Principle Approach® Education

Law and Equity

by James B. Rose

> The judicial power shall extend to all cases in *law and equity*, arising under this Constitution, the laws of the United States, and treaties made or which shall be made, *under their authority*; . . .
>
> (United States Constitution, Article III, Section 2, *emphasis added*)

The power to make law and equity decisions requires good judgment not only by our nation's courts but by every individual—daily!

This article purposes to introduce the Biblical, historical, and practical meaning and application of law and equity to both individual self-government and national civil government. The subject is not simply of legal or historical importance. Principles of law and equity should govern everyday Christian life and living as we strive to exercise a conscience and a Constitution consistent with God's Law and Love. The author presupposes that sound judgment in matters of law and equity are not reserved exclusively to our nation's civil or criminal courts of law. Parents, teachers, pastors—every American Christian—decide cases of law and equity in their daily lives!

Current Premise for Judicial *Inequity*

The "law and equity" power of the United States Supreme Court, especially *equity jurisprudence*, has been used by the nine justices as the constitutional basis for exercising their *own discretion* to form public policy independent of the legislature and the original intent and purpose of the United States Constitution. The Supreme Court has moved from exercising their ***pro**scriptive* power of forbidding the enforcement of an unjust law or action to exercising a ***pre**scriptive* power, i.e., of prescribing laws (by judicial decision) to remedy some perceived injustice.

Professor Gary McDowell's definitive study, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy*, is recommended as the most lucid and insightful contemporary discourse on this subject.[1] As he pondered the prevailing consequences of the current period of judicial activism, he concluded that:

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> The search for the constitutional source of a prescriptive judicial power led to the equity power granted by Article III of the Constitution. And this study, in turn, became more than a critical assessment of judicial activism; it became something of a history of American equity jurisprudence. What follows is an attempt to trace the transmission and transformation of the idea of juridical equity from its first appearance in Aristotle's writings through the recent opinions of the United States Supreme Court under Chief Justice Warren Burger.[2]

A search of the Scriptures confirms that the rule of law and equity originated in the Older Testament with the nature and character of God and became a function of self and civil government to be subsequently exercised by men of God. The concept was introduced by God in Asia through the Hebrews, developed and applied in Europe as a point of law in Greece and Rome, and was embraced by English common law and exercised by English jurists. Subsequently, the principle was amplified and expressed in America by the Pilgrims, the Colonists and the Framers of the *Constitution of the United States of America*.

Biblical Basis of Law and Equity

Equity is an Old Testament term used in tandem with *judgment*, *justice*, and *righteousness*. For example, "equity" in Proverbs 1:3 means "evenness," "uprightness," and is parallel to the Hebrew term for "righteousness." It refers to UPRIGHT, RIGHTEOUS *government* (Psalms 9:9; 75:3; 96:9–10; 99:4) and *speech* (Isaiah 33:15; Proverbs 23:16).

These terms appear to describe attributes of God as in Job 8:3: "Doth God pervert *judgment*? Or doth the Almighty pervert justice?" and in Job 37:23: "Touching the Almighty, we cannot find him out: he is excellent in power, and in *judgment*, and in plenty of *justice*: he will not afflict." Judgment, justice, and equity are correlatives; the existence of one attribute depends upon the existence of the other attributes. Psalm 98:8–9 also unfolds the perfect character of the Lord, " . . . for he cometh to *judge* the earth: *with righteousness shall he judge the world*, and the people with *equity*."

Consider also how justice, judgment, and equity "walk together" in the following verses:

> Of the increase of his government and peace there shall be no end, upon the throne of David, and upon his kingdom, to order it, and to establish it with *judgment* and with *justice* from henceforth even for ever. The zeal of the Lord of hosts will perform this. (Isaiah 9:7)

> The proverbs of Solomon . . . To receive the instruction of wisdom, *justice*, and *judgment*, and *equity*; (Proverbs 1:1,3)

> For the Lord giveth wisdom: out of his mouth cometh knowledge and understanding . . . Then shalt thou understand *righteousness*, and *judgment*, and *equity*; yea, every good path. (Proverbs 2:6,9)

