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THE WARREN COURT: CONFRONTING THE CHARGES OF ACTIVISM

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INTRODUCTION

For almost fifty-three years the Warren Court has retained its place in the spotlight as the "Activist Warren Court." For many during Earl Warren's reign from 1953 to 1969, the word "activist" conjured up the image of the Chief Justice wearing his dark rimmed glasses and black robe and surrounded by his eight associate justices. Many scholars are roused to stimulating debate at the mere mention of Warren's name. This would not be the case for the likes of his predecessor, Chief Justice Frederick Moore Vinson, and most ordinary citizens would not even be able to identify Melville Weston Fuller as an American chief justice. It was not simply controversial cases that made Warren renowned because there has been a long history of highly contentous cases, beginning with *Marbury* v. *Madison* (1803), that asserted a power of judicial review for the Supreme Court to determine whether the actions of the executive and legislative branches are unconstitutional. Yet despite this, no court in history had been deemed "activist" as forcefully and with the same staying power as the Warren Court. Even as "active" an observer as former President Richard Nixon could reflect in his memoirs that "during the 1950s and 1960s, under the leadership of Chief Justice Earl Warren, the Court had been unprecedentedly politically active."[1]

Today, over three decades have passed since Earl Warren retired, but no subsequent court has received the activist label applied to Earl Warren and the seventeen other justices who served with him. The Warren Court left a legacy of rights-based constitutionalism that had overruled federal, state, and local laws they determined were unconstitutional. Prior to Warren's Court it had been widely believed that the Supreme

[1] Richard Nixon, *The Memoirs of Richard Nixon* (New York: Grosset & Dunlap, 1978), 418.

Court was the "least dangerous branch," but for many threatened by the "activist" direction the Court was taking, it became the most dangerous. Under Warren, the Court had overturned precedent in forty-five cases and forty-four of them were perceived as moving in a more liberal direction.[2] But was it just the overruling of statutes and a change in direction for the nation that led people all over America—from a distinguished lawyer and scholar, to a concerned congressman, to a disgruntled Southerner—to cry "activist"? Close analysis of the various charges of activism against the Court suggests that it was something more. It was not just the direction or decisions that constituted their activist identity. Throughout Warren's tenure, activism would not be summed up by one monolithic critique but would be directed towards many aspects of the Court's decisions.

According to Merriam Webster, activism is defined as "a doctrine or practice that emphasizes direct vigorous action especially in support of or opposition to one side of a controversial issue."[3] The word "activist" as applied to the Warren Court is fraught with numerous definitional challenges. Activism in this context is a constructed term imbued with social, cultural, and political meanings, and a single definition would not be adequate to convey the many understandings of the Court under Warren. A simple definition ignores the context in which "activism" was alleged. For some Americans, "activist" had a positive connotation in that the Warren Court was making strides by expanding civil and individual rights. From this position, "social activism" was a good thing. In contrast, others saw it in a more negative sense and blamed the Court for making decisions that seemed to threaten their values and their way of life.

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[2] Thomas M. Keck, *The Most Activist Court in History: The Road to Modern Judicial Conservatism* (Chicago: The University of Chicago Press, 2004), 72.
[3] Merriam-Webster OnLine.

Earl Warren, in his memoirs, noted that "justices must live with their judgments and be judged by them, not only at the time of their rendition, but through the indefinite future."[4] By exploring the activist charges associated with three of the most highly controversial and contested decisions made during the Warren era, one can find a distinct pattern to the charge weaved throughout its most recognized decisions. In *Brown* v. *Board of Education*, *Griswold* v. *Connecticut*, and *Miranda* v. *Arizona,* the charges of "activism," though diverse, attributed to Warren and some of his fellow judges' sense of a "living Constitution." Using this theory of a "living Constitution," the Warren Court would be able to reinterpret a document written in the eighteenth century and make it apply to the conditions and problems that arose in the present. Their belief that institutions, society, and ideologies have a dynamic and ever evolving nature allowed them to reinterpret the Constitution in various ways to determine the judicial solution to the present problems. There was a pattern of critiques of activism because of the way that the Warren Court decided to interpret the Constitution to address the present challenges presented in cases. Many Americans disliked the novelty, the new creation of policy, or simply disagreed with the Court's decision as a way to address the problem presented. Some disagreed with the notion of evolving interpretations of the Constitution and thereby felt the Court should have practiced more judicial restraint or that the problems could be better addressed outside their jurisdiction. Many scholars, lawyers, and even the Warren judges themselves disagreed about the proper precedent or interpretation of the Constitution in order to decide the cases. They often found the interpretations to be erroneous, vague, contradictory, political, or too astray from fidelity to the Constitutional text. The public's perception of the Court's activist nature was significantly shaped by the

[4] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 318.

historical context in addition to past perceptions of the role of the Court. Against the Court's notion of a "living Constitution" to ensure equal protections to its citizens and its selection of cases that could be used to make significant changes in the area of individual rights, many Americans expressed vigorous disapproval of the Court's decisions.

Though these attitudes were diverse, the critics of the Court's charges often followed a distinct pattern in relation to each of the decisions. Many did not approve of Warren's sense of the living Constitution because it allowed the Court a particular amount of leeway in interpreting decisions. Many Americans often did not like how the Court created new law in which they interpreted the new applications of the Constitution to the present. Sometimes there was a simple dislike for the policy itself. The majority of the protest from ordinary citizens rested on the charge of being a countermajoritarian decision, in that the Court was not acting democratically in accordance with the interests of most Americans. They made these claims despite the framers intent for the Court to protect the rights of the minorities. There were others who believed that the Court did not practice enough judicial restraint and that it often led them to adjudicate decisions that many Americans perceived would be better solved by a different form or locale of government. Some scholars and lawyers were critical of how the Court's notion of interpretation allowed them room to stray away from precedent or the proper interpretation of the Constitution. Often these interpretations were said to be vague and were ambiguous in their application to future cases. They also complained that this allowed personal and political views to seep into the decisions.

Earl Warren realized that Supreme Court decisions are especially vulnerable to criticism.

> The Supreme Court is particularly subject to criticism because most of its decisions are, as they say in athletic events, "close calls" and "judgment calls." Also, as a case wends its way to the Supreme Court, it becomes charged with emotion from the publicity given it and the discussion that follows.[5]

Such claims of activism were used by very different people for very different purposes. Southern congressman resisted school desegregation, and social activists praised the expansion of civil rights. Some academics and legal scholars viewed the opinions as rootless activism, a sloppy attempt at social engineering. Even the Court's own justices perceived an improper use of legal precedent, and presidential candidates built their platforms on criticism of the Court's leniency toward criminals. Despite the varied topics of the cases and the different constituencies doing the criticizing, the three cases stirred up charges of activism centered on disagreement or approval of the Court's notion of a living Constitution.

The term "activism" was never used at the time of Chief Justice John Marshall's Court to describe the controversy roused from its decisions. Despite contentious issues that were being settled in the courts during the nineteenth century such as currency reform, slavery, income tax, and transportation competition, the label of "activism" was never used to describe these decisions. "Activism" is a distinctly twentieth-century idiom. There was a nineteenth century constitutional jurisprudence ideology that the Constitution held fixed, fundamental principles and the courts had an obligation to guard these principles from meddling of those such as the legislature and the executive branches.[6] While the Chief Justice Charles Evans Hughes Court during the New Deal may be perceived activist in the conservative sense by overturning federal and state laws

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[5] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 319.
[6] G. Edward White, *Earl Warren: A Public Life* (New York: Oxford University Press, 1982), 351.

having to do with economics, they were trying to fight the new policies proposed by the Roosevelt administration. This nineteenth century form of jurisprudence was epitomized by the Hughes Court in that it felt that Congress did not have the power to interfere with private affairs. They held out against change, whereas the Warren Court welcomed it. The Warren Court on the other hand was making the changes in its time by extending the new rights revolution. Its decisions paralleled other progressive movements of the time like the civil rights movement and women's liberation. Those who deemed the Warren Court activist objected to its sense of a Constitution that was dynamic and ever-evolving. The Court decided that the Constitution's most fundamental, established principles could be interpreted to solve current problems that were not even extant when the framers drafted the Constitution. This twentieth century term, "activism," became associated with the Warren Court in contrast to the widespread belief by the public and even the Hughes Court that justices did not make new law. Instead, they believed that the laws were already firmly established in the Constitution. The Warren Court took a different path than its predecessor, and as a result, became "activist." Warren's Court would receive praise and criticism from the changes they would make to the public's perception of the role of the Supreme Court in American life.

BROWN V. BOARD OF EDUCATION OF TOPEKA **347 US 483 (1954)**

UNANIMOUS DECISION:

- CHIEF JUSTICE EARL WARREN

- JUSTICE HUGO L. BLACK

- JUSTICE HAROLD BURTON

- JUSTICE TOM C. CLARK

- JUSTICE FELIX FRANKFURTER

- JUSTICE JOHN M. HARLAN

- JUSTICE SHERMAN MINTON

- JUSTICE STANLEY REED

BROWN V. BOARD OF EDUCATION OF TOPEKA 347 US 483 (1954)

Although his supporters would later dub him "Superchief," Earl Warren's rise to the chief justiceship was not originally foreseen. On September 8, 1953, Chief Justice Vinson died suddenly of a heart attack. President Dwight Eisenhower had already promised the current California governor the next opening on the bench, but he had no idea that it would be the position of chief justice. Still, Eisenhower appointed him to the chief justice to fill Vinson's former position. Due to his lack of any former judicial experience, Chief Justice Warren entered the Court with condemnations of political patronage already directed towards him.[7]

While many citizens had historically viewed the Court as an "ivory tower," Warren, building on his earlier roles as a as a public servant, a district attorney and California governor, hoped to make the role of the Court an essential element of daily government.[8] He argued that "the judicial process as it functions in the Supreme Court is more open than that of either the legislative or executive branches of government."[9] He desired to change the way American citizens viewed the Court and the Constitution on which the nation was governed. He, like his fellow justices, believed that the Constitution had been intended to provide equal justice before the law to all of its citizens. This conviction was to lead the Court in a new direction of dynamically making decisions to remedy Constitutional wrongs.

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[7] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 778.
[8] Ibid, p.779.
[9] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 342.

The Court's *Brown v. Board of Education of Topeka* (1954) decision is the first case Americans regarded the legacy of the Warren Court. At its issue many also viewed it as the quintessential "activist" decision. Today most agree that the decision was both constitutionally appropriate and morally just by ending racial segregation in public education, although this was not the case when the decision was first announced. At the time of the decision, America was becoming culturally and socially a different nation in which formal racism flourished under law, though race relations were beginning to be challenged in all levels of government, institutions, and daily life. The Jim Crow laws had been tradition and the way of life in the South for decades. After World War II, in which many African Americans had once again loyally served their country, they and many other Americans began to question the realities of second-rate citizenship of African-American citizens and unequal protections allowed under the Constitution. In contrast, there were other Americans who were satisfied with the current racial status quo and thought that changing it would threaten their way of life.

