

# Equity and the Sovereign

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CSAS Working Paper 22-11  
Notre Dame Law Review 97 (2022)

*Judicial Review of Agency Action*, May 11-12, 2022

# EQUITY AND THE SOVEREIGN

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*Equity traces its genesis to kingly power. But the new American constitutional order shattered the crown and left equity unanchored. Who or what, if anything, inherited the role of the sovereign in federal equity? Is the sovereign the executive branch—or is it Congress? Is it “the United States” or “the people of the United States”? However we conceive of the sovereign, is the sovereign entitled to special deference in a federal court of equity—or to the reverse?*

*Federal courts have not arrived at consistent answers to these puzzles. They have vacillated on who the sovereign is. And they have vacillated on whether the sovereign is entitled to equal, better, or worse treatment from equity than other litigants receive. If equity is, like spacetime, our law’s background field—a “gloss written round our code,” in Maitland’s description—then sovereign power is a star so massive that it warps that field, shrinking parts of it and expanding others.*

*This Essay, a contribution to a Symposium on the federal equity power hosted by the Notre Dame Law Review, canvasses the varying approaches that federal courts in equity have taken towards the sovereign. It then explores some implications of equity’s treatment of the sovereign for equitable doctrine and for our understanding of Article III’s reference to “Cases, in . . . Equity.” How to conceive of the sovereign in equity in a government without a sovereign was a problem that challenged the members of the first Congress and the first sitting Justices; it is a problem that continues to lurk in the law today.*

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*But where, say some is the King of America? . . . [I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.*<sup>1</sup>

INTRODUCTION

Equity traces its genesis to kingly power.<sup>2</sup> But “in our system of government . . . [w]e have no king.”<sup>3</sup> Who or what, if anything, inherited the role of the sovereign in federal equity?<sup>4</sup> Is the sovereign the executive branch—or is it Congress? Is it “the United States” or “the people of the United States”? Or is it instead, as Thomas Paine had it, that in America “the law ought to be king[,] and there ought to be no other”?<sup>5</sup> However we conceive of the sovereign, is the sovereign entitled to special deference in a federal court of equity—or to the reverse?

1 THOMAS PAINE, COMMON SENSE 75 (Edward Larkin ed., Broadview Press 2004) (1776).

2 *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (“Equity originated in England as a means for the Crown to dispense justice by exercising its sovereign authority.”); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 107 (5th ed. 2019) (“The anomaly that a politician [the chancellor] should hold the highest judicial office in the land was compounded by the undefined nature of the chancellor’s jurisdiction. The chancellor received no patent or commission defining his authority, he held office at the king’s pleasure . . . His powers derived from his custody of the great seal and from his pre-eminent position in the King’s Council.”); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 437–38 (2003) (noting that equity “derived from the royal prerogative of English kings,” who had “ultimate and supreme power . . . to do justice in any case between their subjects”); *id.* at 438 n.51 (“The operative principle was that the king was the fountainhead of all justice, and in him, resided the final power to do whatever was just and righteous.”); *see also infra* text accompanying notes 84–85.

3 *Langford v. United States*, 101 U.S. 341, 343 (1879).

4 Federal equity is not the sole arena in which “the problem of the missing king” rears its head. *See, e.g., infra* notes 126–28 (sovereign immunity) and note 32 (*parens patriae* standing). On the common law side, the “prerogative writs” (mandamus, habeas corpus, certiorari, quo warranto, prohibition) issued by the King’s Bench derived from the power of the “King’s judges” to “exercise[] his supreme plenary power of judicature.” LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 153 (1965); *see also infra* note 86 (describing the disentanglement of prerogative writs from royal power). I focus only on *federal equity’s* relationship to the *federal sovereign* because the subject is important enough, and confused enough, to warrant sustained attention.

5 *See* PAINE, *supra* note 1.

Federal courts sitting in equity have not arrived at consistent answers to these puzzles. They have vacillated on who the sovereign is. And they have vacillated on whether the sovereign is entitled to equal, better, or worse treatment from equity than other litigants receive. If equity is, like spacetime, our law's background field—a “gloss written round our code”<sup>6</sup>—then sovereign power is a star so massive that it warps that field, shrinking parts of it and expanding others. In this Essay, I set out some examples of that phenomenon and explore some of its continuing ramifications, including in momentous cases decided as recently as a few months ago.<sup>7</sup>

Courts in equity often claim to treat the federal sovereign as if it were just another litigant—one whose “claims . . . appeal . . . to the conscience of the chancellor with the same, but with no greater or less, force than would those of a private citizen . . . under like circumstances.”<sup>8</sup> But the reality is more complicated. To convey a sense of equity's split personality in this realm, Part I surveys an array of doctrines and instances in which federal courts sitting in equity have taken contradictory positions on equity's relationship to sovereign power. In England, as noted, equity derived its power from the crown. In America, from the earliest days of the federal courts onwards, aspects of the law and practice of equity have continued to reflect that point of genesis by displaying a special solicitude toward the sovereign (conceived in varying ways) and its interests (conceived in varying ways). At the same time, however, equity has developed into the chief tool used by American federal courts to *check* sovereign power—a task that the English chancellors could not perform with respect to the king.<sup>9</sup> On this side of the ledger, courts sitting in

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6 See F. W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 18–19 (1910).

7 See *infra* text accompanying notes 115–21, 135–38 (discussing *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.* and *Nat'l Fed'n of Ind. Bus. v. Dep't of Labor*).

8 *Folk v. United States*, 233 F. 177, 191 (8th Cir. 1916) (“This is a suit in equity. In such a suit the claims of the United States . . . appeal to the conscience of the chancellor with the same, but with no greater or less, force than would those of a private citizen . . .”); *Brent v. Bank of Wash.*, 35 U.S. (10 Pet.) 596, 614 (1836) (“Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors . . .”); see also *Irwin v. Dep't of Veterans Admin.*, 498 U.S. 89, 95–96 (1990) (“[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.”); *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 339 (1906) (“In passing upon transactions between the Government and its vendees we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions.”).

9 *Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (“As an agent of the King, the Chancellor had no authority to enjoin him.”); see also James E.

equity have developed fictions about sovereign identity that enable them to elide the sovereign's claims to special treatment, and which at times leverage the protean character of the sovereign as a reason to give the sovereign *less* favorable treatment than private litigants would receive. Equity, then, operates both as a sword and shield *of* the sovereign and as a sword and shield *against* the sovereign.

This two-sided approach to the sovereign, though longstanding, is underappreciated. Its obscuring has consequences, as Section II.A explains. Courts and commentators overlook that in equity the sovereign is in fact often treated differently (or pretend that it is not treated differently) than the ordinary litigant. One consequence of this is that doctrines crafted to accommodate the sovereign's special stature seep outwards to other litigants. Another consequence is that courts and litigants recast cases that turned on the sovereign's special stature as if they would have come out the same way if the sovereign had *not* been a party to the suit, or "read down" those cases in a manner that short-shrifts the sovereign's distinctive position. If we grappled more mindfully with the sovereign's unique station in equity, we could better assess whether such blurring of doctrine is warranted.

Examining equity's conception of sovereign power yields an additional dividend, as Section II.B outlines. It helps to shed light on an enduring ambiguity of federal equity: equity's precise status as constitutional law.<sup>10</sup> Does Article III's reference to "Cases, in . . . Equity"<sup>11</sup> constrain Congress's power to create new equitable remedies? How we conceive of "the sovereign" and its prerogatives may help to answer that longstanding question. One might take the view that, in the American system of government, "We the People," the true sovereigns, allocated sovereignty across the branches through adopting the Constitution. On that view, Congress, as the organ empowered to implement the popular will through legislation, should be able to authorize—just as the English sovereigns once did—the remedies that will be available in equity; moreover, by delegating authority to federal courts, Congress should be able to empower federal courts to change and update the remedies available in equity—just as the English sovereigns long ago empowered their chancellors to do. Seen that way, Article III's reference to "Equity" would not bar the federal sovereign from creating new equitable remedies. But the Court has not—or, at least, has not forthrightly—embraced that conception of the sovereign. Rather, the Court has

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Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1278–79 n.36, 1292 n.112 (2020).

10 See *infra* Section II.B.

11 U.S. CONST. art. III, § 2, cl. 1

left open the possibility that the clause's reference to "Equity" may bound Congress's power. On that view, "Equity" (understood as a body of law extant in 1789 and incorporated by reference in the Constitution) would be able to supersede "sovereign" power (as reflected in a duly enacted federal statute that is otherwise constitutional). That view of things is apparently one that at least Justice Thomas may find congenial.<sup>12</sup>

A brief note at the outset: this Essay's goal is not to propose a singular solution for how federal courts should treat the sovereign in equity, nor is its goal to construct a complete picture of equity's complicated role in American law.<sup>13</sup> Rather, its aim is to foreground, and urge greater attentiveness to, the variety of ways in which courts have conceived of the relationship between equity and the sovereign, and the many degrees of freedom that courts possess in characterizing that relationship. The recurrent challenge in this context, as will be shown below, is never an on-or-off, binary matter of determining "what equity will do" or "what equity will not do." Instead, the question is *what understanding of equity's relationship to the federal sovereign* one should embrace—in the uncertain context in which many different choices can claim fidelity both to "the grand aims of equity"<sup>14</sup> and to its history and traditions.

## I. THE TWO FACES OF EQUITY

In the United States, the Court has said, "there is no such thing as a kingly head to the nation . . . . Under our system the *people*, who are there [in England] called *subjects*, are the sovereign."<sup>15</sup>

12 *Trump*, 138 S. Ct. at 2425 n.2 (2018) (Thomas, J., concurring) ("Even if Congress someday enacted a statute that clearly and expressly authorized universal injunctions, courts would need to consider whether that statute complies with the limits that Article III places on the authority of federal courts."); *id.* at 2426 ("[W]hether the authority comes from a statute or the Constitution, district courts' authority to provide equitable relief is meaningfully constrained. *This authority must comply with longstanding principles of equity that predate this country's founding.*") (emphasis added).

13 As many have observed, equity is both a seemingly inevitable element of any system of law, and a mechanism that risks opening the door to enormous judicial discretion. Even if one totally set aside equity's historical roots in sovereign power, the worry that equity empowers unaccountable judges to depart from democratically enacted legal constraints would anyway exist and need to be managed. This Essay, by canvassing federal equity's treatment of the federal sovereign, seeks to offer a fresh perspective on equity's complexity in order to complement, rather than displace, other accounts of equity and ambivalence toward equity in our legal system. I am grateful to Professor Fallon for his thoughts on this point.

14 *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsburg, J., concurring in part and dissenting in part).

15 *United States v. Lee*, 106 U.S. 196, 205, 208 (1882).

