The Court, The Constitution, and Judicial Activism: The Search for Limits on the Judicial Power


As the debate goes on about the judiciary and its appropriate role in the American political order, there seems to be agreement from many quarters that the courts have overstepped their appropriate bounds without always advancing the public interest or even their own authority. Even among some who defend judicial activism, there is a recognition that such activism has both practical and constitutional limits. A significant number of commentators are agreed that the courts, and especially the Supreme Court, have violated the separation of powers, causing damage not only to themselves but also to the constitutional order. Appropriately but weakly, Congress has tried to re-establish the constitutional balance by proposing limits on the appellate jurisdiction of the courts. Indeed, the rejection of the nomination of Judge Robert Bork to the Supreme Court was justified by some because they feared that Bork would be an activist, i.e., a justice who would be willing to use his judicial power to advance his own conservative political agenda. In


2. Interestingly, it was the liberals who were most eager to paint a picture of Judge Bork as an "activist," i.e., as a judge who would use his judicial power to advance a particular political agenda. And yet it was Judge Bork who was accused of having had a "confirmation conversion." It would seem, however, that the same charge could be leveled at these liberals,
sum, the nation and most of those who follow the courts closely seem ready to breathe a collective sigh of relief when the door is closed on the judicial imperialism of the past few decades.

Practically speaking, the current state of affairs is satisfactory insofar as almost any degree of restraint would be welcome after the judicial excesses of the past. However, viewed more broadly, one may wonder whether the current moderation or "restraint" is adequately grounded in a clear and comprehensive understanding of what has been called "judicial activism." Indeed, if one considers some recent attempts at formulating a "jurisprudence of restraint," one may well conclude that the current respectability of "judicial restraint" is often little more than a mood formed in response to particular examples of judicial activism that offend the sensibilities of various commentators. In other words, the reaction to the recent era of judicial "imperialism," while justified, necessary, and beneficial, is insufficiently grounded to be enduring.

Consider first, by way of illustration, Archibald Cox's book, The Role of the Supreme Court in American Democracy, in which Cox argues that the Court has overstepped its appropriate bounds without advancing the public interest. Cox argues, for example, that the Supreme Court's use of its power in voiding legislation dealing with obscenity has led to a degradation of public order by denying communities the power of enforcing standards of decency, as those communities understand them. Clearly Cox has been shocked by the level of depravity in our speech and press, and he has remade the case for allowing localities wide discretion in the use of their police power in order to avoid or negate this self-degradation. At the level of practice, this is all well and good, but Cox does not go far enough in his analysis of the problem. Cox assumes that the arguments which led to an expansive interpretation of the first amendment and of freedom of speech and of the press were more empirical than political. Thus, Cox seems to think that it is sufficient to point to the degrading and demeaning level of speech and press to justify a less expansive interpretation of the first amendment. But what Cox ignores or overlooks is what most clear-sighted proponents of a broadly understood freedom of expression have always known: that the expansive interpretation of the first amendment that has been in vogue for the past several decades reflects a critique of what might be called "moderate

who suddenly became proponents of "the passive virtues," so to speak. But as will be argued herein, this embrace of judicial restraint was merely strategic and temporary. Judicial activism seems so deeply embedded in the contemporary political psyche that restraintists like Judge Bork can be made to appear as radicals. Cf. note 35 below.

liberalism. " That is, those who argue for a very broad interpretation of the first amendment with regard to speech and press do so because their conception of liberalism is substantially different from earlier conceptions which were guided by traditional notions of public decency and public morality. In order then to defend a less expansive interpretation of the first amendment, a defense of traditional or moderate liberalism is necessary. Cox's argument for "judicial restraint," to the extent that it is merely empirical, is incapable of supplying adequate reasons for resisting the temptation of judicial activism in the area of free speech and free press.

Again, consider one of the most widely noticed books on constitutional law and interpretation to appear in recent years, John Hart Ely's 

_Democracy and Distrust_. Ely is genuinely concerned with judicial activism, for example and most especially as it came to light in the Court's abortion decision, _Roe v. Wade_. Although the basis of his fear is not always clear, Ely seems to fear that judicial activism will undermine democracy by allowing the Court to act like Platonic guardians, making decisions on the basis of their own highly refined preferences, decisions that should be made by the people or by their elected representatives. No doubt Ely's fears are justified but, as with Cox, his response to the danger is inadequately grounded.

As virtually everyone must know by now, Ely turns-or returns-to a process-oriented jurisprudence to control the danger of judicial activism. Ely tries his best to resurrect and finally secure Justice Stone's argument in that most famous of footnotes in the Carolene Products case. According to that footnote, of course, the Court when exercising judicial review should take a long and hard look at laws that hinder the full play of the democratic process, most especially those laws which limit access to that process. So, when the Court is considering such questions as the apportionment of state legislatures or laws that regulate speech and press, it should be most careful to ensure that the laws in question do not limit the democratic process. And if and insofar as such laws do limit that process, either for the sake of public decency or for the sake of representing some groups or interests at the expense of others,

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7. Ibid., 59.

the Court should use its power of judicial review to strike them down as unconstitutional. In brief, the Supreme Court uses its power of judicial review to ensure the integrity of the democratic process. It should not, however, concern itself with the results of that process as it did, according to Ely, in Roe v. Wade.9

As has been noticed by other commentators of various and different persuasions, Ely’s jurisprudence reduces the Constitution to little more than process. According to Ely, the Constitution intended to create a particular kind of process, a full and open democracy, and when this process is compromised the full use of the power of judicial review is perfectly legitimate. Judicial activism for the sake of protecting a full and open democratic process is not only permissible but even desirable in order to enforce the Constitution and adhere to the intentions of its framers. But standing alone, so to speak, Ely’s process-oriented jurisprudence cannot withstand the temptation of result-oriented judicial activism. And the reason for this is best explained by an exponent of judicial activism, Sotirious Barber, in his monograph, On What the Constitution Means.10 By presenting about as clear and comprehensive a defense of judicial activism as we might wish for, Barber illuminates the deficiencies of Ely’s attempt to limit the Court to deciding process-type questions.

According to Barber, the Constitution should be interpreted as looking to the establishment of a particular kind of society, not merely a particular kind of governmental process. For Barber, Ely is wrong in trying to separate process and result because any process is ultimately judged by its results, i.e., by the extent to which it advances certain values. For example, Barber argues that one cannot make sense of the fourteenth amendment or the first amendment or the due process clause or the equal protection clause without asking what end(s) or value(s) they were intended to serve. In Barber’s language, any interpretation of the Constitution worthy of the name must take its bearings from the “aspirations” that underlay that document. To focus on mere process, as Ely does, is insufficient because the process in question can be judged only in light of its results. A full and open democratic process aims at, or aspires to, a full and open democratic society, one in which certain basic rights like a right to privacy in matters of sex and reproduction must be protected. Any other result would be inconsistent with the principles implicit in such a process. rr

For Barber, the great advantage of constitutional government is that

9. Ely, 105-134.
10. Sotirios Barber, op. cit.
11. Ibid., 34-35.
it forces the people to square their actions with their aspirations, especially with their aspiration for a humane and just society. To reduce constitutional government to mere process then destroys the greatest virtue of constitutionalism, as understood by Barber. And to deny the courts the role of "constitutional conscience," as it were, is to deprive the political order of what may be the most effective spur for encouraging us to live up to our aspirations, to that which is "best in us." Judicial activism is then neither inappropriate nor harmful. In fact, it should be welcomed precisely because it serves to remind us of what we wish to be. The aspirations justify judicial activity, which is to say that judicial activism should continue—and will continue—as long as the aspirations are deemed worthwhile. 12

Of course, to say that Barber has exposed Ely's deficiencies is not to say that Barber's theory of constitutional aspirations is without its own deficiencies. One great problem with this theory is squaring it with a written constitution. That is, what we aspire to be and what the Constitution says might be different. For example, some might aspire to a society in which capital punishment is not practiced. What should we do then with a constitution that clearly indicates that such punishment is constitutional? It is very difficult, as the example of Justice Brennan illustrates, 13 to give up our aspirations merely because they conflict with a document written some two hundred years ago by persons long dead. Interpreting the Constitution in light of what Barber calls our "aspirations" turns that document into little more than a warrant for change, even a warrant for changing that document through what pretends to be "interpretation." 14 Necessarily the question arises as how to maintain the authority of a document that may be changed whenever it conflicts with current aspirations. Under Barber's logic, current aspirations and not the Constitution provide the measure of our political life. However much Barber might try to avoid it, the result of his theory of constitutional aspirations undermines the authority of the Constitution and, therewith, the basis of constitutional government as it exists today.

