June 10, 2016

SHOOK
HARDY & BACON

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Pennsylvania General Assembly
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Harrisburg, PA 17120-3012

Hon. Daylin Leach
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Re: Unconstitutionality of Reviving Time-Barred Claims, House Bill 1947

Dear Chairman Greenleaf and Minority Chairman Leach:

Thank you for the opportunity to testify before the Senate Judiciary Committee at its June 13, 2016 hearing examining the constitutionality of H.B. 1947, which would extend the statute of limitations for civil actions related to child sexual abuse from 12 to 32 years after a victim reaches 18 years of age, including actions against private and non-profit organizations. My testimony addresses the constitutionality of one aspect of that law, Section 4, which provides that this new time period "shall be applied retroactively, including to revive an action which was barred by a statute of limitations prior to the effective date of this section." At the request of the Insurance Federation of Pennsylvania and the Pennsylvania Catholic Conference, I have closely examined this issue.

My conclusion is that over 150 years of Pennsylvania law is consistent and unequivocal on this point: reviving a civil claim for which the statute of limitations has run impermissibly interferes with a vested right and violates the Remedies Clause of the Pennsylvania Constitution. My analysis of Pennsylvania's constitutional law is reaffirmed by Pennsylvania treatises[1] and assessments of Pennsylvania law by courts in other states. It is also consistent with a 2013 assessment prepared by a well-known and admired advocate for Pennsylvania's children, Jason P. Kutulakis, who passed away earlier this year, and the Honorable Timothy Lewis, a respected former judge who served on the U.S. District Court for the Western District of Pennsylvania before he was elevated to the U.S. Court of Appeals for the Third Circuit.

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[1] *See, e.g.*, John J. Dvorske & Rachel M. Kane, 2 Standard Pa. Practice 2d § 13:29, Effect on Existing Rights; Retroactive Application—Revival of Barred Action (2016) ("After an action has become barred by an existing statute of limitations, the general rule is that no subsequent legislation will remove the bar or revive the action.").

## Background

I am a partner in the Public Policy Group of Shook, Hardy & Bacon L.L.P. Our firm has an office in Philadelphia. I practice in the firm's Washington, D.C. office. I have written extensively on liability law and civil justice issues. I also serve as adjunct professor at George Washington University Law School. Over the past decade, I have testified before state legislatures on bills that would retroactively eliminate or extend a statute of limitations, or provide a "window" for time-barred child sexual abuse lawsuits. In the course of my work, I have also studied the constitutional issues surrounding the reviver measures that have been considered in other states, as well as the constitutional issues presented here. I do not, and my firm does not, represent plaintiffs or defendants in childhood sexual abuse cases.

In other states, I have generally testified on behalf of the business community, not the Catholic Church. My testimony has focused on why statutes of limitations are an essential element of a fair and well-ordered civil justice system–for any type of claim. They balance an individual's ability to bring a lawsuit with the ability to mount a fair defense and to protect courts from stale or fraudulent claims. Statutes of limitations also provide predictability and certainty to the business community as well as non-profit organizations. It allows them to accurately gauge their potential liability and make financial, insurance coverage, and document retention decisions accordingly. Retroactively allowing time-barred claims, permitting lawsuits based on allegations that occurred decades ago, interferes with these settled expectations.

These sound public policy reasons, in addition to constitutional safeguards, are why only a handful of state legislatures have taken the action that you are considering today, reviving time-barred claims.

## Pennsylvania Courts Have Repeatedly Found that Retroactively Eliminating a Claim or Defense is Unconstitutional

Pennsylvania law has been consistent from the mid-1800s to the present: The Remedies Clause of the Pennsylvania Constitution does not allow the General Assembly to retroactively alter statutes of limitations to revive causes of action that have expired.

