

## THE COURTS

The Coming Slap  
in the Face

by Kenneth Zaretzke

In June 2005, the U.S. Supreme Court handed down its decision in *Kelo v. City of New London*, depriving property owners of rights that virtually everyone has always assumed they had. Very soon—before you can say “sequel to *Lawrence v. Texas*”—the Supreme Court will no doubt take up the issue of same-sex marriage. You think a majority of justices of the current Supreme Court won’t rule in favor of same-sex marriage—overthrowing a few dozen centuries of nearly universal social practice and moral understanding? Don’t bet the ranch.

*Vis-à-vis* the Supreme Court, an ordinary citizen today is like a man in a Honda Civic who has just been hit in front by a slow-moving Ford Explorer. Still strapped in to the driver’s seat and stretching his neck, he is relieved to find that the whiplash was negligible, too slight to have hurt him, when, suddenly, he is rammed from behind by a Hummer doing 50 miles per hour.

Like distinguishing degrees of physical injury, we hapless subjects of the new era of judicial supremacy need to distinguish unfortunate but bearable or tolerable constitutional decisions from intolerable ones (bearing in mind that *tolerable* does not mean *acceptable*). Constitutionally speaking, it makes sense to see *Kelo* as a very unfortunate but not disastrous decision, while regarding *Planned Parenthood v. Casey* (1992) as a disaster. Indeed, *Casey* (which reaffirmed *Roe v. Wade*) is likely to be the necessary precursor of any future pro-same-sex marriage decision.

*Kelo* is bad in the same way that *Lochner v. New York* was bad: It bulldozes past reality. In *Lochner*, the ignored reality was the almost total imbalance of power between employees and their employers. Employees were at risk of becoming capitalist serfs. In *Kelo*, the ignored reality is that residential property is so important to individuals that it should not be taken

away from them by the government, even with “compensation,” except for important governmental purposes. Exactly one century stands between *Kelo* and *Lochner*, but the same bluff capitalism animates both of them.

Such constitutional folly pales in comparison with the constitutional recklessness of *Planned Parenthood v. Casey*. Certainly, any decision that pointedly describes the people who agree with it as “the thoughtful part of the [n]ation,” as *Casey* does, will not exactly allay suspicions that the Court has a secret contempt for ordinary citizens.

The plurality opinion in *Casey*—written by Justices Souter, Kennedy, and O’Connor—gives a few nods to the existence of reasonable disagreement among citizens, but, for the most part, *Casey* runs roughshod over the reality of moral disagreement. The opinion deals with moral disagreement as if it were disconnected from constitutional decisionmaking. We are aware, says the Court, that impassioned feelings are held by many people who oppose abortion as a grave moral wrong, but our duty is to proclaim the liberty of all, not the morality of a few. That oh-so-convenient dodge ignores the fact that what constitutes liberty depends on our view of morality. Suppose that someone claims a liberty to have sex with animals on the good Millian grounds that the only “harm” done is an attenuated and general moral harm to a community that does not want to condone bestiality—presumably just because it regards man-on-animal sex as degrading and revolting. For a Supreme Court that says, as it does in *Casey*, that its sole duty is to define the bounds of liberty, exclusive of contestable moral beliefs, there can be no principled objection to the constitutional protection of bestiality.

After adopting the premise that liberty is somehow independent of morality, *Casey* goes on to weave an entire fabric of constitutional law around that misbegotten idea. The new norm is the incredible idea that the Court must actively resist, rather than seriously consider, points of view that are strongly opposed to its decisions, at least when those points of view are not in wide circulation among the elite. This means embracing radical feminism while downgrading the once respectable idea that an unborn child ought

not to be killed. It means adopting *Casey*’s view that moral considerations are less important than social stability or legal precedent, as if those two things can be measured or defined apart from morality.