Somewhat surprisingly then the current state of affairs with regard to judicial activism is far from satisfactory, as the fate of Judge Robert Bork so aptly illustrated. 15 Most attempts to moderate the imperialistic ten-

12. Ibid., 35-37.
14. Barber, 103 and 136. Consider especially Barber's "constitutional" critique of what he calls "a repressive morality," i.e., a morality that condemns indecent speech and behavior. Ibid., 136-37.
15. See note 2 above.
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dencies of the courts do not reflect a clear understanding of the roots of judicial activism and are unable to fulfill their promise of restraint. On the one hand, practical concerns have blinded some to the need for analyzing as deeply as possible the phenomenon of judicial activism, thereby allowing the immediate and the pressing to obscure the distant and enduring. On the other hand, some are concerned with the distant and enduring roots of judicial activism but they often have not gone far enough in their quest to expose these roots. From a reading of Ely one would never suspect that the issues which concern us today have a history, even a history that predates the American constitutional order itself. Of course, the terms of this debate have changed, but this should not mislead one into thinking that today’s debate is wholly new or even simply American and about American things. In other words, the discussion of judicial power and judicial activism needs to be recast in broader terms if the character of judicial power in constitutional government is to be adequately understood. Much that is of immediate concern is at stake, to be sure, but unless judicial activism is comprehended as fully as possible, not only will the debate over it be less than satisfying, so too will be attempts at reform.

**Equity and the Constitution**

Fortunately, among the books assessing the judicial activism of recent decades Gary L. McDowell’s *Equity and the Constitution* stands out because it is not content with a superficial analysis of the problem of activism. Indeed, as will be argued here, McDowell has laid bare the core of judicial activism by discovering the roots of the current situation in the past, even the very distant past. *Equity and the Constitution* is a most unusual book because it uses the past to evaluate the present in a way that will help in the future. It is then a book worthy of close and careful consideration.

McDowell’s argument may be summarized briefly as follows. Beginning with the query, “What accounts for the judicial activism of the past few decades?”16 McDowell argues that the courts have abused their equity power. Such abuse is evident, McDowell argues, by certain procedural changes made in 1938 in the New Rules of Civil Procedure promulgated by the Supreme Court and, more importantly, by a new and untraditional understanding of equity as evidenced in *Brown v. the Board of Education*, I and II. For McDowell, the Supreme Court’s

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most controversial prescriptive decrees" rest on its equity power and these decrees, often far-reaching and legislative in character, reflect an untraditional understanding of equity, even though the Court continues to use the language of a traditional understanding of the equity power. As McDowell describes this "new equity," the Court fused the idea of equity to the newly discovered right of psychological equality—a right of protection against a feeling of inferiority—to forge a new constitutional standard of equality by law, rather than equality before the law ..." (Equity, 4).

Using this new understanding of equity, the Court has upset the balance of the Constitution, undermining the preeminent place of "the duly elected representatives of the people." In sum, "equity 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 equity as well" (Equity, 4).

For McDowell, the transformation of equity is due primarily to "a substantial loss of judicial appreciation for the great tradition of equity jurisprudence." This great tradition, virtually unchanged from its first formulation by Aristotle, through the Roman tradition, the efforts of English and Scottish students of jurisprudence up to the Founders of the American Republic, has been rejected by recent justices and equity, viewed "from the beginning as a part of law, not as some power superior to it," now threatens to overwhelm the law, including the Constitution itself (Equity, 4).

For example, McDowell argues that this new, expansive notion of equity destroys the scheme of the Constitution by which "a rather intricate system of representation [filters] all the conflicting opinions, passions, and interests of the citizens," fashioning them into "a public policy that resembles, at least somewhat, the public interest" (Equity, 10). Judges and courts, being too far removed from the public, were not intended to be part of this filtration process, at least not to the degree they have become so today. As McDowell summarizes his own argument:

The formulation of public policy is an expression of political will. To be legitimate, such policies must reflect the will of the people, not the independent will of their deputies. The judiciary has not the means available for ascertaining the public will in any meaningful sense... . The Court, under the guise of its "historical equitable remedial powers", has been endeavoring to formulate public policies for which it lacks not only the institutional capacity but, more importantly, the constitutional legitimacy. (Equity, 10-11)
If the problem is clear, so is the solution. First, McDowell recommends not only recovering but himself helps to recover "the substantive concept of juridical equity" (Equity, 15). Indeed, most of *Equity and the Constitution* consists of McDowell’s elaboration of the development of the traditional concept of equity, beginning with Aristotle and tracing it through such students of jurisprudence as Coke, Lord Karnes, and Blackstone, with a chapter on "Justice Story’s 'Science of Equity'," and finally concluding with a consideration of the codification movement in the United States. In this way, McDowell demonstrates how the Supreme Court has recently misinterpreted juridical equity and its more appropriate interpretation.

But along with recovering the traditional and safer understanding of juridical equity, McDowell argues that procedural and institutional reform is necessary as well. Federal court procedure should be reformed by separating equitable pleadings and pleadings at law. Such a reform would remove or lessen the danger of "arbitrary government" by limiting judges’ discretion and, therewith, their opportunity "to decide as their consciences, their opinions, their caprices or their politics might demand" (Equity, 17). By separating a court’s equity jurisdiction from its other jurisdiction, judges would be prevented from "stepping into [their] shoes of equity, and giving what judgement [their] reason or opinion may dictate, while ignoring or denigrating the law itself" (Equity, 6).

The thrust of McDowell’s argument and proposals may be summarized as follows: Recovering the traditional concept of equity is the most important task in confronting and understanding the judicial activism of recent decades. It is necessary to understand once again that equity can "degenerate into arbitrary judicial discretion" (Equity, 6). Having recognized this, it is just as necessary to reform present institutional arrangements so as to make it difficult for courts and judges to exercise a dangerous and constitutionally illegitimate discretion by means of the equity power.

It is essential however to undertake a more detailed examination of McDowell’s argument in order to understand the issues involved as fully as possible. McDowell has divided his monograph into three parts. In the first part, entitled "The Foundations of American Equity: Antecedents to 1792," McDowell traces the origin and development of the concept of equity from Aristotle up to 1792. Here he considers most closely Aristotle’s formulation or reformulation of equity and its subsequent development in Roman and English law. He also considers the concept of equity as it was understood when the Constitution was drafted. In the

17. Ibid., 6, quoting the "Federal Farmer."
second part, "The Transformation of American Equity: 1792-1954," McDowell explains the development of equity in the early years of the new American republic and especially how equity was understood by Joseph Story and the codification movement. Finally, in the third part, "The Constitution and the New Equity," McDowell traces what he calls "The Emergence of Sociological Equity" and "descendants" of this understanding as illustrated by certain Supreme Court decisions following Brown v. the Board of Education.

In what follows, consideration will be directed first to the antecedents of American equity, especially to Aristotle’s formulation of this concept and the English debate over the appropriate form and extent of this power, both of which McDowell considers in some detail. This will set the stage for examining both the early American understanding of equity, especially as understood by Joseph Story, and the more recent understanding and use (or abuse) of equity by the Warren Court. As shall become evident in what follows, while McDowell’s argument is in some respects open to criticism, such criticism in no way undermines his most basic and most important argument that the current understanding and use of the equity power has allowed judges to "explain the Constitution according to the reasoning spirit of it, without being confined to the words or letter" of that document, thereby allowing such judges "to mold the government into almost any shape they please." (Equity, 6).

