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Alexander T. Galloway III

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Lampf v. Gilbertson: The Wrong Answer To A Long-Awaited Question

I. INTRODUCTION

In Lampf v. Gilbertson,1 the United States Supreme Court finally settled the question of which statute of limitations applies to implied private causes of action pursuant to section 10(b) of the Securities Exchange Act of 19342 and to rule 10b-5 of the Securities Exchange Commission.3 In Lampf the Supreme Court held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." This holding departed from the norm of borrowing state periods of limitation for federally created remedies for

2. See infra text accompanying notes 16-33.
3. 15 U.S.C. § 78j(b) (1988). Section 10(b) provides in pertinent part:

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

   . . .

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

Id.

4. 17 C.F.R. § 240.10b-5 (1991). Rule 10(b)-5 provides:

   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails 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 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.

5. 111 S. Ct. at 2782 (footnote omitted). Specifically, the Court selected the language of section 9(e) of the 1934 Act (15 U.S.C. § 78i(e)). 111 S. Ct. at 2782 n.9.
which there is no express statute of limitations. The Court reversed the decision of the court of appeals, which had held that Oregon's two-year limitation period for general fraud claims governed. The court of appeals had remanded the case for the trial court to determine whether equitable tolling applied. The Supreme Court barred plaintiffs' claim, which was filed more than three years after defendant's alleged misrepresentations, because it determined that "[t]he 3-year limit is a period of repose inconsistent with tolling."

The most troublesome aspect of the Court's decision was that the Court applied the new limitations period retroactively and dismissed plaintiffs' claim as untimely. The holding effectively "shut[] the courthouse door on respondents [and all other litigants with pending 10b-(5) claims] because they were unable to predict the future."

This Article begins with an overview of the development of the "absorption doctrine" and of implied causes of action under section 10(b) and rule 10b-5. Next, the Article examines the developments that led to changes in the "absorption doctrine" and the facts and the Court's holding in Lampf. Finally, the Article concludes with an analysis of the Supreme Court's decision.

II. Background

A. The Absorption Doctrine

Analysis of the absorption doctrine necessarily begins with the Supreme Court's decision in Holmberg v. Armbricht. The only issue in Holmberg was whether litigation of a federal equitable claim in federal court was subject to a federal limitations period (laches) or was subject to the equitable limitation principles under the law of the forum state. The Court held that federal law governed suits in equity. However, that "[a]s to actions at law, the silence of Congress has been

9. 111 S. Ct. at 2782.
10. Id.
11. Id. at 2786 (O'Connor, J., dissenting). See infra text accompanying notes 122-36.
13. Bloomenthal, supra note 8, at 238.
14. 327 U.S. at 397. The Court determined that "the decision in [Guaranty Trust Co. v. York, 326 U.S. 99 (1945)] ... is inapplicable to the enforcement of federal equitable rights." Id.; see also Bloomenthal, supra note 8, at 239 n.20.
interpreted to mean that it is federal policy to adopt the local law of limitation."¹⁶ Lower federal courts found in this dicta the authority to apply state statutes of limitation to federal remedies where Congress failed to supply one.

B. The Implied Cause of Action

The texts of section 10 of the Securities Exchange Act of 1934¹⁷ and of Securities Exchange Commission rule 10b-5¹⁷ do not provide an express private right of action against those who violate their requirements.¹⁸ However, in the same year the Court decided Holmberg, a district court held for the first time that one could assert a private claim based upon a violation of rule 10b-5.¹⁹ The court in Kardon v. National Gypsum Co.²⁰ stated:

"The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if: (a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and (b) the interest invaded is one which the enactment is intended to protect."²¹

Allowing the pursuit of such an action was "‘but an application of the maxim, Ubi jus ibi remedium.’ "²² Many courts have followed the decision in Kardon and found implied private causes of action for such violations.²³

Because Congress never intended to create a private cause of action under section 10(b),²⁴ it did not provide an applicable period of limitations.²⁵ Courts have used the Holmberg dictum to fill this gap in the stat-

15. 327 U.S. at 395.
18. See supra notes 3 and 4 for text of section 10(b) and rule 10b-5.
21. Id. at 513 (quoting RESTATEMENT OF TORTS § 286 (1934)).
22. Id. (quoting Texas & Pac. R. Co. v. Rigsby, 241 U.S. 33, 39 (1916)). Literally translated: "where there is a right there is a remedy." BLACK’S LAW DICTIONARY 1363 (5th ed. 1979).
24. Ernst & Ernst, 425 U.S. at 196.
25. But see Fischman v. Raytheon Mfg. Co., 188 F.2d 783, 789 n.4 (2d Cir. 1951), in which the court stated that
ute by applying statutes of limitation from analogous state law claims to
courts. A majority of the courts (nine) have adopted the limitations pe-
period from state blue sky laws because these laws typically contain provi-
sions analogous to rule 10b-5. Only the Ninth and the Tenth Circuits
have opted to apply limitations used in state general fraud claims because
rule 10b-5 is rooted in fraud. The Third Circuit's position is uncertain.
Because there was also disparity among the limitation periods of the vari-
ous states in each circuit, there may have been a multitude of possible
limitation periods for any section 10(b) or rule 10b-5 claim. This situation

"the most persuasive reason for concluding that 10(b) (of the 1934 Act) creates a
private cause of action is found in the Act itself. As originally enacted, Section
29(b) merely declared that all contracts which violate any provision of the Act, or
any rule or regulation under the act, shall be void. In 1938, Congress passed an
amendment to Section 29(b) imposing a short statute of limitations on actions
brought for violation of Commission Rules under Section 15(c)(1). Since Section
15(c)(1), like section 10(b), does not specifically provide for a private action, the
implication of the amendment was that Congress had always assumed that private
actions under those and similar provisions were available."

