



Zombie Litigation: Revivers and Retroactive Lawsuits Are Bad Ideas

By Ted Frank

The controversy over whether and how to seat the Michigan and Florida delegations at the Democratic National Convention shows the danger of changing rules midstream and upsetting settled expectations. Reviver statutes not only obviate statutes of limitations, which are a critical aid to justice, by “reviving” claims that have expired or never existed, but they can also pose the danger of undoing the benefits of future prospective legislation. In evaluating laws, the issue is not merely one of retroactivity, but of the importance of promoting legal certainty. For example, the FISA Amendments Act, S. 2248, while ostensibly acting retroactively to grant immunity to telecommunications companies that cooperated with the Bush administration’s antiterror surveillance program, works to protect settled expectations.

“The possibility of retroactive legislation is a candle to rent-seeking moths.”
—William Landes and Richard Posner¹

In the race for the Democratic presidential nomination, Michigan and Florida broke party rules by scheduling their primaries early. The Democratic Party responded by stripping those states of their delegates to the convention and forbidding candidates to campaign there. Senator Hillary Clinton (D-N.Y.), however, kept her name on the ballot and thus “won” both primaries. Now that the nomination race looks as if it will come down to a battle for delegates at the convention, Senator Clinton is asking for the rules to be changed midstream to count her votes in those two states. This understandably upsets supporters of Senator Barack Obama (D-Ill.),² who relied on the ruling that those states would not get to seat delegates when deciding not to campaign in Michigan or Florida and to withdraw his name from the Michigan ballot. One hopes that this vivid example of the fundamental unfairness of retroactively changing the rules will be instructive

Ted Frank (tfrank@aei.org) is a resident fellow at AEI and director of the AEI Legal Center for the Public Interest.

to policymakers. The Clinton-Obama battle over a retroactive decision will affect only a single presidential election, but many proposals by state and federal lawmakers and litigants to change rules midstream will have considerably larger consequences beyond the individual cases.

Reviver Statutes

A category of special concern is reviver statutes that retroactively change the statute of limitations to “revive” claims that would otherwise be time-barred—that is, barred because of the passage of time. Like zombies in horror movies and books, lawsuits thought long dead are revived, suddenly coming to life to wreak havoc on surprised and disadvantaged defendants who may be entirely innocent.

Article 1, Section 10 of the Constitution prohibits states from making ex post facto laws of retroactive application, but as early as 1798, the Supreme Court restricted this principle to penal

laws.³ After all, if the Ex Post Facto Clause applied to civil cases, there would be no need for clauses barring the impairment of contracts or takings.⁴ It is thus taken as a given that the Constitution permits a legislature to revive retroactively a cause of action that has expired under the statute of limitations, so long as it makes its intention clear.⁵ While there is a pre-suspension against retroactivity,⁶ there is no per se prohibition of retroactive applications of the laws.⁷ Unfortunately, the Supreme Court does not provide adequate enforcement of the Takings Clause when a legislature passes a law creating civil liability for past conduct.⁸ Thus, it is almost entirely up to the legislature to be a backstop to such wealth transfers and to avoid using the dangerous power of retroactivity in all but the most compelling circumstances.

“The authority to impose liability for completed conduct is a dangerous tool in the hands of politically responsive institutions.”⁹ If parties can create liability where none had existed previously through legislative action, then the power of the legislature to reward special interest groups at the expense of the public interest will be almost unbounded.¹⁰

The greatest danger of retroactivity is the undermining of predictability. “[E]xpectations determine decisions and actions in a market economy.”¹¹ If investors have to account for the risk that their contractual arrangements will be disregarded by courts or undone by the legislature, they have to raise prices to account for the risk of postinvestment opportunism.¹² Economic activity decreases.

Statutes of limitations play an important role in ensuring fairness in the justice system. As Supreme Court justice Oliver Wendell Holmes noted, statutes of limitations are “designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”¹³ Time limits work to prevent these unavoidable things from unfairly prejudicing defendants. A recent Supreme Court case involved an employee who waited until after she retired to sue over her pay during her working years;¹⁴ if the claim had not been barred by a statute of limitations, the employer would not have had a fair chance to defend itself. The dismissal of time-barred claims also ensures that past actions will not be judged by contemporary standards,¹⁵ a danger in the pending

legislation in Maryland¹⁶ and in lead paint litigation now before the Rhode Island Supreme Court, where plaintiffs seek to hold the industry liable for decades-old sales that were legal at the time.

