A Little Bit of Laches Goes a Long Way:
Notes on *Petrella v. Metro-Goldwyn-Mayer, Inc.*

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Introduction

The famous Martin Scorsese movie *Raging Bull*, and ancient doctrines of equity, will make a joint appearance later this month at the U.S. Supreme Court. On January 21st, 2014, the Court will be hearing arguments in *Petrella v. Metro-Goldwyn-Mayer, Inc*.[2] The case involves copyright infringement claims about the movie, and about the extent to which those claims are barred by the doctrine of laches.

Laches is a defense that was developed by courts of equity, and it is typically raised in cases where a plaintiff has delayed her suit without good reason. *Petrella* raises two big questions about how laches fits into contemporary American law. One is whether it applies to all remedies or only to equitable remedies. The other is how it is affected by a federal statute of limitations. Is laches displaced, on the theory that Congress has spoken by enacting the statute of limitations, and that it would violate separation of powers for a court to substitute its own equitable doctrines? Or does laches remain and coexist with the statute of limitations, on the theory that Congress legislates against the background of traditional equitable principles?

The parties in *Petrella* offer diametrically opposite answers to these questions. The petitioner, who lost below because the lower courts

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[2] Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946 (9th Cir. 2012), *cert. granted*, 134 S. Ct. 50 (No. 12-1315, 2013 Term).

invoked laches, has argued that laches is entirely precluded because Congress enacted a statute of limitations.[3] On the other hand, the respondents are defending the Ninth Circuit position that in copyright cases the defense of laches applies to all remedies, no matter whether they are legal or equitable.[4] Between these extremes of laches for *no remedies* and laches for *all remedies* lies a better course.[5]

This essay examines the doctrine, history, and theory of laches. It reaches two conclusions. First, laches is and should be limited to equitable remedies. Second, the defense of laches is available unless Congress makes a clear statement abrogating it, and the mere enactment of a statute of limitations is not a clear statement of abrogation. Given these conclusions, the Court should take a middle course in *Petrella*: Retain laches, but apply it only to equitable remedies.

I. Laches Is and Should Be an Equitable Defense

Laches is a defense that can be invoked when the plaintiff has delayed in bringing a suit. But laches is not concerned merely with the fact of delay. It matters *why* the plaintiff delayed to bring the claim, and what *effect* that delay had on the defendant. (In doctrinal terms, the delay must be "unreasonable" and cause "prejudice."[7]) It is this focus on considerations other than the mere passage of time that strongly distinguishes laches from statutes of limitations.[8]

Laches "is an equitable defence, controlled by equitable considerations."[9] Indeed, this has been said so many times that it would

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[3] *See* Brief for Petitioner, Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315 (U.S. Nov. 22, 2013).

[4] *See* Brief for Respondents, Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315 (U.S. Nov. 22, 2013).

[5] An intermediate position is also urged by the amicus brief of three leading remedies scholars. *See* Brief of Douglas Laycock, Mark P. Gergen, and Doug Rendleman as Amicus Curiae in Support of Neither Side, Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315 (U.S. Nov. 22, 2013). This essay diverges from that brief by arguing that laches does and should apply only to equitable remedies.

[7] 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION 103 (2d ed. 1993).

[8] *See, e.g.*, Galliher v. Cadwell, 145 U.S. 368, 373 (1892).

[9] Halstead v. Grinnan, 152 U.S. 412, 417 (1894). This essay describes the restriction of laches to equity as the traditional rule. It takes no position on when in the history of equity that traditional rule developed.

hardly seem to be in doubt. Nevertheless, for nearly a century American scholars have vigorously championed the removal of all distinctions between law and equity,[10] including the traditional restriction of equitable defenses to equitable remedies.[11] Over time, that restriction on the equitable defenses has frayed around the edges, and cases can be found where state and federal courts have applied equitable defenses to legal remedies.[12]

The surprising thing is how rare those cases are. In the mine run of cases the traditional rule still holds: laches applies to equitable remedies and only to equitable remedies.[13] In other words, it typically applies to injunctions, specific performance, constructive trusts, and accounting for profits,[14] but not to legal remedies.[15] Thus when a plaintiff seeks both

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[10] *See e.g.*, Zechariah Chafee, Jr., *Foreword*, SELECTED ESSAYS ON EQUITY iii, iv (Edward D. Re ed. 1955); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBLEMS 53, 53-54, 81-82 (1993); Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1046-1060 (2011); *but cf.* Henry E. Smith, *An Economic Analysis of Law versus Equity* (March 2012 draft); Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990). On the debate outside the United States, see Joshua S. Getzler, *Patterns of Fusion*, in THE CLASSIFICATION OF OBLIGATIONS 157, 159-163 (Peter Birks ed. 1997) ("[T]he wind now blows the other way, with courts favouring the continued distinction of legal and equitable doctrine.").

[11] *See, e.g.*, ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 94 (1950); T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L.J. 63 (2010-2011).

[12] *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946 (9th Cir. 2012); Harris v. Beynon, 570 F. Supp. 690, 692 n.3 (N.D. Ill. 1983); *see also* Eric Fetter, Note, *Laches at Law in Tennessee*, 28 U. MEM. L. REV. 211 (1997) (noting, and critiquing as an outlier, the application of laches to legal claims by Tennessee courts).

