Journal of Civil Rights and Economic Development

Volume 8
Issue 2 *Volume 8, Spring 1993, Issue 2*

Article 10

March 1993

Section 27A of the Securities Exchange Act of 1934: Did Congress Grant Itself New Constitutional Powers?

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SECTION 27A OF THE SECURITIES EXCHANGE ACT OF 1934: DID CONGRESS GRANT ITSELF NEW CONSTITUTIONAL POWERS?

Section 10(b) of the Securities Exchange Act of 1934 (the "'34 Act")[1] was enacted as a general antifraud provision making it unlawful to use manipulation or deception in the purchase or sale of any security.[2] Prior to 1991, no consistent statute of limitations was applied to actions brought under section 10(b) because the statutory language failed to provide for private causes of action.[3] As a result, federal courts adopted and applied different limitation periods from various statutes,[4] causing uncertainty and confusion

[1] *See* Securities Exchange Act of 1934 § 10(b), 15 U.S.C.A. § 78j(b) (West Supp. 1993). This section provides, in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

[2] *Id.*

[3] *See, e.g.*, Lampf v. Gilbertson, 111 S. Ct. 2773, 2779 (1991) ("The text of § 10(b) does not provide for private claims. Such claims are judicial creation, having been implied under the statute for nearly a half century."); *see also* Maclean v. Huddleston, 459 U.S. 375, 380 (1983) (discussing implied rights under 1933 and 1934 Securities and Exchange Acts); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (discussing implied causes of action under section 10(b)); Towner Petroleum Co. Sec. Litig., Nos. 84-4972, 84-5832, 1987 WL 7403, at *4 (E.D.N.Y. Feb. 13, 1987) (characterizing private cause of action under § 10(b) as implied cause of action); Abelson v. Strong, 644 F. Supp. 524, 532 (D. Mass. 1986) (discussing implied causes of action under section 10(b)); Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (providing private individuals with implied cause of action under section 10(b)). *See generally* Alexander T. Galloway III, Note, Lampf v. Gilbertson: *The Wrong Answer to a Long-Awaited Question*, 43 MERCER L. REV. 1307, 1309-10 (1992) (discussing history of implied causes of action under § 10(b)).

[4] *See, e.g.*, *Lampf*, 111 S. Ct. at 2777 (Oregon District Court borrowed Oregon's statue of limitations from fraud claims); Hirschler v. GMD Invest. Ltd. Partnership, No. 91-2087, 1992 WL 188143, at *2 (4th Cir. Aug. 7, 1992) (court borrowing limitation period from Virginia's blue sky law); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1386-87 (7th Cir. 1990) (borrowing statute of limitations and tolling provisions from state's blue sky laws), *cert. denied*, 111 S. Ct. 2887 (1991); Reeves v. Teuscher, 881 F.2d 1495, 1501 (9th Cir. 1989) (applying Washington's three year limitation period and tolling provision); Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452, 454 (7th Cir. 1987) (borrowing statute of limitations from Illinois' state securities laws). *See generally* Harold S. Bloomenthal,

regarding the applicable limitation period for section 10(b) claims.[5]

In 1991, the Supreme Court attempted to resolve this long-standing issue in *Lampf v. Gilbertson*.[6] The Supreme Court held that the applicable statute of limitations would be either one year from discovery or three years after the section 10(b) violation.[7] Subsequent case law required the *Lampf* decision to be applied retroactively,[8] resulting in the dismissal of many cases that would have been timely under the prior system.[9]

Congress responded by enacting section 27A of the '34 Act,[10]

The Statute of Limitations and Rule 10b-5: A Study in Judicial Lassitude, 60 U. COLO. L. REV. 235, 238 (1989) (instructing federal courts to apply local statute of limitations in implied causes of action grounded in federal law).

[5] *See Short*, 908 F.2d at 1389. "'This uncertainty and lack of uniformity promotes forum shopping by plaintiffs and results in wholly unjustified disparities in the rights of different parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty.'" *Id.* (quoting Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 BUS. LAW. 645, 647 (1986)); Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1370 (9th Cir. 1988). "The absence of a uniform limitations period in such actions has been described by Judge Easterbrook as 'one tottering parapet of ramshackle edifice. Deciding what features of state periods of limitations to adopt for which federal statutes waste untold hours.'" *Id.* (quoting Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987), *cert. denied*, 484 U.S. 943 (1987)); *see also* Brief for Petitioner at 9, Lampf v. Gilbertson, 111 S. Ct. 2773 (1991) (No. 90-333). In highlighting the confusion, the brief noted that "a 10(b) claim filed in the Eastern District of Arkansas is subject to a one-year-from-discovery/three-years-from violation limitations period borrowed from the 1934 Act. . . . However, an action filed in the Western District of Arkansas is governed by a different limitations period." *Id.*; *cf.* Brief for Respondents at n.18, *Lampf* (No. 90-333). Some states increased confusion by changing their own statute of limitation periods. *Id. See generally* Bloomenthal, *supra* note 4, at 241. Certain states may have as many as three applicable limitation periods to choose from. *Id.*

[6] 111 S. Ct. 2773 (1991).

[7] *Id.* at 2782. "Litigation instituted pursuant to section 10(b) and Rule 10b-5 therefore must be commenced within one year after discovery of the facts constituting the violation and within three years after such violation." *Id.*

[8] *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2448 (1991). The Supreme Court held that "[w]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.*

[9] *Lampf*, 111 S. Ct. at 2785 (O'Connor, J., dissenting). "[T]he court departs drastically from our established practice and inflicts an injustice . . . . Quite simply the Court shuts the courthouse door on respondents because they were unable to predict the future." *Id.* at 2785-86.

[10] Securities Exchange Act of 1934 § 27A, 15 U.S.C.A. § 78aa-1 (West Supp. 1992). The statute provides, in relevant part:

(a) Effect on pending causes of action:

The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action:

Any private action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

which overturned the retroactive application of *Lampf* and provided for the reinstatement of the dismissed actions.[11] Since its inception, however, section 27A has repeatedly been challenged on constitutional grounds with divergent results in the federal courts.[12] This sharp division has further added to the uncertainty surrounding the applicable limitation period.

Part One of this Note traces the development of the statute of limitations for section 10(b) claims, focusing on the confusion surrounding this issue in the federal courts prior to the *Lampf* decision, and again, after the enactment of section 27A. Part Two examines the constitutional challenges to section 27A and analyzes the rationale of those courts that have held section 27A constitutional. Finally, this Note concludes that section 27A reinstates the confusion that *Lampf* purported to end, but more importantly, it argues that section 27A should be struck down because it is unconstitutional.

I. DEVELOPMENT OF SECTION 10(b) STATUTE OF LIMITATIONS

A. *Prior to 1991*

Beginning in 1946, private causes of action were found to be valid under section 10(b) of the '34 Act.[13] Since these private

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

Id.

[11] *Id.*

[12] *See, e.g.*, Treiber v. Katz, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992) (section 27A unconstitutionally attempts to reinstate cases in which final judgments were already entered); Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992) (section 27A unconstitutionally attempts to overturn Supreme Court interpretation of unchanged law); *In re* Brichard Securities Litigation, 788 F. Supp. 1098, 1112 (N.D. Cal. 1992) (section 27A unconstitutionally violates separation of powers); TGX Corp. v. Simmons, 786 F. Supp. 587, 593 (E.D. La. 1992) [hereinafter TGX I] (section 27A unconstitutionally attempts to reinstate previously dismissed actions). *But see, e.g.*, Anixter v. Home Stake Prod. Co., 977 F.2d 1533, 1542 (10th Cir. 1992) (applying § 27A and reinstating plaintiff's claim); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1575 (11th Cir. 1992) (holding § 27A constitutional); Cannistraci v. Dean Witter Reynolds, Inc., 796 F. Supp. 619, 622 (D. Mass. 1992) (section 27A does not violate separation of powers); Brown v. Hutton Group, 795 F. Supp. 1307, 1313-16 (S.D.N.Y. 1992) (section 27A does not violate separation of powers or Equal Protection Clause); Lundy v. Morgan Stanley & Co., 794 F. Supp. 346, 347 (N.D. Cal. 1992) (section 27A does not offend separation of powers doctrine); Venturetech II v. Deloitte, Haskins & Sells, 790 F. Supp. 574, 576 (E.D.N.C. 1992) (section 27A doesn't violate separation of powers, equal protection, or due Process); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 483 (S.D.N.Y. 1992) (section 27A is "consistent with Separation of Powers and Due Process requirements").

