PUBLIC NUISANCE IN THE PROGRESSIVE ERA

Sean M. Gray*

Abstract

This essay explores a forgotten moment in the long history of public nuisance: its rapid expansion in the Progressive Era. In 1887, the Supreme Court upheld Kansas' state constitutional amendment labeling breweries per se nuisances. Eight years later, in an 1895 review of a habeas petition, the Court affirmed an injunction against a labor protest and a contempt charge resulting from it. At face, these two cases—Mugler v. Kansas *and* In Re Debs*, respectively—seem wholly unrelated. But a closer look shows that the cases must be read together, because they reveal important developments in the scope and enforcement of public nuisance, as well as how it largely operated to the detriment of "unruly" people.*

After Debs*, courts enjoined hundreds of labor protests nationwide on similar grounds. And after* Mugler*, states used the threat of hybrid public-private nuisance suits to close red-light districts: discrete, informally un-policed areas that housed brothels, casinos, and other vice-related businesses. Whether this expansion of nuisance was a serious infringement on constitutional rights (like some thought) or consistent with the American regulatory tradition (as others, including most late-1800s Supreme Court justices, concluded) was a central legal and political question of the day. This essay reconstructs the debate surrounding that question.*

The essay proceeds in four parts. Part I provides a brief historiography of the American regulatory state and public nuisance's role within it. Part II details the historical development of three concepts: the common law doctrine of nuisance, the institutional role of equity courts, and the distinction between civil and criminal law. Part III explains how, in Mugler *and Debs, the Supreme Court reshaped public nuisance in meaningful ways: at bottom, it expanded who could define and enforce nuisance claims as well as what constituted a nuisance. Finally, Part IV outlines the spirited debate that resulted from the two decisions: an extended argument between Progressive reformers, on the one hand, and both populists and conservatives, on the other, about the proper limits of public nuisance and judicial power.*

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INTRODUCTION

The city of Boise, Idaho, used to have two "camping" ordinances in effect. The first criminalized using public property—streets, sidewalks, parks, and the like—as a "camping place," defined as a "temporary or permanent place of dwelling, lodging, or residence."[1] The second barred "occupying, lodging, or sleeping in any building, structure, or public place" without the owner's permission.[2] In 2019, after six homeless persons challenged these two ordinances, the Ninth Circuit held that both violated the Eighth Amendment, prohibiting "cruel and unusual punishment," because they imposed criminal sanctions on homeless people with no place to go.[3] Because all humans are "biologically compelled to rest, whether by sitting, lying, or sleeping," the state could not "criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping in the streets."[4]

The Ninth Circuit described its decision in *Martin v. City of Boise* as a "narrow one," but its critics have cast it as a primary catalyst for the growth of homeless encampments across the western United States.[5] Even so, the Ninth Circuit has doubled down, expanding its holding to forbid civil penalties as well.[6] And while that case sits pending before the Supreme Court, both municipalities and individuals frustrated with these decisions have turned to another legal tool to regulate the homeless: public nuisance.

Public nuisance is a concept as vague as it is storied. William Prosser once described it as the most "impenetrable jungle in the entire law."[7] It dates back to twelfth-century England,

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[1] See Martin v. City of Boise, 920 F.3d 584, 603-04 (9th Cir. 2019) (quoting Boise City Code § 9-10-02).
[2] Id. at 604 (quoting Boise City Code § 6-01-05).
[3] Id. at 603.
[4] Id. at 617 (internal quotation omitted).
[5] See, e.g., Ilan Wurman, "A Legal Strategy for Tackling Homelessness," City Journal (May 24, 2023) ("Since that decision [*Martin*], homeless encampments have proliferated in western U.S. cities, where the Ninth Circuit's ruling governs.").
[6] See Johnson v. City of Grants Pass, 72 F.4th 868 (9th Cir. 2022).
[7] William Prosser, Handbook of the Law of Torts § 71, at 549 (1941).

where the King used it as a legal mechanism to clear blocked roadways. Since then, it has grown to cover a veritable hodgepodge of cases—so much so that when strung together, nuisance cases sound like the start of a bad joke.[8] But public nuisance is much more than a punchline: just last year, litigants used it to secure a court order requiring the city of Phoenix to clear a homeless encampment.[9] Following that case, public nuisance recently was described by one well-known scholar as "a legal strategy for tackling homelessness."[10]

That might be surprising, because today's prominent nuisance cases largely revolve around environmental issues, rather than social ones.[11] But the Phoenix case is certainly not the first time public nuisance has been levied against "unpopular" people. Legal scholars have dated that practice at least as far back as when William Blackstone, in his list of public nuisances, included cottages that served as "harbours for thieves and other idle and dissolute persons."[12] Or recall "Pigs and Positivism," Hendrik Hartog's landmark essay detailing an early nineteenth-century political battle between poor and rich New Yorkers that emerged from a case about whether pigs roaming the city streets constituted a public nuisance.[13]

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[8] See J.R. Spencer, "Public Nuisance—A Critical Examination," 48 Camb. L.J. 55, 55 (1989) ("Why is making obscene telephone calls like laying manure in the street? Answer: in the same way as importing Irish cattle is like building a thatched house in the borough of Blandford Forum; and as digging up the wall of a church is like helping a homicidal maniac to escape from Broadmoor; and as operating a joint-stock company without a royal charter is like being a common [s]cold . . . All are, or at some time have been said to be, a common (alias public) nuisance.").
[9] Brown v. City of Phoenix, CV 2022-010439 (Mar. 27, 2023); see also Sean Gray, "Balancing Democracy and Efficiency: Public Nuisance, Citizen Suits, and the Early Environmentalist Movement," unpublished paper (Dec. 2023) (describing nuisance's importance, in light of its more absurd aspects, in similar terms).
[10] See Wurman, *supra* note 5.
[11] See, e.g., John Copeland Nagle, "Moral Nuisances," 50 Emory L.J. 265 (2001) ("The twentieth century cases that are familiar to most of us today suggest that polluting smokestacks, corroded tanks leaking hazardous wastes into the groundwater, barking dogs, noisy trains, and smelly hog farms represent the kinds of activities that can be targeted by neighboring landowners as a nuisance.") *But see* Leslie Kendrick, "The Perils and Promise of Public Nuisance," 132 Yale L.J. 702 (2023) (describing how state attorneys general are using nuisance to sue opioid producers and firearms manufacturers).
[12] Maureen E. Brady, "Cottages as Public Nuisances: The Long History of Land Use Regulation of the Poor," 73 DePaul L. Rev. 241, 242 (2024) (quoting 4 William Blackstone, Commentaries *168 (4th ed. 1770)).
[13] See generally Hendrick Hartog, "Pigs and Positivism," 1985 Wis. L. Rev. 899 (1965).

This essay recounts an often neglected chapter in the long and "uneasy" relationship between public nuisance and social outsiders: the doctrine's expansion in the Progressive Era.[14] The story starts with two Supreme Court cases. In 1887, the Supreme Court upheld Kansas' state constitutional amendment prohibiting the manufacturing of alcohol and its law labeling breweries per se nuisances.[15] Eight years later, in an 1895 review of a habeas petition, the Court affirmed a federal trial court's injunction of a labor protest and the contempt charge resulting from it.[16] On the facts, these two cases—*Mugler v. Kansas* and *In Re Debs*, respectively—seem wholly unrelated. *Mugler* concerned a state legislature's efforts to regulate liquor production, while *Debs* affirmed a federal district court's injunction against a railway protest.

But over the decades that followed, the cases' relationship became increasingly clear: both were sparkplugs for a supercharged nuisance doctrine. Courts enjoined hundreds of labor protests nationwide once the Court greenlit the practice in *Debs*. And, following *Mugler*, state legislatures increasingly relied on hybrid public-private nuisance suits—deputizing private citizens to file suits to stop unruly behavior, even if the private citizen had no property rights affected by the "nuisance" conduct. American cities were quickly reshaped; threat of these nuisance suits put an end to red-light districts: discrete, informally un-policed areas that housed brothels, casinos, and other vice-related businesses. Whether this expansion of nuisance was consistent with the American regulatory tradition (as most late-1800s Supreme Court justices decided) or a serious infringement on constitutional rights (like many others thought) was a central legal and political question of the day. This essay reconstructs the debate surrounding that question.

[14] Brady, *supra* note 12, at 243.
[15] Mugler v. Kansas, 123 U.S. 623 (1887).
[16] In re Debs, 158 U.S. 564 (1895).

It proceeds in four parts. Part I discusses the historiography of the American regulatory state and public nuisance's role within it. Part II details the historical development of three important concepts: the common law doctrine of public nuisance, equity courts, and the distinction between civil and criminal law. Part III explains how, in *Mugler* and *Debs*, the Supreme Court reshaped those concepts. Finally, Part IV outlines the spirited debate that followed—a debate between Progressive reformers, on the one hand, and both populists and conservatives, on the other, about the proper place of public nuisance and "criminal equity."

The essay advances two arguments. First, *Mugler* and *Debs* led to an expansion of public nuisance, evidenced by (1) the hundreds of labor injunctions and end of red-light districts that followed suit and (2) the fierce debate they caused in judicial opinions, law reviews, and even national political platforms. Second, that expansion was overwhelmingly to the detriment of "unruly" people, a catch-all term I use for those who seemed to pose any threat to the day's status-quo social, moral, and economic order. This potpourri of unpopulars—like brewers, prostitutes, strikers, and bookies—had their conduct criminalized or enjoined without the due process many thought they deserved under the Constitution. And though this saga is central to understanding the Progressive Era, it has important consequences for our own. Public nuisance has continued to balloon in scope, the injunction has become more powerful and politicized, and criminal law has become more synonymous with stringent control over the poor, dissidents, and racial minorities. All these phenomena can be traced back at least to the late nineteenth century.

I. A Brief Historiography of the American Regulatory Tradition

This section briefly details scholars' views on the relationship between the American regulatory state and individual rights. Subsection A first surveys legal historians' approaches to analyzing that relationship, and it then places this essay about the dynamic between public

nuisance and the "unruly" in the Progressive Era within that framework. Subsection B turns to two scholars' competing views about public nuisance in the Progressive Era. It explains how one account focuses more on the substance of nuisance, while another focuses more on the procedure behind its enforcement. It concludes by explaining how each of these accounts, in studying only the relationship between public nuisance and red-light districts, is incomplete. I argue that the rise of labor injunctions is a necessary part of the story.

A. Public Regulations and Private Rights

Legal historians have written extensively on the evolving character of the American regulatory state and its complex interactions with individual rights and freedoms. Harry Scheiber has described three distinct approaches that characterize the field. Some legal historians use a "vested rights model," where they see protection of property rights as the "dominant tradition" in American law and regulation as "a late development (be it salutary or deplorable) in the historical picture."[17] Others take the view that legal culture gave "primacy to material growth" and regulation created "an exploitative legal system, working against the interest of those who were economically disposed."[18] A third model depicts a dialectic tension "among competing conceptions of public rights and private claims, rather than depicting law's influence on society as monolithic at any moment in time or linear with respect to how it changed over time."[19] This essay employs both the second and third approaches. It considers the internal relationship between the public and the private at the turn of the twentieth century, as illustrated through the expansion of public nuisance; still, it does so with a particular eye towards how that dynamic ultimately affects the "unruly," like protestors, prostitutes, gamblers, and brewers.

[17] Harry N. Scheiber, "Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America," 107 Yale L. J. 823, 839 (1997).
[18] Id.
[19] Id.

