 312 (1978). Once the matter is referred to the Department of Justice, the I.R.S. cannot issue civil summonses for the investigation of tax returns. I.R.C. § 7602(c). Since it would be impossible to uncover fraud without civil summons authority, the I.R.S. has adopted a policy of waiting until the criminal prosecution is over before starting civil proceedings. *Badaracco II*, 693 F.2d at 302. If the civil case goes first, the taxpayer may be in a better position to discover facts regarding the pending criminal investigation. *See* Singleton v. Comm'r, 65 T.C. 1123, 1133-38 (1976).

There is an additional reason why the government prefers to let the criminal prosecution go

collected and subject to statutes of limitation in the same manner as taxes.[22] In the criminal area, however, the Code provides that no person can be prosecuted, tried or punished for criminal tax offenses unless indictment or information takes place within three years of the offense.[23] For criminal fraud the applicable period is six years.[24]

The section 6501 periods of limitation begin on the day after the return is actually filed,[25] except that early returns are deemed filed on the last day prescribed by law for filing.[26] In any controversy involving limitations periods, then, an initial inquiry is whether the piece of paper filed qualifies as an adequate return.

What Constitutes a Return?

The Internal Revenue Code uses the word "return" extensively, but neither the Code nor the regulations undertake to define the word.[27] The United States Supreme Court has intimated that an adequate return is one that is honestly and reasonably intended to give the government information as to income, deductions and credits.[28] From this, one could logically

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first: Taxpayers who are convicted under I.R.C. § 7201 are barred by collateral estoppel from denying that the return was fraudulent. *See* Armstrong v. United States, 354 F.2d 274, 290-91 (Ct. Cl. 1965). A conviction under § 7206(1) has the same effect. *See* Goodwin v. Comm'r, 73 T.C. 215 (1979). However, an acquittal under § 7201 does not protect the taxpayer. Since the government's burden of proof in a civil fraud case ("clear and convincing evidence") is less than its burden in the criminal case ("proof beyond a reasonable doubt"), an acquittal is not inconsistent with a civil penalty. *See* Helvering v. Mitchell, 303 U.S. 391, 403 (1938).

22. I.R.C. § 6662(a), § 6671(a).

23. I.R.C. § 6531.

24. *Id.*

25. *See* Burnet v. Willingham Loan and Trust Co., 282 U.S. 437 (1931) (day of filing does not count).

26. I.R.C. § 6501(b)(1).

27. 4 B. BITTKER, *supra* note 1, § 111.1.8, at 111-11.

28. The question of what constitutes an adequate return for limitations purposes was first discussed by the United States Supreme Court in Florsheim Bros. Dry Goods Co., Ltd. v. United States, 280 U.S. 453 (1930). In *Florsheim* the taxpayer had filed a tentative return (Form 1031T), which was also a request for an extension of time. The Court held that Form 1031T was not the return required by the tax statutes and thus could not trigger the five-year statute of limitation provided by § 250(d) of the Revenue Act of 1918. *Id.* at 459-60. The Court wrote:

> The word return is not a technical word of art. It may be true that the filing of a return which is defective or incomplete . . . is sufficient to start the running of the period of limitation . . . . But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with § 239. And, to have that effect, it must honestly and reasonably be intended as such.

Id. at 462.

The definition of an adequate return as one that gives the government information as to income, deductions and credits was also used in Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934). In *Zellerbach*, the corporation had filed a consolidated income and profits tax return. Later the same year, the Revenue Act of 1921 was passed, which required that taxpayers who had filed returns under the old act and who were subject to an additional tax should file a new or supplemental return covering such tax. The only change for the taxpayer in *Zellerbach* was the disallowance of a $2,000 exemption; no supplemental return was filed. The Ninth Circuit Court of Appeals held that the return on file was a nullity, and hence the statute of limitations had never begun to run. Zellerbach Paper Co. v. Helvering, 69 F.2d 852 (9th Cir. 1933). The Supreme Court reversed, holding "[p]erfect accuracy or completeness [was] not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180 (citation omitted). The *Zellerbach* returns were held adequate to set off the usual three-year limitation period. *Id.* at 177-78. If amended returns had been filed, they would not have had any effect on the limitation period that had already begun to

infer that a return that is intentionally fraudulent would be regarded by the Court as a nullity. One commentator has stated it thus: "Since a fraudulent return is not an honest and genuine attempt, section 6501(c)(1) provides that its filing does not start any statute of limitation but instead extends the period for assessment and collection of taxes indefinitely."[29]

The problem with the above inference is that section 6501(c)(1) explicitly mentions a false or fradulent return, casting doubt on the conclusion that a fradulent return is not a return at all. One way of avoiding this contradiction would be to suggest that a particular document may be considered a return for purposes of the tax fraud provisions even if it does not qualify as a return for other purposes of the Code. Even though this solution is contrary to the courts' usual procedure of considering a document either as a return for all purposes or for none,[30] this may be the only possible way to resolve the contradiction that seems to be involved in the use of the phrase "fraudulent return" in section 6501(c)(1).

