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Aditya Bamzai
Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia School of Law

Samuel L. Bray
John N. Matthews Professor of Law, Notre Dame Law School

DEBS AND THE FEDERAL EQUITY JURISDICTION

Aditya Bamzai & Samuel L. Bray***

The United States can sue for equitable relief without statutory authorization. The leading case on this question is In re Debs*, and how to understand that case is of both historical and contemporary importance.* Debs *was a monumental opinion that prompted responses in the political platforms of major parties, presidential addresses, and enormous academic commentary. In the early twentieth century, Congress enacted several pieces of labor legislation that reduced* Debs*'s importance in the specific context of strikes. But in other contexts, the question whether the United States can bring suit in equity remains disputed to this day. The United States has expressly invoked, or implicitly relied on,* Debs *in some of the most high-profile cases in recent years, including* United States v. Texas.

This Article explains the equitable principles at work in Debs *and shows how these principles still have a normative basis today. Collecting materials from traditional equity practice and historic treatments of* Debs *that have escaped the attention of the recent academic literature, this Article especially considers the connection that the* Debs *Court draws between equitable relief and a proprietary interest. It shows how the equity-property connection works as an empowering and limiting principle for the ability of the United States to bring a suit in equity. And it offers guidance to the federal courts by explaining and defending the traditional contours of their equity jurisdiction.*

* Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law, University of Virginia School of Law.

** John N. Matthews Professor of Law, Notre Dame Law School.

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INTRODUCTION

Just over a century and a quarter ago, in 1895, the Supreme Court decided *In re Debs*.[1] The case was remarkable for a variety of reasons. It concerned the authority of the federal government to end the Pullman Strike of 1894, which followed two economic depressions and was the country's most significant disturbance since the Civil War.[2] The case also concerned an individual, Eugene V. Debs, who would go on to run for President as a Socialist in five subsequent elections.[3] And involved in the case were several of the leading lawyers of their generations—among them, a young Clarence Darrow and an older Lyman Trumbull, both of whom represented Debs.[4] Finally, the case concerned the Court's blessing of the use of equitable remedies in a manner that contemporaries immediately realized was unusual in scope and social significance.

In the Judiciary Act of 1789, Congress authorized the federal courts to hear suits in equity, and also authorized the federal government to seek equitable relief as a plaintiff.[5] In addition, Congress sometimes enacted statutes that reached beyond the traditional boundaries of the common law and equity. When it did so, the federal government had no reason to invoke section 11 of the Judiciary Act of

1 158 U.S. 564 (1895).

2 On the Pullman Strike, see ALMONT LINDSEY, THE PULLMAN STRIKE: THE STORY OF A UNIQUE EXPERIMENT AND OF A GREAT LABOR UPHEAVAL (1942).

3 On Debs, see NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST (1982).

4 Darrow would go on to be a crusading civil liberties lawyer and leading member of the American Civil Liberties Union. *See* JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED (2011). Trumbull was the coauthor of the Thirteenth Amendment to the Constitution, which abolished slavery in the United States. *See* HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 222–30 (1913).

5 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1345 (2018)).

1789. But when Congress failed to do so, section 11 provided a fallback option authorizing the United States to sue in "equity."[6] The question of how to construe that authority—and specifically whether there were any limits on the federal government's authority that inhere in the power to seek equitable relief—was front and center in the *Debs* case.

For decades, *Debs* and the concept of the "labor injunction" were at the heart of not only legal but political debate.[7] Consider the platform of the Democratic Party in 1896. It denounced "government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners."[8]

Or consider the State of the Union speech given by then-President, later-Chief Justice, William Howard Taft in 1909. He proposed that Congress enact:

> [A] statute forbidding hereafter the issuing of any injunction or restraining order, whether temporary or permanent, by any Federal court, without previous notice and a reasonable opportunity to be heard on behalf of the parties to be enjoined; unless it shall appear to the satisfaction of the court that the delay necessary to give such notice and hearing would result in irreparable injury to the complainant . . . .[9]

It is rare that the scope of equitable remedies makes its way into political party platforms and the State of the Union address. But the labor injunction of the early twentieth century was an issue that

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6 *Id.*

7 For example, writing in 1921, Justice Brandeis remarked that controversy over the labor injunction had "overshadowed in bitterness the question of the relative substantive rights of the parties." Truax v. Corrigan, 257 U.S. 312, 366 (1921) (Brandeis, J., dissenting). Brandeis noted that legislative proposals pertaining to the validity and scope of such injunctions "occupied the attention of Congress during every session but one in the twenty years between 1894 and 1914." *Id.* at 369 & nn.38–39; *see* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 52–53 (1930) ("[T]he extraordinary remedy of injunction has become the ordinary legal remedy, almost the sole remedy. . . . Organized labor views all law with resentment because of the injunction, and the hostility which it has engendered has created a political problem of proportions." (footnote omitted)).

8 *1896 Democratic Party Platform*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1896-democratic-party-platform/ [https://perma.cc/TX23-DQCC].

9 William Howard Taft, *First Annual Message* (Dec. 7, 1909), *reprinted in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7409, 7432 (1917). Taft's recommendation failed, but significant legislation was enacted in 1914. *See* Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2018)). *See generally Amendments to the Sherman Antitrust Law and Related Matters: Hearing on H.R. 15657 Before the S. Comm. on the Judiciary*, 63d Cong., 2d Sess. (1914).

defined a legal era.[10] Congress effectively ended that era in 1932 when it enacted the Norris-LaGuardia Act,[11] which curtailed labor injunctions.

For some years following passage of the Norris-LaGuardia Act, the scope of the federal government's authority to invoke equitable remedies in the absence of express statutory authorization was a sleepy backwater of the law.[12] In part, that was due to the increasing number of federal statutes that defined the authority of the federal government to seek equitable and related relief. For that reason, the federal government's need to rely on the fallback option contained in 28 U.S.C. § 1345 (the recodification of section 11 of the Judiciary Act of 1789) presented itself with increasing rarity. When it did, courts often remarked that the law in this area was confused.[13] In recent years, however, the issue of the scope of equitable relief for the United States has reemerged. The United States has repeatedly invoked its power to sue in equity when challenging state laws that interfere with the federal government's asserted "power over the subject of

10 *See generally* J.H. BENTON, JR., WHAT IS "GOVERNMENT BY INJUNCTION?" DOES IT EXIST IN THE UNITED STATES? (Concord, N.H., The Rumford Press 1898).

11 Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–115).

12 An illustration of the issue's receding nature can be gleaned from the number of pages devoted to it in the Hart & Wechsler treatise. Perhaps reflecting lingering perspectives on the significance of the labor injunction, in the 1953 edition of the treatise, the authors devoted numerous pages to the topic. In the most recent edition, the authors devote a single note. *Compare* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 747 (7th ed. 2015), *with* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1107–36 (1953). Recent contributions to the literature include the following articles: Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1 (2014); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993); Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in* Parens Patriae, 92 NW. U. L. REV. 111 (1997); Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999). Although each of these articles is highly instructive, none addresses the question from the perspective of traditional equity practice as we do here. For a somewhat older student note addressing this topic, see Note, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566, 1569 (1972) (noting that *Debs* "is susceptible of at least five divergent interpretations").

13 Lower courts, for example, have held that, notwithstanding *Debs*, the federal government cannot sue for equitable relief on the theory that a state has violated its citizens' Fourteenth Amendment rights. *See, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 192 (3d Cir. 1980); United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121, 1122 (4th Cir. 1977). These cases suggest a judicial concern that *Debs* must be subject to some sort of limiting principle, but they do not grapple with the historical materials addressed in this Article and, thus, do not fully articulate what that limiting principle might be.

immigration."[14] In these cases, the parties (and the Court) simply took for granted that the United States could bring an equitable suit without express statutory authority, thereby leading to no Supreme Court analysis on the topic. But the issue became inescapable last term in *United States v. Texas*.[15] There, after granting certiorari to decide whether the United States could sue in equity to block the S.B. 8 abortion statute,[16] the Supreme Court dismissed the United States' petition for certiorari as improvidently granted.[17] But the dismissal only highlights that the issue will not go away, and the courts will continue to struggle with precisely when, and how, and why the federal government can bring a suit in equity.

This Article answers the question of when the United States may bring a nonstatutory suit in equity. We revisit the *Debs* case, place it in historical context, and seek to understand the traditional limits placed on equitable relief. Over the last two decades, the Supreme Court has often looked to traditional equitable principles when deciding whether parties may bring suit and obtain equitable relief,[18] and it does so in part because the Judiciary Act of 1789 is the charter of federal

14 *See* Arizona v. United States, 567 U.S. 387, 394 (2012); United States v. South Carolina, 720 F.3d 518, 533 (4th Cir. 2013); United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012), *cert. denied*, 569 U.S. 968 (2013) (mem.). For older cases on this general topic, see Heckman v. United States, 224 U.S. 413, 438–39 (1912) (addressing the federal government's authority to sue in equity to protect Indian tribes); Sanitary Dist. v. United States, 266 U.S. 405, 426 (1925) (addressing the federal government's authority to sue in equity to carry out the Nation's treaty obligations).

15 United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (per curiam), *cert. dismissed as improvidently granted*, 142 S. Ct. 522 (2021) (mem.). This is not the only recent, high-profile question involving suits in equity by the federal government. Attorney General William Barr suggested that the federal government might sue in equity to prohibit States from enacting strict limits to confront COVID-19. *See, e.g.*, Chris Strohm, *Barr Threatens Legal Action Against Governors over Lockdowns*, BLOOMBERG (Apr. 21, 2020, 1:41 PM), https://www.bloomberg.com/news/articles/2020-04-21/barr-says-doj-may-act-against-governors-with-strict-virus-limits/ [https://perma.cc/9EVT-3DKM]. As these examples illustrate, the issue is by no means a partisan one, but rather a question of federal authority. That question may arise with greater frequency in an era of divided government, because there is reduced likelihood of new statutory causes of action for the federal government.

16 United States v. Texas, 142 S. Ct. 14 (2021) (mem.).

17 United States v. Texas, 142 S. Ct. 522 (2021) (mem.).

18 A similar issue has arisen in a related context: where Congress by statute authorizes the granting of "equitable" relief. There, too, the Court interprets the statutory provision to authorize relief according to traditional equitable principles. *See, e.g.*, Liu v. SEC, 140 S. Ct. 1936, 1942 (2020). Although statutes that authorize equitable relief are related to the Judiciary Act's equitable provision in this way, they are distinct in another: such statutes typically identify the boundaries of the suits they authorize. The Judiciary Act of 1789 identifies no such limits. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1345 (2018)).

equity jurisdiction.[19] Those traditional principles—including the empowering and the limiting principles of equity—therefore remain relevant in the modern era. *Debs* engaged with one such limit, which emphasizes the need for a connection between equitable relief and a "proprietary" or "property" interest.[20] As we will explain below, *Debs* expanded the notion of what might qualify as "property" for equitable purposes. And while the case is susceptible to multiple interpretations, the better reading is to understand it as acknowledging and reinforcing that traditional limitation.

The equity-property connection is sometimes stated as a rule that equity will only protect a proprietary interest.[21] It is sometimes presented more affirmatively—in other words, as a statement equity *will* protect a proprietary interest, notwithstanding some other principle about what equity will not do.[22] The rule has certain exceptions.[23] One exception is that it does not apply if there is statutory authorization for the plaintiff to seek equitable relief, which means the domain in which the proprietary-interest requirement is relevant has been steadily shrinking. And the requirement has been vigorously criticized by scholars for a century.[24]

Nevertheless, the proprietary-interest requirement serves valuable functions today. Where no statute focuses the actions of equity, the traditional limits of equity themselves provide the focus. That is especially needed because equity lacks "causes of action,"[25] which might otherwise define and demarcate the exercise of judicial power. Such restraints have long been recognized as especially important in equity because of its vast remedial powers,[26] and the heightened concerns of political legitimacy that attend those powers—as in *Debs* itself. Moreover, this understanding of the connection between equitable relief and proprietary interests may also have implications for how to understand *Ex parte Young*.[27]

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19 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 332 (1999); *see also infra* Section I.A; *cf.* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. (forthcoming 2023) (arguing that Article III of the U.S. Constitution is the source of the federal courts' equitable jurisdiction).

