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Note

Section 27A of the SEA: An Unplugged Lampf Sheds No Constitutional Light

Patrick T. Murphy

"What greater pleasure than to cheat the cheater!" 1

Jean de La Fontaine

Although the Securities and Exchange Commission’s Rule 10b-5, issued pursuant to section 10(b) of the Securities Exchange Act ("SEA"),2 fails to provide a cause of action for private litigants to remedy fraud in securities transactions, the judiciary has long since implied one.3 For years, however, no uniform federal statute of limitation existed for implied securities fraud


2. As section 10 of the SEA provides: "It shall be unlawful for any person . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary." Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j (1988)).


   It shall be unlawful for any person . . .
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary . . . or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


claims\(^4\) and different jurisdictions applied any limitation period they deemed appropriate.\(^5\) The Supreme Court ended this circuit conflict\(^6\) in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson\(^7\) and established a uniform limitation period by analogizing the appropriate limitation period to those explicitly recognized in other parts of the SEA.\(^8\) This uniform limitation
period is one year from the time the plaintiff discovers the fraud giving rise to the claim, and three years from the fraudulent event itself.\(^9\) *James B. Beam Distilling Co. v. Georgia*,\(^10\) decided on the same day as *Lampf*, dictated that the new one year/three year limitation period would apply retroactively to other pending securities fraud actions.\(^11\)

This retroactive application of the new limitation period resulted in the dismissal of many pending cases\(^12\) and prompted Congress to pass remedial legislation to alleviate the perceived injustice to plaintiffs who faced dismissal of their claims.\(^13\) On December 19, 1991, Congress enacted section 476 of the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"), which was incorporated as section 27A\(^14\) of the SEA

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11. *Id.* at 2441. *James Beam* involved the question of whether judicial decisions should apply prospectively, retroactively, or through selected retroactivity based on a balance of equities in each particular case. Five members of the court wrote separate opinions with none commanding a majority vote. Compare *id.* at 2450 (Blackmun, J., concurring in the judgment) ("We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.") with *id.* at 2449 (White, J., concurring in the judgment) ("Nothing . . . is meant to suggest that I retreat from those opinions . . . recognizing that in proper cases a new rule announced by the Court will not be applied retroactively . . . .").

Although the *James Beam* decision fails to clarify the rationale behind retroactive application of judicial decisions, the decision resulted in retroactive application of the limitation principle announced in *Lampf*. *Id.* at 2441. This retroactive application resulted in the potential discharge of all the pending securities fraud cases that failed to meet the limitation period set by *Lampf*. See Anthony Michael Sabino, *A Statutory Beacon or a Relighted Lamp? The Constitutional Crisis of the New Limitary Period for Federal Securities Law Actions*, 28 TULSA L.J. 23, 61-65 (1992) (arguing that the Supreme Court itself may not continue to believe in the wisdom of retroactive application of *Lampf*).

13. See generally *In re Brichard Sec. Litig.*, 788 F. Supp. 1098, 1104-06 (N.D. Cal. 1992) (discussing the legislative history that the court used to find § 27A unconstitutional).

The full text of the amendment is as follows:

(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.
of 1934. Section 27A displaces the *James Beam* inspired retroactive application of a limitation period for implied securities fraud claims articulated by the Supreme Court in *Lampf*.

Part (a) of section 27A provides that all claims brought before the *Lampf* decision that are still pending final determination shall be decided under pre-*Lampf* law, thus denying *Lampf* any further retroactive application. Part (b) of the amendment allows plaintiffs to reinstate claims that had been dismissed pursuant to *Lampf*. The passage of section 27A resulted in an explosion of litigation as plaintiffs rushed to resurrect claims that were either dismissed or faced dismissal under *Lampf*.

This Note argues that section 27A(b) oversteps the boundaries of our governmental framework through the legislative dispossession of judicially vested rights. This Note also suggests that although section 27A(a) is likely to be deemed constitutional in light of recent precedent, it too strains the relationship between the legislature and the judiciary. Part I of this Note focuses on the theory underlying retroactive legislation, particularly its effect on vested rights and statutes of limitation. Part I also details how such legislation fits within the Constitution's dual requirements of due process of law and separation of powers. Part II discusses the decisions that have ruled on the constitutionality of both subsections of 27A, concentrating on the various rationales for sustaining or striking down the amend-

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(b) *Effect on Dismissed Causes of Action.* Any civil private 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 limitations period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

*Id.*

15. The SEA established the SEC to oversee transactions involving publicly traded institutions and to curb the effects of corrupt corporate inside trading. For a general discussion of some of the SEC's functions and how stock market regulation was the primary impetus behind the 1934 SEA, see De BEdts, *supra* note 2, at 76-85 and Joel Seligman, *The Transformation of Wall Street* 99-100 (1982).

16. *See supra* note 14 (language of § 27A(a)).

17. *See supra* note 14 (language of § 27A(b)). Section 27A does not affect the prospective application of the *Lampf* limitation period.

ment on constitutional grounds. Part III analyzes the applicable constitutional provisions and demonstrates that although recent precedent may protect subsection 27A(a), subsection (b) violates both due process and separation of powers by depriving litigants of rights vested through the final judgment of a court.

I. RETROACTIVITY, LIMITATION PERIODS, AND CONSTITUTIONAL CONCERNS

A. DUE PROCESS CONCERNS AND RETROACTIVITY: JUDICIAL ACQUIESCENCE DESPITE A NEGATIVE PRESUMPTION

Although the Ex Post Facto Clause of the Constitution prohibits retroactive legislation, the courts have only applied this constitutional prohibition to criminal laws, thereby insulating retroactive civil legislation somewhat. Thus, "the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." Despite the lack of an express constitutional bar, courts have historically evinced a distaste for retroactive civil legislation, and such laws face a general negative presumption under the "vested rights" doctrine.

22. Several states have constitutional bars against retroactive legislation. See, e.g., Colo. Const. art. II, § 11, & art. XV, § 12; Ga. Const. art. 1, § 1, ¶ 10; Mo. Const. art. 1, § 13.
23. See Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (arguing Supreme Court opinions evidence "hostility to retroactive legislation").

This distaste for retroactive legislation stems from the Fifth Amendment's incorporation of a concern for stability and the common-law tradition that while a court's ruling may implicate past actions, the legislature should only legislate prospectively. See Hochman, supra note 23, at 692-93. The concern that Congress should legislate prospectively arises partially from the courts' belief that a legislative body should provide guidance for future conduct, rather than react to past events, out of respect for the concept of natural justice. See Elmer E. Smead, The Rule Against Retroactive Legislation: A Basic Principle of Juris-
Despite judicial disfavor of retroactive legislation, Congress has passed many retroactive statutes which have survived constitutional scrutiny. The Supreme Court has not announced any specific due process balancing test for determining the constitutionality of retroactive legislation, and no uniform approach is discernable from cases addressing the issue.

The functional validity of the level of infringement on due process interests by retroactive legislation varies according to the underlying characteristics of the interests at stake. For example, the judiciary has more readily acceded to retroactive legislation if Congress enacted it in response to unforeseen and compelling circumstances, and when Congress plainly evidences an intent to prescribe a new statute retroactively. The

prudence, 20 Minn. L. Rev. 775, 789-90 (1936) (explaining that retroactive laws may violate “first principles, reason, justice, or the nature of our government.”); see also United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982) (“The principle that statutes operate only prospectively, while judicial decisions operate retroactively, is familiar to every law student.”). Concern over the substance of such legislation is based in the concept of unassailable natural rights. See John E. Nowak & Ronald D. Rotunda, Constitutional Law 351 (4th ed. 1991). See generally Richard Ashcraft, Revolutionary Politics & Locke's Two Treatises of Government 255-57 (1986) (comparing a subsistence level of the natural right to property with the rights contemplated in a more highly developed society).