Fair enough; ridding the country of the “kingly head” to the nation was, after all, the point of the Revolution. Equity was, however, a form of “kingly” power—a point certainly not lost on the colonists of pre-Revolutionary America. “[B]y the seventeenth century equity had developed a sullied reputation in some sectors . . . [e]specially among religious and political dissenters,” who associated the Court of Chancery with “royal prerogative, judicial overreaching, and standardless discretion.”<sup>16</sup> Yet, without much discussion of the matter at the Constitutional Convention,<sup>17</sup> the Framers of the Constitution assured equity a continuing role in their new government, by providing in Article III that “the judicial Power shall extend” to “Cases, in . . . Equity.”<sup>18</sup>

The first Congress, in the Judiciary Act of 1789, gave some of the lower federal courts (the circuit courts) jurisdiction over “all suits of a civil nature at common law or in equity” in which at least \$500 was in controversy and in which the parties were diverse or the United States was the plaintiff.<sup>19</sup> Five days later, the so-called “First Process Act”

16 Kristin A. Collins, “A Considerable Surgical Operation”: *Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 267 (2010); Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 54–55 (4th ed. 2019) (“Chancery was closely associated with executive power, hence, with the English colonial masters”); Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, in 5 PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 257, 257–58 (Donald Fleming & Bernard Bailyn eds., 1971) (“[N]o colonial legal institution was the object of such sustained and intense political opposition as the courts dispensing equity law.”); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1203–04 (2005); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 288–89 (1926) (“[T]he colonists regarded equity as an appanage of the Crown’s prerogative, and, therefore, inimical to their individual liberties.”). I do not attempt to capture here the great variation over time in colonial approaches to equity and to courts of equity. For insightful overviews, see Katz, *supra*, and I JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 8–10 (1971).

17 GARY L. MCDOWELL, *EQUITY AND THE CONSTITUTION* 36 (1982) (“Late in the Philadelphia Convention of 1787 the motion to extend the judicial power to both law and equity was passed with only a single objection. There was no debate at that time, and the issue never again arose.”); Collins, *supra* note 16, at 269 (noting the scant debate concerning Article III at the Constitutional Convention, including the lack of debate concerning the “equity” portion of Article III). For a review of the debates concerning equity during ratification, see MCDOWELL, *supra*, at 36, 40–44.

18 U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

19 Judiciary Act of 1789, § 11, ch. 20, 1 Stat. 78 (“That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”). In discussing the debates leading up to the

followed.<sup>20</sup> That Act provided that the “forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law.”<sup>21</sup>

The First Process Act almost, but didn’t, say something more. In the Senate, the original bill had included a provision requiring “[t]hat all Writs [and] Processes issuing out of any of the Courts of the United States, shall be in the name of the President of the United States of America.”<sup>22</sup> As Tom Lee notes, “[s]ome senators chafed at this whiff of the British king’s writs,”<sup>23</sup> and a member of the House protested its connotation that “sovereign authority was vested in the Executive.”<sup>24</sup> The House struck the words “‘the President of’ so that writs would run from the United States, in which sovereignty rightfully reposed.”<sup>25</sup> The two chambers eventually reached a stalemate on this point, and the provision was dropped entirely. Soon

act, Professor Goebel notes that Samuel Chase’s advocacy for “strengthened chancery jurisdiction” was “grasping nettles,” because “the very word ‘chancery’ was identified with prerogative in the popular mind, and so unamendably un-American.” GOEBEL, *supra* note 16, at 493.

20 Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, *repealed by* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. This act is often called the “First Process Act” because it was repealed and replaced in 1792 by what is often called the “Second Process Act.”

21 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94, *repealed by* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

22 Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Plan for the Federal Courts, 1787–1792*, 89 FORDHAM L. REV. 1895, 1923 (2021) (quoting 4 THE DOCUMENTARY HISTORY OF THE UNITED STATES, 1789–1800, at 115 (Maeva Marcus et al. eds., 1992)).

23 *Id.* On the origins of writs, see F.W. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 221–22 (1920) (noting the chancellor’s “duty . . . to draw up those royal writs (original writs) whereby actions are begun in the king’s courts of common law”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915 (1987) (“Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king’s secretary, adviser, and agent. The Chancellor’s staff, the Chancery, sold writs, ‘royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant.’” (quoting with alterations S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 22 (1969))).

24 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 112 (Maeva Marcus et al. eds., 1992) [hereinafter DHSC] (“Congressman Stone argued that ‘substituting the name of the President, instead of the name of United States, was a declaration that the sovereign authority was vested in the Executive. . . . The United States were sovereign; they acted by an agency, but could remove such agency without impairing their own capacity to act.’”); GOEBEL, *supra* note 16, at 515 (noting that to the suggestion that “process should run in the name of the President . . . there was angry reaction summed up in the charge that this was ‘bringing in monarchy by a sidewind,’ a not unreasonable accusation in light of the fact that in pre-Revolutionary days process had run in the name of the King”).

25 Lee, *supra* note 22, at 1924.

thereafter, the Supreme Court resolved in its first set of rules that “(unless and until it shall be otherwise provided by Law) all Process of this Court shall be in the Name of ‘the President of the United States.’”<sup>26</sup> This was the fourth of just four rules adopted by the Supreme Court—the other three had to do with ministerial matters of oaths, attorney admissions, and law clerks.<sup>27</sup> It survives to this day.<sup>28</sup>

The First Congress’s deadlock over how to “Stile”<sup>29</sup> the federal courts’ “writs and processes” has been called “a matter that seems trivial to the modern legal mind.”<sup>30</sup> It does not seem trivial to me. It revealed the disagreement, right from the beginning, over how to frame equity’s relationship to the federal sovereign.<sup>31</sup> The deadlock offers an early snapshot of what proved to be an enduring fracture in American equity, which has since evolved an array of Janus-faced doctrines with respect to the sovereign.

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26 1 DHSC, *supra* note 24, at 177; *see* SUP. CT. R. 5 (1790) (“Ordered, That (unless and until it shall otherwise be provided by law) all process of this court shall be in the name of the President of the United States.”), [https://www.supremecourt.gov/pdfs/rules/rules\\_1803.pdf](https://www.supremecourt.gov/pdfs/rules/rules_1803.pdf) [<https://perma.cc/UUN7-WZ5D>].

27 4 DHSC, *supra* note 24, at 112; *see* SUP. CT. R. 2–4 (1790), [https://www.supremecourt.gov/pdfs/rules/rules\\_1803.pdf](https://www.supremecourt.gov/pdfs/rules/rules_1803.pdf) [<https://perma.cc/UUN7-WZ5D>].

28 *See* SUP. CT. R. 45.1 (2019) (“All process of this Court issues in the name of the President of the United States.”). The wording of the rule has varied over time. *Compare id.*, with SUP. CT. R. 5(1) (1858) (“All process of this court shall be in the name of the President of the United States.”). The “process” referred to encompassed “process at Common Law, or in Equity.” *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320, 320 (1796).

29 *See* Letter from John Jay to William Cushing (Dec. 7, 1789), *reprinted in* 1 DHSC, *supra* note 24, at 682 (“It gives me Pleasure to learn that writs from your District Courts will be in the name of ‘the President of the [U]nited States,’ and that you concur with me in thinking that Stile the most proper.”).

30 Lee, *supra* note 22, at 1924.

31 *See id.* (commenting that the episode “highlighted the hostility to implementing legal practices redolent of British monarchy in the new national courts”); *see also* GOEBEL, *supra* note 16, at 540 (“There is little reason to doubt that the style of process had been viewed in the Congress as a question of constitutional import involving the nature and scope of executive authority.”). For a famous early example, consider the subpoena to the sitting president, Thomas Jefferson, in the Burr trial—a subpoena issued by the president to himself. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.). The subpoena was worded as follows: “The president of the United States of America. To Thomas Jefferson, Robert Smith, Henry Dearborne or either of them who may have the papers—hereinafter mentioned or any of them within his or their keeping or power. You are hereby commanded to appear before the Judges of the circuit court of the United States . . . .” Subpoena served on Thomas Jefferson, June 13, 1807, LIBRARY CONG., <https://www.loc.gov/item/mcc.069/> [<https://perma.cc/B8G9-HLSH>].

### A. *Sword and Shield of the Sovereign*

Equity's roots in sovereign power have inflected the federal courts' development of equity since the Founding. Through a variety of doctrines, courts in equity have shown a special solicitude for the federal sovereign, a solicitude that other litigants do not enjoy. These perks have attached at the threshold of litigation, when the sovereign seeks to commence a case as a plaintiff in equity, or when it has jumped in as an intervenor; they have popped up in the merits stage, when the sovereign asserts its claims and defenses; they have appeared at the remedial stage, when the sovereign seeks equitable relief. Across these various contexts, courts have adopted divergent conceptions of who the sovereign is—waving between conceiving of the sovereign as the executive branch, as Congress, as an amalgamation of these, or as the people.

The sovereign's special treatment in equity starts with its ability to bring a suit in equity in the first place.<sup>32</sup> The most famous example is *In re Debs*,<sup>33</sup> in which the United States sued and won an injunction against the Pullman railroad strike of 1894.<sup>34</sup> When Debs violated the injunction, he was adjudged to be in contempt and imprisoned.<sup>35</sup> The Court, denying Debs's petition for habeas corpus, had to decide whether the United States had been entitled to seek an injunction to begin with.<sup>36</sup> The Court declined to rest its decision on the statutory authority (the Sherman Act) that the lower court had invoked.<sup>37</sup> The Court also rejected the proposition that the government could not seek an injunction because it "ha[d] no pecuniary interest in the controversy."<sup>38</sup> Instead, it adopted a broader holding that went

32 Leaving momentarily the confines of this Essay's federal equity/federal sovereign frame, it's worth noting that cases concerning *parens patriae* standing similarly bend to accommodate the interests of state sovereigns. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) ("One helpful indication in determining whether an alleged injury . . . suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."). For an overview of the United States' litigation advantages, see Helen Hershkoff, 14 WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE §§ 3652–3653 (4th ed.).

33 158 U.S. 564, 566, 583 (1895).

34 See *id.* at 566, 582.

35 See *id.* at 568, 570, 572–73.

36 See *id.* at 575, 600.

37 *Id.* at 600 ("[W]e prefer to rest our judgment on the broader ground . . . believing it of importance that the principles underlying it should be fully stated and affirmed.").

38 *Id.* at 586. The Court noted that "[i]t is said that equity only interferes for the protection of property, and that the government has no property interest." *Id.* at 583. To that, the Court responded that—though it would be a "sufficient reply . . . that the United

beyond the government's statutory authority or proprietary interests to invoke the government's "obligation[]" to "promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare."<sup>39</sup>

Courts and commentators have long clashed on how broadly *Debs* should be read.<sup>40</sup> But it was at a minimum a clear-cut instance in which "[t]he parallelism between government and private plaintiffs broke down."<sup>41</sup> Absent a pecuniary interest or "special injury," no private plaintiff could have obtained an injunction requiring that the "highways of interstate commerce" be kept "free from obstruction," let alone obtained an injunction based on an "obligation[] . . . to promote the interest of all."<sup>42</sup> And though the Court unanimously recognized the right of "the government" (in its term) to seek this sweeping injunction—even "praise[d]" it for seeking that

States have a property in the mails"—the Court "d[id] not care to place our decision upon this ground alone." *Id.* at 583–84.

