

Constitutional Equity

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Working with Justice Blackmun exposed some habits a New Yorker could learn to share. He loved politics, baseball, 8 a.m. breakfasts, afternoons in the library editing opinions with freshly sharpened pencils, and evenings at home with Dottie. He lingered over stories of his days at Harvard, as launch driver in the Harvard-Yale race, surprised to be invited to a yacht party for the winning crew, and as law student marveling at Felix Frankfurter's cadenzas in the classroom.

Justice Blackmun ran a friendly chambers on the south side of the Supreme Court building, between those of Justices Powell and Douglas, smiling as a messenger cooked fragrant Thai food on a hot plate in the clerks' room, tolerant as we smuggled friends into the Court to play ball in the upstairs gym. He was intellectually generous to his clerks, complimenting us on memos or drafts, treating our arguments as serious offerings, arriving back from the Court's conference each week to share how the votes had gone. But he also kept his own counsel. In the *Bakke* case,¹ where the future of educational affirmative action programs was at stake, the Justice arrived at breakfast one spring morning and announced that he hoped we would not be *too* disappointed by his decision to reverse.

He was amused at the politics of the Court, announcing from time to time that he was "in the doghouse" with the Chief, who had assigned him some uplifting opinion to write, enjoying even as he understood his courtship by Justice Brennan. He did not like going head to head in verbal jousts with his colleagues, and didn't mask his personal engagement in his opinions. He was unstudied, a New Yorker might say, but really he was so much more.

Justice Blackmun was a son of the Middle West, and an early claim in our constitutional history and culture is that the West has something distinct to say. The astonishing fertility of the land asks a fertility of mind. The intricate remedies of English and coastal common law might suit professional and monied men, but not plain people who farm or work as mechanics. Books of Law French or Law English were unavailable in a new country, and tangent to its problems. The rigor of inherited law was to be limited by a natural equity, adapting it to America's more generous situation.

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1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)

An early Kentucky writer captured something of this. To codify American law is an impossible task, said Charles Humphreys to the Kentucky Institute in 1824. A new Justinian would have to “go in person from state to state to inform himself”² of the spirit of the new jurisprudence, and by the time he had come round, it would have changed again. The creative task for American lawyers and judges was to cobble a republican law from precedent, political theory, the Enlightenment’s law of nature and nations in a cosmopolitan tradition, and, necessarily, from the practical situation of the states. An American law of liberty was not static or frozen, but required sensibility, reflection, and experiment. “[G]reat inroads were necessarily made” in the traditional common law.³ The sanguinary criminal law of England, for example, with fierce punishments for small offenses, did not fit men’s high hopes in America. In the West, as Gilbert Imlay said, “we feel that dignity nature bestowed upon us at the creation”⁴

Bringing legitimacy to the task of shaping a new law was less problematic for the Founders than it is today. Judges remained conscious that their authority ran in two channels, one of rule, and one of exception, both law and equity. And for Americans, equity was not limited to the systematizations of a Hardwicke or an Eldon. Rather, equity was seen through the eyes of a Kaimes, as a continuing spring of remedy, ever young, providing recourse and writ when on particular facts the law cut too harshly against a person of limited capacity or moral innocence. The formalism of rules, statutory or common law, was moderated by equity’s exceptional power. Our more recent constitutional history reflects this critique of law as applied: Equity’s leaven is nearly homomorphic with our own category of due process.

For the eighteenth and nineteenth centuries, a jurisprudence based on natural moral sense had a broad provenance. Equity would not bring anarchy or inequality of treatment to a normative system. It was a method of accommodating the latent defect of every rule, the unanticipated case in which application was unreasonable. Equity would not vary according to whimsy or taste, but was guided by a faculty of judgment that converged among men. The skepticism of David Hume and his devotees was cured, for Americans, by “common sense”—philosophers such as Thomas Reid and Adam Ferguson, whose works were widely read and taught. The proposition that men possessed a natural moral capacity for judgment, even without positive rules, was attractive to a revolutionary society that had once overthrown old rules.

Indeed, the same acceptance of naturalism informed the original constitutional debate over texts and rights. A bill of rights was not necessary

2. C. Humphreys, *A Sketch of the Science of Law in the United States*, KY. REPORTER, June 21, 1824, at 1.

3. *Id.*

4. GILBERT IMLAY, *Letters from Kentucky*, in A TOPOGRAPHICAL DESCRIPTION OF THE WESTERN TERRITORY OF NORTH AMERICA 28 (London, J. Debrett, 3d ed. 1797).

to many, because rights do not depend on a contractual rule of specialty. Formal covenantal writings were only one manifestation of the sense of propriety and reason in which rights were grounded. The principles of natural justice and republican philosophy framed and limited the powers of government itself. This untethering from text was not alarming, because men lived within a culture, and relied on sensibility.

