Earl Warren, Judicial Activist or Civil Rights Champion?

-Restraint and Activism-

About a month before the official ratification of the Constitution, Alexander Hamilton, in *Federalist 78*, provided his vision of what the judicial branch of government should look like. Besides arguing for the necessity of giving the judicial branch the power of judicial review (which later became a key function of United States courts), Hamilton emphasized the importance of keeping the Federal court system independent from outside political pressures by measures such as life tenure and salary protections for justices. He believed that doing so would ensure that justices had to focus only on the law itself and key legal issues instead of worrying about popular opinion or the interests of the two other branches of government [1].

Yet, as the country moved forward, another issue regarding the judicial branch emerged. While the Constitution could effectively shield justices from external political pressures, there was no formal guarantee that those justices did not rule based on their own private political views. In other words, justices were not forced to rule in support of a certain political agenda, but they certainly could if they indeed wished to. Such a contradiction thus sparked another debate about the judicial branch, mainly between judicial restraint and judicial activism.

Judicial restraint generally refers to the principle that justices keep contemporary political pressures or private agendas separate from their rulings. Thus, advocates of judicial restraint rarely overturn precedent, valuing legal tradition over any political perspectives or needs at the time [2]. It is for this reason that justices who believe in judicial restraint generally lean closer to the strict constructionist side; if Constitutions and laws were up for free interpretation, there would then be too much room for political agendas to influence the application of those laws.

On the opposite side is judicial activism, the idea that justices have a duty to use their power for social progress and rule partially based on public opinion and what is needed at the time. Instead of serving as a cog in a machine (the interpreter of laws that Congress passes and the President executes), judicial activists are more likely to consider the impacts of their ruling, and presumably, use their rulings to advance social progress.

So which ideology is better? There is no consensus. In fact, even the definitions of judicial restraint and activism themselves are blurry at best. While judicial restraint may hinder social progress with its protection of “bad laws” (as it is hesitant to overturn them), judicial activism also potentially sabotages the separation of powers by allowing the judicial branch to effectively serve its own agenda and become policymakers themselves.

The debate between judicial restraint and activism could not be more clearly seen than in Earl Warren’s court from 1953-1969. His time as Chief Justice of the Supreme Court overlapped with the civil rights movements of the 1960s, which he and his court played a large part in. Often considered one of the most liberal courts in United States history, a large criticism of the Warren Court was its “blatant” judicial activism, a radical deviation from the restraint the court traditionally demonstrated; yet, it is also undeniable that his court significantly contributed to the expansion of

civil rights to formerly oppressed minorities. This essay will hence explore these two sides of the argument by looking at two of the most impactful rulings of the Warren court, and discuss whether Earl Warren should be seen as a judicial activist or a civil rights champion.

Brown v. Board of Education

About 60 years before Brown v. Board of Education, the Supreme Court infamously ruled in another case, Plessy v. Ferguson, that racial segregation was legal. Despite the 14th Amendment's equal protection clause, the court decided that as long as segregated facilities were equal in general quality, they did not violate the law, thus creating the doctrine of "separate but equal" and thus legalizing systematic segregation [3].

Decades later, the Board of Education of Topeka, Kansas, using this legal precedent, refused to let Linda Brown, an African American girl, attend a public school close to her house, instead forcing her to attend a segregated black school further away. This prompted her father to take the Board of Education to court, and the case eventually made it to the Warren Court, where it was unanimously decided that "separate but equal" was inherently unequal, that racial segregation instilled a sense of inferiority within children of color in such a way that violated the Equal Protection Clause, and that racial segregation was unconstitutional [4][5].

Conventionally, Brown v. Board of Education is considered a clear example of judicial activism, primarily due to the fact that it overturned the precedent of Plessy v. Ferguson and went against established law [6]. Yet, besides the common criticism of the case not being expedient enough to desegregate schools, few people nowadays would seriously attack the ruling because of its activism. The case indeed did overturn precedent, but that precedent was clearly wrong, and the arguments in support of Brown along with the unanimous opinion of the court were logically and legally sound. The fact that the ruling coincided with a growing sentiment and awareness of civil rights and fit the liberal ideology of the court does not necessarily mean that private agendas were projected onto the rulings, which is, after all, the more dangerous aspect of judicial activism. Thus, the Warren Court's decision, in this case, should rightfully be considered a positive example of judicial activism and be celebrated for its significant contributions towards the advancements of civil rights.

