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An Analysis of the Abortion Issue in America: Judicial Activism from the Perspective of Conflict of Rights

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Abstract: Abortion has been recognized as "the most controversial and emotional issue" in the United States, debate of which has lasting for three decades. The overturning of Roe v. Wade is considered to be one of the major goals of the Republican presidential campaign. As a country with many parties and religions, the debate of abortion has been a constant battle ground between warring factions. Since Roe v. Wade, the pro- and anti-abortion sides have used the right of patients to autonomy and privacy and the unborn's right to life as arguments, triggering a debate over the right to choose and the right to life. However, there are also more views that the issue raised by the Supreme Court's overturning of Roe v. Wade is actually a question of whether the law interferes excessively in political issues. Does it infringe on the legislative power of the states and even the spirit of democracy? This paper attempts to start from the appeal of right protection, go back to the Warren Court, and think about the changes of the meaning of "right" under judicial activism, so as to carry on the discussion of democracy and freedom.

Keywords: abortion, right, court, judicial activism

1. Introduction

In the 1973 Supreme Court case of Roe v. Wade, the Court held that the Texas abortion law violated the due process clause of the Fourteenth Amendment to the Constitution, and that abortion was a constitutional "right to privacy." Bella Abzug spoke in front of the Capitol and said, "Millions of American women feel safe and free as a result of yesterday's decision. The opposing view is that the Constitution should be interpreted as it is written, that is, the right to abortion is not the original purpose of the legislation and is not traditionally recognized as a right to abortion. Second, when the case came into effect at the federal level, it not only overturned the traditional protection of the constitutional rights of the fetus at different stages of pregnancy, holding that the right to life of the fetus in the mother's womb should not be protected, but also overturned individual state laws on abortion.

In June 2022, the Supreme Court decided the case of Dobbs v. Jackson Women's Health Organization, overturning Roe v. Wade by a vote of 5: 4 and nullifying the protection of abortion at the federal level.

In the 50 years since Roe v. Wade, various arguments have been raised, discussed, and fought about the Supreme Court's interference with a woman's right to abortion, until today, the

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contending parties can no longer raise new arguments. From the liberal interpretation of the Constitution, the right to privacy is an inviolable freedom stipulated in the Fourteenth Amendment to the Constitution. The right to privacy includes the right to abortion. This is a dispute over the legitimacy of the interpretation of the Constitution. The claim of "right" has become the main battlefield for both sides. Looking beyond these rights, there is a dispute of two judicial ideas: judicial liberalism and judicial restraint. Generally, everything goes back to the word "right" itself.

2. The Origin of Constitutional Interpretation of Right to Abortion and Right to Life

The first conflicts appear under the right of citizens, focusing on different explanation of the same constitutional provision--The Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution stipulates that no one shall be deprived of life, liberty, or property without due process of law [1]. On the one hand, Lord Justice Blackmun, writing for the majority in favor of Roe, pointed out that there are at least two interests to be protected in pregnancy: the health of the pregnant woman and the life of the fetus [2], and that in the early stages of pregnancy the woman has more freedom to decide. On the other hand, the conservative side, on behalf of constitutional textualism and epistemology with some religious overtones, argues that there is no intention to protect the right to abortion during the writing of the Constitution, and that the life of the fetus is more worthy of protection.

Liberals and conservatives interpret opposing constitutional rights and freedoms through the same article, and the claims of the two sides can be understood clearly. Both sides emphasis on the protection of rights as their explanations. The problem may be caused by the word "rights" itself; the process of defining rights means drawing the line between the parties. As is mentioned in front of the citizens or written in the text, rights are used to describe something that should be respect and protect. But we must be clear that the protection of one right, or claim, is also the denial of another claim. The "Rights Revolution" is the most brilliant creation of American judicial circles in the twentieth century. To understand rights, we need to go back to its birth, the Warren Court, to understand its causes, to see its positive impact on American society and history, and to see its decline.

3. The Warren Court: Setting Precedent

After the New Deal, before the birth of the Warren Court, conservatism was still prevalent, but the Supreme Court, influenced by the judicial restraint presented by Holmes and Brandeis, had a tendency to transform [3]. With the liberal justices in the majority, the Supreme Court began to take a proactive stance on a series of civil and political issues.

Warren Court heard 1,750 cases over 16 years, most notably Brown v. Topeka Board of Education (1954), Baker v. Carr (1962), New York Times & Company v. Sullivan (1964), Miranda v. Arizona (1966), and others. First, in promoting the issue of equal rights, the Warren Court elevated the society's understanding of equal rights from form to substance. Liberal justices started from safeguarding citizens' constitutional rights to enjoy justice. Whether it is policy or law, they will strive to realize "the principle of equal justice under law [4]." The disadvantaged groups, formed by social factors or bad luck, are more difficult to enjoy equal rights than the general groups, the protection of such disadvantaged groups is a kind of social responsibility.

