1982

Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy

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Recommended Citation
Gary L. McDowell, Equity and the Constitution: The Supreme Court, Equitable Relief and Public Policy (University of Chicago Press 1982).

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Introduction

The Federal Farmer  October 10, 1787

It is a very dangerous thing to vest in the same judge power to decide on law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate.
Until little more than two decades ago the federal judiciary held a position in the American political order quite removed from the policymaking function. Although the courts exercised immense political power in determining the constitutionality of legislative and executive actions, that power was essentially proscriptive. Since then, the judiciary has begun to exercise more than judgment in a good many instances, overflowing its former banks by offering prescriptive decrees in many areas of sensitive social policy. By doing so, it has opened itself to soundly reasoned criticism from nearly every quarter.¹

With increasing frequency the federal judiciary has been assuming a new, positive, posture. From the opinions of Chief Justice Warren in Brown v. Board of Education of Topeka, Kansas,* and Chief Justice Burger in Swann v. Charlotte-Mecklenburg Board of Education, to Judge Frank Johnson in Wyatt v. Stickney, Judge Virgil Pittman in Bolden v. City of Mobile, Alabama, and Judge Frank Battisti in United States v. City of Parma, the trend is clear: there is a willingness to enter into the "political thicket" and attempt to straighten out what the more representative institutions have allegedly failed to accomplish. The recent trend has been for the judiciary to move from a position of decreeing what the government cannot do to a position of decreeing what the government must do.

*Full citations are given in the List of Cases, preceding the Bibliography.
Introduction

The most controversial prescriptive judicial decrees of the Supreme Court—Brown v. Board of Education of Topeka, Kansas; Green v. County School Board of New Kent County; Alexander v. Holmes County Board of Education; Carter v. West Feliciana Parish School Board; Swann v. Charlotte-Mecklenburg County Board of Education; Keyes v. School District No. 1, Denver, Colorado; Lau v. Nichols; Milliken v. Bradley (I and II); and Hills v. Gautreaux—all have rested ostensibly upon the same foundation: the equity power created by Article III of the Constitution. But they have rested on an understanding of that power that is new. Beginning with the two Brown v. Board of Education cases (1954 and 1955), the Court fused the idea of equity to the newly discovered right of psychological equal protection—a right of protection against a "feeling of inferiority"—to forge a new constitutional standard of equality by the law, rather than equality before the law. In particular, equity, which was originally understood as a judicial means of offering relief to individuals from "hard bargains" in cases of fraud, accident, mistake, or trust, and as a means of confining the operation of "unjust and partial laws," has lately been stretched to offer relief to whole social classes. The original understanding of equity has been transformed into a "sociological" understanding that has undermined not only equity as a substantive body of law but the idea of equality as well.

In the process of this transformation of the idea of juridical equity, there has been a substantial loss of judicial appreciation for the great tradition of equity jurisprudence. The Court, in using its "historic equitable remedial powers" to impose its politics on society, is often forced to ignore or deny the great tradition of equitable principles and precedents, which had always been viewed as the inherent source of restraint in equitable dispensations.

I

In the Constitution, the equity power is not well defined; indeed, it is not defined at all. But the lack of constitutional definition in no way obscures what the Framers meant by "all cases in law and equity." For the Framers, as for us, the word was backed by several centuries of jurisprudence. The substantive concept of juridical equity—from its first formulation by Aristotle, through the Roman tradition of Cicero and Justinian, through the efforts of such English and Scottish students of jurisprudence as Ranulph de Glanville, Henrici de Bracton, Christopher St. Germain, Sir Edward Coke, Sir Francis Bacon, Thomas Hobbes, Lord Kames, and Sir William Blackstone, and up to the Founders of the American republic—remained virtually unchanged. From one century to the next the idea was transmitted from Aristotle's first pronouncement:

For that which is evil goes beyond the reasonable; sometimes involuntarily; sometimes involuntarily; when, being unable for life...
From Equitable Relief to Public Policy

The idea was transmitted, with nearly every writer paying tribute to Aristotle's first pronouncement. In the Rhetoric Aristotle had pointed out:

For that which is equitable seems to be just, and equity is justice that goes beyond the written law. These omissions in the written law are sometimes involuntary, sometimes voluntary, on the part of legislatures; involuntary when it may have escaped their notice, voluntary when, being unable to define for all cases, they are obliged to make a universal statement, which is not applicable to all, but only to most cases... for life would not be long enough to reckon all the possibilities. If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms. [1374a]

Law, by its nature general, is limited and suffers the possibility of promoting injustice as well as justice in particular instances. It is necessary that there be a continuing opportunity for deliberation to reassert itself in the realm of positive law. Equity is the power to dispense with the harsh rigors of general laws in particular cases. But equity is always to be understood as the exception rather than the rule. Equity, from the beginning, was viewed as a part of the law, not as some power superior to it.