Taking the chief justiceship of a court that had just heard arguments on cumulated suits featuring this conflict, Warren's conviction in a living Constitution created an impact on the issue immediately. Warren insisted that society had transformed dramatically since the framers had written the Constitution almost 170 years earlier and since successors had amended it eighty years earlier. The lawmakers could not have anticipated every issue that would arise in American life, and indeed, did not. This view affected the way in which *Brown* was decided *and* it stimulated the various charges of activism that it quickly attracted. Warren understood that when the United States adopted

the Fourteenth Amendment, it had not anticipated the crisis of racial segregation that would arise in *Brown*. Warren argued that:

> we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education at the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[10]

As a result, Warren himself believed and convinced other judges on the bench that this living Constitution conception remedied this situation by reinterpreting the Constitution to apply the original principles to the current problems. This philosophy in addressing issues not explicitly stated in the Constitution, as in this case, racial segregation, would raise a whole other set of problems for Warren's critics.

Reinterpretation of the Constitution by this principle created a series of problems according to critics summed up in the charge of "activism." The notion of the "living Constitution" allowed a great deal of room for interpreting the application of the Constitution's principles to the cases of their period. As a result, opponents disputed how the Court should have interpreted the Constitution and even whether or not it had the jurisdiction to decide the issue of racial segregation in state-directed public education. A primary critique, particularly in the South, of the Court's activism in the *Brown* decision rested on it being countermajoritarian. Many Southerners argued that it was the role of each state, and not that of the Federal Court and Constitution, to determine racial policies. With these opponents, many scholars and lawyers believed that the "living Constitution" let the justices rely too much on their legal ingenuity, thereby allowing political and

[10] *Brown v. Board of Education of Topeka*. 347 US 483 (1954).

personal bias to outweigh a strong foundation in legal precedent. These reactions would echo through subsequent controversial Warren cases.

The road to the *Brown v. Board of Education* (1954) decision on Monday, May 17, 1954 was not as simple and unproblematic as the unanimous decision may have suggested. *Brown* was part of a long history of cases addressing race issues. Since the Civil War, the Court had issued decisions regarding race issues that were said to contradict the purposes of the newly adopted equal protection and due process clauses of the Fourteenth Amendment. For the most part, these cases tended to maintain the status quo and allow racial discrimination to flourish. The Court in the *Civil Rights Cases* (1883) denied Congress the ability to protect its citizens from racial discrimination, and in essence, invalidated the power of Congress over the Reconstruction Amendments and instead granted it to the states. *Plessy v. Ferguson* (1896) was another landmark race case. Although not written anywhere explicitly in the opinion, the Court decided what the public recognized as the "separate but equal" doctrine approved racial segregation so long as equal facilities were provided.[11] Justice Henry Billings argued that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races unsatisfactory to either."[12] The Court, in deciding these cases, had maintained the racial status quo.

Beginning in 1910s, the Court shifted its course to cut away some of the barriers of racial discrimination that the Courts, through their rulings in the nineteenth-century, had helped build. In *Buchanan v. Warley* (1917) the Court invalidated residential

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[11] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 79.
[12] *Plessy v. Ferguson*. 163 US 537 (1896).

segregation ordinances on the basis of the deprivation of the Fourteenth Amendment's right to property based on color.[13] By 1950, in *Sweatt v. Painter*, the Court in a unanimous decision ordered Heman Marion Sweatt , a black student, to be admitted to the all white University of Texas Law School.[14] This gradual breakdown of segregation in specific instances developed further after World War II. Many Americans were appalled by Hitler's racist philosophy and his subsequent genocide attempt of the Jews. African Americans had proven their loyalty as American citizens by adopting the war cause and fighting in the armed forces, though they were segregated. Many Americans felt uncomfortable with strict segregation that "bore a striking resemblance to the Nazi program."[15]

By the time that Warren was sworn in as the new Chief Justice in October 5, 1953, school desegregation cases were at the top of the Court's agenda. Beginning in June 1952, the Court stated that it would be hearing arguments in December challenging public school segregation. The cases ranged in places from Washington, D.C. to South Carolina to Delaware. The Court decided to merge the cases together, putting the Kansas case at the forefront so that, as Justice Clark hoped, "the whole question would not smack of being a purely Southern one."[16] The justices, before Warren joined them on the bench, had not yet reached an agreement. In fact, under Chief Justice Vinson, the Court was divided on the issue of segregation. Reargument of the cases convened on December 7,

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[13] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 80.
[14] *Sweatt v. Painter*. 339 US 629 (1950).
[15] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 80.
[16] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 778.

1953, this time with Warren as the new Chief Justice. The decision was not announced until six months later, giving Warren time to persuade the Court to a unanimous decision.

Warren recalled that he had done all in his power to make the *Brown* decision legitimate and lasting, as well as accessible and understandable to the American people. Warren knew, although perhaps not specifically, from the opening arguments of the *Brown* case, that it would have an enormous impact in all aspects of American life, and not just public education. He understood that there could be particular reverberations that only one with an insider perspective could possibly foresee and in which "dire results might follow."[17] With this understanding of the magnitude of each decision, when he became the Chief Justice, he transformed the system of delivering opinions so as to release the press copies of each opinion as soon as it was announced. "This gave everyone an equal break at the news."[18] He did not want everyday people to have a disadvantage over the media or those in political and legal professions. Furthermore, Warren stressed that he made a promise to himself not to read the "fan" mail concerning Court cases. He thought it was inappropriate to discuss a case with anyone before the decision was announced to the public. He realized that he could unknowingly be influenced by letters advocating one side or another. Furthermore, he felt that a justice should not have to further explain or defend one's position and that the opinion should stand for itself. As a result of this being such a pivotal decision, the Court managed to fit the opinion into a concise eleven pages, with the intent that it would be short enough to run in the national papers[19]. This conveyed that the opinion and the workings of the

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[17] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 284.
[18] Ibid, p.285.
[19] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 781.

Supreme Court were intended to be accessible and understood by all Americans. In order to stress the gravity and significance of this decision, the Court concluded that they were to have a unanimous decision with an opinion solely signed by the Chief Justice.

When the news of the *Brown* decision broke, many national newspapers, excluding the South, praised the decision for its progressiveness. The *Cincinnati Enquirer* announced that the Supreme Court decision was "simply to act as the conscience of the American nation."[20] While it may have been true for some in the urban areas, it was not so simply celebrated. There were mixed feelings in the black community. In a letter to the Chief Justice, James Taylor from East Liverpod, Ohio revealed that "I am a black man whose life has been made a little sweeter because of the justice that prevailed during your reign."[21] Whereas many saw this as a huge step forward in the way of civil rights and a form of emancipation, others were much more skeptical about how, or even if, this court decision would be implemented within American society. Nat Williams, a Memphis black columnist wrote, "there was no general 'hallelujah', 'tis done' hullabaloo."[22] Instead hopeful thoughts were mixed with cynicism and uncertainty about how state and local governments were planning to enforce this decision, especially in the deeply segregated South. Earl Warren, himself, had noted the difficulty that would follow. "We left those judges [Southern federal judges] the job of implementing it in a region where three centuries of slavery and insidious segregation

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[20]Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 783.

[21]James Taylor, Ohio, to Earl Warren, 11 July 1969, letter in the hand of James Taylor, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.

[22] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 783.

had case-hardened a way of life."[23] Warren knew that the Supreme Court had to declare their constitutional interpretation of the law, but also recognized that the real challenge would be putting the decision into practice by transforming the local governments and the way of life for people in the South.

The idea that just nine justices centered all the way in Washington, holding no political accountability to the South, could change much of the workings of its governments, institutions, and everyday life gave many in the South an impression of extreme power and "activism". As Harry Newton from Dallas, Texas put it, "nobody except the simple-minded fool could possibly believe that Negroes and whites can ever live together in harmony --- five thousand years of history clearly shows this to be fact."[24] This was a shared sentiment among many Southerners. One of their principal claims of activism against this decision would be based upon it being antidemocratic in its opposition to the wishes of the Southern white ruling majority implementing racial segregation in schooling. Many Southerners believed that the Court should have, as had done previously in history, practiced more judicial restraint since they considered this the jurisdiction of the state.

While the members of the United States Senate and House of Representatives were publicly encouraging their citizens to remain lawful, they pledged to find legal ways in which to reverse this perceived "activist" decision. They thought it conflicted with what they understood as the law of the land and the will of the democratic majority in the South. On March 12, 1956, "The Southern Manifesto," that had previously been signed by nineteen U.S. Senators of eleven states and seventy seven members of the House from

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[23]Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 300.
[24] Harry Newton, Texas, to Earl Warren, 17 June 1969, letter in the hand of Harry Newton, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.

Florida to North Carolina, was presented on the Senate floor in response to the recent *Brown* decision. They expressed that the *Brown* decision was faulty in using the Fourteenth Amendment as a basis for their judgment in that it did not only fail to mention education in its content, but through Supreme Court precedent, in ruling in the 1896 *Plessy v. Ferguson* case, the Court had already proclaimed a person was not deprived any of their rights if they were provided with "separate but equal" facilities. They understood that the racially segregated Southern education system was fulfilling this measure and had been "reinstated time and time again."[25] In their view, a century had almost passed in which no challenges through a Constitutional Amendment or Act of Congress had arisen to challenge their way of life.

Besides claiming that the Court had made a decision against the will of the majority of the South along with hinting that it had not used proper precedent, Southerners charged that the Court was overstepping its jurisdiction by meddling with issues they thought they could deal with more properly. For instance, some Southern members of Congress stressed in "The Southern Manifesto" that the Supreme Court was depriving them of their own fundamental rights as humans "for parents should not be deprived by Government of the right to direct the lives and education of their own children."[26] They believed that the Court, when making the decision, did not consider the implications that would occur in implementing such a new system. Many Southerners were fiercely resistant to integration and had used violence to attempt to enforce segregation and display white supremacy. Furthermore, some criticized that the Court would not realistically solve any race related problems by integrated public education. In

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[25] *Congressional Record,* 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington D.C.: Governmental Printing Office, 1956. p.2.
[26] Ibid.

a letter to Warren, C.C. Smith from Memphis, Tennessee explained that "schools are best when the local people in the school district take a great interest in their school and are active in building and administering its affairs. . . I firmly believe it(sic) giving all students an equal opportunity to get an education but you don't get this through forced mixing."[27] To them, the Court should have practiced more judicial restraint because the states knew what was best for their schools. Additionally, they conveyed the perceptions that the decision was countermajoritarian through explaining it as only a step backwards for the way that the majority of Southern whites had traditionally dealt with race related issues. Many white Southerners were under the impression that the *Brown* decision was going to create resentment and suspicion between the supposedly friendly relations between blacks and whites that "The Southern Manifesto" claimed had been "created through 90 years of patient effort by the good people of both races."[28] The white Southern citizens felt that this decision was handed down from the top branch of government that had no perception of what was best for its people, and as a result, would ruin their public school system.

In further critiquing the formulation of the decision for a lack of judicial restraint and being countermajoritarian, the Southern congressmen in "The Southern Manifesto" also charged that the Court, "with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land."[29] This, they regarded as "activist" in that it exceeded their understanding, rather than a prescribed set of rules for the proper role of the Court. The

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[27] C.C. Smith, Tennessee, to Earl Warren, 28 June 1969, letter in the hand of C.C. Smith, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.
[28] *Congressional Record,* 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington D.C.: Governmental Printing Office, 1956. p.2.
[29] Ibid.