Effect of Amended Returns on the Section 6501 Statutes of Limitation

The Supreme Court has held that an amended return filed before the due date becomes the return mentioned in the statute and must be accepted by the Commissioner.[31] On the other hand, The Commissioner

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run. *Id.* at 180. *See also* Kaltreider Constr. Co. v. United States, 303 F.2d 366, 368 (3d Cir.), *cert. denied*, 371 U.S. 877 (1962) (three-year period of limitations begins when original return is filed, not when amended return is filed).

29. Brennan, *The Uncertain Status of Amended Tax Returns: Their Varying Impact on Tax Deficiencies, Tax Elections, and the Statute of Limitations on Civil Tax Fraud*, 7 REVIEW OF TAXATION OF INDIVIDUALS 235, 253 (1983).

30. 4 B. BITTKER, *supra* note 1, § 111.1.8, at 111-12. Recently, the Tax Court reiterated the principle that statutory references to returns should be construed in pari materia. In Conforte v. United States, 74 T.C. 1160 (1980), the taxpayers had filed a Form 1040 reflecting only their names, addresses, social security numbers, filing status, exemptions, an amount designated as taxable income and computations of tax. No amounts or descriptions for gross income and deductions were indicated. The Tax Court, considering whether these forms constituted returns for the purpose of calculating the fraud penalty under § 6653(b), rejected the taxpayers' argument that the amount of tax shown on the Form 1040 qualified as an "amount shown as the tax by the taxpayer upon his return" within the meaning of § 6211(a)(1)(A). *Id.* at 1204.

The court concluded, therefore, that the 6653(c) underpayment was equal to the total tax liability and the Confortes had to pay a fraud penalty of 50% of the total tax due even though they had already paid some of that tax with their timely filed Form 1040. *Id.* The Tax Court supported its conclusion by noting that the form submitted would not have constituted a return for the purpose of § 1348 or § 6501 (it meant, presumably, that such a return could not have triggered the three-year period of § 6501(a) even if it had not been fraudulent) but should be treated as a return for the purposes of § 6211 or § 6653. *Id.*

The Ninth Circuit reversed, holding that Form 1040 was a return both for the purposes of calculating the deficiency under § 6211 and of the fraud penalty. Conforte v. Comm'r, 692 F.2d 587, 591 (9th Cir. 1982). In its opinion, the Ninth Circuit raised the possibility that a document may be considered a return for the purposes of the tax fraud provisions even if it does not qualify as a return for other purposes of the Code. The court wrote:

> We . . . do not exclude the possibility that the same word could have a different meaning in different parts of the Code. The legislative intent must govern this definitional process. Therefore, we believe that where . . . a word could well have a different meaning in different statutory contexts, a purpose-oriented approach should be used when interpreting the meaning of the word as it is used in different sections of the Code.

Id. at 591.

31. Haggar Co. v. Helvering, 308 U.S. 389 (1940). The Internal Revenue Code generally does not expressly authorize amended returns. Brennan, *supra* note 29, at 235. The IRS has, however, administratively permitted their use and has promulgated forms for amending individ-

and the courts have rejected amended returns filed after the due date for a variety of reasons.[32]

In *George M. Still Inc. v. Commissioner*,[33] the Tax Court held that the filing of an amended return did not deprive the Commissioner of the right to assert the fraud penalty. The court observed that Congress has provided "no such magic formula to avoid the civil consequences of fraud."[34] Given that an unlimited assessment period is also one of the civil consequences of fraud, the court's logic would seem to lead to the conclusion that no subsequent act would be allowed to vitiate fraudulent behavior that had already taken place.

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ual and corporate income tax returns. *Id.* at 236. Amended returns "modify, supplement or supplant" the original return; they also operate as refund claims. 4 B. BITTKER, *supra* note 1, § 111.1.7, at 111-9.

Some commentators have noted that courts tend to confuse or use interchangeably the amended return, the supplemental return, and the substituted return. *See, e.g.*, Weisbard, *Amended Returns: When, to File; Rules Not Clear; Ethical Problems Arise*, JOURNAL OF TAXATION 370, 370 (1962). According to Weisbard, an amended return not only implies the existence of a defective original and of a more accurate restatement, but also involves the superseding of the original and should be distinguished from supplemental, which ordinarily implies something added to and to be read with the original. *Id.* at 370. This distinction does not seem to have been given any attention. *See, e.g.*, Zellerbach, 293 U.S. at 180: "A second return . . . is an amendment or supplement to a return already upon the files, and . . . effective by relation. . . ."

32. The courts generally view the Commissioner's treatment of amended returns solely as a matter of internal agency discretion and will not upset his judgment except on a showing of abuse of discretion. *See, e.g.*, Koch v. Alexander, 561 F.2d 1115, 1117 n.10 (4th Cir. 1977); Miskovsky v. United States, 414 F.2d 954, 955 (3d Cir. 1969).