Businesses and third-parties routinely rely on statutes of limitations to evaluate and manage risks and design their business models. The likelihood of lawsuits and liability stemming from any aspect of standard operations is weighed in decision-making. A statute of limitations, while inherently arbitrary—no matter how long the limitations time period is, the bright line means an unfiled claim will be live one day and barred the next—must thus be reasonably short; a hundred-year statute of limitations is little better than no statute of limitations at all.

But reviver statutes change the rules midgame¹⁷ and eliminate this predictability. Instead, third parties doing business with these companies—like insurers, investors, or purchasers of existing businesses—are punished for relying on the existing legal rules. There is not enough notice for these third parties to avoid the harm or risk of lawsuits arising from unexpected earlier events.

In the wake of the controversy over the revelation of the Roman Catholic Church’s mishandling of sexually abusive church officials, several legislatures, at the behest of trial lawyers specializing in suits against Catholic institutions, undid the statute of limitations to permit newly publicized decades-old claims to go forward.¹⁸ The lobbying campaign continues apace in states that have yet to follow suit.

It is worth noting that the push for revivers in sexual abuse litigation did not originate with the scandal over abuse by Catholic priests. In the late 1980s and early 1990s, activists and trial lawyers argued for expanded statutes of limitations for decades-old child-abuse claims that were only “discovered” after therapists recovered “repressed” memories.¹⁹ That the vast majority of claims that followed turned out to be fraudulent²⁰ and that “repressed memories” turned out to be junk science²¹ do not seem to have deterred the second wave of such statutes.

One large danger of permitting litigation over stale claims is the possibility that they will be fraudulent. Where corroborating or refuting evidence is not readily available, a plaintiff’s perjury may be all that is needed to recover in the mass tort context, where a defendant is often unable to use litigation mechanisms effectively to

Statutes of limitations
play an important role
in ensuring fairness in
the justice system.

screen legitimate from illegitimate claims. The archetypical example is that of “bus jumping”—pedestrians leaping onto a bus after an accident, hoping to bring a claim against the municipality²²—but larger-scale frauds have happened in the asbestos, fen-phen, and even Vioxx contexts,²³ even when statutes of limitations have not been at issue. Judging by statistics of claims made against the Los Angeles Archdiocese, at least some of the plaintiffs were making fraudulent claims of abuse—including one who claimed to be abused by a priest who was only five years old at the time of the alleged incident.²⁴ A large proportion of plaintiffs claimed to be molested by a handful of priests, each of whom were allegedly responsible for dozens of victims. But the number of plaintiffs claiming to be the unique victims of deceased priests was statistically unlikely, given that the majority of pedophiles are repeat offenders²⁵—especially when, as was supposedly the case, their crimes go undetected for decades. Of the 244 accused officials in Los Angeles, 150 were accused of a single incident of molestation.²⁶ The vast majority of claims were made to the archdiocese only after reviver legislation was passed by the California legislature in 2002.²⁷ While a good number of the plaintiffs were tragic victims of molestation, there were almost certainly a sizable number of “bus jumpers” who brought claims. “Old claims are more likely to be spurious than new ones.”²⁸

Defending itself against the hundreds of newly discovered claims was a public relations nightmare for the Los Angeles Archdiocese. A discovery process that attempted to distinguish meritorious claims from fraudulent ones was widely criticized as insensitive. The archdiocese eventually settled the hundreds of claims for over \$1 million each, at a total cost of \$774 million.²⁹ The Roman Catholic Church has paid out over \$2 billion nationwide, with trial lawyers collecting nearly \$1 billion of that and five dioceses filing for bankruptcy protection.³⁰