[13] *See, e.g.*, Fischbach v. Fischbach, 187 Md. App. 61, 90, 975 A.2d 333, 350 (2009); Dutcher v. Vandeloo, 34 Misc. 3d 1223(A), 946 N.Y.S.2d 66 (N.Y. Sup. Ct. 2012); Wyler Summit Partnership v. Turner Broad. Sys., Inc., 235 F.3d 1184, 1193 (9th Cir. 2000) (applying California law).

[14] *See, e.g.*, 1 DOBBS, *supra* note 7, at 103 ("A plaintiff guilty of laches may be barred from recovery of any kind of equitable remedy, including injunctions, specific performance, and equitable accounting."); 2 SPENCER W. SYMONS, POMEROY'S TREATISE ON EQUITY JURISPRUDENCE 169 (5th ed. 1941) (describing the principle that "equity aids the vigilant, not those who slumber on their rights" as "operating throughout the remedial portion of equity jurisprudence").

[15] *See* United States v. Mack, 295 U.S. 480, 489 (1935); 1 DOBBS, *supra* note 7, at 104. Thus the Court was leaning in the right direction, though overstating the point, when it said that "application of the equitable defense of laches in an action at law would be

legal and equitable relief, laches can knock out some or all of the requested *equitable* relief but the *legal* relief remains available.[16]

Nor was any of this changed by the adoption of the Federal Rules of Civil Procedure in 1938. The adoption of the Rules brought a unified procedure, with many of its elements being borrowed from equity practice.[17] But the Rules were not understood as changing the requirements for equitable remedies in federal court.[18] Thus courts have specifically held that the merger of law and equity, whether by the federal Rules or by their state counterparts, did not change the principle that laches applies only to equitable remedies.[19]

In short, the current state of the law is described this way by the leading treatise on remedies: "When laches does not amount to estoppel or waiver, it does not ordinarily bar legal claims, only equitable remedies. . . . Courts have routinely referred to laches as an equitable defense, that is, a defense to equitable remedies but not a defense available to to bar a claim of legal relief."[20]

It is not enough, though, to merely note the persistence of the traditional rule that laches is an equitable defense good only against equitable remedies. One must also ask whether it makes any sense. The old distinction between legal and equitable remedies is rooted in English political history, and by the seventeenth century the distinction was caught up in struggles over royal discretionary power. But the fact that the distinction came about through historical accident does not tell us

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novel indeed." *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 245 (1985).

[16] *See, e.g.*, Nilsen v. City of Moss Point, Miss., 674 F.2d 379, 388 (5th Cir. 1982) *affirmed on reh'g*, 701 F.2d 556 (5th Cir. 1983); DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 399 (8th ed. 2011).

[17] *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[18] *See* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power – A Case Study*, 75 NOTRE DAME L. REV. 1291, 1319 (2000) ("Laboring in the mid-1930s, the rulemakers were well aware of the delicacy of the subject of federal injunctions, and they consciously chose to treat the subject lightly, taking the provisions of Rule 65 bodily" from existing statutes and rules) (internal quotation marks and footnotes omitted)).

[19] *See, e.g.*, Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 798 (4th Cir. 2001); Smith v. Gehring, 496 A.2d 317, 323-325 (Md. Ct. Spec. App. 1985).

[20] 1 DOBBS, *supra* note 7, at 104, 105-106.

whether it should be kept or discarded. The contemporary usefulness of the line between legal and equitable remedies, and of the restriction of laches to the latter, are separate questions from those of historical origins.

In most American jurisdictions there are no longer equitable courts, equitable procedures, or substantive areas of the law that are considered equitable. But equitable remedies largely remain distinct. They still form a separate remedial domain with a number of distinctive doctrines, including special defenses, ripeness standards, rules for ex post modification, and enforcement mechanisms.

This set of equitable remedies and related rules has its own logic and coherence, and that logic can be weakened if one piece at a time is pulled out. The logic works like this:

(1) Every legal system needs remedies that compel action or inaction by parties, beyond merely the payment of money. In our system those remedies are primarily equitable.

(2) Once those remedies compelling action or inaction are in place, a legal system will need devices that allow the court to manage the compliance of the parties by observing and responding to violations. In our system many of those devices are exclusive to equitable remedies, such as the requirement that the court's instruction be specific, the possibility that the court may impose contempt sanctions, the ample opportunities to modify or dissolve the remedy as circumstances change, the permissibility of prophylactic requirements as part of the remedy, and the appointment of "equitable helpers" such as monitors and receivers.[21]

(3) Once those managerial devices are in place, a legal system will need means of channeling their proper use and restraining their misuse – especially because of the degree to which these remedies can burden judicial resources and infringe on individual liberty.[22] This is where the equitable defenses fit, as well as a number of other equitable doctrines.

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[21] For discussion of these and other managerial devices that enhance the injunction, see Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. (forthcoming 2014).

[22] On judicial resources, see *id.* On liberty infringement, see Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642 (1992); *but see* Laycock, *Triumph of Equity*, *supra* note 10, at 79-80 (arguing that "if our goal is to limit abuse of

In short, certain kinds of remedies are needed, those remedies require devices for the court to manage the parties, and those remedies and managerial devices need special restraints (because of their administrative costs and potential for abuse). In our legal system, this is roughly speaking the logic of equitable remedies, equitable enforcement, and equitable constraints.

Laches fits into the logic at step three: it is one of the constraints on equitable remedies. To be clear, it is not a constraint on a judge's conscious misuse of equitable remedies. It is after all discretionary. And what it does can often be achieved through other doctrines. But laches, like many of the other rules constraining equity, is a way of focusing judicial attention (both at the trial and appellate level) on a set of cases in which an equitable remedy will usually be inapt.

