IN DEFENSE OF THE LACHES DEFENSE: WHY CONGRESS SHOULD NOT BE PERMITTED TO BAR COURTS FROM CONSIDERING THE LACHES DEFENSE WHEN DECIDING CLAIMS BROUGHT THROUGH THE FEDERAL HEAR ACT

William L. Charron *

I. INTRODUCTION

The Holocaust Expropriated Art Recovery ("HEAR") Act of 2016 is a preemptive federal statute that prescribes a nationwide, six-year statute of limitations over all state law causes of action that may be invoked to address allegations of Nazi-looted art.[1] Unless amended, the HEAR Act will sunset at the end of 2026.[2] Congress is deliberating amendments to the HEAR Act that would, among other things, make it perpetual.[3] Another amendment under consideration is the elimination of the defense of laches from all restitution claims that allege Nazi-based duress transfers of art.[4] Courts have widely held that the HEAR Act, in its present form, does not eliminate the laches defense from such claims.[5]

This article analyzes how an amendment that purports to eliminate the laches defense from HEAR Act-related claims would violate Article III of the U.S. Constitution and the Separation of Powers doctrine. Specifically, such an amendment would unlawfully purport to eliminate the power of the federal courts to fully exercise their vested equitable jurisdiction.

Congress may enact laws that constrain the Judiciary's equitable jurisdiction, either by not providing for a cause of action with an equitable relief entitlement at all, or by expressing certain policy choices that the courts must respect in how they weigh the equities and fashion appropriate relief. The HEAR Act, however, expressly does not confer *any* cause of action or substantive rights. The HEAR Act is a purely procedural statute that engrafts a nationwide statute of limitations on *other* causes of action under state laws that may be invoked by

---

* William Charron is a partner and co-chair of the Art Law practice at Pryor Cashman LLP in New York City. He is also an adjunct professor of Art Law at the University of Virginia School of Law.

[1] Holocaust Expropriated Art Recovery ("HEAR") Act, 22 U.S.C. § 1621 note. For further background into the HEAR Act, *see generally* Simon J. Frankel, *The HEAR Act and Laches After Three Years*, 45 N.C.J. INT'L L. 441 (2020); Nicholas O'Donnell, *The Holocaust Expropriated Art Recovery Act: A Sea Change in US Law of Restitution*, XXII ART ANTIQUITY AND LAW 273 (2017).

[2] HEAR Act § 5(d)(2).

[3] S. 1884, 119th Congr.§ 6(b)(2) (as passed by Senate, December 10, 2025).

[4] *Id.* § 2(a)(8).

[5] *E.g.*, *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 192 (2d Cir. 2019).

claimants to seek restitution of alleged Nazi-looted art.[6] The HEAR Act does not purport to divest courts of their equitable jurisdiction over such claims; to the contrary, the HEAR Act expresses the policy choice of having courts resolve Holocaust-era art disputes "in a just and fair manner" on the merits.[7]

Laches is an equitable defense that is rooted in principles of due process. A laches defense protects good faith purchasers of *allegedly* stolen art from being unable procedurally to defend their title because the critical evidence that is necessary to prove or disprove theft has been lost to time. Laches applies when the loss of such evidence is due to inexcusable delay by claimants or their predecessors in having investigated and acted to preserve the critical evidence.[8]

The laches defense serves a balancing function when a court, sitting in equity, is asked to weigh all relevant considerations in deciding between, on the one hand, an alleged victim of theft, and, on the other hand, an innocent, current owner.[9] The proposed amended HEAR Act would command the courts to ignore when one side has been unduly deprived of the ability and right under due process to put on a meaningful case.

By eliminating the laches defense from state law causes of action that otherwise provide the right to equitable relief and thereby vest the courts with equitable jurisdiction, the proposed amended HEAR Act would unconstitutionally intrude on the province of such courts to develop appropriate factual records and "decide" for themselves what is "just and fair." The HEAR Act's proposed elimination of the laches defense would thus interfere with the Judiciary's core, historical exercise of its equitable jurisdiction when such jurisdiction has otherwise been vested.

---

[6] *See generally* William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19 (2018).

[7] HEAR Act § 3(2).