But first, a word on how others have considered the expansion of the American regulatory state and the tension between the public interest and private rights. William Novak has argued that there is a "deeply rooted American tradition of police and regulatory governance vital to social and economic development regulated society" that defined American governance from 1777 to 1877.[20] Throughout the eighteenth and nineteenth centuries, state and local officials put out a "plethora of bylaws, ordinances, statutes, and common law restrictions regulatory nearly every aspect of early American economy and society," a tradition that he dubs "the well-regulated society."[21] But for Novak, the Civil War put an end to that tradition. The centralization brought by the revitalized post-war Constitution both "undercut antebellum traditions of local-self-government, *salus populi*, and common law" and also "precipitated substantially revised understandings of state power, individual rights, and constitutional law."[22]

Nuisance was one doctrine that became centralized. Novak observes, "State health and police measures essentially disfranchised localities (as well as private citizens) of common law powers to define and abate public nuisances."[23] And enforcing state-level moral legislation led judges to create "an 'inalienable police power' defined increasingly in terms of sovereignty and command rather than consent and common law."[24] Governance after the war became less about reflecting local preference and more about aggrandizing the power of the state. Nuisance served as an easy avenue to accomplish those goals.

While Novak posits that public regulation was always a central part of the American system, others have put more emphasis on private rights. *Munn v. Illinois*, the 1876 case where

[20] William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America (1996), 1, 235.
[21] Id. at 1.
[22] Id. at 241.
[23] Id. at 243.
[24] Id.

the Supreme Court held that the state has the power to regulate private property when it is "affected with a public interest," proves to be an interesting point of conflict among these historians.[25] Novak sees it as the first in a line of "great" police powers case, where the state's regulatory power was affirmed.[26] Harry Scheiber instead views the decision as "far from being a novel, or explicable application of a concept the justices discovered in obscure seventeenth-century jurisprudence."[27] Rather, the so-called affection doctrine "was a timely variant of concepts already well-considered in American law."[28] And where Novak observes the state's police power continuing to grow following *Munn*, Scheiber sees it as a shrinking one, because "an increasingly conservative Supreme Court, disposed to overturn state regulatory legislation, narrowed the range of areas 'affected with a public interest.'"[29] That jurisprudential shift culminated in *Lochner v. New York*, where the Court struck down a maximum hours law as violative of the police powers because it infringed on the bakers' freedom to contract.[30]

Curiously, other invasive state regulations—typically those with a moral tinge, like the prohibition laws upheld in *Mugler* or the red-light abatement laws that followed—survived that increased judicial scrutiny, even if they had economic effects. But in the historiographical conversation about the rise of police power on the one hand and the ascendance of economic liberty on the other, legal historians have avoided putting the spotlight on the particular role of public nuisance in the affair. The oversight is a glaring one.

B. Two Views of Public Nuisance in the Progressive Era

[25] Munn v. Illinois, 94 U.S. 113 (1876).
[26] Novak, *supra* note 20, at 246.
[27] Harry Scheiber, The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts *in* Law and American History, 402 (Donald Fleming & Bernard Bailyn, eds., 1971).
[28] Id.
[29] Id. at 330.
[30] Lochner v. New York, 198 U.S. 45 (1905); see also Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993).

In an age where the Court aggressively struck down some forms of social and economic regulation, public nuisance was a ready vehicle to regulate—green-stamped by the Court in *Mugler* and *Debs*, attractive to reformers eager to reshape the moral contours of society, easily malleable by lower-level actors, and often enforceable by equity courts alone.

The growth of public nuisance and the expansion of injunctive relief following *Mugler* and *Debs* is a turning point in American law for a number of reasons. After *Mugler*, it became evident that nearly anything could be a nuisance if (1) the state legislature said so and (2) it was generally within the police power's broad scope of regulating health, safety, and morals. After *Debs*, courts curtailed protest after protest using equity and contempt as an efficient alternative to criminal punishment—and, in doing so, potentially encroached upon First Amendment liberties. Material, legal, and institutional changes soon followed: the almost-immediate physical effects on American cities wrought by the abatement of brothels and casinos, the hundreds of labor injunctions in the decades to follow *Debs*, the increasingly strange and aggressive uses of nuisance since this period, and the correlative growth of federal equity all illustrate that much.[31] The actors involved also found themselves in an age-old debate about the line between civil and criminal law: one that the courts did not resolve then and still have not today.

Two legal scholars have previously identified that the developments of public nuisance in the Progressive Era are important, but they seem to disagree about why. On the one hand, Peter Hennigan contends that the phenomena offers a valuable insight into an alternative conception of property law considered by reformers. "To the Progressive mind," he argues, "property was more than just a bundle of rights, it was also a bundle of obligations."[32] Through an expanded

[31] For more on the aftermath of this change, see the conclusion.
[32] Peter C. Hennigan, "Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era," 16 Yale J. L. & Human. 123, 197 (2004).

understanding of nuisance doctrine and a comprehensive red-light district abatement campaign, "Progressive reformers articulated a communitarian vision in which the line separating public and private interests vanish."[33] Legislators, he explained, used nuisance to infuse new moral responsibilities into law: everyone had to use their property not only in respect to their neighbors' property interests, but also within the more narrowly defined contours of public morality. Simply put, Hennigan contends that the Progressive Era reformers poured much more substance into what it meant to be a "nuisance."

On the other hand, Scott Stern puts a more procedural gloss on public nuisance's developments in the period. He positions the red-light abatement statute—an early twentieth-century state-level public nuisance law used to shutter brothels via private enforcement—as an early ancestor of the environmental nuisance laws of the 1970s and Texas' 2021 Heartbeat Act, which authorized citizens to enforce an abortion ban against each other via civil suits.[34] Stern argues that we should understand all these laws as part of the same genealogy under a unified theory of "moral nuisance abatement statutes."[35] While he concludes that public nuisance is "a powerful but neutral tool of law," the red-light abatement statutes were novel for two reasons: they disposed of injury-in-fact requirements typically required for citizens to bring public nuisance suits against each other, and accordingly, they "normalized the use of nuisance actions as a means of empowering private citizens to impose their values on others via courts."[36] And while zoning, segregation laws, quarantine laws, and other exercises of the police power grew in

[33] Id. at 197–98.
[34] Scott W. Stern, "Moral Nuisance Abatement Statutes," 117 NW. U. L. Rev. 613 (2022).
[35] Id. at 622. To that point, he explains: all three "emerged from strikingly similar beginnings; all were motivated by a strident skepticism of public enforcement; all spread in very similar ways; and all expressly tried to achieve ends that activists had long sought through other political channels." Id. Yet Stern quickly pivots to say that each "have been most successful as threats—not by actually engendering an avalanche of citizen suits." Id.
[36] Id. at 623, 675.

the period as well, none were so malleable in scope or form, and none were so rooted in the common law.[37]

Though Stern and Hennigan draw different conclusions on the same historical record—Hennigan with a focus on substance, Stern on procedure—they agree on a fundamental descriptive point: the public nuisance laws of the Progressive Era became so broad and so creatively restructured that "each citizen [c]ould become his own attorney general."[38] This essay builds on that conclusion and explores its implications.

Stern and Hennigan have done valuable work on the topic, but their accounts are not complete. They do not engage too deeply with the vital historiographical conversation about the tradition of American regulation described above. And in focusing primarily on state legislatures' moral nuisance laws, they undersell another key part of the story: the expansion of federal judiciary's equitable powers to curtail labor protests.[39] At the same time Progressive reformers used nuisance to curb liquor production, prostitution, and gambling, judges used it to stop workers from protesting labor conditions—an ironic development in the age where the judiciary was supposedly a vehement guardian of economic liberty.[40] When *Mugler* and *Debs* are read together, public nuisance in the Progressive Era is properly rounded out into a doctrine that led to heavy-handedness against the unruly in both the social *and* the economic spheres.

Public nuisance's development thus illustrates an important change in the relationship between the state and the individual in a transient moment of government, one couched between

[37] That is not to say that those laws did not touch on important aspects of American life. Zoning and quarantine laws, indeed, were arguably outgrowths of public nuisance's common law origins.
[38] Hennigan, *supra* note 32, at 127.
[39] To be fair, Hennigan does mention the labor injunction phenomena in passing, but it is not close to central to his account. See Hennigan, *supra* note 32, at 137 ("Among the most controversial uses of injunctive power was the enjoining of labor strikes under the premise of protecting interstate commerce.")
[40] See generally G.E. White, History of American Law, Vol. III. (describing the Supreme Court's "guardian review" posture during the *Lochner* era).

the constitutional changes brought by the Civil War and the rise of the New Deal's administrative state. When chattel slavery was no longer a means for oppressing some supposedly "unruly" people, legislators, judges, and reformers all took a more active approach to keep the masses in line.[41] Public nuisance and "criminal equity," I contend, served as ready avenues for them to do so. Both were used in conjunction to curb unpopular behavior, regulate unsavory people, and instill a thicker—but necessarily incomplete—understanding of a shared common good: one that reflected the sensibilities of those in power, often at the expense of those who were not.[42]

Definitions of nuisance were vague, enforcement was largely discretionary, and the results overwhelmingly hurt the unpopular and those without means. Indeed, the commonalities among the groups affected by the development of nuisance are scarce: after all, what do labor strikers, prostitutes, bookies, and brewers really have in common? Frankly, little, except for the facts that (1) they lacked much social power and capital and (2) that their conduct threatened rigid social orders, both old and new. But that was enough to subject their unruliness to the legal system, and particularly the nuisance doctrine, while other, more powerful and arguably more harmful actors—like titans of industry who failed to maintain adequately safe workplaces—were able to carry on their normal course, irrespective of the public and private harms they caused. As Part IV explains, this expanded nuisance doctrine wrought both legal and material harms, including the reshaping of American cities and the suppression of the labor movement.

[41] See generally Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation (1998).

[42] Though Progressive Era abatement statutes might be cast as democratic (in the sense that they represented the will of the people through the elected legislature) and thus even preferable to judicially-imposed public nuisance, several problems remain. For one, the electorate of the late nineteenth-century states was hardly a representative one; for another, the citizen suit remained available only to those who had the capital to enforce it. Thanks to Leslie Kendrick for raising this point in a conversation about the piece.

In that sense, expanded nuisance laws served as important precursors and companions to the vagrancy laws that seemed ever-present in the mid-twentieth century United States.[43] But where Justice William Douglas put a quick and long-overdue end to vagrancy's regime in *Papachristou v. City of Jacksonville*,[44] the Court has historically been much more hesitant to define the outer boundaries of what—and who—can be a nuisance.[45] Unlike status-based vagrancy laws, the story of public nuisance in America has no clearly defined beginning, middle, or end, because it has been continually remolded to serve different purposes, both noble and not, after the Progressive Era.[46] But by placing the story of public nuisance within the broader American tradition of regulating society and the downtrodden's place within it, this essay offers a new perspective into the debates surrounding the doctrine's wide growth in a narrow period.

II. The Context: Legal Change and the Common Law

In order to argue that public nuisance expanded in the Progressive Era, some historical context is necessary. This part takes up that task, and it provides background on three important concepts: first, the common law doctrine of public nuisance, then historical role of equity courts, and finally, the distinction between civil and criminal law.

A. Public and Private Nuisances

Historians, legal scholars, and treatise writers all trace the common law origins of nuisance to twelfth and thirteenth century England, where the king brought suit against private

[43] See generally Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016).
[44] 405 U.S. 156 (1972).
[45] See Stern, *supra* note 19, at 677 & n. 478–81. ("Throughout the 1970s, state courts disagreed vehemently over whether general public nuisance statutes could be used to shutter 'lewd' dancing, theaters, or bookstores, and the Supreme Court provided little guidance.")
[46] That is not to say that vagrancy laws had that clearly defined "beginning, middle, and end" in the moment. Only in hindsight were they able to be discerned. Still, even with that hindsight in the context of nuisance, narrative clarity is not to the same degree achievable.

individuals to clear blocked roads and waterways.[47] These constituted the first "public" nuisance suits, because the action underlying the suit interfered with everyone's right to travel across public lands. The "public nuisance" doctrine was born. While the substance of public nuisance suits evolved to cover a diverse range of harms, the successful ones all had a common denominator: an interference with "public rights."[48] Among the eight types of "common," or public, nuisances that William Blackstone identified in 1769 were "disorderly inns or ale-houses, bawdy-houses, gaming houses, stage-plays unlicensed, booths and stages for ropedancers, mountebanks, and the like."[49] At first blush, then, places like breweries, brothels, casinos, and prostitutes have always been within the scope of public nuisance.

