

WHEN THE SUPREME COURT SHUTS ITS DOORS, MAY CONGRESS RE-OPEN THEM?: SEPARATION OF POWERS CHALLENGES TO § 27A OF THE SECURITIES EXCHANGE ACT

When the 1980s drew to a close, Americans awoke to a number of insider trading scandals.¹ Stories of billions of dollars squandered and life savings lost riveted the nation's attention.² Individuals with names like Milken and Boesky stood before the nation as the embodiment of greed.³

In the midst of this frenzy, the United States Supreme Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* and *James B. Beam Distilling Co. v. Georgia*.⁴ Together, these decisions established a new statute of limitations for private actions brought under § 10(b) of the Securities Exchange Act of 1934 ("§ 10(b)")⁵ and Rule 10b-5 of the Securities Exchange Commission ("Rule 10b-5"),⁶ and

¹ Nancy Rivera Brooks, *1990-1991: Winners & Losers*, L.A. TIMES, Jan. 2, 1991, at D2.

² See *id.*

³ JAMES B. STEWART, DEN OF THIEVES 516 (1992).

⁴ *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782, *reh'g denied*, 112 S. Ct. 27 (1991); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2448 (1991).

⁵ 15 U.S.C. § 78j(b) (1988). The statute provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of the investors.

15 U.S.C. § 78j.

⁶ 17 C.F.R. § 240.10b-5 (1992). Rule 10(b)-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

applied the new limitations period retroactively to all parties with such litigation currently pending.⁷ As a result, lower courts dismissed as time-barred a multitude of § 10(b) and Rule 10b-5 private actions legitimately brought under prevailing jurisdictional statutes of limitations.⁸

Because suits against high profile financial figures of the 1980s like Milken and Boesky were among those dismissed, a public outcry over the *Lampf* and *Beam* decisions arose.⁹ Congress responded by passing § 27A of the Securities and Exchange Act of 1934 ("§ 27A").¹⁰ Under § 27A, the statute of limitations applicable in a jurisdiction on June 19, 1991, the day before *Lampf* and *Beam* were decided, is controlling for all cases in that jurisdiction affected by the retroactive application of *Lampf*.¹¹ The statute also provides that upon proper motion, any claim dismissed as time-barred under *Lampf* can be reinstated within sixty days of § 27A's enactment.¹² Section 27A has sparked a significant separation of powers debate both among commentators and the federal courts of the United States.¹³

⁷ *Lampf*, 111 S. Ct. at 2782; *Beam*, 111 S. Ct. at 2448.

⁸ E.g., *Boudreau v. Deloitte, Haskins & Sells*, 942 F.2d 497, 498 (8th Cir. 1991); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1442 (10th Cir. 1991), cert. granted and judgment vacated sub nom. *Dennler v. Trippett*, 112 S. Ct. 1658 amended 122 S. Ct. 1757 (1992) [hereinafter *Anixter I*]; *Cohen v. Prudential-Bache Sec., Inc.*, 777 F. Supp. 276, 281 (S.D.N.Y. 1991); *Continental Bank, Nat'l Ass'n v. Village of Ludlow*, 777 F. Supp. 92, 103 (D. Mass. 1991).

⁹ HAROLD S. BLOOMENTHAL, *EMERGING TRENDS IN SECURITIES LAW* § 1.06, at 1-20 (1992); Kathryn A. Oberly & Stephen M. Shapiro, *The Year in Review: Significant Judicial Developments*, in 24TH ANNUAL INSTITUTE ON SECURITIES REGULATION 9, 46 (1992).

¹⁰ 15 U.S.C. § 78aa-1 (commonly known as § 27A of the Securities and Exchange Act of 1934). Section 27A provides:

(a) Effect on pending causes of action

The limitations period for any private civil action implied under [section 10(b)] of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under [section 10(b)] of this title that was commenced on or before June 19, 1991—

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

(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.

¹¹ See *id.*

¹² See *id.*

¹³ To date, four circuit courts and a number of district courts have held the statute to be constitutional. E.g., *Gray v. First Winthrop Corp.*, No. 91-16907, 92-15986, 92-15901, 92-16193,

In striking down the statute, the courts have articulated three separation of powers grounds.¹⁴ First, courts have determined that § 27A directs them to ignore the *Lampf* statute of limitations without creating a new limitations period.¹⁵ Second, courts have held that the statute impermissibly reverses final judicial judgments.¹⁶ Finally, courts have contended that the statute directs the courts to ignore a constitutionally based decision of the United States Supreme Court.¹⁷ Although these arguments have been successful in a number of districts, most courts have reached the opposite conclusion, holding that the statute is constitutional.¹⁸

This Note argues that, although Congress did direct federal courts to ignore the *Lampf* decision in a specific set of cases without providing a new statute of limitations, Congress did not violate the separation of

1993 U.S. App. LEXIS 6995, at *29 (9th Cir. Apr. 7, 1993); *Berning v. A.G. Edwards & Sons, No. 91-3318*, 1993 U.S. App. LEXIS 6074, at *23-24 (7th Cir. Mar. 25, 1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir. 1992), *cert. denied sub nom. Dennler v. Trippet*, 61 U.S.L.W. 3714 (1993) [hereinafter *Anixter II*]; *In re Integrated Resources Real Estate Ltd. Partnership Sec. Litig.*, [current] Fed. Sec. L. Rep. (CCH) § 97,311, at 95,541 (S.D.N.Y. Jan. 8, 1993); *Aquilio v. Manaker*, [current] Fed. Sec. L. Rep. (CCH) § 97,265, at 95,198 (N.D.N.Y. Nov. 13, 1992); *Dendinger v. First Nat'l Corp.*, [current] Fed. Sec. L. Rep. (CCH) § 97,268, at 95,224 (E.D. La. Oct. 28, 1992); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476, 483 (S.D.N.Y. 1992). Nevertheless, a significant number of courts have held that the statute is unconstitutional. *E.g.*, *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108, 115 (N.D. Tex. 1992); *Treiber v. Katz*, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992); *Johnston v. Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992); *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092, 1098 (D. Colo. 1992); *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231, 235 (E.D. Ky. 1992); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1112 (N.D. Cal. 1992). See also BLOOMENTHAL, *supra* note 9, § 1.06, at 1-32 to 1-40; Oberly & Shapiro, *supra* note 9, at 46-55; Anthony Michael Sabino, *A Statutory Beacon or a Relighted Lamp? The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 65 (1992); Dennis J. Block & Jonathan M. Hoff, *Constitutionality of § 27A: Statute of Limitations*, N.Y. L.J., May 21, 1992, at 5; Barbara Franklin, *Last Word on 'Lampf'*, N.Y. L.J., Oct. 22, 1992, at 5; Richard L. Jacobson, *Turning Down the Lamp: Is Exchange Act Section 27A Constitutional?*, 6 INSIGHTS, April 1992, at 36; Harvey L. Pitt & Karl A. Groskaufmanis, *Was the Lampf Quick Fix Constitutional?*, NAT'L L.J., Dec. 7, 1992, at 16; Thomas L. Riesenbergh, *The SEC's Amicus Briefs on Lampf*, 6 INSIGHTS, May 1992, at 37.

¹⁴ See Oberly & Shapiro, *supra* note 9, at 47-49; Block & Hoff, *supra* note 13, at 10. Section 27A has also been challenged as a violation of the Fifth Amendment's Due Process and Equal Protection clauses. See Block & Hoff, *supra* note 13, at 10. Because neither of these claims has ever been truly successful, this Note does not discuss them in any depth. For a brief outline of the arguments set forth by the parties as well as a proposed response, see Sabino, *supra* note 13, at 50-52, 54-56.

¹⁵ *E.g.*, *Bank of Denver*, 789 F. Supp. at 1097; *Brichard*, 788 F. Supp. at 1105.

¹⁶ *E.g.*, *Treiber*, 796 F. Supp. at 1062; *Plaut*, 789 F. Supp. at 235; *Brichard*, 788 F. Supp. at 1107.

¹⁷ *E.g.*, *Brichard*, 788 F. Supp. at 1111-12; *TGX Corp. v. Simmons*, 786 F. Supp. 587, 594 (E.D. La. 1992).

¹⁸ *E.g.*, *Henderson*, 971 F.2d at 1575; *Anixter II*, 977 F.2d at 1547; *Axel Johnson*, 790 F. Supp. at 483.

powers doctrine because it did not direct the outcome of those cases. This Note also determines that Congress did not direct the courts to ignore a constitutionally based decision of the U.S. Supreme Court. Nevertheless, this Note concludes that the portion of the congressional statute that requires the courts to reinstate cases dismissed as a result of *Lampf* improperly intrudes on the realm of the judiciary and thus violates the separation of powers doctrine. Section I examines the United States Supreme Court's decisions in *Lampf* and *Beam* and the enactment of § 27A, the statute Congress passed in an effort to reinstate cases dismissed as a result of *Lampf* and *Beam*.¹⁹ Section II explains the separation of powers doctrine and discusses the holdings of the federal courts that have addressed constitutional challenges to the statute.²⁰ Finally, section III considers the likely future for this controversy and analyzes the arguments challenging the statute, determining that because Congress may not alter final judgments of the courts, the reinstatement provision of § 27A must be held unconstitutional.²¹

I. JUDICIAL AND LEGISLATIVE DEVELOPMENT OF A NEW STATUTE OF LIMITATIONS

A. *The Supreme Court's Creation and Retroactive Application*

In 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, the United States Supreme Court delineated a federal statute of limitations for private actions instituted pursuant to § 10(b) and Rule 10b-5.²² In a 5-4 decision, the Court held that private § 10(b) and Rule 10b-5 actions must be brought within one year of discovery of the violation and within three years of the violation's occurrence ("one-and-three year period").²³ The *Lampf* Court reasoned that when a subsection of a federal statute lacks a limitations period and the main statute provides an analogous express statute of limitations, a court should use the express liminary period rather than applying the general practice of borrowing an analogous state limitations period.²⁴ Relying on express causes of action created by the 1934 Securities and Exchange Act, each with a variation of a one-and-three-year limitations period, the Court adopted the statutory configuration as the new

¹⁹ See *infra* notes 23-112 and accompanying text.

²⁰ See *infra* notes 113-347 and accompanying text.

²¹ See *infra* notes 348-86 and accompanying text.

²² 111 S. Ct. 2773, 2782, *reh'g denied*, 112 S. Ct. 27 (1991).

²³ *Id.* at 2782.

²⁴ *Id.* at 2780.

federal limitations period.²⁵ Because the plaintiffs' did not bring suit within this limitations period, the Court dismissed their claim as untimely.²⁶

The plaintiffs sued the defendant, a law firm, because, based on letters of opinion prepared by the defendant, the plaintiffs bought shares in several limited partnerships, expecting tax benefits.²⁷ The partnerships subsequently failed and the Internal Revenue Service disallowed the tax benefits determining that the partnership benefits were overvalued.²⁸ The plaintiffs filed suit charging the defendant with violation of, among other things, § 10(b) and Rule 10b-5.²⁹ Plaintiffs claimed that misrepresentations in the defendant's memoranda led them to invest in the partnerships.³⁰

Upon the defendant's motion for summary judgment, the United States District Court for the District of Oregon determined that the plaintiffs' securities claims were governed by the state statute of limitations for the most analogous forum-state cause of action.³¹ The court determined that the Oregon fraud statute would apply, with a two-year statute of limitations.³² Based on the facts of the case, the district court determined that the plaintiffs had failed to bring suit within two years of being placed on inquiry notice of the defendant's alleged violation.³³ On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded the case, determining that the district court had not completely resolved factual issues controlling when plaintiffs had or should have discovered the violations.³⁴ The United States Supreme Court granted certiorari to resolve a split among the circuits as to whether a uniform federal limitations period applied to § 10(b) and Rule 10b-5 claims or whether analogous, but diverse, state statutes of limitations should be applied.³⁵

²⁵ *Id.* at 2780-81.

²⁶ *Id.* at 2782.

²⁷ *Lampf*, 111 S. Ct. at 2776.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 2777.

³² *Lampf*, 111 S. Ct. at 2777.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* See, e.g., *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 364 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990); *In re Date Access Sys. Sec. Litig.*, 843 F.2d 1537, 1550 (3d Cir.) (en banc), cert. denied sub nom. *Vitiello v. Kahlowsky & Co.*, 488 U.S. 849 (1988); *Corwin v. Marney, Orton Inv.*, 843 F.2d 194, 197 (5th Cir.), cert. denied, 488 U.S. 924 (1988). See also Howard S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 237 (1989).

The Supreme Court's discussion of the issue began with a plurality opinion.³⁶ The plurality noted the general rule that when no statute of limitations is provided by Congress for a federal cause of action, the presiding court "borrows" or "absorbs" the local time limitation most analogous to the pending issue.³⁷ The plurality noted, however, that the Supreme Court had created a uniform statute where operation of a state limitations period frustrated the purpose of the federal statute.³⁸ The plurality continued by stating that the borrowing practice is to be abandoned only when a federal rule provides a closer analogy than state statutes and when the federal policies at stake make the federal rule a "more appropriate vehicle for interstitial lawmaking."³⁹

Then, with a majority, the Court turned its attention to § 10(b).⁴⁰ The *Lampf* Court noted that its task in assigning a uniform statute of limitations was complicated by the fact that the text of § 10(b) does not provide for a private remedy based on violation of its requirements.⁴¹ Rather, the private cause of action under § 10(b) and Rule 10b-5 was judicially created and implied under the statute for the past forty-seven years.⁴² The *Lampf* Court thus set out on what it referred to as the "awkward task" of establishing the statute of limitations that Congress wanted the courts to apply for a cause of action Congress never knew existed.⁴³

The *Lampf* Court continued by determining that when the claim asserted derives from a statute that also contains an express cause of action and statute of limitations, a court should look first to that statute

³⁶ *Lampf*, 111 S. Ct. at 2778.

³⁷ *Id.* This practice was derived from the Rules of Decision Act, 28 U.S.C. § 1652 (1988). *Id.*

³⁸ *Id.* (citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 161 (1983)). Some commentators and judges had already asserted that § 10(b) was just such a situation. In the words of one judge, the practice of borrowing analogous state limitation periods in § 10(b) actions was "one tottering parapet of a ramshackle edifice." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987). One commentator argued that the lack of a standardized federal statute of limitations encouraged forum shopping and wasted judicial resources as judges were forced to spend time searching for an analogous local statute. Bloomenthal, *supra* note 35, at 296.

³⁹ *Lampf*, 111 S. Ct. at 2778 (quoting *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989)).

⁴⁰ *Lampf*, 111 S. Ct. at 2779.

⁴¹ *Id.*; see also 15 U.S.C. § 78j(b), *supra* note 5. The *Lampf* Court readily acknowledged that Congress never intended for a private remedy to exist. 111 S. Ct. at 2780. Rule 10b-5 also does not expressly provide for a private remedy. 17 C.F.R. § 240.10b-5, *supra* note 6; THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 13.2, at 449 (1985).

⁴² *Lampf*, 111 S. Ct. at 2779. The first case to imply the private cause of action from the statute was *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946). ("disregard of the command of a statute is a wrongful act and a tort").