[8] *E.g.*, *Zuckerman*, 928 F.3d at 193-94 ("'A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim.' . . . [W]e conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in 'deceased witness[es], faded memories . . . and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence.") (citations omitted). The author of this article was co-counsel to The Metropolitan Museum of Art in the *Zuckerman* case.

[9] *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 307 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012) ("However laches is applied in this case, it will work a certain inequity on the losing party, and this Court is 'in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss.' On the one hand, a finding of no unreasonable delay would deprive Bakalar of property he purchased in good faith almost fifty years ago. On the other hand, a ruling for Bakalar will deprive Grunbaum's rightful heirs of a Drawing that, but for the atrocities of the Holocaust, might have remained in the family until today.") (citation omitted). The author of this article represented David Bakalar.

II. THE HISTORICAL UNDERPINNINGS OF THE LACHES DEFENSE

Legal systems contain doctrines that help courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances. "[T]he nature of the equitable,' Aristotle long ago observed, is 'a correction of law where it is defective owing to its universality." Laches is one such equitable doctrine. It applies in those extraordinary cases where the plaintiff "unreasonably delays in filing a suit," and, as a result, causes "unjust hardship" to the defendant."[10]

The doctrine of laches was expounded and embraced by the Supreme Court nearly 200 years ago in *Piatt v. Vattier*, a real property ownership dispute where the defendant had adversely possessed the property for 30 years.[11] The Court there explained:

> The established doctrine, – or as Lord Redesdale phrased it, in *Hovenden v. Annesley*, "the law of courts of equity" – from its being a rule adopted by those courts, independently of any positive legislative limitations, is, that it will not entertain stale demands. . . . "A court of equity," said he, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing; *laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation of suit in this court."* The same doctrine . . . . has been acted on in the fullest manner by this court . . . .[12]

Laches is deeply rooted in the equitable jurisdiction of American courts.

III. THE ROLE OF THE LACHES DEFENSE IN ART RESTITUTION CLAIMS

The laches defense plays a prominent role in art restitution cases, including, although not at all limited to, cases arising out of the Holocaust. An oft-invoked cause of action in stolen art cases is replevin, which is an equitable claim for the recovery and return of chattel that is "directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the [chattel]."[13] Because restitution claims – ordering the handover of property – are

---

[10] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 668 (2014) (Breyer, J., dissenting) (quoting THE NICOMACHEAN ETHICS 99 (Lesley Brown ed., David Ross trans., Oxford World's Classics 2009) (citation omitted).

[11] 34 U.S. 405, 416 (1835) (Story, J.).

[12] *Id.* at 416-17 (emphasis added) (citations omitted).

[13] *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991).

equitable, the equitable jurisdiction of courts is activated, thereby implicating the possibility of a laches defense.

To demonstrate laches, the current owner of art trying to defend title must prove: (i) that the claimant or the claimant's predecessors knew or should have known of the existence of a claim for allegedly stolen art; (ii) that the claimant or the claimant's predecessors inexcusably delayed in taking any action to bring a claim; and (iii) that the current owner was unduly prejudiced because, as a result of the claimant's or their predecessors' inactivity and the passage of time, evidence necessary to rebut the claim of theft has been lost or destroyed and material witnesses have passed away.[14] Both "inexcusable delay" and "undue prejudice" must be shown.[15]

Numerous courts have applied the laches defense to bar art restitution claims arising out of the World War II era.[16] These are principled rulings based on conclusions that it would have been unjust and unfair to wrest property from good faith owners when allegations of Nazi theft were unprovable due to the loss of critical evidence – and where such loss of evidence was caused by the claimants' or their predecessors' unreasonable delay in acting.[17]

In *Zuckerman v. Metropolitan Museum of Art*, for example, the plaintiff sought recovery of a Pablo Picasso painting that the plaintiff's ancestors in Europe had sold to a well-known, private art dealer in France in 1938 "to raise money to escape Hitler's growing influence in Italy and relocate to Brazil."[18] The plaintiff sued pursuant to the HEAR Act and argued that her ancestors sold the painting "under duress" caused by the rise of Nazism.[19]

The court dismissed the plaintiff's claims on the basis of laches. *First*, the court found that the plaintiff's ancestors had themselves unreasonably delayed the seeking of restitution of the painting, explaining:

> It is evident on the face of the complaint that the Leffmanns knew to whom they sold the Painting in 1938, and Zuckerman nowhere

---

[14] *E.g.*, *Bakalar*, 500 F. App'x at 8 (citations omitted).