The Antecedents of American Equity: Ancients and Moderns

 Appropriately, McDowell begins his examination of the concept of equity with Aristotle, who reformulated epieikeia in a way that redeemed it from earlier condemnations. Prior to Aristotle’s formulation, "epieikeia stood in marked contrast to the law." In fact, it "stood outside the sphere of law" although it was used to blunt "the sharp edges of the law." Quoting Max Hamburger’s treatise, Morals and Law: The Growth of Aristotle’s Legal Theory, 18 McDowell argues that one of Aristotle’s greatest achievements was to demonstrate that "epieikeia constitutes only the corrective function of the law and is not something different from the law." 19

As McDowell notices, Aristotle spoke of equity in at least three of his works, Magna Moralia, the Nicomachean Ethics, and the Art of Rhetoric, apparently developing his thoughts about equity along the

19. Ibid., 96.
way. In any case, the fullest statement by Aristotle on equity occurs in the *Rhetoric*, where he made "a clear distinction between the procedural and substantive aspects of equity." There, Aristotle argued that "equity is justice that goes beyond the written law," much as he argued in the *Ethics* that "equity, though just, is not legal justice, but a rectification of legal justice."²⁰ And equity is necessary and even beneficial because law always has "recourse to general terms," taking "into consideration the majority of the cases" and being unable to recognize all possibilities or the exceptional. As Aristotle wrote in his *Ethics*:

> When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver himself would decide if he were present on the occasion and would have enacted if he had been cognizant of the case in question. (Equity, 16-17)

And again in the *Rhetoric*, Aristotle spoke of both "voluntary" and "involuntary" omissions in the written law. These omissions are involuntary when something has escaped the legislator's notice and "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" (Equity, 17).

For Aristotle then equity is necessary because law is imperfect, reflecting as it does human nature, and to enforce the law without exceptions or mitigations might result in injustice. "The positive law, being conceived by men, suffers in kind; it is by its nature defective." And the remedy for this imperfection is equity which is "a means of attempting to reconcile the demands of justice with man's ability to be just." But according to McDowell, Aristotle understood that equity might be abused and, therefore, he subordinated it to the law. Aristotle feared "judicial discretion," and he argued that "properly enacted laws remain the primary means for a people to approximate justice" (Equity, 17-18). Equity is the exception, never the rule, and in this way it mitigates the severity of the law without supplanting it.

McDowell goes on to argue that "to an amazing degree the Aristotelian concept of judicial equity continues to be accepted." In fact, prior to the emergence of the new sociological understanding of equity, "the only embellishment of [Aristotle's] observations has been in the procedural rather than the substantive realm" (Equity, 18). For example, Roman jurisprudence, even while embracing more fully a tradition of

"natural law" than Aristotle did, maintained and transmitted Aristotle's understanding of equity as "the means necessary to mitigate or buffer the rigor of the law." Where Roman jurisprudence had its greatest impact was "in its institutional arrangements for meting out equity." Rome developed "a body of equity law" through the creation of certain offices, most importantly, the office of praetor. A corpus of equity law arose based on the edicts of the praetors, a corpus which was "filled out by treatises written by jurisconsults" and led ultimately to "the formal fusion of law and equity" under the reforms of Justinian (Equity, 20-21).

More importantly for understanding how the framers understood equity are English jurisprudential developments, which also preserved and transmitted Aristotle's understanding of equity. McDowell skillfully and concisely traces equity in the writings of Ranulph de Granville and Henrici de Bracton, both of whom wrote legal treatises that "perpetuated the understanding of equity first formulated by Aristotle and absorbed by Rome" (Equity, 22). Again, in 1518, Christopher St. Germain published *Dialogues Between a Doctor of Divinity and a Student of the Laws of England* which "clearly and powerfully articulated the Aristotelian concept of equity." As in Aristotle, so too in St. Germain "equity was not a means of subverting the law but rather a means of bolstering the law.... Equity was to be a healthy complement to the law in its quest for justice" (Equity, 23). Then, at a later period, a debate erupted in England between Sir Edward Coke and Sir Francis Bacon over the most appropriate disposition of the equity power. Coke argued that this power should be vested in the court of Common Pleas, i.e., in common law judges, and not in the Court of Chancery, which was not independent of the monarch. Coke argued that "the power of equity was inherently a judicial power," and that its use was to be learned by developing one's legal knowledge which Coke characterized as an "artificial reason and judgement" that requires "long study and experience" (Equity, 25-26). Bacon, on the other hand, argued that the equity power ought to be separate from the common law and vested in the Court of Chancery as "the supreme judicial tribunal." Bacon feared that "should the law and equity be fused, the law would certainly be devoured by equity," thus undermining the certainty of law by allowing judges to legislate (Equity, 27).

Now this debate between Coke and Bacon was important both for the development of the equity power in Great Britain and the United States. Its importance was underscored by Thomas Hobbes when he wrote *A Dialogue Between a Philosopher and a Student of the Common Laws of England*. Hobbes sided, not surprisingly perhaps, with Bacon and the "executive power." But just as important is the fact that, as McDowell points out, the debate was over procedural matters:
However glaring the differences over procedural questions, Bacon and [Coke] 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. (Equity, 6)

According to McDowell then Aristotle’s understanding of equity was still accepted in the seventeenth century in England. The procedural question was decided in favor of Coke and via the work of Lord Karnes, Aristotle’s understanding of equity was passed to the United States with the aid of William Blackstone. Agreeing with Kames, Blackstone recommended uniting courts of law and courts of equity because both law and equity rested on the same ground: “equally artificial systems, founded in the same principles of justice and positive law.” And in order to lessen the danger of judges exercising an arbitrary discretion, Blackstone would rely upon “a system ... of equity . . . a regular science” which prevented judges from abusing whatever discretion their equity power gave them (Equity, 31).

The extent to which the Constitution was influenced by the outcome of this great debate is reflected by the fact that in 1787 “the Founders quietly moved to fuse law and equity in the separate and coordinate judicial power created by the Constitution” (Equity, 31). Moreover, in the Federalist, when speaking about the equity power, Hamilton argued that this power, although apparently dangerous, would be limited by “strict rules and precedents.” As McDowell summarizes the Federalist:

Thus, for Hamilton the power of equity applied to cases arising between individuals over ‘hard bargains,’ which demanded, strictly speaking, that exceptions be made to general rules. And this power was to be confined by adherence to the precedents that had evolved in equity jurisdiction. (Equity, 41-42)

Such, in summary, is how McDowell discusses the origin and development of equity from Aristotle to the drafting of the Constitution in 1787. Despite its brevity, the scope of McDowell’s argument and research is impressive. Without sacrificing clarity, he has presented an admirable account of the origin and development of equity throughout the Western political tradition. However, some questions arise, especially regarding McDowell’s understanding of the Aristotelian concept of equity and the claim that this concept has prevailed throughout the centuries without more than procedural changes being made to it. This question arises because, as McDowell recognizes in Equity, the West-
ern tradition of political philosophy can be divided into two "camps," often labelled "ancients" and "moderns" (Equity, 51). Tracing the roots of modernity to Machiavelli, McDowell argues that "Machiavelli radically attacked that tradition [i.e. antiquity] by denying that justice has any natural support, any superhuman support." Like his successors and unlike his predecessors, "Machiavelli took his bearings from his empirical observations of how men in fact do live their lives." Hobbes essentially followed Machiavelli's lead, for although Hobbes was concerned "to resurrect concern for natural law," he formulated a "new and lower conception of natural law." Hobbes did so because he divorced natural law from man's reason and attached it to his passions, more specifically, to man's "strongest passion-the fear of violent death." McDowell summarizes his understanding of modernity as follows: "Thus, in the modern tradition, natural law comes to have, as its primary object, mere life rather than life lived well. Human virtue is replaced by human existence" (Equity, 51-52).

There is no reason at this point to argue with McDowell's conception of modernity. However, if the modern experiment is acknowledged to be at odds with antiquity, can it simply adopt Aristotle's conception of equity as one of its own? Is it plausible to argue that a concept such as equity can survive unchanged what McDowell admits was a radical reorientation towards politics and human life? The answer depends on the significance of equity itself, on its importance or centrality to Aristotelian or ancient political philosophy. If equity proved to be central to Aristotelian political philosophy, then it seems doubtful it would or could be adopted wholesale as part of the new dispensation which began with Machiavelli. On the other hand, if equity were to be peripheral to Aristotelian political philosophy, then it might well fit into the modern project as well.

