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TWO VISIONS OF JUSTICE: FEDERAL COURTS AT A CROSSROADS*

FRANK ASKIN**

For some time now, the conservative legal movement has waged a concerted campaign to exalt a doctrine it refers to as “judicial restraint” and to demonize that which it terms “judicial activism.” At the end of the 1995 term, Supreme Court Justice Clarence Thomas enunciated one of the clearest statements yet of the aims and arguments of that movement. In his concurring opinion in *Missouri v. Jenkins*,¹ Justice Thomas openly challenged the underlying rationale of the historic *Brown v. Board of Education*² school desegregation decision.³ He also alleged that the Supreme Court began a trend in the mid-1950s toward a vast usurpation of legislative power in an effort to enforce constitutional rights.⁴

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¹ 115 S. Ct. 2038, 2061 (1995) (Thomas, J., concurring).

² 347 U.S. 483 (1954); *see id.* at 495. *Brown* stands for the proposition that racial segregation in schools violates equal protection as it is guaranteed by the Fourteenth Amendment. *Id.*

³ *See Jenkins* 115 S. Ct. at 2067, 2071-72 (asserting generally that scholastic achievement of black students is not affected by integration); *see also id.* at 2065. Justice Thomas states:

‘Racial isolation’ itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.

Id.

⁴ *See Brown*, 347 U.S. at 494 (advocating racial integration in schools to promote educational opportunities for all students); *see also* Milliken v. Bradley, 433 U.S. 267, 290 (1977) (approving remedial or compensatory education programs paid for by State to schoolchildren subjected to past acts of de jure segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 37-42 (1971) (granting federal courts broad discretion to order busing, set racial targets for school populations, and alter attendance zones); United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 235-36 (1969) (allowing federal courts to desegregate faculty staff members according to specific mathematical ratios); *cf.* Hutto v. Finney, 437 U.S. 678, 688 (1978) (using structural injunctions to supervise mental hospital); Flaherty v. Thomas S., 902 F.2d 250, 255 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990)

In *Jenkins*, a slim majority of the Court struck down orders approved by two lower federal courts which required a Kansas City school district to take specific remedial action in response to a long-standing desegregation order.⁵ Although Justice Thomas purported to speak for no one but himself,⁶ his concurrence articulated a broad and sweeping rationale not only for the outcome in *Jenkins*, but also for a number of other decisions in recent years in which a conservative majority⁷ of the Court has sharply curtailed the authority of federal courts to shape remedies which could effectively ameliorate constitutional violations.⁸ Justice Thomas' opinion in *Jenkins* enunciates a flawed doctrine which he and the radical right for which he speaks would impose upon our constitutional jurisprudence.

Central to Justice Thomas' attack was the notion that the Supreme Court had manipulated ancient principles of equity as practiced by the English Courts of Chancery to impose its own political judgments on the body politic.⁹ He raged over the fact that the Justices, usually under the guidance of Justice William Brennan, Jr., had creatively invoked equitable principles to provide effective remedies for otherwise intractable constitutional violations.¹⁰

It is true that decisions made by the Supreme Court beginning in the mid-1950s brought about significant changes in America's social structure. Most notable among these changes were the end

(permitting relief to hospitalized mental patients for unconstitutional conditions imposed in mental hospital).

⁵ *Jenkins*, 115 S. Ct. at 2055-56. The Court held that lower courts tried to achieve indirectly that which they could not achieve directly; namely, the courts imposed interdistrict goals which went beyond the identified intra-district violation, thereby going beyond the nature of Constitutional violation. *Id.* at 2051.

⁶ *Missouri v. Jenkins*, 115 S. Ct. 2038, 2061 (1995).

⁷ See generally Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. Rev. 329, 329 (1995) (commenting on increasingly conservative swing of Supreme Court over last 20 years).

⁸ See *Milliken*, 418 at 751-53; see also *Freeman v. Pitts*, 503 U.S. 467, 498-99 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991); cf. *Spallone v. United States*, 493 U.S. 265, 279-80 (1990).