[15] *Id.*

[16] Because New York is the United States' art market hub, decisions from New York courts are most prominent in this area – particularly because New York law requires current, good faith owners of allegedly stolen art to *disprove* allegations of theft. *Lubell*, 77 N.Y.2d at 321; *see, e.g.*, *Matter of Peters v. Sotheby's Inc.*, 821 N.Y.S.2d 61 (N.Y. App. Div. 2006) ("The delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of [the artwork] has prejudiced the good-faith purchaser since none of the parties to the original sale of the painting . . . are alive."); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 752 N.Y.S.2d 295, 296-297 (N.Y. App. Div. 2002) (holding that a laches defense applied based on a similar analysis).

[17] *See Lubell*, 77 N.Y.2d at 317.

[18] 928 F.3d at 189-90.

[19] *Id.* at 190.

> contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting. Indeed, over seventy years passed between the sale of the painting in 1938 and Zuckerman's demand that the Met return the Painting in 2010.
>
> It is eminently understandable that the Leffmanns did not bring any claim for the Painting during the course of World War II and even, perhaps, for a few years thereafter, given their specific circumstances. However, it is simply not plausible that the Leffmanns and their heirs would not have been able to seek replevin of the Painting prior to 2010. As noted above, the Leffmanns, being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses. This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a "masterwork" of Picasso, not an obscure piece of art.[20]

Second, the court found that the plaintiff's ancestors' delay had unduly prejudiced the painting's current owner, which could not longer adequately defend against the assertion of "duress," finding:

> Assuming *arguendo* that Plaintiff's central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties. No witnesses remain who could testify on behalf of the Met that the Sale was voluntary, or indeed on behalf of the Plaintiff that the Painting was sold "involuntar[ily]," because the Leffmanns "had absolutely no other alternative." Nor are there first-hand witnesses who could testify to facts relevant to the Met's possible affirmative defenses . . . .On these facts, "the original owner[s'] lack of due diligence and prejudice to the party currently in possession are apparent," and the issue of laches can be decided as a matter of law.[21]

A similar result was reached in *Bennigson v. The Solomon R. Guggenheim Foundation*.[22] In that case the plaintiffs, suing pursuant to the HEAR Act and asserting a similar claim of "duress," alleged that their ancestors, who had "experienced severe persecution when the Nazis took over Germany and were forced to flee to other countries," sold a different Pablo Picasso painting in 1938 to

---

[20] *Id.* at 193-94 (citation omitted).
[21] *Id.* at 194-95 (citations omitted).
[22] 242 A.D.3d 567 (N.Y. App. Div. 2025).

a well-known, Jewish, private art dealer in France "to raise cash to escape to Argentina."[23]

The court dismissed the case on the basis of laches, finding both unreasonable delay where no claim was made for the painting's return for over 80 years, despite awareness of the painting's circumstances and well-publicized reports of the painting's bequest to the current owner in the 1960s, and prejudice caused by such delay in the form of lost, essential testimony from first-hand witnesses.[24]

The *Bakalar v. Vavra* case is also notable because it arose out of the Holocaust, but the laches ruling applied to a claim of post-war, intra-family theft. The claimants in *Bakalar* alleged that an Egon Schiele drawing had been stolen from their ancestor by the Nazis in the late-1930s.[25] While certain documentary evidence survived the war and demonstrated that the claimants' ancestor had owned a number of works by Schiele before his arrest and eventual murder at the hands of the Nazis, no documents proved that the ancestor had owned the drawing at issue or that the Nazis had ever seized the drawing.[26]

Post-war documentation, however, demonstrated that the sister-in-law of the Holocaust victim had possessed and sold the drawing to a Swiss art dealer in the 1950s.[27] This evidence was sufficient to both establish an inference of the Holocaust victim's prior ownership of the drawing, but also to rebut the claimants' allegations of Nazi theft.[28]