⁴³ *Lampf*, 111 S. Ct. at 2780.

to determine the appropriate limitations period.⁴⁴ Thus, only where no federal analogy is available should a court apply state borrowing principles.⁴⁵ Applying this rule to § 10(b), the *Lampf* Court noted that the 1934 Securities and Exchange Act contained a number of express causes of action and, with one exception, each was a variation of the one-and-three-year period proposed.⁴⁶ Thus, the Court adopted the one-and-three-year statute of limitations period for private actions brought under § 10(b) and Rule 10b-5.⁴⁷

The *Lampf* Court concluded its opinion by retroactively applying the new limitations period to the parties before it.⁴⁸ Thus, the Court dismissed the plaintiffs' suit as time-barred.⁴⁹ The Court offered no explanation for this unprecedented holding.⁵⁰

Justice O'Connor, joined by Justice Kennedy, dissented to the Court's opinion.⁵¹ Justice O'Connor questioned the *Lampf* Court's decision to dismiss the plaintiffs' suit based on a federal statute of limitations announced four-and-one-half years after the suit was filed.⁵² Justice O'Connor noted that previously, the Court had never applied a new limitations period retroactively to the case in which it was announced in order to bar an action that had been timely filed under the prevailing law in the circuit.⁵³ Justice O'Connor argued that the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See also 15 U.S.C. §§ 78i(c) (willful manipulation of security prices), 78r(c) (misleading filings), 77m (1988). Several circuit courts, seeking to create a federal standard, had already looked to the statute as enacted by Congress in 1934 and arrived at the one-and-three-year statute of limitations. *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 364 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1550 (3d Cir.) (en banc), cert. denied sub nom. *Vitiello v. Kahlowsky & Co.*, 488 U.S. 849 (1988). Nevertheless, some circuits continued to rely on analogous state statutes of limitations. E.g., *Corwin v. Marney, Orton Inv.*, 843 F.2d 194, 197 (5th Cir.), cert. denied, 488 U.S. 924 (1988).

⁴⁷ *Lampf*, 111 S. Ct. at 2781. The SEC argued that § 20A of the Insider Trading and Securities Enforcement Act of 1988, with a five-year statute of limitations, provided the closest federal analogy to § 10b. *Id.* The *Lampf* Court chose not to adopt this argument. *Id.*

⁴⁸ *Id.* at 2782.

⁴⁹ *Id.*

⁵⁰ See *id.*

⁵¹ *Id.* at 2785 (O'Connor, J., dissenting).

⁵² *Lampf*, 111 S. Ct. at 2786.

⁵³ *Id.* See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987) (upholding Third Circuit decision not to apply new statute of limitations retroactively); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 109 (1971). In *Chevron Oil*, the United States Supreme Court declined to retroactively apply a new statute of limitations to the parties in the case and instead developed a three-prong test for determining when a court should decline to apply a new rule of law retroactively. *Id.* at 406-07. Initially, the test provides that the decision to be applied must set forth a new principle of law. *Id.* at 406. Second, the court must consider whether retroactive application of the law will advance or retard its operation. *Id.* at 406-07. Finally, a decision should not be applied retroac-

Court's past practice reflected the principle that due process is violated when a party is arbitrarily denied the right to be heard in court.⁵⁴ She concluded by asserting that the Court ignored this traditional standard of justifiable reliance and due process, thereby "visiting unprecedented unfairness" on plaintiffs.⁵⁵

In sum, the *Lampf* Court created a new federal statute of limitations for private actions brought under § 10(b) and Rule 10b-5.⁵⁶ The Court determined that because the Securities and Exchange Act of 1934 provided an analogous express statute of limitations, the one-and-three year limitations period for § 10(b) served as the best expression of congressional intent.⁵⁷ Thus, the Court held that in § 10(b) actions federal courts should no longer borrow statute of limitations from analogous state statutes but should uniformly apply the federal one-and-three year period.⁵⁸ Because the plaintiffs' suit had not been brought within this limitations period, the Court dismissed it.⁵⁹

On the same day as the United States Supreme Court issued the *Lampf* opinion, it decided *James B. Beam Distilling Co. v. Georgia*.⁶⁰ The *Beam* Court held that when the Supreme Court applies a rule of law to the litigants in one case, it must apply that rule to all other similarly situated litigants.⁶¹ The Court reasoned that "selective prospectivity," whereby a new law is applied to the parties before the court but not to other similarly situated litigants, violates principles of equity and stare decisis.⁶² Accordingly, the Court retroactively applied an earlier ruling to the parties in *Beam*, despite the fact that the *Beam* claim arose before the Court decided the earlier case.⁶³

Beam involved a Georgia state law that imposed an excise tax on imported alcohol that was twice the tax imposed on alcohol from Georgia-grown products.⁶⁴ In an earlier decision, the United States Supreme Court held as unconstitutional a law exempting certain lo-

tively if it is likely to produce inequitable results. *Id.* at 407. The *Lampf* majority failed to address the applicability of the *Chevron* analysis. 111 S. Ct. at 2787 (O'Connor, J., dissenting).

⁵⁴ *Lampf*, 111 S. Ct. at 2786.

⁵⁵ *Id.* at 2787-88.

⁵⁶ *Id.* at 2782.

⁵⁷ *Id.* at 2780.

⁵⁸ *Id.*

⁵⁹ *Lampf*, 111 S. Ct. at 2782.

⁶⁰ 111 S. Ct. 2439, 2448 (1991).

⁶¹ *Id.*

⁶² *Id.* at 2446.

⁶³ *Id.* at 2441. In the earlier case, *Bacchus Imports, Ltd. v. Dias*, the Court determined that a 20% Hawaiian liquor excise law, which exempted certain locally produced liquors, violated the Commerce Clause. 468 U.S. 263, 265, 276 (1984).

⁶⁴ *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2442 (1991).

cally produced alcohol from a liquor excise tax.⁶⁵ In *Beam*, the Georgia Supreme Court determined that the tax violated the Federal Constitution under the Supreme Court's earlier ruling, but the courts held that the Supreme Court's ruling in the earlier case was to be applied prospectively only.⁶⁶ The Georgia Supreme Court therefore denied the plaintiff a refund of the higher taxes imposed under the statute.⁶⁷ A plurality of the Supreme Court held, however, that similarly situated litigants should be treated alike, and accordingly held that the earlier decision applied to the parties in *Beam*, despite the fact that *Beam* arose before the Court decided the earlier case.⁶⁸

The Court began its plurality opinion by noting that only when the law changes do principles of retroactivity become an issue for courts.⁶⁹ According to the plurality, when the law changes, choice of law considerations dictate whether that rule should be applied retroactively or prospectively.⁷⁰ The Court observed that there are three ways in which this choice of law problem may be solved.⁷¹ First, decisions may be applied fully retroactively, both to the parties before the court as well as to all others with claims pending.⁷² The *Beam* Court noted that full retroactivity is regarded as the norm and is consistent with the declaratory theory of law, that propounds that courts only find the law—they do not make it.⁷³

⁶⁵ *Bacchus*, 468 U.S. at 265, 276.

⁶⁶ *James B. Beam Distilling Co. v. Georgia*, 382 S.E.2d 95, 96 (Ga. 1989). In making this determination, the Georgia Supreme Court applied the retroactivity test set forth by the United States Supreme Court in *Chevron Oil*, 404 U.S. 97, 106–07 (1971); see *supra* note 53. The Georgia Supreme Court determined that the first prong of the *Chevron Oil* test applied because, during the time the tax was collected, the state believed the tax was constitutional. *Beam*, 382 S.E.2d at 96. Moreover, the court noted that when the Georgia legislature learned of the Supreme Court's ruling in *Bacchus*, it modified the tax law to correct its defects. *Id.* Next, the court noted that the second prong of the test was inapplicable because the tax statute was repealed in 1985. *Id.* Finally, in applying the third prong, the Georgia court conducted a balancing test. *Id.* On the one hand, the increased tax level was likely to have been passed on to the distilling company's customers. *Id.* at 97. On the other hand, requiring the state to return approximately \$30 million in taxes which the state had collected in good faith under a presumptively valid statute would impose a severe financial burden on the state and its citizens. *Id.* Accordingly, the court applied an exception to the general rule that unconstitutional statutes are void *ab initio*, on the grounds that application of the rule would be unjust. *Id.*

⁶⁷ *Beam*, 382 S.E.2d at 96.

⁶⁸ *Beam*, 111 S. Ct. at 2446. Although a majority of the Court joined the decision, four Justices wrote separate opinions. *Id.* at 2441. No single opinion garnered the support of more than three Justices. *Id.*

⁶⁹ *Id.* at 2443.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Beam*, 111 S. Ct. at 2443.

Second, decisions may be applied purely prospectively.⁷⁴ In other words, the court may apply the newly announced rule neither to the parties before it nor to those who are similarly situated.⁷⁵ The *Beam* Court noted that the Supreme Court has infrequently limited cases to pure prospective application.⁷⁶

Finally, the decision may be applied through "selective prospectivity."⁷⁷ Specifically, the rule is applied in the case through which it is announced, but courts continue to apply the old rule to all cases with facts predating the pronouncement.⁷⁸ In analyzing this alternative, the Court determined that selective prospectivity violates the tenet that similarly situated litigants should be treated similarly.⁷⁹ Noting that the Court had already proscribed selective prospectivity in the criminal context, the Court concluded that selective prospectivity is also impermissible in the civil context.⁸⁰ Thus, the *Beam* Court held that once a court has applied a new rule retroactively to the parties before it, that rule must be consistently applied to all other litigants.⁸¹ The Court went on to exclude, however, litigants barred by procedural requirements or res judicata, stating that "once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed."⁸² In delivering this holding, the Court reiterated that the opinion rested on narrow choice of law grounds.⁸³

Justice Scalia, joined by Justice Marshall and Justice Blackmun, concurred in the Court's holding that selective prospectivity is impermissible.⁸⁴ He argued, however, that the basis for this decision is not

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (citing, inter alia, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

⁷⁷ *Id.* at 2444.

⁷⁸ *Id.* This method was initially applied when a number of prophylactic criminal procedure laws were handed down to assure criminal defendants' rights. *Id.* The Court declined to apply these judgments retroactively in fear of upsetting the criminal justice process. *Id.*

⁷⁹ *Beam*, 111 S. Ct. at 2444.

⁸⁰ *Id.* at 2444-45, 2446 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). In *Griffith*, the Court held that a new rule for the conduct of criminal prosecution should be retroactively applied to all cases, state or federal, in which final judgments had not been reached. 479 U.S. at 328. The *Griffith* Court determined that failure to retroactively apply newly declared constitutional rules to pending criminal cases violated norms of constitutional adjudication. *Id.* at 322. The Court reasoned that Article III commanded the Court to adjudicate only cases and controversies and thus, unlike a legislature, the Court was unable to pronounce constitutional rules of criminal procedure on a broad basis. *Id.* As a second rationale, the Court noted that selective prospectivity violates the principal that similarly situated litigants should be treated alike. *Id.* at 323.

⁸¹ *Beam*, 111 S. Ct. at 2447-48.

⁸² *Id.* at 2446.

⁸³ *Id.* at 2448. Justice White concurred in the judgment on the narrow grounds set forth by the majority opinion. *Id.* at 2449 (White, J., concurring). Justice White disagreed, however, with the Court's failure to endorse the propriety of pure prospective application. *Id.*

⁸⁴ *Id.* at 2450 (Scalia, J., concurring).

inequity, as the opinion of the Court set forth.⁸⁵ Rather, Justice Scalia maintained that selective prospectivity is prohibited by the Constitution and thus cannot be characterized as a choice of law question.⁸⁶ Justice Scalia noted that Article III of the Constitution of the United States vests the judicial power in the Court to say what the law is, not to make it.⁸⁷ Accordingly, Justice Scalia concluded that selective prospectivity was not merely inequitable, but constitutionally proscribed because it represented an effort by the courts to make law in violation of the separation of powers doctrine.⁸⁸

Justice Blackmun also concurred, joined by Justice Marshall and Justice Scalia.⁸⁹ Justice Blackmun agreed with Justice Scalia that the Constitution prohibits selective prospectivity.⁹⁰ He maintained that this principle was clearly laid out when the Court disallowed selective prospectivity in the criminal context.⁹¹ Justice Blackmun continued that, unlike a legislature, the Court is incapable of promulgating rules with only a prospective application.⁹² He concluded, therefore, that the ban on selective prospectivity "derives from the integrity of judicial review," which does not justify applying a rule which the court has found to be wrong to litigants who are in or still may come to court.⁹³

The *Beam* plurality therefore extended the prohibition against selective prospectivity to civil cases.⁹⁴ The Court reasoned that selective prospectivity violates principles of equity and stare decisis.⁹⁵ Accordingly, the Court held that when the Supreme Court applies a rule of law to litigants in one case, that rule must be applied to all similarly situated litigants.⁹⁶

One week after the pronouncement of the *Lampf* and *Beam* decisions, the United States Supreme Court made clear the combined effect of the two cases when read together.⁹⁷ On June 28, 1991, the Supreme Court granted certiorari to and remanded for further con-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Beam*, 111 S. Ct. at 2450-51 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that Congress may not enact a law that contravenes the Supreme Court's interpretation of the Constitution)).

⁸⁸ *Id.* at 2450 (Scalia, J., concurring).

⁸⁹ *Id.* at 2449 (Blackmun, J., concurring).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Beam*, 111 S. Ct. at 2449.

⁹³ *Id.* at 2450.

⁹⁴ *Id.* at 2446.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2448.

⁹⁷ Robert W. Ginn, *United States Supreme Court Changes in Determining Whether Judicial Decisions Should Apply Retroactively*, 25 CREIGHTON L. REV. 29, 38 (1991).

sideration the case of *Northwest Savings Bank v. Welch*, a § 10(b) statute of limitations case on appeal from the United States Court of Appeals for the Second Circuit.⁹⁸ The Supreme Court instructed the Second Circuit to consider *Welch* in light of the Court's decisions in *Beam* and *Lampf*.⁹⁹ Thus, the Supreme Court was instructing lower courts that *Lampf* must be applied retroactively to all private § 10(b) cases pending on June 20, 1991, the date the Court issued the *Lampf* decision.¹⁰⁰

As a result of *Lampf*, *Beam* and *Northwest Savings*, federal courts throughout the country dismissed private actions brought under § 10(b) and Rule 10b-5 as time-barred.¹⁰¹ As of November 21, 1991, according to United States Representative Edward Markey (D-Mass.), \$650 million in securities fraud claims were dismissed and over \$4 billion in fraud claims, including suits against Michael Milken, Charles Keating and Fred Carr were subject to dismissal.¹⁰² A public outcry arose.¹⁰³ Congress, therefore, felt compelled to act in order to try and restore some of the damage caused by the *Lampf* and *Beam* decisions.¹⁰⁴

B. Congress's Response—Section 27A of the Exchange Act

After the effect of the Supreme Court's decisions became clear, Congress sought to enact an express statute of limitations for private causes of action brought under § 10(b) and Rule 10b-5.¹⁰⁵ In both the House of Representatives and the Senate, bills were introduced that would create longer statutes of limitations than those established by *Lampf*.¹⁰⁶ Due to strong opposition, however, the proponents of the

⁹⁸ 111 S. Ct. 2882 (1991). The issue to be decided in the Second Circuit case, *Welch v. Cadre Capital*, was whether *Ceres Partners v. GEL Assocs.* applied retroactively. *Welch*, 923 F.2d 989, 990 (2d Cir. 1991). In *Ceres Partners*, the Second Circuit abandoned the practice of borrowing analogous state statutes of limitations in actions brought under § 10(b) in favor of a uniform federal limitations period, such as the one created by the *Lampf* Court, applied retroactively. 918 F.2d 349, 364 (2d Cir. 1990). The *Welch* court applied the three-prong *Chevron Oil* test and, determining that the test was satisfied, declined to apply the new statute of limitations retroactively. 923 F.2d at 994-95.