39 *See id.* at 584; *see also id.* at 586 ("[W]henever 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, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.").

40 *See, e.g.,* United States v. Solomon, 563 F.2d 1121, 1127 (4th Cir. 1977) ("If *Debs* is given its most expansive possible meaning, the executive may sue without statutory authorization whenever the alleged violations 'affect the public at large.' . . . Other courts, however, have treated *Debs* as depending upon one or more of the particular elements of the facts on which it was decided, *e.g.,* . . . the harm was a public nuisance." (quoting *Debs*, 158 U.S. at 586)); Aditya Bamzai & Samuel L. Bray, *Debs and the Federal Equity Power*, 98 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 36), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3953534](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3953534) (arguing that *Debs* should be read as allowing suits by the United States concerning "a proprietary interest of the sovereign itself, or the proprietary interests of the public that are protected in the abatement of a public nuisance"); *see also infra* notes 141–42 and accompanying text.

41 Note, *Protecting the Public Interest: Nonstatutory Suits by the United States*, 89 YALE L.J. 118, 121 (1979); *see also id.* at 120 (noting that "the early decisions recognized no essential difference between the United States and other parties plaintiff. The government was entitled to claim standing and to imply rights of action on the same terms as other legal persons."); *id.* at 122 ("By allowing the United States to satisfy the standing requirement by citing an injury to the public or the public interest, rather than to itself as a legal entity, the Supreme Court recognized that the United States was different from other legal persons.").

42 *Debs*, 158 U.S. at 586, 593; *see also id.* at 584 ("The obligations which [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."); *cf.* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1852) ("Where no special damage is alleged, an individual could not prosecute in his own name for a public nuisance.").

injunction<sup>43</sup>—the Court did not satisfactorily resolve *who* “the government” was. By disclaiming reliance on statute, the Court seemingly equated the executive branch with “the government”; it neither broached nor answered the question of why the executive branch was entitled to seek an equitable remedy without being authorized to do so by Congress.<sup>44</sup> Subsequent decisions allowing the United States to seek nonstatutory equitable remedies have likewise failed to resolve these issues, sometimes skipping over them entirely.<sup>45</sup> The Court recently ducked the question again.<sup>46</sup>

The government does not just enjoy special perks when it seeks to begin its own suits. It also has received special treatment when it seeks to intervene in suits that others are litigating. (In case this needs saying, “intervention practice is largely the product of equity.”<sup>47</sup>) An influential case on intervention—*SEC v. U.S. Realty & Improvement Co.*<sup>48</sup>—illustrates the point. In *U.S. Realty*, a publicly

43 *Debs*, 158 U.S. at 583 (“Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong . . . and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals . . .”).

44 Note, *supra* note 41, at 122 n.23.

45 See, e.g., *Arizona v. United States*, 567 U.S. 387, 393 (2012) (addressing on the merits a nonstatutory suit in equity by the United States to enjoin a state law as preempted but failing to explain why the United States could sue); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (also known as *Pentagon Papers*) (addressing on the merits a nonstatutory suit in equity by the United States to enjoin publication of the *Pentagon Papers* but failing to explain why the United States could sue). In *Pentagon Papers*, Justice Marshall contended that the “ultimate issue in the[] case[]” was not the momentous First Amendment question but rather whether the executive branch could sue in equity. *Id.* at 741 (Marshall, J., concurring) (“The problem here is whether . . . the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest.”). Justice Harlan, writing in dissent and joined by Burger and Blackmun, also questioned “[w]hether the Attorney General is authorized to bring these suits in the name of the United States.” *Id.* at 753 (Harlan, J., dissenting).

46 *United States v. Texas*, 142 S. Ct. 522 (2021) (per curiam) (dismissed as improvidently granted). The district court held that the United States’s “sovereign interests” in “vindicating its citizens['] constitutional rights,” as well as the challenged bill’s impact on interstate commerce, allowed the United States to sue Texas in equity. *United States v. Texas*, 2021 WL 4593319, at \*16, \*18 (W.D. Tex. Oct. 6, 2021); see *id.* at \*25 (“[W]hen the machinations of the state effectively cut off private access to the federal courts, . . . the situation may warrant resort to an equitable action by the United States.”); *id.* at \*24 (rejecting argument that *Debs* is limited to cases of public nuisance); *id.* at \*17 (rejecting argument that *Debs* is limited to cases of proprietary interest).

47 Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65, 69 n.19 (1940); see FED. EQUITY R. 37 (1912) (rescinded in 1938 by the Federal Rules of Civil Procedure); FED. R. CIV. P. 24. For discussion of the development of intervention practice in equity, see Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 304–307, 313 & n.186 (2020).

48 310 U.S. 434 (1940).

listed corporation filed for bankruptcy under Chapter 10; the SEC thought the corporation should have used Chapter 11, so it sought to intervene and have the petition dismissed. The Second Circuit held that the SEC should not be allowed to intervene because the SEC had no right to any of the property involved in the bankruptcy case, nor did it have statutory authority to intervene.<sup>49</sup> The Court disagreed—citing, *inter alia*, *Debs*—finding that the SEC “plain[ly]” had a “sufficient interest in the maintenance of its statutory authority and the performance of its public duties” to intervene.<sup>50</sup> It did not matter that the SEC had no “personal, financial or pecuniary interest” at stake; that “public” interest was adequate.<sup>51</sup> Nor did it make a difference that the SEC lacked a “claim or defense” in the sense those terms are generally understood.<sup>52</sup> The “threat” to the SEC’s “statutory role” was enough to give it entry to the case.<sup>53</sup> As will be discussed more below, confusion as to whether *U.S. Realty* addressed intervention *by the sovereign* or intervention *full stop* has had an enduring impact on the interpretation of Rule 24.<sup>54</sup>

A variety of equitable doctrines also make special accommodations for the sovereign.<sup>55</sup> The United States “enjoys the benefit of a special exception from the usual principle that ‘he who seeks equity must do equity.’”<sup>56</sup> The United States is not bound by equitable

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49 *Id.* at 434, 458 (“[The Second Circuit’s decision] is in effect that a governmental agency not asserting the right to possession or control of specific property involved in a litigation may not be permitted to intervene without statutory authority.”).

50 *Id.* at 460.

51 *Id.*; see Berger, *supra* note 47, at 69 (“The rules which have required a property interest as a basis for intervention have not been strictly applied to intervention by governmental bodies because the courts have recognized that a non-pecuniary interest may be as vital to a state as any possessory interest. The *Realty* case furnishes an example.”).

52 See David L. Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 736 (1968) (citing *U.S. Realty* as a case in which the Court “refused to be deterred by the ‘claim or defense’ language of rule 24”).

53 See Nelson, *supra* note 47, at 325 (critiquing broader readings of *U.S. Realty* and positing that “[p]erhaps *U.S. Realty* simply recognized the ability of regulatory agencies to intervene in lawsuits that threatened to circumvent their statutory role”); *id.* (describing *U.S. Realty* as “of a piece with various rules and statutes—some enacted in the same era—that provide special authorization for intervention by public authorities”).

54 See *infra* text accompanying notes 130–34.

55 See PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1323 (2d ed. 1973).

56 *Id.*; Note, *Immunity from Statutes of Limitations and Other Doctrines Favoring the United States as Plaintiff*, 55 COLUM. L. REV. 1177, 1189 (1955) (explaining that unlike a private suitor, the United States need not offer to return the consideration paid when it seeks to rescind a fraudulently induced transaction); *Causey v. United States*, 240 U.S. 399, 402 (1916) (rejecting the objection that “the bill cannot be maintained because it does not contain an offer to return the scrip received. . . . The objection assumes that the suit is

estoppel, which “will not lie against the Government as it lies against private litigants.”<sup>57</sup> As to issues of law, the United States is not bound by nonmutual collateral estoppel, because “the constraints which peculiarly affect the Government” set it apart from the ordinary “private civil litig[ant].”<sup>58</sup> Even that most familiar equitable defense—laches<sup>59</sup>—has been held not to apply to the sovereign. Citing the doctrine *nullum tempus occurrit regi*—“no time runs against the king”—the Court has held that “[l]aches, however gross, cannot be imputed to [the United States],”<sup>60</sup> for a suit by the United States “to enforce a public right or protect a public interest . . . stands upon a different plane . . . from the ordinary private suit.”<sup>61</sup>

On the remedial end of equity, the federal government has also enjoyed special solicitude. The Court has allowed “the United States” to seek injunctions that Congress has forbidden by statute to private suitors, such as injunctions against state court proceedings and labor strikes.<sup>62</sup> And in a number of cases the Court has allowed

upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced.”).

57 *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419 (1990) (“From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.”); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) (“When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.”).

58 *United States v. Mendoza*, 464 U.S. 154, 162–63 (1984) (“The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.”).

59 *United States v. Admin. Enters, Inc.*, 46 F.3d 670, 672 (7th Cir. 1995) (“This versatile, flexible, and serviceable doctrine, originally equity’s counterpart to statutes of limitations (which were not applicable to suits in equity), is a ground for dismissing a suit if the defendant can show that the plaintiff delayed unjustifiably in filing and that as a result the defendant was harmed, either by being hampered in his ability to defend or by incurring some other detriment.”).

60 *United States v. Thompson*, 98 U.S. 486, 489 (1878); *id.* at 489–90 (“[T]hese prerogatives . . . had belonged to the crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created.”); *see also United States v. Summerlin*, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights.”).

61 *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *cf. Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943) (applying federal common law to preempt a state law laches defense in a suit brought by the United States).

62 *Leiter Mins., Inc. v. United States*, 352 U.S. 220, 225–26 (1957) (holding that the Anti-Injunction Act does not bar the United States from seeking a stay of state court proceedings); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 270–72 (1947) (holding that Norris-LaGuardia Act did not bar the United States from seeking a labor

the federal government to obtain equitable remedies against private parties by expansively reading ambiguous statutory text to permit such remedies. A good illustration is *Porter v. Warner Holding Co.*<sup>63</sup> A landlord had collected rents that exceeded the rent caps imposed by the Office of Price Administration (OPA).<sup>64</sup> The OPA sued for an injunction restraining the landlord from continuing to charge excess rents, as well as for a decree requiring the landlord to refund any excess rents collected to the tenants.<sup>65</sup> The difficulty was that the Emergency Price Control Act (EPCA) created only a short window for tenants to sue for overcharges, and that period had elapsed.<sup>66</sup> The question was, then, whether the OPA, in its enforcement action, could anyway obtain an order requiring that restitution be paid to the overcharged tenants. The Court held that it could.<sup>67</sup> Stressing “the public interest . . . involved in a proceeding of this nature,” the Court reasoned that the courts’ “equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.”<sup>68</sup> The Court refused to read the EPCA as truncating the “inherent equitable jurisdiction” of federal courts, instead regarding an order of restitution of excessive charges as “appropriate and necessary to enforce compliance with the Act and to give effect to its purposes,” i.e., “the statutory policy of preventing inflation.”<sup>69</sup> The dissent chided the Court for inventing a remedy that Congress had omitted.<sup>70</sup>

Another illustration is *Mitchell v. Robert DeMario Jewelry*,<sup>71</sup> in which the Court considered an enforcement action by the Secretary of Labor seeking reimbursement of lost wages to employees discharged unlawfully in retaliation for complaining of violations of the Fair Labor Standards Act (FLSA).<sup>72</sup> The FLSA forbade courts adjudicating such an enforcement action “to order the payment to

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injunction); *cf. id.* at 313 (Frankfurter, J., concurring) (“Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases. Nothing in the [Norris-LaGuardia] Act remotely hints that the withdrawal of this power turns on the character of the parties.”).

