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

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

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

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

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

2 Id.


4 See, e.g., Lampf, 111 S. Ct. at 2777 (Oregon District Court borrowed Oregon's statute of limitations from fraud claims); Hirschler v. GMD Invest. Ltd. Partnership, No. 91-2087, 1992 WL 188143, at *2 (4th Cir. Aug. 7, 1992) (court borrowing limitation period from Virginia's blue sky law); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1386-87 (7th Cir. 1990) (borrowing statute of limitations and tolling provisions from state's blue sky laws), cert. denied, 111 S. Ct. 2887 (1991); Reeves v. Teuscher, 881 F.2d 1495, 1501 (9th Cir. 1989) (applying Washington's three year limitation period and tolling provision); Teamsters Local 282 Pension Trust Fund v. Angelos, 815 F.2d 452, 454 (7th Cir. 1987) (borrowing statute of limitations from Illinois' state securities laws). See generally Harold S. Bloomenthal,
regarding the applicable limitation period for section 10(b) claims.5

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

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


5 See Short, 908 F.2d at 1389. "This uncertainty and lack of uniformity promotes forum shopping by plaintiffs and results in wholly unjustified disparities in the rights of different parties litigating identical claims in different states. Neither plaintiffs nor defendants can determine their rights with any certainty." Id. (quoting Committee on Federal Regulation of Securities, Report of the Task Force on Statute of Limitations for Implied Actions, 41 Bus. Law. 645, 647 (1986)); Davis v. Birr, Wilson & Co., 839 F.2d 1369, 1370 (9th Cir. 1988).

6 The absence of a uniform limitations period in such actions has been described by Judge Easterbrook as 'one tottering parapet of ramshackle edifice. Deciding what features of state periods of limitations to adopt for which federal statutes waste untold hours.'" Id. (quoting Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987), cert. denied, 484 U.S. 943 (1987)); see also Brief for Petitioner at 9, Lampf v. Gilbertson, 111 S. Ct. 2773 (1991) (No. 90-333). In highlighting the confusion, the brief noted that "a 10(b) claim filed in the Eastern District of Arkansas is subject to a one-year-from-discovery/three-years-from-violation limitations period borrowed from the 1934 Act . . . However, an action filed in the Western District of Arkansas is governed by a different limitations period." Id.; cf. Brief for Respondents at n.18, Lampf (No. 90-333). Some states increased confusion by changing their own statute of limitation periods. Id. See generally Bloomenthal, supra note 4, at 241. Certain states may have as many as three applicable limitation periods to choose from. Id.

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

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

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

(a) Effect on pending causes of action:
The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
(b) Effect on dismissed causes of action:
Any private action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—
(1) which was dismissed as time barred subsequent to June 19, 1991, and
which overturned the retroactive application of Lampf and provided for the reinstatement of the dismissed actions. Since its inception, however, section 27A has repeatedly been challenged on constitutional grounds with divergent results in the federal courts. This sharp division has further added to the uncertainty surrounding the applicable limitation period.

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

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

A. Prior to 1991

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

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

Id.

11 Id.
claims were implied in law; the statute did not contain a statute of limitations. Under the directive of the Supreme Court in Holmberg v. Armbrecht, lower courts considered the applicable state law to ascertain the proper statute of limitations.

1. Application of State Statutes of Limitation

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

"Where, as here the whole statute discloses a broad purpose to regulate securities . . . in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies." Id. 14

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

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

16 327 U.S. 392 (1946).

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

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

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

20 See, e.g., Lampf v. Gilbertson, 111 S. Ct. 2773, 2777 (1991) (limited partnerships in computer software and equipment); Litton Industries, Inc. v. Lehman Brothers, Kuhn, Loeb, Inc., 967 F.2d 742, 746 (2d Cir. 1992) (artificial inflation of corporate stock resulting from insider trading); Hirschler v. GMD Investments, No. 91-2087. 1992 WL 188143, at *1 (4th Cir. Aug. 7, 1992) (limited partnership in 220 unit apartment complex); Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1386 (7th Cir. 1990) (fraudulent representation concern-
eventually began to look beyond state fraud and blue sky limitation periods. An overabundance of applicable limitation periods developed, thus providing plaintiffs with the opportunity to "forum shop." As a result, the lack of a uniform limitation period caused confusion, uncertainty, and judicial inefficiency among the courts.

