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Equity and the Constitution

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EQUITY AND THE CONSTITUTION. By *Gary L. McDowell*. Chicago: University of Chicago Press. 1982. Pp. xvii, 180. $20.

Commentators have debated for years the role of judicial activism and policy-making in a constitutional democracy.[1] Moreover, both advocates and critics of judicial activism have often focused their debate on the desegregation cases, starting with *Brown v. Board of Education*.[2] Gary McDowell's *Equity and the Constitution*, therefore, is not the first book criticizing the Court's activist role, nor is it the first to cite *Brown* and its progeny as a primary example of judicial legislation. The book is unique, however, in analyzing the Court's exercise of its equity power to formulate relief in these cases. McDowell argues, after an historical examination of equity jurisprudence, that the Supreme Court has exceeded the equity power granted in the Constitution. Though McDowell musters an impressive analysis of equity history, his narrow historical perspective ultimately limits the impact of this contribution to the judicial activism debate.

The main argument in *Equity* is that the Court's use of its equitable powers to extend broad relief in the desegregation cases violated the "great tradition of equity jurisprudence" (p. 121) and, therefore, exceeds the equity power granted by Article III of the Constitution.[3] McDowell authoritatively traces the principles of equity from their Aristotelian origins to the concept of equity incorporated in the Constitution. He emphasizes two principles of traditional equity inherent in that constitutional concept. First, the exercise of equity power is limited to specific extraordinary cases which involve exceptions to general rules; equitable relief is only available where strict application of a general rule of law would lead to a result contrary to the intent of the rule. Second, strict rules and adherence to precedent must restrict judicial discretion to prevent courts from legislating through the exercise of equitable powers. McDowell asserts that the Court in *Brown* violated both principles: it ignored the particularities of each of the four cases consolidated in *Brown* (p. 97); it found injury from segregation that was intangible, based on abstract rights derived solely from the nature of the plaintiff's *class*, and neither clearly proven nor shown to be irreparable (p. 98); it issued prescriptive decrees rather than merely enjoining enforcement of segregation laws (p. 109); and, finally, the Court extended the relief beyond the plaintiffs as individuals to their racial class (p. 100). These actions, which the Court perpetuated in subsequent decisions, transformed the traditional limited judicial power into a broad "soci-

1. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977) (criticizes judicial activism based on the fourteenth amendment); O. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (favors judicial use of equity powers); N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975) (denounces activism as beyond constitutional powers); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) (favors fierce judicial activism).

2. 347 U.S. 483 (1954) (decision for plaintiffs); 349 U.S. 294 (1955) (formulation of remedy). See p. 4 for the author's listing of the most controversial equity-related decrees; citations start at p. 155.

3. U.S. CONST. art. III, §2, cl. 1 reads, in part: "The judicial Power shall extend to all Cases, in Law and Equity . . . ."

ological understanding of equity" (p. 110) that entangles the Court in policymaking.

McDowell also argues that the Court lacks the institutional capacity to make the policy choices its reasoning in *Brown* depends on. Unfortunately, the reader can only follow this argument with some difficulty. In his introduction, McDowell states that: "An older political science assumed that the formulation of policies that were to reach the lives of people were more safely written by the duly elected representatives of the people . . . . It was never assumed that the judiciary was competent for that task" (p. 10). This argument is lost in McDowell's discussion of equity history but resurfaces in his criticism of the desegregation cases. McDowell's proof of the Court's incapacity rests on the assertion that "one need only consider the lack of consistency in the Court's decisions as well as its continued reliance on sociological and psychological research for its standard of constitutional meaning" (p. 121). This assertion might be supported implicitly by McDowell's discussion throughout *Equity* of historic concerns about the exercise of judicial discretion and by his criticism of the intangible nature of the constitutional injury found by the Court. McDowell erred, however, in placing the burden of finding support for this assertion on the reader. Given the growing literature on judicial capacity to formulate policy,[4] McDowell's passing comments are not very persuasive.

After establishing that the Court has over-stepped the bounds of its traditional equitable powers, McDowell proposes that Congress restrain the Court and restore the limited scope of equitable relief by exercising its constitutional powers over the judiciary.[5] This proposal, offered without analysis or support, seems simplistic at best. It assumes a broad Congressional power to manipulate the powers of the federal courts, an assumption widely disputed.[6] Moreover, it ignores the crucial link between legal rights and remedies. *Brown* itself illustrates that courts protecting widely violated rights will devise equally broad solutions. McDowell must realize that his focus on equity alone will not be enough to restrain the activist Court; *Roe v. Wade*,[7] the abortion case, for example, did not involve the Court's equity power. Thus, he concludes *Equity* by calling for an attempt to change public opinion of the Court and its actions, apparently assuming that the public favors the Court's activism: "The first step in righting our current judicial wrongs is to muster all possible rhetorical force against the prevalent view and to educate public opinion" (p. 135).