### 1. *The Remedies Clause and Early Construction*

The Pennsylvania Constitution contains a provision known as the Remedies Clause. Article I, Section 11, does not permit the legislature to eliminate certain fixed rights – whether it is a right to bring an accrued claim or the right to assert an established defense. It provides:

> All courts shall be open; and *every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law*, and right and justice administered without sale, denial, or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

The Supreme Court of Pennsylvania recognized that "due course of law" prevents legislation that revives a time-barred claim as early as 1862. In *Baggs's Appeal*, a family member missed the 7-year deadline to file claims for a distribution from the estate but, 12-years later, convinced the legislature to pass a law requiring a local court to consider the claim.[2] The court struck down the statute, finding that "[a] man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an Act of Assembly."[3]

### 2. *Lewis and the Leading Cases of the 20th Century*

There were other constitutional issues at play in *Baggs's Appeal*, such as the inappropriateness of passing legislation to address a particular case or person. In 1908, however, the Pennsylvania Supreme Court firmly established in *Lewis v. Pennsylvania Railroad Company* that the Remedies Clause provides a "vested right" to a defense "which the legislature may not interfere with."[4] The Superior Court later applied *Lewis* in two cases, *Overmiller* (1960) and *Maycock* (1984), to find that the Remedies Clause does not permit the legislature to revive time-barred claims.

In *Lewis*, the widow of a conductor who lost his life in a train accident sued the railroad for negligence. A statute in effect at the time of the death did not allow such claims. During the pendency of the lawsuit, however, the General Assembly repealed that law and passed a new law providing liability for the circumstances of the conductor's death. The Supreme Court of Pennsylvania found that the Remedies Clause did not allow the law to apply retroactively. It recognized that just the legislature cannot take away a cause of action after it has accrued, just as the legislature cannot retroactively eliminate a defense:

> A legal exemption from liability on a particular demand, constituting a complete defense to an action brought, stands on quite as high ground as a right of action. If the law of the

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[2] *Baggs's Appeal*, 43 Pa. 512, 515, 1862 WL 5187, at *3 (1862).

[3] *Id.*; *see also Mengers v. Dentler*, 33 Pa. 495 (1859) (finding act of the legislature could not retroactively validate an invalid sale because the law in effect at the time applies and "[i]f this law be changed or annulled, the case is changed, and justice denied, and the due course of law violated").

[4] *Lewis v. Pennsylvania R. Co.*, 69 A. 821, 822-23 (Pa. 1908).

> case at the time when it became complete is such an inherent element in it that a plaintiff may claim it has a vested right, on what possible ground can it be held that a defendant has no vested right with respect to an exemption or defense? The authorities make no distinction between them.[5]

While *Lewis* involved a defense other than the statute of limitations, the Court explicitly recognized that "[t]here is a vested right in an accrued cause of action, in a defense to a cause of action, *even in the statute of limitations when the bar has attached,* by which an action for a debt is barred."[6]

*Lewis* remains "good law" and is regularly and consistently applied in modern times to prevent revival of time-barred claims.[7] The Superior Court applied it in a 1960 case to find that an amendment to the workers' compensation law that extended the time for filing a petition for rehearing did not apply where the period in effect at the time had expired. In that case, *Overmiller v. D. E. Horn & Co.*, the court recognized:

> *As to causes which are not barred,* a statute of limitation may be extended, or even repealed.
>
> But, here the cause was barred. The year within which the board had a statutory right to consider a petition for rehearing had passed without any petition having been filed. It is accepted, almost without exception or qualification, that after an action has become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action.[8]

Statutes of limitations, the court found, "bar not only the remedy but the right."[9] The court concluded that "[e]ven if the legislature by specific language had indicated its intention to [revive time-barred claims], our Supreme Court has held that such statutory provisions should not be carried out."[10]

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[5] *Id.* at 823

[6] *Id.*

[7] *See, e.g., Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 77 A.3d 587, 600 & n. 16 (Pa. 2013) (reaffirming validity of *Lewis* and the Remedies Clause's protection of "causes of action and defenses from impairment once they have accrued").

[8] *Overmiller v. D. E. Horn & Co.*, 159 A.2d 245, 247-48 (Pa. Super. Ct. 1960).

[9] *Id.* at 249.