20 We use these two terms interchangeably. *See infra* Section I.D.

21 *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

22 *See infra* Sections I.C–D.

23 *See infra* notes 87–88 and accompanying text.

24 *See, e.g.*, Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

25 *See* Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763 (2022).

26 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530 (2016).

27 209 U.S. 123 (1908). On *Ex parte Young*, see generally John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989 (2008); James E. Pfander & Jacob P. Wentzel, *The Common Law*

Our Article proceeds as follows. In Part I, we analyze some of equity's traditional limiting principles, including the "equity will not" doctrines and the equity-property connection. This Part describes the leading English Chancery case, *Gee v. Pritchard*.[28] In Part II, we turn to the lead up to the *Debs* case, the *Debs* case itself, and its aftermath. Finally, in Part III, we will turn to an evaluation of the nature of equity today—and discuss what equity's limiting principles in the present should be.

I. A SKETCH OF THE RELEVANT LAW OF EQUITY

In this Part, we describe the relevant law of equity necessary for understanding *Debs*. Without comprehensively addressing the topic, Section I.A spells out the foundation of the federal courts' equity jurisdiction and the Supreme Court's cases addressing its scope. Sections I.B through I.D then explain how the English Court of Chancery and the equity tradition more broadly established limits on injunctive powers that cabin and direct a court's discretion. One of those limits—as we will discuss in Section I.D—was the need for a connection between equitable relief and a proprietary interest.

A. The Basis for Federal Equity Jurisdiction

Article III permits the federal courts to decide "Cases, in Law and Equity."[29] The First Congress carried into effect a portion of Article III's permission to decide "equity" cases by authorizing federal courts, in the Judiciary Act of 1789, to hear some, though not all, "suits of a civil nature at common law or in equity."[30] In relevant part, the First Judiciary Act authorized jurisdiction (subject to an amount-in-controversy requirement) over "all suits of a civil nature at common law or in equity, where . . . the United States are plaintiffs, or petitioners."[31]

Origins of Ex parte Young, 72 STAN. L. REV. 1269 (2020); David L. Shapiro, Ex Parte Young *and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69 (2011). On the related question of sovereign immunity, see William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017).

28 Gee v. Pritchard (1818) 36 Eng. Rep. 670; 2 Swans. 403.

29 U.S. Const. art. III, §§ 1–2. According to Madison's notes, William Samuel Johnson of Connecticut "suggested that the judicial power ought to extend to equity as well as law—and moved to insert the words 'both in law and equity' after the words 'U.S.'" in Article III. James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422, 428 (Max Farrand ed., rev. ed. 1966). George Read of Delaware "objected to vesting these powers in the same Court," which prompted a vote at which two States (Delaware and Maryland) dissented. *Id.*

30 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1345 (2018)).

31 *Id.*

As the Supreme Court has consistently understood, this statutory authorization to adjudicate equity cases was linked to the equitable jurisdiction of the English Court of Chancery in 1789. Writing in 1928, then-Professor (and future Judge) Armistead Dobie explained that "[s]ubstantially . . . the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789."[32] The modern statement of this proposition is found in the Court's decision in *Grupo Mexicano*,[33] but many other cases both before and after *Grupo Mexicano* link section 11 of the First Judiciary Act with the English Court of Chancery's jurisdiction.[34]

That proposition does not mean the federal courts' equity jurisdiction is completely fixed or static,[35] and *Grupo Mexicano* does not say

32 ARMISTEAD M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928); *cf.* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

33 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

34 *E.g.*, Marshall v. Marshall, 547 U.S. 293, 308 (2006) (noting that "the equity jurisdiction conferred by the Judiciary Act of 1789 . . . is that of the English Court of Chancery in 1789" (quoting Markham v. Allen, 326 U.S. 490, 494 (1946)); Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945) ("The suits in equity of which the federal courts have had 'cognizance' ever since 1789 constituted the body of law which had been transplanted to this country from the English Court of Chancery."); Atlas Life Ins. Co. v. W.I.S., Inc., 306 U.S. 563, 568 (1939) ("The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."); Matthews v. Rodgers, 284 U.S. 521, 529 (1932) ("The equity jurisdiction conferred on inferior courts of the United States by [section] 11 of the Judiciary Act of 1789 . . . is that of the English court of chancery at the time of the separation of the two countries." (citing Judiciary Act of 1789, ch. 20, 1 Stat. 73, 78)); Waterman v. Canal-La. Bank & Tr. Co., 215 U.S. 33, 43 (1909); Arrowsmith v. Gleason, 129 U.S. 86, 99 (1889); McConihay v. Wright, 121 U.S. 201, 206 (1887); Generes v. Campbell, 78 U.S. (11 Wall.) 193, 196–98 (1870); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 460, 462 (1855); Fontain v. Ravenel, 58 U.S. (17 How.) 369, 384 (1855) ("The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States."); Story v. Livingston, 38 U.S. (13 Pet.) 359, 368 (1839); Vattier v. Hinde, 32 U.S. (7 Pet.) 252, 252 (1833); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222–23 (1818) (tracing equitable remedies to "the principles of . . . equity, as distinguished and defined in that country from which we derive our knowledge of those principles"). For an argument that it is not the Judiciary Act of 1789, but Article III of the U.S. Constitution, that connects the federal courts' equity jurisdiction with the English Chancery, see Gallogly, *supra* note 19.

35 *See* Gordon v. Washington, 295 U.S. 30, 36 (1935) ("From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, *as they have*

that it is.[36] Nor could it be, because equity responds to inadequacies in the law, and as the law changes, equity must adjust.[37] But it does mean that any claim to the exercise of federal equity jurisdiction must find a basis in the equity tradition, reckoning both with the tradition's powers and with its limits. Accordingly, the U.S. Supreme Court has repeatedly rejected the argument that plaintiffs can get into equity merely by appealing to its flexibility.[38]

Thus every plaintiff needs some basis in the equitable tradition in order to seek and obtain equitable relief. Appeals to equitable flexibility, or to the maxim that every right needs a remedy, are not a sufficient basis for the exercise of equity jurisdiction by a federal court.

B. The Backdrop to Equity's Limiting Principles

The English historian Frederick Maitland described equity "as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code."[39] In a similar vein, section 11 of the First Judiciary Act created a "gloss" around statutes that do not explicitly mention equity, authorizing equitable jurisdiction and equitable remedies even when Congress has not statutorily specified them. But at the same time, the statute incorporated limits on equitable practice that existed in the Court of Chancery and the equitable tradition.

There were several reasons why the equitable tradition developed these limits. For one thing, equity has a high density of moral terms—such as, for example, "good faith,"[40] which were often tied to the

been developed in the federal courts." (emphasis added)); *see also* Riley T. Keenan, *Judge-Made Equity*, 74 ALA. L. REV. (forthcoming 2023).

36 *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1010 n.61 (2015) (citing *Grupo Mexicano*, 527 U.S. at 332–33).

37 *See* Pfander & Wentzel, *supra* note 27, at 1276; *see also* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 n.19 (1962) ("It was settled in *Beacon Theatres* that procedural changes which remove the inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases."); N. Pac. R.R. Co. v. Amacker, 46 F. 233, 236 (C.C.D. Mont. 1891) ("The perfecting of legal proceedings has often done away with the necessity of a resort to equitable remedies.").

38 *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 217 (2002); *Grupo Mexicano*, 527 U.S. at 321.

39 F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 18 (A.H. Chaytor & W.J. Whittaker eds., 1909).

40 *E.g.*, Smith v. Clay (1767) 29 Eng. Rep. 743, 744; 3 Bro. C.C. 646, 646 ("A court of equity 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 right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence . . . ."); *see* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1123–28 (2021); Roger Young & Stephen Spitz, Essay, *SUEM—Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175 (2003).

notion of the chancellor's conscience.[41] Limits were necessary precisely because the tradition vested a judge with discretionary powers whose exercise was guided by conscience. By limiting when equitable relief was appropriate, the tradition could justify vesting such discretion in the hands of the chancellor.

For another, equitable remedies such as the injunction allowed direct supervision and control of the parties—for example, through detailed specification of an injunction, conditions on the plaintiff to obtain relief, appointment of masters and receivers, modification or dissolution of the decree, and enforcement by contempt.[42] These awesome powers needed some limiting principles.

Finally, courts of equity acted only when there was an inadequate remedy at law.[43] Equity is related to law rather than the other way around.[44] This can be expressed in various metaphors: equity is the second-guesser, the instant replay system, the backup generator so the lights don't go out. Equity was adjectival, or, in Henry Smith's phrase, "meta-law."[45]

All three of these characteristics have been found in equity for centuries, and they are rooted not in high theory but in the very practical operation of Chancery as a judicial institution. Many of equity's themes are predictable if we think of equity as traceable to the iterative decisions of chancellor-bishops, who used inquisitorial procedure and Chancery's administrative apparatus in order to correct the injustice

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41 *Compare* IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET (2018), *with* Samuel L. Bray, *A Parsimonious Equity?: Discussion of* Equity: Conscience Goes to Market, 21 JERUSALEM REV. LEGAL STUD. 1, 6–9 (2020), *and* Richard Hedlund, *The Theological Foundations of Equity's Conscience*, 4 OXFORD J.L. & RELIGION 119 (2015).

42 *See* Bray, *supra* note 26, at 563–72.

43 *See, e.g.*, 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."); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) ("The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is . . . the absence of an adequate remedy at law."). Note that inadequacy of legal remedies is a requirement in what is called equity's "concurrent jurisdiction," but not in the "exclusive jurisdiction" (i.e., where equity developed the entire substantive law, as in the law of trusts). On this distinction, see 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33, at 32–33 (Boston, Hilliard, Gray & Co. 1836) ("The jurisdiction of a Court of Equity is sometimes concurrent with the jurisdiction of a Court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it."); *see also* David Yale, *A Trichotomy of Equity*, 6 J. LEGAL HIST. 194 (1985).

44 For further discussion, see Bray & Miller, *supra* note 25, at 1782–85; Smith, *supra* note 40, at 1067.

45 Smith, *supra* note 40, at 1067. One implication is that when law and equity conflict, equity has the last word. *See, e.g.*, Earl of Oxford's Case (1615) 21 Eng. Rep. 485, 486; 1 Chan. Rep. 1, 5; Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 466–67 (2003).

of specific results reached by courts of law. But what is also predictable is the anxieties that this kind of equity would generate—anxieties about discretion, about power, about legitimacy. These anxieties have come to the surface whenever there has been an especially muscular use of equitable remedies in the United States.[46]

These characteristics of equity, and the anxiety that these characteristics predictability generate, are the keys to understanding equity's limiting principles.

C. The "Equity Will Not" Doctrines

In order to channel and to define the scope of its extraordinary authority, the Court of Chancery and the broader equity tradition developed a series of doctrines to limit equitable powers—principles about what equity will not do. Equity will not enjoin a crime,[47] will not enjoin a criminal proceeding,[48] will not protect political rights,[49] will not protect personal rights unless touching property,[50] will not enjoin a libel,[51] and so on. All of these principles were critiqued by equity's critics (and the tide has been against the "equity will not" doctrines throughout the last century). Even so, these principles have not entirely disappeared from judicial decisions,[52] and some of them are

46 Episodes include the use of equity to suppress labor demonstrations in the early twentieth century, to desegregate schools and overhaul prisons and other state institutions in the late twentieth-century, and to control the federal government with national injunctions in the early twenty-first century. In every one of these instances "government by injunction" has been the critique. On the reaction to *Debs* in particular, see *infra* Section II.C.

47 *See* Mayor of York v. Pilkington (1742) 26. Eng. Rep. 584, 585; 2 Atk. 302, 302 ("This court has not originally, and strictly, any restraining power over criminal prosecutions . . . ." (citing Montague v. Dudman (1751) 28 Eng. Rep. 253; 2 Ves. Sen. 396)).