⁹ See *Jenkins*, 115 S. Ct. at 2066-67. Justice Thomas cites several cases in which equitable remedial powers were expanded. *Id.* Specifically, Justice Thomas points to those decisions in which the Court sought to remedy segregation by forcing blacks and whites to be represented in equal numbers. *Id.* See generally *supra*, note 4 and accompanying text (discussing Court's efforts to enforce constitutional rights).

¹⁰ *Jenkins*, 115 S. Ct. at 2067. Justice Thomas further argues that judges have disregarded the inherent limitations on their authority in their attempts to reconstruct institutions and bureaucracies. *Id.*

of official racial segregation in schools and elsewhere;¹¹ the reapportionment of federal and state legislative bodies to reflect the principle of "one person one vote;"¹² a vast expansion of free speech law which hastened the demise of the repressive McCarthy Era;¹³ the reform of archaic penal¹⁴ and mental institutions;¹⁵ the further elevation of the historic constitutional wall designed to separate church and state;¹⁶ and the imposition of strict due process requirements on government bureaucrats in order to guarantee individuals a public hearing before their rights could seriously be impaired.¹⁷

Justice Thomas obviously views these developments as a perversion of our constitutional system and a violation of the doctrines of separation of powers and states' rights.¹⁸ To support this position, he cited the Federalist Papers, focusing primarily on those writings of Alexander Hamilton intended to allay fears that federal equity courts might abuse their discretion and override statutory and common law.¹⁹

¹¹ See *Brown v. Board of Educ.*, 347 U.S. 483, 483 (1954).

¹² See *Gray v. Sanders*, 372 U.S. 368, 381 (1963). The Court stated that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.*

¹³ See *Dombrowski v. Pfister*, 380 U.S. 479, 496 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965).

¹⁴ See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that prison authorities' failure to provide for inmates' medical needs constitutes "cruel and unusual punishment").

¹⁵ See *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982) (finding that Due Process Clause established that government must provide safe conditions for confinement of involuntarily committed mentally retarded individuals); *Parnham v. J.R.*, 442 U.S. 584, 587 (1974) (holding that Due Process Clause requires child to have benefit of neutral fact finder in determining whether child should be committed at parents' insistence).

¹⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (creating three part test to avoid violation of Establishment Clause); see also *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120 (1982) (finding violation of Establishment Clause in zoning regulation granting power of veto to religious organizations for any business located within 500 feet of church premises).

¹⁷ See *Goldberg v. Kelly*, 397 U.S. 254, 269-71 (1970).

¹⁸ *Missouri v. Jenkins*, 115 S. Ct. 2038, 2062 (1995) (Thomas, J., concurring). Justice Thomas noted that the "exercise of . . . authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm." *Id.*

¹⁹ See generally THE FEDERALIST No. 80 (Alexander Hamilton) (defending need for equity jurisdiction because litigation between individuals must necessarily contain elements of "fraud, accident, trust or hardship" which could not be fairly decided within "legal jurisdiction" but required "equity jurisdiction"); THE FEDERALIST No. 83 (Alexander Hamilton) (assuring anti-federalists that U.S. courts would be permitted to use equity jurisdiction only in extraordinary circumstances).

Curiously, Thomas' concurrence ignores the Civil War and the ensuing wartime amendments.²⁰ Justice Thomas writes as though constitutional history ended in 1789, and the constitutional revolution of 1865 never occurred. He seemingly forgets that this nation fought a bloody war to curb the authority of the states and subsequently amended the Constitution to guarantee against future abuses of citizens in the name of states' rights. The resultant Fourteenth Amendment categorically asserts that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws."²¹

Additionally, the separation of powers so nostalgically yearned for by Justice Thomas, appears to be nothing more than the power of the legislative and executive branches to ignore the constitutionally conferred rights of individuals. The law of this country has clearly been otherwise since *Marbury v. Madison*.²² That landmark decision requires the judicial branch to assure that the other branches of government adhere to constitutional restraints in their exercise of power.²³

Justice Thomas' concurrence also reinvented Anglo-American jurisprudence. He correctly asserts that early Americans as well as English democrats were concerned that free-wheeling equity courts might create and enforce their own legal norms.²⁴ Those concerns, however, focused on the abuse of "substantive" jurisdiction by courts of equity. Justice Thomas concentrates his modern criticisms on the exercise of the "remedial" powers of courts of equity to provide effective remedies for the enforcement of legal rights.