⁹⁹ *Northwest Savings Bank*, 111 S. Ct. at 2882-83.

¹⁰⁰ See Ginn, *supra* note 97, at 38.

¹⁰¹ E.g., *Boudreau v. Deloitte, Haskins & Sells*, 942 F.2d 497, 498 (8th Cir. 1991); *Anixter I*, 939 F.2d 1420, 1442 (10th Cir. 1991), *cert. granted and judgment vacated sub nom.* Dennler v. Trippett, 112 S. Ct. 1658 *amended* 122 S. Ct. 1757 (1992); *Cohen v. Prudential-Bache Sec., Inc.*, 777 F. Supp. 276, 281 (S.D.N.Y. 1991); *Continental Bank, Nat'l Ass'n v. Village of Ludlow*, 777 F. Supp. 92, 103 (D. Mass. 1991). In *Anixter I*, for example, the plaintiffs' \$130 million jury award on a fraud claim was dismissed on appeal as time-barred after 18 years of litigation. 939 F.2d at 1442.

¹⁰² See 137 CONG. REC. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey).

¹⁰³ See BLOOMENTHAL, *supra* note 9, § 1.06 at 1-20; Oberly & Shapiro, *supra* note 9, at 46.

¹⁰⁴ See Sabino, *supra* note 13, at 26.

¹⁰⁵ Oberly & Shapiro, *supra* note 9, at 46.

¹⁰⁶ On July 23, 1991, Senator Bryan (D-Nev.) introduced S. 1533, entitled "Securities Investor

bills were unable to garner enough support to enact the longer statute of limitations.¹⁰⁷

When the efforts to pass a bill altering the statute of limitations created by the *Lampf* decision failed, the Senate Committee on Banking, Housing and Urban Affairs and the House Committee on Energy and Commerce reached a compromise.¹⁰⁸ The committee members agreed to leave the statute of limitations intact but to "reverse its retroactive effect" on cases that were timely filed prior to the Court's decision.¹⁰⁹ This compromise, codified as § 27A of the Exchange Act, provides that the jurisdictional statute of limitations existing on June 19, 1991, the day before *Lampf* and *Beam* were decided, is the limitations period for any private action implied under § 10(b) filed on or before that date.¹¹⁰ Moreover, subsection (b) of the statute provides for the reinstatement of any private action implied under § 10(b) that was timely filed on or before June 19, 1991, and was dismissed as a result of the Supreme Court's retroactive application of the new statute of limitations announced in *Lampf*.¹¹¹ Thus, as a result of the passage of § 27A, there are now two statutes of limitations that apply to private actions implied under § 10(b): the one-and-three year period for those cases filed after June 19, 1991, and the applicable jurisdictional limitations period for cases filed prior to that date.¹¹²

II. SEPARATION OF POWERS CHALLENGES TO § 27A

The enactment of § 27A set off a wave of litigation throughout the country.¹¹³ A number of courts have determined that the statute violates the separation of powers doctrine because it impermissibly encroaches on the realm of the judiciary.¹¹⁴ To date, the Seventh, Ninth, Tenth and Eleventh Circuits have upheld the constitutionality of

Protection Act." See 137 CONG. REC. S10,675-76, S10,691 (daily ed. July 23, 1991) (statement of Sen. Riegle). The bill proposed that Congress enact a new statute of limitations requiring that private § 10(b) actions be filed within two years of discovery or five years of the occurrence. *Id.* at S10,691-92. On the House side, a similar bill was proposed by Representative Edward Markey (D-Mass.). See 137 CONG. REC. H6,316 (daily ed. Aug. 1, 1991). Entitled "The Securities Investors Legal Rights Act of 1991," the bill proposed a 3-and-5-year statute of limitations. 137 CONG. REC. E2,843 (daily ed. Aug. 2, 1991) (extended remarks of Rep. Markey).

¹⁰⁷ 137 CONG. REC. S17,033-34 (statement of Sen. Domenici). See also BLOOMENTHAL, *supra* note 9, § 1.06, at 1-20.

¹⁰⁸ BLOOMENTHAL, *supra* note 9, § 1.06, at 1-20.

¹⁰⁹ See 137 CONG. REC. H11,810-11 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell).

¹¹⁰ 15 U.S.C. § 78aa-1(a) (1991). See *supra* note 10 for text of statute.

¹¹¹ 15 U.S.C. § 78aa-1(b). See *supra* note 10 for text of statute.

¹¹² Oberly & Shapiro, *supra* note 9, at 54.

¹¹³ Franklin, *supra* note 13, at 5.

¹¹⁴ *E.g.*, *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108, 115 (N.D. Tex. 1992); *Treiber v. Katz*, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992); *Johnston v. Cigna Corp.*,

§ 27A.¹¹⁵ Appeals are also pending in the Second, Third, Fourth, Fifth and Sixth Circuits.¹¹⁶

A. *The Separation of Powers Doctrine*

*No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty . . .*¹¹⁷

The Supreme Court has consistently held that the concept of maintaining three separate and distinct branches of government is "essential to the preservation of liberty."¹¹⁸ The primary purpose of separation of powers is to keep each branch of government independent of one another, without risk of intimidation or control by other branches.¹¹⁹ To this end, Article I imbues Congress with legislative powers, Article II installs the powers of the Executive in the President and Article III vests the judicial power of the United States in the federal courts.¹²⁰ The Framers did not intend, however, nor has the Supreme Court determined, that separation of powers dictates that the branches be hermetically sealed from one another.¹²¹ Rather, a degree of interdependence among the branches is both expected and required.¹²² Thus, the Supreme Court has only struck down legislative or executive action when a risk of the encroachment or aggrandizement of one branch at the expense of another is present.¹²³

An analysis of the constitutionality of § 27A requires discussion of Congress's ability to pass retroactive case law as well as its capacity to alter final judgments of the courts. Within the separated powers

789 F. Supp. 1098, 1100 (D. Colo. 1992); *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092, 1098 (D. Colo. 1992); *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231, 235 (E.D. Ky. 1992); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1112 (N.D. Cal. 1992).

¹¹⁵ *Gray v. First Winthrop Corp.*, No. 91-16907, 92-15986, 92-15901, 92-16193, 1993 U.S. App. LEXIS 6995, at *29 (9th Cir. Apr. 7, 1993); *Berning v. A.G. Edwards & Sons*, No. 91-3318, 1993 U.S. App. LEXIS 6074, at *23-24 (7th Cir. Mar. 25, 1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Anixter II*, 977 F.2d 1533, 1547 (10th Cir. 1992), *cert. denied sub nom.* *Dennler v. Trippet*, 61 U.S.L.W. 3714 (1993).

¹¹⁶ *Franklin*, *supra* note 13, at 5. Statistics are as of September 30, 1992. *Id.*

¹¹⁷ THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter, ed., 1961).

¹¹⁸ *Mistretta v. United States*, 488 U.S. 361, 380 (1989). In *Mistretta*, Congress upheld the creation of the United States Sentencing Commission, an independent body within the judicial branch authorized to promulgate criminal sentencing guidelines, against excessive delegation and separation of powers challenges. *Id.* at 412.

¹¹⁹ *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982) (Burger, J. concurring).

¹²⁰ U.S. CONST. art. I-III.

¹²¹ *Mistretta*, 488 U.S. at 381.

¹²² *Id.*

¹²³ *Id.* at 382. The *Mistretta* Court identified fear of encroachment as the determinative factor

scheme, Congress has the authority to enact statutes embodying substantive law that the courts are required to enforce.¹²⁴ These statutes may retroactively affect rights and duties of litigants, as long as the retroactive application of the statute is justified by a rational purpose.¹²⁵ Congress's enactment must, however, alter either substantive or procedural law.¹²⁶ The legislature cannot simply contradict a Supreme Court determination and prescribe a rule of decision in a case pending before the courts without changing the underlying law.¹²⁷

As a general rule, Congress also may not exercise an appellate-type review of judicial judgments, either altering the judgment's terms or ordering new trials in cases where final judgments have been issued.¹²⁸ Congressional reversal of final judgments violates the separation of powers doctrine not only because it intrudes on the exclusive power of the courts to adjudicate cases, but also because it allows litigants to evade final rulings of the courts, effectively rendering a court's decision an advisory opinion.¹²⁹ The Supreme Court has, however, made

in the Supreme Court's separation of powers jurisprudence. *Id. See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986) (congressional retention of power to remove an officer charged with an executive function violates separation of powers); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (one-house veto of Attorney General's execution of delegated powers violates separation of powers); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (the essential powers of Article III courts may not be vested in Article I courts). Thus, the Supreme Court has upheld congressional and presidential actions when this danger is absent. *Mistretta*, 488 U.S. at 382. *See, e.g.,* *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (upholding judicial designation of the Special Prosecutor); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986) (upholding agency's assumption of jurisdiction over state law counter-claims as presenting no risk of aggrandizement); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 444-45 (1977) (upholding legislation authorizing the General Services Administration to regulate Executive Branch documents upon President's resignation).

¹²⁴ *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-5, at 50 (2d ed. 1988).

¹²⁵ *United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989) (statute requiring American claimants to the Iran-United States Claims Tribunal to pay percentage of awards to United States does not violate due process).

¹²⁶ TRIBE, *supra* note 124, § 3-5, at 50 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871)).

¹²⁷ *See Klein*, 80 U.S. (13 Wall.) at 146.

¹²⁸ *Block & Hoff*, *supra* note 13, at 10; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 413 n.4 (1792) ("no decision of any court of the United States can, under any circumstances . . . agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested . . ."); *United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874) ("Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government.") In addition to separation of powers violations, congressional intrusion in final judgments of the judiciary also raises due process concerns. *Block & Hoff*, *supra* note 13, at 10. *See McCullough v. Virginia*, 172 U.S. 102, 123 (1898) ("[i]t is not within the power of the legislature to take away rights which have been once vested by judgment.")

¹²⁹ *Block & Hoff*, *supra* note 13, at 10. The prohibition against court advisory opinions was first set forth by the Supreme Court in an August 8, 1793 letter to then-Secretary of State Thomas

exceptions to this rule.¹³⁰ For example, in instances where Congress orders relitigation of a matter previously determined in its favor, the Supreme Court has determined that a violation of the separation of powers doctrine has not occurred.¹³¹

In 1871, in *United States v. Klein*, the United States Supreme Court focused on Congress's capacity to pass retroactive laws and held that a congressional statute violated the separation of powers doctrine by directing the Court to decide a specific case in a specific way.¹³² The Court determined that the statute, which directed the Supreme Court to give a presidential pardon precisely the opposite value that the Court had determined it to have, was unconstitutional because it "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it."¹³³ The Court reasoned that Congress's retroactive statute created no new legal circumstances.¹³⁴ The Supreme Court, therefore, concluded that "Congress has inadvertently passed the limit which separates the legislative from the judicial power."¹³⁵

In *Klein*, the plaintiff, administrator of the estate of V.F. Wilson, sought to repossess the proceeds of the decedent's cotton.¹³⁶ The Treasury Department seized the cotton pursuant to an 1863 congressional statute directing it to take and sell all property either abandoned by or seized from the Confederate forces.¹³⁷ The statute also provided, however, that individuals who remained loyal to the Union during the war could recover their property.¹³⁸ In December of 1863, the President

Jefferson seeking advice on U.S.-European relations. See PAUL M. BATOR ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-66 (3d. ed. 1988). The Supreme Court informed Mr. Jefferson that the separation of powers doctrine dictated that the Court cannot extrajudicially decide the questions submitted to it by the executive. *Id.* at 66-67. Since Jefferson's efforts to obtain advice from the Supreme Court failed, the Attorney General has served as the President's primary legal advisor. *Id.* at 71.

¹³⁰ Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 811 (11th Cir. 1985) (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980)).

¹³¹ See *Sioux Nation*, 448 U.S. at 406-07.

¹³² 80 U.S. (13 Wall.) 128, 146-47 (1871).

¹³³ *Id.* at 146, 147.

¹³⁴ *Id.* at 147.

¹³⁵ *Id.* The *Klein* Court also ruled that Congress had impermissibly encroached on the powers of the President to issue pardons under Article I, § 2 of the Constitution of the United States. *Id.* at 148. *Klein* is also read for the rule that Congress may not manipulate the Supreme Court's appellate jurisdiction in order to secure unconstitutional ends. Lawrence Gene Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 41 (1981).

¹³⁶ 80 U.S. (13 Wall.) at 136.

¹³⁷ *Id.* at 130-31, 136.

¹³⁸ *Id.* at 131.

proclaimed that a full pardon and restoration of property rights would be granted to individuals who took an oath of loyalty to the Union.¹³⁹ Prior to his death, Wilson took such an oath.¹⁴⁰

Based on the decedent's oath of loyalty, Klein brought suit in the Court of Claims seeking to have the cotton returned to him.¹⁴¹ The court determined that Wilson's estate was entitled to receive the proceeds of the cotton.¹⁴² The United States appealed to the U.S. Supreme Court, which earlier that year affirmed a separate case on similar facts.¹⁴³ Subsequent to the Court's decision in the earlier case, however, Congress enacted a proviso to the appropriations bill of the Court of Claims, declaring that a) presidential pardons were not proof of loyalty to the United States Government and could not be used as evidence of such in the Court of Claims; b) in cases where the Court of Claims had already entered a favorable judgment for a claimant, the Supreme Court was to dismiss any appeal for lack of jurisdiction; and c) the Court of Claims was to treat a pardon as evidence of disloyalty.¹⁴⁴ Thus, in *Klein*, the United States argued that the Supreme Court should remand the case to the Court of Claims with a mandate that it be dismissed for want of jurisdiction.¹⁴⁵

The *Klein* Court began by noting that under Article III, Congress is free to limit the Supreme Court's appellate jurisdiction in a particular class of cases.¹⁴⁶ The Court determined, however, that Congress's proviso here simply sought to withhold the Supreme Court's appellate jurisdiction as a means to an end.¹⁴⁷ According to the Court, by denying the Supreme Court's appellate jurisdiction in cases where a presidential pardon had been granted, Congress sought to contradict the value the Supreme Court had already assigned to presidential pardons in the earlier case.¹⁴⁸ Moreover, the *Klein* Court noted, Congress's provision required the Supreme Court to assess the facts of a case and *then* determine that it lacked jurisdiction over the case.¹⁴⁹ The Court con-

¹³⁹ *Id.* at 131-32.

¹⁴⁰ *Id.* at 132.

¹⁴¹ *Klein*, 80 U.S. (13 Wall.) at 132.

¹⁴² *Id.*

¹⁴³ *Id.* at 132-33. In the previous case, *United States v. Padelford*, the Supreme Court determined that the presidential pardon made the plaintiff innocent in the eyes of the law and his property was purged of any previous offense. 76 U.S. (9 Wall.) 531, 543 (1864).

¹⁴⁴ *Klein*, 80 U.S. (13 Wall.) at 133-34.

¹⁴⁵ *Id.* at 134.