As the moral arguments of the pro-life side are eminently reasonable, *Casey*’s (and *Roe*’s) defenders can only argue, as a last resort, that “forced” pregnancy violates the 13th Amendment’s prohibition on involuntary servitude. This is the claim of Yale Law Prof. Jed Rubenfeld in his recent book *Revolution by Judiciary*. Never mind that the fetus or embryo is wholly innocent of any wrongdoing. No, he must be presumed—constitutionally presumed—to be guilty of imposing servitude on the woman and hence deserving, in effect, of being executed. Professor Rubenfeld’s interpretation of the 13th Amendment would avoid the cruel irony of the fetus’s being killed not only without due process of law but in the very name of (so-called substantive) due process. Nevertheless, it strains credulity to suggest, as Professor Rubenfeld does, that the “involuntary servitude” of pregnancy is a matter of straightforward constitutional meaning.

Regardless, *Casey* and *Roe* are worse than *Lochner* and *Kelo* because they involve quintessentially moral issues. And *Casey*, even more than *Roe*, cheapens the currency of morality by pretending, first, that liberty can be defined apart from morality, and, second, that pragmatic concerns are more important than moral ones, especially when the moral issues are “contestable.” (Pragmatic issues aren’t contestable? Are we really sure we know what social stability requires or what weight a given precedent objectively carries?)

And yet, *Casey* may not long remain the worst Supreme Court ruling of our lifetime. That honor may soon belong to a Supreme Court decision legitimizing same-sex marriage.

It is an insult to citizens for the courts even to be deciding the issue of same-sex marriage. It’s not just that marriage is a vital social institution whose definition and scope should be left to the people. Nor is it simply that traditional marriage—the union of male and female—has been the exclusive practice for two millennia. Above and beyond such considerations is a practical reality: The institution of marriage presupposes the fact of procreation,

and only heterosexual couples have an ideal capacity to procreate.

“Presupposes” should not be confused with “implies.” Marriage does not *imply* procreation. If it did, we would have to regard the marriages of sterile heterosexual couples as not being good marriages. And we would also have to concede the validity of the argument, by supporters of same-sex marriage, that, if sterile heterosexual couples can get married, homosexual couples should be able to, as well. What counts is the ideal capacity to procreate.

Civil marriage for homosexual couples is a serious mistake on these grounds alone. What is really outrageous, however, is that judges are making the state and federal constitutions into accomplices in the social construction of this conceptual absurdity. It is hard to see how judges could be more contemptuous of citizens.

Since the 1970's, the ideal of self-respecting citizenship has been run almost entirely into the ground by the courts. Many citizens are still maddeningly clueless about what is happening to them. The prospect of judicially mandated same-sex marriage could change all that.

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## CONSERVATISM

### Whispers From Kirk

by Gerald J. Russello

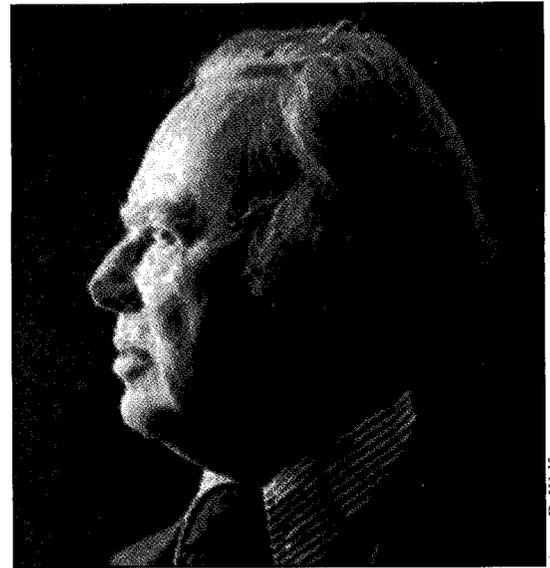
Stan Evans has described bodies of thought as having “lifecycles”; they emerge, thrive for a while, and, unless continually nourished, eventually hollow out and pass away. Having reached the end of its lifecycle, liberalism, as a coherent body of thought, is dead. There are still liberals, of course. But the tradition derived variously from John Locke, John Stuart Mill, and Montesquieu, which was transmuted in the 1950's by the Cold War and transmogrified beyond recognition by the social revolutions of the 60's and 70's and the influence of Michel Foucault and company, has not been able to sustain itself. The ethos of revolution, which was tied, in varying degrees, to Enlightenment rationalism, utilitarianism, individualism, anti-Christianity, and socialism, has proved itself to be an insufficient basis for a full and humane social order. Liberalism's culture of individual rights has become increas-

