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A STATUTORY BEACON OR A RELIGHTED *LAMPF*? THE CONSTITUTIONAL CRISIS OF THE NEW LIMITARY PERIOD FOR FEDERAL SECURITIES LAW ACTIONS*

Anthony Michael Sabino†

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† B.S., 1980, J.D. 1983, St. John's University. Associate, Marks & Murase, New York, New York. Adjunct Professor of Law, St. John's University School of Law. The author dedicates this article with deepest affection to James Nicholas Sabino, and to all his hopes and dreams.

I. PREAMBLE

"May you live in interesting times" is a well-known ancient Chinese curse. Although not usually a superstitious lot, many securities lawyers believe they are now laboring under that imprecation. Their bedevilment stems from a combination of: (1) the Supreme Court's proclamation of a new uniform statute of limitations for securities fraud actions in the landmark case of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* (*Lampf*);[1] (2) subsequent congressional action that negated the retroactive application of that new limitary period by adding section 27A to the Securities Exchange Act,[2] and now; (3) the controversy over whether that remedial legislation can constitutionally prohibit the retroactive application of the period of limitation prescribed by *Lampf* to pending cases.

Having just concluded a lengthy writing on the new limitary period with an eleventh-hour postscript describing the passage of the congressional mandate for prospective application of the new limitary period, this author shares the vexation of his colleagues.[3] While subsequent decisions on the issue were both expected and welcomed, especially at the trial level, few could have foretold that the titanic struggle, so soon ended, was but the precursor to yet another cataclysm. This article will address the latest emerging struggle over the proper statute of limitations for securities fraud actions.

The decision of the Supreme Court in *Anixter v. Home-Stake Production Co.*[4] to vacate and remand the decree of the Court of Appeals for the Tenth Circuit in light of the new section 27A, which prohibits the retroactive application of the rule first pronounced in *Lampf*, is critical to this writing. This article shall collect and analyze the history and legislative purpose of the new statute; parse the lower court decisions that have upheld it or declared it unconstitutional; discuss the appellate scenarios now *sub judice*; and propose an outcome that does justice to the litigants

1. 111 S. Ct. 2773 (1991).

2. 15 U.S.C. § 78aa (1988). *See also infra* note 15 and accompanying text.

3. *See* Anthony M. Sabino, *The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, and a Call for Reform*, 19 PEPP. L. REV. 485 (1992) for a discussion of the cases addressing the proper statute of limitations for securities fraud actions implied under § 10b-5.

4. 939 F.2d 1420 (10th Cir. 1991), *cert. granted and judgment vacated sub nom.*, Dennler v. Trippet, 112 S. Ct. 1658, *and amended by* 112 S. Ct. 1757 (1992).

whose cases hang in the balance on this issue, while contemporaneously having proper regard for the constitutional questions raised therein.

II. RULE 10B-5 AND ITS LIMITATIONS: A QUICK REVIEW

It is now well established that although section 10(b) of the Securities Exchange Act of 1934[5] and rule 10b-5[6] provide the "ultimate weapons" of securities anti-fraud enforcement and litigation, they lack a defined statute of limitations. For decades, an internecine conflict has raged among the circuits, each borrowing diverse statutes of limitations from its forum state. This inequitable and virtually unworkable crazy-quilt pattern finally met its end in *Lampf*, in which the Supreme Court ruled that "[l]itigation instituted pursuant to [section] 10(b) and Rule 10b-5 therefore must be commenced within one year after the discovery of facts constituting the violation and within three years after such violation."[7]

Although the *Lampf* rule was welcomed, its immediate repercussions were not. Because *Lampf* dismissed section 10(b) claims actually before the courts as untimely under the new one-year/three-year period, and because of its linkage to *James B. Beam Distilling Co. v. Georgia (Beam)*,[8] securities fraud plaintiffs who had timely filed their lawsuits under then-existing law found the future of their actions endangered by the retroactive application of the new, shorter limitary period prescribed in *Lampf*. For instance, in *Boudreau v. Deloitte, Haskins & Sells*,[9] the Eighth Circuit remanded a securities fraud case to the district court after being "compelled to apply [*Lampf*] retroactively."[10] The opinion noted that the Supreme Court applied *Lampf* retroactively "without discussion or analysis."[11] Parenthetically, the Eighth Circuit observed that while Justice Souter's plurality opinion in *Beam* was joined only by one other member of the Court, the concurrences of four of the remaining Justices lent support to the retroactive application of *Lampf*.[12]

In the waning days of June 1991, it became apparent that an untold

5. 15 U.S.C. § 78j(b) (1988).
6. 17 C.F.R. § 240.10b-5 (1992).
7. *Lampf*, 111 S. Ct. at 2782.
8. 111 S. Ct. 2439 (1991) (*Beam*). The Court handed down *Beam* and *Lampf* on the same day. *Beam* addressed a state tax law question, and arguably advocated its own retroactive application to civil rulings.
9. 942 F.2d 497 (8th Cir. 1991) (per curiam). The Eight Circuit panel included Senior Circuit Judge Peck of the Sixth Circuit.
10. *Id.* at 498.
11. *Id.*
12. *Id.* at 498 n.1.

number of securities fraud lawsuits were in immediate jeopardy of being dismissed as untimely. The supposed mandate from the Supreme Court to apply the new one-year/three-year limitary rule retroactively to pending cases could mean dismissal on that ground alone for any case filed in reliance on a longer, pre-*Lampf* period of limitation, regardless of the merits of the case. Congress naturally felt compelled to avoid at all costs the prospect of the dismissal of suits filed by legitimate plaintiffs under section 10(b). Accordingly, the legislative branch sprang into action to absorb the aftershocks felt in the wake of *Lampf*.

III. THE NEW SECTION 27A—A STATUTORY BAR TO THE RETROACTIVE APPLICATION OF *LAMPF*

At the urging of the Chairman of the Securities and Exchange Commission ("SEC") and other proponents,[13] and after much debate,[14] Congress responded to the outcry against the draconian effects of *Lampf* by promulgating the new section 27A. The statute provides as follows:

> SEC. 27A(a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, 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 Act that was commenced on or before June 19,1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed prior to June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.[15]

The passage of section 27A evinced the will of Congress to prevent any potential damage caused by the retroactive application of *Lampf*. This revision to the 1934 Act restores the applicable limitary periods to lawsuits commenced pre-*Lampf*, and permits plaintiffs to reinstate anti-fraud

13. *See SEC Reiterates Support for Extending Limitations Period for Private Lawsuits*, [1990-1991 Transfer Binder] 23 Sec. Reg. & L. Rep. (BNA) 1433 (Oct. 4, 1991).

14. *Id.* at 1434.

15. FDIC Improvement Act of 1991, Pub L. No. 102-242, § 476, 105 Stat. 2387 (codified at 15 U.S.C. § 78aa-1).

actions dismissed on the basis of *Lampf*.[16] Given the subsequent firestorm of controversy over the constitutionality of section 27A, an in-depth examination of the legislative history of that provision is in order.

A. *The Genesis of Section 27A*

Even before it addressed the issue of *Lampf*'s retroactivity, Congress was subjected to a barrage of requests to rework the entire limitary scheme set forth by the Supreme Court in *Lampf*. In hearings before the Senate, SEC Chairman Richard Breeden endorsed a two-years-from discovery/five-years-after-violation statute of limitations for causes of action implied under section 10(b). Citing the fact that the intrinsic nature of securities fraud makes detection difficult, and indeed most likely only after the fraud has collapsed, Chairman Breeden faulted *Lampf* for promulgating an "unrealistically short" limitary period that would harm the viability of the private lawsuits so essential to the anti-fraud statute's enforcement function.[17]

Acting on Commissioner Breeden's suggestion, Senators Bryan and Riegle introduced S. 1533 to the Senate Securities Subcommittee.[18] Called "The Securities Investor Protection Act of 1991," the bill would have added a new section at the end of the codification of the Securities Exchange Act.[19] The proposed statute provided that "any private right of action arising from a violation of [the 1934] Act" would be governed by a two-years-from discovery/five-years-from-the violation limitary rule.[20] This statutory amendment would have also eliminated the retroactive application of *Lampf* and permitted lawsuits then pending to be decided by its two-year/five-year limitary period. Senator Bryan added that his remedial legislation was based upon the *amicus* brief filed by the SEC in *Lampf*, and that all causes of action implied under the federal securities laws would fall within the penumbra of the new two-year/five-year rule.[21]

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16. *Id.*

17. *Breeden Endorses Bill to Reverse Decision on § 10(b) Limitations Period*, [1990-1991 Transfer Binder] 23 Sec. Reg. & L. Rep. (BNA) 1141 (July 23, 1991) [hereinafter *Breeden Endorses Bill*].

18. Senator Riegle, chairman of the full Banking, Housing, and Urban Affairs Committee, co-sponsored the proposed measure.

19. S. 1533, 102d Cong., 1st Sess. (1991). *See* 137 CONG. REC. S10,675-76 (daily ed. July 23, 1991) (statement of Sen. Bryan).

20. 137 CONG. REC. S10,691 (daily ed. July 23, 1991) (comments of Sen. Bryan).

21. *Breeden Endorses Bill*, *supra* note 17, at 1141.

If enacted, the new provision would apply to any proceeding pending on or commenced after June 19, 1991.[22] Additionally, the proposed amendment explicitly commanded that any cause of action (1) dismissed as time-barred after June 19, 1991, (2) which would have been timely filed under applicable law the day before *Lampf* was decided, and (3) which would have been timely under the new two-year/five-year statutory rule, could be refiled within 60 days of the date of passage of the amendment.[23]

When S. 1533 was introduced,[24] Senator Bryan found it hard to determine "exactly [which plaintiffs would] be affected" by *Lampf*.[25] Concerned for defendants and plaintiffs alike, he continued:

> Of course, the securities industry needs to be protected as well. An unlimited time limit for filing section 10 suits would expose securities firms to unreasonable and unpredictable liabilities. [This amendment] recognizes the concerns of both the securities industry and the individual investor.[26]

Chairman Breeden "strongly endorsed the measure, saying that lawsuits brought by individuals, and not his agency, 'performed a critical role in preserving the integrity of our securities market.' "[27] He added that "uncovering sophisticated securities fraud was difficult and time-consuming," and suggested that had the *Lampf* rule been in effect at the time, "about 'one-half of the case against Drexel Burnham, a large part of the Equity Funding case[,] and all of the case against E.F. Hutton for check-kiting would have been barred.' "[28]

Mr. Breeden also noted that applied retroactively, the one-year/three-year limitary period could threaten shareholder suits against the Bank of Commerce and Credit International and Salomon Brothers.[29]

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22. *Id.*

23. *Id.*

24. 137 CONG. REC. S10,675-76 (daily ed. July 23, 1991).

25. *Id.* at S10,691.

26. *Id.* Senator Bryan also offered the substance of S. 1533 as an amendment to the Senate Banking Committee's comprehensive banking reform bill. Representative Markey, chairman of the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, introduced the House of Representatives' counterpart to the Bryan measure. *Senate Bank Reform Bill Would Reverse Decision On § 10(b) Limitations Period*, 23 FED. SEC. & CORP. DEV. 1291 (1991). The Markey proposal went even further, allowing plaintiffs "to bring suits within either five years of the alleged violation or three years from the time the alleged violation was discovered." *Id.*

27. Leslie Wayne, *Breeden Backs Investors on Fraud Suits*, N.Y. TIMES, Oct. 3, 1991, at 10 [hereinafter *Breeden Backs Investors*].

