CONSTITUTIONAL LAW—DID CONGRESS OVERREACH IN ITS REACTION TO LAMPF?

John D. McNally
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INTRODUCTION

Section 10(b) of the Securities Exchange Act of 1934 and the accompanying rule 10b-52 have been used for over forty-five years to bring private actions for securities fraud claims in the federal courts. Since neither the statute nor the accompanying regulation specify a statute of limitations to be applied in such cases, the federal courts traditionally "borrowed" a statute of limitations from the state law of the district in which the case was heard. However, by the late 1980s, some circuits had decided to establish a more uniform statute of limitations for these claims. The resulting "divergence of opinion among the [c]ircuits" over the proper statute of limitations led the Supreme Court to take up the issue. The Court's resolution was to establish a uniform statute of limitations through its ruling in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson. The Court also held that this new rule was to be applied retroactively.

The result of the Lampf decision was that many pending 10b-5 cases which had been commenced in reliance on more lenient statutes of limitations were suddenly time-barred. Congress took note of this and responded by passing an amendment to the Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified at 15 U.S.C. § 78j(b) (1988)).

9. Id. at 364. The decision to apply the rule to the litigants before the Court, along with the Court’s decision in James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), announced the same day, meant that the new rule would be applied retroactively to all pending cases.
ties Exchange Act reinstating those claims. The legislation, which was attached to the Federal Deposit Insurance Corporation Improvement Act of 1991, added section 27A to the Securities Exchange Act of 1934. Section 27A(a) declared that the applicable statute of limitations for claims filed prior to the Lampf decision would be the statute of limitations applicable in that jurisdiction on the day before Lampf was decided. Part (b) of the statute allowed plaintiffs whose suits had been dismissed as time-barred on the basis of Lampf to petition for reinstatement within sixty days.

Defendants in 10b-5 actions have claimed that section 27A violates the separation of powers doctrine because it represents an attempt by Congress to prescribe judicial decisions or to exercise direct congressional review of judicial decisions. The United States Supreme Court has affirmed, by an equally divided vote, a Court of Appeals for the Fifth Circuit decision holding section 27A(b) constitutional. Justice O'Connor took no part in the consideration or decision of the case. Certiorari has been granted in another case dealing with the application of section 27A(b), however, creating another opportunity for the Court to declare whether section 27A is constitutional.

This Note will review some of the cases dealing with these claims. Part I will describe the background of the issue, including the nature of claims under section 10(b) and the federal courts' prior practice of borrowing the local statute of limitations in those suits. Part I will also review the decisions in Lampf and James B. Beam Distilling Co. v. Georgia, which led to the enactment of section 27A. Finally, Part I will examine that legislation.
Part II of this Note will discuss the separation of powers doctrine and survey various approaches to separation of powers analysis. In particular, Part II will address the difference between a proper exercise of the legislative function which changes or modifies the law, and an unconstitutional prescription of a rule of decision which usurps the decision making power of the judiciary. Part III will discuss the decisions in *Henderson v. Scientific-Atlanta, Inc.*,21 and *Plaut v. Spendthrift Farm, Inc.*,22 two of the circuit court opinions which have focused directly on the separation of powers challenges to the new legislation.23 Finally, Part IV will examine the application of separation of powers analysis to the *Henderson* and *Plaut* cases and explain why section 27A is unconstitutional.

I. BACKGROUND

A. Section 10(b) of the Securities Exchange Act and Rule 10b-5

During the Great Depression, Congress enacted laws to provide better federal regulation of the securities markets.24 The Securities Act of 193325 and the Securities Exchange Act of 193426 outlined rules for the registration of securities with the Securities Exchange Commission27 and the disclosure of relevant information to prospective buyers and sellers of securities.

Section 10(b) of the Securities Exchange Act of 193428 makes it unlawful for a person to employ "manipulative or deceptive device[s]" in connection with the purchase or sale of registered securities "in contravention of such rules and regulations as the

22. 1 F.3d 1487 (6th Cir. 1993), cert. granted, 114 S. Ct. 2161 (1994).
Commission may prescribe." The Commission later promulgated Rule 10b-5, which prohibits fraud, the making of untrue statements, and omissions of material facts that might tend to mislead any person in connection with the purchase or sale of any security.

Although neither the statute nor the regulation expressly provide a private right of action for violations, the courts have found an implied private right of action under Rule 10b-5. Over the years, such actions have become "the most important antifraud protection of the entire Federal securities laws." Because the Securities Exchange Commission does not have adequate resources to detect and prosecute securities fraud, private actions to uncover and punish fraud are essential to safeguard the integrity of the securities markets.

Rule 10b-5 jurisprudence was developed in the lower federal courts over the course of twenty-two years before the Supreme Court addressed the subject. In the years that followed, the Court outlined the elements of a successful 10b-5 claim. Prior to the Lampf decision, the statute of limitations in 10b-5 cases was the

29. Id.  
30. 17 C.F.R. § 240.10b-5 (1993). The regulation provides as follows:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) To employ any device, scheme, or artifice to defraud,
   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
   (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.  
33. See id.  
subject of much confusion. Since Congress did not contemplate a private right of action under section 10(b) when it enacted section 10(b), it did not include a statute of limitations.

B. Method of Determining the Statute of Limitations

When Congress has provided no statute of limitations for a federal cause of action, the traditional practice of the federal courts is to borrow "the local time limitation most analogous to the case at hand." The Supreme Court has characterized this practice as the fulfillment of congressional expectations. Despite these solid roots, the practice presents problems which have led some courts to develop exceptions to the rule. For instance, state legislatures probably did not have the federal cause of action in mind when enacting the local statute of limitations. Therefore, a situation may arise where the local statute of limitations frustrates the purpose of the federal statute. In such a situation, the court should look to federal law for a more suitable statute of limitations.

The Lampf Court described a hierarchical analysis to be used as a guide in selecting the appropriate statute of limitations for a federal cause of action with no express statute of limitations. First, the court must determine whether a uniform statute of limitations is needed. The need for a uniform standard may arise because the federal cause of action tends to encompass a complex variety of topics. In such a situation, a particular local statute may be an unsatisfactory analog from which to draw a statute of limitations.

