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NOTES

IS PURELY RETROACTIVE LEGISLATION LIMITED BY THE SEPARATION OF POWERS?: RETHINKING *UNITED STATES V. KLEIN*

TABLE OF CONTENTS

INTRODUCTION

The case law regarding the division of powers encompassed by our "structural Constitution" can make an area as imprecise as freedom of speech seem a paragon of clarity.[1] In hard cases, deciphering the line between the power of the federal courts and the federal legislature rarely involves actions that are clearly labeled "adjudication" and "legislation," for only conflicts in which these categories blur are likely to be brought to court. This Note addresses one type of problem that occasionally arises concerning the separation of powers between the courts and Congress: Congress' power to enact legislation that affects the outcome of cases pending in federal courts.[2]

When addressing this question, the strategy of modern courts has been to draw a definitional line between legislative and judicial acts. The principal precedent upon which modern decisions rely is the post-Civil War case of *United States v. Klein*.[3] As the substance of legislation begins to replace the function of the judiciary, or seems to strain our traditional conception of what legislation ought to accomplish, the courts have attempted to articulate rules that will pigeonhole the legislation into one of two categories: a valid "legislative" act or an invalid "judicial" act. Modern courts have derived two rules from *Klein* that, they argue, establish this distinction: (1) legislation is invalid if it prescribes a rule of decision in a pending case without changing the underlying law; (2) legislation is invalid if it mandates

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1 Modern commentators have described the Supreme Court's separation of powers jurisprudence as a muddle. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) ("Unanimity among constitutional scholars is all but unheard of. Perhaps when achieved it should be celebrated. But one point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle."). Brown cites a long list of scholars in support of this claim. *See, e.g.*, Stephen L. Carter, *From* Sick Chicken *to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 721 (1987); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489-96 (1987); Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 312 (1989).

2 This is a problem that is likely to arise more frequently given the Court's recent decision in James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991). As discussed *infra* notes 12 to 17 and accompanying text, *Beam* appears to portend retroactive application of new judicial law in all civil litigation. As such, unpopular judicial opinions may frequently fuel Congressional attempts to change the consequences of their retroactive application. *But see* Anthony M. Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period for Federal Securities Actions*, 28 TULSA L.J. 23, 61-64 (1992).

3 80 U.S. (13 Wall.) 128 (1872).

findings of fact or conclusions of law.[4] Each of these rules is intended to identify a characteristic of the legislation that takes it beyond a legislative act to the performance of a typically judicial task.

The purpose of this Note is twofold. First, it challenges the adequacy of this categorical approach, arguing that this approach does not follow from a careful reading of *Klein* and that it fails to provide principled guidance for the lower courts. Rules involving terms such as "underlying law" and "fact finding" are hopelessly opaque.[5] Second, this Note offers an alternative frame of reference for approaching this separation of powers problem by focusing on the retroactive aspect of such legislation. The Note contends that a separation of powers analysis in this area should assess the purposes and consequences of the retroactive legislation, rather than attempt to wedge the legislation into some murky category.

The occasion for addressing this issue is presented by the recent spate of lower federal court decisions regarding the constitutionality of section 27A of the Securities Exchange Act, enacted as section 476 of the Federal Deposit Insurance Corporation Improvement Act (FDICIA).[6] Section 27A provides a new limitations period for all section 10(b) securities actions commenced prior to June 20, 1991. The legislation is retroactive in scope insofar as it relates only to events prior to enactment and, more narrowly, as it relates only to legal actions commenced prior to enactment. To understand the underlying

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4 Some commentators include a third alternative: legislation is invalid if it mandates a particular decision on the merits or forecloses a decision on the merits. This formulation, however, does not appear in the principal decisions of the circuit courts and, if taken literally, would apply to any application of new law in a pending litigation. Thus, while this formulation suggests the evil underlying the legislation at issue in *Klein*, it does not provide any guidance for deciding specific cases. For an explanation of the three interpretations of *Klein* offered by district courts addressing the constitutionality of § 27A, see Craig W. Palm, *The Constitutionality of Section 27A of the Securities Exchange Act: Is Congress Rubbing* Lampf *the Wrong Way?*, 37 VILL. L. REV. 1213 (1992). Palm examines § 27A in light of each of these rules and concludes that is it constitutional. *Compare* Jill E. Fisch, *As Time Goes By: New Questions About The Statute of Limitations For Rule 10b-5*, 61 FORDHAM L. REV. S101, S119-S120 (1993) (conflating the three criteria and concluding that § 27A is unconstitutional); Heidi J. Goldstein, Note, *When the Supreme Court Shuts Its Doors, May Congress Re-Open Them?: Separation of Powers Challenges to § 27A of the Securities Exchange Act*, 34 B.C. L. REV. 853, 874-75 (1993) (concluding that the operative rule is whether the legislation changes the law); Patrick T. Murphy, Note, *Section 27A of the SEA: An Unplugged* Lampf *Sheds No Constitutional Light*, 78 MINN. L. REV. 197, 211-12 (1993) (emphasizing the "rule of decision" rationale and concluding that § 27A(a) usurped the judicial function but nonetheless is constitutional); Ronner, *infra* note 266, at 1067-72 (proposing a new test for *Klein* situations and concluding that § 27A is unconstitutional). Although agreeing with Palm's ultimate conclusion, the purpose of this Note is to provoke a reconsideration of the way in which we analyze this issue.

5 *See* Axel Johnson Inc. v. Arthur Andersen, 6 F.3d 78, 81 (2d Cir. 1993) ("The conceptual line between a valid legislative change in law and an invalid legislative act of adjudication is often difficult to draw.").

6 15 U.S.C. § 78aa-1 (1992).

purpose of section 27A and the mechanism that Congress adopted to achieve this purpose, it is necessary to recount briefly the events leading to its enactment.[7]

On June 19, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,[8] the Supreme Court announced a "new rule" for determining the appropriate statute of limitations period for section 10(b) securities actions. The Court rejected the traditional approach in Section 10(b) actions of applying the most analogous state statute of limitations. Under the new rule, the appropriate limitation period is the most analogous federal period, as prescribed by sections nine and fifteen of the Securities Exchange Act.[9] These sections provide that actions must be filed within one year of the discovery of the fraud but not, in any case, more than three years after the fraud occurred.[10] In those jurisdictions that had not previously adopted the one/three period, the *Lampf* rule reduced the period of time allowed for filing and eliminated the liberal tolling doctrines provided by state fraud limitation periods.[11]

On the same day as *Lampf*, the Court decided *James B. Beam Distilling Co. v. Georgia*.[12] The issue raised in *Beam* was the propriety of "selective prospectivity." By this phrase, the Court referred to the judicial practice of deciding a case by introducing a "new" rule of law that upsets prior precedent,[13] and applying that new rule to the parties before the court, but not to other pending litigation or, more broadly, to causes of action arising prior to the decision of the case.[14] The Court held in *Beam* that judicial use of selective prospectivity was improper.[15] *Beam*'s holding implied, of course, that *Lampf*'s limitations

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7 *See* Sabino, *supra* note 2, at 27-30; Fisch, *supra* note 4, at S109, S115; Palm, *supra* note 4, at 1260-64.

8 111 S. Ct. 2773 (1991).

9 For a discussion of the adoption of the new limitation period by *Lampf*, see Thomas H. Stewart, Note, *One Statute, One Statute of Limitations; At Last Uniformity For Section 10(b) Claims:* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 60 U. CIN. L. REV. 533 (1991).

10 *Lampf*, 111 S. Ct. at 2780-81.

11 *See* Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607 (1992) (arguing that the better reading of *Lampf* is that equitable tolling doctrines survive).

12 111 S. Ct. 2439 (1991).

13 We should set aside the question of whether one deems the novelty as *making* new law or as *finding* the law to be other than it had heretofore been understood.

14 The Court contrasted "selective prospectivity" with "pure retrospectivity" and "pure prospectivity." A court applying the principle of pure retrospectivity would apply the new rule to all pending and future cases. A court applying the principle of pure prospectivity would treat the new rule as a law to be applied in future cases, but refuse to apply it to the parties presently before the court or to pending litigants. *Beam*, 111 S. Ct. at 2443-44.

15 The ground for the holding is the subject of lively debate. The opinion of Justice Souter, announcing the judgment of the Court was joined only by Justice Stevens. Justice Souter appears to rest the holding on the application of conflict of laws principles. Justice

period applied to pending as well as future section 10(b) litigation.[16] As many plaintiffs, relying on the more liberal state limitations periods applicable prior to *Lampf*, had brought section 10(b) actions more than three years after the alleged fraud, defendants quickly moved to dismiss their claims.[17]

Scalia's concurrence, joined by Justices Marshall and Blackmun, based his decision on constitutional grounds. He found the use of selective prospectivity to be beyond the judicial power of Article III courts. Justice White concurred on *stare decisis* grounds because he felt that *Griffith v. Kentucky*, 479 U.S. 314 (1987) governed, despite the fact that he dissented in *Griffith*. Justice O'Connor, joined by Rehnquist and Kennedy, dissented. *See The Supreme Court, 1991 Term—Leading Cases*, 105 HARV. L. REV. 177, 339-49 (1992).

16 One commentator has suggested that it is uncertain whether the *Lampf* rule would be applied retroactively to other pending cases. The argument is that *Chevron v. Huson*, 404 U.S. 97 (1971), creates a special exception to the *Beam* rule, which prohibits selective prospectivity, for changes in limitation periods. *See* Sabino, *supra* note 2, at 61-65. The claim amounts to little more than wishful thinking, as Justice O'Connor's despairing dissent in *Lampf* indicates. Justice Souter's approach in *Beam* rests on the notion that treating the parties before the court and the parties in pending cases differently, a practice implicit in selective prospectivity, is inequitable. That policy concern is unaffected by differences in the type of rule changed. While the distinction between limitation rules and substantive rules may be relevant to a determination of whether or not to apply pure prospectivity, the Court's decision to apply the new rule to the *Lampf* parties foreclosed consideration of the new rule's applicability to other pending parties. *See infra* note 21, citing cases applying *Lampf* retroactively.

Lyman Johnson offers a better argument regarding the limited effect of *Lampf* on pending plaintiffs' actions. He argues that the *Lampf* rule does not spell the demise of equitable tolling nor the triumph of repose. This is because the one year/three year period should prompt courts to recoguize that a good doctrine of repose distinguishes between applications in the context of *fraudulent concealment* and applications in simple *fraud*. According to Johnson, in cases where the defendant conceals the fraud, the legal clock does not begin to run because the wrong has not ceased. *See* Johnson, *supra* note 11, at 614-17. For a case misapplying the tolling doctrine as advocated by Johnson, see McCool v. Strata Oil, 972 F.2d 1452 (7th Cir. 1992).

17 For example, suppose that Smith is a client of broker Jones in Denver. Colorado has a three year statute of limitations for fraud and a rule for equitable tolling of the period that runs from the date of the discovery of the fraud. Jones defrauds Smith in violation of § 10(b). Consider the following two scenarios. First, Smith discovers Jones' fraud one year after the occurrence of such fraud. One and a half years later, Smith files a § 10(b) action against Jones. Under Colorado law, Smith is within the three year period with or without equitable tolling. However, under the *Lampf* rule, Smith failed to bring the action within one year of discovery and so the action is time barred. Second, Smith discovers the action two and a half years after the fraud and then files a § 10(b) action one year later. Under Colorado law, Smith's filing is timely under the equitable tolling doctrine. Under the *Lampf* rule, Smith is time barred because the three year period serves as a statute of repose. Motions for dismissal based on these grounds were affirmed by several circuit courts. Pommer v. Medtest Corp., 961 F.2d 620 (7th Cir. 1992); Anixter v. Home-Stake Prod. Co., 947 F.2d 897 (10th Cir. 1991) *vacated*, 112 S. Ct. 1757 (1992) (remanded for reconsideration in light of § 27A); Welch v. Cadre Capital, 946 F.2d 185 (2d. Cir. 1991); Boudreau v. Deloitte, Haskins & Sells, 942 F.2d 497 (8th Cir. 1991). District courts followed suit. Cohen v. Prudential-Bache Sec., Inc., 777 F. Supp. 276 (S.D.N.Y. 1991); Continental Bank, Nat. Ass'n v. Village of Ludlow, 777 F. Supp. 92 (D. Mass. 1991); Lewis v. Hermann, 775 F. Supp. 1137 (N.D. Ill. 1991); Randolph County Fed. Sav. & Loan Ass'n v. Sutliffe, 775 F. Supp. 1113 (S.D. Ohio 1991); Hastie v. American Agri-Corp., 774 F. Supp. 1251 (C.D. Cal. 1991); Bank of Denver v. Southwestern Capital Group, Inc., 770 F. Supp.

Outraged at the destruction of meritorious claims on technical grounds against such securities villains as Charles Keating and Michael Milken, Congress sought to remedy the *Lampf* decision.[18] Failing to reach a consensus on a new limitations period, Congress instead enacted section 27A of the Exchange Act.[19] Section 27A provides (a) that in cases filed prior to *Lampf* the appropriate limitations period is dictated by the statute of limitations existing in that jurisdiction prior to *Lampf* and (b) that any cases pending prior to *Lampf* which had subsequently been dismissed on *Lampf* grounds be reinstated.[20]

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595 (D. Colo. 1991); Brumbaugh v. Princeton Partners, 766 F. Supp. 497 (S.D. W. Va. 1991).

18 Two House Committees, the Committee on Banking, Finance and Urban Affairs (CBFUA) and the Committee on Energy and Commerce (CEC), considered responses to the *Lampf* decision. The records of both committees make it clear that the primary concern of the Committees was to reverse the dismissal of claims arising from the wake of the financial scandals of the late 1980s, the Savings & Loan scandals and the insider-trading scandals. Representative Markey stated that, unless § 27A [the act ultimately adopted] was enacted, "over $4 billion of fraud claims, including those against Milken, Keating and Fred Carr, are threatened with pending dismissal motions solely as a result of *Lampf*." In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105 (N.D. Cal 1992) (quoting from 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991)). Similarly, Representative Dingell, the Chairman of the Committee on Energy and Commerce, explained:

> This provision is critically important because Lampf has resulted in the dismissal of many private rule 10(b)-5 actions against figures in major financial scandals including Charles Keating, Michael Milken, and others. Those cases can now be reinstated on motion.

Id. at 1105 (quoting from 137 Cong. Rec. H11,811 (daily ed. Nov. 26, 1991)).

A concern for fairness to plaintiffs might not have been the only motivation for the elected representatives to enact § 27A. At the time, Congress was within one-year of the election cycle, and the failure of the government to properly regulate the securities and banking industries was often cited as the cause of the crisis. Some of this criticism was muted by pointing the finger to private individuals who were most abusive of the long leash provided by the government. Such a windfall to those individuals deflecting attention from the governmental failure would not have been lost on the public.

For a different interpretation of the congressional motive, see Sabino, *supra* note 2, at 26-30.

19 President Bush signed the Act on December 19, 1991. *See* section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236, Pub. L. No. 102-242; 15 U.S.C. § 78aa (Supp. 1992).

20 The text of the Act is as follows:

> The Securities Exchange Act of 1934 is amended by inserting after section 27 (15 U.S.C. 78aa) the following new section:
>
> "SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION
>
> "Sec. 27A.(a) Effect on Pending Causes of Action.—The limitation period for any private civil 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, such as laws existed on June 19, 1991.
>
> (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-

Defendants seeking the shelter of *Lampf* have attacked the constitutionality of section 27A on several grounds.[21] These arguments fall into three broad classifications. First, defendants argue that section 27A violates separation of powers principles because: (a) Congress may not require the Court to conduct itself in a manner contrary to the Constitution;[22] (b) Congress may not disturb final judgments of

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(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 not later than 60 days after the date of enactment of this section.

Id.

21 It is ironic that the result of *Lampf* has been to fuel an enormous body of litigation, since one of the purposes underlying the Court's adoption of a uniform statute of limitations was to reduce the amount of litigation being consumed by the question.

Ingenious or ingenuous defendants, depending on one's perspective, have also contended that pre-*Lampf* actions remain time-barred under § 27A. The argument runs: (i) the limitation period announced in § 27A is the period "provided by the laws applicable in the jurisdiction" prior to *Lampf*; (ii) the Supreme Court does not "make" law, it "finds" law, and thus in deciding *Lampf* the Court determined what the law of limitations *was*; therefore, (iii) the law "applicable in the jurisdiction" prior to *Lampf* is *Lampf*. The argument requires reading the language of § 27A in a vacuum. If Congress intended anything, it intended that *Lampf* not govern decisionmaking in these cases. No court has accepted the contention. *See, e.g.*, In re Taxable Municipal Bond Sec. Litig., 796 F. Supp. 954 (E.D. La. 1992); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965 (E.D. Wash. 1992); Brown v. The Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992); In re Brichard Sec. Litig., 788 F. Supp. 1098, 1107-08 (N.D. Cal. 1992).

The application of § 27A does raise some interesting problems for those circuits that adopted the one/three limitation period prior to *Lampf*, but then decided not to apply that period retroactively. The decision in *Beam* mandated that the period be treated retroactively. The question then becomes whether, in such a jurisdiction, § 27A requires the application of pre-*Beam* principles of retroactivity. *See, e.g.*, Walsche v. First Investor's Corp., 981 F.2d 649 (2d. Cir. 1992) (applying the pre-*Beam* rule of retroactivity); McCool v. Strata Oil, 972 F.2d 1452 (7th Cir. 1992); Fry v. UAL Corporation, 1992 WL 177086 (N.D. Ill. July 23, 1992) (holding that the Seventh Circuit's one year/three year rule, as adopted in Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), should not have retroactive effect); Brown v. The Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992) (applying the Second Circuit's pre-*Beam* rule of retroactivity); Ades v. Deloitte & Touche, 1992 WL 6142 (S.D.N.Y. 1992) (same).

22 The argument is that § 27A requires the court to treat the *Lampf* limitation period in a selectively prospective manner and so directs courts to act beyond their Article III powers as purportedly announced in *Beam*. The success of this argument rests on one's reading of *Beam*. To date, all circuit courts that have addressed the question have found that § 27A is constitutional on either of two grounds: (1) because *Beam* is only a restraint on the judicial enunciation of selective prospectivity, not on the legislature; and/or (2) because *Beam* is not constitutionally grounded. Axel Johnson Inc. v. Arthur Andersen, 6 F.3d 78 (2nd Cir. 1993); Pacific Mutual Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 680 (1994); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993); Cooperativa De Ahorro Y Credito Aguado v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); Gray v. First Winthrop Corp., 998 F.2d 1564 (9th Cir. 1993); Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272 (7th Cir. 1993); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct.

federal courts;[23] and (c), under the principles of *United States v. Klein*,[24] Congress may not legislate with the sole purpose and effect of altering outcomes in pending litigation.[25] Second, they assert that section 27A violates the Due Process Clause.[26] Lastly, they claim that section 27A violates the Equal Protection Clause.[27]

1841 (1993). *But see* Ronner, *infra* note 266, at 1071-72 (arguing that § 27A is unconstitutional because it invades the judicial province marked out by *Beam*).