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> Your iniquities have separated between you and your God, and your sins have hid his face from you, that he will not hear . . . And *judgment* is turned away backward, and *justice* standeth afar off: for truth is fallen in the street, and *equity* cannot enter. (Isaiah 59:2,14)
>
> That my covenant might be with Levi, saith the Lord of hosts. The law of truth was in his mouth, and iniquity was not found in his lips: he walked with me in *peace* and *equity*, and did turn many away from inequity. (Malachi 2:4,6)
>
> (*italics added*)

The Bible confirms that God exercises judgment, justice, and equity perfectly, without error. It is reasonable to infer that God purposes for man to reflect the law and love of God in his own demonstration of judgment, justice, and equity.

Noah Webster defines *equity* as "the impartial distribution of justice, or the doing that to another which the laws of God and man, and of reason, give him a right to claim." *Judgment* is "the spirit of wisdom and prudence, enabling a person to discern right and wrong, good and evil. And *Justice* is "the virtue which consists in giving to every one what is his due." [3]

In jurisprudence (the science of law), *equity* is the correction or qualification of the law when the law is too severe or defective. Although our civil courts may use their equity power to supply justice in circumstances not covered by law, just consider how often parents and teachers use their law and equity powers when they establish rules or laws for the better ordering of their households or classrooms. They become "justices of the peace" responsible for exercising good judgment, justice, and equity when their own laws or rules are deficient or are violated and challenged.

Historical Development

Reasoning from the Word of God, the Christian presupposes that *law and equity* originated with God and was defined in the Old Testament which confirms that the concept was first articulated on the Asian continent. Professor McDowell documents that the concept was further developed in Europe by the Greeks and Romans and refined by English jurists. He believes that Aristotle (B.C. 384–322) was the first Greek philosopher to fashion a notion of judicial equity. Before Aristotle, the Greek word *epieikeia* or "equity" had broad connotations relating to clemency, leniency, indulgence, or even forgiveness for some deviation of the law. Hence, the idea of equity was in *contrast to the law, not in harmony with it*. The Greeks conceived of equity as a means by which the sharp edges of the law could be blunted. Aristotle, however, defined *epieikeia* as a "corrective function of the law and not something different from the law" but he also recognized the problem and dangers of judges using their equity powers as a way to justify exercising their own discretion (power of exercising one's own judgment) beyond the intent of the law.[4]

Professor McDowell has observed that "Basically, our debt to the Roman jurists extends only to their having preserved and transmitted the Greek contribution and to their first efforts at what can properly be called a rudimentary court of equity." [5]

By the twelfth century, the English tradition of equity jurisprudence embraced the Roman idea of equity. Ranulph de Glanville, "chief justiciary of all England" in 1180, wrote one of the first English common-law treatises. He, along with Henrici de Bracton, a judge of the King's Bench during the reign of Henry II, cited Justinian's Institutes on the subject of law and equity. Both writers understood equity to flow from discretion (exercising independent judgment where the meaning of the law is in dispute) and not from blind adherence to the law, thus perpetuating the understanding of equity first formulated by Aristotle and embraced by Rome.[6] One of the most important observations on the subject, however, was made by Christopher St. Germain. His *Dialogue between a Doctor of Divinity and a Student of the Laws of England,* written in 1518, argued that "'equity is ordained . . . to temper and mitigate the rigor of the law'" and insisted that "'*equity followeth law' insofar as it must reflect the law's intent*. Equity was not a means of subverting the law, but rather a means of bolstering the law." [7]

The English contribution to equity jurisprudence has been documented through the legal writing of Sir Edward Coke, Sir Francis Bacon, and Thomas Hobbes. As English law developed, the idea grew that common law and the judges who administered it—called the Kings Bench—were becoming independent of the king and his prerogatives, giving rise to the earlier Biblical premise that the rule of law was superior to the rule of the King. However, about 1350, Courts of Equity arose separate from the Common Law Courts. The purpose of the Courts of Equity were to allow individuals who believed themselves without remedy or justice before the common law to appeal to the King's conscience for leniency, or for grace or special dispensations. The King usually referred these petitions for clemency to his Chancellor, usually a church man and Keeper of the Great Seal, to decide the case. By the fifteenth century, petitions to the King were being referred to a Court of Chancery. By the sixteenth century, a conflict grew between the authority of the Courts of Chancery, also called Courts of Equity, and the Kings Bench or the Common Law Court.[8]