Throughout the vast tradition of equity jurisprudence one maxim was held to be indispensable in the administration of equity: Aequitas sequitur legem—"Equity follows the law." Equity was necessary, in many cases, to fulfill the law. The law, being by its nature general in scope and application, always admits of exceptions. However, when the law did provide an adequate and complete remedy for alleged wrongs, an equity court was understood to have no authority to embellish or replace it. In particular, it was the common belief that a court of equity had no control over "imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations."

The major innovations in equity jurisprudence, following Aristotle, were in the procedural rather than the substantive realm. In Rome there first appeared a special office for the administration of equity. This idea was brought to its most complete institutional expression in England with the creation of the office of the chancellor, or "Keeper of the King's Conscience." Throughout the entire history of procedural innovations in equitable adjudication it was understood that equity is a potentially dangerous source of arbitrary discretion; and when kings came to be replaced by constitutions, the procedural arrangements for the dispensation of equity had to be reconsidered in light of this potential danger.

In America the debate was largely between those who followed the opinion of Sir Francis Bacon and those who followed that of Henry Home, Lord Kames. Bacon advocated a rigid separation between courts
of law and courts of equity. Karnes believed, to the contrary, that the separation of law from equity was a chimerical idea and that justice, if it were to be served, demanded that each court enjoy a mixed jurisdiction, reaching to both law and equity.

These older debates between Kames and Bacon over juridical equity were essentially different views on how to restrain this necessary but potentially dangerous power. One way differentiated equitable and legal pleadings, making clear that the former was a kind of last resort when the latter had been exhausted. The other way consolidated law and equity but in the process bound equity by rules and precedents through a law or "science" of equity, thus rendering it self-regulating.

But however glaring the differences over the procedural questions, Bacon and Kames were united on a deeper, substantive level. Beneath their differences was a crucial underlying agreement, that equity, though necessary to correct the harshness of strict law, could degenerate into arbitrary judicial discretion. Both believed that equity must be carefully restrained and hedged in order to curb its excesses without undermining its essential function.

The Founders chose to follow the tradition of Lord Kames. In the Philadelphia Convention they moved quickly and relatively quietly to vest in one supreme court, and such inferior courts as might be created, a judicial power that would extend to all cases in law and equity. The procedures for administering the power of equity—like the rest of the judicial power—the Convention chose to leave to Congress.

When the proposed Constitution emerged from the Convention, the fusion of law and equity was assailed by such keen-eyed Anti-Federalists as "Brutus" and the "Federal Farmer." To "Brutus," the provision for the judicial power would allow judges to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter," thereby granting them power "to mould the government into almost any shape they pleased."  

The "Federal Farmer" was equally wary of the proposed judiciary. In his view his countrymen were "more in the danger of sowing the seed of arbitrary government in this department than in any other." The lack of precision in defining the limits of equity in the Constitution was a serious defect that would contribute to "an arbitrary power of discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics" might demand. For if a judge should find that the "law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate."  

Whatever their reservations about the judicial power generally or the equity provision in particular, the Anti-Federalists were unable to thwart ratification of the Constitution. A number of them took to influence to some judiciary.

In the Judiciary Act between those who argued to vest that equity procedures in a "science" of equity, thus rendering it proper to prescribe equity procedures; the Supreme Court under Chief Justiceic and Chancery in England was generally embraced in American law.

The safety provided by the Process Acts was to some from the procedure of jurisdiction to entertain the procedural distinction as a dangerous source of the was generally embraced in American law.

In the nineteenth century the common law in an administration of justice Movement was the proceedings. In time the Court in the name of justice. In 1938 the trend with the adoption of these rules the formal distinctions was abolished.

By combining the peculiar Court in effect ignored core of its procedural adventuring. In 1938, the Court made it of law to their shoes of active, just as the "Fed"
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ratification of the Constitution. But, once it had been ratified, a good
number of them took their places in the first Congress and there were able
to influence to some degree the procedural arrangements of the new
judiciary.
In the Judiciary Act of 1789, Congress effected something of a balance
between those who advocated a hard separation of law from equity and
those who argued for an unrestricted use of equity as a judicial tool in
each federal court. While the act extended equity jurisdiction to all federal
courts, it also established a firm rule as to when causes in equity could
and could not be sustained. In the Process Act of 1792, Congress allowed
that equity procedures in the federal courts would be “according to the
principles, rules and usages which belong to a court of equity as con­
tradistinguished from a court of common law.” This act, as passed, gave
the Supreme Court the discretion to make such regulations as it thought
proper to prescribe equity procedure in the lower courts. In that year the
Court, under Chief Justice John Jay, announced that in making such
regulations it would “consider the practices of the Courts of Kings Bench
and Chancery in England as affording outlines.”

