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The Constitutionality of Section 27A of the Securities Exchange Act: Is Congress Rubbing Lampf the Wrong Way

Craig W. Palm

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THE CONSTITUTIONALITY OF SECTION 27A OF THE SECURITIES EXCHANGE ACT: IS CONGRESS RUBBING LAMPF THE WRONG WAY?

CRAIG W. PALM*

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I. INTRODUCTION

THE Securities and Exchange Commission (SEC) sought to protect the public from fraud in the purchase or sale of securi-
CONSTITUTIONALITY OF SECTION 27A

Palm: The Constitutionality of Section 27A of the Securities Exchange Act

1. Rule 10b-5, promulgated in 1948 and amended in 1951, states:

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.


2. Section 10 of the Exchange Act 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,

... to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.


3. As the former SEC Chairman, David Ruder, stated: "The benefit of private actions comes in part from plaintiffs obtaining damages or injunctive relief, but more importantly from lawyers who counsel their clients on measures to be taken in order to avoid both SEC and private actions." David S. Ruder, Securities and Exchange Commission Enforcement Practices, 85 NW. U. L. REV. 607, 607 n. 1 (1991).

4. The implied right of action was first recognized in Kardon v. National Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946). The Supreme Court has expressly approved of implied private rights of action under Rule 10b-5. See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 230-31 (1988) (stating that through "[j]udicial interpretation and application, legislative acquiescence, and the passage of time" a private right of action exists under § 10(b) and Rule 10b-5 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975)); see also Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (noting that "a private right of action under § 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years").
Rule 10b-5, the lower courts disagreed on the applicable limitations period for such actions.

Before 1988, the lower courts uniformly followed the traditional rule, which was to borrow the most closely analogous state law limitations period to fill any gaps in federal causes of action. The borrowing practice naturally caused variation among the lower federal courts with respect to the limitations period for Rule 10b-5 actions. These divergences led to forum shopping and costly litigation. Concerned about these problems, three circuit courts of appeal ultimately adopted a uniform federal statute of limitations for Rule 10b-5 actions. The uniform limitations period chosen by the three circuits was the so-called "one-and-three-year" rule expressly contained in other limitations provisions within the Securities Act of 1933 (Securities Act) and the Exchange Act. The one-and-three-year rule requires the plaintiff to bring an action within one year after discovery of the alleged violation, but no later than three years after the alleged violation occurred.

On June 20, 1991, the Supreme Court decided two cases that had a dramatic impact on the limitations period for Rule 10b-5 claims. In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, the Supreme Court adopted the one-and-three-year rule as the uniform federal limitations period for Rule 10b-5 actions. On the same day it decided Lampf, the Court also decided James B. Beam Distilling Co. v. Georgia. In a fractured decision, the Beam Court held that when the judiciary announces a new rule of law in civil cases, that rule must be applied to all claims based upon events arising before the decision, except for claims barred by res judicata or on procedural grounds.

Because the Supreme Court applied the Lampf rule to the litigants in that case, the lower courts interpreted Lampf and Beam as requiring courts to apply the Lampf rule to all 10b-5 cases pending when Lampf and Beam were decided. The retroactive application of the Lampf rule led courts to dismiss many 10b-5 actions as untimely. These dismissals precluded plaintiffs from trying cases on the merits in which they sought more than four billion dollars in damages. Many of the dismissed claims had been brought

5. For a discussion of the traditional borrowing practices and the uniform limitations period adopted by the three circuits, see infra notes 26-69 and accompanying text.
against high profile securities fraud defendants and major participants in the recent savings and loan debacle.  

Congress reacted quickly to the double whammy of Lampf and Beam by enacting section 27A of the Exchange Act. In effect, section 27A returned the law to its pre-Lampf and pre-Beam state for all qualifying cases filed before Lampf and Beam. Under section 27A, the statute of limitations for section 10(b) actions filed before the Lampf decision is the limitations period that was in effect in the jurisdiction before the Lampf decision. In addition, section 27A provides that the principles of retroactivity governing section 10(b) suits filed before the Beam decision are the principles that were in effect in the jurisdiction before Beam was decided. Significantly, section 27A also permitted the courts to reinstate many of the cases that had been dismissed under the Lampf rule.  

Plaintiffs have utilized section 27A to defend against motions to dismiss and to seek reinstatement of cases previously dismissed under Lampf and Beam. The reliance on section 27A to protect

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8. See Kevin G. Salwen, Many Securities-Fraud Suits Are Likely to Go Unheard With High Court Ruling, WALL ST. J., Nov. 21, 1991, at A3.
(a) Effect on pending causes of action
   The limitation period for any private civil action implied under [§ 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 [§ 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 December 19, 1991.
10. The provision permitted the lower courts that had previously adopted the one-and-three-year rule to use pre-Beam law to decide whether that new rule would apply retroactively or prospectively. For a discussion of the retroactive or prospective application of a new rule of law, see infra notes 112-50 and accompanying text.
11. A case qualified for reinstatement if it was filed before the Lampf decision and would have been timely under the limitations rule and retroactivity principles in effect in that jurisdiction prior to the Court’s decisions in Lampf and Beam. For a discussion of the operation of § 27A, see infra notes 200-03 and accompanying text.
existing claims and resuscitate previously dismissed claims brought a flurry of constitutional challenges from aggrieved defendants. These defendants have raised two major constitutional challenges. First, defendants contend that section 27A deprives them of vested property rights in contravention of the Fifth Amendment. Second, they argue that section 27A violates the separation of powers doctrine because: (1) section 27A imposes a rule of decision on the judiciary contrary to the principles enunciated by the Supreme Court in a Civil War case, *United States v. Klein*,\(^\text{12}\) and (2) section 27A legislatively overrules the *Beam* decision. These constitutional challenges have had only limited success. To date, most of the district courts and the four circuits that have directly addressed the question have upheld the constitutionality of section 27A.\(^\text{13}\)

This Article discusses whether section 27A is constitutional. In particular, the discussion focuses on whether section 27A divests defendants of vested property interests in contravention of the Fifth Amendment or violates the separation of powers doctrine. Part II presents a historical account of the applicable limitations periods for 10b-5 actions, culminating with a discussion of the Supreme Court’s decision in *Lampf*. Part III examines the law concerning the retroactive or prospective application of new judicially announced rules like *Lampf*, with particular emphasis on the Court’s most recent decision on retroactivity in *Beam*. Part IV explores the legislative history and purposes behind section 27A and discusses the operation of section 27A. Part V analyzes whether defendants have vested property rights that arise from the *Lampf* rule itself or from final judgments of dismissal based on the *Lampf* rule. This part concludes that section 27A may unconstitutionally deprive defendants of vested rights. Part VI delves into the separation of powers doctrine and discusses whether section 27A violates that doctrine. This part concludes that section 27A does not violate the separation of powers doctrine.

II. HISTORICAL BACKGROUND OF STATUTES OF LIMITATION IN RULE 10B-5 LITIGATION

A. Statutes of Limitation and Statutes of Repose In General

Statutes of limitation are typically characterized as remedial

\(^{12}\) 80 U.S. (13 Wall.) 128 (1872).

\(^{13}\) For a discussion of these constitutional challenges to § 27A, see infra notes 228-412 and accompanying text.
or procedural rules that bar the remedy associated with a cause of action while leaving the underlying substantive right intact.\textsuperscript{14} The distinctions between right and remedy and between substance and procedure originated in conflicts of law jurisprudence.\textsuperscript{15} Under conflicts of law analyses, the court uses the forum’s choice of law method to determine the law governing the substantive issues but generally applies forum law to procedural issues.\textsuperscript{16} In order to ascertain which law governs a case and the extent to which that law applies, the court must first characterize each issue as substantive or procedural.\textsuperscript{17} Statutes of limitation are generally characterized as procedural or remedial (that is, affecting the remedy) because they eliminate an otherwise available remedy for policy reasons that include protecting the judiciary from the problems encountered in resolving stale claims.\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{14} See, e.g., Sun Oil Co. v. Wortman, 486 U.S. 717, 725-26 (1988) (identifying long-established support for proposition that statutes of limitation do “not extinguish the underlying right but merely cause[,] the remedy to be withheld,” and therefore are procedural rather than substantive); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (noting that Supreme Court had previously “adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights” (discussing Campbell v. Holt, 115 U.S. 620 (1885))); Davis v. Mills, 194 U.S. 451, 454 (1904) (stating that ordinarily statutes of limitation are viewed as procedural, “affecting the remedy only and not the right”).
  \item \textsuperscript{15} See Sun Oil, 486 U.S. at 722-29 (reaffirming ability of courts to characterize statutes of limitation as procedural based upon traditional choice of law practices); Margaret R. Grossman, \textit{Statutes of Limitations and the Conflict of Laws: Modern Analysis}, 1980 Ariz. St. L.J. 1, 9-11 (noting that statutes of limitation protect forum from need to adjudicate stale claims and defendant citizens from need to defend for unlimited periods; such interests affect remedy not right, and therefore are characterized as procedural for conflict of laws purposes).
  \item \textsuperscript{16} See \textit{Restatement (First) of Conflict of Laws} § 584 (1934) (forum uses its conflict of laws rule to determine if issue is substantive or procedural); \textit{id.} § 585 (once issue is determined to be procedural, law of forum applies). The modern conflict of laws approaches pertaining to statutes of limitation issues continue to follow this substantive-procedural dichotomy. See \textit{Restatement (Second) of Conflict of Laws} § 142 (Supp. 1971) (statute of limitations of forum determines whether or not issue is barred); \textit{id.} § 143 (only if foreign statute of limitations bars “the right and not merely the remedy” will it be applied). The major distinction between the original and the modern conflict of law rules is the method used to determine the proper substantive law to apply. See \textit{Restatement (Second) of Conflict of Laws} § 142 (Revisions 1988) (general rule continues to be that forum applies its statute of limitations). For a further discussion of this complex area of conflict of laws jurisprudence, see Eugene F. Scoles & Peter Hay, \textit{Conflict of Laws} §§ 3.8-12 (1982); Russell J. Weintraub, \textit{Commentary on the Conflict of Laws} §§ 3.2C1-2C (3d ed. 1986); Grossman, \textit{supra} note 15, at 19-45.
  \item \textsuperscript{17} Grossman, \textit{supra} note 15, at 3-9 (following characterization of issue as either substantive or procedural, court applies law of forum to matters of procedure and law of situs of injury to matters of substance).
  \item \textsuperscript{18} As the Fourth Circuit noted:
\end{itemize}
Notwithstanding the normal characterization of statutes of limitation as procedural or remedial,19 the courts developed exceptions to the traditional approach and sometimes characterized limitations periods as substantive.20 Courts use two main tests to

Statutes of limitation represent a public policy judgment by a State as to the time at which an action becomes too stale to proceed in its courts. States rightly may be concerned about the prosecution of fraudulent claims and reliability of judgments rendered upon old claims, where memories may have faded, witnesses may have died, and evidence may have been lost. It has also been said that statutes of limitation also serve the interest of allowing defendants to rest assured that, after a certain period of time, their exposure to liability has ended. It is felt, and we agree, that the principal purpose of limiting statutes is the prevention of stale claims, and that the repose of defendants is merely an incidental benefit of such statutes. Statutes of limitation, then, are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect.


19. Courts and commentators have criticized the utility of characterizing statutes of limitation as procedural or remedial because the labels can be manipulated to achieve the court’s desired disposition of the case. 3 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 520 (2d ed. 1964). Professor Rabel identified the “fundamental inadequacy of the distinction between ‘extinguishing the right’ and only affecting the ‘remedy’” as promoting characterization that can turn “upon the result sought.” Id. (citing Edgar H. Ailes, Limitation of Actions and the Conflict of Laws, 31 MICH. L. REV. 474, 493 n.116 (1933)); see also Davis v. Mills, 194 U.S. 451, 454 (1904) (observing that in cases where statute of limitations can reasonably be considered substantive, court may be willing to eliminate defendant’s liability after limitations period expires).

Donna A. Boswell, Comment, The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action, 136 U. PA. L. REV. 1447, 1465 n.99 (1988) (“The convenient fiction that rights have perpetual lives, while remedies have a limited duration, [has] allowed courts to ‘waive’ the bar [of a statute of limitations], or ‘revive’ the remedy [for a cause of action] in the interest of justice, without creating a new right upon which to base the plaintiff’s recovery once the statutory period ha[s] lapsed.”).

The Fourth Circuit, however, has suggested that “the labels serve a useful purpose in describing the various interests underlying the two types of laws.” Goad, 831 F.2d at 511. As the Supreme Court observed in Chase:

The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.


20. For an overview of the judicial exceptions to the general rule that statutes of limitation are procedural in nature, see Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154-56 (2d Cir. 1955) (describing various tests for characterizing statutes of limitation as procedural or substantive); SCOLES & HAY, supra note 16, §§ 3.10-.11 (discussing two exceptions to general rule, substantive characterization of limitations periods and borrowing statutes, both designed to
determine whether statutes of limitation are substantive: the "built-in" test and the "specificity" test. Under the "built-in" test, if a limitations period is contained in the same statute that creates the cause of action, then the time limit is considered a part of the substantive cause of action and its running extinguishes the underlying right. Under the broader "specificity" test, even though the limitations period is not included in the statute creating the action, but in a different statute, the limitations period qualifies the right if it specifically relates to the particular cause of action at issue. Under either test, if the limitations period affects the substantive right and extinguishes an otherwise available cause of action, the statute of limitations is considered substantive for choice of law purposes.

21. See Grossman, supra note 15, at 12-13. The specificity exception was first articulated by the Supreme Court in Davis v. Mills:

The fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.

Davis v. Mills, 194 U.S. 451, 454 (1904); see also Mackey v. Judy's Foods, Inc., 654 F. Supp. 1465, 1480 (M.D. Tenn. 1987) (indicating that so long as limitations period is "directed specifically to the statutorily created liability" it can be considered substantive), aff'd, 867 F.2d 325 (6th Cir. 1989).

Some courts apply a liberal version of the test, finding that a statute of limitations extinguishes a substantive right "if it specifically relates to a particular cause of action." Hafer v. Firestone Tire & Rubber Co., 523 F. Supp. 1216, 1218 n.5 (E.D. Pa. 1981); see also Kalmich v. Bruno, 553 F.2d 549, 554 (7th Cir.), cert. denied, 434 U.S. 940 (1977). In Kalmich, the Seventh Circuit adopted a broad interpretation of the specificity test. The court held that an Illinois statute of limitations was directed to a statutory war crimes cause of action with sufficient specificity to be regarded as a substantive part of the cause of action, even though the limitations period had to be applied through an intermediary statute and the various statutes involved were enacted at different times. Id. Other courts have developed a restrictive formulation of the specificity test so that, to be considered substantive, a statute of limitations "must be so inextricably bound up in the statute creating the right that it is deemed a portion of the substantive right itself." Thomas v. FMC Corp., 610 F. Supp. 912, 915 (M.D. Ala. 1985).
As noted, a statute of limitations generally bars any remedy unless the cause of action is brought within a specified time period after the occurrence or discovery of an injury. In contrast, a statute of repose terminates the cause of action after a specific time period has elapsed, regardless of whether any injury has occurred or has even been discovered. 24 Unlike the procedural or remedial statutes of limitation that do not meet the built-in or specificity tests, statutes of repose are characterized by the majority of jurisdictions as substantive. 25


Statutes of limitation and repose may be distinguished both by their method of operation and their underlying purpose. . . . Statutes of repose run from an arbitrary event such as the date of a product's purchase, and do not use the date of the injury as a factor in computing the limitation period. Statutes of limitation, on the other hand, generally "set much shorter time periods which run from the time the cause of action accrues."

. . . .

Statutes of limitation and repose may also be distinguished by their respective purposes. In ordinary statutes of limitation, any repose provided to defendants is merely incidental. The main purpose of such statutes is the prevention of stale claims . . . . Statutes of repose, in contrast, operate as a grant of immunity [for a potential defendant] . . . . Menne v. Celotex Corp., 722 F. Supp. 662, 665-66 (D. Kan. 1989) (citations omitted) (quoting Wayne v. Tennessee Valley Auth., 730 F.2d 392, 401-02 (5th Cir. 1984), cert. denied, 469 U.S. 1159 (1985)); see also Wayne v. Tennessee Valley Auth., 730 F.2d 392, 401-02 (5th Cir. 1984) (stating that "statutes [of repose] acquire a substantive nature, barring rights of action even before injury has occurred if the injury occurs subsequent to the prescribed time period"); cert. denied, 469 U.S. 1159 (1985); Alves v. Siegel's Broadway Auto Parts, Inc., 710 F. Supp. 864, 869 (D. Mass. 1989) ("[W]hen a statute of repose extinguishes a cause of action, . . . [t]he injury need not have occurred, much less have been discovered."); Menne v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (observing that in statutes of repose "the time for filing suit is engraved onto a substantive right created by law" and that "[s]tatutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights'" (quoting Bolick v. American Barmag Corp., 293 S.E.2d 415, 418 (N.C. 1982)); City of Bluefield v. Autotrol Corp., 723 F. Supp. 362, 365 (S.D. W. Va. 1989) (alleging statutes of repose to architects' and builders' statutes which create outer limits of time within which statutes of limitation operate; once outer time limit expires so does substantive right to bring suit); Unified Sch. Dist. No. 500 v. United States Gypsum Co., 719 F. Supp. 1003, 1006 (D. Kan. 1989) (distinguishing statute of repose from statute of limitations by its effect on substantive rights); Crouch v. General Elec. Co., 699 F. Supp. 585, 591 n.5 (S.D. Miss. 1988) (holding that statute of repose extinguishes substantive right). The procedural/substantive distinction for statutes of limitation and statutes of repose has important ramifications for potential litigants. A plaintiff may be required to affirmatively plead satisfaction of a statute of repose as an essential element of the cause of action. See Wayne, 730 F.2d at 402 (requiring plaintiff to prove claim filed within statute of repose period before cause of action under Tennessee statute could be established); Condus v. Howard Sav. Bank, 781 F.
B. Statutes of Limitation in Rule 10b-5 Actions

Because section 10(b) and Rule 10b-5 do not expressly provide for a private right of action, it is not surprising that the provisions lack an express statute of limitations governing the timeliness of private actions brought pursuant to them. The courts obviously needed to remedy the deficiency. Traditionally, when Congress did not include an express statute of limitations

Supp. 1052, 1059 (D.N.J. 1992) (construing one-and-three-year limitations period of § 13 of Exchange Act as statute of repose to be applied to § 10(b) securities actions in light of Lampf and therefore requiring litigant to plead limitations period as element of cause of action). A procedural statute of limitations is a defense that is waived if not raised by the defendant, while a substantive statute of repose is generally considered non-waivable. See Luzadder v. Despatch Oven Co., 834 F.2d 355, 358 (3d Cir. 1987) (stating that statute of repose “is a non-waivable right, contrary to a statute of limitations, which is waived, if not alleged, in a responsive pleading” (quoting Fetterhoff v. Fetterhoff, 512 A.2d 30, 32 (Pa. Super. Ct. 1986))), cert. denied, 485 U.S. 1035 (1988). This rule is consistent with the substantive characterization of statutes of repose because the time limitation is such an integral component of the substantive right that its protection cannot be relinquished.

The majority of courts find critical differences between statutes of limitation and statutes of repose. See, e.g., Good, 831 F.2d at 510-11. Nonetheless, a minority of courts reject the substantive characterization of statutes of repose and regard both types of statutes as strictly procedural or remedial in nature. See Wesley Theological Seminary v. United States Gypsum Co., 876 F.2d 119, 122 (D.C. Cir. 1989) (rejecting as “somewhat metaphysical” distinction between statutes of repose and statutes of limitation, based upon idea that statute of repose confers substantive rights, while statute of limitations governs purely procedural rights), cert. denied, 494 U.S. 1003 (1990); see also Habenicht v. Sturm, Ruger & Co., 660 F. Supp. 52, 53 (D. Conn. 1986) (rejecting majority view and stating that statutes of repose, like statutes of limitation, simply prescribe time period within which certain rights could be enforced); Hansen v. Sears, Roebuck & Co., 574 F. Supp. 641, 645 (E.D. Mo. 1983) (emphasizing that statute of repose is procedural rule that only affects remedy). According to this perspective, a statute of repose is analogous to a statute of limitations and characterized as a procedural time limit which functions independently of any substantive cause of action. The Supreme Court has suggested, in the context of a land sale contract forfeiture action, that a statute of repose may function as a remedial device, altering a remedy rather than an obligation. City of El Paso v. Simmons, 379 U.S. 497, 506 n.9 (1965). The courts which have espoused this remedial characterization, however, have failed to provide any consistent rationale for this viewpoint.

As will be discussed later, if the limitations period is considered substantive, the cause of action is extinguished when the time period expires and cannot be revived by legal or private means. On the other hand, if the limitations period is procedural, the remedy is withheld upon the running of the period but can be reinstated in a number of ways, including legislative modification of the limitations period. For a discussion of this procedural/substance distinction, see infra notes 233-88 and accompanying text.

26. See Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1387 (7th Cir. 1990) (“Section 10(b) itself grants rulemaking authority to the SEC; because it does not create a right of action, it is not accompanied by a statute of limitations.”), cert. denied, 111 S. Ct. 2887 (1991).
period for violations of federal statutory law, courts "borrowed" the most analogous limitations period of the forum state as the applicable limitations period.²⁷

Before the decision in Lampf, courts generally utilized the borrowing rule in 10b-5 actions. The application of the borrowing doctrine led to significant variations in the limitations periods within and among the circuits for two reasons.²⁸ First, even if the courts chose the same type of cause of action as analogous, the


Possible sources for an applicable statute of limitations include: using one of the federal catchall limitations periods, adopting an applicable local law of limitations, or applying a statute of limitations found in a similar section in the federal securities law. For a discussion of the third option, see infra notes 59-68 and accompanying text. The federal catchall provisions which might be applicable include: 28 U.S.C. § 2401(a) (1988) (stating that civil actions against United States must be brought within six years, subject to certain exclusions); id. § 2415 (limiting time period in which specified actions may be brought by United States); and id. § 2462 (limiting time period in which actions for "enforcement of any civil fine, penalty, or forfeiture" may be brought). None of the federal catchall limitation periods, however, are applicable to private actions brought under section 10(b) and Rule 10b-5. See Allison D. Garrett, The Ramshackle Edifice: Limitations Periods for Private Actions Under Rule 10b-5, 28 Duq. L. Rev. 1, 2 & n.6 (1989).

Garrett indicates that although § 2462(a) could apply to private actions under Rule 10b-5, the Supreme Court has refused to extend its application. Id. at 2 n.6. In Meeker v. Lehigh Valley R.R., the Supreme Court, in reference to the predecessor of § 2462, stated:

The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such.


²⁸. The limitations period varied from as little as one year to as long as ten years. See Garrett, supra note 27, at 19 n.116.
limitations period for that cause of action often differed from state to state. Second, the courts disagreed on which type of state limitations period to apply. Although each court attempted to select a statute of limitations that effectuated the policy of the private cause of action under Rule 10b-5, they disagreed on the best approach. For example, courts adopted the state's fraud limitations period, the state's "general" or catchall limitations period or determined the applicable limitations period on a case-by-case basis.

In addition to choosing different limitations periods for 10b-5 cases, the courts adopted different tolling rules. Tolling rules determine what events suspend or temporarily stop the accrual or running of a limitations period. Tolling rules differ in


31. Task Force Report, supra note 30, at 648-49. The authors indicate that a state's common law fraud limitations period was often favored because it was longer than the blue sky laws. Id. at 648. Moreover, the courts following this view perceived the longer limitations period as more consistent with the liberal approach to § 10(b) actions often taken by the federal courts. Id.; see, e.g., United Cal. Bank v. Salik, 481 F.2d 1012, 1015 (9th Cir.) (favoring longer period because it served "broad remedial policies of federal securities laws"), cert. denied, 414 U.S. 1004 (1973).

32. Blue sky laws, like Rule 10b-5, often include provisions prohibiting fraud in the sale of securities. Some courts have relied on the state blue sky laws because those laws have "a common purpose with the federal securities laws." Carothers v. Rice, 633 F.2d 7, 13-14 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981); see also Diamond v. Lamotte, 709 F.2d 1419, 1424 (11th Cir. 1983) (stating that blue sky statutes are more analogous to securities fraud than common law fraud statutes); Task Force Report, supra note 30, at 650 (indicating that at time of writing, four federal circuits applied blue sky laws).

33. Garrett, supra note 27, at 24-25 & n.151.


35. See Garrett, supra note 27, at 29-34.
significant ways, including who has the burden of proof and whether the stacking of tolling events is permitted. In choosing tolling rules for 10b-5 actions, some courts adopted the federal tolling doctrine of fraudulent concealment. Other courts adopted state tolling doctrines, which differ from the federal tolling rules with respect to the events that toll the running of the statute, the burden of proving concealment and the standard for discovery of the fraud. Finally, some courts combined aspects of both the federal and state tolling doctrines.

The variation of limitations periods and tolling doctrines applied by the courts created several problems. Because the events constituting Rule 10b-5 violations often involved interstate transactions, at least two sets of state statutes had to be considered. Once the court decided which state's law governed the limitations period, it then had to decide if that state's conflict of laws rules mandated the use of another state's statute of limitations. Because many litigants often joined in a common suit with operative facts arising from events that took place in different states, the borrowing doctrine sometimes required the application of different limitations periods to different litigants in the same case.

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36. See, e.g., General Builders Supply Co. v. River Hill Coal Venture, 796 F.2d 8, 11-14 (1st Cir. 1986) (stating that under § 10(b) and Rule 10b-5, plaintiff has burden of pleading compliance with statute of limitations, including any tolling issues).


38. See, e.g., Goldstandt v. Bear, Stearns & Co., 522 F.2d 1265, 1268-69 (7th Cir. 1975) (relying on federal doctrine of equitable concealment in Rule 10b-5 action). This doctrine allows tolling of the statute of limitations in a securities action until the plaintiff knows or, with reasonable diligence, should have known of the facts constituting the fraud. Id. at 1268. An exception to the doctrine of fraudulent concealment exists when the fraud is actively concealed. Id. If the defendant actively conceals the fraud, the statute of limitations period is tolled until the plaintiff actually discovers the fraud. Id. The courts were divided over the issue of whether the plaintiff in an actual concealment case had to use reasonable diligence in attempting to discover the fraud. See Garrett, supra note 27, at 32 & n.195 (comparing cases supporting both views).


41. Id. at 1388 (explaining that transaction must first involve interstate commerce for securities law to apply).

42. Id.

43. Id.

44. See, e.g., Kronfeld v. Advest, Inc., 675 F. Supp. 1449, 1457 n.21
The problem was further compounded by the need to determine which specific statute of limitations to borrow and which tolling standard to apply. The borrowing practices thus encouraged forum shopping as plaintiffs searched for the venue with the longest statute of limitations and most favorable tolling rules. The borrowing approach caused substantial uncertainty and excessive litigation with respect to the applicable limitations period for 10b-5 actions.

(S.D.N.Y. 1987) (finding that litigants in 26 states were subject to separate limitations periods as result of state borrowing doctrine).

45. As noted earlier, the courts usually had more than one state cause of action from which to choose. Often the choice was among the limitations period for the state’s blue sky laws, the period for common law fraud actions or a “general” limitations period. For a discussion of these choices, see supra notes 27-34 and accompanying text.

46. See Short, 908 F.2d at 1389 (“Translating state periods of limitations to federal court also has led to difficult questions concerning whose tolling and estoppel doctrines apply: the state’s, the federal court’s, or both?”); see also Garrett, supra note 27, at 29-34 (discussing problems with respect to federal and state tolling doctrines).

47. The venue provision of § 27 of the Exchange Act, “allows actions to be brought where the violation occurred or where the defendant is found, is an inhabitant, or transacts business.” 15 U.S.C. § 7822 (1988). Thus, the problem of forum shopping in Rule 10b-5 actions is exacerbated because venue for § 10(b) actions may be proper in many districts. Garrett, supra note 27, at 21.

48. Tolling doctrines differ significantly. For example, some tolling doctrines place the burden of persuasion on the party asserting the doctrine. See Norris v. Wirtz, 818 F.2d 1329, 1331 (7th Cir.) (asserting party bears burden of persuasion), cert. denied, 484 U.S. 943 (1987); Cook v. Avien, Inc., 573 F.2d 685, 695 (1st Cir. 1978) (assigning burden of proving compliance with limitations period to plaintiff). Moreover, the legal standard determining when a plaintiff had notice of the fraud differs under each tolling doctrine. Under some tolling doctrines, a subjective legal standard is applied thereby allowing the court to consider the plaintiff’s sophistication. See, e.g., Ohio v. Peterson, Lowry, Rall, Barber & Ross, 472 F. Supp. 402, 408 (D. Colo. 1979) (stating that “some weight [is given] to . . . the legal sophistication of the party involved”), aff’d, 651 F.2d 687 (10th Cir.), cert. denied, 454 U.S. 895 (1981). Other tolling doctrines apply an objective legal standard which requires the plaintiff to exercise the diligence of a reasonable investor to discover the fraud. See, e.g., Campbell v. Upjohn Co., 676 F.2d 1122, 1126-27 (6th Cir. 1982) (indicating that under facts of case, diligent plaintiff would have been apprised of fraud). Finally, stacking of tolling events is not permitted under all tolling doctrines even though under some tolling doctrines the statute of limitations is tolled for the duration of two consecutively occurring events. Garrett, supra note 27, at 30 n.180.