23 The attack focuses on the provision in § 27A(b) that requires reinstatement of cases dismissed on the basis of *Lampf*. The circuit courts are split on the issue of whether a final judgment resting on a technical ground is due less weight than a final judgment on the merits. *Compare* Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487 (6th Cir. 1993) (§ 27A(b) is unconstitutional), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121) *and* Johnston v. Cigua Corp., 14 F.3d 486 (10th Cir. 1993) (same), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. May 2, 1994) (No. 93-1723); *with* Pacific Mutual Life Ins. v. First Republicbank Corp., 997 F.2d 39 (5th Cir. 1993) (§ 27A(b) is constitutional) (U.S. Jan. 11, 1994), *cert. granted*, 114 S. Ct. 680 (1994). *See also* Goldstein *supra* note 4, at 895-98; Palm *supra* note 4, at 1284-90 (same); Murphy, *supra* note 4, at 223-28 (same). Although this Note does not specifically address the issue, its reasoning is consistent with the view that § 27A(b) is unconstitutional. Those courts finding § 27A constitutional on this ground treat the issue essentially the same as they treat due process objections to the statute. Since rights do not vest with the passage of a limitations period, these courts reason, Congress does not divest a property interest by reinstating actions accorded final judgment by virtue of dismissal for time barred. This conflation of the due process and separation of powers grounds for constitutionality restricts the scope of protection of individual liberty interests that separation of powers serves. The holding in *Wheeling Bridge* is contrary to this anemic view of the finality of judgments. *See infra* notes 211-23 and accompanying text.

24 80 U.S. (13 Wall.) 128 (1872).

25 To date, all circuit courts addressing the question have found § 27A constitutional with regard to this issue. *See* Axel Johnson Inc. v. Arthur Andersen, 6 F.3d 78 (2nd Cir. 1993); Pacific Mutual Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39 (5th Cir. 1993), *cert. granted on other grounds*, 114 S. Ct. 680 (1994); Cooke v. Manufactured Homes, Inc., 998 F.2d 1256 (4th Cir. 1993); Cooperativa De Ahorro Y Credito Aguado v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993); Berning v. A.G. Edwards & Sons, Inc., 990 F.2d 272 (7th Cir. 1993); Henderson v. Scientific-Atlanta Inc., 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993).

26 The due process argument relies on the claim that the defendant's rights vested when the *Lampf* limitation period passed. No court has accepted this argument. *See, e.g.*, Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993). These courts have relied on International Union of Elec., Radio and Mach. Workers v. Robbins & Myers, 429 U.S. 229 (1976), for the proposition that rights do not vest with the passage of a limitations period. *See also* Campbell v. Holt, 115 U.S. 620 (1885) (distinguishing the effect of changing time bar concerning real property and assumpsit).

27 The equal protection challenges rest on either or both of two class claims: (i) § 27A treats residents of states differently on the basis of residence and (ii) § 27A treats parties in cases filed prior to *Lampf* differently than parties filing after *Lampf* was decided. No court has accepted these arguments. See, e.g., Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992); Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992).

This Note will examine only the *Klein* prong of the separation of powers attack.[28] Analysis of this area rests on two related doctrines. The first, stemming from *United States v. Schooner Peggy*, states that courts, whether trial or appellate, must apply the law as it exists at the time of decision regardless of whether that law differs from the law existing at the time the action was filed.[29] This is often referred to as the "Changed Law Rule."[30] The second, derived from *Klein*, creates an exception to the Changed Law Rule for legislation that violates the separation of powers by improperly intruding on judicial prerogatives. The precise nature of this exception is disputed. As noted above, modern courts have traditionally interpreted *Klein* as standing for either or both of two rules: (1) that Congress may not prescribe a rule of decision for pending cases without changing underlying law (the "underlying law exception"); and (2) that Congress may not mandate findings of fact or conclusions of law for pending cases (the "dictation of fact exception").[31] Each of these interpretations of *Klein*'s holding is derived from ambiguous language of *Klein* to the effect that Congress violates the separation of powers when it "prescribe[s] rules of decision to the Judicial Department of the government in cases pending before it."[32] Federal district court opinions concerning section 27A clearly show that, regardless of the rule relied upon, neither of the two rule-based approaches provides a clear basis for decision-making.[33] The purpose of this Note is to demonstrate that section 27A

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28 For an excellent discussion of all of the arguments raised against § 27A, see Palm, *supra* note 4. *See also* Sabino, *supra* note 2; Fisch, *supra* note 4; Goldstein, *supra* note 4; Murphy, *supra* note 4.

29 5 U.S. (1 Cranch) 103 (1801).

30 This Note borrows this phrase from Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WISC. L. REV. 1189, 1240 (1981).

31 *See* Palm, *supra* note 4, at 1302-1316.

32 *Klein*, 80 U.S. (13 Wall.) at 146.

33 Despite the current unanimity of the circuits, there was significant disagreement among the district courts concerning the constitutionality of § 27A under the *Klein* doctrine. A majority of district courts found that § 27A was a constitutional change in law. *See, e.g.*, Arioli v. Prudential-Bache Sec., Inc., 800 F. Supp. 1478 (E.D. Mich. 1992); Cannistraci v. Dean Witter Reynolds, Inc., 796 F. Supp. 619 (D. Mass. 1992); Duke v. Touche Ross, No. 90 CIV. 5610 (JFK), 1992 WL 197412 (S.D.N.Y. Aug. 4, 1992); Kalmanson v. McLaughlin, No. 86 CIV. 9366 (JFK), 1992 WL 190139 (S.D.N.Y. July 29, 1992); Fry v. UAL Corp., No. 90 C 0999, 1992 WL 177086 (N.D. Ill. July 23, 1992); Rabin v. Fivzar Assoc., 801 F. Supp. 1045 (S.D.N.Y. 1992); Lundy v. Morgan Stanley & Co., 794 F. Supp. 346 (N.D. Cal. 1992); Maio v. Advanced Filtration Systems, Ltd., 795 F. Supp. 1364 (E.D. Penn. 1992); *In re* American Continental Corp./Lincoln Sav. and Loan Sec. Litig., 794 F. Supp. 1424 (D. Ariz. 1992); Threiber v. Katz, 796 F. Supp. 1054 (E.D. Mich. 1992); Gray v. First Winthrop Corp., 776 F.Supp 504 (N.D. Cal. 1991), *rev'd*, 989 F.2d 1564 (9th Cir. 1993); *In re* Taxable Mun. Bond Sec. Litig., 796 F. Supp. 954 (E.D. La. 1992); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965 (E.D. Wash. 1992); Brown v. Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992); Adler v. Berg Harmon Assocs., 790 F. Supp. 1235 (S.D.N.Y. 1992); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 78 78 (2d Cir. 1993); Hastie v. American Agri-Corp., No. CV92-2392, SACV 90-164-GLT, SACV 90-243-

offers the Supreme Court an opportunity to redefine this area of separation of powers jurisprudence by rejecting rule-based approaches and adopting a functionalist test for determining whether Congress has exceeded its power by enacting a retroactive law that affects pending litigation.[34]

Part I of this Note will examine the *Klein* decision and its modern progeny and will argue that the rules deduced from *Klein* fail to provide a principled basis for decisions in this area. Part II suggests that the *Klein* progeny reflects an unreasonably narrow conception of courts' task in analyzing legislative intrusion into the province of the judiciary. This Part then offers an alternative framework for understanding such legislation, incorporating "retroactivity" into the separation of powers analysis. Part III reconsiders the nineteenth century precedents and contends that they afford support to the broader view

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GLT, SACV 91-236-GLT, 1992 WL 388998 (C.D. Cal. Apr. 20, 1992); Fred Hindler, Inc. v. Telequest, Inc., No. CIV 89-0847, 1992 WL 158631 (S.D. Cal. Mar. 31, 1992); First v. Prudential Bache Sec. Inc., No. CIV 91-0047 H(M), 1991 WL 346367, (S.D. Cal. Mar. 24, 1992); *In re* Meldridge, Inc. Sec. Litig., No. 87-1426-JU, 1992 WL 58265 (D. Or. Mar. 20, 1992); TGX Corp v. Simmons, 786 F. Supp. 587 (E.D. La. 1992), *rev'd on other grounds*, 997 F.2d 39 (5th Cir. 1993); TBG Inc. v. Bendis, No. CIV. A. 89-2423-0, 1992 WL 80622 (D. Kan. Mar. 5, 1992); Venturtech II, Ltd v. Deloitte Haskins & Sells, 790 F. Supp. 574 (E.D. N.C. 1992), *aff'd*, 993 F.2d 228 (4th Cir. 1993); Ayers v. Sutliffe, No. C-1-90-650, 1992 WL 207235 (S.D. Ohio Feb. 11, 1992); Bankard v. First Carolina Communications, Inc., No. 89 C 8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992); Ash v. Dean Witter Reynolds, Inc., 806 F. Supp. 1473 (E.D. Cal. 1992). But many others reached the opposite conclusion. *See* Abrams & Wofsy v. Renaissance Inv. Corp., 820 F. Supp. 1519 (N.D. Ga. 1993); Rosenthal v. Dean Witter Reynolds Inc., 811 F. Supp. 562 (D. Colo. 1992), *rev'd*, 982 F.2d 529 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2339 (1993); Dulude v. Cigna Sec. Inc., No. 90-CV-72191-DT, 1992 WL 281411 (E.D. Mich. May 14, 1992); *In re* Rospatch Sec. Litig., 802 F. Supp. 110 (W.D. Mich. 1992); In re Brichard Sec. Litig., 788 F. Supp. 1098 (N.D. Cal. 1992); Johnston v. Cigna Corp., 789 F. Supp. 1098 (D. Colo. 1992), *aff'd on other grounds*, 14 F.3d 486 (10th Cir. 1993); Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D. Colo. 1992); Mancino v. Int'l Technology Corp., No. 89-7244-RMT (SX), 1992 WL 114436 (C.D. Cal. Mar. 10, 1992).

34 The opportunity seems ripe for two reasons. First, the Court appeared to reserve precisely the question raised by § 27A in Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407, 1415 (1992). Second, the Court has shown great interest in separation of powers doctrine over the past decade. For example, the Court has shown increasing interest in viewing standing as raising separation of powers questions. Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2144 (1992). For other examples of the Court's development of separation of powers doctrine, see Mistretta v. United States, 488 U.S. 361 (1989) (participation of federal judges in legislatively created sentencing panel not a violation of separation of powers); Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel scheme not a violation of separation of powers); Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating provisions of the Gramm-Rudman-Hollings Act on separation of powers ground); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (independent administrative hearings for state law counterclaims not violation of Article III); I.N.S. v. Chadha, 462 U.S. 919 (1983) (permitting an alien to challenge a legislative veto of a decision suspending a deportation order against him because the veto violated the separation of powers); Northern Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Congressional creation of bankruptcy courts without provision of life tenure is a violation of Article III).

advocated in the prior section. Drawing from these considerations, Part IV formulates a test for resolving *Klein*-type questions and assesses the constitutionality of section 27A under the proposed test.

I

UNITED STATES V. KLEIN AND ITS TROUBLED PROGENY

A. The Facts and Reasoning of *United States v. Klein*

During the Civil War, Congress enacted numerous laws concerning the property seized from Southerners by the federal government in the course of the war. An 1862 act enabled the government to confiscate property held by persons aiding the rebellion. It also authorized the President to issue a proclamation of pardon and amnesty "at such times, and on such conditions as he should deem expedient" to those who had aided in the rebellion.[35] An 1863 statute, the Abandoned Property Collection Act, provided Treasury agents with the power to seize and sell captured property and deposit the proceeds of the sale into the United States Treasury.[36] The 1863 Act further provided that the owners of seized property could seek compensation in the United States Court of Claims by presenting proof of ownership and proof that the owner had never "given any aid or comfort to the present rebellion."[37]

On December 8, 1863, the President issued a proclamation of pardon as provided for by the 1862 Act. The proclamation provided that "a full pardon should be hereby granted . . . , with restoration of all rights of property" to those who shall "take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate."[38]

On April 30, 1870, the Supreme Court rendered an opinion in the case of *United States v. Padelford*.[39] Padelford sought compensation for cotton seized towards the conclusion of the war. The Court found that Padelford had in fact aided the enemy by acting as a surety upon the official bonds of officers in the rebel army.[40] Nonetheless, the Court found that Padelford was entitled to compensation because, despite the statutory prohibition against compensating those who had aided the rebellion, he had later received a pardon by taking a loyalty oath pursuant to the December 1863 proclamation.[41] Thus, the Court interpreted the 1863 statute as providing a remedy to both

35 *Klein*, 80 U.S. (13 Wall.) at 131.
36 *Id.*
37 *Id.*
38 *Id.* at 132.
39 76 U.S. (9 Wall.) 531 (1869).
40 *Id.* at 538.
41 *Id.* at 543.

those who were actually loyal and those deemed to be loyal by virtue of the pardon.

In the *Klein* case, the administrator for the estate of V.F. Wilson, namely Klein, sought compensation for Wilson's cotton seized during the war.[42] When the Court of Claims first heard Klein's claim, it found in his favor on the ground that there was no evidence of Wilson's disloyalty.[43] While the judgment awaited appeal to the Supreme Court, new evidence emerged showing that Wilson had acted as a surety on the bonds of two Confederate officers.[44] The Court of Claims heard the case anew after the Supreme Court had issued the *Padelford* opinion. The parties stipulated to the evidence of disloyalty, but the Court of Claims again ruled in Klein's favor based on a pardon received by Wilson on February 15, 1864.[45] As the case awaited appeal to the Supreme Court, Congress sought to intervene.

Responding to *Padelford* and the Court of Claims judgment for Klein, Congress attempted to undo the Supreme Court's decision by passing the "1870 Proviso," as a rider to an appropriations measure.[46] In framing the legislation, Congress faced three obstacles. First, Congress did not want to deny recovery against the government under the 1863 Act in toto.[47] Second, Congress rightly suspected that the Supreme Court would find that a change in the evidentiary value of the pardon constituted an unconstitutional intrusion on the executive's pardon power.[48] Third, Congress realized that a change in the jurisdiction of the Supreme Court would not disturb the Court of Claims' judgment for Klein insofar as the Court of Claims was not then perceived as an Article III court.[49]

Congress employed a two-pronged approach to overcome these problems: (1) the 1870 Proviso changed the evidentiary requirements for a finding of loyalty under the 1863 Act by deeming a pardon unadmissible as evidence at trial or upon appeal, and stipulating that proof of loyalty must show loyalty in fact; and (2) the 1870 Proviso required that in cases where judgment was obtained by proof of loyalty based on a pardon, the Supreme Court shall have no jurisdiction over the matter and shall *dismiss* the judgment for want of jurisdic-

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42 *Klein*, 80 U.S. (13 Wall.) at 132.

43 *See* Young, *supra* note 30, at 1199.

44 *Id.* at 1199.

45 *Klein*, 80 U.S. (13 Wall.) at 132. *See* Young, *supra* note 30, at 1199.

46 *Klein*, 80 U.S. (13 Wall.) at 133-34. This Note will not explore the separation of powers issues arising from the passage of the 1870 Proviso as an appropriations measure.

47 *See* Young, *supra* note 30, at 1203-09.

48 *Id.*

49 *See* Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 72 (1981); *but see* Young, *supra* note 30, at 1255.

tion.[50] By instructing the Court to dismiss the case, Congress thought it had found a way to give the Supreme Court the power to dissolve the Court of Claims judgment without giving the Supreme Court the power to hear the government's appeal.[51]

As Congress anticipated, the Court ruled that the 1870 Proviso was an unconstitutional violation of separation of powers because it impaired "the effect of a pardon, and thus infring[ed] the constitutional power of the Executive."[52] Having made this determination, the Court had to address whether the second aspect of the 1870 Proviso was a proper "exception" to or "regulation" of federal court juris-

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50 The 1870 Proviso read as follows:

> *Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters required, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.
>
> *And provided further*, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant.

quoted in Klein, 80 U.S. (13 Wall.) at 133-34.

51 *See* Young, *supra* note 30, at 1206-09.

52 *Klein*, 80 U.S. (13 Wall.) at 147.

diction.[53] Writing for the Court, Chief Justice Chase found that the 1870 Proviso "inadvertently passed the limit which separates the legislative from the judicial power."[54]

The passages in Chief Justice Chase's opinion concerning legislative interference with the judicial power, which comprise barely two pages, are not "model[s] of clarity."[55] Chase began by stating the limits of Congress' power to alter the jurisdiction of the federal courts.[56] He further noted that the "legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions."[57] From this proposition he concluded that, had the Act done nothing more than deny the right of appeal, the 1870 Proviso would be unobjectionable.[58]

However, Chase explained, the purpose of the 1870 Proviso was not to regulate jurisdiction, but to deny to "pardons granted by the President the effect which [the Supreme Court] had adjudged them to have."[59] Rather than comprehensively revoking the Court's jurisdiction over all actions arising under the 1863 Act, the 1870 Proviso made jurisdiction turn on the discovery of a "certain state of things"[60] since jurisdiction only failed where the claim under the 1863 Act was premised on a pardon. The 1870 Proviso provided that evidence of loyalty based solely on the existence of a pardon, combined with a judicial determination to give the constitutionally required effect to the pardon, acted to defeat the Court's jurisdiction over the action. Chase found that this was "not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[61]

The actual holding of *Klein* is very narrow. In cases pending before the Court, Congress may not condition the Court's jurisdiction to hear a matter on the Court's abstaining from applying certain constitutional clauses in rendering its decision.[62] This is a variation on the challenge to section 27A resting on *Beam*: that Congress cannot

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53 U.S. CONST. art. III, § 2.

54 *Klein*, 80 U.S. (13 Wall.) at 147.

55 *See* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 369 (3d ed. 1988).

56 Justice Chase had written the opinion in *Ex parte McCardle* a mere two years prior. 74 U.S. (7 Wall.) 506 (1868).

57 *Klein*, 80 U.S. (13 Wall.) at 145; *see also* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).

58 Could Congress have ordered the Court of Claims to rehear Klein's case in light of the 1870 Proviso? Not according to the decision in *Wheeling Bridge*, in which the Court held that Congress could not alter a court's judgment awarding costs in a finally adjudicated action involving private rights. *See infra* note 219 and accompanying text.

59 *Klein*, 80 U.S. (13 Wall.) at 145.

60 *Id.* at 145-46.

61 *Id.* at 146.

62 *See* Young, *supra* note 30, at 1223 n.179; BATOR ET AL., *supra* note 55, at 303.

instruct the Court to conduct itself in a manner contrary to the Constitution.[63] As Congress cannot prescribe that the Court uphold an unconstitutional law,[64] Congress cannot condition the Court's jurisdiction on its giving effect to an unconstitutional statute.[65]

Chief Justice Chase, however, did not confine himself to this basic principle, but sought to explain the source of this limitation on the power of Congress to determine federal jurisdiction in the separation of powers doctrine. Chase argued that the 1870 Proviso amounted to nothing more than a legislative order to reach a particular conclusion about an issue of law in pending cases.[66] He asked rhetorically:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we [dismiss] without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?[67]

It seems unlikely that Chase intended to overrule the Changed Law Rule since the case establishing that rule predated *Klein* by seventy years.[68] He may, however, have been seeking to carve out an exception to it. The form of his argument clearly suggests this possibility:

> (i) It is self-evident that the legislature cannot prescribe a rule of decision in cases pending before the judiciary without usurping the judicial function.
>
> (ii) The legislature cannot do indirectly what it cannot do directly.
>
> (iii) The 1870 Proviso indirectly prescribes a rule of decision.
>
> (iv) Therefore, the 1870 Proviso is a usurpation of the judicial function.

The first premise suggests that we imagine a statute which reads "in the case of X and Y now before the Court, the Court will decide such and such." Faced with this premise, Chase argues that Congress cannot tell the court what facts to find, what conclusions of law to

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63 *See supra* note 22 and accompanying text.

64 For example, suppose that Congress passed an unconstitutional national school prayer act. Congress could not cure the constitutional problem by attaching a clause which required the Court to deem the act constitutional. This is not because such a finding would be an invasion of the fact finding function (the question is mixed law and fact), but rather, because it is outside the power of Congress to change the law of the Constitution.

65 *See* Sager, *supra* note 49, at 71-72; Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1963).

66 *Klein*, 80 U.S. (13 Wall.) at 146.

