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Constitutionality of Section 27A of the Securities and Exchange Act of 1934: Congressional Response to the Upheaval of the Lampf Decision, The;Note

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THE CONSTITUTIONALITY OF SECTION 27A OF THE SECURITIES AND EXCHANGE ACT OF 1934: CONGRESSIONAL RESPONSE TO THE UPHEAVAL OF THE *LAMPF* DECISION

On January 10, 1994 the Supreme Court granted certiorari in the case of *Morgan Stanley & Co. v. Pacific Mutual Life Ins.*[1] The issue to be reviewed was whether Section 27A of the Securities and Exchange Act of 1934 is constitutional.[2] Currently the First, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits have ruled that it is, and the Sixth has ruled it is not.[3] This split is the result of Congress' enactment of legislation aimed at overruling the retroactive effect of the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson.*[4]

Part I of this Note summarizes the issues involved in the debate over Congress' action. Part II analyzes Section 10(b) and Rule 10b-5 of the Securities Act of 1934 and discusses the manner in which federal courts traditionally chose statutes of limitations for 10b-5 claims before *Lampf.* Part III examines the *Lampf* decision and the retroactivity of Supreme Court decisions. Part IV explains the separation of powers between Congress and the Judiciary and discusses why Congress' intent in enacting Section 27A was a response to retroactive application of *Lampf.* Part V examines the arguments against the constitutionality of Section 27A and the treatment this issue has received in the federal courts. Part VI concludes that Section 27A is unconstitutional because it is violative of the Fifth Amendment and the separation of powers doctrine.

I. SUMMARY OF THE ISSUES CONCERNING THE CONSTITUTIONALITY OF SECTION 27A

Section 27A[5] created a new generation of ancillary litigation in federal courts.[6]

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1. 114 S. Ct. 680 (Jan. 10, 1994) *sub. nom.* Pacific Mut. Life Ins. v. First Republicbank, 806 F. Supp. 108 (D.C. 1992); 997 F.2d 39 (5th Cir. 1993). Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

2. 15 U.S.C. § 78aa-1 (1991) [hereinafter "Section 27A"].

3. Upholding the constitutionality, *see, e.g.*, TGX Corp. v. Simmons, 997 F.2d 39 (5th Cir. 1993); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993); Cooperative de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272 (7th Cir. 1993); Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993); Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1841 (1993); Henderson v. Scientific-Atlanta, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S.Ct. 95 (1993); Rejecting constitutionality, *see* Plaut v. Spendthrift Farms, 1 F.3d 1487 (6th Cir. 1993) [hereinafter "Plaut II"].

4. 111 S.Ct. 2773 (1991) [hereinafter "Lampf"].

5. On December 19, 1991, President Bush signed into law Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified at Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1), which proscribed *pro forma* retroactive application of the decision in *Lampf*, § 27A provides that:

> (a) EFFECT ON PENDING CAUSES OF ACTION—The limitation period for any private action implied under section 10(b) of this Act 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.

When Congress enacted Section 27A it overruled the retroactive application of statutes of limitations as mandated by the Supreme Court's *Lampf* decision,[7] and returned Rule 10b-5[8] and Section 10(b)[9] to the previous status as one of the more troublesome federal securities claims to bring.

In *Lampf*, a 5-4 majority ruled that 10b-5 claims should be governed by the federal statute of limitations borrowed from Sections 9(e) and 18(c) of the 1934 Act. This statute of limitations [hereinafter "the combination statute"] provides that a plaintiff has one year from the date of discovery of fraud or misrepresentation to press his claim, with an absolute bar to claims three years after the acts alleged.[10]

The federal statute of limitation established in *Lampf*, was applied retroactively to comply with another case the Supreme Court decided the same day, *James B. Beam Distilling Co. v. Georgia*.[11] The *Beam* Court held that new rules of law are to be applied retroactively unless the Court specifically rules otherwise.[12]

Prior to the *Lampf* decision, most federal district courts borrowed the statute of limitations from the forum state's blue sky laws to determine the timeliness of 10b-5 claims. These state statutes of limitation ranged from one to ten years.[13]

The retroactive application of the combination statute resulted in the dismissal of hundreds of 10b-5 claims nationwide. The total aggregate value of these dismissed claims exceeded six billion dollars.[14] In response, Congress amended the Securities Act of 1934, adding Section 27A, to prevent retroactive application of the *Lampf* decision required by *Beam*.

A. The Five Challenges to Section 27A

Section 27A is neither constitutional nor rational. It reflects a political response to a judicially-mandated decision, and as such, fails to adequately address the statute of

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(b) EFFECT ON DISMISSED CAUSES OF ACTION—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
(1) which was dismissed as time barred subsequent to June 19, 1991, and
(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 no later than 60 days after the date of enactment of this section.

6. One case alone, Anixter v. Home Stake, 947 F.2d 897 (10th Cir. 1991), denied rehearing based on the new law after the Circuit Court reversed a $142 million judgment. After 18 years of litigation, the court ruled the claims were time barred under *Lampf*.

7. 111 S. Ct. 2773 (1991).

8. 17 C.F.R. § 240.10b-5 (1991).

9. 15 U.S.C. §78i(e) (1988) (Throughout this Note "Section 10(b)" refers to the fraud provisions of the Securities Act of 1934, "Rule 10b-5" refers to the Rule promulgated by the Securities and Exchange Commission to explain the conduct prohibited by Section 10(b), and "10b-5 claims" refers to the causes of action brought by plaintiffs implied under Rule 10b-5).

10. *Lampf*, 111 S. Ct. at 2782.

11. 111 S.Ct 2439 (1991) [hereinafter "Beam"].

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

13. O'Hara v. Kovens, 625 F.2d 15, 18 (4th Cir. 1980) (applying the one-year Maryland blue sky law limitations period, Md. Corp. & Assn's Code Ann. 11-703(f)); Denny v. Performance Sys., Inc. [1971-1972] Fed. Sec. L. Rep. (CCH) 93,387 (M.D. Tenn. 1971) (applying Tennessee's ten-year limitations period governing fraud, TENN. CODE ANN. 12 28-310). The previous case law is well summarized in "Report of the Task Force on Statute of Limitations for Implied Actions," 41 BUS. LAW. 645, 648-54 (1986), and in the 2d Circuit's opinion in Ceres Partners v. GEL Associates, 918 F.2d 349, 354-55 (2d Cir. 1990).

14. Leslie Wane, "Breeden Backs Investors on Fraud Suits," N.Y. TIMES, Oct. 3, 1991, at A10.

limitations problem or prescribe a viable solution. Section 27A was the product of popular unrest. For reasons to be discussed, its language and effect do not address the problems indicated in its legislative history as the reason for its enactment.

Several federal judges, whose tenure, unlike members of Congress, does not depend on popular mandate, have held Section 27A unconstitutional for numerous reasons.[15] First, these courts hold that Section 27A merely instructs the courts to ignore the Supreme Court's decision in *Beam*,[16] thereby violating the separation of powers doctrine.[17]

Second, the language of Section 27A directs a particular result in a limited group of cases. The legislative history indicates that Congress "was tacitly directing a result in the cases of those individuals whom Congress held in low esteem"[18] namely, the primary defendants in the insider trading cases of the late 1980s. This special treatment of specific insider traders directly contradicts the holding in *United States v. Klein*.[19] *Klein* held that Congress may not prescribe a particular rule of decision to cases pending in federal court.[20]

Third, while two Courts of Appeal[21] point to the recent decision in *Robertson v. Seattle Audubon*[22] to bolster their belief that Section 27A is constitutional, these courts are misguided in that the *Seattle Audubon* decision does not apply to Article III challenges or choice of law issues.[23] As addressed in the Sixth Circuit's decision of *Plaut v. Spendthrift Farms*,[24] the crux of the *Seattle Audubon* decision was that Congress may change the underlying law that supports a claim, and thereby change the position of litigants that are currently pressing them.[25] However, when no law underlying a claim exists, as is the case in statute of limitations of implied causes of action,