[10] *Id.*

The issue of reviving time-barred claims again came to the forefront in the mid-1980s in cases involving injuries that occurred during childhood. Traditionally, Pennsylvania law did not toll the statute of limitations during childhood.[11] As a result, when a child was injured, parents had to bring a cause of action on his or her behalf within the applicable statute of limitations period. The child could not later, after becoming an adult, file a lawsuit to recover. In 1984, the General Assembly adopted a law that tolled the statute of limitations for any civil action during infancy.[12] The legislation was silent as to whether it applied retroactively.

Following enactment, there was a flurry of litigation by individuals, who were now adults, alleging injuries that occurred during their childhood. Examples include a slip-and-fall claim against the City of Philadelphia for a sidewalk fall,[13] a medical malpractice claim against an obstetrician and hospital for birth-related injuries,[14] premises liability action against a landlord for a hand burnt on a heater,[15] and product liability actions against a manufacturer for the loss of a leg after a child was struck by a lawnmower,[16] and a drug maker for fraudulent concealment of the risks of taking a drug during pregnancy.[17]

In each reported case, the court dismissed the action, finding that the legislature's addition of a tolling period to the statute of limitations did not revive a time-barred claim. The most frequently cited of these cases has been the Superior Court's 1986 ruling in *Maycock v. Gravely Corp.* (the lawnmower accident). There, a unanimous three-judge found that while the General Assembly had not expressed an intent to apply the law to revive time-barred claims, "had the legislature made any such attempt there is authority to indicate that it would be unconstitutional."[18] *Maycock* reaffirmed that while the General Assembly may retroactively extend the statute of limitations for claims where the right to sue "has accrued but not yet expired," it cannot revive an action that is already barred.[19]

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[11] *See Peterson v. Delaware River Ferry Co.*, 42 A. 955 (Pa. 1899); *see also Walters v. Ditzler*, 227 A.2d 833 (Pa. 1967) and *Von Collin v. Pennsylvania R. Co.*, 80 A.2d 83 (Pa. 1951) (reaffirming *Peterson*).

[12] P.L. 337, No. 67, § 1 (1984) (codified at 42 Pa. Consol. Stat. Ann. § 5533(b)(1)).

[13] *Lewis v. City of Philadelphia*, 520 A.2d 874, 876 (Pa. Super. Ct. 1987).

[14] *Larthey by Larthey v. Bland*, 532 A.2d 456, 462 (Pa. Super. Ct. 1987).

[15] *Redenz v. Rosenberg*, 520 A.2d 883 (Pa. Super. Ct. 1987).

[16] *Maycock v. Gravely Corp.*, 508 A.2d 330 (Pa. Super. Ct. 1986).

[17] *Urland v. Merrell-Dow Pharmas., Inc.*, 822 F.2d 1268 (3d Cir. 1987).

[18] *Maycock*, 508 A.2d at 333-34 n.3 (quoting *Overmiller*, 159 A.2d at 249).

[19] *Id.* at 333.

Other Pennsylvania cases echo this point.[20] In addition, the U.S. Court of Appeals for the Third Circuit has recognized, "Under Pennsylvania law, after an action had become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action. Thus, it has consistently been held that the minor's tolling statute does not act to revive claims that had already been barred by the applicable statute of limitations prior to the effective date of the Act."[21]



### 3. *Cases of the Past 20 Years: A Reaffirmation, Not a Retreat*

Some suggest that recent court decisions make the continuing applicability of this substantial body of Pennsylvania case law "murky" or a "gray area." They do not. Rather, Pennsylvania courts continue to reaffirm that the legislature may retroactively make minor procedural changes to how cases are decided or vary the available remedies, but it cannot extinguish a claim or defense.

For example, in 1997, the Supreme Court of Pennsylvania ruled in *Bible v. Commonwealth* that the legislature could retroactively amend the amount recoverable for hearing loss through a workers' compensation claim.[22] As the Court made clear, that legislation did not disturb a vested right to file a claim, but only altered the method of calculating a reasonable award.[23] In fact, the Court quoted *Lewis v. Pennsylvania R.R. Co.* with approval in distinguishing a vested right ("present or future enforcement of a demand, or a legal exception from a demand made by another") from a mere expectation of receiving a specific amount of compensation through a lawsuit.[24]

Those who contend that the General Assembly may revive time-barred claims may suggest that *Bible* was a retreat from the Court's longstanding position on retroactivity, pointing to language in it stating: "No one has a vested right in a statute of limitations or other procedural matters. The legislature may at any time alter, amend or repeal such provisions without

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[20] *See, e.g., Larthey*, 532 A.2d at 462 ("We find no support for appellants' argument that [the tolling law] should be applied retroactively to revive a cause of action already barred by the statute of limitations."); *Redenz*, 520 A.2d at 885 (quoting *Maycock* with approval); *Lewis*, 520 A.2d at 876 ("[E]xpired causes of action cannot be revived.").