67 *Id.*

68 *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

reach, or what decision on the merits to issue. To make these sorts of "judicial determinations" is to exercise judicial power. A bar against such direct intrusions into the integrity of judicial process might still appear consistent with the Changed Law Rule. However, once we follow the second premise and accept *indirect* prescriptions of rules of decision as sometimes invalid, a direct conflict with the Changed Law Rule is created. An exceptionless Changed Law Rule dictates that, as a general matter, Congress can change the rules of law that courts use to render judgments in any pending cases. In doing so, however, Congress indirectly alters the outcome of pending cases and thus indirectly achieves control of the judiciary.

Thus, Justice Chase seems to be suggesting that some indirections are unacceptable and it would seem, despite the Changed Law Rule, that changes in law fall within the class of such indirections. What Chase needed to explain, but did not, is how to differentiate valid from invalid members of the class of "indirect rule-prescriptions."[69]

B. The *Klein* Doctrine Prior to the Debate over Section 27A

As mentioned in the introduction, modern courts have offered two rules for performing the sorting problem left open by Justice Chase's opinion in *Klein*:

> (1) legislation is invalid if it prescribes a rule of decision in a pending case without changing the underlying law (the "underlying law exception"); and
> (2) legislation is invalid if it mandates findings of fact on conclusions of law (the "dictation of fact exception").

The purpose of this Section is to identify how these rules are employed and the difficulties that courts have had in applying them.

The dictation of fact exception was first articulated in the second edition of Henry Hart and Herbert Wechsler's federal courts casebook.[70] In *United States v. Brainer*,[71] the Sixth Circuit became the first federal court to adopt the Hart and Wechsler criterion. This sec-

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69 It is interesting to note, however, that Congress had the last word, as the Court later held that Congress need not appropriate funds due to pardoned persons. Hart v. United States, 118 U.S. 62, 66 (1886). *See* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 118 (1968).

70 *See* BATOR, ET AL., *supra* note 55, at 369 n.4.

71 691 F.2d 691 (1982). The issue in *Brainer* concerned the constitutionality of the Speedy Trial Act of 1972. 18 U.S.C. §§ 3161-3174. Under the Speedy Trial Act, defendants had to be tried within 70 days from whichever came first: the date of the indictment or the date the defendant first appeared before the court where the charge was pending. Although Brainer's trial date exceeded the seventy day limit, the district court denied Brainer's motion to dismiss, relying on a version of *Klein*'s underlying law exception. It found that the Speedy Trial Act usurped the judicial power by determining the "actual substantive outcome of individual criminal cases" without a change in the underlying substantive law of the crime. 515 F. Supp. 627, 636 (D.Md. 1981). The district court also

tion examines a series of decisions in the Ninth Circuit that attempted to follow the rule articulated in *Brainer*. Examining the decisions of the Ninth Circuit reveals the first practical problem of the *Klein* rules: even when rigorously applied, the rules provide a hollow source of protection for the judiciary because they are easy to legislate around. The discussion then turns to the recent Supreme Court decision in *Robertson v. Seattle Audubon Society*.[72] A comparison of the Supreme Court's application of the *Klein* rules with that of the Ninth Circuit reveals the second practical problem: the outcome yielded by the rules is entirely a function of how the court chooses to characterize the legislation at issue—a choice unbounded by any principle.[73]

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found that the Act was "an unwarranted intrusion into the administration of the judicial system." *Id.*

The Sixth Circuit rejected the district court's formulation of the rule, adopting the dictation of fact language suggested in the second edition of HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM. The court wrote that:

> the better reading of *Klein* is quite narrow and construes the case as holding only that Congress violated the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under the threat of loss of jurisdiction)' *and* purports 'to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'

691 F.2d at 695 (emphasis added) (quoting PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 316 (2d ed. 1973)).

Thus, the court adopts a two-prong reading of *Klein*, which provides that legislation is unconstitutional only if it both (a) falls within the dictation of fact exception and (b) is independently unconstitutional. On these facts, the court argued that the Speedy Trial Act "lays down [no] rules of decision," but only "rules of practice and procedure." *Brainer*, 691 F.2d at 695. Such rules are within the province of the legislature, as evidenced by Congress's passage of the Federal Rules of Civil Procedure. *Id.* at 695-96. Interestingly, the court specifically analogizes the type of procedural law embodied in the Speedy Trial Act to a statute of limitations:

> Statutes of limitations provide perhaps the closest analogy. Few would suggest that such statutes intrude upon the judiciary's substantive decisional role. The suggestion rings just as hollow when applied to the time limits and dismissal sanction of the Speedy Trial Act, which dispose of cases solely on the procedural ground of undue delay and without regard to the guilt of innocence of the accused.

Id. at 696.

It might appear that the holding of the case is that legislation is proper so long as it changes the underlying substantive *or* procedural *or* quasi-procedural law. Notice, however, that *Brainer* should not invoke *Klein* at all. First, the Speedy Trial Act was in place prior to the commencement of Brainer's prosecution, while the court's concern in *Klein* was the effect of legislation on pending litigation. Second, the issue in *Brainer* is not the power of the legislature to affect outcomes (any procedural rule, as the Sixth Circuit noted, may do this), but the propriety of condoning legislative control of court administration. *Klein* may offer some guidance for adjudicating this question, but it does not enumerate a rule for its determination.

72 112 S. Ct. 1407 (1992).

73 *See* Professor Ronner's article *infra* note 266, at 1048-55 (offering a similar critique of the Ninth Circuit and *Robertson* decisions).

1. *The Ninth Circuit Decisions*

The Ninth Circuit first subscribed to the dictation of fact exception in *In re Consolidated United States Atmospheric Testing Litigation.*[74] The plaintiffs in that case brought suit against several government contractors in an effort to recover damages for injuries arising from radiation exposure during nuclear testing. While the action was pending, Congress passed a law mandating that the plaintiff's exclusive remedy was to sue the United States under the Federal Tort Claims Act (FTCA). The legislation effectively restricted the scope of any potential recovery by the plaintiffs.

The adoption of the dictation of fact exception greatly simplified the court's analysis.[75] Because the legislation did not mandate any particular determination of fact with respect to the existence, cause, or extent of the injury, it did not violate the exception.

Although the legislation did not mandate the outcome of claims brought under the Federal Tort Claims Act, it clearly mandated the outcome of other claims that the plaintiffs might have brought. Had the court adopted the underlying law exception, it would have had to answer the more difficult question of whether depriving the plaintiffs of these claims constituted a substantive change in law.[76] In other words, the court would have needed to explore whether the limitation of the remedy was permissible as a change in the underlying substantive law of tort, or whether it was impermissible as an ad hoc restriction of the rights of the plaintiffs that left tort law unchanged.[77]

The next case to consider is *Seattle Audubon v. Robertson.*[78] This case involved section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990 (The "Northwest Timber

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74 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988).

75 The Ninth Circuit later modified its position in Seattle Audubon v. Robertson, 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992). It determined that the proper standard under *Klein* is disjunctive, not conjunctive, and that Congress may not dictate how the court should decide an issue of fact *or* require the court to decide a case in accordance with a rule of law that is independently unconstitutional. *Seattle Audubon*, 914 F.2d at 1315. The opinion is curious. The court states that the disjunctive standard was adopted in Grimsey v. Huff, 876 F.2d 738 (9th Cir. 1989), but that case merely raised the question without deciding it. The court also appears oblivious to the fact that, in *Grimsey*, it recognized that the most recent edition of HART & WECHSLER had withdrawn its support for the proposition that the dictation of fact exception is attributable to *Klein*. Furthermore, citing United States v. Sioux Nation of Indians to support a disjunctive reading is inapposite. While it is true that Justice Blackmun's opinion supports *a* disjunctive reading, the disjunction is between the underlying law exception and the type of corollary rule set forth in the *Beam* line of arguments against § 27A's constitutionality. 448 U.S. 371, 404-05 (1980).

76 The differences between the tests applied by the district court and the circuit court are enumerated in *Brainer, supra* note 71.

77 The general relationship to due process concerns should be noted. By segregating out radiation victims from the general class of tort plaintiffs, Congress altered governmental tort liability without affecting tort plaintiffs generally.

78 914 F.2d 1311 (9th Cir. 1987).

Compromise"), which was environmental legislation enacted specifically to undermine two pending actions in the Pacific Northwest. The pending litigation challenged proposed timber sales on grounds that they failed to comply with the requirements of the National Environmental Protection Act (NEPA) and other environmental statutes. Section 318 legislatively declared that the Environmental Impact Statement filed in conjunction with timber sales satisfied the requirements of NEPA and the other statutes, thereby purporting to eliminate the basis for challenging the timber sales at issue in the pending litigation.

The Ninth Circuit groped for a way to assess whether the dictation of fact exception applied. Ultimately, it interpreted the rule in a way that simply restated the underlying law exception:

> [T]he critical distinction, for purposes of deciding the limits of Congress' authority to affect pending litigation through statute, is between the actual repeal or amendment of the law . . . , which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible.[79]

Although the dictation of fact exception looked like a means for clarifying the law/nonlaw distinction in *Atmospheric Testing*, the *Seattle Audubon* court reverted to relying on the underlying law exception as a means of assessing whether legislation dictates facts.

The court held that, because the legislation did not exempt the acreage from NEPA, it did not change the underlying law and so the legislation dictated a "finding of fact." According to *Seattle Audubon*, in order for a court to find that a party has complied with NEPA, it must find that the Secretary of the Interior has "used the principles of multiple use and sustained yield" in his management of the public land and that "detailed statements of detrimental effects" had been met. Under section 318, the court is instructed to find that these factual predicates have been met regardless of the truth of the matter.

In reaching its decision in *Seattle Audubon*, the court distinguished *Stop H-3 Ass'n v. Dole*.[80] In *Stop H-3*, the Ninth Circuit held that a federal appropriations bill that had specifically exempted a highway project from compliance with environmental laws was constitutional.[81]

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79 *Id.* at 1315.

80 870 F.2d 1419 (9th Cir. 1989).

81 *See id.* at 1437-38. Since *Stop H-3* was decided after *Atmospheric Testing*, it is curious that the Ninth Circuit did not employ the underlying law exception in deciding the case. In finding that the highway project exemption was not unconstitutional, the *Stop H-3* court observed:

> Nor did Congress perform a 'judicial' function in exempting H-3 from section 4(f). Congress, in enacting laws, may rest its policy decisions on 'factual' determination, including determinations concerning the relationship

The *Seattle Audubon* court reasoned that the exemption actually changed the underlying law in *Stop H-3*.[82] The upshot of this distinction is that the legislation in *Seattle Audubon* would have been constitutional if only Congress had specifically exempted the public lands from federal and state environmental regulations rather than "deeming" that such regulations were satisfied. In other words, the Ninth Circuit's understanding of separation of powers principles would allow Congress to enact legislation that serves solely to alter the outcome of pending litigation, so long as the "proper" form is followed.[83]

This trio of cases demonstrates two problems. First, the attempt to categorize legislation on the basis of these tests engenders no clear criteria. Second, neither version of the *Klein* doctrine imposes a meaningful limit on congressional power because Congress can always present its rules of decisions in the guise of "exemptions."[84]

> of facts to preexisting law. Thus the Conference Committee's expression of its view that the H-3 project satisfied the requirements of the 4(f) statutes . . . does not represent 'adjudication' by Congress but rather the legitimate result of investigation and analysis upon which legislative decisions are based.

870 F.2d at 1438.

The court treated the highway project exemption as eliminating federal court jurisdiction to hear the claim. *See id.* at 1437. It then distinguished *Klein* by noting that *Klein* stands for the proposition that Congress cannot give federal courts the power to hear a matter and then instruct them to dismiss it should they find certain facts. *See id.* at 1437 n.26.

82 *See Seattle Audubon*, 914 F.2d at 1316-17.

83 Although the Ninth Circuit did not make the argument, the court might have sought to justify the distinction by arguing that the type of legislation at issue in *Stop H-3* allows Congress to diminish its political accountability. For example, a law which simply exempts the highway project from complying with environmental regulations would render the effect of congressional action more understandable and more visible to the public. Section 318, in contrast, obscures the action of Congress by seemingly replacing the relevant environmental regulations with new ones. Such an action injures the separation of powers doctrine in two ways. First, it undermines the structural integrity of the tripartite system because political accountability is an essential check on the abuse of legislative powers. Second, it injures the independence and institutional integrity of the judiciary because it manipulates the courts. *See* Robert H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Show v. Reno, 92 MICH. L. REV. 483, 520 (1993) (arguing that many constitutional decisions find the form of state action impermissible, while noting that the state may constitutionally reach the same ends by other means).

The *Seattle Audubon* controversy, however, identifies two problems with the proposed argument. First, the media was not fooled by the form of the Congressional Act. Second, the legislation kept some limits on agency action that were important to Congress. An exemption might have given the agency a free hand. Moreover, the argument simply is not the one that the Ninth Circuit made. Instead, the *Seattle Audubon* court contended that the distinction rested upon the impropriety of congressional attempts to manipulate the judicial process of reaching an outcome, rather than the particular outcome itself. *See* 914 F.2d at 1316-17.

84 Madison's observation in Federalist 48 is instructive on the expansive nature of legislative power:

2. *The Supreme Court's Reversal of the Ninth Circuit's* Seattle Audubon *Decision*

In *Robertson v. Seattle Audubon Society*,[85] the Supreme Court unanimously repudiated the Ninth Circuit's determination that section 318 dictated a finding of fact and failed to change the underlying law. Justice Thomas, writing for the Court, reasoned that after the enactment of section 318 the state of law was such that the Bureau of Land Management could satisfy its environmental obligations either by conforming to the requirements of the underlying statute (e.g., NEPA) *or* by conforming to the requirements of section 318.[86] Given this characterization of section 318, the Court easily found that section 318 changed the underlying substantive environmental laws governing the public lands in question.[87] The Court depicts section 318 as a separate law establishing distinct environmental requirements, whereas the Ninth Circuit views the provision as an addendum to substantive environmental legislation which limits judicial determinations under the existing law.

The tripartite conception of adjudication advocated by Henry Hart and Albert Sack offers an explanation for the disharmony of the Ninth Circuit and Supreme Court approaches.[88] Under this theory of adjudication, courts engage in law declaring,[89] fact finding,[90] and law application.[91] The Ninth Circuit determined that a court would find the governing rules embodied in the existing substantive law, such as the MBTA. Under the Ninth Circuit approach, section 318 enters into the adjudicative process when the court applies the governing rule to its factual determinations. For example, under this approach a Court would consider the effect of the management plan on the spotted owl habitat. Thus, because section 318 deemed that the management plan satisfied the governing rnle regardless of the actual factual determination, the Ninth Circuit interpreted it as displacing the law

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> [The legislature's] constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.

THE FEDERALIST PAPERS No. 48 at 310 (James Madison) (Isaac Kramnick ed., 1987).

85 112 S. Ct. 1407 (1992).

86 *See id.* at 1413.

87 *See id.*

88 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 369-86 (1958).

89 The judgment of the court as to the legal rules which goveru the outcome of the dispute. *See id.* at 374.

90 The determination of the facts giving rise to the dispute. *See id.* at 375.

91 The application of the governing law to found facts. *See id.*

application stage of adjudication. In contrast, the Supreme Court reasoned that section 318 emerges at the earlier law determination stage.

How should a court ascertain the stage of the adjudicative process at which section 318 operates? In response to the Ninth Circuit's observation that, under the language of section 318, the management plan is "deemed" to be in compliance with other laws, Justice Thomas wrote:

> We fail to appreciate the significance of this observation. Congress might have modified MBTA directly, for example, in order to impose a new obligation of complying either with the current § 2 [of the MBTA] or with [§ 318]. Instead, Congress enacted an entirely separate statute deeming compliance with [§ 318] to constitute compliance with § 2—a "modification" of the MBTA, we conclude, through operation of the canon that specific provisions qualify general ones. As explained above, each formulation would have produced an identical task for a court adjudicating the MBTA claims—determining either that the challenged harvesting did not violate § 2 as currently written or that it did not violate [§ 318].[92]

Justice Thomas's claim appears to be that since Congress could have modified the MBTA directly—and since the *effect* on the court's process is the same—the Court will treat section 318 as if it had done so. This reasoning turns the Ninth Circuit's effort to distinguish *Seattle Audubon* from *Stop H-3* on its head. As Congress could have exempted the public land from the MBTA with the same effect, section 318 ceases to be a cause for concern.

The efforts of the Supreme Court and Ninth Circuit are not inspiring. On the one hand, the Ninth Circuit's reasoning implies that the separation of powers doctrine amounts to nothing more than a restraint on the manner in which Congress drafts laws that affect pending litigation.[93] But is the separation of powers such a weak doctrine that it merely regulates the form of legislation and not its substance?[94] On the other hand, the Supreme Court's analysis apparently calls for an inevitably fruitless search for legislation that dictates

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92 *Robertson*, 112 S. Ct. at 1414 (citation omitted).

93 Nevertheless, the form of legislation illustrates something about the legislative process that gave rise to it. Since an exemption would have been more straight-forward, it is unclear why Congress did not follow this route.

94 The Ninth Circuit's view of separation of powers finds support, bowever, in Gerald Gunther's discussion of the power of Congress to limit the jurisdiction of the Court. Gunther contends that revocation of jurisdiction over a matter is always legitimate. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908 (1984). *See also* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 911 (1982) (arguing that Congress has broad power to limit the jurisdiction of the federal judiciary).

fact.[95] One might suspect that the courts simply use the doctrine in an ad hoc manner to achieve the results they desire.[96]

This Note defers the resolution of these questions until later,[97] but at this juncture it is important to recognize that *Robertson* does not foreclose such inquiry. Although the *Robertson* Court accepted the Ninth Circuit's adoption of the underlying law exception for the purpose of reviewing the Ninth Circuit's decision, the Court explicitly stated that its opinion did not address the general question of the proper constitutional standard.[98] It noted that an amicus brief challenging the Ninth Circuit's standard suggested that "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[99] The Court, however, chose not to address the merits of this suggestion, reasoning that the issue was not raised by the Ninth Circuit or the respondent.[100] If the Court was indeed signaling that it is prepared to reconsider the separation of powers jurisprudence in this area, then, as discussed below,[101] many defendants in section 27A cases have been remiss in failing to argue for a different approach.

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95 In Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993), a Ninth Circuit panel implied an alternative understanding of *Robertson*, namely that *Klein* simply has no continuing vitality. With a tone of resignation, the court wrote:

> *Robertson* indicates a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way. Because Section 27A more clearly and directly changes the underlying substantive law than the appropriation "rider" upheld in *Robertson*, section 27A amply passes *whatever is left of the Klein test.*

989 F.2d at 1569-70 (emphasis added). In Section II.B. *infra*, the Note argues that such an outcome is contrary to the principles underlying the separation of powers doctrine.

96 Philip Kurland, for example, has suggested that "[t]he ancient concept of separation of powers and checks and balances has been reduced to a slogan, to be trotted out by the Supreme Court from time to time as a substitute for a reasoned judgment." PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 179 (1978).

97 *See* discussion *infra* part IV.

98 The Court wrote:

> We have no occasion to address any broad question of Article III jurisprudence. The Court of Appeals held that subsection (b)(6)(a) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(a) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct.

Robertson, 112 S. Ct. at 1414.

99 *Id.* at 1415.

100 *Id.*

101 *See* discussion *infra* part IV.

C. The Errant Efforts of the District Courts in Deciding the Constitutionality of Section 27A

Inconsistent results among federal district courts concerning the constitutionality of section 27A are primarily the product of disagreement over characterization of section 27A as a change in the underlying law.[102] For example, the district court in *Bankard v. First Carolina Communications, Inc.*[103] explained that section 27A changed the law, and that appearances to the contrary arise "only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction."[104] Thus far, the federal appeals courts have unanimously agreed with this analysis.[105] In contrast, the district court in *In re Brichard Securities Litigation* found that "Congress did not change the statute of limitations announced in *Lampf.* Congress only changed the *retroactive* effect of the statute of limitations announced in *Lampf.*"[106] The rather conclusory analyses of both the *Bankard* and *Brichard* courts are characteristic of the decisions addressing the issue.