Id. (quoting Comment, The Prospects for Rule X-10B-5: An Emerging Remedy for De-
frauded Investors, 59 Yale L.J. 1120, 1134 (1950)).

26. "One of the first appellate cases to consider the applicable statute of limitations in a
Rule 10b-5 action and to borrow a state statute by analogy was Fischman v. Raytheon Man-
ufacturing Co. There was no discussion of the issue that went hand in hand with the court's
recognition of implied claims under Rule 10b-5. The courts for nearly thirty-five years
thereafter applied Holmberg almost by rote and looked for an appropriate state analogy."
Bloomenthal, supra note 8, at 240 (footnote omitted). See also Robert W. Ginn, The Stat-
ute of Limitation Applicable to Section 10(b) Actions: Data Access and its Progeny, 24

27. Ginn, supra note 26, at 785 (citing Ernst & Ernst, 425 U.S. at 210 n.29).
28. See Bloomenthal, supra note 8, at 240 n.30.
29. See Bloomenthal, supra note 8, at 241 nn.32-33.
30. See id. at 240 n.31 (citing Roberts v. Magnetic Metals Co., 611 F.2d 450 (3rd Cir.
1979)). The court in Roberts

actually applied the general fraud statute of limitations in an action brought by a
defrauded seller because the appropriate (New Jersey) blue-sky law civil liability
provisions were applicable only to defrauded purchasers. The dissenting opinion,
however, would have applied the blue-sky limitation period even under these cir-
cumstances, and the concurring opinion 'would in ordinary circumstances' have
applied the blue-sky limitation period but felt precluded from doing so since that
act did not provide a remedy. Accordingly, two judges of the three-member panel
deciding Roberts under 'ordinary circumstances' would have applied the state
blue-sky law.

Id. (citations omitted).
encouraged forum shopping. For example, the possible periods range anywhere from one year in Maryland to ten years in Tennessee. This situation was, to say the least, less than desirable. Accordingly, the courts began to "eschew mechanical application of the absorption doctrine."

C. The Road To Uniformity

The first in a line of recent decisions that have not followed precedent based on the Holmberg dicta was DelCostello v. International Brotherhood of Teamsters. In DelCostello an employee brought suit against his employer and union under the Labor Management Relations Act. The Court refused to apply prior holdings that applied state periods of limitation to similar actions brought by a union on behalf of its members and by an employee and held, instead, that a federal claim provided "a closer analogy" than did available state statutes. Thus, the Court carved out an exception to the absorption doctrine:

[R]esort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make the rule a significantly more appropriate vehicle for interstitial law making, we have not hesitated to turn away from state law.

The Court faced a similar situation in Wilson v. Garcia, an action brought under Section 1983, a statute that also lacks an applicable statute of limitations. Although the Court in Wilson applied a state statute

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31. See Ginn, supra note 26, at 783-84 n.7.
33. Ginn, supra note 26, at 786.
38. 462 U.S. at 172.
39. Id. at 171-72.
42. See O'Sullivan v. Felix, 233 U.S. 318 (1914).
of limitations, Justice Stevens indicated that in the future the Court "would resist mechanical adherence to the absorption doctrine" by articulating a three-prong test for determining the applicable limitations period. He said that courts should:

[fff]irst consider whether state or federal law governs the characterization of [the] claim for statute of limitations purposes. If federal law applies, we must next decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. Finally, we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle.

Although Justice O'Connor dissented in Wilson and DelCostello, she indicated that she could be persuaded to abandon the absorption doctrine under the right conditions.

Apparently Agency Holding Corp. v. Malley-Duff & Associates presented the conditions O'Connor required. In Malley-Duff the Court had to decide upon the appropriate statute of limitations for a civil action brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In an opinion written by Justice O'Connor, the Court held that the limitations period established by the Clayton Act provided the best analogy. The Court followed the Wilson test and found that a uniform period was required because "RICO is similar to § 1983 in that both “encompass numerous and diverse topics and subtopics.” However, the Court went beyond Wilson when it chose a federal period of limitations. The Court found that the Clayton Act provided a much closer

43. 471 U.S. at 280.
44. Ginn, supra note 26, at 787.
45. 471 U.S. at 268.
46. 471 U.S. at 279-87 (O'Connor, J., dissenting).
47. 482 U.S. at 174-75 (O'Connor, J., dissenting).
48. Justice O'Connor agreed that the characterization of section 1983 claims was a federal question, but saw no reason for departing from the old rule (of applying limitations periods on a claim-by-claim basis) in Wilson. 471 U.S. at 280 (O'Connor, J., dissenting). In DelCostello O'Connor felt compelled to adhere to the norm of borrowing from state limitations periods because she felt that the facts of DelCostello did not present reasons sufficient to outweigh the presumption in favor of state law. 462 U.S. at 175 (O'Connor, J., dissenting).
52. 483 U.S. at 150. "RICO was patterned after the Clayton Act." Id.
53. See supra text accompanying notes 40-45.
54. 483 U.S. at 149 (quoting A.J. Cunningham Packing Corp. v. Congress Fin. Corp., 792 F.2d 330, 337 (3rd Cir. 1986)).
analogy than any action under state law because "while \[t\]he atrocities' that led Congress to enact 42 U.S.C. § 1983 'plainly sounded in tort,' there is no comparable single state law analogue to RICO."