[21] *Urland*, 822 F.2d at 1276 (internal citations and quotation omitted); *see also Simon Wrecking Co. v. AIU Ins. Co.*, 350 F. Supp. 2d 624, 634 (E.D. Pa. 2004) ("In Pennsylvania, intervening changes in law do not revive actions that have already been barred by the running of the statute of limitations.") (quoting *Overmiller*, internal quotations omitted).

[22] *Bible v. Com., Dep't of Labor & Indus.*, 696 A.2d 1149, 1156 (Pa. 1997).

[23] *See id.* at 1156 ("The right to receive compensation for hearing loss has not been impaired, only the remedy has varied.").

[24] *See id.*

offending constitutional restraints."[25] However, in the sentence that immediately follows, the Supreme Court of Pennsylvania included the key condition: "So long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued, a want of due process is in no way involved."[26] In other words, consistent with the Court's longstanding jurisprudence, once a claim or defense accrues, it becomes a vested right that cannot be extinguished.[27] That did not occur in *Bible*, where the plaintiff continued to have a right to receive compensation for hearing loss, but it did occur in 2004 in *Ieropoli v. AC & S Corp.*

In *Ieropoli*, the Supreme Court of Pennsylvania found that the General Assembly crossed the line into unconstitutionality when it retroactively *extinguished* asbestos claims against corporations whose liability resulted from a merger with another company that made asbestos-containing products.[28] After the legislation took effect, a company filed a motion to dismiss hundreds of pending asbestos claims as a result of the new law. Although the Court recognized that the legislature had legitimate public policy concerns with the heavy toll of asbestos litigation upon certain Pennsylvania businesses, it found that "any statutory effort aimed at reformation must not offend the Remedies Clause, if it is to pass constitutional muster."[29] The Court reaffirmed that "[a]n accrued cause of action is a vested right and as such, cannot be eliminated by subsequent legislation."[30] As prior case law makes clear, this principle applies equally to an accrued defense—the running of the statute of limitations.

The constitutional defect in retroactively reviving time-barred claims is perhaps best seen by inverting the objective: Instead of retroactively reviving an expired claim, imagine being asked to legislatively shorten a statute of limitations to retroactively extinguish a plaintiff's cause of action. For example, in *McDonald v. Redevelopment Authority of Allegheny County*,

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[25] *Id.* at 1152 (quoting *Agostin v. Pittsburgh Steel Foundry Corp.*, 47 A.2d 680, 684 (1946)).

[26] *Id.*

[27] Even if some view *Bible* as showing greater openness to retroactive legislation, it is noteworthy that the plaintiffs did not assert, and the Court did not address, the constitutionality of the law at issue under the Remedies Clause, Article I, Section 11 of the Pennsylvania Constitution. Rather, the question was whether retroactively amending the amount recoverable through a workers' compensation claim violated *due process* rights under Article I, Section 9, of the Pennsylvania Constitution, impermissibly impaired contract obligations under Article I, Section 17, of the Pennsylvania Constitution, or violated corresponding provisions of the U.S. Constitution. *See id.* at 252. In fact, *Bible* does not include a single reference to the Remedies Clause.

[28] *Ieropoli v. AC & S Corp.*, 842 A.2d 919 (Pa. 2004).

[29] *Id.* at 932.