For McDowell, equity is more peripheral than central to Aristotle's political philosophy. As he presents it, Aristotelian equity should be understood as an adaptation to the rule of law, an adaptation which is essentially uncontroversial. To quote from the source, Hamburger, that McDowell relies on most heavily: "Equity is simply legal dynamics as opposed to and corrective of legal statics." Equity is or rather became a technical term under Aristotle's formulation: "Aristotle's great achievement was to explain that epieikeia constitutes only the corrective function of law and is not something different from law." By this view, equity allows for "dispensing with the harsh rigor of general laws in particular cases" without undermining the law or permitting "unfettered discretion" (Equity, 6). "Equity is always to be understood as the exception rather than the rule" (Equity, 18). Accordingly, equity amounts to little more than a means of moderating the potential harshness of the law..."
strictly interpreted and applied. It is little more than a means of disposing of unique or highly irregular cases which the lawgiver(s) could not possibly have foreseen. So understood, equity seems by and large devoid of political implications.

It is possible to wonder, however, whether this interpretation fully comprehends the role equity plays in Aristotle’s political philosophy. Indeed, McDowell himself implies more than this in the context of discussing the shortcomings of the rule of law:

Law by its very nature is limited and suffers the possibility of promoting injustice as well as justice. The positive law, being conceived by men, suffers in kind: It is by nature defective. In order to bring the positive law more closely in line with demands of justice, it is necessary that there be a continuing opportunity for human reason to reassert itself in the realm of positive law. (Equity, 18, emphasis added)

From this perspective equity takes on an importance much greater than that usually attributed to a "technical term." Here equity is the means by which the political order is kept open to human reason. And as it has been argued that the crux of Aristotle’s political project was "to establish a role for reason in political life," equity can be seen as central to Aristotle’s project and as having immense implications for political life itself. For this reason, one can begin to wonder whether equity as understood by Aristotle would occupy the same position or have the same meaning for "the moderns" insofar as they rejected Aristotelian political science and his conception of the best political order.

Elaborating on this, for Aristotle equity is a permanent feature of political life because of the limitations of the rule of law. As customarily interpreted, Aristotle recognized the need to make exceptions to "correct" the law, but never the need to supplant it. Equity is, from this point of view, always necessary but always subordinate to the law. But how "limited" is the rule of law? For Aristotle, the law is or "wants" to be general; it "seeks" to govern men or to allow men to govern in accord with certain generalities for the sake of justice. 22 In being general, however, the law loses sight of the particular or the singular, neither seeing some exceptions nor being able to accommodate the exceptional. Due to these deficiencies in law, in some cases following the law results in injustice, the opposite of what it intends or is intended for. Put differently,
situations arise which could not have been accommodated by the law. For example, the law provides penalties for those who corrupt the young. Such a law makes perfect sense because every political order wants and needs to protect its young from corruption. But, as was well known to Aristotle, questions might arise in enforcing such a law. Should such a law be applied to Socrates? That is, would such a law be justly applied to Socrates? This is not an easy question to answer, nor can an appeal to law adequately answer it because the question itself takes one beyond the law and legal questions.

Legally speaking, the question is: Did Socrates corrupt the young in Athens? But to be fair to Socrates, to be equitable, one cannot answer this question without asking what is meant by "corruption," and whether Socrates did indeed "corrupt" the young. Equity then requires that one assess Socrates’ teaching, an assessment that clearly takes one beyond the law and even perhaps beyond the realm of law. The law assumes, of course, that the meaning of "corruption" is clear and it must assume this. But as Aristotle argues in *Magna Moralia*, equity requires "discrimination," the faculty of making "nice distinctions" that cannot be made by the law or the law-giver as law-giver (Equity, 16). If these distinctions or "discriminations" are not made, the result will be injustice.

Moreover, the answer to the question whether Socrates was guilty of corrupting the young has implications for the character of Athenian political life. That is, if Socrates is held not guilty of corrupting the young, then the character of Athenian society, would change with the old gods perhaps being replaced by new gods. Hence, by rehabilitating equity and distinguishing it from law, Aristotle may be thought of as trying to "institutionalize" the possibility of political change, even political change of a fundamental variety. In its broadest sense then equity may be viewed as Aristotle’s way of offsetting the tendency of the law to stifle political change, especially beneficial political change. For Aristotle, equity is not subordinate to the law, at least not always. Equity is a reflection of the inherent limits of the rule of law and it points to a critique of the rule of law based on the need and desirability of political change. In this way, equity reveals the essential character of Aristotle’s political philosophy and its differences with modern political philosophy.

Turning to Aristotle’s discussion of equity, there is some reason to think that it does occupy more than a peripheral or technical place in his political project. First, Aristotle’s discussion of equity takes place in the context of discussing both the rule of law and what may be translated as the problem of "graspingness," what we might call "greed."24 Aristotle

24. Hamburger, 94.
suggests that the equitable man takes less than the law might allow him to claim. Hamburger corrects Aristotle here, pointing out that equity could entitle a man to more than the law itself would justify. Aristotle’s emphasis draws attention to the rule of law and the problem of "graspingness," of claiming too much for oneself. Perhaps one defect of the rule of law is that it does not in itself sufficiently inculcate self-restraint and therefore needs the corrective of equity and the equitable man. And one might surmise that in regimes governed by the rule of law unmitigated by equity, or in regimes where equity is insufficiently distinguished from law, "graspingness" might be a problem. Thus, equity serves to modify the regime as it modifies the rule of law.

It should also be noted that Aristotle argued that equity is "a rectification of legal justice" while not being legal justice (Equity, 16). Law is general and therefore equity is necessary so the regime can recognize what the law cannot recognize. Furthermore, the equitable man repairs to the "lawgiver," i.e., to the perspective of the legislator or, as we might say, the founder. Some of the implications of this are even noted by Hamburger:

> It is equitable ... to look to the lawgiver and not the law, to the spirit and not to the letter [of the law] ..., to the whole and not to the part ..., to prefer arbitration to judgement, for the arbitrator sees what is equitable but the judge only the law. 26

Of course, looking to the lawgiver in the sense of the founder takes one beyond the law itself, which the lawgiver created in establishing the regime. Looking to the lawgiver in this sense requires a broader perspective, even a different perspective than is required of the judge. The arbitrator, as Hamburger calls him, replaces the judge. For Aristotle, equity seems to point beyond the law understood as clear and enforceable rules in the direction of what we might call "fundamental principles." Aristotle’s discussion of equity seems to suggest that judges as law-enforcers or even law-interpreters are insufficient. Put differently, "legal reasoning" is insufficient and something more, even something different, is required. The reason required resembles that exercised by a founder or lawgiver. And the next question is: To what extent does such reason continue to play a role in political life under the modern dispensation?

McDowell is correct to argue that modernity lowered its sights, that it aimed at preserving life and making life commodious rather than at perfecting or elevating it. McDowell also recognizes that science underlies

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25. Ibid.
26. Ibid.
the modern political project, with advances in science, both natural and political, fulfilling the promise of comfortable self-preservation for the many as well as the few even while removing the many from the tutelage of the few. The law, "public law" broadly understood, replaces the tutelage of old orders as reflected by the fact, for example, that the "monarch" is transformed into "the chief executive," gaining enforcement powers while losing spiritual powers.\(^27\) As McDowell indicates, in modernity the law renders the rule of the many "safe" while the law is rendered both safe and progressive by science, understood as both natural and social science (Equity, 51-53). In this context, the use of science by courts as aids in interpreting the Constitution may not be particularly surprising. But this is anticipating too much.