Court they argued was, in a way, "the maker of history and of tradition that bind it"[30] but what they did not perceive is that history did not have to be static. They viewed the Court's interpretation of the Constitution as an attempt to legislate, encroaching in the role of Congress and undermining the "reserved rights of the States and the people."[31] The justices in preparing the judgment had expected some form of backlash in that they had predicted that Southern whites and politicians would find ways in which to defend their way of life.

But while history generally portrayed the South as volatile and antagonistic in response to the 1954 *Brown* decision because their conservative way of life seemed to be such a contrast to the liberal reforms in civil rights, it would be too simplistic to sum up the entire South by this characterization. While this was often the case that was reported, there were some prominent figures who were not openly and immediately denouncing it as an "activist" court. Although they may have not been actively celebrating the decision, there were a few government officials who were stressing acceptance and lawfulness of the decision. Francis Adams Cherry, the governor of Arkansas at the time, told his state and the rest of the nation, "Arkansas will obey the law. It always has."[32] Some of the governors were insisting on voices and acts of moderation as Virginia governor, Thomas Stanley, did in tenaciously urging his state to keep "cool heads, calm study, and sound judgment."[33] There were white Southerners at the time who believed that it was the first step in overturning the severe inequalities between blacks and whites in the South. In a

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[30] Alexander M. Bickel, "Is the Warren Court Too 'Political,'" *The New York Times Magazine,* 25 September 1985, cited in David F. Forte, *The Supreme Court in American Politics: Judicial Activism vs. Judicial Restraint* (Lexington: D.C. Heath and Company, 1972), 54.
[31] *Congressional Record,* 84th Congress Second Session. Vol. 102, part 4 (March 12, 1956). Washington D.C.: Governmental Printing Office, 1956. p.1.
[32] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 783.
[33] Ibid.

letter to Warren from Macon, Georgia, David L. Mincey stated that "it took one hundred years for equal protection of the laws to come to its real meaning, and it came under your leadership."[34]

Another prevalent claim of activism descended from the notion of the "living Constitution" was that the reinterpretation often allowed the Court to sway from fidelity to the Constitutional text. In the case of *Brown*, many criticized the Court for putting less of an emphasis on solid legal precedent and more on sociological evidence, and as a result, moving away from judicial restraint. The belief that the *Brown v. Board* decision was an "activist" decision opposed to the true principles of the Constitution was not only articulated by angry Southern white citizens and politicians, but also by highly revered academics. Learned Hand, a Second Circuit judge who was often revered as the most eminent jurist not on the Supreme Court, highly critiqued the Court after its *Brown* judgment and spread his message questioning the legitimacy of the Court and its decision to other academic institutions. In delivering the annual Holmes Lectures at Harvard Law School in February 1958, he, with a background in judicial restraint, condemned the Court for what he saw as stepping out of the proper limits of judicial power.[35] He insinuated that the Court was accruing so much power in law-making that it was taking over the role of Congress. "It seems to me that we must assume that it did mean to reverse the 'legislative judgment' by its own appraisal."[36] Many academics and observers of the Court realized that there wass some legislation involved in adjudication.

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[34] David L. Mincey, Georgia, to Earl Warren, 4 October 1968, letter in the hand of David L. Mincey, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.
[35] Thomas M. Keck, *The Most Activist Court in History: The Road to Modern Judicial Conservatism* (Chicago: The University of Chicago Press, 2004), 55.
[36] Learned Hand, *Bill of Rights: The Oliver Wendell Holmes Lectures, 1958, (*Cambridge: Harvard University Press, 1958), 54.

In interpreting law, one, in a sense, is making new law. Although this may be the case for many academics, it did not go so far as to excuse the Court for the perceived boldness in decisions that they figured should have leaned more towards the principle of restricted adjudication. Like the legendary justice, Benjamin Cardozo, believed, "He [a justice] fills the open space in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart."[37] While there were no direct guidelines for how much liberty a justice carried in interpreting decision, there was a perceived boundary, though fluid, that critics felt a justice could not cross.

Furthermore, Hand admonished the Court for the language of their opinions. He believed that justices would circuitously denounce educational segregation for various reasons by emphasizing such social language as "feelings of inferiority" rather than legal precedent. He saw them overruling the legislature when the Court would "wrap their veto in a protective veil of adjectives…to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision."[38] He was especially critical on judges who used their personal or political preferences to be wrapped up in vague constitutional language that would mislead the general public. As a part of human nature, one is guided in choices by preferences and values. For critics it prompted the question of whether it was even possible for the Supreme Court to make a truly objective and neutral decision and if not, was it automatically doomed to be "activist"? If this was so, there was something that set the Warren Court apart in that hundreds of decisions made before this and not criticized

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[37] Phillip Kurland, "Toward a Political Supreme Court," *The University of Chicago Law Review* Vol. 37 (1969), cited in David F. Forte, *The Supreme Court in American Politics: Judicial Activism vs. Judicial Restraint* (Lexington: D.C. Heath and Company, 1972), 84.

[38] Learned Hand, *Bill of Rights: The Oliver Wendell Holmes Lectures, 1958, (*Cambridge: Harvard University Press, 1958), 70.

in the same "activist" sense as did this Court. Arthur Miller and Ronald Howell, professors of law and political science respectively, believed that "decisions should be reached on constitutional cases … by the application of known or ascertainable objective standards to the facts of this case."[39] If this was one of the parameters in which decisions were supposed to be made, then the Warren Court could be deemed "activist" for using language that presented segregation as a social issue rather than a legal one and in not justifying the decisions strictly through constitutional principles.

Another way in which Learned Hand, with other critics, perceived *Brown* as a decision not properly founded in the Constitution was that it did not explicitly overrule *Plessy v Ferguson*. Other scholars argued it did though. Despite this it became clear that *Brown* did not override segregation in all areas and institutions. To Hand, this seemed to downplay the urgency of racial equality in all areas to exclusively emphasize its importance in public education. By claiming the decision was unfounded in the Constitution, he suggested that this was an interpretation of self interests and a political cause. Similarly to Louis Brandeis and Felix Frankfurter view of the Supreme Court's role, Hand believed that the Court should have refused more of the case conflicts in which it had been presented if it did not seem to pertain to the Constitution. He even envisioned "the Court will assume the role of a third legislative chamber"[40] if the justices continued this path of "overruling" the legislature by not upholding a sense of judicial restraint. Hand's criticisms of the Court were a blow to the decision's legitimacy as a result of the intellectual authority he carried and to the national exposure he received.

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[39] Arthur Miller and Ronald Howell, "The Myth of Neutrality in Constitutional Adjudication," *University of Chicago Law Review*, Vol. 27, No. 4 (1960), cited in David F. Forte, *The Supreme Court in American Politics: Judicial Activism vs. Judicial Restraint* (Lexington: D.C. Heath and Company, 1972), 46.
[40] Learned Hand, *Bill of Rights: The Oliver Wendell Holmes Lectures, 1958,* (Cambridge: Harvard University Press, 1958), 55.

Despite Hand's criticism of the decision, Chief Justice Warren was more disappointed by the lack of positive response from the White House. He placed some of the blame for it not being well received and enforced timely and efficiently on President Dwight Eisenhower himself. Warren believed that many of the negative reactions to *Brown* were due to the virtual silence from the White House. Although not explicit, he charged them of conveying the aphorism "that discrimination cannot be eliminated by laws, but only by the hearts of people".[41] As revealed in his memoirs, Warren believed that the racial strife that occurred after *Brown* could have simply all been avoided if the popular President Eisenhower been more vocal in expressing his approval and urging the American public to accept it as law. Warren especially resented an encounter during a White House dinner when the *Brown* case was under submission. Eisenhower, in alluding sympathy for the South, confided in Warren, "These are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes."[42] Without the public and enthusiastic consent of the White House for *Brown*, the Court appeared alone in its decision. The lack of support—essentially flat-out silence—from such a leading figure, especially one charged with enforcing the law, furthered opponents' sense of illegitimacy of the Court's decision.

It was not only the White House that the Court blamed for the lack of action taken both before and after the *Brown* decision to ensure equal protection for people of all races. Warren also blamed Congress for the lack of previous civil rights legislation. In his memoir, he expressed that if Congress had only passed "remedial" legislation previously

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[41] Earl Warren, *The Memoirs of Earl Warren* (Garden City, N.Y.: Doubleday & Company, Inc., 1977), 289.
[42] Ibid, p. 291.

then the emotional tension of the Court's task would have been avoided. The prospect of that had been highly improbable due to the strong Southern resistance in the cases of the Truman administration's efforts and the subsequent civil rights legislation of the 1964 Civil Rights Act and the 1965 Voting Rights Act that succeeded the *Brown* decision a decade later. Opponents argued that since there was no national desegregation legislation prior to the case, the Court's decision was ahead of the public majority at that time. Critics understood this to show that the Court was "activist" in that they were making law that the American public had not mandated. This was perceived by many as countermajoritarian and thus, contrary to many American's perceptions of the role of their government.

America's institutions were built on principles of democracy. This allowed many critics to perceive the Supreme Court's nine judges' ability to interpret the law as the antithesis of these principles. Although, the Court's supporters pointed out that America's institutions were also built upon ideas of rights inviolable by a democratic majority. The Supreme Court, Phillip Kurland noted, is "the single institution in our system created for the purpose of protecting the interests of minorities."[43] Thus, advocates and critics contested whether the Court should have ruled or practiced judicial restraint and waited for the other representative forms of government to take the responsibility of legislating. Warren and the rest of the Court would have preferred that, believing that some of the implications and the "activist" accusations that arose out of the *Brown* decision would have been avoided altogether. Other branches of government had

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[43] Phillip Kurland, "Toward a Political Supreme Court," *The University of Chicago Law Review* Vol. 37 (1969), cited in David F. Forte, *The Supreme Court in American Politics: Judicial Activism vs. Judicial Restraint* (Lexington: D.C. Heath and Company, 1972), 82.

stepped in on the issues of civil rights. Perhaps that would have been true. But the Warren Court did decide to take on *Brown*.

It was not inevitable that the nation would react the way it did after the May 17, 1954 decision, nor was it wholly beyond Warren's Court to affect the response. Some criticism of the Court suggests that it was not purely external forces that caused the outcome. Much of the criticism stemmed not just on the basis of deciding the case but of how the justices explained their basis for their decision.