Now in some ways the doctrine of laches that survives in American law is quite different from the traditional doctrine. When there were no statutes of limitations on claims in equity, "laches" was used to express the full range of equity's responses to the passage of time. A court of equity could *deny* relief where there had been unreasonable and prejudicial delay, or *grant* relief in the interests of justice even though decades had passed. Either way, courts of equity would emphasize traditionally equitable concerns, such as the fault of the party, the discretion of the judge, and the facts of the case. Today laches tends to be used in a narrower, negative sense, as a reason to deny equitable relief within the statutory period, rather than as wholly separate approach to the passage of time to be used in courts of equity.

Yet even for laches in its current form, there are reasons to keep the traditional restriction of laches to equitable relief. The argument that follows is not premised on the idea that laches would never be useful for legal remedies. Rather, the argument is a relative one: laches is *more* useful for equitable remedies. This relative affinity between laches and equitable remedies shows that the traditional restriction is not arbitrary.

First, compared to legal remedies, equitable remedies tend to be more vulnerable to changing circumstances. Money is money, and

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the contempt power, it is far better to limit the contempt power than to limit the scope of equity").

inflation can be calculated for damages.[24] But injunctions may become impossible as circumstances change, especially mandatory injunctions (i.e., injunctions that require, rather than prohibit, conduct by the enjoined party). Constructive trusts can be imposed only on a defined corpus, but as time passes, and funds are transferred and things are bought and sold, that sharp definition wears away. And accounting for profits becomes more difficult and error-prone as time recedes, because it depends to an unusual degree on the survival of records.[25]

Second, equitable remedies are more likely to be opportunistically abused as time passes. The amount of damages does not typically fluctuate based on conduct after the legal violation. But the "value" of an injunction, specific performance, or accounting for profits often will vary based on actions in the future. Indeed, this kind of opportunistic abuse of equitable remedies – where the plaintiff waits to see whether the value of an asset goes up or down before suing – is cited by courts as a reason to invoke laches to cut short the time allowed by a statute of limitations.[26] By contrast, the non-monetary remedies available at law tend not to involve property or profits (with the exception of replevin), and thus they are less vulnerable to this form of opportunism.

Third, equitable remedies tend to impose greater costs on the parties and on the judicial system. In part this is because of the cost for parties to comply, and in part it is because of the cost of having judges oversee that compliance. This is again a probabilistic point – a simple prohibitory injunction may be easily complied with, and a court may have to exert itself to enforce legal remedies. Nevertheless, there is a pronounced tendency for legal remedies to require something of the defendant that is sharply defined: for damages, an amount of money that can be counted; for replevin, a specific object that can be returned; for mandamus, a duty that can be performed – a duty that is so fully

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[24] To extend the point to non-monetary relief at law: the good sought in replevin is still intact, or else the plaintiff would not post the required bond; and mandamus seeks the performance of a duty that is ministerial.

[25] *See, e.g.*, Stearns v. Page, 48 U.S. 819, 828 (1849) (noting the defendant's ultimately prevailing argument that no accounting should be granted "after so great a lapse of time, when papers are lost, witnesses dead, and transactions forgotten").

[26] *See, e.g.*, Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 592-593 (1875); Haas v. Leo Feist, Inc., 234 F. 105, 108 (S.D.N.Y. 1916) (Hand, J.); *see also* 3 DOBBS, *supra* note 7, at 220-221 & nn. 27-28.

specified that it can be considered "ministerial." Equitable remedies tend to impose duties that lack such a sharp definition. True, an injunction must be specific in its requirements and prohibitions, but what an injunction is specific *about* is often performance that must be measured in qualitative terms. A constructive trust imposes the duties of a trustee – which are famously invulnerable to complete specification ex ante. And specific performance and accounting for profits also impose duties that are hard to fully specify ex ante and that can require judicial management ex post.[27]

Finally, laches is not so much a granting of judicial power as it is a way of structuring decisionmaking about the equitable powers the courts already have. Equitable remedies are not given as of right; judges have equitable discretion not to give them. That means that judges can achieve the effect of laches without ever invoking laches. It might, therefore, seem to be a pointless doctrine. But many equitable doctrines overlap in this way, and they are not the worse for doing so. Instead, as noted above, equitable doctrines focus judicial attention; they structure and guide the exercise of equitable discretion. Laches does that by calling judicial attention to the problem of abusive, prejudicial delay, in a manner fully consistent with traditional equitable concerns.[28] For those who argue that equity should no longer be thought of as distinctive, this will of course not be a persuasive argument. But for those who think equitable remedies are distinctive – for reasons of

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[27] This point would admittedly not be sufficient if it stood alone, since it shows why there should be doctrines favoring legal relief but it does not by itself indicate why one of these doctrines should concern prejudicial delay.

[28] *See* Roger Young and Stephen Spitz, *SUEM – Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175 (2003) (discussing laches in connection with the maxim that "equity aids the vigilant and diligent"). As an English chancellor said, in words often quoted by the U.S. Supreme Court:

> A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced.

Smith v. Clay, 3 Brown, Ch. 639 (1767) (Camden, Ch.).

history and the logic of equity sketched out above – applying laches only to equitable remedies is just a variation on the general themes of equity's distinctive concern with particular circumstances, abuse of rights, and good faith.