2. Application of Federal Statutes of Limitation

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

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

\[\text{22 \text{Id. at 1389. Because of the confusion "[v]ast amounts of judicial time and attorneys' fees are wasted." \text{Id. (quoting from ABA Committee, supra note 5, at 647); Roberts v. Magnetic Metals Co., 611 F.2d 450, 461 (3d Cir. 1979) (Seitz, J., dissenting). "Finally the confusion is compounded . . .." \text{Id. (emphasis added); see also supra note 5 and accompanying text (describing confusion and waste among courts in determining applicable limitations period).}}\]

\[\text{23 462 U.S. 151 (1983).}
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\[\text{24 Id. at 171-72 (without abandoning practice of federal courts borrowing from state law, Supreme Court created an opportunity to look beyond state law to federal law).}
\]

\[\text{25 Id. "[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle . . . we have not hesitated to turn away from state law." \text{Id.}}\]

\[\text{26 See supra note 25 and accompanying text (stating Delcostello created exception that allowed courts to apply more analogous federal law).}\]
In re Data Access Systems Securities Litigation was the first instance where a court applied a federal statute of limitations period to a section 10(b) claim. In Data Access, the United States Court of Appeals for the Third Circuit premised its holding on the determination made by the Supreme Court in Agency Holding Corp. v. Malley-Duff Associates. Although Agency Holding recognized the need for a uniform period of limitations for section 10(b) actions, the Supreme Court failed to establish such a limitations period. Therefore, the Data Access court held that the applicable statute of limitations should be one year after discovery or three years after the violation occurred. Despite the uniform application of this standard by the Third Circuit, other circuits continued to apply various state and federal limitation periods, thus furthering the need for Supreme Court intervention.

B. The Lampf Decision

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

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29 Id. at 1550 (adopting one year after discovery or three years after violation limitation period from express limitations sections of Securities Exchange Act of 1934).
31 Data Access, 843 F.2d at 1543-44. “This court has already recognized the necessity for establishing a uniform limitations period when we resort to ‘borrowing’ state law... We therefore conclude... the courts must select ‘the one most appropriate statute of limitations for all civil [§ 10(b) and Rule 10b-5] claims.’” Id. at 1544 (quoting Malley-Duff Assocs., Inc. v. Crown Life, 792 F.2d 341 (3d Cir. 1986)).
32 See id. “At the outset we recognize that the Supreme Court has to rule on the applicable limitations period for section 10b and Rule 10b-5 action.” Id.; see also Bloomenthal, supra note 4, at 236 (discussing Supreme Court’s refusal to address issue in late 1970 and early 1980).
33 Data Access, 843 F.2d at 1550. “Accordingly we have decided that the proper period of limitations for a complaint charging violation of section 10(b) and Rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation.” Id.
34 See, e.g., Bath v. Bushkin, 913 F.2d 817, 819 (10th Cir. 1990) (remanding to district court to apply most analogous state law); Nesbit v. McNeil, 896 F.2d 380, 384 (9th Cir. 1990) (rejecting Third Circuit’s approach and applying Oregon state law).
36 See Lampf v. Gilbertson, 111 S. Ct. 2773, 2777 (1991). “In view of the divergence of opinion among the Circuits regarding the limitations period for Rule 10b-5 claims, we granted certiorari to address this important issue.” Id. (footnote omitted).
37 Id. Plaintiffs-respondents purchased units in a limited partnership for the purpose of
granted defendant’s-petitioner’s motion for summary judgment because the plaintiffs’-respondents’ claims were time-barred under the two year Oregon fraud statute of limitations.\textsuperscript{38} On appeal, the Ninth Circuit rejected plaintiffs’-respondents’ argument that a federal statute of limitations should be applied, but reversed the finding that factual issues still remained which prevented summary judgment.\textsuperscript{39} The Supreme Court granted certiorari in view of the conflicting decisions among the circuits concerning the appropriate statute of limitations.\textsuperscript{40}

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

When the Court applied this statutory period to the Lampf litigants, it was required to apply the period retroactively to all other similarly situated litigants.\textsuperscript{44} The retroactivity ruling was dic-
tated by the decision handed down the same day in *James B. Beam Distilling Co. v. Georgia.* Writing for the Court, Justice David Souter stated “[w]hen the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata.”