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15. Cases finding § 27A unconstitutional include: Dulude v. Cigna Secs., Inc., No. 90-CV-72191-DT (E.D.Mich. 1992); Gray v. First Winthrop Corp., No. C-90-2600 (N.D.Cal. Apr. 16, 1992) (ruling that Section 27A contravenes the constitutional decision in *Beam*); Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231 (E.D.Ky. 1992) [hereinafter "Plaut I"] (ruling that §27A directs federal courts to reverse or suspend final judgments); *In re* Brichard Secs. Litig., 788 F. Supp. 1098 (N.D.Cal. 1992) (ruling that Section 27A violates separation of powers principles by prescribing the rule of decision in pending cases, by subjecting final judgments of federal courts to reversal or review and by contradicting constitutional decision of Supreme Court); Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D.Colo. 1992) (ruling that Section 27A prescribes the rule of decision in particular cases, encroaches on the judiciary's power to interpret the law); TGX Corp. v. Simmons, 786 F. Supp. 587 (E.D.La. 1992) (holding that although Section 27A does change law, the statute is unconstitutional because it is inconsistent with the constitutional mandate of *Beam*); Johnston v. CIGNA, 789 F. Supp. 1098 (D.Colo. 1992); Howard Treiber, et al, v. Katz, et al, No. 90-CV-70374, (E.D.Mich. 1992); Hindler, Inc. v. Telequest, Melridge, Inc. Securities Litigation, No. 87-1426-JU, (D.Or. 1992); *In re* Taxable Municipal Bond Securities Litigation, No. CIV-A-MDL863, 1992 WL 119990 (E.D.La. 1992).

16. *Brichard*, 788 F. Supp. at 1103; *Bank of Denver*, 789 F. Supp. at 1097; *Plaut I*, 789 F. Supp. at 235; *Johnson*, 789 F. Supp. at 1101.

17. United States v. O'Grady 89 U.S. 641, 647-48, (1894) (ruling it is the exclusive power of the judiciary to adjudicate cases).

18. *Brichard*, 788 F. Supp. at 1106, (citing 137 Cong. Rec. H 11,811 (daily ed. Nov. 26, 1991)).

19. 80 U.S. (13 Wall) 126 (1871).

20. *Id.* at 167.

21. Anixter v. Home-Stake Productions Co., 977 F.2d 1549, 1559 (10th Cir. 1992); Henderson v. Scientific-Atlanta Inc., 971 F.2d 1567, 1574 (11th Cir. 1992).

22. 112 S.Ct 1407 (1992).

23. *Id.* at 1412 (After finding the Ninth Circuit Court of Appeals erroneously ruled the law directed findings of fact the Court stated, "We have no occasion to address any broad questions of Article III jurisprudence.").

24. 1 F.3d 1487 (6th Cir. 1993).

25. *Id.* at 1497.

Congress has no right to amend the law so as to effect pending cases.[26] Since a 10b-5 claim is a judicially created cause of action, Congress overstepped its authority in trying to amend the *Lampf* decision which concerned 10b-5 claims.[27]

Fourth, district courts have ruled that applying Section 27A(b) violates the Fifth Amendment. This subsection resurrects claims dismissed in the period after *Lampf* and before Section 27A's enactment.[28] Numerous district courts have ruled that resurrecting dismissed claims pursuant to Section 27A(b) violates both the Fifth Amendment and the "vested rights" doctrine because the defendants to those actions had vested rights in the dismissal of the claims against them.[29]

Finally, the stated purpose of Section 27A was to ensure that all Rule 10b-5 litigants were treated fairly and equitably.[30] A uniform federal rule applied retroactively would have such an effect. It is patently unfair that a federal law can be enforced in one state under a ten year statute of limitation, while citizens of another state only have one year to press their federal claim.[31]

II. ANALYSIS OF SECTION 10(b) AND RULE 10b-5 OF THE 1934 SECURITIES ACT

In response to the stock market crash in 1929, the United States Congress enacted the Securities Acts of 1933 and 1934.[32] The Acts require registration of stock offerings, periodic reports of a corporation's financial status, and distribution of certain information to prospective purchasers. The penalties for engaging in fraudulent activities are defined in the rules which accompany the Acts. The activity addressed by Rule 10b-5 of the 1934 Act is well-defined.[33] To prove a claim under Section 10(b) or Rule 10b-5, a plaintiff must show, *inter alia*, that the defendant, with scienter, made a misrepresentation of a material fact or failed to disclose a material fact, and that the plaintiff relied on the misrepresentation or omission and suffered a loss as a result of

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26. *Id.*

27. *Id.* at 1498.

28. *Brichard*, 788 F. Supp. at 1106-1107; *Bank of Denver*, 789 F. Supp. at 1097; *Johnson*, 789 F. Supp. at 1103.

29. *See infra* notes 157-63 and accompanying text.

30. 137 CONG. REC. S18,624 (Nov. 27, 1991) (Statement of Senator Bryan, "We are only addressing the most immediate problem - the unfair application of the Supreme Court's *Lampf* decision to cases that were pending at the time that the decision came down.").

31. *See supra* note 13.

32. The 1929 crash in large part occurred due to speculation associated with the value of stock. Through various fraudulent schemes, the entire stock system, as it existed, collapsed in 1929. To prevent another crash, Congress acted swiftly and enacted two major regulatory acts in two years. The 1933 Act regulates the actions of corporations who issue stock. The 1934 Act is primarily concerned with regulating secondary resellers and requiring corporations to file periodic reports as to the condition and financial future of their corporations.

33. Commission Rule 10b-5, first promulgated in 1942, now provides:

> 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,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1990).

the misrepresentation or omission.[34] However, Congress did not include a statute of limitations for Rule 10b-5 because it did not enact the rule to provide for private suits. Courts interpreting Rule 10b-5 found an implied cause of action[35] which allows private litigants to pursue individual claims against parties who engage in acts contravening Rule 10b-5.[36]

A. Determining the Statute of Limitation in 10b-5 Claims Prior to *Lampf*

When courts interpreted Rule 10b-5 as granting an implied cause of action, they had to determine what statute of limitation to apply.[37] Courts would normally borrow the forum state's statute of limitations for blue sky laws similar to Section 10(b) or state common law fraud, to determine if the 10b-5 claim was timely.[38] "This 'borrowing' of state law accorded with the traditional practice of looking to the law of the forum state to provide a limitations period for federal claims when federal law is silent on the applicable limitations period."[39]

Because of the nature of this implied action, class actions and multidistrict claims became especially unwieldy.[40] Insider trading scandals of the 1980s prompted hundreds of investors nationwide to file 10b-5 claims.[41] With suits arising that involved multiple parties, class actions, and multidistrict actions, district courts were unable to find a single state's law that could apply to all parties in an action, and thus, choice of law questions became the predominant inquiry to determine timeliness.[42] The Panel on Multidistrict Litigation consolidated several of these suits for pretrial discovery.[43] Still the question that eluded several judges remained: "What is the correct statute of limitations?"[44]

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34. *See, e.g.*, Bloor v. Carro, Spanbock, Londin, Rodman & Fass, 754 F.2d 57, 61 (2d Cir. 1985).

35. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210-211 & n.29 (1976).

36. Herrman & MacLean v. Huddlestrom, 459 U.S. 375, 382 (1983) (recognizing an individual cause of action based on Rule 10b-5).

37. *Herrman & MacLean*, at 384; *see also*, Touche, Ross & Co. v. Redington, 442 U.S. 560 (1979) (discussion of the remedies available under implied causes of action).

38. "It is the usual rule that when Congress has failed to provide a statute of limitations for a federal cause of action the court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." *Lampf*, at 2778, (quoting Wilson v. Garcia, 471 U.S. 261, 266-67 (1985)); *See also*, Auto Workers v. Hoosier Corp., 383 U.S. 696, 704 (1966).

39. American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 556 n.27 (1974); Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-05 (1966); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

40. "The multistate nature of [the federal cause of action at issue] indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarante[e] . . . complex and expensive litigation over what should be a straightforward matter.'"

Lampf at 2779, (quoting Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 146 (1987)).

41. For an accurate and in depth examination of the entire insider-trading scandal, *see* JAMES B. STEWART, DEN OF THIEVES, 1992.

42. *See* Brief for the Securities and Exchange Commission as Amicus Curiae, No. 90-333, December 5, 1990.