Amended returns filed after the due date in an attempt to create a deficiency have uniformly been rejected. According to § 6213, Tax Court jurisdiction depends upon the existence of a deficiency as defined in § 6211(a)(1)(A). In most cases, § 6211(a)(1)(A) refers to the amount shown by the taxpayer on his original or timely filed amended return. Brennan, *supra* note 29, at 239. If an amended return filed after the due date shows an additional tax, Reg. 301.6211-1(a) includes this amount in the deficiency calculation. However, if the untimely amended return shows a decrease in tax due, it is not allowed to create a deficiency so as to give the taxpayer the advantage of a prepayment hearing in the Tax Court. In Koch v. Alexander, 561 F.2d 1115 (4th Cir. 1977), the court discussed what would happen if the taxpayer was allowed to create a deficiency by filing an amended return: "[I]t would be utterly disruptive of the administration of the tax laws if a taxpayer could disregard his return and automatically change an assessment based thereon by making an amended return in his favor long after the expiration of the time for filing the original return." *Id.* at 1117.

In the characteristic "heads I win, tails you lose" mode of the IRS, regulations provide that amended returns showing higher taxes due can destroy deficiencies and deprive the Tax Court of jurisdiction. Reg. 301.6211-1(a).

In a similar vein, the Tax Court has rejected amended returns filed in an attempt to erase the fraud penalty. Section 6653(b) defines the fraud penalty as 50% of the underpayment if any part of the latter is due to fraud. Section 6653(c)(1) generally defines an underpayment as the same as a deficiency under § 6211(a)(1)(A), except that the "tax shown on the return" (in § 6211(a)(1)(A)) is expressly limited to the tax shown on a timely return. The Tax Court has held that the fraud penalty is 50% of the difference between the correct tax liability and the tax shown on the taxpayer's original return. *See* Benes v. Comm'r, 42 T.C. 358 (1964), *cert. denied*, 384 U.S. 961 (1966); George M. Still Inc. v. Comm'r, 19 T.C. 1072 (1953), *aff'd*, 218 F.2d 639 (2d Cir. 1955); Eck v. Comm'r, 16 T.C. 511 (1951), *aff'd per curiam*, 202 F.2d 750 (2d Cir.), *cert. denied*, 346 U.S. 822 (1953).

33. 19 T.C. 1072 (1953) *aff'd*, 218 F.2d 639 (2d Cir. 1955).

34. The court wrote:

> Any other result would make sport of the so-called fraud penalty. A taxpayer who had filed a fraudulent return would merely take his chances that the fraud would not be investigated or discovered, and then, if an investigation were made, would simply pay the tax which he owned anyhow and thereby nullify the fraud penalty. We think Congress has provided no such magic formula to avoid the civil consequences of fraud.

Id. at 1077.

Unfortunately, the Tax Court has not been consistent in its application of the *Still* conclusion. For example, in *Ira Goldring v. Commissioner*,[35] the Tax Court held that when the original return omits more than 25% of gross income, it triggers the extended statute of limitation notwithstanding the fact that the amended return reduced the omission to below 25%. The *Goldring* court argued that the logic of the *Still* opinion referred to above[36] would apply *a fortiori* when what is sought by the Service is not a penalty, but merely the collection of taxes that would be due if not barred by the statute of limitations.[37] The same logic failed, however, to convince the same court when it was faced with a situation where the taxpayer had fraudulently failed to file tax returns, but had later filed nonfraudulent (albeit delinquent) returns. In *Bennett v. Commissioner*,[38] the Tax Court held that the filing on nonfraudulent returns would be sufficient to start the three year period of limitations even though it could not operate to wipe out the fraud penalty that had already accrued.[39]

The *Bennett* court invoked a policy-oriented rather than a syllogistic analysis to support its conclusion.[40] According to the court, the extended time helps the Commissioner ferret out fraud, and thus there could be no policy in favor of permitting unlimited time for assessment once a nonfraudulent return puts the Commissioner on notice of a taxpayer's receipts and deductions.[41]

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35. 20 T.C. 79 (1953).
36. *See supra* notes 33 and 34 and accompanying text.
37. *Goldring*, 20 T.C. at 83.
38. 30 T.C. 114 (1958).
39. *Id.* at 123.
40. Note 41 *infra* contains the syllogistic analysis that would be used if *Bennett* were before the court today.

The policy that the *Bennett* court was attempting to further had been categorically stated by the United States Supreme Court in Colony Inc. v. Comm'r, 357 U.S. 28 (1958), a case construing the precursor of § 6501(e)(1)(A). The Court found the extended limitations period inapplicable to returns that disclose the facts forming the basis for the deficiency: "We think that in enacting [the statute] Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate . . . where, because of a taxpayer's omission, . . . the Commissioner is at a special disadvantage. . . ." *Id.* at 36.

The *Bennett* petitioner's late filing had not put the Commissioner at a special disadvantage, and therefore there was no policy reason for the application of the extended period.

