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Kermit Roosevelt  
*Professor of Law*

June 10, 2016

Sen. Stewart J. Greenleaf  
Chairman, PA Senate Judiciary Committee  
Room 19 East Wing  
Harrisburg, PA 17120-3012

Sen. Daylin Leach  
Minority Chairman, PA Senate Judiciary Committee  
Room 543 Main Capitol  
Harrisburg, PA 17120-3017

Dear Senators,

I write to offer you my opinion on the permissibility under the Pennsylvania Constitution of a statute reviving a civil cause of action after the expiration of a limitations period. My opinion is that while there are respectable arguments on both sides, the better view is that such a revival statute would be constitutional.

There are constitutional limits on retroactive legislation. One such limit is the rule that vested rights may not be altered retroactively. Over a hundred years ago, in Lewis v. Pennsylvania Railroad Co., 220 Pa. 317, 69 A. 821, 823 (Pa. 1908), the Pennsylvania Supreme Court addressed this issue in dictum, quoting a treatise that listed the expiration of a limitations period as among the vested rights that could not be altered retroactively. That was not a uniform understanding, and maybe not even the majority understanding at the time: traditional thinking held that limitations periods were procedural in nature and hence could not give rise to vested rights. (It is another longstanding rule that people do not have vested rights in procedural rules.) The Lewis decision did not specifically endorse the characterization of expired limitations periods as vested rights, and in fact the decision did not concern revival of a civil claim at all.

In the intervening years, the concept of vested rights has become generally less significant, so that the constraints on retroactive legislation have loosened. In Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994), the U.S. Supreme Court, as a matter of federal constitutional law, recognized that changes to procedural law did not count as retroactive legislation, and that even changes to substantive law could generally be made retroactive if the legislature expressed its will clearly. There is no corresponding Pennsylvania Supreme Court decision, though lower court decisions suggest that a similar evolution of thinking has occurred in Pennsylvania. In 2008, the Commonwealth Court held that the retroactive alteration of a limitations period was permissible under Pennsylvania's constitution, in McDonald v. Redevelopment Auth., 952 A.2d 713, 718 (Pa. Commw. Ct. 2008), appeal denied 600 Pa. 772, 968 A.2d 234 (Pa. 2009), observing that "no 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 provisions without offending constitutional restraints."

Lewis provides some support for the claim that the Pennsylvania Supreme Court considers limitations periods substantive for retroactivity purposes, and thus it is not possible to say with complete confidence that the court would allow retroactive alteration of a limitations period. But my judgment is that a window limitations law would be found permissible under the Pennsylvania Constitution. I base this conclusion primarily on two considerations 1) the restrictions on retroactive legislation have generally loosened over time, and I would expect Pennsylvania courts to follow this general trend; and 2) even in the restrictive era, procedural changes were permitted, and limitations periods have traditionally been considered procedural.

This second point seems to me the decisive one. Pennsylvania courts generally classify limitations periods as procedural. The Lewis decision quoted a treatise that apparently deemed them substantive, but Lewis did not announce that as the law of Pennsylvania, and there is far more substantial authority--recent cases, older cases, even Pennsylvania Supreme Court cases—holding limitations periods to be procedural. E.g., In re Philadelphia Elec. Co., 43 A.2d 116, 119; 352 Pa. 457, 463-64 (Pa. 1945) ("A statute of limitations provides a procedural limitation but does not deal with substantive rights."). In that case, Lewis would not be a barrier even if it had not been undermined by more recent developments.

This is also consistent with the general purpose of restrictions on retroactive legislation and the Pennsylvania Remedies Clause, which is to prevent the legislature from changing the legal significance of past events that took place outside of court (what courts call primary conduct). The basic idea is that if someone has a claim, the legislature should not be able to reach back and take it away (making wrongful conduct right), and if someone has done nothing wrong, the legislature should not be able to reach back and make them liable for something that was innocent when done (making rightful conduct wrong). Limitations periods are different: the running of a limitations period (unlike the existence of a substantive defense) does not mean the defendant's conduct was not wrongful. Hence the defendant's interest in that limitations bar is qualitatively different from a defendant's interest in a substantive defense or a plaintiff's interest in a claim. This is what courts mean when they say that no one has a vested right to do wrong. Reviving a limitations period does not change wrong to right or vice versa, which is the most objectionable feature of retroactive legislation. I believe it is permissible under the Pennsylvania Constitution. If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Kermit Roosevelt". The signature is fluid and cursive, with the first name "Kermit" being more prominent than the last name "Roosevelt".

Kermit Roosevelt

# Kermit Roosevelt



Kermit Roosevelt is a professor of law at the University of Pennsylvania Law School, specializing in Constitutional Law. He graduated from Harvard College and Yale Law School and clerked for Judge Stephen F. Williams on the United States Court of Appeals for the DC Circuit and Justice David H. Souter on the United States Supreme Court. Before joining the Penn faculty, he practiced appellate litigation with the Chicago office of Mayer, Brown, Rowe & Maw. His articles have appeared in numerous law reviews and he is the author of five books, including *The Myth of Judicial Activism* (Yale, 2006) and the novel *Allegiance* (Regan Arts, 2015).