43. *See In re* General Development Corp. Bond Lit., 800 F. Supp. 1143 (S.D.N.Y. 1992).

44. *See, e.g., In re* Clinton Oil Co. Securities Litigation, [1977-1978] Fed. Sec. L. Rep. (CCH) P96,015 (D. Kan. 1977) (transferee court in Multidistrict litigation was forced to select a different limitation period for each of several consolidated actions involving the identical violation). *See also* Pinney v. Edward D. Jones & Co., 735 F. Supp. 915 (W.D. Ark. 1990) (discussing five options avail-

As a result of the confusion in multidistrict and class action cases, the need for a federal statute of limitations became clear.[45] Therefore, when the Supreme Court accepted certiorari to consider the issue, they entered into an area that was ripe for clarification.[46]

III. THE *LAMPF* DECISION

The major issue surrounding *Lampf* is not whether the Court selected the most analogous state statute of limitations, but rather, whether the new federal rule announced applies to cases pending at the time *Lampf* was rendered. The majority in *Lampf* applied the new limitations period retroactively to the parties before it without any analysis, despite a strongly worded dissent by Justice O'Connor on this point.[47] Prior to *Lampf*, three Circuits adopted the combination statute for use in 10b-5 claims. These three circuits reached mixed conclusions on the issue of retroactivity. The Third Circuit applied its new rule retroactively,[48] the Second Circuit declined to do so,[49] and the Seventh Circuit in two separate cases avoided the issue altogether,[50] or left it for district courts to decide.[51]

In *Lampf*, the Supreme Court could only reach agreement on three issues. The Court agreed that there was a need for a federal statute of limitations for Rule 10b-5 actions. Next, The Court concluded that the most appropriate statute for this purpose was the combination statute applicable to express causes of actions for manipulation and for filing false and misleading SEC reports contained in Sections 9(c) and 18(e) of the 1934 Act.[52] The Court also agreed that the new statute would apply retroactively.[53]

Justice Blackmun delivered the majority opinion of the Court, in which Justices Rehnquist, White, Marshall, and Scalia joined. Justice Blackmun used a "hierarchical analysis" to determine the circumstances under which it would be appropriate to apply a federal statute of limitations to implied causes of action. Although technically not the opinion of the Court, since only three justices joined him,[54] Justice Blackmun's hier-

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able to courts attempting to set limitations periods applicable to non-resident class claims); Kronfeld v. Advest, Inc., 675 F. Supp. 1449, 1457-58 & n.21 (S.D.N.Y. 1987) (borrowing statute resulted in application of at least 26 separate statutes of limitations).

45. *See Lampf, supra* note 38. (The problems associated with borrowing state statute of limitations created incredible legal headaches for multistate and class action securities claims. *See e.g.* Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987) *cert. denied*, 484 U.S. 943 (1987) (characterizing the borrowing process as applied in multistate claims as "one tottering parapet of a ramshackle edifice.").

46. Both the Petitioners and the SEC agreed that a single federal statute of limitations was necessary. *See supra* note 38; Brief for Petitioner, 90-333, at 9 (1991).

47. *Lampf*, 111 S. Ct. at 2785 (O'Connor, J. dissenting) (arguing that precedent solidly demonstrated that the case was not time-barred. Justice O'Connor concluded that holding a claim as untimely as measured against a rule that did not exist when the case was filed was manifestly unfair and that the Majority's action was altogether inappropriate as the Supreme Court had never before applied a newly found statute of limitations retroactively).

48. Hill v. Equitable Trust Co., 851 F.2d 691, 697-98 (3d Cir. 1988).

49. Welch v. Cadre Capital, 923 F.2d 989, 995 (2d Cir. 1989).

50. Robin v. Arthur Young & Co., 915 F.2d 1120, 1123 (7th Cir. 1990).

51. Radiology Center S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1223 (7th Cir. 1990).

52. *Lampf*, 111 S. Ct. at 2782 n. 10, (citing 15 U.S.C. §§ 78i and 78l (et seq.)). The Court ruled that the specific terms of 15 U.S.C. § 78i(e) would be considered for questions of statutory construction.

53. *Lampf*, 111 S. Ct. at 2782.

54. Justice Scalia did not concur in Justice Blackmun's use of the "hierarchical analysis." *Lampf*, 111 S. Ct. at 2783.

archical analysis clarifies the role the Court assumed in applying the combination statute.[55] The Court considered federal borrowing "a closely circumscribed exception," to be made "only when 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 for interstitial lawmaking."[56]

Using his "hierarchical analysis" Justice Blackmun explained why state "borrowing" is unwise in Rule 10b-5 cases. "First the court must determine whether a uniform statute of limitations is to be selected."[57] This is appropriate "where a federal cause of action tends in practice to 'encompass numerous diverse topics and subtopics.'"[58] Justice Blackmun argued that this was the case with 10b-5 claims as prosecution under Rule 10b-5 often resulted "[such] that a single state statute may not be consistently applied within a jurisdiction, the [Supreme Court has] concluded that federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes."[59]

Second, assuming a uniform limitations period is appropriate, the court must decide whether the period should be gleaned from state or federal sources. "[T]he court should accord particular weight to the geographic character of the claim."[60] When the claim is multi-state in nature with the possibility of multiple state statutes of limitations, Blackmun stated that the court should lean towards use of a federal statute of limitations to avoid forum shopping and expensive litigation over the appropriate statute of limitations.[61]

If forum shopping and cost benefit considerations balance in favor of federal borrowing, the courts must still consider a final factor. The courts must make a determination whether a federal statute clearly provides a closer fit than any available state statute.[62]

This final step of Blackmun's "hierarchical inquiry" applies where an express cause of action exists in the same statute under which the implied cause of action arises.[63] In these cases, the courts should give first consideration to the statute of limitations for that express action.[64]

Where the claim asserted is implied from a statute that also contains an express cause of action with a time limitation, the Court stated, courts should first look to "the statute of origin" to determine the correct limitations period:[65]

> We can imagine no closer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections . . .[66] [w]hen the

55. *Lampf*, 111 S. Ct. at 2777.
56. *Lampf*, 111 S. Ct. at 2778 (quoting Reed v. United Transportation Union, 488 U.S. 319, 324 (1989)).
57. *Lampf*, 111 S. Ct. at 2778.
58. *Id.*
59. *Lampf*, 111 S. Ct. at 2279 (quoting Wilson v. Garcia, 471 U.S. 261, 273-75 (1985)).
60. *Lampf*, 111 S. Ct. at 2779.
61. *Id.* (citing Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 157 (1987)).
62. *Id.*
63. *Lampf*, 111 S. Ct. at 2778.
64. *Lampf*, 111 S. Ct. at 2779.
65. *Id.*
66. *Lampf*, 111 S. Ct. at 2780, (citing DelCostello v. International Brotherhood of Teamsters, 462

> statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. Only when no analogous counterpart is available should a court then proceed to apply state borrowing principles . . . .[67]

The task of determining whether a statute of limitations within the 1934 Act provides a closer fit than state statutes is complicated by the technical nature of Section 10(b) cases.[68] The Court determined that two sections of the 1934 Act[69] protect investors from the same fraudulent conduct that forms the basis of Section 10(b), prohibiting the manipulation of stock prices and imposing regular reporting requirements on companies whose stock is listed on national securities exchanges.[70]

Additionally, when Congress enacted the 1934 Act, it specifically amended the 1933 Act to incorporate a one and three year limitation period for all actions contained in the 1934 Act. The Court in *Lampf* thus concluded that Congress intended to apply the one and three year limitation period broadly to the Securities field.[71] Therefore, all of the considerations forwarded by Justice Blackmun weighed in favor of borrowing a statute of limitations from the Securities Act itself. That statute applied to actions for willful manipulation and misleading filings, two activities that closely resemble the conduct underlying a 10b-5 claim.

The Court rejected the SEC's position that the five-year statute of limitation found in Section 20A of the 1934 Act would be more appropriate to 10b-5 claims.[72] The Court held that there was no evidence to support the belief that Congress intended to apply this scheme to anything other than insider trading violations. The Court noted, in *dicta,* that Congress included language specifically stating that nothing in the section would be construed to affect the availability of any other cause of action implied by the statute.[73]

As a final matter, the Supreme Court rejected the SEC's contention that the adoption of a one and three year period of limitation would frustrate the purposes of

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U.S. 151, 171 (1983)).