¹⁴⁶ *Id.* at 145.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Klein*, 80 U.S. (13 Wall.) at 145.

cluded that the congressional proviso directed the Court to decide specific cases in specific ways, thereby violating the separation of powers.¹⁵⁰

In making its determination, the *Klein* Court distinguished its 1855 decision in *Pennsylvania v. Wheeling and Belmont Bridge Co.*¹⁵¹ In *Wheeling Bridge*, the Supreme Court had previously determined that a low bridge was an obstruction to steamboat traffic, ordering that it be either raised or razed.¹⁵² Congress subsequently passed a statute, however, declaring the bridge to be legal at its present height and making it a post-road for mail delivery.¹⁵³ The *Wheeling Bridge* Court held Congress's act constitutional, declaring that although the bridge remained an obstruction in fact, it no longer operated as such in law.¹⁵⁴

In distinguishing *Wheeling Bridge*, the *Klein* Court noted that, unlike the current situation, Congress's act in *Wheeling Bridge* did not constitute an arbitrary rule of decision.¹⁵⁵ Rather, the *Wheeling Bridge* Court was left to apply its ordinary rules to the new circumstances created by the congressional act.¹⁵⁶ The *Klein* Court, on the other hand, determined that no new circumstances were created by the congressional proviso that instructed the Court to regard presidential pardons as evidence of disloyalty.¹⁵⁷ Rather, the *Klein* Court concluded that the proviso barred the Court from giving the pardon the value that the Court had previously determined the pardon deserved and was, in fact, told to give that evidence precisely the opposite weight.¹⁵⁸ Thus, the Court held that Congress had crossed the line that separates the legislature from the judiciary, in violation of the Constitution.¹⁵⁹

Then, in 1980, in *United States v. Sioux Nation of Indians*, the Supreme Court offered a broad reading of its opinion in *Klein*.¹⁶⁰ The

¹⁵⁰ *Id.* at 146.

¹⁵¹ *Id.* at 147; *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430 (1855).

¹⁵² 59 U.S. (18 How.) at 429.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 430.

¹⁵⁵ *Klein*, 80 U.S. (13 Wall.) at 146-47.

¹⁵⁶ *Id.* at 147.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* At least one commentator has suggested that *Klein* does little more than hold that it is an unconstitutional encroachment of the judicial function when Congress binds the Court to reverse a decision of the lower court in accordance with an unconstitutional rule. BATOR ET AL., *supra* note 129, at 369. Another commentator notes that *Klein*'s excessively broad statements have allowed the case to be "viewed as nearly all things to all men." Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WIS. L. REV. 1189, 1195 (1981).

¹⁶⁰ 448 U.S. 371, 405 (1980); Carroll Dorgan, Note, *Section 2212: A Remedy for Veterans—With a Catch*, 75 CAL. L. REV. 1513, 1527 (1987).

Sioux Nation Court held that a congressional statute that directly provided for Court of Claims review of a Sioux Nation 1877 takings claim without regard to the res judicata or collateral estoppel effects of an earlier claims court decision, did not violate the separation of powers doctrine.¹⁶¹ The *Sioux Nation* Court reasoned that the statute in question was distinguishable from the proviso in *Klein*, where Congress had prescribed a rule for the decision of specific cases in a particular way.¹⁶² The *Sioux Nation* Court determined that the United States Government, in its capacity as settlor of the nation's debts, had merely waived its res judicata defense in the subject litigation.¹⁶³ The Court concluded, therefore, that Congress had neither reversed the decisions of the claims court nor prescribed the outcome of the Court of Claims new review on the merits.¹⁶⁴

The *Sioux Nation* Court began its opinion by questioning whether the congressional statute violated the separation of powers on one of two grounds.¹⁶⁵ First, the Court considered whether Congress had upset a final judgment of the claims court, thereby making it an advisory opinion.¹⁶⁶ Second, the Court asked whether Congress had violated *Klein* by prescribing a rule of decision to the claims court—stripping that court of its adjudicatory function.¹⁶⁷ In response to both of these questions, the Court cited precedent that supported the Government's

¹⁶¹ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 407 (1980). In 1923, the Sioux Nation filed petition in the Court of Claims alleging that the U.S. Government had taken the Black Hills without providing just compensation to the Sioux. *Id.* at 384. In 1942, the Court of Claims dismissed the Sioux' action, declaring that it lacked authorization to determine whether the price given the Sioux by Congress in 1877 was adequate. *Id.* In 1946, however, Congress passed a statute creating the Indian Claims Commission ("ICC") to serve as a new forum to hear and determine all tribal grievances. *Id.* at 384-85. The Sioux submitted their claim to the ICC in 1950. *Id.* at 385. After a series of procedural difficulties, the ICC, in 1974, finally determined that the Court of Claims' 1942 decision did not serve as a res judicata bar to the Sioux' Fifth Amendment takings claim, because the previous suit had been dismissed due to lack of jurisdiction. *Id.* at 385-86. The ICC then found that the compensation awarded the Sioux in 1877 did not approximate the true value of the Black Hills and that the United States Government had, therefore, effected a taking by eminent domain. *Id.* at 386. Just compensation was, accordingly, owed to the Sioux. *Id.* On appeal by the Government, the Court of Claims held that the Black Hills claim was indeed barred by the res judicata effect of the 1942 decision. *Id.* at 386-87. Nevertheless, the Court of Claims affirmed the ICC's ruling and held that, but for the res judicata effect of the earlier decision, it would award the Sioux \$17.5 million. *Id.* at 388.

¹⁶² *Id.* at 405.

¹⁶³ *Id.* at 397, 405.

¹⁶⁴ *Id.* at 406.

¹⁶⁵ *Id.* at 391.

¹⁶⁶ *Sioux Nation*, 448 U.S. at 391 (citing *Hayburn's Case*, 5 U.S. (2 Dall.) 409, 410-14 (1792)). Although the Court raised the advisory opinion issue, it did not deal with it specifically because the matter had been addressed in precedent. See Young, *supra* note 159, at 1252.

¹⁶⁷ *Sioux Nation*, 448 U.S. at 392.

ability to waive a substantive defense to a claim.¹⁶⁸ The *Sioux Nation* Court also distinguished *Klein*, where the Court held that Congress may not prescribe a rule of decision for cases pending before the courts.¹⁶⁹ The Court noted that in *Klein*, the fact that the Government sought to determine the issue in its own favor was of obvious importance.¹⁷⁰ Second, whereas the proviso in *Klein* sought to determine particular cases in a particular way, Congress's waiver of a defense in *Sioux Nation* did not affect the claims court's ability to determine the takings claims on the merits.¹⁷¹ Thus, the *Sioux Nation* Court concluded that Congress had not violated the separation of powers doctrine because it neither "reviewed" a final judgment nor prescribed the outcome of a case based on its merits.¹⁷²

Justice Rehnquist dissented, arguing that Congress could not constitutionally require the Court of Claims to reopen a final judgment.¹⁷³ In essence, Justice Rehnquist asserted, Congress had reviewed the earlier Court of Claims' judgment, set aside its ruling and ordered a new trial.¹⁷⁴ Thus, Congress impermissibly exercised the judicial power reserved to the courts in Article III of the Constitution.¹⁷⁵ Justice Rehnquist acknowledged that Congress may exercise its legislative powers by either limiting judicial jurisdiction or establishing new legal rights after the date of a final judgment which alter that judgment's impact.¹⁷⁶ Nevertheless, he concluded, Congress may neither review and set aside a court's final judgment nor order the retrial of a previously adjudicated issue.¹⁷⁷

In 1990, in *Seattle Audubon Society v. Robertson* [hereinafter "*Robertson I*"], the United States Court of Appeals for the Ninth Circuit relied on both *Klein* and *Sioux Nation* in determining that Congress had

¹⁶⁸ *Id.* at 397-402. See, e.g., *Cherokee Nation v. United States*, 270 U.S. 476, 486 (1926) (Congress may waive its res judicata defense on a prior judgment entered in the Government's favor).

¹⁶⁹ *Sioux Nation*, 448 U.S. at 405 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* One commentator suggests that the *Sioux Nation* Court should have included in this distinction from *Klein* the fact that the rule prescribed was itself unconstitutional as a usurpation of executive power. See BATOR ET AL., *supra* note 129, at 369 n.4.

¹⁷² *Sioux Nation*, 446 U.S. at 406-07. Having upheld the statute, the *Sioux Nation* Court then proceeded to affirm the Court of Claims conclusion that the Sioux' land had been taken without just compensation. *Id.* at 424. The Court of Claims' award was affirmed. *Id.*

¹⁷³ *Id.* at 424-25 (Rehnquist, J., dissenting).

¹⁷⁴ *Id.* at 427.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 429.

¹⁷⁷ *Sioux Nation*, 448 U.S. at 429.

crossed the line that separates the legislature from the judiciary.¹⁷⁸ In 1989, the Seattle Audubon Society and several environmental groups sought declaratory and injunctive relief against the United States Forest Service's timber management guidelines because the guidelines afforded insufficient protection to the northern spotted owl.¹⁷⁹ The Washington Contract Loggers Association filed a separate suit charging that the guidelines were overly restrictive of timber harvesting.¹⁸⁰ Prior to the district court's decision in either case, Congress passed § 318 of the Department of the Interior Appropriations Act.¹⁸¹ Subsection (b)(6)(A) of this Act specifically referred to the two pending actions and claimed that the land management standards set by subsections (b)(3) and (b)(5) of the statute were adequate to meet the statutory requirements underlying the two cases.¹⁸² The district court dismissed the Audubon Society's claim under the statute and the environmental group appealed to the Ninth Circuit.¹⁸³

In striking down the statute as unconstitutional, the Ninth Circuit noted that for the first time, Congress had directed the federal courts to reach certain results in certain cases, identified by both name and file number.¹⁸⁴ The Ninth Circuit reasoned that although Congress may amend or repeal any law, even with the express purpose of ending litigation, Congress cannot require a certain case to come out in a certain way when the legislation creates no new legal circumstances.¹⁸⁵ Thus, under this standard, the Ninth Circuit determined that subsection (b)(6)(A) violated the separation of powers doctrine because it did not repeal or amend the environmental laws at issue in the two pending actions.¹⁸⁶ Because the section directed the court to reach a

¹⁷⁸ 914 F.2d 1311, 1314, 1315, 1317 (9th Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 1407, 1415 (1992) [hereinafter *Robertson I.*].

¹⁷⁹ *Id.* at 1313.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, 103 stat. 745-50 (1989).

¹⁸² *Robertson I.*, 914 F.2d at 1313. Section 318(b)(6)(A) provides in pertinent part:
... Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section ... is adequate consideration for the purpose of meeting the statutory requirements that are the basics for [the two cases].

Id. Subsection (b)(3) of the statute designated certain Forest Service lands as protected areas for the spotted owl. Subsection (b)(5) identified similarly protected areas of Bureau of Land Management land.

¹⁸³ *Robertson I.*, 914 F.2d at 1313-14.

¹⁸⁴ *Id.* at 1314.

¹⁸⁵ *Id.* at 1315 (citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430 (1855)) (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871)).

¹⁸⁶ *Id.* at 1316.

specific result based on specific factual findings the court held that the act clearly violated *Klein*.¹⁸⁷

On appeal, in *Robertson v. Seattle Audubon Society*, [hereinafter "*Robertson II*"], the United States Supreme Court reversed the decision of the Ninth Circuit.¹⁸⁸ In a unanimous opinion, the Court determined that subsection (b)(6)(A) did indeed compel changes in the law rather than directing findings under old law.¹⁸⁹ The Court reasoned that Congress replaced the legal standards underlying the two actions and substituted them with those enacted in subsections (b)(3) and (b)(5), without directing the actual applications of these standards.¹⁹⁰ The Court concluded that subsection (b)(6)(A) modified old provisions and did effect a change in the law.¹⁹¹

Thus, in *Robertson II*, the Supreme Court was presented with a statute that directly referred to pending litigation and claimed that the statute met the legal requirements underlying those cases.¹⁹² Although the Ninth Circuit held that the statute violated *Klein* because it directed the court to reach a specific result based on factual findings, the United States Supreme Court reversed.¹⁹³ The Court held that the statute did change the law and therefore did not violate the separation of powers.¹⁹⁴ Because the Court reached this conclusion, it declined to address the Ninth Circuit's interpretation of *Klein*.¹⁹⁵

In sum, under our scheme of separated powers, Congress promulgates laws and courts apply the law existing at the time of decision.¹⁹⁶ According to *Wheeling Bridge*, Congress can amend or repeal any law, even for the purpose of ending litigation.¹⁹⁷ In *Klein*, the Court determined, however, that Congress may not prescribe a rule of decision for specific cases in specific ways.¹⁹⁸ The *Sioux Nation* Court read *Klein* as proscribing congressional direction of the outcome of judicial cases, based on the merits.¹⁹⁹ If, therefore, the Court determines that a congressional statute changes the law rather than directs findings

¹⁸⁷ *Id.*

¹⁸⁸ 112 S. Ct. 1407, 1415 (1992) [hereinafter *Robertson II*].

¹⁸⁹ *Id.* at 1413.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1414.

¹⁹² *Id.* at 1412.

¹⁹³ *Robertson II*, 112 S. Ct. at 1415.

¹⁹⁴ *Id.* at 1414.

¹⁹⁵ *Id.*

¹⁹⁶ See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (when a case is on appeal and Congress changes the underlying law, courts must adhere to that law).

¹⁹⁷ See *Robertson I*, 914 F.2d 1311, 1315 (9th Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 1407, 1415 (1992).

¹⁹⁸ *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

¹⁹⁹ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 407 (1980).

under old law, no violation of the separation of powers doctrine will be found.²⁰⁰

B. Determinations of the Courts on § 27A's Constitutionality

Congress's enactment of § 27A led to a groundswell of cases in jurisdictions throughout the country, aimed at determining whether § 27A's denial of *Lampf's* effects to a discrete number of cases violates the separation of powers doctrine.²⁰¹ To date, most courts confronted with the question of whether Congress's statute impermissibly encroaches on the judiciary's realm have concluded that the separation of powers doctrine is not violated.²⁰² Nevertheless, a significant number of courts have reached the opposite conclusion and have, therefore, refused to apply the statute.²⁰³

1. Section 27A is Unconstitutional

Some courts holding that § 27A is unconstitutional maintain that the statute directs a rule of decision in the limited number of cases affected by the *Lampf* decision's retroactive application, without changing the underlying law.²⁰⁴ Other courts have held that the statute impermissibly reinstates cases dismissed by the courts in a final judgment.²⁰⁵ Finally, several courts have contended that the statute directs

²⁰⁰ *Robertson II*, 112 S. Ct. at 1414.

²⁰¹ Pitt & Groskaufmanis, *supra* note 13, at 18.

²⁰² *E.g.*, Gray v. First Winthrop Corp., No. 91-16907, 92-15986, 92-15901, 92-16193, 1993 U.S. App. LEXIS 6995, at *29 (9th Cir. Apr. 7, 1993); Berning v. A.G. Edwards & Sons, No. 91-3318, 1993 U.S. App. LEXIS 6074, at *23-24 (7th Cir. Mar. 25, 1993); Henderson v. Scientific Atlanta, Inc., 971 F.2d 1567, 1575 (11th Cir. 1992); *Anixter II*, 977 F.2d 1533, 1547 (10th Cir. 1992), *cert. denied sub nom.* Dennler v. Trippet, 61 U.S.L.W. 3714 (1993); *In re Integrated Resources Real Estate Ltd. Partnership Sec. Litig.*, [current] Fed. Sec. L. Rep. (CCH) § 97,311, at 95,541 (S.D.N.Y. Jan. 8, 1993); Aquilio v. Manaker, [current] Fed. Sec. L. Rep. (CCH) § 97,265, at 95,198 (N.D.N.Y. Nov. 13, 1992); Dendinger v. First Nat'l Corp., [current] Fed. Sec. L. Rep. (CCH) § 97,268, at 95,224 (E.D. La. Oct. 28, 1992); Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 483 (S.D.N.Y. 1992). In addition, although the issue of § 27A's constitutionality has not yet been presented to the United States Court of Appeals for the Second Circuit, that court, in dicta, has indicated that it is "unimpressed" with the analysis of those courts that have struck the statute down. *Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d, 742, 751 n.6 (2d Cir. 1992).