28. See Nowak & Rotunda, supra note 25, at 407-08 (“[T]he legislative history of the due process clauses fails to provide the Court with any special criteria to determine when retroactive legislation violates constitutional principles.”). This inconsistency may be due in part to the historically shifting views regarding the proper level of protection from legislative interference in individual property rights provided by the Due Process Clause. See id. at 379 (discussing cyclical nature of due process jurisprudence).

29. Compare Hochman, supra note 23, at 696-97 (proposing a three factor analysis including the public interest, nature of the right, and degree of infringement) with Nowak & Rotunda, supra note 25, at 407-15 (lumping retroactive statutes into four major categories).

30. Compare Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447 (1934) (upholding depression era legislation designed to aid troubled mortgagees against an impairment of contracts claim) with Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (holding legislation destroying value of mortgage unconstitutional). See generally Hochman, supra note 23, at 697-711 (arguing that the stronger the public interest served by a retroactive statute, the more likely it will be upheld).

31. See Estrin, supra note 24, at 2047-48; see also Usery v. Turner Elkhorn
Supreme Court has held that although retroactive legislation generally must only have a rational basis, the judiciary may heighten its review when such legislation infringes on individual rights. In assessing the validity of retroactive legislation, however, courts do engage in a subtle balancing of individual and governmental interests with the scale skewed in the government's favor. Under this variation of the rational basis test, the judiciary still applies only a "low level of scrutiny" to such general retroactive laws because the "burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."

B. THE EFFECT OF RETROACTIVE LEGISLATION ON JUDICIAL DECISION MAKING

1. Statutory Bars, Rights, and Remedies

Numerous commentators and courts have addressed the effect of statutes of limitation on individual rights. Despite the panorama of discourse, no conclusive schematic framework for

Mining Co., 428 U.S. 1, 16 (1976), quoted in Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 728-30 (1984) ([O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations [citations omitted]. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.).


33. Turner Elkhorn, 428 U.S. at 17 ("The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (listing cases dealing with infringement on a wide range of rights).

34. See Hochman, supra note 23, at 697.

35. See Estrin, supra note 24, at 2048.

36. R.A. Gray, 467 U.S. at 730 (emphasis added).


38. See, e.g., Board of Regents of the Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980) ("[T]here comes a point at which the delay . . . in asserting a claim is sufficiently likely . . . to upset settled expectations that a substantive claim will be barred . . . ").; Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (explaining that statute of limitation protection "has never been regarded as what now is called a 'fundamental' right" and is "good only by legislative grace and . . . subject to a relatively large degree of legislative control."). But cf. Tomanio, 446 U.S. at 487 ("Statutes of limitations are not simply technicalities. On the contrary they have long been respected as fundamental to a well-ordered judicial system.").
determining the proper effect of a limitation period on any given right has evolved.\textsuperscript{39} This inconsistency results in part from the arbitrary, pragmatic basis for the application of statutes of limitation.\textsuperscript{40} The Supreme Court has often affirmed the importance of such artificial limitation periods,\textsuperscript{41} but allows their circumvention with little difficulty when it deems the situation appropriate.\textsuperscript{42}

Due to concerns about the artificiality of statutes of limitation and fairness to the reasonable expectations of litigants, courts generally do not enforce rights acquired through or extinguished by the expiration of a statute of limitation when the legislature enacts subsequent legislation to eliminate those rights.\textsuperscript{43} In \textit{Chase Securities Corp. v. Donaldson},\textsuperscript{44} for example, the Supreme Court allowed such a legislatively altered limitation period to stand.\textsuperscript{45}

The \textit{Chase Securities} decision underscores the distinction between fully extinguished rights, and remedies lost through the "mere lapse of time."\textsuperscript{46} The Court stated that the legislature may alter a limitation period "even after a right of action is

\textsuperscript{39} The Supreme Court has stated that "[s]tatutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law." \textit{Chase Sec. Corp.}, 325 U.S. at 313.

\textsuperscript{40} See \textit{id.} at 314 ("[Limitation periods] find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.").

\textsuperscript{41} See \textit{Tomanio}, 446 U.S. at 487.

\textsuperscript{42} See \textit{Chase Sec. Corp.}, 325 U.S. at 316. The Court found no per se constitutional offense in circumventing a statute of limitation. The Court also highlighted a lack of hardship associated with lifting a limitary bar and a lack of any justifiable reliance on former law by the defendants. \textit{Id.}

\textsuperscript{43} See, e.g., \textit{id.} at 316 ("The nature of the defenses shows that no course of action was undertaken . . . on the assumption that the old rule would be continued." One cannot commit a wrong and "depend[ ] on a statute of limitation for shelter from liability."); \textit{International Union of Elec., Radio & Mach. Workers v. Robbins & Myers}, 429 U.S. 229, 243-44 (1976) (holding that legislative revival of a time barred action did not violate due process).

\textsuperscript{44} 325 U.S. 304 (1945).

\textsuperscript{45} Without enumerating a specific test to apply to legislative alterations of limitation periods, the Court observed the following:

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\text{[s]ome are of the opinion that . . . limitations statutes should be viewed as extinguishing the claim and destroying the right itself . . . On the other hand, some common-law courts have regarded true statutes of limitations as doing no more than to cut off resort to the courts for enforcement of a claim.}
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\textit{Id.} at 313 (citations omitted).

\textsuperscript{46} See \textit{id.} at 316. \textit{But see} \textit{Hochman}, \textit{supra} note 23, at 711-12 n.106 (describing "right-remedy dichotomy" as conclusory and "of little use in decid-
barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar."47 The Court indicated, however, that it would allow this result because the contested legislative action occurred "before final adjudication."48

Because statutes of limitations are generally legislatively created49 and appear to affect only the remedies through which one attempts to assert rights rather than the underlying rights themselves,50 it is problematic to use the term "vested rights" when discussing these statutes.51 Distinguishing between rights and remedies is important because under current doctrine Congress has the power to alter or modify the remedies for asserting a vested right but cannot tamper with the underlying right itself.52

2. Possible Circumvention of the Adjudicatory Process

Traditionally, courts have held that retroactive legislation may not unsettle "vested" rights.53 There is no general consensus about exactly how rights vest, however.54 With the decline

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47. Chase Sec. Corp., 325 U.S. at 311-12.
48. 325 U.S. at 316. The language of Chase Securities indicates that this "final adjudication" distinction simply requires a final termination of the litigation and does not require an actual determination of the substantive merits of the claim. See id. at 310 (stating that this case was not one in which "statutory immunity from suit had been fully adjudged so that legislative action deprived [defendant] of a final judgment in its favor").

Moreover, unless otherwise specified, judgments based on statutes of limitation are considered to be "on the merits." See FED. R. Civ. P. 41(b); Shoup v. Boll & Howell Co., 872 F.2d 1178, 1180 (4th Cir. 1989); Nilson v. City of Moss Point, 674 F.2d 379, 382 (5th Cir. 1982), on rehearing, 701 F.2d 556 (5th Cir. 1983) (en banc); Nathan v. Rowan, 651 F.2d 1223, 1226 (6th Cir. 1981).


50. See Campbell v. Holt, 115 U.S. 620, 628 (1885) ("[N]o right is destroyed when the law restores a remedy which has been lost.").
51. For a general discussion of the difficult distinction between rights and remedies, see Bryant Smith, Retroactive Laws and Vested Rights, 5 Tex. L. Rev. 231, 241-48 (1927); Hochman, supra note 23, at 711-12 n.106 and accompanying text; Nowak & Rotunda, supra note 25, at 413-15.
52. See Crane v. Hahlo, 258 U.S. 142, 147 (1922) (stating that "so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change").
53. See Hochman, supra note 23, at 696.
54. Hochman argues that three factors must be considered in determining the validity of a right in light of retroactive legislation: the "public interest
of substantive due process, the "vesting" controversy now revolves around whether a final judgment is sufficient to vest rights, or whether, as several commentators suggest, the "indefinite language of the due process clause" may require an additional element of justifiable reliance in the finality of the judgment to render adjudicated rights inviolable. Whatever the specifics of the test applied, the analytical focus consistently centers on notions of fairness to the litigants before the court. This principle of fairness to the respective parties, however, is necessarily viewed in the context of the structural guarantees of our system of governance.