67. *Lampf,* 111 S. Ct. at 2780.

68. The 1934 Act contains a number of express causes of action—Sections 9(e), 18(c), and 29(b)—each with an explicit limitations period which contains some variation of the one year and three year combination statute. The Court determined that two of these express causes of action—Sections 9 and 18—were analogous to Section 10(b) actions. *Lampf* 111 S. Ct. at 2780-81. (Section 9 deals with willful manipulation of securities prices. Section 18 relates to making false or misleading filings to the SEC).

69. Section 9 of the 1934 Act, 15 U.S.C. § 78i, pertaining to the willful manipulation of security prices, and Section 18, 15 U.S.C. § 78r, relating to misleading filings, target the precise dangers that are the focus of Section 10(b). Each is an integral element of a complex web of regulations. Each was intended to facilitate a central goal: "to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges." *Lampf,* 111 S. Ct. at 2781, (quoting Ernst & Ernst, 425 U.S. at 195, citing S. Rep. No. 792, 73d Cong., 2d Sess., 1-5 (1934)).

70. *Lampf,* 111 S. Ct. at 2778.

71. In a footnote, the Supreme Court explained that Section 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), set a two-year rather than three-year period of limitations, but held that, since the statute dealt with disgorgement of profits and differed in focus from the other sections, it was not an appropriate source from which to borrow a limitations period. *Lampf,* 111 S. Ct. at 2780, n.5.

72. Section 20A, the Court explained, is part of ITSFEA which was added 54 years after enactment of the 1934 Act, and focuses specifically on misuse of inside information, for which, Congress recognized, it was difficult to uncover evidence. *Lampf,* 111 S. Ct. at 2781.

73. *Lampf,* 111 S. Ct. at 2782.

Section 10(b).[74] The Court held that the period provided sufficient time to allow the victims of fraud to discover and file their claims.[75]

The Supreme Court, by dismissing the plaintiffs' claims under Rule 10b-5, also implicitly determined that the combination statute applied retroactively to 10b-5 claims already within the federal court system.[76] Announced the same day as *Lampf*, the Supreme Court's *Beam* decision determined that all newly found rules of law were to be given retroactive effect, thereby mandating the application of the combination statute to all pending 10b-5 claims.

A. Retroactivity of Supreme Court Decisions

In decisions prior to *Beam*, federal courts used the test fashioned by the Supreme Court in *Chevron Oil Co. v. Huson*[77] to determine if new rules of decision should be applied prospectively or retroactively. In *Chevron Oil*, the Court ruled that for a court decision to apply only prospectively, it must "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ."[78] If this requirement is satisfied, a court should then weigh in each case whether retroactive application would conflict with the purposes of the rule and whether it would produce inequitable results.[79]

1. The Modern Rule of Retroactivity: James B. Beam Distilling v. Georgia

The Supreme Court consistently followed *Chevron Oil*[80] until its decision in *Beam*.[81] The issue in *Beam* was whether a 1984 Supreme Court decision invalidating a Hawaii state tax should be applied retroactively.[82] This tax applied a higher rate to imported alcohol products than domestic products.[83]

In a plurality decision, Justice Souter, joined by Justice Stevens, rejected the *Chevron Oil* analysis, holding instead that "principles of equality and *stare decisis*" controlled and required the 1984 decision to be given retroactive effect.[84]

Despite the concurrence of six Justices in the judgment of the Court, there was no majority agreement as to the basis for the holding. They simply rejected selective prospectivity, a practice whereby a court "applies a new rule in the case in which it is pronounced, then returns to the old one with respect to all others arising on facts pre-

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74. *Lampf*, 111 S. Ct. at 2781.

75. *Id.*

76. *Beam*, 111 S. Ct. at 2448. ("When 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*.").

77. 404 U.S. 97 (1971).

78. *Id.* at 106-07 (regarding the unforseeability in terms of Section 27A, it is telling that the Second, Third, and Seventh Circuits had already adopted the one and three year combination statute. Therefore, it is hard to say that the *Lampf* decision was not foreshadowed. *See supra* notes 47-50 and accompanying text).

79. *Id.*

80. American Trucking Ass'n Inc. v. Smith, 110 S. Ct. 2323, 2333-35 (1990); St. Francis College v. Al-Khazraji, 481 U.S. 604, 608-09 (1987).

81. 111 S. Ct. 2439 (1991). *See generally* Block & Hall, *Securities Law Developments End Supreme Court Term*, NEW YORK L.J., July 18, 1991, at 5.

82. Bacchus Imports v. Dias, 468 U.S. 263 (1984).

83. *Beam*, 111 S. Ct. at 2445.

84. *Id.*, at 2446.

dating the pronouncement."[85]

Justice Souter reasoned that "retroactivity is properly seen in the first instance as a matter of choice of law,"[86] and 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."[87] Justice Souter determined that selective prospectivity violates Article III of the Constitution. The opinion held that it is "error to refuse to apply a rule of federal law retroactively [to other similar situated litigants in prior cases] after the case announcing the rule has already done so."[88]

Justices Blackmun, Scalia and Marshall, in contrast, based their concurrences on constitutional principles. Specifically, the Blackmun and Scalia pluralities reasoned that selective prospectivity conflicts with the dictates of Article III. The courts may "decide only 'cases' and 'controversies.'"[89] "Unlike a legislature," Justice Blackmun wrote,

> [w]e do not promulgate new rules to 'be applied prospectively only,' . . . . The nature of judicial review constrains us to consider the case that is actually before us, and, if it requires us to announce a new rule, to do so in the context of the case and apply it to the parties who brought us the case to decide. To do otherwise is to warp the role that we, as judges, play in a government of limited powers.[90]

Although only three Justices articulated a constitutional basis for the holding, several district courts interpreting the decision attach constitutional weight to it.[91]

2. The Effect of Beam *on* Lampf

It is not clear that the majority in *Lampf* relied on *Beam* because it applied the new limitations rule retroactively without discussion. In the six months between *Lampf* and the passage of Section 27A, however, numerous district courts as well as the Second, Eighth and Tenth Circuits ruled that the new limitations period of one year from the date of discovery with an absolute bar after three years announced in *Lampf* applied retroactively.[92] Without question, before Congress acted, it was the unanimous opinion of the federal judiciary that *Beam* made *Lampf* retroactive.

IV. SEPARATION OF POWERS QUESTIONS BETWEEN THE SUPREME COURT AND CONGRESS

Congress cannot prescribe a rule of decision for the judiciary.[93] Nor can Con-

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85. *Id.* at 2444.
86. *Id.* at 2443.
87. *Id.* at 2443-44.
88. *Id.* at 2446.
89. *Beam,* 111 S. Ct. at 2449 (Blackmun, J., concurring).
90. *Id.* at 2449-50.
91. TGX Corp. v. Simmons, 786 F. Supp. at 593 (*Beam* opinion states "constitutional mandate"); *In re* Brichard Securities Lit., 788 F. Supp. at 1109 (holding *Beam* to be a constitutional decision).
92. Anixter v. Home-Stake Prod. Co., 939 F.2d 1420, 1441-42 (10th Cir. 1991), *reh'g. denied,* 1991 U.S. App. LEXIS 24818 (10th Cir. Oct. 21, 1991); Welch v. Cadre Capital, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,287; Boudreau v. Deloitte, Haskins & Sells, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,194; Brumbaugh v. Princeton Partners, 766 F. Supp. 497, 499 (S.D.W.Va. 1991); Baggett v. Edward D. Jones & Co., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,215.
93. United States v. Klein, 80 U.S. (13 Wall.) 128, 146, (1871) (holding that a legislative enactment which changed the effect of a civil war pardon in cases where the pardoned sought to regain seized property impermissibly "prescribe[d] a rule for the decision of a cause in a particular way.").

gress enact a law that effects a rule of decision without changing the underlying procedural or substantive law, or otherwise contravene the Constitution by contradicting a Constitutional decision by the Court.[94]

A. The Seminal Case for Separation of Powers Analysis: *United States v. Klein*

United States v. Klein,[95] an 1871 case, involved a statute under which residents of former Confederate states could recover property upon proof of loyalty to the federal government. The administrator of a deceased Confederate sympathizer's estate brought suit in the Court of Claims to obtain the proceeds of property that had been seized and sold by the Government during the Civil War.[96] A federal statute allowed for such recovery upon proof of the claimant's loyalty during the war.