[13] *See, e.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946).

claims were implied in law,[14] the statute did not contain a statute of limitations.[15] Under the directive of the Supreme Court in *Holmberg v. Armbrecht*,[16] lower courts considered the applicable state law to ascertain the proper statute of limitations.[17]

1. Application of State Statutes of Limitation

Initially, courts applied the statute of limitations of analogous common-law fraud actions.[18] Soon, a trend developed whereby the courts began using limitation periods from state securities or "blue sky" laws.[19] Nonetheless, because of the broad scope of possible transactions that could fall under section 10(b),[20] courts

"Where, as here the whole statute discloses a broad purpose to regulate securities . . . in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." *Id.*

[14] *See supra* note 3 and accompanying text (citing cases finding private cause of action in § 10(b) implied in law).

[15] *See, e.g.*, Bath v. Bushkin, 695 F. Supp. 1156, 1159 (D. Wyo. 1988), *aff'd in part, rev'd in part, and vacated in part*, 913 F.2d 817 (10th Cir. 1990). "Because an express, private cause of action is not contained in Rule 10b-5, it is not surprising that no statute of limitations provision was created to limit the time within which private 10b-5 actions may be brought." *Id.*

[16] 327 U.S. 392 (1946).

[17] *Id.* at 395. The Supreme Court noted that in the absence of an express federal period, the limitations period from the most analogous statute of limitations would be borrowed. *Id.* "As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." *Id.*

[18] *See, e.g.*, Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1411-12 (9th Cir. 1987) (applying statute of limitations from Montana's fraud statute); Williams v. Sinclair, 529 F.2d 1383, 1387 (9th Cir. 1975) (borrowing limitation period from Oregon's fraud statute), *cert. denied*, 426 U.S. 936 (1976); Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Properties, Ltd., 740 F. Supp. 1553, 1567 (W.D. Okla. 1989) (borrowing limitations period from Oklahoma's fraud statute); *see also* Bloomenthal, *supra* note 4, at 240 (discussing initial use of limitations periods from state common law fraud statutes).

[19] *See* Bloomenthal, *supra* note 4, at 240 ("[A] trend developed to apply the blue-sky period of limitations, generally using the doctrine of equitable tolling to determine when the period began to run."); *see also* Smith v. Duff & Phelps, Inc., 891 F.2d 1567, 1570 (11th Cir. 1990) (holding most analogous standard was Alabama's blue sky laws); Harris v. Union Elec. Co., 787 F.2d 355, 360 (8th Cir.) (borrowing limitations period from Missouri's blue sky law), *cert. denied*, 479 U.S. 823 (1986); Forrestal Village, Inc. v. Graham, 551 F.2d 411, 413 (D.C. Cir. 1977) (local blue sky law "best effectuates the federal policy"); Nortek, Inc. v. Alexander Grant & Co., 532 F.2d 1013, 1015 (5th Cir. 1976) (applying local blue sky law or that which bears "closest resemblance to the SEC section sued under"), *cert. denied*, 429 U.S. 1042 (1977) (borrowing from Florida's blue sky law); Alodex Corp. Sec. Litigation, 533 F.2d 372, 374 (8th Cir. 1976) (borrowing from Iowa's blue sky law); Umstead v. Durham Hosiery Mills, Inc., 578 F. Supp. 342, 347 (M.D.N.C. 1984) (borrowing North Carolina's blue sky law as most analogous statute); Davis v. A.G. Edwards & Sons, Inc., 635 F. Supp. 707, 715 (W.D. La. 1986) (borrowing from Louisiana's blue sky law).

[20] *See, e.g.*, Lampf v. Gilbertson, 111 S. Ct. 2773, 2777 (1991) (limited partnerships in computer software and equipment); Litton Industries, Inc. v. Lehman Brothers, Kuhn, Loeb, Inc., 967 F.2d 742, 746 (2d Cir. 1992) (artificial inflation of corporate stock resulting from insider trading); Hirschler v. GMD Investments, No. 91-2087, 1992 WL 188143, at *1 (4th Cir. Aug. 7, 1992) (limited partnership in 220 unit apartment complex); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1386 (7th Cir. 1990) (fraudulent representation concern-

eventually began to look beyond state fraud and blue sky limitation periods.[21] An overabundance of applicable limitation periods developed, thus providing plaintiffs with the opportunity to "forum shop."[22] As a result, the lack of a uniform limitation period caused confusion, uncertainty, and judicial inefficiency among the courts.[23]

2. Application of Federal Statutes of Limitation

In 1983, the Supreme Court decided *DelCostello v. International Brotherhood of Teamsters*,[24] which gave federal courts, in the absence of congressional direction, the power to move away from the application of state limitation periods.[25] The Supreme Court reasoned that if a federal law was more analogous than the state law, the court should then apply the federal statutory period.[26] Although this inaugural case did not involve a section 10(b) claim, it nevertheless created another alternative which courts could follow in the adjudication of 10(b) actions.[27]

ing stock valuation), *cert. denied*, 111 S. Ct. 2887 (1991); Nesbit v. McNeil, 896 F.2d. 380, 380 (9th Cir. 1990) (churning of investment accounts); Brown v. Hutton Group, 795 F. Supp. 1307, 1310 (S.D.N.Y. 1992) (purchase of interest in oil and gas partnership); Venturetech II v. Deloitte, Haskins & Sells, 790 F. Supp. 576, 579 (E.D.N.C. 1992) (misrepresentation in connection with annual financial statements); Cohen v. Prudential-Bache Securities, Inc., 777 F. Supp. 276, 277 (S.D.N.Y. 1991) (limited partnership in hotel); Axel Johnson, Inc. v. Arthur Andersen & Co., 762 F. Supp. 599, 600 (S.D.N.Y. 1992) (detrimental reliance on inadequate audit); Bath v. Bushkin, Gaims, Gaines, & Jonas, 695 F. Supp. 1156, 1158 (D. Wyo. 1988) (investment units in master videotapes of commercial television programs).

[21] *See, e.g.*, Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452, 455 (7th Cir. 1987) (borrowing from Illinois' securities law); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500, 1507 (11th Cir. 1986) (borrowing from Georgia's securities act); Cahill v. Ernst & Ernst, 625 F.2d 151, 153 (7th Cir. 1980) (borrowing from Wisconsin's securities laws).

[22] *Short*, 908 F.2d at 1389 ("lack of uniformity creates forum shopping").

[23] *See id.* at 1389. Because of the confusion "[v]ast amounts of judicial time and attorneys' fees are wasted." *Id.* (quoting from ABA Committee, *supra* note 5, at 647); Roberts v. Magnetic Metals Co., 611 F.2d 450, 461 (3d Cir. 1979) (Seitz, J., dissenting). "Finally the *confusion is compounded* . . . ." *Id.* (emphasis added); *see also supra* note 5 and accompanying text (describing confusion and waste among courts in determining applicable limitations period).

[24] 462 U.S. 151 (1983).

[25] *Id.* at 171-72 (without abandoning practice of federal courts borrowing from state law, Supreme Court created an opportunity to look beyond state law to federal law).

[26] *Id.* "[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle . . . we have not hesitated to turn away from state law." *Id.*

[27] *See supra* note 25 and accompanying text (stating *Delcostello* created exception that allowed courts to apply more analogous federal law).

In re Data Access Systems Securities Litigation[28] was the first instance where a court applied a federal statute of limitations period to a section 10(b) claim.[29] In *Data Access*, the United States Court of Appeals for the Third Circuit premised its holding on the determination made by the Supreme Court in *Agency Holding Corp. v. Malley-Duff Associates*.[30] Although *Agency Holding* recognized the need for a uniform period of limitations for section 10(b) actions,[31] the Supreme Court failed to establish such a limitations period.[32] Therefore, the *Data Access* court held that the applicable statute of limitations should be one year after discovery or three years after the violation occurred.[33] Despite the uniform application of this standard by the Third Circuit, other circuits continued to apply various state and federal limitation periods, thus furthering the need for Supreme Court intervention.[34]

B. *The* Lampf *Decision*

In 1990, the Supreme Court granted certiorari to *Lampf v. Gilbertson*[35] to ascertian a uniform statute of limitations period for section 10(b) actions.[36] In *Lampf*, plaintiffs-respondents filed suit, in the United States District Court for the District of Oregon, claiming petitioners violated section 10(b) and Rule 10b-5 with respect to the sale of limited partnership units.[37] The District Court

[28] 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988).

[29] *Id.* at 1550 (adopting one year after discovery or three years after violation limitation period from express limitations sections of Securities Exchange Act of 1934).

[30] 483 U.S. 143 (1987).