But three important doctrinal questions remain: who can define the substance of "nuisance," who can bring a nuisance suit, and what remedy is available to the plaintiff who brings suit? Turning to the first question, the answer has never been fixed. At English common law, judges had the power find a nuisance as a legal determination—indeed, the list that Blackstone was the accumulation of centuries of judges' legal conclusions. In rare instances through the seventeenth and eighteenth centuries, Parliament added to the list of common law nuisances. Two examples are especially colorful.[50] First, in 1666, Parliament dubbed the importation of Irish cattle a common nuisance; a year later, following the Great Fire of London, Parliament "deemed it to be a public nuisance to erect any building in London or Westminster

[47] See Kendrick, *supra* note 11, at 713; Spencer, *supra* note 8, at 56; Restatement (Second) of Torts, § 821 (Am. L. Inst. 1979).
[48] Kendrick, *supra* note 11, at 718.
[49] Id. (citing 4 William Blackstone, Commentaries, 168).
[50] See Spencer, *supra* note 8, at 63–64.

except subject to conditions" laid out in an act to rebuild London.[51] Even so, Parliament rarely exercised this power after the turn of the eighteenth century.[52]

Since the Founding, American judges retained the common law power to adjudicate nuisance; state legislatures soon weaseled their way into the business of defining nuisances as well. Still, that power was limited and contested. An example from Thomas Cooley's 1871 treatise *Constitutional Limitations* illustrates the point. The New Hampshire state legislature declared that bowling alleys within "twenty-five rods of a dwelling house" were per se nuisances, but the state law only applied in towns that chose to adopt that piece of legislation.[53] As described later, though, that local deference soon meet its demise.[54] The legislative power to define per se nuisances was disputed, but the Court in *Mugler* confirmed that the state legislature had the power to do so.[55]

The answer to the second question—who could file a nuisance suit—has been similarly in flux. Another doctrinal division is necessary. Public nuisance suits were only half the story, after all, because private nuisance suits developed in England soon after public ones did. H.G. Wood, a late nineteenth-century American treatise writer, explained that a public nuisance was an action that, among other things, violates "a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury."[56] Private nuisance suits, in turn, emerged from "injuries that result from the violation of private rights and

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[51] Id.
[52] Spencer explains that Parliament largely exercised this power to define nuisances in response to the King's use of the dispensing power, where he absolved subjects from their "duty to comply with a statute." That dispensing power was limited by the Bill of Rights in 1689, so Parliament's power to define nuisances was not nearly as important. Spencer, *supra* note 8, at 64.
[53] Thomas Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (1871), 123.
[54] See Part III.A
[55] Id.
[56] H.G. Wood, A Practical Treatise on the Law of Nuisances in Their Various Forms; including Remedies Therefor at Law and in Equity (1875), at § 17.

produce damage but to one or a few persons, so it cannot be said to be public."[57] Grounded primarily in the unclear distinction between "public" and "private" rights, Wood's categories are not especially illuminating.

Still, there were obvious differences. Central to the distinction was who bore the harm; for the most part, this defined who could sue.[58] At first, only an aggrieved neighbor whose property was harmed by conduct could bring a private suit, because only they suffered real harm, while only the government could bring a public suit, because only they enforced the public's rights. The development of the relator action and the "special injury" rule, discussed below, complicate this otherwise straightforward division. But generally, place seemed to be a central point of difference between public and private nuisance suits: if the nuisance affected only the use of the neighbor's property rights, it was likely private, so only the aggrieved neighbor could so, but if it affected the nearby public way, too, it was public, so the government controlled the power to sue.

Another type of place—where claims could be vindicated—further distinguished between public and private nuisances. At English common law, private nuisance claims were typically brought in equity courts, because the appropriate remedy was only an injunction, while public nuisance claims were criminal offenses at law, "whose redress must be pursued by criminal prosecution at the public."[59] As Hennigan observes, the historic notion in American treatises, too, was that "[p]ublic nuisance actions, therefore, entitled defendants to trial by jury," while private ones did not.[60] This was subject to change in the Progressive Era, because *public* nuisance claims

[57] Id. at § 15.
[58] Hennigan, *supra* note 32, at 130.
[59] Id.
[60] Wood, *supra* note 56, at § 16.

brought by *private* citizens began to filed in *equity* courts and enforced via contempt charges, which did not require a jury.

But to make matters muddier, neither the public-private nuisance binary nor the law-equity court binary is entirely comprehensive. Wood explained that there was a historical basis for a third type of claim dating back to English common law: a *private* damages claim resulting from a *public* nuisance suit. Wood described this type of nuisance as a "mixed" claim: "public, in that they produce injury to many persons or all the public," while "private, because at the same time they produce a special and particular injury to private rights, which subjects the wrong-doer to indictment by the public and to damages at the suit of persons injured."[61] Hennigan traces this third type to an "anonymous" English case in 1536 that held "a private citizen could bring an action on the case for public nuisance where he could show that he had suffered 'greater hurt or inconvenience than any other man.'"[62] The "special injury" rule was adopted in the common law, creating the third category of nuisance suits.[63]

The development of the "relator action" made the situation more complicated in England. Starting in the eighteenth century, private citizens there could—with permission of the attorney general—get an injunction against a public nuisance when their property interests were implicated. In this respect, Spencer explains, "equity came to follow the common law, which since the sixteenth century had accepted that a plaintiff who had suffered 'particular damage' as a result of a public nuisance could bring an action in his own name for *damages*.'"[64] And while the historical record is less clear about whether a mechanism akin to the relator action was available in the United States prior to the *Mugler*/*Debs* developments, if a citizen were able to

[61] Id.
[62] Hennigan, *supra* note 32, at 130-31.
[63] Wood, *supra* note 56, at § 16.
[64] Spencer, *supra* note 8, at 69.

bring suit for injunctive relief, it was likely grounded in the "special injury" rationale. That would soon change.

To summarize the common law developments in nuisance prior to *Mugler* and *Debs*: judges certainly had the power to define nuisances, while legislatures like Parliament and state legislatures only did so in rare instances. There were, generally speaking, three "types" of nuisance suits. First, the government could bring public nuisance suits for general harms, and they did so via criminal prosecutions and injunctions. Second, private citizens brought private nuisance suits for particularized harms, and they did so in tort. Finally, in rare instances, private citizens could bring damages actions for particularized harms resulting from generalized nuisances under the "special injury" rule. In England, relator actions allowed private citizens to enjoin a public nuisance when there was specialized harm. Soon, Progressive-era reformers changed the doctrine to create a *fourth* posture for nuisance claims: they used statutes to dispense of the "special injury" rule and allow private suits for an injunction against a public nuisance, even absent particularized harm.[65]

B. Law Courts and Equity Courts

In the Progressive Era, the question of forum—the fairest place to adjudicate and enforce a nuisance claim—became especially contested. That was because opponents of an expanded nuisance also feared the resurrection of "criminal equity," where equity courts administered criminal punishment without the jury trial that they believed the Constitution required. The concerns largely turned on the now-arcane distinctions between law and equity. The obvious difference between the two was remedial: generally, law courts hosted criminal prosecutions

[65] See Part IV.B.

before juries and could assign penalties for damages, while equity courts could only issue injunctions and other remedies to resolve private conflicts where law was inadequate.

Yet that was not always the case. State court cases throughout the early twentieth century recounted a more complex history of equity courts issuing criminal convictions absent juries in the aftermath of *In re Debs*—and often citing it, no less. For instance, the Supreme Court of Louisiana provided the following account of the role of English common-law equity courts in a 1924 decision:

> In early times the English court of Chancery, *not without much protest on the part of the common-law courts*, occasionally issued injunctions to restrain the commission of certain criminal acts. This jurisdiction seems to have been confined to cases in which other tribunals were too weak to protect the poorer and more helpless classes of the community against the power of the great nobles, and the reasons for exercising it disappeared when the common-law courts became fully capable of controlling and repressing such acts of violence and outrage.[66]

Simply put, equity courts in medieval England were permitted to hear criminal cases when an adequate remedy was not available at law. In the nuisance context, that meant that if a slow-moving criminal prosecution would do more harm than good to a property interest, the injunction was a permissible stop-gap remedy. But as law courts became more advanced and criminal justice more efficient in England, "the exercise of this prerogative grew less frequent."[67] Accordingly, equity courts' power to hear criminal cases waned.

The story of Star Chamber, a now-infamous seventeenth-century English chancery court that exercised criminal equity jurisdiction, is worth note. Opponents of "public nuisance as criminal equity" alluded to it as a particularly dark moment in English law that illustrated their concerns. In Star Chamber, English plaintiffs and prosecutors had a number of advantages over defendants that would alarm modern readers. As one English legal historian wrote, the

[66] City of New Orleans v. Liberty Shop, 157 La. 26, 30 (1924) (emphasis added).
[67] Id. at 29.

"proceedings were begun by information and tried summarily, with no need to satisfy a grand jury and a trial jury."[68] Creative punishments, including "the slitting of noses and severing of ears," awaited convicted defendants.[69] Parliament abolished the institution in 1641 after it became associated primarily with "political prosecutions and vindictive punishments."[70] For students of history, it served a valuable lesson: criminal prosecutions needed meaningful procedures to protect defendants, and equity courts could not provide them.[71]

In the American context, two views on criminal equity had emerged by the Progressive Era. As Hennigan explains, one treatise writer in 1884 contended that "public nuisances" were a case "where equity took jurisdiction even though the injury was criminal and there was a clear remedy at law."[72] The treatise writer—Seymour Thompson—cited Joseph Story's treaty on equity as a main source for his conclusion. After all, Story wrote that equity courts' jurisdiction in criminal nuisance cases "has been distinctly traced back to the reign of Queen Elizabeth."[73] Others were not convinced. Some took issue with Story's account of nuisance, claiming it read the record too narrowly and did not properly account for the separation of powers since then.[74]

Indeed, criminal equity proved troublesome to many. A 1918 decision from the Supreme Court of Colorado illustrates why.[75] The plaintiff, a mining company, brought a suit in an equity

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[68] John Baker, Introduction to English Legal History (5th ed., 2019), 128.
[69] Id.
[70] Id.
[71] Baker hedges on whether the story of Star Chamber is truly one of criminal equity, because "offences cultivated in the Star Chamber could not be prosecuted on indictment in the regular courts." Id. at 128. In other words, there *was* no adequate remedy available at law, unlike in the public nuisance cases and other statutory-prohibited criminal conduct. Still, "this quasi-equitable criminal jurisdiction was later supposed to have been abandoned, or rather surrendered to the legislature, in the interest of certainty." Id. at 128.
[72] Hennigan, *supra* note 32, at 135 (citing Seymour D. Thompson, Injunctions Against Criminal Acts, 18 Am. L. Rev. 599, 603-04).
[73] Hennigan, *supra* note 34, at 135 (quoting 2 Joseph Story, Commentaries on Equity Jurisprudence 1248 (14th ed. 1918.).
[74] See generally Hennigan, *supra* note 32, at n.59 (explaining the debate over Story's account of equity jurisprudence).
[75] Heber v. Portland Gold Min. Co., 64 Colo. 352 (1918).

court for an injunction against defendants who were stealing and selling their ores. The Colorado Supreme Court denied the claim. It explained, "Modern penal laws are intended both to punish the criminal and to deter others from perpetrating like offenses. . . [w]here a criminal prosecution will effectually redress the plaintiff's wrong, he has no remedy in equity."[76] The court rejected the claim for two reasons. First, the fact that the plaintiff could not establish harm in a court of law did not bolster his case: "There is no reason to believe why it would not be equally difficult to show a violation of the injunction" as it would be to cite a violation of a statute.[77] The fact that there was no remedy at law did not necessarily mean one was due in equity. Second, the injunction might "deny one cited for contempt a trial by jury in what is in effect a criminal case."[78] If the equity court issued an injunction to stop stealing, and the defendant again stole, and then the equity court haled him into court, it could convict him of contempt of the order—functionally the equivalent of breaking a criminal law already on the books—without the proper procedures for a criminal conviction, including heightened evidentiary standards and a jury. Then, the court "might convict persons of an offense which the statutes of the state make a felony," even though "courts of equity are not fitted for the administration of law."[79] Many feared this same situation loomed after the developments sparked by *Mugler* and *Debs*.[80]

C. Civil and Criminal Laws

A final concept that marked the Progressive Era debate about public nuisance and criminal equity was the distinction between civil and criminal law. Were the nuisance—whether it be a brothel, brewery, or a labor protest—not abated quickly, someone could be charged with

[76] Id. at 356.
[77] Id. at 357.
[78] Id. at 357.
[79] Id.
[80] See Part IV.

contempt and end up in prison. To its opponents, the equity court was pulling a fast one: it was providing both civil equitable remedies and criminal prosecution in one fell swoop. Opponents contended that these defendants were deprived of fundamental constitutional protections—a jury, a higher burden of proof, a deliberately slower process—and instead given summary proceedings akin to Star Chamber.