Cardozo Law professor Marci A. Hamilton, as part of a larger and understandable campaign against clergy abuse, has been the leading academic behind the campaign for reviver laws and eliminating statutes of limitations. She argues that the immorality of child molestation overrides any justice or fairness concerns associated with statutes of limitations, which she either ignores or dismisses offhandedly as “absurd.”³¹ Professor Hamilton goes so far as to turn the traditional concern about faded evidence in stale cases on its head by claiming that the lack of a statute of limitations would allow

plaintiffs time to unearth the “tremendous amount of untapped evidence” that was “studiously ignored in the past.”³² Professor Hamilton’s sole protection for defendants would be to rely on wise prosecutorial discretion to weed out cases that suffer from the “proof problem,”³³ but this slim reed is no protection at all in the civil context: there is no prosecutorial discretion in civil litigation, and, with millions of dollars at stake, plaintiffs and their attorneys will have incentive to exaggerate or fabricate “untapped evidence.” Professor Hamilton entirely fails to consider the fairness and economic rationales behind statutes of limitations; her objection to them appears to be entirely instrumental, as obstacles to her ultimate goal of punishing the church, rather than based on any sound public policy. One is reminded of Sir Thomas More’s rebuttal in the 1966 film *A Man for All Seasons*:

William Roper: “So, now you give the Devil the benefit of law!”

Sir Thomas: “Yes! What would you do? Cut a great road through the law to get after the Devil?”

Roper: “Why, yes! I’d cut down every law in England to do that!”

Sir Thomas: “Oh? And when the last law was down, and the Devil turned ’round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man’s laws, not God’s! And if you cut them down . . . do you really think you could stand upright in the winds that would blow then?”

“Yes,” Sir Thomas concludes. “I’d give the Devil the benefit of law, for my own safety’s sake!” But Professor Hamilton has made an academic career out of rationalizing Roper’s position in her pursuit of the church (rather than the devil), rarely if ever contemplating the larger implications for innocent defendants of eliminating such protections.

Bad facts have resulted in bad legislation. Certainly, one has little sympathy for the way the Roman Catholic Church protected pedophiles in its midst for decades, and compensation was justifiably due to some of the settling plaintiffs. But just as certainly, the church was defrauded by other plaintiffs with unverifiable claims. There was never a gap in the law that improperly

permitted priests to molest children, and statutes of limitations are often especially generous to injured children, often permitting them to toll the running of the statute until after they reach the age of majority and can bring suit in their own names. For example, for someone injured at the age of ten in the year 2000, the time-limits to sue will not start running until he turns eighteen in 2008. If lawsuits were time-barred, they were because hundreds of victims voluntarily chose never to come forward.³⁴ The reviver legislation traded a perceived injustice of a false negative for other injustices of false positives, while at the same time increasing legal uncertainty for third-party innocents. Insurers modeling risk in California now have to account for the possibility that the legislature will retroactively create new or revive old liabilities. Without being able to rely on a statute of limitations, a purchaser doing due diligence on a target will need to worry about buried landmines of liability in decades-old files. That increased uncertainty will raise prices and hurt the public at large for a far greater sum than the few hundred million dollars awarded to a few hundred California plaintiffs.

For example, the Vioxx litigation was able to settle because, as of September 30, 2007, three years had passed since the withdrawal of Vioxx from the market, meaning that for forty-two of fifty states with statutes of limitations three years or shorter, further claims against Merck would be time-barred. The fear is that offering settlements while plaintiffs can continue to bring suits will encourage as many new lawsuits as get settled, leaving a company worse off than if it had continued to litigate. If more than a handful of states enlarge their statutes of limitations beyond three years (as Oregon recently did with its statute)³⁵ or make revivers common, future defendants will not be able to achieve the finality or legal certainty Merck did by settling, and settlements will either take longer or not happen at all.³⁶

Undoing Tort Reform

An especially pernicious retroactive reviver statute is pending in the Michigan legislature. In 1996, Michigan passed a law barring most product-liability suits against pharmaceutical products that had been approved by the FDA.³⁷ The reform was good public policy: it makes

little sense to have a lay jury with only the costs of a drug approval decision before it second-guess the cost-benefit analysis of the regulatory agency.³⁸ Limiting product-liability lawsuits against FDA-approved drugs reduces the expense of drugs to all consumers and encourages the sale of drugs that the FDA has found to be safe and effective but that cannot be sold profitably because of the risk of litigation.³⁹

As public-choice economists would point out, the difficulty of attempting to do this on the state level is that while the Michigan law benefits the residents of all fifty states (and the rest of the world) *ex ante*, the *ex post* cost of that law is borne entirely by Michigan residents. Michigan drug purchasers do not get to participate in the litigation lottery the way other state residents do, but federal regulations effectively prevent drug manufacturers from providing special discounts to Michigan drug purchasers despite the lower marginal cost of selling to Michigan residents.⁴⁰

The Michigan legislature showed admirable ability to rise above the collective action problem and pass an immunity law that benefited the common good, but local trial lawyers are lobbying hard to repeal the reform. This would be bad enough were the retreat from good public policy merely prospective, but one of the pending bills, H.B. 4045, would create a three-year window to sue drug manufacturers retroactively—not just repealing the reform but undoing it entirely by reviving lawsuits that the previous legislature thought should be impermissible.