C. Post-Lampf: The Confusion Continues

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

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

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

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

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

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

50 See *Lampf* v. Gilbertson, 111 S. Ct. 2773, 2786 (1991) (O'Connor, J., dissenting). "Quite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future." *Id.*; see also 137 Cong. Rec. S18624 (daily ed. Nov 21, 1991) (statement of Sen. Bryan). "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitation than when they brought their suits." *Id.*
In an almost immediate response to Lampf, Congress enacted section 27A of the '34 Act to resolve this frustration.\textsuperscript{51} On December 19, 1991, only six months after the Supreme Court decided Lampf, President George Bush signed into law the provision\textsuperscript{52} directing courts to continue applying the statute of limitations applicable to section 10(b) claims in that state's jurisdiction before Lampf, and allowing the previously displaced litigants to file motions within sixty days to reinstate their causes of action.\textsuperscript{53} In this capacity, Congress, in effect, assumed the role of a "super appellate court,"\textsuperscript{54} rendering the Supreme Court's decision a mere advisory opinion.\textsuperscript{55}

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

\begin{itemize}
\item \textsuperscript{51} See supra note 10 (citing § 27A).
\item \textsuperscript{52} See Block & Hoff, supra note 47, at 5. "The legislation was signed into law by President Bush on December 19, 1991 and is codified as Section 27A of the Exchange Act." Id.
\item \textsuperscript{53} See supra note 10 (citing § 27A).
\item \textsuperscript{54} Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992). "Congress thus effectively acted as a 'super-appellate court,' overturning Lampf without replacing that decision with any new law." Id.
\item \textsuperscript{55} In re Brichard Sec. Litig., 788 F. Supp. 1098, 1103 (N.D. Cal. 1992). "Such congressional review would also undermine Article III in that it would transform judgments into advisory opinions and thereby subject their finality." Id.
\item \textsuperscript{57} 789 F. Supp. 1092 (D. Colo. 1992).
\item \textsuperscript{58} Id. at 1098. "I hold that [§ 27A] violates the principle of the separation of powers and is, therefore unconstitutional." Id.
\item \textsuperscript{60} Block & Hoff, supra note 47, at 10. "For now, however, the uncertainty continues to grow concerning the constitutionality of § 27A as well as the applicable statute of limitations for § 10(b) actions filed prior to June 20, 1991." Id.
\end{itemize}
tainty as to which courts will or will not honor section 27A as a means of reinstating their causes of action. Despite three circuit courts declaring section 27A constitutional, the Supreme Court must address this issue and determine the constitutionality of section 27A and more importantly, whether Congress will be allowed to assume this "super appellate role."

II. CONSTITUTIONAL CHALLENGES

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

A. Separation of Powers

Congress violates the separation of powers doctrine when it enacts legislation that intrudes upon the constitutionally reserved powers of the judicial branch. Three different challenges have been made against section 27A based on the separation of powers doctrine. The first challenge argues that section 27A directs courts to decide a particular group of cases in a certain manner which contravenes the Klein doctrine. Another argument main-
tains that section 27A conflicts with the Supreme Court's holding in Beam because it allows similarly situated litigants to be treated differently. The third challenge asserts that section 27A(b), which provides for the reinstatement of claims dismissed after Lampf, conflicts with the exclusive power of the courts to adjudicate cases.