The Supreme Court, while attempting to make the opinion accessible and understandable to all, presented an opinion that critics believed was an enigma. Not just critics, but many legal scholars thought the language of the Court's opinion questioned the legitimacy of the justices' intentions in making a judgment. For trying to create a forceful opinion, in making it unanimous and signed by the Chief Justice, the opinion's third paragraph conveyed a surprising tone of uncertainty, that for critics, cast doubt on the legitimacy of the decision. The Court wrote that after all the investigation and arguments, it "cast some light" on the issue but "[was] not enough to resolve the problem" and "at best, they are inconclusive."[44] To scholars, like Hofstra Law School professor, Leon Friedman, the Court had set its self up for criticism of being "activist" by claiming to be unqualified to decide on an issue with such ambiguity and a lack of guiding principles.[45]

In addition to legal scholars' perceptions that the language of the Court was inconclusive, the opinion also seemed to critics to contradict itself in its explanation of constitutional interpretation. In stating that "separate educational facilities are inherently

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[44] Leon Friedman Ed., *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55* (New York: Chelsea House Publishers, 1969), 327.
[45] Ibid.

unequal", the Court declared that racial segregation in public education went against the Due Process Clause in the Fourteenth Amendment. Critics noted that if this was true, then it also assumed that this had been so since it was adopted almost ninety years earlier. Further, to opponents, this seemed to invalidate any court cases that supported racial segregation and discrimination, such as *Plessy*. To them, the opinion seemed to contradict this thought with the instruction to look at segregation and its effects over time to determine whether or not it was constitutional. "We must consider public education in the light of its full development and its present place in American life throughout the Nation."[46] To critics, this suggested that the effects of segregation had perhaps not always been unequal as implied earlier. The reference to history and transformation conveyed that the appropriate application of the Constitution was changing and there were not timeless guiding principles that inherently made segregation unequal, as expressed a few paragraphs earlier in the opinion. Some scholars thought that, in this case, the Court suggested that the constitutionality of segregation in public education was not the basis of its decision. They argued that its emphasis on the passing of time and its subsequent effects made segregation a social and political issue instead.[47]

Another source of controversy surrounding the *Brown* opinion as to whether it was influenced by external social and political issues was its Footnote Eleven. Instead of relying upon past Court cases regarding "separate but equal" principles, such as *Sipeul* v. *Oklahoma* and *McLaurin* v. *Oklahoma State Regents*, in the conventional way of precedent, the Court mentioned them but stressed their irrelevancy to the *Brown* decision. They set those cases apart deciding that they did not have to reexamine the validity of

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[46] Ibid, p.329.
[47] Ibid.

Plessy since in these cases the black students' education was not only separate, but unequal. *Brown*, the Court declared was to not determine whether the education had equal concrete things such as facilities, teachers, and curriculum, but whether "the effect of segregation"[48] inherently made segregated public education unequal. Although the opinion made reference to various "separate but equal" doctrine cases, it used very little case precedent to justify its decision in *Brown.* "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."[49] In writing this, the Court concluded that there was no place for segregation in public education. This did not simply overturn *Plessy v. Ferguson* because they were not saying that segregation was unconstitutional in other areas. Warren wrote that segregation in education was unequal and thus the plaintiffs were denied their equal protection rights under the Fourteenth Amendment.

The argument that the Warren Court was "activist" often addressed the issue that it used a great deal of social science as a basis for its decision in *Brown.* The use of social science rather than legal precedent provoked criticisms of "activism" in that the Court was deciding on the basis of social effect rather than legal principle. The opinion announced that "whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[50] Opponents bolstered that by noting Warren's ever repeated question, "But is it fair?" They used these statements to reveal how the Court was guided by social science findings. To them,

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[48] Ibid.
[49] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 732.
[50] Ibid.

the Court emphasized the use of books and studies in the social sciences regarding racial segregation, discrimination, and the resulting psychological effects for blacks.

One such argument citing the Court's substitution for soft sciences and lack of legal precedent pointed to Gunnar Myrdal's *An American Dilemma.* The book had been written in 1944 to assess the "negro problem in America"[51] and was based upon the examinations of black politics, economics, social stratifications, inequality, leadership and race attitudes. Opponents of the decision were angered that a radical "foreigner" who had supposedly "sent a message of condolence on the death of Stalin"[52] was a leading figure in possibly swaying the justices' decisions. Myrdal made general and expansive claims about blacks, they charged, often without citing how he had come to these conclusions. He made statements for blacks as a whole in that "the pressure of this expectancy on the part of society conditions and forces him, willy-nilly, into the role of Negro champion."[53] He continued that these expectations were deeply rooted in various American institutions including universities and public education.

Since Gunnar Myrdal's assessment of the blacks in American society, social and psychological studies have become more complex and highly developed but even in this period the social sciences were still relatively in their primitive state and were not highly relied upon or regarded as truth. Legal scholars condemned the Court in its use of these social sciences as a basis in influencing their decisions for these "facts" were interpreted by social scientists whose methods could be inherently flawed and their conclusions, simplistic. After the decision had come out, Warren defended his controversial Footnote

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[51] Ibid, p.784.
[52] Ibid.
[53] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Row, 1962), 28.

Eleven in claiming that "It was only a note."[54] But for many critics, it was not just a note. It was an indication of the Court taking its own sociological and political views in influencing the way in which they interpreted law. To the eyes of many, *Brown* had become an instance of solving a social problem rather than a legal one.

Today, not many Americans would assert that the Warren Court came across the wrong decision in *Brown,* but that is not to say that it is still not highly contested. There were many Americans at the time, particularly white Southerners, who accused the Warren Court of being activist especially on the grounds that the decision was countermajoritarian and that it could have been better dealt with by the state. While this charge of activism does not hold as strong as it did at the announcement of the decision, legal scholars today still charge the Warren Court of activism. They do this not on the basis of the decision itself, but rather how the justices made this decision. Critics have continually charged the Court of activism particularly through *Brown's* use of social sciences rather than legal precedent, and its confusing and contradictory language of the opinion.

[54]Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 784.

GRISWOLD V. CONNECTICUT 381 U.S. 479 (1965)

CHIEF JUSTICE EARL WARREN – REGULAR CONCURRENCE
(AGREED WITH GOLDBERG)

JUSTICE HUGO L. BLACK – DISSENT
(WROTE OPINION)

JUSTICE WILLIAM J. BRENNAN, JR. – REGULAR CONCURRENCE
(AGREED WITH GOLDBERG)

JUSTICE TOM C. CLARK – MAJORITY

JUSTICE WILLIAM O. DOUGLAS - MAJORITY

JUSTICE ARTHUR J. GOLDBERG – REGULAR CONCURRENCE
(WROTE OPINION)

JUSTICE JOHN M. HARLAN – SPECIAL CONCURRENCE
(WROTE OPINION)

JUSTICE POTTER STEWART – DISSENT
(WROTE OPINION)

JUSTICE BYRON R. WHITE – SPECIAL CONCURRENCE
(WROTE OPINION)

GRISWOLD V. CONNECTICUT 381 U.S. 479 (1965)

While *Brown v. Board of Education* might be perceived as the landmark decision of an "activist" court, it was only the beginning of a long trail of controversy that would follow. The Warren Court had been deciding highly disputed cases for about nine years by the time they took on the case that would soon establish a new area of constitutional law, *Griswold v. Connecticut* (1965). The Court's willingness to take on cases dealing with individual and civil rights and its record of expanding enumerated liberties brought an increased number of special interest groups eagerly seeking to get their cases heard.

Griswold v. Connecticut was criticized as "activist" from its very beginnings and resonates through to the present. Its legacy in interpreting the constitutional "right to privacy" became the stepping stone for deciding *Roe v. Wade* (1973), after Warren's retirement. This landmark decision legalized abortion in 1973 and is responsible for polarizing political attitudes on the issue that are still very alive today. To the delight of some and the horror of others, the Warren Court initiated the legalization of abortion for married women. *Griswold*'s "right to privacy" was then extended to unmarried couples in *Roe*. President Ronald Reagan, in an unsolicited article for *Human Life Review* in 1983, wrote:

> Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators — not a single state had such unrestricted abortion before the Supreme Court decreed it to be national policy in 1973 . . . This is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. [55]

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[55] Ronald Reagan, "Abortion and the Conscience of the Nation," *National Review Online*, June 10, 2004, originally appearing in the *Human Life Review*, Spring 1983.

This statement conveys the lasting effects of the Court's decisions on the nation's politics, the outrage that would continue to grow, the strong political responses of both sides, and the sentiments of the Court stepping beyond their role. These were a few of the feelings that sprung from American voices together in calling this a clear case of judicial activism.

The Warren's Court notion of the "living Constitution" prompted many of the charges of activism towards the *Griswold* decision. The Court majority's interpretation of the "right to privacy" in *Griswold* epitomized this notion in that this fundamental principle, this perceived "right to privacy," was a basic right set in the Constitution that the Court could use in solving the problems of the ever-evolving society. Unfortunately, the Constitution held no specific guidelines on the matters falling under *Griswold*. Many opponents' charges of activism originated from the various interpretations of what the justices believed the Constitution did or did not state about contraceptives, abortion, and the "right to privacy" within the context of *Griswold*.

Griswold v. Connecticut dealt with the prosecution of Estelle Griswold, the executive director of the Planned Parenthood League in Connecticut and one of its doctors, Dr. C. Lee Buxton who had prescribed contraceptives to a married woman. They had gone against an 1879 Connecticut statute that banned the use of any contraceptive drug or device and also punished anyone who provided or recommended any forms of contraception.[56] The justices' role was to find whether or not this law was constitutional. In a seven-to-two decision they overruled the Connecticut statute on the grounds that it failed to uphold the constitutional right to privacy.

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[56] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 182.

The "right to privacy" was not an entirely new legal concept at this time. A 1961 decision, *Poe v. Ullman*, built the argument from Justice John Harlan's dissent that *Griswold* would later use as its foundation. *Poe*, in itself, had not done very much to overrule the Connecticut law prohibiting the sale and use of contraceptives. Justice Felix Frankfurter had written the plurality opinion denying it judicial review since the law had never been enforced, and as a rule, the Court could only decide cases that have a legal challenge to adjudicate.[57] Justice Harlan disagreed with Frankfurter and in his lengthy dissent he stated, "I believe that a statute making it a criminal offense for a married couple to use contraceptives is in an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[58] On this basis, Harlan was able to refer back to this dissent to conjure the "right to privacy" protection he used four years later in *Griswold v. Connecticut* to overrule the contraceptive statute. Some critics viewed this right to privacy as a way of inventing new constitutional law by pretending to uphold old law.