49. Considerable judicial time and resources were devoted to deciding the statute of limitations issues in 10b-5 cases. Professor Louis Loss commented that “[t]his reference to state law makes for a great amount of utterly wasteful litigation.” LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1168 (1983). In Norris, Judge Easterbrook, a critic of the borrowing practices in § 10(b) actions, noted that “[d]eciding which features of state periods of limitation to adopt for which federal statutes wastes untold hours.” Norris, 818 F.2d at 1332. The ABA Committee on Federal Regulation of Securities commented that “[v]ast amounts of judicial time and attorneys’ fees are wasted.” Task Force Report, supra note 30, at 647.
These problems with the borrowing doctrine prompted many commentators to call for a uniform federal limitations period for 10b-5 actions.\(^{50}\) In response, between 1988 and 1990, the Second, Third and Seventh Circuits adopted a uniform federal limitations period.\(^{51}\) Deviating from the traditional borrowing rule, these circuits relied on an alternative approach set out by the Supreme Court in the 1987 case of *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*\(^{52}\)

In *Agency Holding*, the Court announced an analytical framework for courts to use in choosing an appropriate statute of limitations to fill congressional gaps.\(^{53}\) Under the *Agency Holding*

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\(^{50}\) See, e.g., Hal M. Bateman & Gerald P. Keith, *Statutes of Limitations Applicable to Private Actions Under SEC Rule 10b-5: Complexity in Need of Reform*, 39 Mo. L. REV. 165, 181 (1974) (offering critique that "[a] federal cause of action, derived from a federal statutory policy and within the exclusive jurisdiction of the federal courts should be governed by an appropriate federal statute of limitations"); Garrett, *supra* note 27, at 34-40 (discussing alternatives to present "state of confusion" and calling for Supreme Court or congressional guidance regarding Rule 10b-5 limitations periods); David S. Ruder & Neil S. Cross, *Limitations on Civil Liability Under Rule 10b-5*, 1972 DUKL.J. 1125, 1151 ("A uniform federal statute of limitations should replace the present system of searching for the applicable state statute."); *Task Force Report, supra* note 30, at 656 (indicating that either judicial or legislative action was necessary to resolve problems); Gordon W. Stewart, *Note, Statutes of Limitation for Rule 10b-5*, 39 WASH. & LEE L. REV. 1021, 1044-46 (1982) (proposing use of Federal Securities Code, if adopted by Congress, as uniform Rule 10b-5 limitations period); see also *Short*, 908 F.2d at 1389 ("Loud calls for reform issue from scholars and the bar. With a unanimity unmatched in any other corner of securities law, everyone wants a simpler way—and to everyone that means a uniform federal statute of limitations.").

\(^{51}\) Ceres Partners v. GEL Assocs., 918 F.2d 349, 360-61 (2d Cir. 1990) (finding that application of state statutes of limitation to claims under Exchange Act was inappropriate and that Congress would have intended uniform national limitations period); *Short*, 908 F.2d at 1389 (holding that federal rather than state law should control Rule 10b-5 limitations period); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1545 (3d Cir.) (en banc) (concluding that Exchange Act provisions are more analogous than state statutory limitations periods), *cert. denied*, 488 U.S. 849 (1988).

\(^{52}\) 483 U.S. 143 (1987). One commentator characterized the *Agency Holding* approach as "The Well Kept Secret." Bloomenthal, *supra* note 34, at 246. In *Short*, the court commented that the "[f]ederal courts are so accustomed to turning to state periods of limitations that we (and our colleagues in other circuits) did this on auto-pilot, without discussing whether something differentiated securities laws from other statutes." *Short*, 908 F.2d at 1387.

\(^{53}\) The *Agency Holding* framework had evolved from a series of earlier court decisions. The Supreme Court began to erode the general practice of borrowing the most analogous state statute of limitations in 1958. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). In *McAllister*, the Court created a narrow exception to the local borrowing rule, holding that a state's statute of limitations would not be applied when doing so would deny a party the full benefit of a federal law. *Id.* at 225-26.

The Supreme Court expanded the exception in 1983. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983). In *DelCostello*, the Court held that the state borrowing rule would not be applied "when a rule from elsewhere
framework, a court first decides whether the federal statute requires uniform treatment of all claims arising under the statute or whether the statute of limitations issue should be decided on a case-by-case basis.\textsuperscript{54} If the court decides a uniform period is required, it then determines whether state or federal law provides the most appropriate limitations period.\textsuperscript{55} Although the \textit{Agency Holding} Court reaffirmed the general rule of borrowing the local limitations period,\textsuperscript{56} it held that if the court determines that Congress would not have intended the use of a state statute of limitations, then a federal limitations period should be selected.\textsuperscript{57}

\textsuperscript{54} \textit{Agency Holding}, 483 U.S. at 147.
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} (reaffirming general assumption that Congress intended, through its silence, to encourage local borrowing practices).
\textsuperscript{57} \textit{Id.} at 147-48. Applying this analytical framework to the litigants in the \textit{Agency Holding} case, the Court held that the adoption of a uniform statute of limitations was justified by the need for uniformity and certainty in the federal
Thus, the statute of limitations issue was subtly transformed from a selection process that automatically borrowed state law to one in which courts attempted to determine congressional intent in situations where Congress had remained silent.

Applying the *Agency Holding* framework to 10b-5 claims, the Second, Third and Seventh Circuits determined that the federal interest in uniformity, certainty and the minimization of litigation dictated a uniform approach to 10b-5 actions. Noting that the Exchange Act, the statute from which the implied cause of action sprang, contained express causes of action similar to those arising under section 10(b) and Rule 10b-5 and that those express causes of action had express limitations periods, these circuits concluded that the selection of a federal limitations period was appropriate. Because state statutes of limitation were not designed with a federal cause of action in mind, the three circuits reasoned that the federal limitations periods found in other sections of the Exchange Act provided a better analogy to Rule 10b-5 than state alternatives. The three circuits also recognized that the confusion, forum shopping and wasteful litigation cre-

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58. *See Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 356-60 (2d Cir. 1990) (citing *Agency Holding* as support, Second Circuit joined Third and Seventh Circuits in applying federal limitations period to claims brought under Exchange Act); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1388 (7th Cir. 1990) (holding that *DelCostello* and *Agency Holding* indicate that when federal law provides closer analogy than state statutes, federal limitations period is more appropriate), *cert. denied*, 111 S. Ct. 2887 (1991); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1543 (3d Cir.) (en banc) (stating that previous approach utilized by court must be modified in light of *Agency Holding*), *cert. denied*, 488 U.S. 849 (1988); *see also Bloomenthal*, supra note 34, at 266-69 (examining Third Circuit’s acceptance of uniform limitations period in *Data Access*).

59. *Ceres*, 918 F.2d at 360-61 (holding that “judicial selection of a uniform nationwide limitations period is what Congress would have intended for private rights of action judicially implied under those laws”); *Short*, 908 F.2d at 1389 (agreeing with commentators calling for uniform federal statute of limitations); *Data Access*, 843 F.2d at 1543-44 (noting that uniform statute of limitations would reduce uncertainty and excessive litigation).

60. *Ceres*, 918 F.2d at 362 (concluding that § 9(e) and § 18(a) of Exchange Act were most analogous and noting that these provisions had same limitations period); *Short*, 908 F.2d at 1392 (stating that § 13, with its express limitations period, was most analogous to Rule 10b-5 actions); *Data Access*, 843 F.2d at 1548 (indicating that § 9(e), § 16(b), § 18(c) and § 29(b) were companion provisions to § 10(b) and were more analogous than state statutes).

61. *Ceres*, 918 F.2d at 364; *Short*, 908 F.2d at 1388; *Data Access*, 843 F.2d at 1545.

62. *E.g.*, *Ceres*, 918 F.2d at 362; *Short*, 908 F.2d at 1392; *Data Access*, 843 F.2d at 1548.
ated by the local borrowing practices in 10b-5 actions provided additional justification for the adoption of a uniform federal rule as "a significantly more appropriate vehicle for interstitial law-making." The three circuits rejected the normal local borrowing rule and adopted a uniform federal limitations period for 10b-5 actions.

The uniform federal limitations period chosen by the three circuits was a one-and-three-year rule, which is the repose period for a number of the express statutory causes of action in the Exchange Act and the Securities Act. This limitations period requires that an action be brought within one year after discovery of the violation and no later than three years after the violation occurs. The courts found that the purposes underlying the express actions to which the express one-and-three-year limitations period applied provided the closest analogy to the purposes behind 10b-5 actions.

The three circuits also found that the doctrine of equitable tolling was incompatible with the three-year period of repose.

63. Data Access, 843 F.2d at 1542 (citing DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983)); see also Ceres, 918 F.2d at 355; Short, 908 F.2d at 1389; Data Access, 843 F.2d at 1539.

64. The Second Circuit found that the limitations periods of § 9(e) and § 18(a) of the Exchange Act provided the best analogy. Ceres, 918 F.2d at 362. The Seventh Circuit determined that § 13 of the Securities Act, as amended by the Exchange Act, provided the closest analogy to 10b-5 actions. Short, 908 F.2d at 1392. The Third Circuit generally adopted the one-and-three-year limitations period from the Exchange Act, citing to the "companion provisions" § 9(e), § 16(b), § 18(c) and § 29(b), three of which contained the express limitations period adopted. Data Access, 843 F.2d at 1548.

The three circuits rejected the SEC's position that § 20A(b)(4) of the Exchange Act, which provides a five-year limitations period for certain insider trading actions, was the most appropriate of the federal securities acts limitations periods to apply. See Ceres, 918 F.2d at 362-63; Short, 908 F.2d at 1388, 1390-93; Data Access, 843 F.2d at 1548-49. For example, the Second Circuit rejected § 20A because it was restricted to insider trading, which represented only one aspect of § 10(b). Ceres, 918 F.2d at 363. The court thought that the other sections of the Exchange Act were more closely analogous to § 10(b) actions. Id. at 362-63.

65. Data Access, 843 F.2d at 1550.

66. For example, the Data Access court observed that § 10(b) and the other selected Exchange Act provisions reflected the same purpose: to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." Data Access, 843 F.2d at 1548 (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 728 (1975)); see also Basic Inc. v. Levinson, 485 U.S. 224, 290 (1988).

67. See Ceres, 918 F.2d at 361-63 (observing that three-year period was most appropriate as outside limit); Short, 908 F.2d at 1391 (determining that if equitable tolling of three-year period of repose were allowed, then period of repose would be useless); Data Access, 843 F.2d at 1546 (indicating that there were valid
Consequently, once the limitations period begins to run, no equitable principles stop or suspend the limitations clock. In other words, if the 10b-5 action is not brought within three years of the alleged violation, the action is time-barred regardless of when the violation is discovered. The three-year period acts as a statute of repose; once the time to bring suit expires, the substantive right to bring the action is extinguished.68

The other circuits refused to follow the lead of the Second, Third and Seventh Circuits, and maintained the customary local borrowing practice.69 Thus, the confusion, waste and forum shopping surrounding 10b-5 actions continued in those circuits. These problems were compounded by the emergence of another possible limitations period—the new one-and-three-year rule adopted by the three circuits.

C. The Lampf Decision

On June 20, 1991, the United States Supreme Court finally addressed the problem of the limitations period for 10b-5 actions in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson.70 In Lampf, the Supreme Court adopted the uniform one-and-three-year rule as the law of the land for 10b-5 private actions.

The facts of Lampf are simple. From 1979 to 1981, the plaintiffs purchased interests in seven limited partnerships in Connecticut.71 The partnerships failed. After an IRS investigation, the

68. The Seventh Circuit noted that the reason for extinguishing substantive rights in securities fraud actions was "to curtail the extent to which the securities laws permit recoveries based on the wisdom given by hindsight." Short, 908 F.2d at 1392. The Seventh Circuit further noted:

Prices of securities are volatile. If suit may be postponed indefinitely on equitable grounds [because the applicable limitations period is a procedural statute of limitations], then investors may gamble with other people's money. An investor . . . may sell her shares for a price certain. If the firm does poorly, she keeps the money; if it does well, she sues and asks for the increase in value.

Id.

69. See, e.g., Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 818-19 (10th Cir. 1990) (holding that precedent required application of state limitations period); Nesbit v. McNeil, 896 F.2d 380, 384 (9th Cir. 1990) (refusing to adopt uniform federal limitations period until issue was addressed by Circuit en banc); Smith v. Duff & Phelps, Inc., 891 F.2d 1567, 1569-70 (11th Cir. 1990) (holding that "statute of limitations for section 10(b) claims is the period that the forum state applies to the most closely analogous state claim").


71. Id. at 2776.
The plaintiffs were denied certain claimed federal tax benefits. The plaintiffs brought suit against the New Jersey law firm of Lampf, Pleva, Lipkind, Prupis & Petigrow, and others, alleging that the defendants made material misrepresentations in the offering memorandum in violation of section 10(b) and Rule 10b-5.

The plaintiffs commenced their action on November 3, 1986, in the United States District Court for the District of Oregon. The plaintiffs alleged that they first learned of the misrepresentations in 1985. The district court found that the plaintiffs were on inquiry notice of the violations as early as October 1982, and that there was insufficient evidence of concealment to trigger equitable tolling. After deciding that the most closely analogous state statute of limitations was Oregon's two-year statute of limitations for fraud claims, the district court held that the plaintiffs' claims were untimely and granted summary judgment for the defendants.

The Ninth Circuit agreed with the district court's conclusion.

72. Id. The plaintiffs had purchased the partnership interests for federal tax reasons. When the partnerships failed, the IRS denied the plaintiffs the claimed tax benefits because the partnership assets were overvalued and there was insufficient showing of a profit motive. Id.

73. Id. The plaintiffs alleged that the misrepresentations included assurances by the defendants that the limited partnership investments would bring substantial tax benefits and that the computer products offered for sale were readily marketable and would generate a profit. Id. at 2776-77.

74. Id. at 2776.

75. Id. at 2777. According to the plaintiffs, they received notice of the alleged misrepresentations for the first time when the IRS disallowed the tax benefits claimed. Id.

76. Id. The district court found that the plaintiffs were furnished with periodic reports showing declines in the financial status of the partnerships. In addition, the court determined that the general partners knew of the allegations of misconduct as early as October 1982, and therefore the plaintiffs were on "inquiry notice" as to fraud at that time. Id.

77. Id. The plaintiffs argued that reports provided by the defendants and the installation of a particular individual as the general partner combined to fraudulently conceal from the limited partners the extent of the misrepresentation regarding the tax shelter status of the limited partnerships. Brief for Petitioner in Support of Petition for Writ of Certiorari, app. D at 42A, Lampf, 111 S. Ct. 2773 (1991) (No. 90-333) [hereinafter Petition for Certiorari]. The trial court rejected this argument, noting that in order to toll the statute of limitations through a fraudulent concealment allegation the "plaintiff must demonstrate affirmative conduct on the defendant's part which, under the circumstances, would lead a reasonable person to believe he did not have a claim." Id. at 41A.

78. Lampf, 111 S. Ct. at 2777. The trial court followed circuit precedent in finding the local statute of limitations for fraud to be the most analogous period to apply to federal securities claims. Petition for Certiorari, supra note 77, at 35A; see also Robuck v. Dean Witter & Co., 649 F.2d 641, 643 (9th Cir. 1980).
that Oregon's two-year statute of limitations for fraud was the applicable limitations period for 10b-5 actions. The appellate court reversed, however, finding that there were unresolved factual issues concerning when the plaintiffs were on inquiry notice of the alleged misrepresentations.

The United States Supreme Court reversed. The Court held that the statute of limitations for 10b-5 actions is the one-and-three-year limitations period found in a number of express limitations provisions in other sections of the Securities Act and the Exchange Act. The Court applied the new rule to the litigants in Lampf and dismissed the case because the plaintiffs had not commenced the action within three years of the alleged misrepresentations.

The majority acknowledged that the normal judicial practice was to borrow the limitations period of the most closely analogous local law when a federal statute did not contain an express limitations period. The Court, however, reaffirmed the vitality of the exception to the local borrowing rule that it had announced in Agency Holding. The Lampf Court reiterated the three-step procedure it had announced in Agency Holding for lower courts to

79. Lampf, 111 S. Ct. at 2777. In adopting the Oregon state statute of limitations, the Court of Appeals rejected the plaintiffs' argument that a uniform federal statute of limitations should apply. Id.
80. Id. For the text of the unpublished Ninth Circuit opinion, see Petition for Certiorari, supra note 77, at app. B.
82. Lampf, 111 S. Ct. at 2778. Justice Blackmun wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices Marshall and White. Id. at 2776. Justice Scalia wrote an opinion in which he concurred in all parts of the decision, including the judgment, except for the Court's decision to borrow an analogous federal statute of limitations. Id. at 2783 (Scalia, J., concurring in part, dissenting in part).
83. Lampf, 111 S. Ct. at 2778. For a discussion of the Agency Holding framework as an exception to the local borrowing rule, see supra notes 53-57 and accompanying text.
84. Id. at 2778-79. For a discussion of the Agency Holding framework, see supra notes 53-57 and accompanying text.

Although Justice Scalia concurred, he rejected the Agency Holding framework. In Justice Scalia's opinion, when an express cause of action lacks an express limitations period provided by Congress, then either the local borrowing rule is utilized or, if there are no analogous state statutes from which to derive a limitations period, no limitations period is applied to the cause of action. Id. at 2783 (Scalia, J., concurring in part, dissenting in part).
use in determining the appropriate limitations period for federal claims in situations where Congress did not provide an express limitations period. First, the court must determine if the cause of action requires a uniform statute of limitations. Second, the court considers the risk of forum shopping to determine if the borrowed limitations period should be based on federal or state law. Third, even when this geographical factor weighs in favor of borrowing a federal limitations period, the court must determine whether the federal statute provides a “closer fit” than the applicable state statute of limitations before the court abandons the normal practice of borrowing the state rule. The Lampf Court indicated that each step should be analyzed with the purpose of furthering the goal and operation of the underlying substantive federal law.

After detailing the analytical framework for the normal case, the Court observed that 10b-5 actions are judicially implied and therefore present a distinguishable situation from other federal causes of action that lack an express limitations period. Because the cause of action is implied, it is difficult to ascertain the intent of Congress concerning the appropriate limitations period.

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85. Lampf, 111 S. Ct. at 2778-79.
86. Id. at 2779. The Court stated:
Where a federal cause of action tends in practice to “encompass numerous and diverse topics and subtopics” such that a single state limitations period may not be consistently applied within a jurisdiction, we have concluded that the federal interests in predictability and judicial economy counsel the adoption of one source, or class of sources, for borrowing purposes.

87. Id. (quoting Wilson v. Garcia, 471 U.S. 261, 273 (1985)).

88. Id.

89. Id. The Court noted that when a claim was multistate in nature, thereby increasing the risk of multiple limitations periods, the selection of a federal limitations period was preferable to minimize the dangers of forum shopping and protracted, expensive litigation. Id. (citing Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 154 (1987)).

90. Id.

91. The fictitious search for nonexistent congressional intent in the case of an implied right of action is odd. As noted above, Agency Holding provides a framework for choosing a limitations period in situations where Congress provides an express private right of action but omits a statute of limitations. Gleaning what limitations period Congress would want in such situations makes some sense. Relying on any notion of congressional intent when dealing with an implied private right of action, like a Rule 10b-5 action, borders on the ludicrous. Undaunted by the task, the Lampf Court stated:
Therefore, according to the Court, when the cause of action is implied under a statute and the statute of origin contains other express causes of action with express limitations periods, a court should look first to the statute of origin for an analogous limitations period.92 The Court stated that lower courts should resort to the local borrowing practice in such situations only if there is no analogous cause of action in the statute of origin.93 This holding constituted an important new exception to the traditional borrowing rule but was consistent with recent prior holdings, at least to the extent that it reaffirmed the search for congressional intent.

Applying the new exception to the 10b-5 case before it, the Court noted that the Exchange Act and the Securities Act contain a number of express provisions with a one-and-three-year limitations period.94 Specifically, the Court pointed to the language of sections 9(e)95 and 18(c)96 of the Exchange Act, which deal with the willful manipulation of stock prices and misleading filings, respectively. The Court reasoned that borrowing the limitations period from these provisions was appropriate because these sections "target the precise dangers that are the focus of § 10(b)."97

In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed. Fortunately, however, the drafters of § 10(b) have provided guidance [in other sections of the Securities and Exchange Acts].

Id. at 2780.

92. Id. Although the Court mentioned the factors of the Agency Holding framework that when applied will often lead the court to apply the local borrowing rule, the Court's new exception for implied causes of action essentially created a strong preference for adopting a borrowed federal provision. "We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." Id. Therefore, although the Supreme Court came to the same conclusion as the three circuits that adopted the one-and-three-year limitations period prior to Lampf, the Court's reasoning was significantly different because it created a previously unrecognized exception to the local borrowing doctrine.

93. Id.

94. Id.

95. Section 9(e) of the Exchange Act provides: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(e) (1988).

96. Section 18(c) of the Exchange Act provides: "No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued." 15 U.S.C. § 78r(c) (1988).

97. Lampf, 111 S. Ct. at 2781. The Court noted the similarities of the provisions in that "[e]ach was intended to facilitate a central goal: 'to protect inves-
The Court also took note of the one-and-three-year limitations period contained in section 13 of the Securities Act, which covers actions brought under sections 11 and 12 of the Securities Act. Acknowledging the slight differences in the language of the express limitations provisions in the Securities Act and the Exchange Act, the Court observed that if the variation ever became relevant, the language of section 9(e) of the Exchange Act would control.

The Court rejected the SEC's argument that the five-year period of repose contained in section 20A of the Exchange Act was the most appropriate limitations period. The Court emphasized that section 20A, which accompanied the Insider Trading and Securities Fraud Enforcement Act of 1988 (Insider Trading Act), was enacted fifty years after the other sections of the Exchange Act and the Securities Act. In addition, the Court noted that section 20A dealt only with the specific problems involved in insider trading cases, and therefore did not have as broad a reach as Rule 10b-5. As a result, the Court decided that the provisions of the Exchange Act and the Securities Act containing the one-and-three-year limitations period provided a better analogy for 10b-5 actions.

The Court next addressed the applicability of equitable tollors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on national securities exchanges.  

100. 15 U.S.C. § 78t-l(b)(4) (1988) (added to Exchange Act in 1988). The relevant language of the section provides: "No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." Id.
101. Lampf, 111 S. Ct. at 2781.
102. Id.
103. Id. The Court recognized that § 20A was drafted to deal with the unique problems implicated by insider trading, particularly evidentiary and detection problems. Id. The Court also believed that the drafters of § 20A did not intend it to have application beyond the Insider Trading Act. Id. To support this conclusion, the Court cited § 20A(d), which states that "[n]othing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter." Lampf, 111 S. Ct. at 2781 (quoting 15 U.S.C. § 78t-l(d) (1988)).

104. The Second, Third and Seventh Circuits in adopting the one-and-three-year limitations period also had rejected the SEC's argument that § 20A provided the closest analogy. See Ceres Partners v. GEL Assoc.s, 918 F.2d 349, 363 (2d Cir. 1990); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1392 (7th
The Court found that the doctrine of equitable tolling was "fundamentally inconsistent with the 1-and-3-year structure." Because the one-year period did not begin to run until after the facts constituting the fraud were discovered, equitable tolling was unnecessary with respect to the one-year limit. The Court thought that the application of the doctrine of equitable tolling was inconsistent with the three-year period of repose because the underlying purpose of the three-year rule was to provide an outside limit after which no action could be maintained.

Four Justices dissented. In Justice O'Connor's dissent,
she argued that the new rule should not be applied to the litigants in the *Lampf* case, but that the Court should follow its holding in *Chevron Oil Co. v. Huson*110 and apply the *Lampf* rule prospectively.111 Unswayed by Justice O’Connor’s dissent, the Court applied the new uniform federal statute of limitations to the litigants in *Lampf* and dismissed the case without specifically addressing whether the new rule would be given retroactive or prospective effect in other pending 10b-5 cases. The legal principles governing the decision to adopt a new judicial rule retroactively or prospectively are explored in the next part.

III. CHOICE OF LAW FOR JUDICIAL DECISIONS ANNOUNCING A NEW RULE OF LAW

A. Retroactive or Prospective Application of a New Rule of Law

When a court announces a new rule of law, the court must determine who will be affected by that new law. Of course, all claims arising after the announcement of the new rule of law will be governed by it. When faced with a claim that arose before the date of the new rule of law, the court must decide whether the new law or the old law applies. This question is often referred to as the choice of law for judicial decisions announcing a new rule of law.

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as a choice of law issue. The next section discusses the options available to the courts when making this choice of law determination. The Article then reviews the principal Supreme Court cases on the issue concluding with the Court's recent decision in *Beam*.

1. **Judicial Options for Applying a New Rule of Law**

Retroactive application of a newly announced rule of law is the normal practice. If the new judicial rule is applied retroactively, it is applied to all nonfinal claims, including: the claims made in the case in which the new rule is announced, all pending cases containing the same causes of action at the time of the decision, and claims arising from facts predating the announce-

112. *See* James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991) ("Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law."). In *Beam*, Justice Souter identified three methods of dealing with a choice of law issue; retroactivity, prospectivity and selective prospectivity. *Id.* at 2443-44. Other authorities have recognized additional possible options. For example, the court may choose prospective-prospective application of a new decision where the court announces a new rule of law in a particular case but grants a time delay between that case and the time when application of the new rule of law begins. *See* Cameron S. DeLong, *Note, Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions, 1985 U. Ill. L. Rev. 117, 127*; *Note, Prospective-Prospective Overruling, 51 Minn. L. Rev. 79, 81* (1966).

113. *See* DeLong, *Note, supra* note 112, at 119, 125. The decision to apply a new rule retroactively comports with a number of generally accepted theories about the judiciary's proper function in our legal system. First, retroactivity requires courts to decide all cases based upon the court's current understanding of the law as it exists at the time of the decision. *See* *Beam*, 111 S. Ct. at 2443; Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring); DeLong, *Note, supra* note 112, at 119. In *Beam*, Justice Souter relied on Justice Harlan's opinion in *Mackey*. *Beam*, 111 S. Ct. at 2443. Second, retroactive application of a new law is consistent with the courts' established role of interpreting the law, and not assuming the legislative role of making law. *Id.* (noting that declaratory theory of law means that judges do not make law, rather they find law as it always was). Justice Harlan noted that the power of the Court to "disregard current law in adjudicating cases before [the Court] that have not already run the full course of appellate review, is quite simply an assertion that [the Court's] constitutional function is not one of adjudication but in effect of legislation." *Mackey*, 401 U.S. at 679 (Harlan, J., concurring). In other words, when a change in the law is announced, theoretically, the changed law was actually the law as it always was, and therefore was the law that applied to claims which arose prior to the announcement of a change in the law. Finally, retroactive application arguably treats all similarly situated individuals equally. *See* *Beam*, 111 S. Ct. at 2444 (noting that when court practices selective prospectivity, court breaches principle that all litigants are to be treated equally).

114. *Beam*, 111 S. Ct. at 2443.

115. *See, e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987) ("The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision."); Vandenberg v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941) (holding that in diversity case in which there was inter-
ment of the new rule.\textsuperscript{116} Retroactive application of a judicial change in the law does not, however, revive either claims barred by res judicata or claims otherwise barred by a procedural barrier such as a statute of limitations.\textsuperscript{117}

Instead of giving a new pronouncement retroactive effect, the court could give the new rule purely prospective effect. In such a case, the new rule applies only to claims arising after the date of the decision.\textsuperscript{118} The new rule does not apply to the litigants in

vening judicial change in law, appellate court must decide case based on current state of law, not law as it was when lower court decided case); Patterson v. Alabama, 294 U.S. 600, 607 (1935) (vacating lower court's judgment and remanding because law on which lower court had relied was changed by subsequent decision); United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."); cf. Thorpe v. Housing Auth., 393 U.S. 268, 281-82 (1969). In Thorpe, the Court recognized the general rule that "an appellate court must apply the law in effect at the time it renders its decision." \textit{Id.} at 281. The Court went on to state that the "same reasoning has been applied where the change was constitutional, statutory, or judicial." \textit{Id.} at 282 (footnotes omitted).

\textsuperscript{116} See DeLong, Note, supra note 112, at 125 ("[A] new rule is applied retroactively when all conduct open to some form of judicial review is subject to the new rule.").

\textsuperscript{117} \textit{Beam}, 111 S. Ct. at 2443; see also Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981) ("Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375 (1940) (holding that final decree based on statute later found unconstitutional was not to be overturned because decision was final and relitigation was barred by res judicata).

The exception to retroactive application arises from the policy of protecting the finality of litigation. \textit{Beam}, 111 S. Ct. at 2447. In \textit{Beam}, the Court expressed that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties." \textit{Id.} (quoting \textit{Federated Dep't Stores}, 452 U.S. at 401); see also American Trucking Ass'n, Inc. v. Smith, 496 U.S. 167, 212 (1990) (Stevens, J., dissenting) ("When the legal rights of parties have been finally determined, principles of public policy and of private peace dictate that the matter not be open to relitigation every time there is a change in the law.") (quoting \textit{Federated Dep't Stores}, 452 U.S. at 401)).