41. *Bennett*, 30 T.C. at 123-24. Commentators have pointed out that the Tax Court's decision could have been supported by the language of the statute itself without having to take recourse to policy matters. Their argument hinges on the fact that § 6501(c)(3) applies only so long as no return is filed. Once a return is filed, § 6501(a) takes over. Brennan, *supra* note 29, at 259. The lateness of the return does not affect the applicability of § 6501(a) because the section states that the tax "shall be assessed within 3 years after the return was filed (whether or not such return was filed on *or after the* date prescribed" (emphasis added). This parenthetical language was added to I.R.C. § 6501(a) in 1954. (*Bennett*, however, interpreted § 276 of the 1939 Code.) It seems, therefore, that at least since 1954, a taxpayer who fails to file a return, with or without a willful intent to evade taxes, will get the benefit of a three-year limitations period once he files a return, however delinquent the return may be. Note, *Amended Returns and the Limitations Period for Tax Fraud*, 51 GEO. WASH. L. REV. 600, 601 n.5 (1983).

The Effect of Amended Returns on the Section 6501(c)(1) Statute of Limitations—the Intercircuit Conflict

In *Dowell v. Commissioner*,[42] the Tenth Circuit held that the filing of a nonfraudulent amended return triggers the three-year period of section 6501(a) despite the unlimited assessment period allowed by section 6501(c)(1). That court phrased the issue in terms of the adequacy of the return rather than its original or amended nature,[43] concluding that the fraudulent returns were not really returns and thus did not start any limitation period running. According to the *Dowell* majority: "Section 6501(c) represents the antithesis of a limitations concept and in the absence of anything else the commencement of any period of repose for fraudulent returns is put in limbo. . . ."[44] Therefore, the court reasoned, once the taxpayer has shown an honest and genuine effort to satisfy the law by filing an amended return, the 6501(a) period should begin to run.[45] The Tenth Circuit also pointed out that the fraudulent filing provision of section 6501(c)(1) should be construed consistently with the failure-to-file provision of section 6501(c)(3), since these subsections were part of the same section in the 1939 Code and Congress gave no reason for their bifurcation in the 1954 Code.[46]

The *Dowell* court pointed out that the purpose of section 6501(c)(1) was to provide the government time to unearth the information that had been withheld by the taxpayer; the court argued that once this information reaches the government, "there can be no policy in favor of permitting assessment thereafter at any time."[47] The majority was also of the opinion that the fraud penalty and the criminal prosecution punished the taxpayer enough and that "no irrevocable forfeiture of the benefits of limitations periods [was] contemplated as an additional punishment or penalty."[48]

In *Klemp v. Commissioner*,[49] the full Tax Court reconsidered its deci-

42. 614 F.2d 1263 (10th Cir. 1980).

The taxpayers in *Dowell* had filed fraudulent income tax returns for the years 1963-66. In 1968 they filed amended returns for all four years. In 1974, more than six years after the amended returns were filed, the Commissioner issued a notice of deficiency. The Tax Court held that the original fraudulent returns triggered the unlimited period for assessment provided for in § 6501(c)(1) and that the subsequent amended return did not shorten the period. Dowell v. Comm'r, 68 T.C. 646, 649 (1977), *rev'd and remanded*, 614 F.2d 1263 (10th Cir. 1980).

43. Dowell, 614 F.2d at 1265. *See also supra* note 28.

44. Dowell, 614 F.2d at 1265-66.

45. *Id.* at 1266.

46. *Id.* The Revenue Act of 1921 authorized an unlimited period for tax assessment of individuals who either failed to file a return or filed a fraudulent return. Pub. L. No. 67-98, 42 Stat. 227, 265, *reprinted in* 95 U.S. REVENUE ACTS (B. Reams ed. 1979). All subsequent revenue laws until 1954 contained the two exceptions within the same subsection. Revenue Act of 1921 § 250(d); Internal Revenue Code of 1939, § 276(a). In 1954 Congress separated them into two different subdivisions (§ 6501(c)(1), (3)). One commentator has stated that the legislative history contains no explanation for this change. Note, *Amended Returns and the Limitations Period for Tax Fraud*, 51 GEO. WASH. L. REV. 600, 602 n.13 (1983). Justice Stevens, dissenting in *Badaracco III*, 104 U.S. 756 (1984), came to a different conclusion. According to him, under the 1921 statute, the filing of a fraudulent return had no greater effect on the limitations period than the filing of no return at all, and the legislative history of the 1954 revision indicated that there was no intention to change the statute's meaning. *Id.* at 4086. *See also infra* note 50.

47. *Dowell*, 614 F.2d at 1266.