48 *See* 2 STORY, *supra* note 43, § 893, at 178 ("Courts of Equity . . . will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature.").

49 *See* Nabob of the Carnatic v. E. India Co. (1791) 30 Eng. Rep. 391, 391; 1 Ves. Jun. 371, 392–93; Nabob of the Carnatic v. E. India Co. (1793) 30 Eng. Rep. 521, 523; 2 Ves. Jun. 56, 60. For a critical review of this case, see Seth Davis, *Empire in Equity*, 97 NOTRE DAME L. REV. 1985 (2022).

50 *See* JAMES W. EATON & ARCHIBALD H. THROCKMORTON, HANDBOOK OF EQUITY JURISPRUDENCE § 294, at 542 (2d ed. 1923) ("The English court of chancery had no power to grant injunctions, except in cases where there was injury, either actual or prospective, to civil property.").

51 *See* Brandreth v. Lance, 8 Paige Ch. 24, 27–29 (N.Y. Ch. 1839) (relying on *Gee v. Pritchard* as marking "[t]he utmost extent to which the court of chancery has ever gone in restraining any publication by injunction," and concluding that "this court has no jurisdiction or authority" to enjoin the libel as requested (citing Gee v. Pritchard (1818) 36 Eng. Rep. 670; 2 Swans. 403)).

52 On not enjoining a crime, see Florida v. Seminole Tribe, 181 F.3d 1237, 1249 (11th Cir. 1999); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969); Leider v. Lewis, 394 P.3d 1055, 1063 (Cal. 2017); Horne v. Endres, 61 So. 3d 428, 431 (Fla. Dist. Ct. App. 2011).

codified in state statutes.[53] A full account of these "equity will not" doctrines, and which ones have enduring force, will have to be done in future work. But this subsection will briefly describe their normative basis, and the next subsection will take up the related idea that equity will not do certain things unless property is involved, which is a critical issue in understanding *Debs*.

As already noted, a central principle for equity is that it acts where there is no adequate remedy at law. This is a concrete manifestation of equity's adjectival quality, and it is sometimes described as a head of equitable jurisdiction; it is also part of most modern tests for permanent and preliminary injunctions.[54] But what is an adequate remedy at law? If it means that equity acts only when it can do something better, in the sense of more desirable to the plaintiff, then it would be a requirement that is met in essentially every case involving an equitable remedy. It must mean something more.

So how do courts of equity decide whether there is an adequate remedy at law? A full answer would require looking at the subject from other angles,[55] but part of the answer has traditionally been supplied by the "equity will not" doctrines. These doctrines offer a way of deciding the adequacy of legal remedies. But they do so not case by case, based on the judge's impression of how serious the inadequacy is in this instance, but rather categorically. Equity does not enjoin a

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On not enjoining a criminal proceeding, see Younger v. Harris, 401 U.S. 37, 43–44 (1971); Stefanelli v. Minard, 342 U.S. 117, 120 (1951); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); *In re* Sawyer, 124 U.S. 200, 210 (1888); Trump v. United States, 54 F.4th 689 (11th Cir. 2022); Billy/Dot, Inc. v. Fields, 908 S.W.2d 335, 337 (Ark. 1995); GeorgiaCarry.org v. Atlanta Botanical Garden, Inc., 785 S.E.2d 874, 879 (Ga. 2016).

On not protecting political rights, see South v. Peters, 339 U.S. 276, 277 (1950) (per curiam); *Sawyer*, 124 U.S. at 212; Airport Auth. v. City of St. Marys, 678 S.E.2d 103, 105–06 (Ga. Ct. App. 2009); Macy v. Okla. City Sch. Dist. No. 89, 961 P.2d 804, 808 (Okla. 1998).

On not enjoining a libel, see Kramer v. Thompson, 947 F.2d 666, 680 (3d Cir. 1991) (Becker, J.); Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 115–19 (Del. Ch. 2017); Kinney v. Barnes, 443 S.W.3d 87, 95 (Tex. 2014) (defamation).

53 *See, e.g.*, CAL. CIV. CODE § 3369 (West 2022) ("Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law."); GA. CODE ANN. § 9-5-2 (2022) ("Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them.").

54 *E.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

55 *See* EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS 595 (3d ed. 2020) (describing the inquiry into an adequate remedy as a shorthand for the sum of considerations comparing the legal and equitable remedies); Bray & Miller, *supra* note 25 (emphasizing the plaintiff's story); Bray, *supra* note 26, at 580–81 (explaining how the adequacy requirement encourages consciousness about the law/equity line).

crime, or a criminal proceeding, because it is presumed that the criminal process will offer an adequate remedy, allowing as it does the raising of constitutional, procedural, and substantive objections.[56] And the doctrine that "equity will not protect a personal right" kept equity from taking over the field of tort law, allowing that field to develop on its own very different principles,[57] while equity developed injunctions against trespass and nuisance. (This is how *In re Debs* was litigated, as a public nuisance involving property rights.)[58] The doctrine that equity would not protect a personal right also worked to preserve the domain of the civil jury in tort law.

It is possible to overstate how categorical these doctrines are. They all have exceptions—equity does not enjoin a crime, unless doing so is necessary to protect property rights;[59] equity does not enjoin a criminal proceeding, unless the prosecutor is acting in bad faith;[60] equity does not enjoin a libel, except a trade libel;[61] and so on.

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56 Dombrowski v. Pfister, 380 U.S. 479, 485 (1965) ("[I]n a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution."); Fitts v. McGhee, 172 U.S. 516, 531–32 (1899) ("We are of opinion that the Circuit Court of the United States, sitting in equity, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court. . . . Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land." (citing Robb. v. Connoly, 111 U.S. 624 (1884))); *Seminole Tribe*, 181 F.3d at 1249.

57 *See* John C.P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort*, *in* EQUITY AND LAW: FUSION AND FISSION 309 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

58 *See infra* notes 126–55 and accompanying text; *see also* United Steelworkers of Am. v. United States, 361 U.S. 39, 61 (1959) (Frankfurter and Harlan, JJ., concurring) ("The crux of the *Debs* decision, that the Government may invoke judicial power to abate what is in effect a nuisance detrimental to the public interest, has remained intact.").

59 *E.g.*, City of New York v. Andrews, 719 N.Y.S.2d 442, 455 (N.Y. Sup. Ct. 2000); *see also* United States v. Santee Sioux Tribe, 135 F.3d 558, 565 (8th Cir. 1998) (exceptions "1) in cases of national emergency; 2) in cases of widespread public nuisance; and 3) in cases where a statute grants a court the power to enjoin a crime"); SEC v. Carriba Air, Inc., 681 F.2d 1318, 1321 (11th Cir. 1982) (exception for public nuisances); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969) (exceptions for "national emergencies, widespread public nuisances, and where a specific statutory grant of power exists"); Billy/Dot, Inc. v. Fields, 908 S.W.2d 335, 337 (Ark. 1995) ("narrow exception" for lawful businesses); Att'y Gen. v. PowerPick Player's Club, 783 N.W.2d 515, 534 (Mich. Ct. App. 2010) (exception for nuisances).

60 *See Dombrowski*, 380 U.S. at 490, 497; Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

61 Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 120–23 (Del. Ch. 2017). *Organovo Holdings* also notes an exception for adjudicated falsehoods. *Id.* at 123–26.

Thus, these apparently categorical resolutions of the adequacy of the remedy are actually presumptions that can then be shifted back in the other direction in the appropriate circumstances. The use of these kinds of shifting presumptions is characteristic of equity.[62]

But what these categorical presumptions do make clear is that "no adequate remedy" is a term of art, and that it is assessed not just by the effectiveness of other remedies in a particular case, as a one-off, but also by how that particular case fits into the legal landscape—a larger set of decisions about where to allocate the sum of a court's equitable interventions. The "equity will not" doctrines therefore work to ration and channel the use of equity's scarce resources. These include not only equity's ultimate resources of remedial intervention, but also its decision-making resources for deciding which cases to focus on.

So far, this subsection has shown that the "equity will not" doctrines help keep equity adjectival (one of the characteristics of equity mentioned above).[63] But the characteristics of equity generate the anxieties about equity. It is not an accident that the "equity will not" doctrines have tended to keep equity away from the most politically sensitive and delicate matters.

A cynic would say these assurances of what equity would not do are mere verbal tricks. They allow equity to talk a good game, to proclaim its modesty, while really offering an aggressive encroachment on other areas of the law. But a less cynical take is that the chancellors have recognized, at least since the showdown between Lord Coke and Lord Ellesmere,[64] that the survival of equity depends on the acceptance of its legitimacy. And it has a lot working against it on that front. Its remedies are more intrusive. The enforcement of those remedies might be indefinite imprisonment of contemnors. It lacks the check of the civil jury. And it has been haunted by John Selden's gibe that all its talk of morality and conscience is simply a ruse for judicial will.[65]

So, the Chancery had to constantly be shoring up its legitimacy, and it did so in part through the "equity will not" doctrines. For example, equity once had a criminal jurisdiction—Star Chamber—and it learned its lesson.[66] And equity's avoidance of protecting political

62 *See* Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 219–30 (2012).

63 *See supra* notes 43–45 and accompanying text.

64 *See generally* J.H. Baker, *The Common Lawyers and the Chancery: 1616*, 4 IRISH JURIST 368 (1969).

65 JOHN SELDEN, *Equity*, *in* TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN ESQ. 43, 43–44 (London, E. Smith ed. 1689).

66 On Star Chamber and the rejection of criminal equity, see generally JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 568–72 (2009). *Cf.* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 443 (2d ed. 1948) ("Insofar as the

rights once kept the federal courts out of the "political thicket" of overseeing electoral district lines,[67] even as the courts were willing to give legal damages for violations of the right to vote.[68] An unwillingness by equity to enjoin crimes prevents it from going around the protections for an accused person in a criminal trial. Nor is it an accident that most of the abstention doctrines developed over the last century were for the federal courts' exercise of equitable powers.[69]

D. The "Equity Will Not" Doctrines and Property

For most of these constraining principles, the equity courts developed exceptions based on the need to protect property rights.[70] For example, equity will not enjoin a criminal proceeding, except to protect property rights.[71] Nor, it is said, will equity enjoin crimes, except

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original King's Council undertook to prevent crimes as such, its powers were later exercised by the Court of Star Chamber, and ceased to exist when that court was abolished. It then became common for courts and writers to state that equity had no jurisdiction to enjoin the commission of a crime, though in practice it continued to issue injunctions at the suit of a private party where the threatened act would cause irreparable injury to his property, even though the act might also be made a crime.").

67 The shift announced in *Baker v. Carr* was a conscious rejection of this equitable principle of restraint. *Compare* Baker v. Carr, 369 U.S. 186, 231–32 (1962), *with* South v. Peters, 339 U.S. 276, 277 (1950) (per curiam) ("Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.").

68 *See* Nixon v. Herndon, 273 U.S. 536, 539–42(1927); Wayne v. Venable, 260 F. 64, 65, 70 (8th Cir. 1919); Ashby v. White (1703) 92 Eng. Rep. 126; 2 Ld. Raym. 939; *see also* Lane v. Wilson, 307 U.S. 268, 269, 277 (1939).

69 *E.g.*, Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943); R.R. Comm'n v. Pullman Co., 312 U.S. 496, 500–01 (1941); *see also* Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737 (2020); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1358 (1960).

70 GEO. TUCKER BISPHAM, THE PRINCIPLES OF EQUITY: A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN COURTS OF CHANCERY § 402, at 365 (Philadelphia, Kay & Brother 1874) (remarking that the "writ of injunction" is used to "prevent injuries to property"); *id.* § 453, at 407 ("[T]he jurisdiction of equity is exercised solely on the ground of protection to property . . . ."); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 359 (San Francisco, A.L. Bancroft & Co. 1881) (describing rights enforceable in equity as "rights of property or rights analogous to property"). For a recent statement along the same lines, see Pfander & Wentzel, *supra* note 27, at 1294 (referring to British practice and remarking that "[c]hancery handled private law matters in cases where equitable titles, rights, or remedies were at issue, and did so almost exclusively in the context of resolving property disputes" (footnote omitted)).