In an earlier case, the Supreme Court had ruled that the grant of a presidential pardon to ex-Confederate property owners was "proof of loyalty" sufficient to satisfy the statute.[97] Klein had received such a pardon, and thus, the Court of Claims held his estate was entitled to the proceeds from the seized property.

During the pendency of the government's appeal to the Supreme Court, Congress enacted legislation which provided that a presidential pardon was not admissible as evidence of loyalty.[98] Congress changed the rule of decision making a pardon conclusive evidence of disloyalty rather than evidence of loyalty.[99]

The Court struck down the statute as unconstitutional.[100] The Court determined that Congress had violated the separation of powers by "prescrib[ing] a rule for the decision of a cause in a particular way."[101] The statute impermissibly mandated courts to accept factual findings regarding the effect of a pardon.

B. *Klein* Revisited: The Supreme Court Clarifies Congress' Power in *Robertson v. Seattle Audubon*

While *Klein* has historically been the touchstone of a separation of powers inquiry, the Supreme Court's recent decision in the separation of powers context, *Robertson v. Seattle Audubon*,[102] may provide more insight. In *Seattle Audubon*, environmental groups asserted that the federal government's regulation of timber harvesting in the Pacific Northwest granted the northern spotted owl too little protection.

As with *Lampf*, Congress responded with compromise legislation.[103] The statute established certain harvesting restrictions and noted that the standards set were adequate to meet the statutory requirements cited in the pending litigation.

The plaintiffs challenged the compromise legislation as violating Article III. They

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94. *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1102 (N.D.Cal. 1992) (referring to Section 27A's effect of contravening *Beam*, a constitutional decision of the Supreme Court).
95. 80 U.S. (13 Wall.) 128 (1871).
96. *Id.* at 132.
97. *Id.* at 133.
98. *Id.*
99. *Id.* at 145-46.
100. *Id.* at 147.
101. *Id.* at 146.
102. 112 S. Ct. 1407 (1992).
103. Congress enacted Section 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, also known as the "Northwest Timber Compromise," in response to ongoing litigation concerning the harvesting and sale of timber from old-growth forests in the Pacific Northwest. *Id.* at 1408.

claimed it purported to direct the results in two pending cases.[104] Writing for a unanimous Court, Justice Thomas reversed the decision. The legislation, Justice Thomas wrote, had changed the law governing endangered species, and the pending cases were referenced only to identify the statutory provisions in question.[105] The Court reasoned that the operation of the new subsection "modified the old provisions" and did not "direct any particular findings of fact or applications of law, old or new, to fact."[106] The statute did not pass on "the 'legal or factual adequacy' of administrative documents authorizing the sales"[107] or "instruct the courts" how to decide whether particular timber sales violated [the Act]."[108] Therefore, Congress had acted within its Constitutional power by amending substantive parts of a federal legislation.

C. The Congressional Response to the Tumult of *Lampf*: Section 27A

The 10b-5 claims dismissed by *Lampf* presented a very problematic situation for federal legislators. Put simply, many of the 10b-5 claims were part of larger insider trading fraud cases. In the late 1980s it was these insider trading cases that provided the impetus for change to the Securities Act.[109] Therefore, these dismissals were given priority treatment in Congress.[110] Several members of Congres spoke at great length denouncing the effect of the *Lampf* decision, and targeting the particular defendants they believed would get away if private plaintiffs were not allowed to press their 10b-5 claims.

1. The Senate Hearings on Lampf

In hearings conducted before the Senate, SEC chairman Richard Breeden advocated that Congress implement a two and five year combination statute.[111] He reasoned that the *Lampf* rule provided an unreasonably short period of limitations that would reduce the viability of private suits under Section 10(b).[112] Breeden called this statute of limitations, "unrealistically short," and would cause "undue damage to private litigation . . . sharply limit[ing] the number of cases that will be brought."[113]

The SEC recognizes that the motivation to press private suits is an integral part

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104. On appeal, the Ninth Circuit held the provision unconstitutional because it (referring to § 318) "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "[subsection (b)(6)(a)] directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court"; Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

105. *Robertson*, 112 S. Ct. at 1414.

106. *Id.* at 1413.

107. *Id.*

108. *Id.*

109. Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"), 15 U.S.C. § 78t-1(b)(4) (1988).

110. *See, e.g.*, 137 CONG. REC. H11,811-12 (daily ed., Nov. 26, 1991) (Statement of Rep. Dingell). "This provision is critically important because *Lampf* has resulted in the dismissal of many private rule 10b-5 actions against figures in major financial scandals including Charles Keating, Michael Milken and others. Those cases can now be reinstated . . . ." Representative Dingell later wrote to the Chairman of the Committee on Banking, Finance and Urban Affairs, "In light of your Committee's extensive hearings on Charles Keating . . . we hope you will support this result." 137 CONG. REC. H11,811 (daily ed. Nov. 26, 1991).

111. "Breeden Endorses Bill to Reverse Decision on § 10b Limitations Period," 23 SEC. REG. & L.REP. (BNA) 1141 (July 26, 1991).

112. *Id.*

113. *Id.*

of SEC regulation.[114] The fear of a private antitrust or securities claim persuades issuers and secondary resellers to comply with the stringent regulations the SEC proffers. Therefore, the SEC felt that any statute of limitations that allowed suits to be dismissed would negatively effect the enforcement processes.[115] The SEC's position was the impetus for the Congresional action at the heart of this debate.

2. Analysis of Section 27A and its Effects

To ensure that private prosecution of inside traders would continue, Congress buried within the Deposit Insurance Reform and Taxpayer Protection Act of 1991,[116] the provision adding Section 27A to the 1934 Exchange Act. This section was designed to address the perceived plight of plaintiffs in the hundreds of federal 10b-5 claims that were dismissed by *Lampf* and *Beam*.[117] Congress enacted Section 27A intending to reinstate for these plaintiffs the right to redress their grievances removed by way of *Lampf* and *Beam*. Instead, it spawned a new wave of ancillary litigation challenging the constitutionality of Section 27A and weighing the merits of reinstating previously dismissed claims. The question turned from which state's law to apply, to whether the federal law was constitutional.

In the weeks following the enactment of Section 27A, many of the claims extinguished by *Lampf* were reinstated. Several others were not, as district court judges ruled that Congress had stepped beyond its constitutional power and impermissibly violated the Separation of Powers Doctrine.[118] Another district court reinstated claims thus implicitly rejecting the notion that Section 27A was unconstitutional.[119] Still other courts reinstated 10b-5 claims without consideration of the constitutionality of Section 27A.[120] Other district courts ruled Section 27A was constitutional.[121]

V. THE ARGUMENTS SURROUNDING SECTION 27A

No language in Section 27A changes the law; the statute merely prohibits the retroactive application of the *Lampf* decision. As of this writing there is still no express statute of limitations within Section 10(b). Congress did not enact a uniform statute of

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114. "[P]rivate actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

115. *See supra* note 111.

116. S.543 102d Cong., 2d Sess. (1991); See, 137 CONG. REC. S10,675 (Nov. 21, 1991).

117. *See supra* note 111.

118. *See supra* note 16.

119. *See* Litton Indus. v. Lehman Bros. Kuhn Loeb Inc., 967 F.2d 742, 751 n.6 (2d Cir. 1992) ("Although the parties have not suggested that section 27A is unconstitutional, we are aware that several district courts have so held, but, like Judges Conner and Lasker, we are unimpressed by the cogency of their analysis.").