The danger of this law to the public interest cannot be overstated. The advantage of liability reform is the ability of new laws to create legal certainty for economic actors, thus reducing transactions costs and risk and increasing investment. When that legal certainty is obviated by the risk that the law will be nullified, reform cannot accomplish its purpose. This is evident in the state medical malpractice context, where state legislatures pass laws, but insurers, understanding that state courts may strike down those laws, do not immediately adjust rates until that legal certainty is achieved through constitutional amendment (as in Texas) or a state supreme court decision.⁴¹ For example, in Ohio, malpractice insurers did not immediately respond to reform because of fear that the state supreme court would strike down the damages caps.⁴² Opponents of reform pointed

One of the pending bills would create a three-year window to sue drug manufacturers retroactively—not just repealing the reform but undoing it entirely. The danger of this law to the public interest cannot be overstated.

to this delayed reaction and disingenuously claimed that legislative reform does not work,⁴³ even as they were engaging in the litigation that, in the short run, nullified its effects before the Ohio Supreme Court affirmed the power of the legislature to regulate civil damages caps.⁴⁴

The uncertainty over whether a court will uphold a recently enacted law, however, is merely prospective and temporary. If the Michigan legislature and the Michigan Supreme Court permit a retroactive reviver of lawsuits that were explicitly forbidden by previous statutes, then investors in American business would be on notice: reform is meaningless because any future legislature can undo reform retroactively. Uncertainty in the law would be a permanent and entrenched state of affairs because, without constitutional protection, future legislatures would be unable to undo the damage to legal certainty caused by the legislature that retroactively revoked a reform.⁴⁵ Such a claw-back by trial lawyers in the legislative process would destroy the ability of reforms to create a state of legal certainty.

Courts regularly strike down liability reforms that affect substantive rights of plaintiffs in pending cases.⁴⁶ The Takings Clause and principles of separation of powers clearly prevent legislation from reversing final judgments that benefit individual plaintiffs. These principles should be reciprocal when it comes to defendants. If they are not, then legislation and court decisions could serve only as a ratchet to increase liability because changes in the law that benefit defendants can be undone by retroactive changes of the rules, while changes in the law that benefit plaintiffs are entrenched.

The FISA Amendments Act

There are legitimate purposes for retroactive legislation. For example, it is widely accepted that the legislature can and should use legislation to cure ambiguities in existing law, even if that legislation is technically retroactive.⁴⁷ Such issues arise in the pending legislative battle over retroactive immunity to telecommunications firms for assisting the U.S. government in the post-September 11 targeting of al Qaeda communications.⁴⁸

Telecommunications companies relied upon the assurances of the president and the attorney general that the intelligence-gathering operation was legal. Perhaps

those assurances will be determined in the future to be legally incorrect, but a government employee acting under such assurances would have qualified immunity from suit because of the lack of violation of a clearly established constitutional right.⁴⁹ Private industry, without the ability to second-guess the attorney general, should be equally protected. According to former attorneys general Benjamin Civiletti and Dick Thornburgh and former FBI and CIA director William Webster:

For hundreds of years our legal system has operated under the premise that, in a public emergency, we want private citizens to respond to the government's call for help unless the citizen knows for sure

that the government is acting illegally. If Congress does not act now, it would be basically saying that private citizens should only help when they are absolutely certain that all the government's actions are legal. Given the threats we face in today's world, this would be a perilous policy.⁵⁰