[31] *Data Access*, 843 F.2d at 1543-44. "This court has already recognized the necessity for establishing a uniform limitations period when we resort to 'borrowing' state law. . . . We therefore conclude . . . the courts must select 'the one most appropriate statute of limitations for *all* civil [§ 10(b) and Rule 10b-5] claims.'" *Id.* at 1544 (quoting Malley-Duff Assocs., Inc. v. Crown Life, 792 F.2d 341 (3d Cir. 1986)).

[32] *See id.* "At the outset we recognize that the Supreme Court has to rule on the applicable limitations period for section 10b and Rule 10b-5 action." *Id.*; *see also* Bloomenthal, *supra* note 4, at 236 (discussing Supreme Court's refusal to address issue in late 1970 and early 1980).

[33] *Data Access*, 843 F.2d at 1550. "Accordingly we have decided that the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation." *Id.*

[34] *See, e.g.*, Bath v. Bushkin, 913 F.2d 817, 819 (10th Cir. 1990) (remanding to district court to apply most analogous state law); Nesbit v. McNeil, 896 F.2d 380, 384 (9th Cir. 1990) (rejecting Third Circuit's approach and applying Oregon state law).

[35] 498 U.S. 894 (1990) (granting certiorari).

[36] *See* Lampf v. Gilbertson, 111 S. Ct. 2773, 2777 (1991). "In view of the divergence of opinion among the Circuits regarding the limitations period for Rule 10b-5 claims, we granted certiorari to address this important issue." *Id.* (footnote omitted).

[37] *Id.* Plaintiffs-respondents purchased units in a limited partnership for the purpose of

granted defendant's-petitioner's motion for summary judgment because the plaintiffs'-respondents' claims were time-barred under the two year Oregon fraud statute of limitations.[38] On appeal, the Ninth Circuit rejected plaintiffs'-respondents' argument that a federal statute of limitations should be applied, but reversed the finding that factual issues still remained which prevented summary judgment.[39] The Supreme Court granted certiorari in view of the conflicting decisions among the circuits concerning the appropriate statute of limitations.[40]

In determining which statute of limitations should apply, the Supreme Court found that if an action is implied in law, a court should first look to the statute from which it emanates.[41] The majority concluded that "[w]hen the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end."[42] The Court then held that the applicable rule for 10(b) and 10b-5 actions should be the one year after discovery or three years after the violation period contained in other sections of the '34 Act.[43]

When the Court applied this statutory period to the *Lampf* litigants, it was required to apply the period retroactively to all other similarly situated litigants.[44] The retroactivity ruling was dic-

receiving federal income tax benefits. *Id.* at 2775. Petitioner assisted in the organization of the partnership and prepared opinion letters concerning the investments. *Id.* After the partnership failed and respondents were denied their tax benefits by the IRS, they filed suit claiming petitioner made misrepresentations concerning the partnership in its opinion letter. *Id.*

[38] *Id.* at 2777. "[T]he District Court granted summary judgment for the defendants on the ground that the complaints were not timely filed. . . . The securities were governed by the state statute of limitations for the most analogous forum-state cause of action. The Court determined this to be Oregon's 2-year limitations period for fraud claims." *Id.* (citations omitted).

[39] *Id.* "The Court of Appeals for the Ninth Circuit reversed and remanded the cases. . . . [T]he Court of Appeals found that unresolved factual issues as to when plaintiffs-respondents discovered or should have discovered the alleged fraud precluded summary judgment." *Id.* In selecting Oregon's two-year limitation period, the Ninth Circuit "implicitly rejected petitioner's argument that a federal limitations period should apply." *Id.*

[40] *Id.*

[41] *Lampf*, 111 S. Ct. at 2780. "We conclude that where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Id.*

[42] *Id.*

[43] *Id.* at 2782.

[44] *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2446 (1991) (requiring retroactive application of judicially announced rules when court announcing rule applied it to litigants of that case); *see also* Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1569 (11th Cir. 1992) ("This circuit has recognized that *Beam* requires retroactive application of the new statute of limitations rule announced in *Lampf*.").

tated by the decision handed down the same day in *James B. Beam Distilling Co. v. Georgia*.[45] Writing for the Court, Justice David Souter stated "[w]hen the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata."[46]

C. *Post*-Lampf: *The Confusion Continues*

After the *Lampf* decision, it was believed that the confusion underlying section 10(b) litigation had been put to an end.[47] Federal courts finally had a uniform and detailed limitation period to apply to 10(b) actions.[48] Because *Lampf* applied retroactively, many complaints involving securities fraud claiming millions of dollars in damages were dismissed prior to or during trial.[49] The result of being practically thrown out of the courthouse generated outrage among defrauded investors throughout America.[50]

[45] 111 S. Ct. 2439 (1991). "Once retroactive application is chosen for any . . . new rule, it is chosen for all others who might seek its prospective application." *Id.* at 2447-48.

[46] *Id.* at 2448. In his opinion, Justice Souter explained that a decision may be applied in three ways. *Id.* at 2443. First, it may be applied retroactively to both "the parties before the court and to all others by and against whom claims may be pressed." *Id.* Second, a decision may be applied purely prospectively, that is, "applied neither to the parties in the law-making decision nor to those others against, or by whom it might be applied to conduct, or events occurring before that decision." *Id.* Under the purely prospective method "[t]he case is decided under the old law but becomes a vehicle for announcing the new [law] . . . ." *Id.* Finally, a "selectively prospective" application is a decision which applies to the litigants in that case but is otherwise prospective for other similarly situated litigants. *Id.* at 2444. The *Beam* Court held that selective prospectivity violates a basic rule of fairness because other litigants, involved in cases having similar circumstances are deprived of a prospective construction. *Id.*

[47] *See generally* Dennis J. Block & Jonathan M. Hoff, *Constitutionality of § 27A: Statute of Limitations*, N.Y.L.J., May 21, 1992, at 5, col. 1. "The Supreme Court's decision in *Lampf* purported to end the considerable confusion and disagreement which had divided the federal courts over the interpretation of the applicable limitation period for actions implied under § 10(b)." *Id.*

[48] *See supra* note 42 and accompanying text (discussing *Lampf* holding); *see also* Central Bank v. Cleveland, Nos. 91-2784, 91-2785, 1992 WL 315117, at *2 (E.D. La. Oct. 19, 1992) (relying on Supreme Court's decision on statute of limitations).

[49] *See* 137 CONG. REC. S18624 (daily ed. Nov. 21, 1991) (statement of Sen. Bryan) (lawsuits totalling $652 million had already been dismissed, with motions pending totaling $4.55 billion and another $1.21 billion expected to be filed); Howard Mintz, *Legge Strikes Grandfather Clause*, THE RECORDER, Mar. 5, 1992, at 5 (discussing reinstatement of cases thrown out of court as result of *Lampf*); Kevin G. Salwen, *Many Securities-Fraud Suits Are Likely to Go Unheard After High Court Ruling*, WALL ST. J., Nov. 21, 1991, at A3 (discussing cases to be dismissed as result of *Lampf*).

[50] *See* Lampf v. Gilbertson, 111 S. Ct. 2773, 2786 (1991) (O'Connor, J., dissenting). "Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future." *Id.*; *see also* 137 CONG. REC. S18624 (daily ed. Nov 21, 1991) (statement of Sen. Bryan). "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitation than when they brought their suits." *Id.*

In an almost immediate response to *Lampf*, Congress enacted section 27A of the '34 Act to resolve this frustration.[51] On December 19, 1991, only six months after the Supreme Court decided *Lampf*, President George Bush signed into law the provision[52] directing courts to continue applying the statute of limitations applicable to section 10(b) claims in that state's jurisdiction before *Lampf*, and allowing the previously displaced litigants to file motions within sixty days to reinstate their causes of action.[53] In this capacity, Congress, in effect, assumed the role of a "super appellate court,"[54] rendering the Supreme Court's decision a mere advisory opinion.[55]

Initially, this congressional action was accepted by the federal courts.[56] However, in *Bank of Denver v. Southeastern Capital Group, Inc.*,[57] the District Court for the District of Colorado declared section 27A unconstitutional on the ground that Congress had violated the separation of powers doctrine.[58] Following Colorado's lead, other district courts began to declare section 27A unconstitutional.[59] Once again, section 10(b) litigants found themselves amid the confusion and uncertainty that had prevailed in prior years.[60] These events allowed section 10(b) litigants to again become forum shoppers, providing them with some cer-

[51] *See supra* note 10 (citing § 27A).