\textsuperscript{118} See \textit{Beam}, 111 S. Ct. at 2443 (stating that under pure prospective application, new rule affects only conduct or events occurring after date of decision); \textit{Smith}, 496 U.S. at 187 (holding that prospective application of decision declaring flat highway tax unconstitutional meant that new rule applied to taxation which occurred after case in which new rule of law announced); DeLong, Note, supra note 112, at 126 ("Pure prospective overruling occurs when a new rule governs only claims arising after the court's decision." (footnotes omitted)); Comment, \textit{Prospective Application of Judicial Decisions}, 33 ALA. L. REV. 463, 470 (1982) (observing that pure prospective ruling does not apply to parties before court or to facts or transactions that occurred prior to ruling).
the case announcing the new rule of law, nor to any similarly situated litigants whose claims arose before the decision. This choice of law method recognizes that people rely on precedent and that, in some circumstances, it is unfair to apply a change in the law to people whose actions or inactions were shaped by the law existing at the time those events occurred. Although critics object to purely prospective application of new judicial rules on both constitutional and policy grounds, courts have applied both criminal and civil rules prospectively.

Occasionally, courts engage in selective or modified prospective rulings. Throughout this Article, the term "prospective" means purely prospective unless the context clearly indicates otherwise.

One of the primary criticisms of prospective adjudication is that the court does not fulfill its adjudicatory function by giving a law pure prospective effect, because such an approach is more consistent with the legislative role of making the law rather than the judicial role of interpreting the law. The Court recently observed that prospective application of a new law does violence to the doctrine of stare decisis by making it too easy for the courts to make new law. Id.; see also Comment, supra note 118, at 471 (stating that critics have labeled prospective technique as "judicial legislation").

Another major concern with respect to pure prospective rulings is that when a court adjudicates in this way, a court exceeds the power granted through Article III of the United States Constitution that gives courts the authority to decide "cases and controversies." U.S. Const. art. III, § 2. Arguably, when a court does not apply the law to the litigants in the case in which the law is announced, a court is not deciding a case or controversy and therefore the rule of law announced is technically dicta or merely an advisory opinion. See Comment, supra note 118, at 471. Prospective application also contravenes the principle that courts must decide cases based on their best current understanding of the law. Id. Critics also claim that pure prospectivity is a disincentive for litigants to argue for a change in the law. This assertion is based on the belief that a litigant will not expend resources to argue for the adoption of a new rule of law if that litigant will not benefit from the new law. Id.

Although not presently used, the Supreme Court has utilized pure prospectivity in the civil sphere. See Smith, 496 U.S. at 187 (declaring that decision invalidating state highway use tax would not be applied retroactively); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982) (concluding that prior decision granting broad jurisdiction to bankruptcy courts under 28 U.S.C. § 1471 was unconstitutional and should not be applied retroactively); Lemon v. Kurtzman, 411 U.S. 192, 207-09 (1973) (declining to retroactively apply prior decision that declared state statute unconstitutional, thereby allowing reimbursement to nonpublic sectarian schools for services performed prior to ruling); Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (holding decision requiring adoption of state's one-year statute of limitations should not be applied retroactively); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422-23 (1964) (refusing to apply prior holding that when claim is brought in state court and fully adjudicated, claim is precluded in federal court). The Court has also applied pure prospectivity in criminal cases. See, e.g., Linkletter v. Walker, 381 U.S. 618, 639-40 (1965) (holding that Court's
Selective prospectivity occurs when the court applies the new rule to some, but not all, of the nonfinal claims that arose before the date of the decision announcing the new rule. Selective prospectivity arose in response to the perceived constitutional problems of purely prospective adjudication. The reliance of some but not all litigants on the old rule is the primary justification for applying a new rule in a selectively prospective manner. Those litigants who relied on the old rule ought to have their actions judged in accordance with that rule and those litigants who did not rely on the old rule ought to have no claim that the old rule should govern their case. By applying the new rule to the litigants in some cases, typically at least in the case in which the new law is announced, the courts eliminated the criticism that pure prospectivity permitted the courts to render advisory opinions in contravention of Article III’s “case or controversy” requirement.

2. The Chevron Oil Test

At the time Lampf was decided, courts were using the test developed by the Supreme Court in *Chevron Oil Co. v. Huson* to decide whether a new judicially announced rule of law should be given retroactive or prospective application in civil cases. In *Chevron Oil* the issue was whether the Supreme Court would retroactively apply a new rule of law it had announced in an earlier decision to determine the relevant statute of limitations applicable to the *Chevron Oil* litigants.

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122. See, e.g., Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (holding that new rule announced in *Taylor v. Louisiana*, 419 U.S. 522 (1975), which was applied to party in *Taylor*, would not be applied retroactively to appellants whose convictions occurred prior to date of *Taylor* holding); Stovall v. Denno, 388 U.S. 293, 296 (1967) (holding that new rule of law announced in *United States v. Wade*, 388 U.S. 218 (1967), which was applied to party in *Wade*, would not be applied retroactively); Johnson v. New Jersey, 384 U.S. 719, 721 (1966) (holding that decisions in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), should be applied retroactively only to cases in which trial was commenced after dates of those decisions). Selective prospectivity has been referred to as quasi-prospectivity by some commentators. See, e.g., DeLong, Note, supra note 112, at 127-28.


124. Id. at 128.


126. Id. at 105. In the earlier decision, the Court announced that all cases arising under the Outer Continental Shelf Lands Act (Lands Act) would not be governed by general admiralty law as prior cases had held, but would be gov-
The *Chevron Oil* Court developed a three-factor test to determine whether a new rule of law should be given prospective effect. First, a court considers whether the rule at issue in fact establishes a new principle of law or overturns clear past precedent.127 The announcement of a new rule is a necessary but not a sufficient condition for the prospective application of this rule. Second, a court evaluates the prior history of the rule to determine whether retroactive application will enhance or diminish the rule’s effectiveness.128 Third, a court evaluates whether retroactive application of the new rule “could produce substantial inequitable results” that weigh in favor of applying the new rule prospectively.129 Applying this three-factor test to the facts in *Chevron Oil*, the Court held that the new rule of law at issue should be applied prospectively.130

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3. Application of Chevron Oil in Civil Cases

For two decades following the *Chevron Oil* decision, the Court applied the *Chevron Oil* test when determining whether a judicially announced rule would be applied prospectively or retroactively.\(^{131}\) In 1990, the Supreme Court revisited the issue of the prospective application of the new rule, and that the equities favored prospective application because Huson had not "slept on his rights." *Id.* at 108.

131. For example, in *Saint Francis College v. Al-Khazraji*, the Supreme Court affirmed the Third Circuit's decision to prospectively apply a new rule governing statutes of limitations for 28 U.S.C. § 1981 actions. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). The background of the *Saint Francis College* case is somewhat complex. In the 1985 case of *Wilson v. Garcia*, 471 U.S. 261, 276 (1985), the Supreme Court decided that when choosing a statute of limitations for § 1983 actions the courts must borrow the state limitations period applicable to personal injury torts. The same year, the Third Circuit held that the Supreme Court's decision in *Wilson* should apply to § 1983 actions the courts must borrow the state limitations period applicable to personal injury torts. The same year, the Third Circuit held that the Supreme Court's decision in *Wilson* should apply to § 1983 actions as well, and therefore held that Pennsylvania's two-year statute of limitations would govern § 1981 actions. *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987). The *Goodman* court noted that before the Supreme Court decision in *Wilson*, the precedent in the Third Circuit was firmly established that a plaintiff had six years to bring a § 1981 action. *Id.* at 118 (observing that prior to *Wilson* decision, actions involving employment discrimination claims were viewed as more akin to contract actions, and therefore most analogous limitations period was state six-year contract limitations period); see, e.g., *Davis v. United States Steel Supply*, 581 F.2d 335, 341 (3d Cir. 1978) (applying state six-year statute of limitations to § 1981 employment discrimination claim).

In *Saint Francis College*, the plaintiff initiated his § 1981 claim prior to the *Wilson* and *Goodman* decisions. *See Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 513 (3d Cir. 1986), aff'd, 481 U.S. 604 (1987). The Third Circuit applied the *Chevron Oil* test to determine whether or not the *Goodman* decision should be given retroactive effect as to the applicable statute of limitations. *Id.* at 512-14. The Third Circuit decided that *Goodman* should be applied prospectively under the *Chevron Oil* test, particularly because *Goodman* overruled established circuit precedent and because retroactive application would be inequitable to the plaintiff. *Id.* The Supreme Court upheld the Third Circuit's decision not to apply the *Goodman* decision retroactively. *Saint Francis College*, 481 U.S. at 609 ("We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior cases. Nor has petitioner persuaded us that there was any error in the application of *Chevron* in the circumstances existing in this case.").

The new rule governing § 1981 statute of limitations periods had been announced by the Third Circuit in *Goodman v. Lukens Steel Co.* *See Goodman v. Lukens Steel Co.*, 777 F.2d 113, 120 (3d Cir. 1985), aff'd, 482 U.S. 656 (1987). The Supreme Court upheld the retroactive application of the new statute of limitations to the litigants of that case. *Goodman*, 482 U.S. 656, 662-63 (1987). The Court noted that it was only after Goodman filed his suit, but before the Supreme Court's decision in *Wilson*, that the Third Circuit decided a solid line of cases holding that the appropriate statute of limitations was six years. *Id.* Consequently, the Supreme Court held that Goodman could not have relied on the six-year statute of limitations and, therefore, *Chevron Oil* did not require prospective application of the rule in Goodman's case. *Id.*

Despite upholding the retroactive application of the statute of limitations in *Goodman*, the Supreme Court upheld the prospective application of the same statute of limitations to the litigants in *Saint Francis College*. At least on its face, it appears that the Court was applying selective prospectivity. The cases may be
civil retroactivity doctrine in American Trucking Ass'ns, Inc. v. Smith. The case produced no majority opinion, underscoring the metamorphosis of some of the Justices' views and the serious division among them with respect to the Chevron Oil test. In fact, this decision was a harbinger of the end of the Court's solid backing of the Chevron Oil decision.

In Smith, the plaintiffs brought suit in the Arkansas state courts in 1983, challenging the constitutionality of a state highway tax on Commerce Clause grounds. In a previous decision in American Trucking Ass'ns, Inc. v. Scheiner, the Supreme Court had declared a similar Pennsylvania tax to be unconstitutional. The Arkansas Supreme Court found the Arkansas highway tax unconstitutional in light of Scheiner, but held that a refund of all the taxes paid by the plaintiffs was required only if the Scheiner decision was retroactively applied. After considering the

consistent with the notion of pure prospectivity or retroactivity however, because in Goodman, there was no "new rule" because essentially there was no settled old rule. In both cases, the Supreme Court approved the Third Circuit's application of the Chevron Oil test.


133. Id. at 171. The plaintiffs alleged that the tax imposed by the Arkansas Highway Use Equalization Tax Law (HUE), unconstitutionally favored in-state truckers by placing a heavier tax burden on out-of-state truckers. Id. at 172; see also Ark. Code Ann. § 27-35-205 (Michie 1987) (repealed 1991). The Arkansas Supreme Court denied the petitioner's claims on the merits and held that the HUE tax was constitutional. American Trucking Ass'ns, Inc. v. Gray, 707 S.W.2d 759, 761-64 (Ark. 1986) (rejecting Commerce Clause, Equal Protection, and Privileges and Immunities challenges to HUE tax), vacated, 483 U.S. 1014 (1987). The petitioners appealed to the Supreme Court, which held the case in abeyance pending determination of the constitutionality of a similar Pennsylvania HUE tax in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987).


135. After the Scheiner decision, the plaintiffs in Smith moved to enjoin further collection of the Arkansas HUE tax, or in the alternative, to establish an escrow for the payment of the taxes pending the Arkansas Supreme Court's re-determination of the constitutionality of the HUE tax. Smith, 496 U.S. at 173. Denied relief by the Arkansas courts, the motion to enjoin or establish an escrow was appealed to Justice Blackmun, acting as Circuit Justice. American Trucking Ass'ns, Inc. v. Gray, 483 U.S. 1306, 1307-08 (Blackmun, Circuit Justice 1987). Justice Blackmun ordered the HUE taxes to be escrowed until the Arkansas Supreme Court reached a decision on the merits. Id. at 1310. Justice Blackmun concluded that there was "a significant possibility that the Arkansas courts will declare the HUE tax unconstitutional . . . [or,] [i]f they fail to do so, I believe that there is a significant possibility that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction and [the Supreme Court] will reverse the decision." Id. at 1309.

ron Oil factors, the Arkansas court determined that Scheiner should be applied prospectively.\textsuperscript{137}

On appeal to the United States Supreme Court, Justice O'Connor delivered the plurality opinion of the Court.\textsuperscript{138} She narrowly defined the issue before the Court as whether the Arkansas Supreme Court had properly applied the Chevron Oil test in determining that Scheiner would be applied prospectively.\textsuperscript{139} The plurality concluded that the Arkansas Supreme Court had correctly applied the Chevron Oil test.\textsuperscript{140}

\textsuperscript{137} Id. at 378-79. Applying the first Chevron Oil factor, the court indicated that it was reasonable for the court to have relied on prior interpretations of the constitutional reach of the Commerce Clause, and that such interpretations could be characterized as clear past precedent. Id. at 378. Second, the court stated that prospective application of the Scheiner decision would help achieve the goal of free trade among the states under the Commerce Clause. Id. at 379. Finally, under the third Chevron Oil factor, the court found that the "equities favor[ed] disallowing refund of the tax money already paid into the state treasury." Id. As a result of this analysis, the court decided that taxes paid before Justice Blackmun's escrow order would not be refunded, but taxes paid into escrow after the August 14, 1987 escrow order would be refunded. Id.


\textsuperscript{139} Id. at 178. Justice O'Connor distinguished the case before the Court in Smith from the remedial issues faced by the Court in McKesson Corp. v. Division of Alcoholic Beverages \& Tobacco, 496 U.S. 18 (1990). Smith, 496 U.S. at 178. The distinction relates to the question of whether the issue before the Court was one in which it was required to decide the retroactive or prospective application of a new rule of law or whether the issue was what impact retroactive or prospective application had on remedial issues. In McKesson, the Court held that when a party is taxed pursuant to a law that was unconstitutional under existing precedent, then federal law requires that certain minimum relief be given to that party. McKesson, 496 U.S. at 22. Justice O'Connor noted that the Smith Court was not yet at the stage of McKesson because the Court was not deciding a remedial issue as in McKesson, but instead was deciding whether the Arkansas court properly applied the Chevron Oil factors to the tax refund issue. Smith, 496 U.S. at 178-79. Because the Smith Court ultimately found that the Arkansas Supreme Court had misapplied the Chevron Oil factors, the case was remanded so that the state court could decide the remedial issues. Id. at 179.

\textsuperscript{140} Smith, 496 U.S. at 179-86. As an initial matter, Justice O'Connor held that when the issue before the Court involved a determination of the retroactive or prospective application of a constitutional decision (as was present in Smith), such determination was a matter of federal law. Id. at 177. Therefore, the issue in Smith presented a federal question—whether the Arkansas Supreme Court properly applied the Scheiner decision prospectively. Id. at 178. After performing a Chevron Oil analysis, Justice O'Connor agreed that the Scheiner decision was properly prospectively applied only to HUE taxes assessed after June 23, 1987, the date of the Scheiner decision. Id. at 179-83.

Of particular importance, the Court found that the Scheiner decision did not apply to taxes paid prior to June 23, 1987, the date of the Scheiner decision, but that principles of retroactivity required that once the Scheiner decision was given prospective application, it applied to all HUE taxes assessed from the date of the Scheiner decision onward, regardless of when the taxes were actually collected. Id. at 187. Therefore, the Court determined that the Arkansas court misapplied the principles of retroactivity when it refunded only the taxes paid into the es-
Justice Scalia concurred. Although he did not rely on the test for prospective overruling established in *Chevron Oil*, he avoided applying *Scheiner* retroactively by relying on the principle of stare decisis. Justice Scalia agreed with the dissent, however, that courts exceed their powers when they overrule precedent prospectively.

Justice Stevens dissented in an opinion joined by Justices

crow account mandated by Justice Blackmun. *Id.* at 186-87. This misapplication occurred because all taxes assessed after June 23, 1987, not just the taxes paid into the escrow fund, were subject to the prospective application of the *Scheiner* decision. *Id.* at 187.

141. *Id.* at 200 (Scalia, J., concurring).

142. *Id.* at 204-05 (Scalia, J., concurring). Justice Scalia disagreed with both the *Scheiner* decision and "the so-called 'negative' Commerce Clause jurisprudence." *Id.* at 202 (Scalia, J., concurring). Justice Scalia thought that the modern jurisprudential interpretation of the Commerce Clause was judicially unsound and beyond the courts' powers. *Id.* (Scalia, J., concurring); see also Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting in part). Justice Scalia contended that the negative use of the Commerce Clause by courts was improper because the Commerce Clause is "nothing more than a grant of power to Congress." *Smith*, 496 U.S. at 202 (Scalia, J., concurring). Thus, Justice Scalia thought that the power of the courts in Commerce Clause cases was limited to deciding whether a state law conflicts with a congressional rule of law issued pursuant to the power created in Congress to regulate trade under the Commerce Clause. *Id.* (Scalia, J., concurring).

According to Justice Scalia, when a court utilizes the theory of the negative Commerce Clause, the court is not interpreting the Constitution, but is instead implying law from congressional silence. *Id.* (Scalia, J., concurring). The court, therefore, acts as a legislature, asking what a "reasonable federal regulator of commerce" would intend. *Id.* at 203 (Scalia, J., concurring). Justice Scalia noting that this judicial activism has resulted in laws that are constantly in flux, stated that "[t]he 'negative' Commerce Clause is inherently unpredictable—unpredictable not just because we have applied its standards poorly or inconsistently, but because it requires us and the lower courts to accommodate, like a legislature, the inevitably shifting variables of a national economy." *Id.* (Scalia, J., concurring). According to Justice Scalia, the constant change surrounding "negative" Commerce Clause jurisprudence continually upsets the expectations of litigants. Therefore, he believes that it would be contrary to stare decisis to apply a law-changing decision to transactions and occurrences that had taken place under the old law. *Id.* at 204 (Scalia, J., concurring).

Out of respect for stare decisis, Justice Scalia found the post-*Scheiner* taxation in *Smith* unconstitutional. *Id.* (Scalia, J., concurring). Because, in Justice Scalia's view, the courts are not interpreting the Constitution when applying the Commerce Clause but are implying the intention of Congress, he did not feel compelled to find that taxes imposed prior to *Scheiner* were unconstitutional. Instead, Justice Scalia thought that, because he had dissented in *Scheiner*, he was obligated to "persist in that position (at least where his vote [was] necessary to the disposition of the case) with respect to action taken before the overruling occurred." *Id.* at 205 (Scalia, J., concurring). Therefore, he retained his opinion that flat taxes do not violate the Constitution concerning transactions prior to the *Scheiner* decision.

143. *Smith*, 496 U.S. at 201 (Scalia, J., concurring).
Brennan, Marshall and Blackmun.\textsuperscript{144} In Justice Stevens' opinion, because the courts had never recognized prospective application of a new rule of law, the plurality incorrectly interpreted \textit{Chevron Oil} when the plurality determined that the new rule in \textit{Scheiner} would be applied prospectively.\textsuperscript{145} Justice Stevens distinguished \textit{Chevron Oil} and other cases in which the Court applied the \textit{Chevron Oil} test on the ground that those cases dealt with remedial issues, not choice of law issues.\textsuperscript{146} He characterized the statute of limitations issue in \textit{Chevron Oil} as remedial because of the equitable discretion traditionally exercised by courts over statutes of limitation issues.\textsuperscript{147} Justice Stevens contrasted this situation to cases in which the federal courts had no equitable discretion and thus "no authority to refuse to apply a law retroactively."\textsuperscript{148}

\textsuperscript{144} Id. at 205 (Stevens, J., dissenting). In Justice Stevens' opinion, two issues were before the Court: whether the HUE tax was unconstitutional and, if so, whether the state was obligated to grant a refund. \textit{Id.} (Stevens, J., dissenting). Justice Stevens thought that determining the appropriate relief if the tax was unconstitutional was a mixed question of federal and state law to be determined in the first instance by the state court. \textit{Id.} at 205-06 (Stevens, J., dissenting). Concerning the issue of whether the HUE tax was unconstitutional, Justice Stevens believed that it was a matter of pure federal law, whose determination "should be applied uniformly throughout the Nation." \textit{Id.} at 205 (Stevens, J., dissenting).

\textsuperscript{145} Id. at 219-20 (Stevens, J., dissenting). Justice Stevens thought the Arkansas HUE tax was unconstitutional in light of \textit{Scheiner}. \textit{Id.} at 211-12 (Stevens, J., dissenting). He concluded that \textit{Scheiner} should have been applied retroactively to all litigants, including those in \textit{Smith}, based on "[f]undamental notions of fairness and legal process." \textit{Id.} at 212 (Stevens, J., dissenting). There is some evidence that Justice Stevens intended to limit retroactivity to cases that involved constitutional issues. First, he relied on Griffith v. Kentucky, 479 U.S. 314 (1987), for the proposition that the same considerations in criminal law that require retroactive application of a decision of law also apply to civil law. \textit{Smith}, 496 U.S. at 213-14 (Stevens, J., dissenting). \textit{Griffith} involved a constitutional issue (Equal Protection violation in use of preemptory challenges) and \textit{Smith} also involved a constitutional issue (Commerce Clause violation through taxation of interstate commerce). According to Justice Stevens, the Constitution may therefore require that cases be decided on the court's current understanding of the law and that all similarly situated litigants should be treated equally. \textit{Id.} at 214 (Stevens, J., dissenting).

\textsuperscript{146} \textit{Smith}, 496 U.S. at 214 (Stevens, J., dissenting).

\textsuperscript{147} \textit{Id.} at 221 (Stevens, J., dissenting). This equitable discretion manifested itself in the development of the doctrines of tolling, laches and waiver. \textit{Id.} (Stevens, J., dissenting). It should be noted that these equitable doctrines have not been applied to substantive statutes of repose once the absolute limit in which to bring suit has expired. If the federal courts do not have equitable discretion in the execution of statutes of repose, then the reasoning adopted by Justice Stevens would indicate that a federal court would be required to apply a statute of repose retroactively.

\textsuperscript{148} \textit{Id.} at 222 (Stevens, J., dissenting). In Justice Stevens' opinion, the Court had not previously been required to distinguish between the remedial determination and the choice of law determination because the prior cases were federal cases that required the application of federal law and federal remedies.
The plurality disagreed with Justice Stevens' characterization of the Court's civil retroactivity doctrine as limited to remedial issues. Instead, the plurality perceived the Court's *Chevron Oil* test as the means to decide whether any new rule would be given retroactive or prospective application. The schism in the Court on choice of law issues set the stage for the *Beam* case.

**B. The Beam Decision**

The Supreme Court revisited the issue of selective prospectivity in *James B. Beam Distilling Co. v. Georgia*, which was decided on the same day as *Lampf*. The issue in *Beam* was whether the Court's earlier decision in *Bacchus Imports, Ltd. v. Dias* applied retroactively and permitted the petitioner to claim a refund for taxes imposed before the *Bacchus* decision. In *Bacchus*, the Court considered a Hawaiian tax that levied a higher tax on imported alcohol products than on domestic alcohol products and found the tax unconstitutional under the Commerce Clause.

In *Beam*, the plaintiff sought a refund of taxes levied under a Georgia statute that was virtually identical to the Hawaiian statute in *Bacchus*. The Georgia Supreme Court affirmed the trial court's decision that the Georgia tax violated the Commerce Clause because, like the tax in *Bacchus*, the Georgia tax discrimi-

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Id. (Stevens, J., dissenting). In *Smith*, however, Justice Stevens noted that the remedial issue needed to be separated from the substantive law issue because the remedial issue required an initial state court determination. Id. at 206 (Stevens, J., dissenting).

149. Id. at 188-89, 195-96.

150. Id. at 196. In support of this proposition, Justice O'Connor noted that in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court held that due process required that some minimal relief be given to a litigant who paid taxes under an unconstitutional tax scheme. *Smith*, 496 U.S. at 181; see also *McKesson*, 496 U.S. at 36-43. According to Justice O'Connor, if *Chevron Oil* was characterized as remedial, then *Chevron Oil* would essentially be useless because after *McKesson*, due process, not equitable considerations, would normally dictate the relief to which a party is entitled. *Smith*, 496 U.S. at 194.

The plurality also rejected the contention that the Court's criminal retroactivity doctrine applied with equal force to civil law. Id. at 197-99. Finally, the plurality did not think that Article III compelled retroactive application of a judicially announced new rule of law. Id. at 200.


155. *Beam*, 111 S. Ct. at 2442.
nated between imported and domestic spirits. Nonetheless, the Georgia court held that the Bacchus ruling would be given prospective application under the Chevron Oil test, and therefore the Court denied Beam's request for a refund of the taxes paid before Bacchus.

Although the Beam case generated five separate opinions, a majority of the Court held that when a court announces a new federal rule of law and applies it to the litigants in the case, the court must also apply this rule retroactively to all litigants whose claims arose from facts predating the pronouncement of the new rule. The majority also agreed that the case-by-case approach of Chevron Oil could no longer be tolerated, and rejected selective prospectivity. The majority, however, could not agree on the reasoning for the judgment, and three Justices dissented.

Justice Souter, along with Justice Stevens, delivered the judgment of the Court. Justice Souter assumed that the Court followed the normal procedure and retroactively applied the new rule announced in Bacchus to the litigants in Bacchus. According to Justice Souter, because the new rule of law had been applied to the litigants in Bacchus, principles of equality and stare decisis required that the rule of law also apply retroactively to all similarly situated litigants whose claims were not procedurally barred or precluded by res judicata. Thus, the Bacchus rule had to apply retroactively to all claims pending at the time of the Bacchus decision, or arising from facts predating Bacchus, including the tax imposed by Georgia in Beam.


157. Id. at 96-97. Applying the Chevron Oil test, the Georgia Supreme Court found that: (1) the state relied on state court findings and on its ability to collect taxes under the tax statute, therefore the decision at issue could be considered a new rule of law; (2) the second Chevron Oil element was not applicable because the statute at issue was repealed; and (3) under a balance of the equities, any refund of prior years' taxes could be an economic windfall to the corporate taxpayers and a severe financial burden on Georgia. Id.

158. Beam, 111 S. Ct. at 2446, 2448, 2450.

159. Id. at 2444-45.

160. Id. at 2441.

161. Id. at 2445.

162. Id. at 2445-48.

163. Id. at 2448.
of parties who had relied on the old rule. In such cases, the Chevron Oil analysis was no longer available to apply a new rule prospectively to protect litigants who had relied on the previously existing law. To this extent, Justice Souter's decision implicitly overruled Chevron Oil.

Justice Souter's opinion, however, did not explicitly overrule Chevron Oil. Justice Souter emphasized that the rule he announced in Beam was narrow and dealt only with choice of law issues. He contrasted choice of law issues with remedial issues. According to Justice Souter, after a court determines

164. Id. at 2446-47.
165. Id. at 2447. The Court stated:
Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.

Id. at 2447-48 (citations omitted).
166. Id. at 2448.
167. Id. at 2443. A careful reading of Beam reveals that the roles of retroactivity and prospectivity in the context of remedial issues were left unresolved:

The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law . . . . We do not speculate as to the bounds or propriety of pure prospectivity.

Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court . . . . Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided . . . .

Id. at 2448. Specifically, Beam indicated that even after a determination was made as to the retroactive or prospective effect of a ruling, a remedial issue involving additional constitutional, equitable or state law considerations may persist. Id.

The Court had previously provided guidance regarding these considerations for courts confronted with retroactivity questions involving remedial issues. For example, in McKesson, the Court held that compliance with constitutional due process required Florida to provide a clear and certain remedy of post-payment refund of taxes paid pursuant to an unconstitutional and discriminatory liquor tax scheme. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 40 (1990). In McKesson, two distinct equitable considerations were raised by the Florida Supreme Court in determining the appropriate remedy. First, the court observed that the preferential tax scheme was implemented in good faith in reliance on a presumptively valid statute. Id.
whether the changed law applies retroactively (the choice of law determination), a court then decides which remedial principles will control. The choice of law is a federal question when the

at 44. Thus, imposing the obligation to refund taxes collected pursuant to what was later adjudicated to be an unconstitutional tax would “undermine the State’s ability to engage in sound fiscal planning.” Id. Second, the court suggested that, if given a refund, the petitioner would receive an unfair windfall because the cost of the tax most likely was passed on to customers and suppliers, and was not borne by petitioner. Id. at 46. On appeal, the United States Supreme Court concluded that neither equitable consideration was sufficient to justify the refusal to provide retroactive relief. Id. at 47-49.

*Bacchus Imports, Ltd. v. Dias* provides an example of a case in which state law considerations influenced the available remedies. In *Bacchus*, the Court stated: “These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).