²⁰³ *E.g.*, Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 806 F. Supp. 108, 115 (N.D. Tex. 1992); Treiber v. Katz, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992); Johnston v. Cigna Corp., 789 F. Supp. 1098, 1100 (D. Colo. 1992); Bank of Denver v. Southeastern Capital Group, 789 F. Supp. 1092, 1098 (D. Colo. 1992); Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 235 (E.D. Ky. 1992); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1112 (N.D. Cal. 1992).

²⁰⁴ *E.g.*, *Bank of Denver*, 789 F. Supp. at 1097; *Brichard*, 788 F. Supp. at 1105.

²⁰⁵ *E.g.*, *Treiber*, 796 F. Supp. at 1062; *Plaut*, 789 F. Supp. at 235; *Brichard*, 788 F. Supp. at 1107.

the courts to ignore a constitutionally based decision of the United States Supreme Court.²⁰⁶

In March 1992, in *In re Brichard Securities Litigation*, the United States District Court for the Northern District of California, determined that § 27A violates the separation of powers doctrine.²⁰⁷ In September 1991, the court dismissed the plaintiff's § 10(b) claim as untimely due to the Supreme Court's ruling in *Lampf and Beam*, which retroactively imposed a one-and-three year statute of limitations on private actions brought under § 10(b) and Rule 10b-5.²⁰⁸ Pursuant to Congress's enactment of § 27A, plaintiffs made a motion to the court to reinstate their claim.²⁰⁹ The *Brichard* court denied the plaintiff's motion, however, reasoning that because § 27A was unconstitutional, the plaintiff's claim was time barred.²¹⁰

The *Brichard* court articulated three reasons for striking down the statute.²¹¹ First, the court concluded that § 27A(a) did not change the law, but rather directed that the *Lampf* ruling could not be applied retroactively.²¹² Thus, like the statute in *Klein*, § 27A intrudes on the adjudicative function of the courts by directing a rule of decision in pending cases.²¹³ Second, the court determined that § 27(b) impermissibly directs courts to reverse final judgments.²¹⁴ Finally, the court reasoned that § 27A changes the constitutional rule announced by the Supreme Court in *Beam*, in contravention of separation of powers doctrine.²¹⁵ Thus, the *Brichard* court determined that § 27A is unconstitutional.²¹⁶

In the wake of the *Brichard* decision, a number of district court cases have also determined that § 27A violates the separation of powers doctrine.²¹⁷ Although these courts have struck the statute down, they

²⁰⁶ *E.g.*, *Brichard*, 788 F. Supp. at 1111-12; *TGX Corp. v. Simmons*, 786 F. Supp. 587, 594 (E.D. La. 1992).

²⁰⁷ *Brichard*, 788 F. Supp. at 1112.

²⁰⁸ *Id.* at 1100-01.

²⁰⁹ *Id.* at 1100.

²¹⁰ *Id.* at 1112.

²¹¹ *Id.* at 1104-12.

²¹² *Brichard*, 788 F. Supp. at 1104.

²¹³ *Id.* at 1105.

²¹⁴ *Id.* at 1106.

²¹⁵ *Id.* at 1108.

²¹⁶ *Id.* at 1112.

²¹⁷ *E.g.*, *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108, 115 (N.D. Tex. 1992); *Treiber v. Katz*, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992); *Johnston v. Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992); *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092, 1098 (D. Colo. 1992); *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231, 235 (E.D. Ky. 1992); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1112 (N.D. Cal. 1992); *Sabino*, *supra* note 13, at 39.

have not all adopted each of the three rationales set forth by the *Brichard* court.²¹⁸ This note, therefore, will discuss these cases in turn as they add relevant reasoning to the *Brichard* court's rationale.

a. *Section 27A Directs Outcomes in Specific Cases Without Changing the Underlying Law*

The *Brichard* court began its analysis by noting that the Supreme Court has approved of legislation that retroactively affects rights of litigants if the legislation's retroactive application has a rational basis.²¹⁹ According to the *Brichard* court, the Supreme Court has also acknowledged that Congress may enact legislation that affects pending cases.²²⁰ Nevertheless, the court determined, Congress may not usurp the judiciary's role by adjudicating cases.²²¹ Therefore, the *Brichard* court held that Congress may not enact legislation that prescribes a rule of decision to courts in pending cases without changing the underlying substantive or procedural law.²²²

The *Brichard* court then determined that § 27A failed to change the rule articulated by the Supreme Court in *Lampf*.²²³ Instead, the court found that § 27A, which instructs that the statute of limitations to be applied to a § 10(b) action is the one existing in its respective jurisdiction the day before *Lampf* was decided, merely limits the retroactive application of the one-and-three year limitations period set forth in *Lampf*.²²⁴ Thus, the court concluded, § 27A tells courts what rule

²¹⁸ Sabino, *supra* note 13, at 39. The *Brichard* court's rejection of § 27A provides the most exhaustive analysis of the issue. *Id.* at 34.

²¹⁹ *Brichard*, 788 F. Supp. at 1102 (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 64 (1989)).

²²⁰ *Id.* (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

²²¹ *Id.*

²²² *Id.* (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871); *Robertson I*, 914 F.2d 1311, 1316 (9th Cir. 1990), *rev'd on other grounds*, 112 S. Ct. 1407, 1415 (1992). The *Brichard* court provided subsequent procedural history for *Robertson I*, asserting that the case had been reversed on other grounds, thereby implying that the Ninth Circuit's interpretation of *Klein* and *Sioux Nation* was not overturned by the Supreme Court's decision in *Robertson II*. *Brichard*, 788 F. Supp. at 1102.

²²³ *Brichard*, 788 F. Supp. at 1103-04.

²²⁴ *Id.* at 1104. The *Brichard* court supported this conclusion by focusing on the statute's legislative history, finding that it "resonate[d]" with Congress's concern over the high profile insider trading cases which would be dismissed as a result of *Lampf*. *Id.* at 1104-05. The court concluded that when Congress was unable to garner enough support for a wholesale change of the *Lampf* statute of limitations, it merely instructed courts not to apply it in a finite number of cases without changing the underlying rule. *Id.* at 1106. One commentator has noted, however, that the *Brichard* court's reliance on floor debates is improper. See Sabino, *supra* note 13, at 59-60. Mr. Sabino asserts that the Supreme Court has consistently disapproved of the use of bill Committee Reports as an authoritative source of legislative intent. *Id.* at 60.

may not be applied without enacting a new law.²²⁵ The court held that Congress's failure to change the law violated *Klein*, which, according to the *Brichard* court, held that Congress may not direct the adjudicative process without changing a substantive or procedural rule.²²⁶ The *Brichard* court determined that without changing the underlying law, Congress may not direct rules of decision to the courts in pending cases.²²⁷ Thus, the court held that the statute was unconstitutional.²²⁸

In March 1992, in *Bank of Denver v. Southeastern Capital Group* the United States District Court for the District of Colorado also concluded that § 27A was unconstitutional because it failed to change the law.²²⁹ The *Bank of Denver* court began its analysis by noting that in *Klein*, the Supreme Court held that the congressional proviso denying presidential pardons the effect that the Court had found them to have was unconstitutional because the proviso directed the Court's decision in a case without changing the underlying law.²³⁰ The *Bank of Denver* court reasoned that in *Lampf*, the Supreme Court, in an exercise of its constitutional duty to interpret the laws, adopted a one-and-three year statute of limitations.²³¹ In enacting § 27A, however, Congress did not change the law by enacting an express statute of limitations and applying it retroactively.²³² Instead, the court determined, Congress selected a discrete category of federal cases and instructed lower courts hearing these cases to ignore the Supreme Court's ruling in *Lampf*.²³³ Thus, the *Bank of Denver* court held that § 27A is directly analogous to the unconstitutional statute in *Klein* and declined to reinstate plaintiff's claim.²³⁴

The *Bank of Denver* court then determined that it was irrelevant that § 27A did not explicitly dictate a decision on the merits of § 10(b) claims. The court noted that the proviso in *Klein* did not direct a specific decision on the merits of plaintiff's claim for return of property.²³⁵ Rather, the *Klein* proviso provided the Supreme Court with the

²²⁵ *Brichard*, 788 F. Supp. at 1104.

²²⁶ *Id.* at 1105.

²²⁷ *Id.*

²²⁸ *Id.* at 1112.

²²⁹ 789 F. Supp. 1092, 1097 (D. Colo. 1992). Because the *Bank of Denver* court found the statute to be unconstitutional, it denied reinstatement of plaintiff's claim under § 10(b) and Rule 10b-5. *Id.* at 1093-94.

²³⁰ *Id.* at 1096-97.

²³¹ *Id.* at 1097.

²³² *Id.*

²³³ *Id.* The court reasoned that Congress should have employed its legitimate check on the Supreme Court's power by enacting a new statute of limitations in § 10(b) cases and applying it retroactively. *Id.*

²³⁴ *Bank of Denver*, 789 F. Supp. at 1097.

²³⁵ *Id.*

interpretive rule that presidential pardons were evidence of disloyalty.²³⁶ Similarly, the court determined, § 27A provides courts with the interpretive rule that the jurisdictional statute of limitations existing on June 19, 1991, must be applied.²³⁷ Both statutes, the court concluded, prescribe an interpretation that is contrary to prior Supreme Court law, and thus, the court held that § 27A is unconstitutional.²³⁸

Then, in May 1992, in *Johnston v. Cigna Corporation*, the United States District Court for the District of Colorado declined to reconsider its *Bank of Denver* ruling in light of the United States Supreme Court's March 25, 1992 decision in *Robertson II*, where the Court held that the Interior Appropriations Act represented a change in the law and therefore did not violate *Klein*.²³⁹ The *Johnston* court determined that § 27A was entirely different from the statute at issue in *Robertson II*.²⁴⁰ First, the *Robertson II* statute made clear that compliance would constitute compliance with several previously existing statutes.²⁴¹ Section 27A, however, attempted to overturn the Supreme Court's interpretation of § 10(b).²⁴² Second, whereas the statute in *Robertson II* prospectively dictated a set of rules to apply to future timber harvesting in a limited geographical area, § 27A's effect was purely retroactive.²⁴³ Holding that § 27A's sole purpose is to "select a limited body of pending federal cases for resurrection from the death knell sounded by *Lampf*," the court concluded that *Robertson II* did not alter its previous determination on the statute's constitutionality.²⁴⁴

b. 27A(b) Upsets Final Judgments of the Courts

As a second prong of its analysis, the *Brichard* court focused specifically on § 27A(b), which orders courts to reinstate § 10(b) actions instituted prior to June 19, 1991, which were dismissed as a result of

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* The court went on to conclude that § 27A also violates general separation of power principles, in addition to its breach of *Klein*. *Id.* The court noted that § 27A impermissibly encroaches on the judiciary branch by directing courts to apply the *Lampf* doctrine in some cases while ignoring it in others. *Id.* at 1097-98. The court determined that without changing the law, Congress cannot "erase binding Supreme Court precedent by legislative fiat." *Id.* at 1098.

²³⁹ 789 F. Supp. 1098, 1100 (D. Colo. 1992). The same judge decided both *Bank of Denver* and *Johnston*. *Johnston*, 789 F. Supp. at 1099; *Bank of Denver*, 789 F. Supp. at 1093.

²⁴⁰ *Johnston*, 789 F. Supp. at 1101. The *Johnston* court noted that the Supreme Court reversed the Ninth Circuit's decision in *Robertson I* because the Court determined that the statute in question changed the law. *Id.* For this reason, the *Johnston* court held, the Supreme Court declined to comment on the Ninth Circuit's interpretation of *Klein*. *Id.*

²⁴¹ *Id.* at 1101-02.

²⁴² *Id.* at 1102.

²⁴³ *Id.*

²⁴⁴ *Johnston*, 789 F. Supp. at 1102.

the Supreme Court's *Lampf* opinion.²⁴⁵ The court reasoned that in addition to Congress's failure to amend the underlying law, Congress had committed a greater separation of powers violation with § 27A(b) which impermissibly directs courts to reverse final judgments.²⁴⁶ The court noted, in fact, that the plaintiffs in the *Lampf* decision itself had been successful in reinstating their claim pursuant to § 27A(b).²⁴⁷ Nevertheless, the court concluded that Congress cannot upset the final judgments of either the Supreme Court or lower federal courts.²⁴⁸ Thus, the court determined that § 27A(b) was constitutionally impermissible because it both reduced decisions of the court to mere advisory opinions and, as an act of legislative review, intruded upon the exclusive power of the judiciary to adjudicate cases.²⁴⁹

In June 1992, in *Treiber v. Katz*, the United States District Court for the Eastern District of Michigan also concluded that § 27A was unconstitutional because it upset final judgments of a court.²⁵⁰ The *Treiber* court began its analysis by noting that § 27A(b) retroactively changed the statute of limitations for cases that were no longer pending before the courts.²⁵¹ The court acknowledged that parties have no vested rights in statutes of limitation.²⁵² Nevertheless, the court determined that Supreme Court doctrine does hold that once final judgments are issued, the rights of the litigants are vested and the legislature no longer has power to alter those rights.²⁵³ Thus, the *Treiber* court

²⁴⁵ *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1106 (N.D. Cal. 1992).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1107 n.9 (citing *Gilbertson v. Leasing Consultants Assocs.*, No. 86-1369-RE (D. Or. Feb. 6, 1992)).

²⁴⁸ *Id.* at 1107.

²⁴⁹ *Id.*

²⁵⁰ 796 F. Supp. 1054, 1062 (E.D. Mich. 1992). Because the *Treiber* court determined that § 27A is unconstitutional, it declined to reinstate plaintiffs previously dismissed complaint that alleged that defendant's offer of limited partnerships in a Dallas apartment complex violated § 10(b) and Rule 10b-5. *Id.* at 1055. In considering the constitutionality of the statute, the court found that § 27A does not prescribe specific rules for deciding cases in a specific way. *Id.* at 1058. The court concluded, therefore, that *Klein* was not violated by the statute. *Id.* at 1059. The court's holding that the statute is unconstitutional, therefore, rests specifically on subsection (b), which, according to the court, impermissibly directs courts to reverse final judgments. *Id.* at 1062.

²⁵¹ *Id.* at 1059.

²⁵² *Id.* at 1060 (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). In *Chase*, the United States Supreme Court determined that a state statute that lifted the bar of a statute of limitation in a pending claim was not a taking, under the Due Process Clause of the Fourteenth Amendment. 325 U.S. at 314. The Court reasoned that statutes of limitations represent a privilege to litigate, not a fundamental right, and are thus subject to a large degree of legislative control. *Id.* The *Chase* Court did not, however, address the situation presented by § 27A—namely the dismissal of a lawsuit on the grounds that it is untimely and its subsequent reinstatement. *See id.* at 310.