48. *Id.*

49. 77 T.C. 201 (1981), *rev'd and remanded*, 725 F.2d 1488 (9th Cir. 1984).

sion in *Dowell* and adopted the Tenth Circuit's reasoning.[50] The Third Circuit, however, took a contrary position. In *Badaracco v. Commissioner*, it found section 6501(c)(1) to be clear on its face, giving no indication that Congress intended to let amended returns affect that exception to the usual three-year period.[51] More importantly, the Third Circuit saw a distinction between a fraudulent filing and a fraudulent failure to file.[52] It argued that since section 6501(a) applies whether or not the return was timely filed, taxpayers who failed to file in time are to be given the benefit of the section 6501(a) period once they file irrespective of whether the failure to file was occasioned by fraud.[53]

The *Badaracco* court elaborated on the contradiction between the *Dowell* and *Goldring* cases.[54] Under *Dowell*, if a more than 25% omission of gross income was caused by fraud rather than inadvertence, the amended return would set off the three-year period; under *Goldring*, the same omission due to inadvertence would not operate to reduce the six-year limitation period of section 6501(e)(1)(A) that was already running from the date of the original return. If the amended return was filed, say, a year after the original ones, the defrauding taxpayer would have to be assessed within four years after the original filing whereas the innocent taxpayer would still have to wait another two years before he could close his books. That this result would be anomalous is without doubt; however, the contraction could have been resolved by overruling *Goldring* as inconsistent with *Dowell*, an alternative that the *Badaracco* court failed to consider.

Finally, the Third Circuit in *Badaracco* was unwilling to allow the Commissioner only three years to meet his dual responsibilities of proceeding both civilly and criminally.[55] The court recognized that the Internal Revenue Service policy of deferring civil assessment and collection until the completion of criminal proceedings was both "necessary and wise"[56] and should not lightly be endangered.

A few months after the Third Circuit decided *Badaracco*, the Fifth Circuit decided to adopt the Third rather than the Tenth Circuit view,[57] and a full-scale intercircuit conflict was under way. This conflict has now

50. *Id.* at 204. The *Klemp* court pointed out that, by definition, a statute of limitations *limits* the time within which an action can be taken and that § 6501(c)(1) does not satisfy this definition. The court also quoted H. Rept. 704, 73d Cong., 2d sess. 35 (1934), commenting that the present law (§ 276(a) of the 1934 Code, a predecessor to § 6501(c)(1)) permitted "[t]he government to assess the tax without regard to the statute of limitations in case of failure to file a return or in case of a fraudulent return." *Id.* at 204 n.6.

The Tax Court has followed *Klemp* in a series of memorandum decisions. *See, e.g.*, Galvin v. Comm'r, T.C. Memo 1982-689; Kramer v. Comm'r, T.C. Memo 1982-308; Liroff v. Comm'r, T.C. Memo 1982-309; Derfel v. Comm'r, T.C. Memo 1982-311.

The Second Circuit also appears to have been persuaded by the analysis of the *Klemp* majority. *See* Britton v. United States, 532 F. Supp. 275 (D. Vt. 1981), *aff'd mem.*, 697 F.2d 288 (2d Cir. 1982).

51. *Badaracco II*, 693 F.2d at 299.

52. *Id.* at 301 n.6.

53. *Id.* at 300.

54. *Id.* at 300-01.

55. *Id.* at 301. *See also supra* note 21.

56. *Id.* at 301, (quoting Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962)).

57. Nesmith v. Comm'r, 42 T.C.M. 1269 (1981), *rev'd and remanded*, 699 F.2d 712 (5th Cir.

been resolved by the United States Supreme Court's affirmance of the Third Circuit in its *Badaracco* decision.[58]

THE *BADARACCO* DECISION

In an 8-1 decision, the United States Supreme Court held that where a taxpayer files a false or fraudulent return but later files a nonfraudulent amended return, section 6501(c)(1) applies and a tax may be assessed at any time, regardless of whether more than three years have passed since the amended return was filed.[59]

The Adequate Return Issue

The *Badaracco* Court squarely denied the assertion that the fraudulent return was a nullity and that the nonfraudulent amended return was, therefore, the return referred to in the Code.[60] The Court pronounced, somewhat tersely, that "a document which on its face plausibly purports to be in compliance and which is signed by the taxpayer is a return despite its inaccuracies."[61] This definition seemed to the Court to comport with the meaning of the word "return" as used in the various subsections of section 6501.[62] No attempt was made to explain the inconsistency between this definition of an adequate return and the one the Court had given before: the return must be an honest and genuine endeavor to satisfy the law.[63]

Since the Court determined that the original fraudulent return was not a nullity, it had little trouble establishing that this was "the return" referred to in all of section 6501.[64] Stressing the principle that statutes of

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1983). The fifth circuit did not elaborate on its reasons for upholding the analysis of the *Badaracco II* court.

58. *Badaracco III*, 104 S. Ct. 756 (1984).

59. *Id.* at 4083.

60. "This nullity notion does not persuade us, for it is plain that "the return" referred to in § 6501(a) is the original, not the amended return." *Id.* at 4084.

61. *Id.*

62. *Id.*

63. *See supra* note 28 and accompanying text.