These arguments might appeal to modern sensibilities. Enforcement of criminal laws through prosecution by the government can result in imprisonment and deprivation of civil rights. In contrast, enforcement of civil laws by either the government or a private party tends to result only in the assessment of liability and fines. It is typically thought that the government cannot enforce what we would call "criminal" penalties, especially imprisonment, without some semblance of protections afforded to criminal defendants under the Constitution.

But some legal scholars have made clear that the distinction between criminal and civil law has long been a tenuous one. Modern debates surrounding the constitutionality of federal administrative law—where cases are adjudicated and penalties assessed often without either a jury or even an Article III judge—and civil asset forfeiture laws—where the government seizes property used for criminal conduct under only the standards required by civil law—have inspired plenty of scholarship on the issue.[81] That scholarship is worth a brief look here, because some modern arguments are markedly similar to some Progressive-era arguments about public nuisance and criminal equity described later in this essay.

Caleb Nelson explains that modern opponents of civil forfeiture laws, for instance, object that these laws "authorize the government to punish people for violations of the law, but without

[81] See, e.g., James Bovard, Lost Rights: The Destruction of American Liberty (1994); Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 Georgetown L.J. 1 (2005); Philip Hamburger, Is Administrative Law Unlawful? (2014).

the special safeguards that the Constitution requires for criminal prosecutions."[82] For them, this results in an "end run around criminal procedure" that unconstitutionally deprives defendants of due process rights.[83] But Nelson contends that that there is "considerable historical support" for the conclusion that "not all punishment is criminal punishment."[84] While civil asset forfeitures might be "unfair and unwise," the fact that claimants "are not afforded the procedural protections of the Constitution" is not dispositive of their unconstitutionality.[85]

Indeed, the threat of punishment alone has not always triggered constitutional protections. Debt collections and civil penalties at common law were often considered both punitive and civil, without constituting heightened protections or requiring juries. It is important to note that the harm threatened by criminal equity in the Progressive Era was one different in kind and degree than that posed by civil asset forfeitures: the threat of imprisonment, not seizure of property, often loomed. Still, this modern debate illustrates that questions about the line between criminal and civil law and the proper occasions to provide heightened constitutional protections remain contested.

III. THE CHANGE: *MUGLER*, *DEBS*, AND THE NEW PUBLIC NUISANCE

Onto the paradigm-shifting cases.[86] The Supreme Court's decisions in *Mugler* and *Debs* significantly strengthened the state's power to regulate the social order. Each decision represented a victory for the government against a citizen or group considered "unruly," and

[82] Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 Yale L. J. 2446, 2487 (2016).
[83] Id.
[84] Id. at 2496.
[85] Id. at 2446.
[86] Of course, the Supreme Court's decisions aren't the only place where legal change happens. See, e.g., Goluboff, *supra* note 43, at 7 ("Constitutional change does not begin and end at the Supreme Court, with the decisions or biographies of the justices. It does not even begin with some heroic lawyer or organization identifying an obvious constitutional issue and crafting a strategy to address it."). A longer work might develop Mugler or Debs' stories more, or it may expand on the liquor abatement campaign in Kansas more extensively, for instance. But given this essay's narrower focus—and given the significant change in the legal landscape following these decisions—a focus on the Court's decisions is especially apt.

each involved an expanded use of nuisance law to do so. In *Mugler*, the Court generously defined the outer bounds of the police power when it upheld two Kansas anti-liquor laws, and the language in which it did so left the door open for Progressive reformers. *In re Debs*, in turn, affirmed a novel judicial use of the injunction—suppressing labor unrest because it was a nuisance that interfered with highways. Together, the cases illustrate the Court's consent to creative and expanded uses of nuisance.

Even so, the two decisions signify two types of decision-making. *Mugler v. Kansas* can easily read as an exercise of judicial restraint, because the Court upheld, rather than invalidated, novel state regulations. *In re Debs*, in turn, is better understood as an "activist" decision, because it expanded judicial power "although no statute had granted such authority."[87] Read like that, the two decisions might well reflect two different eras of the Court marked by two different Chief Justices: Morrison Waite for *Mugler*, Melville Fuller for *Debs*.[88] *Debs*, then, served as a harbinger for decisions to come in the *Lochner* Era: judicial protection for business at the expense of labor.

A. *Mugler v. Kansas* and the "Salutary Jurisdiction."

Peter Mugler immigrated to the United States—and specifically, Kansas—in 1872, and he opened up a brewery in small-town Salinas in 1877.[89] He became an American citizen in June 1881, but only months later, the state outlawed the industry on which he staked his livelihood.[90] Despite the laws, Mugler continued to run the brewery, because its specialized equipment meant that it had little value as anything else.[91] The authorities soon caught him; he was tried criminally

[87] David P. Currie, "The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910," 52 U. Chi. L. Rev. 324, 326 (1985).
[88] Id. ("The Fuller Court's activism in protecting economic interests contrasts sharply with the judicial restraint of its predecessors, but the difference should not be exaggerated.").
[89] 8 S.Ct. 273.
[90] Id.
[91] Id. at 274.

without a jury, fined $100—the equivalent of over $3,000 today—and forced to shutter the brewery.[92] After going through the appeals process for nearly six years, Mugler finally had his day at the Supreme Court in 1887, ten years after the brewery first opened. The Court consolidated his case with that of two other defendants, Ziebold and Hagelin, who faced challenges under a new nuisance law that accomplished the same ends.[93]

The 1881 liquor act that Mugler was convicted under plainly prohibited the production and sale of liquors, making it a criminal offense. An 1885 amendment added the nuisance element that proved especially controversial for Ziebold and Hagelin. Section Thirteen declared that "all places where intoxicating liquors are manufactured, sold, bartered, or given away" were "hereby declared to be common nuisances."[94] The state dispensed with the special-injury rule, so nearly anyone could bring a suit: "the attorney general, county attorney, or any citizen of the county" could "maintain an action in the name of the state to abate and perpetually enjoin" the nuisance.[95] Soon would come an injunction, too, and anyone violating the injunction—by maintaining the unlawful production or sale of the liquors—could be imprisoned between thirty and sixty days, fined between one hundred and five hundred dollars, or both.[96] After "any court having jurisdiction finding such place to be a nuisance under this section" found as much, the sheriff was "directed to shut up and abate" the property by destroying everything "used in keeping the nuisance wherein."[97] On challenge from another disgruntled brewer, the Supreme Court of Kansas had already upheld the law.[98]

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[92] Id.
[93] Id. at 302.
[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] State v. Crawford, 28 Kan. 726 (1882).

At the Supreme Court, Mugler, Ziebold, and Hagelin made three arguments against the liquor abatement laws. They contended first that the laws exceeded Kansas' ability to regulate under the police power. Second, they argued that the law's operation violated their Fifth Amendment right to just compensation. Finally, Ziebold and Hagelin specifically argued that the nuisance section deprived them of Fourteenth Amendment rights—substantive, in the destruction of their property, and procedural in the infliction of inflicting criminal punishment without a jury. They believed that the state could not designate the property a nuisance via legislation—to "make such a determination is a judicial function," because "rights of property cannot be so arbitrarily destroyed or injured."[99] The state could not, with the stroke of a pen, make breweries per-se nuisances: the offense of nuisance was a legal determination to be found by a court, not presupposed by the legislature. That was the case no matter if the nuisance was public or private, they contended. "Even in cases of public nuisances, where equity has jurisdiction, exceptional and extremely limited as it is, the question of nuisance or not must in cases of doubt be tried by a jury, and the injunction will be granted or not as that fact is decided."[100] By establishing that the breweries were per se public nuisances, their operation suddenly became a crime: the laws improperly "dispense[d] with proof of the single fact which constitutes the crime, thereby taking a way the presumption of innocence."[101] As a result, the defendants concluded, "Not only is the section unconstitutional, but all the other parts of the act equally so."[102]

Most of the Court did not accept these arguments. With the support of six other Justices, Justice John Marshall Harlan—today famous as the "Great Dissenter"—found himself writing

[99] Mugler v. Kansas, 8 S.Ct. at 290.
[100] Id.
[101] Id. at 291.
[102] Id.

for a 7-1 majority rejecting the trio of defendants' trio of claims.[103] Justice Harlan explained that states had the right "to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people."[104] Harlan made clear that the state's police power was not unlimited: if its statute "has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law," the court should step in.[105] But that was not the case here. The Court made clear that liquor abatement laws were rationally within the state's purview. He explained:

> [W]e cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country, are, in some degree at least, traceable to this evil.[106]

To strike this down would be to usurp "legislative functions" and "override the will of the people as expressed by their chosen representatives."[107] That proved too much.

As for the concerns about public nuisance, factfinding, and due process, Justice Harlan made short shrift of them. Because the statute was "prospective in operation," rather than an ex post facto law, and because it did not require courts to declare nuisances automatically, it was permissible. The trial court, after all, did have to find that "the place in question has been," since the passage of the statute, "so used as to make it a common nuisance."[108] Just because the injunction could be issued before the suit was over, Harlan explained, did not "dispens[e] with such preliminary proof as is necessary to authorize the injunction pending the suit." In other

[103] For a history recounting Marshall's career as a dissenter, see Peter S. Canellos, The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero (2021).
[104] 123 U.S. 623, 659. (Author's note: The S.Ct. edition provided the assignment of errors, but once I moved into the text of the opinion, I have switched to the U.S. reporter.)
[105] Id. at 661.
[106] Id. at 662.
[107] Id. at 662.
[108] Id. at 672.

words, the plaintiff still needed to bring a case before the equity court. They could not simply go to the police and have the building torn down. That was sufficient enough protection.

Finally, citing Justice Story's treatise on equitable remedies, Justice Harlan refuted the idea that equity courts using an injunction to remedy a public nuisance was violative of due process.[109] The statute could properly dispose of the need for a jury, because "such a mode of trial is not required in suits in equity brought to abate a public nuisance." After all, that was a well-enough accepted principle that it ended up in Justice Story's treaty. Justice Harlan saw equity courts' jurisdiction in public nuisance cases as a boon to the proper operation of the law. The courts of equity can "give a more speedy, effectual, and permanent remedy than can be had at law," he thought, so they acted within their jurisdiction in these liquor-abatement cases.[110] Indeed, he saw great potential for equity courts' use in this context: "They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future."[111] Courts of law, in turn, "only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings."[112] Equity courts could issue injunctions before the harmful conduct occurred—perhaps while a brewery was being constructed—but law courts could only issue punishment once the prosecution had been successful. Harlan concluded, "This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community. Though not frequently exercised, the power undoubtedly exists in courts of equity thus to protect the public against injury."[113] With that, the Court upheld the Kansas laws.

[109] Id. at 672–73 (citing 2 Story, Eq. Jur. §§ 921, 922).
[110] Id. at 673.
[111] Id. at 673.
[112] Id.
[113] Id.