Notwithstanding the general uncertainty about the exact

served by the statute", the nature of the asserted right, and the degree of infringement the statute imposes on that right. Hochman, supra note 23, at 697. But see Bryant Smith, Retroactive Laws and Vested Rights II, 6 Tex. L. Rev. 409 (1928) ("[T]he distinctions between vested and non-vested rights . . . were found to break down before the hard cases and to serve mainly to label or classify the decisions after they have already been reached on other grounds."); cf. Edward S. Stimson, Retroactive Application of Law—A Problem in Constitutional Law, 38 Mich. L. Rev. 30, 56 (1939) (concluding that statutes invalidated by the Due Process Clause should be limited to those "where a party has changed his position in reliance on existing law").

Indeed, the Supreme Court has had difficulty defining the term because "the word [sic] vested right is nowhere used in the Constitution." Campbell, 115 U.S. at 628. The Court went on to say that "although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution." Id.

55. See supra notes 25-28 and accompanying text (discussing changing historical views of the concepts of due process and natural justice).

56. See Hodges v. Synder, 261 U.S. 600 (1923). "[T]he private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." Id. at 603. The Court explained that this rule did not hold true for public rights. Id. Rule 10b-5 claims, however, involve a private cause of action to enforce private rights. Lampf, 111 S. Ct. at 2779; see also Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 875 n.3 (7th Cir. 1976) (distinguishing between Hodges and McCullough v. Virginia, and questioning continued validity of that distinction), overruled on other grounds, Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 615 (7th Cir. 1982). See generally Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 69-70 (1982) (distinguishing public from private rights while admitting that the distinction is not always clear).

57. See Hochman, supra note 23, at 694.

58. See Smith, supra note 54, at 409; Stimson, supra note 54, at 56.

59. See Smith, supra note 54, at 409; Stimson, supra note 54, at 56. The tripartite analysis of Hochman, supra note 23, at 697, can also be collapsed into this basic principle relatively easily, with each of his factors sliding the balance on the scale of equity.

60. See infra notes 65-70 and accompanying text (two-fold nature of adjudicated rights).
nature of vested rights, the Supreme Court in *McCullough v. Virginia*\(^{61}\) held that legislation cannot specifically overturn final judgments of the courts.\(^{62}\) The *McCullough* Court reaffirmed and gave specific voice to the long acknowledged constitutional principle that a legislature may not "change the rights and liabilities of parties, which have been established by a solemn judgment."\(^{63}\) This formulation of the "vested rights"\(^{64}\) doctrine requires a two-fold constitutional analysis.\(^{65}\) Adjudicated rights are essentially a form of private property,\(^{66}\) which implicates due process interests.\(^{67}\) In addition, vested rights analysis incorporates a separation of powers component as the judicial determination of litigants' rights\(^{68}\) is protected from a superior legislative review.\(^{69}\) Thus, allowing Congress to divest specifically adjudicated rights threatens to violate the dual constitutional requirements of due process and an independent judiciary.\(^{70}\)

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61. 172 U.S. 102 (1898).
62. *Id.* "It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." *Id.* at 123-24. As the Court went on to state in this particular context: "[W]e have no doubt that the rights acquired by the judgment . . . were not disturbed by a subsequent repeal of the statute." *Id.* at 124; see Hodges v. Snyder, 261 U.S. 600, 603 (1923); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 647-48 (1874); Hayburn's Case, 2 U.S. (2 Dall.) 409, 413 n.4 (1792); Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); Taxpayers for Animas-La Plata v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984).
64. *See Cornw., supra* note 25, at 72.
65. *See id.* at 72-73 (stating that initially the vested rights doctrine was directed "at legislation interfering with judicial decisions affecting vested rights" and later developed to encompass general legislation).
66. *See Harding, supra* note 25, at 82 (describing the legal recognition of a claim as a "right of intangible property").
67. *See U.S. Const. amend. V. ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); see also Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) (discussing property aspect of adjudicated rights which legislature has "no greater power [over] than any other"), *cert. denied*, 490 U.S. 1090 (1989). This property aspect invokes both the procedural aspect of due process and the relatively low level of substantive due process, which may be heightened when specific individual rights are involved. *See supra* note 33 and accompanying text.
68. *See U.S. Const. art. III, § 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (asserting that denying the necessity of judicial interpretation of constitutionally supreme legal principles "would subvert the very foundations of all written constitutions").
69. *See Georgia Ass'n of Retarded Citizens, 855 F.2d at 810.
70. *See Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C.
Congress does have the ability, however, to directly circumvent the constraints of the "vested rights" doctrine in two ways. Congress may waive the res judicata effect of a prior judgment in its favor. Such a waiver is consistent with the congressional capacity "to pay the Debts . . . of the United States," which would be overridden were res judicata binding on the government. Additionally, Congress may overturn the results of specific cases to the extent that they affect "public right[s] over which Congress has unfettered control," but may not infringe on private rights settled by the courts.

Despite the limits on direct congressional infringement of adjudicated rights, those rights are not entirely inviolate because the final judgment of a lower court may be overturned as erroneous on appeal. Moreover, while a case is on appeal, courts will apply laws enacted after the lower court decision that change the underlying law. This application of the new law may affect the final disposition of the case because a reviewing court must "apply the law in effect at the time it renders its decision." Because such laws do not undermine final judicial determinations, they neither infringe on the independence of the judiciary, nor divest litigants of settled rights.

Federal Rule of Civil Procedure 60(b) provides another manner for possible "Relief from Judgment or Order," whereby courts may, in unusual circumstances, grant relief from an otherwise final judgment to promote equity. Aside from unu-

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72. Id.; see U.S. Const. art. I, § 8, cl. 1.
73. Georgia Ass'n of Retarded Citizens, 855 F.2d at 812.
74. See id. (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1855)); see also Hodges v. Snyder, 261 U.S. 600, 603-04 (1923) (distinguishing between public and private rights).
76. See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 108-10 (1801).
78. Fed. R. Cvr. P. 60(b) provides in part:
On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following
usual factual circumstances, a change in the law may also "avoid the res judicata effect of a prior judgment by creating new rights or remedies." Such a change may open the door for a court to revisit a seemingly final judgment in the interest of equitable justice under Rule 60(b), but "[n]ormally, a final judgment is not open even to direct attack... solely on the basis of a subsequent change in circumstances." Although Congress may create the necessary change in circumstances, the judiciary must determine if that change is sufficient to revisit a final judgment. Congress itself cannot divest adjudicated rights except in the two narrow ways discussed above.

3. An Independent Judiciary and the Competitive Nature of an Active Congress

a. Overriding Separation of Powers Principles

Article I of the Constitution grants Congress the legislative power and enumerates many of the instances in which that power may be exercised. Because the Constitution contemplates Congress as the main policy-making body, legislative
enactments are presumed valid\textsuperscript{88} unless they infringe on explicit provisions of the Constitution.\textsuperscript{89}

Although Congress exercises an active role in our governmental structure,\textsuperscript{90} the judiciary is much more passive.\textsuperscript{91} The theory of binding precedent\textsuperscript{92} and Article III's "case or controversy" requirement\textsuperscript{93} combine to limit judicial power. This latter limitation on the judiciary forbids the courts from giving Congress advisory opinions on the validity of a particular law because such advisory opinions subvert the "judicial . . . nature"\textsuperscript{94} of the courts' constitutional role.