The claimants alternatively asserted that the sister-in-law (who had passed away in the 1970s) had stolen the painting from the Holocaust victim's estate (*i.e.*, because there were other potential heirs by intestacy who should have been entitled to proportional ownership of the drawing).[29] The court rejected this alternative theory on the basis of laches.[30]

In particular, the court found that the surviving evidence demonstrated that the claimants' parents and grandparents were either aware of or close to the sister-in-law before she died, and therefore more likely than not knew of her possession of the drawing and had elected not to bring a claim against her.[31] The claimants sued after the sister-in-law and those other family members, who had been more proximate to the events, had died. The court found that "[t]here can be no serious

---

[23] *Id.* at 568.
[24] *Id.*
[25] 500 F. App'x at 7.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 8.
[29] *Id.*
[30] *Id.*
[31] *Id.*

dispute that the deaths of family members – [the sister-in-law] and others of her generation, and the next – have deprived [the current owner] of key witnesses."[32] Because the current owner no longer had a reasonable ability to rebut the allegations that the sister-in-law had been a thief, the court applied laches and barred the claim for replevin.[33]

These and numerous other cases arising out of the Holocaust demonstrate that laches exists as a form of due process protection for good faith current owners of art *alleged* to have been stolen: laches protects *bona fide* current owners from being placed in the position of not having a reasonable opportunity to develop a factual record and rebut allegations of theft due to the loss of evidence, where the loss of evidence is attributable to undue delay by the claimant in having sued.[34]

Moreover, as stated above, the laches defense is often successful in art restitution cases that do *not* arise out of the Holocaust. In *Platt v. Michaan*, for example, the court dismissed claims asserting that a grandson of the artist Louis Comfort Tiffany had violated a purported "Anti-alienation restriction" imposed on all family members not to sell Tiffany art to outsiders by selling two Tiffany paintings to the defendant, who was not a Tiffany family member.[35] The evidence of such a restriction was equivocal, at best.[36] The court dismissed the claims brought by Tiffany's great-grandchildren on the basis of, *inter alia*, the laches defense, finding undue delay by their ancestors, who had failed to take any action sooner, and undue prejudice caused by such delay "because the key witnesses to the purported existence of the anti-alienation agreement" were all deceased and "cannot testify."[37]

Thus, laches is not just a procedural, time-based defense, but also a defense focused on the quality of evidence that exists after a period of undue delay, and whether the possessor of allegedly stolen art has been left with a meaningful opportunity to make a rebuttal presentation. Indeed, laches does *not* apply in cases of undue delay alone. If conclusive evidence of Nazi theft continues to exist and is

---

[32] *Id.* (citations omitted).

[33] *Id.* at 9.

[34] *Cf. Miller v. French*, 530 U.S. 327, 350 (2000) ("[W]hether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns."); *Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005) ("[D]ue process requires . . . "a meaningful opportunity to be heard" and a "reasonable opportunity to . . . present evidence . . . ") (citations omitted).

[35] 695 F. Supp. 3d 420, 437 (S.D.N.Y. 2023). The author of this article represented Allen Michaan in the *Platt* case.

[36] *Id.* at 441-43.

[37] *Id.* at 447-48 ("Because Plaintiffs *and* their predecessors … knew or should have known of the circumstances giving rise to the claim by no later than [the alleged family thief's] death . . . the Court finds that there was an unreasonable delay . . . . The resulting prejudice of Plaintiffs' delay is clear. Plaintiffs' delay in pursuing their claim "makes it difficult to garner evidence to vindicate [Defendant's] ... rights) (citations omitted).

presented *notwithstanding* a period of undue delay by a claimant, the current owner cannot claim "undue prejudice" because the owner could not reasonably be expected to rebut the fact of theft.[38] Laches is not merely a time-based defense in this context: it is a defense founded on the quality of evidence that remains available regardless of delay.