Modernity builds upon science because science holds forth the promise of permanence, individual and political. Insofar as science succeeds, irregularity disappears or what appeared to be irregularity comes to be seen, by means of science, as regular, general, or certain. Under the advance of science, "irregularities" disappear and equity no longer appears as necessary as it did for Aristotle. If it does persist, it can be viewed as temporary, as something which will pass away with the full development of science. As the new science of politics is developed, equity can be dispensed with because of ever more comprehensive and precise rules and laws. Moreover, given the danger of arbitrariness inherent in an extra-legal discretion such as equity, the consummation of the rule of law based on science is a cause that all can espouse.

Summarizing up to this point: We have considered Aristotle's conception of equity in light of the distinction McDowell makes between "ancients" and "moderns." In doing so, it has emerged that equity might well be considered one of the central features of Aristotle's political philosophy, thereby making it unclear how or to what extent the modern political project is open to Aristotle's understanding of equity. Indeed, Aristotle's rehabilitation of equity may have reflected his recognition of the limits of a scientific understanding of man as the basis of political life.\(^28\) Insofar as modern political philosophy is based on science, Aristotle's rehabilitation of equity appears unnecessary. As we shall see, under one view of the modern political project equity does appear in a much different light than it appeared to Aristotle.

\(^{27}\) Consider *Federalist* 69, where Hamilton implies that the most important difference between a president of the United States and the monarchy of Great Britain is that a president lacks spiritual authority. *Federalist Papers* (New York: New American Library, 1969).

\(^{28}\) Nichols, 110.
Early American Equity and Its Antecedents: Modernity and Rule of Law

As indicated above, it is necessary to consider equity under the modern dispensation in order to assess McDowell’s claim that Aristotle’s conception of equity has survived pretty much intact from its origins almost to the present. For purposes of clarification, this examination will proceed on the assumption that there are basic or fundamental differences between the “ancients” and the “moderns.” The following discussion will then underline the differences between the ancients and moderns even though some of the moderns being considered may not have understood their own activities in light of this distinction. Thus, it may well be that the method of proceeding will skew the discussion immediately following by virtue of what might be an “imposed framework.”

One of the more interesting facets of McDowell’s account of the modern conception of equity is the fact that as modernity develops the distinction between law and equity tends to disappear. More precisely, whereas Aristotle stressed the differences between law and equity, between legal justice and the kind of justice produced by the equitable man, the moderns stress the similarities between law and equity. Indeed, equity is collapsed back into law as modernity develops. That this is so and that this represents a departure from Aristotle’s understanding of equity becomes clear even in the debate between Sir Edward Coke and Sir Francis Bacon, to which we now turn.

As McDowell argues, Coke and Bacon were agreed that equity was potentially dangerous because it could, if left unchecked, consume the law. Coke saw this danger as greatest were this power to be entrusted to the king or his courts. He denied “that the royal prerogative was ever to be considered above the law,” which would be the result if the equity power were vested in the king’s Court of Chancery. As McDowell summarizes Coke’s argument:

For Coke, the power of equity was inherently a judicial power; equitable dispensations, made to mitigate the severity of the received law, fall to judges, not to the king. If the equity court, the Court of Chancery, should have the right to review common law proceedings, then not only is equity wrenched from the judicial power but the law is reduced to a position of subservience to the royal whim. (Equity, 26-27)

For Bacon, on the other hand, equity jurisdiction ought to be separated from the common law jurisdiction in order to maintain “the certainty of the law.” If courts of equity and courts of law were not separated, then judges would use their equity power to “mutilate the law,
serving not to supplement but to supplant it. " As McDowell says, "the fusion of law with equity" would mean that "judges could cease to judge and begin to legislate" (Equity, 27).

Both Coke and Bacon, although disagreeing about where the equity power should be lodged, emphasize its dangers more than Aristotle. That is, equity is more problematic for both Coke and Bacon than it was for Aristotle and both sought to control it in order to preserve the integrity of the law. Ultimately, this concern leads via Lord Karnes and Blackstone to "systematizing" equity in order to remove the danger of an arbitrary discretion being wielded by judges (Equity, 29-32). But it is not at all clear that Aristotle thought equity could be "systematized." As Sir Ernest Barker has written: "Greek 'equity' was based on the idea of fairness and humanity in some ways analogous to the idea underlying English Equity or Roman ius Naturale; but it was in no sense (as they were) a formulated body of law. "29 Why the change and how is it related to modern political philosophy?

Under the modern dispensation, the rule of law is far less ambiguous than it was for Aristotle. In part, this is due to the modern conception of reason, which Hobbes called "the spy of the passions." For Hobbes as for others in modernity, man is essentially selfish or self-centered; he seeks above all else to preserve and advance himself, seeking power after power until he dies (Equity, 52). Reason, as the servant of the passions, does not and cannot rule the passions. And because it is subordinate to the passions, reason cannot be trusted to govern or rule. Rather, reason should be governed and the best means of doing this is the law. As reason is suspect, so too is discretion in any form. Reason should be subordinated to the law, which is to say that the best political order is one in which the law is perfected to such a degree that discretion is unnecessary.

Modern constitutionalism reflects this understanding of reason. The most fundamental political artifact is a law, a constitution, a law which limits government by establishing limits on official discretion. Almost any manifestation of discretion, whether legislative, executive, or judicial, is often suspect. At its most extreme, the rule of law displaces or replaces the rule of men.30 Thus, it is not wholly surprising that the distinction between law and equity tends to disappear under the modern dispensation. For example, Blackstone wrote in his Commentaries on the Laws of England:

30. It is often said that the Constitution of the United States created "a government of laws, not of men." Most often, this is said precisely when it seems least true, e.g., in the
Equity . . . in its true and genuine meaning, is the soul and spirit of all law: *positive* law is construed and *rational* law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. But the very terms of a court of *equity*, and a court of *law*, as contrasted to each other are apt to confound and mislead us; as if one judged without equity, and the other was not bound by the law. (Equity, 31)

Moreover, Blackstone further depreciates equity by arguing that the rule of law without equity is preferable to equity unbound and unlimited, even though such rule might be harsh:

... if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. (Equity, 31)

In distinction from Aristotle, Blackstone preferred the strict and inflexible rule of law to an equity power that left judges free to decide cases according to their reason or conscience.

A similar stance toward equity was struck by at least some of the most prominent American legal scholars in the early years of the republic, e.g., James Wilson and Joseph Story. As McDowell points out, James Wilson argued against separating equity from law, saying that such a separation was "absurd."

For Wilson, courts of law are also courts of equity, and courts of equity must also be courts of law. The reason is clear: both questions of law and questions of equity have, as their primary object, justice. To separate the two concerns is to undermine the primary object of all judicial power. Law and equity are woven so closely together that to separate them would rip asunder the fabric of justice. (Equity, 42)

Moreover, separating law and equity is unnecessary for Wilson because eventually equity becomes law. For Wilson, law and equity "are in a state of continual progression; one occupying incessantly the ground which the other, in its advancement, has left. The posts now possessed by strict law were formerly possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law" (Equity, 42). As James Wilson saw it, equity perfected becomes law, leaving some-

midst of a constitutional crisis brought on by the exercise of power beyond the law. For one of the more forceful and consistent exponents of this view, cf. the works of Raoul Berger, too numerous to cite here. See note 1 above.
thing of the impression that in the best political order law replaces equity or equity becomes unnecessary. Nothing in Aristotle’s discussion of equity conveys the impression that equity is temporary or that it can, at some time in the future, be replaced by law. For Aristotle, equity is a permanent feature of political life because “the material of conduct is essentially irregular.”

Similarly, Joseph Story also was ultimately dissatisfied with equity, arguing that eventually equity could be reduced to rules if equity were cultivated as a science. As McDowell summarizes in his chapter entitled, “Joseph Story’s Science of Equity”:

The problem (as Story saw it) was not that equity lacked exact principles and settled rules but rather that equity had not yet been cultivated as a science. The confusion over equity led to a ‘spectral dread of it’ as being a transcendent power, acting above the law, and superseding and annulling its operations at the whim of any judge. Story insisted that equity was, to the contrary, more than any other department of the law, completely fenced in by principles. If the common law was to be preserved, it was necessary to cultivate equity as a science, for, at bottom, equity was the heart of the common law because it ‘addressed to the consciences of men the beneficent and wholesome principles of justice.’ (Equity, 73)

As McDowell notes, Story’s works, Commentaries on Equity Jurisprudence and Commentaries on Equity Pleadings, were intended to be systematic or scientific. And Story understood his efforts as nothing less than trying to create a legal science that “may be said almost to compass every human action” and one which resembled “the natural sciences where new discoveries continually led the way to new and sometimes astonishing results” (Equity, 84).