The safety provided in the Judiciary Act of 1789 and the subsequent
Process Acts was to separate rigidly the procedure of equity pleadings
from the procedure of pleadings at law while leaving each court with the
jurisdiction to entertain both. The draftsmen of these bills saw this proce­
dural distinction as necessary if equity was to be kept from becoming a
dangerous source of unfettered judicial discretion. This understanding
was generally embraced by the judiciary as a fundamental maxim of
American law.

In the nineteenth century, however, there began a movement to codify
the common law in an attempt to reduce judicial discretion and render the
administration of justice more efficient. A cardinal tenet of the Codifica­
tion Movement was the merger of equity proceedings with legal pro­
cedings. In time the Codifiers gained ground, and the merger of law and
equity in the name of judicial efficiency and simplicity became common­
place. In 1938 the trend peaked in the Supreme Court of the United States
with the adoption of the New Rules of Civil Procedure. In that body of
rules the formal distinction between equity procedures and legal proce­
dures was abolished.

By combining the procedures of law with procedures in equity, the
Court in effect ignored the dangers of equity that had always lain at the
core of its procedural arrangements. With the Rules of Civil Procedure
of 1938, the Court made it convenient for judges to switch from their shoes
of law to their shoes of equity whenever they found the law too restric­
tive, just as the “Federal Farmer” had warned. In its effort to reduce
equity to a safe and more certain code, the Court opened the door for the power of equity to be exercised with a disregard for precedent or procedure.

II

The underlying assumption of American constitutionalism is that there is an intimate connection between procedure and substance, and that the institutional arrangements of a polity have a direct bearing on its substantive actions. This understanding lay at the heart of the original separation of law and equity. By maintaining a procedurally distinct judicial system, equity would be kept from flowing over and giving the law an undue liberalism, and law would be kept from rendering equitable dispensations too rigidly bound. Each had its place in the American system; and to maintain its authority, each had to be kept in its place. The merging of equity procedures and legal procedures had one overwhelming effect. Without the rigid separation of pleadings, it was only a matter of time until equity no longer would be held as a necessary substantive body of law and would be viewed as merely another set of procedural remedies available to a court. Restraint through adherence to principle and precedent would be lost.

In Porter v. Warner (1946) the Court seemed on the verge of giving equity a radical expansion by arguing that when the “public interest is involved in a proceeding” the equitable powers of the federal district courts “assume an even broader and more flexible character than when only a private controversy is at stake.” But it was not until 1955 that it became clear just how fluid equity had become. The Court, in the second Brown v. Board of Education of Topeka, Kansas case, fashioned a new understanding of the Court’s equitable remedial powers. The central thrust was that in the place of an individual adverse litigant the Court placed an aggrieved social class. Its remedies would be decreed, no longer for the individual who had been injured by the generality of the law, but rather for whole classes of people on the basis of a deprivation of rights—a deprivation that was provable only by resort to the uncertain realm of psychological knowledge and sociological inference. Further, the Court went beyond decreeing discriminatory laws unconstitutional and restricting their operation: it attempted to fashion broad remedies for those so deprived.

What is particularly striking about Warren’s invocation of the federal equity power in Brown (II) is that, while he spoke of the “traditional attributes” and guiding “principles” of equity being controlling, he then ignored most of the more substantial equitable principles in writing his decree. The effect was a blank check.

The understanding of equity differs from the traditional understanding.

Old
Equitable and legal procedures separated.
Applied to specific individual cases.
Focused on specific claims, especially property.
Usually exercised in a way to block the enforcement of an unjust law or action.
Largely bound by precedent.
Required an irreparable injury.

Restricted by the federal government.

Since Brown, the Court’s public perception of, it has sought to define its social-science speculation, both constitutional and sociological equity have sought to define its scope. As we conclude in Swann v. Charlotte-Mecklenburg Board of Education (1971) that “words are the instruments of fairness inherent in equitable principles, they are all we have. One governmental power cannot inaccurately define the appropriate scope of something desperately needed.”

III

The most prominent federal constitutional issue addressed. Equity has been seen as a “private needs.” What individuals from “hard ba...
decree. The effect was to present the lower federal courts with a virtual blank check.