The court's definition of a return that is adequate to trigger the § 6501(c)(1) statute of limitations may suffice in cases where the return contains a full description of the alleged income, deductions and credits. In United States v. Long, 618 F.2d 74 (9th Cir. 1980), the court held that a return with zeros in all spaces was still a return for the purposes of the § 7203 "failure to file" penalty. However, it is not clear whether a return that is incomplete as well as fraudulent will be found adequate under the principle set out in *Badaracco III*. For example, if the taxpayer filed a Form 1040 that contained only an amount designated as taxable income, the return would probably set off the § 6501(c) provisions if the income was fraudulently understated. *See* United States v. Conforte, 692 F.2d 587 (9th Cir. 1982), where such a return was considered adequate under §§ 6211(a)(1)(A) and 6653; however, if the income designated as the taxable income on such a return were the true income, one wonders whether the return would be held to have triggered the § 6501(a) period.

It is, of course, possible that the word "return" could be construed differently for the purposes of the fraud provisions than for the rest of the Code. *See* discussion *supra* note 30.

64. *Badaracco III*, 104 S. Ct. at 762. It has been pointed out that § 6011(a) contemplates only one return. Brennan, *supra* note 29, at 236. Perhaps one could think of the original and amended returns as together constituting the "return" referred to in § 6011(a), the filing date being the date of submission of the amended return in instances where the first return had substantial omissions. The fear that this would encourage belated amended returns could be dispelled by letting the Commissioner assess the taxpayer a delinquency penalty under § 6651(a) (a maximum of 25% of the underpayment) rather than the 50% fraud penalty under § 6653(a).

limitation must receive a strict construction in favor of the government,[65] The Court found that section 6501(c)(1) was clear on its face and allowed the tax to be assessed "at any time" once the taxpayer filed a fraudulent return;[66] the Court also held that Congress could not have intended to reinstate the three-year period of section 6501(a) on the filing of an amended return since Congress had not provided for the filing of an amended return at all.[67]

Justice Stevens, in a lucid and compelling dissent, said he could not see why this was an instance of a false or fraudulent return.[68] Rather than elaborating on the adequacy of the first return, Justice Stevens saw the first nonfraudulent return as the return referred to in the Code and defined under prior holdings of the Court.[69] His position was buttressed by the provision in Reg. 301.6211-(1)(a) mandating that the amended return be the basis for the Commissioner's assessment.[70] He pointed out the inconsistency in using the amended return to calculate the tax due but not to

65. While the general rule is that the sovereign is exempt from statutes of limitations, *see supra* note 1, an exception exists when the sovereign expressly imposes a limitation period upon itself. Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938); United States v. Nashville, 118 U.S. 120 (1886); United States v. Weintraub, 614 F.2d at 619.

Once Congress has expressly manifested its intention to bind the United States to a statute of limitations, courts generally construe the statute strictly in favor of the government. 10 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 57.02 (1976). *See also* E.I. Dupont de Nemours and Co. v. Davis, 264 U.S. 456, 462 (1924); Lucia v. United States, 474 F.2d 565, 570 (5th Cir. 1973).

Strict construction of limitations statutes is an anomaly in the tax area, where generally, courts have construed the laws against the state and in favor of the taxpayer. As one commentator states: "Notwithstanding the crucial importance of tax revenues for the support of government and its services, however, it is a settled rule that tax laws are to be strictly construed against the state and in favor of the taxpayer." 3 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 66.01, at 179 (4th ed. rev. of 3d ed. of Sutherland Statutory Construction 1974). *See also* Bowers v. New York and Albany Lighterage Co., 273 U.S. 346, 350 (1927) ("the provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers"); Gould v. Gould, 245 U.S. 151, 153 (1915) ("In case of doubt (statutes levying taxes) are construed most strongly against the Government and in favor of the citizen"); Lambert v. Mississippi Limestone Corp., 405 So.2d 131, 132 (Miss. 1981) ("tax laws are to be strictly construed against taxing authorities and all doubts resolved in favor of the taxpayer"); Nash Finch Co. v. South Dakota Dept. of Revenue, 312 N.W.2d 470, 472 (S.D. 1981) ("ambiguities in a statute imposing a tax are interpreted in favor of the taxpayer").

The *Badaracco III* Court paid no attention to the tension that seems to exist between the courts' predilection to tilt the balance on the side of the taxpayer when it comes to other taxing statutes and their adherence to the common-law tradition of strict construction of statutes of limitation in favor of the sovereign.

66. *Badaracco III*, 104 S. Ct. at 762.

67. *Id.*

68. *Id.* at 766 (Stevens, J., dissenting).

69. Justice Stevens was not, however, considering the two returns as together constituting one nonfraudulent return. *See supra* note 64. Rather, he thought of the amended return as the adequate return that set off the 3-year limitations period, giving no effect whatsoever to the original return. *See supra* note 28.