1. Violation of the Klein Doctrine

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

1992) (section 27A "prescribes a rule of decision" in violation of Klein doctrine); Brichard, 788 F. Supp. at 1104-07 (section 27A "directs a rule of decision by intruding on the adjudicative process"). But see, e.g., Rabin, 801 F. Supp. at 1054 (section 27A does not violate Klein but rather "specifies the law to be applied to the relevant cases and leaves to the courts the job of applying that law to the particular facts before them"); Treiber, 796 F. Supp. at 1058-59 (section 27A does not direct courts to make particular findings of fact, and therefore, does not violate Klein doctrine); Brown, 795 F. Supp. at 1313-14 (same); Adler, 790 F. Supp. at 479-80 (explaining that § 27A is unlike statute in Klein); TGX I, 786 F. Supp. 587, 592 (E.D. La. 1992) (section 27A does not "implicate the separation of powers principles established by Klein"); Hindler v. Telequest, No. 89-0847, 1992 WL 155631, at *1 (S.D. Cal Mar. 31, 1992) (section 27A does not violate Klein doctrine).

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

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

If Congress disagrees with the Supreme Court's interpretation, it is free to amend the statute as it sees fit." Id.; Bank of Denver, 789 F. Supp. at 1096. "Congress has a constitutional means to alter judicial interpretation of a statute—it can repeal or amend the law." Id.; see also Block & Hoff, supra note 47, at 5. "Congress may constitutionally alter judicial interpretation of a statute." Id.

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

80 U.S. (13 Wall.) 128 (1871).

Id. at 146-47. In Klein, the Supreme Court held that a congressional enactment, which advised the courts not to consider a pardon as evidence of loyalty during the Civil War, was
courts have found that section 27A violates the Klein doctrine because it directs courts to decide a certain group of cases in a particular manner without amending the underlying limitation period for section 10(b) claims announced in Lampf.\(^{74}\)

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

Section 27A did not provide a new limitation period for section 10(b) claims.\(^{78}\) Although the legislators originally intended to change the Lampf rule,\(^{79}\) an agreement could not be reached on a unconstitutional. \textit{Id.} at 147-48. The Court stated that Congress violated the separation of powers doctrine by requiring the courts to characterize a pardon as evidence of disloyalty, when the Court had already held it to be proof of loyalty. \textit{Id.} at 146-48. The Court found that the "great and controlling purpose" of the statute was to deny the effect that the Court had given to a pardon. \textit{Id.} at 145-46.

\(^{74}\) See supra note 67 and accompanying text (citing cases which analyzed § 27A under the Klein doctrine).


\(^{76}\) See supra notes 44-46 and accompanying text (explaining that Beam required that Lampf decision be applied retroactively).

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

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

\(^{79}\) See \textit{Brichard}, 788 F. Supp. at 1104. In reviewing the legislative history surrounding § 27A, Judge Legge stated:

Two bills to change the statute of limitations announced in Lampf were proposed. Senator Byran [sic] and Representative Markey introduced separate bills that would have enacted a limitations period longer than the one-year/three-year rule announced in Lampf, and that also would have "eliminate[d] the retroactivity of the Lampf decision,
suitable limitation period, and section 27A was the result of a political compromise. While drafting section 27A, Congress was pressured to remedy the harsh consequences of the Lampf holding before the end of the congressional session. Under this compromise, the limitation period announced in Lampf was impliedly adopted by Congress in section 27A and only its retroactive application was limited.

Furthermore, section 27A did not amend the rule announced in Beam. In Beam, the Supreme Court rejected “selective prospectivity” of judicially announced rules. Under “selective prospectivity,” a court would apply a new rule to the litigants at bar, while not applying the rule retroactively to cases commenced prior to that decision. But according to Beam, once a judicially created allowing suits underway to move forward under the new time limit rule.


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

Id. (emphasis added).

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

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

83 See supra note 75 and accompanying text (explaining that § 27A limited retroactive application of Lampf); see also 137 Cong. Rec. S18623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan) (“I am pleased that Congress is overturning the most egregious part of the Court’s decision.”).