28. *Id.*

29. *Id.*

Notably, it was reported separately that both the seized insurer, Executive Life of California, and imprisoned junk bond king Michael Milken had begun to seek dismissals in their cases based on the holding in *Lampf*. Chairman Breeden has continued to lend strong support to a statutory two-year/five-year limitary period, as evidenced by his comments at public forums.[30]

Congress' motivation did not change significantly when the Bryan proposal became part of S. 543, the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991.[31] Primarily, Congress' goal remained to allow pre-*Lampf* securities fraud cases "to be able to proceed and not be cut off by [*Lampf*'s new] statute of limitations."[32] Admittedly, the lawmakers knew they would have to revisit the issue to debate a statutory extension of the new one-year/three-year rule.[33] However, because *Lampf* would have resulted in the dismissal of cases if left undisturbed, expediency demanded that Congress act immediately and return to the issue of limitary period another day.[34]

On December 19, 1991, President Bush signed the 1991 banking reform bill into law, thereby statutorily eradicating the retroactive effect of *Lampf*.[35] As its preamble announces, the law's legislative history is composed of the Senate Report, the House Report, and the House Conference Report.[36] In this context, the individual legislative history of section 27A is quite remarkable, primarily because of its absence. The House Report[37] obviously devotes much of its text to monetary relief for the Bank Insurance Fund ("BIF"). Remarkably however, the report never mentions the reason for enacting section 27A, even in the section-by-section analysis, where an odd gap looms inexplicably where the discussion should appear.[38]

30. *Breeden Urges Changes to Limit Baseless Securities Allegations*, 23 Sec. Reg. & L. Rep. (BNA) 1524 (Oct. 18, 1991) (reiterating support for S. 1533 in speech delivered before Corporate Counsel Inst. on Oct. 16, 1991).

31. 137 CONG. REC. S17,305 (daily ed. Nov. 21, 1991) (comments of Sen. Riegle).

32. *Id.* at § 17,307.

33. *Id.* (comments of Sen. Domenici).

34. *Id.* at S17,315 (comments of Sen. Riegle). It was confirmed that the proposed amendment was "not intended to apply to or in any way affect the parties or the claims in the *Lampf* decision itself." *Id.* at S17,383 (comments of Sen. Garn).

35. FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2387 (codified at 15 U.S.C. § 78aa-1).

36. H.R. REP. No. 102-330, 102d Cong., 1st Sess. at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1901.

37. *Id.* at 1901-26.

38. *Id.* at 1960.

The abridged House Conference Report[39] offers one possible explanation for the apparent omission of the history of section 27A. This report notes that House and Senate conferees "met for two days under a stringent deadline" to consider legislation to fund the BIF. By motion, the full House instructed its representatives to consider only issues within the scope of the House's FDIC bill, and not the "more voluminous" Senate proposal. "[A]ll agreed that in the short time available for forging this compromise, recapitalizing the BIF took top priority."[40] The urgency of the conference may thus explain the failure to mention section 27A in the legislative history of the BIF.

In sum, section 27A offers nothing in the way of true legislative history, a defect that the subsequent discussion shall show to be most telling. Rather, one must look to the Congressional Record and other public statements of lawmakers to determine its origins. The salient point is that while the legislators cited specific examples of notorious securities fraud cases that would go unpunished if *Lampf* were applied retroactively, Congress still intended to (and did) affect only a general, loosely defined set of litigants in section 10(b) cases. The high profile prosecutions were named only as handy exemplars.

B. *Retroactivity Denied*

The negation by section 27A of the retroactive effect of *Lampf* seemed to take a firm hold in the wake of the passage of the FDIC Act. For instance, the district judges of the Second Circuit, the "Mother Court" of federal securities law,[41] turned away attempts to apply the new one-year/three-year rule retroactively and relied without hesitation on pre-*Lampf* limitary periods borrowed from the forum states' statutes of limitation to decide pending or refiled cases.[42]

In *Mekhjian v. Wollin*,[43] District Judge Connor focused on the fact that the plaintiffs were residents of New Jersey, a forum in which the

39. H.R. CONF. REP. No. 102-407, 102d Cong., 1st Sess. 169 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1901, 1964.

40. *Id.*

41. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1985) (Blackmun, J., dissenting).

42. Alfadda v. Fenn, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,625 (S.D.N.Y. Feb. 21, 1992) (McKenna, J.); Ahmed v. Trupin, 781 F. Supp. 1017, 1021 (S.D.N.Y. 1992) (Sweet, J.); *Cf.* Lewis v. Hermann, 775 F. Supp. 1137, 1143-46 (N.D. Ill. 1991). In *Lewis*, District Judge Aspen bypassed *Lampf* and decreed that the retroactivity issue had been resolved by Short v. Belleville Shoe Mfg., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991), in which the Seventh Circuit imposed a one-year/three-year limitary rule.

43. 782 F. Supp. 881 (S.D.N.Y. 1992).

one-year/three-year limitary period had long been in force.[44] Ruling on various motions to dismiss, the trial court noted that the new section 27A precluded the retroactive application of the *Lampf* rule.[45] Nonetheless, since the statute now decreed that then-existing securities fraud actions should be governed by the pre-*Lampf* limitation periods of the relevant forum, Judge Connor borrowed the one-year/three-year rule that prevailed in the plaintiffs' home state before *Lampf* was decided.[46] Having thus won the battle only to lose the war, the plaintiffs saw their actions dismissed.[47]

Observers initially believed that such cogent logic as Judge Connor's would rule the day. However, that thought quickly perished, as the viability of section 27A was suddenly brought under the inquisition of other, more skeptical judges.

C. *The New Constitutional Challenge*

On the basis of such opinions as Judge Connor's, one would think that the new uniform statute of limitations would be well settled and its application restricted to prospective use, even under section 27A. However, times are much too interesting for such a pat result, and constitutional challenges to the remedial legislation soon arose.

TGX Corp. v. Simmons (TGX)[48] constituted one of the first successful challenges to section 27A. In that decision, District Judge Peter Beer flatly declared that section 27A was unconstitutional because it violated

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44. *Id.* at 885 (citing *In re* Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988)).

45. *Id.*

46. *Id.*

47. *Id. See also* Borden, Inc. v. Spoor Behrins Campbell & Young, Inc., [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,556, at 96,563 (S.D.N.Y. Mar. 13, 1992) (Connor, J.) ("By enacting Section 27A limiting *Lampf's* retroactivity, Congress now requires this Court to conduct an analysis of the statute of limitations applicable to each plaintiff."). Judge Connor also held that principles of equitable tolling do not apply here. *Mekhjian*, 782 F. Supp. at 886; *Borden, Inc.*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 96,562.

Judge Connor commented succinctly that the statute of limitations for § 10(b) "has both evolved and regressed" as a result of *Lampf* and the subsequent passage of section 27A. *Mekhjian*, 782 F. Supp. at 884. He added that "Congress has effectively turned back the clock" on securities fraud actions that were pending before the Supreme Court decided *Lampf*. *Id.* at 885. *Accord* Department of Economic. Dev. v. Arthur Andersen & Co., 1992 U.S. Dist. LEXIS 4586, at *4 (S.D.N.Y. Apr. 7, 1992) (calling for a "straightforward application" of section 27A). *See also* Ades v. Deloitte & Touche, [1991-1992 Transfer Binder] Fed.Sec. L. Rep. (CCH) ¶ 96,469 (S.D.N.Y. Jan. 2, 1992); Schick v. Ernst & Young, 141 F.R.D. 23 (S.D.N.Y. 1992). In *Schick*, District Judge Sweet noted in dicta that section 27A "effectively bars the retroactive application of *Lampf*." *Id.* at 24 n.2.

48. 786 F. Supp. 587 (E.D. La. 1992).

"established separation of powers principles."[49] The trial judge based his separation of powers analysis on "[t]wo related constitutional principles."[50] The first principle originated in *United States v. Klein*,[51] in which the Supreme Court held that while Congress can amend or repeal any law, it cannot "prescribe a rule for a decision of a cause in a particular way" where "no new circumstances have been created by legislation."[52] Judge Beer admitted that section 27A did not contravene this initial precept,[53] and found that Congress changed the law by enacting section 27(A). Therefore, Congress had not contravened the principles of separation of powers established by *Klein* and its progeny. The judge that found before section 27(A) was enacted, all section 10(b) claims were properly subject to the limitations period announced in *Lampf* and made to apply retroactively by *Beam*. Section 27(A) then changed the law by limiting *Lampf* only to prospective application.[54] Judge Beer further suggested that *Lampf* did not change the law, but instead merely clarified "what the law has always been."[55] Thus, Judge Beer asserted that through *Beam*, *Lampf* simply found the law where it was.

However, the court found that section 27A changed the established rule and that such a function was clearly an unconstitutional exercise of the Congress' power to make new law.[56] It was because of the second *Klein* principle that the new statute failed to pass constitutional scrutiny. Judge Beer relied extensively on the "selective retroactivity" discussion in *Beam*.[57] The court rationalized its inquiry by maintaining that "[o]nce a court finds that a congressional enactment has changed the law, the court must then review the enactment itself, to assure that its substance does not constitute an impermissible legislative encroachment on the judicial power."[58] In short, the *TGX* court unquestioningly applied the full force of Justice Souter's plurality opinion in *Beam* to the *Lampf* context, and held that "section 27A effect[ed] the selective prospectivity constitutionally proscribed in *Beam*."[59] On this basis, the court

49. *Id.* at 591 n.4. As a result of this decision, the court declined to address the due process aspect of the statute's constitutionality.
50. *Id.* at 591.
51. 80 U.S. (13 Wall.) 128 (1871).
52. *Id.* at 146-47 (followed by Seattle Audobon Soc'y v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991); *TGX Corp.*, 786 F. Supp. at 591).
53. *TGX Corp.*, 786 F. Supp. at 592.
54. *Id.*
55. *Id.*
56. *Id.* at 594.
57. *Id.* at 592-93.
58. *Id.* at 592 n.5.
59. *Id.* at 594.

had no choice but to find section 27A unconstitutional.[60]

Days after *TGX* was decided, District Judge Lewis T. Babcock of Colorado ruled in two separate opinions issued on the same day that the new limitary statute was unconstitutional. In *Bank of Denver v. Southeastern Capital Group, Inc.*,[61] certain defendants had previously obtained a dismissal of the plaintiff's section 10(b) claims on the basis of *Lampf*. Pursuant to section 27A, the plaintiffs moved to reinstate their section 10(b) claims. The court denied the plaintiffs' motions to reinstate, and asserted that because of *Beam*, "*Lampf* applied retroactively to all pending [section] 10(b) cases."[62] In this context, Judge Babcock cast the new statute in an unforgiving light, asserting that section 27A carves out a limited class of pending federal actions for special treatment. "[Although] cases filed after the *Lampf* decision are subject to the one-and-three . . . rule, cases pending on June 19, 1991 return to the precedent that applied in each jurisdiction before *Lampf*."[63] Not surprisingly, the court then found section 27A unconstitutional.[64]

Central to Judge Babcock's separation of powers analysis was his quotation of the Supreme Court's holding in *Nixon v. Administrator of General Services*.[65] In *Nixon*, the Supreme Court held that the proper inquiry to determine whether an act disrupts the proper balance between the branches focuses on the extent to which the act prevents a branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must a federal court determine whether that impact is justified by an overriding need to promote objectives within Congress' constitutional authority.[66]

The court remonstrated that under our tripartite system of checks and balances, the "constitutional means" available to Congress to alter judicial interpretation of a law is simple: "[I]t can repeal or amend the law. Congress can even require the courts to apply such changes retroactively" and thereby indirectly affect the outcome of pending litigation.[67]

Judge Babcock acknowledged that a federal court should invalidate a duly enacted statute "only for the most compelling constitutional reasons." Still though, the court was convinced that "Congress ha[d]