63 328 U.S. 395 (1946).

64 *Id.* at 396.

65 *Id.* at 396–97.

66 *See id.* at 401.

67 *See id.* at 403.

68 *Id.* at 398.

69 *Id.* at 400.

70 *Id.* at 408 (Rutledge, J., dissenting) (“[T]he remedy now sought is inconsistent with the remedies expressly given by the statute and contrary to the substantive rights it creates. I think too this is why Congress failed to provide for restitution, indeed cut off that remedy.”).

71 361 U.S. 288 (1960).

72 *See id.* at 289–90.

employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.”<sup>73</sup> Nonetheless, over three dissents, the Court relied on the “statutory purposes” and the “policy of the legislature” to hold that courts had “equitable jurisdiction” to order reimbursement for wages lost by unlawfully discharged employees.<sup>74</sup>

Decisions that similarly rely on the “public interest” or the “purposes” or the “policy” of federal laws have since put many arrows into the quivers of federal regulatory agencies seeking remedies in equity. As Seth Davis has explained, “[c]ourts have presumed that Congress intends federal agencies to have the ‘means to ensure compliance with’ their decisions, and, more broadly, ‘to enforce Congress’ will.”<sup>75</sup> The “apparent impulse to make federal administration effective” has redounded to the benefit of the FDA, the FTC, and the SEC, all of which have succeeded in winning equitable remedies not expressly provided by statute.<sup>76</sup> These decisions, to be clear, are not just relics of a bygone era of purposivism in statutory interpretation. As recently as 2020—in *Liu v. SEC*<sup>77</sup>—the Court construed the SEC’s statutory authority to seek “equitable relief” as allowing courts to order disgorgement of a wrong-doer’s net profits in SEC civil enforcement proceedings,<sup>78</sup> notwithstanding the ambiguity of that language and over the dissent’s

73 *Id.* at 299 (Whittaker, J., dissenting).

74 *See id.* at 291–93 (majority opinion) (“When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, ‘there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.’ To the policy of the Fair Labor Standards Act we therefore now turn.” (quoting *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 203 (1839))).

75 Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 53 (2014) (first quoting *United States v. Santee Sioux Tribe*, 135 F.3d 558, 562 (8th Cir. 1998); and then quoting *FDIC v. Mallen*, 661 F. Supp. 1003, 1010 (N.D. Iowa 1987)).

76 *See id.* at 53–54; *see also* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 525 (2011) (“After *Porter*, the Supreme Court and lower appellate courts afforded agencies the right to seek restitution and disgorgement for back pay under the Fair Labor Standards Act, restitution for unlawfully marketed devices under the Food, Drug, and Cosmetic Act, restitution for gains made from insider trading and material misstatements under Rule 10b-5 of the Securities Act of 1934, and disgorgement for unfair trade practices and antitrust violations under section 13 of the Federal Trade Commission Act.”).

77 140 S. Ct. 1936 (2020).

78 *See id.* at 1940, 1950. *Liu* was not a total victory for the SEC. The Court held that disgorgement should be limited to the net profits of the wrongdoer; left open the question whether disgorged funds must be restored to investors when doing so would not be feasible; and held that joint and several liability may be limited to only those parties engaged in concerted wrongdoing. *See id.* at 1947–50.

protest that “[b]ecause disgorgement is a creation of the 20th century, it is not properly characterized as ‘equitable relief.’”<sup>79</sup>

Examples could be multiplied, but as these illustrations show, courts in equity have accommodated and strengthened sovereign power in many ways. Equity has been forged into a flexible and serviceable tool of the sovereign, for use as both its sword (e.g., when the government sues and seeks equitable remedies) and as its shield (e.g., when the government resists laches or estoppel defenses).

That accommodating stance to sovereign power has had proven appeal, but it has nonetheless discomfited some observers. The English chancellors would have had obvious reasons to give the sovereign special treatment: they were servants of the crown, from which their powers flowed.<sup>80</sup> For equally obvious reasons, that sovereign-favoring conception of equity sits uneasily with the American constitutional structure, in which the federal courts are not the servants of Congress, the executive branch, or both combined. As a result, some are naturally tempted to try to backfill more democratically palatable justifications for the curiously crown-shaped divots and bulges in equity’s landscape. Justice Stone, for example, attempted to disentangle the sovereign’s exemption from laches from “any inherited notions of the personal privilege of the king” by arguing that the rule “is supportable now” on policy grounds;<sup>81</sup> in Justice Stone’s view, that exemption “benefit[s] and advantage[s] . . . every citizen, including the defendant[] whose plea of laches . . . it precludes.”<sup>82</sup> Others are drawn to reject these special perks, rather than sweep them under the rug, as for example Justice Black would have liked to have done when he protested (in dissent) a decision that allowed the federal government to escape estoppel.<sup>83</sup> Still and all, the sovereign’s special treatment persists.

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79 *Id.* at 1950 (Thomas, J., dissenting).

80 *See, e.g.*, A.T. CARTER, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 167–68 (3d ed. 1906) (describing how royal support for the Court of Chancery in 1616 cemented Chancery’s power to issue injunctions); *see also supra* note 2 and *infra* notes 84–85.

81 *Guar. Tr. Co. v. United States*, 304 U.S. 126, 132 (1938) (“Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.”).

82 *Id.* It would be convenient to think that any given rule of special treatment for “the sovereign” is worth retaining on policy grounds because it necessarily “benefits . . . every citizen”—but that notion is also one that could be used to repackage and justify nearly any royal prerogative.

83 *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (“Our Government should not, by picayunish haggling over the scope of its

### B. *Sword and Shield Against the Sovereign*

Equity, if one only thought about its royal source, would seem to offer inhospitable terrain for the development of doctrines that would *limit* sovereign power or *disfavor* the sovereign. Consider that in the time of Richard II, the chancellor took an oath that “he shall not know or suffer the hurt or disheriting of the King, or that the rights of the Crown be decreased by any means . . . and that he shall do and purchase the King’s profit in all he reasonably may.”<sup>84</sup> Or consider Bacon’s description that in chancery—“where suits are tried properly”—“the king is never upon defence . . . for you may not come with a *queritur* against the king, but must humbly *supplicate* unto him, or modestly *disclose*, and lay before him your right, or civilly offer a *negative* of his right . . . . These be the ways that you must proceed in, when you have to deal with the majesty of a king.”<sup>85</sup> Thus, as one might have expected, in England it was not the Court of Chancery but the law courts that exerted “power . . . to curb the excesses of the burgeoning administrative state.”<sup>86</sup>

Eventually, however, and notwithstanding equity’s historical subservience to sovereign power, American federal courts in equity

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promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do.”).

84 See A. H. MARSH, HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY 13–14 (Toronto, Carswell & Co. 1890). “[A]ll our juridical antiquaries admit that the jurisdiction of chancery was established, and in full operation during the reign of Richard II.” JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 46 (2d ed., London, Stevens and Haynes 1892).

85 Francis Bacon, *The Argument of Sir Francis Bacon, Knight, Attorney-General in the King’s Bench, in the Case De Rege Inconsulto, Between Brownlow and Michell*, in 7 THE WORKS OF FRANCIS BACON 687, 694 (James Spedding, Robert Leslie Ellis & Douglas Denon Heath eds., 7th ed., London, Longman, Green, and Co. et al. 1859).

86 Pfander & Wentzel, *supra* note 9, at 1276; *see id.* at 1278 & n.36 (noting that for “well over two centuries” proceedings before common law courts rather than courts of equity served as the mechanism for guarding public rights and that English and American “courts of equity rarely engaged with matters of public law until well after 1789”). As early as the seventeenth century, Jaffe observes, the common law courts acquired “independent judicial power,” despite the fact that the King was “the nominal source of the power . . . of his judges.” *See* JAFFE, *supra* note 4, at 154–55 (“[T]hough the prerogative writs were in form issued in the King’s name, their development in the Seventeenth Century—this is particularly true of mandamus and certiorari—involved a substitution of the judicial power of King’s Bench for the direct executive supervision of Star Chamber. The Act of Settlement of 1700 confirmed the independence of the King’s judges and in the hands of strong Chief Justices such as Holt and Mansfield the prerogative writs became an important aspect of that independent judicial power. To a considerable extent the proceedings have shed their prerogative character and functioned quite simply as remedies for the redress of private claims against government.”).

would come to perform the task of curbing sovereign power,<sup>87</sup> and indeed would do so in ways that went far beyond what courts at law had been capable of accomplishing. The history here is well-known: as remedies at law—writs of mandamus, prohibition, certiorari, and quo warranto—languished in the wings of the federal system,<sup>88</sup> the injunction came to take center stage. By the end of the nineteenth century, “federal courts embraced the injunction as a substitute” for the common-law writs.<sup>89</sup> Best known is the “watershed”<sup>90</sup> decision in *Ex parte Young*,<sup>91</sup> which authorized injunctive relief against state officials in order to curb the enforcement of illegal state regulation. *Ex parte Young*’s less famous but equally momentous sister cases, *McAnnulty* and *Stimson*, allowed injunctions to be issued against federal officers alleged to be acting unlawfully.<sup>92</sup>

Today, suits seeking such “*Young*-type” injunctions against state and federal officers are a staple of public law litigation in federal courts. They rest on a famous pair of fictions that stand in evident tension. The first is that a *Young*-type suit does not offend a state’s, or the federal government’s, “sovereign immunity” because “such a suit is not really against the [state or federal government], but rather

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87 See *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (“The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. . . . It is a judge-made remedy. . . .”). It is worth emphasizing that the source cited by Justice Scalia for this “long history of judicial review” is an article about the common law writs of certiorari and mandamus. See Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956). The “history of judicial review of illegal executive action,” in other words, is longer than the history of judicial review *via courts of equity*. See Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 298 n.31 (1948) (identifying *Noble v. Union River Logging Railroad*, 147 U.S. 165 (1893), as the case in which an “injunction was first granted to review [federal] administrative action”).

88 See Lee, *supra* note 87, at 295–96; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 948–949 (2011); see also *Degge v. Hitchcock*, 229 U.S. 162, 170–71 (1913); see generally JAFFE, *supra* note 4, at 165–93.

89 See Pfander & Wentzel, *supra* note 9, at 1280.

90 Edelman v. Jordan, 415 U.S. 651, 664 (1974).

91 209 U.S. 123 (1908). *Young* allowed a suit by railroad shareholders to enjoin the Minnesota attorney general from enforcing allegedly unconstitutionally low railroad rates. See generally Edward A. Purcell, Jr., *Ex Parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931 (2009).