McDowell's concentration on equitable powers, while making *Equity* unique, results in a narrow perspective that limits the book's persuasiveness. In the debate over the propriety of judicial activism, McDowell's po-

4. *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

5. U.S. CONST. art. III, §2, cl. 2 subjects Supreme Court appellate jurisdiction to Congressional regulation. U.S. CONST. art. I, §8, cl. 9 grants Congress the power to constitute tribunals inferior to the Supreme Court.

6. *See, e.g.*, Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973); Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter Be Limited by Congressional Power Under the Former?*, 72 W.VA. L. REV. 238 (1970).

7. 410 U.S. 113 (1973).

sition in favor of the "equity tradition" places him in the interpretivist camp.[8] Consistent with this interpretivist status, McDowell devotes a few pages of his "epilogue" to a criticism of the noninterpretivist idea of a "living Constitution" (pp. 127-30). He also criticizes the *Brown* Court's "dubious doctrine" (p. 131) of psychological equal protection and offers an alternative basis for finding a constitutional right in the *Brown* plaintiffs that would be more acceptable to interpretivists.[9] But McDowell does not attempt to formulate a complete interpretivist argument nor to place his views in the context of other interpretivist scholarship. In focusing solely on equitable relief, he slights the broader framework needed to support his conclusions.[10]

Equity's narrow perspective also prevents McDowell from addressing opposing arguments. He assumes, apparently, that *Equity* proves a return to tradition is the only rational course of action. Yet McDowell devotes a chapter to "Joseph Story's 'Science' of Equity" (pp. 70-85) and writes that Story believed, like others, that "[e]quity, like the common law generally, was not a static entity but a dynamic system of jurisprudence" (p. 82). McDowell fails to discuss the possibility that this flexible, dynamic system — equity — could expand to accommodate class relief where appropriate.[11]

A related failure is McDowell's total disregard of the social and political context existing at the time of the desegregation decisions.[12] At that time, Congress had the power to legislate in the civil rights area, but it had not done so. Expansion of equity is arguably appropriate in *Brown* because of two arguments that follow from this context. First, the broad class relief that the Court rendered in *Brown* was the most practicable relief to vindicate the rights of the individual plaintiffs, especially in light of congressional inaction. Second, although Congress had the power to restrain the Court after *Brown*, it chose *not* to do so because the Court was handling a sensitive political issue Congress was incapable of handling at the time. Regardless of the true validity of these and similar arguments that supporters of the desegregation decisions may advance, the significant point is that

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8. The two sides in the dispute on constitutional theory have been labeled "interpretivism" and "noninterpretivism." The nature of the former is that: "[J]udges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." The opposing noninterpretivistic view is that: "[C]ourts should go beyond that set of references and enforce norms that cannot be discovered wtihin the four corners of the document." J. ELY, DEMOCRACY AND DISTRUST 1 (1980) (footnote omitted). *See also* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

9. "In the *Brown* . . . cases, the Court would have been on firmer ground . . . had it approached the 'separate but equal' doctrine as an infringement on liberty rather than as a denial of equality." P. 131.

10. To justify his reliance on an historic interpretation of the Constitution, for example, McDowell needs more than passing references to noninterpretivist viewpoints.

11. McDowell recognizes and discusses cases that involved expanded use of the equity power, although the *Brown* Court failed to use these as precedents. *See* pp. 101-05. He argues, however: "[E]ven the more appropriate cases . . . had never approached the massive expansion of federal equity powers at the expense of the tradition of the principles of equity jurisprudence to the extent that Warren expanded them in *Brown* . . . ." P. 105.

12. One commentator would assert the propriety of the desegregation decisions on the basis of societal values. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 237-38 (1962).

Equity simply does not respond to them.[13]

Finally, writers such as McDowell who spin crafty arguments in defense of the "original understanding" of the Constitution inevitably endorse certain exceedingly unsavory results. Judges are, and should be, reluctant to respond to the claims of those victimized by the base injustice of racial discrimination or brutalized in total institutions by saying: "The Constitution of the United States is the supreme law of the land and provides that you shall not be so victimized or brutalized, but because of some arcane technicalities, fully two centuries old, you will just have to go right on bearing the injustice you complain of." Certain arguments are far more satisfactory in the books of academics than in the opinions of the courts.

McDowell's *Equity* provides an excellent history of the traditional equity power. *Equity* also establishes that the Supreme Court's decisions in *Brown* and its progeny violate that tradition. McDowell maintains a narrow historical perspective, however; he does not place his argument in the context of other interpretivist views or answer opposing arguments. His brief dismissal of less historical constitutional interpretations and his failure to analyze the broad substantive doctrines leading to expansive remedies, among other omissions, tend to cripple his argument. McDowell's narrow perspective prevents *Equity* from being a persuasive attack on judicial activism. Instead, *Equity* provides only another argument that interpretivists may advance and noninterpretivists may reject as irrelevant.[14]

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13. McDowell does point out in a footnote that "[t]he new equity has had at least one formidable advocate." *See* O. FISS, *supra* note 1. His response to Fiss is terse: "Fiss's celebration of the civil rights injunction, however, becomes intelligible only if one abandons the received wisdom of the tradition of equity jurisprudence . . . ." P. 138 n.13.

14. This book was also reviewed in 96 HARV. L. REV. 555 (1982).