60. *Id.*
61. 789 F. Supp. 1092 (D. Colo. 1992).
62. *Id.* at 1094.
63. *Id.*
64. *Id.* at 1098.
65. 433 U.S. 425 (1977).
66. *Bank of Denver*, 789 F. Supp. at 1095 (quoting *Nixon*, 433 U.S. at 443).
67. *Id.* at 1096.

crossed the line into the exclusive province of the judiciary" by enacting section 27A.[68] The court stated the essence of the lawmakers' intrusion into the judicial realm as follows:

> Congress did not retroactively amend the section to state an express limitations period. Rather, Congress selected a discrete category of federal cases, those pending on June 19, 1991, and directed federal courts hearing these cases to ignore the Supreme Court's binding interpretation of [section] 10(b) set out in *Lampf*. Congress thus effectively acted as a 'super-appellate court,' overturning *Lampf* without replacing that decision with any new law.[69]

The court then buttressed its holding with the additional finding that section 27A is unconstitutional under general principles of separation of power. "It is beyond debate that the quintessential constitutional attribute of the judiciary is the power to interpret the laws. Section [27A] impermissibly encroaches on this function by directing federal courts to ignore the Supreme Court's decision in some cases and to apply *Lampf* in others."[70]

Finally, the court concluded its analysis with a statement tantamount to a rebuke of the Congress. Once again pointing to the legislators' power to amend or repeal a law if they are displeased with the judiciary's interpretation of it, Judge Babcock chided that "Congress could have written an express statute of limitation and repose into [section] 10(b) and applied the amendment retroactively."[71]

Without question, the most exhaustive rejection of section 27A on constitutional grounds appears in *In re Brichard Securities Litigation* (*Brichard*).[72] Price Waterhouse, the defendant accounting firm, opposed the plaintiffs' motion to reinstate their securities fraud actions.[73] Judge Charles Legge voided section 27A as unconstitutional on the grounds that it violated separation of powers principles. In so holding, Judge Legge concluded that section 27A impermissibly attempted to direct decisions in particular cases.[74] The Attorney General and the SEC filed a

68. *Id.* at 1097 (citation omitted).

69. *Id.*

70. *Id.* at 1097-98.

71. *Id.* at 1098; *see also* Johnston v. Cigna Corp., 789 F. Supp. 1098 (D. Colo. 1992). Because "Congress does not have the power to upset final judgments," Judge Babcock refused to reinstate Johnston's securities fraud claims pursuant to section 27A on the ground that a final judgment had been entered in their case more than a month before § 27A was enacted. *Id.* at 1100.

72. 788 F. Supp. 1098 (N.D. Cal. 1992).

73. *Id.* at 1100.

74. *Id.* Because it intended to declare section 27A unconstitutional, the court notified the United States Attorney General of the pendency of the dispute pursuant to 28 U.S.C. § 2403(a) (1988).

statement of interest and a brief in support of plaintiffs, which the court considered.[75]

Judge Legge defined the basic issue before the court as "whether Congress [had] exceeded its authority under Article I" and "intrude[d] into powers reserved to the judiciary under Article III."[76] The court acknowledged Supreme Court precedent for the propositions that first, Congress may permissibly enact retroactive legislation if the application of that legislation is justified by " 'a rational legislative purpose,' "[77] and second, that Congress may enact legislation affecting pending cases.[78] However, noted the court, "[b]oth of these principles presuppose a substantive or procedural change in law made by Congress."[79] The court found that in this case, Congress had impermissibly attempted to prevent the application of *Lampf* to existing cases.[80] Judge Legge thus opined that section 27A enacted neither any underlying substantive law nor a statute of limitations for section 10(b) cases. Rather, the statute left *Lampf* untouched.

The court then declared the statute unconstitutional as a violation of the separation of powers doctrine because it "improperly direct[ed] a result in pending cases, and reverse[d] final judgments of the federal courts."[81] Moreover, suggested the court, by altering the rule from *Beam*, section 27A intrudes on the Supreme Court's authority as the "final expounder of the Constitution."[82]

Judge Legge devoted the majority of his opinion to state what he believed section 27A is *not*. He contended that it is not a statute of limitations for section 10(b), and that it does not change an existing limitary period. Instead, he asserted that its enactment merely prevents (and was merely intended to prevent) the retroactive application of *Lampf*.[83] The court indicated that if Congress had promulgated a true statute of limitations for anti-fraud actions and "had commanded that the new statute

75. *In re Brichard Sec. Litig.*, 788 F. Supp. at 1100.

76. *Id.* at 1102.

77. *Id.* (quoting United States v. Sperry Corp., 493 U.S. 52, 64 (1989)).

78. *Id.* (quoting United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)).

79. *Id.*

80. *Id.* at 1104 (admitting that since "the circuits were not in agreement" on the limitary period for § 10(b) at the time, "it could be argued that [§] 27A(a) does not direct the outcome of that specific group of cases.").

81. *Id.* at 1103.

82. *Id.*

83. *Id.* at 1103-04.

was to apply retroactively," such a law would pass constitutional muster.[84] Nonetheless, held the court, it was impermissible for Congress to bar the application of a specific decision.[85] This intrusion on the adjudicative function[86] is analogous to the issue in *Klein*[87] because it "directs a rule of decision."[88]

In addition to pointing out the textual infirmities of section 27A, the *Brichard* court characterized the statute's legislative history as darkening an already looming cloud of unconstitutionality.[89] Reviewing the recorded floor debates preceding the statute's passage, Judge Legge found that the lawmakers' comments clearly supported the holding that the new law was specifically directed to change the outcome of certain court proceedings, thereby contravening the separation of powers doctrine.[90] The court opined that although Congress was anxious to avoid what it perceived as an "undesirable outcome in particular cases," it was nevertheless reluctant to enact a statute of limitations different from the one set forth in *Lampf*.[91] "As in *Klein*, the statute's 'great and controlling purpose' was to direct the outcome in specific cases without changing the governing law."[92]

Having thus declared section 27A(a) unconstitutional, the *Brichard* opinion then pronounced that subsection (b) was also unconstitutional. After applying the analysis presented above to subsection (b), Judge Legge found that this portion of the statute represented a classic attempt by Congress to compel a particular result in a specified group of cases without changing the underlying law.[93]

This accusation, if true, raised the additional problem of whether section 27A(b) impermissibly directs courts to reverse final judgments.[94] Thus, said the district judge, "even if [the] court were to find that section 27A changed the law announced in *Lampf*, it would be compelled to find subsection (b) otherwise unconstitutional since a change in law cannot

84. *Id.* at 1104 n.5.

85. *Id.* at 1104. The court noted that the impermissible intrusion in this case resulted from the legislative directive *not* to follow *Lampf*, not from the passage of some alternative rule. *Id.*

86. *Id.*

87. 80 U.S. (13 Wall.) 128, 147-48 (1871).

88. *In re Brichard Sec. Litig.*, 788 F. Supp. at 1104.

89. *Id.* at 1105.

90. *Id.* at 1105-06.

91. *Id.* at 1106.

92. *Id.*

93. *Id.*

94. *Id.*

affect final judgments of courts."[95] The court grounded this holding on two basic legal arguments. First, section 27A(b), as an act of discretion of one branch of government over a declaration by the judiciary, amounts to an advisory opinion, which is not "not within the judicial power."[96] Second, as an act of legislative review of the final judgments of federal courts, it invades the judicial branch's exclusive power under Article III to adjudicate cases.[97] Thus, "section 27A(b) improperly nullifies the judgment of the Supreme Court in *Lampf* and the final judgements of other federal courts which [had] dismissed [section] 10(b)-5 actions in accord with *Lampf* and *Beam*."[98]

Notwithstanding these arguments, the *Brichard* opinion was not yet complete. Judge Legge next addressed the impact of section 27A on *Beam*.[99] He declared that *Beam* was a "constitutional decision," and therefore one that Congress could not change by mere statutory enactment.[100]

The court first asserted that the rule announced in *Lampf* was inextricably intertwined with *Beam*, and thus rejected the argument made by both the United States and the SEC that *Beam* does not preclude Congress from "curtail[ing] the retroactive effect" of *Lampf*.[101] The district judge then rejoined that *Beam* not only announced a rule of retroactivity, but that it applied its own rule retroactively to pending cases.[102]

In response, the plaintiffs argued that section 27A did not affect the nexus between *Beam* and *Lampf*.[103] Instead, they suggested, it merely ensured that the new one-year/three-year rule would only be applied prospectively.[104] Acknowledging some support for that argument, the court nevertheless ruled that the plaintiffs' argument "[did] not answer the violence that section 27A did to *Beam*."[105]

By compelling *Beam* only to apply prospectively, said the court, section 27A conflicts with the retroactivity rule announced by the Supreme Court in that decision.[106] In other words, "[s]ection 27A replaces the

95. *Id.* (citations omitted).
96. *Id.* at 1107 (citing Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792)).
97. *Id.* (citing United States v. O'Grady, 89 U.S. (22 Wall.) 641 (1874)).
98. *Id.* at 1108 (citations omitted).
99. *Id.*
100. *Id.*
101. *Id.* at 1109.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

Beam decision against selective prospectivity with a law of selective prospectivity in certain cases."[107] For this additional reason Judge Legge found section 27A unconstitutional.

Brichard is also significant in view of its handling of the United States' argument that *Beam* was not a ruling of constitutional import. The U.S. Attorney General had asserted that *Beam* was not a constitutional decision because a majority of the Justices "did not base their decisions on constitutional grounds."[108] Nevertheless, the court held that those opinions demonstrated that the Supreme Court concurred that its decision was in fact based on constitutional grounds.[109]

Likewise, Judge Legge rejected that same argument when the *Brichard* plaintiffs raised it. First, *Brichard* quoted a decision by the Supreme Court in a criminal case which held that the failure to apply a newly declared constitutional rule to criminal cases pending on direct review violated basic norms of constitutional adjudication.[110]

Second, Judge Legge contended that "Justice Souter's depiction of the issue in *Beam* as a choice of law problem cannot be interpreted as a judgment that the *Beam* decision rests on less than constitutional ground[s]."[111] Rejecting the simultaneous contention that the application of section 27A "is merely a statutory issue,"[112] Judge Legge ruled that although the constitutional grounds for *Beam* may be mixed, the case was ultimately based on the Constitution.[113] This finding thus compelled the declaration that section 27A is unconstitutional, since "Congress may not enact a law that contravenes the Supreme Court's judgment on questions of constitutional interpretation."[114]

Notwithstanding its holding, the *Brichard* court recognized "the concerns that prompted Congress to enact section 27A."[115] Nevertheless, it held that "such concerns cannot override the Constitution."[116] Pulling these diverse elements together one last time, the court summarized the reasons for its rejection of section 27A as unconstitutional:

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107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 1110 (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)).
111. *Id.*
112. *Id.*
113. *Id.* at 1111-12.
114. *Id.* at 1112 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
115. *Id.*
116. *Id.*

> Congress did not enact a statute of limitations for [section] 10(b) actions. Instead, without making any change in the underlying law, Congress attempted to direct the outcome of a certain group of cases. Section 27A intrudes into the powers reserved to the judiciary by Article III, and violates the constitutional separation of powers between the judicial and legislative branches.[117]

And so, following *Brichard*'s lead, a number of district courts have now struck out against section 27A. They have voided the statute as unconstitutional on the basis of the related yet diverse reasons that it violates the constitutional doctrines of separation of powers, equal protection, and other crucial dogma. But these cases represent but one side of the debate.