The lower courts have, by and large, treated the underlying law exception as the operative rule for determining the constitutionality of section 27A.[107] This subpart identifies and critiques the three principal arguments that have been employed to advance the claim that section 27A changes law in a manner consistent with *Klein*: the incorporation argument, the purpose argument and the mere waiver of a technical defense argument.[108]

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102 For a list of cases, see *supra* note 33.

103 Bankard v. First Carolina Communications, Inc., No. 89-8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992).

104 *Id.* at *6.

105 *See supra* note 25. For a discussion and criticism of the circuit court opinions, see Ronner, *infra* note 266, at 1061-65.

106 *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1103 (N.D. Cal. 1992).

107 *See* Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 479 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 78 (2d Cir. 1993); *see also* In re Brichard Sec. Litig., 788 F. Supp. 1098, 1102 (N.D. Cal. 1992) (the application of retroactive legislation to pending cases "presuppose[s] a substantive or procedural change in law made by Congress"). Indeed, one district court judge has observed that "[t]here is considerable dispute . . . as to how broadly *Klein* is to be read. The exact scope of *Klein* need not be resolved, however, because even under [defendant's] broad reading, *Klein* is not applicable where the legislation under review establishes a new and generally applicable rule." *Axel Johnson*, 790 F. Supp. at 479.

108 Given the large number of decisions that have come down in the past two years, *see supra* notes 25 and 33, this subpart does not attempt to summarize all the decisions; nor would such an exercise be particularly useful, given their redundancy. Instead, this section attempts to identify the various arguments that the courts have offered for and against the constitutionality of § 27A.

1. *The Incorporation Argument*

Courts that find section 27A to be constitutional reason that, although the provision does not explicitly change the statute of limitations for Section 10(b) actions by prescribing a specific number of years, it does alter the limitations period by incorporating pre-*Lampf* law (call this the "incorporation argument").[109] Courts ruling that section 27A is unconstitutional offer two types of responses.

The first, the purely retrospective response, denies that section 27A changed the statute of limitations for section 10(b) actions insofar as the one/three *Lampf* scheme still survives to govern in all future cases.[110] According to this approach, changing the statute of limitations in only a retrospective manner is not the same as changing the "underlying substantive or procedural rule."[111]

The challenge that the purely retrospective response offers cannot be resolved within the framework of analysis supplied by the underlying law exception. The underlying law exception places the legislation within the judicial decisionmaking process and defines what counts as "changed law." Retroactivity concerns, however, do not fit within this framework. Rather, the question of how broadly or narrowly Congress must address a subject matter when enacting legislation with the specific purpose of affecting pending litigation depends on one's understanding of the principles and policies underlying the separation of powers.

That pure retroactivity is the central concern, and that the underlying law exception obscures this fact, is demonstrated by the differential treatment given by the courts to a common premise: that Congress could constitutionally have changed the statute of limitations for section 10(b) and explicitly given that change in law retroac-

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109 *See, e.g.*, Adler v. Berg Harmon Assocs., 790 F. Supp. 1235, 1243 (S.D.N.Y. 1992); Bankard v. First Carolina Communications, Inc., No. 89-C8571, 1992 WL 3694, at *5 (N.D. Ill. Jan. 6, 1992); Rabin v. Fivzar Assocs., 801 F. Supp. 1045, 1053-54 (S.D.N.Y. 1992).

110 A second, more oblique argument supporting the retrospective response, is that Congress did not provide a rule of law, but rather declared that a rule of law—*Lampf*—may not be applied. *See, e.g.*, *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1104 (N.D. Cal. 1992) ("Congress stated what rule may *not* be applied, even though it did not enact a substantive or procedural law."). This claim has two pitfalls. First, the statute does provide some positive reference as to what the applicable law should be because it refers to the law prevailing in the circuits prior to *Lampf*. It seems unlikely that the district court in *Brichard* would be any more receptive to a law which provided a purely retroactive ten year statute of limitations. Nevertheless, such a law would satisfy the court's requirement. Second, it is not obvious why Congress cannot declare that a particular rule of law constructed by the courts shall not govern without providing a substantive alternative. Suppose, for example, that the legislature deemed that contributory negligence was grossly unfair, but also felt that the proper method of adjusting the doctrine would be to let the common law try again.

111 *See, e.g.*, Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992); Abrams & Wofsy v. Renaissance Inv. Corp., 820 F. Supp. 1519, 1525 (N.D. Ga. 1993); *In re* Brichard Sec. Litig., 788 F. Supp. 1098, 1103 (N.D. Cal. 1992).

tive effect. The district court in *Axel Johnson, Inc. v. Arthur Andersen & Co.*, for example, interpreted this premise to mean that Congress indeed changes the law even when it chooses to do so retrospectively.[112] On the other hand, the district court in *Bank of Denver v. Southeastern Capital Group Inc.* took the view that Congress' capacity to check the judiciary by making a wholesale change in the statute of limitations does not foreclose the conclusion that a partial change is invalid.[113] These differing views result in a stalemate so long as the question of whether section 27A itself counts as a change in law remains unanswered.

The second response to the incorporation argument offered by courts finding section 27A unconstitutional, the "intepretivist response," reasons that the change infringes on a court's interpretive task because it tells courts how to interpret the statute of limitations—namely, to ignore *Lampf* and apply the prior circuit rulings—rather than giving courts a rule to apply.[114] The court in *Bank of Denver* argued that such a prescription is inappropriate under the separation of powers doctrine, since it is the province of the judiciary to determine what and how rules of law should be applied to a particular case.[115] Comparing section 27A to the statute in *Klein*, the court noted that "[i]n both instances, the prescribed interpretation was at odds with prior Supreme Court law."[116]

The interpretivist response is problematic in two respects. First, *Klein* is distinguishable insofar as that case involved the interpretation

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112 Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 479-80 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 78 (2d Cir. 1993). Note the use of the term "retrospective" here. It refers to the time of filing rather than the time of the cause of action. Section 27A does not alter the statute of limitations for causes of action arising prior to *Lampf*. It only impacts actions filed prior to *Lampf*. The fact that those who have lost actions by failing to file prior to *Lampf* share the same reliance interests as those who would have lost actions but for § 27A seemingly did not concern Congress. The Seventh Circuit treats the notion of retroactivity in the context of new limitations periods in a similar manner. *See* McCool v. Strata Oil Co., 972 F.2d 1452, 1459-60 (7th Cir. 1992).

113 *Bank of Denver*, 789 F. Supp. at 1097:

> If Congress' purpose was to change the law, it could have enacted a retroactive express statute of limitations or made § 476 applicable to all cases regardless of whether they were filed on or before June 19, 1991. Instead, by selecting a discrete body of pending actions for special treatment under § 476, Congress demonstrated that its sole purpose was to nullify the Supreme Court's interpretation of § 10(b) without amending § 10(b) itself. In so doing, Congress usurped the power set aside to the judiciary by the Constitution.

114 *Id.* at 1097 ("[Section] 476 prescribes an interpretive rule that, in any civil action implied under § 10(b), the limitations period would be the period applicable in the jurisdiction on June 19, 1991."). The proposition that § 27A only tells Courts what rule not to apply is a variation on this point. In re Brichard Sec. Litig., 788 F. Supp. 1098 (N.D. Cal. 1992).

115 *See Bank of Denver*, 789 F. Supp. at 1097-98 (D. Colo. 1992).

116 *Id.* at 1097.

of the Constitution's Pardon Clause, whereas the issue presented here is one of statutory interpretation. Second, the interpretivist claim begs the question. Section 27A only prescribes interpretation if it fails to effect a legitimate change in law, but, it is precisely the conclusion of the incorporation argument that it effects such a change. Thus, the debate continues to revolve around two contradictory presumptions for which no second level of recourse exists.

The invocation of *Robertson* by courts interpreting section 27A takes them through yet another rondel. On the one hand, courts relying on *Robertson*[117] are wrong to regard it as dispositive for the section 27A cases. The issue in *Robertson* was whether the locus of the legislative intrusion occurred at the fact-finding or the law-declaring stage of the process.[118] To the extent that section 27A raises adjudicative process concerns at all, the issue in the section 27A cases rests on a distinction between types of effects at the law declaring stage.[119]

On the other hand, courts distinguishing *Robertson* similarly go awry. The district court in *Johnston v. Cigna Corp.*, for example, attempted to distinguish *Robertson* on the ground that section 318 rewrote a legislatively created law, whereas section 27A involved the alteration of a rule derived from a Supreme Court decision.[120] Given that the question is whether section 27A changes law, it is unclear what relevance the legislative or judicial origin of prior law has with regard to the determination of section 27A's status as law or nonlaw. To legislatively alter a judge-made law is no less an alteration of law than the modification of a statute.[121] The bottom line is that *Robertson* simply does not offer an answer to the law-nonlaw conundrum raised by section 27A.[122]

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117 *See, e.g.*, Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992) (relying on *Robertson* for the proposition that § 27A changed the law), *cert. denied*, 114 S. Ct. 95 (1993); Fry v. UAL Corp., No. 90 C 0999, 1992 WL 177086 (N.D. Ill. July 23, 1992).

118 *See Robertson*, 112 S. Ct. at 1412-13.

119 Reading the interpretation argument in the most generous light, the claim is that § 27A preempts the law-declaring stage by dictating how the court should determine what law governs (i.e., telling the courts not to refer to *Lampf*), rather than providing a new substantive law.

120 The *Johnston* court argued that in *Robertson* "Congress rewrote its own statutory framework. In stark contrast, § 476 attempts to overturn a decision of the Supreme Court interpreting the unchanged language of section 10(b)." Johnston v. Cigna Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992), *aff'd on other grounds*, 14 F.3d 486 (10th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3757 (U.S. May 2, 1994) (No. 93-1723). The contrast is clear, but it is hardly stark.

121 As noted above, *supra* notes 96 to 98 and accompanying text, *Robertson* does not endorse the underlying law exception. It merely holds that, if the exception is the law, the Ninth Circuit misapplied it. The question that § 27A really raises is whether congressional alteration of the law in a manner that only affects pending litigation offends the separation of powers doctrine.

122 The Eleventh Circuit rejected defendant's suggestion that *Robertson* be distinguished on the ground that it involved legislation with a prospective and retrospective

In sum, the problem is not whether section 27A changes law, but whether the separation of powers doctrine permits this type of change in law. This is not a question that the courts can answer by classifying section 27A as a change or not a change in the law.

2. *The Legislative Purpose Argument*

In *In re Brichard Securities Litigation*, the district court argues at length that the sole motive of Congress in passing section 27A was to affect the outcome of pending litigation, especially the outcome of a few cases involving highly visible defendants.[123] Thus, the *Brichard* court held section 27A unconstitutional under the *Klein* prohibition.[124] Other authorities have offered three alternative interpretations of section 27A's legislative purpose. First, Congress might not have acted to affect any particular litigation, but rather to protect the reliance interests of plaintiffs in a broad class of cases.[125] Second, an inquiry into legislative motive might not be appropriate in section 27A cases.[126] Third, a purpose to affect pending litigation might not render legislation invalid under the separation of powers doctrine so long as the affected litigants are treated as a class.[127]

While the purpose argument may be a legitimate ground for attacking section 27A, we need to recoguize that it is irrelevant to the underlying law exception. Purpose constitutes a criterion for determining the propriety of section 27A that is external to the classification of the point at which the legislation intervenes in the adjudicative process. The purpose at issue is Congress' desire to alter outcomes in pending litigation, not Congress' goal of telling judges what to do.

3. *The Mere Waiver of a Technical Defense Argument*

Another external criterion that has been introduced as support for section 27A's constitutionality is the claim that it is procedural and

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effect, whereas § 27A only has a retrospective effect. *See* Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1573 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993) (arguing that "[t]he presence of an additional prospective effect in no way lessens interference" with judicial decisionmaking). This conclusion seems correct as long as it is limited to the confines of the legal process framework. However, it does not answer the question that the Supreme Court reserves in *Robertson*, namely whether some other considerations might be relevant to the issue of intrusion on judicial power.

123 In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105-06 (N.D. Cal. 1992).

124 *See id.* at 1105, 1112.

125 Axel Johnson, Inc., v. Arthur Anderson & Co., 790 F. Supp. 476, 483 (S.D.N.Y. 1992), *aff'd*, 6 F.3d 78 (2d Cir. 1993).

126 *Id.* at 480.

127 *See* Palm, *supra* note 4, at 1308 n.376 (discussing interpretations of *Klein* which rest on legislative purpose).

technical in nature.[128] For example, a Tenth Circuit panel considers the constitutionality of section 27A in the following manner:

> In enacting Section 27A, Congress exercised a key legislative power. Statutes of limitations traditionally reside in the legislative branch . . . . In this sense, our case more closely resembles *United States v. Sioux Nation of Indians*, in which the Court affirmed Congress' power to enact legislation waiving the res judicata defense of a prior judgement [sic]. "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."[129]

Looking to the subject matter of the legislation, the panel found that section 27A was constitutional because its application only served to reverse adjudications on technical grounds.[130] However, the panel's reliance on *United States v. Sioux Nation of Indians*[131] is inappropriate. That case dealt with legislation waiving an affirmative defense that otherwise would have been available to the government.[132] Consequently, the government affected only its own rights by passing the legislation. Section 27A, by contrast, compromises the rights of private defendants. Moreover, a consideration of subject matter is irrelevant to whether the legislation falls within the underlying law exception.

Nonetheless, there may be merit to the suggestion that the subject of the legislation should be a factor in the separation of powers analysis. Part IV considers this point in greater detail.[133]

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128 *See, e.g.*, Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993); Fry v. UAL Corp., No. 90 C 0999, 1992 WL 177086, at *13 (N.D. Ill. July 23, 1992).

129 *Anixter*, 977 F.2d at 1546 (citation omitted) (quoting Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 483 (S.D.N.Y. 1992), *aff'd*, 6 F.2d 78 (2d Cir. 1993)).

130 The analysis is akin to Judge Lasker's "hallmarks of legislation" argument. In *Axel Johnson*, Judge Lasker suggests that the propriety of § 27A can be determined by noting that it bears the "hallmarks of legislation." 790 F. Supp. at 479. As a general matter, the suggestion steers us toward practical criteria for determining whether § 27A violates separation of powers principles. The criterion offered by Judge Lasker, however, proves to be unhelpful. The only characteristic that Lasker cites as indicative of § 27A's legislative character is that it deals with a subject matter—statutes of limitations—which is typically a legislative prerogative. The issue that § 27A raises, however, is not the general subject-matter of the legislation, but rather the propriety of legislating over a proper subject-matter in a manner which only affects pending actions. The ill-fated legislation in *Klein* was no less concerned with a typically legislative judgment—the liability of the government for property seized in the course of the war.

131 448 U.S. 371 (1980).

132 *See Sioux Nation*, 448 U.S. at 405.

133 *See infra* notes 246-66 and accompanying text.

4. *Summary*

The section 27A cases reveal that attempts to apply the underlying law exception result in one of two conclusions. On the one hand, the ambiguities latent in the legal process model of adjudication allow section 27A to be classified as a change in law. The rather inept drafting of the statute aside, it is difficult to envision section 27A as anything else. Indeed, in the wake of *Robertson* it is difficult to characterize any legislation as something other than a change in law, which is problematic from the standpoint of separation of powers jurisprudence. On the other hand, courts repelled by the restrictive scope of section 27A's application are forced to characterize reasonable separation of powers objections in a somewhat absurd way. In order to make the plausible argument that there should be an exception to the Changed Law Rule where the scope of legislation goes no further than pending litigation, they must also put forth the ridiculous claim that such legislation is not a change in law.

D. Problems with Applying the *Klein* Rules

As discussed earlier, the comment concerning *Klein* in the second edition of Hart & Wechsler's casebook on federal courts is the source of the dictation of fact exception that is attributed to *Klein*.[134] This section contends that the exception intuitively seems plausible based on the legal process notions developed by Hart and Sacks in their Harvard lectures.[135] Nevertheless, the dictation of fact exception suffers from the indeterminacy embodied in any attempt to ground a decision on the basis of categories as amorphous as "fact" and "law."[136]

The rule seems plausible because lawyers often carve up the adjudicative universe into categories of determinations of law, findings of fact, and applications of law to fact.[137] As generally understood, our adversarial system depends on a neutral set of rules being impartially applied by the judge after the parties have proffered grounds for the germane set of rules and evidence of the relevant facts for the case. The intrusion of a third party, the legislature, into the dispute upsets the balance. When the legislature promulgates new law, the role of a judge is unimpeached, insofar as the judge is simply confronted with a new neutral rule to apply. On the other hand, when the legislature goes so far as to mandate how the judge is to determine a certain fact,

134 *See supra* note 71.

135 *See* HART & SACKS, *supra* note 88.

136 For an excellent discussion of the legal process view advocated by Hart and Sacks, see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

137 *See supra* notes 88-91 and accompanying text.

the functions of fact finding and equal application of the laws are frustrated.

The problem with this model is that facts and rules are not so neatly disjoined. What counts as a relevant fact in a given case will depend on what is determined to be the relevant rule, which in turn depends on the characterization of the facts. It is unnecessary to take a position regarding the indeterminacy of language[138] or the theory-ladenness of facts.[139] Nor is it vital to maintain that the fact-law distinction is not useful for some purposes. Rather, the point is simply that the distinction is not useful as an analytic concept for distinguishing between types of legislative acts.[140] As the above discussion regarding the efforts of the courts indicates, the distinction is too elusive for consistent application.[141]

Robertson illustrates the problems inherent in applying the underlying law exception. There it was clear that the status of the legislation depended entirely on the framework employed by the court to characterize the legislation. To the Supreme Court, it was new law because it created an independent ground for environmental adequacy. To the Ninth Circuit, it was a dictation of fact because it interfered with how the court would decide whether the preexisting rules applied to a particular fact. In other words, even though a law might seem patently clear, it can still be described as establishing an independent rule, rather than as a dictation of fact.[142]

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138 *See, e.g.*, WILLARD VAN ORMAN QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 32 (1969).

139 *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 53-65 (1970); Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, *in* CRITICISM AND THE GROWTH OF KNOWLEDGE 91-197 (Imre Lakatos & Alan Musgrave eds., 1970). For examples of attempts to apply these concepts of the philosophy of science and language to legal analysis, see Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, *in* THE POLITICS OF INTERPRETATION 271 (W.J.T. Mitchell ed., 1983); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 46 (1987); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42-61 (1990).

140 *See* Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 711 (1990). *See also* THE FEDERALIST No. 37 at 244 (James Madison) (Isaac Kramnick ed., 1987) ("[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . . [q]uestions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adapts in political science.").

141 For an extended criticism of the distinction between fact and law in the context of judicial oversight of administrative agency action, see CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 98-105 (1990). *See generally* Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979).

142 Perhaps the best evidence of the evisceration of *Klein*'s result by these approaches is provided by the Ninth Circuit's *Gray v. First Winthrop Corp.* decision. *See* quotation, *supra* note 95. Furthermore, the confusion is not limited to the courts. The commentaries on § 27A published thus far have reached different conclusions regarding the proper stan-

Attempts under the *Klein* rules to distinguish between law and nonlaw have yielded two unacceptable results: courts either defer to the legislative enactments at issue or allow their own political views to dictate whether the substantive objective of the legislation merits judicial deference. Neither of these alternatives is acceptable. Part II argues that the integrity and independence of the judiciary is impeded when its judgments can be nullified by the stroke of the legislative pen. Judicial integrity, however, is equally jeopardized when courts defend their turf in an unprincipled and ad hoc manner.