²⁵³ *Treiber*, 796 F. Supp. at 1061. This doctrine relies, inter alia, on the principle of separation

determined, parties *do* have vested rights in the final judgment of a court dismissing a § 10(b) suit brought against them and this right cannot be constitutionally divested.²⁵⁴ Moreover, the court stated, if Congress could set aside final judgments, judicial rulings would become simple advisory opinions.²⁵⁵

The *Treiber* court then rejected the government's argument that because § 27A(b) merely reinstates a dismissal on statute of limitations grounds, rather than on the merits, the legislation does not effect vested rights.²⁵⁶ The court disagreed with the government's argument that *Sioux Nation*, where the Supreme Court upheld a congressional statute waiving the res judicata effect of a prior judgment rendered in the government's favor, stands for the proposition that only statutes that reverse merit-based final judgments violate the separation of powers doctrine.²⁵⁷ The court determined that this reading of *Sioux Nation* was overly broad.²⁵⁸ Instead, the *Treiber* court limited *Sioux Nation* to the Supreme Court's acknowledgement of Congress's broad power to pay the nation's debts.²⁵⁹

The *Treiber* court then distinguished § 27A from the statute at issue in *Sioux Nation*.²⁶⁰ First, rather than waiving a defense on the government's behalf, § 27A waives the defense of private litigants.²⁶¹ Furthermore, the court noted, in passing § 27A, Congress did not ground its authority in its power to pay the nation's debts.²⁶² The *Treiber* court held, therefore, that § 27A is unconstitutional because it impermissibly seeks to alter a final judgment.²⁶³

c. Section 27A Changes the Constitutional Law Enunciated in Beam

Finally, in *Brichard*, the United States District Court for the Northern District of California determined that even if § 27A did change the law and did not reverse final judgments, it still failed to pass constitu-

of powers that prohibits legislative review of judicial actions. *Id.* at 1060. The *Treiber* court also noted that the "vested rights" doctrine has a due process component based on the fact that once rights are fixed by judgment, they become a form of property. *Id.* The legislature, according to the court, has no greater right over this type of property than it does over any other. *Id.*

²⁵⁴ *Id.* at 1061.

²⁵⁵ *Id.*

²⁵⁶ *Id.* The United States filed a statement of interest. *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Treiber*, 796 F. Supp. at 1061.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Treiber*, 796 F. Supp. at 1062.

tional muster because it changed the constitutional rule announced in *Beam*, that similarly situated litigants must be treated the same.²⁶⁴ The *Brichard* court maintained that the *Beam* Court's rejection of selective prospectivity in the civil context relied heavily on precedent that stated that selective prospectivity in criminal cases was unconstitutional.²⁶⁵ The *Brichard* court further noted that the concurring opinions in *Beam*, wherein Justices Scalia and Blackmun separately maintained that selective prospectivity was constitutionally proscribed, lent weight to the conclusion that the *Beam* decision, as a whole, was constitutionally based.²⁶⁶ The court then determined that even if the language of the *Beam* decision implied that the Justices relied on the non-constitutional dimensions of judicial power in making their ruling, because the judicial power is rooted in Article III, selective prospectivity raises a constitutional question.²⁶⁷ Ultimately, the court concluded that despite the fact that the constitutional grounds for the *Beam* decision were somewhat mixed, the case was, nevertheless based on the Constitution.²⁶⁸ Because Congress may not pass a law that overrides the Supreme Court's determination of the Constitution, the court held that § 27A was unconstitutional.²⁶⁹

TGX Corp. v. Simmons, a March 1992 decision of the United States District Court for the Eastern District of Louisiana, also held that *Beam* was a constitutionally based decision and that § 27A was, therefore, unconstitutional because it contravened *Beam's* ruling.²⁷⁰ Because the *TGX* court determined that *Beam* stands for the proposition that selective prospectivity is unconstitutional, it went on to hold that § 27A,

²⁶⁴ See *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1108 (N.D. Cal. 1992).

²⁶⁵ *Id.* at 1110 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). See *supra* note 80 for a discussion of the Supreme Court's holding in *Griffith*.

²⁶⁶ 788 F. Supp. at 1110. Justice Scalia argued that the principle against selective prospectivity derives from Article III, § 1 of the United States Constitution. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991) (Scalia, J., concurring). Justice Blackmun maintained that the *Beam* decision was required by judicial responsibility, for to do otherwise would "warp the role that . . . judges play in government." *Id.* at 2450 (Blackmun, J., concurring).

²⁶⁷ *Brichard*, 788 F. Supp. at 1110.

²⁶⁸ *Id.* at 1111-12.

²⁶⁹ *Id.* at 1112 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 147, 177 (1803)).

²⁷⁰ 786 F. Supp. 587, 594 (E.D. La. 1992). Pursuant to § 27A(b), the plaintiffs, the *Simmons*, sought to reinstate their § 10(b) and Rule 10b-5 claims against defendant, *TGX, Corp.*, for failing to disclose the existence of a lawsuit pending against *TGX*, which significantly devalued the company's stock. *Id.* at 589. The *TGX* court began its discussion by rejecting the argument that § 27A failed to change the law. *Id.* at 592. Instead, the court determined that Congress changed the law, but it had done so in a matter "inconsistent with the constitutional mandate" established by *Beam*. *Id.* at 591. Accordingly, the court held that § 27A violated the principle of separation of powers. *Id.*

which limits *Lampf* to prospective application only, contravenes that constitutional principle.²⁷¹ According to the court, § 27A essentially requires courts to treat similarly situated litigants dissimilarly, in violation of *Beam*.²⁷² The *TGX* court concluded that § 27A violates the doctrine of separation of powers.²⁷³

Thus, there are three bases that underlie the decision of courts that § 27A is unconstitutional.²⁷⁴ First, some courts have held that § 27A does not enact a substantive or procedural law.²⁷⁵ Instead, these courts have determined that § 27A intrudes upon the judiciary's function by ordering courts not to apply the Supreme Court's *Lampf* ruling in a discrete number of cases.²⁷⁶ Thus, these courts have determined that the statute, like the unconstitutional proviso in *Klein*, directs courts to determine specific cases in a specific way without changing the underlying law.²⁷⁷ Other courts have struck down subsection (b) of the statute, which directs courts to reinstate those cases dismissed as time-barred under *Lampf*, by determining that the separation of powers doctrine is violated when Congress alters final decisions of the courts.²⁷⁸

Finally, some courts have invalidated the statute on the grounds that Congress violated the separation of powers doctrine by ordering courts to apply the *Lampf* decision to some cases and not to others.²⁷⁹ These courts have concluded that § 27A directs courts to violate the prohibition of selective prospectivity articulated in *Beam*, wherein the Supreme Court determined that similarly situated litigants must be treated the same.²⁸⁰ Because these courts have determined that the Supreme Court's decision in *Beam* was based on the Court's interpretation of the Constitution, they conclude that Congress has ordered

²⁷¹ *Id.* at 594.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See Oberly & Shapiro, *supra* note 9, at 47-49; Block & Hoff, *supra* note 13, at 10.

²⁷⁵ E.g., *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092, 1097 (D. Colo. 1992); *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1103 (N.D. Cal. 1992).

²⁷⁶ E.g., *Bank of Denver*, 789 F. Supp. at 1097; *Brichard*, 788 F. Supp. at 1103.

²⁷⁷ E.g., *Bank of Denver*, 789 F. Supp. at 1097; *Brichard*, 788 F. Supp. at 1105.

²⁷⁸ E.g., *Treiber v. Katz*, 796 F. Supp. 1054, 1062 (E.D. Mich. 1992); *Johnston v. Cigna Corp.*, 789 F. Supp. 1098, 1100 (D. Colo. 1992); *Brichard*, 788 F. Supp. at 1107.

²⁷⁹ E.g., *Pacific Mutual Life Ins. Co. v. First Republicbank Corp.*, 806 F. Supp. 108, 115 (N.D. Tex. 1992) (Section 27A breaches a constitutional principle because source of *Beam* holding can be none other than the Constitution); *Brichard*, 788 F. Supp. at 1108 (same); *TGX Corp. v. Simmons*, 786 F. Supp. 587, 594 (E.D. La. 1992) (same).

²⁸⁰ E.g., *Pacific Mutual*, 806 F. Supp. at 115; *Brichard*, 788 F. Supp. at 1108; *TGX*, 786 F. Supp. at 594.

lower courts to ignore a Supreme Court constitutional interpretation.²⁸¹

2. Section 27A is Constitutional

Courts that have upheld the constitutionality of § 27A have reached three contrary conclusions in their support of the statute.²⁸² Initially, these courts have determined that § 27A changes the law by prescribing a new statute of limitations that the courts must apply to § 10(b) litigation instituted prior to June 19, 1991 and thus is unlike the proviso at issue in *Klein*.²⁸³ More importantly, these courts have determined that § 27A does not violate *Klein* because it does not direct the outcome in those cases.²⁸⁴ Many courts have also rejected the challenge that § 27A(b) is unconstitutional because it orders the reinstatement of final judgments, concluding instead that *Sioux Nation* indicates that Congress may, in some instances, offer relitigation of a decided claim.²⁸⁵ Finally, courts have addressed the argument that § 27A orders lower courts to ignore the constitutional mandate of *Beam* by countering that *Beam* was not a constitutional decision.²⁸⁶

In August 1992, in *Anixter v. Home Stake Production Co.* [hereinafter *Anixter II*], the United States Court of Appeals for the Tenth Circuit held that § 27A does not violate separation of powers doctrine and, therefore the court reinstated plaintiff's § 10(b) claim.²⁸⁷ The Tenth Circuit had previously reversed a \$130 million judgment in the plaintiff's favor as a result of the Supreme Court's decision in *Lampf*.²⁸⁸ The

²⁸¹ E.g., *Pacific Mutual*, 806 F. Supp. at 115; *Brichard*, 788 F. Supp. at 1108; *TGX*, 786 F. Supp. at 594.

²⁸² E.g., *Anixter II*, 977 F.2d 1533, 1543-47 (10th Cir. 1992), *cert. denied sub nom.* Dennler v. Trippet, 61 U.S.L.W. 3714 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571-73 (11th Cir. 1992).

²⁸³ E.g., *Anixter II*, 977 F.2d at 1545; *Axel Johnson v. Arthur Andersen & Co.*, 790 F. Supp. 476, 479 (S.D.N.Y. 1992).

²⁸⁴ E.g., *Anixter II*, 977 F.2d at 1545; *Henderson*, 971 F.2d at 1573; *Axel Johnson*, 790 F. Supp. at 479.

²⁸⁵ *Anixter II*, 977 F.2d at 1546; *Axel Johnson*, 790 F. Supp. at 481.

²⁸⁶ E.g., *Anixter II*, 977 F.2d at 1547; *Ash v. Dean Witter Reynolds, Inc.*, 806 F. Supp. 1473, 1477 (E.D. Cal. 1992).

²⁸⁷ 977 F.2d at 1547.

²⁸⁸ *Id.* at 1542. The plaintiffs originally sued alleging that the defendant, Home-Stake Production Co., a developer of oil and gas properties, defrauded investors by offering them bogus tax deductions and capital investment plans. *Anixter I*, 939 F.2d 1420, 1430 (10th Cir. 1991), *cert. granted and judgment vacated sub nom.* Dennler v. Trippet, 112 S. Ct. 1658 *amended* 112 S. Ct. 1757 (1992). A jury trial resulted in a \$130 million verdict. *Id.* On appeal, however, the Tenth Circuit dismissed the plaintiffs' suit as untimely pursuant to the Supreme Court's recent decision in *Lampf*. *Id.* at 1442.

United States Supreme Court granted certiorari to plaintiff's appeal and subsequently vacated and remanded the earlier decision, instructing the lower court to reconsider the matter in light of § 27A.²⁸⁹

On reconsideration, the *Anixter II* court addressed whether § 27A violates the separation of powers doctrine.²⁹⁰ The court, however, rejected all three rationales supporting the argument that § 27A is unconstitutional.²⁹¹ First, the court noted that § 27A reflects Congress's legislative capacity to change the law.²⁹² Moreover, the court determined, § 27A neither directs courts to make specific factual findings nor mandates particular case results.²⁹³ Second, the court upheld the power of Congress to alter statutes of limitation, even after a final judgment has been rendered.²⁹⁴ Finally, the court rejected the defendant's assertions that *Beam* was a constitutionally based decision.²⁹⁵

As in the previous section, this Note discusses *Anixter II* together with the rationales advanced by other courts that have upheld § 27A. Relevant arguments from other courts will be added to the text as they enhance the discussions of the *Anixter II* court.

a. *Section 27A Changes the Law by Creating a New Statute of Limitations and Does Not Direct Specific Findings*

The *Anixter II* court began its analysis by considering the defendant's argument that § 27A does not change existing law or create new law, but simply instructs courts to decide specific cases in a particular fashion.²⁹⁶ The court rejected this argument, concluding that § 27A was distinguishable from the proviso in *Klein* that had directed courts to make specific factual findings in specific cases without changing the underlying law.²⁹⁷ Instead, the court concluded, § 27A changes the law by prescribing a new statute of limitations that the courts must apply to those cases instituted prior to June 19, 1991.²⁹⁸

Moreover, the *Anixter II* court determined, regardless of any am-

²⁸⁹ *Dennler*, 112 S. Ct. at 1757.

²⁹⁰ *Anixter II*, 977 F.2d at 1542. The *Anixter II* court ordered the parties to address the decisions of the District of Colorado and the Eastern District of Louisiana, respectively in *Bank of Denver* and *TGX*. *Id.*

²⁹¹ *Id.* at 1543-48.

²⁹² *Id.* at 1542.

²⁹³ *Id.* at 1545.

²⁹⁴ *Id.* at 1546.

²⁹⁵ *Anixter II*, 977 F.2d at 1547.

²⁹⁶ *Id.* at 1544.

²⁹⁷ *Id.* at 1545.

²⁹⁸ *Id.* There is little question that Congress may change the law and impose that change retroactively. *Id.* (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)).

biguities arising from the Supreme Court's decision in *Klein*, the Supreme Court's *Robertson II* opinion convinced the circuit court that § 27A changed the law and did not direct findings under old law.²⁹⁹ According to the court, § 27A was similar to the statute in *Robertson II* in that it modified an old provision and neither directed specific factual findings nor compelled a rule of decision in private actions brought under § 10(b).³⁰⁰ Rather, the court held, § 27A "merely turns back the legal clock" to the time just before *Lampf* was decided and allows courts to make independent judgments based on the law as they determined it existed on June 19, 1991.³⁰¹ The court held that in enacting § 27A, Congress acted within its legitimate power to change a rule of law and to retroactively apply the new rule to pending cases.³⁰²

In September 1992, in *Henderson v. Scientific-Atlanta, Inc.*, a divided panel of the United States Court of Appeals for the Eleventh Circuit also upheld the constitutionality of § 27A under this theory.³⁰³ Under § 27A, the plaintiffs in *Henderson* sought to reinstate their \$370 million class action against the defendant, Scientific-Atlanta, charging omissions, misstatements and misrepresentations that fraudulently inflated the value of the defendant's stock.³⁰⁴ Like the *Anixter II* court, the *Henderson* court relied heavily on the Supreme Court's decision in *Robertson II* in determining that § 27A implemented a change in the law.³⁰⁵ The Eleventh Circuit concluded that because § 27A does not direct particular findings of fact in particular cases it does not violate the doctrine of separation of powers.³⁰⁶

b. Statute Does Not Upset Final Judgments

As a second rationale for its holding, the *Anixter II* court rejected the defendant's argument that the court's previous dismissal of plain-

²⁹⁹ *Id.*

³⁰⁰ *Anixter II*, 977 F.2d at 1545.

³⁰¹ *Id.* (quoting *Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235, 1243 (S.D.N.Y. 1992) (holding that § 27A does not violate the separation of powers doctrine)).

³⁰² *Id.* at 1545-46.

³⁰³ 971 F.2d 1567, 1575 (11th Cir. 1992).

³⁰⁴ *Id.* at 1569. The district court had previously granted the defendant's motion for summary judgment dismissing the plaintiffs' suit as time-barred under *Lampf*. *Id.*

³⁰⁵ *Id.* at 1573.