Although the judiciary and Congress have seemingly distinct roles, they need not "operate with absolute independence"\textsuperscript{95} because they have "overlapping responsibility"\textsuperscript{96} in the proper functioning of the government. It is imperative, however, that "no provision of law 'impermissibly threaten the institutional integrity of the Judicial Branch.'"\textsuperscript{97} Essentially, Congress may not undermine the independence and integrity of the judiciary through legislative encroachment\textsuperscript{98} because an effec-


\textsuperscript{89} See Carolene Prods. Co., 304 U.S. at 152 n.4; see also United States v. Bitty, 208 U.S. 393, 399-400 (1908) (stating that Congress must show "due regard to all the provisions of the Constitution").

\textsuperscript{90} Unlike the courts, Congress is not limited by a precedent setting jurisprudential theory. Rather, the political and legislative processes limit congressional behavior. See David L. Shapiro, Courts, Legislatures and Paternalism, 74 Va. L. Rev. 519, 554 (1988). This, of course, leaves the legislature more prone to the influence of "short-term passions" than an independent court system. \textit{Id.} at 556.

\textsuperscript{91} See generally \textit{id.} at 551-58 (outlining distinction between courts and legislatures).

\textsuperscript{92} See \textit{id.} at 554.

\textsuperscript{93} See Muskrat v. United States, 219 U.S. 346, 361 (1911) (declaring that the judiciary's power arises "because the rights of the litigants . . . require the court to choose between the fundamental law and a law purporting to be . . . constitutional").

\textsuperscript{94} \textit{Id.} at 362.


\textsuperscript{96} Mistretta v. United States, 488 U.S. 361, 381 (1989).

\textsuperscript{97} \textit{Id.} at 383 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

\textsuperscript{98} Mistretta adopted a "flexible understanding of separation of powers," but reaffirmed the Court's willingness "to strike down provisions of law . . . that undermine the authority and independence of one or another coordinate Branch." \textit{Id.} at 381-82; see \textsc{The Federalist} No. 48, at 333 (James Madison)
tive separation of powers is "essential to the preservation of liberty." Moreover, Congress may not deny litigants the opportunity to fairly challenge legislation that infringes on due process rights. Congress's limited Article III capacity confers no judicial power on the Congress because "the judicial Power of the United States [is] vested in [the] Supreme Court" and lower courts.

b. Rule of Decision Analysis

The "rule of decision" doctrine represents a particular application of the exclusivity of the judicial power. Although Congress may change the underlying law while cases are on appeal, it may not provide a "rule of decision" that directs particular findings or outcomes for the courts to follow in adjudicating cases. The Supreme Court first announced this principle in the reconstruction era case United States v. Klein. In Klein, the Court held that Congress could not command courts to ignore evidence of a presidential pardon in determining whether claimants who had to prove their loyalty to the United States in order to recover property seized as a result of the Civil War were actually loyal. The Klein Court acknowledged con-

(J.E. Cooke ed., 1961) ("The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.").

100. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (assuming "that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis").
101. See U.S. CONST. art. I, § 1 (granting Congress authority to "ordain and establish" lower courts); id. art. II, § 2 (granting Congress authority to alter the Supreme Court's jurisdiction).
103. See supra notes 76-77 and accompanying text.
104. 80 U.S. (13 Wall.) 128 (1872). The Constitution empowers Congress to change the underlying law when it disagrees with the results of judicial interpretation. See supra notes 76-77 and accompanying text. Problems arise, however, when Congress attempts to control the outcome of a case or category of cases without amending the underlying law that gives rise to the claim. At least one court has found this consideration compelling in striking down § 27A as unconstitutional. See In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105 (N.D. Cal. 1992). But see Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 479 (S.D.N.Y. 1992) (noting "considerable dispute . . . as to how broadly Klein is to be read").
105. The plaintiff administrator in Klein sought reimbursement from the government for the proceeds from a sale of property during the Civil War. The government granted such proceeds upon a proper showing of loyalty. Klein, 80 U.S. (13 Wall.) at 139. The property owner had received a presidential pardon, which the courts previously had adjudged to be conclusive proof of loyalty. See
gressional ability to control the jurisdiction of the lower courts but was also concerned with the "great and controlling purpose" of the contested legislation.\textsuperscript{106} The Court considered the congressional attempt to deny the judicially determined effect of a pardon to be an untenable legislative encroachment, as Congress tried to forbid the court from giving "the effect to evidence which, in its own judgment, such evidence should have."\textsuperscript{107}

The Supreme Court recently revisited the rule of decision theory in \textit{Robertson v. Seattle Audubon Society}.\textsuperscript{108} In \textit{Seattle Audubon}, the Court assessed a section of the Northwest Timber Compromise,\textsuperscript{109} which altered timber harvesting rights in forests inhabited by spotted owls. These harvesting rights were the subject of ongoing litigation, and the legislation specified that certain pending cases met the statutory criteria for bringing a claim.\textsuperscript{110} The Ninth Circuit Court of Appeals struck down the law as violative of \textit{Klein} because it directed a particular decision in a case without repealing or amending the underlying law.\textsuperscript{111} The Supreme Court unanimously reversed this disposition, stating that because Congress changed the underlying law and did not "direct any particular findings of fact or applications of law, old or new, to fact," \textit{Klein} did not apply at all.\textsuperscript{112}

\section{II. SECTION 27A AND JUDICIAL REACTION}

Prior to \textit{Lampf}, the circuit courts did not apply a uniform

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\textsuperscript{106} United States v. Padelford, 76 U.S. (9 Wall.) 531, 542-43 (1870). Congress enacted subsequent legislation stating that a pardon was inadmissible proof of loyalty, but the Court held that the statute directed a rule of decision in contravention of separation of powers without changing the underlying law. \textit{Klein}, 80 U.S. (13 Wall.) at 143-48.

\textsuperscript{107} \textit{Klein}, 80 U.S. (13 Wall.) at 145.

\textsuperscript{108} Id. at 147.


\textsuperscript{110} Congress set forth these requirements in subsection (b)(6)(A) of the Act:

\begin{quote}
Congress hereby determines and directs that management of areas . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.
\end{quote}

\textsuperscript{111} Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1314-15 (9th Cir. 1990), rev'd, 112 S. Ct. 1407 (1992).

\textsuperscript{112} \textit{Seattle Audubon}, 112 S. Ct. at 1413.
limitation period for 10b-5 securities fraud claims. Commentators applauded the uniformity created by Lampf but criticized its retroactive application. Congress eventually responded to this criticism by adopting section 27A to deny Lampf its retroactivity. A spate of litigation regarding the constitutionality of section 27A soon followed. Defendants have attacked the amendment on constitutional grounds, arguing that section 27A violates the separation of powers by mandating a rule of decision, and that it violates due process by resuscitating settled claims and removing vested rights. Although federal district courts have disagreed on the constitutionality of the amendment, the circuit courts that have assessed the validity of part (a) of the amendment have

113. See Stewart, supra note 5, at 556-58 (discussing previous methods for determining limiting periods prior to Lampf).
114. See Joseph Cachey III, Case Comment, Lampf v. Gilbertson: Rule 10b-5's Time Has Come, 69 DENY. U. L. Rev. 135, 149 (1992) ("[A] uniform, national statute of limitations for Rule 10b-5 actions is in accordance with virtually every commentator who has written on the subject.").
115. See, e.g., id. (describing retroactivity of Lampf as "deplorable").