120. These courts rely on Jean v. Nelson, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision.").

121. District courts finding Section 27A constitutional: Rabin v. Fivzar, 801 F. Supp. 1045 (S.D.N.Y. 1992) (finding that § 27A(a) did not violate separation of powers or 5th Amendment due process); Brown v. Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992) (addressing separation of powers, due process and equal protection issues); Adler v. Berg Harmon Assocs., 790 F. Supp. 1235 (S.D.N.Y. 1992) (failing to address equal protection issues); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476 (S.D.N.Y. 1992); TBG, Inc. v. Bendis, No. 89-2423-0, 1992 WL 80622 (D.Kan. Mar. 5, 1992) (addressing separation of powers issue); Ayers v. Sutliffe, No. C-1-90-630, slip op., 1992 WL 100132 (S.D.Oh. Feb. 11, 1992) (addressing separation of powers and equal protection issues); Venturtech II, Ltd. v. Deloitte Haskins & Sells, 790 F. Supp. 574 (E.D.N.C. 1992) (addressing separation of powers, due process and equal protection issues).

limitations, instead, it passed Section 27A(a) which allows plaintiffs to renew claims that would otherwise be dismissed on statute of limitations grounds had *Lampf* been applied retroactively.[122] Section 27A(b) forces federal courts to reinstate claims that were dismissed under *Lampf*.[123]

A. The *Klein* Argument Against Section 27A

For many courts, Section 27A falls impermissibly within the parameters determined to be the sole province of the Supreme Court.[124] This is the modern interpretation of the decision of *United States v. Klein*.[125] Just as *Klein* directed that Congress could not "prescribe rules of decision to the judicial department of the government in cases pending before it,"[126] federal courts considering Section 27A have concluded that "Congress cannot direct federal courts to ignore Supreme Court precedent in a discrete category of pending cases without violating the separation of powers principle."[127] Section 27A(b) forces courts to reinstate claims dismissed with prejudice, directly violating *Klein*.[128]

The SEC maintains that Section 27A does not violate the *Klein* principle. The SEC asserts that Section 27A merely removes from defendants a procedural defense of statute of limitations without prescribing the outcome of the litigation.[129] The SEC bases its position on the Supreme Court's decision in *United States v. Sioux Nation of Indians*.[130]

In *Sioux Nation* the Supreme Court ordered the Court of Claims to allow Native American plaintiffs to relitigate claims that had been earlier dismissed. By doing so, the Supreme Court removed the procedural defense of res judicata from the defendant, the United States. The case concerned a debt allegedly owed by the government. That debt, unlike alleged compensatory damages under the Securities Laws, was concrete and provable. Therefore, the facts and the effect of *Sioux Nation* are distinguishable from the issues and facts concerning *Lampf* and *Beam*.

In addition, the *Sioux Nation* Court determined that removing a procedural defense from a litigant does not violate *Klein*.[131] However, this reasoning is inapplicable to the Section 27A inquiry. The key issue is not whether Section 27A removes a procedural defense, but whether it grants exemption from retroactive application of a

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122. *See supra* note 5. (Section 27A(a) directs courts to apply the limitation period under Section 10(b) to claims commenced on or before June 19, 1991, provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991).

123. *Id.* (Section 27A(b) directs courts to reinstate cases dismissed as time-barred subsequent to June 19, 1991 if they would have been timely under the law existing on that date).

124. *See* Plaut v. Spendthrift Farms, 1 F.3d 1487 [hereinafter "Plaut II"] (6th Cir. 1993).

125. 80 U.S. at 128.

126. *Id.* at 146.

127. *Bank of Denver*, 789 F. Supp. at 1098; *see also, In re* Brichard Securities Lit., 788 F. Supp. at 1106, (quoting Klein, at 147-48), ("Congress left *Lampf* untouched but instructed the courts to apply it to a certain group of cases. As in *Klein*, the "great and controlling purpose" was to direct the outcome in specific cases without changing the law.").

128. Henderson v. Scientific Am., 971 F.2d 1567, 1576 (Wellford, J., dissenting).

129. "SEC Files Joint Brief with Department of Justice, Arguing that Statute of Limitations Provision in § 27A of the Securities Exchange Act Is Constitutional." SEC News Release 92-20, 1992 WL 83265 (S.E.C.) (arguing in the Henderson Case before the 11th Circuit that the defendants' claim of unconstitutionality was unfounded).

130. *Plaut II*, 1 F.3d at 1497-98 (holding that Congress' rescission of a technical procedural defense did not violate the *Klein* rule).

131. *Id.*

Supreme Court decision. If anything, *Sioux Nation* supports the Supreme Court's ability to retroactively amend a procedural defense, but does not provide a basis for Congress to overrule the Supreme Court.

B. If *Beam* Was Decided Under the Constitution, Congress Cannot Enact Legislation to Overrule its Application in the Federal Courts

When the Supreme Court finds a new rule of law and applies that law to the litigants in a civil case, the rule applies retroactively to all pending cases.[132] The enactment of Section 27A runs contrary to this principle. The Supreme Court left plaintiffs in *Lampf* without recourse, while other similarly situated litigants who filed their claims later, still enjoyed the protection of their states' statutes of limitation.[133] It is counterintuitive to the purpose of the statute not to have *Lampf* apply retroactively.[134] Congress was concerned with equitable and uniform handling of federal claims to all citizens. To allow state law to dictate the statute of limitations, perpetuates a non-uniform application of the Securities Act to residents of different states.

Some courts have found it persuasive that Justice Souter cited Supreme Court precedent to determine that the Constitution mandated retroactive application of new rules of law to pending cases.[135] "The constitutional grounds for *Beam* may be mixed," said one court, "however, the end result is that *Beam* is based on the Constitution."[136] As a constitutionally based decision, *Beam* would be outside the power of Congress to amend by legislation.[137]

C. The Separation of Powers Argument: Congress Cannot Act as a Super-Appellate Court

The *Klein* argument aside, the Separation of Powers Doctrine is also violated when Congress seeks to reverse a Supreme Court decision. To preserve the separation of powers, Congress is forbidden from enacting a law that reverses or allows for review of a final judgment of either the Supreme Court or lower federal courts.[138] Section 27A does just that and as such violates the principle of separation of powers.[139]

Section 27A, in one court's words, "did not enact a statute of limitations for [Rule] 10b-5 cases, but left the *Lampf* rule untouched."[140] Section 27A intrudes upon the adjudicative function of the courts by mandating "what rule may not be applied, even though it did not enact a substantive or procedural law."[141] Another court said that Congress "effectively acted as a 'super-appellate court,' overturning *Lampf* without

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132. *Beam*, 111 S. Ct. at 2447-48.

133. Section 27A revives the statute of limitation for claims filed before June 19, 1991. The plaintiffs in *Lampf* filed their actions on November 3, 1986. Under the *Lampf* decision, the named plaintiffs' claims are untimely, while claims filed between November 3, 1986 and June 19, 1991 are still viable under the plaintiffs' forum states' statute of limitation. *See infra* note 149.

134. *See supra* note 29.

135. *TGX v. Simmons*, 786 F. Supp. at 592.

136. *Brichard*, 788 F. Supp. at 1111-1112.

137. *Plaut II*, 1 F.3d at 1499.

138. Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989).

139. For a more in-depth analysis of Section 27A's infringement upon the Separation of Powers Doctrine read Judge Legge's decision in *In re* Brichard Securities Litigation, 788 F. Supp. 1098 (N.D.Cal. 1992).

140. *Id.* at 1103.

141. *Brichard*, 788 F. Supp at 1104.

replacing that decision with any new law."[142]

D. The Fifth Amendment Prohibition Against Resurrecting Final Judgments as a Bar to Section 27A

Subsection (b) of Section 27A requires federal courts to reinstate, upon motion by the plaintiffs, any 10b-5 claim pending on the date *Lampf* was announced and dismissed prior to the enactment of Section 27A.[143] Section 27A(b) raises particularly difficult constitutional issues because it directs the reversal of final judgments entered by federal courts. Such an edict clashes directly with the venerable principle that "Congress cannot reverse or suspend a specific decision of a federal court."[144] As one court put it, federal judges are mindful that an erosion of this principle might transform their purportedly final judgments into "advisory opinions."[145] The result would be "a legislative appeal of judicial action" that was never intended by the framers of the Constitution.[146]

Section 27A(b) allows plaintiffs to reinstate previously dismissed anti-fraud claims provided they fulfill the requirements set forth in the statute.[147] Defendants challenging Section 27A(b) claim the act violates Fifth Amendment due process because it directs federal courts to reverse or suspend final judgments. Indeed, under the vested rights doctrine, the legislature may not, consistent with Article III and the Fifth Amendment, direct the reversal or suspension of a decision of a federal court,[148] or take away rights which have been once vested by judgment.[149] However, absent the entry of a final judgment, the dismissal of an action as time-barred does not vest the prevailing party with any property rights.[150]

The case perhaps most often cited for the vested rights doctrine is *McCullough v. Virginia*,[151] in which the Supreme Court held that the legislature lacks the power to

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142. *Bank of Denver*, 789 F. Supp. at 1097.

