



Strange New Respect, 1992

by Tom Bethell

In recognition of his school prayer and abortion rulings, Justice Anthony Kennedy recently received the Strange New Respect Award for 1992. The award ceremony, attended by prominent journalists, was held in the Georgetown garden of a retired Washington publisher. I was fortunate enough to attend, the ground rules specifying that no one present, other than Kennedy himself, could be identified. The award was actually presented by a well-known liberal columnist with a northeastern newspaper, who has become a tremendous Kennedy admirer. To those who may not have heard, the Strange New Respect Award is given to political figures who betray their conservative supporters after moving to Washington. Such people are usually said to have "grown."

Kennedy, of course, went to the Supreme Court with strong support among conservatives and pro-lifers, and a general expectation that he would not let them down. Now he has "surprised friend and foe alike." He has also hired a law clerk trained by Laurence Tribe, Harvard's best-known progressive thinker.

Kennedy was also honored with the prestigious Taney Medal, which from time to time is awarded to justices who uphold the neglected constitutional doctrine that "the legislative will must remain subordinate to the judicial power of the Supreme Court." The most recent recipient was Justice Harry Blackmun. The medal is named after Chief Justice Roger B. Taney, who presided over an 1857 ruling of the court, *Dred Scott v. Sandford*, which oddly prefigures *Roe v. Wade* (1973).

In its recent case, *Planned Parent-*

hood v. Casey, the Court reaffirmed *Roe*, with three of the five justices appointed by Reagan and Bush (O'Connor and Souter, in addition to Kennedy) joining Blackmun and Stevens. Everyone at the ceremony was delighted and even surprised that Republican Presidents had managed—from the point of view of their supporters—to choose so poorly. Kennedy was feted for his "growth," and reporters present were smiling broadly at rumors (thought to emanate from Kennedy's law clerks) that the Justice has become very attentive to his newsclips. His "courage" was much praised, but there was a certain amount of grumbling at Robert Bork's contrary view that the *Casey* ruling was "intensely popular with just about everybody Justices care about: the *New York Times*, the *Washington Post*, the three network news programs, law school faculties, and at least 90 percent of the people Justices may meet at Washington dinner parties."

In the *Dred Scott* case, Chief Justice Taney found that, constitutionally, Congress had no power to prohibit slavery in the Territories, because such a prohibition would constitute a "taking" of private property. In *Roe*, Blackmun found that, constitutionally, state legislatures had no power to prohibit abortion in the states, because such a prohibition would interfere with the "right to privacy." Both cases used constitutional rhetoric to preempt legislative action. Taney, like Kennedy, was a Catholic and a decent fellow who was "personally opposed" to slavery and "personally kind to Negroes," according to one of his biographers. But he would not allow his personal beliefs to interfere with his judicial duties as he saw them. Slaves, like the unborn, were not considered to be "fully human," but were to be regarded as the property of their owners (mothers).

Dred Scott was a slave, but at least he emerged from his encounter with the Supreme Court in one piece. "This doughty gentleman of color has become the hero of the day, if not of the age," the St. Louis *Washington Union* reported in 1857. Barnum's Hotel in St. Louis supported him as a public attraction, "and while life lasted he enjoyed himself hugely," according to another Taney biographer. Taney was praised by some newspapers ("The decision in the Dred Scott case must be a *finality*, so far as federal legislation is concerned," the Richmond *Enquirer* editorialized), reviled by others, and as for himself, serenely confident "that this act of my judicial life will stand the test of time and the sober judgment of the country."

It was widely expected at the ceremony that Justice Souter would also win Strange New Respect. He had stood shoulder-to-shoulder with Kennedy in the abortion and prayer cases. Three days after the *Casey* decision was announced, Fox Butterfield wrote a Souter Has Grown story for the *New York Times*, a good specimen of the genre, and in writing it Butterfield in effect nominated Souter for the award. But there was a last-minute decision to withhold it from the reclusive Justice, because of an apparent and little-noted conflict of interest in the abortion case.

During Souter's confirmation hearings in September 1990, Howard Phillips of the Conservative Caucus testified that in February 1973, when Souter was a member of the board of trustees of Concord Hospital, "he participated in a unanimous decision that abortion be performed at that hospital. . . . Similarly, Dartmouth Hitchcock Hospital, which is associated with the Dartmouth Medical School, has performed abortions up to the end of the second trimester. During

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the period of Mr. Souter's tenure as a decision-maker of these two institutions, many hundreds of abortions were performed under his authority, with no indication that he ever objected to or protested the performance of these abortions."