III. CONGRESS SHOULD NOT PROHIBIT A COURT SITTING IN EQUITY FROM CONSIDERING EVIDENCE OF LACHES

A. Separation of Powers Dictates that the Judiciary "Decides" Cases

Article III of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[39] The "judicial Power" includes, most importantly, the power of the courts to "decide" cases and controversies. As the Supreme Court explained in *Plaut v. Spendthrift Farm, Inc.*:

> The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . . .[40]

Under the separation of powers doctrine, Article III prohibits Congress from usurping the power of the judicial branch to "decide" cases.[41] "In the context of Article III, deciding a case means resolving it on the basis of legal reasons, not political or extra-legal reasons…. Separation [of the judicial branch] from the Legislature was paramount [to the Framers] because it protected the decisions of particular cases from political will or extra-legal bias."[42] Thus, the Judicial Branch alone must be in a position to weigh evidence and "decide" cases before it.[43] Chief Justice Roberts's dissent in *Bank Markazi* is illustrative:

---

[38] *E.g.*, *In re Estate of Flamenbaum*, 22 N.Y.3d 962, 965-66 (2013) (finding in Holocaust-era antiquity context that laches was not shown where, even if claimant had not exercised due diligence, the current possessor was not unduly prejudiced because the evidence ultimately uncovered convincingly demonstrated that the antiquity had, in fact, been stolen).

[39] U.S. Const., art. III; *see also id.* at art. I, § 8, cl. 9.

[40] 514 U.S. 211, 218-19 (1995) (emphasis added); *accord Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) ("Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty . . . to say what the law is' in particular cases and controversies.") (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

[41] *Plaut*, 514 U.S. at 219 ("[A] 'judicial Power' is one to render dispositive judgments.' By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.") (citation omitted).

[42] Dustin B. Benham, *Beyond Congress's Reach: Constitutional Aspects of Inherent Power*, 43 Seton Hall L. Rev. 75, 84 (2013); *see also Bank Markazi*, 578 U.S. at 212 ("Necessarily, that endowment of authority [from Article III] blocks Congress from 'requir[ing] federal courts to exercise the judicial power in a manner that Article III forbids.'") (quoting *Plaut*, 514 U.S. at 218).

[43] *E.g.*, *Plaut*, 514 U.S. at 218-19.

> No less than if it had passed a law saying "respondents win," Congress has decided this case by enacting a bespoke statute tailored to this case that resolves the parties' specific legal disputes to guarantee respondents victory. . . *"[T]he legislative body is, in truth, by no means competent to the determination of causes between party and party," having exercised the judicial power "without being shackled with rules," guided only by "crude notions of equity.*"[44]

To decide cases, moreover, courts must be able "to develop an accurate factual record . . . . Indeed, it is impossible to decide cases without a factual record . . . . If Congress prohibited courts from developing a record, they could not decide cases."[45] This principle reflects a basic tenet of constitutional due process: litigants must be given "a meaningful opportunity to be heard," which includes the right to present evidence.[46] Accordingly, Congress may not enact laws that purport to supersede the Judicial Branch's sole right to consider an appropriate factual record and to "decide" cases and controversies within their jurisdiction.

B. Once Vested with Equitable Jurisdiction, a Federal Court Must be Permitted to Exercise Its Equitable Discretion and to Decide Cases for Itself

When a cause of action gives a court jurisdiction to grant equitable relief, the court's power is necessarily broad and flexible.[47] "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. Exercise of that discretion . . . may require them to *withhold* their relief in furtherance of a recognized, defined public policy."[48]

Congress has the power not to vest courts with equitable jurisdiction over specific causes of action in the first instance. As explained by the Supreme Court in *Lockerty v. Phillips*: "The Congressional power to ordain and establish inferior

---

[44] 578 U.S. 237, 241 (Roberts, C.J., dissenting) (citations omitted) (emphasis added).

[45] Benham, *supra* note 44, at 77, 97.

[46] *See, e.g.*, *Miller*, 530 U.S. at 350 ("due process … principally serves to protect the personal rights of litigants to a full and fair hearing").

[47] *See, e.g.*, *Meredith v. City of Winter Haven*, 320 U.S. 228, 235 (1943); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.") (citations omitted); Theodore K. Cheng, *Invading An Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform Act*, 56 Wash. & Lee L. Rev. 969, 1007-08 (1999) ("Equity courts were designed to provide remedies in those situations in which the award of monetary damages by a law court failed to remedy the harm.")