143. *See supra* note 5.

144. *Plaut I*, 789 F. Supp. at 234. *See also* Johnson v. CIGNA, 789 F. Supp. 1098, 1100 (D.Colo. 1992) ("The Supreme Court has repeatedly held that litigants have vested rights in final judgments and that Congress has no power to take away those vested rights through later legislation.").

145. *Brichard*, 788 F. Supp. at 1107.

146. *Plaut I*, 789 F. Supp. at 235.

147. To reinstate a claim the plaintiffs must prove that their claim was timely filed under the state statute of limitations as it existed on June 19, 1991, and that their case was dismissed pursuant to the statute of limitations found in the *Lampf* decision. Section 27A(b) provides that the limitation period for a claim under Section 10b or Rule 10b-5 commenced on or before June 19, 1991; (1) which was dismissed as time barred subsequent to June 19, 1991, and (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. 15 U.S.C. § 78aa-1(b) (West Supp. 1992) (this section does not authorize reinstatement of a claim that would have been time-barred under the principles applicable on June 19, 1991).

148. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

149. *McDaniel*, 855 F.2d at 810-12 (11th Cir. 1988) ("Congress' power to create new causes of action, new legal rights, or impose previously unrecognized duties, does not permit it to disturb a right that vests as the result of a judgment."); McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("when . . . actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.").

150. *See* Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 310-16 (1945) (where defendant's "statutory immunity from suit had [not] been fully adjudged so that legislative action deprived it of a final judgment in its favor", due process is not violated by restoration of remedy to the plaintiff); Campbell v. Holt, 115 U.S. 620 (1885).

151. 172 U.S. 102, 123-24 (1898).

take away rights that have been vested by final judgment:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when these actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.[152]

Section 27A(b), [that which resurrects claims dismissed with prejudice under the *Lampf* decision] clearly abridges the doctrine of vested rights. Defendants to 10b-5 claims whose cases were dismissed under *Lampf*, face the same problems as the parties in *McCullough*, namely an over-zealous legislature.

E. Legislative History as Evidence of Separation of Powers Violation.

The legislative history of Section 27A clearly indicates that Congress intended to target Rule 10b-5 defendants and hold them responsible under a special rule of decision.[153] By enacting Section 27A, Congress did not overrule the *Beam* decision in all cases.[154] Defendants in claims other than 10b-5 will still be subject to *Beam* for retroactive application of a new rule of law. This intent evidences a political reaction to the controversy caused by courts applying *Lampf* retroactively.

There is no doubt that the motivation and the intent behind the law was to hold out certain Rule 10b-5 defendants for special treatment under the law.[155] As the legislative history is a proper place to ascertain whether federal enactment is unconstitutional, there is no doubt as to the status of Section 27A.[156] The legislative history reflects not an intent to clarify federal law and provide a single cogent method for determining timeliness, but an intent to single out the most egregious offenders of Rule 10b-5. As Judge Batchelder recognized in *Plaut*, Senator Bryan himself referenced particular defendants and singled them out as being the target of the new law.[157] Secondly, the legislative history evidences a clear intent to resurrect final judgments, and make viable claims that were fully adjudicated or dismissed with prejudice.[158] Both of these examples show that the law cannot be characterized by plaintiffs or the United States,[159] as either a change in the underlying securities law, or an exercise of Congress' power to administer the Constitution.

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152. *Id.*

153. 137 CONG. REC. H11812 (daily ed. Nov. 26, 1991) (statement of Rep. Mackey, MICH., "[T]he Supreme Court signed over a multi-billion dollar check to Michael Milken, Charles Keating, and a coalition of special interests which produced the financial wreckage of the 1980s."); 137 CONG. REC. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan, "We are only addressing the most immediate problem - the unfair application of the Supreme Court's *Lampf* decision to cases that were pending at the time that the decision came down."). Sen. Bryan also explicitly referenced noted securities defendants, the Bank of Credit and Commerce Int'l, Drexel Burnham, E.F. Hutton, Ivan Boesky, Michael Milken, Salomon Brothers, and Lincoln Federal Savings by name.

154. *Brichard*, Securities Lit. 788 F. Supp. at 1103, ("What Section 27A did was to say that the Lampf rule should not, contrary to the *Beam* and *Lampf* decisions, be applied by federal courts to existing 10b-5 cases.").

155. *See supra* note 151.

156. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (ruling that when the legislative history, "affirmatively" and "clearly" confirms the suspicion of unconstitutionality, the court must acknowledge it).

157. *Plaut II*, 1 F.3d at 1499.

158. *Id.*

159. When acting as intervenor as a matter of right when the constitutionality of a law is challenged. 28 U.S.C. § 2403(a).

F. Analysis of the Treatment Section 27A has Received Prior to the Grant of Certiorari

1. The Sixth Circuit's Response to Section 27A, Plaut v. Spendthrift Farms

The Sixth Circuit was the first appellate court to rule that Section 27A was unconstitutional.[160] Judge Batchelder, who wrote the majority opinion, ruled Section 27A an impermissible violation of the separation of powers, because it disturbed final judgments between private litigants.[161] The court also held that the acts of Congress, in debating and enacting Section 27A, were violative of the vested rights doctrine enunciated in *McCullough v. Maryland.*[162] Additionally, the court recognized that the Supreme Court's decision in *Seattle Audubon* was inapplicable to support a claim of constitutionality.[163] That decision, Judge Batchelder wrote, concerned the amendment of an existing statute and therefore did not reach questions of whether Congress infringed on Article III's grant of power to the judiciary.[164]

2. District Court Responses to Section 27A

The first district court to rule that Section 27A violated the Separation of Powers Doctrine rendered its opinion in *TGX v. Simmons.*[165] The District Court relied on the holding in *Beam*[166] to determine that Congress had impermissibly entered into the realm of the Supreme Court's province. The court ruled that Section 27A breached the "selective prospectivity constitutionally proscribed in *Beam.*"[167]

Two cases decided by Judge Babcock of Colorado support the view of Judge Beer, albeit for somewhat different reasons.[168] In the first decision, *Bank of Denver v. Southeastern Capital Group,* Judge Babcock ruled that:

> Congress did not retroactively amend the section to state an express limitations period. Rather, 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 rule 10b-5 set out in *Lampf.* Congress thus effectively acted as a 'super-appellate court,' overturning *Lampf* without replacing that decision with any new law.[169]

Judge Babcock believed Congress had donned the traditional robes of the judiciary and usurped the core judicial function of the Article III courts.[170] His view comes directly from his interpretation of the Supreme Court's decision in *Nixon v. Administrator of General Services.*[171] In *Nixon,* the Court set forth its test to determine when

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160. *Plaut II,* 1 F.3d 1487, 1499.
161. *Id.* at 1493.
162. *Id.*
163. *Id.* at 1495-96.
164. *Id.* at 1496.
165. 786 F. Supp. at 587.
166. *Id.* at 594.
167. *Id.*
168. Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D.Colo. 1992); Johnson v. CIGNA, 789 F. Supp. 1098 (D.Colo. 1992).
169. 789 F. Supp. at 1097.
170. *Id.*
171. 433 U.S. 425 (1977).

an act of Congress disrupts the proper balance between the branches of government. The test rests on whether the actions of one branch prevent another branch from accomplishing its constitutionally assigned functions.[172] Only where the potential for disruption is present must a federal court determine whether the impact is justified by an overriding need to promote objectives within Congress's constitutional authority.[173] Judge Beer determined that in enacting Section 27A Congress did exactly what the *Nixon* Court prohibited. In the end, Judge Babcock's opinion described how Congress could have permissibly accomplished what they hoped to in Section 27A, but did not, either for political reasons or because of oversight.[174]

The second decision rendered by Judge Babcock, addressed Section 27A(b) in a Fifth Amendment context, believing that Congress could not upset final judgments. Judge Babcock reasoned that since "Congress does not have the power to upset final judgments,"[175] the previously dismissed action could not be revived. In the end, Judge Babcock seems to have mixed Beer's position with a healthy dose of *James Beam* to reach this conclusion.