[52] *See* Block & Hoff, *supra* note 47, at 5. "The legislation was signed into law by President Bush on December 19, 1991 and is codified as Section 27A of the Exchange Act." *Id.*

[53] *See supra* note 10 (citing § 27A).

[54] Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992). "Congress thus effectively acted as a 'super-appellate court,' overturning *Lampf* without replacing that decision with any new law." *Id.*

[55] *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1103 (N.D. Cal. 1992). "Such congressional review would also undermine Article III in that it would transform judgments into advisory opinions and thereby subject their finality." *Id.*

[56] *See* Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1547 (10th Cir. 1992) (holding § 27A constitutional); Henderson v. Scientific-Atlanta, Inc., 971 F.2d. 1567, 1575 (11th Cir. 1992) (same); Cannistraci v. Dean Witter Reynolds, Inc., 796 F. Supp. 619, 622 (D. Mass. 1992) (same); Brown v. Hutton Group, 795 F. Supp. 1307, 1316 (S.D.N.Y. 1992) (same); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 483-84 (S.D.N.Y 1992) (same).

[57] 789 F. Supp. 1092 (D. Colo. 1992).

[58] *Id.* at 1098. "I hold that [§ 27A] violates the principle of the separation of powers and is, therefore unconstitutional." *Id.*

[59] *See, e.g.*, Treiber v. Katz, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992) (holding § 27A unconstitutional); Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992) (same); Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 235 (E.D. Ky. 1992) (same); *Brichard*, 788 F. Supp. at 1112 (same); TGX I, 786 F. Supp. 584, 587 (E.D. La. 1992) (same).

[60] Block & Hoff, *supra* note 47, at 10. "For now, however, the uncertainty continues to grow concerning the constitutionality of § 27A as well as the applicable statute of limitations for § 10(b) actions filed prior to June 20, 1991." *Id.*

tainty as to which courts will or will not honor section 27A as a means of reinstating their causes of action. Despite three circuit courts declaring section 27A constitutional,[61] the Supreme Court must address this issue and determine the constitutionality of section 27A and more importantly, whether Congress will be allowed to assume this "super appellate role."

II. CONSTITUTIONAL CHALLENGES

Since its enactment, the constitutionality of section 27A has been challenged on the grounds that it violates: the separation of powers between the legislative and the judicial branches;[62] the Fifth Amendment guarantee of due process;[63] and the Fifth Amendment guarantee of equal protection.[64]

A. *Separation of Powers*

Congress violates the separation of powers doctrine when it enacts legislation that intrudes upon the constitutionally reserved powers of the judicial branch.[65] Three different challenges have been made against section 27A based on the separation of powers doctrine.[66] The first challenge argues that section 27A directs courts to decide a particular group of cases in a certain manner which contravenes the *Klein* doctrine.[67] Another argument main-

[61] *See* Brening v. A.G. Edwards & Sons, Inc., 990 F.2d 272, 277 (7th Cir. 1993) (holding § 27A constitutional); Anixter v. Home Stake Prod. Co., 977 F.2d 1533, 1542 (10th Cir. 1992) (same); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1575 (11th Cir. 1992) (same).

[62] *See, e.g.*, *Anixter*, 977 F.2d at 1544-46 (addressing claim that § 27A violates separation of powers doctrine); *Henderson*, 971 F.2d at 1573 (same); Rabin v. Fivzar, 801 F. Supp. 1045, 1053-54 (S.D.N.Y. 1992) (same); *Treiber*, 796 F. Supp. at 1059 (same); Adler v. Berg Harmon Assoc., 790 F. Supp. 1235, 1243-44 (S.D.N.Y. 1992) (same); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 483-84 (S.D.N.Y. 1992) (same); *Johnston*, 789 F. Supp. at 1099 (same); Bank of Denver v. Southeastern Capital Group, Inc. 789 F. Supp. 1092, 1097 (D. Colo. 1992) (same); *Brichard*, 788 F. Supp. at 1112 (same).

[63] *See, e.g.*, *Anixter*, 977 F.2d at 1546 (addressing due process challenge); *Rabin*, 801 F. Supp. at 1055-56 (same); *Treiber*, 796 F. Supp. at 1062 (same); *Adler*, 790 F. Supp. at 1244-45 (same); *Plaut*, 789 F. Supp. at 235 (same); TGX Corp. v. Simmons, Nos. 87-5298, 90-0849, 1992 WL 125365, at *1 (E.D. Ky. May 20, 1992) [hereinafter TGX II] (same).

[64] *See, e.g.*, *Henderson*, 971 F.2d at 1574 (addressing challenge to § 27A based on equal protection); Brown v. Hutton Group, 795 F. Supp. 1307, 1316 (S.D.N.Y. 1992) (same); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965, 970 (E.D. Wash. 1992) (same).

[65] *See Brichard*, 788 F. Supp. at 1102 (discussing judiciary's role of handing out judgments, which Congress cannot re-examine).

[66] *See generally* Block & Hoff, *supra* note 47, at 10 (explaining separation of power challenges that have been raised).

[67] *See, e.g.*, Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992) (section 27A "compels a result" by directing federal courts to ignore Supreme Court's interpretation); Bank of Denver v. Southeastern Capital Group, 789 F. Supp. 1092, 1097-98 (D. Colo.

tains that section 27A conflicts with the Supreme Court's holding in *Beam* because it allows similarly situated litigants to be treated differently.[68] The third challenge asserts that section 27A(b), which provides for the reinstatement of claims dismissed after *Lampf*, conflicts with the exclusive power of the courts to adjudicate cases.[69]

1. Violation of the *Klein* Doctrine

If Congress disagrees with the judicial interpretation of a statute, it has the power to repeal or amend the law.[70] Additionally, Congress can affect pending litigation by requiring retroactive application of the changed law.[71] This power is not considered absolute and in 1871, it was limited by *United States v. Klein*.[72] In *Klein*, the Supreme Court held that Congress may not "prescribe a rule of decision" for cases pending before the courts without first amending or repealing the underlying law.[73] Several district

1992) (section 27A "prescribes a rule of decision" in violation of *Klein* doctrine); *Brichard*, 788 F. Supp. at 1104-07 (section 27A "directs a rule of decision by intruding on the adjudicative process"). *But see, e.g.*, *Rabin*, 801 F. Supp. at 1054 (section 27A does not violate *Klein* but rather "specifies the law to be applied to the relevant cases and leaves to the courts the job of applying that law to the particular facts before them"); *Treiber*, 796 F. Supp. at 1058-59 (section 27A does not direct courts to make particular findings of fact, and therefore, does not violate *Klein* doctrine); *Brown*, 795 F. Supp. at 1313-14 (same); *Adler*, 790 F. Supp. at 479-80 (explaining that § 27A is unlike statute in *Klein*); TGX I, 786 F. Supp. 587, 592 (E.D. La. 1992) (section 27A does not "implicate the separation of powers principles established by *Klein*"); Hindler v. Telequest, No. 89-0847, 1992 WL 158631, at *1 (S.D. Cal Mar. 31, 1992) (section 27A does not violate *Klein* doctrine).

[68] *See Brichard*, 789 F. Supp. at 1109 (section 27A conflicts with *Beam* rule by permitting selectively prospective application of new statute of limitations); TGX I 786 F. Supp. at 592 ("[s]ection 27A contravenes constitutional mandate established in *Beam*"). *But see* Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1547 (10th Cir. 1992) (selective prospectivity not declared unconstitutional by *Beam*); *Rabin*, 801 F. Supp. at 1054 (same); *Brown*, 795 F. Supp. at 1315 (same).

[69] *See* Block & Hoff, *supra* note 47, at 10 (stating congressional review of final judgments offends separation of powers doctrine by intruding upon courts' exclusive power to adjudicate cases).

[70] *See, e.g.*, Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1571 (11th Cir. 1992). "If Congress disagrees with the Supreme Court's interpretation, it is free to amend the statute as it sees fit." *Id.*; *Bank of Denver*, 789 F. Supp. at 1096. "Congress has a constitutional means to alter judicial interpretation of a statute—it can repeal or amend the law." *Id.*; *see also* Block & Hoff, *supra* note 47, at 5. "Congress may constitutionally alter judicial interpretation of a statute." *Id.*

[71] *See Bank of Denver*, 789 F. Supp. at 1096. "Congress can affect indirectly the outcome of pending litigation." *Id.*; Block & Hoff, *supra* note 47, at 5. "Congress generally has the power to repeal or amend the law even after federal courts have already rule on it, and can even require the courts to apply such changes retroactively, thereby indirectly affecting the outcome of pending litigation." *Id.* (footnotes omitted).

[72] 80 U.S. (13 Wall.) 128 (1871).