Again, in Story’s writings as in those of James Wilson, elements appear that have no counterpart in Aristotle. Although McDowell is correct to distinguish Story’s conception of science from what is all-too-often prevalent in contemporary social science, nonetheless Aristotle gives little or no indication that equity itself may be transformed into rules or even into a code of principles. Moreover, the idea of progress, apparently central to the thought of both Wilson and Story, has no counterpart in Aristotle. The reason for this may well be that for Aristotle the world was less measurable and malleable than for Wilson and for Story, who both alluded to the apparently great promise of progress based on the modern sciences. In any case, whatever their assessment of science and the promise of progress it holds, both Wilson and Story argue that it

is possible to transform equity into law, to systematize it, with the aid of science.

McDowell goes on to distinguish Story, the political moderate, from the codifiers like David Dudley Field, who wanted to codify all law for the sake of simplicity and certainty. But viewed in light of Story’s attempt to systematize equity, it is more difficult to distinguish him from the codifiers than McDowell believes. As McDowell notes, Field’s approach to codification was “historical,” i.e., basically the same approach Story adhered to. However, McDowell tries to distinguish Story and Field by arguing that the latter was more radical: “whereas Story had been satisfied to restate existing law and demonstrate to the present the relevance of the past, Field went further. He ultimately sought not only to restate existing law but to cut off its ‘excrescences’ and to amend it to meet modern conditions” (Equity, 87). But as we have already noted, Story was not entirely immune from the promise of progress based on science. Indeed, McDowell admits that “Story accepted as his obligation the ‘scientific’ exposition of the common law,” meaning that he was prepared to mold the common law according to the dictates of “new discoveries,” even those discoveries that lead to “new and sometimes astonishing results.” To be sure, Story was more keenly aware than the codifiers of the dangers of legal and social engineering on a grand scale because he was convinced “how slowly every good system of laws must be in consolidating; and how easily the rashness of an hour may destroy what ages have scarcely cemented in a solid form.” Nonetheless, however adamantly Story denied “the methodology of the Codification Movement,” his goal was similar if not identical to theirs: “to introduce uniform principles and rules of law and equity throughout the nation, at both the state and federal level” (Equity, 82). In this sense, Story is closer to the codifiers than he is to Aristotle in that he looked forward to the creation of a nearly perfect code of law and/or rules by which judgment would be rendered safe and disputes fairly resolved.

Viewed from the perspective of the distinction between ancients and moderns then both Story and Wilson can be made to appear decidedly modern. They both possess a great faith in science, natural as well as political and legal. In fact, both Story and Wilson seem to have entertained the possibility of the perfection of man and of society through the cultivation of these sciences. At the very least, when compared to Aristotle, both seem decidedly “progressive,” if not as simplistically progressive as some of their contemporaries. And because of their faith in science and progress, both men seem to suggest that equity is dispensable or that it will, in the future, become unnecessary.

But this clarification, while it does distinguish Story and Wilson from Aristotle, does not undermine McDowell’s more pressing argument
that the roots of judicial activism lie in the expansive use of the equity power. It is by means of the equity power that the developments of modern science make themselves felt in the legal order. Story knew this and therefore he undertook to cultivate equity "scientifically," arguing that such a cultivation would or should take place over the course of centuries. To use the language of Story, only when the science of jurisprudence is perfected, when it may be said to compass every human action, measure every human duty [by] searching into and expounding the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation, only then will equity be perfected and cease to be dangerous (Equity, 84). Story's faith in progress may have been greater than Aristotle's, but not so great as more recent social scientists or social engineers who fail to appreciate how superficially idealistic is their "pragmatism." However great, Story's faith was bounded by "elements of morals and ethics, and the eternal law of nature," i.e., by principles deemed to be fundamental or unchanging and which can be used to evaluate each and every political action (Equity, 84). In sum, as McDowell argues, Story's science was not "value-free" but was firmly grounded in fundamental or first principles. Without such principles, a grossly expansive kind of equity appears, an equity power which is hitched directly to science, pseudo and otherwise, and judges often simplistically adopt the latest conceptions of "progressive public policy" because they carry the imprimatur of science. But this is still anticipating too much.

Therefore, whatever might be said of his claim that Aristotle's conception of equity has survived almost to the present with little adaptation, McDowell is correct to direct our attention to equity, its origins, and its development in the modern age. By considering equity in both its Aristotelian and its modern manifestations, it is possible to understand more clearly the character of constitutional government and perhaps even the character of the modern political project. On a more practical level, it is possible to understand the most recent manifestations of judicial activism as the result of the radicalization of certain tendencies, most importantly, of the tendency to enshrine science as the only legitimate kind of knowledge and as the only legitimate measure of social progress. If inaccurate regarding certain particulars, McDowell is correct to argue that recovering the Aristotelian understanding of equity is essential for preserving the health of constitutional government.

The Transformation of American Equity:
The Rise of Sociological Jurisprudence

Up to this point, we have seen that despite McDowell's impressive argument to the contrary, Aristotle's conception of equity has been
transformed over the course of two centuries of development. Nor should this be surprising. Modern political philosophy is fundamentally different from Aristotle’s political philosophy and because equity is central to the latter’s political project, it could not be merely transmitted with only minor or procedural embellishments into the modern era. As we have seen, equity is depreciated under the modern dispensation even to the point of being collapsed into law. Ultimately, the hope of modernity was that equity would prove unnecessary as “public law” developed and the rule of law was perfected.

Moreover, we have seen that in the early years of the new republic, equity was understood in its modern manifestation. The Constitution fused law and equity and at least some of the most prominent American legal scholars worked to “systematize” it in order to prevent the possibility of its abuse by judges. There even was some agreement that equity would ultimately disappear, consumed as it were by the law. In the words of James Wilson, “The posts now possessed by strict law were formerly possessed by equity; and the posts now possessed by equity will hereafter be possessed by strict law” (Equity, 42). As with other early modern theorists, so too with early American theorists: As science rendered political and social progress possible and real, judicial discretion exercised by means of the equity power would prove to be unnecessary.

But what happened? According to McDowell, a radically new kind of jurisprudence appeared, one which altered the traditional conception of equity, one which freed judges to legislate rather than judge, to make policy rather than do equity. And this new jurisprudence comes to light most clearly in the Supreme Court’s decisions in Brown v. Board of Education, I and II. As McDowell argues:

The school desegregation cases posited a new understanding of equitable relief, and this is one of their most important but least discussed aspects. In the second historic Brown v. Board of Education of Topeka, Kansas the Supreme Court, in essence, fused the idea of equity to the newly discovered right of psychological equal protection that had been pronounced in Brown I and, in doing so, generated a new sociological understanding of equitable relief. This broadened concept of equity has been a major source of an assumed judicial power to formulate—rather than merely negate—public policies. (Equity, 97)

For McDowell then Brown II constitutes at once a theoretical reformulation of equity jurisdiction and an exercise of judicial power of unprecedented scope.