Significantly, the Court also noted in its analysis that:

The multistate nature of RICO indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would "virtually guarante[e] . . . complex and expensive litigation over what should be a straight forward matter."

The decisions in Wilson, DelCostello, and Malley-Duff did not involve claims arising from section 10(b) or rule 10b-5. However, the analysis in Malley-Duff, in which the Court expressed concerns over the practicalities of litigation and forum shopping because of the multistate nature of the claims at issue, set the stage for the holding reached in Lampf.

In Re Data Access Systems Securities Litigation was the first case involving claims under section 10(b) and rule 10b-5 in which a court departed from the traditional application of the absorption doctrine. The court in Data Access held:

"[T]he federal schema of limitations set forth in the Securities Exchange Act of 1934 "clearly provides a closer analogy than available state statutes," and that "the federal policies at stake [in section 10(b) and Rule 10b-5 actions] and the practicalities of litigation make [the federal] rule a significantly more appropriate vehicle for interstitial law-making."

In so holding, the court followed the Malley-Duff analysis. As in Malley-Duff, the court agreed with the reasoning in Wilson and decided that section 10(b) and rule 10b-5 actions require a uniform period of limitations.

The court next addressed the issue of whether it should choose a federal or state period. Although the Third Circuit had previously decided that a state limitation period would apply to such actions, two judges expressed a desire to depart from these holdings, but recognized that

55. Id. at 152 (quoting Wilson v. Garcia, 471 U.S. 261, 277 (1985)).
56. Id. at 154 (quoting Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, 41 Bus. Law. 391, 392 (1985)).
58. Id. at 1545 (quoting DelCostello, 462 U.S. 151, 172 (1983)).
59. Id. at 1543.
60. See Biggans v. Bache Halsey Stuart Shields, Inc., 638 F.2d 605 (3rd Cir. 1980); Roberts v. Magnetic Metals Co., 611 F.2d 450 (3rd Cir. 1979).
mandatory precedent bound them.61 However, the reasoning in DelCortello, Wilson, and Malley-Duff emancipated the Third Circuit from its own constraining precedent.62 The court noted that section 10(b) "and its companion provisions [sections 9(e), 16(b), 18(c), and 29(b)] are aimed at the same objectives. All of these companion provisions, except section 16(b), have a uniform federal limitations period."63 Furthermore, section 10(b) and rule 10b-5 claims are multistate in nature.64 That nature, coupled with the Act's broad venue provisions and national service of process provision,65 promotes forum shopping.66 The relationship between section 10(b) and its companion provisions is strikingly similar to that between the RICO and Clayton Acts noted in Malley-Duff. Accordingly, the court stated "it would seem bizarre if not anomalous to go beyond the express statutes of limitations contained in provisions of the 1934 Act."67 The court held that "the proper period of limitations for a complaint charging violation of section 10(b) and rule 10b-5 is one year after the plaintiff discovers the facts constituting the violation, and in no event more than three years after such violation."68

61. [T]he Supreme Court has announced the rule that we must look not for an analogous federal limitations period, but for an analogous forum state limitations period . . . . Much can be said, perhaps for a different rule in a different context directing a federal court to statutes of limitations governing analogous federal causes of action. But the rule has been otherwise for many years, and an inferior Federal court is not free to change it. Roberts, 611 F.2d at 454.

Noting that several commentators have argued that federal courts should look to the most analogous federal statute for a Rule 10b-5 limitations period, Chief Judge Seitz stated: "Were I writing on a clean slate, I would be inclined to adopt that approach. The Supreme Court, however, has rarely deviated from the normal rule of looking to state statutes."

In re Data Access Sys. Sec. Litig., 843 F.2d at 1540 (quoting Roberts, 611 F.2d at 454 (Seitz, C.J., dissenting)).

62. See supra text accompanying notes 34-56.

63. 843 F.2d at 1548. Further, "[a]ll reflect, in common with section 10(b), the purpose of the original Securities Act of 1933: to 'provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.'" Id. (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 728 (1975)).

64. Id. at 1550.


66. See supra text accompanying note 56; see also Bloomenthal, supra note 8, at 275 nn.262-63.

67. 843 F.2d at 1549.

68. Id. at 1550. The court in Data Access, unlike the Court in Lampf, did not specify exactly from which statute it borrowed, although it appears that the relevant language came from 15 U.S.C. § 77m. See supra note 5.
III. THE FACTS OF Lampf v. Gilbertson

From 1979 to 1981, several investors purchased units in seven Connecticut limited partnerships. The partnerships were formed for the purpose of purchasing and leasing computer hardware and software. The law firm of Lampf, Pleva, Lipkind, Prupis & Petigrow helped organize the partnerships. The firm provided legal services, which included preparation of an opinion regarding the tax consequences of investing in the partnerships. Investors purchased units in the partnerships as part of a planned tax shelter. The partnerships ultimately failed, "due in part to technological obsolescence of their wares."