In 1954, Brown v. Board of Education was the best case to represent the Warren Court's substantive advancement of equity and equality. At the time, black and white students attending separate schools did not violate the doctrine of "separate but equal." Brown appealed to the federal courts, arguing that although the implementation of black and white schools was identical, this was equality in form only, and the "system" of school segregation actually had a detrimental effect on

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black children's education. Brown's claim was eventually upheld by the Supreme Court. In its decision, the Warren Court pointed out that the physical elements of public schools may be identical, but segregation is often interpreted as marking blacks as inferior, and this will affect children's motivation to learn.

In Baker v. Carr, the state legislature's apportionment of seats and the number of voters in the districts violated the state's laws and violated citizens' equal rights to vote. Tennessee voters, led by Baker, appealed to the Supreme Court. The Supreme Court chose the latter between deference to the elected authorities and judicial restraint, and judicial activism for social justice. It held that the federal Supreme Court has jurisdiction over apportionment cases, and the state's apportionment of seats violated the constitutional right to equal protection of the laws. Justice Brennan further pointed out in his decision that the primary consideration in determining whether an issue is political is whether the issue has been finally adjudicated by another political branch.

It is indeed against democracy for a few members of the Supreme Court to decide the matters of many citizens at the federal level. But in the American society at that time, facing the inequality and racism, the lack of the awareness of the equal rights, the rights of the disadvantaged could not be protected, and the possibility of the division of the country, the citizens were in urgent need of active and dynamic judicial intervention, for which although democracy was sacrificed, but in exchange for a better result.

The Warren Court for the first time referred the constitutional protection of rights to a new understanding level, and the "right revolution" deepened the awareness of personal right and freedom. Citizens gradually have more expectations and requirement over the country. Judicial activism, guiding the federal court to bypass the state rights to affect the life of civil society, in fact eased the segregation of the United States.

However, people's concept of rights will change and grow with the development of the society. During the period from the budding of judicial liberalism to the Warren Court, more and more substantive "rights" were included in the discussion at the federal judicial level, greatly expanding the scope of the protection of equal rights. In the 1925 case of Gitlow v. New York, the justices insisted that freedom of speech and freedom of the press are among the freedoms protected by the due process clause of the Fourteenth Amendment. In 1966, Miranda v. Arizona, the provision of exclusionary rule of illegal evidence and the right to attorney had witnessed an advance, a development that, in this case, perfectly combined with the right to silence, formed the famous Miranda Rights. In 1967, Katz v. United States raised the protection of the right to privacy to a new level through due process of law.

4. Judicial Activism: Magnifying Human Rights

Judicial activism and judicial restraint are two kinds of opposite legal philosophies, the opposition and conflict of the two accompanied with the whole 20th century constitutional history. Wolfe defined judicial activism, that is, judges who add personal value judgments and political tendencies to judicial trials are judicial activism; Judicial activism is exercising "legislative power" in constitutional cases [5].

In the early days of the constitution and federalism, the courts were set to be more passive and independent. Hamilton emphasized the importance of judicial independence in his Federalist Papers, saying that the independence of the judiciary meant that it was independent of the people, that judges were not elected, and that the judiciary could only passively adjudicate cases and be less threatened by the power of the executive and legislative branches [6].

Professor Sunstein has argued that Supreme Court decisions on major and sensitive issues should be as narrow and shallow as possible [7]. Judicial activism means that the court takes an active stance in political and civic matters, which, as a consequence, is not necessarily bad. In the Brown

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case, it was the Warren Court that intervened to promote equal rights that eased America's social problems, while in the Lochner case, the Court's conclusion that the freedom of contract was a constitutional freedom was controversial and hindered social and economic development to some extent. An institution is not only good or bad in terms of consequences, but also in terms of the threat it poses.

From Justice Stone's Annotated IV in United States v. Carolene Products Company to the Warren Court, the Supreme Court's justification for judicial activism was that it needed to interpret the Constitution with the times so that it reflected the civil rights and social values of the new era. The core logic of this proposition is to protect the substantive value, but it does not mention the procedure problem. The purpose of constitutional review is to restrict the lawmaker's legislation that violates the constitution and declare it to be unconstitutional by the power of judicial interpretation of the supreme law. If we interpret the Constitution in an active way, the inevitable problem is how to identify which rights belong to the Constitution.

To put it another way, rights are legitimate claims and interests. "We protect those interests primarily by granting what we call our legal rights to those who claim those interests [8]". The protection of one interest involves a concession to another interest, and excessive protection of a right will cause damage to another right. When the awareness of rights and the demand for equal rights increase, the exercise of rights is prone to abuse. Moreover, this possible abuse may be magnified by judicial activism of the supreme court. If we say that in Brown v. Board of Education, the Supreme Court conformed to the right guarantee of public opinion and the interests of the disadvantaged through judicial intervention, judicial activism created a good result and confirmed the principle of substantive due process. Today, in Roe v. Wade, the Supreme Court has continued the trend of "politicization" . However, due to the equal strength of each side, this case is not as morally justified as the Warren Court. The conflict of the two sides' own positions, and the expression with which the two sides express their positions – substantive rights – will be further magnified. On the one hand, the conflict between the two sides is based on opposing political positions. On the other hand, the establishment of substantive due process makes judges interpret due process of law in many cases, making the due process a container of potential rights and claims of citizens. The scope and boundary of rights are expanding and inflating. Rights are more likely to contradict each other, and the result may be a conflict of rights, as exemplified by Roe v. Wade.