In *Beam*, the Court stated:

Once a rule is found to apply [retroactively], there may then be a further issue of remedies, . . . whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to constitutional thresholds, the remedial inquiry is one governed by state law, at least where the case originates in state court.

*Beam*, 111 S. Ct. at 2443 (citations omitted). The *Beam* Court also noted that “any consideration of remedial issues necessarily implies that the precedential question [of retroactive application] has been settled to the effect that the rule of law will apply to the parties before the Court.” Id. at 2445.

Justice Souter intimated in his opinion that *Chevron Oil* is best understood as a decision involving remedial, not choice of law concerns. *See id.* at 2443-44 (noting that Court had applied decisions purely prospectively in *Chevron Oil* and other cases but that “it has never been required to distinguish the remedial from the choice-of-law aspect of its decision”). Moreover, Justice Souter stated that “[b]oth parties have assumed the applicability of the *Chevron Oil* test, under which the Court has accepted prospectivity (whether in the choice-of-law or remedial sense, it is not clear).” Id. at 2445. However, Justice Souter went on to state that “our decision [in *Beam*] does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case.” Id. at 2447. Justice Souter’s observations are consistent with the views expressed by Justice Stevens in *Smith*; that *Chevron Oil* is best seen as a case dealing with a remedial statute of limitations issue. American Trucking Ass’ns, Inc. v. Smith, 496 U.S. 167, 219-20 (1990) (Stevens, J., dissenting). For a discussion of Justice Stevens’ views in *Smith*, see supra notes 144-48 and accompanying text.

If the *Lampf* limitations period is characterized as procedural or remedial, then the treatment of the limitations issue would be made part of the remedial inquiry, distinct from an initial determination of retroactivity or prospectivity. Consequently, if the uniform federal limitations period enunciated in *Lampf* can be characterized as remedial, then *Beam* may not mandate the retroactive application of that limitations period. No court has yet faced or acknowledged this possibility. Rather, all courts have uniformly held that *Beam* is applicable to *Lampf*. If limitations periods are remedial and *Beam* does not apply, then § 27A, which was intended to undo the retroactive application of the *Lampf* limitations period, would be rendered unnecessary.

rule in question "derives from federal law." In Justice Souter's view, once the determination of retroactivity or prospectivity is made in the case in which the rule is promulgated, later courts may not perform a *Chevron Oil* analysis to determine if the law applies retroactively or prospectively, regardless of the equities of that particular action. Although Justice Souter declined to speculate on the "propriety of pure prospectivity," it would seem that after *Beam*, the only time a *Chevron Oil* analysis is relevant is either when the court confronts remedial issues or in the case in which the court adopts the new rule of law. Although Justice Souter's opinion is unclear, his reliance on the principles of equality and stare decisis seems predicated on jurisprudential principles and not constitutional mandates.

Justice White concurred in the judgment and agreed with Justice Souter that *Bacchus* should apply to the litigants in *Beam* because the changed law had been applied to the litigants in *Bacchus*. He observed that there is "no precedent in civil cases [for] applying a new rule to the parties in the case in which the rule is first announced but not to others similarly situated." Justice White noted that *Griffith v. Kentucky* prohibited the use of selective prospectivity in criminal cases. Even though he dissented in *Griffith* and might be inclined to decide *Beam* differently, Justice White believed he was bound by *Griffith* on stare decisis grounds.

Justice Blackmun concurred, in an opinion joined by Justices Scalia and Marshall, because he thought that both pure and sele-

169. *Id.*

170. *Id.* at 2447-48. Justice Souter stated that "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application." *Id.*

171. *Id.* at 2443-45; see also *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 344 (1991) (observing that "[t]he choice between retroactivity and prospectivity in a particular case depends on how the rule in question was applied when first announced or, in the case announcing the rule, on consideration of the *Chevron Oil* factors").

172. For a discussion of whether *Beam* is a constitutionally based decision, see infra notes 394-404 and accompanying text.


175. *Beam*, 111 S. Ct. at 2448-49 (White, J., concurring).

176. *Id.* at 2449 (White, J., concurring); see also *Griffith*, 479 U.S. at 329 (White, J., dissenting).

177. *Beam*, 111 S. Ct. at 2449 (White, J., concurring). Justice White wrote separately to rebut Justice Souter's implication that the issue of pure prospectivity was an open one. Justice White emphasized that Supreme Court precedent supported the propriety of pure prospectivity. *Id.* (White, J., concurring).
just as the judiciary's constitutional power.178 Justice Blackmun adopted the Court's reasoning in Griffith and rejected the use of selective or pure prospectivity in civil actions for three reasons.179 First, prospective decision-making violates the case or controversy requirement of Article III of the Constitution.180 Second, prospective application of judicial decisions "violates the principle of treating similarly situated defendants the same."181 According to Justice Blackmun, this principle "derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court."182 Third, retroactivity and stare decisis have a salutary effect on judicially declared changes in the law because the effect of the two doctrines "forces us to consider the disruption that our new decisional rules cause, . . . prevent[ing] us from altering the law each time the opportunity presents itself."183 Justice Blackmun concluded that prospective application of new rules "breaches our obligation to discharge our constitutional function."184 Thus, Justices Blackmun, Marshall and Scalia believed that retroactive application of new judicial rules was constitutionally mandated.

Justice Scalia wrote a separate concurrence, which was joined by Justices Marshall and Blackmun. This concurrence offered another reason why prospective rulings exceed the constitutional power of the judiciary.185 Although Justice Scalia recognized that judges "make" law, he noted that "they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."186 According to Justice Scalia, when

178. Id. at 2449-50 (Blackmun, J., concurring).
179. Id. The reasons given by Justice Blackmun correspond, by and large, to the reasons which he expressed in Griffith in which the Court held that new rules in criminal cases would be applied retroactively to all pending or nonfinal cases. Griffith, 479 U.S. at 320-28.
180. Beam, 111 S. Ct. at 2449-50 (Blackmun, J., concurring); Griffith, 479 U.S. at 322 ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").
181. Beam, 111 S. Ct. at 2450 (Blackmun, J., concurring); Griffith, 479 U.S. at 323-24.
182. Beam, 111 S. Ct. at 2450 (Blackmun, J., concurring).
183. Id. (Blackmun, J., concurring).
184. Id. (Blackmun, J., concurring).
185. Id. (Scalia, J., concurring).
186. Id. at 2451 (Scalia, J., concurring) (emphasis omitted).
the law is "found" it must be the same law for all cases coming before and after it unless a different law is subsequently "found."

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, dissented. The dissent performed a Chevron Oil analysis of Bacchus and concluded that Bacchus was improperly applied to the litigants in that case. Although the dissent conceded that nothing could be done about Bacchus, they thought there was no reason to compound the error by applying the changed law retroactively to all other cases.

Beam constituted a sharp break from the Court's past practice under Chevron Oil which permitted courts to consider the parties' reliance interests when deciding whether to apply a new law prospectively. By changing the law concerning the choice of law approach for new judicial rules, Beam created a new issue in 10b-5 litigation: whether Beam required courts to apply Lampf to all pending cases.

C. Impact of Lampf and Beam on Section 10(b) Litigation

Following the Lampf and Beam decisions, the lower federal courts had to decide whether Beam required retroactive application of the Lampf limitations period to pending section 10(b) cases, because the Lampf court had announced a new rule of law and applied it to the litigants in Lampf. If the courts applied Lampf retroactively, many of the pending 10b-5 cases would be subject to dismissal as barred under the Lampf rule even though they were timely when filed.

The three circuits that had adopted the uniform limitations period prior to Lampf had initially left unresolved the question of retroactive application of the new law announced by those circuits to pending cases. In decisions following the adoption of the

187. Id. (O'Connor, J., dissenting).
188. Id. at 2453-56 (O'Connor, J., dissenting).
189. Id. at 2456 (O'Connor, J., dissenting).
190. For example, the Seventh Circuit stated that "[w]e leave for the future all questions concerning retroactive application of this decision. Retroactivity has not been briefed, and the retroactive application of decisions affecting periods of limitations is a question of some subtlety." Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1389-90 (7th Cir. 1990), cert. denied, 111 S. Ct. 2887 (1991); accord Ceres Partners v. GEL Assocs., 918 F.2d 349, 364 (2d Cir. 1990) (holding that retroactivity issue did not arise because limitations period applied was same period that would have been applied under prior precedent); In re Data Access Sys. Sec. Litig., 843 F.2d 1537, 1550-51 (3d Cir.) (en banc) (refusing to address issue of prospective application of rule announced because question certified from district court did not include issue of prospective application), cert. denied, 488 U.S. 849 (1988).
uniform limitations period but prior to Lampf and Beam, the three circuits acknowledged that the general rule was to apply judicial decisions retroactively\textsuperscript{191} but also noted that a new rule could be applied prospectively under Chevron Oil.\textsuperscript{192} Although the circuits generally agreed that the Chevron Oil analysis should be performed on a case-by-case basis,\textsuperscript{193} they diverged on their application of the Chevron Oil factors to the new Rule 10b-5 limitations period that they had chosen.\textsuperscript{194}

\textsuperscript{191} See, e.g., Welch v. Cadre Capital, 923 F.2d 989, 993 (2d Cir.) (recognizing that general rule was to apply judicial decisions retroactively but granting exception under Chevron Oil analysis), vacated and superseded, 946 F.2d 185 (2d Cir. 1991) (vacated because impact of Lampf and Beam required court to apply new rule retroactively without exception); Polansky v. Painewebber Inc., 762 F. Supp. 768, 770 (N.D. Ill. 1991) ("There is a presumption favoring retroactive treatment." (citing EEOC v. Vucitech, 842 F.2d 936, 941 (7th Cir. 1988))).

\textsuperscript{192} For a discussion of the Chevron Oil test, see supra notes 125-30 and accompanying text.


\textsuperscript{194} The Second Circuit was relatively settled with respect to the application of Ceres, determining that the first, but not all three, of the Chevron Oil factors must be met before prospective application of a new rule occurred. See Welch, 923 F.2d at 994. With respect to the first Chevron Oil factor, the Second Circuit stated that it was unnecessary for the parties in each case to prove actual reliance on the former rule of law. Id. at 993 n.5. The court noted: "It is worth emphasizing that the first prong of the Chevron test requires only a prior rule on which plaintiffs 'may' have relied, and does not create a test of actual reliance.” Id. Additionally, the Second Circuit rejected the argument that the Supreme Court decisions in DelCostello, Wilson and Agency Holding, which eroded the local borrowing practices, signaled the demise of the local borrowing rule in the Second Circuit. Therefore, litigants were not prevented from claiming reliance on the old borrowing rule. Id. at 994. For a discussion of the DelCostello, Wilson and Agency Holding cases, see supra notes 53-57 and accompanying text. The Second Circuit held that the second Chevron Oil factor suggested prospective application of the Ceres rule. See, e.g., Welch, 923 F.2d at 994-95 (stating that primary purpose of statute of repose was to give plaintiffs notice of time in which action must be brought and defendants notice of time in which they were subject to suit, and concluding that purpose of limitations period was not furthered by applying new limitations period to litigants in previously instituted actions). With respect to the third Chevron Oil factor, there was some divergence in the Second Circuit. The third factor allowed the court to weigh the equities in each case. In the majority of cases, Second Circuit courts held it inequitable to apply the Ceres rule to the litigants before the court. See, e.g., id. at 995 (concluding that concealment of fraud by defendant, not lassitude of plaintiff, was cause of delay in filing action); Gutman v. Equidyne Extractive Indus., 769 F. Supp. 121, 125 (S.D.N.Y. 1991) (indicating that retroactive application "could constitute an unjust penalty for rightful reliance on existing law"); Duke v. Touche Ross & Co., 765 F. Supp. 69, 73-74 (S.D.N.Y. 1991) (finding that retroactive application of Ceres would be inequitable); Flickinger v. Harold C. Brown & Co., 759 F. Supp. 992, 997 (W.D.N.Y.) (observing that equities favored prospective application), rev'd on other grounds, 947 F.2d 595 (2d Cir. 1991). But cf. Varnberg v. Minnick, 760 F. Supp. 315, 328-29 (S.D.N.Y. 1991) (choosing retroactive application of new limitations period after finding that equities weighed in favor of defendant because
After the Supreme Court's decisions in *Lampf* and *Beam*, the plaintiff inexcusably waited more than three years to bring suit and defendant demonstrated hardship as result of delay).

In the Seventh Circuit, the law concerning retroactive application of the uniform limitations period was also well settled. Unlike the Second Circuit, the Seventh Circuit generally applied the Short one-and-three-year period of repose retroactively. *See Polansky*, 762 F. Supp. at 772 (concluding that because plaintiff could not establish any *Chevron Oil* element, Short would be applied retroactively); *Wentzka v. Gellman*, 759 F. Supp. 484, 487 (E.D. Wis. 1991) (requiring retroactive application of Short due to failure to fulfill all three *Chevron Oil* factors); accord *Greenberg v. Boettcher & Co.*, 755 F. Supp. 776, 785 (N.D. Ill. 1991); *In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1388 (N.D. Ill. 1990). But see *Reshal Assocs. v. Long Grove Trading Co.*, 754 F. Supp. 1226, 1241 (N.D. Ill. 1990) (requiring prospective application of Short because all three *Chevron Oil* factors were satisfied). In the Seventh Circuit, prospective application of the new limitations period occurred only if all three *Chevron Oil* factors were met. *See Wentzka*, 759 F. Supp. at 487. The courts also placed heavy emphasis on the litigants' ability to prove reliance on the prior limitations period. If the litigant could not establish reliance on the old statute of limitations, the new limitations period was applied. Only in *Reshal* did a Seventh Circuit court find adequate reliance on prior precedent. *Reshal*, 754 F. Supp. at 1241 & n.13 (applying new rule prospectively because plaintiffs established that they had justifiably delayed suit for one year in attempt to reach settlement and conduct factual investigations and therefore had relied on prior limitations period).


In *Hill*, the leading case in the Third Circuit, the court determined that in order to establish the first prong of *Chevron Oil* there must have been clear precedent on which the litigant relied. *Hill*, 851 F.2d at 696. The courts were split over whether clear precedent existed prior to *Data Access*. *Id.* at 697-98. The problem was exacerbated because the prior precedent was characterized as fact-based. *Id.* Therefore, whether clear precedent existed depended on whether the facts in the case before the court were analogous to the facts in a prior decision. For example, in *McCarter*, the Third Circuit found that the determinative issue was whether the factual situation before the court was similar enough to the facts of any prior holdings on which the plaintiffs could have relied. *McCarter*, 883 F.2d at 203. If the facts were analogous, then the court found clear
lower courts began to receive and grant motions to dismiss 10b-5 actions on the basis of the new Lampf rule. Although the Court applied the new Lampf rule to the litigants in Lampf, the Court never expressly held that Lampf must be applied retroactively. The district courts, followed by the circuit courts, however, found that because the Court applied the new rule in Lampf to the litigants in that case, Beam required applying the Lampf rule to all pending cases whether those cases were filed before or after the Lampf decision.

precedent. See Gruber, 911 F.2d at 967 (finding that factual situation in case before court was sufficiently similar to prior precedent such that plaintiffs could have reasonably relied). If the facts were not analogous, then the court determined that the law in the Third Circuit was too unsettled for a litigant to have justifiably relied. See, e.g., McCarter, 883 F.2d at 204 (finding that no case provided precedent for case before court).

195. See, e.g., Boudreau v. Deloitte, Haskins & Sells, 942 F.2d 497, 498 (8th Cir. 1991) (finding that court was compelled to apply Lampf rule retroactively to pending cases); Koulouris v. Chalmers, 779 F. Supp. 99, 100 (N.D. Ill. 1991) (holding that because plaintiff did not bring § 10(b) claim within three-year repose period, Lampf and Beam required dismissal of cause of action); Wegbreit v. Marley Orchards Corp., 793 F. Supp. 957, 959 (E.D. Wash. 1991) (agreeing with other courts which stated that Lampf rule must be applied retroactively under Beam decision and therefore dismissing plaintiffs’ § 10(b) claims), motion to reinstate granted, 793 F. Supp. 965 (E.D. Wash. 1992) (reinstated following passage of § 27A); Held v. Davis, 778 F. Supp. 527, 530 (S.D. Fla. 1991) (dismissing plaintiff’s claims as time-barred because of holdings in Lampf and Beam).

196. Justice O’Connor dissented precisely because she was concerned that the combined effect of Lampf and Beam would result in the application of the new rule to all pending cases. To prevent such retroactive application, the Court could perhaps rule that because the Lampf rule concerned a limitations period, it should be treated as a remedial situation by analogy to Justice Souter’s comments in Beam and Justice Stevens’ comments in Smith. If the Lampf rule is treated as remedial, then the automatic retroactivity rule of Beam may not apply. Given the failure of the Lampf majority to address the issue in the face of Justice O’Connor’s dissent on that specific point, it is likely that a majority of the Court would rule that Beam mandates the retroactive application of the Lampf rule. But see Anthony M. Sabino, A Statutory Beacon or a Relighted Lampf? The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions, 28 Tulsa L.J. 23, 61-65 (1992) (arguing that it is unlikely that Court would hold that Lampf must be applied retroactively).

197. See, e.g., Welch v. Cadre Capital, 946 F.2d 185 (2d Cir. 1991) (vacating prior decision that allowed prospective application of Ceres and concluding that Lampf and Beam required retroactive application of Ceres to all pending cases); Philip Morris Capital Corp. v. Century Power Corp., 778 F. Supp. 141, 146 (S.D.N.Y. 1991) (observing that Supreme Court’s remand of Welch, which had prospectively applied Lampf rule, was “clear indication that [Beam] was meant to apply to cases involving retroactively reduced statutes of limitations”), modified on other grounds, 788 F. Supp. 794 (S.D.N.Y. 1992); Gray v. First Winthrop Corp., 776 F. Supp. 504, 508 (N.D. Cal. 1991) (concluding that because Supreme Court applied Lampf rule to litigants in Lampf, Lampf rule must be retroactively applied to all pending cases); Bank of Denver v. Southeastern Capital Group, Inc., 770 F. Supp. 595, 596 (D. Colo. 1991) (stating that court was required to dismiss § 10(b) claims because of Lampf and circuit precedent).
IV. CONGRESS REACTS TO LAMPF AND BEAM IN SECTION 27A

Congress reacted quickly to the Supreme Court’s decisions in Lampf and Beam and the problems posed by the retroactive application of Lampf to pending 10b-5 actions by enacting section 27A of the Exchange Act. Section 27A provides:

(a) Effect on pending causes of action

The limitation 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 Dec. 19, 1991.

Section 27A applies only to cases asserting claims based upon implied rights of action arising under section 10(b) of the Exchange Act that were commenced on or before June 19, 1991, the day before the Lampf and Beam decisions. The statute has

198. Steven B. Rosenfeld & Barbara A. Mehlman, The Constitutional Controversy Over the Limitations Period in Securities Fraud Cases, 25 REV. SEC. & COMMODITIES REG. 99, 99 (May 6, 1992) ("[S]eldom has Congress enacted—either with due deliberation or, as in this case, in great haste—a statute that immediately revives hundreds of time-barred claims in high stakes damage suits pending nearly everywhere."). Because of the haste in which § 27A was enacted and the fact that the provision was only a very small appendage to the FDIC Improvement Act of 1991, none of the relevant congressional reports provides information about the goals or congressional intent with respect to § 27A. See Sabino, supra note 196, at 29-30 ("[T]he individual legislative history of section 27A is quite remarkable, primarily because of its absence. . . . In sum, section 27A offers nothing in the way of true legislative history . . . . Rather, one must look to the Congressional Record and other public statements of lawmakers to determine its origins.").

three components. First, it provides that the limitations period that was in effect on June 19, 1991 in the jurisdiction in which the case was filed will govern pending cases. Second, the controlling principles of retroactivity are those that were in effect in the forum jurisdiction on the day before the Beam decision. Thus, Beam's rule of retroactivity does not automatically apply to all actions brought under Rule 10b-5. Normally, the lower courts will apply the Chevron Oil test when determining whether to apply a new rule retroactively or prospectively. Third, upon timely motion, plaintiffs may obtain reinstatement of 10b-5 private civil actions that were dismissed as time-barred after the Lampf and Beam decisions, if the actions would have been timely under the limitations period and retroactivity principles in effect in the forum jurisdiction on June 19, 1991.

In order to obtain reinstatement of a case dismissed as time-barred under Lampf, a plaintiff must establish that (1) the plaintiff commenced the case on or before June 19, 1991; (2) the action was dismissed on statute of limitations grounds; (3) the action would have been timely under the laws of the forum jurisdiction, including principles of retroactivity, as they existed on June 19, 1991; and (4) the motion for reinstatement was made within sixty days after the enactment of section 27A.

A. Legislative History of Section 27A

Section 27A evolved from two separate bills, each containing a specific limitations period for implied causes of action arising under section 10(b). The first bill was introduced on July 23, 1991, less than five weeks after the Court's decisions in Lampf and

200. See id. § 78aa-1(a).
201. Id. § 78aa-1(b)(2).
202. See id. § 78aa-1(b)(1).
204. One of the bills was introduced in the Senate on July 23, 1991, and one was introduced in the House of Representatives on August 1, 1991. See S. 1533, 102d Cong., 1st Sess. (1991); H.R. 3185, 102d Cong., 1st Sess. (1991). The original bills contained specific limitations periods for § 10(b) actions: a two-and-five year statute of limitations and repose in the Senate bill and a three- and-five year version in the House bill. See id. The Senate bill was originally introduced purportedly as a compromise, because Senator Bryan (the bill's original sponsor) would have preferred "to enact a simple 2 or 3 year after discovery rule, with no overall repose period." 137 CONG. REC. S10,691 (daily ed. July 23, 1991) (statement of Sen. Bryan).
The final version of section 27A was substantially different from the original proposals. The final version of the statute was the product of legislative compromise; its omission of a specific limitations period occurred because the House and Senate could not agree on a uniform limitations period.

The record of the section 27A floor debate reveals two important aspects about the legislation. First, the provision was designed to overturn Lampf in order to prevent "the dismissal of a great number of legitimate cases currently under litigation."
Congress viewed the retroactive application of *Lampf* to cases pending prior to *Lampf* as fundamentally unfair because: it changed the rules in effect when the alleged violations occurred; caused billions of dollars in losses to private investors; and granted unwarranted legal protection to high-profile perpetrators.209 Second, section 27A was intended to mitigate the costs of the savings & loan bailout by extending the time for the Federal Deposit Insurance Corporation (FDIC) to file suit based upon its right of subrogation.210 Notwithstanding the limitations expressed in the statute, at least some members of Congress were apparently under the impression that section 27A would permit reinstatement of all cases that were filed before the *Lampf* decision and subsequently dismissed on the basis of *Lampf*.211

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209. As Senator Bryan noted: "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitations than when they brought their suits." 137 CONG. REC. S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). Senator Riegle’s statement that Congress “must take steps to protect those investors who had cases pending prior to” the *Lampf* decision further indicates congressional concern for investors. 137 CONG. REC. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle). As one court noted: “The legislative history resonates with a single refrain: Congress was concerned that unless section 27A(a) was enacted, ‘over $4 billion of fraud claims . . . [were] threatened with pending dismissal motions solely as a result of *Lampf*.” In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105 (N.D. Cal. 1992) (quoting 137 CONG. REC. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey)).

210. 137 CONG. REC. S17,036 (daily ed. Nov. 19, 1991) (statement of Sen. Bryan) ("[F]requently the Federal Deposit Insurance Corporation is subrogated to the rights of the victims of . . . securities frauds and unless this decision is modified the FDIC will be unable to recover the damages as a consequence of the fraud perpetrated against those from whom their rights are inherited.").

211. *See* Henley v. Slone, 961 F.2d 23, 25 (2d Cir. 1992) ("Congressman Edward J. Markey contended that the provision ‘permits the reinstatement of any suit which may have been dismissed post-*Lampf* as a result of the *Lampf* decision.’ Moreover, the only specific explanation we have located of the reference to retroactivity in section 27A indicates that the proponents of the amendment ex-
B. Application of Section 27A

Although the operation and scope of the statute may present a few interpretive problems, the statute's basic operation is clear. An example of the proper application of the statute is the Seventh Circuit's decision in *McCool v. Strata Oil Co.*

In *McCool*, the plaintiffs commenced their action in 1989, alleging violations of certain securities laws, including Rule 10b-5. On a partial summary judgment motion brought by the defendants, the district court employed the traditional borrowing rule and determined that a three-year Illinois statute of limitations applied to the plaintiffs' 10b-5 claim and barred it. The plaintiffs appealed.

After the district court dismissed the case but before the appeal was decided, three developments occurred. First, the Seventh Circuit adopted the one-and-three-year uniform federal limitations period in *Short v. Belleville Shoe Manufacturing Co.* In *Short*, the Seventh Circuit left open the question whether that decision would be applied retroactively. Second, the Supreme Court decided the *Lampf* and *Beam* cases, which required the retroactive application of *Lampf* to the *McCool* case. Finally, Congress enacted section 27A, which required the court to apply the legal rules in effect before the *Lampf* and *Beam* decisions.
McCool court had to decide "what to do with this tangled web." 220

The McCool court found that section 27A required the court to apply the statute of limitations in effect on the day before Lampf. 221 The statute of limitations in effect in the Seventh Circuit on that day was the uniform period enunciated in Short, which would have barred the plaintiffs' claims. 222 Instead of applying the Short rule, the court properly determined that section 27A also required the court to apply the principles of retroactivity in effect in the jurisdiction on the day before the Beam decision. 223 Before Beam was decided, the Seventh Circuit had not determined whether Short applied retroactively. The court decided that the controlling precedent on retroactivity prior to Beam was Chevron Oil and proceeded to perform a Chevron Oil analysis. 224 After finding that the plaintiffs had relied on the limitations period in effect before Short, the court determined that Short should be given prospective effect, at least with respect to the McCool plaintiffs. 225

Because the Lampf rule did not apply and Short was given prospective effect, the court applied the limitations period in effect prior to Short, which was the traditional state borrowing rule. 226 Consequently, the Seventh Circuit affirmed the original district court ruling, which applied the borrowing rule, notwithstanding the intervening changes in the law made by Short, Lampf and Beam. 227

220. Id. at 1455. The McCool court indicated that if Beam had been a constitutional decision, the court would have needed to decide whether it was required to obey the congressional mandate in § 27A. Id. at 1458 n.3. For a discussion of whether Beam is a constitutionally based decision, see infra notes 394-404 and accompanying text.

221. McCool, 972 F.2d at 1458.


223. McCool, 972 F.2d at 1458.

224. Id. at 1458-59. For a discussion of Chevron Oil, see supra notes 125-30 and accompanying text.

225. McCool, 972 F.2d at 1459.

226. Id. The applicable Illinois statute of limitations was three years from the time the plaintiffs knew, or should have known, about the fraud, but never more than five years after the sale of the securities. Id. at 1459-60.

227. Id. at 1463.
V. CONSTITUTIONALITY OF SECTION 27A—VESTED RIGHTS CHALLENGE

A. Introduction to the Vested Rights Doctrine

After Congress enacted section 27A, plaintiffs relied on the statute to defend against motions to dismiss cases on the ground that the cases were untimely under Lampf. Plaintiffs also invoked section 27A(b) to support their motions to reinstate cases previously dismissed on the basis of Lampf and Beam. In response, defendants attacked the constitutionality of section 27A on two primary grounds. First, defendants claimed that section 27A deprived them of vested property rights in contravention of the Fifth Amendment. Second, defendants asserted that section 27A violated the separation of powers doctrine. This part of the Article explores whether section 27A divests defendants of vested rights in violation of the Fifth Amendment. Part VI then considers the separation of powers issue.

Defendants have had mixed success in their attacks on the constitutionality of section 27A on the ground that it divests them of vested rights. A few courts have ruled that section 27A deprives defendants of vested rights by unconstitutionally divesting the litigants of their property interests in final judgments. Other courts, however, have sustained the constitutionality of section 27A against due process challenges even when the defendants had received final judgments of dismissal in their favor.

228. See Rosenfeld & Mehlman, supra note 198, at 100 (“It did not take anything like the allotted 60 days before a raft of reinstatement motions seeking to restore already-dismissed claims were filed, together with scores of supplemental briefs relying on section 27A to oppose pending dismissal motions.”).


Of the cases finding § 27A unconstitutional on these grounds, three have involved a final dismissal of the claim against the defendant. Treiber, 796 F. Supp. at 1062; Plaut, 789 F. Supp. at 235; Johnston, 789 F. Supp. at 1099.

Although the term "vested right" is not found in the Constitution, the basic notion is that the Fifth Amendment prohibits the federal government from taking vested property rights away from individuals without due process of law. In section 27A cases, a property interest protected by the Fifth Amendment could arise from either: (1) the running of the Lampf limitations period itself; or (2) a final judgment of dismissal based upon the Lampf limitations period. In both cases, a defendant would claim that the...


231. The vested rights doctrine has two components: a due process component and a separation of powers component. As to the due process component, see Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) ("[R]ights fixed by judgment are ... a form of property over which legislatures have no greater power than any other."). cert. denied, 490 U.S. 1090 (1989); Treiber, 796 F. Supp. at 1060 ("The vested rights doctrine has a due process component premised upon the fact that once rights are fixed by judgment, they are a form of property over which the legislature has no greater power than it has over any other form of property."); Plaut, 789 F. Supp. at 234 ("[W]hen final judgment has been entered, the rights of the parties have been fixed, and legislative modification amounts to an unlawful taking.").