In late 1982 and early 1983, the investors learned that the Internal Revenue Service ("IRS") was investigating the partnerships. The IRS eventually disallowed various claimed tax deductions because of overvaluation of partnership assets and lack of profit motive. On November 3, 1986 and June 4, 1987 several investors filed complaints in the United States District Court for the District of Oregon, naming as defendants the law firm and others who prepared the offering statement for the partnership. The complaints alleged that defendants violated section 10(b) and rule 10b-5 by inducing plaintiffs to invest in the partnerships by misrepresenting material facts in the offering statements. Specifically, plaintiffs alleged that the offering statements assured potential investors that the partnership would generate a profit, that the products were marketable, that equipment appraisals were accurate and reasonable, and that the investments would entitle them to tax benefits. Plaintiffs further alleged that they did not become aware of the alleged misrepresentations until 1985, when the IRS disallowed the tax deductions.

The district court consolidated the actions for discovery and pretrial proceedings. The court granted defendant's summary judgment motion, ruling that, according to controlling precedent, the actions were not timely filed. The court held that Oregon's two-year period of limitations applicable to fraud governed the actions. The court determined that plaintiffs had notice of the alleged fraud as early as 1982 and ruled that there were not sufficient grounds to toll this period.

The Court of Appeals for the Ninth Circuit reversed and remanded. The court of appeals agreed that Oregon's two-year period for fraud

70. Id. at 2776.
71. Id.
72. Id. at 2776-77.
73. Id. at 2777 (citing Robuck v. Dean Witter & Co., 649 F.2d 641 (9th Cir. 1980)).
74. Id. (citing ORE. REV. STAT. § 12.110(1), (4) (1989)).
75. Id.
76. Id.
claims applied, but remanded ordering the trial court to determine when plaintiffs had actual or constructive knowledge of the alleged fraud. In so holding, the appellate court rejected defendants' claim that a federal limitations period applied.

Because of the "divergence of opinion" among the circuits, the Supreme Court granted certiorari and ruled that the proper period of limitations for section 10(b) and rule 10b-5 claims should come from the Securities Exchange Act of 1934 itself. The Court, therefore, reversed the decision of the Ninth Circuit Court of Appeals.

IV. THE SUPREME COURT'S ESTABLISHMENT OF A UNIFORM PERIOD OF LIMITATIONS FOR SECTION 10(b) AND RULE 10b-5 CLAIMS

When the Supreme Court established a uniform period of limitations for section 10(b) and rule 10b-5 claims, it outlined a unique approach applicable to implied causes of action. First, the court noted that when Congress has failed to provide a statute of limitations, a strong preference exists in favor of the absorption doctrine. The Court noted that while this preference finds its roots in the Rules of Decision Act, Congress, in enacting remedial legislation, ordinarily "'intends by its silence that we borrow state law.' " However, the Court also noted, however, that exceptions to this rule exist because state legislatures, in enacting statutes of limitation, rarely consider federal interests. When use of the absorption doctrine would frustrate federal policies at stake, courts may abandon the preference for state limitations periods. However, because the preference for the absorption doctrine is so strong, courts should resort to federal limitations periods "'only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes."' From the decisions rendered in DelCostello, Wilson, Malley-Duff, and Data Access, the Court "distill[ed] a hierarchical inquiry" to determine the appropri-

77. Id.
78. Id.
80. 111 S. Ct. at 2781.
81. Id. at 2783.
84. 111 S. Ct. at 2778 (quoting Malley-Duff, 483 U.S. 143, 147 (1987)).
85. Id. (citing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)).
86. Id.
87. Id. (quoting Reed v. United Transp. Union, 488 U.S. 319, 324 (1989)).
statute of limitations for a federal cause of action where Congress has failed to provide one.99

First, the Court examined whether claims filed under section 10(b) and rule 10b-5 require a uniform period of limitations, or whether each claim should require an individual determination that considered the factual and legal questions presented.99 If a need exists for a uniform limitations period, the next question is whether state or federal law should govern.99

A crucial factor in making this determination is the geographic nature of the claim:

"The multistate nature of [the federal cause of action at issue] indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would 'virtually guarantee[e] . . . complex and expensive litigation over what should be a straightforward matter.'"99

The Court reemphasized the presumption in favor of borrowing state law and ruled that federal law should be borrowed only if it supplied a clearly closer analogy.99

Although the Court outlined its analysis in detail, it was merely paying lip service to prior precedent. The Court determined that implied causes of action, such as those asserted under section 10(b) and rule 10b-5, deserved unique attention, while express causes of action, without their own limitations periods, would still be subject to the above analysis.99

The Court first noted that claims under section 10(b) and rule 10b-5 have "nontraditional origins" because they were judicially created.99 Although the Supreme Court has "repeatedly recognized the validity of such claims, [it] made no pretense that it was Congress's design to provide the remedy afforded."99 Against this backdrop the Court in Lampf "faced . . . the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed."99 Where a cause of action is implied under a specific section of a statute that also contains express causes of action with provisions for periods of limitation, the Court decided it should look first to

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88. Id. at 2778-79.
89. Id. at 2779 (citing Wilson v. Garcia, 471 U.S. 261, 273-75 (1985)).
90. Id.
91. Id. (quoting Agency Holding Corp. v. Malley-Duff, 483 U.S. 143, 154 (1987)).
92. Id.
93. Id. at 2779-81.
94. Id. at 2779. See supra text accompanying notes 16-23.
95. 111 S. Ct. at 2780 (citations omitted).
96. Id.
the periods of limitation contained in the statute of origin. The Court based this conclusion upon the belief that there is "no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." When the statute of origin does contain express periods of limitation, as is the case with section 10(b) and rule 10b-5, the inquiry is at an end; however, if, and only if, the statute of origin contains no statute of limitation for an analogous counterpart, should courts resort to state law.