There are two main objections to the account just given. One is that limiting laches to equitable remedies will not make much difference, since the defense of estoppel is available no matter what remedy is sought. It is true that in extreme cases of laches a defendant can also raise the defense of estoppel, because with enough time delay shades into the misrepresentation that estoppel requires. But there are less extreme cases, cases where the plaintiff is guilty of prejudicial delay but not misrepresentation (and is thus subject to laches but not estoppel). Indeed, *Petrella* itself seems to be such a case. Moreover, this objection actually strengthens the argument for restricting laches to equitable remedies. Restricting laches will not lead to egregious results, because estoppel will be available for all remedies in the most extreme cases. The parade of horribles has few if any floats.

The other objection is that it would be better to go behind the law and equity proxies to just ask, in the particular case, whether laches is needed. This critique is more radical and could be extended to all of the doctrines that distinguish legal from equitable relief – we could discard the entire distinction and rely instead on purely functional analysis.[29] Yet legal systems pervasively use rules without collapsing them into the underlying functional arguments. In doing so, legal systems are often taking into account institutional constraints such as imperfect knowledge, mistaken judgment, and the cost of transmitting information to third parties. Put differently, the restriction of laches to equitable remedies is a rule (albeit a rule about when to use a standard), with all the pros and cons that being a rule implies. That is not a fault, unless it is a bad rule. But it is not. Equitable remedies are the ones that are most vulnerable to changing circumstances and opportunistic abuse as time passes, and they are more costly to provide.

In short, laches is traditionally an equitable defense. This is not an arbitrary distinction, and there is reason to keep the traditional rule as long as the line between equitable and legal remedies persists.

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[29] *See* Laycock, *Triumph of Equity*, *supra* note 10.

II. Laches in an Age of Statutes of Limitation

Another question raised by *Petrella* is about the interaction of laches with a federal statute of limitations.[30] The tension between statutes of limitations and equity is hardly new. They have coexisted in Anglo-American law for more than four centuries. What follows here is not a full history of the relationship of laches and statutes of limitations, but merely a suggestive and preliminary survey of leading cases in the U.S. Supreme Court.

The Court has had numerous cases that directly address whether the presence of a statute of limitations displaces laches. In these cases the Court routinely applied laches to bar equitable claims and remedies, notwithstanding the fact that one of the parties invoked a statute of limitations:

- In *Piatt v. Vattier*, 34 U.S. 405 (1835), rejecting an equitable claim to quiet title to real property and for an account of profits, brought after thirty years of possession by the defendant, the Court expressly chose not to base its holding on the statute of limitations for analogous claims at law but instead based it on the equitable defense of laches "independently of the statute." *Id.* at 415, 416 (using the quoted phrase three times).
- In *McKnight v. Taylor*, 42 U.S. 161 (1843), the Court applied laches to a suit to execute a trust – seemingly only months before the twenty-year statute of limitations would have run for a similar claim to recover debts at law, *id.* at 168. The Court relied on the principle that "a court of chancery refuses to lend its aid to stale demands" and that lack of "conscience, good faith, and reasonable diligence" is "always a limitation of suit in that court." *Id.*
- In *Bowman v. Wathen*, 42 U.S. 189 (1843), the Court invoked laches as grounds not to enjoin a ferry that had operated for thirty-eight years, allegedly in violation of the exclusive ferry right of the

[30] This question is distinguishable from the preceding one about whether laches should be distinctively equitable, but these two questions may be related in a subtly hydraulic way. If laches were to be extended to all remedies, judges might be more willing to reduce the circumstances in which it could be invoked. In other words, more breadth, less depth.

complainants. The Court emphasized that plaintiffs were seeking relief in equity, and that those who seek the "interposition" of a court of equity must comply with the "settled principles which govern its action," including the rejection of stale demands "independently of any statutes of limitation." *Id.* at 193-194.

- In *Stearns v. Page*, 48 U.S. 819 (1849), where the statute of limitations for account at both law and equity was six years, the Court nevertheless entertained an equitable claim for account twenty-six years after the settlement of an estate, though it denied relief because there were no allegations "stated in [the complainant's] bill, and sustained by proof, . . . as would justify the interference of a court of equity after so great a lapse of time." *Id.* at 830.
- In *Maxwell v. Kennedy*, 49 U.S. 210 (1850), where the complainant sued in equity to enforce a forty-six-year-old judgment, the Court applied laches, noting that it was "unnecessary . . . to determine whether the statute of limitations of Alabama does or does not apply," because "upon principles of equity" the complainant could not be given relief. *Id.* at 221-222.
- In *Badger v. Badger*, 69 U.S. 87 (1864), when rejecting equitable claims for fraud and account against the administrator of an estate that had been settled thirty years earlier, the Court applied laches and expressly declined to ground its decision on a statute of limitations for actions against administrators of estates.
- In *Harwood v. Railroad Co.*, 84 U.S. 78 (1872), the Court rejected a claim to set aside a judicial sale, giving as one reason that the plaintiffs had waited five years to sue and had not specified when they learned the sale was collusive, adding: "Without reference to any statute of limitations, the courts have adopted the principle that the delay which will defeat a recovery must depend on the particular circumstances of each case." *Id.* at 81.
- In *Hume v. Beale's Executrix*, 84 U.S. 336 (1872), the Court rejected a claim against trustees brought four decades after the alleged misappropriation, because the complainants' laches meant they had "disentitled themselves to the relief which they seek to obtain." *Id.* at 348. In dicta the Court added: "It is an established rule with courts of equity, independent of any statute limiting the

time in which suits can be brought, that they will not entertain stale demands." *Id.*