D. *The Challenge Rejected*

Just as the foregoing cases have held section 27A unconstitutional as an impermissible attempt to affect judgments in specific cases, others have found that section 27A serves a perfectly legitimate legislative function. One of the first cases finding section 27A viable was *Bankard v. First Carolina Communications*.[118] Judge Hart, the author of the *Bankard* opinion, had previously applied *Lampf* retroactively in light of *Beam*, even though "the issue of retroactive application was not expressly discussed by the [*Lampf*] majority."[119]

In *Bankard*, Judge Hart held that "[s]ection 27A precludes application" of *Lampf* retroactively.[120] The *Bankard* court summarily rejected the defendants' claims that the limitary statute was unconstitutional.[121] The court asserted that section 27A does not direct the courts to make a particular factual finding or to reach a particular decision on the merits of any securities fraud claim.[122] Hence, the principles of separation of power are not violated.[123] The defendants' argument did not merit consideration because the court found the underlying premise to be false.[124] Judge Hart elaborated that "Congress has changed the law and that it might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating

117. *Id.*
118. No. 89-8571, 1992 U.S. Dist. LEXIS 53 (N.D. Ill. Jan. 3, 1992).
119. Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 483 (N.D. Ill. 1991).
120. *Bankard*, 1992 U.S. Dist. LEXIS at *15 n.5.
121. *Id.* at *19.
122. *Id.* at *17-18.
123. *Id.*
124. *Id.* at 18.

the prevailing law in the applicable jurisdiction."[125]

Additionally, Judge Hart found the defendants' due process argument against section 27A to be "without merit" because the enactment of the statute did not deprive the defendants of any vested right.[126] Addressing the contention that section 27A lacked the "rational purpose" necessary to pass muster on equal protection principles, the court countered that it is not irrational to keep in effect existing rules regarding a statute of limitations until parties have notice of the changed rule.[127] Giving such notice prevents parties from being injured by relying on old, superseded law.[128] Thus, ruled the court, Congress had a rational basis for permitting limitation periods that may have differed among jurisdictions before June 20, 1991 to remain in effect. As of that same day, the court reasoned, securities fraud litigants would have notice of a uniform standard for all jurisdictions.[129] The court concluded that since it does not affect any protected category of persons and is rational, the statute does not violate equal protection.[130]

An Ohio district court rejected similar challenges to section 27A in *Ayers v. Sutliffe*,[131] in which the court reinstated the plaintiffs' causes of action over the defendant's opposition. The defendant contended that section 27A violated the separation of powers doctrine and the Due Process and Equal Protection clauses of the Fourteenth Amendment.[132]

Dismissing these contentions, District Judge Carl B. Rubin concluded that *Lampf* and *Beam* "clearly effected a change in the existing law . . . in this and many other jurisdictions" by establishing a one-year/three-year limitations period for section 10(b) actions, and that *Beam* compelled the retroactive application of the new limitary period.[133]

125. *Id.*; *In re* Taxable Mun. Bond Sec. Litig., [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,802, at 93,119 (E.D. La. May 20, 1992) (holding that § 27A "simply modified a defense" without affecting the merits of the underlying claim, and therefore was constitutional); Fred Hindler, Inc. v. Telequest, Inc., [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,634, at 92,990 (S.D. Cal. Mar. 31, 1992) (holding that by amending an existing statute, Congress did not violate separation of powers doctrine); *In re* Melridge, Inc. Sec. Litig., No. 87-1426-JU, 1992 U.S. Dist. LEXIS 3477, at *6 (D. Or. Mar. 20, 1992).

126. *Bankard*, 1992 U.S. Dist LEXIS at *19.

127. *Id.* at *18.

128. *Id.*

129. *Id.*

130. *Id.* (footnotes omitted).

131. [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,552, at 92,536 (S.D. Ohio Feb. 11, 1992).

132. *Id.* at 92,537.

133. *Id.* at 92,537.

However, the passage of section 27A changed that law yet again, forbidding retroactive application of *Lampf* even under the traditional analysis.[134]

Next, the court held that section 27A does not violate the separation of powers doctrine. The court opined first that by enacting section 27A, Congress had

> simply eliminated a defense available to defendants in an unidentified number of cases based on the date on which the cases were filed. Second, as a general rule, if Congress changes the law during the pendency of a case, the courts are obligated to apply the law as they find it at the time of judgment . . . . This court's current understanding of the law is that it must apply the laws of this Circuit setting forth the limitations period for [section] 10b-5 cases as such laws existed on June 19, 1991.[135]

Moreover, in finding that section 27A does not violate either the due process or equal protection doctrines, Judge Rubin eloquently stated the essential *raison d'être* of the remedial provision, holding that:

> [a]pplication of [section 27A] will further the legitimate legislative purpose of allowing those claimants who timely filed securities fraud claims under the then applicable law to pursue such claims. Further, there is a rational basis for applying [section 27A] only to those claimants who filed claims prior to the date the decisions in *Lampf* and *Beam* were handed down. Those claimants had no notice that a law other than that which was in effect on the date they filed their claims would govern the question of whether the claims were timely filed.[136]

For these reasons, the *Ayers* court found that section 27A was constitutional and thus valid.

District Judge Huff reached a similar result in *First v. Prudential Bache Securities, Inc.*[137] The defendants had "argue[d] that the limitations period provided by section 27A does not apply because the section is unconstitutional."[138] The court held that section 27A does not offend the doctrine of separation of powers because Congress did not focus on the merits of any particular case to determine which claims are timely and which are not.[139] Rather, the court believed, "[i]n enacting section

134. *Id. Accord* Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 576, 589-90 (E.D.N.C. 1992) (reinstating § 10(b) claims without discussion).

135. *Ayers*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 92,537.

136. *Id.* (citations omitted).

137. [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,622, at 92,918 (S.D. Cal. Mar. 24, 1992).

138. *Id.* at 92,919.

139. *Id.*

27A, Congress acted rationally and not arbitrarily. The rational purpose behind the legislation is to define a statutory claim . . . and to reinstate claims Congress believed should be resolved on the merits."[140] Judge Huff concluded that "[m]erely because the defendants feel a uniform rule is more appropriate and better reasoned does not mean that, by choosing a different rule, Congress acted irrationally," and that section 27A does not violate the Due Process or Equal Protection clause.[141]

Finally, the eminent Judge Morris Lasker rendered a cogent opinion embracing section 27A in *Axel Johnson, Inc. v. Arthur Andersen & Co.*, in which the court held that section 27A did not implicate due process or separation of powers concerns.[142] Granting relief to the plaintiff from the previous dismissal of its securities fraud suit as untimely, the court found that the new statute "exhibits the central characteristic of legislation, as opposed to adjudication."[143] Before reaching this conclusion, the court noted that Congress has the power to set limitary periods and "to apply [them] retroactively as well as prospectively."[144] "[C]hanging a statute of limitations is at heart a legislative task," and the Supreme Court's action in *Lampf* was possible only because of the absence of a specific provision regulating section 10(b) actions.[145]

Section 27A not only possesses these "hallmarks of legislation," continued Judge Lasker, but also lacks the traditional "attributes of adjudication. It does not refer to this or any other case by name, [or] dictate specific findings of fact or conclusions of law in any case."[146] The court rejected the defendant's contention that the new law was intended to entrap selected high-profile securities fraud defendants and found that this assertion was "belied by [section] 27A's applicability to a generally identified set of cases."[147] "[T]he mere fact that new legislation reaches even a very few cases that existed at the time of enactment and were intended to be influenced by the legislation does not render the legislation . . . unconstitutional" as a violation of the separation of powers doctrine."[148]

140. *Id.*
141. *Id.*
142. 790 F. Supp. 476 (S.D.N.Y. 1992).
143. *Id.* at 479.
144. *Id.* at 478 (declaring that the Supreme Court's recent reversal of the Ninth Circuit in Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407 (1992), undercut defendant's separation of powers argument). In *Robertson*, the Court upheld § 27A because it modified the existing law by replacing the legal standards against which the challenged conduct would be judged. *Id.* at 1413-14.
145. *Axel Johnson, Inc.*, 790 F. Supp. at 479 n.2.
146. *Id.* at 479.
147. *Id.* at 480.
148. *Id.*

The court then addressed the viability of subsection (b) of section 27A. The defendant's admittedly potent argument was that the new law unconstitutionally revived previously adjudicated cases.[149] In spite of that comparatively stronger claim, the court found that the reworked statute of limitations did not merely reverse decided cases: Instead, it imposed a new statute of limitations for cases filed before *Lampf* was issued. The court thus held that separation of power principles do not preclude such legislative revision.[150]

Acknowledging the disunity among federal district courts on the constitutionality of section 27A,[151] Judge Lasker nevertheless found the law valid.[152] The court enumerated four reasons why the so-called "final judgment" of the earlier dismissal had not vested any rights in the defendant.[153]

First, the apparent finality of the earlier judgment was rendered "less certain" by the short time that had elapsed between the execution of judgment and the passage of section 27A.[154] This was particularly true in light of Federal Rule of Civil Procedure 60(b), which permits a court to relieve a party from a final judgment where a motion under that rule is made within a reasonable time not more than one year after the judgment.[155] The plaintiff in *Axel Johnson* had made a motion pursuant to that same rule.[156]

Second, "the artificiality and technicality of the sole reason" for the earlier dismissal, "which had nothing to do with [the] merits" of the case, favored the relief requested by the plaintiff.[157] A law (such as section 27A) that alters such a technical defense "goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications" made upon the merits.[158]

Third, ruled Judge Lasker, a contrary result would be "too arbitrary and burdensome" to plaintiffs whose proceedings were dismissed after *Lampf* but before Congress enacted section 27A.[159]

And finally, noted the court, Congress promulgated section 27A not

149. *Id.*
150. *Id.* at 481.
151. *Id.*
152. *Id.* at 483-84.
153. *Id.* at 482-84.
154. *Id.* at 482.
155. *Id.* (citing FED. R. CIV. P. 60(b)).
156. *Id.* at 477.
157. *Id.* at 482.
158. *Id.* at 483.
159. *Id.*

to isolate and reverse decided cases, but rather to provide relief for a broadly defined class of claimants from what it deemed to be an unfair rule.[160] "Such evenhanded treatment is less threatening to the judiciary's independence than would be Congressional action to reverse particular adjudications."[161] For these reasons, no claim of unconstitutionality against section 27A could survive, and the plaintiff was entitled to reinstate its section 10(b) claim.

After reviewing the arguments addressed in *Axel Johnson*, one can begin to survey the battle lines drawn by the numerous districts courts that have had the opportunity to pass upon the viability of section 27A. Those opposed to its continued existence have argued mightily, invoking various constitutional doctrines such as separation of powers, due process, and equal protection. Conversely, those who support the efficacy and propriety of the new law have had no such difficulties dealing with allegations that section 27A is unconstitutional. Although the latter cases may not delve into the constitutional questions to the same degree as the former, they possess the singular virtue of finding that section 27A is an appropriate exercise of Congress' lawmaking power. Each decision upholding section 27A disposes handily of the attacks on the constitutionality of that law, finding that the legislators acted well within the scope of their enumerated powers.

E. *The Circuits in Waiting*

Given the growing controversy among federal district judges, it is clear that the issue of the constitutionality of section 27A will not be settled at the trial level. Rather, only guidance from the appellate circuits will resolve the lingering question. Accordingly, we now turn to review the efforts of the federal circuits.

The case of *Henley v. Slone*[162] could provide an answer to this crisis. In *Henley*, the Court of Appeals for the Second Circuit remanded an

160. *Id.*

161. *Id.*; *see also* Brown v. The Hutton Group, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,624 (S.D.N.Y. Apr. 27, 1992) ("Section 27A merely turns back the legal clock to the period just prior to *Lampf* and then permits courts independently to adjudicate any reopened actions on the basis of the law as they determine it then existed."); Adler v. Berg Harmon Assocs., 790 F. Supp. 1235, (S.D.N.Y. 1992) (same). *Cf.* Philip Morris Capital Corp. v. Century Power Corp., [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,629 (S.D.N.Y. Apr. 22, 1992) (refusing to reinstate previously dismissed sucurities fraud claims on the grounds that they would be untimely even under § 27A, and therefore not reaching the statute's constitutionality).