Still, not everyone was sold. Justice Stephen Field dissented. He contended that the laws "passed beyond" the "utmost verge of constitutional authority" and "crossed the line which separates regulation from confiscation."[114] They usurped the judiciary of its fact-finding determination, because the court "is not to determine *whether* the place is a common nuisance in fact," but rather "*if* it comes within the definition of the statute."[115] The statute also stripped equity courts of their fundamental purpose: discretionary remedies. No matter the case, the court had to order not only that the place was "shut up" and seized, but also that all "the liquor found therein, and all other property used in keeping and maintaining the nuisance" must be destroyed, no matter "whether they are of such a character as could be used in any other business, or be of value for any other purposes."[116] And that punishment was doled out before the state established the commission of a crime in a law court. The statute provided that an injunction had to be issued at the start of the case, not its conclusion. So too the punishment, it seemed. "The destruction to be ordered is not as a forfeiture upon conviction of any offense," he reminded all, "but merely because the legislature has so commanded."[117] The law, for Field, resembled a bill of attainder.

If this law were enforced to the letter, Justice Field thought that it would deprive citizens of Kansas both due process rights and property rights. That due process rights analysis had two parts: the substantive right to keep the property until the judiciary had determined its use violated the law, and the procedural right to have a judge, not a legislature, decide that the property constituted a nuisance. The remedy in nuisance cases was typically to stop injurious use of the property, Justice Field observed, "not to tear down or to demolish the building itself or to destroy

[114] Id. at 678 (Field, J., dissenting).
[115] Id. at 677 (Field, J., dissenting) (emphasis added).
[116] Id. (Field, J., dissenting).
[117] Id. (Field, J., dissenting).

property found within it."[118] Abatement under the statute improperly extended beyond the scope of the liquor itself and required "destruction of property like bottles, glasses, and other utensils, which may be used for many lawful purposes." In part sounding in substantive due process—of which Justice Field was famously an early advocate—and just compensation for takings, the dissent took seriously the economic harm this law's operation put on a previously law-abiding citizen. Unfortunately, none of the defendants' rights would be vindicated. Seven Justices had made it clear that nearly anything could be a public nuisance under state statute, so long as it was generally related to the state's police power.

B. *In Re Debs* and "the United States courts that ended the strike."

Eight years later, the Court again waded into the thicket of public nuisance and criminal equity when it decided *In re Debs*.[119] There, the Court upheld a federal injunction shutting down the Pullman railway strike, the largest and most violent labor conflict to date, and it affirmed a contempt charge against the strike's lead architect, Eugene Debs, for violating the injunction.

As one scholar has observed, the Pullman strike "pitted prototypical representatives of 'capital' and 'labor'" against each other: George Pullman, "the chief stockholder and executive officer of a corporation manufacturing railroad cars," and Debs, "a former railroad worker and president of the nation's largest railroad workers union."[120] Using nuisance generously and criminal equity creatively, the high court sided with capital over labor.

Pullman, Illinois, was a company town founded just outside Chicago in 1881, by George Pullman—an industrialist extraordinaire and the inventor of the sleeping car. Both near prominent railway stops and the site where Pullman had his sleeping cars constructed, the town

[118] Id. (Field, J., dissenting).
[119] 158 U.S. 564 (1895).
[120] David Ray Papke, The Pullman Case: The Clash of Labor and Capital in Industrial America (1999), 2.

grew gradually alongside his business in the decade that followed its founding. By 1893, over twelve thousand laborers and rail workers, alongside their families, lived there. When the economy crashed that year, layoffs and reductions in wages sowed discontent among the towns' workers. After a heated episode where several workers were fired—likely for failing to move into the company town that Pullman seemed to run with an iron fist—discontent grew steadily. On May 11, 1894, several thousand workers departed from the town's shops and stations and refused to come back. The strike was on.[121]

Eugene Debs—then president of the American Railway Union, one of the nation's largest labor unions at the time—tried to stop the unrest. Via bulletins, letters, and impassioned speeches, he encouraged workers to fight for their rights while also doing so nonviolently. But he could do little to control the 150,000 workers around the country who followed in the Pullman strikers' footsteps. Soon, strikers were stopping trains in their tracks throughout the Midwest. Though the state militia was called in and the trains began to run as normal again, federal officials remained worried. President Grover Cleveland thought the situation posed an active threat to the rule of law. At one point in cabinet deliberations, he famously stated, "If it takes every dollar in the Treasury and every soldier in the United States Army to deliver the postal card in Chicago, that postal card shall be delivered."[122] Soon, federal troops were on the ground in Chicago ready to suppress the movement.

All the while, United States Attorney General Richard Olney headed to the United States District Court for Chicago, seeking to enjoin the strike.[123] Olney succeeded, and the district court

[121] Id. at 17–20.
[122] Id. at 30.
[123] The Chicago Federal District Court served as a precursor to today's United States District Court for the Northern District of Illinois. See generally Richard Cahan, A Court That Shaped America: Chicago's Federal District Court from Abe Lincoln to Abbie Hoffman (2002).

issued an injunction against the protest on July 2, nearly two months after it began.[124] The court ordered the union to refrain "from interfering with, hindering, obstructing, or stopping any of the involved railroads" and from interfering with any trains carrying the "mails of the United States."[125] But the injunction—which later came to be pejoratively described as an "omnibus" one—went further: it ordered Union leaders not only to stop the violence and the interference with the railroads and the mail, but also to stop protesting more generally. The order prohibited "compelling or inducing" the railroad employees from performing their duties on the railroad or from allowing others to take up the work instead.[126] Still, the district court did not cite statutory grounds for its jurisdiction to issue the injunction; instead, when Debs appealed, the court claimed equitable jurisdiction over the case because the protestors were a public nuisance.

Before the appeal, though, came Debs' arrest for contempt of the injunction. The order was published in local papers and posted on moving railcars even before it was formally served on Debs himself, raising eyebrows from even more conservative members of the bar in the area. The *Chicago Tribune* observed that its language was "so broad and sweeping that interference with the railroads, even of the remotest kind, will be made practically impossible."[127] Debs, a self-educated man, failed to see its legal significance: "I cannot see the necessity for serving an injunction on me commanding me not to do that which the statutes of the state also require me not to do."[128] Only five days after the injunction was ordered, Debs found himself imprisoned for the conduct of his workers. He had been arrested for contempt of court: by not shutting down the protest, he violated the court's order.

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[124] See United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894) (providing the text of the original writ of injunction).
[125] Id. at 726.
[126] Id.
[127] Id.
[128] Papke, *supra* note 120, at 41.

Debs argued that there was no jurisdiction for the court to act, because it did not cite a statute. But the court refuted that claim: "The charge made against the defendants was that they were engaged in a conspiracy to hinder and interrupt interstate commerce and the carriage of the mails upon the railroads centering in Chicago, by means and in a manner to constitute, within the recognized definitions, a public nuisance."[129] It proceeded to tour through equitable jurisdiction cases and treatises to support the conclusion that the federal court had jurisdiction even absent a statute. It could issue an injunction to quell a public nuisance, like a protest, under equity when the government's property interests were at stake—as was here, through the danger posed to the mails. Debs was sentenced to six months imprisonment.

Debs filed a habeas writ that eventually landed on the Supreme Court's docket. Still, by then, the strike had long been over. Some of the best advocates in the country—including a young Clarence Darrow—made up Debs' team before the Court. Pursuant to late nineteenth-century Supreme Court practice, each of Debs' lawyers submitted their own brief on his behalf. Darrow's brief, along with that of famed Chicago attorney Stephen Gregory, were particularly instructive on the issues of public nuisance and criminal equity.[130]

Debs put forth two arguments: first, that the district court lacked jurisdiction in equity to issue such a broad order, and second, that his civil contempt proceeding was an improper substitute for a criminal trial. On the first argument, Gregory wrote that such expansive injunctions would "turn over the workingmen of this country, bound hand and foot, to the mercy of corporate rapacity and greed in a time when combination rules every market and every great enterprise and dominates all activities."[131] If equitable jurisdiction were upheld in this instance,

[129] United States v. Debs, 64 F. at 740.
[130] Papke, *supra* note 120, at 62–63.
[131] Id. at 63.

the "right to strike" would be quickly curbed by any single district judge. Darrow, in turn, argued that the district court had "no authority or jurisdiction to make [its] order," because there was no on-point statute.[132] In part, this was because the Sherman Antitrust Act—the most relevant federal statute at the time—did not convey federal district courts the power to enjoin strikes.[133] Darrow also relied on the historical relationship between injunctions and property: "Enjoining strikes or strikers, or enjoining labor organizations or mobs would be a procedure not in keeping with the courts of chancery."[134] Equity courts previously forbid the use of property that impaired others' rights under public nuisance claims, but Darrow contended that conduct like protesting was different in kind: this was not one person's use of their own property harming another's rights, so it was unprecedented under the previous scope of public nuisance.

Both Gregory and Darrow also highlighted Debs' deprivation of criminal due process rights: the district court was engaging in that infamous idea of criminal equity. Darrow again drew his argument back to the role of equity courts, who should only be concerned with "property and property rights."[135] He explained, "To enjoin the actions of men when those actions have no direct reference to property rights would be to replace the criminal procedure and penal statutes with the chancery power of courts."[136] By this, he meant that criminal public nuisance charges, if left to equity courts, would become all-consuming: if violent protest constituted the infringement of a property right, what commission of a crime could not? And by

[132] Aditya Bamzai and Samuel Bray, Debs and the Federal Equity Jurisdiction, 98 Notre Dame Law Review 699, 721 (2022) (quoting Argument for Petitioners, In re Debs, 158 U.S. 564 (1985) (No. 11), reprinted in 11 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 268, 269 (Philip B. Kurland & Gerhard Casper eds., 1975)).
[133] But, as Professors Bamzai and Bray note, the Court paid no attention to this argument in its final decision. Bamzai and Bray, *supra* note 132, at 721.
[134] Id.
[135] Id.
[136] Id.

that, he worried, could every criminal be charged summarily under contempt rather than in front of a jury?

In the conclusion of his brief, Gregory raised the rhetorical register even higher than Darrow. "This injunction was aimed at a strike," he observed, "these men were imprisoned because they were leaders of a strike."[137] Further, he proclaimed, "No more tyrannous and arbitrary government can be devised than the administration of criminal law by a single judge by means of injunction and proceedings in contempt."[138] The consequences of a universal rule promoting this practice would be especially dastardly, he warned. "To extend this power generally to criminal cases would be absolutely destructive to liberty and intolerable to a free people."[139] Even "worse than ex post facto legislation," a regime of injunctions would be one where "no man would be safe; no limits could be prescribed to the acts which might be forbidden nor the punishment to be inflicted."[140] That could not stand under the Constitution, Debs' team thought.

Yet their arguments fell on deaf ears. The Court unanimously upheld the injunction and denied Debs' writ for habeas. Justice David Brewer first answered Darrow's argument that the United States did not have a property interest by holding that the "United States have a property interest in the mails, the protection of which was one of the purposes of the bill."[141] As such, public nuisance was implicated. The Court was adamant that the district court did have jurisdiction to issue an injunction via equity under the doctrine of public nuisance. Justice Brewer established as much through an analogy to the common law: the "obstruction of a

[137] Papke, *supra* note 120, at 63.
[138] Id. at 64.
[139] Id.
[140] Id.
[141] 158 U.S. 564, 583.

highway is a public nuisance, and a public nuisance has always been held subject to abatement at the instance of the government."[142] While labor union protests were not typically the type of highway obstruction considered—both because railways were relatively new in comparison to the common law and equity powers and because strikes were not classically considered obstructions—Justice Brewer thought this situation merited an appropriate expansion of federal equity jurisdiction. "Constitutional provisions do not change," he explained, "but their operation extends to new matters, as the modes of business and the habits of life of the people vary with each succeeding generation."[143] Though the use of an injunction to curb a strike was new, that was not because it was not well-founded: it was because strikes themselves were a relatively new phenomena.

Justice Brewer then walked through the criminal charges against Debs. He first noted that the same act "may give rise to civil action and criminal prosecution," so the equity court's jurisdiction was "not destroyed" by the fact that violation of the injunction constituted a crime.[144] Justice Brewer explained, "So here the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings." But "the complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights."[145] And it would be no defense to criminal prosecution for Debs to say that he "disobeyed the orders of the injunction served upon [him] and have [already] been punished for such obedience."[146] In other words, Brewer thought that concerns of criminal equity and double jeopardy were far overstated.