- In *Marsh v. Whitmore*, 88 U.S. 178 (1874), the Court rejected a seemingly meritorious claim that certain corporate bonds should be voided, because the complainant's objection was "stale" and was "vague" about the grounds for delay. The Court noted that equity could "justly refuse to consider" such a case regardless of whether the defendant had pleaded the statute of limitations. *Id.* at 184-185.
- In *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587 (1875), the Court held that a corporation could receive no relief in equity because it had waited an unreasonable length of time (four years) to sue to rescind a contract entered into by one of its directors, adding that in deciding what time was reasonable "in any particular case, we are but little aided by the analogies of the statutes of limitation." *Id.* at 592.
- In *Sullivan v. Portland & Kennebec Railroad Co.*, 94 U.S. 806 (1876), the Court applied laches to bar equitable claims brought eleven years after the statute of limitations had run, not because of that statute (because it was not pleaded), but because a court of equity can decline to give relief according to "the inherent principles of its own system of jurisprudence." *Id.* at 811.
- In *Brown v. County of Buena Vista*, 95 U.S. 157 (1877), the Court declined to give a county any relief in its suit in equity to set aside a fraudulently obtained judgment, because the county had not sued promptly. The Court noted that even though the state statute of limitations might not bar the suit, a court of equity could still apply laches based on the circumstances of the particular case. *Id.* at 160.
- In *Speidel v. Henrici*, 120 U.S. 377 (1877), the Court applied laches where a person left a commune called the Harmony Society and fifty years later sought a share of its property. The Court noted that its holding would be the same even if the case "was not strictly within the statute of limitations," because "the plaintiff showed so little vigilance and so great laches, that the circuit court rightly held that he was not entitled to relief in equity." *Id.* at 390; *see also id.* at 387 ("Independently of any statute of limitations,

courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them.").

- In *Alsop v. Riker*, 155 U.S. 448 (1894), the Court applied laches "independently of the statute of limitations" to an equitable claim seeking to make trustees personally liable, without any prejudice to legal claims that might be brought.
- In *Patterson v. Hewitt*, 195 U.S. 309 (1904), the Court applied laches to a claim to enforce a trust, notwithstanding a state statute of limitations. It did so because "we consider the better rule to be that, even if the statute of limitations be made applicable, in general terms to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired." *Id.* at 319.

Nevertheless, even while the Court was regularly applying laches, or declining to apply laches but recognizing its availability as a defense, there was also a strain of skepticism. In one case, in a long passage laying out the basic principles of laches, the Court added as an aside: "*Quaere*, whether the doctrine of laches or lapse of time can ever be invoked in a suit to which a statute of limitations applies."[32]

Furthermore, in a number of cases the Court suggested limiting principles for the use of laches when there was a relevant statute of limitations. The one most commonly invoked was a distinction between two kinds of equitable "jurisdiction."[33] If a court's equitable jurisdiction was "concurrent," which roughly meant that the case could have been brought either at law or in equity, the statute of limitations applied in equity and excluded the application of laches. But if a court had "exclusive" equitable jurisdiction, the court could ignore any

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[32] Traer v. Clews, 115 U.S. 528, 542 (1885) (citing Sheldon v. Keokuk Northern Line Packet Co., 8 Fed. Rep. 769 (W.D. Wis. 1881) (Harlan, J.)).

[33] The phrase "equitable jurisdiction" was once common. It is not a reference to *jurisdiction* in its contemporary technical sense, i.e., whether a court has power to pronounce a judgment, but rather was a shorthand for the whole "body of equitable precedents, practices, and attitudes." 1 DOBBS, *supra* note 7, at 180.

analogous statute of limitations and apply laches doctrine (either to extend or cut short the time given to the complaining party).[34]

A second limiting principle was also offered: equitable doctrines could *cut short* the time provided by a statute of limitations, but they could not *extend* it. The statute of limitations set a hard outer limit for the time in which claims could be brought; in equity that was all it did.[35]

A third limiting principle was suggested by the first Justice Harlan: where there was a statute of limitations, the doctrine of laches could be invoked only in a "clear case."[36]

What should we make of these possible limiting principles today? The first should be rejected. It rested on Justice Story's unfortunate classification of equity into three different kinds of "jurisdiction": exclusive, concurrent, and auxiliary (also called assistant or ancillary). The classification has never been consistently applied by the U.S. Supreme Court in laches cases,[37] and it is difficult, as can be seen in the historical mistakes of Justice Story and others who have tried to parcel up equitable claims, remedies, and procedures among the different

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[34] *See, e.g.*, Cope v. Anderson, 331 U.S. 461, 463-464 (1947); Russell v. Todd, 309 U.S. 280, 288-291 (1940); Elmendorf v. Taylor, 23 U.S. 152, 177-180 note *a* (1825) (Marshall, C.J.). The authority usually invoked was an ambiguous passage in 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA, § 1520, at 981-983 (4th ed. rev. corr. enl. 1846).