[48] *Meredith*, 320 U.S. at 235 (emphasis added).

courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'"[49]

Congress also may enact substantive laws that bar any right to an equitable remedy.[50] The HEAR Act, however, expressly does *not* "create a civil claim or cause of action under Federal or State law."[51] Nor does the HEAR Act bar a claimant's entitlement to equitable relief. On the contrary, the HEAR Act embraces equitable remedies provided by the various state laws, including the remedy of restitution. The HEAR Act is a purely procedural statute that engrafts a nationwide, six-year statute of limitations over all state substantive laws that allow for the restitution of alleged Nazi-stolen artwork.[52]

Because state law claims for replevin are equitable, they vest deciding courts with equitable jurisdiction.[53] The HEAR Act does not purport to deprive the courts of such jurisdiction; the HEAR Act is predicated on the existence of equitable jurisdiction.

As equitable jurisdiction is vested in the Judiciary to resolve claims asserting Nazi looting of art, the full range of equitable discretion should remain available to the Judiciary. As the Supreme Court explained in *Porter v. Warner Holding Co.*, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[54]

---

[49] 319 U.S. 1982 (1943).

[50] *See Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Nothing in either the language or the legislative history of § 205(g) indicates that Congress intended to preclude injunctive relief in [Social Security Act] suits."); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) ("Here Congress said nothing about the power of the Court of Appeals to issue stay orders under [the Comunications Act of 1934]. But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts."); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 497-99 (2001) (finding that courts exercising equitable jurisdiction under Federal Controlled Substances Act may not consider evidence of medical necessity as being part of the "public interest" because the statute made a "policy choice … as to what behavior should be prohibited" and "preclude[d] consideration of this evidence [of a medical necessity] . . . ").

[51] HEAR Act § 5(f).

[52] *Id.* § 5(a).

[53] *E.g.*, *Lubell*, 77 N.Y.2d at 321.

[54] 328 U.S. 395, 398 (1946); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-94 (2006) ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination [of infringement] . . . . [T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.") (citations omitted); Cheng, *supra* note 49, at 1010 ("Although all federal courts except the Supreme Court are created by acts of Congress, the federal courts' equity jurisdiction is an inherent component of their structure and should remain impervious to legislative regulation once created.").

While the Supreme Court has long held that Congress may proscribe the laches defense from actions at law by imposing statutes of limitation, the Court has recognized a demarcation with respect to the role of the laches defense in actions at equity.[55]

In *Petrella*, for example, the Court held that Congress could bar laches as a defense under the Copyright Act to a claim for damages if the claim is brought within the congressionally prescribed limitations period.[56] The Court also specifically explained, however: "Should Petrella ultimately prevail on the merits, the District Court, in determining appropriate injunctive relief and assessing profits, *may take account of her delay in commencing suit*."[57]

Petrella had the effect of overruling the Fourth Circuit's decision in *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, which found that, "when Congress creates a cause of action and provides both legal and equitable remedies, its statute of limitations for that cause of action should govern, regardless of the remedy sought."[58] However, the HEAR Act does not create a cause of action or itself afford either legal or equitable remedies.[59] Thus, where Congress, through the HEAR Act, has neither conferred nor withdrawn the equitable jurisdiction of the courts to decide claims seeking restitution of alleged Nazi-looted art under other state laws, the courts should retain the ability to exercise the laches doctrine.[60]

---

[55] *United States v. Mack*, 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations is no defense at law.") (citations omitted); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 n.16 (1985) ("[A]pplication of the equitable defense of laches in an action at law would be novel indeed."); *Petrella*, 572 U.S at 686 (holding that laches cannot bar claim for damages under Copyright Act if claim is asserted within the act's statute of limitations). The merger of law and equity in 1938 does not affect this analysis. *E.g.*, *Petrella*, 572 U.S. at 678.

[56] 572 U.S. at 667.

[57] *Id.* at 668 (emphasis supplied; citation omitted); *see also Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 235 (6th Cir. 2007) ("To the extent . . . that the relief sought by the plaintiffs exceeds what might otherwise be considered just, we recognize that a statutory limitation period on filing suit need not always trump equitable principles.") (citations omitted); *New Era Publ'ns Int'l ApS v. Henry Holt and Co.*, 873 F.2d 576, 585 (2d Cir. 1989) ("Such severe prejudice, coupled with the unconscionable delay already described, mandates denial of the injunction for laches and relegation of New Era to its damages remedy") (citations omitted); *Ivani Contracting Corp. v. City of N.Y.*, 103 F.3d 257, 259 (2d Cir. 1997) ("The Supreme Court long ago recognized that, while the doctrine of laches survived as a further limitation upon granting relief in equity, '[l]aches within the term of the statute of limitations is no defense at law.'") (citations omitted); *Lubell*, 77 N.Y.2d at 321 ("Despite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the Statute of Limitations, our holding today should not be seen as either sanctioning the museum's conduct or suggesting that the museum's conduct is no longer an issue in this case. We agree with the Appellate Division that the arguments raised in the appellant's summary judgment papers are directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting.").