[30] *Id.* In response to *Ieropoli*, the General Assembly enacted a second statute that applied the limitation on successor liability prospectively only to correct the Remedies Clause violation. *See Johnson v. Am. Std.*, 8 A.2d 318, 323-24 (Pa. 2010) (citing 42 Pa. Consol. Stat. 5524.1(b)).

the Commonwealth Court in 2008 considered whether the legislature could reduce the time to challenge reasonable compensation when the government takes property through an eminent domain action from four years to one year.[31] The court found that the legislature could retroactively do so, *but only if an aggrieved party has a reasonable amount of time to bring an accrued claim.*[32] The plaintiff in that case had a full eight months after the law took effect to bring the claim under the new statute of limitations, but waited until 4 years after the new period took effect to do so. As the court made clear, it would have found retroactive application of the change to the statute of limitations unconstitutional had the shortening of the limitations period extinguished the plaintiff's claim.[33]

*McDonald* demonstrates that the legislature can retroactively reduce a statute of limitations so long as it does not effectively take away a plaintiff's vested right to bring a claim.[34] The same principle applies to reviving time-barred actions. The legislature can retroactively extend a statute of limitations for claims where the time period has not yet expired, but it cannot constitutionally eliminate a vested defense once that period has ended.

Finally, the Supreme Court of Pennsylvania most recently applied the vested rights analysis in 2008, when it found in *Konidaris v. Portnoff Law Associates* that the legislature could retroactively authorize school districts to require delinquent taxpayers to pay reasonable attorney's fees. There, the Court observed that "we have refused to apply retroactive legislation that reduces a defendant's defenses or 'exemptions from demands' based on the concept of a vested right."[35]

*Konidaris* reaffirmed *Lewis's* distinction between "a mere expectation" and a vested right, which includes a "legal exemption from a demand made by another."[36] Applying these principles, the Court found that

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[31] *McDonald v. Redevelopment Auth. of Allegheny County*, 952 A.2d 713, 717-18 (Pa. Commw. Ct. 2008).

[32] *See id.* ("As a matter of constitutional law, a statute of limitations goes to matters of remedy, not to the destruction or impairment of a fundamental right, *so long as the aggrieved party has a reasonable time to sue.*") (emphasis added).

[33] *See id.* at 718 ("Because Condemnees retained the right to challenge the just compensation received and because they had a reasonable amount of time in which to do so, the change in the statute of limitations did not destroy or impair Condemnees' fundamental right to just compensation.").

[34] *See id.* ("[N]o one has a vested right in a statute of limitations or other procedural matters, and the legislature may at any time alter, amend or repeal such provision without offending constitutional restraints, *as long as there is no omission of a remedy for the enforcement of a right for which a remedy existed when the right accrued.*") (emphasis added).

[35] *See Konidaris v. Portnoff Law Assocs.*, 953 A.2d 1231, 1242 (Pa. 2008) (citing *Lewis*, 69 A. at 823).

[36] *See id. at* 1241.

altering a defendant's asserted "right not to pay attorneys' fees" (an unprotected personal expectation) is not the same as taking away "an affirmative defense against an accrued cause of action," a vested right protected by the Remedies Clause.[37] There is no question that the statute of limitations is an affirmative defense, and therefore protected from retroactive elimination by the Remedies Clause.[38]

There is no inconsistency in these decisions. Individually and collectively, they stand for the proposition that the General Assembly cannot eliminate accrued claims or defenses. The General Assembly can increase a statute of limitations *for claims that have not yet expired.* The flip side of the coin is that the legislature can reduce the period to bring a lawsuit, but only if the change does not actually or effectively preclude bringing an accrued claim.[39] In some circumstances, the legislature can retroactively modify the amount recoverable on a claim.

But as these cases make clear, what the General Assembly cannot do is extinguish an accrued claim or revive a claim that is barred by the statute of limitations.

## Most States Do Not Revive Time-Barred Claims

Nationally, most states have not taken the extraordinary step of reviving time-barred claims. Pennsylvania's constitutional law regarding vested rights is consistent with the approach taken by most states, leading the vast majority of state legislatures to apply extensions of the statute of limitations prospectively, not retroactively.

### *1. Pennsylvania Law is Consistent with a Majority of States*

Pennsylvania's constitutional law is consistent with most sister states that have decided the issue. As several state supreme courts have observed, "The weight of American authority holds that the [statute of limitations] bar does create a vested right in the defense" that does not allow the legislature to

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[37] *Id. at* 1242.

