Separation of Powers: Prevention of Retroactive Judicial Lawmaking

Summary:
In one area of law, tort law, courts have been empowered to develop rules based on precedent, decisions that already have taken place. In recent times, however, courts in some states have created brand new duties on citizens that have no precedent in past decisions. In creating those new duties, courts have imposed liability on a retroactive basis.

Fundamental principles of fairness, as well as constitutional mandates, prevent legislatures from making law on an ex post facto basis. The same principle of prevention of retroactive lawmaking should apply to the judicial branch of government.

Model Legislation:
Section 1: (Short Title) This Act shall be known and titled as The Separation of Powers Act: Prevention of Retroactive Judicial Lawmaking.

Section 2: (Legislative Intent) The judicial branch of this state shall not create rules of law on a retroactive basis, including rules of law that would apply to conduct that occurred prior to the time of the filing of a claim arising out of that conduct.