Souter had gone much further than merely claiming abortion should be legal. As Phillips said, he joined the court as "an accomplice to abortion," giving him a personal stake in the issue. It was as though a member of Taney's court had voted against Dred Scott while being a trustee of a market where slaves also happened to be sold. (Taney had shown "sensitivity" by manumitting his personal slaves before coming to the Court.) "Under the circumstances," the columnist Joseph Sobran has written for *Human Life Review*, "is it likely that [Souter] would have voted to overturn *Roe*? Could he even rule impartially on it, when to reverse that decision might imply something awful about his own willing part in promoting abortion in private life?" Souter's role as a hospital overseer for many years "makes problematic the propriety of his ruling on a question that could reflect so keenly on his own past. He came to the Court with a personal interest in the legitimacy of *Roe*."

Because of this cloud, it was regretfully decided to deny Souter an award this year. People who "grow" must be quite above suspicion before they can win Washington's glittering prizes, and we can only assume that Butterfield didn't know about the Concord Hospital, for he said nothing about it. But the committee is still enthusiastic about Souter and sees him as one of the most promising Republicans in years, outside of Kennedy himself. (Justice O'Connor, it's widely conceded, already grew years ago.) Since Souter can count on accolades and media glory if he continues to grow as a Justice, he can no doubt be expected to rule soundly in the future.

At the ceremony, the written opinion of Souter, Kennedy, and O'Connor was praised as "a magnificent example of Republican jurisprudence." Radical precedent was upheld (and *Roe* indeed was radical) with suitable obeisance to *stare decisis*. Footnotes and tiny demurrals sufficed to avoid the appearance of mere slavishness. That is the way the Washington establishment likes and expects Republicans to behave;

Kennedy, Souter, and O'Connor did not disappoint. "They are the real conservatives," I heard it said a dozen times as I strolled about the R Street garden.

There was also some quiet grumbling amid the backslapping, on account of the inept admission by the center-holding trio that they weren't entirely sure that *Roe* had been properly decided in the first place. In withholding judgment on the correctness of *Roe* and then meekly upholding it, the centerholders, it was felt, had unnecessarily given the game away. They had shown, rather too conspicuously, that they were responding to the very public pressure they had decried.

I also heard expressions of surprise at George Bush's response. He oddly boasted that the ruling showed he had told the truth when he claimed there had been "no litmus test" for Souter. He seemed to think his own truthfulness was at stake, rather than the Court's integrity. Bush's inopportune self-vindication told the Washington establishment what it did not expect to hear from him, that he is really not too concerned about the way the Court rules on abortion. He might more logically have taken credit for appointing Clarence Thomas, who did not betray those who supported his nomination.

A couple of days after its Souter-has-grown story, the *New York Times* attacked Justice Thomas for not following Souter's "pattern of growth." Here we come to an unreported aspect of the story. An increasing percentage of women seeking abortions are black; for every three black babies born, two are aborted; black women are more than twice as likely to get abortions as white women. At least 400,000 black pregnancies are aborted each year; 70 percent of Planned Parenthood clinics are in black and Hispanic neighborhoods. As Michael K. Flaherty pointed out in last month's issue, Planned Parenthood founder Margaret Sanger wrote that "we do not want word to go out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members."

Hmmmm. Is it possible that word of this somehow got out to Justice Thomas even though the news is not fit to print? There is, no doubt, considerable right-wing support for abortion today, but its basis is carefully left unstated—at least

in print. A right-winger I know is *particularly* in favor of subsidized abortions. Here's an angle on racism that journalists *don't* want to dig into. It might be a little uncomfortable for their choice-promoting feminist friends to see who their real bedfellows are. Harken unto abortionist Edward Allred, quoted in the *San Diego Union* as saying: "When a sullen black woman of 17 or 18 can decide to have a baby and get welfare and food stamps and become a burden to us all, it's time to stop. In parts of South Los Angeles, having babies for welfare is the only industry the people have."

A little more of Allred & Co. in print and blacks might become more suspicious of the abortion-promoting liberals they have faithfully followed for years. But it's worth noting that the published expression of right-wing (as opposed to merely conservative) opinion is taboo in the U.S. today. The taboo is faithfully observed by conservatives. Liberals, by contrast, relish the added leverage provided by those on their own side but further to the left, and they are delighted not to have to contend with the full spectrum of opposition from the right. If books like *The Rising Tide of Color*, written by Lothrop Stoddard (Ph.D., Harvard) were still published by respectable houses (Scribner's), those who support abortion on ostensibly liberal grounds might also come under suspicion of liking its demographic outcome. Liberals *are* big supporters of population control in the Third World, after all, not to mention subsidized abortions here.