37. See Ernst & Ernst, 425 U.S. at 196.
40. Id.
41. Ceres Partners v. GEL Assocs., 918 F.2d 349 (2d Cir. 1990) (departing from pre-Lampf practice of borrowing local statute of limitations in § 10(b) cases and looking instead to other provisions of the Securities Exchange Act for a suitable statute of limitations model); In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.) (en banc) (same), cert. denied, 488 U.S. 849 (1988).
42. Lampf, 501 U.S. at 355.
43. Id. at 355-56.
44. Id. at 362. For examples of courts applying this rationale, see Ceres, 918 F.2d 349; In re Data Access, 843 F.2d 1537, cert. denied, 488 U.S. 849.
45. Lampf, 501 U.S. at 357.
46. Id.
47. Id.
Second, if a uniform standard is desirable, the court must determine whether the source should be state or federal law. The possibility of multi-state litigation and the attendant risk of forum-shopping are factors in this determination. Finally, the court must recognize the presumption that a state statute will be borrowed. To overcome that presumption, the court must find a federal statute that is a closer fit to the federal cause of action at hand than the available state statutes. Only after analyzing these factors should a federal court determine the appropriate source of a statute of limitations.

C. The Statute of Limitations for an Alleged Section 10(b) Violation

Having undertaken this analysis, the Lampf Court held that a uniform statute of limitations was needed for actions brought under section 10(b) of the Securities Exchange Act of 1934. To determine the appropriate statute of limitations, the Court looked for indications of the enacting Congress' sentiment about a proper statute of limitations. In other words, the Lampf Court sought to understand what the Seventy-third Congress would have intended if it had actually contemplated the private right of action recognized by the federal courts. The Court ruled that when "the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period."

The Court found that other provisions of the Securities Exchange Act of 1934, which have express time limitations, and were enacted with the same goal in mind as section 10(b), provide the

48. Id.
49. Id. (citation omitted); see also In re Home-Stake Prod. Co. Sec. Litig., 76 F.R.D. 337 (N.D. Okla. 1975) (noting that cases involving litigants from several districts were consolidated pursuant to an order of the Judicial Panel on Multidistrict Litigation).
50. Lampf, 501 U.S. at 357.
51. Id.
52. Id. at 355.
53. Id. at 359.
54. Id.
56. Lampf, 501 U.S. at 360. Referring to the purposes of the various provisions of the Securities Exchange Act of 1934, the Court noted that "[e]ach was intended to facilitate a central goal: 'to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter
best analog from which to draw the statute of limitations for section 10(b) claims. Sections 9(e) and 18(c) of the Securities Exchange Act of 1934, and language of the 1934 Act which amended section 13 of the 1933 Act, all contained an explicit limitations period of one year from the date the violation was discovered, or should have been discovered, and a limit of three years in any case from the actual occurrence.\(^5\)\(^7\) The *Lampf* Court therefore adopted the one year and three year limitations periods for section 10(b) claims.

The Court also held that the new rule would apply to the parties in the case before it.\(^5\)\(^8\) This decision had the effect of creating a one year and three year limitations period for plaintiffs with pending section 10(b) claims.\(^5\)\(^9\) The applicability of the rule to pending claims was emphatically confirmed by Justice Souter’s opinion in *James B. Beam Distilling Co. v. Georgia*,\(^6\)\(^0\) announced the same day as *Lampf*.

The *Beam* Court held that a previous interpretation of federal law by the Supreme Court, made applicable to the litigants in the case before it, was applicable retroactively to all litigants with similar pending claims,\(^6\)\(^1\) regardless of equitable considerations such as reliance on the old law.\(^6\)\(^2\) Therefore, plaintiffs in pending Rule 10b-5 cases were bound by the Court’s ruling in *Lampf*. The *Lampf*
Court also made it clear that an equitable tolling of the statute of limitations was not permissible in 10b-5 cases,63 and that the limit of three years from the occurrence of the fraud or misrepresentation was an absolute maximum.64

All at once, plaintiffs across the country who had filed suit in reliance on their forum's local statute of limitations65 were time-barred from asserting their claims. Defendants in 10b-5 suits filed for summary judgment on the basis of the more restrictive uniform federal statute of limitations and the cases were dismissed.66

D. The Congressional Response to Lampf

The congressional response to the Lampf ruling was the passage of an amendment to the Securities Exchange Act of 1934, attached to the Federal Deposit Insurance Corporation Improvement Act of 1991.67 Section 476 of that Act amended the Securities Ex-

the Court to consider "the inequity imposed by retroactive application" of a new principle of law. Id. at 107.


64. Id. Thus, unlike some lower courts in the Second and Seventh Circuits, the Lampf Court left plaintiffs who had filed suit in reliance on the old law with no escape hatch. The Court of Appeals for the Second Circuit, in Ceres Partners v. GEL Assocs., 918 F.2d 349 (2d Cir. 1990), and the Court of Appeals for the Seventh Circuit, in Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), cert. denied, 111 S. Ct. 2887 (1991), had also adopted a statute of limitations based on the Securities Exchange Act analogs. Nevertheless, at least some district courts in those circuits had held that the one and three year limits adopted by the courts of appeals were not to be given retroactive effect when equitable concerns, such as reliance on the old statute, justified exceptions. See Brown v. Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992); Bankard v. First Carolina Communications, Inc., No. 89-8571, 1992 WL 3694 (N.D. Ill. January 6, 1992).

65. Prior to Lampf, federal courts adopted the local statute of limitations most closely analogous to the case at hand. Lampf, 501 U.S. at 355. These statutes were usually borrowed from the local fraud statutes or the local blue-sky laws. Denise Rodosevich, Comment, Obtaining Uniformity for Section 10(b) and Rule 10b-5 Causes of Action, 22 CONN. L. REV. 525, 529 (1990). Therefore, the statute of limitations applied to 10b-5 cases varied from one to ten years depending on the jurisdiction. Id. at 559.


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.
change Act of 1934 by adding section 27A.

In substance, part (a) of this legislation directed that for all pending cases filed prior to the decision in Lampf, the statute of limitations in effect in each respective district on the day before the Lampf decision was to be applied. Part (b) of the legislation directed the reinstatement of any claims which had been dismissed as time barred as a consequence of the Lampf decision. Plaintiffs in these dismissed suits were given sixty days in which to apply for reinstatement.