[38] *Reott v. Asia Trend, Inc.*, 55 A.3d 1088, 1106 (Pa. 2012) "[T]he statute of limitations and immunity from suit are affirmative defenses.").

[39] As the Nebraska Supreme Court aptly observed, "The immunity afforded by a statute of repose is a right which is as valuable to a defendant as the right to recover on a judgment is to a plaintiff; the two are but different sides of the same coin. Just as a judgment is a vested right which cannot be impaired by a subsequent legislative act, so, too, is immunity granted by a completed statutory bar." *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773-74 (Neb. 1991) (holding statute purporting to exempt asbestos claims from ten-year statute of limitations could not be retroactively applied to claims extinguished by prior version of the statute); see also *Wiley v. Roof*, 641 So.2d 66, 68-69 (Fla. 1994) ("Once the defense of the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest.").

revive a time-barred claim.[40] These states apply a vested-rights analysis that is consistent with Pennsylvania law, whether they do so through applying a remedies clause, a specific state constitutional provision prohibiting retroactive legislation, due process safeguards, or another state constitutional provision.[41] Courts have applied these constitutional principles to not allow revival of time-barred claims in a wide range of cases—negligence claims, product liability actions, asbestos claims, and workers' compensation claims, among others.

A minority of states, about one-third, find that legislation reviving time-barred claims is permissible or appear likely to reach that result. These states generally follow the approach taken under the U.S. Constitution, which contains an "Ex Post Facto" clause that prohibits retroactive criminal laws,[42] including retroactive revival of time-barred criminal prosecutions,[43] but does not provide a similar prohibition against retroactive laws affecting civil

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[40] *Johnson v. Garlock, Inc.*, 682 So.2d 25, 27-28 (Ala. 1996); *see also Johnson v. Lilly*, 823 S.W.2d 883, 885 (Ark. 1992) ("[W]e have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred."); *Frideres v. Schiltz*, 540 N.W.2d 261, 266-67 (Iowa 1995) ("[I]n the majority of jurisdictions, the right to set up the bar of the statute of limitations, after the statute of limitations had run, as a defense to a cause of action, has been held to be a vested right which cannot be taken away by statute, regardless of the nature of the cause of action."); *Dobson v. Quinn Freight Lines, Inc.*, 415 A.2d 814, 816-17 (Me. 1980) ("The authorities from other jurisdictions are generally in accord with our conclusion" that running of the statute of limitations creates a vested right); *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341-42 (Mo. 1993) (recognizing constitutional prohibition of legislative revival of a time-barred claim "appears to be the majority view among jurisdictions with constitutional provisions" similar to Missouri); *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) ("Most state courts addressing the issue of the retroactivity of statutes have held that legislation which attempts to revive claims which have been previously time-barred impermissibly interferes with vested rights of the defendant, and this violates due process."); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995) ("In refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations, this court has chosen to follow the majority rule.").

[41] *See, e.g., Garlock*, 682 So.2d at 27-28; *Lilly*, 823 S.W.2d at 885; *Jefferson County Dept. of Social Services v. D.A.G.*, 607 P.2d 1004 (Colo. 1980); *Wiley v. Roof*, 641 So.2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009); *Skolak v. Skolak*, 895 N.E.2d 1241, 1243 (Ind. Ct. App. 2008); *Frideres*, 540 N.W.2d at 266-67; *Johnson v. Gans Furniture Indus., Inc.*, 114 S.W.3d 850, 854-55 (Ky. 2003); *Henry v. SBA Shipyard, Inc.*, 24 So.3d 956, 960-61 (La. Ct. App. 2009), *writ denied*, 27 So.3d 853 (La. 2010); *Dobson*, 415 A.2d at 816-17; *Doe*, 862 S.W.2d at 341-42; *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773-75 (Neb. 1991); *Gould v. Concord Hosp.*, 493 A.2d 1193, 1195-96 (N.H. 1985); *Colony Hill Condominium Assn. v. Colony Co.*, 320 S.E.2d 273 (N.C. 1984); *Wright v. Keiser*, 568 P.2d 1262, 1267 (Okla. 1977); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Doese*, 501 N.W.2d at 369-71; *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696-97 (Tenn. 1974); *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999); *Roark*, 893 P.2d at 1062-63; *Murray v. Luzenac Corp.*, 830 A.2d 1, 2-3 (Vt. 2003); *Starnes v. Cayouette*, 419 S.E.2d 669, 674-75 (Va. 1992).