The Supreme Court had a long history of discussing privacy rights, but until *Griswold*, it had remained merely a matter of discussion. Some viewed the decision immediately as activist in that it made "privacy rights" a potentially expansive constitutional protection. Despite the fact that it was no longer just talk, critics said it was unclear as to its implementation and its extent. Robert G. Dixon, Jr., a law professor at George Washington University in 1965, noted the "case is longer on yearning than

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[57] Mark B. Levin, *Men in Black: How the Supreme Court is Destroying America* (Washington D.C.: Regnery Publishing, Inc., 2005), 56.
[58] *Poe v. Ullman,* 367 U.S. 49 (1961).

substantive content."[59] It was unclear as to where this right of privacy was applicable. Historically, rights related to privacy had been integrated into common law. Unlike this case, they typically applied to one's property best summed up by the old saying, "a man's home is his castle."[60] Dixon argued that it became confusing when most of the discussion of privacy had been related to property and now was specifically addressing marital privacy. He further explained that the "right to privacy" was "more subjective than 'liberty' and 'justice.'" [61] In fact, in writing his opinion, Justice Black had a difficult time in trying to find the proper amendment on which to support the "right to privacy". He drew upon the First, Third, Fourth, Fifth, Ninth, and the Fourteenth Amendments to extract particular protections and guarantees to derive the privacy right. By using broad protections that were not similar in context, the opinion was almost guaranteed to create confusion over its ambiguity and how it would, if at all, apply beyond the privacy within marriage. In 1965 the Associate Dean and Professor of Law at New York University, Robert B. McKay, asked, "what is the relationship, if any, between the right of marital privacy and the other aspects of the right of privacy…?"[62] Despite reference to many precedents, it was vague as to how precedents relating to things such as unreasonable searches and seizure, self-incrimination clauses, and prohibitions against quartering soldiers without the owner's consent, would translate into a constitutional right to privacy. This ambiguity opened the door for it to be interpreted to apply to numerous forms of privacy rights. The justices did not just narrowly restrict the right to privacy

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[59] Robert G. Dixon, Jr., "The Griswold Penumbra: Constitutional Charter for an Expanded Right to Privacy," *Michigan Law Review* 64, No. 2 (Dec., 1965): 197.
[60] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 182.
[61] Robert G. Dixon, Jr., "The Griswold Penumbra: Constitutional Charter for an Expanded Right to Privacy," *Michigan Law Review* 64, No. 2 (Dec., 1965): 197
[62] Robert B. McKay, "The Right of Privacy: Emanations and Intimations" *Michigan Law Review* 64, No. 2 (Dec., 1965): 263.

specifically to the context of *Griswold*. McKay further questioned the potential for this right by asking, "if there is a right to marital privacy in the home, why should there not be as well a right of privacy in the home or the place of business against the unwelcome intrusion of uninvited participants in conversations intended to be private?"[63] According to McKay, Justice William Douglas erred when translating this right into specifics. Douglas wrote that "various guarantees create zones of privacy."[64] In this statement one could conclude that these zones would be expansive, encompassing numerous of rights that would tend to fall under privacy. This may not have been the intent of the justices, for in *Poe v. Ullman*. Justice Harlan, in his dissent, created the basis for the right to privacy conveying that it was not meant to be all-encompassing. He stated, "the right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced." Even further, the Court's right to privacy ought not be extended to protect such crimes as murder, rape, or domestic abuse. So the question for many who were claiming activism was, how far-reaching was this right and what standard would be determined to say what was protected within the right to privacy? These details were not explicitly written in the opinions. The assertion that the right to privacy would be applicable to marriage and not the others would be an example of a decision that was vaguely written to encompass the rights that the justices personally believed as important and would not protect those that were perceived as immoral. This ambiguity was perceived by legal experts as an activist strategy that would allow the Court to pick which actions would be protected by this new constitutional right to privacy.

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[63] Ibid. p.278
[64] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

One of the most highly disputed aspects of the case was the reasoning behind the ruling. Politics and personal preferences aside, this decision was highly criticized for its legal rationales. In picking apart the numerous opinions and dissents, it is almost needless to say that there was not a general consensus in this decision, so much of the criticism of its alleged activism sprung from confusion about what the justices were saying. Chief Justice Earl Warren eleven years earlier had stressed the importance of having a single opinion that was brief and understandable to the American public for *Brown v. Board of Education*. By this point he may have forgotten this concept because the language and the rationales in the *Griswold* decision are both confusing and incongruous.

Perhaps one of the most noticeable aspects of confusion was Justice Douglas's opinion stating that "the foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance."[65] This sent many Americans running to their dictionaries. A penumbra is "a partial shadow, as in an eclipse, between regions of complete shadow and complete illumination."[66] Emanate is "to come or send forth from a source."[67] The obscurity of these words created bewilderment as to where the concurring justices had derived the right to privacy. In addition, Justice Douglas's choice of the word "penumbra" hinted that there were rights in the Bill of Rights that were not explicit and it was the role of the Court to determine what were these specific rights. Some lawyers viewed this as activist in that it would grant the Court the authority to determine upon their own discretion which rights, not explicitly stated, were implied in the Bill of Rights. Without precise rules or a basis in precedent, it seemed to give the justices a great deal of

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[65] *Griswold v. Connecticut,* 381 U.S. 479 (1965).
[66] *The American Heritage Dictionary,* 3rd ed., "penumbra."
[67] *The American Heritage Dictionary,* 3rd ed., "emanate."

power to make decisions determining what was protected based upon their own personal and political beliefs.

Along with criticisms of perplexing rationales, J. H. Ely, Earl Warren's law clerk, explained in a memorandum to the Chief Justice that Douglas's opinion was too "unsound" in which to concur.[68] He agreed with Warren's view that nothing in the Constitution specifically supported a right to privacy. He noted that there are specific mentions of privacy such as the First Amendment protections of the privacy of belief and thought and the Fourth Amendment protections of one's privacy from unreasonable searches and seizures. Despite these, he did not find the general or overarching right to privacy that Douglas suggested. He expressed the fear of many lawyers looking at the future application of this ambiguous right when he wrote that "when one seizes upon a right which does not appear in the Constitution, that right can be given whatever shape and scope the person discussing it wishes to have."[69] While Ely knew that Warren, as in the *Brown* decision, had hoped for unanimity among the justices, he urged him not to agree with an opinion that "incorporates an approach to the Constitution so dangerous that you should not join it."[70]

J.H. Ely also stressed the lack of clarity in Justice Arthur Goldberg's opinion as well and suggested that Warren not concur in his rationale. He noted that Goldberg's perception of the right to privacy was vague in that he related it only to this privacy of the "marital bedroom"[71] As a result, Ely confided in Warren that Goldberg's opinion was

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[68] J.H. Ely, to Earl Warren, memorandum of J. H. Ely, The Papers of Earl Warren, Box 520, Manuscript Room, Library of Congress, Washington, D.C.
[69] Ibid.
[70] Ibid.
[71] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

"disturbingly unclear as to the dimensions of the right which is being recognized."[72] Ely noted the danger in the rationale's lack of clarity. He knew that lawyers, academics, and the public could interpret it in various ways. He realized that "one might read it to mean that the State cannot set limits on what married couples can do in their bedrooms" and stressed that there were already various laws that control sexual activity.[73] If he did not mean to invalidate these particular laws already in the books, then Goldberg's words were unclear as to what specifically should have been nullified.

Besides the perplexing and obscure language used, the legal rationales seemed to contradict each other. While Justice Goldberg was said to have concurred with both Justice Douglas's judgment and opinion, the majority of his opinion was based on an entirely different theory. Paul G. Kauper, a professor of law at the University of Michigan Law School, noted that Goldberg's opinion was based on a theory that had no relation and made no reference to Justice's Douglas's "notion that the right of privacy at issue is an emanation from specifics of the Bill of Rights or embraced within the penumbra of the rights."[74] In contrast, Goldberg believed that fundamental personal rights were not solely confined to the Bill of Rights but rather he expanded the way in which the due process clause protects fundamental rights. He essentially summed up the classical rights theory but went further by interpreting that the Court had a role in protecting these fundamental rights and grounding it in the Ninth Amendment. He believed that the Ninth Amendment protected fundamental rights even though they were not explicitly written in the Bill of Rights and it was the Court's job to uphold these

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[72] J.H. Ely, to Earl Warren, memorandum of J. H. Ely, The Papers of Earl Warren, Box 520, Manuscript Room, Library of Congress, Washington, D.C.
[73] Ibid.
[74] Paul G. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case," *Michigan Law Review* 64, no. 2 (Dec., 1965): 244.

fundamental rights. Lawyers and law professors, like Kauper, saw this as activist because there was such a discrepancy in reasoning between the two written opinions. The seven concurring justices were split on the issue of where and why the right to privacy was guaranteed. The lack of consensus pointed out the uncertainty of the right's origin causing Americans to question the legitimacy of it and pointed to personal bias in creating this right, rather than an authoritative legal rationale. Secondly, critics perceived this as activist in that Goldberg proclaimed that the Court had power to interpret rights beyond the protections in the Bill of Rights. Goldberg may have sensed the impending criticism and so explicitly denied in his opinion that judges would use their "personal and private notions"[75] to determine what rights were fundamental. "Rather, they must look at the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"[76] Still, this rationale granted the Court a lot of leeway to discern the fundamental rights, which some activist critics assumed would be influenced by personal or outside politics.

Perhaps the harshest critics and most damaging to the validity of the Court's decision were the dissenting justices, Justice Douglas Black and Justice Potter Stewart. It was not a surprise to many that Stewart would dissent in this case. Justice Douglas had once casually called him a conservative, but he shared little in common with the judicial restraint advocate Felix Frankfurter or the more liberal minded John Harlan. Stewart often ignored the labels pasted on him because he thought they revealed that a justice decided cases based on his personal or political preferences. He had the reputation for being a common-law judge who was bound often by judicial precedent but still heeded

[75] *Griswold v. Connecticut,* 381 U.S. 479 (1965).
[76] Ibid.

attention to how law would realistically work in implementation.[77] His dissent in *Griswold* may have been short, but it was poignant. He admitted that the Connecticut statute was a "silly law,"[78] but did not find any reason for the Court to overrule it. He understood that it had not been enforced in the past and would be hard to do so in the future. Personally, he believed that contraceptive choices in a marriage were a matter of private choice and that professional counsel about it should be available for couples, but he differentiated between what would he would choose as an individual and what he considered under his best discretion, was a violation of the Constitution. He sought to convey his judicial "objectivity" by stating that they were not asked "whether to think the law is unwise, or even asinine"[79] but to go beyond their beliefs and impartially evaluate its constitutionality. Although he may have thought the statute was foolish, he believed it was not the role of the judiciary to overrule a law simply because it was not popular or enforceable. He thought the only way that it could be overturned was through the Connecticut legislature.[80] Although he did not say it in so many words, Stewart viewed this decision to be activist in that it was not the role of the judiciary to overrule laws that were unpopular. Even though he did not see it as a practical law, he thought it ought to be challenged in the legislature rather than the courts.

While it was not a major surprise that Potter Stewart dissented in this case, it was more surprising for the senior associate justice, Hugo Black, to dissent. His dissent was even lengthier than Stewart's. Justice Black was a populist, whose concerns for the

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[77] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 67.
[78] *Griswold v. Connecticut,* 381 U.S. 479 (1965).
[79] Ibid.
[80] Fred P. Graham, "7-to-2 Ruling Establishes Marriage Privileges - Stirs Debate," *New York Times,* June 8, 1965, p. 34.

common man were made clear in cases in which his vote helped to expand individual and civil rights. During the New Deal, he had provoked many conservative senators and he stressed his populist belief in declaring the Constitution, through a literal reading, as a surefire guide to American government. As a constitutional literalist, he believed that the Fourteenth Amendment's due process clause overtly translated into total incorporation in which the Bill of Rights was applicable to the states. None of the other justices adopted this theory so much as him, but throughout his lengthy term, he gained a more liberal reputation for applying this law theory into his decision-making.[81] So when the justice who seemed to epitomize individual protection from the states dissented on this issue, it made others question the *Griswold* outcome more.