3. Support for Section 27A: The Tenth and Eleventh Circuits Use Seattle Audubon *to Uphold Constitutionality*

In *Anixter v. Home-Stake Productions Co.*[176] and *Henderson v. Scientific-Atlanta Inc.*[177] respectively, the Tenth and Eleventh Circuits held that Section 27A is constitutional. Basing their decisions on *Seattle Audubon*,[178] these courts held that Section 27A was a change in existing law, rather than the creation of a new federal rule. An analysis of the two opinions demonstrates that they suffer from the same legal fallacy as criticized by Judge Batchelder in *Plaut*.[179]

In *Henderson*, the Eleventh Circuit in a 2-1 decision, held that Section 27A did not violate due process or separation-of-powers principles. The majority reversed the lower court's dismissal of a securities fraud class action,[180] accepting the plaintiffs' claim that the amendment creating Section 27A, should be applied to this suit and requiring the lower court to reinstate their case.[181]

The majority also rejected defendant Scientific-Atlanta's claims that retroactive application would violate due process and equal protection principles of the Fifth Amendment.[182] The majority found that Section 27A presents no separation-of-powers problems because it "has not interfered with the judicial process. The Act does not require courts to make any particular findings of fact or applications of law to fact."[183] "Section 27A," the *Henderson* majority observed, "is a classic example of Congress' practice of 'overruling' a statutory construction by the Supreme Court."[184]

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172. *Id.* at 441.
173. *Bank of Denver*, 789 F. Supp. at 1095 (quoting *Nixon*, 433 U.S. at 443).
174. *Id.* at 1098.
175. 789 F. Supp. at 1100.
176. 977 F.2d 1549 (10th Cir. 1992).
177. 971 F.2d 1567 (11th Cir. 1992).
178. *Henderson*, 971 F.2d at 1570; *Anixter*, 977 F.2d at 1552.
179. *Plaut II*, 1 F.3d at 1495
180. 971 F.2d at 1570.
181. *Id.*
182. *Id.*
183. 971 F.2d at 1569.
184. *Henderson*, 971 F.2d at 1571, n.4.

In dissent, Senior Circuit Judge Harry W. Wellford recognized that these courts have emphasized that Section 27A marked a change in the law, effected through a partial reversal of a Supreme Court decision. He concluded that the enactment, as written, impermissibly infringed upon the powers delegated to the courts under Article III.[185]

The Tenth Circuit ruled in *Anixter* that "[s]tatutes of limitations traditionally reside in the legislative branch."[186] Indeed, according to one district court, the Supreme Court's action in *Lampf* was "possible only in the absence of a statutory limitations period."[187] However, while this area may be the sole province of the Legislative Branch, Congress did not amend the statute of limitations or change the law. Congress phrased the law merely to effect the application of a rule of decision in the Judiciary.

The *Anixter* decision also reduced the significance of Section 27A's effect on the principle of retroactivity announced in *Beam*. "*Beam* was carefully crafted," the Tenth Circuit observed, "to garner a plurality to agree only that retroactive application of a rule of law announced in a case was a matter of a choice of law and not of constitutional import."[188] As a result, the *Anixter* court concluded that Congress's alteration of the Rule 10b-5 statute of limitations should not be susceptible to a constitutional challenge.

Both the Tenth and Eleventh Circuit decisions emphasized that Section 27A directs no factual findings on the merits in a particular case.[189] The provision "merely turns back the legal clock to the period just prior to *Lampf* [italics supplied]" and then leaves it to courts to decide reopened cases on their merits.[190] Yet, by turning back the clocks, the district courts reopen decisions that were made final earlier, in direct opposition to the mandates of *McCullough* and *Klein*.[191]

VI. CONCLUSION

It is axiomatic that "within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty."[192] Under this system, the legislature is to enact laws of general application and the courts are to decide particular cases arising under those laws and to exercise the exclusive authority to "say what the law is."[193] Conversely stated, "[t]he judicial power cannot legislate, nor can the legislative power act judicially."[194]

Where acts of the legislative branch prevent the judicial branch from accomplishing its constitutionally assigned functions, Congress "passe[s] over the limit which separates the legislative from the judicial power."[195] While Congress has the power to change the law underlying federal causes of action, it failed to do so in this case. Sec-

185. *Id.* at 1572.
186. *Anixter*, 977 F.2d at 1552.
187. *Axel Johnson*, 790 F. Supp. at 479 n.2.
188. *Anixter*, 977 F.2d at 1554.
189. *Id.* at 1552 (The *Anixter* court noted that "§ 27A does not direct courts to make specific factual findings or mandate a result in a particular case.").
190. *Id.* (quoting *Adler*, 790 F. Supp. at 1243).
191. *See Plaut II*, 1 F.3d at 1494.
192. Mistretta v. United States, 488 U.S. 361, 380 (1989).
193. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
194. Pennsylvania v. Wheeling & Belmont Bridge, 59 U.S. (18 How.) 421, 441 (1856) (McLean, J., dissenting).
195. United States v. Sioux Nation of Indians, 448 U.S. 371, 391 (1980).

tion 27A does not change the law. It does not prescribe a new limitations period, nor does it add a substantive rule for future litigants. Section 27A merely directs courts to ignore the *Beam* decision when they are confronted with 10b-5 claims. In all other cases, no matter what type of law, *Beam* is still authoritative. The Court in *Beam* explicitly rejected this selective prospectivity, and will do so again in *Morgan Stanley & Co. v. Pacific Mutual Life Ins.*[196]

The entire debacle reflects a counterintuitive way of thinking. According to the Congressional Record, one of the reasons for passing Section 27A into law, was that under *Lampf* as applied by *Beam*, there would be unfair treatment of the rights of litigants depending on which state they filed their actions. In states where the one and three year combination statute was already the law, litigants were unaffected by *Lampf*. Therefore, under Section 27A litigants are treated unfairly. Section 27A allows litigants in one state to press a federal claim that would be untimely in another state. Until *Lampf*, the SEC and the courts were in agreement that there was a pressing need for a uniform federal statute of limitations.[197] It was not until the public responded to *Lampf* that Congress decided to remedy the problem of state borrowing. In an effort to appease their constituents, several members of Congress acted quickly and unconstitutionally.

The relation of the legislature to the judiciary cannot be compromised to promote the relationship of the legislature to the citizenry. The Supreme Court does not decide its cases based on public opinion, and laws trumping Supreme Court rulings must not be enacted merely to appease the public concern. By specifically referencing particular defendants and citing them as motivation for the law, Congress fell into conflict with the *Klein* decision. Their action was entirely political, and did not reflect a rational evaluation of the proper means of achieving the desired effect.

Unfortunately, the limitations period that the Supreme Court settled on was politically unpopular. Not a big concern for the Court or the SEC whose interests were consistent application of the law and the prevention of fraud. The concern by members of Congress, who with an impending election on the horizon could not sit and allow the bullies of the junk bond market to escape with the savings of widows and orphans, was different.[198] It is understandable, given the duties of Congress that Section 27A was the solution they proposed. It is not politically correct to decide an issue in favor of the rights of defendants; after all, that's the Supreme Court's job.

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196. *See supra* note 1.

197. *See supra* note 38.

198. Sherry R. Sontag, *"The Battle to Stretch the Limits"* NATIONAL L.J., November 4, 1991, at 1; (The political power of these two groups seems to cross into areas of which they would suffer no harm. While Senators produced widows and orphans to testify at the Senate hearings on Section 27A, not many poor widows or orphans seek out the advice of law firms as to which limited partnerships would be best as tax shelters.).

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