Applying this test to the facts of Lampf, the Court held the "express remedial provisions [of the 1934 Act] represent 'a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.'"

Upon selecting a specific provision from the 1934 Act, the Court noted that sections 9 and 18, which relate to misleading filings, "target the precise dangers that are the focus of §10(b)" and that each was intended to remedy the same evil.

The Court used this analysis to buttress an argument proffered by the Securities Exchange Commission ("SEC") appearing as amicus curiae. The SEC agreed with the use of a uniform federal period, but urged the application of the five-year provision found in section 20A of the 1934 Act. The Court observed that this section, added by the Insider Trading and Securities Fraud Enforcement Act of 1988, was designed to remedy specific violations, namely insider trading. To counter the Court's conclusion, the SEC maintained that section 10(b) claims may be subject to two different statutes of limitation because "some conduct that is violative of §10(b) is also actionable under §20A." The Court ob-

97. Id.
98. Id.
99. Id.
100. Id. (quoting DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 169 (1983)).
102. 111 S. Ct. at 2781. Each was intended to "protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets, and to impose regular reporting requirements on companies whose stock is listed on the national securities exchanges." Id. (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1978)).
105. 111 S. Ct. at 2781.
106. Id.
served, however, that section 20A violations would also be actionable under other provisions of the 1934 Act that have different express limitations periods.\textsuperscript{107} The Court dismissed the SEC's final argument that adopting a three-year period of repose would frustrate the policies of section 10(b), noting the numerous provisions that indicate otherwise by including such limitations schemes.\textsuperscript{108}

Finally, the Court addressed the issue of equitable tolling.\textsuperscript{109} Plaintiffs contended that the doctrine of equitable tolling should apply such that:

"[W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."\textsuperscript{110}

The Court concluded, however, that "the tolling doctrine is fundamentally inconsistent with the 1-and-3-year period."\textsuperscript{111} This conclusion is premised on the fact that the one-year period begins after discovery of the facts constituting the alleged fraud and, thus, the three-year period is nothing more than an outside limit.\textsuperscript{112} The Court held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 . . . must be commenced within one year after discovery of the facts constituting the violation and within three years after such violation."\textsuperscript{113} The Court, therefore, reversed the decision of the Ninth Circuit Court of Appeals and dismissed plaintiffs' complaint.\textsuperscript{114}

Although he recognized the precedential value of DelCostello, Wilson, and Malley-Duff, Justice Scalia concurred in the judgment, noting his continued disagreement with the methodology employed in those decisions.\textsuperscript{115} In Scalia's view, if no federal period exists, courts should first look to state law or, if state law conflicts with federal policy, no limitations period should apply.\textsuperscript{116} However, he did concede that by applying his view, injustices would result "to those who must litigate past inventions."\textsuperscript{117} Although he disagreed with the methodology of recent prece-

\begin{itemize}
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id. at 2782. See Bloomenthal, supra note 8, at 278-91.
\item \textsuperscript{110} 111 S. Ct. at 2782 (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874)).
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. See Bloomenthal, supra note 8, at 288.
\item \textsuperscript{113} 111 S. Ct. at 2782.
\item \textsuperscript{114} Id. at 2782-83.
\item \textsuperscript{115} Id. at 2783 (citing Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 157-70 (1987)) (Scalia, J., concurring in judgment).
\item \textsuperscript{116} Id. (Scalia, J., concurring in judgment).
\item \textsuperscript{117} Id. (Scalia, J., concurring in judgment).
\end{itemize}
dent, he accepted that, for implied causes of action, resort to the statute of origin was the most reasonable approach.\textsuperscript{118}

V. THE MINORITY VIEWS

In his dissent, Justice Stevens, joined by Justice Souter, agreed with the majority that a uniform federal period should apply; however, he argued that establishing the period of limitations is the responsibility of Congress, not the judiciary.\textsuperscript{119} The reasons he gave for his position are especially significant given that:

\begin{quote}
[\textit{w}hen a legislature enacts a new rule of law governing the timeliness of legal action, it can—and usually does—specify the effective date of the rule and determine the extent to which it shall apply to pending claims. When the Court ventures into this lawmaking arena, however, it inevitably raises questions concerning the retroactivity of its new rule that are difficult and arguably inconsistent with the neutral, non-policy making role of the judge.\textsuperscript{120}
\end{quote}

Justice Stevens also noted that, while he agreed with the majority’s policy reasons, they were insufficient to justify departing from the well-established absorption doctrine.\textsuperscript{121}

Justice O’Connor, joined by Justice Kennedy, also dissented.\textsuperscript{122} She and Justice Kennedy agreed that the Court should adopt a one-year-from-discovery rule, but not the three-year period of repose.\textsuperscript{123} She wrote separately to express her disagreement with the majority’s retroactive application of the new period of limitations to the litigants in the instant case.\textsuperscript{124}