Black challenged the Court's legitimacy by denouncing their decision to overrule a law, that to him, did not violate any part of the Constitution. He, like Stewart, believed that it was the role of the Connecticut legislature to overturn the law if the law was seen as outdated, unreasonable, or unenforceable. He distinguished himself from the other concurring justices by saying that he did not find the Connecticut statute to be constitutional on the principle that the "law is wise or that its policy is a good one" but claimed that it was "every bit as offensive to me as it is to my Brethren of the majority."[82] By doing this, he conveyed that while he and Stewart did not necessarily agree with the law, they left their personal politics aside, in contrast to the other justices, to make a neutral decision on the constitutionality of the law. The day of the ruling Black's wife, Elizabeth, highlighted this idea further by expressing the Court had taken improper action because "where a law offended the conscience of a community, or judges, then the Court

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[81] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 37.
[82] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

could overrule it, thereby making the Constitution current with changing time."[83] In contrast, it made the other judges appear activist by "reciting reasons why it [Connecticut statute] is offensive to them"[84] and used this as their basis for deeming it unconstitutional. Justice Black also attacked "the right to privacy" which had been their foundation of their argument for unconstitutional grounds. "The Court talks about a constitutional right to privacy . . . But there is not."[85] The concurring justices' Fourteenth Amendment's guarantee of "unreasonable searches and seizures" does not just protect privacy. If that was the case it would not matter if someone's house was searched or properties stolen as long as they knew about it. He condemned the justices for not using "the kind of liberal reading" the Bill of Rights needed and to think that it protected this alleged "right to privacy" "belittles that Amendment."[86]In saying this, Black made it clear that the justices had made an activist decision by striking down a law they did not personally agree with and by attempting to use an Amendment he deemed out of context in order to provide a legal rationale for the whole thing.

Black further drove the point across that *Griswold* was an activist decision in that he compared it to *Lochner v. New York* (1905), a decision liberals claim as a legacy of inappropriate judicial activism. In this case, it was the opposite form of activism that many people were associating with the Warren Court that was overruling state and federal statures. In this case, the Court struck down a maximum work hour law for bakers as unconstitutional to denying freedom of contract.[87] Black made reference that the due

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[83] Elizabeth Black and Hugo Black, *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* (New York: Random House 1986), 116.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 558.

process clause was used in a liberal method, as in *Lochner*, to strike down economic legislation that was "threatening, many people thought, the tranquility and stability of the Nation."[88] He implied that this Court was doing virtually the same thing, but rather instead of being activist in a conservative political sense, associated with *Lochner*, the concurring justices were using the due process clause to make a more liberal activist decision. Justice Black had explained that this was "no less dangerous" than what the *Lochner* Court had done.

Despite the various charges of activism from many different angles, not all groups perceived the *Griswold* decision negatively. Surprisingly to many, the Roman Catholic Church, for the most part, supported the decision and saw it as a form of social activism that was achieving important individual rights. It was well received because as the *New York Times* explained that the Court in *Griswold* "was not focused on whether birth control was morally good or bad but whether the laws prohibiting it were an invasion of privacy and an infringement on civil liberty."[89] Like many leaders in the Church, such as the Jesuit authority, Reverend John Courtney Murray and British Member of Parliament, Norman St. John-Stevas, they saw the decision as a form of protection of privacy rights within the sacred sacrament of marriage. The Catholic Conference on Civil Liberties even wrote an amicus curiae brief to oppose the Connecticut statute founded on privacy grounds. Right before the National Catholic Welfare Conference, William Ball, the general counsel for the Pennsylvania Catholic Conference, complimented the *Griswold* decision especially as a response against a Senate bill. The bill proposed to find ways in which to "deal with rapid population growth throughout the world and the problems

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[88] *Griswold v. Connecticut,* 381 U.S. 479 (1965).
[89] John Cogley, "Bishops and the Courts: Both Connect Birth Control Program with the Question of Civil Liberties," *New York Times*, August 26, 1965, p.42.

arising from or connected with such growth."[90] To many, *Griswold* protected privacy in the sanctity of marriage and did not seem to address contraceptives whereas this bill seemed a threat to Catholics that there might be discussion about disseminating contraceptives not even in the United States, but internationally.

Despite the lack of organized and vocal supporters, there were also American citizens who did understand *Griswold* as a win for individual rights, particularly for women. In a letter to Warren, Gloria Nelson from New York wrote, "I am particularly grateful for the Griswold vs Connecticut [sic] decision which allows me as a female to purposefully conceive a child."[91] She expressed that the Court had now made a decision to protect the rights of women similarly like they had made previous decisions to protect the rights of the "indigent."

Whether the outcome of the *Griswold* decision was supported or abhorred, many Americans would contest the validity of the decision for subsequent years. The Warren Court's sense of a "living Constitution" allowed the justices to belief that this present problem in *Griswold* could be solved with the fundamental principles of the Constitution. Unfortunately, the justices could not agree exactly what principles and to what end they applied in this decision. As a result, the Court would face charges of activism for *Griswold*, even by the Court's justices themselves.

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[90]Robert B. McKay, "The Right of Privacy: Emanations and Intimations" *Michigan Law Review* 64, no. 2 (Dec., 1965): 280.

[91] Gloria Nelson, New York, to Earl Warren, 22 June 1968, letter in the hand of Gloria Nelson, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.

MIRANDA V. ARIZONA 384 U.S. 236 (1966)

CHIEF JUSTICE EARL WARREN – MAJORITY
(WROTE OPINION)

JUSTICE HUGO L. BLACK – MAJORITY

JUSTICE WILLIAM J. BRENNAN, JR. – MAJORITY

JUSTICE TOM C. CLARK – DISSENT
(WROTE OPINION)

JUSTICE WILLIAM O. DOUGLAS – MAJORITY

JUSTICE ABE FORTAS – MAJORITY

JUSTICE JOHN M. HARLAN – DISSENT
(WROTE OPINION)

JUSTICE POTTER STEWART – DISSENT
(AGREED WITH HARLAN)

JUSTICE BYRON R. WHITE – DISSENT
(WROTE OPINION)

MIRANDA V. ARIZONA 384 U.S. 236 (1966)

Miranda v. Arizona was surely a Warren decision that had many charges of activism pitted against it. Even now, most regard it as the most momentous Supreme Court decision involving the criminal political system, creating a large impression on criminal procedures. On June 13, 1966, the Court decided in a five-to-four decision that confessions in criminal cases made without the presence of counsel and without clear notification of the accused person's due process rights was regarded as self-incrimination, thereby breaching the Fifth Amendment. Despite a confession given voluntarily by the defendant, the Court majority found it to be coercive unless the police had warned the suspects of certain rights guaranteeing protection from self-incrimination. These "procedural safeguards"[92] included the right to not answer any questions, the warning that anything the suspects said could be used against them in court, the right to have an attorney present, and the right to have one provided for the suspects if they were not able to obtain one. These particulars now form the foundation of what are now commonly called the "*Miranda* rights."

Miranda was another decision that Warren and his fellow justices derived from the notion of a "living Constitution." They used the Constitution's fundamental principles to address the new problems arising in criminal procedures that ought to give all citizens, including criminal suspects, equal protections under the Constitution. As in the *Brown* and *Griswold* decisions, Americans cast similar charges of activism toward the Court for its decision in *Miranda*. Some complained the lack of judicial restraint the Court showed when they felt the matter should have been better left for other forms of government to

[92] *Miranda v. Arizona* 384 U.S. 236 (1966).

decide. Many Americans felt the decision was activist in that it was countermajoritarian. They felt a general dislike for the new policy that they perceived coddled criminals and contributed to further crime. Even some of the justices on the bench criticized the decision for not abiding by the Constitutional text and utilizing proper precedents. While there were some Americans who would voice their approval of the Court's interpretation of the Constitution, many others found it an objectionable display of judicial activism.

Miranda v. Arizona involved a man who was arrested on the suspicion of kidnapping and rape who, when arrested, was not informed that he had the right to have an attorney present. Despite a lack of threats or evident coercion from interrogators, he signed a written statement admitting his guilt of the crimes that was used as evidence in his conviction. The essential dilemma was whether or not Miranda, not being explicitly informed of some of his basic rights had led to self-incrimination. In avoiding addressing this problem in a case-by-case basis, the Supreme Court decided *Miranda* together with similar cases such as *Vigneria v. New York* and *Westover v. United States* on certiorari (pulling up the records from the lower courts) to the Court of Appeals. In all of these cases, the suspect while under police custody was cut off from the outside world and urged to answer questions from law enforcement officers, detectives, and prosecuting attorneys. None of the suspects were given notification of their rights at the beginnings of the interrogations. As a result, in all four of the cases, the defendants produced a response, and in three of the cases, they signed statements as well. All of this was used as evidence in their trials. As Chief Justice Warren summed up, the constitutional issue

examined was the "admissibility of statements obtained from a dependent question while in custody or otherwise deprived of his freedom of action in any significant way."[93]

As the case of *Brown v. Board of Education* had restructured the American system of public segregation by requiring desegregation, *Miranda* restructured the American system of criminal procedure. Many Americans considered the closely divided decision to be activist in that the Court had not practiced enough judicial restraint. The decision established the Court as the constitutional overseer of locales. By determining whether or not all fifty states were complying with freedom from self-incrimination as guaranteed in the Fifth Amendment, many Americans felt that the Court was overstepping its jurisdictional bounds. Instead of letting the state legislatures exercise their representative power through the creation and enforcement of local regulations, they were instead told to comply with the higher authority of the federal Supreme Court. Over ten years earlier in *Brown v. Board* the Warren Court had changed from what could almost be considered salutary neglect regarding public school desegregation to the creation of strict guidelines for the local school boards to administer. In the same way, *Miranda* overturned the wide procedural latitude that law enforcement had formerly had and was now requiring the federal judiciary to supervise the police with strict guidelines in its conduct in criminal procedures such as interrogations. What before had been a state of local autonomy had now become what some considered a controlling federal government that lacked knowledge and sensitivity to what was best for each locality. Many individuals, especially in the South and less urbanized areas, were disturbed by what seemed to be the continual loss of states' rights and a growing number of restrictions on local laws and procedures. In a letter to Chief Justice Warren, Viola Auer

[93] Ibid.

of Lima, Ohio asked, "are you proud that decisions of the Supreme Court, under your leadership, have coddled the criminals and 'hamstrung' law enforcement officers to the extent that there is no longer any respect for law and order?"[94] Many, including some in law enforcement, objected that the Supreme Court made what seemed like excessive regulations that only made law enforcement's job more tedious and time-consuming. Some of the public saw it as another example of inefficient bureaucracy at work. Similar to *Brown* many Americans felt that their local law enforcement knew the best interests of its people better than the nine men sitting on the Supreme Court in Washington, D.C.