70. The Commissioner may not have been obligated to accept the amended returns, but he did and used them as the basis for his assessment. Reg. 301.6211-1(a) provides: "Any amount shown as additional tax on an amended return . . . filed after the due date . . . shall be treated as an amount shown by the taxpayer 'upon his return' for the purposes of computing the amount of a deficiency (under § 6211(a)(1)(A))." This results in denying the taxpayer his prepayment forum if he shows enough additional tax on his amended return to wipe out a deficiency. See § 6653(c). Submitting an amended return may also count as an admission against interest in a tax fraud prosecution. Hayes v. United States, 227 F.2d 540 (10th Cir. 1955), *cert. den.*, 353 U.S. 953 (1957). Submitting an amended return does not seem to have any advantages for the taxpayer other than the possibility that the IRS may decide not to recommend criminal prosecution in a referral to the

trigger the three year limitation period.[71]

The Conflict Between Dowell *and* Goldring

The Third Circuit had pointed out that the *Dowell* result reduces the assessment period for a fraudulent taxpayer to three years after the filing of an amended return, whereas the *Goldring* decision makes it impossible for the taxpayer who innocently understated his income by more than 25% to escape the six-year period by filing an amended return.[72] Justice Blackmun, writing for the *Badaracco* majority found compelling the Third Circuit's demonstration of the inconsistency between the *Dowell* and *Goldring* holdings.[73]

Justice Stevens, in dissent, pointed out that the majority had ignored the fact that the Supreme Court had never been faced with the issue in *Goldring*, viz., the correct construction of section 6501(e)(1)(A).[74] More importantly, he did not see any inconsistency between the two cases: the two decisions taken together did not necessarily mean that a fraudulent taxpayer was better off than one who innocently understated his income because the former was still subject to criminal penalties under a six-year statute of limitation.[75]

The Policy Questions

Having disposed of objections on analytical grounds, the *Badaracco* majority turned to questions of tax policy, concluding that substantial policy considerations supported a literal reading of section 6501(c)(1). First, the Court found that the filing of an amended return does not necessarily remove the Commissioner from the disadvantageous position in which he was originally placed; such a return, coming, as it does, from a taxpayer who has already made false statements under penalty of perjury, does not vitiate the need for a thorough investigation.[76] Second, the Court focused on the fact that the Commissioner is frequently forced to place a civil audit in abeyance when a criminal prosecution is recommended and concluded that a limit of three years may, as a practical matter, mean that no assessment can be made.[77] Finally, the Court pointed out that Congress in-

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Justice Department on the ground that ostensible repentance might incline a jury to resolve doubts in the taxpayer's favor.

71. *Badaracco III*, 104 S. Ct. at 766 n.1 (Stevens, J., dissenting).

72. *See supra* note 54 and accompanying text.

73. *Badaracco III*, 104 S. Ct. at 761.

74. *Id.* at 768 n.6 (Stevens, J., dissenting).

75. *Id.* An unlimited assessment period *is*, however, considered a penalty for fraud or failure to file. When the statute of limitations was being discussed in Congress, several members expressed dissatisfaction with an unlimited period. Nevertheless, the exception for fraudulent returns remained. Apparently Congress wished to withhold from those who commit fraud the privilege of a limitations period. Note, *Amended Returns and the Limitations Period for Tax Fraud*, 51 GEO. WASH. L. REV. 600, 605-06 n.41, 44 (1983). It seems unfair to subject the innocent taxpayer to a longer assessment period than the fraudulent taxpayer is subject to.

76. *Id.* at 4085. In a failure to file situation, however, the government is required to proceed both criminally and civilly within three years after a correct, though delinquent return is filed. *See Bennett*, 30 T.C. 114 (1958); Rev. Rul. 79-178, 1979-1 C.B. 197.

77. *Badaracco III*, 104 S. Ct. at 785.

tended to make a difference between a fraudulent filing and a fraudulent failure to file.[78] It approved the decision of the Tax Court in *Bennett*[79] where it was held that if a taxpayer had fraudulently failed to file, the delinquent but nonfraudulent return that he subsequently filed would suffice to start the three-year statute running. The *Badaracco* Court based its support of *Bennett* not on the policy issues cited by the Tax Court but on a reading of the statute: Since section 6501(c)(3) speaks of a failure to file, whether or not occasioned by fraud, once a return is filed the section is inapplicable and section 6501(a) comes into play.[80]

Justice Stevens in his dissent explored the purpose behind the enactment of the section 6501 limitations provisions, concluding that the purpose was to incorporate into tax law the common-law principle that fraud did not repeal the bar of limitations but merely tolled it until the fraud was discovered or at least discoverable.[81] Thus he found no reason not to set off the regular period once an adequate return was filed. Second, he pointed out that legislative history supported equal treatment of fraudulent filling and a failure to file.[82] He found the majority's approval of *Bennett* difficult to reconcile, especially as the Commissioner was, if anything, at a greater disadvantage when no return was filed at all than when something was filed even though the latter may have been tainted by fraud.[83] Finally, Justice Stevens gave short shrift to the majority's argument that its decision was necessary to the preservation of the existing scheme of putting the criminal prosecution before the civil one; he suggested that the three year statute of limitations be tolled during pendancy of the criminal investigation.[84]