162. 961 F.2d 23 (2d Cir. 1992).

appeal to allow the district court to reconsider the timeliness of the plaintiff's section 10(b) suit. The decision bears examination on several points.

First, the unanimous tribunal agreed that "prior to June 19, [1991] this Court had anticipated *Lampf* by adopting the one-year/three-year limitations period in *Ceres Partners v. GEL Associates*. However, on June 19, it was also the law of this Circuit that *Ceres Partners* was not to be applied retroactively as a routine matter."[163] Closely examining section 27A, Circuit Judge Newman suggested that the limitations period on anti-fraud suits "is to be governed not by automatic application of the state limitations period that preceded *Ceres Partners*, but by a case-specific determination of whether the retroactivity principles applied in [*Welch v. Cadre Capital*] make it inappropriate to apply the new limitations period."[164]

For these reasons, the panel was compelled to follow the clear statutory language of section 27A, which requires the application of "the laws applicable in the jurisdiction, including principles of retroactivity."[165] In *Henley*, this meant that the one-year/three-year rule of *Ceres Partners* applied "sparingly" in light of the retroactivity principles enunciated in *Welch I*.[166]

Notwithstanding this support for the strictly prospective application of the one-year/three-year rule, the Second Circuit neatly left the defendants' constitutional challenge to section 27A undecided.[167] The panel explicitly declined to anticipate the constitutional issue unless and until it was determined that Henley's suit was timely under section 27A. If the district court determined that the suit was timely, the Second Circuit would consider any constitutional challenges the appellees might choose to present at that time.[168]

163. *Id.* at 25 (citing Ceres Partners v. GEL Assocs., 918 F.2d 349, 364 (2d Cir. 1990)). *See also* Welch v. Cadre Capital, 923 F.2d 989, 993 (2d Cir.) (*Welch I*), judgment *vacated and remanded sub nom.*, Northwest Sav. Bank PaSA v. Welch, 111 S. Ct. 2882, 2882-83, *remanded*, 946 F.2d 185 (2d Cir. 1991) (*Welch II*). *Ceres Partners* established the one-year/three-year rule as controlling in the Second Circuit before *Lampf* was decided. *Ceres Partners*, 918 F.2d at 364. *Welch I*, which originally held that the *Ceres* rule was not to be applied retroactively, was remanded in light of *Lampf*. *Welch I*, 923 F.2d at 993.

164. *Henley*, 961 F.2d at 25. *See also Brown*, [1992] Fed. Sec. L. Rep. (CCH) ¶ 96,624, at 92,927 n.3. In *Henley*, the Second Circuit envisioned the retroactive application of *Ceres Partners* "in only the very narrowest of circumstances, if any." *Id.* at 92,927 n.3.

165. *Henley*, 961 F.2d at 26 (citing 42 U.S.C.A. § 78aa-1 (West Supp. 1992)).

166. *Id.* at 25-26.

167. *Id.* at 26.

168. *Id.*

Despite the refusal of the Second Circuit to pass on the constitutional merits of section 27A, one might find a possible outcome of an eventual examination of that issue in *Welch v. Cadre Capital* (*Welch II*),[169] the decision rendered after the remand of that case by the Supreme Court.[170]

Not surprisingly, the Second Circuit found the plaintiff's securities fraud claims time-barred pursuant to the *Lampf* rule, as applied retroactively.[171] More important, however, was Circuit Judge Newman's discussion of the confusion surrounding the retroactivity issue.

Acknowledging the Supreme Court's application of the new limitary rule to the plaintiffs in *Lampf*, the panel opined that the retroactive application had prevailed over a dissenting opinion which pointed out that "the Court had previously declined to apply new statute of limitations rules to the litigation in which the new rule was announced."[172] Therefore, noted the court, one could argue that

> *Lampf* applied the new limitations rule retroactively to the litigation in which the rule was announced to avoid Article III concerns about advisory opinions, without implying that the new rule applie[d] retroactively to all other lawsuits still pending on direct review. That argument, however, is foreclosed by the decision in *Jim Beam*.[173]

Therefore, the Second Circuit felt compelled in *Welch II* to "apply *Lampf* retroactively to all cases."[174] Nevertheless, the unanimous panel made it plain that it would prefer to apply the new one-year/three-year rule only prospectively:

> Were it not for *Jim Beam*, we would welcome the opportunity to withhold retroactive application of the new limitations rule from all plaintiffs (other than those in the *Lampf* litigation) who filed timely under the pre-existing limitations period, for all of the reasons we set forth in *Welch I*. But, until advised to the contrary, we feel obliged to disregard the prior teaching of *Saint Francis College* and apply the more

169. 946 F.2d 185 (1991).

170. *See Welch I*, 923 F.2d 989 (2d Cir.), *judgment vacated and remanded sub nom.* Northwest Sav. Bank, PaSA v. Welch, 111 S. Ct. 2882, *remanded*, 946 F.2d 185 (2d Cir. 1991) (*Welch II*). The Second Circuit reversed itself in *Welch II* and reinstated the original judgment of the district court, 735 F. Supp. 467 (D. Conn. 1989). *Welch II* followed *Lampf*, which had already been decided, but preceded the enactment of section 27A by more than two full months.

171. *Welch II*, 946 F.2d at 186.

172. *Id.* (citing *Lampf*, 111 S. Ct. at 2785).

173. *Id.* at 186. *See also* Sterling v. Block, 953 F.2d 198, 200 (5th Cir. 1992) (finding that *Beam* dictates that a prospectivity analysis is inappropriate if the new rule was retroactively applied to the parties in the case in which it was originally announced).

174. *Welch II*, 946 F.2d at 187.

recent guidance of *Jim Beam*.[175]

Welch II represents an enigma with respect to the effect of *Lampf*. Taking *Welch II* at face value, one finds that the Second Circuit seems to imply support for the full retroactivity of *Lampf* in light of *Beam*.[176] However, in the same breath the panel clings to the prospective application-only rule that it asserted in *Welch I*. Moreover, Judge Newman indicates that the circuit court did not use the test established in *Chevron Oil Co. v. Huson*[177] for retroactivity for the sole reason that the panel believed that *Beam* did not give it sufficiently broad latitude to do so.[178]

Yet aside from these intimations, the fact remains that *Welch II* was issued before section 27A became law. Therefore, one must wonder how much of *Welch II* (if any) will survive in the post-section 27A world. Clearly, the Second Circuit had the opportunity in *Henley* to reaffirm the conclusions of law that it set forth in *Welch II*. One might interpret its failure to do so as a sign that the enactment of section 27A dramatically reduced the precedential value of *Welch II*.

The panel in *Welch II* was reluctant to apply *Lampf* retroactively, especially in light of: (1) Justice O'Connor's strong opposition to such an application; (2) the Supreme Court's omission of any discussion of that subject in *Lampf*, and; (3) the Court's failure to reconcile *Lampf* with other existing precedents safeguarding the retroactive application of new law.[179] It is at least possible that the Second Circuit or some other federal circuit could view *Lampf*'s lack of cohesion as indirect support for the constitutional validity of section 27A. In any event, numerous outcomes are available when and if the Second or any other circuit takes a fresh look at *Lampf*'s retroactivity in view of the statute. As the next section reveals, such a review may soon be forthcoming.

F. Anixter—*The Tenth Circuit Awaits*

The precise question of the effect of section 27A on *Lampf*'s retroactivity was briefly before the Supreme Court on a petition for certiorari encaptioned *Dennler v. Trippet*.[180] This appeal to the Supreme Court asked whether section 27A requires the reversal of a Tenth Circuit decision ordering dismissal of the plaintiffs' section 10(b) claims as time-

175. *Id.* (citing Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)).
176. *Id.* at 187-88.
177. 404 U.S. 97 (1971).
178. *Welch II*, 946 F.2d at 186-88.
179. *Lampf*, 111 S. Ct. at 2785-86.
180. 112 S. Ct. 1658, *amended by* 112 S. Ct. 1757 (1992).

barred, based on a retroactive application of *Lampf*.[181] The plaintiffs asserted that this dismissal could not stand in light of section 27A. Therefore, the plaintiffs assert, the decision below should be reversed and remanded.[182]

In the disputed Tenth Circuit opinion, *Anixter v. Home-Stake Production Co.*,[183] the plaintiffs had sued the defendants alleging securities fraud in the sale of interests in oil and gas production programs.[184] The plaintiffs contended that Home-Stake Production Company (Home-Stake), an Oklahoma-based developer of oil and gas properties, defrauded investors via "an elaborate and ongoing scheme" through which it offered tax deductions in the form of intangible drilling costs (IDCs) in addition to a return on the investors' capital.[185]

Between 1964 and 1972, Home-Stake set up subsidiaries called annual Program Operating Corporations (POCs). The POCs represented distinct production programs registered by Home-Stake with the SEC. "Contrary to Home-Stake's representations, however, investments in . . . POCs were not directed at developing the particular oil property, but instead were recirculated and recharacterized, ultimately to be distributed to subsequent POC purchasers in the form of quarterly payments purported to represent income from oil production."[186]

Essentially, the plaintiffs claimed that Home-Stake had perpetrated a classic Ponzi scheme.[187] A trial culminated in a jury verdict totalling approximately $130 million for all plaintiffs.[188] On the subsequent appeal, Circuit Judge Moore initially stated that the only issue to be resolved was whether, given the plaintiffs' contentions that principles of equitable tolling and equitable estoppel should be applied to save their claims from dismissal as time barred,[189] the plaintiffs' actions were timely under section 13 of the Securities Act of 1933.[190]

Notwithstanding its initial devotion to that sole issue, the panel examined the timeliness of the plaintiffs' section 10(b) claims "under both

181. *Id.*
182. *See High Court Remands Case to CA 10 for Reconsideration; Cites Sec. 27A*, 24 Sec. Reg. & L. Rep. (BNA) 606 (Apr. 24, 1992).
183. 939 F.2d 1420 (10th Cir. 1991), *cert. granted and judgment vacated sub nom.*, Dennler v. Trippett, 112 S. Ct. 1658, *amended by* 112 S. Ct. 1757 (1992).
184. *Anixter*, 939 F.2d at 1429.
185. *Id.* at 1430.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 1435-36.
190. *See* 15 U.S.C. § 77m (1988).

the Oklahoma statute of limitations for fraud and [under] the . . . federal scheme."[191] The Tenth Circuit first analyzed those claims in the context of the one-year/three-year limitary period established by the Third Circuit in *In re Data Access Systems Securities Litigation*.[192] Given that *Anixter* was decided little more than a month after *Lampf* was issued, the panel also looked to the Supreme Court's opinion in that case, as well as to its own discussion of the plaintiffs' claims under section 13.[193] On these bases, the court found the plaintiffs' claims to be barred as untimely.

Soon thereafter, the plaintiffs petitioned for rehearing *en banc* by the Tenth Circuit.[194] The SEC filed a brief as *amicus curiae* in support of the plaintiffs.[195] Granting rehearing in part in order to clarify its original opinion, the same panel stated that its second purpose in acting on the petition was to "dispose of the issue of the retroactive application of *Lampf*."[196]

Writing once more for a three-judge panel, Circuit Judge Moore interpreted *Lampf* in reliance on *Beam*. Proceeding from *Beam*, the panel held that:

> [the Supreme] Court grounded the question of retroactivity '*entirely to an issue of choice of law*' and stated, 'when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.' A week later, the Court granted a writ of certiorari in [*Welch I*], which had held that *Ceres Partners v. GEL Associates* met 'the threshold [*Chevron*] requirement for nonretroactive application.' The Court vacated and remanded the case for further consideration in light of the discussion in *James Beam* and [*Lampf*]. Consequently, the Court has resolved the issue of retroactivity.[197]

Thus, once more compelled to apply *Lampf* retroactively, the Tenth Circuit denied the plaintiffs' petition for rehearing without further comment.[198]

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191. *Anixter*, 939 F.2d at 1440.