71 *See* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); *Ex parte* Young, 209 U.S. 123, 161–62 (1908); Dobbins v. Los Angeles, 195 U.S. 223, 241 (1904); *In re* Debs, 158 U.S. 564, 593 (1895).

to protect property.[72] Nor would equity traditionally protect personal rights—again, unless touching property.[73] On the basis of these exceptions, the Court has sometimes gone so far as to say: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."[74] Or, as the Court said in *Weinberger v. Romero-Barcelo*,[75] "[a]n injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.'"[76]

For many readers, this emphasis on property will be hard to grasp. Yet it is critical for understanding *In re Debs* and *Ex parte Young*, because both cases present themselves as acceptable exercises of federal equity jurisdiction precisely because that exercise had a connection to property.[77] And the connection between equity and property runs as a major line of exception through the "equity will not" doctrines.

The leading nineteenth-century case for the equity-property connection was *Gee v. Pritchard*.[78] In *Gee*, a wealthy decedent left £4,000 outright to a nonmarital son (along with the interest on another £6,000), while leaving the rest of the estate in the hands of his widow.[79] The nonmarital son, who happened to be a clergyman in the Church of England, was displeased that he did not receive more from his stepmother, and he tried to extort her into increasing his inheritance by threatening to publish letters that she had sent him.[80] The widow sought and obtained from Lord Chancellor Eldon an injunction prohibiting the publication of the letters.[81] In deciding to continue the

72 *See In re* Sawyer, 124 U.S. 200, 222 (1888) (Field, J., concurring) ("In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity.").

73 *See* Gee v. Pritchard (1818) 36 Eng. Rep. 670; 2 Swans. 403.

74 *Sawyer*, 124 U.S. at 210; *see also* P.G. Turner, *Rudiments of the Equitable Remedy of Compensation for Breach of Confidence*, *in* EQUITABLE COMPENSATION AND DISGORGEMENT OF PROFIT 239, 270 (Simone Degeling & Jason N.E. Varuhas eds., 2017) (stating the general rule, sometimes honored in the breach, that "[e]quity only compensates for loss suffered through harm to economic and proprietary interests").

75 456 U.S. 305 (1982).

76 *Id.* at 312 (quoting Cavanaugh v. Looney, 248 U.S. 453, 456 (1919)); *see also* LAJIM, LLC v. Gen. Elec. Co., 917 F.3d 933, 943 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 58 (2019) (mem.), which quotes this passage from *Weinberger v. Romero-Barcelo* to establish that "the Supreme Court applies traditional equitable principles to environmental statutes."

77 *Ex parte* Young, 209 U.S. 123, 161–62 (1908); *In re* Debs, 158 U.S. 564, 593 (1895). On the different ways to read *Debs*, see *infra* Section II.B.

78 Gee v. Pritchard (1818) 36 Eng. Rep. 670; 2 Swans. 403.

79 *Id.* at 673; 2 Swans. at 410.

80 *Id.*

81 *Id.* at 678; 2 Swans. at 424.

injunction, the chancellor concluded that the widow had a qualified property interest in the letters that allowed protection by Chancery. "[C]harges of wounding feelings,"[82] said Lord Chancellor Eldon, were not enough, but the widow prevailed because she had "a sufficient property in the original letters to authorise an injunction."[83]

Gee relied in part on an equally consequential Chancery case, *Pope v. Curl*, brought by the poet Alexander Pope and decided in June of 1741.[84] Represented by William Murray, the future Lord Mansfield, Pope sought an injunction against Edmund Curll, a bookseller who published various letters between Pope and others, including the author Jonathan Swift.[85] Against the argument that Pope had lost his property right in the letters by sending them, Lord Hardwicke reasoned that the receiver of letters has only a special or qualified property, confined to the material on which they are written and not extended to the expression of the mind of the writer.[86]

Gee v. Pritchard is famous for three things: it stoutly defended precedent in equity, it took what would later be considered a long step toward a right of privacy, and it tied the jurisdiction of equity to property. That last contribution is the one relevant here, and though Lord Chancellor Eldon felt himself strictly constrained by precedent, and did not perceive himself as saying anything new, his words connecting equity and property became widely influential.

Gee would be much cited, on both sides of the Atlantic Ocean, for the proposition that a proprietary interest was necessary for equitable jurisdiction. Various exceptions emerged. One was that the proprietary-interest requirement did not apply in the areas exclusively developed by equity (e.g., trust, breach of confidence).[87] Another exception would become much more important: no proprietary interest was required if a statute authorized injunctive relief.[88] But even as courts

82 *Id.* at 677; 2 Swans. at 422 ("With reference to charges of wounding feelings, looking at the jurisdiction of the Court to be, if not entirely, mainly, relative to the question, whether the Plaintiff has or has not, property . . . .").

83 *Id.* at 678; 2 Swans. at 424.

84 Pope v. Curl (Ch. 1741) 26 Eng. Rep. 608; 2 Atk. 342; Mark Rose, *The Author in Court:* Pope v. Curll *(1741)*, 21 CULTURAL CRITIQUE 197, 197 (1992).

85 Rose, *supra* note 84, at 197. For a discussion of the historical background to the case, see *id.*

86 *Pope*, 26 Eng. Rep. at 608; 2 Atk. at 342.

87 J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES § 21-330, at 758 (5th ed. 2015); R.P. Meagher, 7 SYDNEY L. REV. 313, 315 (1974) (reviewing I.C.F. SPRY, EQUITABLE REMEDIES (1971)) ("[T]he requirement of a proprietary interest only existed in the case of injunctions in aid of purely legal rights."). On equity's exclusive jurisdiction, see *supra* note 43.

88 *See, e.g.*, *In re* Sawyer, 124 U.S. 200, 210 (1888) ("The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."); United States v. Jalas, 409 F.2d 358, 360 (7th Cir. 1969) (listing as an exception

applied the proprietary-interest requirement, they tended to expand the scope of what counted as "property."[89]

II. *DEBS*

When an 1894 strike by the American Railway Union against the Pullman factory in Chicago halted most of the passenger and freight trains west of Detroit, President Grover Cleveland sought a federal court order to stop the boycott.[90] The federal court, acting in equity, issued an injunction against the union, its officers, and others.[91] When Eugene V. Debs defied the injunction, he was prosecuted for contempt of court—a prosecution that ultimately led to the Supreme Court's opinion in *Debs*.[92]

The backdrop of the legal proceedings was dramatic. The doctrinal steps were equally important. In this Part, we address those steps chronologically, starting with key cases that preceded *Debs*, turning to a summary of *Debs*, and ending with the aftermath and reception of the case.

*A. The Pre-*Debs *Landscape*

The Supreme Court confronted the proper scope of the government's authority to bring equitable claims on several occasions in the years preceding *Debs*. Three cases—each one decided in 1888—set the stage for the litigation that followed in *Debs* just six years later.

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to the rule against enjoining a crime those circumstances "where a specific statutory grant of power exists"); Egg Harbor City v. Colasuonno, 440 A.2d 69, 70 (N.J. Super. Ct. Ch. Div. 1981) (concluding that a court of equity may not "enjoin violations of the state penal laws or ordinances of a municipality," "[a]bsent some statutory authority and except in cases where the activity sought to be enjoined constitutes a nuisance in and of itself"); State *ex rel.* Kirk v. Gail, 373 P.2d 955, 958 (Wyo. 1962).

89 *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired." (first citing *Sawyer*, 124 U.S. at 210; then citing *In re* Debs, 158 U.S. 564, 593 (1895); then citing Truax v. Raich, 239 U.S. 33, 37–38 (1915); then citing Brennan v. United Hatters of N. Am., 65 A. 165 (N.J. 1906); and then citing Barr v. Essex Trades Council, 30 A. 881 (N.J. Ch. 1894)); *see also* Note, *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 999 (1965).

90 *See* Proclamation No. 9233, 80 Fed. Reg. 10315, 10315 (Feb. 19, 2015).

91 *See Debs*, 158 U.S. at 570.

92 *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1162 (1989). For a history of the leadup to the *Debs* litigation and the broader backdrop to labor injunctions, see *id.*

In re Sawyer[93] was the first of the trilogy. In *Sawyer*, the Court did not have before it a lawsuit by the federal government, but rather considered the traditional limits imposed by equity in a suit between state officials.[94] The Court held that a federal court had no jurisdiction to entertain a bill of equity to restrain city authorities from removing a police judge from office.[95] The case arose when the elected police judge sued the mayor and eleven members of the council of the city of Lincoln, Nebraska, in equity, alleging that they had violated the Due Process Clause and Equal Protection Clause in failing to comply with a local law authorizing his removal from office only on certain, unmet conditions.[96] The plaintiff sought a writ of injunction to prevent the mayor and council members from proceeding further with the charges against him, which the lower court granted.[97] When the mayor and council members violated the injunction, the Marshal of the United States imprisoned them, prompting a filing of a writ of habeas corpus that challenged the underlying injunction as exceeding the limits imposed by equity.[98]

The Court observed that "[u]nder the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts."[99] With respect to courts of equity, the Court said that their "office and jurisdiction . . . unless enlarged by express statute, are limited to the protection of rights of property."[100] That meant that a court of equity had "no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers."[101] To sustain such a bill in equity to restrain the "removal of public officers," the Court reasoned, would "invade the domain of the courts of common law, or of the executive and administrative department of the government."[102] The Court

93 124 U.S. 200.
94 *See id.* at 201.
95 *See id.* at 220.
96 *See id.* at 201–05.
97 *See id.* at 206.
98 *See id.* at 201–02.
99 *Id.* at 209–10.
100 *Id.* at 210.
101 *Id.*
102 *Id.* The Court reasoned that the "jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error, or appeal, or by mandamus, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*." *Id.* at 212.

concluded that, in the case before it, "[n]o question of property is suggested."[103]

In the second case in the trilogy of 1888, *United States v. San Jacinto Tin Co.*,[104] the Court addressed a bill in equity brought by the United States to cancel a patent for land on the ground that the patent had been obtained by fraud.[105] The backdrop of the case was a set of complex statutes through which Congress authorized the General Land Office to issue patents for land, but did not expressly authorize the federal government to sue if a claimant defrauded the Office in seeking a land patent.[106] Despite the absence of such a statute, several earlier cases had adjudicated suits in equity brought by the federal government alleging such fraud, albeit without expressly commenting on the government's authority to bring a suit.[107]

The *San Jacinto Tin* Court expressly held that the government could bring such a lawsuit. The Court explained that the federal government's authority "to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit."[108] For that reason, the government was required to show that it had, "like the private individual, . . . such an interest in the relief sought as" entitled it to sue in equity.[109] That meant that, if the dispute was about "a question of property, a case must be made in which the court can afford a remedy in regard to that property"; and if about "a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States."[110]

At the same time, the *San Jacinto Tin* Court stressed that:

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103 *Id.* at 217.

104 125 U.S. 273 (1888).

105 The fraud allegedly was an extensive one and, as the Court noted, was alleged "to have been committed upon the government by its own officers." *Id.* at 278. But the Court ultimately concluded that there was "a total failure of evidence to establish any participation in this fraud on the part of any of the persons in the service of the government, who are charged with having been engaged in it." *Id.* at 297–98.

106 *Id.* at 284–85.

107 *See* Moffat v. United States, 112 U.S. 24 (1884) (setting aside a land patent because it had been obtained by fraud); United States v. Minor, 114 U.S. 233, 244 (1885) (setting aside a land patent obtained by fraud where a portion of the land would revert to the federal government and remarking that "it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant"); Colo. Coal & Iron Co. v. United States, 123 U.S. 307 (1887); United States v. Throckmorton, 98 U.S. 61 (1878) (entertaining suit in equity to vacate land patent).

108 125 U.S. at 285.

109 *Id.*

110 *Id.* at 285–86.

