from Phyllis Schlafly

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We Still Have an Activist Supreme Court

When we elected Ronald Reagan President, conservatives dreamed that we would soon get a strict-constructionist Supreme Court. We hoped for an end to judicial activism -- the practice of writing into U.S. law the social preferences of the sitting Justices rather than just interpreting challenged laws against the standard of what the Constitution actually says.

Unfortunately, that was just a dream. We still haven't got a Supreme Court that exercises that kind of restraint. The Court administered a one-two punch for judicial activism when it handed down the decisions banning graduation invocations and reaffirming Roe v. Wade.

The Rhode Is1and graduation prayer case, Lee v. Weisman, surprised practically everybody. The majority opinion by Justice Anthony Kennedy overturned a couple of hundred years of American practice without citing anything in the Constitution, law, history, or tradition to support its ruling.

Justice Antonio Scalia's dissent was biting in its satire, Whereas Kennedy rationalized his conclusion by "research in psychology," Scalia pointed out that this has no particular bearing on the issue, and furthermore, "the Court has gone beyond the realm where judges know what they are doing."

The Kennedy majority decision postured that it was protecting immature children from "psychological coercion," even though, as Scalia pointed out, the students were not required to pray, bow their heads, fold their hands, or say Amen. Is it really too much to expect high school graduates to stand or sit quietly in toleration of the sincerely-held views of others? What will be the next target of what Scalia called "the Court's bulldozer" -- banning the Pledge of Allegiance to the Flag? Or the singing of God Bless America?

The Court's on-again-off-again rulings about religion have kept, us in a judicial thicket which is, as one justice has said, "more commonly associated with interior decorators than with the judiciary." The banning of graduation invocations puts down religion as though it is something to be indulged in secret, like pornography.

After flinging a couple of centuries of traditional practice to the winds on June 24, five days later the three-justice decision in Planned Parenthood v. Casey pontificated a truly incredible new rule, namely, that decisions of the Imperial Court must be adhered to just because they have been decided, whether correct or not.

The O'Connor-Souter-Kennedy decision reaffirmed Roe v. Wade NOT because it was a correct judgment, but on the ground that it is necessary to retain it for the sake of stare decisis, to protect the Court's claim to "legitimacy," and to avoid any appearance that the Court was caving into political pressures. All these sanctimonious claims are ridiculous and inconsistent on their face.

As Chief Justice Rehnquist stated in his dissent stare decisis doesn't require us to stand pat on a wrong decision. Anyway, the Casey ruling itself overturned previous Supreme Court decisions on abortion regulations.

The new rule on abortion is to be whether or not the challenged legislation imposes an "undue burden" on a woman's ability to get an abortion. This is not a constitutional rule, but one that emanates from the activism of a Court that grabbed the abortion issue out of the hands of the state legislatures in 1973.

The Court ruled that requiring a woman to be given information about risks and alternatives, to wait 24-hours, and to have her parents' consent if she is a minor, are NOT "undue burdens," but that requiring her to notify her husband (just notify him, not acquiesce in his wishes) IS an undue burden. Since there is obviously no rule (of Constitution, law, logic or tradition) that produces this result, every other regulation henceforth passed by any of the 50 state legislatures will have to be submitted to the Court to ascertain whether or not it is an "undue burden."

Of course 1aws forbidding or regulating abortion intrude on a woman's "liberty." But, as Justice Scalia pointed out, it is okay for laws to intrude on your liberty if the Constitution does not forbid it.

A good example is the laws against bigamy. They, indeed, intrude on your liberty to marry, but bigamy is not protected by the Constitution, and longstanding traditions of American society have confirmed that it can be legally proscribed.

It's obvious that Presidents Reagan and Bush didn't have the litmus test on Roe v. Wade that they were accused of having. But one has to question the good faith of the three justices who accepted. appointment from those Presidents without telling

them that they valued stare decisis more highly than a strict and faithful reading of the U.S. Constitution.