192. *Id.* at 1440-41 (citing *In re* Data Access Sys. Sec. Litig., 843 F.2d 1537, 1546 (3d Cir.), *cert. denied sub nom.*, Vitiello v. I. Kahlowsky & Co., 488 U.S. 849 (1988)).

193. *Id.* at 1441-42.

194. Anixter v. Home-Stake Prod. Co., 947 F.2d 897, 898 (10th Cir. 1991) (ruling on motion for rehearing).

195. *Id.* at 898.

196. *Id.*

197. *Id.* at 899 (emphasis added) (citations omitted).

198. *Id.*

The Supreme Court reacted swiftly to the plaintiffs' petition for review. The Justices vacated the Tenth Circuit's decision in *Anixter* and remanded the case for reconsideration in light of section 27A.[199] In so doing, the High Court has set the stage for the Tenth Circuit to make a landmark ruling on the constitutionality of the new limitary statute. Although one last appeal to the Supreme Court seems inevitable, the decision of the Tenth Circuit should at least be highly influential and possibly dispositive in deciding whether section 27A is constitutional.

IV. ANALYSIS

Although it is an appropriate topic of intense and lengthy discussion, the essence of the section 27A/*Lampf* retroactivity controversy is quite simple: The precise question is whether section 27A can prohibit the retroactive application of the new limitary rule pronounced in *Lampf* without offending the Constitution. This article suggests that despite declarations to the contrary, section 27A is constitutional.

A. Chase Securities—*The Benevolent Parent of Section 27A?*

Critical to this analysis is *Chase Securities Corp. v. Donaldson*,[200] in which the Supreme Court addressed a similar sitaution to the one presented here. In that case, the defendant complained that a revision to the Minnesota "blue sky" law governing the intrastate sale of securities had the effect of "lift[ing] the bar of the statute of limitations in a pending litigation" and amounted to a taking of its property without due process of law.[201] The High Court disagreed, holding that a state legislature may constitutionally "repeal or extend a statute of limitations, even after a right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar."[202]

Notably, the Court found the statute at issue to be "a general one, applying to all similarly situated persons or transactions," and involving a number of cases. While the motivation behind the law's enactment could spring from "a few cases or . . . a single case," that motivation alone would not establish a denial of equal protection.[203] The Justices agreed that the legislation merely reinstated a lapsed remedy, that the

199. Dennler v. Trippett, 112 S. Ct. 1658, *amended by* 112 S. Ct. 1757 (1992) (Justices Douglas and Thomas took no part in this decision).
200. 325 U.S. 304 (1945).
201. *Id.* at 305.
202. *Id.* at 311-12.
203. *Id.* at 309 n.5.

defendant had no "vested right to immunity" from such a legislative revision, and that the reinstatement of this remedy did not violate the the Equal Protection Clause of the Fourteenth Amendment.[204]

Indeed, the Supreme Court ruled unequivocally that although the Fourteenth Amendment forbids the taking of life, liberty, or property without due process, it "does not make an act of state legislation void merely because it has some retrospective operation."[205] The Court found that "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 Constitution.[206] This pronouncement is consistent with Congress' established power to change the law.

It was also important that the defendant in *Chase* did not point out any "special hardships or oppressive effects" suffered because of the law's retroactivity.[207] Moreover, under the circumstances presented in *Chase Securities*, no constitutional right exists to preclude a change in the relevant law before a case is finally adjudicated: The defendant "had acquired no immunity from this suit that has become a federal constitutional right."[208]

Chase Securities is also remarkable for its almost metaphysical discussion of statutes of limitation in general. Justice Jackson wrote that these provisions "always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law."[209] He continued:

> 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 courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. *Their shelter has never been regarded as what now is called a 'fundamental' right* or what used to be called a 'natural' right of the individual. He may, of course,

204. *Id.* at 312 n.8.
205. *Id.* at 315.
206. *Id.* at 316; *see also* International Union Elec., Radio & Mach. Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 244 (1976) (Rehnquist, J.).
207. *Chase Secs. Corp.*, 325 U.S. at 316.
208. *Id.*
209. *Id.* at 313.

> have the protection of the policy while it exists, but *the 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.*
>
> * * *
>
> [S]tatutes 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.[210]

In retrospect, the statute litigated in *Chase Securities* bears many clear parallels to section 27A. Section 27A, for example, merely restores a remedy to a plaintiff, while divesting defendants of but a single defense. It does not discriminate, as its impact is felt broadly by a general set of similarly situated litigants. For this reason, section 27A does not affect constitutional rights.

Given such similarities of function and design, is it not likely that today's Supreme Court would find the recent limitary enactment constitutional for the same reasons? Justice Jackson puts the entire issue into perspective by positing that statutes of limitations are largely matters of legislative discretion and that they rarely implicate rights of constitutional import. Today's judiciary would be well advised to maintain such a perspective in these matters.

B. *Separation of Powers: Still Separate?*

The concerns voiced by district courts that have invalidated section 27A as an impermissible intrusion into the power granted the judiciary by Article III are dramatically overstated. For instance, constitutional landmark cases on this point, such as *Northern Pipeline Construction. Co. v. Marathon Pipe Line Co.*,[211] are of little use, if any, in the present controversy. Other modern decisions delineating the separation of powers delegated under Articles I and III have focused on adjudicative bodies created by Article I and whether they wrongly competed for powers exclusively reserved to the judiciary by Article III.[212] These matters are not implicated in the dispute over the constitutionality of section 27A.

Congress clearly may not usurp the judiciary power under Article

210. *Id.* at 314 (citations and footnote omitted) (emphasis added).

211. 458 U.S. 50 (1982). *Northern Pipeline* upheld a constitutional challenge to the reconstituted bankruptcy courts because those tribunals improperly exercised the "essential attributes" of judicial power.

212. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584 (1985); Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-52 (1986).

III to adjudicate cases. Therefore, it may not enact legislation that "prescribe[s] rules of decision to the judicial branch of the government in cases pending before it" unless it changes an underlying substantive or procedural law.[213] Likewise, Congress may not enact a change in the law that upsets the results of the final judgments of the courts.[214]

However, none of these weighty concerns are present here. Section 27A is, in reality, a law made by Congress like any other law. It was motivated by Congress' disagreement with a judicial interpretation of an earlier statute. And it is undisputed that Congress can amend or repeal a statutory provision. At its heart, section 27A amends section 10(b) and is precisely aimed at the limitary period that *Lampf* imposed on actions arising under that statute: It merely interprets related provisions of the federal securities acts. Courts finding no constitutional defects with section 27A have done so largely because they view the statute in that manner. Conversely, courts that have struck the statute as unconstitutional quite simply read too much into new law.

In *Brichard*, the court admitted that the circuits were in disagreement over the appropriate limitary period for section 10(b) at the time *Lampf* was decided. However, the same court stubbornly and incorrectly refused to conclude that Congress made a new law when it enacted section 27A. Section 27A was an appropriate congressional response to the Supreme Court's decision in *Lampf*. Congress intended to codify the one-year/three-year limitary period that would impose a pre-existing rule of limitation on pending cases by repealing or amending interstitial law created around the anti-fraud section of the federal securities code. Even Judge Beer in *TGX Corp.*, an anti-section 27A decision, admitted that the new statute marked a true change in existing law by these classic methods.[215]

Additionally, suggestions that section 27A violates separation of powers principles miss the issue. The district courts that take umbrage at section 27A on separation of powers grounds simply misstate the doctrine's applicability to the new statute. For example, Judge Babcock in

213. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980); United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871).

214. *See* Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792); 13 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3529.1, at 302 (1985).

215. 786 F. Supp. at 592 (*"Congress has changed the law with the enactment of [§] 27A*: Section 27A represents a change in the law, such that Congress has not contravened the separation of powers principle established by *Klein* and its progeny.").

Bank of Denver[216] cited *Nixon v. Administrator of General Services*[217] in support of his separation of powers argument that section 27A was unconstitutional.[218] However, that district court erred by quoting the *Nixon* case, for there the Supreme Court actually found that the statute did not violate the doctrine of separation of powers. The heart of the politically charged controversy in *Nixon* was the constitutionality of a congressional enactment designed to preserve the documents and tape recordings of former President Nixon after he resigned the presidency.[219] *Inter alia*, Mr. Nixon asserted that the law violated the separation of powers between the executive and legislative branches.[220]

The Supreme Court rejected this contention. Writing for the Court, Justice Brennan explained that the separation of powers between the coordinate branches of government is not automatically violated when the alleged intrusion actually robs one branch of its ability to function properly. Instead, noted the Court,

> in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[221]

In short, if nothing in a law is "unduly disruptive" of the branch it affects, the law cannot be said to be "unconstitutional on its face."[222]

Therefore, one cannot find support for the contention that section 27A violates the doctrine of separation of powers in the *Nixon* case or any other. The new limitary statute does not invade or even encroach on the function of any other branch; it merely sets forth a bright-line division of the applicable periods for a metamorphasized limitary rule, as modified by Congress in its rightful function of repealing or amending law.

C. *Equal Protection*

Some district courts have taken exception to section 27A on the

216. 789 F. Supp. 1092 (D. Colo. 1992).
217. 433 U.S. 425, 443 (1977).
218. *Bank of Denver*, 789 F. Supp. at 1095.
219. *Nixon*, 433 U.S. at 429-30.
220. *Id.*
221. *Id.* at 443 (citations omitted).
222. *Id.* at 444-45.

grounds that it unconstitutionally deprives similarly situated persons of equal protection of the law. The gist of this argument seems to be that by modifying slightly the applicability of a new limitary period, Congress has deprived litigants in federal securities fraud actions of a substantive or procedural right of constitutional magnitude. This is plainly an overbearing, if not oppressive, interpretation of the rational limits of the Equal Protection Clause.

As the Court previously pointed out in *Harris v. McRae*,[223] "[t]he guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity."[224] Where "Congress has neither invaded a substantial constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be *rationally related* to a legitimate governmental interest."[225] Referring again to the *Nixon* landmark, in which Mr. Nixon truthfully occupied a class of one, the Supreme Court held that "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment," even if the law disadvantages an individual or identifiable members of a group.[226]

By compelling only a prospective usage of the new limitary period indicated by *Lampf*, section 27A does not affect the basic liberty interests of parties to securities fraud actions. Any suggestion that the new statute abridges such constitutional guarantees is exaggerated. Rather, section 27A does more to protect equality under the law by restoring the *status quo ante*: Parties that filed suits under section 10(b) pursuant to then-existing limitary periods may proceed unmolested. Thus, by enacting section 27A, Congress did not invidiously discriminate or make suspect classifications in violation of the equal protection doctrine. At worst, section 27A might disadvantage an identifiable member of a group, although this argument is not persuasive, considering that the retroactive

223. 448 U.S. 297 (1980).

224. *Id.* at 322.

225. *Id.* at 326 (emphasis added). *Accord* G.D. Searle & Co. v. Cohn, 455 U.S. 404, 408 (1982) ("In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends.").

226. *Nixon*, 433 U.S. at 471 n.33 (citing New Orleans v. Dukes, 427 U.S. 297 (1976); Katzenbach v. Morgan, 384 U.S. 641, 657 (1966)). *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

application of *Lampf* would have been a windfall for a section 10(b) defendant (who never could have anticipated the statute's availability as a defense).