³⁰⁶ *Id.* The *Henderson* court went on to reject the arguments advanced by defendants that § 27A violated both the due process and equal protection clauses of the Fifth Amendment. *Id.* at 1574. In a dissent, Senior Circuit Court Judge Wellford agreed that neither of the Fifth Amendment challenges to § 27A had merit. *Id.* at 1575 (Wellford, J., dissenting). Judge Wellford did argue, however, that those district courts that reached the conclusion that § 27A violated the separation of powers doctrine were correct. *Id.* at 1575-76 (Wellford, J., dissenting).

tiff's § 10(b) claim gave the defendants a vested right in the finality of the judgment.³⁰⁷ The court concluded that given Congress's domain over the enactment of statute of limitations, the issue of § 27A's constitutionality resembled the question at issue in *Sioux Nation*, where the Supreme Court upheld congressional legislation waiving the government's res judicata defense over a prior judgment.³⁰⁸ The Tenth Circuit determined that legislation which changes a technical defense "goes far less to the heart of the judicial function" than legislation which attempts to alter decisions based on the actual merits of a case.³⁰⁹ Moreover, the court noted, vested rights are not created by a statute of limitations.³¹⁰ Thus, the court concluded that the enactment of § 27A was a legitimate exercise of legislative power.³¹¹

In April 1992, in *Axel Johnson, Inc. v. Arthur Andersen & Co.*, the United States District Court for the Southern District of New York also rejected the defendants' argument that § 27A(b) was unconstitutional.³¹² The defendants argued that § 27A(b) constituted impermissible legislative reversal of a final judicial decision in contravention of separation of powers.³¹³ The *Axel Johnson* court determined, however, that neither case law nor separation of powers doctrine required the preclusive effect urged by defendants.³¹⁴ Noting that the Supreme Court's holding in *Sioux Nation* was not entirely on point, the court nevertheless determined that *Sioux Nation* stands for the proposition that Congress may, in some instances, offer relitigation of decided claims.³¹⁵

The *Axel Johnson* court also cited several factors which weighed against the defendants' separation of powers argument.³¹⁶ First, the fact

³⁰⁷ 977 F.2d 1533, 1546 (10th Cir. 1992), *cert. denied sub nom.* Dennler v. Trippet, 61 U.S.L.W. 3714 (1993).

³⁰⁸ *Id.*

³⁰⁹ *Id.* (quoting *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476, 483 (S.D.N.Y. 1992)).

³¹⁰ *Anixter II*, 977 F.2d at 1546 (citing *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945)).

³¹¹ *Anixter II*, 977 F.2d at 1546.

³¹² 790 F. Supp. at 483. The *Axel Johnson* decision also addressed the argument that § 27A directs a rule of decision for those cases filed prior to June 19, 1991, without changing the law prospectively. *Id.* at 478-79. Like the *Anixter II* and *Henderson* courts, however, the *Axel Johnson* court determined that the Supreme Court's holding in *Robertson II* underscored the fact that § 27A constituted a change in the underlying law. *Id.* at 480.

³¹³ *Id.* at 480. In oral argument, the defendants also argued that reinstatement of the plaintiff's claim would deprive the defendant of the due process rights obtained when plaintiff's suit against defendant was initially dismissed. *Id.* The court rejected this argument. *Id.* at 483.

³¹⁴ *Id.* at 481.

³¹⁵ *Id.*

³¹⁶ *Id.* at 482.

that such a short time transpired between the final judgments dismissing the cases and the enactment of § 27A indicated that Congress had not seriously intruded into the realm of the judiciary, particularly in light of Federal Rule of Civil Procedure 60(b), which provides that a court may relieve a party from final judgment.³¹⁷ Second, the fact that the courts dismissed the previous cases on technical grounds, rather than on the merits of the case, weighed in favor of allowing the cases to be reinstated.³¹⁸ Third, ruling that § 27A(b) was unconstitutional would impose too great a burden on plaintiffs.³¹⁹ In essence, the court noted, invalidating § 27A(b) would further penalize those plaintiffs whose cases were dismissed but would have no effect on plaintiffs whose cases had not yet been time-barred.³²⁰ Finally, the court determined that Congress provided relief for a broad class of claimants from what it regarded as an unfair decision, regardless of where in the judicial pipeline the plaintiffs' respective cases fell.³²¹ The court reasoned that this evenhanded treatment of the plaintiffs' claims was less threatening to the judiciary's independence than a congressional action that reversed specific litigation.³²² Accordingly, the court determined that § 27A(b) was consistent with the principles of separation of powers and plaintiff's claim should, therefore, be reinstated.³²³

c. *Beam Was Not a Constitutionally Based Decision*

Finally, in response to the defendant's contention that § 27A violated the constitutional mandate of *Beam*, the *Anixter II* court held that *Beam* was not constitutionally based.³²⁴ Rather, the court noted that "*Beam* was carefully crafted to garner a plurality to agree only that retroactive application of a rule of law announced in a case [is] a matter of a choice of law and not of constitutional import."³²⁵ The court

³¹⁷ 790 F. Supp. at 482. See also FED. R. Civ. P. 60(b) stating that "the court may relieve a party from a final judgment [for] . . . (6) any other reason justifying relief from the operation of the judgment [where a motion is made] within a reasonable time"

³¹⁸ *Axel Johnson*, 790 F. Supp. at 482. The court went on to note that in light of the changing liminary periods surrounding the instant litigation, defendant could not legitimately argue that it relied on the *Lampf* liminary period. *Id.* at 483. Indeed, the court noted that the *Lampf* decision operated as a windfall for defendant Arthur Andersen which was in the midst of defending plaintiff's § 10(b) claim when that claim was time-barred. *Id.*

³¹⁹ *Id.* at 483.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Axel Johnson*, 790 F. Supp. at 483.

³²⁴ *Anixter II*, 977 F.2d 1533, 1547 (10th Cir. 1992), cert. denied sub nom. *Dennler v. Trippet*, 61 U.S.L.W. 3714 (1993).

³²⁵ *Id.* See also *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2448 (1991) ("[t]he

concluded that *Beam* did not declare that the practice of selective prospectivity was unconstitutional and, therefore, Congress did not violate the separation of powers by ordering that *Lampf* be applied to some cases but not to others.³²⁶

In September 1992, the United States District Court for the Eastern District of California in *Ash v. Dean Witter Reynolds, Inc.* offered a detailed treatment of the non-constitutional basis of *Beam*.³²⁷ Under § 10(b), the plaintiffs sued Dean Witter for the actions of one of its brokers, who encouraged the plaintiffs to invest in a tax shelter without advising the plaintiffs that the shelter had not been approved by Dean Witter.³²⁸ The *Ash* court acknowledged that the *Beam* Court's opinion noted that the doctrine of selective prospectivity in criminal cases, which was held by the Supreme Court in an earlier case to be unconstitutional, could not be confined to just criminal law.³²⁹ Nevertheless, the court determined, the *Beam* opinion never mentioned either Article III or the Constitution.³³⁰ Furthermore, the court noted, the portion of the criminal opinion to which the *Beam* opinion referred was the non-constitutional portion of the decision.³³¹ Finally, the *Ash* court determined that the concurrences of Justice Blackmun and Justice Scalia in *Beam* appear to take issue with the fact that the opinion was not grounded in the Constitution.³³²

The *Ash* court continued its analysis by noting that even if *Beam* were constitutionally based, § 27A would still be constitutional.³³³ The court determined that although *Beam* held that courts must retroactively apply federal rules of law when those rules have been applied to the parties in the case which announces that rule, *Beam* did not proscribe Congress's ability to refuse to apply the new rule of law retroactively.³³⁴ The court noted that because Congress is not bound by Article III, in that it does not adjudicate "cases and controversies," *Beam*

grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others . . .").

³²⁶ *Anixter II*, 977 F.2d at 1547.

³²⁷ 806 F. Supp. 1473, 1477-78 (E.D. Cal. 1992). The court had also determined that § 27A does not violate the *Klein* rule in that it neither dictates the outcome in particular cases nor does it fail to change the underlying law. *Id.* at 1476, 1477.

³²⁸ *Id.* at 1473.

³²⁹ *Id.* at 1477-78.

³³⁰ *Id.* at 1478.

³³¹ *Id.*

³³² *Ash*, 806 F. Supp. at 1478.

³³³ *Id.*

³³⁴ *Id.*

cannot be read to limit congressional authority.³³⁵ Accordingly, the *Ash* court concluded that § 27A is constitutional, and noted that if the rule were otherwise then Congress would be prohibited from changing the law once the Supreme Court issued an opinion.³³⁶

Thus, the majority of courts that have addressed this issue have rejected the arguments that § 27A violates the separation of powers doctrine.³³⁷ First, the courts have determined that § 27A changes the law by prescribing a new statute of limitations which the courts must apply to those cases instituted prior to June 19, 1991.³³⁸ Moreover, these courts have concluded that § 27A does not direct specific factual findings on the merits in specific cases.³³⁹ Some of these courts have also determined that § 27A is like the land management statute upheld in *Robertson II*, in that it neither directs specific factual findings nor compels a rule of decision in actions brought under § 10(b).³⁴⁰

Second, courts have rejected the contention that § 27A(b) is unconstitutional based on the proposition that Congress may not alter final judicial judgments.³⁴¹ According to these courts, *Sioux Nation*, which upheld a Congressional statute waiving the government's res judicata defense in a takings claim previously decided in the government's favor, stands for the proposition that Congress may, in some instances, offer relitigation of decided claims.³⁴² These courts have concluded that § 27A is like the statute at issue in *Sioux Nation* in that it merely reinstates cases dismissed on technical grounds, rather than on the merits.³⁴³ Thus, these courts have concluded that § 27A(b) does not violate the separation of powers doctrine.³⁴⁴

Finally, in addressing the argument that § 27A violates the sepa-

³³⁵ *Id.*

³³⁶ *Id.*; see also *Berning v. A.G. Edwards & Sons*, No. 91-3318, 1993 U.S. App. LEXIS 6074, at *19-20 (7th Cir. Mar. 25, 1993). The *Berning* court determined that even if *Beam* were a constitutional decision, the case merely holds that a court, under Article III, must apply the law as it finds it. *Id.* According to the *Berning* court, however, "*Beam* does not hold that Congress lacks the power to change the law for pending cases or that courts are constitutionally compelled to disregard such changes." *Id.* at *20.

³³⁷ *E.g.*, *Anixter II*, 977 F.2d 1533, 1547 (10th Cir. 1992), *cert. denied sub nom.* *Dennler v. Trippet*, 61 U.S.L.W. 3714 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Ash*, 806 F. Supp. at 1477-78; *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476, 483-84 (S.D.N.Y. 1992).

³³⁸ *E.g.*, *Anixter II*, 977 F.2d at 1545; *Axel Johnson*, 790 F. Supp. at 479.

³³⁹ *E.g.*, *Anixter II*, 977 F.2d at 1545; *Henderson*, 971 F.2d at 1573; *Axel Johnson*, 790 F. Supp. at 479.

³⁴⁰ *E.g.*, *Anixter II*, 977 F.2d at 1545; *Henderson*, 971 F.2d at 1573.

³⁴¹ *Anixter II*, 977 F.2d at 1546; *Axel Johnson*, 790 F. Supp. at 481.

³⁴² *Anixter II*, 977 F.2d at 1546; *Axel Johnson*, 790 F. Supp. at 481.

³⁴³ *Anixter II*, 977 F.2d at 1546; *Axel Johnson*, 790 F. Supp. at 481-82.

³⁴⁴ *Anixter II*, 977 F.2d at 1546; *Axel Johnson*, 790 F. Supp. at 483.

ration of powers doctrine because it directs lower courts to ignore the constitutional mandate of *Beam*, courts have held that *Beam* was not a constitutional decision.³⁴⁵ Instead, these courts have pointed to the narrow choice of law grounds on which the Court's plurality opinion in *Beam* rested.³⁴⁶ Thus, these courts concluded that Congress may direct the courts to apply *Lampf* to some litigants but not to others, without violating the separation of powers doctrine.³⁴⁷

III. CONSIDERATION OF THE CONSTITUTIONAL CHALLENGES

In *Lampf*, the Supreme Court focused its efforts on promoting predictability and judicial economy.³⁴⁸ Instead, however, the case sparked a controversy which has been nothing if not unpredictable and wasteful of judicial resources. Since the statute was passed, § 10(b) litigation for those cases filed before June 19, 1991, has focused on the appropriate statute of limitations, rather than on the merits of the plaintiff's case. A logical solution to this problem would be for Congress to enact a law creating a new statute of limitations. Indeed, efforts at this type of legislation have been made.³⁴⁹ Until this happens, however, § 27A is destined to fill the dockets of the federal courts for years to come, notwithstanding the constitutional issue.³⁵⁰

Absent statutory correction, the debate over § 27A's constitutionality will likely be settled either by a number of consistent rulings in the circuits or by a Supreme Court determination.³⁵¹ If the statute is held unconstitutional, the one-and-three year rule established by the *Lampf* Court will remain the law of the land for all cases, regardless of when they were filed. One commentator has suggested, however, that an invalidation of § 27A by the courts will cause Congress to swiftly enact a new statute of limitations which will likely be longer than the one-and-three year period created by *Lampf*.³⁵² On the other hand, if

³⁴⁵ *Anixter II*, 977 F.2d at 1547; *Ash v. Dean Witter Reynolds, Inc.*, 806 F. Supp. 1473, 1477 (E.D. Cal. 1992).

³⁴⁶ *Anixter II*, 977 F.2d at 1547; *Ash*, 806 F. Supp. at 1477.

³⁴⁷ See *Anixter II*, 977 F.2d at 1547; *Ash*, 806 F. Supp. at 1478.

³⁴⁸ See Oberly & Shapiro, *supra* note 13, at 53.

³⁴⁹ *Id.* at 54. Section 3 of Senate Bill 3181, entitled the "Securities Private Enforcement Act of 1992," provides for a two-and-five year statute governing all private actions brought under § 10(b) of the Securities Exchange Act of 1934. *Id.* A separate bill introduced in the House of Representatives, entitled "Securities Private Enforcement Reform Act," provides for a one-and-five year limitation period. *Id.* Both bills were introduced in mid-August, 1992. *Id.*

³⁵⁰ BLOOMENTHAL, *supra* note 9, § 1.06, at 1-41.

³⁵¹ See Oberly & Shapiro, *supra* note 9, at 53. A petition for certiorari was sought and denied in the *Anixter II* case. 61 U.S.L.W. 3714 (1993).

³⁵² See Oberly & Shapiro, *supra* note 9, at 53.

the statute is upheld, then § 10(b) cases will continue to operate under a number of different statutes of limitations, dependent on both the date on which and the jurisdiction where the case was filed. Moreover, the courts will be forced to continue reinstating final judgments at Congress's mandate. This Note argues that this practice of reinstating cases dismissed in final judgments of the courts violates the separation of powers doctrine.

In recent years, the Supreme Court has focused on the encroachment or aggrandizement of one branch at the expense of another in determining whether the doctrine of separation of powers has been violated.³⁵³ Because the functions of the separate branches are not viewed as hermetically sealed from one another, the Supreme Court has upheld executive and legislative action in instances where there has been some overlap among the branches.³⁵⁴ Thus, the proper question to be asked in determining whether § 27A violates the separation of powers doctrine is not simply whether the legislative branch has assumed functions of the judiciary, but whether that intrusion is significant enough to rise to the level of "encroachment" and "aggrandizement."³⁵⁵ Against this standard, this Note considers the three arguments that § 27A violates the separation of powers doctrine and concludes that although the statute does not direct the outcome of specific cases and does not require courts to ignore a constitutional decision of the Supreme Court, § 27A unconstitutionally directs courts to reinstate final judgment, in violation of the separation of powers doctrine.