It was not only ordinary citizens who thought that the Court was overstepping its jurisdiction and entangling itself in state and local affairs, but it was also the sentiment of Congress. In response to the Court's willingness to change state and local law enforcement policies and the mandate from the people to restore law and order, especially during an election year, Congress felt compelled to act. In 1968 they introduced and passed the Omnibus Crime Control and Safe Streets Act of 1968. It was a way for Congress to supersede the Court's alleged "judicial activism". Title II overturned numerous Supreme Court decisions. "Voluntary" confessions were still considered permissible even if law enforcement had not accurately followed the *Miranda* decision's guidelines.[95] The Republican leader of the House at that time, Gerald Ford, acknowledged the disagreement in the Court's appropriate jurisdiction. He stated, "I refuse to concede that the elected representatives of the American people cannot be

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[94]Viola Auer, Ohio, to Earl Warren, 30 July 1968, letter in the hand of Viola Auer, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.
[95] Paul Finkelman and Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States Volume II* (New York: Oxford University Press, Inc., 2002), 861.

winners in a confrontation with the Supreme Court."[96] He essentially presented himself, and his party, as the champion of American democracy through his opposition to what he considered an overly liberal activist Supreme Court. Despite some liberal House members' protests, they failed to win any significant changes to the bill before it was signed by President Johnson on June 6 of that year.[97]

In contrast to claims that *Miranda* demonstrated a lack of judicial restraint, there were other Americans who welcomed the *Miranda* decision. Some law enforcement professionals, academics, lawyers, and members of the general public were delighted that the Court took action to protect minority rights when the other branches of government would not. Some even coined it activist for taking on this decision involving civil and individual rights in sharp contrast to the New Deal Supreme Court, claimed activist by many liberals in its day, which struck down a majority of economic decisions. As a result, it was not best for the state and locales to have this previous sense of autonomy in criminal procedures. Loren P. Beth, a University of Massachusetts professor of government, wrote that "judicial review is needed wherever minority rights are violated. They are violated at some time in any state . . ."[98] Believing that states sometimes have the tendency to comply with what is perceived as democratic, they may overlook the need to protect the rights of those who do not compose the majority. These proponents of *Miranda* believed that not all the states were complying with protections guaranteed in the Constitution. Many of the more progressive law enforcement agencies admitted to practicing similar procedures years before the decision. They did not think that it

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[96] Ibid.
[97] Ibid.
[98] Loren P. Beth, "The Supreme Court and State Civil Liberties" *Western Political Quarterly,* Vol.15, No.4 (Dec., 1961): 835.

hindered their efficacy in interrogations and crime solving but rather created a set of standards for all law enforcement to follow, thereby allowing more equal justice despite one's identity or residence. They believed that those who wanted to confess usually did so. Rather than having some states left behind on more progressive and humane interrogation policies, these guidelines allowed defendants to be prosecuted on a more equal playing field. In one of his Harvard Law School lectures, Archibald Cox, former Solicitor General of the United States and member of the Harvard Law School faculty, felt "it would have been better if the States had themselves reformed their criminal procedure by providing counsel for all indigent defendants at public expense, but the simple fact is that a minority of States failed to act despite a long period of warning."[99] Cox conveyed the opposite of what others criticized as activist in that the states and local law enforcement did not necessarily know best and there needed to be federal standards to ensure more equal justice. He believed that if no other form of government was going to take action in this matter, than it was the role of the Supreme Court to intervene and solve the pressing problem of criminal procedures. This idea was further expressed from a thankful citizen who favored the Court's rulings on such criminal procedure cases such as *Gideon v. Wainwright* (1963), *Escobedo v. Illinois* (1964), and the *Miranda* decision. In a letter to Earl Warren, David Prince from Sioux City, Iowa wrote, "at a time when the President could not act and when a large, unwieldy, factionalized body called the Congress would not act, the Court went ahead."[100] He expressed relief that the local police and prosecution could no longer assume that people were already guilty as soon as

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[99] Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Cambridge, MA: Harvard University Press, 1968), 87.
[100] David Prince, Iowa, to Earl Warren, 22 June 1968, letter in the hand of David Prince, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.

they were arrested and that now these officials would be held accountable to national standards.

Perhaps the most widely noted criticism of activism from the general public regarding the *Miranda* decision dealt with the idea that was expressed by South Carolina Senator, Strom Thurmond, in his *Reports to the People* newsletter. He defiantly stated that "excessive concern for the rights of criminals, including those who have confessed or who have been caught red-handed, has led to disrespect of the law."[101] This criticism of activism expressed by Thurmond, but corresponding with much of the popular sentiment, was twofold. First, they believed that *Miranda* created radical new policy that produced tangible dangers in crime. Secondly, it was countermajoritarian in that it assisted a small minority of criminal suspects, while undermining the protection of the American public. Americans outspokenly expressed these criticisms which were founded in their outrage and indignation towards the Court for this decision. Many Americans' perceptions would be influenced further by interpretations of the decision promulgated through the media and other politicians. A week after the Court announced the *Miranda* decision, it declared in *Johnson v. New Jersey* that the *Miranda* decision would apply to new trials after the decision date on June 13, rather than interrogations started after that date. This decision essentially invalidated all confessions that were made before this date that were going to trial after June 13, 1966. Prosecuting attorneys were devastated when a defendant's confession was the basis of their evidence proving their guilt. Many American citizens were even more distressed with the thought of countless criminals let out into the streets.

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[101] Strom Thurmond, "Strom Thurmond Reports to the People. June 9, 1969," The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.

As Thurmond divulged, *Miranda* became a big hullabaloo as many Americans blamed the Supreme Court for making such an activist decision. These activist claims seemed to be rooted in the belief that the Court was making decisions that were radical and dangerous to the general populace. They believed that it would overturn previous policy and let countless self-confessed convicts walk out of jail with impunity.[102] This decision did not ease the fears of many American citizens who were already frightened by the increased media coverage and politicians' portrayals of increasing crime and a declining sense of social order. It was a time when the media focused their attention on the race riots plaguing the bigger cities and the continual violence and uproar, especially in the Deep South, at the height of the civil rights movement. The media portrayed a sense of impending danger that resulted from this case with headlines such as "Bronx Man Who Admitted Rape Set Free Under Miranda Ruling,"[103] and "Confessed Slayer of Wife and 5 Children Freed."[104] These headlines placed responsibility for this impending terror to the Court's decision. Many American citizens were watching the news and picking up on this rhetoric of increasing crime. In a letter to the Chief Justice Earl Warren, Eva Corneliu from Parkridge, Illinois wrote, "there is more lawlessness than ever. . . All we read in the news paper [sic] and hear on news reports on T.V. are crimes, crimes. I feel that you have done very little about this. You have enacte[ed] laws to protect the criminal."[105] The increasing public perception that there were criminals at loose in the streets created a sense of loathing towards the Supreme Court. The public

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[102] Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 178.
[103] Ibid.
[104] Ibid.
[105] Eva Corneliu, Illinois, to Earl Warren, 26 June 1968, letter in the hand of Eva Corneliu, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.

criticized it as "activist" in that it seemed to overturn what seemed like perfectly good policy. It was not until after *Miranda* was proclaimed that they were sensing the increasing coverage of crime and the rhetoric of a breakdown of law and order. In a reductionist sense, many Americans equated *Miranda* with the root of these problems. Mrs. Frank Dowler from Maryville, Tennessee wrote to the Chief Justice, "I consider you the prime cause of all the riots, black unrest, and criminals now turned loose on society."[106] It was clear many Americans were making the Court the scapegoat for the supposed decline of law and order. On June 12, 1967, the Court in *United States v. Wade* required that counsel be present at police line-ups. This time around the justices appeared to pick up on the criticism of their retroactive mistake in which they sent self-professed criminals on the street. This time they decided that it would only apply to identifications made after this decision's date in order to prevent release of any defendants who had already been identified before this date.[107]

The second half of the "activist" criticism that Thurmond expressed that seemed to sum up the opposing American sentiment was that the decision was countermajoritarian. This infuriated many Americans because the decision was creating new policy in which they felt their individual freedoms and protections were infringed upon as a consequence of criminal suspects' individual rights. Many Americans who claimed to be patriots, taxpayers, and law-abiding citizens were frustrated and perplexed as to how the Court could allow people who were not upstanding citizens and had no qualms breaking the law to be, in a sense, rewarded with more rights and protections.

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[106] Frank Dowler, Tennessee, to Earl Warren, 29 May 1969, letter in the hand of Frank Dowler, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.
[107] Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 178.

Many who had abided by the laws felt duped that they were now deprived of protection from individuals they presumed to be guilty criminals. In a letter to the Chief Justice, Charles Etherington from Piqua, Ohio asked, "why has the court abandoned the age old concept of 'the greatest good for the greatest number of people?'"[108] In a democratic society, many Americans assume that all three branches of government are to determine the best interests of the majority. The legislature is elected in a democratic process and their constituents believe that they will legislate based upon their interests in order to stay in office. Yet, the Supreme Court provides a certain safeguard against this by assuming the responsibility to make decisions that will protect the guarantees of the Constitution for all its citizens, minorities included. Despite this, many citizens, such as Arthur S. Miller, professor of law at George Washington University, and Ronald F. Howell, professor of political science at Jacksonville State University, thought that "the role, then, of the Supreme Court [is] . . . assisting in furthering the democratic ideal. Acting at least in part as a "national conscience," the Court should help articulate in broad principle the goals of American society."[109] Many Americans did not perceive this assertion of new standards for criminal suspects to be in the best interests of the majority of the citizens. For example, Richard Cross, who considered himself a "citizen-taxpayer-businessman-patriot," could not accept that the Supreme Court would make decisions that seemed contrary to democracy and thus, anti-American.[110] He wrote to Chief Justice Warren, "I cannot understand how you could do some of the things you have done unless you have

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[108] Charles Etherington, Ohio, to Earl Warren, 29 January 1969, letter in the hand of Charles Etherington, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.
[109] Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," *University of Chicago Law Review,* Vol.27, No. 4 (1960): 691.
[110] Richard Cross, to Earl Warren, 24 June 1968, letter in the hand of Richard Cross, The Papers of Earl Warren, Box 108, Manuscript Room, Library of Congress, Washington, D.C.

interests which are not that of the United States of America."[111] After the *Miranda* decision, the outspoken allies of the Court seemed intimidated in the wake of this widespread opposition. The Warren Court's approval rating was declining at a steady pace. In a Gallup Pole taken in 1967 forty-five percent of those surveyed regarded the Supreme Court as "excellent" or "good." By the next year after more publicized backlash of the *Miranda* decision, especially in political campaigns, this rating quickly dropped to only thirty-six percent.[112]

While the criticism of Court's politics and alleged lack of jurisdiction was prevalent in the general public, the activist charge of not abiding by the constitutional text also came from within the Court itself. Justice Harlan's disapproval was explicit when he wrote, "I believe the decision of the Court represents poor constitutional law."[113] His dissent was joined by Justice Stewart and Justice White. He noted that besides physical coercion there had been no previous decisions in which "no single default or fixed combination of defaults"[114] would secure exclusion. He believed that the Court decision would lead to the dismissal of perfectly admissible confessions without grounding it in legal precedent. In focusing on Warren's opinion, he criticized his "asserted reliance" on the Fifth Amendment's prohibitions against self-incrimination. [115] Unlike the consenting judges, Warren, Black, Douglas, Brennan and Fortas, Justice Harlan could not find a sufficient basis on which the Court could expand the Fifth Amendment's protection from self-incrimination to apply within the police station. Not only, did he argue, that the opinion failed to address extension of the Fifth outside of trials, but it did not show how

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[111] Ibid.
[112] Donald Grier Stephenson Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections* (New York: Columbia University Press, 1999), 180.
[113] *Miranda v. Arizona* 384 U.S. 236 (1966).
[114] Ibid.
[115] Ibid.

these new "*Miranda* rights" were supported or why they were required at all by the Fifth Amendment. Instead of using the Fifth Amendment, Warren made analogies from the core of the Sixth Amendment. Warren stated that "the following procedures to safeguard the Fifth Amendment privileges must be observed . . . if he is indigent, a lawyer will be appointed to represent him."[116] Harlan argued that this safeguard refers to the Sixth Amendment's protection "to have the Assistance of Counsel for his defense" and not the Fifth. Further the Amendment was created in the context of a trial. Harlan argued, that nothing stated in the Amendment compelled it to have any connection with police interrogations. He argued that the trials that Warren used as precedents were not applicable to police interrogations but rather involved counsel at trial or on appeal.