[142] Id. at 587 (internal citations omitted).
[143] Id. at 592.
[144] Id. at 594.
[145] Id.
[146] Id.

Nor, the Court held, was Debs' right to trial was not violated by the district court. The contempt charge was valid for two reasons. First, the court that issued an injunction should be able to enforce that injunction via the threat of contempt proceedings—otherwise, it could not maintain order in any proceeding. Second, it was permissible because those contempt proceedings are not technically "executing the criminal laws of the land, but only securing to suitors the rights to which it has adjudged them entitled to."[147] Holding Debs in contempt was not enforcing a criminal law; it was supposed to have a deterrent effect on the private rights affected by the protest.

And a deterrent effect it did have. Justice Brewer vindicated the district court's intervention in quelling the labor strike. At length, he praised the virtues of the executive's actions. He wrote:

> 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 on the part of these petitioners and their associates, 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, and invoked their consideration and judgment as to the measure of its rights and powers, and the correlative obligations of those against whom it made complaint.[148]

Better the dispute handled with the strike of a gavel than the strike of a baton, thought Justice Brewer. The government was wise to turn to the federal courts to abate the strike, rather than have direct conflict between federal troops and indignant protestors resulting in martial law. Most interesting was Brewer's use of Debs' own testimony on the matter. Brewer drew from Debs' testimony in the district court contempt trial but inverted its tone from one of

[147] Id. at 595. More than seventy years later, the Court took issue with this particular passage of *Debs* in Bloom v. State of Illinois, 391 U.S. 194. The Court there held that serious criminal contempt trials trigger the constitutional guarantee of a jury, and in the particular case, and the constitutional rights of the defendant—who was sentenced to 24 months of imprisonment for contempt without a jury—were violated.
[148] Id. at 583.

disappointment to one of praise towards the district court. Quoting Debs' words, Brewer wrote: "It was not the soldiers that ended the strike. It was not the old brotherhoods that ended the strike. It was simply the United States courts that ended the strike."[149] Debs was probably right. The strike ended only a few days after he and the other leaders had been arrested on contempt and imprisoned, and the protest seemed to fall apart without his leadership. And while Justice Brewer paid quick homage to the "heroic spirit" of some protestors, he made it clear that their actions were generally not acceptable: "no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the co-operation of a mob, with its accompanying acts of violence."[150] Debs' habeas petition was denied, the district court's injunction was upheld, and the federal courts' equitable jurisdiction was expanded quite significantly.

Though *Debs* expanded nuisance significantly, the holding did not arise from thin air. Some courts in England, state courts, and federal district courts had previously barred organized labor protests on the same grounds.[151] These early nuisance cases might not seem significant, but before nuisance's application to strikes—made famous in *Debs*—the only remedy against an organized labor activity "was a criminal prosecution for conspiracy," a heavy-handed and slow-moving process.[152] Nuisance changed the landscape insofar as it allowed courts to invoke equitable powers to issue injunctions with rapidity: they could act efficiently and, if needed, dole out criminal punishment without a jury. Moreso, these orders were rarely overturned on appeal.[153]

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[149] Id. at 597.
[150] Id. at 598.
[151] See, e.g., Springhead Spinning Co v. Riley, L.R. 6 Eq. 551 (1868); Sherry v. Perkins, 145 Mass 212 (1888); see also Edwin E. Witte, "Early American Labor Cases," 35 Yale L.J. 825, 832–36 (1926) (collecting cases).
[152] Witte, "Early American Labor Cases," 35 Yale L.J. at 837.
[153] Frankfurter's data indicates that from more than a hundred temporary and permanent injunctions issued between 1900 and 1930, only twelve were modified on appeal and only eleven were reversed. Contempt orders themselves were more favorable. Of the 58 people to appeal from convictions on contempt orders, 21 secured reversal.

IV. THE DEBATE: "GOVERNMENT BY INJUNCTION" AND ITS DISCONTENTS

From *Debs* and *Mugler* came a supercharged nuisance doctrine, whose uses were only limited by the creativity of zealous reformers, state legislatures, and equity courts.[154] And with that came a flurry of criticism—direct and indirect—against the decisions. Judges, commentators, and politicians feared that that a limitless nuisance doctrine, an expanding criminal equity jurisdiction, and the novel uses of injunctions each posed discrete threats for the common law and the constitutional order. As Hennigan explains, the "fear that the recent transformation in public nuisance law had undermined the important safeguard of trial by jury as well as breached the line separating public and private rights" was at the forefront of a diverse coalition's concerns.[155] From traditional, conservative jurists like Justice Walbridge Field of the Supreme Court of Massachusetts to populists like late 1890s Democratic Party to legal commentators and journalists, the opposition to these developments ran the ideological gamut.

But the support for these decisions and their effects was equally diverse and diffuse. Some proponents—mainly Progressive reformers—thought that nuisance was explicitly an excellent vehicle for reordering society in their own vision. Others—mainly anti-labor federal and state judges and their proponents across the country—saw an expanded use of equity as an efficient means to end burgeoning labor protests and maintain the status quo. This intellectual debate took place across decades and across many fora: majorities and dissents, law review articles, and even political platforms. Subsections A and B detail the two sides of the debate, and Subsection C explains the material and legal consequences that came from it.

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[154] See, e.g., F.W. Taussig, "Review: Labor Injunction, by Felix Frankfurter, Nathan Greene" 44 Q. J. of Econ. 680, 683 (1930) ("The course of action to which [Attorney General Olney] gave an enormous impetus in the Debs case has grown into a settled practice, and thereby the law in effect has been revolutionized.").
[155] Hennigan, *supra* note 32, at 146.

A. Doctrine Run Amok: The Case for Restraint

Critics had three main objections against the twin developments of an expanded public nuisance doctrine and a growing criminal equity jurisdiction. These criticisms came to bear in opposition to restrictive liquor legislation, red-light abatement statutes, and injunctions aimed at labor protestors. First, many argued that equity's contempt proceedings were a workaround to criminal prosecutions—justice was being sacrificed for efficiency. Second, some also argued that nuisance was straying too far from its common-law origins: to succeed on a nuisance suit, there needed to be competing claims to a property right, not just criminal conduct on someone's property. Finally, federal judges were using equity as a form of self-aggrandizement: judicial activism against labor strikes and other unruly conduct that judges opposed as a matter of personal politics, not as a matter of law. This subsection traces these arguments across judicial decisions, newspapers and law reviews, and even a national party platform.

The first salvo against the Court's expanded nuisance-equity doctrine came in dissent. In *Carleton v. Rugg*, the Massachusetts Supreme Court upheld a liquor abatement law quite similar to that in *Mugler*.[156] And Justice Walbridge Field (not to be confused with *Mugler*'s dissenter Justice Stephen Field) was dissatisfied with the Massachusetts high court's decision. In dissent, he was as much in conversation with the majority in *Mugler* as the majority in the instant case. In passing a nuisance liquor like similar to that of Kansas, the Massachusetts legislature, Justice Field remarked, "apparently thought that a remedy in equity would be more speedy or more certain or more efficient than that by complaint or indictment."[157] It could serve no other purpose than efficiency. After all, he claimed, "[t]he issuing of the injunction of itself adds nothing to the prohibition of the statutes, but the intention plainly is to call into use the peculiar process

[156] 149 Mass. 550 (1889).
[157] Id. at 559 (Field, J., dissenting).

employed by courts of equity in punishing persons guilty of willful violations of injunctions."[158] In other words, the equity courts became the new bearers of the criminal law via their contempt charges. He saw no limit to the injustices this could bring:

> If this can be done, why can it not authorize a court to enjoin any person from doing any illegal or criminal act anywhere within the commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?[159]

Field pointedly remarked that, "except for constitutional limitations, the legislature could deal with all crimes by way of injunctions in equity."[160] But the state's clever workaround denied necessary constitutional protections, a process inapposite with the nation's foundational document. He made that point quite clear: "It was not the intention of the Constitution that persons should be punished for violating general laws by proceedings in equity, or by a court acting without a jury, and subject to no limitations upon its power to fine and imprison except at its own discretion."[161] The traditional separation of powers demanded more than equity court's summary trials: the legislature writes the law, the executive investigates, prosecutes, and enforces it, and the courts of law administer it under the proper procedural restrictions guaranteed by the Constitution. The legislature could not hand the judiciary nuisances by fiat to be charged and punished summarily.

A similar argument popped up in another dissent a decade later. In *Hopkins v. Oxley Stave Co.*, the Eighth Circuit in 1897 upheld an injunction prohibiting not a violent protest, but a peaceful boycott in response to a company's use of child labor.[162] Two coopers' unions wanted to stop the Oxley Stave Company's practices by urging their union members and Oxley Stave's

[158] Id. (Field, J., dissenting).
[159] Id. at 556 (Field, J., dissenting).
[160] Id. (Field, J., dissenting).
[161] Id. at 566 (Field, J., dissenting).
[162] Hopkins v. Oxley Stave Co., 83 F. 912 (8th Cir. 1897).

customers to stop buying its products. Worried, Oxley Stave filed an injunction against them. The district court, acting in equity, granted it. The circuit upheld it because the proposed conduct amounted to "conspiracy to wrongfully deprive the plaintiff of its right to manage its business," but it cited no statute—nor any conduct coming close to common-law conspiracy—in doing so.[163] Nuisance, here, was not the common-law offense at issue, illustrating how the summary trial concerns had grown beyond their original context.

In a long, blistering dissent—one that cited the Bible, Abraham Lincoln, a Catholic cardinal, Justice Oliver Wendell Holmes, and stories from the old English common law—Judge Henry Clay Caldwell threw into sharp relief what he saw as the decision's absurdity. The injunction did "not charge that the defendants violated any law of the state of Kansas or of the United States, or that they threatened to do so."[164] The "conspiracy" here, protesting unfair practices by organizing a refutation of their products, only here "describes a perfectly innocent act, as much so as if the charge was that the defendants 'conspired' to feed a starving comrade, or to bury a dead one."[165] They conspired in the sense that they planned together, but the underlying conduct, organizing a boycott, was no commissioned crime at all.

The decision's legal basis, he contended, was even more tenuous. The plaintiff went to the district court, asked for an injunction because no remedy was available at law—as there was no crime—and was given one without a statutory basis. The defendants were soon held in contempt of the injunction, criminally charged and convicted without a jury. Caldwell equated this sequence with something like "mob law," because the rule of one equity judge's preferences dictating the bounds of all others' conduct.[166] The Constitution could not tolerate it. After

[163] Id. at 921.
[164] Id. (Caldwell, J., dissenting).
[165] Id. at 924 (Caldwell, J., dissenting).
[166] Id. at 925 (Caldwell, J., dissenting).

surveying the relevant constitutional provisions that the defendants were due, including the right to a jury trial, he remarked that the Constitution's clear protections for criminal defendants were "not to be nullified by mustering against them *a little horde of equity maxims and obsolete precedents* originating in a monarchical government having no written constitution."[167] Caldwell pulled no punches. The preferences of one judge—absent a prosecutor on the front end or a jury on the back—had trammeled on the expressive, likely protected, conduct of these workers and union members. The expansion of equity into the realm of criminal law, he clearly thought, was incompatible and incongruent with the Constitution.

In law reviews and talks given to bar associations, critics rang the same sorts of alarm bells as Justice Field and Judge Caldwell. The first came in the 1894 edition of the *University of Pennsylvania Law Review*, where author William Draper Lewis railed against the initial district court injunction against the Pullman strike, even before the final *Debs* decision had been rendered.[168] The question the Court faced in *Debs* was, in his terms: "Can the fact that the crime with which the man is charged injured property and was a public nuisance, justify the court in depriving him of the right of trial by jury?"[169] In other words, did public nuisance's origins in equity allow courts to administer it without typical criminal procedure? The strongest argument in the affirmative was one on the facts: "The actions of Debs and his followers was a public nuisance of the most serious and alarming kind," and "it is the duty of the court to protect property and abate nuisances injurious to property."[170] With that in mind, the district court might have acted appropriately.