The most telling point made by Justice Stevens' dissent concerned the effect of the *Badaracco* decision in the area of transferree liability:[85] under section 6901(c)(1) the Commissioner is entitled to assess deficiencies against transferees within one year after the expiration of the limitations period for assessment against the transferor. Since the limitations period following a fraudulent filing will never run, the Commissioner may "hound a taxpayer's beneficiaries and their descendants in perpetuity."[86]

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78. *Id.* at 766.
79. 30 T.C. 114 (1958). *See supra* notes 38-41 and accompanying text.
80. *See supra* notes 40, 41.
81. *Badaracco III*, 104 S. Ct. at 766 (Stevens, J., dissenting).
82. *Id. See supra* notes 46 and 50.
83. *Badaracco III*, 104 S. Ct. at 768.
84. *Id.* at 769 n.8.
85. The Supreme Court has held that the fraud penalty is civil in nature, intended primarily as a safeguard for protecting the revenue and a method of reimbursing the government for its loss. The characterization as civil permits the government to collect the fraud penalty from someone other than the taxpayer. *See* Note, *The Civil Penalty Triad: Delinquency, Negligence and Civil Fraud—Prevention and Avoidance*, 11 GONZ. L. REV. 628, 658 (1976) and cases cited therein.

It has been held that where fraud is found in the return of the transferor, the statute of limitation will not begin to run for either the transferor or the transferee. Smith v. Comm'r, 249 F.2d 218 (5th Cir. 1957). Whether it would run for a transferee's transferee may depend upon whether the subsequent transferee had knowledge of the original fraud; however, it is also probable that the statute of limitations will never start for the subsequent transferee. *See* Note, *Internal Revenue Code Section 6501: The Code's Statute of Limitations*, 11 GONZ. L. REV. 606, 615 (1976).
86. *Badaracco III*, 104 S. Ct. at 768 n.7 (Stevens, J., dissenting).

The majority did not attempt to dispel this fear.

Conclusion

In *Badaracco v. Commissioner*, the United States Supreme Court held that once a taxpayer has filed a fraudulent return, the tax can be assessed at any time even though a nonfraudulent amended return is subsequently filed. The Court, however, cited with approval the old Tax Court case of *Bennett v. Commissioner*, which held that the taxes of a taxpayer who fraudulently failed to file, but later filed a delinquent nonfraudulent return must be assessed within three years from the date of actual filing. According to the Court, it was Congress' intention that a fraudulent filing be treated in a manner different from a fraudulent failure to file. This conclusion is not unequivocally supported by the legislative history. At least, the history seems equally to support the dissent's conclusion that Congress meant to treat the fraudulent return as a nullity and the filing of such a return as no different in effect from the failure to file a return at all. The dissent's viewpoint is also supported by the Court's prior definition of an adequate return as an honest and genuine endeavor to satisfy the law. By such a definition, a fraudulent return would not be adequate to trigger any period of limitation; once an adequate amended return was filed, however, the regular three-year period would start to run.

Bennett and *Badaracco* read together produce an anomaly: a taxpayer who intends to evade taxes would be better off not filing a return at all, and then, if the Internal Revenue Service starts an investigation, filing a return, rather than originally filing a fraudulent return. Since common sense suggests that it is to the Commissioner's advantage that some return, however fraudulent, be filed, it seems hard to envision that Congress intended this result.

As far as tax policy is concerned, the argument that the Commissioner cannot begin the civil case until the criminal prosecution for fraud has been concluded cannot alone justify an unlimited assessment period for all taxpayers regardless of whether their particular case merits a criminal prosecution. It may be fairer to toll the three-year statute in cases where the matter has been referred to the Department of Justice than to penalize everybody.

In the area of transferee liability, it is difficult to see how a perpetual hounding of the taxpayer's descendents comports with the policy of repose on which a voluntary and peaceful tax collection scheme must depend. It is also difficult to believe that Congress would have fashioned a statute of limitations that would lead to a result so contrary to such a statute's usual purpose of preventing stale claims. That Congress would allow this perpetual hounding even after the taxpayer has furnished the Service with a non-fraudulent account of his income, deductions and credits strains belief even further.

Disquieting as the *Badaracco* result may be, it seems that the Supreme Court's statutory analysis is at least one valid way of interpreting the statute. In any event, Congress has the opportunity to clarify the statute if this

decision is contrary to its actual intent. Tax policy would certainly be better served if Congress decides to make some provision for this form of taxpayer repentance, at least where it takes place before the onset of tax fraud investigations. Tax laws would be more fairly administered if Congress decides to toll the statute in cases where the matter has been referred to the Justice Department for criminal prosecution rather than let the Commissioner hound all taxpayers indefinitely. Some Congressional action in this area would also help the tax attorney in deciding what her ethical responsibilities are when her client tells her he wants to amend his return.

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