[35] *See* Patterson v. Hewitt, 195 U.S. 309, 318 (1904) ("[I]n equity the question of unreasonable delay *within the statutory limitation* is still open . . . ." (emphasis added)); Hayward v. Eliot Nat. Bank, 96 U.S. 611, 617 (1877) ("Courts of equity often treat a lapse of time, *less than that prescribed by the Statute of Limitations*, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right'" (quoting 2 Story, Eq. Jur., sect. 1520) (emphasis added)). Note in this regard that the strongest language in *Elmendorf v. Taylor* against applying laches where there is a statute of limitations is about applying it to *extend* the time in which a claim could be brought. *See* 23 U.S. at 178 note *a*; *see also id.* at 173-174. There also seems to have been particular concern that allowing equitable claims after the statute of limitations could undermine certainty about title to real property.

[36] Sheldon, 8 F. at 773.

[37] For example, Story offers account as the paradigmatic instance of concurrent jurisdiction, *see* 2 STORY, *supra* note 34, at § 1520, at 981, but account was requested in many of the cases where the Supreme Court invoked laches and declined to rest its decision on a statute of limitations, *see, e.g.*, Badger v. Badger, 69 U.S. 87 (1864); Piatt v. Vattier, 34 U.S. 405 (1835).

jurisdictional heads.[38] It is also nearly incoherent, as can be seen in the historic disagreements about what goes in each category.[39] If it was difficult for nineteenth-century commentators to agree on what counted as "concurrent" and "exclusive," the passage of time has not made it easier.[40] At the risk of levity, one could say that any attempt to bring back the distinction between exclusive and concurrent equitable jurisdiction should be barred by laches.

But one need not be as pessimistic about the other limiting principles for laches when it works alongside a statute of limitations. It might make good sense, where there is a statute of limitations, to allow the equitable defense of laches only to cut short the statutory time and not extend it, especially since equitable tolling doctrines now suffice for extensions of statutory time periods. This limiting principle appears to have the support of a number of commentators.[42] Nor would it be

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[38] Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEG. STUD. 659, 664-66 (2007).

[39] *Compare* Lionel Smith, *Common Law and Equity in R3RUE*, 68 WASH. & LEE L. REV. 1185, 1195 (2011) (giving injunctions and specific performance as "the core examples" of the concurrent jurisdiction); George Jarvis Thompson, *History of the English Courts to the Judicature Acts, Part II*, 17 CORNELL L.Q. 203, 215 (1932) (same) *with* Fed. Election Comm'n v. Christian Coal., 965 F. Supp. 66, 71 (D.D.C. 1997) ("[I]njunctive relief is based solely on equity's 'exclusive jurisdiction.'"); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 215 (4th ed. 1918) (classifying specific performance under equity's exclusive jurisdiction); *id.* at 221 (classifying suits for injunctions under equity's exclusive jurisdiction, "since a court of equity alone has power to grant the remedy of injunction"). *See also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 105 n. 1 (1st ed. 1886) (noting disagreement about where to place specific performance, the injunction, cancellation, bills to establish wills, bills quia timet, bills of peace, fraud, mistake, and accident).

[40] It is intriguing in this respect that one of the equity courts that linger in American law, the Chancery Court of Delaware, appears to have abandoned the distinction between exclusive and concurrent equitable jurisdiction for laches in favor of a more intelligible distinction based on whether the plaintiff is seeking legal or equitable relief. For Chancellor Allen's description of this shift, see *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271-275 (Del. Ch. 1993).

[42] *See* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 75 (2d ed. 1948) ("While equity courts cannot disregard these statutes by entertaining a suit after the term fixed by the statute has expired, they still may find a delay less than the time fixed by the statute to be unreasonable and prejudicial, and therefore to preclude recovery."); 2 SYMONS, *supra* note 14, at 175 ("[T]he defense of laches may still be sustained where the lapse of time is less than the statutory period, if grounded upon additional circumstances."); EMILY SHERWIN, THEODORE EISENBERG, & JOSEPH R. RE, AMES, CHAFEE, AND RE ON REMEDIES 795 (2012) ("[T]he doctrine of laches remains important because it enables the court to bar equitable relief when the plaintiff has

objectionable to require a clear case of laches before it could be invoked alongside a statute of limitations.[43] That would be unnecessary, though, given that there is no reason to think that courts are overusing laches.

One question remains: Is laches actually consistent with the judgment made by Congress when it enacts a statute of limitations? It is clear that Congress may alter the law of remedies.[44] But how clearly must it speak in order to do so?

TVA v. Hill[45] represents one way to answer that question: Look for, and follow, every indication of congressional intent about the availability of equitable remedies.[46] On this approach, there is a continuum for the availability of the injunction, and every indication of congressional intention, no matter how small, can move a statute along that continuum.

A different approach has been followed, however, in the Court's more recent cases.[47] In these cases the Court has come very close to requiring a clear statement from Congress in order to abrogate traditional equitable principles. The approach is implicit in varying degrees in *Weinberger v. Romero-Barcelo*[48] and *eBay v. MercExchange*,[49] both

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delayed for a time shorter than the statutory period."); *cf.* OWEN M. FISS, INJUNCTIONS 93 (1st ed. 1972) (suggesting that the doctrine of laches now "has its major thrust in instances where the delay is less than the time provided in the pertinent statute of limitation"); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 964 (4th ed. 2010) (suggesting that "[w]hen an equitable claim is subject to a statute of limitations, laches is irrelevant unless it bars the claim before the limitations period expires," though also noting contrary authority and finding such invocations of laches "rare"). For a contrary view, see 1 DOBBS, *supra* note 7, at 108.

[43] For a statement echoed in many cases, see 2 SYMONS, *supra* note 14, at 173-174.

[44] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937).