> [I]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.[111]

Or, as the Court put it, an "interest or duty of the United States must exist as the foundation of the right of action."[112] And if it was clear "that the suit has actually been brought for the benefit of some third person . . . then the suit must fail."[113] In *San Jacinto Tin*, however, the federal government could meet this requirement, because, if the patent were set aside, "the title to the property [would] revert to the United States, together with the beneficial interest in it."[114]

Although a majority upheld the Court's jurisdiction to invalidate land patents, various Justices expressed concern about the articulated limiting principle. They worried, in other words, that a broad interpretation of the United States' rights in this area could lead to private parties hijacking the federal government's ability to initiate suit. Before *San Jacinto Tin*, in *United States v. Throckmorton*,[115] Justice Miller contended that:

> It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim against his neighbor can, by indemnifying the government for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the [name of the] United States to declare the patent void.[116]

The Court's jurisdictional holding in *San Jacinto Tin*, moreover, was divided. In a separate opinion, Justice Field argued that the Court's decision to take jurisdiction was "unfortunately . . . not a solitary instance" where "the name and power of the United States have been used to serve the interests of private parties."[117] Such cases, Justice Field reasoned, raised the question whether the suit was "really brought by the United States to protect their rights, and not merely to

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111 *Id.* at 286.

112 *Id.*

113 *Id.*

114 *Id.* The Court ultimately concluded that, on the merits, no fraud could be shown to have occurred. *See id.* at 298–301.

115 98 U.S. 61 (1878).

116 *Id.* at 71.

117 *San Jacinto Tin*, 125 U.S. at 303–04 (Field, J., concurring) (citing *Throckmorton*, 98 U.S. 61).

promote the interests of private individuals."[118] Although Justice Field acknowledged that the federal government's equitable action in *San Jacinto Tin* would "restore eleven leagues of land to the public domain," he was skeptical that suit had truly been brought for the benefit of the United States.[119] More broadly, Justice Field contended that "[t]he legislation of congress points out the infinite variety of cases where legal proceedings may be taken on behalf of the United States in the enforcement of their rights, the protection of their property, and the punishment of offenses."[120] Thus, "wherever no authority is conferred by statute, express or implied, for the institution of suits, none in [his] judgment exists."[121]

In the final case in the trilogy, *United States v. American Bell Telephone Co.*,[122] the Court addressed another suit in equity brought by the United States, this time to set aside a patent for an invention on the ground that it had been obtained by fraud or mistake.[123] The patent holder argued that the United States lacked a reversionary interest, and therefore had no pecuniary interest in the subject matter of the suit, and could not bring a suit in equity to contest the validity of the patent.[124] The Court held that the United States' right to bring suit in equity in the case derived from "its obligation to protect the public from the monopoly of the patent which was procured by fraud."[125]

Sawyer, *San Jacinto Tin*, and *American Bell Telephone* each demonstrated the relevance of a proprietary interest to equitable remedies. Taken together, the trilogy also demonstrated the expansive perspective that some judges took on the nature of "property." Both of these themes would be present in the showdown in *Debs*.

B. The Debs *Litigation*

In *Debs*, the federal government sought an injunction from a federal court, "sitting as a court of equity," to restrain the obstruction of "interstate transportation of persons and property" and "carriage of the mails" that had resulted from the Pullman Strike of 1894.[126]

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118 *Id.* at 304.

119 *Id.* at 304–05.

120 *Id.* at 306.

121 *Id.* ("Whenever congress has felt it important that patents for land should be revoked, either because of fraud in their issue, or of breach of conditions in them, it has not failed to authorize legal proceedings for that purpose.").

122 128 U.S. 315 (1888).

123 *Id.* at 316.

124 *Id.* at 367.

125 *Id.*

126 *In re* Debs, 158 U.S. 564, 577 (1895).

1. The Backdrop and Briefing

The case arose when the United States filed a complaint seeking an injunction against the strikers in the Northern District of Illinois.[127] After the district court issued an injunction restraining the performance of certain acts in connection with the Pullman Strike, the United States quickly charged Debs, who was at the time the President of the American Railway Union, along with the Union's vice president, secretary, and board of directors, with violating the injunction and thereby engaging in a contempt of court.[128] A district judge found Debs and other leaders of the American Railway Union to be in contempt of court, and sentenced Debs to six months' imprisonment.[129] Debs and the other Union leaders then sought a writ of habeas corpus from the Supreme Court.

In his argument before the Court, Clarence Darrow sought the release of the Union's leaders from custody "on the ground that the court had no authority or jurisdiction to make [its] order."[130] Darrow's opening argument focused primarily on the inapplicability of the recently enacted Sherman Antitrust Act to the case.[131] In the *Debs* opinion, the Court would pay almost no mind to this contention, declaring that it "enter[ed] into no examination of [the Sherman Act], upon which the circuit court relied mainly to sustain its jurisdiction."[132]

In the course of discussing the Sherman Act, Darrow recognized the equity-property connection. He observed that the Act's enforcement provision authorized U.S. Attorneys to "institute proceedings in equity" to "prevent and restrain" violations of the Act.[133] Darrow reasoned that this provision "would seem by its terms to contemplate that [the Sherman Act] appl[ied] to property and to the ownership and control and the monopolization of property by individuals, corporations or trusts."[134] By contrast, "enjoining strikes or strikers, or enjoining labor organizations or mobs would be a procedure not in keeping

127 Argument for Petitioners, *In re* Debs, 158 U.S. 564 (1985) (No. 11), *reprinted in* 11 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 268, 268 (Philip B. Kurland & Gerhard Casper eds., 1975).

128 *Id.* at 268–69.

129 *Id.* at 269.

130 *Id.*

131 *See id.* at 270–318. Darrow also made several arguments based on the inadequacy of the information filed against Debs and the other petitioners. *See id.* at 319–64. For the Sherman Antitrust Act, see Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2018)).

132 *Debs*, 158 U.S. at 600.

133 Argument for Petitioners, *supra* note 127, at 271 (quoting Sherman Act, ch. 647, § 4, 26 Stat. at 209 (codified as amended at 15 U.S.C. § 4 (2018))).

134 *Id.* at 294.

with the courts of chancery."[135] That was because, in Darrow's words, "[c]ourts of chancery are concerned with property and property rights," and "[t]o enjoin the actions of men when those actions have no direct reference to property rights would be to replace the criminal procedure and penal statutes with the chancery powers of courts."[136]

2. The Court's Opinion

Writing for the Court, Justice Brewer noted that Congress "[d]oubtless" had the authority "to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts."[137] But even in the absence of specific legislation, Justice Brewer reasoned, the federal government also had "the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise."[138]

In reaching that conclusion, the Court addressed Debs's argument that the traditional rules of equity required a connection to property. The federal government, Debs argued, had "no property interest" in the case.[139] As an initial matter, the Court responded that a "sufficient reply [wa]s that the United States have a property in the mails, the protection of which was one of the purposes of" the federal government's lawsuit.[140]

But the Court went on to claim that it did "not care to place [its] decision upon this ground alone."[141] It then spelled out an alternative basis—albeit one of uncertain scope—for its holding that the injunction was proper. The Court's analysis on this point is susceptible to two interpretations.

Some of the Court's language suggested a sweeping holding that the federal government could invoke the fallback equitable option of "a right to apply to its own courts for any proper assistance" whenever there was "injury to the general welfare."[142]

But other parts of the Court's analysis focused specifically on the types of circumstances that could justify an injunction (without statutory authorization) where the United States "ha[d] no pecuniary

135 *Id.*
136 *Id.*
137 *Debs*, 158 U.S. at 581.
138 *Id.* at 582.
139 *Id.* at 583.
140 *Id.*
141 *Id.* at 584.
142 *Id.*

interest in the matter."[143] Thus, as the Court said, "[i]t is obvious" that the government could not "interfere in any mere matter of private controversy between individuals, or . . . use its great powers to enforce the rights of one against another."[144] The federal government could seek equitable relief only where "the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights."[145] In those circumstances, "the mere fact that the government has no pecuniary interest in the controversy" did not prevent it from obtaining equitable relief.[146]

And how could the Court determine if the government was faced with a wrong that "affect[ed] the public at large"?[147] In this respect, the Court noted that "it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."[148] The Court cited *Gilman v. Philadelphia*, an 1865 case, for the proposition that "all the navigable waters of the United States which are accessible from a State other than those in which they lie . . . are the public property of the nation, and subject to all the requisite legislation by Congress."[149] Such an "obstruction of a highway is a public nuisance" and such a "public nuisance has always been held subject to abatement at the instance of the government."[150] And though the "jurisdiction heretofore exercised by the national government over highways ha[d] been in respect to waterways," rather

143 *Id.* Professor Fiss, for example, appears to view the *Debs* Court's holding in this light. He notes that obstruction of railroads did not easily lead to the granting of equitable relief for the federal government because "equity was surrounded and thus circumscribed by a number of doctrines—maxims—that tended to limit the applicability of the public nuisance rule." OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 67 (1993). Professor Fiss notes that the relevant limiting maxim was "that equity only interferes for the protection of property, and that the government has no property interest." *Id.* (quoting *Debs*, 158 U.S. at 583). Brewer's solution, according to Professor Fiss, "appeared willing to repudiate the maxim" and "shied away from defining those limits in terms of property rights." *Id.* at 67–68.

144 *Debs*, 158 U.S. at 586.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.* (quoting Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724–25 (1865)). The Court in *Gilman* continued that this authority "necessarily includes the power to keep them open and free from any obstruction to their navigation interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders." *Gilman*, 70 U.S. (3 Wall.) at 725.

150 *Debs*, 158 U.S. at 587 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *167).

than railroads,[151] the Court held that made no difference because "[b]oth spring from the power to regulate commerce."[152]

A separate portion of *Debs* indicates that the Court understood the government's authority in the case to be proprietary. After holding that the federal government had two bases for equitable jurisdiction—the mails and the highways—the Court considered Debs's objection "that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes."[153] That "general proposition," the Court said, "is unquestioned."[154] But, the Court noted, there was an exception for proprietary interests:

> Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.[155]

In other words, the Court located the *In re Debs* suit within the property exception to the "equity will not enjoin a crime" principle. Indeed, for this part of the argument, there was no alternative. The Court saw the basis for the injunction as protection of "property or rights of a pecuniary nature."

C. Debs*'s Aftermath*

In this Section, we will describe the aftermath of the *Debs* opinion. As noted above, the consequences of the *Debs* case were politically explosive.[156] The case influenced the platform of a political party the year after it was decided and was the subject of intense debate for decades after.[157] Hundreds of labor injunctions were issued in its wake.[158]

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151 *Id.* at 589–90.

152 *Id.* at 590.

153 *Id.* at 593.

154 *Id.*

155 *Id.* (first citing Crawford v. Tyrrell, 28 N.E. 514 (N.Y. 1891); and then quoting Port of Mobile v. Louisville & Nashville R.R. Co., 4 So. 106, 112 (Ala. 1888)); *id.* ("The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights . . . .") (quoting *Port of Mobile*, 4 So. at 112).

156 *See supra* notes 5–12 and accompanying text.

157 The case even prompted the creation of one of the United States' few national holidays—Labor Day. On June 28, 1894, Congress enacted legislation declaring "Labor Day" to be a national holiday. *See* An Act Making Labor Day a Legal Holiday, ch. 118, 28 Stat. 96 (1894).

158 Simply on the numbers, it appears as though an analysis of reported federal cases indicated that 118 applications for injunctive relief in labor cases were filed between 1901 and 1928, of which 100 were successful. *See* FRANKFURTER & GREENE, *supra*

But the more pertinent question for our purposes is how *Debs* was understood doctrinally. Consider a work of scholarship: *The Labor Injunction*, written by then-Professor Felix Frankfurter and his student Nathan Greene in 1930, just over three decades after *Debs* was decided.[159] Frankfurter and Greene recognized that, as initially conceived, "the injunction was chancery's device for avoiding the threat or continuance of an irreparable injury to land."[160] Over time, they pointed out, "the chancellor brought under the concept of property whatever interests he protected,"[161] thereby stretching the concept of property in many ways. Reflecting a legal realist conception of property, Frankfurter and Greene appeared skeptical that the term "property" could be defined with any precision.[162] But they recognized, at the same time, that "the term 'property' has been the lattice-work upon which the labor injunction has climbed."[163] In other words, in 1930, even while expressing some skepticism about whether the term "property" could be precisely defined, Frankfurter and Greene understood that equitable relief had been, and continued to be, tied to that concept.