Concern over the Lampf decision was tied partly to the public perception that the decision would, in effect, insulate some of the more notorious alleged perpetrators of securities fraud in the 1980s, including Michael Milken and Charles Keating, from 10b-5 claims. While this concern over the notorious cases may have been partly responsible for the relatively quick congressional response, the more serious concern was that the time limits adopted by the Lampf Court were simply inadequate to allow the timely detection of elaborate securities fraud schemes by private investors. Even the Securities Exchange Commission, with its many staff and legal resources, is not able to effectively police the securities industry.

(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 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.


69. Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 102d Cong., 1st Sess. 7 (1991) (statement of Richard Breeden, Chairman, SEC). For example, a "Ponzi" scheme involves the selling of investment shares in a particular project with the promise of regular returns on the investment. With the sale of new shares to additional investors, the organizers of the scheme can pay dividends without having actually purchased any investment assets. For a long period of time, as long as the scheme is able to attract sufficient additional investment capital, the organizers can keep investors in the dark about the fraud. See Anixter v. Home-Stake Prod. Co., 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993).

The private investor is at an even greater relative disadvantage.\textsuperscript{71}

Initially, a bill was proposed which would have changed the statute of limitations in 10b-5 cases prospectively as well as retroactively,\textsuperscript{72} but a compromise dropping the prospective sections was finally adopted. The earlier bill, S. 1533, would have established a statute of limitations in 10b-5 cases of two years from the date of discovery, with an absolute maximum, or period of repose, of five years from the actual events constituting the fraud or misrepresentation.\textsuperscript{73} The bill was accepted and recommended for passage by the Senate Committee on Banking, Housing, and Urban Affairs, but opposition quickly developed from the accounting, banking, insurance, and securities industries.\textsuperscript{74} Representatives of these groups argued that the expansion of the statute of limitations would invite an increase of frivolous lawsuits, resulting in greater transactional costs in the securities markets and a decrease in the markets' ability to produce the capital required by our economy.\textsuperscript{75}

These arguments, made on behalf of the affected industries rather than individual defendants, did not evoke separation of powers concerns with the legislation. After the passage of section 27A, however, defendants who were adversely affected by the change in the statute of limitations argued that the new law violated separation of powers.\textsuperscript{76}

\section*{II. The Separation of Powers Doctrine}

\textbf{A. The Constitutional Principle}

Despite the fact that separation of powers is not mentioned in the Constitution, it is a fundamental principle of American constitutional law.\textsuperscript{77} Nevertheless, while our system of government de-
pends on the successful maintenance of separation of powers, this does not mean that a complete division between the workings of the executive, legislative and judicial branches is required. In fact, to maintain a balance of shared power among the three branches, and thereby prevent the concentration of too much power in one branch, each branch must exercise a measure of review and control over the others. This is the notion of “checks and balances.” The ability to carry out these “checks and balances” is often cited as the raison d'etre of the separation of powers. Other theories advanced in support of the separation of powers principle include the efficiency theory and the legitimacy theory.

The efficiency theory is built upon the notion that it is impractical to expect a monolithic government to be able to carry out the various functions of governing a large country. The inefficiency of the United States government under the Articles of Confederation is thought to have influenced the Framers of the Constitution to separate and devolve responsibilities in the interest of getting things done.

The legitimacy theory was also “a matter of great concern to legal theorists in the various ratifying conventions.” The legi-
macy of the new government, and of governments in general, was thought to depend on the accountability of the government, safeguarded by separation of powers. In the late twentieth century, however, it requires some exercise of the imagination to appreciate the significance of the legitimacy theory for a late eighteenth-century citizen.

B. Different Approaches to Separation of Powers Analysis

Approaches to separation of powers analysis vary from a strictly formal approach to a more functional approach. The formal approach focuses on the maintenance of the divisions between the branches, based either on an originalist understanding of the proper roles of the branches or an evolving notion of the proper role of the branches. Commentators have pointed to the Supreme Court’s decisions and reasoning in Bowsher v. Synar and INS v. Chadha as examples of the formalist approach.

This approach suggests that nothing but strict adherence to the structural contours of separation of powers will be sufficient to protect against the danger inherent in the accretion of power to any branch in excess of some constitutionally permissible level. Under the formalist view, any act or practice that usurps the power of another branch of government is an impermissible violation of separation of powers. Separation of powers analysis cannot be solely concerned with the end result of a disputed act or practice, i.e. whether or not an adequate balance of power remains; it is just as much a matter of structure. In other words, if the doctrine is to

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86. See Redish & Cisar, supra note 78.
88. 478 U.S. 714 (1986) (striking down a provision of the Gramm-Rudman-Hollings Act because it required the Comptroller General, who may be removed by Congress, to exercise executive power in trimming the federal budget).
89. 462 U.S. 919 (1983) (holding a provision of the Immigration and Naturalization Act unconstitutional because it gave either chamber of Congress veto power over a suspension of deportation, without requiring approval by the other chamber or the President).
91. Bowsher, 478 U.S. at 730. “The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” Id.
92. See Redish & Cisar, supra note 86, at 451.
deliver the protection envisioned by the drafters of the Constitution it must be defended as a structural limitation regardless of the actual harm done by a particular overreaching act.

Even if there is only minimal actual harm, the usurpation of power must be invalidated. For instance, even though Congress might function more efficiently by taking short cuts with the legislative process, Congress may not legislate without presenting a bill for the President's signature.93 "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."94

On the other hand, a functionalist approach focuses on the ultimate impact of a particular act or practice under review, rather than the structural violations which are important to a formalist analysis.95 The key question in a functional analysis is whether the act or practice results in an unacceptable accretion of power to one of the branches.96 Theoretically, under this approach the practice in question might be an overt exercise by one branch of the power reserved to another, yet pass the separation of powers test as long as the consequences of the practice do not pose a threat to the future independence of any branch.97 Examples of this approach are the more recent Supreme Court decisions in Morrison v. Olson98 and Mistretta v. United States.99

In Morrison, the Court recognized that the power to terminate the office of the independent counsel (investigating ethical violations by members of the executive branch), given to the Special Division of the Court of Appeals for the District of Columbia by the Ethics in Government Act of 1978,100 was more administrative than judicial.101 Nonetheless, the Court was able to accept this, partly because it represented an insignificant encroachment on the execu-

94. Id. at 944.
95. See Redish & Cisar, supra note 78, at 490-91.
96. Id.
97. Id. at 491.
tive power.102

The Mistretta Court dealt with a constitutional challenge to the involvement of federal judges as members of the United States Sentencing Commission. The Mistretta Court noted that the "concern of encroachment and aggrandizement . . . animated our separation-of-powers jurisprudence" while "[b]y the same token, . . . [the Court has] upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment."103

In Mistretta,104 Congress arguably delegated certain legislative responsibilities to the judiciary; and yet the Court held that this sharing of responsibilities was permissible.105 After all, it makes sense for the judicial branch, with its experience in imposing sentences, to help create the rules for sentencing. The Court recognized that the executive and the judicial branches could share responsibility for developing sentencing rules without threatening the coordinate status of either branch.

