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The Supremacists–A Judiciary Out of Control

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Mrs. Schlafly is known to most Americans through her work as a conservative activist, her radio show, and her many public appearances. In many ways, she invented the modern conservative movement as a mobilization of grassroots efforts. Her 1964 book, A Choice Not an Echo, was a manifesto for citizen activism, and a generation of Americans –especially women–rallied to her cause. In 1972 she founded the group now known as Eagle Forum, and she deserves credit for leading the charge against the ratification of the Equal Rights Amendment. Having just celebrated her eightieth birthday, Phyllis Schlafly shows no signs of retirement–much less of retreat.

In The Supremacists, Mrs. Schlafly issues a cogent and well-considered warning to her fellow Americans. "The United States Constitution did not create judicial supremacy or consign us to be ruled by a judicial oligarchy," she reminds. "On the contrary, the Constitution separated the vast powers of the federal government into three branches –legislative, executive, and judicial–with an ingenious system of checks and balances so that each branch can serve as a continuing check on the others." Nevertheless, though the founders did not create judicial supremacy, this nation has experienced a usurpation of power by judges that may well undermine the integrity of our national government.

Phyllis Schlafly is a trained and experienced lawyer, and she addresses this issue as both lawyer and citizen. Her passion is evident, even as her documentation is convincing. Mrs. Schlafly takes her reader back to the founding era, when James Madison wrote in Federalist 51 that the government's constituent parts must, "by their mutual relations, be the means of keeping each other in their proper places." In Federalist 78, Alexander Hamilton advised that the judiciary "will always be the least dangerous" branch of government. Of course, he had a constitutionally restrained judiciary in mind.

As Mrs. Schlafly reminds, the Constitution invests no legislative authority in the judiciary–none at all. Nevertheless, activist judges have usurped a legislative power even if they are denied a legislative authority. As she explains, "The judicial supremacists refuse to be bound by the words of the United States Constitution or the intent of its Framers. Instead, they espouse the theory that the Constitution is a 'living document' which can change according to judicially directed 'evolution'." A series of activist judges, including several seated on the United States Supreme Court, have pressed this agenda of judicial supremacy. As Mrs. Schlafly explains, when the late Supreme Court Justice William J. Brennan argued in 1982 for "the evolution of constitutional doctrine" and for the law to "transcend the printed page," he was setting the philosophical framework for judicial supremacy. Similarly, when the late Justice William O. Douglas referred to the Due Process Clause in the Constitution as "the wildcard to be put to such use as the judges choose," he was asserting the spirit and the substance of judicial supremacy in action.

What happened? Phyllis Schlafly suggests that nothing less than a revolution has taken place, driven by activist judges. She cites Judge Robert H. Bork who argues that the courts are now dominated by "faux intellectuals of the Left"

who practice "politics masquerading as law." As Mrs. Schlafly explains, "Americans believe that revolutionaries usually come dressed in military garb, but Judge Bork details how America has suffered a coup d'etat by men and women in black robes who have changed the rule of law to the rule of judges."

The judges are not acting alone, of course. "All over the nation, special interest advocacy groups are forum-shopping to find judges willing to bypass the Constitution and write their own social and sexual preferences into the law," Mrs. Schlafly explains. "Plaintiffs are seeking out judges willing to cooperate in deconstructing our culture by abolishing the Pledge of Allegiance and the Ten Commandments to please the atheists, and by abolishing marriage standards and anti-pornography statutes to induce the nation to condone unrestricted sex."

Mrs. Schlafly then takes readers through a review of the various fronts in our contemporary culture war, demonstrating how the courts, especially at the federal level, have legislated federal liberalism at the expense of constitutional sanity. Judges have moved to "censor acknowledgement of God," she argues. Yet, "Nothing in the Constitution confers on the federal courts the final authority to decide how other entities of government may acknowledge God."

Judges are also redefining marriage. Referring to the November 18, 2003 decision by the Supreme Judicial Court of Massachusetts legalizing same-sex marriage throughout that state, Mrs. Schlafly remarks, "It's hard to find a more outrageous example of activist judges asserting judicial supremacy that the 4 to 3 decision in Goodridge v. Department of Public Health by the Massachusetts supreme Court mandating same-sex marriage licenses. The Massachusetts state constitution was written by John Adams and adopted in 1780, and any notion that it was intended to include same-sex marriage is absurd." Judges are "taking sides in the culture war," she insists, and homosexual activists now know that the courts represent their best hope for social progress–all at the expense of democratic principle.