The conflict between the authority of each court to decide cases of law and equity was debated by Sir Edward Coke and Sir Francis Bacon. Sir Edward Coke argued that the Courts of Equity should not have the right to review or overrule common law cases because the law would be reduced to the "King's conscience." He strongly argued that equity power should be exercised by the judges, not the King. Sir Francis Bacon was persuaded that equity decisions should be separated from common law jurisdiction, and that the Court of Chancery (equity courts) should be the supreme court of absolute power, authorized to review judgments made in common law courts. Thomas Hobbes stood with Francis Bacon. In his *Leviathan* and *Dialogue between a Philosophy and a Student of the Common laws of England,* he presented the idea of equity as the "11th law of nature" and argued that equity courts must be separate from courts of common law in order to allow a remedy to bad judgments made by common law courts. Another English jurist, Lord Kames, in his *Principles of Equity*, 1766, sided with Coke, and argued that law and equity ought to be decided in all courts of justice, and not to separate their function between a Court of Equity and a Common Law Court.[9] Hence, the English judicial system tended to separate the power of judging questions of law from the power of judging cases of equity.

William Blackstone, the most famous commentator on English Common Law, outlined some of the most important powers and duties of Courts of Equity. He says that they are established "to detect latent frauds and concealments, which the process of Courts of Law is not adopted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law." [10]

Law and Equity in the English Colonies

The American Colonists, before courts of law were formally established, had to resolve many cases of law and equity. For example, William Bradford, Governor of Plymouth Plantation, had to exercise the powers of law and equity when he decided that communal farming, a provision of the legal covenant made with the businessmen in England to finance the trip to the New World, was unjust and had to be set aside while upholding both the intent and the letter of the original agreement. Governor Bradford discerned that communal farming (an idea commensurate with communism) was ". . . found to breed much confusion and discontent, and retard much imploymet that would have been to their benefite and comforte." [11] Hence, he used his equity power to correct the severity of that part of the agreement by instituting individual enterprise and confirming the principle of private property. In another case, Governor Bradford had to exercise judgment, justice, and equity when he decided to publicly expose the private but salacious letters of John Lyford and John Oldham to "prevent ye mischeefe and ruine that (Lyford's and Oldom's) conspiracie and plots . . . would bring on this poor colonie." Thus, he protected the public good while upholding his executive responsibility to preserve the peace, welfare and property of the other Pilgrim settlers.[12]

Colonial jurisprudence embraced its English heritage of justice and common law. American jurists considered the nature and function of civil law and maintained the idea that a written constitution is essential to a free government and ought to bind and control the decisions of the executive and judicial branches of government. And when justice was sought in a court of law, the judges settled disputes according to written, known, and established law and decided cases of equity as the need arose.

Our colonial legal system struggled over how much judicial discretion or equity was permissible within the law of the land. John Dickinson, for example, protested in 1756 that in almost "every court [in Pennsylvania] there is a court of equity, for both judges and juries think it hard to deny a man that relief which he can obtain nowhere else, and without reflecting that equity never intermeddles but where the law denies *all manner* of assistance, every judgment, every verdict is a confused mixture of private passions and popular error, and *every court assumes the power of legislation*." [13]

In 1784, Alexander Hamilton argued a case that explained his idea of judicial review or equity which he later cited in *Federalist Papers* No. 78 and 80. Professor McDowell ably summarized Hamilton's argument in the case of "*Elizabeth Rutgers v. Joshua Waddington*: "His point is clear: equity demands that account

be taken of the spirit as well as the letter of the law because, '*In Law as in Religion* THE LETTER KILLS THE SPIRIT MAKES ALIVE.' [II Cor. 3:6] *Therefore, the attempt to separate law from equity is fundamentally flawed, . . . Questions of law are interwoven with questions of equity, and questions of equity have the law as their primary point of reference.*" [14]

James Wilson, the first professor of law at the College of Philadelphia, in 1790–1792, also confirmed that "courts of law are also courts of equity." [15]

Law and Equity Decisions by Parents and Teachers

Perhaps the reader may now discern that judgments with regard to both law and equity are not only exercised by established courts of law, but are powers exercised daily by individual men, women, parents, pastors and magistrates whenever sound judgment is expected.