II

THE RELATIONSHIP BETWEEN SEPARATION OF POWERS DOCTRINE AND PURELY RETROACTIVE LEGISLATION

In Part I, we saw that the rules attributed to *Klein* fail to provide a basis for consistent and reasoned decision-making in cases involving congressional legislation enacted to affect pending litigation. In advocating the abandonment of these rules, however, it is not this Note's purpose to suggest that no check should be placed on the legislature in such situations. Justice Chase's concern that the legislature does not have the power to prescribe a judicial rule of decision resonates strongly. Intuitively, the legislature's ability to manipulate the results of pending litigation undermines the ideal of ordered liberty and the protections against tyranny for which divided government strives.[143] This section validates that intuition by locating its foundation in the principles underlying the separation of powers.

Our discussion of congressional efforts to affect pending cases has disclosed two problematic elements of such legislation: (1) manipulation of the courts, and (2) retroactive alteration of the legal status of the parties embroiled in the pending litigation.[144] Separation of powers analysis under the *Klein* rules rests solely on the first feature, treating the second element as irrelevant.[145] Such an approach to separation of powers questions is purely "branch protective."[146] The antinomy created by the distinction between "law" and "non-law" presupposes that there are distinct kinds of legislation and that the task of separation of powers analysis is to determine the proper category in which to place section 27A. By viewing the prob-

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dard and result in the case. Fisch, *supra* note 4, at S121-22 (§ 27A did not change the underlying law and thus, is unconstitutional). Goldstein, *supra* note 4, at 892-93 (concluding that although § 27A fails to change the underlying law it is nonetheless constitutional); Palm, *supra* note 4, at 1294 (§ 27A changes the underlying law and thus is constitutional); Sabino, *supra* note 2, at 52-54 (same).

143 *See* Hart, *supra* note 65, at 1373.

144 *See supra* notes 109 to 116 and accompanying text.

145 *See supra* notes 109 to 122 and accompanying text.

146 *See* Brown *supra* note 1, at 1518-19.

lem as an intrusion into the court's decision-making process, the antinomy obscures the possibility that retroactivity itself may pose separation of powers concerns. We can bring retroactivity back into focus by accepting that section 27A is a change in law and asking whether separation of powers principles require a determination that section 27A is an improper change in the law.[147]

In Section II.A., this Note provides a model for examining these issues. Section II.B. briefly traces the contours of separation of powers principles. Finally, Section II.C. argues that purely retroactive legislation implicates constitutional concerns under the separation of powers doctrine that are distinct from due process concerns.

A. A Model for Understanding the Problem Posed by *Klein*

The Supreme Court has long held that retroactive changes in law are to be applied to adjudicated cases pending appeal.[148] As noted earlier, this Note refers to this rule as the Changed Law Rule.[149] The Changed Law Rule inevitably creates conflict between the legislative and judicial branches, since, if applied without limitation, the Changed Law Rule allows Congress to alter judgments prior to the conclusion of the appeals process. Given that one of the purposes of the separation of powers doctrine is to insulate the litigation of private disputes from the vagaries of political power, there should seemingly be some limit on Congress's ability to employ this power.

Imagine a spectrum representing the relative intrusiveness of legislation employing the Changed Law Rule. At one end is legislation (call it "Law X") that declares specifically and exclusively what the outcome of a particular litigation should be (call it *A v. B*). Such a declaration entails a high degree of intrusion on the power of the judiciary to interpret and apply the law.[150] At the other end of the spectrum is legislation (call it "Law Y") that lengthens a statute of limitations for an entire class of cases, so that if it is retroactively applied, it will de-

147 Thus far, however, this suggestion has been rejected by the circuit courts. Gray v. First Winthrop Corp., 989 F.2d 1564, 1573 (9th Cir. 1993) (arguing that retroactive legislation need only pass the rational basis test under due process analysis); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

148 United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). *See* BATOR ET AL., *supra* note 55, at 369 n.4; Young, *supra* note 30, at 1238-44.

149 This Note borrows the term from Professor Young. *See* Young, *supra* note 30, at 1240.

150 *See, e.g.*, Yakus v. United States, 321 U.S. 414, 468 (1944) ("[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.") (Rutledge, J., dissenting). One might, however, implausibly argue that Law X is merely one more piece of the legal mosaic which the courts are obliged to apply. Such a reading seems implicit in the Court's analysis in *Robertson*. *See* 112 S. Ct. at 1413-14.

prive the defendant of an affirmative defense (call it *C v. D*).[151] Law Y is less intrusive than Law X because (1) its purpose is not to affect individual litigation, but rather an area of the law; (2) it changes law prospectively as well as retrospectively (Law X only has retrospective application since it only applies to the particular case); and (3) it does not alter the substantive rights of the affected litigants in the same way as Law X because D had notice of the possibility of legal liability, whereas B did not.[152]

Section 27A fits somewhere between these two hypotheticals. First, its purpose was not to affect only a single litigation, but rather a class (although a narrow one) of pending litigation. Second, it did not change law prospectively, only retrospectively. Third, although the distinction between substance and procedure is obscure, statutes of limitations are generally treated as less fundamental to the rights of parties than, for example, a law creating a cause of action.

For our purposes, consideration of this spectrum will help to identify the problems with permitting legislative preemption of pending cases. The following sections focus on the separation of powers implications of such preemption.

B. The Legislature and the Courts

Fearing the concentration of political power, the Framers adopted a tripartite division of power in the structural provisions of the Constitution. As Madison noted, "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."[153] The development of separation of powers jurisprudence is derived from the Constitution's general grant of legislative, executive and judicial powers to each of the three branches in Articles I, II, and III, and the political principles embodied therein.

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151 *See* Bradley v. School Bd., 416 U.S. 696, 715-16 (1974) (concluding that legislation will generally be applied retroactively unless Congress directs otherwise or doing so results in manifest injustice). *But see* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (stating that silent legislation is presumed to have only prospective effect). For a discussion of retroactive application of general legislation, see Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 TEX. L. REV. 409 (1928).

152 Obviously, if Law Y had shortened the limitation period, thereby retroactively denying C a cause of action, then C cannot be said to have been given notice in the same manner.

153 *See* THE FEDERALIST No. 47, at 304 (James Madison) (Isaac Kramnick ed., 1987) (emphasis omitted).

When allocating judicial power to the federal courts, the Framers clearly acknowledged the danger posed by legislative attempts to usurp the prerogatives of the courts.[154] In *The Federalist No. 47*, Madison explained that "[t]he entire legislature can perform no judiciary act" and that "[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."[155] Examples of such transgressions by state legislatures were familiar to the Framers.[156] In *The Federalist No. 48*, Madison noted instances of overreaching by the Virginia and Pennsylvania legislatures.[157]

A test of the separation principles came early in the history of the new Republic. In 1791, Congress enacted legislation creating a system by which Revolutionary War veterans could apply to the federal circuit courts for a veteran's pension. The courts' task was to determine whether the applicant was indeed a veteran and to enter judgments for the amount of pension to be awarded. The legislation, however, contained a provision giving the Secretary of War the power to deny the judgment of the courts. In what came to be known as *Hayburn's Case*, the circuits refused to hear the veterans' petitions on the ground that the legislation vested judicial power in the hands of the executive branch.[158] In short, *Hayburn's Case* demonstrates that reserving the power to alter judicial judgments by the legislative branch eviscerates the judicial power.

Klein is a more complex instance of legislative intrusion. Unlike the final judgments that would have been subject to review in *Hayburn*, Klein's case was pending appeal at the time of the legislative action. Because the legislature has the power to enact general legislation, *Klein* seemingly presents a case where the exercise of that power improperly interjects itself into the exercise of judicial power. A broad reading of the Changed Law Rule, however, allows such a legislative trump on the ground that the judicial function has not really been infringed upon. Under this interpretation, the execution of the judicial power involves the application of law to litigants, and legislative action in this instance merely gives the judiciary a different set of laws to apply. But this seems to allow legislation as long as it affects more than one case!

The issue ultimately raised by *Klein* and by the section 27A cases is whether the fact that the legislature has exercised its general legisla-

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154 This summary of the Federalist Papers and Hayburn's Case borrows heavily from the excellent discussion in Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487, 1490-93 (6th Cir. 1993).

155 THE FEDERALIST No. 47, at 304-05 (James Madison) (Isaac Kramnick ed., 1987).

156 GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 154-55 (1969).

157 THE FEDERALIST No. 48, at 308 (James Madison) (Isaac Kramnick ed., 1987).

158 Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).

tive powers in a purely retroactive manner alters the logic of Changed Law Rule. The next subpart argues that it does.

C. Separation of Powers Principles in the Context of Retroactive Legislation

In determining the shape of a new government, the Framers of the Constitution expressed concern regarding the power of government to alter the legal consequences of past conduct by retroactive legislation in the Bill of Attainder, Ex Post Facto, Contract, and, later, the Due Process Clauses.[159] Since the Supreme Court held early on in the history of the new Republic that the Ex Post Facto Clause applied only to criminal laws,[160] and the Bill of Attainder[161] and Contract Clauses[162] have also been narrowly construed, the constitutional analysis of retroactive civil legislation has fallen to due process jurisprudence.[163] Under due process analysis, courts and commentators have

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159 *See* Byrant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 231 (1927). This concern did not extend to retroactive changes in adjudicative law. *See* Smith, *supra* note 151, at 414-15. The reason may stem from the Blackstonian view that courts do not make law. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1758-64 (1991).

160 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). This interpretation of the Ex Post Facto Clause was not without its critics. As Justice Story explained,

> The terms, *ex post facto* laws, in a comprehensive sense, embrace all retrospective laws, or laws governing or controlling past transactions, whether they are of a civil, or a criminal nature. And there have not been wanting learned minds, that have contended with no small force of authority and reasoning, that such ought to be the interpretation of the terms in the constitution of the United States. As an original question, the argument would be entitled to grave consideration; but the current opinion and authority has been so generally one way . . . that it is difficult to feel, that it is now an open question. The general interpretation has been, and is, that the phrase applies to acts of a criminal nature only.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1339 (1970). For a summary of the grounds justifying the competing interpretations, see Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 791-92 n.51 (1936).

161 *See* Sabino, *supra* note 2, at 56-59.

162 For a recent discussion of the Contract Clause, see Robert A. Graham, Note, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 MICH. L. REV. 398 (1993).

163 The emphasis on the Due Process Clause, however, was not an instantaneous development. The restrictive interpretation of the Ex Post Facto clause led the Marshall court to develop two lines of analysis for limiting the power of state legislatures to enact retroactive state legislation. First, the Court took an expansive view of the meaning of "contract." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136-37 (1810). Second, the Court utilized a notion of "vested rights" grounded in natural law as a limitation on the power of state legislatures. *Id.* at 143 ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.") (Johnson, J., concurring); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50-51 (1815). Although the early Court appears to have been in agreement that retroactive legislation violates the natural law, it was not unequivo-

focused on the *fairness* of the retroactive legislation.[164] The threshold question ignored by this approach to retroactivity is whether the legislature has the *power* to enact such laws.[165] Thus, in articulating a new framework for understanding conflicts between the courts and Congress, this Section explores a forgotten dimension of the jurisprudence of retroactivity—whether the separation of powers doctrine should be seen as a constraint on the power of Congress to enact retroactive legislation.[166]

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cal about its power to annul state legislation on this ground. *Id. Compare Terrett with* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388-89 (1798) (refusing to void retroactive state legislation even though "[t]o maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments") (emphasis omitted); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834). *See generally* Smead, *supra* note 160, at 788-91; Smith, *supra* note 159, at 234-35.

164 *See* Guido Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1191 n.2 (1962) ("Thus, for example both Hochman and Slawson are concerned with demonstrating, through examinations of the factors which courts appear to weigh in these cases, that 'fairness' is the ultimate test of the validity of retroactive laws. Both authors bypass questions of the sources of legislative power to enact such laws, simply assuming the power exists subject to due process limitations.") (citations omitted). *See also* Estrin, *supra* note 151, at 2049 (arguing that apprehension regarding retrospective laws rests on equitable, not constitutional, concerns); Hochman *supra* note 151, at 696 (arguing that "vested rights" is a conclusory term, and thus, modern due process analysis turns on the question of the degree and reasonableness of a party's reliance on prior law).

165 Legislative power was at the heart of the concern shared by natural law theorists. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("It is against all reason and justice, for a people to entrust a Legislature with such [retroactive] powers; and, therefore, it cannot be presumed that they have done it."). Thus, the concept "vested rights" took a very different form in the natural law decisions than it does in contemporary due process analysis. Under natural law, one found that a right had vested by inquiring whether the right had been "perfected" under the laws existing prior to the enactment of the retroactive legislation. The defect in retroactive legislation was not that it unfairly upset the settled expectations of the parties, but, rather, that retroactive legislation which disturbed the perfected right was not legislative in nature. *See, e.g., Calder*, 3 U.S. (3 Dall.) at 388 ("An ACT of the Legislature (for I cannot call it a *law*) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of the legislative authority."). *See generally* Smead, *supra* note 160, at 780 ("Retroactive laws were held to be oppressive and unjust, and it was maintained that *the essence* of a law was that it be a rule for the future.") (emphasis added). Under due process analysis, on the other hand, the status of retroactive legislative acts as *law* is not questioned. Whether the law meets the requirements of fairness implicated in the due process clause is really what is at issue. The concept of vested rights merely becomes a threshold question to determine whether or not the Fifth or Fourteenth Amendments are implicated by the legislative action.

166 A word of caution for the reader: there are no Supreme Court cases that directly support finding such a constraint in the separation of powers. There are, I believe, historical reasons for the Court's not having taken a route. Most of the early Supreme Court decisions concerning retroactivity involved challenges to state legislative action. The separation of powers doctrine was of no avail in such cases. In *Calder*, the opinion of the Court suggests that a separation of powers argument was made on the basis of the state constitution. While expressing sympathy for the claimant, the Court held that such a state law matter was outside its jurisdiction. As no constitutional constraint could be found to limit the state legislatures, the Court developed a limitation based on the natural law. *See supra* note 163. With the development of this doctrine, the Court had no occasion to develop a

Before proceeding further we need to distinguish between three kinds of legislation: (1) legislation with only prospective effects; (2) legislation with both prospective and retroactive effects; and (3) legislation with purely retroactive effects.[167] The third type of legislation contains a subset, "pending case law": laws which limit the retroactive application to cases pending in the courts at the time of enactment.[168]

In *Gray v. First Winthrop Corp.*, the Ninth Circuit summarily dismissed the claim that a purely retroactive law raises separation of powers concerns.[169] According to the *Gray* court, precedent supports the conclusion that Congress has the power to enact legislation with retroactive effect and that the rationality of such legislation is unaffected by the nonexistence of any putative prospective effect.[170] This analysis conflates the very different inquiries necessary for questions of process

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separation of powers doctrine to meet the question of federal retroactive legislation. *But see* the discussion of United States v. Klein, *infra* notes 224-46 and accompanying text. The natural law theory eventually came into disrepute; but, on the heels of the decline of natural law theory came the passage of the Fourteenth Amendment. The vested rights doctrine developed by the natural law theorists was simply transplanted to due process analysis. While exceptions emerged, the development of a strong interest in protecting proprietary rights during the *Lochner* era diverted litigants from invoking other constitutional provisions to restrain retroactive legislation. *See* Smith, *supra* note 159, at 234, 237. It is peculiar, however, that the assertion that retroactive legislation was beyond the legislative power was not seen as raising a constitutional separation of powers problem. *See* Smith, *supra* note 159, at 235.

167 *See* Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 381 (1977):

> [A] law is retroactive with respect to an act if and only if the law was created at a given time, the act was done before that time, and the law altered the legal status of that act. On the basis of this characterization, we may also say that a law is purely retroactive, or purely prospective, retrospectively, if every act to which it is applicable antedates, or postdates, its creation. A law is partly retroactive and partly prospective if it is applicable to at least one act occurring before, and one occurring after, its creation.

168 The definition of retroactivity employed in this Note is broader than the one provided by Munzer. *Id.* Munzer's definition is restricted to legislation which alters the legal status of a past act. For example, the legislature enacts a law at time t_2 making possession of alcohol illegal, and Smith was in such possession at time t_1. Another sense of retroactivity, which persists today, was articulated by Justice Story in *Society for the Propagation of the Gospel in Foreign Parts v. Wheller*, 2 Gall CC 105 (1814). As Smead states: "The identification of the principle [against retroactivity] with vested rights was made by expanding the principle to make it include a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, which had been vested anterior to the time of enactment of the laws." Smead, *supra* note 160, at 781-82.

I adopt Story's twofold conception of retroactivity, *sans* the vested rights language. Thus, I include in this category of "pending case law" those laws which are purely retrospective in effect, but prospective in form. For example, the legislation in *Seattle Audubon* is purely prospective insofar as it does not alter the legal status of prior agency action. Rather, the legislation permits future agency action which may moot the injunctive relief sought. *See supra* notes 78-82 and accompanying text. Thus, *Seattle Audubon* is a retrospective law in the second sense articulated by Story.

169 989 F.2d 1564, 1570 (9th Cir. 1993). *See also* Henderson v. Scientific-Atlanta Inc., 971 F.2d 1567, 1573 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

170 The *Gray* court wrote:

and questions of power.[171] Under due process analysis, courts examine retroactive legislation in light of its effect on the parties and the rationality of the legislature in adversely affecting the parties' settled expectations.[172] A separation of powers approach to retroactive legislation would focus not on the issue of whether a right had vested, but rather on whether giving retroactive effect to legislation undermines the goals of the separation of powers doctrine.[173]

There are at least three separation of powers values implicated when general legislation is applied retroactively. First, the "ordered liberty argument" concentrates on the fear that an unfettered majority might trample minority rights protected in the Constitution.[174] This assumes that the federal courts, as a counter-majoritarian institution,

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> Appellees argue in the alternative that Section 27A's purely retroactive application renders the legislation constitutionally infirm as violating the principle of separation of powers. They assert that to effect the requisite "change in the underlying law" for Klein purposes, Congress had to couple section 27A's retroactive provision with a prospective change in the law. Cases do not support this argument. Congress clearly has the power to amend a statute and to make that change applicable to pending cases. Further, the Supreme Court has consistently held that Congress may enact legislation with retroactive effect so long as it comports with Due Process by passing constitutional muster under rational basis scrutiny. In Pension Benefit [Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984)], the Court explained that while "retroactive legislation does have to meet a burden not faced by legislation that has only future effects," that burden is met "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

989 F.2d 1564, 1570 (9th Cir. 1993) (citations omitted).

171 *See e.g.*, Calabresi, *supra* note 164, at 1191; Hochman, *supra* note 151, at 694. Due process, however, was not always the basis for the constitutional analysis of retroactive legislation. *See supra* note 163 (discussing the natural law objections to retroactivity).

172 With regard to retroactivity, due process jurisprudence focuses on two issues. First, in order for retrospective application of a law to implicate due process concerns, the new law must abrogate a vested right. *See* Hochman, *supra* note 151, at 696 (noting that "vested right" is conclusory and that the proper analysis of retroactive laws under the due process clause involves a determination of the degree of reliance by the parties). As noted earlier, the lower federal courts have unanimously held that § 27A does not abrogate a vested right. *See supra* note 26 and accompanying text. Second, where a vested right is abrogated, the court applies a rational basis test. *See* U.S. v. Sperry, 493 U.S. 52, 53 (1989); Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 718 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). In reality, the notion of vested rights is mostly paid lip service by the courts and the focus of the inquiry is really a rational basis test. *See* Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 997 F.2d 39, 47 (5th Cir. 1993), *cert. granted*, 114 S. Ct. 680 (1994); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 111-23 (1993).

173 *But see* Estrin, *supra* note 151, at 2049 n.99 (asserting that separation of powers concerns do not underlie the Court's presumption against retroactivity); Verkuil, *supra* note 1, at 306 (suggesting that due process can do the work of the separation of powers doctrine).

