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# The Law's Conscience: Equitable Constitutionalism in America

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THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA. By *Peter Charles Hoffer.* Chapel Hill: The University of North Carolina Press. 1990. Pp. xiv, 301. Cloth, $32.50; paper, $12.95.

On May 17, 1954, the United States Supreme Court decided *Brown v. Board of Education*,[1] setting in motion the most far-reaching and intrusive intervention of the courts into the everyday lives of Americans this country has yet witnessed. In the years that followed, *Brown v. Board of Education II*[2] and other important cases in the Supreme Court and lower federal courts would spread the gospel of desegregation throughout North and South via elaborate remedial schemes designed to overcome the past effects of inadequate segregated schooling on minority students. Erratic in effectiveness and controversial in application, these remedies would nonetheless dramatically transform the educational landscape for millions of students. Though recent events cast doubt on the continuing validity of the broadest of these pronouncements,[3] the vital principle remains clear — separate but equal educational facilities are "inherently unequal," anathema to our constitutional order.[4]

Peter Charles Hoffer's[5] new book, *The Law's Conscience: Equitable Constitutionalism in America,* uses *Brown* as the paradigm of an approach to constitutional adjudication that it identifies and traces back through American and British history to its roots in equity, law's oft-forgotten, sometimes scorned cousin. The meat of the book consists of three parts, each concerned with one of the three pillars on which Hoffer's concept of "equitable constitutionalism" rests: trusteeship, equality, and reality. A brief epilogue follows, examining the Supreme Court's affirmative action jurisprudence in light of the author's historical analysis.

The book's overriding observation is that the Warren Court's frequent invocation of "equitable principles" in its decisions refers to

1. 347 U.S. 483 (1954).

2. 349 U.S. 294 (1955).

3. *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (rejecting minority set-aside program designed to remedy prior discrimination absent particularistic evidence of discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (disallowing minority preferencing in seniority-based teacher layoff scheme).

4. *Brown,* 347 U.S. at 495. The Supreme Court continues, from time to time, to uphold extraordinary judicial actions by lower courts designed to remedy violations of this principle. *See, e.g.,* Missouri v. Jenkins, 110 S. Ct. 1651 (1990) (upholding court order that local school district increase tax rates to fund court-ordered desegregation plan despite state law limiting such rates).

5. Hoffer, a professor of history at the University of Georgia, previously coauthored, with N.E.H. Hull, *Impeachment in America, 1635-1805* (1984).

> an approach to law, including constitutional law, based on doing justice for all concerned. [This approach implies] that ideal equity is fairness, giving all their due. Such fairness is expansive and realistic, adjusting disputes and redressing hardships so all parties can live with each other; it does not end with barren recitals of impersonal rights but addresses real harms; it is mutual, multilateral, and reflexive, making the world whole again.[6]

Hoffer distinguishes these equitable principles, involving trust relationships, equality, and "a flexible and humane realism" (p. 8) from the more prevalent, formalistic view of equity known to Americans from Justice Joseph Story's works[7] — a constrained, rule-bound mode of adjudication providing extraordinary remedies in carefully defined situations (p. 12). Beyond this distinction, however, the book asserts that the older, broader language of equity, "without its technical trappings [and] institutional authority but with all of its moral force," was employed effectively in the British and American *political* arenas in earlier times of crisis (pp. 20-21). This essential unity of the political and legal conceptions of equity is at the heart of equitable constitutionalism, and the book argues that the jurisprudence of equitable constitutionalism follows logically, if not ineluctably, from our history.

Placing *The Law's Conscience* in the existing literature is not easy. Much of it is pure legal history, in the happiest sense of that term — historical narrative melded nicely with unobtrusive but trenchant observation. Yet in a sense it is not *legal* history at all, for much of what the book recounts will be quite familiar even to first-year law students. Hoffer uses terms of art like "equity" loosely or in nonlegal ways, and accords some complex legal issues only superficial discussion.[8] Moreover, the author relies on a broad range of sources going beyond those usually relied on in works of purely legal history.

