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Looking at the Record: Judicial Activism at the High Court

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Wednesday, July 21, 2004

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A look at the three specific decisions presented by Dobson makes the case against Kennedy very convincing. In the 1992 decision, *Planned Parenthood v. Casey*, Kennedy wrote the majority opinion that invalidated a Pennsylvania law that required a woman seeking an abortion to be given full information about the procedure and its risks, required a waiting period of 24 hours before the abortion was performed, and required the informed consent of one parent for a minor to obtain an abortion. The people of Pennsylvania supported these laws through the democratic process and considered the provisions to be fully reasonable and in the best interest of the mother. In writing the majority opinion, Justice Kennedy ruled that the *Roe v. Wade* decision prohibited such minor restrictions on abortion. Furthermore, Justice Kennedy claimed that the *Roe* decision must stand because "the Constitution serves human values, and while the effective reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." In other words, Justice Kennedy ruled that *Roe* must be affirmed simply because women have come to assume access to abortion, and it would injure the prestige and reputation of the court for the justices to admit that the case had been wrongly decided.

President Ronald Reagan was elected as a pro-life candidate who made the defense of unborn human life a central part of his message. He was elected and re-elected to office with landslide majorities and held a powerful electoral mandate for leadership. He appointed both Sandra Day O'Connor and Anthony Kennedy, and both were promoted by Republican leaders who presented them as conservative jurists who would help steer the Court away from judicial activism. Americans had every right to expect that these justices would eventually vote to overturn *Roe v. Wade*—a case so badly decided and so injurious to unborn life that no conservative judge could possibly support its standing. But both Kennedy and O'Connor sided with *Roe*, and cited the injury that would come to the High Court's prestige if such a significant decision were to be reversed. Conservatives and pro-life Americans were outraged by the *Casey* decision, and they had every right to be both shocked and disappointed. The decision was devastating.

In 1996, Kennedy wrote the majority opinion in a case that denied the people of Colorado the right to adopt "Amendment Two" which prevented the state from adopting any laws designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Citizens of Colorado had adopted this amendment to their state constitution by a referendum. The provision was intended simply to establish the fact that sexual behavior or orientation was not a proper qualification for special group rights or legal protections beyond those enjoyed by all citizens.

This was not enough for a majority on the Supreme Court, and the law was ruled unconstitutional. In his vigorous dissent, Justice Antonin Scalia, also a Reagan appointee, asserted that the Constitution of the United States "says nothing about this subject." And thus, it should be left to the people of Colorado to decide their own laws and constitution. Scalia, unlike his fellow Reagan-appointed justices, consistently limits his judicial opinions to the actual content of the Constitution—not to newly invented "rights."

Finally, the case *Lawrence v. Texas*, handed down on June 26, 2003, held that the state of Texas could not criminalize homosexual behavior. In a sweeping opinion, Justice Kennedy argued, “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” With his breathtaking argument, Justice Kennedy effectively ruled that the individual is sovereign to define his own existence—an audacious claim he had made earlier in the *Casey* decision. The implications of this argument are massive and consequential. If every individual has the right to define his own existence, the state has no right to legislate anything that would limit that autonomy. Of course, the Court cannot consistently follow this argument. It turns to this kind of argument when dealing with questions related to sexuality or abortion. The right to define one’s own existence is not likely to appear in the Court’s decisions on criminal law.

Again, Justice Scalia issued a fire-breathing dissent. “This effectively decrees the end of all morals legislation,” he lamented. “If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.” In other words, the right to define one’s own existence is also the right to define one’s own moral code, and according to the majority, the state has no rational basis to interfere.

Furthermore, Scalia asserted, “Today’s opinion is the product of a Court, which is the product of a law-profession culture, that is largely signed on to the so-called homosexual agenda.” This quality of candor is rare in official Court opinions, but Scalia is a deeply frustrated man. He is willing to declare that the emperor has no clothes. The Supreme Court has now signed on to the homosexual agenda. So much for the claim of neutrality.

Americans often ignore the importance of the courts in our system of government. Most of us were taught in school that our government depends upon a system of checks and balances as protection against tyranny. Yet most citizens are unaware that the federal courts have usurped power and now deny citizens the right of democratic process. In assuming this power, courts have decided to legislate and to mandate their own understanding of law and morality over the wishes of the people. The courts do have a very important constitutional role, but the federal judiciary now assumes an authority far beyond that envisioned by the founding fathers.

America is involved in a culture war that involves the most controversial issues of the moral order. Issues such as abortion, homosexuality, children’s rights, and the natural family are regularly contested as two opposing cultural forces meet to debate and decide these issues. The legitimate place for the battle of ideas in the Democratic process. When federal courts preempt democracy and act as black-robed autocrats, the American constitutional order is subverted.

Beyond this, these judges tend to represent a worldview hostile to that of ordinary citizens. In claiming to act on behalf of the people, federal judges often act to deny citizens the legitimacy of the democratic process.

James Dobson is right to point to this problem. Whether or not Anthony Kennedy is the most dangerous man in America, this is an important opportunity to consider the role of the courts in our system of government and the danger of a judicial usurpation of our political process. America faces a political crisis if this trend is not reversed. The rule of law is not the rule of judges.