As to the separation of powers component, see Georgia Ass'n, 855 F.2d at 810 (stating that vested rights doctrine "protects judicial action from superior legislative review"); Treiber, 796 F. Supp. at 1060 ("The doctrine also has a separation of powers component derived from the constitutional limitation on legislative review of judicial action, 'a regime ... subversive of the judicial branch.'") (quoting Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974)); Plaut, 789 F. Supp. at 235 ("A judgment of a court as it affects the parties before the court cannot be disturbed by the legislature without subverting the constitutional independence of the judiciary." (citing Daylo, 501 F.2d at 816)).

Another potential separation of powers problem is that retroactive annulment of a prior final judgment transmutes that judgment into an advisory opinion. Brichard, 788 F. Supp. at 1107 ("[A] judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion.") (quoting 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3529.1 (1978)).

232. There is a third possible source. In theory, a vested right could arise from a nonfinal judgment based upon the Lampf limitations rule. The courts, however, have consistently held that parties acquire no protectable property interests in nonfinal judgments. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 310 (1945) (holding that statute did not deprive defendant of property without due process of law, as defendant's immunity from suit was not finally adjudicated); American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921) (stating that plaintiff had no vested right in law upon which district court's judgment was based while case was on appeal); Rafferty v. Smith, Bell & Co., 257 U.S. 226, 232 (1921) (concluding that respondents had no greater rights in appealable judgment than party whose action was barred by legislation enacted after action was instituted); Grimes v. Huff, 876 F.2d 738, 744 (9th Cir. 1989) (indicating that no property right vests in any cause of action until final unreviewable judgment is rendered), cert. denied, 111 S. Ct. 1620 (1991); Hammond v. United States, 786 F.2d 8, 12 (1st Cir. 1986) (citing Supreme Court opinions to support conclusion that person has no vested right...
existence of the vested right results in immunity from suit.

In order for a defendant to claim successfully that a vested right arises from the mere expiration of the *Lampf* limitations period, the defendant must overcome two obstacles. First, the defendant must show the continued viability of the Supreme Court cases indicating that a vested right arises after the running of a substantive limitations period. Second, the defendant must show that the *Lampf* limitations period is substantive. These issues are explored in the next section, which concludes that: (1) the *Lampf* limitations period is substantive; and (2) although not free from doubt, the Court probably still adheres to the view that a vested right arises upon the expiration of a substantive limitations period.

If a case has actually been dismissed as untimely based upon the expiration of the *Lampf* limitations period and that judgment has become final, the defendant may also contend that the final judgment itself constitutes a vested right. As the final section of this part discusses, the issue confronting the defendant making such a claim is which of two lines of cases applies. The first line of cases holds that vested rights generally do not arise upon the expiration of a limitations period. However, none of these cases involve final judgments. The second line of cases supports the proposition that vested rights arise from final judgments. None of these cases involve a final judgment based upon the expiration of a limitations period. The issue thus becomes which line of cases provides the closer analogy to a case in which the defendant obtains a final judgment based on the running of the *Lampf* limitations period.

Put another way, courts are obligated to apply all constitutional changes in the law applicable to the case if such change occurs at any time during the pendency of the case, including the appeal process.
B. Vested Rights Arising From the Running of the Lampf Limitations Period

1. Supreme Court Cases Regarding Vested Rights and Statutes of Limitation

Although defendants have argued primarily that vested rights arise from final judgments, a defendant could claim a vested property right by virtue of the expiration of the Lampf limitations period alone, regardless of whether the defendant had obtained a final judgment in reliance on that rule at the time section 27A became effective. Under this theory, if a plaintiff’s claim was untimely by virtue of the application of Lampf and Beam, Congress could not enact legislation that had the effect of retroactively removing the bar. The vested property interest would be the “right” to be immune from suit by virtue of the running of the one-and-three-year rule enunciated in Lampf. Although Supreme Court precedent exists that could support such a claim, a defendant would have to establish a number of difficult propositions in order to successfully make this argument.

Campbell v. Holt\(^{233}\) is the earliest important case discussing whether a person has a protectable property interest in being immune from suit once a limitations period expires. In Campbell, a state constitutional amendment retroactively reinstated a tolling provision. The provision had the effect of removing the bar on the plaintiff’s claim even though the applicable limitations period had run.\(^{234}\) The defendant contended that the retroactive appli-

\(^{233}\) 115 U.S. 620 (1885).

\(^{234}\) At the start of the Civil War, Texas passed a law that tolled all statutes of limitations. \textit{Id.} at 621. Prior to this legislation, the defendant in Campbell sold land and acquired the services of slaves legally owned by his minor daughter through an inheritance from her mother. \textit{Id.} at 620. The statute of limitations pertinent to the claim in Campbell required suit to be brought within two years of the actual conversion of the plaintiff’s property. The limitations period was tolled while the plaintiff was still a minor. \textit{Id.} at 621. After the war, the Texas legislature repealed the suspension of the limitations statutes. At that point the plaintiff was no longer a minor and the limitations period on her claim for conversion against her father commenced. \textit{Id.}

After the applicable limitations period had run (barring the daughter’s claim against her father), Texas amended its state constitution to include a provision that reinstated the tolling of limitations statutes, retroactive to the start of the Civil War, until Texas was readmitted into the Union. The amendment stated that “[t]he statutes of limitations of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State, until the acceptance of this Constitution by the United States Congress.” \textit{Id.} The daughter then sued, contending that this provision lifted the bar on her claim against her father because the effect of the constitutional amendment was to toll the limitations period applicable to her suit. \textit{Id.} at 621-22.
ocation of the amendment to a claim that was already barred constituted a taking of his property in violation of the due process provisions of the Fourteenth Amendment. Both the trial court and the appellate court held that the constitutional amendment lifted the statute of limitations bar even though the limitations period had run prior to the amendment. The Supreme Court affirmed, holding that the retroactive tolling provision was constitutional.

In allowing the retroactive tolling provision to lift the bar of the statute of limitations, the Court distinguished between two types of limitations statutes. The first type confers on the defendant a vested right in real property by prescription once the time period expires. The second type bars only the remedy otherwise available to the plaintiff, but confers no vested right in the defendant to be free from suit. In the former situation, the running of the statute of limitations extinguishes the substantive cause of action, while in the latter situation, the limitations period does not affect the underlying substantive right of the plaintiff. The Campbell Court found the limitations period at issue in that case was of the second type, noting:

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. And other statutes, shortening the period or

235. The defendant's claims were based upon the proposition that "the bar of the statute, being complete and perfect, could not . . . be taken away by this constitutional provision, and that, to do so, would violate . . . the Fourteenth Amendment . . . which declares that no State shall 'deprive any person of life, liberty or property without due process of law.'" Id. at 622 (quoting U.S. Const. amend. XIV, § 1).

236. Id.
237. Id. at 630.
238. Id. at 623.
239. Id. at 623-24. The Campbell Court noted:

It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. . . .

But we are of the opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.

Id.
making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.\textsuperscript{240}

The Court went on to observe that no property right vests when a claim is barred by the statute of limitations:

We are unable to see how a man can be said to have \textit{property} in the bar of the statute as a defence to his promise to pay. In the most liberal extension of the use of the word property to choses in action, to incorporeal rights, it is new to call the defence of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law.\textsuperscript{241}

According to the principles set forth in \textit{Campbell}, a statute of limitations barring a claim with respect to the payment of a debt does not vest any right in the debtor not to be sued; rather, the statute merely withdraws the remedy otherwise available to the creditor. Thus, a statutory extension of the time to sue after the original time expires is permissible because it merely revives the barred remedy; the underlying obligation (right) to pay was never terminated.

The Court reaffirmed the \textit{Campbell} holding in \textit{Chase Securities Corp. v. Donaldson}.\textsuperscript{242} In \textit{Chase}, a statutory amendment created a

240. \textit{Id.} at 628 (citation omitted).
241. \textit{Id.} at 629.
242. 325 U.S. 304 (1945). The \textit{Chase} Court noted:
The substantial federal questions which survive the state court decision are whether this case is governed by \textit{Campbell v. Holt} and, if so, whether that case should be reconsidered and overruled.

In \textit{Campbell v. Holt}, . . . this Court held that where a lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here . . . .
specific limitations period for securities sale violations under a state blue sky law. The issue was whether the statutory amendment could apply retroactively to reinstate claims barred by the prior limitations period. The trial court held that the amendment revived the plaintiff's previously dismissed securities fraud claims. The Minnesota Supreme Court affirmed, ruling that the amended law applied to the case and did not violate the defendant's due process rights under the Fourteenth Amendment. On appeal, the United States Supreme Court affirmed, holding that the amended law, which retroactively resurrected the plaintiff's previously barred claim, was constitutional.

The Chase Court determined that the defendant had not obtained a final judgment in his favor before the change in the law

\textit{Id.} at 311-12.

\textbf{243.} In \textit{Chase}, the plaintiff sued to recover the purchase price of securities sold in violation of Minnesota's blue sky law. \textit{Id.} at 305-06. The defendant asserted that the statute of limitations on the plaintiff's claim had run. \textit{Id.} at 306. The plaintiff countered that the statute was tolled when the defendant left the state and did not run during its absence. \textit{Id.} The blue sky law at the time of filing did not specify a limitations period. \textit{Id.} at 306-07. Rather, a general statute of limitations, requiring that the cause of action be brought within six years after discovery, was applied to blue sky law violations. \textit{Id.} The claim was brought seven years after the sale. \textit{Id.} at 305-06.

The trial court ruled that the statute was tolled during the defendant's absence from the state and the claim was therefore still viable. \textit{Id.} at 306. The Supreme Court of Minnesota reversed, finding that the limitations period had run. \textit{Id.} The court held that the statute of limitations was not tolled by the defendant's absence because the defendant, pursuant to statute, had designated agents to receive service of process after its departure. \textit{Id.}

While the case was pending on remand on different grounds, the Minnesota legislature amended the blue sky law, adding a specific limitations period for blue sky law violations. The statutory amendment extended the time available for the plaintiff to commence his cause of action. \textit{Id.} at 306-07 n.3 (citing \textit{MINN. STAT.} § 3996-24 (Supp. 1941)). The revised statute required that suit be brought within six years of delivery of the securities, rather than six years after discovery of a blue sky law violation. \textit{Id.} at 307. If delivery occurred more than five years before the effective date of the revision, the suit could be brought within one year of the statute's enactment. \textit{Id.} at 308. For the full text of the amendment, see \textit{id.} at 306-07 n.3.

\textbf{244.} \textit{Id.} at 308. The defendant moved to raise the issue of the constitutionality of reviving the previously barred action, but the court denied the motion. \textit{Id.} The defendant claimed that application of the amendment would deprive the defendant of property without due process of law. \textit{Id.}

\textbf{245.} \textit{Id.} at 309. In finding that the application of the amended law to the plaintiff's case was constitutional, the Supreme Court of Minnesota relied on \textit{Campbell}: "We do not find that Campbell v. Holt has been reversed or reconsidered, and we regard it as sound law; and, certainly, so far as the Federal Constitution is concerned, it is binding on this court until reversed by the Supreme Court." \textit{Donaldson v. Chase Sec. Corp., 13 N.W.2d 1, 5 (Minn. 1943), aff'd, 325 U.S. 304 (1945).}

\textbf{246.} \textit{Chase}, 325 U.S. at 315-16.
took effect.247 The Court reaffirmed its holding in *Campbell* but adopted a slightly different rationale. The *Chase* Court stated:

This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. *The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value.* . . .

The essential holding in *Campbell v. Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.248

The *Chase* Court reaffirmed the principle that limitations statutes are merely legislative tools used to effectuate public policy concerning the fair and efficient administration of claims.249 Con-

247. *See id.* at 310 (holding that defendant’s statutory immunity in state courts was not final judgment, and therefore legislative action did not deprive defendant of judgment in his favor).

248. *Id.* at 314-16 (emphasis added). The Supreme Court intimated that the right/remedy distinction used in *Campbell* might be “unsound” but found that it produced an acceptable result. *Id.* at 314. The *Chase* Court refused to recognize that such a right/remedy distinction existed as a matter of constitutional law. *Id.* at 316.

249. In describing statutes of limitation, the Court stated:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims . . . . They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

*Id.* at 314 (citation omitted) (footnote omitted).
sequently, the Court declined to treat limitations periods as creating fundamental rights and noted that such periods were subject to substantial legislative control.

Defendants arguing that the expiration of the Lampf limitations period creates vested property interests could distinguish Campbell and Chase by relying on William Danzer & Co. v. Gulf & Ship Island Railroad. In Danzer, a case decided after Campbell but before Chase, the Court considered a statute of limitations that specifically related to a cause of action and therefore affected the right and not the remedy. The issue was whether the limitations period could be extended after the limitations period had run. The Danzer Court distinguished Campbell because Campbell involved a limitations period that affected only the remedy. In Danzer, the Court held that because the running of the limitations period terminated the underlying right upon which the plaintiff based his claim, any extension of the limitations period unconstitutionally divested the defendant of a property interest in contra-

250. Id. The Court noted that statutes of limitation had never been recognized as “fundamental” rights, and could be relied on only through “legislative grace and . . . subject to a relatively large degree of legislative control.” Id.

251. 268 U.S. 633 (1925). In Danzer, the defendant carrier misrouted a shipment of lumber, causing damages to the plaintiff-purchaser. Id. at 634. Subsequent to the expiration of the two-year statute of limitations, the plaintiff filed a claim for reparation with the Interstate Commerce Commission under § 206(f) of the Interstate Commerce Act. Id. Section 206(f) provided that “[t]he period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.” Id. at 635. The plaintiff’s right to file his complaint expired prior to the passage of the Act, but if the period of federal control was excluded, the complaint was timely. Id. at 636.

Under § 206(f), the Commission ordered the defendant to pay damages. Id. at 634. The defendant contended that § 206(f) was unconstitutional because to renew or revive the cause of action that had expired prior to the passage of the Act was to take the defendant’s property without due process of law. Id. at 635.

252. Danzer was not the first case in which the Court accepted the right/remedy distinction. In 1886, the Supreme Court decided that a plaintiff was time-barred from bringing a wrongful death action, stating:

The statute[] create[s] a new legal liability, with the right to [bring] a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all . . . . The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right.

The Harrisburg, 119 U.S. 199, 214 (1886).

253. Danzer, 268 U.S. at 636-37 (“[I]t is plain that [Campbell] does not apply . . . . Th[at] decision rests on the conception that . . . the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional.”).
vention of the Fifth Amendment. \(^{254}\)

The Chase Court considered the right/remedy distinction relied on in Danzer. Although Chase appears to have minimized the right/remedy distinction, the Court did not overrule Danzer. The Chase Court did find that the facts of its case were distinguishable from Danzer because the limitations period in Danzer affected the right while the limitations period in Chase affected only the remedy. \(^{255}\)

Both Campbell and Danzer relied to some extent on the traditional right/remedy distinction in deciding whether a limitations period can be extended to revive a barred claim or remedy. Under these decisions, if the limitations period is remedial or procedural, the defendant has no vested right in the running of the limitations period and a statute extending the time period can revive an action previously barred. If, on the other hand, the limitations period is substantive and affects the right, a subsequent enactment impinges on the defendant's vested right if the enactment attempts to extend the time to bring suit when the action was barred under a prior limitations period. Thus, the defendant relying on Danzer will need to show that the Lampf limitations period is substantive and that Danzer and the right/remedy distinction recognized in Danzer is still viable.

2. The Lampf Rule As a Substantive Limitations Period Affecting the Right

None of the courts considering the constitutionality of section 27A has characterized the limitations period established by Lampf as substantive. If the right/remedy distinction articulated

\(^{254}\) Id. at 637.  
\(^{255}\) In Chase, the Court distinguished Danzer: In the Danzer case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law. . . . [T]he result may be the same if the period of limitation is prescribed by a different statute if it “was directed to the newly created liability so specifically so as to warrant saying that it qualified the right.” [A] situation [where this does not occur] plainly does not parallel that in the Danzer case. . . . [In Chase, the state court, whose opinion the Supreme Court affirmed] considered that the effect of the legislation was merely to reinstate a lapsed remedy, that appellant had acquired no vested right to immunity from a remedy for its wrong . . . and that reinstatement of the remedy by the state legislature did not infringe any federal right under the Fourteenth Amendment, as expounded by this Court in Campbell v. Holt.  
in *Danzer* remains viable, however, the *Lampf* three-year statute of repose appears to be substantive. If so, then under *Danzer*, the *Lampf* limitations period extinguishes the right when the period runs. Congress then could not extend the period to sue if suit was previously barred by *Lampf*. Thus, if the *Lampf* limitations period is substantive and *Danzer* is still good law, resurrecting claims barred under *Lampf* and *Beam* would unconstitutionally divest defendants of property interests.

a. The *Lampf* Limitations Period As a Substantive Statute of Repose

The *Lampf* limitations period can be viewed as substantive. Section 13 of the Exchange Act, one of the express limitations periods to which the *Lampf* Court looked when adopting the one-and-three-year limitations period, has been characterized as “a statute of limitations framed by a statute of repose.” The one-and-three-year structure includes both a statute of limitations component in the one-year discovery period and a statute of repose component in the three-year termination period. The Tenth Circuit has held that the three-year statute of repose in section 13 is substantive three-year and its running extinguishes the underlying liability. Because the *Lampf* rule is itself a hybrid, the one-year discovery component of the *Lampf* limitations period may affect only the remedy while the substantive three-year statute of repose affects the right.

Courts have interpreted section 13 as creating a substantive right of immunity from suit when the three-year period expires and have refused to apply equitable tolling principles to extend that period. Similarly, in adopting the one-and-three-year


   No action shall be maintained . . . unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability . . . more than three years after the security was bona fide offered to the public, or . . . more than three years after the sale.


257. The Tenth Circuit stated that “[w]hat is critical to understanding Section 13 as a statute of repose . . . is the recognition that, as such, not only is the remedy barred, but, also, the liability itself is extinguished.” *Anixter*, 939 F.2d at 1434.

258. See Mekhjian v. Wollin, 782 F. Supp. 881, 885 (S.D.N.Y. 1992) (citing *Anixter* and *Short* to support ruling that three-year period of repose was absolute...
structure in Lampf and rejecting equitable tolling of the three-year prong, the Court in Lampf made it clear that the three-year prong was a statute of repose imposing an unconditional outside temporal limitation on a plaintiff's ability to bring suit under Rule 10b-5. Several courts have echoed the Supreme Court's proclamation that "it is evident that the equitable tolling doctrine is fundamentally inconsistent" with the three-year repose period in section 13 and Lampf. These rulings support the claim that the Lampf rule is substantive.

b. Substance/Procedure Dichotomy in an Implied Private Right of Action

Under traditional conflicts analysis, the issue becomes whether courts should characterize the one-and-three-year limitations period created by Lampf as procedural or substantive. On the one hand, the Lampf limitations period might be viewed as procedural or remedial because it applies to causes of action that are judicially implied rather than legislatively created. Under the traditional tests used to characterize the nature of a statute of limitations, the Lampf limitations period arguably cannot qualify as substantive because both the built-in and the specificity tests are based upon the fact that the legislature created the limitations period as part of the cause of action. The Lampf limitations

The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "[T]he inclusion of the three-year period can have no significance in this context other than to impose an outside limit." Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period. Id. (citation omitted) (quoting Bloomenthal, supra note 34, at 288).

260. Id. (quoting Short, 908 F.2d at 1391).


262. Stewart, Note, supra note 27, at 533-34. For a discussion of how the limitations issue if it is procedural, might be treated under Beam, see supra note 167.

263. For a discussion of the built-in and specificity tests, see supra notes 21-23 and accompanying text. Recently, a district court was faced with an argument that § 27A was properly characterized as substantive and should therefore be analyzed under the Danzer holding. Barr v. McGraw-Hill, No. 87 CIV. 6259
period is neither built-in to the statute creating the cause of action (section 10(b) and Rule 10b-5), nor is it specifically directed to any statutorily-created liability, because courts have implied the liability created under section 10(b). The courts could find that a substantive limitations period can only be created by the legislature and any limitations period created by the judiciary is necessarily procedural.

On the other hand, because courts created the Rule 10b-5 right of action by implication, it would seem that courts could make the limitations period a substantive element of the right to sue. Because the limitations period created in *Lampf* relates specifically to the implied private right of action, the limitations period can be viewed as substantive by analogy to the built-in or specificity tests. Furthermore, the statute of repose component of the rule would probably be treated as substantive under the traditional view. No definitive case law directly supports or rebuts the proposition that an implied limitations period can be characterized as substantive.

3. Continued Viability of *Danzer* and of the Right/Remedy Distinction in Limitations Periods

If the *Lampf* rule is substantive, then based upon traditional conflicts distinctions and *Danzer*, the running of the *Lampf* limitations period would affect the right and terminate the obligation. Under *Danzer*, once the repose period has run, a defendant has a vested right in not being sued that cannot be divested by a subsequent statute reviving the obligation or extending the time to sue on the obligation. This conclusion depends on the continued viability of the right/remedy distinction in limitations periods and the continued viability of *Danzer*.

a. Continued Viability of the Right/Remedy Distinction in Limitations Periods

The continued viability of the right/remedy distinction was (KC), 1992 WL 196754, at *8 n.18 (S.D.N.Y. July 31, 1992). The court rejected the argument, stating:

In *Chase* . . . the Supreme Court observed that *Danzer*'s holding against retroactive change of a statute of limitations as to already accrued causes of action was confined to cases in which the statute creating liability either put a limitations period into existence or in which the limitations period was specifically directed to by a different statute. . . . [W]e note that section 10(b) does not include a reference to a limitations period, nor did it do so prior to the passage of section 27A. Neither does section 27A or any other provision in the Securities Act of 1934 confer a definite limitations period on section 10(b).

*Id.* (citation omitted).
rejected by the D.C. Circuit in a different context in *Wesley Theological Seminary v. United States Gypsum Co.* The D.C. Circuit in *Wesley* rejected a District of Columbia statute revived an earlier time-barred action against manufacturers of building materials. The manufacturer argued “that the earlier limitations period was a substantive statute of repose that had run, giving the defendant a vested right not to be sued.” The manufacturer argued “that *Chase* and *Campbell* [acknowledge] a simple dichotomy between procedure and substance, under which changes in purely procedural provisions may be retroactive while changes in substantive ones may not.” The D.C. Circuit rejected this argument, finding that *Chase* and *Campbell* did not support the procedural/substantive dichotomy suggested by the manufacturer. Although the *Wesley* court recognized that there were differences between statutes of limitation and statutes of repose, the court was unwilling to embrace the right/remedy distinction, finding it “somewhat metaphysical.” The court focused on the language in *Chase* that distinguished between “rules for which 'stability' is important and ones for which 'flexibility' is critical.” The *Wesley* court concluded that “any substance/procedure dichotomy suggested by *Chase* is either completely defunct or, at the very most, establishes procedural rules as a safe harbor within which a legislature may freely make retroactive changes.”

The *Wesley* court found that the procedural/substantive distinction was also undermined by a line of cases exemplified by *Usery v. Turner Elkhorn Mining Co.*, in which the Court held that Congress may enact legislation that disturbs otherwise settled expectations of private parties if the legislation meets the rational basis test. In *Usery*, coal mine operators challenged the consti-

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265. *Id.* at 120.
266. *Id.* at 121.
267. *Id.*
268. *Id.* The manufacturer also relied on the holding of *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) to support its argument. *Wesley*, 876 F.2d at 121. For a discussion of *International Union*, see infra notes 281-85 and accompanying text. The court also rejected the use of *International Union* to support the manufacturer's contention, stating that *International Union* did not mention the substantive/procedural distinction advanced in *Wesley*. *Wesley*, 876 F.2d at 121.
269. *Wesley*, 876 F.2d at 122.
270. *Id.* at 121.
271. *Id.* at 122.
stitutionality of a federal statute that required them to pay benefits to former employees who had died or become disabled as a result of contracting black lung disease. In upholding the retroactive effect of the statute against a due process challenge, the Court declared that the statute was a rational measure within Congress’ power and therefore constitutionally permissible even though the statute upset settled expectations. The rational basis test was subsequently refined by the Court in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., in which the Court held that a court must determine whether the statute in question “is supported by a legitimate legislative purpose furthered by rational means.”

274. Usery, 428 U.S. at 5. The statute required the operators to compensate even former employees who were not employed at the time the legislation was passed. Id. at 12.

275. Id. at 18-19. The Court noted:

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

... [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Id. at 15-17 (citations omitted).

276. 467 U.S. 717 (1984). In Pension Benefit, the Court upheld the constitutionality of a statute that retroactively imposed a penalty on employees who withdrew funds from a multi-employer pension plan, even though withdrawals from the plan had been permitted without penalty when they occurred. Id. at 734. The Court stated that such retroactive legislation met due process requirements if it was supported by a rational legislative purpose. Id. at 729.

277. Id.; see also United States v. Sperry Corp., 493 U.S. 52, 64 (1989) (upholding statute requiring retroactive payment of user fee for parties litigating claims before Iran—United States Claims Tribunal against due process challenge). Both Pension Benefit and Usery cite Fleming v. Rhodes, 331 U.S. 100, 107 (1947), in which the Supreme Court held that parties do not gain immunity from federal regulation of future acts by virtue of rights previously acquired through final judgments. See Pension Benefit, 467 U.S. at 729; Usery, 428 U.S. at 15.

In the cases challenging the constitutionality of § 27A, the courts deciding the issue have held that § 27A meets the due process rational basis test because the statute is rationally related to the furtherance of legitimate governmental interests. E.g., Gray v. First Winthrop Corp., [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,414, at 96,262, 96,265-66 (9th Cir. Apr. 7, 1993) (finding that § 27A passes due process and equal protection rational basis scrutiny); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1574 (11th Cir. 1992) (stating that § 27A is rational means of preserving lawsuits filed prior to Lampf and satisfies due process test); Arioli v. Prudential-Bache Sec. Litig., 800 F. Supp. 1478, 1483-84 (E.D. Mich. 1992) (protecting integrity of securities and banking
Using the *Usery* test, the *Wesley* court stated that it was not irrational to place the burden for losses due to defective materials on the manufacturer, particularly because the manufacturers had not made sales in reliance on the running of the limitations period.\(^{278}\) The defendant attempted to distinguish *Usery* and its progeny by arguing that those cases dealt solely with situations in which Congress had created a new liability where none had previously existed as compared with situations where litigants used a statutory provision in an attempt to revive a barred cause of action. The court rejected this argument because it was unable "to perceive a distinction of constitutional magnitude between an expectation of nonliability that arises from legislative silence and common law nonliability, and one that arises from the type of affirmative legislative action present in this case."\(^{279}\)

If *Chase, Campbell* and the *Usery* line of cases are the relevant authority, the D.C. Circuit’s decision in *Wesley* is persuasive. Significantly, the *Wesley* court did not mention *Danzer*, which held that the expiration of a substantive statute of repose created a protectable property interest in the defendant to be immune from suit.\(^{280}\)

### b. Continued Viability of *Danzer*

Although the *Wesley* court did not discuss *Danzer*, the court rejected the substance/procedure distinction urged by the defendant. In rejecting the defense argument, the court cited *International Union of Electrical Workers v. Robbins & Myers, Inc.*,\(^{281}\) a case...
that raises serious questions about the continued vitality of Danzer.\textsuperscript{282} In International Union, the defendant, relying on Danzer, argued that Congress could not constitutionally revive an action previously barred by the running of the established limitations period.\textsuperscript{283} The Supreme Court, however, relying on Chase, held that Congress did not violate the defendant's due process rights when it enacted a law that retroactively extended the time in which the plaintiff could file an EEOC claim.\textsuperscript{284} The Supreme Court found Chase applicable and read Chase as eviscerating Danzer.\textsuperscript{285}

The International Union Court seems to have misinterpreted Chase because Chase did not limit Danzer to the extent suggested in International Union. The Chase Court found that Danzer was not applicable because the limitations period at issue in Chase affected only the remedy and not the right.\textsuperscript{286} The Chase Court found that Campbell controlled because the limitations period in Campbell affected only the remedy.\textsuperscript{287} The Danzer Court had based its decision on the fact that the limitations period at issue affected the collective bargaining agreement but her grievance was rejected. \textit{Id.} The plaintiff then filed a charge with the EEOC, but not until 108 days after her date of discharge. \textit{Id.} The EEOC granted a right to sue letter and the plaintiff then filed a cause of action. \textit{Id.} The district court granted the defendant's motion to dismiss on the ground that the plaintiff failed to meet the requirements of Title VII which, at that time, required the plaintiff to file her charge with the EEOC within 90 days of discharge. \textit{Id.} at 125.

\textsuperscript{282} Wesley, 876 F.2d at 121.

\textsuperscript{283} International Union, 429 U.S. at 243.

\textsuperscript{284} \textit{Id.} at 243-44. The Sixth Circuit had affirmed the dismissal of the plaintiff-employee's action, holding that the running of the Title VII 90-day limitations period in effect at the time terminated the plaintiff's right to file a charge with the EEOC.