To order the transformation of ‘racially discriminatory’ schools with ‘all deliberate speed’ abandoned the entire tradition of American equity
jurisprudence. The stipulation that the district courts would be responsible for determining whether the local authorities were complying with the order would demand that the court's venture into the realm of educational policy would be unprecedented in scale. (Equity, 109-10)

McDowell's critique of the Court's jurisprudence in *Brown* I and II is persuasive. As McDowell asserts: "In order to proclaim the new application and understanding of equity in *Brown* II, Chief Justice Warren was forced to ignore much of the vast tradition of equitable principles that had developed in America from the time of the Founding." More specifically, Chief Justice Warren's opinion obscured "the most fundamental equity maxim... the separation of law and equity." Earlier judges had maintained this distinction through the use of "established doctrines and settled principles of equity," thereby exercising their discretion "guided by a reverence for precedent." Early courts acted on the basis of the law and "to assert that courts of equity had the power to vindicate abstract principles of justice" would have been viewed as a completely unwarranted extension of judicial power. Moreover, earlier courts had often deemed it impossible for courts to act equitably unless the injury suffered was "irreparable." To claim such an injury, the complainant needed proof, as "mere assertion [of] irreparable injury was not enough." As McDowell argues: "Facts must be alleged from which the court can reasonably infer that such would be the result." Also, the principle of federalism influenced early courts in the use of their equity jurisdiction. "Throughout its equity opinions the Supreme Court deferred to the sanctity of the... federal system." The integrity of the states should be scrupulously protected and, at one time, "even the unconstitutionality of a state law was insufficient to invoke the `extraordinary power of a court of equity, because the preservation of the autonomy of the states was conceived as `fundamental' under the American Constitution." (Equity, 102-03).

In *Brown* II, the Supreme Court violated at least two of these attributes of traditional equity, according to McDowell. First, the Court was forced to rely upon "a feeling of inferiority" to assert that minority children were being injured by segregated schools, "a wholly inadequate injury" by traditional standards. Moreover, Chief Justice Warren could assert only the probability of such an injury in *Brown* I, saying there that a "feeling of inferiority... may affect their hearts and minds in a way unlikely ever to be undone" (Equity, 98). Furthermore, even if one grants the legitimacy of the Court's assessment of the irreparable injury caused by segregation-difficult to do according to McDowell without relying on such notions as "conscience" and "moral duty"-to go beyond enjoin-
ing the enforcement of the state laws in question violated "the sanctity of the ... federal system." By and large, educational policy is entrusted to the states under the Constitution. To stipulate "that the district courts would be responsible for determining whether local authorities were complying with the order would demand that the courts endeavor to superintend a decree so vast that courts in essence assumed a legislative function." As a result of Brown II then, the Supreme court "abandoned the entire tradition of American equity" (Equity, 109-10).

McDowell is aware, however, that even though the Supreme Court did go very far in Brown II, it was not the first time that the equity power was given an expansive interpretation. In fact, McDowell himself argues that there were appropriate precedents available to Chief Justice Warren that would have supported his broad understanding of the Court's equity power, had Warren chosen to use them. For example, in Osborn v. the Bank of the United States, decided in 1824, the Supreme Court held that "in a proper case in equity, [a federal court] may enjoin a State officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant" (Equity, 102). And in Johnson v. Towsley, decided in 1871, the Court ruled that "courts of equity have the power to inquire into and correct mistakes, injustice, and wrong in legislative and executive action when it invades private rights." More generally, McDowell points out that following the Civil War "the Court was beginning to take the view that deprivation of any constitutional right might be sufficient to constitute an irreparable injury for which the complainant could appeal to equity principles." Thus, in Truax v. Reich, for example, the Supreme Court used its equity power to enjoin the enforcement of a state law that restricted the number of aliens an employer could hire because it violated the equal protection clause of the fourteenth amendment. And this ruling was expanded in Terrace v. Thompson when the Court ruled that complainants who allege violation of constitutional rights need not "take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights. The complainants present a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution." Indeed, in 1939 the Supreme Court ruled that "there need not be any jurisdictional amount of loss to the complainant before a case can be brought in equity on the ground of constitutional deprivation" (Equity, 103). And even McDowell admits that Warren has "a perfect precedent" for his Brown II opinion in Porter v. Warner, where the Court argued:

since the public interest was involved in a proceeding of this nature, those equity powers assume a broader and more flexible character than
when only a private controversy is at stake. Power is thereby resident in the District Court, to adjust and reconcile competing claims and to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the Court so that their rights in the subject matter may be determined and enforced. (Equity, 105)

Obviously then although McDowell is correct to argue that *Brown II* was "a massive expansion of the federal equity power at the expense of the tradition of the principles of equity jurisprudence," (Equity, 105) that decision was not without precedent in the decisions of the Supreme Court. As McDowell’s analysis of the precedents illustrates, the equity power had been given a fairly expansive interpretation even before *Brown II*. What is it then that distinguishes *Brown II* from its predecessors and allows McDowell to argue that it constitutes a significant break, even a radical break with the traditional understanding of equity?

At bottom, the Supreme Court’s understanding of the equity power in *Brown II* rests on a new view of the judicial function, which in turn rests on a new view of the Constitution. To quote McDowell:

> The prescriptive decrees of *Brown II*, *Green v. County School Board of New Kent County*, *Carter v. West Feliciano Parish Schools*, *Swann v. Charlotte Mecklenberg County Board of Education*, *Hills v. Gautreaux*, and *Millikin v. Bradley II* are clear examples of a new view of the judicial function. They are, to be sure, the results of a new sociological understanding of the inherently positive "historic equitable remedial powers" ... possessed by the federal judiciary. But this new notion of equity has been made possible only by a new and widely accepted judicial view of the Constitution itself. (Equity, 127)

According to McDowell, there are "two distinct but related lines" to this new understanding of the Constitution. One line holds "that opinions of the Supreme Court-constitutional law-have the same status as the Constitution itself" (Equity, 128). The other, more basic line holds that "the Constitution is not bound by any particular political theory, is not permanent and fixed, but is instead free to move amoeba-like through history" (Equity, 129). That is, *Brown II* rests upon the idea of a "living Constitution." Of course, this view of the Constitution did not originate in *Brown*, and as McDowell is aware it did not even "originate with the Warren Court" itself. But the Warren Court did fully embrace this understanding of the Constitution, with dire implications for the Court’s understanding of its own power and its use of the equity power.

As McDowell clearly understands, a "living Constitution" moves "amoeba-like through history" because it is "not bound by any particular
political theory" (Equity, 102). A "living Constitution" is one which has been severed from its roots, one which has been emptied of political principle. Of course, once emptied of its own political principles, a constitution provides little guidance for politics and political action. Such a constitution is adaptable, even infinitely adaptable, in order to meet the exigencies of the moment or basic changes in society that could not have been anticipated by earlier generations. Such malleability in a constitution is not without its advantages, as it allows the government to choose, unconstrained by what might well be outdated or irrelevant considerations, the most effective public policy available. For example, to use one of the earliest and clearest defenses of the "living constitution," Benjamin Cardozo argued in his still influential book, The Nature of the Judicial Process, that the fundamental principles of the American political order—liberty, equality, and property—have no fixed or permanent meaning and were, therefore, changeable or malleable. They could be molded to accommodate new and unforeseen exigencies, thus ensuring that the Constitution was to be adaptable, flexible, and relevant.

Of course, as Cardozo understood, guidance is still necessary in order to ensure "progress," to ensure that we adapt our Constitution for better and not for worse. And Cardozo also understood that such guidance best comes from science, from social science or, as Cardozo called it, from the "sociological method." It is then but a short step from a "living constitution" to what is best called "sociological jurisprudence," i.e., a jurisprudence that takes its bearings more from social science than from history, logic, or even from the meaning of the Constitution.

As McDowell argues, Chief Justice Warren’s opinion in Brown I hitches the meaning of the Constitution to social science. Indeed, Warren’s opinion reads like an application of what Cardozo called the "sociological method." First, Warren argued that history is inconclusive, i.e., that it is impossible to say on the basis of the available evidence that the framers of the fourteenth amendment intended to proscribe legally mandated racial segregation. This leads Warren to argue that it is impossible to conclude that the Constitution does proscribe racially segregated schools, a conclusion that does not follow as logically as Warren assumes it does. But having concluded that the Constitution does not address the question of racial segregation, Warren turns to science, specifically to psychology, for guidance. And, of course, Warren "discovers" there that segregated schools do irreparable damage to the hearts and minds of minority children by undermining their self-es-

33. Ibid., 51.
teem. This allows the Chief Justice to declare such schools unconstitutional under the equal protection clause of the fourteenth amendment (Equity, 98). In fact, Brown I may be said to "update" the Plessy decision that led to separate but equal schools by citing evidence unavailable in the relatively unsophisticated age in which Plessy v. Ferguson was decided. In any case, in Brown I the Constitution fades into the background and science comes to the fore as the justification for holding racially segregated schools unconstitutional. The legacy of racial segregation is condemned, but not by virtue of the supreme law as by virtue of science.