As Justice O’Connor noted, when plaintiffs filed this action, their claims were governed by the state statute of limitations most analogous to their claim.\textsuperscript{125} Binding Ninth Circuit precedent that had been in existence for over thirty years mandated that result, and the same held true throughout the appellate process.\textsuperscript{126} Thus, plaintiffs were entirely justified in relying on this precedent with regard to the timeliness of their suit.\textsuperscript{127}

\begin{footnotes}
\item 118. Id. (Scalia, J., concurring in judgment).
\item 119. Id. at 2783-85 (Stevens, J., dissenting).
\item 120. Id. at 2784 (citing Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971); In re Data Access Sys. Sec. Litig., 843 F.2d 1537, 1551 (3d Cir. 1988) (Seitz, J., dissenting)) (citations omitted).
\item 121. Id. at 2785 (Stevens, J., dissenting).
\item 122. Id. at 2785-88 (O’Connor, J., dissenting).
\item 123. Id. at 2785 (O’Connor, J., dissenting). See infra text accompanying notes 140-53.
\item 124. Id. at 2785 (O’Connor, J., dissenting).
\item 125. Id. (O’Connor, J., dissenting).
\item 126. Id. at 2785-86 (O’Connor, J., dissenting).
\item 127. Id. at 2786 (O’Connor, J., dissenting).
\end{footnotes}
Nonetheless, "the Court shut[] the courthouse door on respondents because they were unable to predict the future."\textsuperscript{128}

The majority's cursory approach in abandoning the rule established in \textit{Chevron Oil Co. v. Huson}\textsuperscript{129} probably prompted Justice O'Connor to write separately.\textsuperscript{130} \textit{Chevron} set out a three part test to determine whether a new statute of limitations would be applied retroactively.\textsuperscript{131} First, if the new rule overrules clearly established precedent, it should only apply prospectively.\textsuperscript{132} Second, if retroactivity does not advance the purposes of the underlying statute, it should be applied only prospectively.\textsuperscript{133} Finally, the new rule should be applied only prospectively if retroactive application would produce inequitable results.\textsuperscript{134} Justice O'Connor applied that test to the facts of \textit{Lampf} and determined that all of the factors were met:

First, in adopting a federal statute of limitations, the Court overrules clearly established Circuit precedent; the Court admits as much. Second, the Court explains that "the federal interes[t] in predictability" demands a uniform standard. I agree, but surely predictability cannot favor applying retroactively a limitations period that the respondent could not possibly have foreseen. Third, the inequitable results are obvious.\textsuperscript{135}

Accordingly, even if Justice O'Connor had agreed with the statute of limitations selected by the majority, she would have remanded to determine the timeliness of plaintiffs' lawsuit.\textsuperscript{136}

Justice Kennedy wrote separately in dissent on the issue of the three-year period of repose.\textsuperscript{137} He felt that "a 3-year absolute time bar is inconsistent with the practical realities of § 10(b) litigation and the congressional policies underlying that remedy."\textsuperscript{138} In his view, such a period of repose conflicts with traditional limitation periods for fraud-based actions, diminishes the usefulness of section 10(b) in protecting defrauded

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128. \textit{Id.} (O'Connor, J., dissenting).
130. 111 S. Ct. at 2786. "Part IV of the Court's opinion comprises, after all, only two sentences: the first sentence sets out the 1- and 3-year rule; the second states that respondents' complaint is untimely for failure to comply with the rule." \textit{Id.} Justice O'Connor was clearly disturbed by the Court's "matter-of-fact handling of the retroactivity issue." \textit{Id.}
131. 404 U.S. at 106-07.
132. \textit{Id.}
133. \textit{Id.}
134. \textit{Id.}
135. 111 S. Ct. at 2787 (O'Connor, J., dissenting) (citations omitted).
136. \textit{Id.} at 2788 (O'Connor, J., dissenting).
137. \textit{Id.} at 2788-90 (Kennedy, J., dissenting).
138. \textit{Id.} at 2790 (Kennedy, J., dissenting).
\end{flushleft}
investors, and imposes severe limitations on section 10(b) claims, which have become ever more important in today’s society. First, Justice Kennedy noted that the three-year period of repose is inconsistent with traditional periods used for section 10(b). He observed that in most states, the limitations period does not begin to run until discovery of the fraud. Further, in those states that have periods of repose, the shortest period is five years. Second, “[t]he practical and legal obstacles to bringing a private § 10(b) action are significant.” Each claim requires: (1) proof of a “false or misleading statement or material omission;” (2) “reliance thereon;” (3) damages; and (4) “scienter on the part of the defendant.” In today’s complex securities markets, these factors may be difficult to prove. More importantly, the most difficult task of all will be discovering that a violation ever occurred at all, because “[c]oncealment is inherent in most securities fraud cases.” Ernst & Ernst v. Hochfelder provides an extreme example of effective concealment. In Ernst & Ernst, a stockbroker’s suicide note led to the discovery of the fraud twenty-five years after the violation.

Finally, Justice Kennedy criticized the majority’s use of the statute in question because it comes from an express cause of action that differs from section 10(b) and is rarely pursued. Justice Kennedy also noted that the litigants in Lampf should be allowed to rely on settled Ninth Circuit precedent, joining Justice O’Connor’s dissenting opinion in that respect.