[73] *Id.* at 146-47. In *Klein*, the Supreme Court held that a congressional enactment, which advised the courts not to consider a pardon as evidence of loyalty during the Civil War, was

courts have found that section 27A violates the *Klein* doctrine because it directs courts to decide a certain group of cases in a particular manner without amending the underlying limitation period for section 10(b) claims announced in *Lampf*.[74]

The purpose of section 27A was to overturn the retroactive effect of *Lampf*.[75] The retroactive application of the statute of limitations announced in *Lampf* was the result of the rule announced in the *Beam* decision.[76] The underlying laws Congress could have amended in order to change this result were the *Lampf* or the *Beam* holdings. Congress did neither.[77]

Section 27A did not provide a new limitation period for section 10(b) claims.[78] Although the legislators originally intended to change the *Lampf* rule,[79] an agreement could not be reached on a

unconstitutional. *Id.* at 147-48. The Court stated that Congress violated the separation of powers doctrine by requiring the courts to characterize a pardon as evidence of disloyalty, when the Court had already held it to be proof of loyalty. *Id.* at 146-48. The Court found that the "great and controlling purpose" of the statute was to deny the effect that the Court had given to a pardon. *Id.* at 145-46.

[74] *See supra* note 67 and accompanying text (citing cases which analyzed § 27A under the *Klein* doctrine).

[75] *See, e.g.*, Rabin v. Fivzar, 801 F. Supp. 1045, 1047 (S.D.N.Y. 1992) (section 27A proscribed retroactive application of *Lampf* rule); Treiber v. Katz, 796 F. Supp. 1054, 1056 (E.D. Mich. 1992) (section 27A was "an apparent attempt to counteract the retroactive application of *Lampf*"); Adler v. Berg Harmon Assoc., 790 F. Supp. 1235, 1237 (S.D.N.Y. 1992) (section 27A was enacted to modify retroactive application of *Lampf*); *see also* 137 CONG. REC. S17725 (daily ed. Nov. 22, 1991) (statement of Sen. McCain) (section 27A "eliminates the retroactive application of [*Lampf*] decision"); Richard L. Jacobson, *Turning Down the* Lampf*: Is Exchange Act Section 27A Constitutional*, 6 Insights (P-H) No. 4, at 36 (Apr. 1992) ("This statute overrules numerous decisions by lower federal courts to the effect that *Lampf* should be given retroactive application."); Carroll E. Neesemann, *The State of the Law*, in SECURITIES ARBITRATION 1992, at 403 (PLI Corp. Law and Practice Course Handbook Series No. 781, 1992) (section 27A eliminated retroactive application of *Lampf*).

[76] *See supra* notes 44-46 and accompanying text (explaining that *Beam* required that *Lampf* decision be applied retroactively).

[77] *See In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1103 (N.D. Cal. 1992). "[T]he section did not enact any underlying substantive law. . . . What section 27A did was to say that the *Lampf* rule should not, contrary to the *Beam* and *Lampf* decisions of the Supreme Court, be applied by the federal courts to existing cases." *Id.*

[78] Johnston v. Cigna Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992) (Congress did not change law but overturned Supreme Court decision); Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992) (stating Congress overturned *Lampf* without replacing decision with new law); *Brichard*, 788 F. Supp. at 1103 (section 27A "did not enact a statute of limitations . . ., but left the *Lampf* rule untouched."); Block & Hoff, *supra* note 47, at 5 ("It is clear from the language of § 27A that Congress neither codified the limitations period adopted in *Lampf* nor established a new limitations period to govern all pending and future § 10(b) cases.").

[79] *See Brichard*, 788 F. Supp. at 1104. In reviewing the legislative history surrounding § 27A, Judge Legge stated:

> Two bills to change the statute of limitations announced in *Lampf* were proposed. Senator Byran [sic] and Representative Markey introduced separate bills that would have enacted a limitations period longer than the one-year/three-year rule announced in *Lampf*, and that also would have "eliminate[d] the retroactivity of the *Lampf* decision,

suitable limitation period, and section 27A was the result of a political compromise.[80] While drafting section 27A, Congress was pressured to remedy the harsh consequences of the *Lampf* holding before the end of the congressional session.[81] Under this compromise, the limitation period annouced in *Lampf* was impliedly adopted by Congress in section 27A[82] and only its retroactive application was limited.[83]

Furthermore, section 27A did not amend the rule announced in *Beam*.[84] In *Beam*, the Supreme Court rejected "selective prospectivity" of judicially announced rules.[85] Under "selective prospectivity," a court would apply a new rule to the litigants at bar, while not applying the rule retroactively to cases commenced prior to that decision.[86] But according to *Beam*, once a judicially created

allowing suits underway to move forward under the new time limit rule."
Id. (alteration in original) (quoting 137 CONG. REC. S10691 (daily ed. July 23, 1991) (statement of Sen. Bryan)).

[80] 137 CONG. REC. S17305-17306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle). Senator Riegle stated:

> [W]e had a controversy in the area with respect to the *Lampf* decision. I want to say in that area, Senator Bryan and Senator Domenici have worked steadily to resolve those issues. I thank them both for that effort. It would allow the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases that have been filed in the way of alleged fraud, fraudulent activities. That is a very important provision of the bill and we have reached a *compromise* on [it] that settles that issue.

Id. (emphasis added).

[81] *Id.* "We have to enact this bill today, in my view in terms of the time schedule, so that we are in a position to meet our resposibilities, go to conference, and get this legislation in place. The President has asked us to do this on an urgent basis." *Id.*; *see also* 137 CONG. REC. S18522 (daily ed. Nov. 26, 1991) (statement of Sen. Domenici). "We are nearing the end of the session. . . . Were it not the end of the session I would have insisted on taking the Senate's time to fully consider these issues." *Id.*; Salwen, *supra* note 49, at A3. "The Bush Administration . . . has agreed to support the pending legislation, only if it includes provisions to block what the administration considers frivolous suits." *Id.*

[82] *See Brichard*, 788 F. Supp. at 1104. "The limitations periods of *Lampf* are impliedly approved by Congress' taking no action to codify or change those rules." *Id.*; *see also* 137 CONG. REC. S18522 (daily ed. Nov 26, 1991) (statement of Sen. Domenici). "Under our agreement we will postpone until next year the issue of necessary changes to section 10(b) including the appropriate statute of limitations and measures to reduce meritless litigation." *Id.*

[83] *See supra* note 75 and accompanying text (explaining that § 27A limited retroactive application of *Lampf*); *see also* 137 CONG. REC. S18623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan) ("I am pleased that Congress is overturning the most egregious part of the Court's decision.").

[84] *See* Block & Hoff, *supra* note 47, at 10. Section 27A does not change the principles of retroactivity set forth in *Beam*, it only precludes the application of *Beam*'s principles to the statute of limitations adopted in *Lampf*. *Id.*

[85] *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2448 (1991) (stating it is error to to not apply a rule of law retroactively when the case that announced the rule has already done so); *see also supra* notes 8, 44 and accompanying text (stating and explaining *Beam* holding).

[86] *See Beam*, 111 S. Ct. at 2448 (discussing that under selective prospectivity "a court [would] apply a new rule in the case in which it is pronounced, then return to the old [rule]

rule is applied to the litigants in that case, it must also be applied to all similarly situated litigants.[87]

Congress expressed no dissatisfaction with the *Beam* rule itself when it enacted section 27A, but it wanted to prevent its application to the *Lampf* decision.[88] Essentially, section 27A, without changing either holding, instructs courts to disregard *Beam*'s application to the *Lampf* decision.[89]

Relying on the Supreme Court's recent decision in *Robertson v. Seattle Audubon Society*,[90] the Seventh Circuit, in *Berning v. A.G. Edwards & Sons*,[91] the Tenth Circuit, in *Anixter v. Home-Stake Production Co.*,[92] and the Eleventh Circuit, in *Henderson v. Scientific-Atlanta, Inc.*,[93] have held that section 27A does not violate the *Klein* doctrine.

In *Robertson*, environmental groups challenged the proposed timber harvesting of certain forests in which the northern spotted owl, an endangered species, lived.[94] As a result of this ongoing litigation, Congress enacted new harvesting requirements and restrictions, which stated that compliance with these new requirements would be adequate to meet the requirements of the statute that was at the center of the litigation.[95] The environmental groups challenged the constitutionality of the new statute, claiming it directed the results in their pending cases.[96]

In *Robertson*, the Supreme Court held that the statute was not a

with respect to all [other cases] arising on facts predating the pronouncement"); *see also supra* note 46 and accompanying text (explaining three different ways courts can apply new rules).