\textsuperscript{285} \textit{Id.} International Union may have sounded the death knell for Danzer. The Sixth Circuit's decision in Guy relied on and accepted the right/remedy distinction accepted by the Court in Danzer. See Guy, 525 F.2d at 127-28. The Sixth Circuit stated:

The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends.

\ldots\ The subsequent increase of time to file the charge enacted by Congress could not revive plaintiff's claim which had been previously barred and extinguished.

\textit{Id.}

\textsuperscript{286} Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 312 n.8 (1945). For a discussion of Chase, see supra notes 242-50 and accompanying text.

\textsuperscript{287} Chase, 325 U.S. at 312.
Thus, it appears that the Court in International Union improperly held that Chase was the controlling precedent. Nonetheless, if the Court persists in its erroneous reading of Chase and Danzer, the Court will likely continue to reject the principles set forth in Danzer.

4. Conclusions on Vested Rights Arising from the Running of the Lampf Limitations Period

Even assuming that Danzer is still good law, Usery apparently would permit Congress to enact a new statute that retroactively imposes liability on Rule 10b-5 defendants for actions in which they no longer have 10b-5 liability because the Lampf limitations period has run. Creating a new liability and removing a limitations impediment to an existing cause of action will have the same effect: in each case the defendants will be liable for their actions. In the situation in which Congress creates a new statutory liability settled expectations may be disturbed, but no property interest of the defendant is divested by virtue of the statute alone.

It is uncertain whether the running of the Lampf limitations period itself creates a vested right in defendants to be free from suit for 10b-5 violations. Although Supreme Court cases discuss the ability of Congress to revive a previously barred claim by retroactively extending the applicable limitations period, they provide uncertain guidance. Danzer has never been overruled. If Danzer is still good law and the Lampf limitations period is substantive, so that it extinguishes the right to sue, then a defendant appears to have a vested right in the immunity from suit arising from the running of the Lampf limitations period. On the other hand, International Union virtually eviscerates Danzer by misapplying Chase. If the Court persists in misreading Chase, decides to overrule Danzer or decides that the Lampf limitations period is not substantive because it was judicially created or otherwise, then the courts would reject defendants' claims that they acquired vested rights solely upon the expiration of the Lampf limitations period.

Courts should find that the three-year repose period in Lampf is substantive. The viability of the right/remedy distinction and of Danzer present difficult issues. The Court would probably take the position, at least in the context of the constitutionality of section 27A, that a vested right arises from the expiration of a sub-

288. For a discussion of Danzer, see supra notes 251-54 and accompanying text.
stantive limitations period. This conclusion is buttressed by the Court's rejection of equitable tolling in Lampf. The thrust of that determination is arguably that once the repose period runs, the underlying right ceases to exist.

C. Vested Rights Arising from Final Judgments

Defendants who have obtained final, nonappealable dismissals of the actions against them based upon the one-and-three-year limitations period in Lampf also attack the constitutionality of section 27A(b), which requires reinstatement of many of those dismissed cases, by arguing that retroactive legislation that reopens finally-adjudicated actions violates the due process clause of the Fifth Amendment. These defendants claim that their final judgments constitute vested property rights protected by the Fifth Amendment. The courts have split on whether section 27A divests defendants of vested rights arising from final judgments. The disparate holdings stem from a fundamental disagreement over the proper interpretation of the relevant precedent. This part of the Article concludes that once a defendant obtains a final judgment of dismissal based upon the Lampf rule, Congress may not reopen that case by creating a longer limitations period or by extending that period through other means. Accordingly, section 27A(b) is unconstitutional to the extent that it permits reinstatement of cases in which defendants had already obtained final judgments dismissing the claims against them.

Some courts have upheld the constitutionality of the statute against due process challenges by treating the one-and-three-year limitations period in Lampf as remedial or "technical" in nature. These courts conclude that the final dismissal of a lawsuit

289. For the text of § 27A(b), see supra note 9. It is important to note that the term "final judgment" used in this Article refers to a judgment that is final in the sense that it is no longer subject to appeal.

290. See, e.g., Rabin v. Fivzar Assocs., 801 F. Supp. 1045, 1055 (S.D.N.Y. 1992). The due process clause of the Fifth Amendment is extended to the states through the Fourteenth Amendment. Therefore, suits that originate in state courts and raise the due process constitutionality issue do so under the Fourteenth Amendment. At least one commentator has taken the position that § 27A(b) divests defendants of vested rights in their final judgments. See Rosenfeld & Mehlman, supra note 198, at 104-05 (Section 27A(b) "transgresses the rule first established in McCullough v. Virginia, that final judgments of the courts may not be overturned by legislation. . . A contrary rule would violate the separation of powers doctrine by subjecting all judicial action to superior legislative review.").

291. See, e.g., Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992) (indicating that statutes of limitations represent public policy regarding privilege to litigate and their protection is not regarded as fundamental right
based upon the expiration of the Lampf limitations period does not confer a vested property interest as does a final judgment based upon substantive merits. Therefore, these courts hold that the retroactive application of section 27A to dismissed final actions does not divest defendants of constitutionally protected property interests.

Some district courts have held section 27A unconstitutional on the ground that any final judgment is a property right that cannot...
not be divested by subsequent legislation. This position does not conflict with the Supreme Court’s holdings in Campbell, Danzer and Chase because none of the defendants in any of those cases had obtained final judgments of dismissal based upon the expiration of a limitations period. Although the cases provide guidance as to whether a vested right arises solely because of the expiration of a limitations period, they do not address the arguably different problem of whether Congress can constitutionally resurrect a time-barred claim that has been dismissed in a final judgment.

Several cases support the proposition that individuals have

293. See, e.g., Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992) (holding § 27A unconstitutional because although defendants do not have vested rights in particular statute of limitations, defendants do have vested rights in court’s judgment dismissing plaintiff’s § 10(b) claims, which § 27A seeks to reinstate); Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 235 (E.D. Ky. 1992) (noting that although Supreme Court has yet to decide whether dismissal on limitations ground gives rise to vested right, it has determined that final judgment gives rise to vested right); In re Brichard Sec. Litig., 788 F. Supp. 1098, 1106 (N.D. Cal. 1992) (concluding that § 27A is unconstitutional because it directs courts to reverse final judgments).

294. No final judgment had been rendered in Campbell because the state constitutional amendment extending the limitations period was enacted before suit was brought. Campbell v. Holt, 115 U.S. 620, 621 (1885). For a discussion of Campbell, see supra notes 233-41 and accompanying text. The same is true in Danzer. William Danzer & Co. v. Gulf & Ship Island R.R., 268 U.S. 633, 634 (1925). For a discussion of Danzer, see supra notes 251-54 and accompanying text. Although the action had been commenced in Chase when the statute extending the time period was enacted, the case was still pending on remand and the Court assumed that no final judgment had been rendered. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 305-08 (1945). For a discussion of Chase, see supra notes 242-50 and accompanying text.

The Chase Court specifically addressed the argument that a final judgment had been entered by stating:

Appellant, however, insists that it was sued upon two separate and independent causes of action, one being “upon a liability created by statute,” and that its immunity from suit on that cause of action had been finally adjudicated. The argument is not consistent with the holdings of the state court. . . . The state court did not dispose of the liability for statutory violation as a separate cause of action by dismissal or otherwise. We cannot say that it was finally or separately adjudicated. Id. at 310-11. In fact, the Court addressed the status of the adjudication in great length to emphasize that the plaintiff’s claim was never dismissed on statute of limitations grounds. Id. at 305-11.

One commentator analyzed Chase as permitting retroactive application of newly-enacted legislation to cases on appeal, but thought that applying such a statute to finally-adjudicated cases would be improper. Charles B. Hochman, The Supreme Court and The Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 718 (1960) (“The Supreme Court held that this new statutory provision could constitutionally be applied to the case since there had been no final disposition of the litigation. Similarly, it has been held that a statute enacted after judgment may be retroactively applied on appeal.”).
vested property interests in final judgments. The Supreme Court has stated that "[i]t is not within the power of a legislature to take away rights ... vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb [those] rights ... ceases."

None of the Supreme Court cases recognizing vested rights in final judgments involved judgments of dismissal based upon the expiration of a limitations period. Consequently, final judgment cases do not expressly prohibit resuscitating a previously final judgment by extending a previously expired limitations bar. Based upon this distinction, courts finding section 27A(b) constitutional have eschewed these cases and have instead relied on the Campbell line of cases to support the conclusion that the Constitution permits legislative revival of cases dismissed on the basis of a technical defense such as the expiration of a statute of limitations.

295. See, e.g., Hodges v. Snyder, 261 U.S. 600, 603 (1923) ("[T]he private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation."); McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) (concluding that once judgment creates vested right it cannot be legislatively removed); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1855) (noting that private rights determined by final judgment cannot be annulled by subsequent legislation, although same does not apply to public rights); Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) ("The constitutional dimension of this principle, sometimes labelled the 'vested rights' doctrine ... recognizes that rights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other."); cert. denied, 490 U.S. 1090 (1989); Tonya K. v. Board of Educ., 847 F.2d 1243, 1247 (7th Cir. 1988) ("The 'vested rights' doctrine starts from the proposition that a judgment, like a deed, is (or identifies) a species of property. ... Once the court has fixed property rights by judgment, the legislature has no greater power over this form of property than over any other."); Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 818 (D.C. Cir. 1974) (denying retroactive application of newly-enacted statute because "to hold that Congress could annul [the] judgment would be to enlarge substantially the exception carved by applicable precedent in the general, constitutional rule that rights vested in final judgments, no longer subject to appeal, are immune from legislative alteration").


297. For a discussion of these cases, see supra notes 233-50 and accompanying text. It is always important to remember, however, that some statutes of limitation have been held to establish substantive rights. See, e.g., Stewart v. Keyes, 295 U.S. 403, 417 (1935) (holding that suits to recover real or personal property that are barred by statute of limitations cannot be revived by subsequent legislation). The Stewart Court found that such legislation would constitute a deprivation of property without due process because the person benefitting from the bar had legal vested title in the property once the limitations period expired. Id. at 417; see also Danzer, 268 U.S. at 637 ("[S]uch [limita-
In validating section 27A(b), courts must determine that final judgments based upon technical defenses do not rise to the level of protected property rights. This conclusion is problematic for many reasons. First, although the Supreme Court has not decided a case in which the issue was the reopening of a prior final decision rendered between private parties on the basis of a limitations period, the Court has ruled that a final judgment between private litigants could be reopened by a retroactive statute only in very specific and limited circumstances. To date the Court has narrowly confined Congress’ ability to disturb a final judgment to cases involving actions against the government and to cases involving the power of the court to maintain equitable jurisdiction in matters involving public rights. Second, in many jurisdictions, a dismissal based upon statute of limitations grounds operates as a full adjudication on the merits unless otherwise stated. Third, although courts upholding the constitutionality of section 27A in cases involving final judgments rely on the language in Chase and Campbell that limitations periods are “technical] provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act.”). For a discussion of Danzer, see supra notes 251-54 and accompanying text.

In addition, courts that hold § 27A constitutional also distinguish the cases which held that a final judgment on the merits establishes a vested property interest because again, such cases involve substantive rather than remedial rights. For example, one court stated:

[D]efendant's reliance on these cases is misplaced. Rather than involving the modification of a technical defense, the cases cited . . . specifically involved divestiture of a substantive right . . . .

While it is true that “[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment,” this does not apply where the judgement was not based on the substantive merit of the claim, but instead was the result of the application of the defense of statute of limitations, a mere technical rule.


298. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (concluding that government could choose to waive its res judicata defense and pay judgment); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) (allowing relitigation of final judgment in case involving adjudication of public, not private, right). Courts have acknowledged that the Supreme Court has limited the reopening of final judgments to these types of cases. See Daylo, 501 F.2d at 816-18; Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231, 234 n.3 (E.D. Ky. 1992); In re Brichard Sec. Litig., 788 F. Supp. 1098, 1106 n.8 (N.D. Cal. 1992).

'cal" and do not rise to the level of fundamental rights, the Supreme Court has consistently taken the position that final judgments as such do confer protected rights, subject to the very limited exceptions mentioned above. 300 Furthermore, as noted above, the Campbell line of cases is not controlling because it does not involve final judgments. 301 Despite these problems, no clear Supreme Court precedent controls. Although the Court has ruled that the running of a statute of limitations does not create a vested property interest, 302 the Court has not determined whether a final judgment of dismissal, based upon statute of limitations grounds, is a vested property interest protected from retroactive legislation by the Fifth Amendment. 303

Although a few courts have been presented with the issue of whether retroactive legislation can affect a final judgment in other contexts, these courts have avoided directly ruling on the issue. For instance, in two cases involving final judgments, the courts avoided the constitutional issue by finding no clear congressional intent to retroactively apply the statute to final judgments. 304 In two other cases, the courts avoided the constitutional question by

300. For examples of cases standing for this general proposition, see supra notes 295-96 and accompanying text.

301. See, e.g., Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 305, 310, 316 (1945) (indicating that Court considered it important that case involved pending litigation at time of legislative action, not final adjudication). For a discussion of these cases, see supra notes 233-50 and accompanying text.

302. See, e.g., International Union of Elec. Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-44 (1976) (holding that congressional extension of limitations period applied to cases pending appeal at time extension made); see also Chase, 325 U.S. at 315 (lifting bar of statute of limitations to restore remedy does not violate due process); Campbell v. Holt, 115 U.S. 620, 628 (1885) (running of statute of limitations does not affect underlying substantive right); Berstein v. Sullivan, 914 F.2d 1395, 1400-03 (10th Cir. 1990) (holding that legislature may revive claim barred by statute of limitations through extension of limitations period).

303. "The United States, in its Statement of Interest, . . . acknowledges that the Supreme Court has yet to decide whether a dismissal on statute of limitation grounds gives rise to vested rights . . . ." Treiber, 796 F. Supp. at 1061. In Treiber, the district court dismissed the plaintiffs' § 10(b) claims as time-barred and the plaintiffs did not appeal. Id. at 1056. The district court, in rejecting reinstatement of the claim, considered the prior dismissal and failure to appeal as a final judgment. Id. at 1062.

304. See Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) ("In light of the fact that Congress did not clearly express [an intent to apply the statute retroactively to final judgments] the constitutional difficulty associated with this interpretation require[s] the Act to be construed otherwise."). cert. denied, 490 U.S. 1090 (1989); Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 823 (D.C. Cir. 1974) ("In view of the serious constitutional problems that [retroactive application of the statute to final judgments] would raise, we are unwilling to impute [such an intent] to Congress . . . .").
deciding that the judgments at issue were not final judgments. 305

The line of cases represented by *Usery* and its progeny may provide insight into how the Court would rule if faced with this issue. *Usery* held that Congress can change the law in ways that disturb otherwise settled expectations of private parties by retroactively making activities that happened in the past actionable even though those activities were lawful at the time they took place. Moreover, the Supreme Court decisions indicate that final judgments are not always sacrosanct. 306 A logical extension of *Usery* and the cases that permit the reopening of final judgments in certain situations could lead to the conclusion that Congress has the power to undo previously granted protections from suit so long as it does so rationally. Under this view, intangible property rights would never be vested. Arguably, interfering with the right not to be sued for a past obligation "terminated" by a statute of repose seems to present no greater impediment to retroactive legislation than an act creating a new liability for past actions in which no prior liability existed.

Nonetheless, given the Court's apparent inclination to protect rights arising from final judgments and the Court's recognition of the strong societal interest in finality, the Court probably would adopt the position that defendants who obtained final judgments of dismissal based upon the *Lampf* rule acquired vested rights that cannot be divested by retroactive legislation. 307 Thus,

305. Tonya K. v. Board of Educ., 847 F.2d 1243, 1248 (7th Cir. 1988) (finding that prior suit dismissed without prejudice provided no basis for asserting vested right in that judgment); Taxpayers for Animas-La Plata v. Animas-La Plata, 739 F.2d 1472, 1477 (10th Cir. 1984) (stating that retroactive statute that affected pending case violated no vested right).

306. For a discussion of cases that support this view, see supra note 298 and accompanying text.

307. For example, in *Beam*, Justice Souter emphasized the importance of finality and how it acts as a barrier to reopening cases because of new law when he said:

[R]etroactivity in civil cases must be limited by the need for finality; once suit is barred by res judicata . . . a new rule cannot reopen the door already closed. . . . Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicata . . . .

. . . While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be consid-
section 27A(b) would be unconstitutional at least in those cases in which plaintiffs sought reinstatement of dismissed claims when a final judgment was involved.

VI. THE SEPARATION OF POWERS CHALLENGE TO SECTION 27A

A. Introduction

In most of the section 10(b) cases preserved or revived under section 27A, defendants have argued that section 27A violates the constitutional separation of powers doctrine by impermissibly invading the domain of the judiciary. The doctrine's source is Article III of the Constitution, which vests the judicial power of the United States "in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."308 The primary rationale for preventing the legislature from exercising or infringing upon the powers of the judiciary is to prevent the popular will (through the legislature) from depriving unpopular figures and causes of their rights under the law.309

An underlying premise of the separation of powers doctrine is that each branch has its own sphere of influence upon which the other branches may not encroach.310 The border between Con-
gress and the judiciary is, in reality, far from impregnable. Several constitutional provisions mandate checks and balances among the branches.\footnote{11} The general development of the separation of powers doctrine indicates that the separation is not a hermetic seal of one branch from the others.\footnote{12} Early on, the judiciary blurred the border between the judicial and legislative provinces by upholding retroactive legislation and applying judicially promulgated legal principles in a prospective fashion.\footnote{13}

is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others.”).

\footnote{11} The Court has “recognized Madison’s teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power with each Branch.” Mistretta v. United States, 488 U.S. 361, 381 (1989). For example, to provide legislative control over the courts, the Constitution expressly gives Congress control over the creation of all courts inferior to the Supreme Court and the power to make exceptions to the appellate jurisdiction of the Supreme Court itself. U.S. Const. art. III, §§ 1, 2, cl. 2. To provide judicial control over the legislature, the Constitution expressly insulates judges from removal or reduction in compensation during their good behavior while in office. U.S. Const. art. III, § 1.

\footnote{12} Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (citing Buckley v. Valeo, 424 U.S. 1, 121 (1976)); see also \textit{The Constitution of the United States of America: Analysis and Interpretation} 3-7 (Johnny H. Killian & George A. Costello eds., Supp. 1990) (discussing Supreme Court’s use of formalist and functionalist approaches in deciding recent separation of powers questions); \textit{The Federalist} No. 47 (James Madison) (strongly supporting permissibility of invasion of each branch upon others).

\footnote{13} The earliest United States case in which retroactive legislation was given effect seems to be \textit{Calder v. Bull}, in which the Court allowed application of a state statute to reverse the probate decree of a state court notwithstanding the ex post facto clause in Article 9, § 1 of the Constitution. \textit{Calder v. Bull}, 3 U.S. (3 Call.) 386 (1798). The decision to apply the legislation retroactively was somewhat surprising given the general consensus at the time that the constitutional prohibition of ex post facto laws applied equally to all types of statutes. \textit{Constitution: Analysis and Interpretation}, supra note 308, at 381-82; see also 3 Joseph Story, \textit{Commentaries on the Constitution of the United States} § 1339 (1833) (defining term “ex post facto laws” to “embrace all retrospective laws, or laws governing, or controlling past transactions, whether they are of a civil, or a criminal nature”). The \textit{Calder} opinion limited the scope of the ex post facto prohibition to penal statutes. \textit{Calder}, 3 U.S. (3 Dall.) at 390.

Because the function of the legislature is to “make” law, statutes should ideally apply prospectively, i.e., only to events that occur after their enactment. See United States v. Moore, 95 U.S. 760, 762 (1877) (noting that statute should never be construed as applying retroactively if it can be avoided); see also Robert von Moschzisker, \textit{Stare Decisis in Courts of Last Resort}, 37 Harv. L. Rev. 409, 427 (1924) (“It is the function of legislatures to make written laws to govern future situations . . . .”). Because a statute is “made” rather than “found,” parties cannot obtain notice (constructive or actual) prior to its existence and thus cannot be expected to guide their actions by it. Refusing to apply a statute retroactively protects the interests of parties who may have relied on the state of the law before the statute and promotes respect for the rule of law. Arguably, people are more likely to disregard the present state of the law if, because of retroactiv-
Defendants challenging section 27A on separation of powers grounds have raised three distinct arguments. First, section 27A violates the separation of powers doctrine by prescribing a rule of decision to the judiciary without changing the underlying law, in violation of the principles enunciated by the Supreme Court in United States v. Klein and its progeny. Second, because section 27A requires prospective application of Lampf, the statute invades the judiciary's domain by interfering with the Court's constitutionally based decision in Beam, which requires retroactive application of Lampf. Third, section 27A(b) divests defendants of vested rights in final judgments in contravention of the separation principles, they have reason to suspect that it will not be controlling. Ideally, the law governing a given transaction or occurrence should be “fixed” at the time of the transaction or occurrence, regardless of whether the legislature makes subsequent enactments to the contrary. It is at the time of the transaction or occurrence that all of the evidence is fixed and the parties have done and made all of the legally relevant actions and decisions.

Conversely, the decisions of appellate courts in interpreting the law are ideally mere “discovery” of what the existing law is. See James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991); Moschzisker, supra, at 427 (“[C]ourts exist to determine what the law,—written and unwritten,—was at the time of the particular transactions involved in controversies which come before them for adjudication, and to apply that law to those facts.”). Whether a decision is based on statutory or common law, all parties whose transactions or occurrences are governed by that law must be governed by that decision, even parties who have relied on some contrary interpretation of the law, insofar as they have received adequate notice (actual or constructive) of the decision. This protects the justified reliance interests of parties who have expended sufficient effort to understand the law correctly so as to rely upon it, and promotes respect for the rule of law, because parties are likely to make a greater effort to properly understand the law as it presently stands.

Nonetheless, the Supreme Court has permitted retroactive application of statutes since Calder and the purely prospective application of court decisions since Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863). The ability to apply a decision purely prospectively, while giving a court some quasi-legislative power, also gives a court the opportunity to bridge a gap that may arise from the legislature's inability to foresee all possible implications of a given law, whether because of political motivations, poor draftsmanship or the inability to anticipate all cases. Whenever a court attempts to apply a law purely prospectively, however, it is arguably invading the province of the legislature and violating the separation of powers doctrine by legislating from the bench.

On the other hand, giving a legislature some degree of quasi-judicial power, through the ability to make and apply law retroactively, is meritorious as a check on the judiciary, because if the judiciary becomes too activist, making law under the color of interpreting it, the legislature can act to restore the status quo. Yet even retroactive legislative changes are, at least arguably, invading the province of the judiciary and violating the separation of powers doctrine.
of powers component of the vested rights doctrine. After a brief discussion of the relevant Supreme Court precedent, this part of the Article explores the first two arguments.

This part concludes that section 27A does not violate the separation of powers doctrine. Section 27A does not prescribe a rule of decision in contravention of Klein because section 27A changes the law from the automatic application of Lampf to all pending cases to the application of the limitations period and principles of retroactivity in effect in the jurisdiction before Lampf and Beam were decided.

Furthermore, section 27A does not unconstitutionally encroach upon the Beam decision for three reasons. First, Beam is based on jurisprudential principles, not constitutional requirements. Second, section 27A does not result in selective prospectivity in contravention of Beam. Third, Beam does not prevent Congress from engaging in selective prospectivity.

B. Supreme Court Precedent Concerning Congress' Ability to Enact Retroactive Legislation Affecting Pending and Final Judicial Decisions

Since the 1801 Supreme Court decision in United States v. The Schooner Peggy, courts have consistently held that retroactive legislation does not per se violate the separation of powers doctrine. In Schooner Peggy, Chief Justice John Marshall sustained the constitutionality of retroactive legislation holding that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." Although the Court cautioned

316. For a discussion of this argument, see supra notes 289-307 and accompanying text.
317. 5 U.S. (1 Cranch) 103 (1801).
318. Schooner Peggy involved a dispute regarding actions that occurred under the provisions of a treaty between the United States and France. Id. at 107. One provision of the treaty called for the return of certain property captured as "prize" by the privateers of each nation. Id. Prior to ratification of the treaty by the Senate, the French owners of the Peggy petitioned in the United States district court for the return of their ship and cargo, arguing that the Peggy had not been a lawful subject of the statute authorizing such capture in the first place. Id. at 103-04 & n.1. The district judge decided in the French owners' favor, but the circuit court reversed, condemning the vessel and its contents for sale. Id. at 104-07. While the case was still pending on appeal, the treaty was ratified. Id. at 107. The Supreme Court reversed because of the ratification. Id. at 110.
319. Id. This holding reflects the judicial standard that the judiciary ought to apply the law based upon the best current understanding of what the law is at the time of the decision, not what the law was at the time of the events upon
against retroactive construction that would divest private parties of vested rights, the Court acknowledged that legislation would be given retroactive effect if that was Congress' clearly expressed intent.\textsuperscript{320}

The Supreme Court established some constitutional limits to retroactive legislation in \textit{United States v. Klein}.\textsuperscript{321} Klein was the administrator of the estate of Victor Wilson.\textsuperscript{322} The government confiscated cotton owned by Wilson, sold it as captured and abandoned property, and deposited the proceeds of the sale in the United States Treasury.\textsuperscript{323} The cotton was confiscated pursuant to the Abandoned and Captured Property Act of March 12, 1863, (Abandoned Property Act).\textsuperscript{324} Under the Abandoned Property Act, an owner could recover the proceeds from the sale of captured or abandoned property if the owner could prove that "he ha[d] never given any aid or comfort to the present rebellion."\textsuperscript{325}
After Wilson received a presidential pardon in return for taking an oath of loyalty to the Union, Klein, his administrator, brought suit in the Court of Claims to recover the proceeds from the sale of his cotton. The Court of Claims found in favor of Klein.\(^{326}\)

After the Court of Claims decision, the Supreme Court decided *United States v. Padelford*,\(^ {327}\) a case factually similar to *Klein*. In *Padelford*, the Court affirmed a Court of Claims judgment in favor of Padelford holding that if a claimant had received a presidential pardon, the pardon alone sufficed to meet the Abandoned Property Act's requirement that the claimant show that he had given no aid or comfort to the Confederacy.\(^ {328}\)

Shortly after *Padelford*, and while *Klein* was pending on appeal, Congress amended the Abandoned Property Act by adding a proviso. The proviso denied jurisdiction and directed courts to dismiss any claim against the United States (whether at trial in the Court of Claims or on appeal) in which the claimant had accepted a presidential pardon but had not explicitly disclaimed participation in aid of the Confederacy.\(^ {329}\)

The *Klein* Court decided that the proviso contravened the separation of powers doctrine in two ways. First, the proviso improperly impaired the effect of a presidential pardon and thus infringed upon the constitutional powers of the executive branch.\(^ {330}\) Second, and of direct relevance to the constitutional-

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327. 76 U.S. (9 Wall.) 531 (1869).
328. Id. at 543.
329. *Klein*, 80 U.S. (13 Wall.) at 133-34. If upheld, the proviso required the court to dismiss Klein's case because Wilson had not made the required disclaimer when he received the presidential pardon. Id. at 146. In a later case the Court summarized the intended impact of the proviso:

The proviso had three effects: First, no Presidential pardon or amnesty was to be admissible in evidence on behalf of a claimant in the Court of Claims as the proof of loyalty required by the Abandoned and Captured Property Act. Second, the Supreme Court was to dismiss, for want of jurisdiction, any appeal from a judgment of the Court of Claims in favor of a claimant who had established his loyalty through a pardon. Third, the Court of Claims henceforth was to treat a claimant's receipt of a Presidential pardon, without protest, as conclusive evidence that he had given aid and comfort to the rebellion, and to dismiss any lawsuit on his behalf for want of jurisdiction.

*United States v. Sioux Nation of Indians*, 448 U.S. 371, 403 (1980). The *Klein* court concluded: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal." *Klein*, 80 U.S. (13 Wall.) at 144.
330. *Klein*, 80 U.S. (13 Wall.) at 147. The *Klein* Court stated:

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is at-
Constitutionality of Section 27A

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Constitutionality of Section 27A

Palm: The Constitutionality of Section 27A of the Securities Exchange Act

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ity of section 27A, the Klein Court found the proviso constitutionally infirm because it attempted to prescribe a rule of decision in the government's favor in a pending case without changing the underlying circumstances, that is, without changing the law governing the case. In its ruling, the Court made a number of comments concerning why it found the statute repugnant to the constitutional separation of powers doctrine.

The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

Id. at 148.

This holding continues to be the major lesson of Klein.

As one commentator recently noted:

Consistent with constitutional limitations, Congress clearly has authority to fix the rules of procedure, including rules of evidence, which article III courts must apply. Again consistent with constitutional limitations, Congress also has authority to define by statute the substantive law which such courts are to enforce. Nonetheless, the separation of powers does limit congressional regulation of the decision-making processes of article III courts at least this much: if Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases.

Laurence H. Tribe, American Constitutional Law § 3-5, at 50 (2d ed. 1988) (footnotes omitted).