The categorization of an act or practice as the proper function of one branch is not always easy.106 The actions of one branch can sometimes bear a strong resemblance to the recognized functions of another. The Court, through its ability to interpret the laws, and Congress, through its ability to legislate, share the power to create law. When the Supreme Court has declared a retroactive statute of limitations applicable to a certain class of cases, and Congress then reverses the effect of that decision, is Congress simply legislating the statute of limitations, or is it prescribing a rule of decision in particular cases and usurping the judicial power?

C. The Difference Between a Change in the Law and the Prescription of a Rule of Decision

In United States v. Klein,107 the Supreme Court held that congressional prescription of a rule of decision in a pending case vio-

102. Id. "[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." Id. at 691.
105. Id. at 412.
106. See Bowsher v. Synar, 478 U.S. 714, 749 (1986). "One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized with only one of those three labels." Id.
107. 80 U.S. (13 Wall.) 128 (1871).
lated the separation of powers doctrine.108 *Klein* involved a plaintiff seeking payment from the United States Treasury for cotton which had been seized and sold by the Union government during the Civil War.109 In a prior case with similar facts,110 the Court had determined that a Presidential pardon "cured" participation in the rebellion, clearing the way for claimants to recover the property they lost in the war. Shortly thereafter, a proviso attached to an appropriations bill111 declared that pardons would henceforth be deemed inadmissible as evidence of a rightful claim. The proviso further declared that the existence of an uncontroverted pardon would be taken as evidence of participation in the rebellion, rather than as evidence of innocence.112 The *Klein* Court held that this proviso went too far. It characterized the legislative action as the prescription of a "rule for the decision of a cause in a particular way."113 If Congress were allowed to usurp the judicial power to decide cases, then the judiciary would cease to operate as an independent and coordinate branch within the federal system.

The Court went on to distinguish its rule in *Klein* from a prior holding in *Pennsylvania v. Wheeling and Belmont Bridge Co.*114 In an earlier proceeding, the Court had ruled that a certain low bridge over the Ohio River, which obstructed steamboat traffic, was a public nuisance that must be abated.115 Congress reacted to the Court's decision with a law making the bridge a part of the post road system,116 thereby protecting it from the action called for in the Court's earlier decision. The Court found that this was a change in the underlying law governing its decision rather than the prescription of a rule of decision.117 While the change in the law did not affect recovery for past damages, it changed the legal status of the bridge henceforth.

In both *Klein* and *Wheeling Bridge*, legislative action effected a reversal of a prior decision of the Supreme Court. The legislative action was given effect by the passage of a statute in both houses of

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108. *Id.* at 147-48.
109. *Id.* at 136.
113. *Id.* at 146.
114. 59 U.S. (18 How.) 421 (1855).
115. *Id.* at 429.
Congress, yet the *Klein* Court looked through the procedural characteristics indicating that this was a valid change in the law. The *Klein* Court interpreted the language of the proviso as the prescription of a rule of decision, unconstitutional and impermissible, rather than a valid change in the law. To illustrate the point by contrast, the Court referred to the legislative action in *Wheeling Bridge*. The Court characterized the congressional action in that case as a valid change in the law, leaving the Court to apply the new rule created by the legislative branch, in accord with its duties to interpret and apply the existing law.

One hundred and twenty years later, the Court revisited *Wheeling Bridge* in *Robertson v. Seattle Audubon Society*. *Robertson* involved the famous spotted owls of the Northwestern old growth forests. The case consolidated claims made by two environmental groups alleging the violation of five federal environmental statutes. The environmental groups believed that by failing to carry out the provisions of certain federal environmental protection statutes, the Department of the Interior was not adequately protecting the wildlife resources of the forests. On the other side were timber industry groups, arguing that the environmental protection statutes and Bureau of Land Management policies were creating excessive burdens for the timber industry. Congress intervened by passing a law popularly known as the Northwest Tim-

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118. In *Klein*, the relevant statute was passed as a proviso to an appropriations bill which became law on July 12, 1870. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.
119. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871). The Court also condemned the congressional directive to view the presidential pardons in evidence in a manner contrary to the Court’s previous decisions, but on the basis of legislative encroachment on the executive power. *Id.* at 147-48.
120. *Id.* at 146-47.
122. The Seattle Audubon Society and the Portland Audubon Society made the claims. *Id.* at 1410.
125. The timber industry groups were the Northwest Forest Resource Council and the Washington Contract Loggers Association. *Id.*; *Seattle Audubon Soc’y v. Robertson*, 914 F.2d 1311, 1313 (9th Cir. 1990).
ber Compromise.\textsuperscript{126} The Compromise established rules requiring the designation of certain areas as spotted owl habitats and regulating timber sales in those areas for a period of time.\textsuperscript{127} The legislation also declared that the \textit{Robertson} defendants' compliance with these provisions would eliminate any liability for the federal law claims raised by the plaintiffs in the consolidated lawsuits.\textsuperscript{128}

The Court of Appeals for the Ninth Circuit labelled the legislation a violation of the separation of powers doctrine.\textsuperscript{129} The court said that "the critical distinction . . . is between the actual repeal or amendment of the law underlying the litigation, which is permissible, and the actual direction of a particular decision in a case, without repealing or amending the law underlying the litigation, which is not permissible."\textsuperscript{130} While the former is clearly an exercise of the legislative power, the latter usurps the judicial power.