Supreme Court cases were to the same effect. For example, in *International News Service v. Associated Press*,[164] the Court said:

> The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.[165]

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note 7, at 49. But the number of applications in unreported cases might have been much larger. *See id.* at 50–52.

159 *Id.* We are indebted to Frankfurter and Greene's brilliant study for some of the citations in this section.

160 *Id.* at 47; *see also* Pound, *supra* note 24.

161 FRANKFURTER & GREENE, *supra* note 7, at 47.

162 They remarked jokingly that, by expanding the definition of property, "[m]odern issues due to new complexities are thus smothered beneath the delusive simplicity of old terms." *Id.*; *see also id.* at 48 (remarking that "naïvely, American labor leaders have come to believe that the tropical growth of the injunction may be pruned away by artificially confining the notion to property"). At the same time, some portions of their book suggest that they recognized that the concept of property, while perhaps not perfectly definable, must have some essential limitations. *Cf. id.* (quoting Justice Holmes' dissent in *Truax v. Corrigan* for the proposition that expanding the "generic concept of 'property'" to "something of value" can be "question-begging" and that "[b]y calling a business 'property' you make it seem like land . . . But you cannot give it definiteness of contour by calling it a thing." (quoting Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting)).

163 *Id.*

164 248 U.S. 215 (1918).

165 *Id.* at 236 (first citing *In re* Sawyer, 124 U.S. 200, 210 (1888); then citing *In re* Debs, 158 U.S. 564, 593 (1895); then citing Truax v. Raich, 239 U.S. 33, 37–38 (1915); then citing

Leading treatises and casebooks understood *Debs* as an example of equitable intervention to protect property. For example, in the fifth and final edition of Pomeroy's equity treatise, *Debs* illustrated this proposition: "In proper cases an equity court will interpose for the protection of property rights although the injurious acts constitute violations of the criminal law."[166] The McClintock equity treatise also considered the case to be a public nuisance case with an expansive view of property.[167] Similarly, in their equity casebook, Zechariah Chafee and Sidney Post Simpson treated *Debs* as influencing later courts to read the public nuisance category broadly, but still as a decision within that category.[168]

Practitioners also believed that the labor injunction was an extension of the property concept. Thus, Stephen Strong Gregory, a former President of the American Bar Association and one of Darrow's co-counsel in the *In re Debs* litigation,[169] testified in Congress two decades after *Debs* that labor injunctions

> are based upon the theory that the man carrying on a business has a certain sort of property right in the good will or the successful conduct of that business; and that when several hundred or several thousand excited men gather around his premises where he carries his business on, and threaten[s] everybody that comes in there to work, and possibly use violence, that that is such an unlawful

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Brennan v. United Hatters of N. Am., 65 A. 165 (N.J. 1906); and then citing Barr v. Essex Trades Council, 30 A. 881 (N.J. Ch. 1894)). *See Truax*, 257 U.S. at 327 ("Plaintiffs' business is a property right."); *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921). In the Second Circuit opinions affirmed by the Supreme Court in *International News Service*, Judges Hough and Ward engaged in a lengthy and elaborate debate about the nature of property protection over the news. *See* Associated Press v. Int'l News Serv., 245 F. 244 (2d. Cir. 1917), *aff'd* 248 U.S. 215 (1918).

166 4 SPENCER W. SYMONS, A TREATISE ON EQUITY § 1347, at 951 (5th ed. 1941) (citing *Debs*, 158 U.S. 564). The one other cite in Pomeroy of *Debs* is under the general heading "Nuisance—Public." *Id.* § 1349, at 953 (citing *Debs*, 158 U.S. 564).

167 MCCLINTOCK, *supra* note 66, § 151, at 402 (stating that "any civil right of a pecuniary nature is a property right within the rule that equity will protect only rights of property" (first citing *Debs*, 158 U.S. at 593; and then citing *International News Service*, 248 U.S. 215)); *id.* § 163, at 441 (under the heading "Injunction Against Public Nuisances," describing *Debs*: "In the leading case in the establishment of the power of equity to issue injunctions in labor disputes, the court largely relied upon the fact that the acts of the defendants interfered with the operation of railroads, which were national highways" (citing *Debs*, 158 U.S. 564)).

168 1 ZECHARIAH CHAFEE, JR. & SIDNEY POST SIMPSON, CASES ON EQUITY: JURISDICTION AND SPECIFIC PERFORMANCE 220–21 (1934).

169 For an insightful description of Gregory's involvement in *Debs*, see the memorial by his son, Tappan Gregory, *Stephen Strong Gregory*, 6 LAW SCH. REC., iss. 1, 1957, at 1, 1 ("At the request of Clarence Darrow, he joined in the defense of Debs in the contempt and conspiracy proceedings . . . without compensation.").

> interference with property right as may be the subject of protection in equity.[170]

Reflecting Gregory's arguments, in 1928, Congress considered a proposal to define "property" further in this context. It said:

> Equity courts shall have jurisdiction to protect property when there is no remedy at law; for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and transferable . . . .[171]

Commenting on this proposal, Andrew Furuseth, the President of the International Seamen's Union of America, described the bill as follows:

> The meat of this bill is on the question of what constitutes property. An equity court can not deal with anything else, as we have it, and in order to deal with it in that way, in order to get jurisdiction at all we had to extend the meaning . . . of property.
>
> Has Congress the power to redefine the meaning of the word "property" and bring it back to where it was. . . . [W]e believe it has . . . and this bill will effect the purpose.[172]

Each of these proposals and comments reflects the understanding that the labor injunction issued, and could only issue, because of an interference with property. And each was premised on the understanding that, in the absence of such an interference with property, no injunction would issue.

When Congress comprehensively addressed the topic by legislation in the 1932 Norris-LaGuardia Act,[173] it set forth a series of specific

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170 S. REP. NO. 415, at 10539 (1915).

171 *Limiting the Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before the S. Comm. on the Judiciary*, 70th Cong. 171 (1928) [hereinafter *Labor Disputes Hearings*]. For similar legislation, see H.R. 94, 60th Cong. (1907), discussed in *Injunctions: Hearings Before the H. Comm. on the Judiciary*, 62d Cong. 216–308 (1912). And for similar legislation at the state level, see 1914 Mass. Acts 904, 905 (providing that "the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation for employer and employee, and to perform and carry on business in such relation . . . shall be held and construed to be a personal and not a property right"), which was declared unconstitutional in *Bogni v. Perotti*, 112 N.E. 853 (Mass. 1916). *See also* DANIEL DAVENPORT, AN ANALYSIS OF THE UNANIMOUS DECISION OF THE SUPREME COURT OF MASSACHUSETTS DECLARING THE ANTI-INJUNCTION LAW OF THAT STATE UNCONSTITUTIONAL (1916).

172 *Labor Disputes Hearings*, *supra* note 171, at 147; *see* Forbath, *supra* note 92, at 1225 (observing that Furuseth "[r]ehears[ed] the history of chancery in England" and that he contended "that the principle limiting equity to the protection of property was embedded in English jurisprudence at the time the federal judiciary was founded and the boundaries of federal equity power set").

173 Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. § 101–115 (2018)).

labor acts that would not be subject to equitable relief.[174] Those acts included cessation or refusal to perform work or to remain employed, thus effectively prohibiting injunctions in nonviolent labor disputes.[175]

In the years that followed, the blackletter proprietary-interest requirement that formed the basis of *Debs* was excoriated by the legal realists.[176] And, as Roscoe Pound recognized, "[a]ll discussion of these questions runs back to the famous case of *Gee v. Pritchard*."[177] By the middle of the twentieth century the doctrine was widely, though not unanimously, rejected by scholars as an irrational preference for property rights.[178] Some courts had begun to reject the rule, but as late as the 1940s most retained it.[179] But scholars moved on,[180] some courts decisively rejected the property connection, and there were more and more statutes that authorized equitable relief. Over the last half century the proprietary-interest requirement has sometimes been invoked by federal and state courts, but not with anything like the earlier frequency.[181] The proprietary-interest requirement is, in a sense, comparable to *Debs*: a venerable doctrine that the courts must now decide to polish up and put to use, or not.

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174 *Id.* § 4.

175 *Id.*

176 Kramer v. Thompson, 947 F.2d 666, 671 & nn.13–14 (3d Cir. 1991) (Becker, J.) (summarizing criticism). For an illustrative opinion, see Orloff v. L.A. Turf Club, 180 P.2d 321, 324–25 (Cal. 1947).

177 Pound, *supra* note 24, at 642.

178 For a review of the criticism, see *Kramer*, 947 F.2d at 671 & nn.13–14 (Becker, J.); *cf.* Sidney Post Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 222 (1936) (conceding that there is "no reason in theory why equity should confine itself to the protection of property rights," yet suggesting "there may nevertheless be substantial practical grounds for a rule that courts of equity have no jurisdiction to protect interests of personality").

179 *See* Gene E. Gregg, Note, *The Requirement of a "Property Right" as a Basis for Equitable Jurisdiction*, 20 ROCKY MOUNTAIN L. REV. 304 (1948).

180 *See, e.g.*, Note, *Injunctive Protection of Political Rights in the Federal Courts*, 62 HARV. L. REV. 659, 666 (1949) ("The doctrine that 'equity protects only property rights' has been repeatedly and authoritatively discredited." (footnote omitted) (first citing Pound, *supra* note 24; and then citing Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 YALE L.J. 115 (1923))); Long, *supra*. It was sometimes said that the Court interred the proprietary-interest requirement in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). *See, e.g.*, Note, *supra*, at 666. But the proprietary-interest requirement was not at issue in *Hague*. The dissenters did not base their argument on that requirement, and for justices in the majority, it was inapplicable because the statute at issue explicitly authorized relief in equity. *E.g.*, *Hague*, 307 U.S. at 531–32 (Stone, J., concurring).

181 *See supra* note 52 (citing sources).

III. FEDERAL EQUITY JURISDICTION AND ITS BOUNDARIES TODAY

In the preceding Parts, this Article has summarized the features of the law of equity that are most necessary for understanding *In re Debs*, and it has explored the case and its context, as well as its reception. But what is the significance of this analysis for federal equity jurisdiction in the present? Section III.A considers the normative basis of the equity-property connection. Section III.B considers the possible limiting principles available for nonstatutory equitable relief.

A. The Normative Basis of the Equity-Property Connection

Four points are important for understanding the normative force of the equity-property connection.

First, the equity-property connection is sometimes presented as a stand-alone principle, as a proprietary-interest requirement, but it primarily works as part of a much larger system of negation. That larger doctrinal structure is about what equity will not do.[182] And there are sound reasons for equity to be concerned about what it will not do. Equity insistently needs limiting principles at least in part (1) because it does not have "causes of action" as a constraint on suits,[183] (2) because its remedies are more demanding for courts and more vulnerable to abuse by opportunistic litigants,[184] and (3) because the political legitimacy concerns for the federal courts are at their height in equity.[185]

Within that larger system of negation, the equity-property connection is a means of preserving the vitality of equitable remedies. A proprietary interest functions as a basis for equitable intervention; it works as an exception to the "equity will not" doctrines.[186] If we retained some of those doctrines, such as the prohibition on equity enjoining a crime or a criminal proceeding, *and did not have the property exception*, then the scope for equity would erode as the criminal law expanded. The same would also be true for tort law: without the property exception, the expansion of tort law would crowd out equity.

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182 *See generally* Samuel L. Bray, *Equity Will Not . . .*, *in* INTERSTITIAL PRIVATE LAW (Samuel L. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith eds., forthcoming 2023).

183 *See* Bray & Miller, *supra* note 25, at 1170–76.

184 *See* Bray, *supra* note 26, at 534, 572–78.

185 *See supra* notes 65–69 and accompanying text.

186 Even in a jurisdiction that abandoned the proprietary-interest requirement, "there are cases where in the particular circumstances the only possible reason for equitable intervention happens to lie in the support of what may be described as a proprietary right." I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES: SPECIFIC PERFORMANCE, INJUNCTIONS, RECTIFICATION AND EQUITABLE DAMAGES 338–41 (7th ed. 2007).