92 See *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (allowing injunctive relief against federal postmaster general for failure to deliver the plaintiff’s advertisement); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (“[I]n case of an injury threatened by his illegal action, the [federal] officer cannot claim immunity from injunction process.”); see RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 892–93 (7th ed. 2015).

against an individual who has been ‘stripped of his official or representative character’ because of his unlawful conduct.”<sup>93</sup> The second is the simultaneous and contradictory legal fiction that an officer stripped of his official character can nonetheless take state action.<sup>94</sup> The “sovereign” means one thing for purposes of the Eleventh Amendment, and another for purposes of the Fourteenth.<sup>95</sup>

For our purposes, what makes these fictions interesting is how they treat the *identity* of the sovereign in courts of equity. By first defining the sovereign as not including the sovereign’s officers, the first fiction skirts the roadblock of sovereign immunity; by then executing an immediate U-turn and allowing the officer to be treated as a state actor who can be enjoined from enforcing the sovereign’s laws or ordered to offer affirmative relief, the second fiction blazes a path through which plaintiffs are able to vindicate their constitutional rights and secure adherence to constitutional norms by

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93 Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 267 (2011) (Roberts, C.J., dissenting) (quoting *Ex parte Young*, 209 U.S. 123, 159–60 (1908)).

94 See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n.25 (1984).

95 See *id.* at 105 (noting the “well-recognized irony” that an official’s unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment” (quoting Florida Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982))); John F. Duffy, Note, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. CHI. L. REV. 295, 306 n.63 (1989) (noting that *Young* rests on “the apparent asymmetry that a federal court will treat a state officer as an agent of the state for the purpose of the Fourteenth Amendment, but not for the purpose of the Eleventh.”). Scholars have debated whether *Young*’s approach to sovereign immunity should be regarded as resting on a fiction. See David L. Shapiro, *Ex Parte Young and the Uses of History*, 67 N.Y.U. ANN. SURV. AM. L. 69, 74–79 (2011) (summarizing various views of *Young*); see, e.g., John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 996 (2008) (arguing that *Young* “in substance” allowed “an anti-suit injunction that would enforce a defense against the state”). But see Shapiro, *supra*, at 86 (“[*Young*] speaks not in terms of the prospective defendant bringing suit to assert an anticipated defense to an enforcement action but rather of the plaintiff’s objective of preventing a constitutional wrong analogous to a traditional trespass on, or seizure of, the plaintiff’s property.”). Whatever might be said of *Young* itself, subsequent cases relied on *Young* to impose affirmative duties to act; such decisions achieved results that went well beyond what a prospective defendant could achieve in an anticipatory action seeking an anti-suit injunction. *Id.* at 91–92 (“And in fact the line of decisions of which *Young* is an important member has given rise to holdings allowing both affirmative relief and damages against government officers at both the state and federal level, without regard to the existence of statutory authority and without regard to the doctrine of sovereign immunity.”); see also Pfander & Wentzel, *supra* note 9, at 1290 (noting that cabining the *Young* doctrine to anticipatory defenses would “cast[] doubt on the validity of many of the directive and mandatory remedies that have issued in [*Young*’s] name”).

state and federal sovereigns.<sup>96</sup> A “century’s worth of cases,”<sup>97</sup> including some injunctions of astonishing scope, attests to the power and flexibility of this “procedural engine.”<sup>98</sup>

It is not a coincidence, I think, that it was in equity that these unusual fictions about sovereign identity were able to take root and attain such consequence.<sup>99</sup> A court of equity should experience no shame in proceeding through “legal fiction”; in equity, the deployment of the legal fiction, far from being a disfavored stratagem, is often the name of the game. The private law of equity is full of them—the “constructive” trust,<sup>100</sup> the “separate” estate<sup>101</sup>—and the fiction of law, said Blackstone, is always founded in equity: “[I]n *fictione juris semper subsistit aequitas*.”<sup>102</sup> In public law, the fictions embedded in the *Young*-type suit fit comfortably within equity’s overarching tradition of using pragmatic tools to prevent opportun-

96 See Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 972–73 (2019) (“*Brown v. Board of Education*, the one-person, one-vote cases, and challenges to statutes that infringe First Amendment rights have all depended on federal injunctions that directly enforce constitutional norms, not damages remedies or common-law measures of tortious misconduct.”).

97 Pfander & Wentzel, *supra* note 9, at 1289 (quoting James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 213–14 (2016)).

98 See Duffy, *supra* note 95, at 333 n.152.

99 “Unusual” in the sense that the *Young*-type suit allows a court to effectively enjoin a sovereign from acting by enjoining the sovereign’s agents—a result that inverts the principal-agent paradigm and that therefore would struggle to gain a foothold in usual cases involving ordinary private agents and principals. See *Doctor’s Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 304 (2d Cir. 1999) (“It is one thing for an injunction against a principal also to bind the principal’s agents or servants. . . . It is quite different for an injunction against an agent or servant also to bind the principal. By definition, the servant does not control the principal. If the court does not have jurisdiction over the principal, it is not easy to see why the court should have the power to bind her through an order directed against her servant.”).

100 See George B. Barrows, *The Equitable Liability of Stockholders; the Grounds upon Which It Rests*, 13 YALE L.J. 66, 72 (1903) (“In building up this remedial system of constructive trusts, courts of equity went a step further in applying the theory of a trust to cases which were not trusts . . .”).

101 See Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1628 (2001) (“Separate estates were anathema to the principles of coverture, yet courts of equity consistently legitimated them.”); *id.* at 1628 n.78 (“Beginning as early as the thirteenth century, a set of parallel rules developed in courts of equity to relieve women of some of the disadvantages of coverture.”).

102 3 WILLIAM BLACKSTONE, COMMENTARIES \*43 (“[N]o fiction shall extend to work an injury; it’s proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true is it, that *in fictione juris semper subsistit aequitas* [a fiction of law is always founded in equity].”).

ism or bad-faith behavior.<sup>103</sup> But what is inconsonant with equity's institutional genesis is that in *Young*-type suits, these fictions are deployed to constrain rather than to protect the sovereign.

At the remedial end of equity, the special stature of the sovereign can *sometimes* operate to its detriment rather than to its advantage.<sup>104</sup> Consider the familiar “four factor” test for preliminary injunctions,<sup>105</sup> and the similar “four factor” test for stays.<sup>106</sup> Both tests putatively apply to suits by all litigants, including those involving the federal sovereign. But one of the factors—likelihood of irreparable harm—is often trivial to show in suits against the government, because the kinds of harms that governments tend to inflict and are uniquely capable of inflicting (violating constitutional rights, depriving people of statutory procedural rights, illegally deporting people, etc.) are almost automatically treated as irreparable.<sup>107</sup> And because of sovereign immunity, economic harms—which may be treated as reparable if inflicted by a private party—are frequently treated as irreparable when inflicted by the government.<sup>108</sup> On top of that, when the government is a party, the balance of equities and the public interest factors merge.<sup>109</sup> As a result, the final factor—whether the suit is likely to succeed on the merits—often winds up doing at least double and sometimes triple duty, as lower courts tend to mash it together with the other factors and say things to the effect that the

103 See Henry E. Smith, *Equity and Administrative Behaviour*, in EQUITY AND ADMINISTRATION 326, 330 (P.G. Turner ed., 2016) (“[E]quity can be thought of as a decision-making mode that aims to counter opportunism.”).

104 See *infra* note 114 (explaining how the remedial tests sometimes favor the sovereign).

105 See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).

106 *Nken v. Holder*, 556 U.S. 418, 426 (2009) (“(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))).

107 See, e.g., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). An important exception is *Younger v. Harris*, 401 U.S. 37 (1971), which forbade federal suits against pending state criminal prosecutions on the ground that any harm is reparable, not irreparable, through the assertion of a constitutional defense in the state proceeding.

108 See, e.g., *Chamber of Com. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) (“Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.”).

109 *Nken*, 556 U.S. at 435.

government cannot be said to “suffer harm from an injunction that merely ends an unlawful practice,”<sup>110</sup> or that the government can claim no interest in “the perpetuation of unlawful agency action.”<sup>111</sup> The upshot has been that in suits against the federal sovereign, the “four factor” test in lower courts often becomes just a one-factor, or at most a two-factor, inquiry: Is the government likely to be held on the merits to be acting unconstitutionally or illegally?<sup>112</sup>

To be sure, the Court has cautioned against this type of collapsing of the inquiry.<sup>113</sup> But some of its own recent decisions nevertheless topple down all the dominoes at once.<sup>114</sup> An example is

110 *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)).

111 *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (noting the public’s interest in “having governmental agencies abide by the federal laws that govern their existence and operations”).

112 *See, e.g., League of Women Voters*, 838 F.3d at 12 (An “extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest.”); *R.I.L.-R*, 80 F. Supp. 3d at 191 (“[F]actors three and four [balance of harms and public interest] do not require in-depth analysis. . . . In light of the Court’s conclusion that DHS’s current policy of considering deterrence is likely unlawful, and that the policy causes irreparable harm to mothers and children seeking asylum, the Court finds that these last two factors favor Plaintiffs as well.”).

113 *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) (explaining that the “public interest and the Navy’s interest” would “alone require[] denial of the requested injunctive relief,” even if the irreparable injury and likelihood-of-success factors were met).

114 As Stephen Vladeck has trenchantly observed, since 2017 the Court has similarly and recently “quietly shifted” the traditional standard for stays into a merits-dominated inquiry in a slew of “shadow docket” orders in cases seeking emergency relief from lower court decisions granting injunctive relief against the government. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 155–56 (2019) [hereinafter Vladeck, *Solicitor General*]. Once the Court was persuaded that the executive branch was likely to succeed on the merits, the other factors received short shrift; the Court apparently treated the executive branch as suffering irreparable injury whenever one of its policies was placed on hold, and gave little weight to the remaining factors. *See id.* at 131–32, 155–56. “The upshot is that emergency relief now appears to rise and fall entirely on the merits—with virtually no regard for whether the *other* factors that are usually required . . . for such extraordinary relief are in fact satisfied.” *Case Selection and Review at the Supreme Court, Hearing Before the Presidential Comm. on the Supreme Court of the U.S.*, at 14 (2021) (testimony of Stephen I. Vladeck, Alan Wright Chair in Federal Courts, University of Texas School of Law).