Should these judicial powers of judgment be divided within the home, church or school? Would the reader separate the function of law and equity between mom and dad, whereby dad, for example, makes the rules, but mom decides what is equitable or what "ought to be" if she thinks dad's rules were too stern or did not address the case in dispute? Surely law and equity decisions may be administered by whoever is available to settle a dispute over the known and established law. Should a school administrator or the school's Board of Governors make the rules and then empower the classroom teacher to not only administer the law written in the classroom, but also exercise "equity" in order to supply some defect in the rules or to correct and interpret the law when it appears too severe or does not address the issue? No, indeed; cases of law and equity are adjudicated by parents, pastors, and pedagogues at each level of judgment and at each level of appeal.

CHART A

Law / Judgment	Equity / Justice
Consequences of Judgment: sentence of condemnation; punishment; damnation	"What Ought to Be": what is right, just, righteous, plain, straight and level
Law demands obedience and conformity; condemns transgression; reveals corruption; destroys self-righteousness; can be harsh, rigorous and severe	Equity gives relief in extraordinary cases; supplies the defects of the law; offers an exception to the rule but not a decision superior to or contrary to the *intent* of the law
	Grace: giving what is not deserved Mercy: withholding what is deserved, clemency; leniency
"Laws for the lawless"	"Perfect law of liberty"

How does one exercise both law and equity as essential correlatives in order to be just and maintain the law but avoid the consequences of exercising either law without *grace* (or equity) or *grace* (equity) without law?

Resolving a dispute according to the powers and practice of both law and equity may be likened to making decisions based upon God's Moral Law and "Gospel Grace." Judgment and equity is intended to effect justice. Judgment may involve some punishment required by the law whereas equity involves mercy and grace *consistent with the law*. Good government demands "laws for the lawless" and disobedient (I Timothy 1:9), and also embraces the "perfect law of liberty" (James 1:25). God's law demands obedience and condemns transgressions while *God's grace gives* what is not warranted or deserved. The Law of God reveals corruption and destroys self-righteousness while the *mercy of God withholds* what is deserved and forgives in response to repentance and obedient love. (See Chart A)

Consider how frequently parents and teachers are required to apply God's law with the grace of God. How often do we make laws to expose lawless conduct and to punish willful disobedience while attempting to modify or supply the defects of our own law, temper our expectations when they are too severe, or give relief in extraordinary cases without denying the *spirit* or purpose and intent of the law?

CHART B

Law *without* Equity Law *without* Grace	Equity *without* Law Grace *without* Law
Tyranny	Anarchy
Despotism	License
Slavery	insurgency
Bondage	Insurrection
Concentration of Power	Rebellion
	Nihilism

Law *without* equity is equivalent to law *without* grace and can lead to tyranny, slavery, and invites the arbitrary exercise of power to make and execute the law with impunity. On the other hand, equity *without* law can give rise to anarchy, freedom run wild, to license, and insurgency or rebellion to the authority of the law and the lawmaker. However, the proper exercise of law and equity reflects the character of God—the perfect harmony and unity between God's Law and Love. The power to decide cases of law and equity are not opposing powers but harmonious and concurrent enabling the children of God to fulfill both God's law and liberty, God's judgment and justice, God's righteousness and forgiveness. (See Chart B)

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In a local, self-governing Christian home, fairly simple or complex cases of law and equity may arise. For example, a parent rules that their teenage daughter, who may drive the family car, must be home from some wholesome weekend youth activity by 11 p.m. or certain restrictions and other consequences will be imposed. That is the law. However, the deadline passes and the daughter does not come home on time. About 11:30 p.m., she calls to explain that some unforeseen and unavoidable circumstances delayed her timely return. Considering the peculiar circumstances, the parent decides, in good conscience, to exercise his equity power and show mercy by withholding the rigorous consequences of violating his own rule and grace by extending the curfew to 12:30 a.m., unless she misses that deadline.