174 *See* Brown, *supra* note 1, at 1538; Alan B. Morrison, *A Non Power Looks at Separation of Powers*, 79 GEO. L.J. 281 (1990).

protect such rights more effectively than the other two branches of government.[175]

Second, the "institutional integrity argument" focuses on the optimal operation of the tripartite scheme of American constitutionalism. The judiciary cannot be a coequal branch of government, as intended by the Framers, without the power of judicial review. Nor can the judiciary be an effective branch of government if the legitimacy of its decisionmaking process is rendered doubtful by acts of Congress.[176] To combat frequent reversal, the Court's process becomes clouded by calculations about the prospect of being overruled. The courts' authority is, thus, eroded both by Congress' direct assault on its decisions and by indirect politicization underlying courts' decisions. This, of course, exists to a limited degree where Congress prospectively amends legislation to correct what it perceives as judicial misinterpretation of its statutes, but the threat to the status of the judiciary increases where legislative review retroactively defeats the judgments of the courts. Moreover, legislative interference with the judiciary undermines the "equality principle" that lies at the heart of the judicial process.[177] The legitimacy of the judiciary depends, in large part, upon the treatment of like cases in a like manner.[178]

Third, the "accountability argument" focuses on the structural implications of separated powers for the democratic process.[179] The division of power among the branches creates a framework of action within each branch that serves to limit the possible avenues of subterfuge available to competing branches. For example, a legislature with judicial power will be less accountable to the general public because it can enact general legislation to achieve one set of ends, while controlling the outcomes of cases arising under such legislation to achieve a different set of ends.[180]

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175 *See* Brown, *supra* note 1, at 1566.

176 This concern arises even in the context of purely prospective, reactive legislation. *See* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 746-49 (1991) (discussing impact of congressional overruling on the legitimacy of the court).

177 *See* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 185 (1982). Dworkin makes this point in the context of judicial overruling. While the principle, qua principle, is not called into doubt by legislation, the perception of an arbitrary judiciary may nonetheless be raised in the minds of those who may not appreciate the finer distinctions between common and statutory law.

178 *But see* LON L. FULLER, THE MORALITY OF LAW 211 (rev. ed. 1969) (noting that in some cases like as like is served by retroactive legislation).

179 *See* INS v. Chadha, 462 U.S. 919, 966 (1983) ("The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to 'the tyranny of the shifting majority.' ") (Powell, J., concurring).

180 The accountability argument differs from the ordered liberty argument insofar as the latter is concerned with protecting the minority from the majority, whereas the former is concerned with protecting the majority's capacity to evaluate governmental action. *See*

Within the context of due process jurisprudence, as the Ninth Circuit in *Gray* correctly perceived, the distinction between *partly* retrospective laws and *purely* retrospective laws is irrelevant.[181] The question of whether a right has vested is backward-looking. Rights vest when they have been perfected in the past. A party does not rely differently on old law merely because application of the new law is limited to pre-enactment conduct.[182]

Under separation of powers analysis, however, the distinction between partial and pure retroactivity is crucial. As a general matter, permitting otherwise prospective laws to have retroactive effect is consistent with the ordered liberty and institutional integrity. Such laws satisfy ordered liberty concerns because the prospective effect of the law encompasses the general populace, thereby acting as a check on majoritarian impulses.[183] All other things being equal, the majority is encompassed by the new law. Such laws also satisfy institutional integrity by preserving the principle of equality, at least in part, since the new law treats future and pending cases identically.[184] These values are plainly not satisfied in the case of *purely* retrospective legislation. A (often very small) minority, comprised of past actors, are the only

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generally Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451-52 (1991).

181 Pacific Mut. Ins. Co. v. First Republicbank Corp., 997 F.2d 39, 53 (5th Cir. 1993) (noting that *Usery* did not "predicate its blessing of retroactive legislation on an associated prospective component."), *cert. granted*, 114 S. Ct. 680 (1994). *See also* Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

182 *See, e.g.*, Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992) (commencement of law suit did not vest right to application of limitory period pre-dating § 27A), *cert. denied*, 114 S. Ct. 95 (1993); Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (same holding with respect to Portal-to-Portal Act), *cert. denied*, 335 U.S. 887 (1948).

183 One might respond that counter-majoritarian concerns are adequately protected by substantive due process in those cases involving fundamental rights because strict scrutiny is triggered. I think this response fails for three reasons. First, the Framer's counter-majoritarian concerns were not limited to the contemporary court's list of fundamental rights. One of their goals in structuring the new national government was to limit the ability of an unpropertied majority to undermine minority property rights. Second, purely retrospective legislation may threaten minority property rights that are not adequately safeguarded by the political system. Suppose, for example, a purely retrospective law is enacted to limit liability to tort victims injured in an industrial accident. The Court might find such legislation rational for a number of reasons; for example, avoiding the bankruptcy of a company vital to the American economy. Third, separation of powers doctrine may provide greater protection for those fundamental interests than would substantive due process analysis because the determination does not hinge upon whether purely retrospective abrogation of rights is justified, but whether the legislation is beyond the scope of congressional power.

184 This is not to say that a prospective law could never be invalidated on separation of powers grounds. For example, the prospective effect of the legislation may be illusory because there are no possible future parties to whom the new law will apply. Under the meaning of retroactive legislation previously outlined, *see supra* note 168, legislation that is prospective only in form is purely retroactive.

ones affected by the new law; thus they cannot look to the majority for support in the political arena. Moreover, those actors are the *only* actors subject to the new law. Their cases are treated differently from those in the past and those in the future.[185] These defects are all the more magnified in the case of pending case laws, because the number of individuals will be small and their identity will be known at the time of the legislation.

To put it differently, where Congress seeks to alter the effect of prior conduct through retroactive legislation, a requirement that the legislation also operate prospectively acts as a ratchet restraining against majoritarian exploitation. To get the retroactive effect of the legislation on *known* parties, the legislature must live with the prospective effect on *unknown* parties, who could be anyone. Without such prospective effect, the legislature is unbounded by concern for future litigants—the ratchet is removed. And, again, this is all the more true where the *known* parties effected by retroactive legislation is limited to *named* litigants in pending actions.

An exception to the Changed Law Rule for pending case laws is, moreover, consistent with a broad view of Congress' power to remove jurisdiction from the federal courts for classes of cases. Accepting, for the sake of argument, the view that Article III, section 2 of the U.S. Constitution provides Congress with the power to withdraw a particular subject matter completely from federal court jurisdiction,[186] we saw that *Klein* limits Congress' jurisdictional power: Congress may completely withdraw jurisdiction of the federal courts over a subject-matter, but it cannot provide for partial withdrawal contingent upon the judgment of the court.

The rationale for drawing this distinction is compelling. The power of absolute withdrawal of federal jurisdiction provides Congress with an important check on the power of the judiciary. Congress' use of this check, however, carries with it certain appropriate costs.[187] By withdrawing federal jurisdiction over a subject matter, Congress loses the benefits of having a federal forum for decision of such cases and

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185 In the case of § 27A, the parties are treated similarly to prior parties. The Note argues, *infra* notes 267-71 and accompanying text, that this is an important factor in finding § 27A constitutional. But, we can well imagine that Congress could have altered the statute of limitations for pending cases so that it would have differed from prior law, as well as future law under *Lampf*.

186 Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005-06 (1965); Gunther, *supra* note 93, at 905-06. *But see* Hart, *supra* note 65, at 1365 ("exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan"); Joseph Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Sager, *supra* note 49, at 42-60. *See generally* BATOR ET AL., *supra* note 55, at 380-82.

187 *See generally* BATOR ET AL., *supra* note 55, at 384-85; Wechsler, *supra* note 186, at 1006-07.

must take its chances with state courts. In constitutional and federal statutory matters, Congress also loses the benefits that stem from a uniform system of law. Moreover, in the case of federal statutory matter, Congress loses the benefit of having its law interpreted by federal courts as opposed to parochial state courts.

Thus, absolute withdrawal of jurisdiction serves as a potent weapon over a recalcitrant federal judiciary, but a weapon which has internal checks that curb the frequency of its use. In contrast, as *Klein* held, permitting partial withdrawals of jurisdiction is illegitimate; it affords Congress the check on judicial power without the costs associated with the loss of the federal forum. To grant institutional legitimacy to purely retrospective legislation provides Congress with the same windfall. It allows Congress to provide a federal forum for litigation while, at the same time, holding in reserve the trump card of legislative alteration of the pending case.[188] In this respect, the separation of powers value of political accountability is undermined, since Congress can reap the political benefits of popular legislation while remaining cynically aware that it may alter the consequences of that legislation to satisfy special interests with narrowly targeted pending case laws.[189]

This view of the separation of powers entails looking beyond the mere form of legislative and judicial acts.[190] It eschews the formalism

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188 *See infra* note 240 (quoting Young).

189 This is not to suggest that such manipulation would be a frequent occurrence if Congress felt free to do it. Given intra-branch political checks, it is likely only to occur in extraordinary circumstances. Nonetheless, such occasions are precisely when the judiciary is needed.

Note also that this notion of accountability might be extended to support a conclusion that the result in *Beam* is constitutionally based. Selective prospectivity insulates the court from political accountability because it defers the consequences of the new rule. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1802 to 1803 (1991) (arguing that "to deny full retroactivity to [judicial] decisions makes it too easy to cut free from precedent and change the law in much the way that the legislature would").

190 This does not imply, of course, that a more formalist argument could not be formulated to support a prohibition of pure retrospectivity. Justice Story's conception of the natural limits of the legislative power is consistent with such an attack. *See supra* notes 167-68. Moreover, recent scholarship regarding the notion of a rule of law hints at similar limitations. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 251 (1985) (suggesting, in a different context, that "separation of powers was desigued to ensure that the laws passed by the legislature would be prospective and general. Their interpretation by an imported and independent judiciary would prevent retroactive modification and ensure even-handed application, thereby promoting the rule of law."). Support for this position can be drawn from Hamilton's comment in the *Federalist* 81:

> A legislature, without exceeding its province, cannot reverse a discrimination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent, to the state governments, as to the

of attempts to resolve conflicts between the branches on the basis of categorical notions of "legislating" and "judging."[191] As we discussed earlier, such formalism blinkered the court in *Gray*, allowing it to reject unhesitatingly the importance of section 27A's purely retroactive feature.[192] A more substance-based view is both theoretically preferable and more consistent with the Supreme Court's recent approach to separation of powers jurisprudence.[193] In viewing purely retroactive legislation in light of the substantive ends of separation of powers doctrine, we have seen that such legislation intrudes on the prerogatives that the creation of an independent judiciary was meant to protect. Purely retroactive legislation allows Congress to target a small class of persons for judicial favor, achieving the same effect as if it had altered the outcome by directly reviewing federal courts' judgments. Although general legislation with retroactive effect impinges on separation of powers values, the prospective aspect of that legislation ameliorates the danger. Purely retrospective legislation lacks this saving grace.

III

REEXAMINING THE MEANING OF *SCHOONER PEGGY*, *WHEELING BRIDGE* AND *KLEIN*

The purpose of this Part is to assess whether *Klein* is properly read as standing for either of the rules attributed to it by modern courts. Our reexamination of *Klein* will address two questions: does a fair reading of *Klein* support the rules attributed to it by modern courts; and, if not, what guidance does *Klein* offer for developing an alternative approach to retroactive legislation?

In order to appreciate the implications of *Klein*, it is necessary to examine two earlier cases which served as the framework for the *Klein* opinion. The first of these, *Schooner Peggy*,[194] announced the Changed Law Rule. The second, *Wheeling Bridge*,[195] cited by *Klein*, found legislation which solely acted to reverse a federal court injunction to be valid. Any reading of *Klein* as articulating an exception to the Changed Law Rule can only be maintained against this background.

> national government now under consideration. Not the least difference can be pointed out in any view of the subject.

THE FEDERALIST, *supra* note 84, at 453. *See generally* GARY WILLS, EXPLAINING AMERICA: THE FEDERALIST 117-50 (1981) (explaining the legitimacy justification underlying the Framers' understanding of the separation of powers doctrine).

191 An analogous contention is made by EDLEY, *supra* note 141, at 105, with regard to division of power between the courts and administrative agencies.

192 *See supra* note 169-71 and accompanying text.

193 *See infra* notes 247-48 and accompanying text (discussing functionalist approaches to separation of powers).

194 5 U.S. (1 Cranch) 103 (1801).

195 59 U.S. (18 How.) 421 (1855).

In this Part, the Note argues that, at the time that *Klein* was decided, *Schooner Peggy* and *Wheeling Bridge* did not support an expansive view of the Changed Law Rule. On this reading of its predecessors, *Klein* need not stand for the proposition that retroactive characteristics of legislation are irrelevant to the separation of powers doctrine.[196] Indeed, this Part concludes by arguing that *Klein* suggests that retroactivity in fact played a part in the Court's separation of powers analysis.

A. *Schooner Peggy*, the Changed Law Rule, and the Public Rights-Private Rights Distinction

In *Schooner Peggy*, Chief Justice Marshall addressed the question of whether an appellate court must restrict its examination to the question of whether a case had been rightly decided by the lower court at the time of that decision, or whether the appellate court should decide the matter anew taking into account relevant legislation enacted subsequent to the lower court's decision. The answer of the Chief Justice would have important implications for the distribution of power between the judiciary and the Congress.

The facts of the case were straightforward. Under the authority of the President, the Schooner Peggy and her cargo had been captured and seized by the ship Trumball.[197] The Schooner Peggy had been carrying goods from Port au Prince to France and, according to the circuit court, had aboard it some light arms for self-defense.[198] In a suit brought by the owner for the return of the Schooner Peggy, the district court ruled in favor of the owner on the grounds that the ship was not an "armed vessel" and that it was not taken on the "high seas" within the meaning of the then-existing law.[199] On September 23, 1800, the circuit court reversed on both grounds.[200] Chief Justice Marshall avoided these issues of interpretation by resting his determination on a treaty with France, ratified on December 21, 1801 after the circuit court decision,[201] which provided for the restoration of captured property that had not yet been "definitively condemned."[202]

Marshall's argument for applying the new law created by the treaty to the case is not entirely satisfying. Initially, he argued that, under the Constitution, a treaty is the supreme law of the land. Thus, for the Court to condemn the ship would constitute an action of the

196 For an example of this method of interpreting *Klein*, see BATOR ET AL., *supra* note 55, at 369 n.4.

197 *Schooner Peggy*, 5 U.S. (1 Cranch) at 103.

198 *Id.* at 103-06.

199 *Id.* at 104-05.

200 *Id.* at 106-07.

201 *Id.* at 107-09.

202 *Id.* at 108.

Court contrary to that law.[203] In other words, because condemnation is a judicial act and, as was already decided, the lower court judgment was not final with respect to the condemnation, the Court would be in violation of the supreme law if it declared the ship condemned. The argument, however, is circular. The requirement imposed on the Court by the treaty is only binding if the Court, under the powers of appellate review provided in Article III, applies the new law on appeal.

Marshall's second argument is entirely conclusory. He writes:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which goverus, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation."[204]

Marshall is silent as to why no court would contest its obligation.

Finally, Marshall offers a pragmatic justification:

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.[205]

That is to say, the importance of the national purpose in surrendering the property under the treaty justified or outweighed any waiver of vested rights that may result from the retroactive application of the new law.

Marshall never explicitly raises the question of whether the separation of powers doctrine limits such retroactive legislation. Indeed the parties did not raise the issue. Instead, they merely argued that the Schooner Peggy had been "definitively condemned," according to the meaning of the treaty, by the decision of the lower court and offered in support of that interpretive claim the proposition that an appellate court is limited to reviewing the lower court's determination under the then-existing law. The question before the Court, then, was

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203 *Id.*
204 *Id.* at 110.
205 *Id.*

merely one of treaty construction. Having found that the treaty was manifestly intended to apply retroactively, Marshall declined to construe "definitively condemned" to exclude pending cases.[206] Thus, while Marshall framed the issue in a manner which implicated the function and powers of branches of government, his reasoning did not explore separation of powers principles.[207]

Marshall's opinion warrants two final observations. First, Marshall distinguished between private and public cases.[208] That there may be a higher threshold for retroactive application of statutes in cases involving private rights than in cases involving the government is something to explore later.[209] Second, Marshall appeared indifferent to the question of whether or not the private rights of the parties had vested. This distinguishes *Schooner Peggy* from modern cases challenging retroactive application of statutes on due process grounds.[210]

B. *Wheeling Bridge* and the Distinction Between Regulatory and Proprietary Governmental Activity

In *Pennsylvania v. Wheeling and Belmont Bridge Co.*, the Court considered a legislative declaration that sought to invalidate an earlier judgment of the Court.[211] In May 1852, Pennsylvania had sought an

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206 The summary of the case confirms this conclusion:

> The controversy turned principally upon two points:
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> 1st. Whether the capture could be considered as made on the *high seas*, according to the import of that term as used in the act of congress of July 9th, 1798, vol. 4. p. 163.
>
> 2nd. Whether, by the sentence of condemnation by the circuit court on the 23d of September, 1800, the Schooner Peggy could be considered as *definitively* condemned, within the meaning of the 4th article of the convention with France, signed at Paris on the 30th of September, 1800.

Id. at 108.

207 The Supreme Court had followed the *Schooner Peggy*'s Changed Law Rule prior to *Klein*. *See* United States v. Preston, 28 U.S. (3 Peters) 57, 66-67 (1830); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 632 (1813).

208 *Schooner Peggy*, 5 U.S. (1 Cranch) at 108. Under the congressional act, the booty would have been shared equally by the government and the officers and crew of the Trumball. The case, then, is a mixed sort—involving both public and private rights.

209 The relevance of this distinction for separation of powers purposes has been developed in a line of cases concerning the propriety of Congress's creation of non-Article III adjudicative bodies. The parameters of this distinction have shifted over time. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855); Crowell v. Benson, 285 U.S. 22 (1932); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989). For an excellent discussion of the Court's development of this distinction, see Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 (1986).

210 *See supra* note 171 and accompanying text. *See also* Hochman, *supra* note 151, at 694-95.

211 59 U.S. (18 How.) 421 (1855).

injunction from the Court, sitting in original jurisdiction,[212] to enjoin the construction of two suspension bridges crossing the Ohio River at Wheeling, West Virginia and Bridgeport, Ohio. The evidence showed that at high water there was a type of steamship, important to commerce on the Ohio River, whose chimney stacks were too high to pass beneath the bridges, and that Pennsylvania had incurred exceptional expense developing improvements to facilitate the movement of goods from the port of Pittsburgh.[213] The Court found that the bridges obstructed the navigation of the Ohio River to the irreparable injury of Pennsylvania.[214] To avoid imposing undue hardship on the Bridge Company, the Court ordered that it "open a draw in the western channel which would admit the passage of boats, when, from the high water they could not pass under the suspension bridge."[215] The Court also awarded costs to Pennsylvania.