[45] Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

[46] *Id.* at 192-194; *see also* Weinberger v. Romero-Barcelo, 456 U.S. at 322-335 (Stevens, J., dissenting); Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 262 n.12 (1985) (Stevens, J., dissenting); Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513 (1984).

[47] *See* US Airway, Inc. v. McCutchen, 133 S. Ct. 1537 (2013); Cigna Corp. v. Amara, 131 S. Ct. 1866 (2011); Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010); Nken v. Holder, 556 U.S. 418 (2009); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008); Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006); eBay v. MercExchange, 547 U.S. 388 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).

[48] 456 U.S. 305, 320 (1982).

[49] 547 U.S. 388 (2006).

of which say that "a major departure from the long tradition of equity practice should not be lightly implied,"[50] and in *Nken v. Holder*, where the Court required a clear statement from Congress to change the traditional rules about injunctions and stays.[51] In a similar vein, Justice Sotomayor recently argued that the rule that "damages are the default – and equitable relief the exception" is a "background principle" for reading federal statutes.[52] This approach has roots in the Court's earlier jurisprudence, as well.[53]

But can the judicial task of statutory interpretation fit with the notion that traditional equitable principles are "sticky," that it takes some force and momentum to dislodge them? There are three reasons to think the answer is *yes*. The first two reasons are grounded in policy and the third in separation of powers (though at some remove from the text of the Constitution).[54]

The first reason the traditional equitable principles should be sticky is the logic of equitable remedies and related rules discussed above. This logic is weakened as equitable rules are pulled out one by one.

The second reason to make the traditional equitable principles sticky is that having an accepted understanding of what an equitable remedy does, how it is enforced, and the circumstances under which it is given will serve rule of law values (consistency and notice, especially because of the threat of contempt) and decrease information costs to third-parties (who may need to understand the implications of a particular injunction). Of course abolishing laches doesn't change the effect of an injunction *after* it has been given. But there is a slippery slope: letting laches be easily displaced might be fine, but what if we also did the same with whether an injunction is enforceable by contempt, whether it can be modified, whether it only binds those acting in concert with the enjoined party, and so on?

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[50] 456 U.S. at 320; 547 U.S. at 391.

[51] *See* Nken, 556 U.S. at 433 (invoking a "presumption favoring the retention of long-established and familiar principles" (internal quotation marks omitted)). *Nken* also mentioned a distinct but related presumption about the Court's inherent authority.

[52] Sossamon v. Texas, 131 S. Ct. 1651, 1665 (2011) (Sotomayor, J., dissenting).

[53] *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944); Brown v. Swann, 35 U.S. 497, 503 (1836).

[54] On the constitutional grounding of substantive canons, see Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

The third reason is that equitable remedies and related doctrines represent the extremities of judicial power and judicial self-restraint, and they thus implicate to an unusual degree the inherent authority and prudential modesty of the courts. Because equitable remedies can demand so much of a court – at the outer limit a structural injunction, but also many managerial decisions short of that limit – courts wisely "keep a watchful eye on their outstanding obligations, their uncashed checks for judicial management."[55] And because the public consequences of an equitable remedy can be so high, including but not limited to judicial resources, courts have traditionally had many reasons not to give them, including not only laches but also many other doctrines.[56] (Related to this is the idea that equitable remedies are not a matter of right.[57]) These reasons not to give equitable remedies are used to protect third parties, to protect the defendant, and even to protect the court itself. If traditional equitable principles are not easily displaced, it is easier for courts to protect themselves in this way and to determine how their Article III powers are used.[58]

Two analogies might be made for why Congress can abrogate traditional equitable principles, but only if it says so clearly. One is jurisdiction-stripping,[60] and the other is the displacement of the states'

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[55] Bray, *supra* note 21.

[56] One example is the undue hardship defense. *See generally* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in Boomer v. Atlantic Cement)*, 4 J. TORT L. 1 (2012).

[57] For recent cases making this point about permanent injunctions, see *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010); *eBay v. MercExchange*, 547 U.S. 388, 395 (2006); (Roberts, C.J., concurring); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008); *see also* Salazar v. Buono, 130 S. Ct. 1803, 1816 (2010) (plurality) ("Equitable relief is not granted as a matter of course . . . .").

[58] Note that the Constitution itself refers to a distinction between law and equity, though the implications of those references are unclear. For authority that the constitutional references to law and equity are a reason to distinguish them in the federal courts, see *Bennett v. Butterworth*, 52 U.S. 669, 674-675 (1850); *Commercial Nat. Bank in Shreveport v. Parsons*, 144 F.2d 231, 240-241 (5th Cir. 1944); W. S. SIMKINS, A FEDERAL EQUITY SUIT 4 (2d ed. 1911); *cf.* THE FEDERALIST *No. 83* (Alexander Hamilton) (describing a separation of law and equity as "rendering one a sentinel over the other").

[60] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953).

rules of civil procedure.[61] In both analogies, the clear-statement requirement is meant to reconcile congressional authority with the fact that the subject lies within the ordinary competence of a different constitutional actor.

Thus, for reasons of policy, and for a somewhat more attenuated reason of constitutional principle, it is sensible for the federal courts to require something like a clear statement from Congress that it intends to displace traditional equitable principles. No such clear statement is made when Congress passes a statute of limitation, because the Court has often recognized that laches and a statute of limitations may coexist.