If not precisely legal history, Hoffer's work is not purely a work on constitutional interpretation, legal/political philosophy, equitable remedies, or civil rights either. Centrally concerned with issues of constitutional interpretation, it relies little on the extraordinarily rich literature on hermeneutics in the law and elsewhere. Discussing works of political and legal philosophy, it nonetheless descends frequently and willingly from that highly conceptual level to the more mundane mechanics of equity jurisprudence. And though the author is obviously concerned with civil rights issues, the book hovers about the

6. P. 7. Identifying the methodology of equitable constitutionalism with the Warren Court is not to say that other courts at other times have not approached cases in this way, but only that the Warren Court is paradigmatic. Indeed, Hoffer's book seeks to demonstrate that the approach is both normatively sound and historically supported by prior equity practice and theory.

7. Principally J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (1836).

8. The most important of these oversimplifications concerns the raging debate on issues of constitutional interpretation born in the crucible of cases like *Brown*.

topic in prologue and epilogue and chapters interspersed throughout the text, without settling decisively there either.

The book is best described as a more general work — a broadly conceived, meticulously researched, and sometimes boldly written effort to extract from a series of events the important currents of thought and motivation propelling them. Not uniformly successful, it nonetheless provides insightful, original, and informative reading accessible to students of either history or law.

The three core parts of the work explore the concepts of trusteeship (pp. 23-79), equality (pp. 81-137), and reality (pp. 139-98), which are central to equitable constitutionalism.[9] Each part seeks to link, through exploration of Anglo-American political crises, the legal conception of equity to the political one, a linkage moving toward a unity which Hoffer finds culminated in *Brown* and its progeny (p. 198).

The book examines the trusteeship ideal in the context of two chapters, one concerned with English history of the Protectorate and Restoration and the other with American colonial history. These chapters trace the evolution of equity in the early courts of England, and the evolution of political theory in England and America based on the language of equity and, more specifically, equitable trusts.

Hoffer makes a number of interesting observations in this foundational segment. Focusing on John Locke, not as an exponent of contractarian ideals, but for his analogical utilization of the language of trusts (pp. 42-44), the book finds in his works the seed of ideas that would bloom a century later on a distant continent (pp. 45-46). Thomas Jefferson, an equity lawyer, would take these Lockean foundations and build on them, relying frequently on the language of trusts for revolutionary political argument (pp. 66-67). The Declaration of Independence, which the book compares, segment by segment, to a "bill" (or complaint) in equity, provides a celebrated example of this phenomenon (pp. 71-77).

The trusteeship language of equity avoided certain difficulties for the revolutionaries inherent in contractarian arguments against the Crown. Arguments based on social compact could not justify the drastic remedy the revolutionaries required. But by casting the King as trustee for the colonists,[10] dissolution of the "trust" and replacement of the trustee could be justified (pp. 70-71).

The trust analogy posed problems for the revolutionaries, however, because of the historical view that equity, "the conscience of the

9. The reader must not attach legal connotations to the meaning of these words at the outset because Hoffer does not use these words as legal terms of art. This is particularly important with respect to the terms "reality" and "realism," which Hoffer uses not simply to describe a formalist/realist dichotomy, but more casually to indicate a jurisprudence that recognizes empirical reality and is not confined to artificial legalisms and doctrine. Pp. 139-98.

10. In this model, the colonists would be beneficiaries and equitable titleholders of the colonies.

Crown," was founded (naturally) on the Crown's sovereignty. This made the Second Continental Congress a dubious court to pronounce such a terminal remedy, since it did not derive any authority from the King. By ahistorically reconstituting equity in the language of *popular* sovereignty and appointing the Continental Congress its spokesperson, Jefferson avoided this difficulty (p. 73). The King, having breached his fiduciary duty, could be removed as trustee and the trust dissolved.

Part II of the book concerns the equality norm central to equitable constitutionalism. In the first of two chapters, the slowest chapter of the book, Hoffer traces the early evolution of equity in the state and federal courts of the new republic before moving on, in the second chapter, to consider the role of equality concerns in Reconstruction.