Through the discretion of judges, political beliefs, and to a large extent, judgments are determined by the "person" rather than the protection of basic rights. Minority judgments and rulings have always been difficult to stabilize, and each new justice has his or her own political leanings. During his presidential campaign, Trump said that if elected, he would fill the Supreme Court with people who would overturn Roe v. Wade by appointing justices. The announcement of the nomination came just an hour after the death of liberal Justice Ginsburg. Critics of overturning Roe v Wade accuse the Court of "conservatism," but whether it is conservative or liberal, the Court has continued its proactive engagement on political issues. The evaluation of judicial activism should not ignore procedural issues for the sake of substantive justice or the results of complying with society. Judicial activism needs to have certain social and institutional conditions. Not only must the legal system have the space to grant rights to judicial activism, but it must also have the institutional design to prevent judicial activism from excessive interference in democratic politics. Judges must try their best to be fair and just, and the public must have a tolerant and understanding attitude towards judicial activism.

5. Democracy and Equality

As one of the fiercest critics of Roe v. Wade, Professor Ely also says that when judges explore the "fundamental values" of the Constitution according to their own moral philosophy, they are actually

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exercising unlimited discretion. The only fundamental values that judges can discover in the Constitution are their own values. Therefore, the interpretation of the Constitution's "fundamental values" violates the spirit of democracy [9]. From the perspective of the Constitution, federal interference with states' rights and democracy is not a constitutional right, after all. Since Marbury v. Madison initiated the Supreme Court's constitutional review, the legitimacy of the power of constitutional review lies in the protection of vulnerable groups from potential injustice [10], but this protection should accord with more general moral values and not lead to the violation of the rights of more people.

In the case of abortion, the Supreme Court's removal of the federal regulation is tantamount to returning democratic legislation to the states. Does this weaken the protection of minority interests? Liberals see this as the second "Jim Crow". The removal of the protection of women who have had abortions is a sharpening of class equality on a broader level. In states where abortion is prohibited, poor women will have to live under greater stress than rich women. Rich women can go to Canada, which has protected abortion, to obtain an abortion; the law of abortion does not prevent women from obtaining an abortion but forces poor women to seek abortions in dangerous and unhealthy clinics. Second, women bear more responsibilities and suffer more pain in the process of pregnancy than men, but to deprive their right to abortion is to deprive their right to terminate their responsibilities and force them to bear a child.

In the United States, women choosing to abortion are from all classes of the society. And a sizable number of lives are lost each year because of abortion. The demand for equality is legitimate. To recast the mind, when the government chooses to respect democracy, it must sacrifice the rights of pregnant women in some states (majority democracy).

The main criticism of the dissenting opinion of the Supreme Court is not whether abortion is right or wrong, nor is it whether the Supreme Court should protect minority interests, but whether it should limit the Court's activism. Other critics are from the lack of medical facilities and conditions, in Texas, abortion facilities meet the minimum standards for ambulatory surgical centers under Texas law, imposing obstacles to a women seeking an abortion [11]. Thus, it may be better for the federal government to strengthen the protection of pregnant women, the provision of appropriate and adequate medical care in the states under its jurisdiction.

6. Conclusion

In the United States, freedom and tradition have long been issues of law and politics. These two opposing traditions have exerted a deep influence on American society. The abortion issue, ostensibly a constitutional interpretation of the right to life and the right to choose, is actually a confrontation between elite intervention and following the will of the people. The study of abortion, on the basis of agreeing with the original intention of the Supreme Court's review of unconstitutionality, which is to review the protection of social vulnerable groups, should be reconsidered from the extended meaning of rights: the enlargement of "legal freedom" caused by judicial activism, rights become disguised of people's demands and the conflict of opposing rights; to what extent should the court's interference in politics should be tolerated. Going back to the beginning of judicial liberalism, that is, the Warren Court's initiation of the court's legal interference in politics. Behind following the will of the people and consequential justice, we should clearly see the people's and state governments' tolerance of judicial interference. Only by seeing tolerance can we understand the key to lasting debate in Roe v. Wade. If the position of judicial restraint maintained by the Supreme Court is the logical outcome of America's federal system and legislative system, then, in order to solve new problems in social development, when it is necessary to break through this kind of restraint, this breakthrough should be as limited as possible within the

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scope of its own system. Once the previous system and tradition are broken through to solve a problem, new and more complicated problems will arise.

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[11] *In 1938, Justice Stone added a footnote to the decision of U.S. v. Carilence Products Co., which has been cited repeatedly ever since, clearly revealing the role of judicial review in protecting minority interests as a complement to the shortcomings of democratic institutions.*