When these shadow docket cases are viewed together with the cases discussed *infra* notes 115–21 and accompanying text, it becomes evident that the collapsing of the four-factor test into effectively a one-step test is not *necessarily* adverse to the sovereign. Instead, this particular facet of equity—like equity writ large—may cut for or against the sovereign. The direction of the cut will depend pretty much entirely on whether a majority of the Court agrees that a law or policy is likely to be upheld on the merits. Either way, the Court’s opacity on what doctrinal test applies to the sovereign—and

the “stub end” of *Alabama Association of Realtors v. Department of Health and Human Services*,<sup>115</sup> which vacated a stay of the district court decision that had invalidated the CDC’s eviction moratorium.<sup>116</sup> After explaining at length why the government was almost certain to lose on the merits, the Court disposed of the equities in three quick paragraphs, with just a few words on irreparable harm.<sup>117</sup> A few months later, challengers to OSHA’s employer vaccine mandate pounced on exactly this point: “*Alabama Realtors* takes [OSHA’s] argument about the beneficial effects of their legal action off the table. If the Court considers it illegal, then it’s not in the public interest and it’s proper to enjoin it.”<sup>118</sup> The Court ultimately took that shortcut: after holding that the mandate likely exceeded OSHA’s statutory authority, the Court merely said that the “equities do not justify withholding interim relief” and stayed the rule without any evaluation of irreparable harm, the balance of hardships, or the public interest.<sup>119</sup> Indeed, and astonishingly, the Court disclaimed the power to perform that balancing: “It is not our role to weigh such tradeoffs.”<sup>120</sup> The Court did not explain if it was denuded of that “role” only in suits involving the federal sovereign (or in some subset of those suits), or in suits involving private litigants as well.<sup>121</sup>

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whether that same doctrinal test also applies to other litigants—is problematic. See Vladeck, *Solicitor General, supra*, at 157–58 (“[T]he Court risks the perception that the rule is not one for the federal government *in general*, but for the federal government at particular moments in time—perhaps depending upon the identity (or political affiliation) of the sitting President, or perhaps, more granularly, depending upon the political or ideological valence of the particular federal government policy at issue . . .”). I am grateful to Professor Steve Vladeck for his thoughts on these points.

115 141 S. Ct. 2485 (2021).

116 The Court apparently applied the *Nken* stay factors itself, rather than the test for vacatur of stays, which requires a likelihood of certiorari, serious and irreparable injury from the stay, and a showing that the stay was demonstrably wrong under the accepted standards for granting stays. *Id.* at 2488–90; *cf.* *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers).

117 *Alabama Ass’n*, 141 S. Ct. at 2488–90 (noting that while “the public has a strong interest in combating” COVID’s spread, “our system does not permit agencies to act unlawfully even in pursuit of desirable ends. . . . It is up to Congress, not the CDC, to decide whether the public interest merits further action here.”).

118 Transcript of Oral Argument at 51, *Nat’l. Fed’n. of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (No. 21A244).

119 *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 664–66; *id.* at 663 (“Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.”). In *Biden v. Missouri*, the Court was similarly laser-focused on the merits when it granted stays of lower-court injunctions against the federal vaccine mandate for healthcare workers at federally funded facilities. See *Biden v. Missouri*, 142 S. Ct. 647, 653–55 (2022).

120 *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666.

121 See *supra* note 114.

Relatedly, and finally, ambiguity concerning the sovereign's identity can be leveraged against the federal government by litigants seeking to enjoin its actions. Consider the just-mentioned litigation concerning the OSHA vaccine mandate for large employers. The chief judge of the Sixth Circuit, in dissenting from a denial of a stay of the mandate, was unpersuaded by the federal government's recitation of the harms to society that would follow if the vaccine mandate were stayed. Rather, Judge Sutton wrote, "[b]ecause OSHA's authority extends only to regulating the workplace, the equities embedded in the stay factors do not extend to the costs to society of having unvaccinated Americans. They extend only to the risks to workers and companies."<sup>122</sup> Judge Sutton did not regard "the government" as an undifferentiated, unitary entity with the capacity to speak with a single voice on behalf of the public interest. Rather, it was the "perspective of the Secretary of Labor" that appeared relevant to Judge Sutton, a perspective that could not encompass "ancillary benefits for Americans who come into contact with unvaccinated workers"—for those "ancillary benefits" were "not OSHA's to regulate."<sup>123</sup> The Court, when it ultimately stayed the rule, likewise relied on OSHA's "Organic Act" and the limited purview of OSHA's authority.<sup>124</sup>

Now, that slicing and dicing of the public interest along agency "Organic Act" lines may be sensible, or it may not be. The point is simply that the federal government's claim to be acting in the public interest here cashed out in a way strikingly different than it did in, *inter alia*, *Debs*, where one unit of the federal government—the Department of Justice—was allowed to sue to defend the public interest of the country as a whole without *any* statutory authority

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122 *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 284 (6th Cir. 2021) (Sutton, C.J., dissenting) ("The other stay factors largely favor the challengers as well. Because OSHA's authority extends only to regulating the workplace, *the equities embedded in the stay factors* do not extend to the costs to society of having unvaccinated Americans. They extend *only to the risks to workers and companies*. . . . From the perspective of the Secretary of Labor . . . the main risk of staying the rule is to unvaccinated American workers. . . . Even if the mandate would have ancillary benefits for Americans who come into contact with unvaccinated workers outside the workday, that consideration is not OSHA's to regulate." (emphasis added)).

123 *Id.*

124 *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (citing "the text of the agency's Organic Act"); *id.* ("[N]o provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise."); *id.* at 666 ("Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.").

being deemed necessary.<sup>125</sup> It illustrates, like the *Young*-type suit, how framing choices concerning the identity of the federal sovereign may work to the sovereign's detriment in equity.

Here, as before, more examples could probably be adduced, but the gist should be clear: alongside with assisting the sovereign power, equity has simultaneously functioned as a sword against the sovereign and as a shield from actions by the sovereign. Here, as before, courts and judges adopt varying and inconsistent conceptions of the sovereign's identity and of its interests. And here, as before, bases for critique likewise abound. Why should we treat officers *not* as arms of the sovereign for purposes of the sovereign immunity bar, but treat them as state actors for the purposes of other constitutional provisions? What relevance does a jurisdictional limit on one federal agency's regulatory authority have to the determination whether the American public as a whole would be harmed if a given injunction issued against that agency? Because our law remains confused as to who the sovereign is, and how it should be treated in equity, adequate answers to such questions remain elusive.

## II. CONSEQUENCES AND IMPLICATIONS

The puzzle of how to conceive of the sovereign is a familiar theme in caselaw and commentary on sovereign immunity.<sup>126</sup> To pick one pair of opposing views on the point almost at random, Justice Holmes famously deemed the doctrine of sovereign immunity to rest on the "logical and practical ground" that "the authority that makes the law" cannot be held to account to it.<sup>127</sup> Nonsense, countered Louis Jaffe; that justification for sovereign immunity "depends upon the existence of an identifiable unitary sovereign," a "notion" that "at least in modern times, [is] a difficult one to maintain." Jaffe hazarded that "in this country the 'United States' is the most logical contender for that role," but he carefully stressed that "the United

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125 See *In re Debs*, 158 U.S. 564, 584–86 (1895); see also *supra* note 45 and accompanying text (describing other cases in which the Court allowed nonstatutory suits by the United States).

126 See, e.g., *United States v. Lee*, 106 U.S. 196, 206 (1882) ("As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."); *Chisholm v. Georgia*, 2 U.S. 419, 446 (1793) (Iredell, J., dissenting) (noting that cases analogized to petitions of right "could only be presented to the sovereign power, which surely the Governor [of a state] is not. The only constituted authority to which such an application could with any propriety be made, must undoubtedly be the Legislature."); see generally *Alden v. Maine*, 527 U.S. 706, 711–12 (1999).

127 *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) ("[T]here can be no legal right as against the authority that makes the law on which the right depends.").

States must always act through one of its formal organs, none of which itself exercises the full authority of the sovereign.”<sup>128</sup>

In equity, as the above discussion has shown, the same conceptual puzzle has reared its head, albeit in a less recognized way. At times, equity bends to accommodate the claims of what it deems to be the sovereign; at other times, the chancellor turns to bite the hand of the sovereign that once fed him. This Part offers two observations about this tension. First, cases involving the sovereign—because their treatment of the sovereign is rarely explicit or well-understood—can ramify in unpredictable ways through legal doctrine. And second, thinking about the nature of the sovereign in equity offers insight into the puzzle of what Article III means by its reference to cases “in Equity.”

### A. *Consequences for Doctrine*

Equity’s two-faced approach to the federal sovereign manifests in disparate and siloed contexts, which makes that ambivalence difficult to perceive. As a result, courts and litigants overlook that in an important subset of cases the sovereign has received special treatment in equity courts, and so fail to attend to the fact that certain cases were decided on the basis of the sovereign’s distinctive status. This oversight, in turn, has two main types of consequences for doctrine in equity. One is that cases that accorded special treatment to the sovereign—perhaps for sound reasons—can “spill over” to differently situated litigants. Conversely, cases that accorded special treatment to the sovereign—perhaps also for sound reasons—are vulnerable to being “read down” in a fashion that obscures the sovereign’s distinctive role and its unique claims.<sup>129</sup>

An example of the first effect appears in the line of cases on permissive intervention. A decision—*U.S. Realty*—that turned on the sovereign’s right to intervene because of the sovereign’s special position (the SEC’s interest in pursuing its statutory mandate)<sup>130</sup> subsequently got interpreted broadly. Treatises and courts began to

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128 JAFFE, *supra* note 4, at 199–200. Jaffe continued: “Thus the legislature makes laws and grants, where necessary, consent to be sued. The law is enforced by a similarly distinct and limited body, the judiciary . . . . It is hard to see on what ‘logical and practical ground’ the activity of either one of these bodies would compel its being above the law.” *Id.*

129 Courts routinely read precedents broadly and narrowly, and doctrinal confusion sometimes results. Such analytical slippage will be especially hard to be on guard against, though, when an aspect of a case that mattered to its holding (here, the involvement of the sovereign) is not generally understood to be an aspect of a case that *can* much matter to its holding.

130 See *supra* notes 48–54 and accompanying text.

state that an intervenor need not have a “claim or defense” in the conventional sense to intervene in a suit.<sup>131</sup> Eventually, by the 1970s,<sup>132</sup> a reading of Rule 24(b) that began with a case involving the SEC’s statutory mission had germinated into a doctrine that shaped permissive intervention for all litigants<sup>133</sup>—because, we are elsewhere instructed, equitable principles are strictly agnostic as between the sovereign and other litigants.<sup>134</sup>

This spillover effect may now play out in the wake of the Court’s recent decisions concerning preliminary injunctions and stays in suits involving the federal sovereign. As noted, in *Alabama Realtors* and *National Federation of Independent Business*, the Court gave the lion’s share of its attention to whether the challengers were likely to succeed on the merits and very short shrift to the remaining three factors.<sup>135</sup> In *National Federation of Independent Business*, the Court went still farther—it disclaimed the authority to weigh those factors.<sup>136</sup> Sophisticated commentators immediately expressed discomfiture and surprise at the Court’s analysis, while struggling to pinpoint a coherent rationale for the Court’s deviation from the normal multi-step sequence.<sup>137</sup> One of them cautiously broached the possibility that perhaps the decision should be read not as speaking to equity *generally*, but instead as speaking to equity *as applied to federal regulatory agencies acting in excess of their statutory mandates*.<sup>138</sup> How will lower courts respond? A real chance exists that these decisions will

131 Nelson, *supra* note 47, at 328–29.

132 *Id.* (charting the course of cases from the 1950s through the present day and noting that “some lower courts continue to downplay the ‘claim or defense’ language in Rule 24(b)”).