The Supreme Court reversed the Court of Appeals for the Ninth Circuit on this basis. It held that the Northwest Timber Compromise did in fact amend the applicable law, by the "operation of the canon [of construction] that specific provisions qualify general ones."\textsuperscript{131} While Congress did not directly amend the statute underlying the controversy, the Court held that the separate legislation governing the meaning of specific provisions of the underlying legislation had the effect of amending the law. Resting its conclusion on the proposition that the Compromise was a change in the underlying law, the Court declined to consider whether the \textit{Klein} decision requires the invalidation of a statute directing the decision in a case "without amending any law."\textsuperscript{132}

\section*{III. Appellate Court Cases Dealing with the New Legislation}

To date, nine United States courts of appeals have addressed the constitutionality of section 27A.\textsuperscript{133} Eight of the courts have
held that section 27A is a permissible exercise of congressional power; only one has found section 27A unconstitutional. All of these decisions (except two that simply adopted other courts' reasoning without elaboration) addressed the constitutionality of section 27A from several perspectives. Among the challenges to section 27A have been claims that the legislation violates the equal protection and due process guarantees of the Constitution. Some have also argued that the legislation violates the rule against selective prospectivity articulated by the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia,* and that the prohibition of selective prospectivity is constitutionally based. These challenges are beyond the scope of this Note. The focus of this Note is on the separation of powers challenge to section 27A.

A. *The Henderson v. Scientific-Atlanta, Inc.* Decision

In *Henderson,* a class action suit, the plaintiffs represented some forty thousand investors who alleged that the defendant, Scientific-Atlanta, made fraudulent statements and material omissions which artificially inflated the price of its stock. The plaintiffs claimed that they lost over $370 million as a result. While the case was awaiting trial, the Supreme Court issued the *Lampf* decision. Scientific-Atlanta then filed a motion for summary judgment, which was granted. The plaintiffs then filed a notice of appeal, and while the appeal was pending, Congress enacted the Federal

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136. Axel Johnson, Inc., 6 F.3d at 83; Pacific Mut. Life Ins. Co., 997 F.2d at 46; Gray, 989 F.2d at 1572; Henderson, 971 F.2d at 1573-74.


139. 971 F.2d 1567 (11th Cir. 1992).

140. *Id.* at 1569.

141. *Id.*

Deposit Insurance Corporation Improvement Act of 1991. The Court of Appeals for the Eleventh Circuit then vacated the district court’s grant of summary judgment for the defendant. The *Henderson* decision, therefore, dealt with the application of section 27A(a).

1. The *Henderson* Majority

The majority in *Henderson* viewed the enactment of section 27A as a proper exercise of the legislature’s prerogative under the Constitution to overrule a statutory construction of the Supreme Court. The court compared Congress’ action in this context to its enactment of the Civil Rights Act of 1991,144 overruling the Supreme Court’s decisions in a series of civil rights cases.145

The *Henderson* court addressed two arguments that section 27A was an unconstitutional violation of the separation of powers doctrine. The first argument was that section 27A sought to render the *Lampf* decision “a nullity as a binding precedent on the lower federal courts”146 and thereby violated the separation of powers doctrine. The court rather quickly dismissed this contention with the answer that such action is in fact the proper constitutional role of Congress.147 The court referred to the Civil Rights Act of 1991148 as an example of a similar legislative overruling of Supreme Court statutory construction.149

The second argument hinged on the inquiry as to whether or not Congress in fact changed the underlying law. This question was crystallized as part of separation of powers jurisprudence in *United

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146. *Henderson*, 971 F.2d at 1571.

147. Id.


149. *Henderson*, 971 F.2d at 1571 n.4.
States v. Klein. The Henderson majority held that Congress had not attempted to force the courts to reach an outcome contrary to law, but that Congress had in fact changed the law. The Henderson court relied on the Supreme Court’s decision in Robertson v. Seattle Audubon Society to support its view. In Robertson, Congress had addressed a particular lawsuit and declared that compliance with newly enacted legislation would satisfy the laws upon which the plaintiffs based their claims in the existing suit. The Court found this to be a permissible change in the underlying law.

The Eleventh Circuit also found it insignificant that section 27A had only retroactive effect, whereas the statute at issue in Robertson had both retroactive and prospective effect. Finally, the court held that section 27A did not impose a rule of decision on the courts, but allowed the courts to exercise the judicial function of fact finding and applying the changed law.

2. The Henderson Dissent

Judge Wellford’s dissenting opinion in Henderson disagreed with the majority’s conclusion that the legislation at issue did not violate the separation of powers doctrine. The dissent was “persuaded that Congress infringed upon judicial authority by setting out specific rules of decision in pending cases ... as proscribed in United States v. Klein.”

Judge Wellford also referred to what he estimated to be a majority of the district courts that had ruled on this issue and found the statute unconstitutional. Among these cases were Bank of Denver v. Southeastern Capital Group and Johnston v. CIGNA Corp. In Bank of Denver, the district court elaborated on the

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150. 80 U.S. (13 Wall.) 128 (1871); see supra notes 107-32 and accompanying text for an explanation of the relevance of Klein.
151. Henderson, 971 F.2d at 1573.
153. Id. See supra notes 121-32 and accompanying text for a discussion of the Robertson decision.
154. Henderson, 971 F.2d at 1573-74.
155. Id. The court also examined and rejected arguments that § 27A was unconstitutional based on due process and equal protection requirements, but these are beyond the scope of this Note. See supra note 136 and accompanying text.
156. Henderson, 971 F.2d at 1576 (Wellford, J., dissenting) (citation omitted).
157. Id. at 1575.
159. 789 F. Supp. 1098 (D. Colo. 1992), aff'd, 14 F.3d 486 (10th Cir. 1993).
distinction between *Klein* and *Wheeling Bridge*. The central part of the distinction is that Congress may change the underlying law (as it did in *Wheeling Bridge*), but may not leave existing law undisturbed while prescribing the effect it is to be given in the courts (as in *Klein*). The *Bank of Denver* court emphasized that Congress could have directly amended section 10(b) to impose the desired result, but it did not, and probably could not, because it could not agree on the desired change.