The understanding of equity expressed in Brown (II) and its progeny differs from the traditional understanding in seven essential ways:

**Old**
- Equitable and legal procedures separated.
- Applied to specific individuals.
- Focused on specific concrete rights, especially property.
- Usually exercised in a *proscriptive* way to block the enforcement of an unjust law or action.
- Largely bound by precedent.
- Required an irreparable injury that was immediate, great, and clear.
- Restricted by the federal principle.

**New**
- Equitable and legal procedures merged.
- Applied to broad social groups.
- Focused on more abstract rights, especially equality.
- Greater emphasis on broad remedial mandates, hence generally exercised in a *prescriptive* way.
- Largely unbound by precedent.
- Irreparable injury generally proved by a resort to social-science hypotheses.
- Not restricted by the federal principle.

Since Brown, the Court has continued to expand, and to confuse the public perception of, its power of equity. The result has been to substitute social-science speculation for precedent and principle as the standard of both constitutional meaning and equitable relief. This new tradition of sociological equity has baffled even those of its defenders who have sought to define its scope. Chief Justice Burger was thus driven to conclude in *Swann v. Charlotte-Mecklenburg County Board of Education* (at 15-16) that "words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature and limitations without frustrating the appropriate scope of equity." The problem, of course, is that words are all we have. One must at least suspect that, if the limits of any governmental power cannot be clearly and forcefully articulated, then there is something desperately wrong with our understanding of that power.

**III**

The most prominent feature of this new concept of equity is the object addressed. Equity has now become the means of "reconciling public and private needs." What at the Founding was thought to offer relief to individuals from "hard bargains" has become a judicial power to draw the
line between governmental powers and individual rights and to attempt to create remedies for past encroachments against whole classes of people. The Court in *Brown* (II) established the “equitable principles” doctrine to guide the judiciary in “fashioning and effectuating” their desegregation decrees, and that doctrine has survived through *Swann v. Charlotte-Mecklenburg* and is still alive and well in *Milliken v. Bradley* (II) and *United States v. City of Parma*. But this new equity power in no way need be limited to the desegregation cases. One need only recall Benjamin Cardozo’s observation that it is the “tendency of a principle to expand itself to the limit of its logic” to catch a glimpse of the possibilities.

The Court’s fusion of equity to equal protection in the *Brown* cases has led to a distortion of its interpretations of the Constitution. It has led the Court to attempt to fashion broad equitable remedies for society from the particular cases or controversies brought before it. Equity, originally and historically a power addressed toward individuals, has been stretched to cover entire social classes. As a result, the individual adverse “litigant, though still necessary, has tended to fade a bit into the background.” And the Court has been steadily moving into the realm of legislation. Broad decrees “fashioned and effectuated” for the whole country on the basis of “equitable principles” are, in essence, judicially created social policies.

An older political science assumed that the formulation of policies that were to reach the lives of the people were more safely written by the duly elected representatives of the people. Through a rather intricate system of representation, it was believed that all the conflicting opinions, passions, and interests of the citizens could be filtered up into the legislature and, by a process of coalescing and politics, be fashioned into a public policy that resembled, at least somewhat, the public interest. It was never assumed that the judiciary was competent for that task. As Nathaniel Gorham pointed out to the delegates at the Philadelphia Convention, “Judges...are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.” James Madison made the same point in *The Federalist*, No. 49, when he argued that the judiciary “by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossession.”

The formulation of public policy is an expression of a political will. To be legitimate, such policies must reflect the will of the people, not the independent will of their deputies. The judiciary has no means available for ascertaining the public will in any meaningful sense. It is not, strictly speaking, a representative body. It must be assumed that the Court, when it moves to make decisions with respect to such matters as immediate
To effectuate equitable principles, the doctrine of desegregation as declared in the Brown cases has been stretched to fit the individual adverse "litigant, or to fade a bit into the background." 

That the formulation of policies that were more safely written by the duly elected representatives of the people for the whole country on the basis of the conflicting opinions, passions, and interests of the people might be fashioned into a public policy that reflected the will of the people, not the judiciary, was never assumed as part of the task. As Nathaniel Gorham argued, the Philadelphia Convention, responsible for drafting the Constitution, possessed any peculiar knowledge of the nature and permanency of public interest. It was never assumed that the judiciary "by the nature and permanency of it, to share much in their prepossess-

James Madison made the same point about the judiciary in the nature of the people. He argued that the judiciary "by the will of the people, not the judiciary, has no means available. It is not, strictly speaking, the Court, when it attempts to act in such matters as immediate