133 “All” litigants, that is, except (ironically) governments: shortly after *U.S. Realty*, the 1946 amendment to Rule 24(b) removed the requirement that a governmental actor assert a claim or defense in order to intervene. See FED. R. CIV. P. 24(b).

134 See *supra* note 8 and accompanying text.

135 See *supra* notes 113–121 and accompanying text.

136 See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 142 S. Ct. 661, 666 (2022) (per curiam) (“It is not our role to weigh such tradeoffs.”).

137 See William Baude, *Balancing the Equities in the Vaccine Mandate Case*, VOLOKH CONSPIRACY (Jan. 14, 2022), <https://reason.com/volokh/2022/01/14/balancing-the-equities-in-the-vaccine-mandate-case/#> [https://perma.cc/5T2Y-DF3L] (flagging the “scant” and “self-denying” reasoning concerning the equities); Richard Re, *Did the Supreme Court Overrule Equity?*, RE’S JUDICATA (Jan. 14, 2022), <https://richardresjudicata.wordpress.com/2022/01/14/did-the-supreme-court-overrule-equity/> [https://perma.cc/D55C-SLSL] (noting the decision’s “disregard of equitable discretion, to the point of denying that it exists” and that “[i]f taken at face value, this aspect of the Court’s ruling represents a major break from settled practice”). As Professor Vladeck has noted, though, the truncated approach taken in these decisions had recent precursors on the shadow docket. See *supra* note 114 and accompanying text.

138 See Baude, *supra* note 137 (noting the possible argument that “Congress overruled equity for stays of regulations” in 5 U.S.C. § 705).

influence how lower courts apply the four-factor tests in future cases that involve only private litigants. As occurred in the aftermath of *U.S. Realty*, ripple effects for equity writ large may follow from decisions that quite possibly turned entirely on considerations specific to federal regulatory agencies.

Conversely, a failure to perceive that the sovereign's special status has affected the outcome of cases can also have a countervailing impact on doctrine. One way this effect manifests is that courts recast cases that were obviously decided on the basis of the sovereign's special stature in a manner that shortchanges the sovereign's distinctive position and role. As good an example as any is *Debs*. As discussed above, *Debs* permitted the United States to seek equitable relief against railroad strikers notwithstanding the absence of any statutory authorization from Congress for such a suit.<sup>139</sup> The Court stressed that "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"—language that self-evidently speaks to the special nature of the federal sovereign ("the nation") and its duty to protect rights, particularly constitutional rights, secured by federal law.<sup>140</sup> Yet the draw is strong to demote this facet of *Debs*, and instead to assimilate the government to a private plaintiff in equity seeking a garden-variety injunction to abate a nuisance or shield a proprietary interest.<sup>141</sup> Here, the impulse to place the sovereign on the same

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139 See *In re Debs*, 158 U.S. 564, 583–84 (1895).

140 *Id.* at 586. Congress has enacted legislation based on this language in *Debs*. *Debs* was invoked in the Congressional debates leading up to the Act of August 24, 1937, which allowed the United States to intervene in suits that involve the constitutionality of federal statutes. Quoting this passage from *Debs* as support, the Senate Report stated: "Whenever the United States is concerned, the interest which will support its right to intervene is not limited to pecuniary interest. It extends to rights and duties related to sovereignty." S. REP. NO. 75–963, at 2 (1937); see also *id.* at 3–4 ("The United States is not excluded . . . from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights.").

141 See, e.g., *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977) ("Other courts, however, have treated *Debs* as depending upon one or more of the particular elements of the facts on which it was decided, e.g., . . . the harm was a public nuisance . . ."); Bamzai & Bray, *supra* note 40 ("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.").

plane as other litigants would result in the United States being divested of the ability to seek injunctive relief outside the narrow category of suits involving a federal government property interest or something classifiable as a “nuisance.” Whatever may fall within that category, quite a lot of important suits would fall outside of it.<sup>142</sup>

Another illustration of how equity cases involving sovereign interests may be “read down” appears in a recent decision concerning the FTC’s power to seek restitution or disgorgement. The FTC is authorized to obtain a “‘permanent injunction’ in federal court against ‘any person, partnership, or corporation’ that it believes ‘is violating, or is about to violate, any provision of law.’”<sup>143</sup> As discussed,<sup>144</sup> earlier cases—*Porter* and *Robert DeMario*—had broadly interpreted similar language in other laws as supplying adequate authority for courts to award equitable monetary relief in enforcement suits brought by federal agencies regarded as acting in furtherance of the public interest.<sup>145</sup> Adopting the approach of these precedents, eight circuits over a span of decades had held that this provision authorized the FTC to obtain monetary remedies.<sup>146</sup> The Court, however, unanimously ruled otherwise in *AMG Capital Management v. FTC*.<sup>147</sup> First, it distinguished *Porter* and *Robert DeMario* as involving “different statutes.”<sup>148</sup> Next, it relied on a third case (which, by the way, also involved a “different statute”)—*Meghrig v.*

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142 See *United States v. Texas*, 2021 WL 4593319, at \*17 (W.D. Tex. Oct. 6, 2021) (right to abortion); see also *supra* note 45 and accompanying text (describing other nonstatutory suits by the United States).

143 *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021) (quoting 15 U.S.C. § 53(b)).

144 See *supra* notes 63–74 and accompanying text (discussing *Porter* and *Robert DeMario*).

145 *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (“When the Administrator seeks restitution . . . he asks the court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant. Such action is within the recognized power and within the highest tradition of a court of equity.”); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92 (1960) (“When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.”); see *AMG Cap. Mgmt.*, 141 S. Ct. at 1347–48 (noting that the Court had “sometimes interpreted similar language as authorizing judges to order equitable monetary relief” in *Porter* and *Robert DeMario*).

146 *AMG Cap. Mgmt.*, 141 S. Ct. at 1351. Two circuits, in 2019 and 2020, went the other way. *Id.*

147 *Id.* at 1352.

148 *Id.* at 1350 (“The problem for the Commission is that we did not in these two cases purport to set forth a universal rule of interpretation. And both cases involved different statutes.”).

*KFC*<sup>149</sup>—to buttress its conclusion that the FTC could not seek monetary relief pursuant to this provision.<sup>150</sup> The Court either did not notice or did not care that a federal agency was the plaintiff in *AMG*, and that no government entity was a plaintiff (or even a party) in *Meghrig*.<sup>151</sup> Nor did the Court acknowledge its oft-quoted statement that “[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.”<sup>152</sup> Instead, the Court effectively held that the FTC, *like any private litigant*, may not obtain an equitable remedy unless that remedy is spelled out in the statute. As this case illustrates, all it takes is a subtle slide in framing—from “the sovereign is special, because the sovereign speaks for the public interest” (e.g., *Porter, Robert DeMario*) to “the sovereign is like a private party” (e.g., *AMG*)—to entirely change the outcome.

### B. Implications for Article III

Attentiveness to equity’s confused relationship to sovereign power also helps to shed light on an enduring ambiguity of federal equity: equity’s precise status as constitutional law. To what extent, if any, does Article III’s reference to “Cases, in . . . Equity” impose a constitutional ceiling on the kinds of equitable remedies that Congress may create? We do not know. By that I mean simply the following: if the Court were to hold tomorrow that an exercise of equitable power that the Court *regarded as authorized by a federal statute* was nonetheless unconstitutional because of Article III’s reference to “Cases, in . . . Equity,” then that would be first time it had done so.<sup>153</sup>

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149 *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996).

150 *AMG Cap. Mgmt.*, 141 S. Ct. at 1350 (“Here, the inference against § 13(b)’s authorization of monetary relief is strong and follows from the interpretive approach we took in *Meghrig*.”).

151 Some lower court judges did notice but didn’t care. See *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 784–85 (7th Cir. 2019) (“[W]e note that the difference in plaintiffs—private citizens in *Meghrig* and a federal agency here—isn’t material. . . . [T]he public interest doesn’t turn on the identity of the parties involved. . . . [T]he fact that the government is the plaintiff here does not affect the analysis.”). But see *id.* at 786 (Wood, C.J., dissenting).

152 *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937); see also *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (“And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.”).

153 See Keith E. Whittington, *Judicial Review of Congress Database* (2020), <https://scholar.princeton.edu/kewhitt/publications/judicial-review-congress-database> [<https://perma.cc/HE38-XVY7>]; CONG. RSCH. SERV., S. DOC. 112-9, ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

After all this time, the constitutional nature of the equity limitation has remained obscure.<sup>154</sup>

It is worth pausing on this point because courts and commentators can get mixed up about it. Congress granted equity jurisdiction to the federal courts in the Judiciary Act of 1789,<sup>155</sup> and specified in the Process Act of 1792 that “the forms and modes of proceeding[s] . . . in [suits] of equity” were to be “according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law.”<sup>156</sup> The Court interpreted these laws and their successors to authorize the federal courts to supply judge-made remedies—a “federal ‘common law of chancery’”<sup>157</sup>—according to “the practice of the courts of . . . Chancery in England.”<sup>158</sup> It was statutory law, not the Constitution, that the Court was expounding when it said that “[t]he equity jurisdiction conferred on inferior courts . . . is that of the English court of chancery at the time of the separation of the two countries.”<sup>159</sup> Now, it is true that some decisions contain language

2309–2508 (2016), <https://www.govinfo.gov/content/pkg/GPO-CONAN-REV-2016/pdf/GPO-CONAN-REV-2016-11.pdf> [<https://perma.cc/W72C-M6SZ>]; *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, LIBR. OF CONG. (2022), <https://constitution.congress.gov/resources/unconstitutional-laws/> [<https://perma.cc/3X3B-2RUB>].

154 See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1014 n.80 (2015) (“[A]re there any limits on Congress’s ability to change the law of equitable remedies? . . . The Supreme Court has not given a consistent answer . . .”).

155 1 Stat. 73, 78, § 11 (granting some lower federal courts original jurisdiction over “suits of a civil nature . . . in equity”).

156 1 Stat. 275, 276, § 2. The statute allowed courts considerable discretion: “subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.”

157 John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 128 (1998); see also *id.* at 126–129.

158 See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792) (reporting that “the CHIEF JUSTICE, at a subsequent day stated, that—THE COURT considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary”).