In *Johnston*, the same court that decided *Bank of Denver* held that the *Robertson* decision did not alter the interpretation of section 27A either, since the legislation at issue in *Robertson* was a rewriting of the "statutory framework." In both *Bank of Denver* and *Johnston*, the court emphasized the general threat to separation of powers doctrine posed by the new legislation, which in the court's view was "an encroachment on the quintessential constitutional attribute of the judiciary—the power to interpret the laws."

B. *Plaut v. Spendthrift Farm, Inc.*

The *Plaut* plaintiffs were investors in "one of [Kentucky's] premier thoroughbred horse farms." The owners of the farm, and certain of their legal and financial advisors, were the defendants. The plaintiffs purchased their shares in the farm in 1983. The suit was brought in 1987.

Before the case came to trial, the *Lampf* Court had established the three year limit on the commencement of actions under Rule 10b-5. Therefore, the district court dismissed the plaintiffs' suit with prejudice on August 13, 1991. The plaintiffs did not appeal, because they believed that an appeal would have been sanctionable as frivolous, given the *Lampf* ruling. In November of 1991, when

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160. See supra notes 114-20 and accompanying text.
161. See supra notes 114-20 and accompanying text.
166. Id. See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
167. 1 F.3d 1487 (6th Cir. 1993).
168. Id. at 1489.
169. Id.
170. Id.
171. Id.
Congress enacted section 27A, the time allowed for filing an appeal in the *Plaut* case had already expired. Because of this factual distinction, the *Plaut* court focused on part (b) of section 27A, which gave the plaintiffs the opportunity to reopen their case. The court determined that because part (b) of section 27A allowed the reopening of dismissed cases, it violated separation of powers principles. 172

Perhaps not surprisingly, in light of its concern for protecting the finality of settled questions, the *Plaut* court reached back to the eighteenth century for support of its views on separation of the legislative and judicial powers. The court outlined the widespread practice of legislative review of judicial decisions in the colonial period, 173 culminating in "the escalation of legislative interference in private disputes which occurred during the time of the Articles of Confederation." 174 Partly in reaction to this widespread practice, the Framers adopted the separated powers principle. The statement of the crucial underlying concern is attributed to Montesquieu: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.'" 175

The *Plaut* court then described an early test of the separation of powers, *Hayburn's Case*. 176 After the Revolutionary War, Congress made pensions available to disabled veterans. The federal courts were to accept applications for these benefits and determine whether the applicants were indeed veterans and disabled. However, the courts' decisions were reviewable by the Secretary of War. 177 In other words, Congress had given the power to overrule the federal courts to a member of the executive branch. The federal courts declined to carry out this duty, and three of the circuit courts informed President Washington of their concerns in the form of letters, which were later appended to the reported decision in *Hayburn's Case*. 178 "This result was in essence the Court's first in-

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172. *Id.* at 1490.
173. *Id.*
174. *Id.* at 1491.
175. *Id.* (quoting *The Federalist* No. 47 (James Madison)). Montesquieu's statement originally appeared in *The Spirit of Laws*, Volume I, Book IX.
177. *Plaut*, 1 F.3d at 1492.
178. The case is reported in the United States Reporter because Justices of the Court were "riding circuit" at that time. *Hayburn's Case* came as a writ of mandamus
validation of an act of Congress."\textsuperscript{179}

The \textit{Plaut} court read \textit{Hayburn’s Case} as establishing a clear understanding that retroactive disturbance of final judgments of the federal courts is prohibited.\textsuperscript{180} While Congress has the undisputed power to change the law, even as it applies to pending cases, Congress may not upset the prior application of those laws by the courts.

Since the dismissal of a case as time-barred is a final judgment,\textsuperscript{181} subsequent legislation may not reverse that judgment. Because section 27A(b) seeks to do precisely that, it is an “unconstitutional usurpation of the judiciary power.”\textsuperscript{182}

\section*{IV. Applying Separation of Powers Concepts to \textit{Henderson}\textsuperscript{183} and \textit{Plaut}\textsuperscript{184}}

\subsection*{A. The Klein\textsuperscript{185} Rule}

The United States courts of appeals are in agreement that part (a) of section 27A represents legitimate legislative change rather than a prescribed rule of decision.\textsuperscript{186} This view is informed by the Supreme Court’s decision in \textit{Robertson}.\textsuperscript{187} If the legislation at issue in \textit{Robertson} was a permissible exercise of the legislative function even though it specifically addressed claims in two cases pending appeal, then it would seem that section 27A cannot be condemned because the intent of Congress was to address the claims of particular litigants in certain cases pending appeal. The Court of Appeals for the Tenth Circuit held that section 27A, unlike the legislation at issue in \textit{Klein}, “did not ‘direct any particular findings of fact or applications of law, old or new, to fact.’”\textsuperscript{188}

\footnotesize{to the Circuit Court for the District of Pennsylvania, commanding the court to proceed in processing William Hayburn’s application for veteran’s benefits. The writ was rendered moot when Congress amended the procedure for determining pension eligibility. \textit{Hayburn’s Case}, 2 U.S. (2 Dall.) at 409-10.}

\textsuperscript{179} \textit{Plaut}, 1 F.3d at 1492.
\textsuperscript{180} \textit{Id.} at 1493.
\textsuperscript{181} \textit{Id.} at 1495-96.
\textsuperscript{182} \textit{Id.} at 1499.
\textsuperscript{183} 971 F.2d 1567 (11th Cir. 1992).
\textsuperscript{184} 1 F.3d 1487 (6th Cir. 1993).
\textsuperscript{185} 80 U.S. (13 Wall.) 128 (1871).
\textsuperscript{186} \textit{See supra} notes 133-34 and accompanying text.
Congress has the power to enact laws, but it is for the courts to decide the outcome of cases. Nevertheless, laws enacted by Congress may be given retroactive effect. If such a law is passed while a case is pending on appeal, then the appellate court must apply the law as it exists at the time the appeal is heard even if this effects a reversal of an earlier decision. This practice is consistent with the declaratory function of the courts.

On the other hand, Congress may not prescribe the outcome of a given case or group of cases without changing the underlying law. In its most distilled form, Klein stands for the proposition that Congress may not, within its constitutional limits, require the courts to attach a different effect to law than the courts have previously given it, without directly altering the law through legislation. This is exactly what Congress has done in section 27A, however. Of course, section 27A may be viewed simply as legislation establishing a section 10(b) statute of limitations. Reading parts (a) and (b) of section 27A together, though, reveals the clear congressional intent to address the outcome of a limited group of cases rather than provide a general statute of limitations for section 10(b) actions.