Don't expect the *New York Times* to play up minority abortions any time soon, then. Recently, however, the maverick Nicholas Von Hoffman wrote a bold column, published in the *Philadelphia Inquirer*, applauding the Court's ruling. Although he avoided any mention of blacks, he did say that the people who are aborted are just the kind who would be confronting us with Uzis later in life if they were not. Disdaining the evasive rhetoric of "choice," he came right out and applauded the sociological outcome of abortion on demand. A breakthrough, if I'm not mistaken. I'm sorry he couldn't make it for the Strange New Respect award. Nick is a sociable old cove and I think he would have been delighted to pin the Taney Medal on Kennedy's chest. □

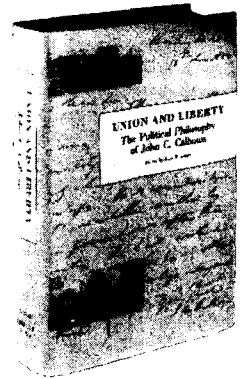
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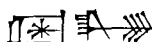
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Rush Limbaugh: Talking Back

Conservatism's media superweapon.

by Terry Eastland

The Dollar Rent-A-Car shuttle is carrying me and my family across the non-fruited plain of the Dallas-Fort Worth Airport. The driver spends much of his day in this bus, which of course comes with a radio, and in Dallas you can get the show on KUII 1190. It's on three hours a day, five days a

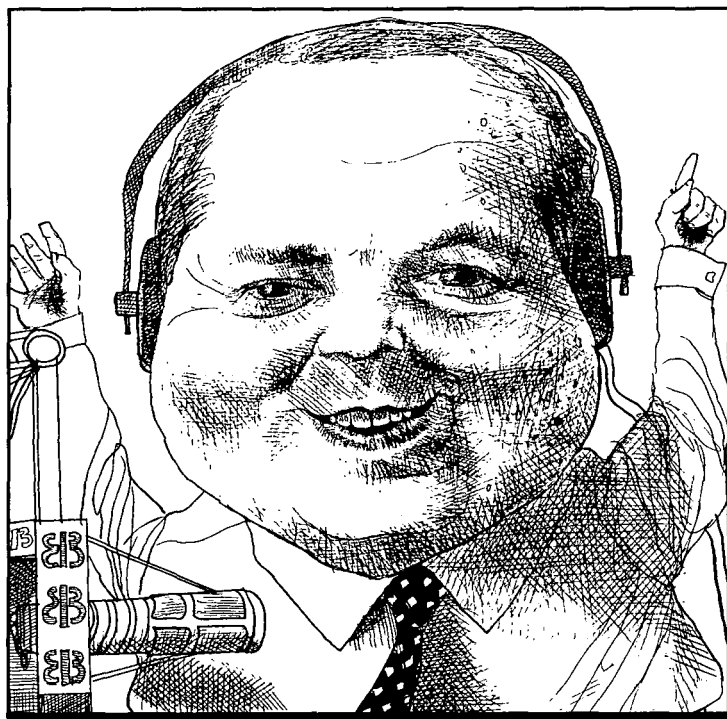
week, on over five hundred stations coast to coast, and my driver is one of the 12 million who listen to him daily.

"Yes, I listen to Rush," he says. "And the scary thing is, I agree with him."

Scary? Perhaps my driver has been intimidated by what Rush Limbaugh calls the "dominant media culture," for only a hidebound liberal could be afraid of what Limbaugh has to say. Limbaugh is a political conservative for whom no hyphen is necessary: neither neo- nor paleo- nor anything else. In this he is much like his hero, Ronald Reagan. What's more, he has a rock-'n'-roll energy that busts the conventional image of the conservative as unfunny and out of it. Or maybe it's Limbaugh's shameless braggadocio, his apologetic admission that he is right only "97.9 percent of the time." Or maybe it's the weird, even tasteless stuff that sometimes finds its way onto the show—such as Limbaugh's recent discussion with several callers about lamb and pig castration.

Four years after it started, "The Rush Limbaugh Show" enjoys the largest audience of any radio talk show since the advent of television. No longer is it possible to say, as Limbaugh does, that he is just "a radio guy." When ABC's "Nightline" did a program last February on

environmentalism's declining appeal, it chose to pit against Sen. Al Gore not another politician but Rush H. Limbaugh III. "What I intended by [having



Terry Eastland, our regular Presswatch columnist, is resident fellow at the Ethics and Public Policy Center and author of the new book Energy in the Executive: The Case for the Strong Presidency (The Free Press).