The Klein Court commented:

The language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We have already decided that it was our duty to consider them and give effect, in cases like the present, as equivalent to proof of loyalty... It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide in its own favor? Can we do so without allowing
In invalidating the proviso at issue in Klein, the Court distinguished Pennsylvania v. Wheeling and Belmont Bridge Co., a decision that determined whether the parties could relitigate issues concerning a public infrastructure after Congress had recharacterized the bridge as a post-road. The Wheeling Bridge Court had determined that Congress had the power to change the substantive law and courts had the power to re-open a final decision and allow the parties to relitigate the case based upon the change of law. In distinguishing Wheeling Bridge from Klein, the Klein Court stated:

No arbitrary rule of decision was prescribed in [Wheeling Bridge], . . . the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

The relationship between retroactive legislation and the separation of powers doctrine again was the central focus of the Supreme Court's disposition of United States v. Sioux Nation of Indi-
The Sioux had filed a petition in the Court of Claims, alleging that certain government actions constituted an unlawful taking of Indian lands in the Black Hills in contravention of the Fifth Amendment. In 1942, the Court of Claims dismissed the suit on the ground that the statute conferring jurisdiction did not include the power to question the adequacy of the compensation paid by Congress. Eight years later, the Sioux resubmitted their claim to the newly-created Indian Claims Commission, which concluded that the claim was valid and the Sioux were entitled to compensation for the taking. When the government appealed, the Court of Claims reversed the Commission and ruled that the Court of Claims' 1942 decision had res judicata effect that precluded the Commission's contrary decision. In dicta, the Court of Claims indicated that the Commission's findings were otherwise correct and that Congress could remedy the problem.

Congress took the hint and passed a statute that directed the Court of Claims to review the Commission's judgment de novo on the merits, to take new evidence and to disregard the defenses of res judicata and collateral estoppel. The Court of Claims promptly affirmed the Commission's finding of a taking, and the government successfully petitioned for certiorari. Writing for the majority, Justice Blackmun held the statute constitutional, at least in part because the act at issue waived the government's defense of res judicata and allowed adjudication on the merits.

337. Id. at 384. The Fort Laramie Treaty provided that "the Great Sioux Reservation including the Black Hills, would be 'set apart for the absolute and undisturbed use and occupation of the Indians herein named.' " Id. at 374 (quoting Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1868) (repealed 1877)). In 1877, Congress passed an act which abrogated the Fort Laramie Treaty and implemented terms of another agreement less favorable to the Sioux. Id. at 382-83; see also Act of Feb. 28, 1877, 19 Stat. 254 (1877).
338. Sioux Nation, 448 U.S. at 384. A special congressional act gave the Court of Claims jurisdiction to hear claims specifically related to disputes between the Sioux tribe and the United States. Id. at 384; see also Act of June 3, 1920, ch. 222, 41 Stat. 738 (1920).
339. Sioux Nation, 448 U.S. at 385-86.
341. Id. at 1302-03.
345. Id. at 405.
In dissent, Justice Rehnquist argued that *Klein* prohibited Congress from forcing the relitigation of an issue once decided because such congressional power would infringe upon the finality of the judiciary's decisions. 346

In *Sioux Nation*, the Supreme Court interpreted *Klein* to have found two distinct separation of powers problems with the proviso. First, the proviso enacted by Congress in *Klein* prescribed a rule of decision in a pending case in such a way as to force courts to decide the controversies in the government's favor. Second, the proviso impaired the effect of a presidential pardon, thus "infringing the constitutional power of the Executive." 347 The *Sioux Nation* Court distinguished *Klein* and rejected the separation of powers challenge to the statute at issue for two reasons. First, the Court observed that "[t]he amendment at issue in the present case . . . waived the defense of res judicata so that a legal claim could be resolved on the merits." 348 Second, the Court indicated that "Congress made no effort . . . to control the Court of Claims' ultimate decision of that claim." 349

The Supreme Court recently again explored the separation of powers limits to legislation affecting pending cases in *Robertson v. Seattle Audubon Society*. 350 *Robertson* arose from the battle between environmental groups and the timber industry over the status of the northern spotted owl in the Pacific Northwest. 351 The environmental groups filed several suits against the United States Department of the Interior in an attempt to prevent the cutting, for sale, of timber on public land. 352 While the suits were pending, Congress passed legislation that prohibited the sale of timber from certain areas and also provided that compliance with that prohibition was sufficient to meet the requirements of the environmental statutes upon which the environmental groups based

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346. *Id.* at 428-31 (Rehnquist, J., dissenting). The majority saw it differently. In upholding the statute, the Court emphasized that the statute "neither brought into question the finality of [the Court of Claims'] earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim." *Id.* at 406.

347. *Id.* at 404-05 (quoting United States v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872)).

348. *Id.* at 405 (emphasis added).

349. *Id.* (emphasis added).


351. *Id.* at 1410.

352. *Id.* The opposition between the two factions was summarized as follows: "'Harvesting the forests, say environmentalists, would kill the owls. Restrictions on harvesting, respond local timber industries, would devastate the region's economy.'' *Id.*
their suits. The legislation cited those actions by case name and docket number. The government moved for dismissal of the actions in light of the government's compliance with the prohibition created by the legislation. The environmental groups opposed the motion, arguing that the legislation violated the separation of powers doctrine by prescribing a rule of decision in a pending case.

The district court granted the government's motion to dismiss. The Ninth Circuit reversed on the ground that the legislation violated the separation of powers doctrine. The Ninth Circuit found that Klein prohibited Congress from directing a decision in pending cases without changing the underlying substantive law. The Supreme Court reversed. Writing for a unanimous Court, Justice Thomas stated that, even assuming that the Ninth Circuit's interpretation of Klein was correct, the new statutory provision changed the prior environmental statutes by providing another method of compliance. Unfortunately, how-
ever, the Court did not decide whether the appellate court's construction of *Klein* was correct or give any indication as to the Court's present view of *Klein*.361

C. The Constitutionality of Section 27A Under *Klein*

The basis for the decision in *Klein* is difficult to identify because of the various justifications advanced by the *Klein* Court for its decision.362 The Supreme Court, most lower courts and many commentators usually view *Klein* as forbidding congressional acts that prescribe rules of decision in pending cases without changing the underlying law.363 Some of the courts addressing the constitutionality of section 27A under the separation of powers doctrine directed particular applications under either the old or the new standards.” *Id.* at 1413. The Court concluded that Congress had changed the law but had not directed a rule of decision in a pending case, noting that “[b]efore subsection (b)(6)(A) was enacted, the original claims would fail only if the challenged harvesting violated none of [the] old provisions. Under subsection (b)(6)(A), by contrast, those same claims would fail if the harvesting [did not violate either (b)(3) or (b)(5)].” *Id.*

361. The *Robertson* Court commented: “The Court of Appeals held that subsection (b)(6)(A) was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that subsection (b)(6)(A) *did* amend applicable law, we need not consider whether this reading of *Klein* is correct.” *Id.* at 1414.

362. See BATOR ET AL., supra note 319, at 369 (“The *Klein* opinion . . . is not a model of clarity.”); Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wis. L. Rev. 1189, 1195 (“[T]he *Klein* opinion combines the clear with the Delphic. Chief Justice Chase's excessively broad and ambiguous statements for the majority provide the Delphic elements in *Klein*. His statements have permitted *Klein* to be viewed as nearly all things to all men.”). For the text of the *Klein* decision containing the various reasons given by the Court to support its holding, see supra note 332.

363. See United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980) (noting that “the proviso at issue in *Klein* had attempted 'to prescribe a rule for the decision of a cause in a particular way'” (quoting United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872))); Pope v. United States, 323 U.S. 1, 8 (1944) (observing that *Klein* condemned statute because it prescribed rule of decision); Austin v. United States, 155 U.S. 417, 424 (1894) (declaring that, among other things, statute invalidated in *Klein* violated Constitution because statute denied jurisdiction to Court through legislative prescription of rule of decision); Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990) (stating that under *Klein*, Congress cannot affect pending case without changing underlying law), rev'd, 112 S. Ct. 1407 (1992); BATOR ET AL., supra note 319, at 369 & n.4 (suggesting that *Klein* prohibits Congress from requiring courts to reverse decision previously rendered pursuant to independently unconstitutional legal rule); Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 87 (1981) (commenting that *Klein* stands for proposition that “Congress cannot give the federal courts jurisdiction to adjudicate cases while directing them to reach a particular result”); cf. Young, supra note 362, at 1196-97 (stating that *Klein* really involved narrow limitation on power of Congress to control jurisdiction of courts and Congress' power to invoke sovereign immunity).
trine have based their decisions on other interpretations of Klein. This section discusses the constitutionality of section 27A cases under the various interpretations utilized and concludes that section 27A is constitutional under all reasonable interpretations of Klein.

1. Section 27A As Prescribing a Rule of Decision Without Changing the Underlying Law

Virtually all of the courts that have discussed whether section

364. For a discussion of the various interpretations of the Klein holding as they relate to § 27A challenges, see infra notes 365-89 and accompanying text.

As stated, the most common interpretation is that Klein forbids congressional acts that prescribe a rule of decision without changing the underlying law. Another interpretation of Klein permits Congress to amend the law as it sees fit and to apply those amendments retroactively so long as the amendment itself does not otherwise violate the Constitution. This view of Klein suggests that there is nothing wrong per se with changing the legal implications of granting a pardon and applying that change to pending cases; the error is that it “impairs the effect of a pardon, and thus infringes the constitutional power of the Executive.” United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872). Klein has also been cited in support of the proposition that “congressional control of the appropriations power does not allow Congress to deny or to direct the President in exercising the power to pardon.” See Marshall Silverberg, The Separation of Powers and Control of the CIA’s Covert Operations, 68 Tex. L. Rev. 575, 621 (1990). Commentators have also noted that the political question doctrine did not bar the adjudication of the dispute between Congress and the Executive in Klein. See, e.g., Louis Henkin, Is There a “Political Question” Doctrine?, 85 Yale L.J. 597, 624 & n.76 (1976).

Others have expressed that “[p]erhaps the safest reading of Klein is that it precludes Congress from impairing the Executive’s power to pardon.” Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 526-27 (1974); see also Archie Parnell, Congressional Interference in Agency Enforcement: The IRS Experience, 89 Yale L.J. 1360, 1379 n.116 (1980) (stating that Congress cannot pass laws impairing President’s pardoning power); Jeremy A. Rabkin & Neal E. Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 224 n.108 (1987) (stating that “no legislation can constitutionally direct courts to ignore the effect of a presidential pardon”); accord Kate Stith, Congress’ Power of the Purse, 97 Yale L.J. 1343, 1351 n.32 (1988); Roger W. Kirst, Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right, 58 Tex. L. Rev. 549, 576-77 (1980). This understanding of Klein views Congress’ law-making and law-applying power as absolute, except in situations in which it infringes on the constitutional prerogatives of another branch, the states or individuals.

In Robertson, the Ninth Circuit also interpreted Klein as prohibiting legislation that instructs the court how to decide an issue of fact or requires the court to decide a case based on a rule of law that is otherwise unconstitutional on other grounds. Robertson, 914 F.2d at 1315-16. On appeal to the Supreme Court, the plaintiffs argued, “Klein and Wheeling Bridge thus stand for the straightforward proposition that Congress cannot direct the outcome of a particular pending case by instructing the courts how to interpret and apply the existing law to the specific pending claims.” Brief of Respondents Seattle Audubon Society et al. at 28-29, Robertson, 112 S. Ct. 1407 (1992) (No. 90-1596).
27A violates the separation of powers doctrine have based their decision on the most common interpretation of Klein under which the primary focus is whether section 27A prescribes a rule of decision without changing the underlying law. Most courts applying this test conclude that section 27A is constitutional because it does not prescribe a rule of decision and because it does change the underlying law. Generally, these courts find that section


366. See, e.g., Gray, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,262-63 (holding that § 27A changed underlying law by providing new statute of limitations for all cases filed before Lampf thereby eliminating retroactive effect of Lampf); Berning, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,099 (holding that § 27A changed limitations period for all cases filed before Lampf); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1573 (11th Cir. 1992) (holding that § 27A "does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991" and that § 27A "does not require courts to make any particular findings of fact or applications

http://digitalcommons.law.villanova.edu/vlr/vol37/iss5/1
27A allows courts to apply their own rules to determine whether they will decide the merits of a section 10(b) claim by removing the preexisting time bar.\textsuperscript{367}

The courts upholding section 27A have found that it effected a change in the preexisting law in two ways.\textsuperscript{368} First, the statute changes the applicable limitations period from the \textit{Lampf} one-and-three-year rule to the limitations period in the forum jurisdiction before \textit{Lampf} was decided. Second, section 27A changes the law by preventing the \textit{automatic} application of \textit{Lampf} to pending cases, in that section 27A requires courts to apply the principles of retroactivity recognized in the forum jurisdiction prior to
Because of section 27A, the lower courts will normally apply the *Chevron Oil* framework to determine the retroactivity of the applicable limitations period, an approach that *Beam* apparently precludes.370

The courts upholding the constitutionality of section 27A acknowledge that Congress did not expressly provide a single, express statute of limitations for all section 10(b) actions. Nevertheless, these courts conclude that section 27A changes the law for all cases filed before *Lampf* and *Beam* by incorporating by reference the jurisdictions' pre-*Lampf* limitations law and pre-*Beam* retroactivity law.371

In contrast, some courts have ruled that section 27A violates the separation of powers doctrine because the statute prescribes a rule of decision. According to these courts, section 27A requires the judiciary to ignore *Lampf* and *Beam* without any change in the underlying law.372 As one district court concluded:

> 369. The effect of the statute may not, in fact, change the result in certain cases where the jurisdiction's pre-*Lampf* rule was the one-and-three-year limitations period and application of the jurisdiction's pre-*Beam* retroactivity test gives that rule retroactive effect.

> 370. For a discussion of *Beam*'s impact on the retroactive application of *Lampf*, see supra notes 190-97 and accompanying text.

> 371. E.g., Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 806 F. Supp. 108, 112 (N.D. Tex. 1992) ("The fact that Congress chose to incorporate the statute of limitations existing in the applicable jurisdiction, rather than prescribe a specific statute of limitations for Section 10(b), has no bearing on whether a change has occurred in the law."); *Rabin*, 801 F. Supp. at 1054 (rejecting defendant's argument that § 27A failed to change existing law because it did not contain uniform limitations period to be applied in all jurisdictions); *Adler*, 790 F. Supp. at 1243 (stating that § 27A changes law through its impact on retroactive application of *Lampf* rule); *Bendis*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 92,923 n.8 (concluding that § 27A changed existing law); *Bankard v. First Carolina Communications*, Inc., No. 89 C 8571, 1992 WL 3694, at *6 (N.D. Ill. Jan. 6, 1992) ("Congress has changed the law. It might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction.").

> 372. See, e.g., *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1103 (N.D. Cal. 1992) (concluding that § 27A violates separation of powers because it improperly prescribes rule of decision in pending cases, reverses final judgments and attempts to change constitutionally mandated rule in *Beam*); *Bank of Denver v. Southeastern Capital Group*, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992) (holding § 27A unconstitutional because it prescribes rule of decision without concomitant change in law); *Johnston v. Cigna Corp.*, 789 F. Supp. 1098, 1101-02 (D. Colo. 1992) (concluding that § 27A was unconstitutional because it directs "a result under the unchanged provisions of § 10(b)—namely, it directs federal courts in a discrete body of pending cases to ignore the Supreme Court's binding interpretation of § 10(b) and to reinstate actions that were dismissed under the Court's interpretation"); *Mancino v. International Technology Corp.*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,614, at 92,892 (C.D. Cal. Mar. 10, 1992) (same). Rosenfeld & Mehlman stated:
This case is directly analogous to *Klein*—in both cases, Congress sought to displace the Supreme Court’s interpretation of a statute without changing the underlying law. Just as in *Klein*, the “great and controlling purpose” of § [27A] is to deny the interpretation of § 10(b) “which this court had adjudged [it] to have.” If Congress’ purpose was to change the law, it could have enacted a retroactive express statute of limitations or made § [27A] applicable to all cases regardless of whether they were filed on or before June 19, 1991. Instead, by selecting a discrete body of pending actions for special treatment under § [27A], Congress demonstrated that its sole purpose was to nullify the Supreme Court’s interpretation of § 10(b) without amending § 10(b) itself. In so doing, Congress usurped the power set aside to the judiciary by the Constitution.373

Interestingly, the courts that invalidate section 27A on the basis of *Klein* acknowledge that Congress probably had the power to pass a retroactive statute that contained a specific, single limitations period for all cases.374

374. The *Bank of Denver* court admitted that “Congress could have written an express statute of limitation and repose into § 10(b) and applied the amendment retroactively.” *Id.* at 1098. The district judge in *Brichard* also opined that Congress would have the power to adopt a retroactive statute of limitations for 10b-5 actions. *Brichard*, 788 F. Supp. at 1104 n.5.
Section 27A is constitutional because it did change the underlying law, and does not prescribe a rule of decision for pending cases. Before section 27A, Lampf and Beam required a court to apply the one-and-three-year limitations period to all nonfinal claims arising before those decisions. After section 27A, Lampf and Beam no longer automatically apply. Instead, a court must look to the law applicable in its own jurisdiction prior to the date Lampf and Beam were decided. Admittedly, Congress' purpose in changing the law was to rectify the perceived injustice that Congress saw in the retroactive application of the Lampf rule to litigants who had filed suit believing that their suits were timely under the limitations periods in effect at the time of filing.

375. For a discussion of how § 27A changed the underlying law, see supra notes 365-71 and accompanying text. Rosenfeld and Mehlmam argue that § 27A did not change the underlying law, stating:

Congress did not, as it did in Seattle Audubon, change the governing rules and then direct courts to apply those changed rules to determine specific pending cases. Here, all Congress did was to direct courts to abandon their usual law-interpreting function, ignore a recent Supreme Court precedent, and instead revert to earlier, conflicting "rules of decision," whatever they might have been. And it also told the district courts in the three circuits that had adopted the Lampf formula prior to Lampf (but had not made it fully retroactive) that they were not to follow the dictates of Beam by now applying those circuit court decisions retroactively. Because both of those directives prescribe "rules of decision," rather than new tenets of substantive law, both of them violate the Klein doctrine.

Rosenfeld & Mehlmam, supra note 198, at 103.

376. One interpretation of Klein turns on the legislative purposes behind a retroactive statute. See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig., 673 F. Supp. 411, 416 (W.D. Wash. 1987) (citing wide range of cases to support statement that "[i]mproper legislative motive has been held repeatedly by the United States Supreme Court to be a valid basis for finding a statute to be constitutionally invalid"), vacated, 1988 WL 158948 (W.D. Wash. July 14, 1988) (vacating ruling as to constitutionality of state statutory version of § 10(b) by finding use of separation of powers doctrine to resolve state governmental actions improper); Eisenberg, supra note 364, at 519, 525-27 (commenting that proviso in Klein was struck down due to political motives); Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1222 & n.368 (1988) (reading Klein as holding that "jurisdictional legislation may not be used as means to achieve an unconstitutional purpose"). But see Samuel Estreicher, Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation, 68 Va. L. Rev. 333, 343 n.20 (1982) (criticizing construction of Klein as turning on inquiry into legislative motive). If the infirmity of the proviso in Klein lay in improper congressional motives that resulted in discriminatory treatment to pardoned Southerners, then Klein is distinguishable from McCardle because in the latter case Congress less clearly directed the statute to any particular litigants. See Ex parte McCardle, 74 U.S. (7 Wall.) 506, 507 (1868). Schooner Peggy would likewise be distinguishable, because the treaty in that case was not ratified for the purpose of depriving the privateers of their prizes. See The Schooner Peggy, 5 U.S. (1 Cranch) 103, 106-07 (1801). For a discussion of the McCardle and Schooner Peggy decisions, see supra notes 317-20 and accompanying text.
Although Congress was moved to enact legislation because of the high profile figures and cases affected by the Beam and Lampf decisions, the legislation affects all cases brought before those de-

377. The leading § 27A case that construes Klein as forbidding the direction of judgments based upon improper motivation is In re Brichard Securities Litigation, 788 F. Supp. 1098 (N.D. Cal. 1992). In reviewing the legislative history of § 27A, the court observed that "[t]he possible dismissal of actions against Messrs. Milken and Keating [was] a constant theme" in Congress' consideration of the bill. Brichard, 788 F. Supp. at 1105. Because "Congress was aware that, by enacting section 27A, it was tacitly directing a result in the cases of those individuals whom Congress held in low esteem, without changing the Lampf rule," the court found § 27A to be "little less than a judgment rendered directly by Congress," and accordingly held § 27A to be an unconstitutional violation of the separation of powers. Id. at 1106 (quoting United States v. Sioux Nation of Indians, 448 U.S. 371, 398 (1980) (quoting Nock v. United States, 2 Ct. Cl. 451, 457 (1867))). On the other hand, the Southern District of New York rejected the same argument, emphasizing the objective generality of the statute and the reality that § 27A did not preclude a court from carrying out its judicial functions. Axel Johnson v. Arthur Andersen & Co., 790 F. Supp. 476, 480 (S.D.N.Y. 1992). The defendants had alleged "that although the statute does not specify particular cases at which it is aimed, it in fact was intended by Congress to pinpoint a few high-profile securities fraud defendants whom it perceived to receive a windfall under Lampf." Id.

Four general difficulties occur with any approach that focuses on "targeting" as the basis of separation of powers problems. First, "as a general rule, courts decline to inquire into Congressional intent in adopting any facially valid legislation." Id. (citing United States v. O'Brien, 391 U.S. 367, 383 (1968)). Because legislatures have priority over courts in determining what the law should be, courts are generally reluctant to inquire into the wisdom or propriety of statutes, restricting themselves to ascertaining their meaning. Indeed, in McCarrdle, Chief Justice Chase said the Supreme Court was "not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution." McCarrdle, 74 U.S. (7 Wall.) at 514. Second, "ascertaining the motive and purpose of a legislative body" is difficult "based upon the statements of only some of its members." Washington Pub. Power Supply, 673 F. Supp. at 417. Third, inquiring into the legislative purpose is potentially futile "if the legislature re-enacts the flawed statute and thwarts the purpose examination by articulating a non-objectionable purpose." Id.

A final potential difficulty with this reading of Klein lies in two decisions following Klein: Hart v. United States, 118 U.S. 62 (1886), and Austin v. United States, 155 U.S. 417 (1894). Like Klein, Hart and Austin were claimants under authorizing statutes that expressly precluded pardonees from establishing their loyalty via their pardons. Austin, 155 U.S. at 419-21; Hart, 118 U.S. at 62-64. Unlike Klein, however, they were unsuccessful in their claims. Austin, 155 U.S. at 443; Hart, 118 U.S. at 66. The Supreme Court affirmed the denial of their recovery. Therefore, it seems that excluding former rebels from recovery under the Abandoned Property Act was not an improper congressional purpose. Thus, although improper purposes may indeed be objectionable, perhaps even constitutionally so, Klein cannot be cited as support for such a proposition. Indeed, Klein itself does not emphasize "targeting" of any particular group as the reason behind its decision. To the extent that improper classification is a problem, an equal protection analysis seems much more appropriate than a forced Klein interpretation.

The only two circuits to evaluate an equal protection challenge have held that § 27A is valid under both the due process and equal protection tests. Gray v. First Winthrop Corp., [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶
cisions and returns the state of the law to the status quo before those decisions.378

Unlike the proviso at issue in Klein, section 27A effects a

97,414, at 96,265 (9th Cir. Apr. 7, 1993); Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567, 1573-74 (11th Cir. 1992). The Tenth Circuit refused to consider an equal protection challenge to § 27A. Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993). The Gray and Henderson courts found that § 27A did not involve a suspect class or fundamental right and therefore should be scrutinized under the rational basis test. Gray, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,265; Henderson, 971 F.2d at 1574. The Gray and Henderson courts held that § 27A furthers the government's legitimate interest in protecting litigants from unanticipated changes in the law and that the classifications created by the statute are rationally related to achieving that legitimate purpose. Gray [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH), at 96,265; Henderson, 971 F.2d at 1574. The court found that the temporal distinctions made in the statute protect the people who relied on the limitations period existing at the time of suit and who expended time and money bringing their actions. Id. In addition, the court concluded that the jurisdictional distinction created by the statute also protects the reliance interest because the litigants bringing suit prior to Lampf and Beam anticipated that the law in the jurisdiction in which they brought suit would apply to their claims. Id.


378. In upholding § 27A, the Southern District of Ohio stated: "Congress has simply eliminated a defense available to defendants in an unidentified number of cases based on the date on which the cases were filed." Ayers, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 92,537 (emphasis added). The Southern District of New York similarly rejected the characterization of § 27A as applying to "a limited set of previously-existing cases without enacting a generally applicable or prospective change in law," finding it to be applicable "to a generally identified set of cases" based on the commencement date of the action. Axel Johnson, 790 F. Supp. at 479-80. The Axel Johnson court stated:

Congress did not single out and reverse decided cases contrary to its predilections. Rather, it provided relief for a broadly defined class of claimants from what it deemed to be an unfair rule, and it did so without regard to whether or not those claimants' cases had yet been adjudicated pursuant to the new rule of Lampf. Such evenhanded treatment
change in the law and permits, rather than precludes, the possibility of a judgment on the merits. In contrast to the proviso at issue in *Klein*, section 27A requires that a court utilize its own rules on limitations periods and retroactivity, not an arbitrary rule of decision foisted on it by Congress. Thus, section 27A is constitutional under the interpretation of *Klein* accepted by the vast majority of courts because section 27A does not prescribe a rule of decision and did change the underlying law governing section 10(b) actions.

2. Section 27A As Mandating Findings of Fact or Conclusions of Law

Some courts have applied alternative interpretations of *Klein* to determine whether section 27A contravenes the separation of powers doctrine. For example, observing that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” 379 some courts have suggested that *Klein* also prohibits Congress from passing legislation that decides issues of fact or questions of law in pending cases. 380 Under this view, most

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380. This reading is supported by language in *Klein* that seems to indicate that Congress may not redefine the legal incidents of a presidential pardon so as to give it an effect opposite from its normal operation. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872). Thus, “[i]f one takes this view, the [Klein Court] recognized a constitutional right of a successful litigant to retain the judgment of a federal constitutional court as long as that judgment was not erroneous when entered.” Young, supra note 362, at 1239.

In *Grimsey v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989), cert. denied, 111 S. Ct. 1620 (1991), and *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 992 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988), the Ninth Circuit held that Congress violates the separation of powers if it dictates how a court is to decide questions of fact or requires a court to decide a case in accordance with an unconstitutional law. Similarly, as Judge Stewart noted in his concurrence in *In re National Store Fixture Co.*:

[T]he legislative branch of government, for all its power to dictate substantive and procedural law to the Article III judiciary, cannot dictate how a court should determine genuine issues of material fact . . . . [F]or Congress to enact a statute compelling courts of the United States to draw factual inferences which could be justified neither by common reason and experience nor by the surrounding facts and circumstances was an unwarranted encroachment on the independence of the judiciary . . . .


Likewise, the Fourth Circuit rejected the contention that the Speedy Trial Act violated *Klein*, stating that “the better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate ‘how the Court should decide an issue of fact
courts have found that section 27A does not unconstitutionally dictate that a court make any specific findings of fact or conclusions of law, but only specifies the legal rule for a court to apply. 381 A few courts have invalidated section 27A on this ground by erroneously substituting “rule of law” for the phrase “rule of decision” in Klein. 382 Such a construction is unjustified because,
since the *Schooner Peggy* decision, it has been settled that Congress can pass a law that affects the parties in a pending case.

Another related interpretation adopted by some courts is that *Klein* permits Congress to decide questions of law in pending cases but prohibits Congress from interfering with the courts in the performance of their fact-finding and evidentiary functions. The statute in *Klein* directed the court to find the acceptance of a pardon as conclusive evidence that the claimant participated in the Confederacy (a direction of a finding of fact), rather than as changing the legal incidents of a pardon. Under this interpretation, the proviso in *Klein* created a conclusive presumption of disloyalty from the unreserved acceptance of a pardon. In so doing, Congress interfered with the evidentiary and fact-finding power of the courts. As the *Klein* Court noted: "[T]he court [is] forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."

Courts testing the constitutional validity of section 27A against this interpretation of *Klein* have upheld the statute, finding that section 27A does not direct any factual finding or prohibit the use of any evidence in deciding the case on the merits. Sec-

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383. One commentator believes that *Klein* turns, at least in part, on an "unconstitutional encroachment on judicial power to weigh and give proper effect to evidence." *Parnell*, *supra* note 364, at 1379 n.116. It is possible that the question in *Klein* was purely an evidentiary one, such that the decision therefore only regulates Congress' power in prescribing rules of evidence. So viewed, the question in *Klein* would be whether Congress can constitutionally create a conclusive presumption that unreserved receipt of a presidential pardon is evidence of disloyalty. If this is the ground of decision, Congress could have conditioned the right of recovery on proof of loyalty in fact, created a rebuttable presumption of disloyalty as an incident of unreserved acceptance of a pardon or required affirmative proof of loyalty. Thus, the impropriety in *Klein* was arguably the conclusiveness of the presumption.