[58] 243 F.3d 789, 798 (4th Cir. 2001).

[59] HEAR Act § 5(f).

[60] It should be noted that there are federal circuit court decisions upholding CERCLA's prohibition on the assertion of laches as a defense to liability – although not damages – in claims

C. Congress May Do No More Than "Guide" the Courts' Exercise of Equitable Discretion Through the HEAR Act

Congress may enact laws that have the effect of guiding courts to exercise their equitable discretion in a particular way to meet Congress's dictated policy.[61] Nevertheless, Congress must leave the final decision-making to the courts. In *Tennessee Valley Auth. v. Hill*, for example the Supreme Court considered the necessity of an injunction under the Endangered Species Act of 1973 against further water dam construction, where it was found that completion of the dam threatened to eradicate a population known as the snail darter.[62] The Court began its analysis by explaining:

> It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. This Court made plain in *Hecht Co. v. Bowles* that "[a] grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." . . . Thus, in *Hecht Co.* the Court refused to grant an injunction when it appeared from the District Court findings that "the issuance of an injunction would have 'no effect by way of insuring better compliance in the future' and would [have been] 'unjust' to [the] petitioner and not 'in the public interest.'"[63]

The Court also explained, however, that while it is the province of the Judiciary to interpret the law: "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws *and for the courts to enforce them when enforcement is sought*."[64] Where the judicial fact-finding demonstrated that completion of the dam threatened extinction of the snail darter, the Court concluded that there was no choice but to enjoin further work on the dam.[65] The Court explained:

---

for environmental cleanup and contribution costs. *Town of Munster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1271-72 (7th Cir. 1994) ("[O]ur holding is limited to the simple proposition that CERCLA does not permit *equitable* defenses to [statutory] liability. We see nothing illogical or untenable about a statutory scheme that bars equitable *defenses* to liability but allows the consideration of equitable *factors* in apportioning costs between various responsible parties."); *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993). While these courts characterized CERCLA cost-recovery claims as "equitable in nature," they are nonetheless claims for money damages (*i.e.*, for the costs of environmental remediation); and, moreover, CERCLA permits courts to "tak[e] into account relevant equitable considerations" in apportioning such damages. *Munster*, 27 F.3d at 1270-71 (citation omitted). These decisions, therefore, should not be viewed as altering the Supreme Court's hostility to the notion that Congress may outlaw an Article III court's consideration of the laches defense when the court has been vested with equitable jurisdiction.

[61] *See, e.g.*, *Meredith*, 320 U.S. at 235.

[62] 437 U.S. 153, 193-94 (1978); 16 U.S.C. § 1536.

[63] 437 U.S. at 193-94 (citations omitted).

[64] *Id.* (emphasis added).

[65] *Id.*

> We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the [dam]. *Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities* . . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.[66]

Thus, the Court determined that an injunction had to issue because there was no other way to "balance the equities" to adequately protect both the snail darter and the continuation of the dam's construction, and Congress's statute had made the clear policy choice to protect the interests of the snail darter over the interests of the dam. The determination to enjoin the dam's construction was nonetheless a "decision" made by the Court; the Endangered Species Act neither deprived the Court of its equitable discretion nor mandated the issuance of an injunction *per se*.[67]

A similar result was reached in *Miller*. In that case, the Court considered the propriety of injunctive relief in connection with a claim brought by prisoners under the Prison Litigation Reform Act of 1995 (the "PLRA").[68] Congress had amended the PLRA to establish "new standards for the enforcement of prospective relief" and had "restricted courts' authority to issue and enforce prospective relief concerning prison conditions, requiring that such relief be supported by findings and precisely tailored to what is needed to remedy the violation of a federal right."[69] The prisoners argued that Congress had unconstitutionally "prescribed a rule of decision" for the Article III courts because no prospective relief could be awarded until a "final decision on the merits" issued in accordance with the statute's high standards.[70] The Court rejected the prisoners' argument, finding that "[r]ather than prescribing a rule of decision, [the statute] simply imposes the consequences of the court's application of the new legal standard . . . . *The PLRA does not deprive courts of their adjudicatory role*, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly."[71]

---

[66] *Id.* (emphasis added).