Mrs. Schlafly offers a particularly incisive critique of the Lawrence v. Texas decision handed down by the U.S. Supreme Court in 2003. "The out-of-the-mainstream attitudes expressed in the majority opinion in Lawrence v. Texas dealt a devastating blow to long-standing American laws and beliefs about morals and self-government, striking down our right to legislate against immoral actions and doing so without advancing any argument that reasonably relates to the U.S. Constitution. No constitutional argument justified the decision that created the new right of sodomy. The decision evolved out of the social preferences of the justices and their pandering to liberal elites."

Beyond this, the judicial usurpers are undermining U.S. sovereignty by citing foreign sources and ceding authority to foreign courts. "Every judge, upon taking office, swears an oath to the United States Constitution. What, therefore, should we say about a judge who by-passes the U.S. Constitution and laws and instead applies a foreign court's opinion? Is such a judge not faithless to his oath of office?" she asks. When judges cannot find a precedent for their preferences in American law, they tend to look elsewhere. Justice Anthony Kennedy looked to sources ranging from the British Parliament and the European Court of Human Rights to a brief filed by former United Nations High Commissioner for Human Rights Mary Robinson in framing his opinion for the Court in the Lawrence v. Texas case. In overruling a previous decision, Bowers v. Hardwick [1986], Justice Kennedy specifically criticized references made by [former] Chief Justice Warren Burger to the nation's Judeo-Christian heritage. "The judicial supremacists think it is their mission to dictate a new regime of sexual mores to replace our Judeo-Christian moral and ethical standards, which they believe are obsolete," she explained.

In other cases, judges have promoted pornography, citing "social value" as a license to produce, promote, and publish pornographic material. This has led to what Judge Bork has called "suffocating vulgarity," and explains why sexually-related businesses are offered so much legal protection by the courts. "We can't hope for any revival of civility and morality in the entertainment industry," Mrs. Schlafly warns, "until Congress clips the power of the Imperial Judiciary to overturn legislative attempts to maintain decency."

Of course, abortion stands as the touchstone issue of judicial activism. Mrs. Schlafly points to the 1973 Roe v. Wade decision as "an extraordinary exercise of judicial supremacy and . . . the godmother to a whole series of subsequent decisions on many subjects for which no basis exists in the Constitution." But abortion is not the only agenda pressed by activist judges on behalf of women. The Imperial Judiciary wants nothing less than the total neutralization of differences between men and women and the eventual reconstitution of a society aligned with their secular utopianism.

As every student of constitutional history knows, the courts cite the 1803 Supreme Court decision, Marbury v. Madison, as the warrant for judicial review and judicial supremacy. Mrs. Schlafly directs her powers of legal analysis

directly to this argument, explaining that the 1803 decision represented not an expansion of judicial power, but an exercise of judicial restraint. It would be more than a half century before the Supreme Court would declare another federal law unconstitutional, but the last half of the twentieth century would see the Supreme Court cite judicial review as constitutional permission for a legal revolution.

In response to the threat of the Imperial Judiciary, Mrs. Schlafly suggests that the United States Senate must reform its rules in order to break the minority's power to delay or prevent the confirmation of federal judges by filibuster. Beyond this, Congress should exercise its constitutional authority to limit the power of the Courts to consider issues that should be outside judicial review. Since the Constitution explicitly allows Congress to make "exceptions" to the types of cases that can be decided by the Supreme Court, Mrs. Schlafly asserts: "This is the most important way that Congress can and should bring an end to the reign of judicial supremacy."

Justice Antonin Scalia once asked: "What secret knowledge, one must wonder, is breathed into lawyers when they become justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years is in fact unconstitutional?" As he lamented, the Supreme Court "is busy designing a Constitution for a country I do not recognize."

All Americans are in Phyllis Schlafly's debt for revealing both the problem of judicial activism and the solution offered within the Constitution. Her book is a brilliant and much-needed call for citizen action. Her call must be heeded–and fast. Otherwise, we will soon find ourselves, along with Justice Scalia, citizens of a nation we no longer recognize.