Section 27A does not implicate a change in the statute of limitations for private actions brought under § 10(b) of the Securities Exchange Act. Rather, the statute tells courts not to apply the one-and-three year limitary period promulgated by the *Lampf* Court. Nevertheless, § 27A does not violate the separation of powers principle because it does not direct a court's outcome in § 10(b) litigation. Thus, there is no evidence of aggrandizement or encroachment by the legislature on the realm of the judiciary. Any challenge made to the statute on the grounds that it directs specific decisions in specific cases without changing the underlying law should therefore fail.

The circumstances surrounding the enactment of § 27A support

³⁵³ *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

³⁵⁴ *Id.* at 381.

³⁵⁵ *See id.* at 382.

³⁵⁶ *See supra* notes 105-12 and accompanying text for a discussion of Congress's efforts to enact a new statute of limitations in response to the *Lampf* decision.

the view that the statute failed to change the law. Congress attempted to pass a measure that would enact a new statute of limitations. The measure failed to garner enough support.³⁵⁶ Unable to change the limitary period Congress did the next best thing—it instructed the lower courts to ignore the *Lampf* decision's retroactive application to a set number of cases.³⁵⁷

In order for § 27A's failure to change the law to rise to the level of a separation of powers violation, Congress must direct the courts to reach specific decisions in those cases rescued from the retroactive application of *Lampf*. Only then will Congress have violated the rule set forth by the Court in *United States v. Klein*.³⁵⁸ In *Klein*, the Court stated that Congress may not prescribe a rule of decision to the courts in specific cases.³⁵⁹ The Supreme Court has subsequently given the case a broad reading.³⁶⁰ In *Sioux Nation*, for example, the Court distinguished the congressional statute waiving the res judicata effect of a prior judgment from the *Klein* proviso by noting that the statute in *Sioux Nation* did not affect the lower court's ability to determine the claim on the merits.³⁶¹ The Supreme Court made it clear that a retroactive statute that did not alter the law was not invalid because it did not direct the actual decision of the courts.³⁶²

Even though § 27A fails to adequately change the law, it still does not violate the doctrine set forth in *Klein*. Rather, the statute simply removes a technical defense from cases. Section 27A does not direct the courts to decide the *outcome* of specific cases in specific ways and is not, therefore, in violation of the separation of powers doctrine.³⁶³

A second challenge to § 27A on separation of powers grounds,

³⁵⁷The argument that § 27A fails to change the law withstands any comparison to the Supreme Court's recent decision in *Robertson II*. The statute upheld in *Robertson II* had a prospective effect, dictating a set of rules to apply to future timber harvesting. In this respect, the statute clearly changed the law applying to future litigation. Section 27A, on the other hand, is entirely retroactive. The statute has no effect on any litigation other than the limited number of § 10(b) cases pending in the federal courts when *Lampf* was decided.

³⁵⁸80 U.S. (13 Wall.) 128, 146 (1871).

³⁵⁹*Id.*

³⁶⁰*United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980).

³⁶¹*Id.*

³⁶²*See id.*

³⁶³Although the *Bank of Denver* court asserted that the statute in *Klein* did not direct a decision on the merits for return of property, this argument misunderstands the nature of the issue in *Klein*. *Bank of Denver v. Southeastern Capital Group*, 789 F. Supp. 1092, 1097 (D. Colo. 1992). In *Klein*, whether the presidential pardon was evidence of loyalty or not, was dispositive to the question of whether plaintiff's property should be returned. In the case of § 27A, on the other hand, whether the statute of limitations is extended or not has nothing to do with whether a § 10(b) violation occurred.

asserting that the statute orders the lower courts to ignore the constitutional proscription against selective prospectivity announced by the Supreme Court in *Beam*, is also without merit. Indeed, it is true that the Supreme Court is the final arbiter of the Constitution, and Congress cannot order the courts to ignore a constitutional determination by the Court.³⁶⁴ Nevertheless, this constitutional fact is irrelevant to any analysis of § 27A, because the Court's decision in *Beam* simply was not based on the Constitution.

Interpretation of the *Beam* decision is complicated by the fact that it was delivered by a severely fragmented plurality. The opinion by Justice Souter, announcing the judgment of the Court, and joined solely by Justice Stevens, rested on the view that selective prospectivity was impermissible based on principles of equity and stare decisis.³⁶⁵ Justice White, concurring separately, joined in this narrow holding of the Court.³⁶⁶ Justice Souter's opinion appeared to reject the arguments made by Justices Scalia and Blackmun, in separate concurrences, that selective prospectivity is constitutionally impermissible.³⁶⁷ The opinions offered by the various members of the Court vary in the breadth of the proscription of selective prospectivity. In such a situation, the Supreme Court has indicated that the opinion resting on the narrowest grounds represents the "highest common denominator" of majority agreement and should, therefore, be regarded as authoritative.³⁶⁸ In other words, for the purposes of precedential value, *Beam* stands for the proposition that principles of equity and stare decisis prevent the Court from applying a new rule to the litigants in the case announcing that rule but not to claims predating the decision.

Of course, part of the stare decisis supporting the Supreme Court's decision in *Beam* was an earlier case where the Supreme Court held that selective prospectivity in the criminal context was constitutionally impermissible.³⁶⁹ The *Beam* Court determined that this previously articulated bar against selective prospectivity could not be confined to the criminal context only.³⁷⁰ In *Brichard*, the United States District Court for the Northern District of California determined that the *Beam* plurality's heavy reliance on the Court's earlier constitutional

³⁶⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁶⁵ *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2446 (1991).

³⁶⁶ *Id.* at 2449 (White, J., concurring).

³⁶⁷ *Id.* at 2449 (Blackmun, J., concurring), 2450 (Scalia, J., concurring).

³⁶⁸ Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760-61 (1980) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

³⁶⁹ *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

³⁷⁰ *Beam*, 111 S. Ct. at 2446.

decision was significant.³⁷¹ Nevertheless, the decision as written by Justice Souter never so much as mentions either Article III or the Constitution itself. Because a Supreme Court interpretation of the Constitution is generally regarded as the final word, unalterable by Congress, it would be inappropriate to bind Congress's hands without a more explicit indication by the Court that it was indeed offering its view on the meaning of the Constitution. Thus, the separation of powers doctrine does not prevent Congress from ordering that *Lampf* be applied to some litigants but not to others because the *Beam* Court did not clearly enunciate that it was offering a constitutionally based decision.

Even if the *Beam* decision is constitutional, § 27A still does not violate the separation of powers doctrine. Justices Blackmun and Scalia, in grounding their concurrences in the Constitution, argued that Article III prevents the federal courts from applying a newly announced rule to some parties and not to others.³⁷² Justice Blackmun asserted that "we fulfill our judicial responsibility by requiring retroactive application of each new rule we announce."³⁷³ This assertion indicates that nothing can prevent Congress, under its Article I powers from passing a law, which restricts that application of the rule the Supreme Court announced in *Lampf*. Although the courts, which are constitutionally limited to hearing "cases and controversies" may be proscribed from treating similarly situated litigants dissimilarly, Congress remains free to change the rule announced by the Supreme Court, thereby affecting some litigants and not others.³⁷⁴ Accordingly, courts should reject the argument that § 27A is in violation of the separation of powers doctrine because it violates the constitutional mandate announced by the *Beam* Court.

Although § 27A(a) appears to withstand constitutional challenges, Section 27A(b) significantly encroaches on the judiciary's exclusive power to adjudicate cases by directing the courts to reinstate cases which have previously been dismissed. Regardless of the fact that litigants are not considered to hold vested rights in a statute of limitation, litigants do hold an interest in final judgments.³⁷⁵ Moreover, when the

³⁷¹ *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1110 (N.D. Cal. 1992).

³⁷² *Beam*, 111 S. Ct. at 2449 (Blackmun, J., concurring), 2450-51 (Scalia, J., concurring).

³⁷³ *Id.* at 2450 (Blackmun, J., concurring).

³⁷⁴ In *Robertson II*, the Supreme Court made clear that Congress may direct legislation at a few existing cases. See *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407, 1414 (1992).

³⁷⁵ *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945) (litigants do not have vested rights in statutes of limitation); *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988) (legislature cannot alter the rights of parties once vested by a solemn

legislature reviews and reinstates final judgments of the courts, it aggrandizes its power in the sense that it acts like a super-appellate court and denotes final decisions of the judiciary branch to mere advisory opinions. This congressional interference into the heart of the judiciary function is not mitigated by the fact that § 27A authorizes relitigation on technical grounds only.³⁷⁶

In *Sioux Nation*, the Court determined that a statute that authorized the relitigation of the Sioux' claim without regard to the res judicata effect of a prior Claims Court judgment did not violate the separation of powers doctrine.³⁷⁷ The *Sioux Nation* Court determined that Congress, in its capacity as settlor of the nation's debts, had merely waived its res judicata defense to the Sioux' claim.³⁷⁸ Subsequently, the United States District Court for the Southern District of New York in *Axel Johnson*, determined that *Sioux Nation* stands for the proposition that Congress, in some instances, may offer relitigation of decided claims.³⁷⁹ This assertion, however, ignores the fundamental feature of both *Sioux Nation* and the line of precedent on which the Supreme Court relied in its holding—in all instances, the United States Government was a litigant waiving its right in a previous favorable judgment.³⁸⁰ The *Sioux Nation* Court said nothing about Congress's ability to intrude into the judiciary's realm by reviewing and discarding final judgments in litigation between private citizens. *Sioux Nation* should be limited to its facts and circumstances and should not be used to support an argument that § 27A(b) is constitutional.

Sioux Nation also should not be read, as it was by the United States Court of Appeals for the Tenth Circuit, in *Anixter II*, to support the proposition that Congress is free to waive the procedural defenses of private litigants.³⁸¹ Although it is true that liminary periods are generally created by Congress and are extended to litigants as a privilege and not a right, this does not mean that Congress has the power to reinstate a claim which the judiciary has determined to be time-barred. Once a

judgment). In *Beam*, the Supreme Court also affirmed the value of final decisions for litigants. 111 S. Ct. at 2446. The Court stated: "once suit is barred by . . . statutes of limitation or repose, a new rule cannot reopen the door already closed" because retroactivity must be limited by the need for finality. *Id.*

³⁷⁶ See *supra* notes 307–23 and accompanying text for rationale offered by the *Anixter II* and *Axel Johnson* courts as to why § 27A's waiver of a technical defense does not violate the rights of litigants.

³⁷⁷ 448 U.S. 371, 407 (1980).

³⁷⁸ *Id.* at 405.

³⁷⁹ 790 F. Supp. 476, 481 (S.D.N.Y. 1992).

³⁸⁰ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 395–402 (1980).

³⁸¹ 977 F.2d 1533, 1546 (10th Cir. 1992).

defendant has been informed by a court that a plaintiff's claim is stale, and the time for appeal has passed, that defendant should be able to retain his or her confidence in our system of separation of powers that Congress may not review and discard that judgment.

Because a party should be able to rely on a final judgment of a court, the justifications asserted by the *Axel Johnson* court in opposition to the defendant's argument that § 27A violates the separation of powers doctrine are without merit.³⁸² First, the *Axel Johnson* court maintained that the short time span transpiring between the court's issuance of the final judgments and Congress's enactment of § 27A indicated that Congress had not seriously intruded into the realm of the judiciary, particularly in light of Rule 60(b) of the Federal Rules of Civil Procedure.³⁸³ Once a court has reached a final judgment and the right to appeal has passed, however, the court should not be confronted with the litigants' reappearance in the courtroom because Congress thinks the court should try the matter again—whether the litigants appear one month or one decade after final judgment. Moreover, the *Axel Johnson* court's reliance on Federal Rule of Civil Procedure 60(b) to support its assertion was disingenuous. The rule provides that the court may relieve a party from a final judgment, within a reasonable amount of time, for any reason justifying relief.³⁸⁴ Nowhere, however, does Rule 60(b) provide that Congress may order the courts to reinstate judgments which the legislature believes the court should hear again.

Second, contrary to the *Axel Johnson* court's assertion, the fact that the § 10(b) claims were dismissed on technical grounds does not render their reinstatement by Congress any less egregious. Although it is true that a dismissal on technical grounds simply removes the unforeseen benefit awarded to defendants by the *Lampf* court, rather than stripping defendants of a valid judgment on the merits, it is simply not within Congress's power to make that distinction. If we allow Congress to step into the judiciary's shoes, picking and choosing among litigants for whom reinstatement is appropriate, then we are essentially giving Congress the power to act as an Article III court, rather than an Article I legislature.

Finally, contrary to the suggestion of the *Axel Johnson* court, this violation of the separation of powers principle is not remedied by the assertion that *Lampf* was an unfair and misguided opinion in terms of

³⁸² 790 F. Supp. at 482–83.

³⁸³ *Id.* at 482.

³⁸⁴ FED. R. CIV. P. 60(b).

its retroactive application. The *Lampf* Court's decision to retroactively apply the one-and-three year statute of limitations was unprecedented and extremely unfortunate for plaintiffs who had spent years litigating their case on the merits only to be told that the matter was time-barred.³⁸⁵ The Supreme Court should certainly be criticized for its unwillingness to adhere to its traditional policy of due process and fundamental fairness in announcing new statutes of limitations.³⁸⁶ Nevertheless, Congress had an appropriate remedy for undoing the Supreme Court's error: it could swiftly enact new legislation retroactively imposing a longer statute of limitations—something which that body tried and failed to do. Instead, the legislature waited over five months as a number of cases were dismissed by lower court's adhering to *Lampf*'s mandate. Only then was legislation passed by which Congress asserted the role of the judiciary in allowing for reinstatement of final judgments.

Section 27A(b) violates the separation of powers principle because it strips defendants of their vested right in a final judgment and intrudes on the power of the judiciary to issue final opinions. Regardless of the fact that Congress, in good faith sought to remedy the unfair situation created by the joint decisions of *Lampf* and *Beam*, Congress overstepped the line that separates the legislature from the judiciary. Efforts at justifying this violation away are simply unpersuasive. Because the legislature cannot alter the final judgments of the courts, § 27A(b) is unconstitutional.

IV. CONCLUSION

Congress's enactment of § 27A has fueled a powerful separation of powers debate, dividing circuits, districts and commentators throughout the country. Although the doctrine of separation of powers does not require that the branches be hermetically sealed from one another, § 27A impermissibly encroaches on the power of the judiciary by requiring courts to reinstate cases dismissed due to the retroactive application of *Lampf*. Reinstatement strips defendants of the vested

³⁸⁵ One commentator argues that it is unlikely that the Supreme Court, if confronted with the *Lampf* issue a second time, would hold that *Lampf*'s liminary period must be retroactively applied. See Sabino, *supra* note 13, at 61. According to Mr. Sabino, the weight of the Court's past precedent indicates that the *Lampf* rule should not have been applied retroactively. *Id.* at 64. Thus, argues Mr. Sabino, the Supreme Court would regard the § 27A issue as an opportunity to resolve concerns over *Lampf*'s retroactive application. *Id.*

³⁸⁶ See *Lampf*, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2786 (O'Connor, J., dissenting), *reh'g denied*, 112 S. Ct. 27 (1992).

right in that judgment. Moreover, reinstatement reduces judicial decisions to mere advisory opinions, thus allowing Congress to act as a super-appellate court. Courts must therefore reject § 27A(b) of the Securities Exchange Act of 1934 as an effort by Congress to aggrandize its power at the expense of the judiciary.

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