Besides the activist claim about the lack of fidelity to constitutional text, Justice Harlan, like many members of the general populace, believed that it was also flawed policy. Justice Harlan stated that the "Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society."[117] He understood this was needed before the Court could make a decision that was going to be imposed upon every state. Harlan expected that the Court's *Miranda* policy would do nothing to protect criminal suspects from police brutality or prohibited forms of coercion. He believed that law enforcement officials "who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers."[118] Essentially, he thought that these Miranda rights would not weed out corrupt police or prosecutors but rather would only eliminate all pressures and anxieties to compel a suspect to confess. He believed the goal to achieve genuinely voluntary confessions was

[116] Ibid.
[117] Ibid.
[118] Ibid.

simply "utopian."[119] Justice White concurred with Harlan's dissent. He stressed the probable danger that many citizens felt loomed from this decision. "[I]n some unknown number of cases" it could potentially "return a killer, a rapist or other criminal to the streets and do the environment which produced him, to repeat his crime whenever it pleases him."[120]

This dissent from the Court materialized into harsh disapproval as Justice Tom C. Clark wrote his own dissent claiming that his fellow dissenting justices did not go far enough. Clark, like the other dissenting justices, condemned the legal basis of the *Miranda* ruling, particularly the lack of precedent. Specifically he found the Court's use of the Fifth Amendment to be "arbitrary" and thought that using the due process clause of the Fifth and Fourteenth Amendments, which he considered more flexible and the Court better familiarized with, would have created a better basis for the effort to ensure a criminal suspect's rights. In doing this they would not be making an activist decision because the Court "would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation." Instead, he thought the due process clause had been used throughout the Court's history as precedent and that society had widely accepted its use in the past. Furthermore, he denounced Warren's long references to police manuals because they were "merely writings in this field by professors and some police officers"[121] and were not the official manuals of any police department and in which police interrogators were required to follow.

Like the other dissenting justices, Justice Clark did not believe merely that the precedent for the decision was erroneous, but in the introduction of his dissent, he noted

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[119] Ibid.
[120] *Miranda v. Arizona* 384 U.S. 236 (1966).
[121] Ibid.

that these new guidelines decided by *Miranda* were unnecessary. He believed that these accounts of police brutality were rare exceptions to the numerous cases that were built each year. He argued that the police agencies were responsible for law enforcement. "I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion."[122] Many Americans would echo this protest. Many considered their local police were being unfairly targeted for a few exceptions. They felt that the Court should let the police make more efforts to protect its citizens instead of criminal suspects.

Though the critique of the Court's use of precedent was not often used by the ordinary citizens, the dissenting justices' conflict about the rationality of the policy reverberated through many American homes. Many agreed with the dissenting justices' rhetoric about the corrections of the way law was being enforced previously and the risks that these new guidelines would only produce fewer confessions and leave more criminals on the loose.

Although the more audible voice of the public may have been negative, there were those who were thankful for the outcome of the decision. Regardless of the rationale and whose supposed jurisdiction it fell under, some citizens, like Glenn Rubel from Miami, Florida wrote to Chief Justice Warren, "your past interpretations of criminal law have balanced the inordinate powers of the police and have returned us to a temporary glorious path of a future democracy."[123] Some had praised the Court for its action in standardizing a field in which corrupt law enforcement officials and prosecutors were hindering the rights of the accused. *Miranda* was historic because it was such a highly contested case, with very valid points made on both sides. *Miranda* would leave its mark

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[122] Ibid.

[123] Glenn Rubel, Florida, to Earl Warren, 3 July 1969, letter in the hand of Glenn Rubel, The Papers of Earl Warren, Box 110, Manuscript Room, Library of Congress, Washington, D.C.

on more than criminal procedures by shaping the face of American politics and culture. A year after the decision, the television show, "Dragnet" reappeared with the detective Joe Friday delivering the *Miranda* rights. Before the decision, American secondary schools taught very little about individual rights and civics, but this case changed that.[124] With *Miranda* rights on television shows and in public education, the decision indirectly educated many Americans about their fundamental rights. *Miranda* also was used to shape party politics. Politicians such as Ronald Reagan and Richard Nixon formed their platforms and won voters by opposing this controversial decision and by trumpeting the growing mandate for law and order. In the 1968 presidential elections, the Court's decisions, including *Miranda*, came a close second to Vietnam in the issues addressed. Nixon boldly asserted, "like many legal and political moderate conservatives, I felt that some Supreme Court Justices were too often using their interpretation of the law to remake American society according to their own social, political, and ideological precepts."[125] Whether one considers *Miranda* as activist or not, it shaped the United States legally, politically, and culturally and the legacy of the *Miranda* rights is still in the forefront of criminal procedure today.

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[124] Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, Inc., 2001), 21.
[125] Richard Nixon, *The Memoirs of Richard Nixon* (New York: Grosset & Dunlap, 1978), 418.

CONCLUSION

> It is the particular genius of the American Constitution that it is a living document intended to endure and capable of enduring for ages to come . . . They [constitutions] are not ephemeral enactments, designed to meet passing occasions. They are to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it' . . . therefore, our contemplation cannot be only of what has been but of what may be . . . I do not believe that the interpretation of the Constitution as a living document implies that the words of the Constitution change their meaning. Times and conditions change, however, and the phrases of the Constitution were designed to reflect the significance of an ever changing world.[126]

Justice Arthur Goldberg, in his 1964 Georgetown University address of "The American Constitution and the Supreme Court in a Dynamic World" summed up the notion of the "living Constitution." He conveyed that despite the "genius" of the Constitution, the Court had to confront the challenge of interpreting the words and meanings of the Constitution to apply to the changing face of America. He understood that the Court could not make decisions just based on the changing conditions and the public mandate, but rather, use the principles in the Constitution that were designed to last hundreds of years into the future.

Alexander Bickel, a former clerk to Felix Frankfurter and a prominent legal scholar, once noted that "the Court has no mandate; it is nobody's voice but its own."[127] Compared to the executive and legislative branches, the Court was framed to be the branch more independent of political influence, and therefore, perceivably to many Americans, the "least dangerous." Its Constitutional creators and jurists for generations to follow believed that it was not intended to make decisions that waive to public opinion or

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[126] Arthur J. Goldberg, Address: "The American Constitution and the Supreme Court in a Dynamic World," Georgetown University, 17 October 1964, Box II: 40, The Papers of Arthur J. Goldberg, Manuscript Room, Library of Congress, Washington, D.C.

[127] Alexander M. Bickel, "Is the Warren Court Too 'Political,'" *The New York Times Magazine,* 25 September 1985, cited in David F. Forte, *The Supreme Court in American Politics: Judicial Activism vs. Judicial Restraint* (Lexington: D.C. Heath and Company, 1972), 54.

to depend on the likelihood of their successful implementation within society. The Warren Court understood this as they made various decisions that did not align with public opinion of the day. At the same time, though, they did not follow the nineteenth century judicial restraint that the Court, headed by Chief Justice Charles Evans Hughes during the New Deal, had professed through its strict interpretation of the basic principles of the Constitution. The Warren Court, in taking such a radical step away from its predecessors' practices and by choosing to take on cases that the Hughes Court would never have conceived of deciding, would inevitably receive some criticism from the public. The magnitude and the form of this criticism were unique. Warren's Court was deemed *the* activist court. The charge of "activism" was a twentieth century phenomena that would dominate the legacy of the Warren Court during its long stand in power and for years to come.

Subsequent scholars, politicians, and many other Americans have summed up the Court's activism simply with the theory that they were liberal policymakers, citing it overruling precedents in forty-five different cases, of which forty-four were considered a more liberal interpretation of the law.[128] But it was not this simple. Despite receiving charges of "making new law," The Court employed the Constitution's fundamental principles, framed in the eighteenth century, and interpreted them to address issues of the twentieth century. The Court understood that the Constitution could be utilized to make positive social change. Rather than just making liberal policy simply upon political beliefs, like many Americans assumed, the Court applied its developing notion of the "living Constitution" to solve problems that were not explicitly covered in the

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[128] Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: The University of Chicago Press, 2004), 72.

Constitution. This enabled the Warren Court to make a more progressive impact than their predecessors, who most likely would have not dared to take on some of these contested issues on the grounds of judicial restraint. In an address at the Georgetown University Law Center in 1965, Justice Brennan expressed that "the law again is coming alive as a living process responsive to changing human needs. The shift is to justice and away from fine-spun technicalities and abstract rules."[129] This belief contrasted sharply with the Hughes Court's process of decision-making. Furthermore, interpreting the Constitution's fundamental principles to apply to such current issues raised in *Brown*, *Griswold*, and *Miranda,* put the Court in a position that opened it up to a great deal of disagreement with its decisions.

In confronting the various charges of activism associated with *Brown*, *Griswold*, and *Miranda,* one can see that they all extend from the notion of the "living Constitution," the flexibility in interpreting the Constitution to address current problems. The charges of "activism" in reference to the Court was socially constructed charged with social and political meanings rooted in the times and modified across various interpretations. Academics, the media, politicians, legal scholars, the American public, and the dissenting justices themselves all had different perceptions of what made the Warren Court activist. Some absolutely disagreed with the notion of the "living Constitution" that enabled the justices to reinterpret the Constitution in a new way that created new policy. They felt that the Court should have practiced more judicial restraint, like their predecessors, and left issues not explicitly addressed in the Constitution to the other branches. Others did not like the new policy that evolved from these decisions.

[129] William J. Brennan, Jr., "The Role of the Court—The Challenge of the Future," *Issues: Documents in Current American Government and Politics* 65-66 (1965): 35.

Legal scholars, academics, and even the dissenting judges would criticize the Court's decisions as activist on the basis of lack of proper legal precedent and fidelity to the Constitutional text. The Court's dynamic interpretations of the Constitution, many felt, allowed the decisions to be too political, vague, contradictory, and uncertain of its future applications. Activist charges also developed from some Americans' perceptions that the Warren Court was antidemocratic because they made countermajoritarian decisions. Taken together, these were the charges that construed the Warren Court's lasting legacy as that of an "activist" court. Clearly, this did not carry one all-encompassing meaning but rather incorporated so many different interpretations of the role of the Supreme Court, and thus, the Constitution, and ultimately, America.

At the beginning of the Warren Court years, starting with *Brown*, most of the charges of activism originated from the American public, politicians, and legal scholars. As time passed, some of the harshest critiques of activism came from dissenting judges. Their rationales and rhetoric were adopted by others. The idea of activism was advanced by that judicial disagreement. While Chief Justice Warren had been able to create unanimity in the *Brown* decision, issuing one opinion to embody the Court's rationales for its decision, by the time that *Griswold* and *Miranda* were decided the lack of consensus in the opinions, along with the presence of various dissents, plagued the legitimacy of the Court's decisions in opponents' eyes and heightened the charge of activism. No longer were charges of a lack of fidelity to the Constitutional text and judicial restraint made from outside the Court, but now justices were devoting a great deal of writing to their contrasting interpretations of the Constitution. Over time, charges of activism against the Warren Court were issued from all demographics of America.

What had been thought as the "least dangerous branch" had been in Warren's years become regarded as an institution that actively made decisions that fundamentally reshaped the social and political face of America. The Warren Court would carry the legacy of the most activist court in America's history, and be both praised and damned for this exact reason.

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