The potential effect of the amendment on vexatious litigation also concerns many. "Any company whose stock price is volatile is a sitting duck for these 10(b) lawsuits regardless of whether there is any fraud involved." 137 Cong. Rec. S17,358 (daily ed. Nov. 21, 1991) (statement of Sen. McConnell); see also The Supreme Court, 1990 Term: Leading Cases, 105 HARV. L. Rev. 177, 409 (1991) ("Lampf will ... result in considerable savings of time and money for both litigants and courts."). See generally 137 Cong. Rec. S17,356-58 (daily ed. Nov. 21, 1991) (discussing the number of 10b-5 lawsuits and their effect on business).
118. See supra notes 104-112 and accompanying text (discussing rule of decision analysis).
119. Although litigants often raise equal protection claims in conjunction with due process claims, this Note does not address equal protection concerns because to do so would not add substantially to the line of argument pursued.
Numerous appeals are currently pending in other circuit courts, and a potential split could return the issue to the Supreme Court.122

A. DECISIONS FINDING 27A CONSTITUTIONAL

1. The Circuit Courts

The Tenth Circuit, in Anixter v. Home-Stake Production Co., was the first appellate court to address the constitutionality of section 27A.123 In Anixter, the circuit court reversed a favorable judgment of $130 million for the plaintiffs124 in light of Lampf. Plaintiffs sought reinstatement after enactment of section 27A, and the Tenth Circuit ordered the original verdict reinstated.125

The Anixter defendants argued that section 27A was unconstitutional because it impermissibly commanded courts to decide cases in a particular manner and thus upset rights that had vested through a final judgment.126 The court rejected the defendants' argument that Congress had mandated a wrongful rule of decision in contravention of Klein.127 It distinguished Klein's rule of decision analysis, concluding that section 27A "does not remove or alter the courts' constitutional adjudicatory function."128 The court also relied on United States v. Sioux Nation of Indians,129 stating that Congress could "waiv[e] the res judicata defense of a prior judgment"130 because the alteration

121. See infra part II.A.1. (detailing circuit court decisions).
123. 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993).
125. Anixter, 977 F.2d at 1542.
126. Id. at 1544.
127. Id.
128. Id. at 1545. The court also relied on the Supreme Court's decision in Robertson v. Seattle Audubon Society, 112 S. Ct. 1407 (1992), which found that § 27A "did not 'direct any particular findings of fact or applications of law.'" Anixter, 977 F.2d at 1545 (quoting Seattle Audubon, 112 S. Ct. at 1413).
130. Anixter, 977 F.2d at 1546 (citing Sioux Nation, 448 U.S. at 397). The Tenth Circuit's reliance on Sioux Nation seems misguided. Sioux Nation stands for the principle that Congress can waive a statutory bar to claims against the United States. Sioux Nation, 448 U.S. at 397. The government's waiver of its own res judicata defense cannot be equated with a governmental waiver of a private party's res judicata defense. Cf. Pennsylvania v. Wheeling
of a technical defense, such as a statute of limitation, does not intrude on the judiciary's role. Finally, in disposing of defendants' vested rights claim, the court relied on Congress's power to alter statutes of limitations within the due process constraints of Chase Securities. In reinstating plaintiffs' claims under section 27A(b), the Anixter court made no mention of the rule that rights acquired through final judgments are vested in the litigants.

Shortly after the Tenth Circuit decided Anixter, the Eleventh Circuit also found section 27A constitutional in Henderson v. Scientific-Atlanta, Inc. In Henderson, investors had initiated a class action suit alleging over $370 million in losses due to securities fraud. Prior to trial, the lower court granted the defendant corporation summary judgment in light of Lampf's new limitation period. While the plaintiffs' appeal of that dismissal was pending, Congress enacted section 27A. Believing that no other appellate court had yet addressed the issue, the Eleventh Circuit concluded that section 27A is a "classic example" of Congress permissibly amending a statute when it disagrees with judicial interpretation. The court stated that "[a]ny effect on pending cases is solely a result of a change in the underlying law," and ordered the lower court to reinstate the

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131. Anixter, 977 F.2d at 1546.
133. Anixter, 977 F.2d at 1547.
134. See supra notes 56 and 62 and accompanying text (discussing rights vested through judgment).
136. Id. at 1569.
137. Id.
138. Id. at 1571.
139. Id. at 1571 n.4. The dissent found that Congress impermissibly set out specific rules of decision. Id. at 1576 (Wellford, J., dissenting). For a general discussion of the increasing pace at which Congress has been overruling promulgations from the Supreme Court, see Abner J. Mikva & Jeff Bleich, When Congress Overrules the Court, 79 CAL. L. REV. 729, 748-49 (1991).
action.140 The court undertook a cursory analysis of the plaintiffs' due process argument,141 but because this case was pending appeal at the time Congress enacted section 27, the court did not discuss the principle of rights vesting through final judgment.142

The Ninth and Seventh Circuits have since followed suit, finding the amendment constitutionally sound in Gray v. First Winthrop Corp.143 and Berning v. A. G. Edwards & Sons, Inc.144 respectively. The Gray opinion provides a more thorough analysis than Berning, but the reasoning of both opinions is similar to that of the earlier Tenth and Eleventh Circuit decisions. Both the Seventh and Ninth Circuits expressly declared that they were not dealing with situations in which there had been a final judgment. As a result, they declined to rule on the validity of the amendment on those grounds.145

2. Other Decisions Finding 27A Constitutional

District courts finding section 27A constitutional have applied various levels of scrutiny to the amendment.146 The reasoning of these decisions also mirrors that of the Tenth and Eleventh Circuits, finding the Klein rule of decision rationale insufficient to strike down the amendment. Moreover, these courts display little substantive discussion of the McCullough rule of rights vesting in final judgments.147

140. Henderson, 971 F.2d at 1573, 1575.
141. See id. at 1573-74. The court also addressed an equal protection claim, but found the claim equally lacking in merit. Id. at 1574.
142. See supra note 62 (discussing vested rights doctrine).
143. 989 F.2d 1564 (9th Cir. 1993). The Gray court expressly acknowledged that rational basis scrutiny applied to the substance of the amendment. Id. at 1570, 1573.
144. 990 F.2d 272 (7th Cir. 1993).
145. Berning, 990 F.2d at 277; Gray, 989 F.2d at 1570.
One court, however, has discussed vested rights in relation to section 27A. In Axel Johnson, Inc. v. Arthur Andersen & Co., the District Court for the Southern District of New York promulgated an early and quite influential decision regarding the constitutionality of section 27A. In reinstating a securities fraud claim under section 27A, the Axel Johnson court found no violation of due process or separation of powers. The court stated that the short time between final adjudication and subsequent passage of section 27A rendered that judgment less certain and allowed the principles underlying Fed. R. Civ. P. 60(b) to overcome the concept of rights vesting in a final judgment. All subsequent decisions in the Southern District of New York, which has been particularly active in deciding section 27A claims, have followed Axel Johnson's lead in upholding the constitutionality of the amendment.

B. DEcisions Finding Section 27A UNCONSTITUTIONAL

Although no circuit court has yet found section 27A unconstitutional, numerous district courts have voided the amendment. District courts striking down section 27A have relied on separation of powers and due process violations. Despite the
Ninth Circuit’s subsequent and contrary holding in Gray v. First Winthrop Corp.,\textsuperscript{154} the District Court for the Northern District of California decided one of the most extensive cases expressing theories in favor of striking down the amendment, \textit{In re Brichard Securities Litigation.}\textsuperscript{155} In \textit{Brichard}, the district court voided the amendment on several grounds, but focused primarily on \textit{Klein}'s separation of powers analysis,\textsuperscript{156} concluding that “section 27A(a) attempts to control one part of the adjudicative process without making a change in the underlying law” by “direct[ing] interim judgments of a court.”\textsuperscript{157} The court further concluded that its assessment of the constitutionality of part (a) applied even more forcefully to part (b) because section 27A(b) further intrudes into the province of the judiciary and vested rights by directing courts to reinstate previously dismissed claims.\textsuperscript{158}

The now defunct \textit{Brichard} opinion is not the only example of judicial disquietude with the amendment, as other district courts have also relied on \textit{Klein} to invalidate section 27A.\textsuperscript{159} The \textit{Klein} rationale, if accepted, renders both parts (a) and (b) of the amendment unconstitutional. Under that framework both