Griswold v. Connecticut

In 1879, the state of Connecticut passed a law that banned the use of, or assistance to other people to use, birth control [6]. Nearly a century later, in 1965, Estelle Griswold and C. Lee Buxton were arrested and fined for offering married couples advice about contraception. They sued, and the case reached the Supreme Court, where it was decided that Connecticut's law banning contraception was unconstitutional. It was argued that the Constitution guaranteed citizens a "right to privacy", which although not explicitly granted, could be inferred from several amendments, most notably the First, Third, Fourth, and Fifth.

Griswold v. Connecticut, though not striking down any significant precedents itself, established the constitutional "right to privacy", that was used in later cases that legalized abortion and same-sex marriage [7]. Unlike Brown v. Board of Education, the judicial activism in this case is apparent in the relatively loose interpretation of the Constitution that led the court to declare such a constitutional right. While the outcome of the case, again, is generally positively perceived

nowadays, despite the judicial activism (by definition) involved, the reasoning and interpretation of the Constitution that led to the declaration of a "right to privacy" is still fiercely debated.

-Coda-

The biggest threat that judicial activism poses is the imposition of private political agendas in the interpretation of laws. These private political agendas can come either from the justices themselves, or outside pressures that the separation of powers is supposed to protect justices from. Justices that impose private biases or agendas in their rulings, in theory, should not be able to earn a nomination from the President and approval from Congress, which leaves outside pressures the biggest potential contributor to the perils of judicial activism, and the separation of powers the most significant protection against such a threat.

However, it is important to remember that the separation of powers is a protection against any single branch of government grabbing too much power for itself. It is not a mandate that forces all three branches to fight and disagree with each other over every single issue, but only those that are necessary. In Brown v. Board of Education, the fact that the decision coincided with the civil rights agenda of the time is not a breach in the system of separation of powers, but rather a reflection of wrong attitudes towards civil rights being corrected throughout society and government. While such an argument is harder to make for Griswold v. Connecticut, due to its reliance on a looser interpretation of the Constitution, the fact that Congress has not made a serious attempt to explicitly limit the scope of the "right to privacy", also shows how the argument that the court's interpretation of the "right to privacy" is objectively wrong does not stand; again, the seemingly activist decision can be seen as nothing out of the ordinary, at most an unexpected yet most likely correct interpretation of the Constitution with no foul play.

In summary, every single ruling, at its core, is upholding a certain agenda. Some agendas are "old", which are commonly reflected by precedent and therefore do not warrant much attention whenever rulings are made according to them; some agendas are "new", and are frequently scrutinized for any signs of judicial activism, as was the case of these Warren Court cases. The transition from "old agendas" to "new agendas" does not automatically translate to judicial activism. It is for this reason, therefore, that instead of accusing Earl Warren as a judicial activist, we should instead compliment him for having the courage to cement the transition between old and discriminatory to new and improved agendas into American political law.

Endnotes:

[1] "Federalist 78 (1788)." *National Constitution Center – constitutioncenter.org*, constitutioncenter.org/the-constitution/historic-document-library/detail/alexander-hamilton-federalist-no-78-1788.09

[2] "Judicial Restraint - Ballotpedia." *Ballotpedia*, ballotpedia.org/Judicial_restraint#:~:text=In%20general%2C%20judicial%20restraint%20is,that%20are%20not%20obviously%20unconstitutional.

[3] *Plessy V. Ferguson (1896)* | National Archives. www.archives.gov/milestone-documents/plessy-v-ferguson.

[4] Noah, Olamide. "Brown V. Board of Education | the Case That Changed America." Legal Defense Fund, 13 Mar. 2024, www.naacpldf.org/brown-vs-board.

[5] Brown V. Board of Education (1954) | National Archives. www.archives.gov/milestone-documents/brown-v-board-of-education#:~:text=Citation%3A%20Brown%20v.%20Board%20of,Record%20Group%20267%3B%20National%20Archives.&text=In%20this%20milestone%20decision%2C%20the,basis%20of%20race%20was%20unconstitutional.

[6] "Griswold V. Connecticut, 381 U.S. 479 (1965)." n.d. *Justia Law*. https://supreme.justia.com/cases/federal/us/381/479/.

[7] Fawbush, Joseph, Esq. 2022. “Griswold V. Connecticut Case Summary.” *Findlaw*. July 18, 2022. https://supreme.findlaw.com/supreme-court-insights/griswold-v--connecticut-case-summary.html.

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