²⁰ See U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment states, in relevant part, that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" *Id.*; U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states, in pertinent part, that "[n]o State . . . [shall] . . . deprive any person of life, liberty or property, without due process of law" *Id.*; U.S. CONST. amend. XV, § 1. The Fifteenth Amendment asserts, in relevant part, that "[t]he rights of the citizenry to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* (emphasis added).

²¹ U.S. CONST. amend. XIV, § 1 (emphasis added).

²² 5 U.S. (1 Cranch) 137 (1803).

²³ *Id.* at 176 (finding that act of Congress contrary to Constitution could not be law, thereby establishing concept of judicial review).

²⁴ See 3 WILLIAM BLACKSTONE, COMMENTARIES 436, 440-41 (1768). See generally Federal Farmer No. 15 (Jan. 18, 1788) in THE COMPLETE ANTI-FEDERALIST 322 (H. Storing ed. 1981).

The idea of equity as part of a jurisprudential system is not a recent invention.²⁵ The theory dates back, at least, to the teachings of Aristotle, which define equity as "justice that goes beyond written law."²⁶ Speaking of the need for "rectification of legal justice," Aristotle wrote²⁷ that "law is always a general statement, yet there are cases which it is not possible to cover in a general statement"²⁸

In the sixteenth century, Parliament warned the British Courts of Chancery not to usurp the common law when it offered adequate remedies.²⁹ Where common law remedies were inadequate, however, Anglo-American legal traditions have long recognized the authority of the equity courts to assert jurisdiction and to provide equitable relief.³⁰

That premise of equity's remedial jurisdiction is the source of authority for the modern injunction.³¹ When traditional legal remedies of compensatory damages did not provide full relief, the equity court was authorized to require wrongdoers to change their behavior upon threat of jail for contempt.³² Today, federal judges

²⁵ See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 214 (1818) (applying equity principles to real property ejection proceeding); Edward D. Re, *The Roman Contribution to the Common Law*, 39 LOY. L. REV. 295, 308-09 (1993) (explaining genesis of English equity principles).

²⁶ See GARY L. McDOWELL, *EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY* 16-17 (1982).

²⁷ See ARISTOTLE, *NICHOMACEAN ETHICS*, Book V, ch. 4, 8, cited in, THE POCKET ARISTOTLE 158-59, 160-274 (Justin D. Kaplan ed. & W.D. Ross trans., Wash. Sq. Press, 1965). Aristotle's Nichomean Ethics consists of 10 chapters offering a discourse on moral, intellectual and political means of achieving happiness, the ultimate goal of humanity. *Id.*

²⁸ *Id.* See generally Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 522-23(1995).

²⁹ See Brent McKnight, *How Shall We Then Reason? The Historical Setting of Equity*, 45 MERCER L. REV. 919, 932-33 n.15 (1994) (discussing conflict between English Parliament and Chancery Courts).

³⁰ See *Mertens v. Hewitt Association*, 113 S. Ct. 2063, 2068 (1993) (discussing appropriate forms of equitable relief); *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 40 (1989) (distinguishing legal causes of action from equitable causes of action); *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 624-25 (1983) (Marshall, J., dissenting) (discussing "well settled" principle of fashioning equitable relief where other remedies are inadequate).

³¹ See Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 153-62 (1995) (discussing role of injunction as equitable remedy); Donald H. Ziegler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666-69 (1987) (discussing federal court authority to fashion rights and remedies); see also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 505 (1959) (stating that injunction is traditionally equitable remedy available where legal remedies are inadequate).