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\textsuperscript{154} 989 F.2d 1564 (9th Cir. 1993).
\textsuperscript{155} 788 F. Supp. 1098 (N.D. Cal. 1992).
\textsuperscript{156} See Sabino, supra note 11, at 34-39. The district court relied heavily on \textit{Klein} and cited the Ninth Circuit's opinion in \textit{Seattle Audubon Society v. Robertson}. \textit{Brichard}, 788 F. Supp. at 1102 (citing Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1315 (9th Cir. 1990), rev'd on other grounds, 112 S. Ct. 1407 (1992)).
\textsuperscript{157} \textit{Brichard}, 788 F. Supp. at 1105.
\textsuperscript{158} The court deemed § 27A(b) improper because it risked turning judgments into advisory opinions that are not within the judiciary's power and because it constituted an act of legislative review. \textit{Id.} at 1107. While avoiding use of the term “vested rights,” and not citing \textit{McCullough}, the court did allow that “Congress does not have the power to upset final judgments of either the Supreme Court or the lower federal courts.” \textit{Id.}
\textsuperscript{159} See Atlantis Group, Inc. v. Rospatch Corp. (\textit{In re Rospatch Sec. Litig.}), 802 F. Supp. 110, 114 (W.D. Mich. 1992) (“Much as \textit{Klein} was unconstitutional because it directed the effect courts should give to a pardon, § 27A is unconstitutional because it directs the effect courts should give to a limitations period.”); Johnston v. Cigna Corp., 789 F. Supp. 1098, 1102 (D. Colo. 1992); Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092, 1097 (D. Colo. 1992). These Colorado decisions only provide intellectual fodder rather than binding precedent as the Tenth Circuit found § 27A constitutionally sound in \textit{Anixter}. See \textit{Anixter} v. Home-Stake Prod. Co., 977 F.2d 1533, 1546 (10th Cir. 1992), cert. denied, 13 S. Ct. 1841 (1993).
subsections amount to an untenable congressional attempt to control the judiciary's interpretation of the law. Along with Klein, courts have relied on the McCullough rule in concluding that section 27A impermissibly dispossesses litigants of vested rights.\textsuperscript{160} At least one court has followed this principle in voiding 27A(b) while upholding part (a) of the amendment.\textsuperscript{161}

III. ANATOMY OF AN AMENDMENT: THE TWO CONSTITUTIONAL FACES OF 27A—DUE PROCESS AND LEGISLATIVE ENCROACHMENT

Congress did not enact section 27A until six months after the Court's decision in \textit{Lampf}.\textsuperscript{162} When Congress finally did react, it did not specify a different limitation period than that set by \textit{Lampf} but merely denied the retroactive application of that decision to cases still pending as well as to those that had been dismissed.\textsuperscript{163} Parts (a) and (b) of the amendment take separate analytical routes at the point of dismissal: part (a) attempts to prevent further retroactive application of \textit{Lampf}, while part (b) tries to undo the results of the retroactive application of \textit{Lampf}'s limitation period. Section 27A as a whole attempts to obtain a consistent result by denying \textit{Lampf} retroactive application in its entirety. Its constituent parts, however, achieve this result by different means, which, when viewed within constitutional and precedential parameters, have differing degrees of legitimacy.

Assessment of the validity of section 27A(a) requires determining whether this subsection actually changes the law set down by \textit{Lampf} or merely instructs the courts to judge cases in a manner inconsistent with current law.\textsuperscript{164} This assessment requires an analysis that relies primarily on the proper functioning of the respective branches in light of Klein's rule of decision analysis and also incorporates the due process concerns implicated by retroactive legislation.


\textsuperscript{161} See Treiber, 796 F. Supp. at 1059.

\textsuperscript{162} \textit{Lampf} came down on June 20, 1991 and the amendment was signed into law on December 19, 1991. \textit{Contra} Axel Johnson, Inc. v. Arthur Andersen, 790 F. Supp. 476, 482-83 (S.D.N.Y. 1992) (stating that the time between the decision and passage of the amendment was sufficiently short to prevent inequity).

\textsuperscript{163} See \textit{In re} Brichard Sec. Litig., 788 F. Supp. 1098, 1105-06 (N.D. Cal. 1992) (discussing the legislative history of the amendment). See supra note 14 for the language of the amendment.

\textsuperscript{164} See supra I.B.3.b (discussing rule of decision analysis).
In contrast, the issue posed by section 27A(b) requires an analysis of the extent to which rights that are vested through the actions of one branch are abrogable by the actions of another. A congressional reversal of judicial decisions implicates two intertwining constitutional concerns. Retroactive legislation of this type infringes on a litigant’s due process rights in the finality of judgment. Furthermore, legislative infringement on the judiciary’s responsibility to hear and adjudicate cases violates the doctrine of separation of powers.

A. 27A(a): Rule of Decision v. Altered Provision

The validity of section 27A(a) turns on whether the provision changes the underlying law in a manner consistent with the proper exercise of congressional power or whether it merely dictates how courts should properly hear and determine cases. Seattle Audubon dictates that Congress may “modify] the [legal] provisions at issue in” appropriate cases as long as it does not direct any particular findings by the courts as forbidden by Klein. Thus, determining whether an alteration of Lampf’s limitation period constitutes directing a judicial “finding” or merely changes an underlying “provision at issue” sheds light on where section 27A(a) fits within the Klein and Seattle Audubon “rule of decision” analysis.

Despite its ability to alter provisions that affect certain cases, Congress may not “pass[ ] the limit which separates the legislative from the judicial power” by enacting legislation that directs the rule of decision to be applied in specific cases. Such action would usurp the judiciary’s capacity to effectively state the law. The same fears that led the Court to invalidate the challenged law in Klein are present in both subsections 27A(a) and 27A(b), because the judiciary is being instructed to ignore a statute of limitation that it had previously deemed applicable to satisfy a congressional vision regarding the appropriate treatment of litigants.

The statute struck down in Klein attempted to invalidate

165. See supra note 67 and accompanying text (discussing the interests implicated by due process).
166. See supra note 68 and accompanying text (discussing the importance of finality of judgments).
167. See supra notes 104-112 and accompanying text (explaining Congress’s ability to change an underlying law after a court decision).
170. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
claims through an evidentiary rule, whereas section 27A attempts to sustain claims by preventing the application of a judicially implied limitation period. Although section 27A(a) merely alters an underlying limitation provision and does not specifically direct final judgments, it remains theoretically problematic. Restraining the congressional desire to interfere with the judiciary clearly motivates the Klein holding. Disavowing the principle behind Klein makes it difficult to find any legislative enactment violative of separation of powers, for the violation may always be labeled as some sort of a "change" in the law.

Applying the finding/provision framework of Seattle Audubon, it appears that the cases affected by part (a) of the amendment involve mere alterable "provisions," thereby legitimizing that portion of the amendment. Returning the courts to the pre-Lampf state of the law only for cases filed before that decision, while leaving Lampf intact for any subsequent actions, is likely to promote confusion and inconsistency. This course of action, however, does arguably "change" the law in a manner consistent with Seattle Audubon because the legislature may readily controvert such an artificial limitation period. The amendment merely provides that each pending claim will be decided based on a limitation period different from the one promulgated in Lampf. Although section 27A(a) does direct the courts to apply old law regarding statutes of limitation, the "changed" limitation period does not "direct any particular findings of fact" or compel any "findings or results under old law."