385. *E.g.*, *Duke*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 93,965 (stating that § 27A does not prescribe any specific factual findings); *Axel Johnson*, 790 F. Supp. at 479 ("Notably absent from § 27A, unlike the statute held unconstitutional in *Klein*, is a specific directive as to what evidence a court may con-
tion 27A poses no separation of powers problems under this alternative interpretation of *Klein* because section 27A does not address any factual or evidentiary matters.

3. **Section 27A As Requiring a Particular Decision on the Merits or Foreclosing a Decision on the Merits**

Some courts have analyzed the constitutionality of section 27A under yet another interpretation of *Klein*. This alternative interpretation is that *Klein* prohibits Congress from enacting a retroactive statute that forecloses a decision on the merits in a pending case. These courts have upheld the validity of section 27A under this interpretation of *Klein*.386 This reading of *Klein* stems from the argument that the proviso in *Klein* violated the separation of powers doctrine because the proviso forced the Court to decide the case in favor of one party even though the Court would have decided the case on the merits in favor of the other party.387 If this is a proper interpretation of *Klein*, section 27A is...
constitutional, because it does not direct a court to decide in favor of one party or lose its jurisdiction to decide the case at all. Rather, section 27A merely requires that the class of cases covered by the statute be adjudicated on the merits if that adjudication is not foreclosed by the limitations periods and choice of law rules existing before Lampf and Beam.

A variation of the preceding interpretation is that Klein merely prohibits the legislature from changing the law to the government's advantage when the government is a party in the litigation.\textsuperscript{388} No court has yet considered the constitutionality of section 27A based on this interpretation of Klein. If this is the party shall ultimately prevail in pending cases. To begin with, the statute in Klein did not dictate who would win any given case. Moreover, were the Klein doctrine that narrow, there would have been no reason for the Sioux Nation Court to have concentrated on Congress's ability to waive the res judicata defense on behalf of the United States as a litigant. Rather, the Court's rationale for upholding the statute at issue in Sioux Nation illustrates why Congress does not pass constitutional muster where it tells district courts how to decide specific issues in cases pending before them in which the United States is not a defendant.

Rosenfeld & Mehlman, supra note 198, at 102.\textsuperscript{388} Under this interpretation, the infirmity of the statute in Klein lay in "allowing one party to the controversy to decide it in its own favor." Klein, 80 U.S. (13 Wall.) at 146. As Justice Chase observed in dicta in Calder v. Bull:

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . [A] law that makes a man a Judge in his own cause . . . . is against all reason and justice . . . ."

Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). One commentator noted:

This narrower view of Klein's possible prohibition is consistent with the Wheeling Bridge case. In short, it allows the government to change the law in a case where it is a party as regulator but not where it is a party disputing property rights or money liability. In a rough sense, one might say the issue is whether the government is a party in a purely governmental capacity or in a proprietary capacity.

Young, supra note 362, at 1242-43; see also Eisenberg, supra note 364, at 526 ("There is . . . language in [Klein] suggesting that a crucial aspect of the case was the fact that the United States was a party and that it is particularly offensive for a litigant to prescribe a rule of decision for its own case."). This approach, however, is problematic. If Klein does prohibit Congress from changing the law to the disadvantage of its opponents in pending litigation, then arguably the Supreme Court should have decided Robertson differently. For a discussion of Robertson, see supra notes 350-61 and accompanying text. As the Ninth Circuit concluded in Gray:

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

correct reading of *Klein*, the only defendants who would have standing to successfully raise the constitutional argument would be those defending actions brought by the United States on its own behalf or as a subrogee.\textsuperscript{389} Either way, the principles in *Klein* would not be violated because section 27A does not prescribe a decision, regardless of the merits of the case, in the government’s favor.

Although there are many views concerning what *Klein* forbids, the core holding in *Klein*, accepted by the vast majority of courts, is that *Klein* prevents Congress from prescribing a rule of decision without changing the underlying law. As noted above, section 27A does not prescribe a rule of decision and does change the underlying law. Moreover, section 27A is constitutional under the alternative interpretations of *Klein* because it does not foist on the courts any findings of fact, conclusions of law, evidentiary conclusions or any particular decision on the merits of any case. In short, section 27A passes constitutional muster under any reasonable interpretation of *Klein*.

D. Section 27A As Unconstitutionally Requiring Selective Prospectivity in Contravention of *Beam*

A few courts have held that section 27A violates the separation of powers doctrine because it nullifies the Supreme Court’s holding in *Beam* that prohibits selective prospectivity.\textsuperscript{390} According to these courts, *Beam*’s prohibition of selective prospectivity is constitutionally based. These courts conclude that section 27A contravenes the separation of powers doctrine because section 27A requires courts to engage in selective prospectivity without changing the underlying law.

\textsuperscript{389} Reading *Klein* in this manner raises the further general retroactivity question of which § 10(b) litigants can use *Klein* to evade § 27A: only those against whom the government had assumed subrogation rights and/or filed claims at the time § 27A was enacted, or also those who were defending against private citizens at the time of the enactment of § 27A but against whom the government later assumed the adversarial position?

tivity when applying the Lampf rule. To support this theory, these courts must accept a number of questionable legal premises. First, Beam must be constitutionally based.\textsuperscript{391} Second, the application of section 27A must require selective prospectivity in contravention of the principles established in Beam.\textsuperscript{392} Third, Beam must be interpreted not only to prohibit judicial decisions that permit selective prospectivity but also to prohibit retroactive legislation that results in selective prospectivity.\textsuperscript{393} The following sections test the validity of these legal premises.

1. Beam \textit{As a Constitutionally Based Decision}

A number of courts, including the circuit courts that have decided the issue, reject the argument that section 27A violates the separation of powers doctrine on the ground that it unconstitutionally overrules Beam. The courts who reach this conclusion usually do so by holding that the rule in Beam is not constitutionally mandated.\textsuperscript{394} By parsing the various opinions in Beam, these...
courts conclude that although three Justices (Blackmun, Marshall and Scalia) held that the Beam rule was constitutionally based, the other Justices joining in the judgment (Souter, Stevens and White) based their decisions upon nonconstitutional jurisprudential concerns. These courts acknowledge that Justice Souter’s opinion relies on Griffith v. Kentucky, a decision in which the Court focused primarily on the judicial function of the Court under the Constitution. However, these courts point out that Justice Souter’s opinion relies on the jurisprudential principles of stare decisis and equality that were also utilized by the Griffith Court as additional nonconstitutional reasons for the rule announced in that case.

Disagreeing with this interpretation of Beam, a few courts


396. 479 U.S. 314 (1987). Griffith held that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” Id. at 322.

397. See, e.g., Adler, 790 F. Supp. at 1244 n.9 (stating that “Justice Souter in Beam found Griffith to apply to civil cases on the principles of stare decisis and equality, not on the basis of judicial integrity under Article III”).
have concluded that Beam's ruling on selective prospectivity is constitutionally based. These courts find that section 27A unconstitutionally attempts to neutralize Beam's requirement that the Lampf rule be applied retroactively by requiring that Beam apply only in cases not covered by section 27A. Courts accepting this theory find that Justice Souter's opinion is predicated on the constitutional principles underlying the Court's decision in Griffith. These courts assert that a majority of the Beam Court embraced the notion that selective prospectivity was prohibited by the Constitution.

The district court's opinion in In re Brichard Securities Litiga-

398. See, e.g., In re Brichard Sec. Litig., 788 F. Supp. 1098, 1109 (N.D. Cal. 1992) ("[T]his court believes that [the four separate opinions dealing with the reasoning behind the final judgment in Beam] demonstrate that the Supreme Court concurred that its decision was on constitutional grounds."); TGX Corp. v. Simmons, 786 F. Supp. 587 (E.D. La. 1992). The court in Simmons noted:

The Court's rejection of selective prospectivity [in Beam] was rooted in article III of the constitution. While Justice Souter did not explicitly reference article III, his reliance on, and adoption of Griffith confirm that his opinion was constitutionally based. Griffith rested squarely on constitutional grounds, holding that article III required full retroactive application of the Court's decisions to pending criminal cases. . . .

The concurrences in Beam further confirm that the Court's rejection of selective prospectivity was constitutionally based. . . . Justice Souter's opinion for the Court, combined with the . . . concurrences, thus establish that the Court's rejection of selective prospectivity was constitutionally based.

Beam thus reflects a judicial interpretation of the constitution, such that congressional enactments inconsistent therewith must fall. Id. at 593-94; Rosenfeld & Mehiman, supra note 198, at 104 ("[I]t is fair to conclude . . . that each of the four opinions [in Beam] reveals solid constitutional underpinnings.").

399. Brichard, 788 F. Supp. at 1109 ("Section 27A replaces the Beam decision against selective prospectivity with a law of selective prospectivity in certain cases. Permitting selective prospective application of statutes of limitations after the Beam court constitutionally forbade selective prospective application of such rules is an attempt to change Beam."); see also Simmons, 786 F. Supp. at 594 ("[S]ection 27A . . . effect[s] the selective prospectivity constitutionally proscribed in Beam, such that section 27A is unconstitutional."). Other commentators have proffered the same type of argument:

[S]ection 27A directs district courts in the Second, Third, and Seventh Circuits to ignore Beam in applying the pre-Lampf decisions in those circuits that had already adopted the one-year/three-year limitations period before June 20, 1991, but had not accorded it full retroactivity. Since it is clear from the Beam decision that the Supreme Court intended the "full retroactivity" principle there adopted to itself apply retroactively, Congress could not tell the courts to ignore Beam and deny these pre-Lampf precedents retroactive effect. But that is what Congress did, and that renders section 27A unconstitutional—regardless of its effect on the outcome of the Lampf litigation. Rosenfeld & Mehiman, supra note 198, at 104.
illustrates the position that *Beam* rests on constitutional grounds. The court observed that the issue in *Beam* was "judicial responsibility" and the resolution of that issue required consideration of the source of judicial power emanating from Article III. According to the court, although Justice Souter did not explicitly discuss the constitutionality of selective prospectivity, his opinion was rife with constitutional overtones because it discussed the nature of judicial power, necessarily implicating Article III.

Although arguably a close call, the reasoning behind Justice Souter's loosely worded opinion is not constitutionally based.

401. Id. at 1109-10.
402. Id. at 1110 ("[H]owever phrased, the judicial power is rooted in Article III of the Constitution and its meaning therefore remains a constitutional question."). In reaching this conclusion, the *Brichard* court cited *Marbury v. Madison*, in which the Supreme Court concluded that when a law contravenes the Constitution the court must decide which of the incompatible rules govern. *Id.* at 1111 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). The *Brichard* court likened that task to Justice Souter's "choice of law" decision in *Beam*. *Id.* Such reasoning is specious. Justice Souter made it clear that what he meant by "choice of law" was simply whether the new law would apply prospectively or retroactively. James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2443 (1991).


The *Griffith* Court justified its opinion on two primary grounds. First, because Article III requires the Court to determine only cases and controversies, "the integrity of judicial review requires that [the Court] apply that rule to all similar cases pending on direct review." *Id.* at 323. The Court, quoting Justice Harlan in *Mackey*, stated:

If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. In truth, the Courts' assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

*Id.* (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring)) (emphasis added). The second basis upon which the *Griffith* Court relied was the concept that "se-
In formulating the *Beam* rule Justice Souter never stated that the rule was constitutionally based. Rather, he emphasized that he

selective application of new rules violates the principle of treating similarly situated defendants the same.” *Id.* at 323 (citing *Desist*, 394 U.S. at 258-59 (Harlan, J., dissenting)).

Justice Harlan’s dissent in *Desist* did not clearly state his conclusions with respect to whether selective prospectivity was constitutionally based or jurisprudentially based. Justice Harlan embraced the “classical view of constitutional adjudication” set forth in *Marbury*. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting). He noted that courts should treat similarly situated people the same unless a principled reason existed for treating them differently. *Id.* (Harlan, J., dissenting). Justice Harlan called this principle a “basic judicial tradition,” but implied that it was not necessarily constitutionally based. *Id.* at 258-59 (Harlan, J., dissenting).

On the other hand, the *Griffith* Court also relied on Justice Harlan’s concurrence in *Mackey*. In that case, Justice Harlan referred to the “awesome power of judicial review” that carries with it “the responsibility of adjudicating cases or controversies according to the law of the land.” *Mackey*, 401 U.S. at 678 (Harlan, J., concurring). Justice Harlan explained that his view was based on *Marbury*, and he spoke of constitutional “duties” and “functions.” *Id.* at 678-79 (Harlan, J., concurring). Consequently, it appears that Justice Harlan essentially based his conclusions on constitutional grounds.

Because the *Griffith* decision is based so strongly upon Justice Harlan’s views, *Griffith* can similarly be considered as constitutionally compelled. Justice Souter's opinion in *Beam* relies heavily on *Griffith*’s reasoning, and therefore a strong argument exists that under Justice Souter’s opinion, selective prospectivity is constitutionally prohibited. On the other hand, because Justice Souter never explicitly expressed whether the *Beam* ruling was constitutionally based, a serious question exists as to his intent in relying on *Griffith*’s principles of equality and stare decisis. The *Griffith* Court did not actually address stare decisis as one of the operative reasons for its decision. In *Mackey*, Justice Harlan did discuss stare decisis, arguing that the ability to decide constitutional cases prospectively “tends to cut this Court loose from the force of precedent, allowing us to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*, a force which ought properly to bear on the judicial resolution of any legal problem.” *Mackey*, 401 U.S. at 680-81 (Harlan, J., dissenting) (citation omitted). Although stare decisis plays an important role in our jurisprudence, it has never risen to the level of a constitutional requirement.

Justice Souter’s opinion in *Beam* excludes application of the ruling to cases barred by res judicata and statutes of limitation on the ground that the finality principle takes precedence over even equality and stare decisis concerns. *Beam*, 111 S. Ct. at 2446-47. In so ruling, it appears that Justice Souter’s opinion agrees with Justice Harlan’s view with respect to finality. For example, in *United States v. Estate of Donnelly*, Justice Harlan stated:

The critical factor in determining when a new decisional rule should be applied to a transaction consummated prior to the decision’s announcement is, in my view, the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . In the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*. Any uncertainty engendered by this approach should, I think, be deemed part of the risks of life.

was deciding only a narrow choice of law issue. Although he cited Griffith, his opinion is predicated on the effect of selective prospectivity on stare decisis and equality, both of which can be viewed as jurisprudential concerns. Thus, even though the issue is not free from doubt, most courts have held that Beam is not based upon constitutional principles.\textsuperscript{404} If Beam is not constitutionally mandated, then section 27A cannot unconstitutionally contravene the courts’ power to declare what the law is.

2. \textit{Section 27A As Requiring Selective Prospectivity}

Even assuming that Beam is constitutionally based, section 27A does not unconstitutionally require selective prospectivity in violation of the principles enunciated in Beam. The major premise underlying the Beam decision is that a court should apply the same rule to all litigants whose claims are either pending or based upon events occurring prior to the decision announcing the new rule of law. According to Justice Souter’s view, principles of stare decisis and equality require that similarly situated litigants be treated the same. The courts finding section 27A unconstitutional reason that the statute limits the \textit{Lampf} rule to prospective application thereby treating similarly situated litigants, those who filed their cases before \textit{Lampf}, differently than the litigants in \textit{Lampf}.

Section 27A, however, treats all similarly situated litigants the same. For section 27A purposes, all similarly situated litigants are those litigants who, like the litigants in \textit{Lampf}, filed section 10(b) actions before the Supreme Court’s decisions in \textit{Lampf} and Beam. By its terms, section 27A applies its rule to all litigants, including the litigants in \textit{Lampf} itself. In fact, the \textit{Lampf} plaintiffs requested and were granted reinstatement under section 27A.\textsuperscript{405} Because section 27A applies to all litigants whose cases were filed prior to the decisions in \textit{Lampf} and Beam, section 27A turns the \textit{Lampf} rule into one that applies on a purely prospective basis.\textsuperscript{406} Nothing in Beam prohibits the application of a judicial rule purely

\textsuperscript{404} For a discussion of the opinions that state that Beam is not constitutionally based, see supra notes 398-402 and accompanying text. See also Sabino, supra note 196, at 60 (concluding that Beam is nothing more than choice of law decision).

\textsuperscript{405} See Brichard, 788 F. Supp. at 1107 n.9.

\textsuperscript{406} Id. at 1109 (“Section 27A’s reversal of the \textit{Lampf} decision as to the \textit{Lampf} litigants supports plaintiffs’ argument that section 27A transformed \textit{Lampf} into a purely prospective rule.”). Although it is true that applying § 27A may lead to different results, Beam only requires that the same rule apply to all similarly situated litigants, not that their cases reach identical results.
prospectively. Consequently, section 27A does not contravene the *Beam* principle that all similarly situated litigants be treated the same.

3. **Beam As Prohibiting Legislation That Requires Selective Prospectivity**

In *Brichard*, the district court invalidated section 27A on separation of powers grounds even though it acknowledged that section 27A requires a purely prospective application of the *Lampf* rule and is not unconstitutional on that ground.\(^{407}\) The court found that section 27A was constitutionally infirm because it violated the *Beam* rule, which requires applying all new judicial rules either purely prospectively or retroactively.\(^{408}\) The district court concluded that because the Supreme Court applied the new rule in *Beam* to the litigants in *Beam*, the principles set forth in *Beam* must apply to all cases pending or arising from events occurring before *Beam* was decided, as well as all cases arising after *Beam* was decided. Under this analysis, section 27A turns the legal clock back to pre-*Beam* law and therefore unconstitutionally permits the courts to ignore *Beam* and engage in selective prospectivity in choosing the statute of limitations in 10b-5 actions.\(^{409}\) Under this theory, Congress may not pass a statute that requires or permits anything other than pure prospectivity or pure retroactivity of judicially declared rules.

The *Brichard* court assumes that the application of section

\(^{407}\) *Id.*

\(^{408}\) *Id.* The *Brichard* court noted: *Beam* dealt with two issues of retroactivity. *Beam* not only announced a rule of retroactivity, but *Beam* also applied its decision on retroactivity retroactively. In the context of securities law, *Beam* directed not just the retroactivity of the statute of limitations announced in *Lampf*; it also affected the retroactivity of any federal statute of limitations announced by a court prior to its decision in *Beam*. Therefore, *Beam* mandates that a judicially declared statute of limitations which operates on the litigants in a case will also operate on similarly situated litigants in cases announced both subsequent and prior to the *Beam* decision.

Section 27A contradicts that result and directs that, at least in § 10(b) cases, *Beam* will apply only to future cases. That conflicts with the rule announced in *Beam*. *Beam* forbade the selective prospective application of new judicially announced federal rules and required their retroactive application. Section 27A replaces the *Beam* decision against selective prospectivity with a law of selective prospectivity in certain cases. Permitting selective prospective application of statutes of limitations after the *Beam* court constitutionally forbade selective prospective application of such rules is an attempt to change *Beam*.

\(^{409}\) *Id.*
27A permits the courts to apply their pre-\textit{Lampf} decisions on a selectively prospective basis. Section 27A, however, incorporates each jurisdiction's pre-\textit{Lampf} limitations period as the limitations period chosen by Congress for section 10(b) actions. In other words, the statute of limitations utilized by the court may have been a new judicial rule at one time but, in essence, has been "borrowed" by Congress as the applicable rule for section 10(b) actions. \textit{Beam} discussed the power of the judiciary to apply its self-generated rules, not the power of Congress to have different rules apply to different litigants.\footnote{E.g., \textit{Gray v. First Winthrop Corp.}, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,414, at 96,265 (9th Cir. Apr. 7, 1993) (observing that \textit{Beam} "speaks only to the power of the judiciary under Article III and says nothing about legislative power under Article I"); \textit{Berning v. Edwards & Sons, Inc.}, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,389, at 96,098 (7th Cir. Mar. 29, 1993) ("Even those Justices [in \textit{Beam}] who discerned a constitutional bar to selective prospectivity were concerned solely with the limits of judicial power under Article III, not with limits on the legislative power under Article I.").} It appears that Congress' power in this regard may be limited by equal protection or due process considerations but not by \textit{Beam}. As noted above, section 27A passes both due process and equal protection scrutiny.\footnote{For a discussion of § 27A's validity under due process and equal protection, see \textit{supra} notes 277 & 377 and accompanying text. \textit{See generally Sabino, \textit{supra} note 196, at 50-57 (concluding that § 27A is constitutional after considering constitutional challenges that have been raised).}

The courts that have invalidated section 27A on the ground that it unconstitutionally treads on \textit{Beam} are implicitly ruling that Congress cannot enact a retroactive statute that results in a rule different from \textit{Lampf} or \textit{Beam} that applies to any litigants whose claims were filed before \textit{Lampf} or \textit{Beam}. Given the Supreme Court's consistent approval of retroactive legislation, this view extends \textit{Beam} further than any Supreme Court opinion. Moreover, under this theory if a court misinterprets congressional intent, Congress could never correct the problem and all cases filed prior to the erroneous decision would have to be decided under the erroneous rule.

The \textit{Lampf} case presents an interesting example. In \textit{Lampf}, the goal of the Court was to determine what statute of limitations Congress desired for section 10(b) actions. Reference was made to the best evidence of that intent, the statute of origin. Based upon Congress' reaction in passing section 27A, it appears that the Court misinterpreted modern congressional intent. At least for those cases brought prior to the decisions in \textit{Lampf} and \textit{Beam}, Congress did not want the one-and-three-year limitations period
but rather wanted to maintain the rules of the jurisdiction in effect prior to the Supreme Court's decisions. Thus, if section 27A is unconstitutional because it nullifies *Beam*, *Beam* imposes limits not only on the courts but also on Congress.412 Absent more explicit language in *Beam* expressing the intent that *Beam* affects the power of Congress, the courts should eschew such an approach.

Section 27A does not violate separation of powers principles by unconstitutionally nullifying the Supreme Court's decision in *Beam*. Although the focus of Justice Souter's opinion in *Beam* is not crystal clear, it appears that a majority of the Court did not view the *Beam* rule as constitutionally mandated. Furthermore, even assuming that the *Beam* rule is constitutionally based, section 27A does not require courts to contravene *Beam* but directs them to apply the rules on limitation periods and retroactivity that were in effect on the day before *Lampf* and *Beam*. Section 27A limits *Lampf* to purely prospective application. Section 27A directs the courts to apply legislatively declared law (albeit borrowed from previously existing judicial law), not judicially created law, in determining the limitations period in section 10(b) actions. Consequently, *Beam*'s restrictions on judicial power have no bearing on whether section 27A violates the separation of powers doctrine.

VIII. Conclusion

*Lampf* and *Beam* provided a one-two knockout punch for many substantial 10b-5 actions pending at the time those cases were decided. Before *Lampf* and *Beam*, plaintiffs thought that they had timely filed their 10b-5 actions based upon the state of the law as it existed in their jurisdictions when they filed suit. Then *Lampf* and *Beam* magically combined in a “now you see it, now you don’t” judicial sleight of hand to literally change the applicable limitations period overnight. After completing this trick, courts informed 10b-5 plaintiffs, “Surprise, you lose!” Not to be outdone, Congress pulled its own rabbit out of a hat by enacting section 27A, thereby turning back the legal clock to make *Lampf* and *Beam* disappear.

Section 27A raises a number of thorny constitutional issues in areas of the law that are not well developed. A uniform limita-

412. See, e.g., Gray, [1993 Tranfer Binder] Fed. Sec. L. Rep. (CCH) at 96,265 (nothing that finding that *Beam* controls power of Congress “stretches the Court's actual holding far beyond its intended constitutional boundaries”); Berning, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,099 (“*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.”).
tions period for 10b-5 actions is necessary. Having that period apply retroactively to govern all cases pending at the time the law changed does not seem necessary, prudent or fair. Most of us would object strenuously if the rules were changed during the course of the game. Yet, this is precisely what Lampf and Beam did. The Court’s Chevron Oil approach to applying changes in limitations periods seems more consistent with justice and fairness.

Perhaps the Court will reconsider its decision in Beam at least for cases involving statutes of limitation. The Court even could decide that the limitations rule in Lampf is remedial and therefore not subject to the Beam rule. However, it appears unlikely that either of those two possibilities will take place. Accordingly, the courts will continue to face constitutional challenges to section 27A.

Whatever else Klein presently means, Robertson suggests that a statutory change in the underlying law is sufficient to meet the constitutional precepts in Klein. Congress clearly changed the law in section 27A if, as the courts have uniformly held, Beam requires that Lampf apply retroactively to all pending cases. The combination of Beam and Lampf means simply that all nonfinal cases filed before Lampf and Beam are governed by the one-and-three-year rule. Section 27A changes this rule by requiring the courts to apply their pre-Beam and pre-Lampf law to Rule 10b-5 limitations issues. In most instances, the effect of section 27A will be that the jurisdiction will apply the borrowing rule, not the uniform one-and-three year-rule. Clearly, section 27A changes the law in a way that comports with Klein.

The separation of powers challenge to section 27A claiming that section 27A unconstitutionally reverses Beam should also fail. First, it is doubtful that the rule in Beam is constitutionally based. Second, section 27A in essence requires that Lampf be applied purely prospectively, an approach that does not violate the Beam rule forbidding selective prospectivity. Finally, Beam is a rule of judicial derivation and application. Beam limits the power of the judicial branch, not the legislative branch. Neither Beam nor any other clear authority forbids Congress from enacting a retroactive statute that requires that some cases be governed by one rule and other cases by a different rule so long as the statute otherwise comports with due process and equal protection guarantees. Section 27A passes both due process and equal protection scrutiny.

The vested rights challenge is more difficult to resolve. For nonfinal cases that were barred under the Lampf and Beam rules
before Congress enacted section 27A, the defendants' conten-
tions will succeed only if the Court adopts the proce-
dure/substance dichotomy, finds that the Lampf rule (or at least
the three-year repose part of the Lampf rule) is substantive and
finds that Danzer is still good law. As discussed, solid legal argu-
ments can be made to support all three propositions.413

On the one hand, many legal results turn on characterization
issues and fine distinctions. The right/remedy distinction in limi-
tations periods has a long history in law. Although International
Union may raise questions about the continued viability of that
distinction and Danzer, the questions arise because International
Union misinterpreted Chase. Moreover, there is a rational basis for
the right/remedy distinction. If a limitations period is substan-
tive, that is, part of the cause of action, there would seem to be no
cause of action left once the period runs. The distinction seems
to be implicit in Lampf in which the Court recognized that the
three-year period of repose is not subject to equitable tolling.
The Lampf Court suggested that the three-year period operated as
the unconditional temporal limit for 10b-5 suits. It would seem
then that a defendant has a vested right not to be sued for 10b-5
violations if the three-year Lampf period has run. Thus, section
27A may be unconstitutional because it divests defendants of
vested rights.

On the other hand, although many legal results turn on char-
acterizations, one is understandably hesitant to have so much turn
on the "somewhat metaphysical" distinction between procedural
and substantive limitations periods. Moreover, International Union
is difficult to reconcile with the argument that the rule announced
in Danzer is still good law. From a policy perspective, no good
reason exists why a defendant should be able to claim that he is
immune from suit based only upon the fortuity that the time pe-
dium was shortened in a substantive way, thereby automatically in-
capacitating the plaintiff from bringing suit. The fact that the
defendant has no equity or policy considerations on its side is ex-
emplified by the Court's holdings in Chase and Campbell. Finally,
the Court could determine that the judicially generated Lampf
limitations period is procedural, thereby making Danzer inapplica-
bale in any event.

In any event, different issues are presented if the defendant
obtained a final judgment of dismissal based upon the Lampf rule

413. For a discussion of this aspect of the vested rights challenge to § 27A,
see supra notes 256-88 and accompanying text.
before section 27A became effective. In this situation, the fortuitous change in Lampf and Beam still leads to the dismissal but the procedural posture of the case now becomes a dismissal resulting in a final judgment. If final judgments are to constitute any basis for ordering our affairs, we should not opt for a rule in which a final judgment is meaningless and can always be reopened. There should be repose for a defendant when a lawsuit comes to a final end. Resurrecting previously dead claims ought to be done sparingly if at all.

Our legal system gives great weight to the interest of finality, as it should. Otherwise, every case could potentially last forever. Justice Souter recognized this interest in Beam, and the Supreme Court cases holding that vested rights spring from final judgments are replete with statements emphasizing the importance of finality.414 Although none of those cases involved a vested right arising from a final judgment of dismissal based upon the running of a limitations period, the spirit of the notion that “final” really means final should control.

Consequently, section 27A(b) should be held unconstitutional in those cases in which the plaintiff seeks to reinstate a previously dismissed cause of action if that dismissal was final. Any other rule impinges too much on the ability of the judiciary to render final judgments and on the need for parties to rely on the finality of those judgments.

Of course, the Court must shoulder some of the blame for this legal morass because of its decision and wavering rationale in Beam. Beam simply does not give enough weight to the legitimate interests of litigants in relying on the law that exists at the time an action is taken. If Chevron Oil were still the rule, the need for section 27A would be obviated. Congress, on the other hand, could have responded to the calls of the commentators and courts and enacted a uniform limitations period for 10b-5 actions. This action would have solved many of the problems without the need for a quick statutory patch job. However the constitutional issues arising from section 27A are resolved, one lesson to be learned from all of this may be that bad law makes hard cases.

414. For a discussion of the Supreme Court cases recognizing the importance of finality, see supra notes 295 & 307.