The legislation is thus distinguishable from other retroactive legislation because it is protecting rather than upsetting settled expectations and reliance interests. If anything, it is the plaintiffs seeking billions of dollars who are violating norms against retroactive liability. This is especially true in this particular instance—because the telecommunications companies were acting in good faith, they would almost certainly win the lawsuits after extensive and expensive litigation under existing law. The retroactive immunity would therefore not shift the underlying rights of any parties but merely shut down a litigation discovery process that would give enemies of America a “road map as to how to avoid the surveillance.”⁵¹

Policymakers and courts reviewing retroactive legislation need to consider the extent to which it upsets or resolves settled expectations and whether benefits are distributed to specific rent-seeking interest groups or to the public at large. Retroactive legislation, when it

Uncertainty in the law would be a permanent and entrenched state of affairs because, without constitutional protection, future legislatures would be unable to undo the damage to legal certainty caused by the legislature that retroactively revoked a reform.

upsets settled expectations, increases legal uncertainty systemwide and can have dramatic adverse effects on investment and the public interest well beyond the parties directly affected by the legislation. Reviver statutes can be especially pernicious. If the legislature will not act responsibly, courts should aggressively protect the constitutional rights of parties when retroactive legislation creates new liabilities for past conduct and more closely scrutinize retroactive legislation to ensure that it is intended to benefit the public at large.

AEI research assistant Sara Wexler and editorial assistant Christy Hall Robinson worked with Mr. Frank to edit and produce this Liability Outlook.

Notes

1. WILLIAM LANDES AND RICHARD POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 17 (2004).
2. Michael Barone, *General Election Campaign Has Already Started*, CREATORS SYNDICATE, Feb. 23, 2008.
3. *Calder v. Bull*, 3 U.S. 386 (1798).
4. *Id.* at 390, 394; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888* at 41-43 (1982). *But see* Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 427 n. 219 (citing extensive literature arguing for broader reading of Ex Post Facto Clause); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538-539 (1998) (Thomas, J., concurring) (questioning continued legitimacy of *Calder v. Bull*).
5. *E.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).
6. *E.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).
7. *E.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).
8. *Cf.* *Eastern Enterprises v. Apfel*, *supra* note 4 (Supreme Court unable to generate majority opinion in Takings Clause case). Chief Justice Rehnquist and Justice O'Connor were in the plurality, so the 2008 edition of the Roberts Court is likely to be similarly fractured.
9. Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1343 (2000) (quoting Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INTEREST L. REV. 87).
10. *Id.*
11. *Id.* at 1344 (quoting J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 865 (1996)).
12. *Id.*; Ted Frank, *End Open-Ended Litigation*, washingtonpost.com, Sep. 7, 2006.
13. *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).
14. *Ledbetter v. Goodyear Tire and Rubber*, 550 U.S. ___, 127 S. Ct. 2162 (2007).
15. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L. J. 453, 493 (1997).
16. HB 1241 (creating a cause of action where plaintiffs may sue paint manufacturers without having symptoms related to lead poisoning and without evidence a manufacturer's paint was used in their houses); *Trial lawyers at the public trough*, BALTIMORE EXAMINER, Mar. 5, 2008. The bill was given an unfavorable report by the Maryland House Judiciary Committee March 19.
17. DAN TROY, *RETROACTIVE LEGISLATION 17-19* (1998).
18. Charles J. Chaput, *Suing the Church*, FIRST THINGS, May 2006.
19. Jorge L. Carro and Joseph V. Hatala, *Recovered Memories, Extended Statutes of Limitations and Discovery Exceptions in Childhood Sexual Abuse Cases: Have We Gone Too Far?*, 23 PEPP. L. REV. 1239 (1995); Walter Olson, *Stale Claims*, REASON, Nov. 2000.
20. Olson, *supra* note 19; RICHARD OFSHE AND ETHAN WATTERS, *MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA* (2d ed. 1996).
21. ELIZABETH LOFTUS AND KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE* (1996); HARRISON G. POPE, JR., *PSYCHOLOGY ASTRAY: FALLACIES IN STUDIES OF "REPRESSED MEMORY" AND CHILDHOOD TRAUMA* (1997).
22. Scott Winokur, *Capitalizing On a Crash? Suits allege secret lives for some on fated Alaska Airlines flight*, SAN FRANCISCO CHRONICLE, Nov. 26, 2000.
23. Ted Frank, *Justice Scams*, N.Y. SUN, Aug. 8, 2006; Ted Frank, *Making the FAIR Act Fair*, 2006 LIABILITY OUTLOOK No. 1.
24. ARCHDIOCESE OF LOS ANGELES, *REPORT TO THE PEOPLE OF GOD: CLERGY SEXUAL ABUSE, ARCHDIOCESE OF LOS ANGELES, 1930–2003 at Appendix* (2004).
25. Ron Langevin, et al., *Lifetime sex offender recidivism: a 25-year follow-up study*, 46 CANADIAN J. OF CRIMINOLOGY AND CRIM. JUST. 531 (2004).
26. ARCHDIOCESE OF LOS ANGELES, *supra* note 24 at 15.
27. *Id.* at 14.
28. *Tyson v. Tyson*, 727 P.2d 226, 228 (Wash. 1986).
29. Associated Press, *Judge approves \$660M abuse settlement*, USA TODAY, Jul. 16, 2007. (Before the \$660 million settlement of remaining claims, the Archdiocese had individually settled several dozen cases for a total of \$114 million. *Id.*)
30. Laurie Goodstein, *Deal Reported in Abuse Cases in Los Angeles*, N.Y. TIMES, Jul. 15, 2007.