Second, the relevant domain for the equity-property connection has been steadily shrinking. As noted above, it is not a requirement in areas where equity developed the substantive law,[187] nor when there is statutory authority for the plaintiff to seek equitable relief.[188] Because so many federal statutes authorize injunctions or other forms of equitable relief, the practical effect is that this combined system of negation (the "equity will not" doctrines and the equity-property connection)—to the extent it continues in the United States—is particularly relevant when there are nonstatutory claims for equitable relief.

Third, "property" is defined broadly. The outer bounds of what will be treated as property are not always clear, especially when a court is abating a public nuisance.[189] But limiting equity to the protection of proprietary interests, including personal rights of a pecuniary nature,[190] is still a limit.[191] One of the central characteristics of property is its thingness, its specificity.[192] Even when we speak of intangible property rights, we are still analogizing to something tangible, treating those intangible property rights as if they were an object in space. Under the traditional rule, an equitable dispute needed some kind of anchor in the plaintiff's property interests. In *Ex parte Young* and *In re*

187 *See supra* note 87 and accompanying text.

188 *See supra* note 88 and accompanying text.

189 MCCLINTOCK, *supra* note 66, § 164, at 443 (noting "a tendency to extend, both by statute and judicial decision, the conception of public nuisances which may be enjoined"). For a recent treatment of public nuisance, see Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. (forthcoming 2023).

190 Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918).

191 In making this claim, we are aware of the debates over the nature of "property" in other contexts, most famously the meaning of the term in the Due Process Clauses of the Constitution. *See, e.g.*, U.S. CONST. amend. V (providing that no person shall "be deprived of life, liberty, or property, without due process of law"); Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (reasoning that it was "realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'" (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964))). For the argument in this Article, it suffices to say that the concept has some content and limits; it is not infinitely elastic and malleable. Just as that content provides a boundary for the protections of the Due Process Clauses, so too can it provide a boundary for the existence of equity jurisdiction.

192 *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1691 (2012). To be sure, it would not take an interest in full-blown in rem property to give rise to equity jurisdiction. To the contrary, *United States v. American Bell Telephone Co.*, which we have discussed above, shows that the government could invoke equity jurisdiction to protect intellectual property. 128 U.S. 315, 359 (1888). For further discussions of "quasi-property," see Henry E. Smith, *Economics of Property Law*, *in* 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 148 (Francesco Parisi ed., 2017); Henry E. Smith, *Equitable Intellectual Property: What's Wrong With Misappropriation?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 42 (Shyamkrishna Balganesh ed., 2013).

Debs, the Court felt it necessary to be inside of the proprietary-interest requirement.[193]

Fourth, the property connection has the effect of focusing the exercise of federal equity jurisdiction. In this way the property connection in equity works much like modern standing doctrine.[194] Modern standing doctrine helps to focus the dispute, ensuring that there are proper parties, that the bounds of the case fit those parties, and that the exercise of power is appropriate to the judicial function. The specificity encouraged by the property exception works in the same way. The property interest ensures the plaintiff has a tie to the dispute, it guides the court as to the scope of the dispute, and it encourages responsible use of federal equity jurisdiction. And if the property connection is stricter and narrower than Article III standing, then that is consistent with how the Supreme Court treats the requirements of equity as additional to and in some sense stricter than those of Article III.[195]

This equity-focusing role seems to pervade each of the different ways the idea is stated in equity cases. Some cases describe the property connection as if it were a requirement that all (nonstatutory) exercises of federal equity jurisdiction protect some property interest of the plaintiff.[196]

Other cases, and these are more frequent, treat the property connection as an exception to the "equity will not" doctrines.[197] It provides a basis for equitable intervention notwithstanding an equitable principle that would otherwise prevent equitable relief.

Still other cases speak of federal equity jurisdiction in terms of protection of "private rights or private property"[198] or "the rights of persons or property."[199] The theme in these cases, which are

193 *See supra* note 77 and accompanying text. In *Weinberger v. Romero-Barcelo*, when the Court cites a case for the proprietary-interest requirement, it is one that treats that requirement as needed in a suit under *Ex parte Young*. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); Cavanaugh v. Looney, 248 U.S. 453, 456 (1919) ("The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.").

194 *Cf.* JOHN MCGHEE, SNELL'S EQUITY § 18–009, at 477 (33d ed. 2015) (putting the equitable doctrine under the heading "*Locus standi*" and stating it as "[a] party will not have standing to bring a claim if he does not have 'some property, right, or interest, in the subject matter of his complaint'" (quoting Maxwell v. Hogg (1867) 2 Ch. App. 307, 311 (appeal taken from Eng.))).

195 *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 111–13 (1983).

196 *E.g.*, *Romero-Barcelo*, 456 U.S. at 312.

197 *E.g.*, City of New York v. Andrews, 719 N.Y.S.2d 442, 455 (N.Y. Sup. Ct. 2000).

198 Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 77 (1868).

199 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 75 (1831) (Thompson, J., dissenting).

marshaled by the Court in *Massachusetts v. Mellon*,[200] is again about the need for concrete disputes between the affected parties. As *Mellon* puts it, while giving a traditional reading of federal equity jurisdiction, the contrast is between on the one hand "rights of person[] or property";[201] and on the other hand "abstract questions of political power, of sovereignty, of government."[202] There is also willingness in the broader equity tradition outside the United States to allow injunctions for trespass to the person, though these cases, too, seem to involve specific, circumscribed disputes.[203]

In one sense, the property connection is simply an arbitrary limit. To keep equity from overtaking everything, and because it has a looser entry structure and does not have the constraint of causes of action,[204] it needs limits. Indeed, in a recent sketch of equity cases throughout the common law countries, one of the findings was that "while there is variety as to how such practical outcomes are reached, many cases have a shared preference for limiting the availability of particular relief."[205] Equity needs limits; this is a limit.

But the connection between property and equity runs deeper than that. Equity, it is often said, acts *in personam*. That maxim is used in various senses, among which is the fact that equitable remedies operate on the person in a special way, exacting obedience and imposing sanctions for disobedience. Legal remedies don't require that same

200 262 U.S. 447, 483–85 (1923). *Mellon* is now often read as a case about Article III standing, but to read it that narrowly "misunderstands the way its analysis intertwines concepts of equity, remedies, and the judicial power." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 433 (2017); *see also id.* at 430–33 (analyzing *Mellon*).

201 *Mellon*, 262 U.S. at 484 (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 75 (Thompson, J., dissenting)).

202 *Id.* at 485. To "rights of person[] or property" *Mellon* adds "rights of dominion over physical domain" and "quasi-sovereign rights actually invaded or threatened." *Id.*

203 *See* HEYDON ET AL., *supra* note 87, § 21-115, at 718. Although not in relation to equity, James Madison once said that "property" meant in one sense the "dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Fredrika J. Teute eds., 1983). And yet, he said, in a "larger and juster meaning" the term "embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*." *Id.* The former sense covered "land, or merchandize, or money," but the latter sense included, among other things, "opinions and the free communication of them" or "religious opinions, and in the profession and practice dictated by them." *Id.* Or as Madison put it, "as a man is said to have a right to his property, he may be equally said to have a property in his rights." *Id.*

204 *See* Bray & Miller, *supra* note 25.

205 Ben McFarlane, *Equity*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 547, 555 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020).

kind of personal involvement by the defendant. But equity also has a less noticed *in rem* tendency. One of the dominant impulses in equitable procedure, back before procedural fusion, was the need to bring in everyone who had an interest in the dispute. Everyone had to be there, or had to be represented, or the chancellor would not issue a decree.[206] There is a sense in which equity had to focus on property because other kinds of interests might be too diffuse; it might be too hard to determine who all the relevant parties were.

Now, of course, there has been procedural fusion.[207] This equitable *in rem* tendency lives on in parts of the merged procedure such as class actions, joinder, and interpleader. But the equitable remedies were developed in tandem with the equitable procedures. That is, the incredible *in personam* powers of equity were not developed and retained in a context where equity would act against the world, but rather where the property connection helped to legitimate and control these impressive powers. The long arm of the injunction was developed in a context where Lord Chancellor Eldon considered himself unable to ameliorate wounded feelings. As Dean Christopher Langdell said, "any one who wishes to understand the English system of equity as it is, and as it has been from the beginning, must study its weakness as well as its strength."[208]

Another way to put this normative point about the property connection is that equity's *in rem* tendency helps to corral its *in personam* tendency. With a close eye on the plaintiff's proprietary interest, equity is encouraged to act as a court, rather than as a roving combination of the legislative and executive powers.[209] This same goal is achieved in cases like *Mellon* that speak of "rights of person[] or property."[210] By directing the court of equity's attention to the personal or proprietary interest *of the plaintiff*, the court is kept in a judicial lane.

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206 *See* Bray, *supra* note 200, at 426.

207 *See generally* Kellen Funk, *The Union of Law and Equity: The United States, 1800–1938*, *in* EQUITY AND LAW: FUSION AND FISSION 46 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019). But only procedural fusion. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 679 (2014) ("True, there has been, since 1938, only 'one form of action—the civil action.' But 'the substantive and remedial principles [applicable] prior to the advent of the federal rules [have] not changed.'" (alterations in original) (citations omitted) (first quoting FED R. CIV. P. 2; and then quoting 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1043, at 177 (3d ed. 2002))); *see also* Bray & Miller, *supra* note 25.

208 C.C. LANGDELL, A SUMMARY OF EQUITY PLEADING 38 n.4 (Cambridge, Charles W. Sever & Co. 2d ed. 1883).

209 *Cf.* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 425 (1982) (referring to "the traditional role of a judge as particularizer" (citing Gee v. Pritchard (1818) 36 Eng. Rep. 670, 674; 2 Swans. 403, 413)).

210 *Mellon*, 262 U.S. at 484; *see supra* notes 200–02 and accompanying text.

B. The Choice of Limiting Principles

The scope of federal equity jurisdiction is shaped by the history of its exercise.[211] But that history, as explored here, leaves choices to the interpreter. *Debs* can be read broadly or narrowly, for example. And in making this kind of choice, an interpreter will necessarily draw on deeper conceptions of what the judicial power is and what it is for. These questions have been right on the surface of the scholarly debates about *Ex parte Young*. They are no less critical in the reading of *In re Debs*. And *Debs* has the additional complication of involving a suit by the federal sovereign—and sovereigns sometimes have broader powers in equity.[212]

Debs is an important part of the federal equity tradition. It is a highly controversial part of that tradition, and it has a good claim to be the most controversial equity decision ever reached by the Supreme Court.[213] It forces the federal courts to think about the first principles of federal equity jurisdiction. The essential questions are whether federal equity jurisdiction is limited; and if so, what the limitations are and why they exist.

It is undeniable that federal equity jurisdiction is limited. Its rootedness in historic equity is a basic principle that runs through many of the Court's decisions, including *Grupo Mexicano*.[214] The question therefore is what are these limitations on the exercise of federal equity jurisdiction. Here there are several possible answers.

One way to answer the question of limits is to draw out of equity a principle like "no adequate remedy at law," and use that principle as the sole limit. In other words, as long as there is an inadequacy in the remedies available, a federal court has the power to remedy that defect, at least when a constitutional right is at stake. Wherever there is a constitutional right, we might say, there is a remedy. Similarly, one could

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211 *See* Gordon v. Washington, 295 U.S. 30, 36 (1935) ("From the beginning, the phrase 'suits in equity' has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts."); *see also* WILLIAM F. WALSH, A TREATISE ON EQUITY 1 (1930) ("The content and nature of equity can be understood only by a study of its historical development and of the principles and practices which it comprehends.").

212 There is some authority, for example, that laches is less easily imputed to a sovereign. *See* HEYDON ET AL., *supra* note 87, § 38-075, at 1095.