[67] *See also Weinberger*, 456 U.S. at 313-14 ("Of course, Congress may intervene and guide or control *the exercise of the courts' discretion* . . . . In *TVA v. Hill*, we held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity . . . . The purpose and language of the [Endangered Species Act] limited the remedies available to the District Court; *only an injunction could vindicate the objectives of the Act.*") (citations omitted) (emphases added).

[68] 18 U.S.C. § 3626.

[69] *Miller*, 530 U.S. at 347 (citations omitted).

[70] *Id.* at 349.

[71] *Id.* at 349-50 (emphasis added); *see also Oakland Cannabis*, 532 U.S. at 499 (finding that Congress set a "public interest" standard that precluded consideration of evidence of medical necessity in deciding whether and how to exercise equitable relief).

Decisions such as *Tennessee Valley*, *Miller* and *Oakland Cannabis* demonstrate that Congress may guide how equitable relief may need to be granted by a court to satisfy a national policy. Nevertheless, once equitable jurisdiction is vested, the court retains the discretion to decide for itself whether to grant equitable relief.

The policy preference expressed by Congress in the HEAR Act is to resolve claims asserting Nazi looting of art in a "just and fair manner" and *on the merits*.[72] By eliminating the laches defense, the HEAR Act would go well beyond an expression of national policy intended to guide the Judiciary's exercise of its equitable discretion. Congress would be commanding the courts to restrain their equitable jurisdiction, and to overlook whether there is an absence of critical evidence necessary to prove or disprove allegations of Nazi theft or duress.[73]

Ironically, eliminating the laches defense would conflict with Congress's policy directive under the HEAR Act of arriving at "just and fair" resolutions. That conflict would be accentuated by courts continuing to apply the laches defense to arrive at "equitable" results in *other* art restitution cases that do not arise out of the Holocaust.

V. CONCLUSION

The HEAR Act embraces and relies upon the equitable jurisdiction of the courts in claims alleging Nazi-based duress transfers of art. By eliminating the laches defense, the proposed amended HEAR Act would have the effect of only partially divesting the courts of their equitable discretion in a manner that necessarily favors the claimants, thereby interfering with the courts' vested jurisdictional right to "decide" such cases for themselves.

Claims asserting Nazi duress in the transfers of art can often involve ambiguous and murky fact patterns. While allegations of Nazi duress must be credited by the federal courts as true at the pleadings stage under Federal Rule of Civil Procedure 12(b)(6), ultimate judgments should be the product of proof. Good faith current owners are entitled to defend their title by testing whether allegations of Nazi duress can be proved or disproved. If the critical evidence is gone – due to choices by claimants or their predecessors not to preserve critical evidence – then the courts are left with allegations that are both unproved and unprovable. The

---

[72] HEAR Act § 3(2).

[73] The effect of this HEAR Act amendment, which would constrain the courts to overlook the lack of evidence that could either prove or disprove bare allegations of Nazi theft or duress, would be to create a *de facto* conclusive or irrebuttable presumption of Nazi theft or duress. Conclusive presumptions are generally found to violate Due Process rights. *See, e.g.*, *Turner v. Department of Emplt. Security*, 423 U.S. 44, 45-46 (1975) (*per curiam*) (finding the conclusive presumption that women are "unable to work" during period of pregnancy to violate Due Process, and explaining that "the Constitution require[s] a more individualized approach" to such questions) (citation omitted).

laches defense exists in acknowledgement of that fact, and to protect against judgments predicated on guesswork.

If Congress were to eliminate the laches defense, then it would no longer merely be guiding the courts towards a policy directive of reaching "just and fair" resolutions of claims asserting Nazi-looted art. Congress would be unlawfully depriving the courts of their vested equitable power under Article III.