31. Marci Hamilton, *The Catholic Church Is Not the Only Culprit in the Abuse Scandal*, FINDLAW, Sept. 25, 2003.

32. Marci Hamilton, *A Massachusetts District Attorney's Clever Tactic in the Child Sex Abuse Wars*, FINDLAW, Oct. 7, 2004.

33. Hamilton, *supra* note 31.

34. The Archdiocese of Los Angeles reports that a number of parents expressly refused to press charges and asked for the church to treat the issue as a religious matter, which slowed their response (though that response was inadequate in other situations), because they did not learn until decades later the extent to which church officials were abusing their authority. ARCHDIOCESE OF LOS ANGELES, *supra* note 24 at 16-17.

35. H.B. 2448 (enacted June 2007) (extended the statute of limitations for Vioxx wrongful death actions to six years).

36. For pending reviver statutes in state legislatures, see AMERICAN TORT REFORM FOUNDATION, DEFROCKING TORT DEFORM 11-13 (2008).

37. Mich. Comp. Laws § 600.2946(5).

38. Cf. *Riegel v. Medtronic*, 552 U.S. ___, 128 S. Ct. 999 (2008).

39. Theodore H. Frank, *Riverboat Poker & Paradoxes: The Vioxx Mass Tort Settlement*, 23 WLF LEGAL BACKGROUNDER No. 12 at 2 (Mar. 21, 2008).

40. *Id.* at 2-3. This collective-action problem is why the most effective reform needs to come from the federal level. *Id.*

41. Indeed, nearly every econometric study of the effect of medical malpractice laws on the insurance environment has failed to account for this legal fact on the ground, by incorrectly treating tort reform as taking effect when passed by the legislature and signed by the executive, rather than when ratified by the third branch. This incorrect measurement of the independent

variable has dampened the results of studies of malpractice reform, leading some academics to conclude (or at least pro-pound), contrary to common sense, that reform that reduces the expense of defending malpractice cases does not reduce insurance expenses.

42. Tim Bonfield, *Doctors Pay More Despite New Law*, CINCINNATI ENQUIRER, Oct. 11, 2004.

43. *Id.*

44. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

45. Cf. also Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665, 1705 (2002) (anticipation of retroactive lawmaking of future legislatures leaves current legislature powerless to affect even current legal relations).

46. E.g., *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006) (striking asbestos reform as applied to pending litigation); *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999) (holding that limitations statute was unconstitutional as applied to plaintiff's case).

47. Eule, *supra* note 4 at 447-48.

48. Compare S. 2248 (granting retroactive immunity where attorney general certifies that assistance was requested) with H.R. 3773 (withholding such immunity).

49. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

50. Benjamin Civiletti, Dick Thornburgh and William Webster, *Surveillance Sanity*, OpinionJournal.com, Oct. 31, 2007; accord John Ashcroft, *Uncle Sam on the Line*, N.Y. TIMES, Nov. 5, 2007.

51. Dan Eggen and Ellen Nakashima, *Bush Moves to Shield Telecommunications Firms*, WASHINGTON POST A7, Mar. 2, 2008 (quoting President Bush).