³² See *Clark v. Coye*, 60 F.3d 600, 604-05 (9th Cir. 1995) (disregarding injunction requires contempt sanctions to conform conduct); *Pro-Choice Network of N.Y. v. Walker*, 994 F.2d 989, 992 (2d Cir. 1993) (advocating contempt sanctions as coercive remedy to conform behavior); *N.A. Sales Co. v. Chapman Indus. Corp.*, 736 F.2d 854, 857-58 (2d Cir. 1984)

who preside over a merged system of law and equity achieve similar results to those of early equity courts by exercising those traditional powers.³³ Historically, it must be conceded that even this remedial power of the Chancellor (or equity judge) did not go unchallenged.³⁴ For example, nineteenth century British critics derided the discretion of the equity courts to enforce legal rights and complained that the only standard by which to measure its authority was the size of the "chancellor's foot."³⁵

In one sense, when Justice Thomas condemns modern Supreme Court decisions for allowing federal equity judges to shape constitutional remedies that work,³⁶ he is merely echoing ancient critiques of well-established Anglo-American remedial law.³⁷ Justice Thomas is incorrect, however, when he suggests that the modern federal injunction which flourished through the years of the Warren Court³⁸ represented a perversion of our legal tradition. The

(demonstrating how wilful violation of injunction results in contempt sanction as well as treble damages).

³³ See FED. R. CIV. P. 1 (abolishing distinctions between actions in law and equity). Federal Rule of Civil Procedure Number 1 states, in relevant part, that "[t]hese rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity . . ." *Id.*; see also *Beacon Theaters*, 359 U.S. at 505-508 (noting federal court jurisdiction to try cases at law and equity within same proceeding). *But see Bereslavsky v. Caffey*, 161 F.2d 499, 500 (2d Cir. 1947) (noting federal procedural rules do not eradicate substantive distinctions between legal and equitable remedies).

³⁴ See *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) (noting modern equity judge does not have limitless discretion of medieval Lord Chancellor to grant or withhold remedy); *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (asserting necessity for equity judge to be flexible rather than rigid); *Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., dissenting) (establishing that although federal courts have historically had broad discretion to fashion equitable remedies, they may not fashion remedies at law without congressional authorization).

³⁵ See JOHN SELDEN, TABLE TALK 43 (Frederick Pollack ed. 1927) (1689). The traditional assessment of equitable remedy is not uniform and has been compared to using the 'Chancellor's foot' as a standard of measure in that "[o]ne Chancellor has a long foot another a short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience." *Id.*; see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 227 (1982) (utilizing 'Chancellor's foot' analogy to demonstrate that national goals would be frustrated if different results were produced in similar situations due to court's exercise of discretion).

³⁶ *Missouri v. Jenkins*, 115 S. Ct. 2038, 2066-71 (1995) (Thomas, J., concurring) (expressing view that federal courts have gone to great extremes to provide equitable results).

³⁷ See David McCord, *Visions of Habeas*, 1994 B.Y.U. L. REV. 735, 800-01 (discussing "arch-conservative," "one fair chance" philosophy of Justices Scalia and Thomas in habeas corpus context); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287 (1993) (noting Anglo-american tradition of awarding exemplary damages).

³⁸ Earl Warren was Chief Justice of the United States Supreme Court from 1953 through 1969. Court decisions during this period are often acknowledged as broad, flexible and individualistic. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1168 n.101 (1988) (dividing Supreme Court doctrine concerning equitable discretion into three historic periods as well as noting Warren Court's expansion of inter-

former Dean of Harvard Law School, Roscoe Pound, regarded as one of the most eminent of modern legal scholars, summarized the relationship between law and equity as follows:

Equity, after all, is a great supplement to the common law. It deals with everything all over the whole domain of the common law. It is a remedial system, really, a great system of remedies where the common law is not equal to maintaining the legal rights which it developed and which it recognizes. After all, it is not merely that equity follows the law. Equity, in a sense is administering the law, but it is administering it by different kinds of remedies and within a different atmosphere, you might say, by application of those remedies.³⁹

It may be more than coincidental that these comments were delivered to the 1948 New Jersey Constitutional Convention at which a young lawyer, William J. Brennan, Jr., sat as a member of the task-force on the judicial article.⁴⁰ It was the same William Brennan who was appointed as a Chancery Judge in the New Jersey Court system in 1949⁴¹ and later became a Justice of the Supreme Court of the United States.⁴²

The arrival of Justice Brennan to the Supreme Court marked the beginning of the Court's modern application of the ancient traditions of Anglo-American equity jurisprudence to constitutional controversies.⁴³ This trend was an attempt to better enable the federal courts to carry out their historic responsibility of enforcing the United States Constitution. Frustrated by the slow pace of constitutionally required school desegregation, the Supreme Court invoked the Chancellor's truncheon. The Court announced that federal trial judges were to assert authority as courts of eq-

pretation of statutory remedies); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965-66 (1993) (explaining expansion of remedies, particularly in civil rights context, as exemplary of Warren court jurisprudence).

