Written by **Jack Kenny** on June 15, 2012

Is Supreme Court Justice Kennedy Our "Decider Guy"?

His brooding countenance stares out at us from a prominent place on the newsstand. Chances are you will not recognize the face. At first glance you might think it's the return of Alan Greenspan, the man who's sober stewardship of the Federal Reserve System included a memorable description of the stock market's "irrational exuberance." The large print on the cover of *Time* magazine calls him "THE DECIDER." Well, that could be Mr. Greenspan, who decided interest rates and money supply for many years. But no, the cover tells us that title goes to Justice Anthony Kennedy, most often the "swing vote" in an evenly and ideologically divided court that resolves many disputes in 5-4 decisions. Since the four liberals and four conservatives vote in generally predictable patterns, Kennedy's unpredictable vote is the lever of power, potentially deciding everything, as the cover tells us with anxious anticipation, "from gay marriage to ObamaCare."

Read through the article and you will find the usual jargon about the "living document," with the Constitution and history moving forward together. (It seems a shame not one of the "other" Kennedys, the ones who made policy from the Senate and the White House, were not on the Supreme Court. Imagine John F. Kennedy ruling from a seat on the high court that the Constitution can't stand still, it must "move fawuhd and yes, with ayuh great deal of viguh.") There is even a brief contrast between Kennedy's cautious, pragmatic conservatism with the atavistic cry from the founding issue of William F. Buckley's *National Review* way back in 1955 to "stand athwart history yelling 'Stop.' " If "history" is moving in the wrong direction, shouting "Stop!" makes a lot of sense, assuming "history" is capable of hearing and heeding.

But that raises the question of how we are able, and if we are able, to judge history's progress. Because at the heart of "progressive" thought is the belief that the right direction, the direction of progress, is wherever we find "history" trending. Given, for example, that most of the developed nations in the world have adopted some form of national health care and the United States lags behind, settling for Medicare and the first stages of ObamaCare, history would appear to be on the side of ObamaCare or some other form of national health care. And if "gay marriage" has gained more acceptance today than was the case 20, 10 or even five years ago, then clearly our "evolving standards of decency" are on the side of same-sex matrimony, notwithstanding that in every one of the more than 30 states where the people have voted on the question, the public has rejected it and reaffirmed the traditional legal meaning of marriage as a union of one man and one woman. So it must be the "evolving standards" of

some elite group of "progressive" thinkers that requires the change in our legal definition of marriage.

The problem is not with Kennedy's leverage as a swing vote. It is with the court taking on such an expanded and still expanding role in resolving the nation's controversies. The court ends up settling not only legal questions, but disputes over policy as well. In some cases, the justices have settled matters and changed the course of history, apparently forever, as with its school desegregation decisions. At other times, they have waded in where angels fear to tread, removing longstanding legal traditions and settling nothing, as appears to be the case with the right to abortion the court manufactured in the *Roe v. Wade* and *Doe v. Bolton* decisions of January 22, 1973. Even when the court seemingly gets it right, the decision often raises the question of whether it should be the court and not local officials deciding the question. The high court, for example, in a landmark 1969 ruling, held that school officials in Des Moines, Iowa, violated the First Amendment by refusing to allow students to wear black armbands in school as a symbol of protest against the Vietnam War. In a 6-3 decision, the court found fallacious the school authorities' contention that the wearing of the armbands would have a disruptive effect on classroom instruction. Yet the fact that three of the justices disagreed would indicate that reasonable men might differ on that question. Why not, then, leave the decision as to whether the armbands would be disruptive to the local officials, who might have a better understanding and "feel" for the climate of conduct in their schools?

All that happened, of course, long before Justice Kennedy joined the court in 1987, as President Reagan's third choice to fill the vacancy created by the retirement of another "centrist," Justice Lewis Powell. Judge Robert Bork was rejected by the Senate and Judge Douglas Ginsburg withdrew as a nominee after it was revealed that he had smoked marijuana. Bork had left a "paper trail" of candid opinion and was forthcoming in advising the Senate Judiciary Committee that he found in the Constitution no vague, undefined right of privacy that, whatever else it did or did not cover, had to be broad enough to cover a woman's right to have her developing fetus aborted. Kennedy observed, *Time* tells us, that "Sometimes, you can be a little too candid." He did not make that mistake at his confirmation hearings and won unanimous Senate support.

But the course he has followed since cannot have been pleasing to Reagan's conservative admirers. Kennedy ruled that executing murderers who were convicted when they were juveniles is prohibited by the Eighth Amendment's ban of "cruel and unusual punishment" and cited decisions by foreign courts to buttress his argument. He has rendered decisions further limiting prayer in public schools, a matter about which the Constitution says, "Congress shall make no law,"and expanding homosexual rights, concerning which the Constitution says nothing at all. The 14th Amendment's requirement that states guarantee their citizens "equal protection of the laws" may be understood to mean that each state must provide the same protection for perverted as for healthy sex. If so, then there must be nothing left of our obscenity laws, since the writers, publishers and sellers of obscenity must be afforded equal protection with those who publish non-lewd materials. And perhaps those who sell poisoned food should enjoy the same legal protections as those who sell wholesome fare.

But Kennedy wore his "centrist" mantle most conspicuously when he joined with Justices David Souter and Sandra Day O'Connor in a joint opinion in the 1992 decision in *Planned Parenthood v. Casey*, challenging Pennsylvania's hemming in of "abortion rights." Reaffirming the central role of the *Roe v Wade* decision, Kennedy, in his part of the trio's musings, wrote: "At the heart of liberty is the right to define one's own concept of existence, of the meaning of the universe, and of the mystery of human life."

Okay. So if one person has a right to formulate his or her own concept of "the meaning of the universe" and "the mystery of human life," then that person is entitled to terminate the life of another if that is consistent with his or her own "concept of existence." As Archie Bunker used to say to Edith, "Can't you folly that?"

And this is the example of the legal reasoning of one *Time* magazine calls a "cautious conservative" following history and the Constitution as they "move forward" together. That sophomoric musing constitutes a legal opinion by a man who sits at the center of the Supreme Court. And lest anyone think this is cherry-picking an example not truly representative of Justice Kennedy's legal reasoning, it is worth noting that he has several times quoted that passage in opinions rendered in succeeding cases, inspiring Justice Antonin Scalia to scorn the "mystery of life" musing that passes for constitutional law and stands as a precedent.

It is not Kennedy's fault that he is the man in the middle, but *Time* asks an interesting question it does not really answer: "Is something wrong with out democracy when one person holds so much sway over so many?" It is a troubling question but not the right one. The question should be: Is there something wrong with out constitutional republic when judges hold so much sway over the law, in effect making social policy rather than interpreting narrow questions of law?