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

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

86 See Beam, 111 S. Ct. at 2448 (discussing that under selective prospectivity “a court [would] apply a new rule in the case in which it is pronounced, then return to the old [rule]
rule is applied to the litigants in that case, it must also be applied to all similarly situated litigants.87

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


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

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

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

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

98 Id.

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

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

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

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

2. Direct Contravention of Beam

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

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

103 See In re Brichard Sec. Litig., 788 F. Supp. 1098, 1108-12 (N.D. Cal. 1992). In his opinion, Judge Legge stated: Beam forbade the selective prospective application of new judicially announced federal rules and required their retroactive application. Section 27A replaces the Beam decision against selective prospectivity with a law of selective prospectivity in certain cases. Permitting selective prospective application of statutes of limitations after the Beam court constitutionally forbade selective prospective application of such rules is an attempt to change Beam. Id. at 1109; see also TGX I, 786 F. Supp. 587, 592-94 (E.D. La. 1992) ("Section 27A contravenes the constitutional mandate in Beam."). But see Rabin, 801 F. Supp. at 1054 (asserting that Beam is not based on constitutional principles); Brown v. Hutton Group, 795 F. Supp. 1307, 1315 (S.D.N.Y. 1992) (same); Adler, 790 F. Supp. at 1243 ("This Court ... does not read Beam as disapproving of the selective prospectivity principle on constitutional grounds."). See generally Block & Hoff, supra note 47, at 10 (examining issue of whether § 27 unconstitutionally contravenes Beam).

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

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

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

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

108 See id. at 1108. "The Supreme Court, and not Congress, has the final word on the meaning of the Constitution." Id.; TGX I, 786 F. Supp. at 594. "[T]he [Supreme] Court is the ultimate arbiter of the constitution." Id.
tution, but rather was based on the principles of "equality" and "stare decisis." These courts have reasoned that since retroactivity in civil cases was founded on these common-law principles, and not the Constitution, Congress had the power to change the rule. Courts following this reasoning ultimately found section 27A constitutional.

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

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

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

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

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

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

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

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


116 See id. at 322-23. According to the Court, "[f]ailure to apply a newly declared constitutional rule to a criminal case pending on direct review violates basic norms of constitutional adjudication." Id. at 322; see also Brichard, 788 F. Supp. at 1110. Justice Souter's heavy reliance on Griffith is significant. Id.; TGX I, 786 F. Supp. at 593. Justice Souter's reliance on Griffith confirms Beam was based on constitutional principles. Id.
Justice Souter, the "equality principle, that similarly situated litigants should be treated the same," actually has greater force in the civil context. Also, in a concurring opinion, written by Justice Antonin Scalia and joined by Justices Harry Blackmun and Thurgood Marshall, it was clearly asserted that selective prospectivity is prohibited by the Constitution, thus furthering the constitutional overtones of Beam.

3. Reinstatement of Dismissed Claims

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

B. Due Process: Vested Rights Doctrine

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

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

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

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

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

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

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

123 See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) (holding Congress may not
Supreme Court held that although legislation may effect subsequent proceedings and pending actions, "when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases." The reasoning behind this prohibition is that a final judgment fixes the rights of the parties, and any congressional disturbance of these rights would constitute an unlawful taking of property without compensation.

It has been argued that a judgment based upon a statute of limitations defense does not create a vested right, and therefore, a reversal of such a judgment does not violate a defendant's right to due process. In Adler v. Berg Harmon Associates, the United States District Court for the Southern District of New York relied on this reasoning and determined that the McCullough rule "does not apply where the judgment was not based upon the merits of the claim, but instead was the result of the application of the defense of statute of limitations, a mere technical rule." This argument was adopted from the Supreme Court's holding in Chase
Securities Corp. v. Donaldson. In Chase, the Court held that modification of a statute of limitations which restored a remedy that was time-barred did not violate due process. However, in Chase, the action was still pending, and therefore, the Court was not disturbing a final judgment. Further, the Court specifically stated that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor."