87 *Beam*, 111 S. Ct. at 2448.

88 *See supra* note 84 and accompanying text (stating § 27A prevents application of *Beam* to *Lampf* rule).

89 *Id.*; *see* Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992). "Congress' great and controlling purpose was not to change the law but to overturn a Supreme Court decision with which it did not agree." *Id.*; *In re* Brichard Sec. Litig., 788 F. Supp 1098, 1103-04 (N.D. Cal. 1992). Congress did not change any statute of limitations, but limited the retroactive application of the limitation period from *Lampf*. *Id.*

90 112 S. Ct. 1407 (1992).

91 990 F.2d 272 (7th Cir. 1993).

92 977 F.2d 1533 (10th Cir. 1992).

93 971 F.2d 1567 (11th Cir. 1992).

94 *Robertson*, 112 S. Ct. at 1410. The groups challenged the federal goverment's allowance of the harvesting and sale of timber from forests in the Pacific Northwest. *Id.* The environmentalists claimed that the harvesting would kill the northern spotted owl, a bird listed as a threatened species under the Endangered Species Act of 1973. *Id.*

95 *Id.* at 1410-11. Congress enacted § 318 of the Department of the Interior and Related Agencies Appropriations Act which directed that compliance with this statute would satisfy the requirements of another statute that was being litigated in *Robertson*. *Id.* at 1410.

96 *Id.* at 1412 (environmental groups claimed "subsection (b)(6)(A), because it purported to direct the results in two pending cases, violated Article III).

violation of the separation of powers because it "compelled changes in law, not findings or results under old law."[97] The Court also stated that the statute did not "direct any particular findings of fact or applications of law, old or new, to fact."[98] The circuit courts, relying on this language, reasoned that because section 27A also did not direct findings of fact, then it did not violate the *Klein* doctrine.[99] However, the Court's decision in *Robertson* was based on the fact that the statute amended the underlying law, and not on its failure to direct factual findings.[100] Therefore, *Robertson* did not narrow the *Klein* doctrine by only requiring that a statute direct findings of fact to be considered a violation of the separation of powers and the circuit courts erred in their analyses of this issue by relying on this language.

Alternatively, regardless of whether *Robertson* does reqire that a statute "direct . . . findings of fact or applications of law, old or new, to fact" to be considered a violation of the *Klein* doctrine, section 27A must still be found unconstitutional. It is evident that section 27A directed "applications of law, old or new, to fact".[101] The statute directs courts to ignore the Supreme Court's decision in *Lampf* and to apply the prior limitation periods.[102] Accordingly, under either interpretation of *Robertson*, section 27A violates the

[97] *Id.* The Court held that "subsection (b)(6)(A) replaced the legal standards underlying the two original challenges with those set forth in subsections (b)(3) and (b)(5), without directing particular applications under either the old or new standards." *Id.* at 1413.

[98] *Id.*

[99] *See* Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1545 (10th Cir. 1992) (upholding § 27A because it does not direct courts to make specific factual findings); Henderson v. Scientific Atlanta, Inc., 971 F.2d 1567, 1573 (11th Cir. 1992) ("The Act does not require courts to make any particular findings of fact or applications of law to fact."). For decisions relying on this statement, see Rabin v. Fivzar Assoc., 801 F. Supp. 1045, 1054 (S.D.N.Y. 1992) (asserting that "nothing in § 27A purports to direct any particular findings of fact"); Treiber v. Katz, 796 F. Supp. 1054, 1058 (E.D. Mich. 1992) ("Admittedly, section 27A may change the eventual outcome of pending cases, but because it does not direct courts to make particular findings in those cases, it does not run afoul of the constitutional limitation described in *Klein*."); Adler v. Berg Harmon Assoc., 790 F. Supp 1235, 1243 (S.D.N.Y. 1992) ("Under *Robertson*, . . . , a law will not be found to be unconstitutional, even where it may effect the outcome of a case, unless it directs particular findings.").

[100] *See Robertson*, 112 S. Ct. at 1414. "Because we conclude that [the statute] did amend applicable law, we need not consider whether [the lower court's] reading of *Klein* is correct." *Id.*

[101] Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992). Section 27A "compels a result under the unchanged provisions of § 10(b)—namely, it directs federal courts in a discrete body of pending cases to ignore the Supreme Court's binding interpretation of § 10(b)." *Id.* (alteration in original) (quoting *Robertson*, 112 S. Ct. at 1413).

[102] *Id.*; *see* Bank of Denver v. Southeastern Capital Group, 789 F. Supp. 1092, 1097 (D. Colo. 1992). "Congress selected a discrete category of federal cases, those pending on June 19, 1991, and directed federal courts hearing these cases to ignore the Supreme Court's binding interpretation of § 10(b) set out in *Lampf*." *Id.*

separation of powers.

2. Direct Contravention of *Beam*

A second separation of powers challenge to section 27A is that the statute directly contravenes the Supreme Court's holding in *Beam*, which rejected selective prospectivity of judicially announced federal rules.[103] In *Lampf*, the new uniform statute of limitations for section 10(b) claims was applied to the litigants in that case.[104] Therefore, according to *Beam*, this new rule must be applied retroactively to all cases commenced before the *Lampf* decision. By refusing to follow *Beam's* mandate of retroactivity,[105] section 27A causes a selectively prospective application of the new statute of limitations.[106] As a result, section 27A causes similarly situated litigants to be treated differently, directly conflicting with the *Beam* holding.[107]

The separation of powers doctrine encompasses the notion that the Supreme Court is "the final expounder of the Constitution."[108] Thus, Congress cannot enact a statute contrary to the Court's constitutional doctrine.[109] To avoid this issue, several district courts have argued that the *Beam* decision was not based on the Consti-

[103] *See In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1108-12 (N.D. Cal. 1992). In his opinion, Judge Legge stated:

> *Beam* forbade the selective prospective application of new judicially announced federal rules and required their retroactive application. Section 27A replaces the *Beam* decision against selective prospectivity with a law of selective prospectivity in certain cases. Permitting selective prospective application of statutes of limitations after the *Beam* court constitutionally forbade selective prospective application of such rules is an attempt to change *Beam*.

Id. at 1109; *see also* TGX I, 786 F. Supp. 587, 592-94 (E.D. La. 1992) ("Section 27A contravenes the constitutional mandate in *Beam*."). *But see Rabin*, 801 F. Supp. at 1054 (asserting that *Beam* is not based on constitutional principles); Brown v. Hutton Group, 795 F. Supp. 1307, 1315 (S.D.N.Y. 1992) (same); *Adler*, 790 F. Supp. at 1243 ("This Court . . . does not read *Beam* as disapproving of the selective prospectivity principle on constitutional grounds."). *See generally* Block & Hoff, *supra* note 47, at 10 (examining issue of whether § 27 unconstitutionally contravenes *Beam*).

[104] *See* Lampf v. Gilbertson, 111 S. Ct. 2773, 2782 (1991). After determining that the applicable statute of limitations for § 10(b) claims was one year from discovery or three years from the violation, the Supreme Court stated that "[a]s there is no dispute that the earliest of plaintiff-respondents' complaints was filed more than three years after petitioners alleged misrepresentations, plaintiff-respondents' claims were untimely." *Id.*

[105] *See supra* note 8 (stating holding of *Beam*).

[106] *See supra* note 103 (stating § 27A causes selective prospectivity).

[107] *See* TGX I, 786 F. Supp. at 592 (section 27A is "inconsistent with the constitutional mandate established in *Beam*").

[108] *In re* Brichard Securities Litig., 788 F. Supp. 1098, 1109 (N.D. Cal. 1992).