Rather than comply with the Court's order, the Bridge Company sought relief from Congress. On August 31, 1852, Congress passed legislation declaring the bridges to be lawful structures and post-roads for the passage of the mails, and mandating that ships be modified so as not to interfere with the bridges.[216] The matter appeared to have been put to rest until the summer of 1854, when the bridge in Wheeling was destroyed by high winds. Pennsylvania sought an injunction to prevent reconstruction of the bridge. On June 28, 1854, Justice Grier, sitting in equity, issued a writ of injunction requiring that the bridge not be reconstructed in a manner inconsistent with the elevations which the 1852 Order found to be a nuisance. The Bridge Company, however, proceeded to build the bridge at an elevation lower than provided for in the 1852 order. In December 1854, Pennsylvania sought a contempt order and an award for execution of the costs decreed in the 1852 order. As a defense, the Bridge Company invoked the statute declaring the bridge to be lawful.[217]

The Supreme Court held that the effect of the statute was to annul the determination that the bridge was a nuisance. Justice Nelson, writing for the Court, said that "although it still may be an obstruction in fact, [it] is not so in the contemplation of the law."[218] The Court, however, sustained the prior judgment with respect to the execution of costs. The Court reasoned that, although Congress can annul the final judgment of a court concerning declarations of rights and equi-

212 *See id.* at 452 (Daniel, J., concurring) (questioning authority of the Court to sit in original jurisdiction over the matter).
213 *Id.* at 437 (McLean, J., dissenting).
214 *Id.* at 439 (McLean, J., dissenting).
215 *Id.*
216 *Id.* at 429.
217 *Id.* at 424-28.
218 *Id.* at 430.

table abatement of violation of those rights, it cannot annul final judgments providing compensation for legal damages suffered by the violation of those rights.[219]

While one might believe that the status of the proposed bridge rested on the type of distinction between public and private rights that the Court might draw today,[220] such was not the understanding of the Court in *Wheeling Bridge*. The precedents of the day drew the line between public and private rights by distinguishing between suits by a citizen against the government and suits by a citizen against a citizen.[221] Thus, because the government was not a party in *Wheeling Bridge*, the case involved only private rights. Moreover, the initial suit was brought as an action in equity for nuisance, and therefore fell within the traditional conception of private rights.[222] Why, then, did the Court permit the lifting of the injunction but not of the damages award? One commentator hypothesizes that *Wheeling Bridge* recognizes an exception to the indestructibility of judgments in cases involving governmental performance of regulatory functions.[223] Although

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219 Justice Nelson wrote:

> But it is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.
>
> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress . . . .
>
> Now, we agree, *if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for the damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court.*

Id. at 431 (emphasis added). The Sixth Circuit emphasized this distinction between legal and injunctive remedies when it found that § 27A(b) unconstitutionally interfered with final judgments. Plaut v. Spendthrift Farm, Inc., 1 F.3d 1487 (6th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121).

220 *See* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 589 (1985) (equating "public right" with some conception of public purpose).

221 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1855); Northern Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982) (The public-rights doctrine "extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.' ") (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)). *See also* Young, *supra* note 209, at 791-94.

222 *See Northern Pipeline*, 458 U.S. at 68 n.25 (1982) ("What clearly remains subject to Art. III are all private adjudication in federal courts within the States—matters from their nature subject to 'a suit at common law or in equity or admiralty'—and all criminal matters, with the narrow exception of military crimes.").

223 Young, *supra* note 30, at 1239 n.237:

> The fact that the legislation considered in the second *Wheeling Bridge* case was enacted after the end of the appellate process in the first case makes

we need not explore the complexities of takings law, we can recognize that, as a necessary incident of governmental regulation, the rights of private parties will be disturbed, but not eliminated, by regulatory action. Thus, any prohibition of legislation with a retroactive effect must be tempered by the realization that the government has a legitimate interest in advancing regulatory ends.

C. Reconstructing Justice Chase's Opinion in *Klein*

This section explores how Justice Chase's rationale in *Klein* can be read in a manner that renders it consistent with *Wheeling Bridge* and *Schooner Peggy*. Two general theses are developed. First, neither the dictation of fact exception nor the underlying law exception is supported by a reconciliation of, on the one hand, the dictum and holding of *Klein* and, on the other hand, the precedents on which it relies. Second, a different exception to the Changed Law Rule emerges from *Klein*. That exception focuses on the effect of purely retroactive legislation on the respective powers of the legislature and judiciary.

As noted earlier, one test that has been attributed to *Klein* is the dictation of fact exception: it is unconstitutional to dictate "how the Court should decide an issue of fact . . . under threat of loss of jurisdiction."[224] The attribution of this rule to *Klein* rests on the direction in the 1870 Proviso that pardons be treated as conclusive evidence of disloyalty. In this manner, the legislature used a rule of evidence to determine a finding of fact. The problem with attributing this holding to *Klein*, as Professor Young points out, is that there was no disputed issue of fact in the case.[225] The parties stipulated that Wilson had in fact aided the enemy. The only issue in *Klein* was the legal question of whether the pardon cured Wilson's act of disloyalty for purposes of recovery under the 1863 Act. While it is true that the 1870 Proviso required a contrary finding of *dis*loyalty in the case of pardoned persons, such a rule of evidence (if otherwise constitutional) was a change in the law of the 1863 Act (and therefore not a dictation of fact at all). It may be that a change in a rule of evidence may be a valid exception to the Changed Law Rule, but *Klein* did not reach the issue.

An alternative test attributed to *Klein*, as discussed earlier, is the underlying law exception: it is unconstitutional to prescribe a rule of

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Wheeling Bridge a stronger case for a finding of unconstitutionality. Chase may be saying that the principle recognized, but not applied, in *Wheeling Bridge* also protects lower court judgments from revision unless revision is justified. Revision was justified in *Wheeling Bridge* but not in *Klein* where the revision was arbitrary and not necessary to the government's function as a regulator.

224 *See supra* note 71 and accompanying text.

225 *See* Young, *supra* note 30, at 1233-38.

decision to the judiciary in pending cases without changing the underlying procedural or substantive law.[226] The attribution of this rule to *Klein* relies on the string of rhetorical questions posed by Justice Chase.[227] The addendum seems to gain support from Chase's attempt to distinguish *Wheeling Bridge*. He noted that in *Wheeling Bridge*, the statute did not prescribe an "arbitrary rule of decision;" rather, it left the "court . . . to apply its ordinary rules to the new circumstances created by the act."[228] The new circumstance was the new "state of the law" concerning the bridge.[229] If this is what he meant, however, Chase failed to tell us in what respect the 1870 Proviso did not change the underlying law.

There are two reasons for believing that the underlying law exception does not capture Chase's intent. First, there is an alternative way to interpret Chase's reference to *Wheeling Bridge*. The "underlying circumstance" altered by the congressional action in *Wheeling Bridge* was not a change in the law of nuisance *per se*, but rather a change in the status of the bridge as wrought by Congress within its power to establish post-roads.[230] An incident of that power is the authority to dictate the requirements of such roads.[231] In contrast, the attempt to revise the judgment on behalf of Klein was not a consequence of the necessary performance of a regulatory function.[232] Second, insofar as the 1870 Proviso clearly changed law by modifying the law of evidence regarding the required proof for claims under the 1863 Act, Chase could not have endorsed the underlying law exception and reached the result he did in *Klein*.

Chase's assertion about new law should be read instead to mean that, because Congress' effort to change the law of pardons was unconstitutional, the law remained unchanged. Congress could not constitutionally override the executive pardon power. Thus, in contrast

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226 *See supra* notes 69-73 and accompanying text.

227 *Klein*, 80 U.S. (13 Wall.) at 146.

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

Id.

228 *Id.* at 146-47.

229 *Id.* at 146.

230 U.S. CONST. art. I, § 8.

231 *See supra* notes 211-23 and accompanying text.

232 *See* Young, *supra* note 30, at 1239-40 n.233 and 1241-43 n.245.

to the new circumstances that existed in *Wheeling Bridge*, the fact that the putative change in the pardon law was invalid meant that no new circumstances were created by the 1870 Act. Because *Klein* found the change in law created by the 1870 Proviso unconstitutional on this ground, the Court was left with the "arbitrary rule" that the Court dismiss for want of jurisdiction.

This analysis suggests that the "indirection" that Chase intends to draw our attention to is Congress's attempt to both grant jurisdiction to and withdraw it from the Court. The 1870 Proviso permitted the Court to examine Klein's case and thus, pass on the constitutionality of the attempt to alter the evidentiary effect of the pardon.[233] Congress first granted jurisdiction to achieve the result it sought from the Court, and then, recognizing that the pardon prong of the 1870 Proviso might be struck down, further provided for revocation of the jurisdictional grant upon a finding of unconstitutionality by the Court. In other words, the jurisdictional revocation, viewed separately, was intended solely to procure a result in the pending litigation. Thus, *Klein* tells us that Congress may grant or withdraw jurisdiction, but to permit Congress to do both at the same time would render the judiciary a mere puppet of the legislative branch.[234]

This approach appears to be supported by Chase's reference to the "great and controlling purpose" of the statute,[235] by which he meant the plain purpose evidenced by the statutory language. In this regard, one should not confuse the issue of the legislature's motivation with the statutory purpose.[236] In any case, the reference to "purpose" suggests the possibility that *Klein* really foreshadows the suggestion in *Robertson*: "that even a change in law, prospectively applied, is unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases."[237] This rationale would thus create an exception to the Changed Law Rule for legislation with a retroactive effect that is limited to pending cases.[238]

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233 *See supra* note 50 and accompanying text.

234 Young, *supra* note 30, at 1221-22.

235 *Klein*, 80 U.S. (13 Wall.) at 145.

236 If Chase meant to refer to legislative purpose, it is curious that he left out any account of the discussions that occurred in Congress when the 1870 Proviso was being considered. *See* Sager, *supra* note 49, at 77. Moreover, two years prior to *Klein*, Justice Chase wrote in *Ex parte McCardle*: "We are not at liberty to inquire into the motives of the legislature." 74 U.S. (7 Wall.) 506, 514 (1869). *But see* Sager, *supra* note 49, at 74-77.

237 This quotation is from *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407, 1415 (1992). Although the 1870 Proviso was purely retrospective insofar as it only altered the legal status of past events, it did affect litigation commenced subsequent to the enactment of the statute. *See* Young, *supra* note 30, at 1222 n.179.

238 Such a reading must be reconciled with *Wheeling Bridge*. One can distinguish the two cases on the ground that *Wheeling Bridge* involved the regulatory role of government, whereas *Klein* concerned a personal right of recovery against the government. Specifically,

Along similar lines, Professor Young has argued that *Klein* creates a somewhat narrower exception to the Changed Law Rule "for new laws from which the government would benefit as a party to a lawsuit in a proprietary context."[239] His argument rests on the notion that allowing Congress to change law in a manner favoring the government undermines legislative accountability.[240] Were courts to apply such new law, Congress could enjoy the appearance of having opened itself to judicial scrutiny while, at the same time, reserving a less visible means for shutting the door. Although Young does not frame his exception in terms of the purely retroactive nature of the revocation of the government's proprietary liability, his argument presumes that the wrong in the changed law is the legislature's narrow purpose behind altering pending litigation.

One final consideration may lend support to the claim that Chase was creating an exception to the Changed Law Rule. Prior to *Klein*,

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Wheeling Bridge dealt with the effect of the proposed bridge on the proprietary rights of upriver users, and recognized that, as a general matter, congressional management of the public roads and waterways will inevitably disturb such rights. In contrast, the position of the government in *Klein* is arguably akin to that of a private party engaged in litigation under the 1863 Act. *See* Young, *supra* note 30, at 1224 n.183, 1229 n.206, and 1241 n.245.

239 Young, *supra* note 30, at 1244.

240 Young's argument is worth reprinting in full:

> For those who agree with Henry Hart that, as a practical matter, a government needs courts to legitimate certain of its activities, an explanation may be as follows. To abolish courts or, even less drastically, to have no court open to suits against the government, sends a clear signal to the electorate that Congress has not chosen to exercise its constitutional option of subjecting certain of its actions to judicial scrutiny. Permitting Congress to create such courts, but to ignore their judgments, involves a congressional choice of unaccountability which is more complicated and, hence, less easily understood by the electorate. As a result, it is more difficult to correct at the polls. When Congress acts as a regulator of public rights, it may need to change the rules governing a pending case on a rationale similar to that relied on by the Court in the *Wheeling Bridge* case. On the other hand when the contest involves claims to money or property, such justification may not be present. Particularly in cases like *Klein*, where, argnably, the government has a sovereign immunity privilege that allows it to avoid a constitutional attack, to permit the goverument to change the law because of some dissatisfaction with the result in pending cases would be to allow the government to hedge its bets from the start. Congress can open its courts to claims against the government hoping for a favorable resolution. If it wins, it wins twice; once with the favorable verdict, and second by the fact that the government appears to have subjected itself to the rule of law. If the government loses, it loses once; it can change the law on appeal. Indeed, it may not even lose an appearance of accountability if its refusals to abide by judgments are few. Perhaps a prohibition against Congress' changing the law on appeal, to favor the government, rests on a judgment that the judicial branch ought not participate in Congress' giving the false impression that it has opened the government to judicial scrutiny. If so, a prohibition against changing the law on appeal to favor the government is one which increases legislative accountability, by requiring that Congress either clearly open or clearly close the courts to certain claims.

Id. at 1248-49.

the Court had generally treated retroactive laws with disfavor and mitigated their effect by employing canons of construction,[241] by voiding them as contrary to natural law,[242] and, in the case of state legislation, by characterizing the law as within the compass of the Contracts Clause.[243] The natural law theory rested, essentially, on the conception that retroactive legislation was judicial rather than legislative in nature.[244] *Klein* can be read as an effort by the Court to find a constitutional hook for applying the natural law conception of retroactivity, as inherently a judicial issue, to that subclass of retroactive laws affecting pending litigation.[245] Chase's argument can be reconstructed as

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241 Unless the language of the act explicitly provided for retroactive application, the Court would construe the law to have only prospective effects. *See* Smead, *supra* note 160, at 778.

242 *See supra* note 163.

243 *See supra* note 162.

244 For example, Chief Justice Marshall wrote:

> If the legislature be its own judge in its own case, it would seem equitable that its decisions should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). The currency of this notion of power is reflected by Justice Story's comments:

> Whether, indeed, independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints on the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that since the American revolution no state government can be presumed to possess the trancendental [sic] sovereignty, to take away vested rights of property; to take the property of A and transfer it to B by a mere legislative act. That government can scarcely he deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property, should be held sacred.

3 STORY, *supra* note 160, at § 1393.

These considerations have a modern analogue in Lon Fuller's discussion of retroactivity. Fuller argues that an underpinning of the morality of law is that it is not retroactive. He derives this from a notion of "intendment" or reciprocity, whereby the populace cedes to governance upon the understanding that, quoting Lilburne, "parliament will act toward the citizen in accordance with its own laws so long as those laws remain unrepealed." FULLER, *supra* note 178, at 51-62, 215-18.

245 This reading of *Klein* must be tempered by the failure of the leading late-nineteenth century commentators to see the separation of powers as a limitation on Congress's power to enact retroactive legislation. *See* WILLIAM P. WADE, A TREATISE ON THE OPERATION AND CONSTRUCTION OF RETROACTIVE LAWS, AS AFFECTED BY CONSTITUTIONAL LIMITATIONS AND JUDICIAL INTERPRETATIONS 5-6 (1880); HENRY C. BLACK, AN ESSAY ON THE CONSTITUTIONAL PROHIBITIONS AGAINST LEGISLATION IMPAIRING THE OBLIGATION OF CONTRACTS, AND AGAINST RETROACTIVE AND EX POST FACTO LAWS (1887). Interestingly, Black recognizes the breadth of the natural law position articulated in *Calder v. Bull* and by Justice Story. However, he appears to equate their understanding of legislative limitation and the social compact with a robust version of due process. *Id.* at 224. One might conjecture that the scope

follows: even if one recognizes that the legislative branch has the power to enact retroactive legislation, that power cannot extend so far as to encompass judicial action by the legislature in cases that are already before the courts *unless* there is some compelling reason to believe that the Constitution grants such a power. A compelling reason arguably exists in the case of treaties (e.g. *Schooner Peggy*) and post-roads (e.g. *Wheeling Bridge*).[246]

To summarize, our discussion of *Klein* has attempted to establish three propositions. First, the contemporary reading of *Klein* as articulating the dictation of fact or underlying law exceptions is incorrect. Second, *Klein* supports the holding that Congress cannot make the jurisdiction of the Court rest on its willingness to apply an unconstitutional law. Third, *Klein* may also support a separation of powers limitation on Congress' power to enact retroactive legislation for the sole purpose of affecting pending litigation. We recognized in Part II that this third proposition comports with the general principles of separation of powers doctrine. The following Part develops a separation of powers test for applying these principles.

IV

AN ALTERNATIVE METHOD FOR DECIDING CASES INVOLVING PURELY RETROACTIVE LEGISLATION

The suggestion recently cast aside by the Court in *Robertson*, that a law is unconstitutional if it sweeps no more broadly than a range of applications at issue in pending cases (call it the "Pending Case Rule"), seems to encompass both the manipulation and retroactivity concerns discussed in Part II. The Pending Case Rule implicates concerns about the manipulation of courts because it recoguizes that such legislation targets judicial disposition of cases. The Pending

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of *Klein* failed to emerge at this time because the concurrent development of substantive due process rendered it unnecessary. *See* Kainen, *supra* note 172, at 123 (discussing the emergence of due process and retroactivity).

246 Pugh v. McCormick, 81 U.S. (14 Wall.) 361 (1872), decided one year after *Klein*, presents some problems for this suggestion, but I do not think that they are dispositive. The issue in *Pugh* was whether a note was admissible in evidence to prove a debt where the plaintiff had failed to follow the procedures for obtaining post-stamps for the note. At the time of trial, the law required the post-stamps to be obtained within a specific period of time and plaintiff had failed to obtain them within that period. Notwithstanding this fact, the trial court admitted the note into evidence. The Supreme Court held that the trial court had erred in admitting the evidence, but nonetheless affirmed the trial court on the ground that Congress had since retroactively changed the limitary period so that the note was now admissible. *Pugh* is distinguishable from the suggested reading of *Klein* in three respects. First, the legislative act in *Pugh* had retrospective and prospective effects, whereas *Klein* involved legislation with only retrospective effects. Second, the legislation at issue in *Klein* clearly targeted pending litigation, whereas the act in *Pugh* did not. Third, the result in *Pugh* seems justified insofar as it reflects the probable expectation of the parties that the note was valid at the time of contracting.

Case Rule implicates retroactivity concerns because it acknowledges that litigants in pending cases are being treated differently than they had expected at the outset of the litigation. This Section of the Note rejects the Pending Case Rule, arguing instead that a pragmatic balancing approach (call it the "Purely Retroactive Legislation Presumption") to deciding cases involving purely retroactive legislation is superior to the formalistic analysis offered by the Pending Case Rule. It then applies the Purely Retroactive Legislation Presumption to section 27A.

A. Devising a Test for Assessing the Constitutionality of Purely Retroactive Laws under Separation of Powers Doctrine

If the arguments elaborated in the previous sections of this Note are correct, the next question is what approach the Court should take when examining purely retrospective laws. Two possibilities come to mind: (1) the Pending Case Rule—a bright line rule providing that purely retrospective laws are an exception to the Changed Law Rule; and (2) the Purely Retroactive Legislation Presumption—a balancing test resting upon consideration of a number of factors.

These two possibilities roughly demarcate the options suggested in the academic debate regarding formalist and functionalist approaches to separation of powers doctrine.[247] The formalists ply a cat-

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247 The Supreme Court has employed both approaches at various times. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality adopting formalist approach); Bowsher v. Synar, 478 U.S. 714 (1986) (formalist approach); Morrison v. Olson 487 U.S. 654 (1988) (functionalist approach); Mistretta v. United States 488 U.S. 361 (1989) (functionalist approach). The battle lines between these approaches were neatly drawn by the majority and dissent in Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). Writing for the majority, Justice O'Connor observed:

> In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.

Id. at 851 (citations omitted). In dissent, Justice Brennan responded:

> The Court requires that the legislative interest in convenience and efficiency be weighted against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result is foreordained, because the balance is weighted against judicial independence. The danger of the Court's balancing approach is, of course, that as individual cases

egorical approach. They seek to define the powers allotted to each of the three branches, taking notice of explicit exceptions provided in the Constitution, and then assess whether the questionable branch act falls within the definition of the acting branch's power. Formalists may differ about the appropriate definition, but they are united by the proposition that the boundaries of branch action must be strictly adhered to if the separation of powers is to prevent undue accumulations of power by a single branch.[248]

Regardless of the general merits of formalist methodology, the Pending Case Rule appears to be unsatisfactory on two grounds. First, the rule faces too much confiicting precedent. There is a long line of Supreme Court precedents upholding purely retroactive laws on the ground that such legislation simply was enacted to cure administrative errors.[249] Moreover, there are the Portal-to-Portal cases, which upheld corrective legislation enacted for the purpose of safeguarding expectations which had been frustrated by a Supreme Court decision interpreting a prior statute.[250] Of course, there is also the confiicting *Wheeling Bridge* decision. While these cases may present some problems for a functionalist approach, the Pending Case Rule would

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> accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated.