A more complex example may involve a married woman who received tax exempt gifts of $10,000 or less in stock from her parents. Her parents clearly did not like their daughter's choice of a husband, although the two are happily married, hence, they gave their daughter tax deductible gifts of stock for "her sole and separate use." They did permit, however, that her husband and children may receive and enjoy the income from his wife's separate property. The "law" of her deceased parents is clear: daughter, these gifts are exclusively yours, but we will permit you to let your husband use the income from it to support you and the children. However, the daughter loves her husband and children, and exercising her power of equity, wills that upon her death, *all her separate property* will be passed to her husband and her children.

Thus far, the reader has discerned that the powers of law and equity may be exercised by individuals as well as established civil courts. Equity, consistent with the intent and purpose of the law, may be decided on the state and national level as well as by the independent, local self-governing home, church, or school.

There is a cause–effect relationship between individual self-government and civil government. Restoring the Biblical spirit of law and equity so essential to our capacity for self-government will help to effect more stable, peaceful, and harmonious local self-governing homes, schools, and churches. Reviving the highest sense of law *and equity* in our homes, schools, and churches will cultivate the character and the conduct to maintain religious, economic, and civil liberty with law and help to effect a moral check on the erroneous doctrine of judicial discretion with indifference to the supreme law of the land, the United States Constitution.

On the national level, the "law and equity" provision is a safeguard to "maintaining a constitutional equilibrium that would render governmental power safe for political liberty." On the local level, it offers individuals relief from too harsh, or unjust and partial laws. That same provision, exercised by individuals in their daily life and living, will also help to preserve individual liberty and property, and relieves the distress in our children and students which is so often caused by our own, mistaken, unjust, and partial rules and righteousness.

As Christopher St. Germain insisted over 400 years ago,

> Equity is a right wiseness that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercy . . . *Equity followeth the law* insofar as it must reflect the law's intent [or spirit] . . . Equity was not to be a means

of subverting the law, but rather a means of bolstering the law, which is itself but the means to a higher end—justice. In following the intent [or spirit of the law] rather than the [literal] words [or letter] of the law, equity was to be a healthy complement to the law in its quest for justice.[16]

[1] Gary L. McDowell, *Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy*. Chicago and London: University of Chicago Press, 1982. Mr. William Hosmer (1932–1993), a dedicated American Christian antiquarian, who collected rare books that documented and confirmed the wonderful works of God and who helped build the libraries of two California research and educational Foundations, discovered the importance of this subject. He brought to our attention the one current authoritative work on the subject of *Law and Equity* by Gary L. McDowell, professor at Newcomb College of Tulane University, and co-director of the Center for the Study of the Constitution at Dickinson College, and an associate with the Center of Judicial Studies in Washington, D.C. Individuals interested in understanding both the spirit and letter of our Constitution should acquire this book and study it.

[2] *Ibid*., Preface, p. xv.

[3] Noah Webster, *American Dictionary of the English Language*, Facsimile 1828 Edition, Foundation for American Christian Education, San Francisco, 1967, 1995.

[4] McDowell, p. 15.

[5] *Ibid*., p. 19.

[6] *Ibid*., p. 22.

[7] *Ibid*., pp. 23–24 (*italics added*).

[8] *Ibid*., pp. 24–25.

[9] *Ibid*., p. 29.

[10] William Blackstone, *Commentaries on the Laws of England, . . . and Copious Analysis of the Contents . . .* by Thomas M. Cooley. Chicago: Callaghan and Cockcroft, 1871. Vol. 1, Introduction, p. 91.

[11] Verna M. Hall, *Christian History of the Constitution*, Vol. I: *Christian Self-Government*, Foundation for American Christian Education, San Francisco, 1960, p. 213.

[12] *Ibid*., pp. 219–221.

[13] McDowell, p. 34, (*emphasis added*).

[14] *Ibid*., p. 39, (*emphasis added*).

[15] *Ibid*., p. 42.

[16] *Ibid*., pp. 23–24, (*emphasis added*).