That does not mean the statute of limitations is irrelevant for laches analysis. The statutory period could be taken as a fixed outer limit. Within that limit a court might wisely stay its hand, following the statute of limitations unless there was a good reason not to.[62] Such a sense of restraint would be consistent with the long history of courts of equity deferring to a statute of limitations. Even so, they need not always defer, for laches remains available as an equitable defense unless it is clearly abrogated by Congress.

III. A Middle Course in *Petrella*

These points are directly relevant to *Petrella*. The petitioner argues that laches is entirely precluded because Congress enacted a statute of limitations. The respondents argue that laches applies to all remedies in this case, no matter whether they are legal or equitable. An intermediate course is supported by the analysis in this essay: (1) laches should be allowed even where there is a statute of limitations, since Congress is presumed to legislate against the backdrop of traditional equitable principles, and (2) laches should continue to be an equitable

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[61] *See* Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2155 n. 138 (2008); *see also* Medellin v. Texas, 552 U.S. 491, 517 (2008) (including among "general principles of interpretation" the principle that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State" (internal quotation marks omitted)).

[62] *Cf.* Graf v. Hope Bldg. Corp., 254 N.Y. 1, 9 (1930) (Cardozo, C.J., dissenting) ("Equity follows the law, but not slavishly nor always," or else "there could never be occasion for the enforcement of equitable doctrine.").

defense that applies to, and only to, equitable remedies. This intermediate solution is congruent with the Supreme Court's recent cases on equitable remedies – cases in which the Court has repeatedly appealed to traditional equitable principles.[63]

If the Court reverses the lower courts' application of laches to damages, it will still have to decide what to do about the lower courts' application of laches to the *equitable* remedies the petitioner requested. These include at the very least the requests for an injunction and for an accounting.[64] In its application to equitable remedies, laches is discretionary and highly flexible. Courts may use it to deny one requested equitable remedy but not another.[65] Courts may apply it to retrospective relief but not to prospective relief.[66] Or they may apply it even to deny a prospective injunction against future violations.[67] Such discretionary decisions are usually made in the first instance by the trial court and should be reversed only for abuse of discretion. There is no

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[63] *See* US Airway, Inc. v. McCutchen, 133 S. Ct. 1537 (2013); Cigna Corp. v. Amara, 131 S. Ct. 1866 (2011); Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010); Nken v. Holder, 556 U.S. 418 (2009); Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008); Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006); eBay v. MercExchange, 547 U.S. 388 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002).

[64] These are contained in counts I and III of the First Amended Complaint. *See* Petrella v. Metro-Goldwyn-Mayer, Inc., First Amended Complaint for Copyright Infringement, Unjust Enrichment, and Demand for Accounting, CV 09-0072 GW (MANx) (May 22, 2009 C.D. Cal.). The request for unjust enrichment in count II of the First Amended Complaint raises the question of how to classify that remedy. Admittedly, the answer will determine to some degree the practical effect of restricting laches to equitable remedies. But the question is a difficult one and this essay does not attempt to resolve it. Nor is it a question that needs to be decided by the Supreme Court in *Petrella*, since it should be considered in the first instance by the lower courts.

[65] *See* Chirco v. Crosswinds Communities, Inc., 474 F.3d 227 (6th Cir. 2007); *see also* R. P. MEAGHER, W. M. C. GUMMOW, & J. R. F. LEHANE, EQUITY: DOCTRINES AND REMEDIES § 3607 (3d ed. 1992) ("[W]here a plurality of equitable causes of action arise out of a transaction, some of them may be barred by laches, others not.").

[66] *See* 1 DOBBS, *supra* note 7, at 106.

[67] *See, e.g.*, La Republique Francaise v. Saratoga Vichy Spring Co., 191 U.S. 427, 436-439 (1903); N.A.A.C.P. v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc., 753 F.2d 131 (D.C. Cir. 1985) (Bazelon, J., joined by Mikva and Bork, JJ.); *see also* Evergreen Safety Council v. RSA Network Inc., 697 F.3d 1221, 1229-1230 (9th Cir. 2012).

reason to think the lower courts' application of laches to the request for an injunction and an accounting for profits was an abuse of discretion.[68]

Conclusion

Laches is, and continues to be, an equitable defense that can be raised against equitable remedies. It is not preempted by the passage of a statute of limitations, for Congress legislates against the backdrop of traditional equitable principles. These principles are fully applicable in *Petrella v. Metro-Goldwyn-Mayer, Inc.* In that case, the Court should retain the defense of laches, notwithstanding the statute of limitations, but apply it only to equitable remedies.

[68] The Solicitor General of the United States argues that the lower courts wrongly applied a "presumption" in favor of laches. Brief for the United States as Amicus Curiae Supporting Petitioners, Petrella v. Metro-Goldwyn-Mayer, Inc., No. 12-1315 (U.S. Nov. 22, 2013), at 15-16. Behind this argument may be the idea that presumptions are somehow inimical to equity, but they are not. *See generally* Gergen, Golden, & Smith, *supra* note 63. This argument has two other failings. First, although the district court and court of appeals *said* there was such a presumption that is not an apt description of what they *did*: they analyzed the reasonableness and prejudicial effect of the delay without a thumb on the scales. Second, the language of "presuming" laches has often been used by equity courts, *e.g.*, Foster v. Mansfield, C. & L. M. R. Co., 146 U.S. 88, 96-97 (1892), especially when applying a legal statute of limitations "by analogy," *see* 1 DOBBS, *supra* note 7, at 107-108. Stray language about presuming laches is at most a venial fault and does not require reversal or remand.