³⁹ State of New Jersey Constitutional Convention of 1947, Vol. IV, Committee on the Judiciary Record (1949).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See KIM ISAAC EISLER, WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 65-69 (1993) (noting Brennan's reluctance to accept appointment to New Jersey bench).

⁴³ See *Baker v. Carr*, 369 U.S. 186, 203-04 (1962). Justice Brennan wrote for the majority and asserted that the district court had jurisdiction in a case in which the state apportionment statute was challenged under the Equal Protection Clause. *Id.* He further noted that federal courts have discretionary power to fashion equitable remedies as they see fit. *Id.*

uity to see that segregation was dismantled "root and branch."⁴⁴ That mandate led federal judges to assert the prerogatives of equity courts in other areas to enforce constitutional principles.⁴⁵ The remedial powers of equity armed the federal courts with the tools necessary to carry out what Justice William Douglas once characterized as the primary task of "keeping government off the backs of the people."⁴⁶

Justice Thomas has thrown down the gauntlet and in so doing has exposed the legal agenda of the radical right.⁴⁷ Namely, a program apparently intended to insulate bureaucrats from judicial interference with unconstitutional programs and policies. It is perfectly appropriate that his views be heard and that he endeavor to make those views the law of the land. He should not be allowed, however, to present his partisan and "result oriented" doctrines as the only true path, or to paint the constitutional advances of recent years, particularly those of the Warren Court, as a perversion of our legal traditions.⁴⁸

With federal courts at an historic crossroads, it is important not only that judges and lawyers but also the citizenry at large, understand the dangers inherent in Justice Thomas' views.⁴⁹ One must ask whether the federal courts will become bastions of power and privilege. The alternative is that the courts revert to the role of

⁴⁴ See *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 438 (1968).

⁴⁵ See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2067 (1995).

⁴⁶ See *Schneider v. Smith*, 390 U.S. 17, 27 (1968); see also Letter from William O. Douglas to William K. Johnson (Apr. 24, 1960), in *THE DOUGLAS LETTERS* 158 (Melvin I. Urofsky ed., 1988).

⁴⁷ See Michael Cominsky, *The Real and Imagined Consequences of Senatorial Consent to Silent Supreme Court Nominees*, 11 J.L. & POL. 41, 48 (1995) (noting that Justice Thomas has joined ranks with Supreme Court's "far right wing"); Christopher Smith & Kimberly A. Benger, *Clouds in the Crystal Ball: Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 124 (1993) (observing that Justice Thomas was appointed by President Bush with intention of fashioning conservative Supreme Court); Catherine P. Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 123 (1993) (commenting that Justice Thomas' strong conservative position has caused consternation among leaders of Black community).

⁴⁸ A. Leon Higginbotham, *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1012 (1992). Judge Higginbotham cautioned Justice Thomas to be exceedingly non-partisan and thoughtful before attacking the Warren Court, civil rights organizations and Justice Thurgood Marshall in future writings. *Id.*; see also Wells, *supra* note 47, at 146 (commenting that Justice Thomas is unlikely to bring about "progressive change" in civil rights).

⁴⁹ See Higginbotham, *supra* note 48, at 1005 (explaining need to make American public understand challenges faced by Supreme Court Justice Thomas in order to make valid assessment of his work).

“people’s courts,”⁵⁰ fulfilling their duty as the guardian of fundamental rights when those rights are abridged or threatened by any abuse of bureaucratic power.⁵¹

⁵⁰ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 344-89, 430-63, 547-53 (1969) (discussing role of “people’s courts” in early American political thought).

⁵¹ See Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *NOTRE DAME L. REV.* 447, 532 n.124 (1994) (noting that role of equity courts is to protect public against “legislative excesses”); see also Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 *CONST. COMMENT.* 329, 350 (1993) (noting Framers’ concern about abuse of government power infringing on individual rights).