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

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

130 325 U.S. 304 (1945).
131 Id. at 315. According to Chase, statutes of limitations are justified by necessity and convenience, not logic. Id. at 314. "[T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." Id. For cases where courts have determined that a final judgment based on a statute of limitations defense does not create a vested right, see Anixter, 977 F.2d at 1546 (relying on Chase to determine final judgment based on statute of limitations defense did not create vested right); Adler, 790 F. Supp. at 1244-45 (judgment based on statute of limitations does not create vested right); Axel Johnson, 790 F. Supp. at 482-83 (same).
132 See Chase, 325 U.S. at 306 (while case was pending, legislature enacted new statute of limitations); see also Block & Hoff, supra note 47, at 10 (stating that claims in Chase, affected by new statute of limitations, had not been dismissed at time new statute was enacted).
133 Chase, 325 U.S. at 310.
134 Id. at 314; Adler, 790 F. Supp. at 1244-45 (relying on language espoused in Chase); Axel Johnson, 790 F. Supp. at 482-83 (quoting Chase language).
135 See Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992). "Even though defendants do not have vested rights in a particular statute of limitation, defendants do have vested rights in this Court's judgment dismissing [plaintiffs' § 10(b) claims]. Once a suit is finally adjudicated, the rights become vested and Congress cannot constitutionally divest them." Id.
Courts have determined that Sioux Nation established that relitigation of adjudicated claims may be authorized by Congress. In Sioux Nation, the Supreme Court reasoned that Congress had the power to enact legislation that waived the effect of a final judgment, which was based on a statute of limitations defense. The statute in Sioux Nation, however, was an acknowledgment by the government of its own obligation to pay for the taking of property, despite previous final judgments in its favor. In other words, the government allowed the parties to relitigate the claims even though it had a final judgment based on a statute of limitations defense. Section 27A(b), on the other hand, did upset the final judgments of private litigants, rendering the holding in Sioux Nation inapplicable. Therefore, courts have incorrectly relied on Sioux Nation as permission for Congress to upset final judgments of private litigants by allowing for the reinstatement of section 10(b) claims.

C. Equal Protection

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

138 See Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992) (case closely resembles Sioux Nation); Axel Johnson, 790 F. Supp. at 481 (asserting Sioux Nation establishes that Congress can authorize relitigation of decided claims).
139 See Sioux Nation, 448 U.S. at 407. "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States . . . " was not unconstitutional. Id.
140 See Treiber v. Katz, 796 F. Supp. 1054, 1061 (E.D. Mich. 1992). Sioux Nation is limited to Congress's "power to recognize and pay the nation's debts." Id. "The Supreme Court determined that the legislation in Sioux Nation did not bring into question the finality of . . . earlier judgments, but only acknowledged the government's obligation to pay compensation for takings of property." Id.
141 See Axel Johnson, 790 F. Supp. at 481 (statute in Sioux Nation "merely operated as a waiver of an available defense by an interested party").
142 See Treiber, 796 F. Supp. at 1061. "The present legislation does not seek to waive a defense enuring to the government's benefit; Section 27A(b) purports to waive a defense enjoyed by private litigants." Id.
143 See supra note 64 and accompanying text (citing cases in which equal protection argument has been addressed). See generally Block & Hoff, supra note 47, at 10 (explaining basis of equal protection challenge).
Parties opposing section 27A have argued that under the statute their liability depends upon arbitrary classifications, such as when the claim was filed, with respect to Lampf, and in which jurisdiction the claim was brought. In other words, the date the claim was filed dictated to the courts whether to apply the new uniform statute of limitations announced in Lampf or the old statute of limitations applicable in the jurisdiction prior to Lampf. In addition, for those claims filed prior to Lampf, the applicable statute of limitations varied depending on the jurisdiction in which the claim was brought.

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

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

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

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

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

147 Id.

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

149 Brown, 795 F. Supp. at 1316-17. "Congress had a legitimate legislative purpose, to protect the reasonable expectations of those claimants who filed prior to Lampf, that was furthered by enacting section 27A." Id.
gress was attempting to effectuate legitimate public policy goal, the Supreme Court, as protector of the Constitution, must hold section 27A unconstitutional in view of the long-term effects this policy will have on the Court's power.

CONCLUSION

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

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