Id. at 863-64 (citations omitted). For a sampling of the academic commentary analyzing the two approaches, see Brown, *supra* note 1, at 1522-31; Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Redish & Cisar, *supra* note 180, at 450; Strauss, *supra* note 1.

248 *Compare* Redish & Cisar, *supra* note 180, at 474 (adopting pragmatic definition of branch power) with Lee S. Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) (advocating an "originalist" perspective).

249 *See, e.g.*, Graham & Foster v. Goodcell, 282 U.S. 409, 429 (1931) ("it is apparent . . . that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."); Forbes Pioneer Boat Line v. Board of Comm'rs of Everglades Drainage District, 258 U.S. 338, 340 (1922); United States v. Heinszen & Co., 206 U.S. 370, 390-91 (1905). Notice that these decisions were rendered in the context of due process challenges, not separation of powers challenges. Thus, the rationale, but not the result, is distinguishable from the Pending Case Rule. Notice, also, that the cases developing the curative legislation exception was decided in the era of *Lochner*, when substantive due process provided a great deal of protection for property interests. The need for such an exception under the current conception of substantive due process is absent.

250 Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948). The case assessed the constitutionality of the Portal to Portal Pay Act of 1947, 29 U.S.C. §§ 251-262, which was enacted in response to the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). *Anderson* had the effect of greatly increasing employers' labor costs, as well as giving employees undeserved "windfall payments." *See* 29 U.S.C. 251(a)(4) (1988). *See generally* BATOR ET AL., *supra* note 55, at 376-77.

require overruling them or creating numerous exceptions.[251] Assuming the latter course, the supposed virtues of bright-line rules are nullified by the development of numerous exceptions.[252] Moreover, these precedents suggest that there may be situations in which pending case laws are justified and, perhaps, necessary accoutrements to the proper functioning of goverument.[253] There may simply be instances when the adverse consequences of voiding a purely retroactive statute outweigh the separation of powers problem.[254] Thus, the Pending Case Rule does not hold out much promise.[255]

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251 One might argue that the creation of exceptions is antithetical to the formalist enterprise. *See, e.g.*, Justice Rehnquist's dissent in *Sioux Nation*. 448 U.S. at 424, 427-34. He contends that the changed law rule is not to be permitted as an exception. He then takes a formal view of final judgments, asserting that Congress cannot alter law, even in a case where such alteration is merely the waiver of a government defense.

252 *See* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 71-76 (1988).

253 One might wonder what the position of the amicus brief suggesting the Pending Case Rule would be if the posture of the case had been the following: Suppose that the Seattle Audubon Society had brought suit for injunctive relief against the BLM under an environmental statute which, given the facts of the case, presented a close question as to whether the agency was in compliance. Congress decides that it prefers Seattle Audubon's position and thus, passes new environmental legislation that only governs the public lands at issue in the case. The BLM pleads that the new law is an attempt by Congress to affect a pending case.

254 Some formalists take the position that bright-line tests serve as a prophylactic to greater violations. *See* Redish & Cisar, *supra* note 180, at 455-56. This view is akin to the rule utilitarian's response to act utilitarianism (or functionalism). Even if, as a general matter, rule utilitarianism is correct, it does not follow that it is appropriate in separation of powers cases. This would only be true if the rule utilitarian could show that the greater good is satisfied in the long run by adherence to the rule. The showing must assume that a principled Court will fail to adopt the functionalist approach in the context of pure retroactivity cases, which in turn would result in the undermining of the judiciary. For example, the invitation to test the stamina of the court in these matters would lead to excessive litigation and inconsistent results. Both would undermine the judiciary's integrity and, in some degree, undermine the credibility of Congress, which would constantly be engaging in conflicts with the judicial branch. However, the issue of pure retroactivity is not likely to be raised so frequently that it would generate these types of concerns. The primary goal is to provide Congress with flexibility, while also providing a safety net for the populace. For a definitive discussion of rule and act utilitarianism, see ALASDAIR MAC INTYRE, A SHORT HISTORY OF ETHICS 227-48 (1966).

255 These two not very subtle objections lead one to speculate about why the Court expressed an interest in the Pending Case Rule at all. Does the Court see the Pending Case Rule as an opportunity to create a kind of limited federal *Lochner*ism? Although the scope of the federal courts' ability to frustrate congressional initiatives would be restricted by limiting the court to pending case laws, that limitation is somewhat open ended. Moreover, adoption of the Pending Case Rule furthers the Court's disapproval of retroactive legislation. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). Moreover, since the rule falls under the rubric of separation of powers, the legislative limitation comes only at the expense of Congress and, therefore, does not sacrifice the Court's federalism concerns. It may, in fact, promote federalism concerns where the federal change in law was made to affect actions brought by private litigants against a state. *Cf.* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443 (1990). Perhaps such concerns are reading too much into Justice Thomas' oblique reference in *Robertson* to the Pending Case Rule.

In contrast, functionalist approaches, which this Note advocates as the proper replacement for the current, formalist understanding of *Klein*, focus on the question of whether the branch act will undermine the ability of the hindered branch to perform its core function,[256] or whether the branch act will adversely affect the maintenance of the values which underlie the separation of powers doctrine.[257] This approach requires a balancing of the interests of the two conflicting branches and a determination of whether the invasion by one branch will lead to an improper diminution of the coequal role of the competing branch.[258]

Since purely retrospective laws intrude on the judiciary's capacity to play its structural role in the maintenance of ordered liberty and the prevention of the accumulation of governmental power, a functionalist should take the view that such laws are prima facie suspect. This status would trigger a balancing approach which recognizes the different interests that arise when an act of the legislature has purely retroactive effects, and especially strict scrutiny should be accorded to legislation that affects only pending litigation.[259]

What should the balancing approach under the Purely Retroactive Legislation Presumption look like? Somewhat tentatively, this Note suggests that the Court consider the following factors: (1) the legislative motive underlying the changed law; (2) the degree of reliance on the old law; (3) the nature of the rights affected by the

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256 Strauss, *supra* note 1, at 492-94.

257 *See, e.g.*, Alfange, *supra* note 140, at 668; Leslie J. Harris, *Rethinking the Relationship Between Juvenile Courts and Treatment Agencies—An Administrative Law Approach*, 28 J. FAM. L. 217, 254 (1989) (distilling two essential elements of separation of powers analysis from Nagel's tests: "[t]he first is to identify what function of which branch is being intruded upon and to determine whether that function is central to that branch's constitutional role . . . the second step is to determine whether the intrusion is too extensive."); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (articulating four general tests for defining the limits imposed by the separation of powers doctrine).

258 Plausibly, one can read Justice Chase's opinion in *Klein* as articulating a functionalist approach. There, Congress set out to do two things: to change the law (albeit unconstitutionally) and to limit the jurisdiction of the court. Both of these are within the general prerogative of the legislative power—the first by virtue of its law-making capacity and the second by virtue of Article III, Section 2—but they operated together under this statute to undermine the judicial power. Compare Justice Jackson's comment: "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

259 A plausible argument can be made that the courts are actually engaged in this balancing process under the rubric of the underlying law exception. The criteria for determining whether legislation is "law" is open-ended and susceptible to manipulation. *See supra* notes 122 to 140 and accompanying text. Recasting the announced standard, as this Note proposes, has the virtue of bringing to light the genuine rationales underlying the determination of these cases.

change in law; and (4) the real world consequences of refusing to enforce the new law. These factors are a variant of the criteria considered by the Court when retroactivity issues arise in the context of general legislation[260] and judicial law-making.[261] The question before the Court in *Chevron Oil v. Huson* was whether it should decline to apply a new rule of law only to claims arising after the date of the decision. Because the primary function of the judiciary is to decide cases and controversies, the Court adopted these factors to serve as self-imposed limitations on engaging in what essentially amounts to legislative law-making. Purely retroactive legislation presents a reverse-*Chevron Oil* scenario. Since the primary function of the legislature is to make laws with prospective effect, the retrospective application of legislation shades into the judicial function. The application of *Chevron Oil*'s standards to determine whether Congress has overstepped its authority creates a kind of equipoise between the branches.

The factors in the Purely Retroactive Legislation Presumption conform to the goals of the separation of powers doctrine. First, by examining the legislature's motive,[262] the court may assess the degree to which Congress is attempting to usurp the judicial function, as feared by Justice Chase in *Klein*.[263] Second, the degree of reliance on the old law measures the extent to which a party reasonably expected an independent judiciary to enforce her rights under the old law. Even though Congress is the culprit responsible for undermining reli-

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260 In *Bradley v. School Bd. of the City of Richmond*, the Court articulated a similar set of factors for determining, in the case of Congressional silence, whether to apply legislation retroactively. 416 U.S. 696, 717 (1974). *See also* Thorpe v. Housing Auth. of the City of Durham, 393 U.S. 268, 282 (1969) (legislation to be accorded retroactive application, except to prevent manifest injustice). More recently, the Court has shown hostility to the retroactive application of legislation in the absence of an explicit legislative directive. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) (when silent, the presumption is that the legislation has only prospective effect).

261 Chevron Oil v. Huson, 404 U.S. 97 (1971) (the third prong of the Chevron test provides that courts consider the inequitability of the result should the new rule be applied); *see also Lampf*, 111 S. Ct. at 2786 ("*Chevron Oil*... [is] based on fundamental notions of justified reliance and due process.") (O'Connor, J., dissenting).

262 *See* John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). For a discussion of the difficulties inherent in an inquiry into legislative motive, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205-17 (1980) (arguing that an original intent approach to constitutional interpretation is untenable).

263 One can distinguish most of the Changed Law Rule line of cases on the ground that they had prospective, as well as retrospective effects and, thus, were not primarily aimed at altering the outcome of pending cases. *See* Pugh v. McCormick, 81 U.S. 361 (1871). This point also distinguishes cases finding partly retroactive laws to be acceptable on due process grounds. *Compare* United States v. Sperry, Corp., 493 U.S. 52, 64 (1989) (under due process clause Congress may not arbitrarily or irrationally make laws retroactively applicable); Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 728-31 (1984); Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 15-17 (1976).

ance, the courts act as an accomplice.[264] When the frustration of a person's reliance is egregious, the equitable function of the court as the dispenser of justice is at risk. Third, factoring the nature of the rights into the balance allows the court to identify legislation which strikes at the core of ordered liberty. An example is Chief Justice Marshall's distinction between private rights and public rights in *Schooner Peggy*. The fourth factor, appraising the real-world effects, implies consideration of the practical institutional factors underlying the separation of powers. For example, the court may distinguish between suits against the government in its regulatory capacity and suits against the government in its proprietary capacity—a distinction suggested by comparing *Wheeling Bridge*, *Klein* and *Robertson*. When the government acts in its regulatory capacity, this factor recognizes that the judiciary's ability to adjudicate matters at the heart of policymaking is limited; whereas, in proprietary matters the posture of the government more closely resembles that of a private citizen, and the controversy more closely resembles ordinary private litigation. In the latter situation, the judiciary does not face issues that it is unequipped to decide.

The Purely Retroactive Legislation Presumption admittedly shades into the type of factors a court might examine in conducting a due process analysis. Nonetheless, these factors are intended to be more robust than the rather anemic inquiry required under the rational basis test.[265] Although the legislature may have some legitimate reason for acting purely retroactively, such a reason alone will not be sufficient to overcome the presumption that the legislature has usurped the judicial function. Rather, the reason must be of such a magnitude that it outweighs concerns about the nature, degree and duration of the reliance on the old law, as well as the extent to which the legislature acted solely for the purpose of altering pending litigation.[266]

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264 Consider Justice Marshall's comment: "it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." New York Times Co. v. United States, 403 U.S. 713, 742-43 (1971) (Marshall, J., concurring).

265 This is not to say that a rejuvenated conception of due process could not meet the concerns raised by this Note, but rather that the present state of due process doctrine does not. *See* Verkuil, *supra* note 1, at 307-11.

266 As this Note was going to press, a different approach was suggested by Professor Amy D. Ronner in her excellent article, *Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes On Judicial Power After* Robertson v. Seattle Audubon Society *and the Federal Appellate Court's Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934*, 35 ARIZ. L. REV. 1037 (1993). Professor Ronner's test finds that legislation improperly invades the judicial function when:

> [the legislation] is so precisely tailored to address the issues in the pending matter that it can be said to fit glove-like around a live case or controversy

B. Applying the Balancing Approach to Section 27A

We now consider the constitutionality of section 27A under the Purely Retroactive Legislation Presumption. First, it is clear that section 27A solely targets pending cases, and so triggers the balancing test. How does section 27A come out in the balance?[267]

The motive underlying section 27A is the protection of the reliance interests of plaintiffs in the pre-*Lampf* law. The unique aspect of section 27A is that, unlike the laws at issue in the other cases we have discussed, it was put in place to restore the pre-existing law.[268] While some of the district court judges have expressed distress that the effect of section 27A is to supplant a recent Supreme Court interpretation, it

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> and if at least one of the following factors is met. The first factor is that the legislation has the effect of favoring the government as a party . . . The second factor is that the intervening legislation infiltrates a domain that is and can be viewed as a traditionally judicial one.

Id. at 1071. While Professor Ronner's article correctly identifies the doctrinal void resulting from *Robertson*, her test has two principal difficulties. Her first factor is too broad, as it would encompass cases where the government is a party in a proprietary role, as well as cases where the government is a party in a regulatory capacity. The fact that her test would require a different result in *Robertson* illustrates this concern. In addition, her second factor simply reintroduces the type of ambiguity that the *Klein* rules produced by requiring identification of "judicial functions." Moreover, her example of such an instance—namely, that § 27A violates this factor because it interferes with the operation of *Beam*—is particularly unhelpful. If *Beam* is constitutionally grounded, then we do not need this argument to invalidate § 27A; on the other hand, if *Beam* is not constitutionally grounded, then it is unclear why Congress may not legislatively alter court-made discretionary rules. Such a view would seem to suggest that there is something improper about Congress legislating in any area of the court's exercise of equitable discretion.

The central difference between Professor Ronner's analysis and the one offered in this Note is that the Note emphasizes retroactivity. In keeping with a more formalist approach, Professor Ronner's argument focuses on the nature of the judicial function and the intrusion caused by legislation that targets pending cases. This Note, on the other hand, focuses on the ends that the separation of powers doctrine seeks to reach and considers whether purely retroactive legislation undermines those ends.

267 Note that the application of the balancing test to § 27A yields the perverse result of requiring the court to do now what it failed to do in *Lampf*. As Justice O'Connor noted in dissent, the opinion of the Court failed to justify applying the new rule announced in *Lampf* to the parties before them in *Chevron Oil*; instead, the Court applied the new rule to the parties without mentioning *Chevron Oil*. The application of these factors amounts to a repudiation of *Lampf*.

268 For a fuller account of the legislative history of § 27A, see Sabino, *supra* note 2, at 26-31.

is instead its singular virtue.[269] The legislation went no further than reestablishing the status quo.[270]

Turning to the degree to which the defendants relied on the statute of limitations announced in *Lampf*, the defendants evoke little sympathy. With respect to the underlying substantive section 10(b) claim, the defendants could not have relied on the new statutory period because it did not exist. Moreover, while it is plausible that when deciding to engage in illegal conduct a person calculates the chance of detection within the limitation period, the defendants' calculation at the time of their allegedly illegal conduct was the period imposed by section 27A. Finally, the only window of opportunity for a change in position due to reliance was between the date of the *Lampf* decision and the enactment of section 27A, which occurred six months later. The public outcry against *Lampf* was strong, and it was reasonable to infer from Congress' conduct that the *Lampf* limitation period would not be long-lived. Reliance in such circumstances is not reasonable.

With respect to the nature of the rights affected, it is relevant that the change wrought by section 27A only altered a limitation period in a manner that matched the limitation period which the defendants could reasonably have believed was applicable at the time of their illegal conduct.[271]

Since the government is not a litigant in these cases, the consequences are limited to the effect that section 27A has on individual parties, a fact which weighs in favor of striking down section 27A. As a general matter, application of purely retroactive laws in matters involving private parties strikes at the core of the judiciary's dispute resolution role. Such laws constitute a manipulation of the political system designed to corrupt the findings of an independent adjudicator. This is one of the reasons that the result in *Klein* seems intuitively correct. The government, as a private party, legislatively altered the legal rules to procure victory in the presumably independent judicial forum. Again, however, this factor is mitigated by the fact that the law merely

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269 *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d. Cir. 1948) (retroactive statute effectuates expectation of parties at time labor contract was entered into); Pugh v. McCormick, 81 U.S. 361 (1871) (prolongation of period to have note stamped satisfied expectation of parties that the note was valid at the time of contracting). *See also* FULLER, *supra* note 178, at 221 (retroactive change of law intended to alter a Supreme Court decision is morally justified where it reinstates expectations of parties that existed prior to an unexpected and unforseen decision by the Court); Hochman, *supra* note 151, at 693 (retroactive statute may effectuate intentions of the parties).

270 Congress was not blameless in the matter. The activity in the lower courts regarding the limitation period should clearly have signalled that the federal courts wanted uniformity in this area and were awaiting Congressional action.

271 *But see* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 462-68 (1982) (arguing that retroactive limitation laws "present an unusually egregious example of retroactive impact").

restores the ground rules that the parties expected would govern when they entered the arena.

On balance, then, section 27A appears to be a reasonable effort by Congress to enact legislation which preserves the status quo *ante Lampf.*

CONCLUSION

For the practitioner defending a section 27A case, the argument set forth in this Note suggests three general conclusions. First, the attempt to formulate a separation of powers challenge to section 27A on the basis of the prevailing *Klein* rules, while meeting with limited success in district courts, is not likely to succeed given the Supreme Court's application of the rule in *Robertson.* Second, *Klein* offers some support for the alternative proposition that retroactive laws the effect of which falls no more broadly than on the class of pending litigants are invalid. Thus, if the Court adopts the Pending Case Rule, section 27A is clearly invalid. Finally, although this Note concludes that the Purely Retroactive Legislation Presumption is superior to such a formalistic rule, and that under this balancing approach section 27A is valid, defendants should frame their separation of powers challenge in the alternative by arguing that even under the Purely Retroactive Legislation Presumption section 27A is invalid.

In a less practical vein, we should note that the irony of the section 27A saga is that the opportunity it presents to insulate the judicial power from legislative invasion is the result of the Court's movement toward a more restrictive conception of the judicial power in *Beam.* Notwithstanding this irony, the innovations represented in this Note and *Beam* are complementary. *Beam* represents an attempt by separation of power formalists to limit equitable flexibility under the "cases and controversies" of the Constitution. The problem with *Beam,* of course, is that it invites future tit-for-tat exchanges between the Court and Congress when the Court's refusal to restrict a new rnle to prospective application generates manifestly unjust results. Congressional efforts to provide a corrective should be treated deferentially by the Court. This raises the possibility, however, that a sterile incantation of *Klein* would serve to justify less benign efforts by Congress to create legal rules whose application goes no further than pending cases. An abandonment of the formalism embodied by the present conception of *Klein* would allow the Court to defer to purely retroactive changes enacted for the protection of parties whose reliance interests were subverted by a new rule of the Court. At the same time, it

would prevent the Court from yielding to Congress the power to alter the outcome of pending litigation in other cases.

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