The ability of Congress and the courts to determine exactly which cases will be affected by the altered limitation periods

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171. See supra note 105 (explaining the "rule of decision" principle).
172. Klein also dealt with an underlying evidentiary "provision" that left room for differing end results, see In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105 (N.D. Cal. 1992), but that failed to save the challenged action because of the overriding congressional intent to interfere in the judicial province. See supra note 106 and accompanying text.
173. See Stewart, supra note 5, at 555-56 (discussing inconsistent state of the law regarding securities fraud limitation periods before the Lampf decision).
175. See id. at 314 (asserting that limitation periods are based "in necessity and convenience rather than in logic").
176. Seattle Audubon, 112 S. Ct. at 1413.
177. Id. at 1413; see supra notes 104-112 and accompanying text (discussing rule of decision and Seattle Audubon).
does not, by itself, invalidate the amendment.178

By enacting section 27A(a), Congress essentially usurped the judicial function. The recent willingness of the Seattle Audubon Court to label a new provision an acceptable modification of the underlying law,179 however, may allow this portion of the amendment to withstand judicial scrutiny. If the provision is indeed an acceptable change in the law, then the courts must apply pre-Lampf law to the cases pending on appeal in accordance with the statute.180

The minimal encroachment of 27A(a) into the judicial province is made even more palatable when viewed in the general context of the low-level procedural and substantive due process scrutiny for retroactive legislation.181 This portion of the amendment serves securities fraud plaintiffs' strong equitable interests182 as it merely provides an opportunity to have their cases heard. Defendants who may gain a windfall from Lampf's retroactivity cannot justifiably rely on the unexpected benefit of an altered limitation period.183 The low-level due process concerns coupled with the potential evisceration of Klein should be enough for the judiciary to disregard this legislative encroachment into the judicial province.184

178. The amendment at issue in Seattle Audubon specifically delineated which cases would be affected by the Northwest Timber Compromise. See supra note 14 for the language of the amendment. This did not alter the Supreme Court's reasoning in that case, for the law "effectively modified the provisions at issue." Seattle Audubon, 112 S. Ct. at 1414. But see Conwin, supra note 25, at 73, 93 (discussing punitive intent of such legislation which would grant Congress an impermissible judicial power).

179. See Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407, 1413 (1992) (avoiding rule of decision analysis because the contested legislation did not direct findings of fact or applications of law).

180. See supra notes 76-77 and accompanying text (stating that appellate courts apply changes in underlying law).

181. See supra notes 29-36 and accompanying text (discussing the due process concerns which retroactive legislation may invoke).

182. The amendment merely reinstates a remedy that may have been available to litigants. See infra note 218 for a discussion of the relative underlying equities of the litigants prior to Lampf. Seattle Audubon's failure to follow Klein may have achieved the right result on the specific facts of that case, but the language of Seattle Audubon could encourage the courts to ignore Klein altogether. A broader reading of Klein than that given by the Tenth and Eleventh Circuits, whereby such legislative action would be untenable, is more appropriate in a practical sense. Such legislative action creates a threat to the legitimate functioning of the courts and individual liberty.

183. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 316 (1945) (declaring that defendant could not violate the law "depending on a statute of limitation for shelter from liability").

184. See Hochman, supra note 23, at 697 (discussing how equitable interests
LIMITATION PERIOD RETROACTIVITY

B. DISPARATE CONSTITUTIONAL FUNCTIONS AND THE PURSUIT OF EQUITY: THE PECULIAR IMPLICATIONS OF 27A(b)

Much of the conflict over section 27A stems from confusion over the amendment's effect because courts address either the amendment as a whole, or whichever part affects the case at bar. Although Klein's rule of decision rationale would invalidate section 27A(b) in the same manner as 27A(a), part (b) of the amendment fails to survive constitutional scrutiny because it violates multiple constitutional considerations. Section 27A(b) impinges on the structural requirement of separated powers and compromises heightened due process rights by ignoring an institutional respect for final judgments.

As a general rule, courts apply retroactive legislation cautiously. Chase Securities Corp., however, made it clear that defendants do not have a sufficient due process right in an expired limitation period to prevent the legislature from retroactively altering that defense to allow plaintiffs to bring their claims. Although limitation periods are retroactively adjustable, once litigants' rights are settled through adjudication, Congress has no authority to alter those final decisions and de-

are important in determining the validity of retroactive legislation through three enumerated factors).

185. Compare Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476, 479 (S.D.N.Y. 1992) (arguing that § 27A "exhibits the central characteristic of legislation, as opposed to adjudication") with In re Brichard Sec. Litig., 788 F. Supp. 1098, 1105 (N.D. Cal. 1992) (arguing that § 27A "attempts to control one part of the adjudicative process without making a change in the underlying law").


187. See, e.g., Treiber, 796 F. Supp. at 1060; see supra notes 62-69 and accompanying text for a discussion of legislative inability to disturb a final judgment.

One Commentator has also argued that "section 27A does not affect Constitutional Rights" in light of Chase Securities. Sabino, supra note 11, at 52. Although this may adequately explain § 27A(a) to some, it does not reconcile 27A(b) with McCullough. The simple truth is that they are irreconcilable. Even Sabino would agree that "Congress may not enact a change in the law that upsets the results of the final judgments of the courts." Id. at 53.

188. See supra notes 38-41 and accompanying text; see also Smith, supra note 54, at 415 (arguing that retroactivity itself is an insufficient objection without other constitutional considerations and therefore, "manifestly unsound").


190. See supra note 48 (defining a judgment based on a statute of limitation as on the merits).
prive litigants of the benefit of a final judgment. The Chase Securities Court recognized this important distinction between mere limitation periods and adjudicated rights in light of due process concerns. Although finality of judgment invokes both the litigants' heightened due process interests in protecting their adjudicated property rights and an overall reliance interest in the stability of judicial decision making, analyzing the amendment's validity merely in variable levels of due process is insufficient. Rather, the due process interests invoked by final adjudication garnish greater relevance when viewed within the context of separation of powers.

The principle that final adjudicated decisions vest the rights of litigants in a manner uncontrovertible by the legislature is necessary to properly maintain an independent judiciary and to protect the due process interests of those appearing before the courts. An analysis relating retroactivity and the due process concerns of vested rights to separation of powers must take into account the impact of allowing an active Congress even greater leeway in overturning decisions of an institutionally passive judiciary. Institutional respect for judicial decision making is a necessary incident of our governmental framework, because "granting Congress the power to set aside final judgments would

193. See supra note 66.
194. See Hochman, supra note 23, at 718 (proposing that passing of right into judgment increases desire for stability).
195. This analysis does not rely on outdated notions of substantive due process. See supra notes 25-28 and accompanying text. This analysis implicates the procedural elements of due process protection that crystallize in a final judgment and preclude a legislative divestment from a separate power. See supra notes 62-66 and accompanying text.
196. See supra note 62 and accompanying text (discussing McCullough and the finality of judgment).
198. The framers regarded institutional safeguards as necessary to guard against the inherent tendency of legislative bodies to extend the reach of their power:

The representatives of the people . . . seem sometimes to fancy that they are the people themselves; and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments . . .

transform judicial rulings into advisory opinions."¹⁹⁹ Structural
disrespect of the judiciary fictionalizes separation of powers by
subordinating the courts to a congressional "court of last re-
sort,"²⁰⁰ that, in turn, renders judicial protection of individual
rights a nullity through a superior legislative appeal.²⁰¹ For
this reason it is imperative that "[w]hen a judgment becomes
final, it is final for all purposes, regardless of its basis."²⁰²

The judicial functions protected by our constitutional
structure and the separation of powers doctrine "spill[] over into"²⁰³
the realm of due process. Implicating multiple constitutional
concerns heightens the necessity for protection against such leg-
islative encroachment, because these institutional safeguards
are necessarily grounded in the concepts of justice and fairness
to the parties in front of the court.²⁰⁴ Section 27A(b) impermis-
sibly blurs the distinction between the legislature and judiciary.
Unlike section 27A(a), this distinction does not necessarily re-
sult from the amendment promulgating a rule of decision for the
courts.²⁰⁵ Rather, section 27A(b) usurps the equitable basis of
the judiciary's functional capacity to grant relief from a final
judgment through a mandatory, congressionally imposed rever-
sal of vested rights.²⁰⁶ Congress may indeed have had a rational
basis for enacting section 27A. The rational basis or balancing