[109] *See id.* at 1108. "The Supreme Court, and not Congress, has the final word on the meaning of the Constitution." *Id.*; TGX I, 786 F. Supp. at 594. "[T]he [Supreme] Court is the ultimate arbiter of the constitution." *Id.*

tution, but rather was based on the principles of "equality" and "stare decisis."[110] These courts have reasoned that since retroactivity in civil cases was founded on these common-law principles, and not the Constitution, Congress had the power to change the rule.[111] Courts following this reasoning ultimately found section 27A constitutional.[112]

This argument is flawed, as the Court's decision in *Beam* was, in fact, based on the Constitution. While Justice Souter's opinion in *Beam* did not explicitly refer to the Constitution as the basis for his decision,[113] his reliance on the principle of "equality" throughout the opinion suggested a constitutional analysis based on the Equal Protection Clause.[114] Furthermore, Justice Souter's opinion relied heavily on the Supreme Court's earlier decision in *Griffith v. Kentucky*,[115] where selective prospectivity in the criminal context was abandoned on constitutional grounds.[116] According to

[110] *See* Rabin v. Fivzar Assoc., 801 F. Supp. 1045, 1054 (S.D.N.Y. 1992). The court rejected the defendant's argument that *Beam* was constitutionally grounded. *Id.*; Adler v. Berg Harmon Assocs., 790 F. Supp. 1235, 1243-44 (S.D.N.Y. 1992). In *Adler*, Judge Conner reasoned that the *Beam* decision was not based on the Constitution because:

> Only three Justices out of nine found a constitutional basis for the Court's conclusion that selective prospectivity of judicial decisions was impermissible—Justices Blackmun, Marshall and Scalia found that retroactive application of judicial decisions is required by Article III of the Constitution. Justice Souter, writing for the Court and joined by Justice Stevens, stated that "selective prospectivity . . . breaches the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally." Justice Souter viewed the retroactivity issue very narrowly, as "an issue of choice of law" and refused to speculate as to the bounds or propriety of pure prospectivity.

Id. (quoting James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991)). *But see Brichard*, 788 F. Supp. at 1111 (stating that *Beam* was decided on constitutional grounds); TGX I, 786 F. Supp. at 594 (discussing that constitutional mandate of *Beam* cannot be contravened by Congress).

[111] *See* Jacobson, *supra* note 75, at 2 (judicially-created common law rules may be changed by Congress).

[112] *See supra* note 103 (citing cases that found *Beam* not based on Constitution).

[113] *See Beam*, 111 S. Ct. at 2448 (stating grounds for *Beam* decision were confined to issue of choice of law); TGX I, 786 F. Supp. at 593 (explaining that "Justice Souter did not explicitly reference article III [of the Constitution]").

[114] *See Beam*, 111 S. Ct. at 2446 (relying on the "equality principle, that similarly situated litigants should be treated the same"); *Brichard*, 788 F. Supp. at 1110 (noting *Beam* opinion referred to principles of "equity" and "equality"); TGX I, 786 F. Supp. at 593 (stating that Justice Souter recognized "inequity inherent in selective prospectivity"); *see also* Jacobson, *supra* note 75, at 2 ("Because the notion of 'equality,' . . . is suggestive of an equal protection of the laws analysis, the constitutional underpinnings of *Beam* are not free from doubt.").

[115] 479 U.S. 314 (1987).

[116] *See id.* at 322-23. According to the Court, "[f]ailure to apply a newly declared constitutional rule to a criminal case pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322; *see also Brichard*, 788 F. Supp. at 1110. Justice Souter's heavy reliance on *Griffith* is significant. *Id.*; TGX I, 786 F. Supp. at 593. Justice Souter's reliance on *Griffith* confirms *Beam* was based on constitutional principles. *Id.*

Justice Souter, the "equality principle, that similarly situated litigants should be treated the same," actually has greater force in the civil context.[117] Also, in a concurring opinion, written by Justice Antonin Scalia and joined by Justices Harry Blackmun and Thurgood Marshall, it was clearly asserted that selective prospectivity is prohibited by the Constitution, thus furthering the constitutional overtones of *Beam*.[118]

3. Reinstatement of Dismissed Claims

Section 27A(b) allows for the reinstatement of claims dismissed after *Lampf*.[119] However, congressional reversal of final judgments intrudes upon judiciary powers and offends the separation of powers doctrine.[120] If this were permitted, litigants would avoid final judgments by appealing to Congress and a court's decision would become "nothing more than an advisory opinion."[121] Therefore, section 27A violates the separation of powers doctrine.

B. Due Process: Vested Rights Doctrine

The reinstatement of dismissed claims under section 27A(b) has also been challenged as a violation of due process.[122] Congress lacks the power to take away rights once those rights are vested in a final judgment.[123] In 1898, in *McCullough v. Virginia*,[124] the

[117] *Beam* 111 S. Ct. at 2446. "*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. Its strength is in fact greater in the latter sphere." *Id.* (citations omitted).

[118] *See id.* at 2450 (Scalia, J., concurring) (selective prospectivity is "impermissible simply because it is not allowed by the Constitution"); *see also id.* at 2449 (Blackmun, J., concurring) (selective prospectivity violates Constitution).

[119] *See supra* note 10 and accompanying text (citing § 27A(b)).

[120] *Brichard*, 788 F. Supp. at 1102. "The prohibition against allowing Congress to disrupt final decisions of the courts is 'consistent with separation of powers' because it 'protects judicial action from superior legislative review.'" *Id.* (quoting Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989)); *see also* Block & Hoff, *supra* note 47, at 10. Congressional review of final judgments offends the doctrine of the separation of powers because it intrudes upon the courts' exclusive power to adjudicate cases. *Id.*

[121] Block & Hoff, *supra* note 47, at 10 (Congressional reversal of final judgments "transforms the judicial decision into nothing more than an advisory opinion."); *see also Brichard*, 788 F. Supp. at 1103 (congressional review "would transform judgments into advisory opinions and thereby subvert their finality").

[122] *See supra* note 63 and accompanying text (citing cases addressing due process challenge); *see also* Block & Hoff, *supra* note 47, at 10 ("Courts . . . have found that the reinstatement of § 10(b) claims pursuant to § 27A(b) not only eviscerates the fundamental principle of finality of judgments, but also deprives private litigants of their vested rights in a final judgment.").

[123] *See* McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) (holding Congress may not

Supreme Court held that although legislation may effect subsequent proceedings and pending actions, "when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases."[125] The reasoning behind this prohibition is that a final judgment fixes the rights of the parties, and any congressional disturbance of these rights would constitute an unlawful taking of property without compensation.[126]

It has been argued that a judgment based upon a statute of limitations defense does not create a vested right, and therefore, a reversal of such a judgment does not violate a defendant's right to due process.[127] In *Adler v. Berg Harmon Associates*,[128] the United States District Court for the Southern District of New York relied on this reasoning and determined that the *McCullough* rule "does not apply where the judgment was not based upon the merits of the claim, but instead was the result of the application of the defense of statute of limitations, a mere technical rule."[129] This argument was adopted from the Supreme Court's holding in *Chase*

disturb rights after they pass into judgment); Massingill v. Downs, 48 U.S. (7 How.) 758, 767 (1849) ("[N]o legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment."); Johnston v. CIGNA Corp., 789 F. Supp. 1098, 1100 (D. Colo. 1992) ("[L]itigants have vested rights in final judgments and . . . Congress has no power to take away those vested rights through later legislation.").

124 172 U.S. 102 (1898).

125 *Id.* at 124.

126 Block & Hoff, *supra* note 47, at 10. "When final judgment has been entered, the rights of the parties have been fixed, and legislative modification amounts to an unlawful taking in violation of the Fifth Amendment guarantee of Due Process." *Id.*; *see also* Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 234 (E.D. Ky. 1992). Legislative modification may amount to an unjustified taking. *Id.*

127 *See, e.g.*, Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992) (judgment based on statute of limitations defense does not create a vested right); Adler v. Berg Harmon Assoc., 790 F. Supp. 1235, 1244 (S.D.N.Y. 1992) (timeliness defense never considered fundamental right); Venturetech II v. Deloitte, Haskins & Sells, 790 F. Supp. 574, 576 (E.D.N.C. 1992) (section 27A(b) does not violate due process because "[s]tatutes of limitations do not create vested rights"); Bankard v. First Carolina Communications, Inc., No. 89-C8571, 1992 WL 3694, at *6 (N.D. Ill. Jan. 6, 1992) (section 27A does not deprive defendant of any vested right). *But see, e.g.*, Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) ("defendants do have vested rights in this Court's judgment dismissing Plaintiffs' § 10(b) claims"); *Plaut*, 789 F. Supp. at 235 ("When a judgment becomes final, it is final for all purposes, regardless of its basis."); TGX II, Nos. 87-5298, 90-0849, 1992 WL 125365, at *1 (E.D. La 1992) (asserting defendant has vested right in judgment based on statute of limitations defense).

128 790 F. Supp. 1235 (S.D.N.Y. 1992).

129 *Id.* at 1244; *see also* Axel Johnson, Inc. v. Arthur Anderson & Co., 790 F. Supp. 476, 482 (S.D.N.Y. 1992). The *Axel Johnson* court noted that the sole reason for dismissal of the plaintiff's case was artificial and technical, having nothing to do with its merits. *Id.* "Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." *Id.* at 483.