While indicating his disapproval of this legacy, McDowell argues that the Court’s reasoning leaves much to be desired. First, the Court’s reliance on social science blinds it to some deeply rooted constitutional principles, e.g., federalism. Entrusting the federal courts with the power to superintend desegregation meant, as is all too clear now, that local and state authorities would be subjected to the ever-constant scrutiny of federal judges and other federal authorities (Equity, 109). More importantly; however, by interpreting equity to guarantee "flexibility and expansiveness, so that new remedies may be invented or old ones modified in order to satisfy the needs of a progressive social condition," (Equity, 104) the Court subordinates the meaning of the Constitution and the scope of the equity power to an ever-developing science. Progress as defined by science takes precedence over adherence to constitutionally established principles and perhaps to the idea of "abiding principles" altogether. In following science, the Court prepares the way for Justice William Douglas’s assertion in Harper v. Virginia Board of Elections that the principles themselves change (Equity, 129). And at this point, "sociological jurisprudence" is left virtually unrestrained in its attempt "to satisfy the needs of a progressive social condition." As McDowell says: "The result [is] public policy, not equitable relief" (Equity, 135).

Conversely, by relying on science, the Court lost the opportunity to be the nation’s "republican schoolmaster" (Equity, 134). If the Court had grounded Brown I firmly in the Constitution—and this would only have required it to adopt Justice Harlan’s dissent in Plessy v. Ferguson—the result would have been a "judicial opinion ... woven into the fabric of the American political consciousness to such a degree that it would be taken for granted" (Equity, 134). The Constitution and what the Court said it was would have coincided in a way that not only solidified but even raised the foundations of the American political order to a new height. In sum, in Brown I the Court let pass an opportunity to assert the relevance of the Constitution as fundamental law and to nur-
ture a respect for that document and its principles as the centerpiece of American political life.

But however much such an opinion might be wished for, it is important to understand the appeal of the opinion Warren wrote. As noted earlier and throughout, modern constitutionalism is a complex phenomenon. On the one hand, modern constitutionalism reflects modernity’s acceptance of the rule of law as superior to the rule of men because while laws are disinterested, men are not. Moreover, modern science promises the perfection of the rule of law because it claims to be able to explain human behavior systematically. As even Joseph Story could write, the science of law is "vast," "intricate," and "comprehensive..." In the widest extent it may be said almost to encompass every human action; and in its minute details, to measure every human action. As McDowell summarizes Story’s project: "He saw equity not as a mere set of procedural remedies but as a system of jurisprudence, an auxiliary to the strict law, which aimed at an understanding of justice that transcended the fluctuating decrees of popular consent. He sought to bring the law into a state approximating the exactness of Science" (Equity, 84).

Under the modern dispensation then the rule of law is perfectible by being hitched to the development of the sciences, both natural and social. Again, although he was a political moderate, Joseph Story shared this understanding of the law, arguing that the common law—which is of course judge-made law—is capable of "continually expanding with the progress of society." In fact, Story argued that the common law "resembles the natural sciences where new discoveries continually lead the way to new and sometimes astonishing results" (Equity, 84). Law then is perfected by being subordinated to science because science seeks to discover ways to "systematize" the world for the sake of commodious self-preservation. Indeed, in a world characterized by constant change or flux, enduring or permanent principles are difficult to discover and even more difficult to defend. For in light of such flux, such principles often seem to stand in the way of progress. And as we have seen, sociological jurisprudence as it arose in the United States was conceived as an alternative to a principled but static conception of constitutional law.

Chief Justice Warren and the Supreme Court may have avoided Justice John Harlan’s dissent in *Messy* then precisely because it is so firmly grounded in the Constitution and constitutional principle. That is, from the perspective of a sociological jurisprudence, it is better to ground one’s decision in science or scientific evidence than in "principles deemed to be fundamental." For in this way, the Court can in the fu-

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34. Marbury v. Madison, 1 Cranch 137, 156 (1803).
ture "satisfy the needs of a progressive social condition." It can, in sum, change the principles for the sake of progress. On the other hand, modern constitutionalism is based on certain fundamental and permanent truths, "self-evident truths," truths not dependent upon scientific discovery or evidence. For the likes of Joseph Story, these principles reflect both "the eternal law of nature" and "the eternal law of revelation" (Equity, 84). And, of course, adherence to these principles is the very definition of "civilization" and Story sought to embed them in the law via the equity power.

A problem arises, however, because progress and principle clash. Progress requires, above all else, flexibility or malleability while principle requires stability at least. Moreover, under the dispensation of modern science in which the world is understood as flux, it seems best to assume the principles themselves change or, at least, that the principles are sufficiently malleable to guarantee progress. In the final analysis, it is all too easy to sacrifice principle for the sake of progress or to interpret principle for the sake of guaranteeing progress, as defined by science.

Conclusion

By drawing our attention to the long overlooked issue of equity and tracing the debate over this power back to its roots, McDowell has drawn our attention to the issue of constitutional government itself. He

35. The distinguishing characteristic of contemporary judicial activism is its rejection of abiding or fundamental principles. Nowhere is this clearer than in Laurence Tribe’s monograph, Constitutional Choices, where on the first page of his first chapter, Tribe writes: “Who would disagree that constitutional decisions—choices among competing constitutional arguments and meanings—ought to, and necessarily do, represent something less whimsical and personal than the unconstrained ‘will of the judges’? Yet who could believe that constitutional decisions and choices might reflect anything as external and eternal, impersonal and inexorable, as the ‘will of the law’? For starters, anyone who claimed to know what the ‘will of the law’ was on such troubling matters as the ... relationship among children, parents, religious authorities, and political communities ... would properly be suspected of megalomania.” Of course, Tribe knows that he is perilously close to legal nihilism, but he denies that that is his role. Tribe does reject, however, all efforts at discovering the meaning of the Constitution because he denies it has any meaning other than what we attribute to it. Hence, Tribe says that the basic questions of constitutional law seem basically unanswerable. That is, these questions are unanswerable in light of any abiding, fundamental principles, constitutional or otherwise. As McDowell notes, reasoning such as this leads to “judicial activism with a vengeance.” (132) See Constitutional Choices, 3-6. It may be added that the basic problem with contemporary judicial activism is not so much that it so frequently enters the political arena—although from the viewpoint of popular government this is a problem—but that it enters the political arena unaccompanied by political or constitutional principle. For a somewhat different view of modern judicial activism, see Wolfe, The Rise of Modern Judicial Review. note 1 above.
has laid bare the roots of recent judicial activism and, more importantly, has shown us why it is essential to deal with this phenomenon. To be concerned with judicial activism today—and perhaps with future manifestations of that "temptation"—one need not be a "reactionary." Indeed, one need only be concerned with constitutional government. As we have noted above, although constitutional government is above all principled government, there is a tendency to move away from principle, a tendency that wears many disguises and that spans the entire political spectrum. But the tendency to modify principle for the sake of progress is dangerous because it undermines constitutional government. Such government requires more than "progress," however defined; it requires the enunciation, elaboration, and application of fundamental political principles. By calling our attention to the issue of equity, McDowell has exposed the tendency of judicial activism to denigrate principle for the sake of progress. More importantly, however, McDowell has helped clarify the character of constitutional government and the requisites for ensuring its health and well-being.

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36. Of course, restraintists, insofar as they give up the search for abiding and fundamental principles, are also guilty of endorsing the idea of a "living Constitution." Indeed, the earliest proponents of this idea were restraintists. Cf., e.g., Cardozo's *The Nature of the Judicial Process.* Further, even some more recent manifestations of restraint come from those who do not reject the idea of a "living Constitution." Most importantly, consider then-Justice William Rehnquist's article, "The Living Constitution," in McDowell's *Taking the Constitution Seriously* (Dubuque: Kendall-Hunt, 1983).