213 *Cf.* OWEN M. FISS, INJUNCTIONS 596 (1972) ("Many generations of students at the Harvard Law School have heard Professor Ernest Brown comment that *Debs* was the darkest day in Supreme Court history. This comment seems particularly intriguing since Professor Brown thought that the Court had many dark days, and yet few have had the courage to ask him why he thought *Debs* was *that* bad. He was known for refusing to answer 'obvious' questions.").

214 *See supra* note 34; Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999).

draw out a principle of resistance to opportunism and manipulation, and these are indeed pervasive concerns of equity.[215]

A second answer is to find the limit on equity by assimilating its bases of relief with those of law. For example, a federal court could insist that a plaintiff show an "equitable cause of action." That requirement might be satisfied when there is a federal statute that specifically authorizes a party to bring suit and obtain equitable relief. If there were no authorizing statute, however, a plaintiff would have to show some other equitable cause of action. The practical effect might be to eliminate nonstatutory suits for equitable relief. This limit would not be specific to equity; on its face, it seems to do no more than apply to equity an across-the-board requirement of a cause of action.

A third answer is to consider the broader structure of limiting principles that the Court worked within when it decided *In re Debs* and *Ex parte Young*. In that structure, the adequacy of legal remedies is critical, but it is not the sole criterion, and it is not simply a matter of the judge weighing the urgency of the remedy in a particular case. Instead, there are categories in which equitable relief is presumptively unavailable—including crimes and criminal proceedings, where reliance is placed on the criminal process; and personal rights, where reliance is placed on damages in tort. Across those categories that are presumptively off-limits to equity, there is an exception where equity is invoked to protect a proprietary interest (or in some formulations, a personal or proprietary interest[216]). The equity-property connection helps focus the dispute and prevents equity from pushing aside other areas of law that have their own separate logic, limits, and principles.[217]

Each of these approaches to the limits on federal equity jurisdiction has its own challenges. With the first limit, a principle like no adequate remedy at law, or a principle that equity can thwart opportunism and manipulation, the challenge is that there may not really be a limit. This is something Doug Laycock emphasized three decades ago in his critique of the no-adequate-remedy principle.[218] If it means no more than that there must be a reason for the plaintiff to prefer the equitable remedy, the "limitation" lacks bite: the plaintiff who asks for an equitable remedy always has some reason to prefer it. Moreover, a

215 *See* Smith, *supra* note 40, at 1076–81.

216 *See supra* notes 200–02 and accompanying text.

217 *See.* Pfander & Wentzel, *supra* note 27, at 1340 & n.457 (noting a suggestion from Henry Monaghan "that one might summarize the limited scope of the antisuit injunction by observing that equity focused on private property rights, leaving issues of liberty to the courts of common law").

218 *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991). For additional views on the no-adequate-remedy-at-law-requirement, see *supra* note 55 and accompanying text.

limitation to cases of opportunism and manipulation—instead of using the actual doctrinal categories developed by equity to deal with opportunism and manipulation—risks running rather close to the position of the dissent that was rejected in *Grupo Mexicano*.[219]

With the second approach, which finds a limit in the requirement of an equitable cause of action, the problem is that equity does not have causes of action.[220] It has an entirely different organizing structure, which is centered on the plaintiff's grievance.[221] This kind of limit cannot really make sense of *Debs*, because there was no "cause of action," in the sense of a legal entitlement to sue. There are limits in *Debs*, but those limits are not generated by the cause of action, but instead come from other aspects of the system of equity.

With the third answer, using the traditional limiting principles of equity, the central objection is that federal courts are no longer in the habit of regularly applying the proprietary-interest requirement. Indeed, *Baker v. Carr* rejected the principle that equity will not protect political rights.[222] But other "equity will not" doctrines have continued to appear in the Court's cases, including *Younger v. Harris*.[223] And the proprietary-interest requirement was endorsed in *Weinberger v. Romero-Barcelo*.[224] If the Court takes this third approach to limits, it will have to decide which traditional equitable principles to carry forward and develop. But that is exactly what the Court has been doing in all of its new equity cases.[225]

Equity is not static, and yet the Court has also rejected an approach to federal equity jurisdiction that is completely presentist. The historic landmarks of the equity tradition, including cases like *Gee* and its antecedents, are relevant today precisely because of the basis of federal equity jurisdiction.[226] So the mere fact that the property connection has faded in recent cases does not decide its applicability, at least as long as the Court is committed to the approach of *Grupo Mexicano*.

More specifically, the traditional limiting principles are especially apt in a context, such as *United States v. Texas*,[227] where the United

219 *See Grupo Mexicano*, 527 U.S. at 331 n.11.

220 *See generally* Bray & Miller, *supra* note 25.

221 *See id.* at 1777–80.

222 369 U.S. 186, 234, 237 (1962).

223 401 U.S. 37, 43–44 (1971).

224 456 U.S. 305, 312 (1982) (citing Cavanaugh v. Looney, 248 U.S. 453, 456 (1919)).

225 *See* Bray, *supra* note 36. On the problem of translating traditional equity into the present, see Samuel L. Bray, *Form and Substance in the Fusion of Law and Equity*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 231, 231–32 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020).

226 *See supra* Section I.A.

227 United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (per curiam), *cert. dismissed as improvidently granted*, 142 S. Ct. 522 (mem.) (2021).

States brings a nonstatutory claim for equitable relief. This is so for two reasons. First, precisely because the claim is nonstatutory, it does not have the narrowing and focusing that comes from the statute. This is the wisdom of the traditional property connection for nonstatutory cases.[228] Second, if the basis for the suit by the United States is a reach back almost 130 years for a litigation superpower, under *In re Debs*, it is more than appropriate for the historic limits on that superpower to be brought along as well. Retrieve the power, retrieve the limits.

In our view, then, the third approach is best. In a case where there is no statutory basis for injunctive relief, the plaintiff should be required to connect her claim to some proprietary interest (or, in some formulations, personal or proprietary interest). Although there are ways in which the sovereign has broader power in equity,[229] this is not one of them. In *Debs*, the Court considered the traditional limiting principle of no injunction against a crime, except to protect property, to still be a vital limit on the sovereign's suit.[230]

Thus *Debs* should be read as authorizing suits by the United States to protect the rights of U.S. citizens when that suit can be connected to some kind of proprietary interest—whether a proprietary interest of the sovereign itself, or the proprietary interests of the public that are protected in the abatement of a public nuisance.

Although there will be hard questions with this approach, it is the only one that meets the challenge of fidelity to the powers and limits of equitable relief, as those powers and limits have been developed and enunciated in the equitable tradition of the federal courts—including *In re Debs* and *Ex parte Young*. Moreover, it is supported by two interlocking reasons. The traditional equitable limiting principles help federal courts to avoid the relentless pressure toward abstract disputes; and they constrain the intensity and scope of equitable remedies.

How does equity, as an adjectival system of remedies,[231] administered by federal courts in our constitutional system,[232] interact with these concerns about the abstractness of the suit and the intensity of

228 The other exception noted above, for the exclusive jurisdiction of equity, is also sound. When equity develops the entire substantive body of law, including trust and breach of confidence, there is no reason for concern that equity will subvert the logic and procedural protections available in the body of law to which it relates (e.g., criminal law, tort).

229 *See supra* note 212 and accompanying text.

230 *See In re* Debs, 158 U.S. 564, 593 (1895); *cf.* NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 893 (7th Cir. 1990) (Posner, J.) ("The principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff." (first citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); and then citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542–45 (1987))). For discussion, see *supra* notes 153–55 and accompanying text.

231 *See* Bray & Miller, *supra* note 25, 1782–85. *See generally* Smith, *supra* note 40.

232 *See* Younger v. Harris, 401 U.S. 37, 43–45 (1971).

the remedy? To put the question differently, when we are in equity—when the plaintiff is asserting a basis for equitable relief—should a judge's concerns about abstractness and remedial intensity go up or down?

And here there is a clear answer in our constitutional tradition. It is that in equity, *especially in equity*, the federal courts should be concerned about the abstractness of the suit and the intensity of the remedy. In *Cherokee Nation v. Georgia*,[233] Chief Justice Marshall specifically contrasted the possibility of deciding the question in law with the greater reluctance the Court should have in equity to control a branch of state government.[234] In *City of Los Angeles v. Lyons*,[235] the Court held not only that there was no Article III standing but also that there was not a sufficient basis for relief in equity, and a reason for the Court's conclusion seems to have been the intensity of the remedy sought by the plaintiff.[236] And of course there is the holding of *Massachusetts v. Mellon*:[237] equity courts don't strike down laws, but instead they protect particular plaintiffs (or classes of plaintiffs) from having those laws enforced against them.[238]

It is certainly true that equity can entertain novel suits—or else there would never have been equity. But when it does so, it still is careful about the abstraction of the suit and the intensity of the remedy. One of the principles of equitable jurisdiction is that "[t]here is a constant interplay between the question of whether the plaintiff *should be in equity* and the question of what the plaintiff *wants from equity*."[239]

The English chancellors did think about abstractness and remedial intensity.[240] It is true that they would not have transposed these

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233 30 U.S. (5 Pet.) 1 (1831).

234 *Id.* at 20.

235 461 U.S. 95 (1983).

236 *Compare id.* at 111–13, *with* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 10 n.44 (1984).

237 262 U.S. 447 (1923).

238 *See* Bray, *supra* note 200, at 430–33; *see also* California v. Texas, 141 S. Ct. 2104, 2115 (2021) (quoting *Mellon*, 262 U.S. at 488).

239 Bray & Miller, *supra* note 25, at 1798; *cf.* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867) ("[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties . . . ."); Jacob Hoffman Brewing Co. v. McElligott, 259 F. 525, 531 (2d Cir. 1919) ("The right to maintain the suits, i.e., to give the injunctive relief prayed for . . . .").

240 *See* City of Columbus v. Mercantile Tr. & Deposit Co. of Balt., 218 U.S. 645, 663 (1910) ("In the case of *Atty. Genl. v. Council of Birmingham*, the Vice Chancellor said: 'I am not sitting here as a committee of public safety, armed with arbitrary power to prevent what it is said will be a great injury not to Birmingham only but to the whole of England; that is not my function.'" (quoting Att'y-Gen. v. Council of Birmingham (1858) 70 Eng. Rep. 220, 225; 4 K. & J. 528, 539)). For a U.S. example, see *Matthews v. Rodgers*, 284 U.S. 521, 530 (1932) (concluding that even though the plaintiff "sets up that the single issue of

into the key of concerns about the role of the federal judiciary. Yet that does not matter. As the Court said in *Younger v. Harris*, about the principle that equity will not enjoin a criminal proceeding:

> The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution . . . .[241]

CONCLUSION

Equity is a critical part of American law, and the federal courts are familiar with interpreting statutory authorizations of equitable relief. But nonstatutory suits for equitable relief pose particular challenges. When the plaintiff is the United States, one challenge is how to understand *In re Debs*.

This Article revisits *Debs*. We have situated *Debs* within its doctrinal context (the traditional limiting principles of equity) and shown how it was understood—perhaps surprisingly—as a case grounded on the traditional equitable jurisdiction to protect property. But we have also marked out the choices that judicial interpreters have when trying to make sense of the case. One of those choices is whether to read *Debs*'s alternative basis of jurisdiction broadly or narrowly. Another, related choice is about what the limiting principles will be for suits by the United States for nonstatutory equitable relief. However *Debs* may be read, one of its enduring lessons is that, one way or another, there will always be limits in equity.

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constitutionality of the taxing statute is involved," there was "a failure of such identity of parties and issues as would support the jurisdiction in equity").

241 Younger v. Harris, 401 U.S. 37, 44 (1971). The Court proceeded to cite the U.S. Constitution as generating the "underlying reason[s] for restraining courts of equity from interfering with criminal prosecutions." *Id.* The constitutional inputs to equity are just as important for governmental plaintiffs. As the California Supreme Court recently put it, in a case in which it reaffirmed one of the "equity will not" principles (i.e., that equity will not enjoin a crime), the principle serves as "an important limitation on the scope of the government's power to exploit the public nuisance injunction as an adjunct of general legal policy." Leider v. Lewis, 394 P.3d 1055, 1061 (Cal. 2017) (quoting People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 606 (Cal. 1997)).