Early authorities on equity, such as Joseph Story, worried that unconstrained chancellors would abuse their broad discretion, reaching out beyond the controversy before them to reorder social and economic relations in the society at large. This concern was particularly acute with respect to the slavery issue. Personally opposed to slavery, Story was nevertheless more concerned with maintenance of the Union. He saw in the "troubled conscience" of the chancellor the potential for its disintegration (p. 82). The ideas of Story and other like-minded authorities would ultimately succeed in chaining the chancellor's discretion by formalizing much of equity practice through unified procedural codes and other doctrinal devices (pp. 100-06).

As the nation neared civil war, cases involving testamentary manumission of slaves would pit the consciences of chancellors against a Southern legal regime steadfast in its barriers against such actions (pp. 111-23). In almost every case, conscience lost (pp. 116-17). But in those few cases where it did not, and where manumission was allowed, Hoffer sees a preference for equality before the law that would have a profound effect on Reconstruction and its legacy (p. 123).

The book characterizes the entirety of Reconstruction as an "equitable public trust" (p. 134). The Reconstruction amendments, the Civil Rights Acts, and the Freedmen's Bureau embodied two of the key ingredients of equitable constitutionalism, trusteeship (the Bureau) and legal equality (the amendments and acts) (pp. 126-34). Unfortunately, however, *The Civil Rights Cases*[11] thwarted the full realization of the principle by refusing to recognize the final element, realism (p. 135). The Court argued that blacks had secured equal rights under the law and must now prosper without governmental favoritism, ignoring the systematic, governmentally fostered reality which guaranteed blacks "inferior legal status, earning power, and political influence" (p. 135). Equality at law and public trust concep-

11. 109 U.S. 3 (1883).

tions were rendered useless while "real judges in real courts were [not] willing to enforce [them]" (p. 137).

The last part of *The Law's Conscience* is its most complex and problematic. In Part III Hoffer explores the necessity of realism to equitable constitutionalism. Although the book finds the Supreme Court's post-Civil War jurisprudence formalistic and singularly lacking in willingness to confront reality (pp. 139-42), it argues that formalism ultimately became a trap for the Court, finally giving way to a more flexible approach which ultimately produced *Brown* — the paradigm of equitable constitutionalism (pp. 143-46).

The salvation of equity from the damnation of formalism came in the form of a doctrine known as Balance of Equity. Developed in response to the need for tolerance of the inevitable inconveniences caused by industry following the Civil War, the doctrine provided a basis for judges to deny injunctive relief against manufacturers in nuisance cases. In such cases the benefit to the plaintiff from an injunction was balanced, rather precariously in most instances, against the harm to the defendant manufacturer from the injunction. If the benefit did not outweigh the harm, no relief would be granted (pp. 151-52).

Balancing the nuisance injunction's impact on the plaintiff and its impact on the enterprise affected inevitably involved real world considerations, and this sense of reality seeped into the opinions in this area (p. 154). The judicial handling of injunctions in other areas, like government regulation and labor, however, remained remorselessly formalistic (p. 156). A generation later, this would begin to change dramatically (pp. 157-58). Balance of Equity evolved under pressure from the new social science and emergent political forces into a powerful tool for managing societal problems by looking deeply into their factual basis, including their impact on the parties and the public, and fashioning responsive remedies based on real world considerations (pp. 171-74).

This approach would lead, twenty odd years later, to the Supreme Court's decisions in *Brown*[12] and *Brown II*[13] (pp. 180-81). The author views these decisions as flawed but proud attempts to reach injustice in a way that would realistically promote fairness for all concerned (pp. 181-90). Initially limited in impact, these attempts would meet with considerable but delayed success two decades later in the courageous remedial decisions handed down by federal district courts.[14]

The book's treatment of *Brown, Brown II,* and their lower court

12. Brown v. Board of Educ., 347 U.S. 483 (1954).

13. Brown v. Board of Educ., 349 U.S. 294 (1955).

14. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (affirming district court decision ordering busing to desegregate the Charlotte-Mecklenburg school system in North Carolina); *see also* J. BASS, UNLIKELY HEROES (1981); SOUTHERN JUSTICE (L. Friedman ed. 1965); J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

progeny is complex and strives for "fairmindedness,"[15] lauding the approach taken while acknowledging the inadequacies inherent in the opinions, the most notable of which is *Brown II's* equivocal "all deliberate speed"[16] formulation (pp. 186-87). This formulation of the time frame for remedial action pursuant to *Brown* virtually eliminated any chance for prompt compliance with the desegregation decree (pp. 186-87). The book nevertheless defends *Brown II,* denying that it represents a compromise to secure unanimity or a concession to federalism and insisting that it represents instead a "highly ambitious" fusion of "higher equity" and real world remedy stressing fairness and flexibility (p. 189).