ingly unworkable and has made politics impossible. Moreover, liberalism has metastasized into a corrosive popular culture that even many liberals oppose. Finally, as a direct rebuke to liberal visions of a gradually secularizing world, nonliberal and traditional religious movements are now stronger than they have been in perhaps a century.

What does this mean for conservatives? For one thing, it means that what Adrian Woolridge has called the “Coulterization” of conservatism is a dead end. “Movement” conservatism's shrill condemnation of the “liberal” bogeyman is falling on deaf ears, as it is becoming increasingly detached from social and political reality. On issues ranging from foreign policy to the environment, the political landscape is shifting, but mainstream conservatives are not paying attention. The growing opposition to the Iraq war is the most recent, and the most significant, case in point: Many mainstream conservatives seemed to favor any Republican so long as he supported the war, while long-time conservatives were blacklisted, or worse, for opposing it. This tunnel vision justifies critics who say that conservatism has no real substance to it and is, at most, a reaction to the dominant liberalism.

Russell Kirk is often thought of as the great antagonist of liberalism. His *Conservative Mind* (1953), after all, provided an explicit contrast with the liberal one, which was, at the time, so dominant that critics such as Lionel Trilling could think of no alternative to it. Some may think Kirk would have little to offer regarding the challenges conservatism faces in this century. After all, he died in 1994, which, in our post-September 11 world, seems like a long time ago. Before his death, many had already written him off, for, among other things, his opposition to the Gulf War. Even Kirk's admirers sometimes forget that, even in the 1950's, Kirk was looking beyond the end of liberalism. Because of its inherent faults, liberalism soon was emptied of content and “ceased to signify anything, even among its most sincere partisans, [other] than a vague good will.” In “The Dissolution of Liberalism” (1955), Kirk was already writing its obituary:

The liberal system attained popularity because it promised progress without the onerous duties exacted by tradition and religion. It is now in the process of dissolution because, founded upon an imperfect



Aaron D. Wolf

and distorted myth, it has been unable to fulfill its promise, and because it no longer appeals in any degree to the higher imagination. It has been undone by social disillusion.

What would come next? Would there be a totalitarian takeover of some sort? After all, the communists were, at the time, working to infiltrate American society. No, said Kirk, it is far more likely that a “Machiavellian scheme founded upon self-interest and creature comforts” would take hold on American culture. The excesses of the counterculture of the following two decades, and the baby boomers' materialist narcissism masquerading as social concern that characterized the 80's and 90's, were, for Kirk, expected results of liberalism's disintegration.

The challenge for conservatives is to create a substantive program within their own tradition without having to feed off the carcass of liberalism. Part of that challenge involves re-imagining that tradition, as Kirk did in his day and as writers such as Bill Kauffman have done more recently, by calling on lesser-known figures and movements in American history that give the lie to the ossified divisions of contemporary politics.

In 1954, Russell Kirk published *A Program for Conservatives*, which was reissued in 1989 as *Prospects for Conservatives*. It is the closest Kirk ever came in writing to discussing actual policies that suited his romantic, imaginative conservatism, though, in the book, he explicitly disclaims any sort of political program. Rather, he sets forth a framework for conservatives for analyzing political issues.

In *Prospects*, Kirk devotes an entire