This is not, by itself, a fatal flaw. The Robertson Court upheld the Northwest Timber Compromise despite the fact that the legislation at issue specifically addressed pending cases. The legislation at issue in Robertson, however, made general changes in the management policies for the federally-owned Northwest forests. In fact, by the "operation of the canon [of construction] that specific provisions qualify general ones," the Northwest Timber Compromise directly amended the underlying statutes.

In comparison, Congress had no intention of changing the statute of limitations through section 27A, except in the cases of particular litigants. In effect, Congress sought to reach into the

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190. U.S. CONST. art. III, §§ 1, 2.
192. See United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).
195. Robertson, 112 S. Ct. at 1413-14; see also Atonio v. Wards Cove Packing Co., 10 F.3d 1485 (9th Cir. 1993) (discussing the specific reference to a certain case in the Civil Rights Act of 1991).
196. Robertson, 112 S. Ct. at 1413.
197. Id. at 1414.
proceedings involving these particular litigants and change the outcome of their cases, without changing the underlying law. Whereas the Northwest Timber Compromise changed federal law relating to the management of wildlife habitats, section 27A made no change in the law. Section 27A simply reversed cases which had been dismissed and allowed a more liberal statute of limitations in pending cases. The Lampf rule, establishing a stringent and uniform section 10(b) statute of limitations, remains intact. The statute of limitations applying to all other litigants remains as it was prior to the passage of section 27A. There is no practical difference between the congressional action in Klein and the congressional action in passing section 27A.

In Klein, the Court examined legislation which changed the application of a certain law in particular cases. Proponents of Congress' action might have argued that such legislation effected a change in the law, which should have been dutifully applied by the courts. In the same way, proponents of section 27A insist that the "new" law should be applied by the courts. Yet section 27A has changed the law on the statute of limitations in section 10(b) cases no more than the congressional proviso in Klein changed the law regarding pardons for former rebels. Section 27A only changed the judicial treatment to be given to certain factual circumstances, i.e., the filing dates of claims under section 10(b).

The plaintiffs who benefitted from section 27A present a very sympathetic case, considering that the rules of the game were changed after they had already commenced their lawsuits. To allow Congress, however, to help the plaintiffs in this way would obliterate the distinction between law-making and judicial decision-making. The separation of powers doctrine prohibits the prescription by Congress of a rule of decision for the courts.

By reference to Klein, the Henderson court, and the other courts which adopted its reasoning or conclusions, applied the correct test to determine whether section 27A was compatible with separation of powers doctrine. The courts have, nevertheless, arrived at the wrong answer. Section 27A fails the Klein test. Section 27A is the prescription of a rule of decision by Congress, despite the fact that it came in the guise of legislation.

B. *The Meaning of Hayburn's Case*\(^{199}\)

Perhaps an even more difficult question, raised by section 27A(b), is whether a case dismissed as time-barred and *not* pending on appeal can be restored by legislative action. This was the question addressed by the *Plaut* court. In reaching its conclusion that section 27A(b) violates the separation of powers, the *Plaut* court relied heavily on *Hayburn's Case*.

There are two problems with the *Plaut* court's reliance on *Hayburn's Case* to support its holding. First, the reported decision did not reach the constitutional question of whether another branch could review and overturn the final decision of a federal court.\(^{200}\) The question was rendered moot by the amendment to the benefits determination procedure which removed the courts from that process.\(^{201}\) The reported decision simply announced the Court's intention to follow the example of the British courts in defining the duties and structure of the federal courts.\(^{202}\) No pronouncements were made as to the appropriateness of the pension application review process.

Second, the *Plaut* court attached a significance to *Hayburn's Case* that went far beyond the Supreme Court's recent statements concerning the case. The Supreme Court has indicated that the problem with the pension act at issue in *Hayburn's Case* was that it required the federal courts to carry out non-judicial work.\(^{203}\) The issue was not whether decisions of the federal courts were subject to review by another branch.\(^{204}\)

What *Hayburn's Case* makes clear is that the courts may not, in their capacity as courts, carry out the administrative work of the executive branch. Since it was the administrative character of the courts' assignment under the pension act which gave rise to the constitutional objections, it cannot be said that *Hayburn's Case* stands for the repudiation of review of proper federal court decisions. Because Congress had instructed the courts to carry out an executive

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199. 2 U.S. (2 Dall.) 409 (1792).
201. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10.
202. Id. at 413-14. For a detailed analysis of the "real" meaning of *Hayburn's Case*, see Marcus & Tier, *supra* note 176, at 534-41.
204. Nor was the issue whether individual Justices could participate in the administrative proceedings under the pension act. This was a period of experimentation, bred by necessity, for the new federal government, testing by practice the means of carrying out the work of government where the Constitution left the boundaries uncertain. See *id.* at 398-99.
function, in *Hayburn's Case* there could be no proper federal court decisions to be reviewed. That was precisely the problem.

The degree of concern about the improper assignment of an executive function to the courts, such as in *Hayburn's Case*, may be more difficult for a modern reader to appreciate than it was for a late eighteenth century citizen. At that time, there was widespread concern about separation of powers based in part on the notion that separation was necessary to establish the legitimacy of governments. Judicial and executive functions could not be joined in a legitimate government. This was the problem with the pension law at issue in *Hayburn's Case*. The courts were being asked to carry out the executive function, as commissioners rather than as judges.

Our modern focus on the "checks and balances" theory of separation of powers might influence our reading of *Hayburn's Case* today. This understanding of the purpose of separated powers predominates, to the virtual exclusion of other separated powers theories. But in 1792, the issue was simply whether the courts could carry out a plainly executive function. The real concern raised by section 27A(b), however, is not that Congress has somehow charged the federal courts with non-judicial tasks by asserting the power to re-open closed cases. The real concern is that Congress has attempted to exercise the judicial power by seeking to reverse the fortunes of litigants in closed cases.