159 *Matthews v. Rodgers*, 284 U.S. 521, 529 (1932); see, e.g., *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (“The Judiciary Act of 1789 conferred on the federal courts jurisdiction over ‘all suits . . . in equity.’ . . . We have long held that “[t]he ‘jurisdiction’ thus conferred . . . 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.”); *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939) (“Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have ‘cognizance . . . of all suits of a civil nature at common law or in equity’ in

hinting that the references to equity in Article III and in the Judiciary Act mean the same thing.<sup>160</sup> A natural temptation exists to read the two provisions as coextensive because they are worded almost identically. But we know from *Strawbridge v. Curtiss*<sup>161</sup> and from

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cases appropriately brought in those courts. This provision is perpetuated in . . . 28 U.S.C. § 41(1), which declares that the district courts shall have jurisdiction of such suits. 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." (citing *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *In re Sawyer*, 124 U.S. 200, 209–210 (1888); *Matthews*, 284 U.S. at 525; *Gordon v. Washington*, 295 U.S. 30, 36 (1935)); *Gordon*, 295 U.S. at 36 ("By the Judiciary Act of 1789 . . . the lower federal courts were given original jurisdiction 'of suits . . . in equity,' where the other jurisdictional requisites are satisfied. 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." (citing *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 221–23 (1818); *United States v. Howland*, 17 U.S. (4 Wheat.) 108, 115 (1819); *Waterman v. Canal-La. Bank & Tr. Co.*, 215 U.S. 33, 43 (1909))); *Guffey v. Smith*, 237 U.S. 101, 114 (1915) ("By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting." (emphasis added)); *Robinson*, 16 U.S. (3 Wheat.) at 222–23 ("The court, therefore think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." (emphasis added)); see also *Markham v. Allen*, 326 U.S. 490, 494 (1946) (federal courts have "no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters").

160 See, e.g., *Irvine v. Marshall*, 61 U.S. 558, 565 (1857) ("In the interpretation of these clauses of the Constitution and the statute [the Judiciary Act], this court has repeatedly ruled . . . [t]hat by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence."); *Sawyer*, 124 U.S. at 209–10 ("Under 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."); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 654 (1832) ("The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the union, and the rule of decision is the same in all."); cf. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 57 (12th ed. 1877) ("[T]he uniform interpretation of that clause has been, that, by cases in equity are meant cases, which, in the jurisprudence of England (the parent country), are so called, as contradistinguished from cases of the common law. So that, in the courts of the United States, equity jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in England.").

161 7 U.S. 267 (1806).

*Louisville & Nashville Railroad Co. v. Mottley*<sup>162</sup> that statutes can mean very different things than Article III, even when they are worded in essentially identical terms. And the bottom line is that the Court has never yet held that Article III's reference to "Equity" is a hard constitutional limit on the equitable remedies that Congress may create.<sup>163</sup>

Should it so hold, if the question arises? Thinking through who "the sovereign" is in equity offers a fresh lens on that question. On one venerable view of the American system of government, the people of the United States—the ultimate sovereigns—allocated sovereignty across the branches through adopting the Constitution. When it enacts a law, Congress is exercising its share of that sovereign power (or, in Paine's terms, "THE LAW" is the "King of America"<sup>164</sup>). Standing to that extent in the shoes of the sovereign, Congress should therefore be able to authorize—just as the English sovereigns once did—the remedies that will be available in equity, and Congress should likewise be able to expand, even radically expand, the remedies available in equity. Moreover, Congress should, by delegating that authority to courts,<sup>165</sup> be able to empower courts to shape and to change the remedies available in equity—just as English sovereigns long ago empowered their chancellors to do. And indeed that view of affairs has substantial support.<sup>166</sup>

162 211 U.S. 149 (1908).

163 See *supra* note 153–54. For an examination of the distinct question whether Article III courts possess inherent authority to grant equitable remedies, see Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4058852](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4058852).

164 See PAINE, *supra* note 1.

165 I assume here the continued vitality of current doctrine concerning nondelegation—an assumption that may be risky. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

166 See, e.g., *Sawyer*, 124 U.S. at 210 ("The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property." (emphasis added)); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854) ("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." (emphasis added)); *Boyle*, 31 U.S. at 658 ("[T]he settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe." (emphasis added)); *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796) ("The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles; but still, it is thought, that we are also authorised to make such deviations as are necessary to adapt the process

On another view, there would be a limit on Congress's capacity to wield its share of sovereign power in this domain: Article III would cap what even Congress can accomplish. On this view, Article III's reference to "Equity" would incorporate a static body of law extant in 1789 as the yardstick against which congressional statutes must be measured for their constitutionality. In that event, even a "clear[] and express[]" authorization of a particular equitable remedy by Congress would not be enough; one would still have to determine whether that statute comported with "longstanding principles of equity that predate this country's founding."<sup>167</sup> This is a view that Justice Thomas has articulated,<sup>168</sup> and that other judges apparently find attractive.<sup>169</sup> Can we say who the sovereign would be then? Those "longstanding principles of equity" did not come from nowhere, after all; there was a line of kings and queens, up to and including George III, whose chancellors articulated that body of law.

Now, to consider American equity today to still be the creature of *those* sovereigns would unnerve anyone. A less unorthodox way to phrase this view would be to say that the Framers and ratifiers of the

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and rules of the Court to the peculiar circumstances of this country, subject to the interposition, alteration, and controul, of the Legislature."); *see also* *Grupo Mexicano v. All. Bond Fund*, 527 U.S. at 328, 327, 333 (1999) (holding that the district court lacked authority to issue a certain type of novel injunctive relief "unknown to traditional equity practice," but stating that Congress could authorize this "formidable power over debtors"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict.") (quoting *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 264 (1933)); *Ex parte Boyd*, 105 U.S. 647, 656 (1881) ("And the remaining question, therefore, becomes, not so much whether Congress may, by appropriate legislation, transmute an equitable into a legal procedure, as, whether it can in any wise change the rules of pleading and procedure as to courts, either of law or equity, in force in England at the time of the adoption of the Constitution, or whether, by the adoption of that instrument, all progress in the modes of enforcing rights, both at law and in equity, was arrested and their forms forever fixed. To state the question is to answer it.").

167 *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.2, 2426 (Thomas, J., concurring); *see also* *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part and dissenting in part) ("[A] federal court's jurisdiction in equity extends no further than '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.'").

168 *Trump*, 138 S. Ct. at 2425–26 (Thomas, J., concurring).

169 *DHS v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (citing Article III problems and "equitable and constitutional" issues with universal injunctions); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 258 (4th Cir. 2020) (arguing that "[b]oth Article III and federal statutes" incorporate historical limitations on equitable power).

Constitution, acting in their sovereign capacity, chose to adopt equity, as elaborated by the Court of Chancery circa 1789, into Article III. So rephrased, this claim is still suspect, both because of its incompatibility with precedent and practice<sup>170</sup> and because it runs athwart of equity's own embedded traditions of adaptability and flexibility.<sup>171</sup> Indeed, that claim may not even capture accurately what was meant by the Framers when they included the term "Equity" in the Constitution.<sup>172</sup>

Why, then, does such a conception have appeal to its adherents? To those who find appealing the project of constitutionalizing limits on equity, that appeal surely does not flow from some latent yearning to still be governed by a body of law made by royal chancellors. Rather, it likely rests upon an impulse to tame and legitimate what otherwise may seem unruly and illegitimate. Mistrust of equity dates back before the Founding.<sup>173</sup> That mistrust ebbs and flows over time, but it has endured. One way to counter that legitimacy challenge is to seek to strengthen equity's connection to history and to tradition and to reduce its capacity for "flexibility and expansiveness."<sup>174</sup>

170 See Pfander & Wentzel, *supra* note 9, at 1355–57 (explaining that equitable originalism calls into question "the legitimacy of *Ex parte Young*" and arguing instead for "an evolutionary conception of federal equity"); Mila Sohoni, *The Lost History of the 'Universal' Injunction*, 133 HARV. L. REV. 920, 928 (2020) (noting that a "strictly originalist approach to the judicial power in equity . . . cannot be squared with . . . a century-plus of practice").

171 See Pfander & Wentzel, *supra* note 9, at 1282 ("A jurisprudence of constitutional remedies that measures the legitimate scope of modern federal equity by looking to the practices of the High Court of Chancery, circa 1789, . . . may also deprive equity of its characteristic ability to adapt to changes in the remedial system as a whole."). See generally Riley T. Keenan, *Living Equity*, ALA. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4011398](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011398).

172 The clause "Law and Equity" may be read as simply allowing the federal courts to be fused or blended courts (i.e., courts that could hear cases and give remedies in both law and equity). Because that was a "structural choice" that departed from the English model, it would have been worth spelling out. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1666 (2011); THE FEDERALIST NO. 80 (Alexander Hamilton) ("There is hardly a subject of litigation between individuals, which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARSHIP, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. . . . In such cases . . . it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction."). So read, the clause would not cabin the substance of equity to the metes and bounds of English chancery practice circa 1789.

173 See *supra* note 16.

174 See *Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 601 (1896) ("[E]quity . . . has always preserved the elements of flexibility and expansiveness, so that new [remedies] may be invented, or old ones modified, in order to meet the requirements of every case and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising, and new kinds of wrongs are

whether that expansiveness comes from courts, from Congress, or from both acting together. Our modern moment in law is one in which fears of legislative overreach and wariness of delegation are burgeoning, and themes of originalism and formalism are ascendant. In such an era, the impetus to claim that rule-like limits, history, and tradition impose sharp constraints upon equity will gain additional energy and momentum—and there's no stronger limit than a constitutional rule.

### CONCLUSION

The Constitution “split the atom of sovereignty”<sup>175</sup> not just across the federal government and the states, but also across the three branches. Equity was historically the creation and the handmaiden of sovereign power, but the new American constitutional order shattered the crown and left equity unanchored. How to conceive of the sovereign in equity in a government without a sovereign was a problem that challenged the members of the first Congress and the first sitting Justices; it is a problem that continues to lurk in the law today.

Resolving this confusion is not just a rhetorical or superficial matter—a matter of inserting a more democratically palatable term (“the United States”<sup>176</sup>) at the top of a writ. It is, instead, a substantive and real challenge—more precisely, a cluster of policy-laden, value-laden, difficult-to-answer, challenges. It is the policy-laden problem of working out what should rightly follow from the fact that one of the parties to a suit in equity in a federal court happens to be the “United States,” a federal agency, or one of its officers. It is the value-laden problem of working out whether the sovereign, or a particular part of the sovereign, may speak for, and seek to vindicate, the rights of all. It is even the difficult-to-answer constitutional problem of working out who ultimately gets to decide what equitable powers the federal courts can today wield.

Now, it would be pleasant to be able to claim that the law of equity, as it stands today, has dealt with these issues adequately. It would be lovely to be able to grandly announce that—consciously or unconsciously—federal courts have hit upon a dynamic equilibrium between accommodating the sovereign and checking it, a “nice[ly]

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constantly committed.” (quoting JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 111 (1881)).

175 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

176 See *supra* text accompanying notes 22–28.

adjust[ed]<sup>177</sup> balance through which federal equity and the federal sovereign may coexist and thrive in a symbiotic fashion.

But that would be inapt. More accurate would be to frankly admit that federal courts in equity—far from elaborating some underlying vision of how equity should conceive of the sovereign and how equity should relate to the sovereign—have scarcely seemed to be conscious of the issue to begin with. If one doesn't know that it matters in equity who the sovereign is, one won't think very hard about how one is defining the identity of the sovereign. If one isn't aware how much the line between the sovereign and the not-sovereign has mattered to equity, one won't much care how one draws that line either. This Essay has shown that it has mattered a great deal, and continues to matter a great deal, how these demarcations are drawn.

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177 *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (“The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.”).