[42] U.S. Const. art. I, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

[43] *See Stogner v. California*, 539 U.S. 607 (2003) (holding that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution").

claims.[44] For that reason, under federal constitutional law, there is no vested right in a statute of limitations defense that prohibits reviving an otherwise time-barred claim.[45] Delaware, for example, follows the federal approach.[46] The U.S. Supreme Court has recognized, however, that state constitutions can provide greater safeguards than the U.S. Constitution.[47] Many states, including Pennsylvania, do so.



Indeed, the Connecticut Supreme Court, which recently found that its constitutional law favored the minority federal approach, recognized that Pennsylvania is among those states in which "legislation that retroactively amends a statute of limitations in a way that revives time barred claims is per se invalid."[48]

### 2. *The Vast Majority of State Legislatures Have Rejected Bills That Would Revive Time-Barred Claims*

Almost all state legislatures in which proposals similar to H.B. 1947 have been introduced in recent years have rejected them, not acted upon them, or amended the bill to apply prospectively only.

There are just seven exceptions: California (one-year window in 2004), Connecticut (retroactive extension enacted 2002), Delaware (two-year window in 2007-2009), Hawaii (two-year window enacted in 2012 and

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[44] While the U.S. Supreme Court has provided Congress with more of a free hand to enact retroactive legislation, it has also expressed strong concern with such a long "disfavored" approach. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[R]etroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

[45] *See Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S. 620, 628 (1885).

[46] *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258-59 (Del. 2011) (recognizing that Delaware, in interpreting "due process of law" under its own Constitution, accords that phrase the same meaning as under the U.S. Constitution, and following *Chase* and *Campbell*).

[47] *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

[48] *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462 (Conn. 2015); *see also State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 369-71 (S.D. 1993) (recognizing Pennsylvania is among states in which legislation reviving time-barred claims is invalid).

The constitutionality of revivers is uncertain or undecided in some states. *See, e.g., Catholic Bishop of N. Alaska v. Does 1-6*, 141 P.3d 719, 725 (Alaska 2006) (avoiding constitutional concern by finding that 2001 law lifting statute of limitations for civil claims based on felony sexual abuse of a minor does not apply retroactively); *Doe v. Roe*, 20 A.3d 787, 799 (Md. 2011) (holding extension of statute of limitations could retroactively apply to child sexual abuse claim that was *not time-barred* under the period in effect before the 2003 effective date of legislation establishing a longer statute of limitations and recognizing that "[w]e would be faced with a different situation entirely had Roe's claim been barred under the three-year limitations period. . . .").

extended in 2014), Massachusetts (extension of statute of limitations enacted in 2014 which retroactively applies to perpetrators but not negligent supervision actions against organizations), Oregon (retroactive extension enacted 2009), and Utah (three-year window enacted 2016). These states generally follow the minority approach. Their constitutional law is unlike Pennsylvania, which has a well-developed body of case law recognizing that both an accrued claim and an accrued defense are vested rights that cannot be extinguished by the legislature.



As a result of constitutional restrictions and public policy considerations, the vast majority of states have adopted a finite, but longer, statute of limitations for child sexual abuse claims than other claims and applied it to future claims.

## Conclusion

I applaud this Committee for its care in developing legislation to protect victims of childhood sexual abuse and striving to do so in a manner that is consistent with the Pennsylvania Constitution. Based on my examination of Pennsylvania law, it is my opinion that H.B. 1947, to the extent that it would revive time-barred civil claims, violates the Remedies Clause. Extending the statute of limitations prospectively, as many other states have done, would avoid this constitutional problem.

Respectfully submitted,

Cary Silverman

cc: Members of the Senate Judiciary Committee