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[167] Id. (Caldwell, J., dissenting) (emphasis added).
[168] William Draper Lewis, "A Protest Against Administering Criminal Law by Injunction: The *Debs* Case," 42 Penn. L. Rev. 879 (1894). See also Zechariah Chafee Jr., "The Progress of the Law 1919-20: Equitable Relief of Torts," 34 Harv. L. Rev. 388 (1921); Robert N. Golding, "Constitutional Question Involved in the Abatement and Injunction Sections of the National Prohibition Act," 19 Ill. L. Rev. 71 (1924).
[169] Lewis, *supra* note 168, at 881.
[170] Id.

But the argument *against* the court's actions proved stronger for Lewis. An injunction in equity was only typical when there is "the claim of right on both sides," like when two neighbors have a dispute over the proper use of property.[171] To illustrate the point, Lewis asked, "If a robber threatens to break in my house by night and plunder my premises, did anyone ever hear of my going into a court of equity to restrain him?"[172] It took two properties to tango: criminal conduct on one could alone could not trigger equitable relief in a nuisance claim. Draper believed that "the case should have been tried, as on those facts it was, an exceptional case, and martial law declared."[173] The district court should not have run roughshod over the demands of the Constitution in order to get a quicker result, when martial law would have done so while maintaining Debs' right. In other words, there was "no necessity to strain the principles of the procedures of the civil courts, and to make a precedent which will be used over and over again to undermine the most valuable of the safeguards of individual liberty—the trial by jury."[174]

A 1903 piece in the *Harvard Law Review* also set out the problem and the stakes clearly. In "The Revival of Criminal Equity," Edwin Mack, an attorney from Milwaukee, began by gesturing to the legal and social dynamism of the Progressive Era.[175] "The more complicated relations of capital and labor [and] the severer struggle for existence," he observed, gave "rise to new demands on the legal system."[176] The most pressing demand was one of efficiency: how can the legal system best enforce regulations on allegedly undesirable behavior—like making alcohol, protesting working conditions, or running a brothel—to maintain a well-ordered society? "The uncertainty of trial in criminal courts, due both to their fostering of technicality

[171] Id. at 882.
[172] Id.
[173] Id. at 883.
[174] Id.
[175] Edwin Mack, "The Revival of Criminal Equity," 16 Harv. L. Rev. 389 (1903).
[176] Id. at 392.

and the low standards of their juries," Mack explained, "have made people turn for relief to courts of equity."[177] For some, the slow-moving, highly procedural criminal justice system was no longer up to snuff. The equity court operated under less burdensome civil standards and without juries, but it could summarily issue criminal contempt charges and convictions, loaded with fines and even terms of imprisonment, if its orders were not obeyed promptly and fully.

But Mack saw this reliance on equity as a cause for alarm. Although it was efficient, he worried that the nation was "overlook[ing] its shortcomings and the dangers that lie hidden beneath it."[178] He explained that the injunctions here "do in fact administer the criminal laws, and bringing the procedure of courts of equity to the establishment and punishment of crimes they violate fundamental principles of our jurisprudence."[179] That path had been trodden before, Mack explained—hundreds of years ago in England in the infamous Star Chamber—and it did not end well. After narrating why English common law barred equity courts from administering the criminal law, Mack argued that nuisance should only be used "to determine whether the plaintiff has rights that ought to be protected from injury," not "to prevent the defendant from violating unquestioned rights."[180] When the conduct at issue was clearly unlawful, the court was "no longer using its power of punishment to make its adjudication of controversies effective."[181] Instead, it made "its process of contempt a means for summary enforcement of the administrative law."[182] Contempt charges were redundant in a world governed by criminal statute; they were also dangerous insofar as they had little oversight beyond the discretion of the singular judge.

[177] Id.
[178] Id. at 401.
[179] Id.
[180] Id. at 399.
[181] Id.
[182] Id. at 402.

Mack noted that the public was getting concerned: these cases caused "a vague feeling that traditional safeguards are being encroached upon, and with this there is a growing apprehension of one-man power."[183] Seeing that, he made a vigorous appeal to maintaining the separation of powers. "If we were brought face to face with the problem of maintaining order only by means of the criminal courts," he posited, "though the process might be slow, the final result would be that our criminal prosecutions would be made effective."[184] Moreover, "at the same time, courts of equity would be freed from the danger of arousing popular opposition to their procedure by their enforcement of the criminal law."[185] Legitimacy would be restored, and tensions would be quelled. Mack concluded, "Our history has proved that the dangers of abuse of authority through methods of summary trials are evil that cannot be compensated for by greater efficiency the system produces."[186] Mack believed a strong wall between civil and criminal law was necessary to preserve individual liberties and constitutional order: only when criminal law is set out by the legislature and administered through "trial by jury under constitutional safeguards" could a legitimate system remain intact.[187]

A decade after Mack wrote his piece, another author analyzed the developments of nuisance and the need for slower, more deliberate proceedings. In a paper given to the Kansas State Bar Association and reprinted in the *Chicago Legal News* titled "The Abatement of Public Nuisances," E.W. Grant—an attorney from Kansas, arguably the frontlines of these developments—argued that states' expansion of public nuisance since *Mugler* was one to cause alarm.[188] States had been removing injury-in-fact requirements from public nuisance statutes,

[183] Id.
[184] Id. at 403.
[185] Id.
[186] Id. at 402.
[187] Id.
[188] E.W. Grant, "The Abatement of Public Nuisances," 40 Chi. Legal News 410 (1908)

like in *Mugler*, and allowing any citizen to file suit. This was a far cry from its common-law origins. "If the public is only injured and no individual suffers any particular damage," Grant observed, "the remedy would seem to be properly by an indictment."[189] What amounted to a "purely public nuisance cannot be abated without a trial by a court of law, and then only by an officer whose duty it is to carry into execution the order of the land."[190] Judicial proceedings' primary function "was to give hot blood time to cool, to prevent men from redressing their own wrongs," and allowing anyone to file a suit for a public nuisance undermined that.[191] Grant was especially worried about the growth of public abatement, the remedy of self-help, by private citizens. While injunctions in equity courts posed one threat, he was worried that the natural development of the expansion of nuisance would mean next that the public could skip the equity courts altogether and destroy nuisances themselves.[192]

Alongside an academic and judicial discourse against an expanded use of nuisance and equity jurisdiction came a popular one, headed up by the Democratic Party. In its 1896 national platform—directly responding to the *Debs* decision—the party proclaimed as follows:

> We especially object to *government by injunction* as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners.[193]

While the more conservative opponents of a growing nuisance-criminal equity doctrine focused on constitutional rights, the populist response put greater emphasis to the harms on organized labor. As explained below, the case of the "labor injunction" became a hot-button political topic for decades to come.

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[189] Id. at 411.
[190] Id.
[191] Id.
[192] Id.
[193] 1896 Democratic Party Platform, The American Presidency Project. https://www.presidency.ucsb.edu/documents/1896-democratic-party-platform (emphasis added). How the "government by injunction" platform issue affected the 1896 election would be ample grounds for further research.

B. Justice Served Efficiently: The Case for Reform

But not everyone was so skeptical of the twin developments of public nuisance and the criminal injunction. Some thought this were no development at all, in fact. An 1897 article in the *Virginia Law Register*—now known as the *Virginia Law Review*—defended the use of equity and contempt proceedings in the so-called "labor" cases.[194] William Peterkin, an attorney from West Virginia, argued that the fears were overstated and critics were ignorant of the true history of equitable remedies. Courts issuing equitable remedies for the obstruction of waterways and other passageways had a deep-rooted legacy; the labor protestors in the *Debs* case were engaging in the same sort of nuisance conduct, but no one seemed to object to it in the first instance. "The interference of a court of equity to enjoin acts which are crimes," when those acts threaten property interests, "is not only reasonable, but is sanctioned by abundant authority, both State and Federal," he argued.[195] And to the extent that the context of strikes were an innovation, Peterkin thought that was because strikes "are themselves innovations."[196] Repeating Justice Brewer's point in *Debs*, Peterkin claimed that courts had long "applied old and established principles to new conditions." [197] This allegedly novel application of injunctions was no different.

Peterkin also addressed arguments about "summary punishment."[198] The idea that courts could "punish disobedience of their orders has existed from time immemorial, it has been co-exist with the courts themselves, and is absolutely necessary to their existence."[199] The power to hold someone in contempt was a power inherent within the courts' proper function. Requiring

[194] William Peterkin, "Government By Injunction," 3 Virginia Law Register 549, 553 (1897).
[195] Id. at 555.
[196] Id.
[197] Id.
[198] Id. at 558.
[199] Id.

juries was inappropriate and inefficient in this context. Equity courts had none, so the contempt cases "would have to be sent to a law court," while "proceedings in the equity court must be suspended."[200] And what if juries refused to enforce contempt orders? Another jury would be forced to come in and hear *their* contempt orders, "and so on *ad infinitum*."[201] Still, Peterkin conceded that adding uniformity and procedure, at least an affidavit for the facts, would make contempt proceedings fairer to defendants.

A few years later, George Whitelock, an attorney from Baltimore, made an even more forceful set of arguments defending the Progressive-era use of nuisance and injunctions.[202] In "Development of the Injunction in the United States," Whitelock lauded the *Debs* decision as a matter of sound doctrine and good policy. While he spent some time detailing opposing positions,[203] he found some reliable support for his position: then-federal judge and now President William Howard Taft. Taft had called the decision "a great judgment of a great court," because it led to the peaceful end of the hostilities and was grounded in a proper judicial role: protecting property rights.[204] As for summary punishment concerns, Taft concluded that "no Anglo-Saxon" had "ever enjoyed" the right "to interpose a jury trial between them and the enforcement of a court's order."[205] It was neither in the Constitution nor was it a good practice to promote. Whitelock leaned on quotes from another federal judge, Francis E. Baker, to refute the charge that labor injunctions were mere politicking. Judges would take the same actions, Baker proposed, if capital were striking so seriously against labor's rights.

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[200] Id. at 559.
[201] Id. (italics in original.)
[202] "Development of the Injunction in the United States," 15 Chi. Legal News 107, 108 (1912-1913).
[203] Whitelock copied extended portions of another document—Charles Allen's arguments against injunctive relief in *Debs*, which might prove another source worth examining in the future. Id. at 108. Allen's quote about people being "afraid of their own institutions" provided a portion of the title of this paper.
[204] Id. at 108.
[205] Id. at 108.

Whitelock then addressed congressional attempts to restrict judicial power. What began as a strike against "government by injunction," he argued, had become one of "judicial autocracy," because opponents of judicial equity were engaging in "facile or psychopathic demagogue[ry]" by claiming that the judges should be so beholden to the will of the masses.[206] And even were "government by injunction" a political choice, as opposed to the binding nature of precedent, Whitelock contended that it *was* a good policy: "the conservative will prefer its beneficent control to that of parliaments whose only spring of actions is popular initiative, and whose statutes must be galvanized into life by the plebiscite."[207] Power was indeed better rested in the judiciary than "the whim of a fickle and fluctuating majority, whose decisions on grave constitutional reforms are reversible by popular referendum."[208] Whitelock closed with a quote from Justice Brewer apparently made "shortly before his death." Brewer warned that "to restrict the power of injunction would be to return in the direction of barbarism."[209] So too thought Whitelock.