VI. Analysis

Although the title of this Article indicates the author’s disapproval of the Court’s result in Lampf, there are many reasons to applaud the Court’s decision. The absence of a uniform limitations period in section 10(b) and rule 10b-5, to use the words of Judge Easterbrook, was “one tottering parapet of a ramshackle edifice. Deciding what features of state
periods of limitation to adopt for which federal statutes wastes untold hours.\textsuperscript{166} The situation prior to the decision in \textit{Lampf} presented great dangers of forum shopping.\textsuperscript{181} The need for a uniform federal limitations period was compelling:

In the context of federal securities regulation . . . the use of state law has disserved not only the federal courts but litigants, the bar, and the investment community. As the current chaotic state of the law demonstrates, no state law is readily applicable to the federal rights sought to be enforced. Furthermore, deference to state law is not warranted because federal, not state, interests are involved in the federal courts’ creation and application of the implied private right of action under section 10 and rule 10b-5.\textsuperscript{185}

Even after \textit{Data Access}, few district courts\textsuperscript{163} and only two circuit courts\textsuperscript{184} followed the reasoning eventually employed by the Supreme Court in \textit{Lampf}. Thus, Supreme Court adjudication was needed to resolve conflicting positions among the federal courts.

On its face, the decision reached in \textit{Lampf} makes perfectly good sense. The Court’s initial inquiry guided it toward federal law,\textsuperscript{166} which is contrary to the absorption doctrine and the decisions in \textit{DelCostello}, \textit{Wilson}, and \textit{Malley-Duff}. But, if the courts imply a cause of action from an Act that also creates express causes of action, logic dictates turning to the statute of origin to ascertain what the enacting legislature would have done.\textsuperscript{166} Moreover, even if the court had applied the \textit{DelCostello-Wilson-Malley-Duff} analysis to the facts in \textit{Lampf}, it probably would have reached the same result. First, there is a definite need for uniformity in section 10(b) and rule 10b-5 claims.\textsuperscript{187} Next, because of the multi-state nature of these claims, a uniform federal limitations period best serves the statute’s purposes.\textsuperscript{188} Finally, the federal policies are best served by

\begin{itemize}
\item[150.] \textit{In re Data Access Sys. Sec. Litig.}, 843 F.2d 1537, 1539-40 (quoting Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.), cert. denied, 484 U.S. 943 (1987)).
\item[151.] \textit{See supra} text accompanying notes 64-66.
\item[152.] Beasley, \textit{supra} note 32, at 666.
\item[154.] \textit{See} Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 2887 (1991); Ceres Partners v. GEL Assoc., 918 F.2d 349 (2d Cir. 1990).
\item[155.] \textit{See supra} text accompanying notes 97-99.
\item[156.] \textit{See supra} text accompanying note 98.
\item[157.] \textit{See supra} text accompanying notes 40-45, 59, 152.
\item[158.] \textit{See supra} text accompanying notes 56, 63-66.
\end{itemize}
limitations periods within the Act itself and, thus, the federal period clearly provides a closer analogy.  

Despite the foregoing, a critical analysis of the Lampf opinion reveals many shortcomings. The first problem was the Court's decision to apply the new period of limitations retroactively and, thus, effectively bar these and other plaintiffs' claims altogether.  

Another shortcoming was the establishment of an absolute three-year period of repose.  

Probably the most disturbing aspect of Lampf was the Court's decision to apply the new limitations period retroactively, thus dismissing plaintiffs' suit. Even more surprising was the Court's cursory treatment of the issue. Part IV of the Court's opinion merely states that the new limitations period is one year from discovery of the facts constituting the alleged fraud and at most three years from the violation and then concludes that plaintiffs' claim was time-barred. Before Lampf, it was a well-settled rule that most new statutes of limitation would apply prospectively. Plaintiffs in Lampf had justifiably relied on prior Ninth Circuit precedent that would have used state periods of limitation applying the doctrine of equitable tolling. As Justice O'Connor put it: "[q]uite simply, the Court shuts the courthouse door on respondents because they were unable to predict the future."  

To make matters worse, the same day that Lampf was decided, the Supreme Court handed down its decision in James B. Beam Distilling Co. v. Georgia ("Jim Beam"). The basic import of the Court's holding in Jim Beam is that "where the Court applies a new rule retroactively to one set of litigants, the same rule must be applied to all other litigants as a matter of equality and stare decisis." This holding immediately impacted section 10(b) litigation. In Welch v. Cadre Capital, the Second Circuit Court of Appeals applied the Chevron test and determined that a federal statute of limitations in a section 10(b) claim should not be ap-

159. See supra text accompanying note 58.  
161. Id. at 2782.  
162. Id. at 2782-83. See infra note 188.  
163. 111 S. Ct. at 2782-83; see also supra note 130.  
164. See supra text accompanying notes 129-36.  
165. See supra text accompanying notes 125-27.  
166. 111 S. Ct. at 2786 (O'Connor, J., dissenting).  
170. See supra text accompanying notes 129-34; see also Feldman & Neuman, supra note 168, at 182.
plied retroactively.\textsuperscript{171} However, after granting certiorari,\textsuperscript{172} the Supreme Court vacated and remanded for determination in light of \textit{Lampf} and \textit{Jim Beam}.\textsuperscript{178} Other section 10(b) and rule 10b-5 cases originally filed in reliance on the absorption doctrine likely will be dismissed, based upon \textit{Lampf}, simply because the litigants were "unable to predict the future."\textsuperscript{174} Moreover, though \textit{Chevron} is still good law, its import is extremely limited.\textsuperscript{176}