For those who prefer a static Constitution, it is instructive to remember how these early generations viewed the evolving judgments of equity. Apprehension of natural justice would change in the "progress of society, and in the course of practice, . . . by ripeness of discernment and growing delicacy of sentiment."⁵ Equity was not a fixed or static system, at least epistemically. Equity, as soulmate to law, was a powerful agent, overcoming even the texts of legislatures. So much a conservative as James Kent noted, "Courts [are] bound to give such a construction to a statute as [is] consistent with justice, *though contrary to the letter* of it."⁶ Henry Home, Lord Kaimes, popular on the frontier among the Scotch-Irish, confided:

The power of a court of equity, to redress the injustice of common law . . . with respect to statutes, is founded on the same principle, *viz.* that there ought to be a remedy for every wrong. . . . [T]he words of a statute correspond not always to the will of the legislature; and . . . the things enacted prove not always proper means to answer the end in view. . . . [H]ence the necessity of a court of equity, to redress the injustice of courts of common law with respect to statutes, as well as with respect to deeds and covenants.⁷

These brief excursions into time, distance, and equity are not meant to distract, but rather to hint at what Justice Blackmun may be about. In the spirit of American law, he has been skeptical of theory and chary of wordsmiths who suppose that a three-part test or formal system will capture history, nature, or understanding. He often has suggested that the facts speak for themselves, preferring the modest steps of induction, searching the particular for a compass direction, but not inclined to announce the end state. The federal courts were conceived, let us not forget, as courts of equity and law.

The thought of American lawyers in the early nineteenth century, that they were bound to draw upon natural moral sense in relation to the facts as a key supplement to precedent and rule, is one that Justice Blackmun has shared in

5. LORD KAIMES [HENRY HOME], *PRINCIPLES OF EQUITY* 15 (Edinburgh, A. Kincaid 1760).

6. *Dash v. Van Kleeck*, 7 Johns. 477, 502 (N.Y. Sup. Ct. 1810) (emphasis added), see *Ham v. M'Claws*, 1 S.C.L. (1 Bay) 93, 98 (Super. Ct. 1793) ("[S]tatutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles. . . . We are . . . bound to give such a construction to [the statute], as will be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law:").

7. LORD KAIMES [HENRY HOME], *supra* note 5, at 124–25.

his jurisprudence. It is also an unspoken agenda of American legal realism. Realism was not merely a destructive project, as some have supposed. Rather, it was also an exercise for those with naturalist proclivities, founded on the premise that in hard study of the facts one might discern shared moral truths—that in reconstructing American law we must trust, finally, the discipline of the heart, moral understanding, and common culture, as much as the contradictory strains of precedent and case.

Justice Blackmun's most important work on the Supreme Court has been as the voice of exception, of equity as relief from hardened rule, asking why we should rebuff a claim of injury. The heart of his work has been the strength of the moral counterexample—asking how a system of law can be impregnable if it has overlooked the claims of the weak, of the heterogenous, of the disenfranchised.

In this, his character is his strength. He has a Shaker plainness; his brevity speaks of the snares of rationalization. He recognized the danger that triumphant majorities can overlook human truths. His opinions included an occasional phrase that his brethren spurned as sentimental or emotional, yet that is the reader's token that the relationship of judge to party is not abstracted, but calls for a law sufficiently keen to do justice in the particular case.⁸

Justice Blackmun has spoken plainly of things we are reluctant to see. That racial antipathy and condescension are still present in American society, and that shifting burdens of proof can be a convenient way of grandfathering our advantage. That women face lives of great difficulty, trying to balance the claims of family against the demands of work and profession. That prisons, necessary as a place to confine men of violence, are a Kantian hell. That the state, in awarding children to one parent's custody, precludes other adults from intervening, and takes on some responsibility to assure the child is not abused. That many of our colleagues, cousins, and friends, including people of great creativity and heart, have found themselves in relationships that do not conform to the ordinary models of family. That the desire to serve one's country extends to many types of people, including those who are asked by their religion to wear a token of clothing such as a yarmulke, and that the state cannot lightly ask one to forswear God in order to support one's country. That fact finding in criminal trials and in capital cases is humanly fallible, and maxims about the need for finality and the crucial stage of the trial cannot

8. Aristotle writes in *The Rhetoric* that there are three ways a lawyer may hope to persuade his audience. The first is the *ethos* of the speaker. "We believe good men more fully and more readily than others," says Aristotle. ARISTOTLE, *THE RHETORIC*, bk. I, ch. 2, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 2155 (Jonathan Barnes ed., 1984). "[T]he personal goodness revealed by the speaker contributes . . . to his power of persuasion." *Id.* The second is *pathos*, an engagement of the audience in empathy, deploying the evocative power of the facts as the stimulus to a natural justice. Aristotelian *pathos* does not lumber under the connotation of the modern word. The third is *nomos*, or the logical argument in the form of syllogism. Justice Blackmun has allowed his audience these independent routes to understanding.

change this fallibility. The Justice has appropriately reminded us that procedural default and the time limits on a motion for a new trial are a plain poor excuse for executing a person where there is substantial newly developed doubt about actual guilt.

Professor Henry Monaghan of the Columbia Law School wrote an influential essay some years ago, suggesting that much of the activity of the Supreme Court in constitutional interpretation should be seen as akin to common law.⁹ The specification of rules and remedies in criminal cases, such as the detailed rules for search and seizure and interrogation, and the exclusionary rule that enforces them, draws on the courts' traditional competence in creating common law.

I would propose in turn, that the other side of Supreme Court activity is a constitutional equity. It is not static, it is not slave to text, it will change in the "progress of society, and in the course of practice, . . . by ripeness of discernment and growing delicacy of sentiment."¹⁰ It is the law that makes exception, from procedure, from rule, when injustice would result. Justice Blackmun's Constitution is cousin to Lord Kaimes' power of equity. And beyond dispute, Justice Harry Andrew Blackmun has been a most worthy Chancellor.

9. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword. Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

10. LORD KAIMES [HENRY HOME], *supra* note 5, at iv