While *Hayburn's Case* seems to be an inappropriate foundation for the *Plaut* court's holding, it is only inappropriate to the extent that the *Plaut* court focused on the reviewability of judicial decisions. As shown above, this is not the real significance of *Hayburn's Case*. The Supreme Court has pointed out that *Hayburn's Case* really dealt with the independence of the judicial branch.

C. Formal vs. Functional Analysis

A review of the Supreme Court's decisions in *Chadha, Bowsher, Olson*, and *Mistretta* leaves some question about the Court's view of the proper approach to separation of powers analysis. In light of this uncertainty, both the formal and functional perspectives

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205. *Wills, supra* note 81, at 113-16.
206. *See supra* notes 77-84 and accompanying text.
208. *See supra* notes 85-106 and accompanying text.
on separation of powers should be considered. However, it seems clear that the majority of the courts of appeals have adopted a functional analysis, epitomized by the *Henderson* court's acceptance of section 27A.209

1. The Formal Analysis

The formal analysis must begin with a determination of the proper power of the legislative branch.210 Through its ability to alter statutes which have been interpreted by the courts, the legislative branch reviews and controls the judiciary. It may change the law in response to the Court's construction of a particular statute.211 The key question raised by the enactment of section 27A is whether Congress has gone beyond its checking function and usurped the judicial power, thereby violating the separation of powers.

If Congress had only amended an existing law specifying the statute of limitations in section 10(b) actions, or if Congress had established a new provision of the Securities Exchange Act of 1934 which provided a statute of limitations for all section 10(b) cases, then it would be much easier to classify the congressional action as the exercise of its proper constitutional power. If such were the case, then Congress would have clearly changed the underlying law at issue, and would have satisfied the test articulated in both *Klein* and *Robertson*. Perhaps the best solution would have been the explicit establishment of a new claim for relief for plaintiffs in securities fraud cases, by the traditional legislative process.

Section 27A was addressed, however, only to the group of cases which had been affected by the *Lampf* decision. By enacting section 27A, Congress passed legislation which, in effect, overturned certain decisions of the judiciary.212

The Supreme Court held in *Wheeling Bridge* and in *Robertson* that a change in the law directed at pending cases may be constitutional. The change in the underlying law in *Wheeling Bridge* did not

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209. See *supra* notes 183-207 and accompanying text for an analysis of the courts of appeals' views on the constitutionality of § 27A.


212. Part (b) of the legislation was specifically addressed to those cases that were already dismissed as time-barred. 15 U.S.C. § 78aa-l(b) (Supp V 1993).
affect the plaintiff's right to recovery for past damages, i.e., those incurred before the law was changed. The *Wheeling Bridge* legislation had a strictly prospective effect. In *Robertson*, the new rules outlined in the legislation at issue applied to future conduct in compliance with the relevant environmental statutes. In neither case did the Court accept the notion that Congress could upset the judiciary's disposition of claims in particular cases through legislation enacted solely for that purpose.\textsuperscript{213} Therefore, under a formal analysis, section 27A is unconstitutional.

2. The Functional Analysis

The functional analysis involves a balancing of the legislative branch's power to change the law and the judiciary's ability to make independent decisions, with an emphasis on the ultimate impact of a certain piece of legislation on each branch's ability to carry out its prescribed function in the future. The *Mistretta* Court explained the functional concerns relating to the Judiciary:

In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch."\textsuperscript{214}

The courts of appeals have failed to acknowledge the impact that congressional reversal of judicial decisions could have. While it is undisputed that a law can be given full retroactive effect by Congress,\textsuperscript{215} it is another matter to allow legislation to reverse the courts' disposition of cases decided under the law applicable at the time of the decision. While Congress may reinstate claims against the United States through the enactment of legislation,\textsuperscript{216} it may not upset the expectations of private parties in a settled lawsuit.

If the separation of powers is to serve us for the next two centuries, the independence of the judicial branch must be maintained. The importance of this principle has been recognized since at least

\textsuperscript{213} But cf. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (waiving the United States' defense of res judicata to permit rehearing on Sioux claims). In *Sioux Nation*, Congress acted both as legislative body and party to the case.


\textsuperscript{216} See United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).
the time of *Hayburn's Case*. The power to direct the courts to hear certain cases which have already been dismissed certainly represents a threat to "the institutional integrity of the Judicial Branch."^{217}

"The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."^{218} While section 27A favors a class of sympathetic plaintiffs—those left without a remedy by the *Lampf* Court—the broader implication of a rule such as section 27A is a clearly unacceptable accretion of power to the legislative branch. It is not difficult to imagine other groups of influential litigants, having lost in court, petitioning Congress for a "second chance." Section 27A survives neither the formal nor the functional analyses.^{219}

**Conclusion**

Viewed from any of the perspectives discussed in this Note, it would seem that Congress has overstepped its bounds. If Congress could not muster a consensus on the proper statute of limitations in section 10(b) cases then it should not be allowed to act to overturn a decision made by the Court in a particular class of cases. It is tempting to adopt the result which would allow these cases to be decided on their merits, and a sense of justice for the claimants exerts a strong pressure to do so. If the integrity of the judicial branch is to be preserved for future decision-making, however, its power to render final decisions must be respected.

Perhaps the judiciary turned its back on thousands of honest and hard working investors who were swindled and foreclosed from recovery by the *Lampf* decision. While the Supreme Court’s decision in *Lampf* may have been unfair to plaintiffs with pending 10b-5 claims, it would also be unfair to defendants who had successfully moved for dismissal under the rule of *Lampf* to reverse the outcome of their cases. The challenge of the separation of powers doctrine is to promote justice and the rule of law by protecting the realm of each branch from the encroachments of the others. An

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expeditious solution to the problem of a particular class of plaintiffs can bring much greater uncertainty to all future litigants.

What makes this a difficult case is that certain plaintiffs had rights taken away from them by the Court, and Congress simply acted to restore those rights. Nonetheless, the structural nature of the separation of powers requires that Congress be restrained from usurping judicial power. Section 27A(a) is unconstitutional because it prescribes a rule of decision for the courts without changing the underlying law any more than Congress changed the law in the Klein case. Part (b) is unconstitutional because it threatens the independence of the judiciary. The courts focusing on section 27A(a) have used the correct test, but reached the wrong result. The Plaut court, which focused on part (b), reached the correct result, but through reliance on the wrong analysis.

John D. McNally