Finally, the rational relationship standard is easily met here because the legislative revision to section 10(b), a federal regulatory scheme created by Congress more than a half-century ago, is merely a rational exercise of the lawmakers' will to amend a body of law that it had created to make that law more equitable to all it affects. In sum, any constitutional challenge to section 27A on this basis must fail.

D. *Prohibitions Against Ex Post Facto Laws and Bills of Attainder*

Other constitutional mandates have no bearing on the controversy over the validity of section 27A. It is important to distinguish between the Supreme Court's constitutional jurisprudence in criminal cases and rulings in civil proceedings. Unfortunately, such cases as *Brichard*[227] fail to recognize this difference and thus incorrectly apply precedents from the criminal arena to civil disputes when the criminal cases properly have little bearing, if any, on the civil cases.

Among the constitutional landmarks to be excepted from this general rule is the three-prong test of retroactivity for newly constituted rules of criminal procedure, as first established over two decades ago in *Linkletter v. Walker*[228] and modified in *United States v. Johnson*,[229] and *Griffith v. Kentucky*.[230] Judge Legge relied upon both *Linkletter* and *Griffith* when deciding *Brichard*.[231]

Griffith reminds that *Johnson* "did not address the area of civil retroactivity."[232] Additionally, in concluding the majority opinion, Justice Blackmun specified that the precise holding in *Griffith* was "that a new rule for the conduct of *criminal prosecutions* is to be applied retroactively to all cases."[233] Thus, federal courts should not consider the Supreme Court's decision in *Griffith* and its progeny when deciding issues of retroactivity in civil cases.

For these reasons, the Ex Post Facto Clause[234] has no place in the controversy surrounding section 27A, as traditionally that clause has

227. 788 F. Supp. 1098 (N.D. Cal. 1992).
228. 381 U.S. 618 (1965).
229. 457 U.S. 537 (1982).
230. 479 U.S. 314 (1987).
231. 788 F. Supp. at 1110-11.
232. *Griffith*, 479 U.S. at 322 n.8 (citing *Johnson*, 457 U.S. at 563).
233. *Id.* at 328 (emphasis added).
234. U.S. CONST., art. I, § 9, cl. 3.

barred only "penal legislation which imposes or increases criminal punishment" for previously lawful conduct.[235] Chief Justice Rehnquist recently postulated that "[a]lthough the Latin phrase *'ex post facto'* literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them."[236]

As a related matter, the counterpart to the prohibition against ex post facto laws—the prohibition against bills of attainder[237]—is not in any way implicated in the dispute over the constitutionality of section 27A. This is so because that constitutional "proscription . . . reaches only statutes that inflict punishment on the specified individual or group."[238] Moreover, a law that "furthers nonpunitive legislative goals" without inflicting punishment does not violate the Constitution.[239]

Nixon also addressed a bill of attainder argument.[240] The former President asserted that by passing a law which removed him as the custodian of his presidential papers, Congress had essentially enacted a classic bill of attainder, "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[241]

Notably, Justice Brennan opined that the Bill of Attainder Clause is "an important ingredient" of the separation of powers doctrine because it prevents Congress from intruding on the function of the judiciary.[242] Admittedly, earlier Supreme Court cases "unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder."[243] Nevertheless, held the Court, this pervasive concept cannot rightly be carried to an extreme. Rejecting Mr. Nixon's all-encompassing view, the High Court ruled that:

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235. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (upholding a deportation law attacked on constitutional grounds, including for violations of the Due Process Clause, as "a civil rather than a criminal" measure).

236. Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990).

237. U.S. CONST., art. I, § 9, cl. 3.

238. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984). *Compare* United States v. Lovett, 328 U.S. 303, 316 (1946) (holding that a statute which denies compensation to specified government employees "clearly accomplishes the punishment of named individuals without a judicial trial").

239. *Selective Serv. Sys.*, 468 U.S. at 856.

240. *Nixon*, 433 U.S. at 468.

241. *Id.* (citations omitted).

242. *Id.* at 469 (quoting United States v. Brown, 381 U.S. 437, 445 (1985)).

243. *Id.*

> By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important 'bulwark against tyranny,' it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.
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> * * *
>
> [T]he fact that [the statute specifically referred to the former President by name still did] not automatically offend the Bill of Attainder Clause.[244]

Despite the facts that Mr. Nixon "constituted a legitimate class of one," and that "the focus of the enactment [could] be fairly and rationally understood" as to preserve the documents of his presidency[245] the Court upheld the statute compelling him to turn over his papers. To conclude this point, the Court added that:

> Moreover, even if the specificity element were deemed to be satisfied here, the Bill of Attainder Clause would not automatically be implicated. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether Congress . . . 'inflict[ed] punishment' within the constitutional proscription against bills of attainder.[246]

After cataloging the historically more notorious forms of punishment and finding that the former President could claim none of them had been

244. *Id.* at 470-72 (footnotes, quotations and citations omitted). The *Nixon* court added:

> [T]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

Id. at 470 n.32.

245. *Id.* at 472.

246. *Id.* at 472-73 (citations omitted).

worked upon him,[247] the Court applied its more functional test to determine whether the so-called punishment "further[ed] nonpunitive legislative purposes . . . . Where such legitimate legislative purposes do not appear," one can safely conclude that the law violates the Bill of Attainder Clause's prohibition against meting out punishment to specified individuals.[248]

In the dispute involving Mr. Nixon, no such impermissible purpose was present. The Court found that the statute served legitimate nonpunitive legislative goals, including the preservation of Mr. Nixon's records for historical purposes.[249] Justice Brennan found that the motivation behind the law was not one of punishment: Indeed, the legislative record evinced no such intent. Mr. Nixon therefore could not sustain his bill of attainder claim.[250]

The defendants in *Anixter* now find themselves in a position similar to Mr. Nixon's. Their argument, however, is even more attenuated because the new limitary statute does nothing, facially or otherwise, to punish. Moreover, any so-called "classification" that section 27A might amorphously create is far less intrusive than the one complained of by the former President. Moreover, even in *Nixon*, the Supreme Court found that the "intrusion" was not constitutionally offensive. To claim that section 27A violates the Bill of Attainder Clause is quite simply illogical.

E. *A History Without a Lesson*

Another practice of courts that have declared section 27A unconstitutional is to rely heavily on the statute's so-called legislative history. This reliance is misplaced, as it is clear that the legislative reports which accompanied the bill omitted any discussion whatsoever of the new law. This leaves the sporadic floor debates of the Congress, as memorialized in the Congressional Record, as the only organized compilation of the legislative history of section 27A. *Brichard*, for one, supported its finding that section 27A is unconstitutional by alleging that the very words of the lawmakers clearly indicated that the law's purpose was to usurp the powers of the judicial branch.

The course steered by *Brichard* and its like is perilous indeed. The

247. *Id.* at 473-75.
248. *Id.* at 475-76 (citations ommitted).
249. *Id.* at 476-78.
250. *Id.* at 478.

Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' "[251] Chief Justice Rehnquist himself previously opined that the High Court "eschew[s] reliance on . . . passing comments" and "casual statements" made on the floor of Congress by its members.[252] In the view of the Chief Justice, such remarks do not make for "impressive legislative history,"[253] and it is unlikely that such comments could carry the day in a further adjudication. Thus, the courts that have lined up against section 27A on this ground have improperly and erroneously relied upon suspect legislative commentary.

F. Beam: *More Good Than Harm to Section 27A*

Another flawed proposition raised against section 27A is that the statute must fail because of the allegedly "constitutional rule" of *Beam*. In particular, the opinion of the district court in *Brichard* pointed to legislative encroachment, summarily rejecting the argument that *Beam* was, in truth, a choice of law disposition.

To suggest that *Beam* is anything more than a choice of law case is simply to ignore the text of the opinion itself, which states explicitly it is exactly that—a choice of law decision. The conclusion of Justice Souter's plurality opinion declares:

> The grounds for our decision today are narrow. They are confined entirely to an issue of *choice of law*: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*.[254]

This analysis leads one to conclude that *Beam* is not a landmark case of constitutional proportions. Certainly, the Tenth Circuit had no quarrel with the High Court's characterization of the Tenth Circuit's opinion in *Anixter*.[255] Circuit Judge Moore quoted Justice Souter's language from *Beam* to find unequivocally that the Supreme Court's holding "grounded the question of retroactivity 'entirely to an issue of choice of law.' "[256]

251. Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

252. *Id.*

253. *Id.* at 78 (quoting *Zuber*, 396 U.S. at 187).

254. *Beam*, 111 S. Ct. at 2448 (emphasis added).

255. 947 F.2d 897 (10th Cir. 1991).

256. *Id.* at 899 (quoting *Beam*, 111 S. Ct. at 2448). *See* Brown v. The Hutton Group, [1991 - 1992 Transfer Binder] Sec. Reg. L. Rep. (CCH) ¶ 96,626, at 92,929 (S.D.N.Y. Apr. 27, 1992). In

On this basis, *Beam* offers no solace to the opponents of section 27A.

Moreover, notwithstanding the criticisms of *Beam* as stated here and elsewhere, *Beam* may actually prove that section 27A *is* constitutional. For example, the common thread within the opinions decrying the new limitary statute as an unwarranted intrusion by the Congress into the domain of the judiciary is that the courts have interpreted *Beam* to demand the retroactive application of the limitations period enumerated in *Lampf*. If so, it follows that the passage of section 27A was the proper exercise of Congress' constitutional power to amend or repeal law. Additionally, just such an exercise of legislative prerogative was advocated by Justice Stevens' dissent in *Lampf*. Justice Stevens asserted that the revision of limitary periods is "a lawmaking task that should properly be performed by Congress."[257] Demonstrating great foresight, the Justice commented that "[w]hen the Court ventures into this lawmaking arena, . . . it inevitably raises questions concerning the retroactivity of its new rule that are difficult and arguably inconsistent with the neutral, non-policy making role of the judge."[258] By enacting section 27A, Congress did exactly what Justice Stevens implored. Is it not true, after all, that the Supreme Court, upon careful examination of the existing federal securities acts, interpreted those statutory bodies to impose a one-year/three-year statute of limitations upon section 10(b) actions? Continuing in this vein, was the supposed mandate of *Beam* to apply *Lampf* retroactively not the same type of judicial interpretation, made pursuant to some statutory scheme? Admittedly, *Lampf* was interstitial lawmaking by the Court. But the point remains—is the legislative branch still not empowered to change the law by statutory amendment or repeal? It is asserted here that Congress constitutionally did so when it promulgated section 27A.

G. *Retroactivity Denied:* Lampf II

Finally, there is most certainly no clear sign that if confronted with the issue, the Supreme Court would hold that *Lampf*'s limitary period must be applied retroactively. As the author has addressed this point at length elsewhere,[259] that discussion will not be repeated here, save for the

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that case, District Judge Conner strongly disagreed with the Court's finding that § 27A was unconstitutional, and wrote that only three Justices of nine predicated the *Beam* analysis on constitutional grounds. *Id.*

257. *Lampf*, 111 S. Ct. at 2783 (Stevens, J., dissenting).

258. *Id.* at 2784 (citations omitted).

259. Sabino, *supra* note 3, at 516, 527-52.

following critical points.

First, *Lampf* obtusely applied its own new rule to the litigants before the Court. The justification for this application by itself is never made clear, let alone a full declaration that the new limitary period was intended to be enforced retroactively.[260]

Second, the companion case of *Beam*, which supposedly championed unfettered retroactivity, is, in short, a disjointed opinion ultimately resulting in the application of a pre-existing limitary rule, not a true exercise of unencumbered retroactivity.[261] Putting aside the discordant notes struck by *Beam*, which themselves add to the air of uncertainty, *Lampf* is bereft of any indicia that the High Court would explicitly advocate a retroactive application of the one-year/three-year rule to pre-*Lampf* cases. Indeed, *Lampf* leads to exactly the opposite conclusion.