Securities Corp. v. Donaldson.[130] In *Chase*, the Court held that modification of a statute of limitations which restored a remedy that was time-barred did not violate due process.[131] However, in *Chase*, the action was still pending, and therefore, the Court was not disturbing a final judgment.[132] Further, the Court specifically stated that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor."[133]

Despite this distinction, courts have specifically focused on the *Chase* Court's statement that the "shelter [of a statute of limitations] has never been regarded as what now is called a 'fundamental' right . . . of the individual."[134] Therefore, those courts which construe *Chase* to mean that a judgment based on a statute of limitations does not create a vested right are incorrect. Although a defendant does not have a vested right in a statute of limitations defense, the Supreme Court has not stated that there is no vested right in a final judgment based on a statute of limitations defense.[135] Once the lawsuit is finally adjudicated, Congress cannot disturb the final judgment upon which it was based.[136] Therefore, section 27A(b) violates the Due Process Clause by stripping away a right vested in a final judgment.

In concluding that Congress has the power to upset a final judgment based on a statute of limitations defense, courts have also relied on the Supreme Court's decision in *United States v. Sioux*

[130] 325 U.S. 304 (1945).

[131] *Id.* at 315. According to *Chase*, statutes of limitations are justified by necessity and convenience, not logic. *Id.* at 314. "[T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Id.* For cases where courts have determined that a final judgment based on a statute of limitations defense does not create a vested right, see *Anixter*, 977 F.2d at 1546 (relying on *Chase* to determine final judgment based on statute of limitations defense did not create vested right); *Adler*, 790 F. Supp. at 1244-45 (judgment based on statute of limitations does not create vested right); *Axel Johnson*, 790 F. Supp. at 482-83 (same).

[132] *See Chase*, 325 U.S. at 306 (while case was pending, legislature enacted new statute of limitations); *see also* Block & Hoff, *supra* note 47, at 10 (stating that claims in *Chase*, affected by new statute of limitations, had not been dismissed at time new statute was enacted).

[133] *Chase*, 325 U.S. at 310.

[134] *Id.* at 314; *Adler*, 790 F. Supp. at 1244-45 (relying on language espoused in *Chase*); *Axel Johnson*, 790 F. Supp. at 482-83 (quoting *Chase* language).

[135] *See* Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992). "Even though defendants do not have vested rights in a particular statute of limitation, defendants *do* have vested rights in this Court's judgment dismissing [p]laintiffs' § 10(b) claims. Once a suit is finally adjudicated, the rights become vested and Congress cannot constitutionally divest them." *Id.*

[136] Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 235 (E.D. Ky. 1992).

Nation of Indians.[137] Courts have determined that *Sioux Nation* established that relitigation of adjudicated claims may be authorized by Congress.[138] In *Sioux Nation*, the Supreme Court reasoned that Congress had the power to enact legislation that waived the effect of a final judgment, which was based on a statute of limitations defense.[139] The statute in *Sioux Nation*, however, was an acknowledgment by the government of its own obligation to pay for the taking of property, despite previous final judgments in its favor.[140] In other words, the government allowed the parties to relitigate the claims even though it had a final judgment based on a statute of limitations defense.[141] Section 27A(b), on the other hand, did upset the final judgments of private litigants, rendering the holding in *Sioux Nation* inapplicable.[142] Therefore, courts have incorrectly relied on *Sioux Nation* as permission for Congress to upset final judgments of private litigants by allowing for the reinstatement of section 10(b) claims.

C. *Equal Protection*

Section 27A has also been challenged on the ground it violates the Fifth Amendment guarantee of equal protection because it causes similarly situated litigants to be treated differently.[143] A statute, which doesn't affect a fundamental right or create a suspect classification, will withstand an equal protection challenge as long as it is rationally related to a legitimate governmental inter-

[137] 448 U.S. 371 (1979).

[138] *See* Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992) (case closely resembles *Sioux Nation*); *Axel Johnson*, 790 F. Supp. at 481 (asserting *Sioux Nation* establishes that Congress can authorize relitigation of decided claims).

[139] *See Sioux Nation*, 448 U.S. at 407. "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States . . . " was not unconstitutional. *Id.*

[140] *See* Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992). *Sioux Nation* is limited to Congress's "power to recognize and pay the nation's debts." *Id.* "The Supreme Court determined that the legislation in *Sioux Nation* did not bring into question the finality of . . . earlier judgments, but only acknowledged the government's obligation to pay compensation for takings of property." *Id.*

[141] *See Axel Johnson*, 790 F. Supp. at 481 (statute in *Sioux Nation* "merely operated as a waiver of an available defense by an interested party").

[142] *See Treiber*, 796 F. Supp. at 1061. "The present legislation does not seek to waive a defense enuring to the government's benefit; Section 27A(b) purports to waive a defense enjoyed by private litigants." *Id.*

[143] *See supra* note 64 and accompanying text (citing cases in which equal protection argument has been addressed). *See generally* Block & Hoff, *supra* note 47, at 10 (explaining basis of equal protection challenge).

est.[144] Parties opposing section 27A have argued that under the statute their liability depends upon arbitrary classifications, such as when the claim was filed, with respect to *Lampf*, and in which jurisdiction the claim was brought.[145] In other words, the date the claim was filed dictated to the courts whether to apply the new uniform statute of limitations announced in *Lampf* or the old statute of limitations applicable in the jurisdiction prior to *Lampf*.[146] In addition, for those claims filed prior to *Lampf*, the applicable statute of limitations varied depending on the jurisdiction in which the claim was brought.[147]

Those courts considering this argument have rejected it, finding that the classifications created by the statute serve a rational governmental purpose.[148] The goal of Congress in enacting the statute was to protect those plaintiffs whose section 10(b) claims were dismissed because they were commenced prior to the *Lampf* decision. Section 27A was a rational way to achieve that goal.[149] Accordingly, section 27A does not violate the Equal Protection Clause.

The constitutional challenges to section 27A are that it violates the separation of powers doctrine, the Due Process Clause, and the Equal Protection Clause. In conclusion, it is asserted that section 27A violates the separation of powers doctrine and the Due Process Clause. Additionally, it is argued that even though Con-

144 Vance v. Bradley, 440 U.S. 93, 97 (1979). A statute does not violate equal protection "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.*

145 *See, e.g.*, Henderson v. Scientific-Atlanta Inc., 971 F.2d 1567, 1574 (11th Cir. 1992) (defendant argued that under § 27A liability depends on residence and whether case was filed before *Lampf*); Brown v. Hutton Group, 795 F. Supp. 1307, 1311 (S.D.N.Y. 1992) (defendants assert statute is irrational and creates arbitrary classifications between similarly situated litigants); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965, 970 (E.D. Wash. 1992) ("defendants object to the fact that imposition of liability under § 10(b) may depend upon the jurisdiction in which the claim was pending . . . and whether it was filed before or after *Lampf*").

146 *See supra* note 10 and accompanying text (citing text of § 27A).

147 *Id.*

148 *See Henderson*, 971 F.2d at 1574. It is not irrational that applicable statutes of limitation vary from one jurisdiction to another. *Id.* "Because section 27A does not affect a fundamental right or discriminate on the basis of a suspect classification, the statute is due to be upheld so long as it is rationally related to furthering a legitimate interest." *Id.*; *Brown*, 795 F. Supp. at 1311. "Congress had a rational basis for applying section 27A only to those claimants who filed claims prior to . . . the date *Lampf* was decided." *Id.*; *Wegbreit*, 793 F. Supp. at 970. The distinctions made by § 27A serve a rational purpose.

149 *Brown*, 795 F. Supp. at 1316-17. "Congress had a legitimate legislative purpose, to protect the reasonable expectations of those claimants who filed prior to *Lampf*, that was furthered by enacting section 27A." *Id.*

gress was attempting to effectuate legitimate public policy goal, the Supreme Court, as protector of the Constitution, must hold section 27A unconstitutional in view of the long-term effects this policy will have on the Court's power.

CONCLUSION

The Supreme Court adopted a uniform statute of limitations in *Lampf* to end the confusion and uncertainty surrounding the applicable statute of limitations for section 10(b) claims. However, as a result of the retroactive application of this new limitation period, the claims of many section 10(b) litigants who commenced their actions prior to the *Lampf* decision were rendered untimely. To remedy the harshness of this result Congress enacted section 27A. This statute was immediately challenged on constitutional grounds. This enactment allowed Congress to impermissibly intrude into the exclusive domain of the judiciary and took away rights of litigants that were vested in final judgments. Further, the Supreme Court must readdress this issue in order to resolve the confusion created by section 27A, and more importantly, to decide whether Congress will be permitted to assume the role of "super-appellate court."

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