Justice Kennedy identified another shortcoming of the decision in \textit{Lampf} in his dissenting opinion.\textsuperscript{178} He agreed that a uniform federal period with a one-year-from-discovery rule should apply but disagreed with the three-year period of repose.\textsuperscript{177} Although many of the limitations periods the 1934 Act provides are similar to the one the Court adopted in \textit{Lampf},\textsuperscript{178} the three-year period of repose disserves the federal policies at stake in section 10(b) and rule 10b-5 litigation: "[t]he federal three-year absolute limitation applicable to expressly created private actions has been criticized, however, as too short for 10b-5 actions, because plaintiffs, particularly in complex cases, frequently do not discover fraud until long after its perpetration."\textsuperscript{179} Many courts chose the longer period of limitations applicable to state common law fraud for that reason:\textsuperscript{180} "The longer limitations period has been seen as consistent with the federal policy of liberal availability of the 10b-5 remedy."\textsuperscript{181} Further, longer limitation periods best serve "the broad remedial policies of the federal securities laws."\textsuperscript{182} The purpose of section 10(b) supports application of the many

\textsuperscript{171} 923 F.2d at 995.
\textsuperscript{172} 111 S. Ct. 2882 (1991).
\textsuperscript{173} Id. at 2882-83. Subsequently, the case was vacated and superseded. 946 F.2d 185 (2d Cir. 1991).
\textsuperscript{174} 111 S. Ct. 2777, 2786 (1991) (O'Connor, J., dissenting). See infra note 188.
\textsuperscript{175} Justice Souter stated that the decision in \textit{Jim Beam} did not overrule \textit{Chevron}. While that is literally true, \textit{Jim Beam} did greatly limit the applicability of \textit{Chevron}. As a result of \textit{Jim Beam}, the \textit{Chevron} analysis can henceforth be employed in only one, and possibly two, circumstances. First, a \textit{Chevron} analysis can be employed in the law-changing case to determine whether the new rule should be applied to the litigants before the court. Second, if the court determines that the new rule should not be applied retroactively, it remains an open question whether the \textit{Chevron} analysis should be used in subsequent cases posing the identical question.

Feldman & Neuman, supra note 168, at 182 n.27.
\textsuperscript{176} See supra text accompanying notes 137-49.
\textsuperscript{177} See id.
\textsuperscript{178} 111 S. Ct. at 2780-81.
\textsuperscript{179} Beasley, supra note 32, at 666.
\textsuperscript{180} See supra text accompanying note 30.
\textsuperscript{181} Beasley, supra note 32, at 648.
\textsuperscript{182} Beasley, supra note 32, at 648 n.29 (quoting United Cal. Bank v. Salik, 481 F.2d at 1015 (9th Cir.), cert. denied, 414 U.S. 1004 (1973)).
suggested alternative periods rather than the three-year absolute period of repose adopted by the Court.\footnote{183}

VII. CONCLUSION

Although the above shortcomings are serious in nature, the Court was not really free to fashion its own period of limitations as this would have been "too lawless to be imagined."\footnote{184} Creating new law is really an arena for the legislature.\footnote{185} The Court conducted a reasoned analysis and reached the most logical answer short of resorting to judicial legislation. However, retroactive application of the decision was extremely unjust to the litigants in \textit{Lampf}.\footnote{186} Moreover, a three-year period of repose will hinder the effectiveness of section 10(b) and rule 10b-5.\footnote{187} Hopefully, Congress will respond to this serious deficiency in the law. Unfortunately such action will do nothing to redress plaintiffs in \textit{Lampf} or in many presently pending actions, for "even if prompt congressional action is taken, it will not avail defrauded investor's caught by the Court's new and unforgiving rule, here applied on a retroactive basis to a pending action."\footnote{188}

\textbf{ALEXANDER T. GALLOWAY III}

\footnote{183. Beasley, \textit{supra} note 32, at 656-57.}
\footnote{184. 111 S. Ct. 2777, 2783 (1991) (Scalia, J., concurring in judgment).}
\footnote{185. \textit{Id.} at 2783-84 (Stevens, J., dissenting).}
\footnote{186. See \textit{supra} text accompanying notes 162-66.}
\footnote{187. See \textit{supra} text accompanying notes 137-49.}
\footnote{188. 111 S. Ct. at 2790 (Kennedy, J., dissenting). Subsequent to the writing of this Article, Congress, in apparent recognition of the validity of the author's criticisms of the retroactive application of the decision in \textit{Lampf}, amended the Securities Exchange Act of 1934. The amendment, to be codified at 15 U.S.C. § 78aa-1, provides:}

\begin{quote}
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. Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
\begin{enumerate}
\item which was dismissed as time barred subsequent to June 19, 1991, and
\item 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,
\end{enumerate}
shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.
\end{quote}

However, it should be noted that several district courts have been called upon to determine the constitutionality of this new legislation. This constitutional scrutiny involves deciding whether § 78aa-1 violates the separation of powers doctrine, and whether the statute is "irrational and creates arbitrary classifications in contravention of the Fifth Amendment's