For the foregoing reasons, one must seriously contemplate the vigorous dissent hurled by Justice O'Connor at *Lampf*'s application of its own new rule to the parties before the court in that controversy. Justice O'Connor remonstrated that:

> This Court has, on several occasions, announced new statutes of limitations. Until today, however, the Court had *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent. Our practice has been instead to evaluate the case at hand by the old limitations period, reserving the new rule for application in future cases.[262]

This principle, Justice O'Connor pointed out, is based on "fundamental notions of justified reliance and due process," implemented to ensure a party its day in court.[263] Detailing why the Court went awry in failing to apply that doctrine here, Justice O'Connor opined:

> First, in adopting a federal statute of limitations, the Court overrules clearly established Circuit precedent; the Court admits as much. Second, the Court explains that 'the federal interes[t] in predictability' demands a uniform standard. I agree, but surely predictability cannot favor applying retroactively a limitations period that the respondent could not possibly have foreseen. Third, the inequitable results are obvious. After spending four-and-one-half years in court and tens of thousands of dollars in attorney's fees, respondents' suit is dismissed for failure to comply with a limitations period that did not exist until

260. *Id.* at 542.
261. *Id.* at 536-52.
262. *Lampf*, 111 S. Ct. at 2786 (O'Connor, J., dissenting).
263. *Id.*

today.[264]

Doubting that the bench's "cursory treatment" was an oversight, Justice O'Connor criticized the Court for "visiting unprecedented unfairness" on the plaintiffs "for reasons unknown and unexplained in choos[ing] to ignore the issue."[265]

Justice O'Connor's dissent in *Lampf* was not by mere happenstance: It is firmly grounded in principles long espoused by the Supreme Court to safeguard the proper retroactive application of new law. Years of precedent issued by the High Court have shown great distaste for the inherent unfairness of retroactivity in statutes of limitations cases.[266] The litmus test for retroactive application of a new law was postulated in *Chevron Oil Co. v. Huson*,[267] where the Court was asked to determine whether its own decision in *Rodrigue v. Aetna Casualty & Surety Co.*,[268] which adopted state law instead of federal common law as the basis for computing the limitations period for claims under the Lands Act, should be applied retroactively or only prospectively. In *Chevron*, the Court elected not to apply the new rule retroactively when to do so would have barred the plaintiff's claim.

The *Chevron* Court cited three factors to consider in deciding whether to choose prospective application:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.[269]

Adhering to *Chevron*, the Court recently "reaffirmed the commonsense rule that decisions specifying the applicable statute of limitations

264. *Id.* at 2787 (citations omitted).

265. *Id.* at 2787-88.

266. Saint Francis College v. Al Khazraji, 481 U.S. 604, 608-09 (1987).

267. 404 U.S. 97 (1971).

268. 395 U.S. 352 (1969).

269. *Chevron*, 404 U.S. at 106-07 (quotations and citations omitted).

apply only prospectively."[270] In *American Trucking Associations, Inc. v. Smith*, Justice O'Connor stated that the nonretroactivity doctrine demands consideration of the equities and gives "great weight to the reliance interests" of all parties affected.[271] "[H]arsh and disruptive effect[s] on those who relied on prior law" compel prospective application.[272] Justice O'Connor concluded that,

> if the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.[273]

The plurality reaffirmed the principles embodied in *Chevron*[274] and rejected the dissent's suggestion that the Court overrule *Chevron*.[275]

Even in the *American Trucking* dissent, continued support for *Chevron* and its progeny came to the fore. Justice Stevens, in a dissenting opinion joined by Justices Brennan, Marshall, and Blackmun, recognized that the Court has "declined to give 'retroactive effect' to decisions announcing 'new' rules of law."[276] Those cases typically arise from statute of limitations controversies,[277] "an area over which the federal courts historically have asserted *equitable* discretion," which implicitly includes the power to refuse to apply a law retroactively.[278] *Chevron, St. Francis College*, and others establish "a principle particular to the exercise of [that] equitable discretion."[279]

Thus, the retroactive application of the new limitary period in *Lampf* is markedly out of step with the Court's mainstream holdings. As Justice O'Connor noted in *Lampf*:

> *Chevron Oil* and *Saint Francis College* are based on fundamental notions of justified reliance and due process. They reflect a straightforward application of an earlier line of cases holding that it violates due

270. *Lampf*, 111 S. Ct. at 2787 (citing American Trucking Ass'ns v. Smith, 496 U.S. 167, 199-200 (1990)) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.).

271. *American Trucking Ass'ns*, 496 U.S. at 185. *See* Westinghouse Elec. Corp. v. Franklin, 789 F. Supp. 1313, 1319 (D.N.J. 1992) (Brotman, J.) (refusing to apply *Lampf* retroactively to other anti-fraud provisions of the federal securities code in light of *American Trucking* "because of the inequity" that would result to the plaintiffs).

272. *American Trucking Ass'ns*, 496 U.S. at 191.

273. *Id.*

274. *Id.* at 199.

275. *Id.* at 189.

276. *Id.* at 209 (Stevens, J., dissenting).

277. *Id.*

278. *Id.* at 221 (emphasis added).

279. *Id.* at 222.

> process to apply a limitations period retroactively and thereby deprive a party arbitrarily of a right to be heard in court. Not surprisingly, then, the Court's decision in *Chevron Oil* and *Saint Francis College* not to apply new limitations periods retroactively generated no disagreement among members of the Court: the opinion in *Chevron Oil* was joined by all but one Justice, who did not reach the retroactivity question; [and] *Saint Francis College* was unanimous.[280]

Given the critical reliance on the Supreme Court's decision in *Lampf*, one who wagers that the Justices would continue to propound a retroactive application of *Lampf* in light of these landmark holdings, especially after the promulgation of section 27A, takes an enormous risk. The safer bet, and indeed the best choice as a strictly legal matter, is that the *Lampf* rule is not destined for continued retrofitting to the section 10(b) cases that preceded it. Rather, section 27A would most likely be upheld by the Supreme Court, not only because it is a constitutionally permissible exercise of legislative power, but because it resolves the concerns over *Lampf*'s retroactivity that the high Court articulated but did not resolve at that time.

V. CONCLUSION

As the foregoing analysis reveals, the arena of federal securities litigation has been once again cast into the shadow of uncertainty. No sooner than the Supreme Court settled the simple, yet divisive, question of the appropriate limitary period to be applied to section 10(b) securities fraud actions, the retroactivity issue the court left unresolved has reared its head, spurring a legislative reaction. And because the lawmakers arguably did not address the entire spectrum of considerations raised by *Lampf* when they enacted section 27A, the trial courts are forced into striking discord over the new statute's constitutionality.

The constitutional rationales raised by the district courts in opposition to section 27A are not to be dismissed lightly. Nevertheless, they presume too much in contending that Congress invaded the sacrosanct separation of powers and violated the constitutional doctrines of equal protection and prohibitions against bills of attainder and ex post facto laws.

Other courts have viewed the issue quite differently: They counter that Congress is simply doing what it has done constitutionally for over two centuries—when displeased with a judicial interpretation of a statute

280. *Lampf*, 111 S. Ct. at 2787 (O'Connor, J., dissenting).

(or, as here, with interstitial lawmaking in lieu of a statute), the lawmakers amend the statute to bring it into line with what Congress intended but may not have articulated clearly enough in the past. The dogmas of constitutional jurisprudence discussed in this article have not been invaded, offended, or otherwise troubled by the enactment of section 27A.

Moreover, the cases overturning section 27A make a prodigious—and dangerous—assumption: That the Supreme Court would continue to apply *Lampf* retroactively. The glaring disharmony of opinion on this issue in both *Lampf* and *Beam* cuts heavily against that presumption. Rather, the more likely result is that courts reviewing section 27A will follow *Chevron*, find the statute constitutional, and refuse to apply *Lampf* retroactively. One takes a significant risk in suggesting that section 27A is unconstitutional because the Court intended *Lampf* to be applied retroactively.

Both the Supreme Court and Congress must share the blame here for the current crisis—the Justices for not making clear their intentions for the new limitary period, and the lawmakers for leaving the statute of limitations issue half unresolved. All the signs indicate that the latter will reopen debate on the entire section 10(b) limitations issue in future sessions. Indeed, the instant controversy leaves Congress with no option but to delve back into a debate on all aspects of the section 10(b) limitations issue. One can only hope that Congress will comprehensively rework the law to reflect its true intentions and eliminate the need for additional litigation to resolve the questions of the proper limitation period for section 10(b) actions.

Just as likely, many of the district and appellate decisions discussed in this article will find their way to the Supreme Court. A High Court decision declaring section 27A constitutional is not probable, but is nonetheless welcome. In the interim, high hopes abound for the wisdom of the Tenth Circuit in *Anixter*. Yet if that case is not to be dispositive, then let *Lampf II* resolve all questions and close this agonizing chapter of federal securities litigation once and for all by restoring justice to those who relied upon pre-*Lampf* limitary periods, while at the same time ensuring a fair application of the new uniform statute of limitations to subsequent cases.

AFTERWORD

In the early fall of 1992 and since the completion of this article, the Tenth and Eleventh Circuits have declared section 27A constitutional for precisely the reasons discussed in the article. After oral argument on the rehearing of *Anixter v. Home-Stake Production Co.*,[1] the Tenth Circuit followed *Roberton v. Seattle Audubon Society*[2] and held that section 27A does not impermissibly attempt to direct the judgments of courts in specified cases. Rather, decided the court, section 27A constitutes a change in the law. Soon thereafter, the Eleventh Circuit reached the same result in *Henderson v. Scientific-Atlanta.*[3] These ciruit level decisions are consistent with recent holdings of other federal courts that section 27A is the product of legitimate exercise of Congress' power to change the law.[4] The author fervently hopes that the decisions in *Anixter* and *Henderson* will put to rest the controversy over the constitutionality of section 27A.

Anthony Michael Sabino

1. 939 F.2d 1420 (10th Cir. 1991), *cert. granted and judgment vacated sub nom.*, Dennler v. Trippett, 112 S. Ct. 1658, *amended by* 112 S. Ct. 1757, *aff'd*, Anixter v. Home-Stake Prod. Co., 61 U.S.L.W. 2139 (10th Cir. Aug. 24, 1992).

2. 112 S. Ct. 1407 (1992), *followed by* Anixter v. Home-Stake Prod. Co., 61 U.S.L.W. 2139 (10th Cir. Aug. 24, 1992).

3. 971 F.2d 1567 (11th Cir. 1992).

4. Kalmanson v. McLaughlin, No. 86 Civ. 9366, 1992 WL 190139 (S.D.N.Y. July 29, 1992); Rabin v. Fivzar Assoc., No. 90 Civ. 4869, 1992 WL 192056 (S.D.N.Y. July 10, 1992); Lundy v. Morgan Stanley & Co., 794 F. Supp. 346 (N.D. Cal. 1992); Cortes v. Gratkowski, 795 F. Supp. 248 (N.D. Ill. 1992); Maio v. Advance Filtration Sys., 795 F. Supp. 1364 (E.D. Pa. 1992). *See also* McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992). *Contra* Treiber v. Katz, 769 F. Supp. 1054 (E.D. Mich. 1992).

Additionally, although the Second Circuit has not yet expressly followed *Anixter* and *Henderson*, it has implied strongly that it will do so if confronted with a constitutional challenge to section 27A. Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742 (2d Cir. 1992).