C. Winners and Losers: The End of Red-Light Districts and Labor Injunctions

While some argued about injunctions in papers, journals, and even the halls of Congress, other Progressive-era reformers got busy with the power granted to state legislatures in *Mugler* to define per se nuisances. In statehouses across the nation, they drafted and enacted red-light abatement statutes, aiming to eliminate those districts in cities where vices flourished and law enforcement turned a blind eye. The new statutes empowered private citizens to bring and enforce nuisance suits against brothels, even if they had no property interest affected by that

[206] Id. at 110.
[207] Id. at 110.
[208] Id. at 110.
[209] Id. at 110. Why, exactly, Justice Brewer was so concerned with injunctions shortly before his death is an inquiry for another day.

brothel.[210] Here, the reformers took the third type of nuisance claim described in Part II—the "special injury" rule, where a private party could bring a public nuisance suit if they suffered a particularly harmful injury—and stripped it of its rationale. The result was that anyone could bring a suit against any per se public nuisance in an equity court, passing around both the special injury rule and the requirement for a jury, so long as the legislature declared it as much.

The campaign to pass these red-light abatement laws—efforts that were wildly successful—is out of the scope of this paper.[211] But a brief look at some reasons *why* the Progressive reformers thought that this expansion of nuisance and equity was appropriate to stop prostitution is still illustrative of the larger debates about the two doctrines. By empowering private citizens to bring suits, reformers could circumvent what they saw as a largely unreliable, and even morally bankrupt, criminal justice system. One reform group in Chicago, known as the "Group of Fifteen," insinuated that the police were not trustworthy to enforce laws against prostitution, in part because they were regular patrons of the brothels they were supposed to shut down.[212] A Progressive state attorney general declared that the existence of red-light districts implicated the police: "You cannot have a segregated vice district without having a corrupted police force," he concluded.[213] Upright citizens could take their place with these new laws.

Even if cases did get to a court of law, Progressives assumed that most potential jurors would not convict prostitutes, because the jurors often saw vice districts as "necessary and inevitable."[214] As one Progressive-era reformer put it, even "one man on the jury—from prejudice, corruption, or a misunderstanding of the nature of his duties" who refused to convict

[210] See Hennigan, *supra* note 32, at 139–40; Stern, *supra* note 34, at 628–30.
[211] See Hennigan, *supra* note 32, at 175–77; Stern, *supra* note 36, at 630–34.
[212] Hennigan, *supra* note 32, at 149–50.
[213] Id. at 149.
[214] Id. at 150.

would lead to government resources wasted and injustice perpetuated.[215] We might understand the Progressive intentions' with red-light district abatement laws as exactly in-line with the fears articulated by their opponents: reformers sought to restyle the doctrine to make punishment more expedient and without a jury. In their view, it was better that a moral few take the law into their own hands and get it right, rather than an immoral or apathetic majority allow blatant turpitude to continue.

These reformers largely won out, because legal challenges to the new nuisance claims were ineffective. These statutes were generally upheld in state courts nationwide, with only one exception: the Supreme Court of New Jersey.[216] That court struck it down on terms that you should be familiar with by now: it improperly gave the state's equity courts "the power to deal with a certain class of criminal cases by the writ of injunction, and the summary process of contempt."[217] After detailing a number of equity cases at both the common law and the American context, the court explained, "No instance can be found in the English reports, nor in the reports of this country, in states where the common law prevailed and still prevails, where a court of equity has ever taken cognizance of a case of a public nuisance founded purely on moral turpitude."[218] The New Jersey Supreme Court took seriously that division of public and private nuisance suits detailed in Part II: public nuisance was only a cognizable claim for relief in an individual suit when special injury to property, not just immoral conduct, affected the plaintiff.

But to be clear, New Jersey was the *only* state where this abatement law was struck down on these grounds, despite the laws' prevalence in dozens of states and challenges in nearly as

[215] Id.
[216] Hedden v. Hand, 107 A. 285, 291 (N.J. 1919). See also Stern, *supra* note 34, at 667–69 (describing the landscape of challenges to the constitutionality of these laws).
[217] Hand, 107 A. 285, 288.
[218] Id. at 290.

many. A new regime quickly came into effect. The legal consequences were mixed, as Hennigan and Stern have made clear. Hennigan observes that "equity courts were not swamped with thousands of bills for injunctions," so their impact on the "formal" legal system had to be "relatively minor."[219] He rightly points out that the red-light laws were effective on the *street*, rather than the *courts*, so their effect was more sociological than it was legal. Threat of legal consequence and intimidation alone were enough to shutter brothels around the nation. The presence of these statutes on the books meant that by the early 1920s, red-light districts were no more.[220]

Rather than dying out as a profession, though, prostitution itself diffused throughout American cities, often from white Progressive areas into racially diverse neighborhoods: a pattern that Stern suggests "led to these neighborhoods becoming targets of enhanced policing."[221] Another scholar has concluded that the acts ultimately harmed the women that Progressives supposedly sought to help: they "pushed the women out of the relative stability of their houses and vice areas and into the harsher world of hotel rooms and pimps."[222] No matter who suffered the greatest harm in particular, it is clear that these laws affected American life beyond the halls of legislatures and courtrooms; further, that they did so to the detriment of those who found little representation in those same halls and courtrooms.

Stern disagrees with Hennigan that their legal impact was minor, and he has the better of the argument. Red-light abatement laws "normalized the use of nuisance actions as a means of empowering private citizens to impose their values on others via the court."[223] Alongside liquor

[219] Hennigan, *supra* note 32, at 181.
[220] See generally Thomas Mackey, Red Lights Out: A Legal History of Prostitution, Disorderly Houses, and Vice Districts, 1870-1917 (1987), 353–79.
[221] Stern, *supra* note 34, at 653.
[222] Id. at 653 (quoting Mackey, *supra* note 220, at 261).
[223] Id. at 675.

legislation, these laws were among the first to broaden "the meaning of nuisance to encompass nearly anything that could plausibly be construed as immoral."[224] Stern observes that their principle effect was "only for further punish the marginalized, not to vouchsafe the commons." As one legal phenomena, the red-light district, faded away, its killer—the private suit for public nuisance—was on the ascent. And unlike the labor injunctions, who met their demise in the 1930s, hybrid private nuisance suits still exist. In these respects, the "case for reform" won.

As suggested above, the story of the labor injunction is more clear-cut. These injunctions certainly became popular in the years following *Debs*, much to the dismay of labor strikers. Hundreds were issued between *Debs* in 1895 and Congress's ban of the practice in the 1930s, according to Felix Frankfurter, then the leading scholar on the question.[225] These injunctions faced resistance from both populists and, surprisingly, pro-labor Progressives who otherwise quite preferred equitable remedies and an expanded nuisance. Over the years, several bills were proposed in Congress to try and limit contempt proceedings in federal court; none prevailed in the Progressive Era. It took until the New Deal for the era of labor injunctions to come to a close, where Congress shut the door firmly with the Norris-La Guardia Act.[226] And decades later, in the 1968 decision of *Bloom v. Illinois*, the Supreme Court overruled *In re Debs* and other decisions that permitted summary criminal contempt convictions for serious crimes.[227] Read together, the Norris-La Guardia Act and *Bloom* amount to an almost wholesale rejection of *In Re Debs*. And in this respect, the "case for restraint" won—though it took a while to get there.

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[224] Id. at 682.
[225] Felix Frankfurter & Nathan Greene, The Labor Injunction (1930).
[226] See William E. Forbath, The Shaping of the American Labor Movement, 102 Harv. L. Rev. 1109, 1148 (1989).
[227] 391 U.S. 194, 211 (1968). Justice White explained: "When serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court." If criminal punishment loomed, "considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."

CONCLUSION

The story of public nuisance in the Progressive Era could be read in many ways.[228] The cast of characters involved in it—the brewers, protestors, prostitutes, reformers, judges, authors, and politicians—all interpreted it differently. Still, they each found themselves central players into a centuries-long debate about the contours of the doctrine, all as they fought for new economic rights, defended their vision of the Constitution, crusaded to reform society, or simply tried to scrape by. Their battles—in courtrooms, ballot boxes, legislatures, newspapers, law reviews, and party platforms—highlight the important and malleable role that public nuisance can play in our legal system. In many ways, creativity won out against caution. The end of red-light districts and the judicial suppression of the labor movement show as much. Even so, few "victories" for any camp were absolute. The ultimate end of the labor injunctions years later, for instance, illustrates how restraint narrowly prevailed—eventually.

Indeed, the winding road to any one group's ideal outcome shows, at bottom, the dynamism and the danger behind legal development. Change comes nationally and it comes locally; decisions are penned by Supreme Court Justices and ordinances are crafted by zealous small-town reformers. In one way or another, though, legal change almost always comes from "above." But taking another vantage point—repositioning ourselves to consider the law's effects from "below," from those who are most affected by change but least positioned to affect it—can help us develop a more holistic understanding of the development of law. By examining doctrinal developments through the lens of their effects on "unruly people," this paper has tried to do just that.

[228] See, e.g., Hennigan, *supra* note 32, at 128 ("Some will find in this examination of the Red Light Abatement Laws an optimistic story of how nuisance law can be used to enforce community rights…others, by contrast, will find a cautionary tale about the use of civil remedies to accomplish criminal objectives.")

That leads us back to the present. Though equity courts and red-light districts are a relic of a distant legal and social past, the story of public nuisance is more than a dusty old history. Decisions about what—and even who—constitutes a "nuisance" and how we "abate" those nuisances reflect communal commitments to certain visions of a well-ordered society. Looking at the Progressive Era's debates about public nuisance can help us better understand the "nuisances" we face today. Indeed, the downstream effects of the developments described here—especially the ballooning of public nuisance, the ever-shifting line between criminal and civil law, and the expansion of injunctive relief—are manifold.[229]

Recall, for instance, the homeless encampment in Phoenix that served as our point of departure. A few months after the state court deemed it a public nuisance, the city government cleared it. "People who had lived there for years were hesitant to leave it behind," one reporter explained.[230] "Belongings were packed into green trash bins provided by the city before people got in the back of cars to take them to shelter."[231] Crime has dropped by fifty percent in the area since the clearing, and far fewer homeless people reside in the area.

But new problems have arisen, too. In Phoenix shelters now, "there are virtually no beds available," and typical shelter-goers "have had to move, which makes it harder for outreach

[229] See, e.g., Sean Gray, "Chronic Nuisance Ordinances, Impossible Choices, and State Constitutions," 109 Virginia Law Review Online 124 (2023) (explaining how towns use public nuisance to evict citizens when they contact emergency services too often); Kelly Rissman, "Florida Gov. Ron DeSantis files Complaint about Drag Show Brunch and Kids," Vanity Fair (July 31, 2022) (describing how Florida is expanding public nuisance to prosecute individuals and properties who host drag shows) https://www.vanityfair.com/news/2022/07/florida-gov-rob-desantis-files-complaint-against-drag-show-brunch; Stern, *supra* note 19 (connecting early twentieth-century nuisance developments to Texas' S.B. 8 bill); Mary M. Cheh, "Constitutional Limits on Using Civil Remedies to Achieve Criminal Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," 42 Hastings L. J. 1325, 1326 (1991) (detailing how "civil remedies are blended with or used to supplement criminal sanctions, as evidenced by widespread use of forfeiture in drug cases").

[230] Helen Rummel, "Phoenix's largest homeless encampment, 'The Zone,' is now gone," Arizona Republic (Nov. 2, 2023) https://www.azcentral.com/story/news/local/phoenix/2023/11/02/phoenixs-largest-homeless-encampment-the-zone-is-now-gone/71415236007.

[231] Id.

teams to find them and keep them engaged."[232] Funding to sustain these shelters is running short. Solving one problem for one group of constituents, then, has created new problems for others, particularly unpopular and underrepresented ones.[233] Where criminal law "failed," some would say that nuisance "succeeded." Whether that's the case is ultimately a matter of perspective. What the Progressive Era shows us, though, is that the use of public nuisance—to ends noble or not—is never without consequence.

[232] Justin Lum, "Surviving 'The Zone': Crime drops where Phoenix's tent city once was but homeless crisis persists," Fox 10 Phoenix (Jan. 30, 2024).
[233] See Emma Smith, "Homelessness as a Public Nuisance: Has the Arizona Judiciary Set a Dangerous Precedent?" Arizona State Law Journal (Feb. 1, 2024) ("As advocates for the unhoused have pointed out, the outcome in *Brown* simply changes the problem's appearance; it does not provide a solution.").