²⁰¹. See supra notes 62-66 and accompanying text (discussing the signifi-
cance of finality of judgment).
²⁰³. King v. Finch, 428 F.2d 709, 712-13 (5th Cir. 1970); see Treiber, 796 F.
Supp. at 1059.
²⁰⁴. See NOWAK & ROTUNDA, supra note 25, at 487 ("If life, liberty or prop-
erty is at stake, the individual has a right to a fair procedure.").
²⁰⁵. See supra notes 104-105 (recognizing that Congress may not direct
findings by the judiciary). A direct attack on § 27A(a) requires a greater em-
phasis on the rule of Klein, because the heightened due process and separation
of power concerns invoked by finality of judgment are not yet present. Courts
upholding the constitutionality of § 27A, however, have failed to recognize that
as a result of Lampf and James Beam, the cases § 27A(b) affects are no longer
pending and must be analyzed differently than those cases affected by 27A(a).
See Treiber, 796 F. Supp. at 1059 (recognizing that the plain language of
§ 27A(b) governs cases not pending before the courts). See supra note 14 for the
language of § 27A(b).
²⁰⁶. The theoretical basis for Klein and Seattle Audubon provides a glimpse
into this distinction. Klein and Seattle Audubon both expressed that there are
limits as to the extent to which Congress may instruct the courts how best to
fulfill their duties under Article III. See supra notes 104-112. McCullough, on
the other hand, removes finally adjudicated decisions from potential legislative
upheaval by vesting the rights of the litigants before the court. See supra note
test used to determine if general retroactive legislation satisfies due process constraints is inappropriate in this instance, however, because *McCullough* and its progeny allow no congressional divestment of a judicially determined right.\(^{207}\)

Although the Constitution forbids Congress from revisiting final decisions, the judiciary may, in limited circumstances,\(^{209}\) reconsider a judgment through application of Federal Rule of Civil Procedure 60(b).\(^{210}\) A motion to reinstate a securities fraud claim under section 27A(b) is not analogous to the Rule, however, because 27A(b) misconstrues the equitable function and philosophy behind reinstatement under Rule 60(b).\(^{211}\) Indeed, the rationale of Rule 60(b) gives strength to the argument that section 27A(b) impermissibly impinges on a strictly judicial function because the Rule is designed to provide litigants with an opportunity to revisit a judgment when a *court independently* determines in its equitable judgment that the facts of any particular case, including statutory changes, warrant reinstatement.\(^{212}\) Mandatory reinstatement through laws which reflect a *legislative* determination that an injustice occurred within the judiciary undermines the structural considerations implicit in Rule 60(b) by granting the legislature an impermissible power of ultimate judicial review.

Congress could not agree on a change in the underlying limitation period announced in *Lampf*.\(^{213}\) Such an amended limitation period would have given the judiciary an opportunity to grant equitable relief to litigants facing unfair prejudice from the effects of a prior dismissal.\(^{214}\) Section 27A(b) does not, however, create any "new rights or remedies" to satisfy the stringent

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\(^{207}\) See supra notes 32-36 and accompanying text ("modified" rational basis test for retroactive legislation).

\(^{208}\) See supra note 62 and accompanying text (*McCullough's* rule of finality of judgment).

\(^{209}\) See 7 Moore ET AL., supra note 79, ¶ 60.27[1] (discussing necessity of exceptional circumstances for Rule 60(b) relief).

\(^{210}\) See supra note 78 (language of Rule 60(b)).

\(^{211}\) See supra notes 78-84 and accompanying text (discussing the judiciary's equitable power to grant relief from a final judgment).

\(^{212}\) See supra notes 78-84 and accompanying text (discussing the judiciary's equitable power to grant relief from judgment).


\(^{214}\) See supra note 82 and accompanying text (describing requirements for granting relief from judgment).
requirements for reinstating a claim. Instead, the amendment instructs courts to reinstate dismissed cases and to pretend that Lampf was never applied retroactively. Acquiescence in such behavior could lead to a congressional re-determination of what is "fair" and "just" for litigants whenever Congress disagrees with the incidents of judicial decision making. This result is untenable because the distinct and separate power of Congress cannot circumvent the application of exclusively judicial principles by ordering the courts to reinstate adjudicated cases.

The mere fact that unsympathetic defendants benefit from a judicial decision provides no rationale for ignoring the procedural and structural guarantees of our federal system of governance. In the same way that the judiciary cannot tell the legislature what laws to enact, Congress cannot determine what

215. See supra note 79 and accompanying text (stating that new rights or remedies may avoid effects of prior judgment).
216. See Brichard, 788 F. Supp. at 1104.
217. McCullough simply does not allow this result. See supra note 62; see also Tonya K. ex rel. Diane K. v. Board of Educ., 847 F.2d at 1243, 1248 (7th Cir. 1988) (claiming the argument that reopening a case under Rule 60(b) does not interfere with vested rights requires acceptance of the view that "there are no 'rights' of any kind, and every decision fixing interests in property is forever malleable"). See supra Part I.D.3 for discussion of separation of powers.
218. See supra notes 62 & 78-84 and accompanying text (discussing vested rights and relief from judgment).

The equitable parameters of due process may initially seem to support upholding part (b) of the amendment as constitutional, for it merely reinstates claims so as to provide an opportunity to be heard. The Tenth Circuit declared that "Congress evinced a legitimate purpose to protect the reasonable expectations of litigants who relied on established law in filing § 10(b) actions." Anixter v. Home-Stake Prod. Co., 977 F.2d at 1533, 1546 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993). Given the varying approaches taken by the circuits and the various states they serve, the overall approach to determining limitation periods can hardly be dismissed as "established" despite its standing within the confines of the Tenth Circuit. For a delineation of the differing approaches that jurisdictions took in applying statutes of limitation to 10(b)-5 claims before Lampf, see Stewart, supra note 5, at 556.

The proposition of fairness allegedly implicit within § 27A(b) is itself debatable. See Smead, supra note 25, at 777 (arguing the concept of justice is the basic component of opposition to retroactive legislation); supra note 117 (amendment may promote vexatious litigation). Such a notion loses all authoritative force when the equitable concerns of due process are viewed in light of the structural guarantees of our separated government. Compare Hochman, supra note 23, at 720-24 (arguing that the rights acquired through statutes of limitation rest on insubstantial equity) with id. at 718-19 (arguing that the rights passed into judgment present a stronger claim). Hochman would analyze § 27A in terms of a three-factor balancing test, but this does not account for the requirement of separation of powers. See id. at 697.
is just and unjust in the realm of finally adjudicated decisions.\(^{219}\) Legislation such as 27A, particularly subsection (b), is inherently punitive in its retroactive effect\(^{220}\) and upsets the precepts that underlie our government. Sustaining the distinct nature of these roles is necessary for the protection of individual rights through the proper maintenance of the structural framework of our government.

CONCLUSION

Congress may not enact legislation upsetting adjudicatorily vested rights in a manner that is inconsistent with equitable principles and the structural framework of the Constitution. Judicial complacency regarding legislation such as section 27A(b) upsets the delicate balance between the respective branches by relegating the judiciary to the role of mere advisor to Congress rather than structural coequal. Moreover, the courts have a duty to protect and enforce the rights of litigants before them. To ensure a sustained judicial capacity to do so the courts must avoid abdicating that role to the legislature. Allowing Congress to divest litigants of rights accrued through adjudication violates the due process rights of those litigants. Although section 27A(a) is disquieting, it should survive constitutional scrutiny in light of recent precedent and a willingness within the judiciary to acquiesce in congressional determinations of, and changes in, the law despite an intrusion into the judicial province. Section 27A(b), however, imperils the future role of a completely independent court system by subjecting judicial decisions to a constitutionally untenable review by Congress.

\(^{219}\) See, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 408, 412 (1792) ("[N]o decision of any court of the United States can . . . be liable to a reversion . . . by the Legislature itself, in whom no judicial power of any kind appears to be vested. . . .").

\(^{220}\) See Corwin, supra note 25, at 93, 98.