This defense is somewhat quickly made and not altogether convincing. Certainly arguments can be made in support of the general approach taken in *Brown II,* including those which the author sets out. These arguments do not, however, demonstrate that *Brown II* was not also a compromise designed to ensure unanimity or a concession to federalism.

More importantly, the book recognizes but gives short shrift to important arguments against balancing approaches to cases involving constitutional rights.[17] These approaches pose serious potential dangers. Provision of "realistic" remedies may in practice and perception generate weaker protections than full remedies that are less likely to succeed,[18] and remedial balancing may obscure the substantive right on which it has been fashioned by considering it just another factor in the equation, directly comparable with other interests.[19]

Beyond incidentally submerging spirited substantive debate beneath pseudo-mathematical equations, though, balancing approaches risk permitting intentional cloaking of substantive choices. Indeed, one of the most powerful critiques of balancing centers on the inevitable unavailability of objective valuation techniques for the interests involved.[20] It thus becomes easy to cast around for some likely variables and quantify them in a way that produces the desired outcome. Such a process need not even be conscious.

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15. Hoffer asserts in a brief prefatory cavil against law office history that "the historian must not let commitment to a particular policy or its reform dictate a reading of past documents that distorts their sense or ignores their context." P. xi.

16. 349 U.S. at 301.

17. Pp. 186-87, 285 n.22. See Aleinikoff, *Constitutional Law in an Age of Balancing,* 96 YALE L.J. 943 (1987), for an extended argument against this approach. Note, however, that neither *Brown* nor *Brown II* is generally viewed as a balancing case. Still, the decisional methodology the book supports, stressing accommodation of reality and effective remedies, is susceptible to an analogous balancing critique.

18. *But see* Gewirtz, *Remedies and Resistance,* 92 YALE L.J. 585 (1983) (arguing that realistic interest balancing remedies are preferable to rights maximizing ones but arguing for judicial candor in their application).

19. *See* Aleinikoff, *supra* note 17, at 986-87.

20. *See id.* at 973-74.

Clearly there is a difference between ignoring reality and denying principle. Both are jurisprudential evils and are perhaps, though this is not beyond question, independently rectifiable. Balancing approaches may endanger this possibility. Equitable constitutionalism eschews formalist approaches that ignore situational reality, but in declaiming the virtues of discretion and balancing the book runs the risk of arguing for a methodology obscuring principle.

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The book presents remarkably disparate yet subtly connected ideas in a coherent, interesting way. With the exception of a few difficult pages summarizing the evolution of particularly intricate doctrinal points, Hoffer writes in an engaging, vigorous style which sustains interest throughout. Complex legal issues, where examined, are described with unusual clarity and thus rendered accessible even to the layperson. Hoffer's summary of positions taken by the various Justices of the Supreme Court in the complex affirmative action jurisprudence of recent years is an excellent example (pp. 200-11).

The author weaves great variety into his text. Beyond the usual cases, legal treatises, and law review articles, the book refers frequently to nonlegal texts, correspondence, and papers regarding a broad range of human endeavor. Though its generality sometimes compels explanations unnecessary to the knowledgeable legal reader, the breadth of the book's approach is more than ample restitution for this small inconvenience.

The legal community will find in Hoffer's book a fresh way of conceptualizing old events and ideas. Refusing to be bound to the conventional terms of the interpretational debate, the book puts forth a novel vision of what is going on in civil rights cases and other cases involving complex remedial decrees, ambiguous motivations, and a real world at odds with the doctrinal one. If the book's mission is sometimes unclear, and its argument for "equitable" approaches to constitutional questions not thoroughly convincing, it nevertheless remains consistently readable and informative throughout.

— *Neil A. Riemann*